

Bankruptcy Circuit Update
Featuring cases from August 2015

First Circuit

Wheeling & Lake Erie Railway Co., v. Keach
(In re Montreal, Maine & Atlantic Railway, LTD.),
___ F. 3d ___, 2015 WL 4934212 (1st Cir., August 10, 2015)

In a case of first impression, the Court of Appeals for the First Circuit affirmed the Bankruptcy Appellate Panel's affirmance of the bankruptcy court's finding that Article 9 of Maine's Uniform Code does NOT govern the taking and perfection of a security interest in a right to payment arising under an insurance policy, the common law does. As such, the affected creditor, appellant Wheeling & Lake Erie Railway Company ("Wheeling"), had failed to properly perfect its security interest in payment due to the debtor under an insurance policy.

Because of this, the bankruptcy court awarded the proceeds from a settlement arising out of a disputed claim under the policy to the debtor, free and clear of Wheeling's asserted interest.

Wheeling had extended to the debtor a pre-petition line of credit, secured by, *inter alia*, insurance proceeds.

Wheeling had filed a UCC-1 financing statement, and took no other action to perfect in the insurance policies that the debtor might hold or come to hold. One subset of transactions that Article 9 excludes is the transfer of an interest in or an assignment of a claim under a policy of insurance, and thus this insurance exclusion also covers payment rights under insurance policies. While Maine's highest state court had not identified the method of perfection, the First Circuit opined that it would have to be more than what Wheeling did, in that the UCC-1 was wholly inadequate to give fair notice to others of its alleged interest in the insurance policy as it did not identify insurance rights as a form of Wheeling's original collateral.

In re Trudeau,
2015 WL 5095905, (1st Cir. B.A.P., August 27, 2015)

Bankruptcy Appellate Panel for the First Circuit affirmed the bankruptcy court's order dismissing the debtor's case for failure to comply with certain court orders requiring him to file documents. The debtor was a *pro se* litigant, and was incarcerated, arguing that his confinement prevented him from complying. The court below found that the debtor had the ability to file motions and responses, and thus could have made a good faith effort to comply with the filing of his missing schedules and statements after the court had previously extended the deadlines for compliance.

Belser v. Nationstar Mortgage, LLC, (In re Belser),
534 B.R. 228 (1st Cir. B.A.P., August 6, 2015)

Debtor appealed from the bankruptcy court's order overruling his objection to the proof of claim filed by Nationstar Mortgage, LLC ("Nationstar") on the grounds of untimeliness. For the reasons set forth in the opinion, the Bankruptcy Appellate Panel for the First Circuit ("BAP") affirmed.

Nationstar objected to confirmation of the debtor's plan as failing to fully pay its pre-petition arrearage. Nationstar failed to file a formal proof of claim by the claims bar date. The debtor filed a formal proof of claim on behalf of Nationstar setting the pre-petition arrearage at \$10,000.00, which the debtor candidly admitted was an educated guess as to arrears. Thereafter and after the claims bar date had expired, Nationstar filed a formal proof of claim setting the arrearage at a higher amount, and did not indicate that it was an amendment to the debtor's proof of claim. Debtor objected to Nationstar's filing as untimely.

Nationstar later argued that its objection to confirmation was an informal proof of claim, or alternatively that its late-filed proof of claim was an amendment to the debtor's timely-filed proof of claim on its behalf. The bankruptcy court's ruling overruled the debtor's objection on grounds of untimeliness.

The BAP held that Nationstar was bound by the claims bar date. As to standing, Nationstar had filed its objection to confirmation prior to the lapse of the claims bar date and its claim had not been disallowed. Further, Nationstar, having an undisputed lien, was a party in interest entitled to object to confirmation of the debtor's plan.

The BAP further held that Nationstar's objection to confirmation was a public record that put the debtor on notice as to the existence, nature and amount of Nationstar's claim. As the bankruptcy court pointed out, its ruling was not as to the merits of Nationstar's claim, and the bankruptcy court specifically allowed the debtor to challenge the merits of Nationstar's claim. Rather, the bankruptcy court ruled that it would not disallow Nationstar's claim on the grounds of untimeliness. Thus, the BAP concluded that the bankruptcy court did not err in applying the informal proof of claim doctrine or in determining that Nationstar's plan objection constituted a valid informal proof of claim.

Further, the BAP also concluded the the bankruptcy court did not abuse its discretion in also determining that Nationstar's formally filed proof of claim was an amendment to the proof of claim the debtor had previously and timely filed.

Submitted by:

PATRICIA S. GARDNER, ESQ.

Senior Counsel, Legal Advice & Referral Center

The Foreclosure Relief Project

15 Green Street

Concord, NH 03301

Email: pgardner@larcnh.org

Third Circuit

***In re New Century TRS Holding, Inc., et al.* 2015 WL 4717878 (3d Cir. Aug. 10, 2015)**

At issue was the District Court's conclusion that the Bankruptcy Court erred in determining that service of a notice of a bar date (which was served by publication to unknown creditors) comported with due process. Appellees, Molly S. White and Ralph N. White, asserted that they were clearly known to the Debtors and thus were entitled to actual notice of the bar date. The Third Circuit ruled that the District Court failed to determine the preliminary issue of whether the Whites had standing to appeal the Bankruptcy Court's ruling because the ruling pertained to unknown creditors, but the Whites were alleging that they were known creditors. If the Whites were known creditors, then they would not have standing to appeal the process by which unknown creditors were noticed. The Third Circuit vacated the District Court's ruling and remanded the matter on that basis.

