Bankruptcy Circuit Update

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First Circuit

Privitera v. Curran (In re Curran)
BAP NO. MW 15-051, 2016 WL 4165901 (B.A.P. 1st Cir., August 4, 2016)

Debtor's former girlfriend/creditor filed an adversary proceeding seeking a determination that a judgment owed to her arising from a business loan was non-dischargeable pursuant to §523(a)(2)(B). Pre-petition the creditor loaned $30,000 to the debtor for his business. Only the creditor was represented by counsel. The parties signed a "Loan Agreement and Promissory Note" which included a "List of Collateral" as an exhibit. The list included two trucks and the current value of each truck. The list did not disclose that the debtor did not have the title to one of the trucks and that both trucks were encumbered. The loan documents provided that the debtor would sign a security agreement and would not encumber "any…property…, whether owned at the date hereof or hereafter acquired…" No security agreement was ever filed and therefore the creditor was unsecured. The debtor filed a motion to dismiss for failure to state a claim and the creditor sought leave to amend the claim. The bankruptcy court granted the motion to dismiss and denied the motion for leave to amend.

The creditor alleged in her complaint that the debt was non-dischargeable under § 523(a)(2)(B) because (1) the debtor made a statement of his financial condition in writing; (2) the statement was materially false because it misrepresented the equity available in the trucks to secure the loan; (3) the creditor reasonably relied on the debtor's misrepresentations because she did not have business experience, had no reason to disbelieve the debtor, had no knowledge of truck loans and was grieving the death of her brother; (4) the debtor intentionally deceived the creditor; and (5) the creditor suffered damages.

The Panel upheld the dismissal of the complaint. First, under either a narrow or broad interpretation of a "statement of the debtor's financial condition", the "List of Collateral" did not constitute a statement falling within the statute. "…[T]he List of Collateral, on its face, simply indicated the Debtor's ownership, possession, or control of property, and did not have any being on his financial position." Further, the creditor failed to plead sufficient facts to demonstrate the List of Collateral was materially false. For example, the creditor failed to plead that there was an agreement that the debtor would pledge unencumbered collateral. In the end, the Panel held that the List of Collateral was exactly what it purported to be on its face – a list of the debtor's property and the purchase price for the property. Having failed to plead two essential elements to a § 523(a)(2)(B) claim, the Panel held that the bankruptcy court did not err in dismissing the complaint.

As to the motion to amend, the Panel reviewed the creditor's proposed § 523(a)(2)(A) amended complaint and held that denial of the motion was appropriate. Here, the Panel concluded based on oral argument that the creditor was attempting to argue that the debtor

"knew she understood the List of Collateral to be a list of encumbered assets which would be available to her in the event of default, and he had a duty to clarify his use of the word 'cost.'" The creditor's lack of effort to obtain clarification of the use of the word "cost" and failure to take any steps to perfect her client proved fatal to this argument. "[The creditor] claims she would not have extended the loan absent the availability of the trucks for security, she never offered why neither she nor her counsel took any steps to guaranty that she had anything more than an unsecured loan."

As a result, the bankruptcy court's orders were affirmed.

Harris v. Scarcelli (In re Oak Knoll Assocs., L.P.)
No. 15-2189, --- F.3d ---, 2016 WL 4410065 (1st Cir. August 19, 2016)

Pre-petition the debtor and a real estate broker entered into a listing agreement. A contract for purchase and sale was accepted, however the deal fell through pre-petition. The debtor filed an application to employ the broker post-petition, which was granted. However, a proposed order was never filed with the bankruptcy court. The application to employ was then withdrawn. Soon thereafter, the debtor and the original buyer entered into a new purchase and sale agreement which ultimately closed. The real estate broker received no commissions from the sale and therefore sought relief in the bankruptcy court under 11 U.S.C. § 501 and § 105(a). The bankruptcy court granted the debtor's motion for summary judgment finding that the broker was not entitled to a commission as a matter of law.

The First Circuit first considered the broker's Section 501 argument which required consideration of Connecticut law to analyze the pre-petition listing agreement. The Broker argued that he was only required to procure the acceptance of an offer to earn the commission based on a pre-petition or, in the alternative, the contract was in effect at the time of the sale and therefore the commission was earned. Both arguments were rejected. First, the First Circuit Court of Appeals reviewed the contract as a whole and held that "the listing agreement unambiguously require[d] that a sale take place in order for [the Broker] to earn a commission." Second, the Court held that even if the contract was read in the manner proposed by the broker, the broker failed to make a record that an offer was accepted within twelve months of the last exchange of negotiations. As a result, the broker's alternative argument failed.

Last, the broker sought equitable relief under § 105(a) pointing to a Connection statute that provided relief to a real estate broker "if it would be inequitable to deny such recovery." However, the Court was unable to reach the merits of this argument because it was waived. The broker both failed to raise the argument at the bankruptcy court level and failed to sufficiently brief the argument for the Court's consideration.

Summary judgment in favor of the debtor affirmed.