***In re Tribune Media Company* 2015 WL 4925923 (3d Cir. August 19, 2015)**

Confirmation was sought with respect to two competing Chapter 11 plans. The United States Bankruptcy Court for the District of Delaware entered an order confirming one of plans, and the proponent of the competing plan appealed. The District Court granted in part a motion to dismiss the appeal as equitably moot, and appeal was taken. The Third Circuit affirmed in part, reversed in part and remanded , and held that (i) the appeal from the bankruptcy court order confirming the proposed Chapter 11 plan by one party was equitably moot because that party sought to set aside a settlement contained in the plan could not be severed from the rest of plan; and (ii) the appeal by the parties that merely sought to set aside distribution to one class of creditors (a group of lenders referred to as the "Trustees" for the benefit of a class that allegedly had priority pursuant to terms of subordination agreement) was not equitably moot. With regard to the latter issue, the Third Circuit ruled that the Trustees sought disgorgement from other creditors of \$30 million that the Trustees believe they were contractually entitled to receive, and the Trustees' request neither jeopardized the \$7.5 billion plan of reorganization nor harmed third parties who justifiably relied on plan confirmation.

***In re SemCrude L.P.* 2015 WL 4635798 (3d Cir. Aug. 5, 2015)**

The individual co-founder of a bankrupt limited partnership filed an emergency motion to enforce a settlement that had been previously approved by Bankruptcy Court. The settlement enjoined the limited partners from pursuing claims against him that were allegedly derivative of claims previously asserted by a litigation trust. The Third Circuit Court of Appeals affirmed, and held that (i) the limited partners' fraud claims were masked claims for diminution in value of their limited partner units as a result of the co-founder's mismanagement and, as such, were derivative of claims previously released by the co-founder's bankruptcy litigation trust, and (ii) the limited partners were unable to show that they were injured separately from the company or all other unitholders on the basis of the alleged misconduct, or that they were entitled to recovery

of the units they would not have contributed or would have sold but for the co-founder's misconduct. Thus, the limited partners' breach of fiduciary duty claim was derivative, and was barred by the litigation trust's release.

Submitted by:

Meena Untawale

CIT Group Inc.

One CIT Drive

Livingston, NJ 07039

Phone: (973) 740-5019

Email: Meena.Untawale@cit.com

Fifth Circuit

JUNE

Rosco Holdings, Inc. v. McConnell, Esq.,
2015 WL 3450194 (June 1, 2015)

The Fifth Circuit affirmed the district court's ruling that the debtor's plan did not specifically and equivocally retain claims against the debtor's attorney for negligent misrepresentation and malpractice. Neither the debtor's plan nor disclosure statement mentioned the debtor's claims against the attorneys, and the plan stated that the debtor did not anticipate pursuing any claims other than already-existing litigation.

Firefighters Retirement System, et al. v. Citco Group, et al.,
788 F.3d 425 (June 5, 2015)

The Fifth Circuit held that district courts cannot permissively abstain from exercising jurisdiction in proceedings related to Chapter 15 cases. Section 1334(c)(1) provides:

Except with respect to a case under chapter 15 of title 11, nothing in this section prevents a district court in the interest of justice, or in the interest of comity with State courts or respect for State law, from abstaining from hearing a particular proceeding arising under title 11 or arising in or related to a case under title 11.

The Fifth Circuit held the phrase "Except with respect to a case under chapter 15 of title 11" means that both the Chapter 15 case itself and cases "arising in or related to" Chapter 15 cases are excluded from permissive abstention.

David Adler v. Gregory D. Frost, et al. (In re Gulf States Long Term Acute Care of Covington),
2015 WL 3622820 (June 11, 2015)

In Adler, the disbursing agent under the debtor's confirmed plan filed common law tort and contract claims against Gregory D. Frost ("Frost") and Breazeale, Sachse & Wilson, L.L.P.

("B&W"), previous attorneys of the debtor. The debtor's plan contained a blanket reservation that the trustee may pursue "[a]ny and all claims and causes of action which may have been asserted by the Debtor prior to the Effective Date" and a provision that purported to retain the debtor's avoidance actions and fraudulent transfer claims against named individuals, not including the defendants. The district court held the disbursing agent did not have standing under the plan to pursue the claims because the debtor's plan did not "specifically and unequivocally" reserve the debtor's claims against Frost and B&W as required under *Dynasty Oil & Gas, LLC v. Citizens Bank (In re United Operating, LLC)*, 540 F.3d 351 (5th Cir. 2008). The purpose behind the "specific and unequivocal" standard is "(1) to promote the efficient administration of the bankruptcy estate and (2) provide creditors the information they need to intelligently vote for or against a proposed chapter 11 plan."

The Fifth Circuit affirmed the district court's ruling finding the plan at issue did not specifically name the defendants as potential defendants, and instead contained a blanket reservation of any and all claims. The Fifth Circuit also held the plan's reservations of avoidance actions claims was insufficient to reserve the common law claims asserted against Frost and B&W.

Alternatively, the disbursing agent argued that a blanket reservation was proper and the "specific and unequivocal" standard should not apply because Frost and B&W were not creditors of the debtor and therefore, not entitled to vote on the plan. The Fifth Circuit refused to consider this argument, however, because the disbursing agent failed to raise the argument before the district court.

***Carroll, et al. v. Samera Abide*, 788 F.3d 502 (June 11, 2015)**

In the bankruptcy cases of William and Carolyn Carroll and their corporation, the Carrolls' children requested a determination that certain movables had been properly transferred to them. Samera Abide, the bankruptcy trustee for the debtors, filed a counterclaim seeking a determination regarding proper ownership. The dispute was withdrawn to the district court. During the case, the district court entered an order that the Carrolls turn over any computers of the debtor-corporation to Abide. The Carrolls asserted that one computer was their personal computer; however, the trustee took the computer. The plaintiffs filed a motion with the district court requesting the trustee turnover the computer. The district court deferred a ruling on the motion allowing the trustee to obtain a forensic expert to evaluate the computer. The plaintiffs alleged the district court did not authorize the trustee to access the computer. After making its ruling on ownership, the district court then ordered the computer returned. Upon receipt of the computer, the plaintiffs' forensic expert determined that the trustee had accessed the computer three times.

The plaintiffs brought a lawsuit in the district court against Abide claiming he violated their Fourth Amendment rights for illegal search and seizure. The district court dismissed the complaint ruling the plaintiffs were required to request leave of the bankruptcy court to file a lawsuit against the trustee pursuant to the Supreme Court decision *Barton v. Barbour*, 104 U.S. 126, 128 (1881) (citing *Davis v. Gray*, 83 U.S. (16 Wall.) 203 (1872)). In *Barton*, the Supreme Court held that in order to file a lawsuit against a receiver a plaintiff must seek leave from the

court that appointed the receiver. “An action against a receiver without court permission, the [Supreme] Court reasoned, is an attempt ‘to obtain some advantage over the other claimants upon the assets in the receiver’s hands.’ If such a suit were allowed, ‘the court which appointed the receiver and was administering the trust assets would be impotent to restrain him.’”

The Fifth Circuit vacated the district court’s decision and remanded to the district court. While the Fifth Circuit had previously applied Barton to lawsuits against bankruptcy trustees, it held that the Barton doctrine did not apply in this case because the claims against Abide, as trustee, stemmed from his conduct while carrying out orders from the district court rather than the bankruptcy court. The Fifth Circuit found that the concerns Barton implicated did not apply in this situation, i.e. if parties could sue trustees, a foreign court could “turn bankruptcy trustees into bankruptcy winners.” (citing *In re Linton*, 136 F.3d 544, 546 (7th Cir. 1998)). The reasoning is that the plaintiffs filed suit in the same court that presided over the adversary proceeding. The Fifth Circuit further found another rationale behind the Barton doctrine did not apply, i.e. bankruptcy courts has strong interest in protecting trustees from personal liability as officers of the court. The Fifth Circuit noted that Abide served as an officer in both courts; thus, the district court shared the same interest in protecting the trustee.

***Ralph Janvey, as Receiver for Stanford International Bank Limited, et al., v. The Golf Channel Incorporated*, 792 F.3d 539 (5th Cir. June 30, 2015).**

In 2006, Stanford International Bank negotiated a deal with the Golf Channel regarding an advertising package. Stanford was apparently attempting to reach the Golf Channel’s high-net-worth viewership that was likely to invest in tis Ponzi scheme. Ultimately, an agreement was struck to, among other things, provide live coverage of a golf tournament hosted by Stanford. In total, Stanford paid the Golf Channel \$5.9 million.

By 2009, the SEC uncovered the massive Ponzi scheme, one of the largest in the history of the United States. The SEC filed a lawsuit in the Northern District of Texas, and the District Court appointed a receiver over Stanford. The receiver sued the Golf Channel to recover the \$5.9 million as a fraudulent conveyance under the Texas Uniform Fraudulent Transfer Act, asserting the transaction provided no value to Stanford’s creditors. The Golf Channel asserted an affirmative defense allowed under section 24.009(a) the TUFTA – “(1) that it took the transfer in good faith; and (2) that, in return for the transfer, it gave the debtor something of ‘reasonably equivalent value.’” The Golf Channel argued that it provided "reasonably equivalent value" for the transfers by providing advertising.

In March 2015, the Fifth Circuit issued its original opinion *Janvey v. Golf Channel*, 780 F.3d 641 (5th Cir. 2015) (“Original Opinion”). In the Original Opinion, the Fifth Circuit held value is determined from the perspective of the creditors of the transferor and proof of market value is insufficient. The Fifth Circuit found that the Golf Channel failed to produce evidence to meet its burden of proving value to the creditors of Stanford, and that the Golf Channels’ advertising services which were purchased to extend a Ponzi scheme could not, as a matter of law, provide any value to Stanford’s creditors. In other words, Stanford’s creditors could not receive value for advertising efforts intended to extend a Ponzi scheme. Accordingly, the Fifth

Circuit rendered judgment in favor of the receiver, who was entitled to void the agreement, and Golf Channel was required to return the full \$5.9 million.

Golf Channel filed a petition for panel rehearing, which the Fifth Circuit granted, vacating the Original Opinion. The Fifth Circuit found that it must determine under Texas law and the TUFTA the meaning of “value and/or reasonably equivalent value”. The Fifth Circuit reasoned that there were some discrepancies between the definitions in the TUFTA and the comments in the TUFTA and that only the Texas Supreme Court could rule on this discrepancy. Since there were no decisions from the Texas Supreme Court addressing this dispute, the Fifth Circuit certified the following question to the Texas Supreme Court:

Considering the definition of “value” in section 24.004(a) of the Texas Business and Commerce Code, the definition of “reasonably equivalent value” in section 24.004(d) of the Texas Business and Commerce Code, and the comment in the Uniform Fraudulent Transfer Act stating that “value” is measured “from a creditor’s viewpoint,” what showing of “value” under TUFTA is sufficient for a transferee to prove the elements of the affirmative defense under section 24.009(a) of the Texas Business and Commerce Code?

“Put another way, under TUFTA, is proof of the market value sufficient to establish ‘reasonably equivalent value’ for purposes of the affirmative defense in § 24.009(a), or must the transferee produce specific evidence to show value of the transfer to the debtor’s creditors?”

Submitted by:

Cherie Dessauer Nobles
Heller, Draper, Patrick,
Horn & Dabney LLC
650 Poydras St. Ste. 2500
New Orleans, LA 70130
Direct 504-299-3318
Email: cnobles@hellerdraper.com

Sixth Circuit

In re Matteson, 2015 WL 4719556 (B.A.P. 6th Cir. Aug. 10, 2015)

The Bankruptcy Appellate Panel affirms in part, reverses in part, and remands the decision of the Bankruptcy Court for the Middle District of Tennessee which reduced the amount of secured debt owed to Bank of America for mortgage loans on the basis that the Bank never filed proofs of claim. The debtors proposed a plan that provided for curing of arrears and maintenance of ongoing payments through the chapter 13 trustee as disbursing agent. The plan prescribed that in order to receive distributions a creditor “must” file a proof of claim. However, the Bank never filed a proof of claim for the two particular loans at issue. Following payment of filed claims, the trustee refunded additional monies to the debtors. The debtors then moved to

avoid the liens of the Bank. The Bankruptcy Court held that the Bank still held valid liens. However, the Bankruptcy Court reduced the amount of the debts secured by the liens by the amounts that the Bank had “precluded [itself] from receiving through the confirmed plan.” However, on appeal, the B.A.P. held that because the debtors or the trustee could have filed a proof of claim for the Bank, the Bankruptcy Court erred in reducing the amount of the debt owed to the Bank.

In re Henry, 534 B.R. 721 (B.A.P. 6th Cir. 2015)

The Bankruptcy Appellate Panel affirms the dismissal of a pro se debtor’s chapter 13 case for failing to timely file a plan. After originally filing a chapter 13 plan that exceeded the applicable commitment period and which was highly speculative in terms of feasibility, the Bankruptcy Court for the Southern District of Ohio entered an order denying confirmation of the debtor’s plan and requiring an amended plan to be filed within fourteen days. With no plan having been filed within this period of time (although the debtor maintained a plan was mailed to the court), the Bankruptcy Court dismissed the debtor’s case. On appeal, the B.A.P. found no reason to disturb the Bankruptcy Court’s ruling, by noting, among other things, that if a pro se debtor has any doubt that documents will arrive late through the mail, then a debtor should make arrangements to physically present such documents at a clerk’s office.

Submitted by:

Jason Shorter, Staff Attorney
Chapter 13 Trustee Christopher T. Micale
Western District of Virginia
Email: jshorter09@my.asl.edu

Seventh Circuit

In re Wilson, 2015 WL 4716321 (7th Cir. Aug. 10, 2015)

On August 10, 2015, the Seventh Circuit Court of Appeals affirmed the decision of the bankruptcy court, holding that calculation of a trustee’s compensation under 11 U.S.C. § 326(a), which is based on a formula regarding the amount of property distributed, need not be reduced by virtue of amounts that went to secured creditors. Specifically, the trustee collected a total of \$498,621.56 to distribute and sought \$28,030.33 in compensation. Using those figures, the trustee’s compensation was allowable, and the bankruptcy court allowed it. The debtors’ principal unsecured creditor argued on appeal, however, that the \$370,996.54 that went to secured creditors should not be included in that calculation, such “the net disbursement by the trustee to the creditors to be only \$127,625.02, an estimate that would reduce the trustee’s maximum fee to \$9,631.25 in accordance with the formula in section 326(a).” (Slip Op. 3). However, under 11 U.S.C. § 330(a)(1)(A), the trustee was entitled to compensation for services that were both “actual” and “necessary,” and it was undisputed that the trustee and his staff spent at least 200 hours on this particular case, at least in part due to the principal unsecured creditor’s own litigiousness. As such, the trustee’s compensation was neither unreasonable nor exceeded the statutory limitations.

***In re Schwartz*, 592 Fed. Appx. 605 (7th Cir. Aug. 24, 2015)**

On August 24, 2015, the Seventh Circuit Court of Appeals affirmed the decision of the bankruptcy court to involuntarily dismiss the debtors' petition under 11 U.S.C. § 707 because the debtors did not make any attempt to change their lifestyle prior to filing bankruptcy. Specifically, Mr. Schwartz worked for a brokerage firm and, upon his hire, entered into a promissory note for \$400,000, pursuant to which the principal balance was gradually forgiven after seven years of continued employment. However, the firm fired him after two years. Mr. Schwartz refused to pay, and his former employer won an award for \$568,568 in principal, interest and attorneys fees. Rather than making any attempt to pay, the Schwartzes filed for bankruptcy. While Mr. Schwartz had after-tax annual income of \$114,000 (\$9,500 per month), the family's monthly expenses exceeded their monthly income by more than \$1,500, including private school tuition and \$850 for a Range Rover. (Mrs. Schwartz did not work.) It was undisputed that the Schwartzes did not "step[] up their personal expenditures in anticipation of declaring bankruptcy" but that they "didn't take it down a peg so that there would be some money for their creditors," either. (Slip Op. 7). At the request of Mr. Schwartz's former employer, the bankruptcy court dismissed their petition "for cause" under Section 707(a), and the Seventh Circuit affirmed on the grounds that the failure to "take it down a peg . . . was sufficient cause for denying a discharge of their debts. They could so easily have paid them at least in part; they had no excuse for not doing so." (*Id.*)

***St. Catherine Hosp. of Ind., LLC v. Ind. Family & Social Servs. Admin.*, 2015 WL 5063193 (7th Cir. Aug. 28, 2015)**

On August 28, 2015, the Seventh Circuit Court of Appeals reversed the decision of the district court, holding that a "hospital assessment fee" ("HAF") was a prepetition claim subject to the automatic stay. The hospital filed for bankruptcy on June 19, 2012. The Indiana Family & Social Services Administration ("FSSA") argued that the 2013 HAF was not a pre-petition claim because, although the HAF was assessed based on prepetition conduct, the hospital's continued operation post-petition (on July 1, 2012) was required in order for the 2013 HAF to come into effect and be due and payable. The bankruptcy court held that the 2013 HAF was a prepetition claim subject to the stay and ordered the FSSA to repay the funds, but the district court disagreed. The Seventh Circuit agreed with the bankruptcy court, holding that the 2013 HAF was a pre-petition claim subject to the stay, albeit contingent: "That St. Catherine's continued operation as an eligible hospital on July 1, 2012 may have been required in order for the 2013 HAF to be assessed...simply make[s] the claim 'contingent' upon the hospital's continued eligibility on July 1, 2012. ...[T]he Code's definition of 'claim' explicitly includes any 'right to payment, whether or not such right is...contingent' upon some future event, which may or may not happen after the filing of a bankruptcy petition." (Slip Op. 10).

Submitted by:
Michael R. Cedillos

Greenberg Traurig, LLP
77 West Wacker Drive, Suite 3100
Chicago, IL 60601
Email: cedillosm@gtlaw.com

Eighth Circuit

***Venture Bank v. Lapidis*, 2015 WL 5011704 (8th Cir. August 25, 2015)**

In this matter, the Eighth Circuit upheld rulings by the bankruptcy court and district court holding that agreements entered into by the debtor and a bank lender to extend the maturity date of a loan were unenforceable following the debtor's discharge because the agreements failed to comply with the requirements of a reaffirmation agreement under section 524(c).

The series of agreements at issue related to a prepetition loan secured by a third mortgage on the debtor's home. Following the debtors chapter 7 filing, the debtor and the bank lender entered into a "Debt Re-Affirmation Agreement" on the understanding that the bank would refinance all three mortgages. However, the debtor's attorney refused to sign the reaffirmation agreement and it was never filed with the bankruptcy court, such that it failed to comply with section 524(c).

Following the debtor's discharge two further agreements were entered into extending the maturity date of the loan. The bank never refinanced the mortgages and, after making twelve monthly payments under the agreements, the debtor ceased payment. The bank sought to enforce the agreements in state court. The debtor then removed to the bankruptcy court and filed a counterclaim seeking damages asserting that the bank violated the discharge injunction by seeking loan payments following the discharge.

The Eighth Circuit upheld the bankruptcy court and district court's ruling that the reaffirmation agreement was unenforceable because of its failure to comply with section 524(c). The Bank argued that the agreement was still valid because its agreement not to foreclose was adequate consideration under Minnesota law. The Eighth Circuit rejected this argument because, even assuming the agreement was valid under Minnesota law, to be enforceable a reaffirmation agreement must be enforceable under state law *and also* meet the requirements of section 524(c). The Eighth Circuit further held that the bank had violated the discharge injunction, upholding the bankruptcy court's ruling that the payments were not voluntary. While the debtor testified at trial that he had made the payments to induce the bank to refinance the mortgages, the Eighth Circuit stated that there was evidence of pressure and inducement by the bank sufficient to support the bankruptcy court's finding of that the repayments were not "voluntary" under section 524(f).

***Heritage Bank v. Woodward (In re Woodward)*, 2015 WL 4923520 (August 13, 2015)**

The primary issue that the Bankruptcy Appellate Panel addressed in the matter is whether section 1129(b)(2)(B)(ii)'s absolute priority rule prevents individual Chapter 11 debtors from retaining prepetition property when not all creditors' claims will be paid in full.

The absolute priority rule provides that a dissenting class of unsecured creditors must be paid in full before any junior class may receive or retain any property under a reorganization plan. There is an exception that allows individual Chapter 11 debtor to retain property included in the estate under section 1115 without first paying creditors. Under section 1115 "property of the estate" is defined as property and income acquired after commencement of the case in addition to prepetition property specified in section 541. The issue that was before BAP arises from question of whether, as used in section 1129(b)(2)(B)(ii), "property included in the estate under section 1115" refers solely to postpetition property and income or is inclusive of prepetition property. Courts have split on this question. The BAP held that it referred solely to post-petition property and the absolute priority rule still prevents individual Chapter 11 debtors from retaining prepetition property.

The BAP supported its ruling by stating that the text of the statutes themselves support their position because the only property that section 1115 can take into the estate is postpetition property because prepetition property is already a part of the estate under section 541. The BAP also asserted that had Congress wished to abrogate the absolute priority rule when it amended the Bankruptcy Code to allow the exception for individual Chapter 11 debtors it would have. As further support, the BAP noted that majority of courts to have addressed the question had reached the same conclusion.

Needler v. Casamatta (In re Miller Automotive Group),
2015 WL 4746246 (BAP 8th Cir. August 12, 2015)

This matter stems from an order of the bankruptcy court imposing sanctions against the debtor's attorney for numerous acts of misconduct during the bankruptcy proceedings. Following the bankruptcy cases dismissal, the U.S. Trustee sought to have case reopened for the purpose of filing the sanctions motion. The U.S. Trustee's action was prompted after receiving a written complaint about the attorney's conduct from the debtor and the debtor's principals during his representation of the debtor. The U.S. Trustee's motion to reopen was granted without hearing. The U.S. Trustee then brought the sanctions motion. Following a hearing the motion was granted.

On appeal, the debtor's former attorney argued that the bankruptcy court had erred in reopening the case without a hearing. The BAP dismissed this argument noting that section 350(b) does not require that a hearing be held on such motion. The attorney further argued that the case should not have been reopened because the case was dismissed without being fully administered. In doing so, he relied upon an earlier ruling by the Eighth Circuit BAP that had held "section 350 should not be used to reopen a case that was dismissed before it was fully administered."

This argument was also dismissed by the BAP. In doing so, the BAP reasoned that in the earlier case the debtor was seeking to reopen a case that had been dismissed so that the debtor

could seek to proceed with their bankruptcy case and the situation here was distinguishable as the motion to reopen was not sought to set aside the effect of the dismissal. Ultimately, the BAP held that the bankruptcy court had acted fairly, reasonably and without bias and upheld the sanctions.

Submitted by:

Matthew S. Sepuya
Diamond McCarthy LLP
150 California Street, Suite 2200
San Francisco, CA 94111
Email: msepuya@diamondmccarthy.com

Ninth Circuit

JULY

***Boukatch v. Midfirst Bank (In re Boukatch),* 2015 WL 4127158 (9th Cir. BAP July 9, 2015)**

The matter before the BAP was an appeal by chapter 13 debtors of an order by a bankruptcy court denying their motion to avoid—strip off—a wholly unsecured junior lien on their residence. Joining the 4th and 11th circuit courts of appeal, *Branigan v. Davis (In re Davis)*, 716 F.3d 331 (4th Cir. 2013); *Wells Fargo Bank, N.A. v. Scantling (In re Scantling)*, 754 F.3d 1323 (11th Cir. 2014), and the 6th and 8th circuit Bankruptcy Appellate Panels, *In re Cain*, 513 B.R. 316 (6th Cir. BAP 2014); *Fisette v. Keller (In re Fisette)*, (8th Cir. BAP 2011), the 9th circuit BAP held that so-called “chapter 20” debtors could strip off wholly unsecured liens on their principal residences notwithstanding that they were ineligible for a discharge under Code section 1328(f). Factually, less than 4 years after receiving their chapter 7 discharge, the debtors filed a chapter 13 case. The debtors valued their residence at \$187,500, identifying a first lien of \$228,300 and a second lien of \$67,484 and, consistent with their chapter 13 plan, moved to avoid the lien held by the junior creditor because it was not supported by collateral. Neither the chapter 13 trustee nor the second lienholder objected to the plan which provided that the junior lienholder’s lien would be stripped; nevertheless, the bankruptcy court denied the motion based upon *Victoria v. Billingslea*, 470 B.R. 545 (S.D. Cal. 2012) (affirming bankruptcy court’s ruling that a “chapter 20” debtor cannot permanently avoid an unsecured junior lien without obtaining a discharge or making payment in full). The court noted that in a chapter 13 case where a debtor is entitled to a discharge, such a debtor can strip off wholly unsecured liens, citing the Ninth Circuit’s decision in *In re Zimmer*, 313 F.3d 1220 (9th Cir. 2002). The court explained that the anti-modification provisions of Code section 1322(b)(2) allow a chapter 13 debtor to modify the rights of a creditor holding secured and unsecured claims, but not the rights of a holder of a secured claims whose collateral is limited to a debtor’s principal residence. The court further explained that those anti-modification provisions only benefit secured creditors after application of section 506, but here the junior lienholder’s claim was not a secured claim because it was not secured by collateral, that is, the value of the first lienholder’s lien exceeded the value of the

debtors' residence. After noting the split of authorities on whether "chapter 20" debtors ineligible for discharge could strip off wholly unsecured liens, the court adopted the line of cases answering that question in the affirmative, led by two recent circuit court decisions so holding, *Scantling* and *Davis*.

McKnew v. Wilson (In re Wilson),
2015 WL 4072213 (Bankr. C.D. Cal. July 2, 2015)

The matter before the court was a motion by judgment creditors to compel the debtor to answer questions posed to him as to which he asserted the testimonial privilege under the Fifth Amendment. The court quoted extensively from the Ninth Circuit's decision in *United States v Neff*, 615 F.2d 1235 (9th Cir. 1980) setting forth the applicable standards, in summary form, that the trial court "must examine the 'implications of the question(s) in the setting in which (they are) asked,'" (quoting *Hoffman v. United States*, 341 U.S. 486, (1951)), by considering the questions posed, their setting, and the peculiarities of the case, whether a threat of self-incrimination exists. The court explained that the questions posed did not, in and of themselves, suggest responses would be incriminating¹, and found no basis for the debtor's assertion of the testimonial privilege. The court explained that the questions "seemed targeted at revealing sources of current income or assets that could be used to satisfy creditors' unsatisfied judgment." 2015 WL 4072213, *2. The court noted that there could be no valid concern for criminal prosecution for failure to make required disclosures in the debtor's petition and schedules because such claims were time-barred, and in all events the questions concerned current financial information which was not reportable when the debtor filed his petition and schedules. Next, the court rejected argument by the debtor, based on 18 U.S.C. § 3507, as to why he need not submit for in camera review documents that might reflect why the questions posed might elicit responses that would be incriminating. Accordingly, the court concluded that the debtor was not excused from submitting for in camera review documents or explanation as to why answering the questions posed to him would be potentially incriminating, but gave the debtor a second opportunity to do so given the debtor's reliance upon erroneous legal advice.

In re Altamirano,
2015 WL 4180754 (Bankr. C.D. Cal. July 10, 2015)

The matter before the court was a stay relief motion filed by the trustee for a mortgage loan trust, and specifically, the issue of whether the movant possessed standing because it did not hold the relevant promissory note and it did not join the holder of that note as an indispensable or necessary party. But movant adduced evidence that it held the relevant note, that evidence was unrebutted such that the court found that movant was the real party in interest to prosecute the stay relief motion. Alternatively, the court explained that, even if movant did not hold the

¹ Section 3057(a) provides, in part, that "[a]ny judge...having reasonable grounds for believing that any violation under chapter 9 of this title or other laws of the United States relating to insolvent debtors...has been committed, or that an investigation should be had in connection therewith, shall report to the appropriate United States attorney all the facts and circumstances of the case...."

relevant promissory note, California law on non-judicial foreclosure authorized a party to foreclose “based solely on its status as an assignee of a lender’s rights under a deed of trust, without regard to who holds the borrower’s promissory note.” 2015 WL 4180754,*3. The court cited Cal. Civil Code § 2924(a)(1) which provides that a “trustee, mortgagee or beneficiary or their authorized agents” may conduct the foreclosure process, and § 2924(b)(4) which provides that a “person authorized to record the notice of sale” includes “an agent for the mortgagee or beneficiary, an agent of the named trustee, any person designated in an executed substitution of trustee, or an agent of that substituted trustee.” Relying on un rebutted evidence, the court determined that movant was the assignee of the lender’s rights under the relevant deed of trust which gave movant the authority to conduct a foreclosure process based on the original deed of trust via non-judicial foreclosure sale under Cal. Civil Code § 2924(a)(1) et seq. This determination meant that movant possessed standing to seek stay relief, and established a “colorable claim” for such relief under *In re Veal*, 450 B.R. 897 (9th Cir. BAP 2011). Finally, the court determined that movant had met the standards for stay relief under Code section 362(d)(2) as the debtor’s case was a chapter 7 liquidating bankruptcy case and, therefore, the property subject of the stay relief motion was not necessary for an effective reorganization.

***Double Bogey, L.P. v. Enea, et al.*,
794 F.3d 1047, WL 4478055 (9th Cir. July 22, 2015)**

The Ninth Circuit reviewed a judgment for defendants, principals of a real estate management firm, arising from losses on investments in two properties, in a non-dischargeability action under section 523(a)(4) because they were not fiduciaries of the investor-plaintiff. Specifically, the Ninth Circuit reviewed the bankruptcy court’s holding that, while the individual defendants’ company was a fiduciary of the investor-plaintiff, the fact that the investor-plaintiff established a prima facie case that the individual defendants were alter egos of their company under California law was insufficient to deem the individual defendants fiduciaries for section 523(a)(4) purposes. The Ninth Circuit framed the issue as whether a debtor can be considered a “fiduciary” under Section 523(a)(4) solely by application of California’s alter ego doctrine. The Ninth Circuit explained that “the mere fact that state law places two parties in a relationship that may have some characteristics of a fiduciary relationship does not necessarily mean that the relationship is a fiduciary relationship under 11 U.S.C. § 523(a)(4).” The Ninth Circuit further explained that common law doctrines, like California’s alter ego doctrine, “rarely impose trust-like obligations sufficient to create a fiduciary relationship under Section 523(a)(4)” and that “[i]n the few instances where we have recognized a fiduciary relationship in part based on common law doctrines, such doctrines merely heightened—in clear and express language—duties already imposed by statute.” Distinguishing prior case law the Ninth Circuit explained that “California’s alter ego doctrine merely acts as a procedural mechanism by which an individual can be held jointly liable for the wrongdoing of his or her corporate alter ego.” The Ninth Circuit reasoned that “[r]egardless of the ends to which the alter ego ‘procedural device’ may be put in California state court, it does not clearly and expressly impose trust obligations prior to defalcation as required by Section 523(a)(4)” such that a finding of alter ego is insufficient to establish a “fiduciary” relationship contemplated by the Bankruptcy Code. Thus, even if a trustee can demonstrate that a corporate debtor is a fiduciary of a plaintiff, and that debtor’s principal(s) is an alter ego of the debtor under state law (at least California law), evidence to that

effect is an insufficient basis upon which to hold the debtor's principal(s) liable under Code section 523(a)(4) for defalcation in a fiduciary capacity.

Submitted by:

Paul Avron

Berger Singerman

One Town Center Road, Suite 301

Boca Raton, FL 33486

Office: (561) 241-9500

Email: PAvron@bergersingerman.com

10th Circuit

Jubber v. SMC Electrical Products, Inc, et al (In re C.W. Mining Company)
2015 WL 4717709 (10th Cir. August 10, 2015)

In *Jubber*, the Tenth Circuit Court of Appeals affirmed the bankruptcy court's rejection of the Trustee's preference claim on summary judgment. The transaction at issue involved an agreement to purchase certain mining equipment with the goal to increase production. Debtor made a single payment of \$200,000 within 90 days of the filing of the Petition. Consequently, the Trustee initiated an adversary seeking to avoid the transfer pursuant to 11 U.S.C. § 547(b). The Trustee argued that the transaction could not be considered "ordinary course" because it was a first-time transaction. The Tenth Circuit disagreed finding that a first-time transaction can qualify as ordinary course if the transaction is ordinary in relation to the debtor's and the creditor's past practices when dealing with other similarly situated parties. Upon application of this standard to the facts of the case, the Tenth Circuit affirmed the judgment of the Bankruptcy Court.

Frank Anthony Arenas v. U.S. Trustee (In re Frank Anthony Arenas)
2015 WL 5008718 (10th Cir. BAP, August 21, 2015)

Debtor, Frank Anthony Arenas, is licensed to grow and dispense medical marijuana in Colorado. As a result of a state court judgment being entered against him, Debtor filed for Chapter 7 bankruptcy. The U.S. Trustee moved to dismiss the Chapter 7 case and, in response, Debtor moved to convert to Chapter 13. The United States Bankruptcy Appellate Panel for the Tenth Circuit affirmed the bankruptcy court's decision to deny the Debtor's Motion to Convert from Chapter 13 to Chapter 7 and also concluded that that Chapter 13 Plan confirmation was similarly barred where the sale and distribution of marijuana violated the federal Controlled Substances Act, 21 U.S.C. § 801 et seq. The Debtors' criminal conduct demonstrated a lack of good faith barring conversion or confirmation.

Submitted by:

Christopher Staine

Lysbeth L. George

Cullen Sweeney
Emilie Blanchard
CROWE & DUNLEVY, PC
324 N. Robinson Avenue, Suite 100
Oklahoma City, OK 73102
Phone: 405.234.3245
Email: lysbeth.george@crowedunlevy.com
christopher.staine@crowedunlevy.com
cullen.sweeney@crowedunlevy.com
emilie.blanchard@crowedunlevy.com

11th Circuit

In re Seidling

2015 WL 4621253 (11th Cir. Aug. 4, 2015)

Creditor (Kelly) filed a proof of claim, which was objected to by both the debtor and non-filing ex-spouse (Seidling). The primary issue on appeal was whether the bankruptcy court erred in allowing Kelly's claim against debtor's estate based, in part, on debtor's admission that Kelly's bad faith claim had merit. The debtor had failed to respond to a request for admission—that “he entered into a conspiracy to file a bad faith involuntary bankruptcy” against Kelly’s son, thus admission was deemed admitted. The debtor then withdrew his objections, leaving only ex-spouse’s objection to Kelly’s claim. The court held that ex-spouse no longer had standing, thus allowed Kelly’s claim.

Ex-spouse argued Rule 36(b) of Fed.R.Civ.P. claiming this was an admission for another purpose and could not be used against the party in any other proceeding. The bankruptcy court, which was affirmed by the district court, held that the admission was used against the same party in the same proceeding and, therefore, did not violate the rule.

In addition, in her appeal to the district court, Seidling raised several other issues, which the court held were waived. Her Rule 8006 disclosure stated that “the Court erred” in entering its order; however, this was insufficient to infer specific grounds for error on appeal and thus were waived. The Court affirmed the district court’s judgements.

In re Sagamore Partners, Ltd

---Fed.Appx. ---, 2015 WL 5091909 (11th Cir. Aug. 31, 2015)

The Eleventh Circuit affirmed the district court’s determination that the debtor may be required to pay the default interest to cure and reinstate its loan, but reversed the district court’s determination that the lender had waived the default interest. The lender objected to the debtor’s bankruptcy plan that proposed to cure the default at the non-default interest rate and reinstating the original terms of the loan, and the bankruptcy court denied confirmation. The bankruptcy court confirmed the debtor’s amended plan, which proposed to repay the indebtedness in full on

terms and conditions determined by the court. In connection with the amended plan, the debtor filed an objection to the creditor's claim on the basis that the creditor was not entitled to both late fees and default rate interest.

The bankruptcy court held that the creditor failed to demand default-rate interest and that the notice of default was defective, thus all that flowed from the defective notice was improper, including default interest. The district court disagreed with the bankruptcy court that the notice was defective; however, it affirmed that the creditor had waived its rights to default interest. Moreover, having asserted its entitlement to late fees, the creditor was precluded from also recovering default-rate interest.

The Court held that the lender did not waive default interest rate since by the terms of the loan agreement, the lender was not required to provide any default notice, and expressly waived any notice requirement not explicitly called for by the loan agreement or applicable law. Thus, the Eleventh Circuit held that in order for a chapter 11 debtor to cure a default on a loan, the debtor must cure the default "in accordance with the underlying contract or agreement, so long as that document complies with relevant nonbankruptcy law."

Continental Trust Corporation Limited v. Mukamal
2015 WL 5118126 (S.D. Fla. Aug. 31, 2015)

Continental Trust appealed the bankruptcy court's order denying their motion to reopen the adversary, which alleged fraudulent transfer and civil theft claims, and to vacate a default judgment that was in excess of six million dollars. The District Court affirmed finding that the applicable standard of review for orders denying relief under Federal Rule of Civil Procedure 60(d) is abuse of discretion.

Continental Trust filed an appearance in the adversary and filed a motion to abate discovery or in the alternative to extend time to respond to discovery (the "Motion") approximately nine (9) months after the entry of the default judgment. In its Motion, Continental Trust stated that it "intends to forthwith file a motion to vacate the default judgment." One month later, the bankruptcy court denied their Motion to abate. Approximately 21 months after filing their Motion and 30 months after the entry of the default judgment, Continental Trust moved to vacate the default judgment. "The Eleventh Circuit has identified the following elements required for Rule 60(d)(1) relief:

a judgment which ought not, in equity and good conscience, to be enforced; (2) a good defense to the alleged cause of action on which the judgment is founded; (3) fraud, accident, or mistake which prevented the defendant in the judgment from obtaining the benefit of his defense; (4) the absence of fault or negligence on the part of defendant; and (5) the absence of any remedy at law. *Aldana v. Del Monte Fresh Produce N.A., Inc.*, 741 F.3d 1349, 1359 (11th Cir. 2014)

While Continental Trust argued that it would be unjust judgment since Continental Trust was never the recipient of the funds, it took 21 months for Continental Trust to move to set aside

the default when it professed its intent to do so forthwith at that time it filed the Motion. Thus Continental Trust failed to demonstrate the elements required for Rule 60(b)(1) relief.

Iskander v. Carrera USA, LLC,
2015 WL 5097117 (S.D. Fla. Aug. 31, 2015)

Debtor appealed the bankruptcy court's order granting Carrera's emergency motion for relief from the automatic stay. Debtor owned two properties (Unit 1413 and 51 S.W. Road), both of which were in foreclosure proceedings. The debtor filed Chapter 13 to stop the foreclosure sale of Unit 1413. However, at the time of filing the debtor was unaware that the foreclosure sale was continued until a later date, thus the debtor filed motion to dismiss his bankruptcy without prejudice. However, the bankruptcy court dismissed prohibiting the debtor from refileing for six months.

Shortly thereafter, a foreclosure sale was set for the 51 S.W. Road property. The debtor filed an emergency motion to reopen the first bankruptcy and shorten the prejudice period to allow him to file a new bankruptcy case. The bankruptcy court stated that it would reopen the first bankruptcy, shorten the prejudice period, but would not stop the foreclosure sale and enjoin the clerk of court from issuing the certificate of sale until further order. The debtor's counsel submitted a proposed order, which included a scrivener's error— "certificate of title" rather than "certificate of sale" was enjoined. Under bankruptcy and Florida law, a debtor loses the right to restructure a mortgage after a foreclosure sale has taken place and a certificate of sale has issued. Carrera was the successful bidder of the 51 S.W. Road and filed an emergency motion for relief from stay to direct the clerk of the circuit court to issue the certificate of title.

The debtor then filed a motion to correct the scrivener's error. The bankruptcy court denied debtor's motion on the grounds that the equities favored Carrera, whom the bankruptcy court considered an innocent third party purchaser who was unaware at the time of the bidding that there were any restrictions on the issuance of the certificate of sale. The Court disagreed finding that Carrera had constructive knowledge when it registered to bid as well as constructive notice of the order that contained the scrivener's error, thus the Court reversed and remanded.

Submitted by:

Susan Heath Sharp
Stichter Riedel Blain & Prosser P.A.
110 East Madison Street, Suite 200
Tampa, Florida 33602
Email: ssharp@srbp.com