July

United Sur. & Indem. Co. v. P.R. Elec. Power Auth. (In re Industrias Vassallo, Inc.)
BAP NOS. PR 15-046, PR 15-048, BAP NO. PR 15-054, BAP NO. PR 15-055,
2016 WL 3681089 (B.A.P. 1st Cir., July 5, 2016)

Puerto Rico Electric Power Authority ("PREPA") supplied electric to the debtor. Payment of the electric bill was guaranteed by a bond issued by United Surety & Indemnity Company ("USIC"). PREPA filed a Proof of Claim for $2.4 million. The debtor, however, claimed that it was entitled to a setoff for damages incurred as a result of power interruptions and/or fluctuations for an amount greater than PREPA's claim in an adversary proceeding. USIC sought to intervene in the adversary proceeding and alleged it was not liable on the bond because the amount of the debtor's damages exceeded PREPA's claim. The bankruptcy court granted the motion to intervene. Several years into the case, the debtor obtained leave to amend its complaint to reduce its damages to an amount less than PREPA's claim.

The bankruptcy court partially granted PREPA's motions for summary judgment because the debtor's damages were less than the amount owed to PREPA. The court dismissed the Complaint for Intervention, awarded PREPA the amount of the bond and denied without prejudice PREPA's request for interest and attorneys' fees. USIC's motions for reconsideration were denied. The bankruptcy court then entered a Partial Judgment which included a certification under Rule 54(b) that there was " no just reason for further delay" in the entry of the final judgment.

USIC's appeal followed. PREPA challenged the finality of the orders on appeal relating to dismissal of its Complaint for Intervention. The Panel issued an order to show cause directing USIC to demonstrate why its appeal should not be dismissed for lack of jurisdiction. USIC's argument did not persuade the Panel and the appeal was dismissed.

Six years after the adversary proceeding was filed, the debtor moved to voluntarily dismiss the case. In response, USIC filed an amended complaint in intervention without leave of court. Instead, USIC filed an "Informative Motion" explaining why it was within its rights to file the amended complaint, alleging that the Order to Show Cause permitted it to amend its complaint at any time until the adjudication of the debtor's complaint. PREPA and USIC did not object to the debtor's dismissal motion and the bankruptcy court granted the motion and entered a final judgment of dismissal. It also disallowed the amended complaint in intervention due to the voluntary dismissal of the adversary proceeding. It adjourned a status conference which USIC had requested go forward. USIC sought reconsideration of the order dismissing its amended complaint in intervention which was denied.

The Panel first disposed of PREPA's cross-appeal. Because PREPA consented to the motion to dismiss the adversary proceeding and failed to reserve its right to appeal any orders, the Panel held it was without jurisdiction to consider the cross-appeal. Accordingly, the cross-appeal was dismissed.

Next, the Panel considered USIC's appeal of the judgment dismissing the adversary proceeding. Similar to PREPA's error in failing to preserve its appellate remedies, USIC waived any right to appeal the judgment of dismissal because it did not challenge the debtor's motion to dismiss. The Panel noted that even in the absence of the waiver, the bankruptcy court did not abuse its discretion because the only other party to the adversary proceeding, PREPA, did not object to the dismissal.

USIC's efforts to continue the adversary proceeding by filing its amended complaint were also rejected. First, the Panel noted that USIC was not entitled to file the amended complaint under Rule 15(a)(1) and, second, it did not obtain leave nor PREPA's consent under 15(a)(2). Even if USIC's Informative Motion was read to request relief under 15(a)(2), USIC's efforts were without merit for two reasons: (1) USIC failed to obtain an order setting aside the judgment dismissing its original complaint and therefore the court could not consider any amendments; and (2) the extensive delay between the filing of the original complaint and the amendment would constitute undue delay and prejudice. The Panel also dismissed USIC's argument that the Panel authorized the late amendment in its Order to Show Cause.

The final issue considered was the effect of the affirmance of the judgment of dismissal on USIC's appeal of several interlocutory orders. The Panel determined that the issues raised by the appeal were rendered moot by the affirmance. Further, "USIC's silence regarding the voluntary dismissal of the adversary proceeding has far-ranging consequences that extend beyond the loss of its right to appeal [the judgment of dismissal]." The Panel noted that USIC allowed the dismissal without ever mentioning its intent to preserve its right to appeal the interlocutory orders. "We see no reason to consider the Interlocutory Orders after USIC permitted the adversary proceeding to die in the bankruptcy court."

The judgment of dismissal of the adversary proceeding was affirmed and the Panel declined to review the interlocutory orders. PREPA's cross-appeal was dismissed.

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Third Circuit

***Rosenberg v. DVI Receivables XVII, LLC*,**
No. 15-2622, 2016 WL 4501675 (3d Cir. Aug. 29, 2016)

In a precedential opinion reversing the district court, the Third Circuit held that damages awarded under § 303(i) of the Bankruptcy Code for the bad faith filing of an involuntary petition

did not preempt a subsequent state law tortious interference claim filed by affiliated parties of the involuntary debtors.

The tortious interference claim at issue in *Rosenberg* arose from involuntary petitions filed against Maury Rosenberg and his company National Medical Imaging ("NMI"), who owned and operated medical imaging centers in the Philadelphia area. The involuntary petitions were filed by DVI Receivables and U.S. Bank, the lessors on the medical imaging equipment maintained at locations owned by NMI. The bankruptcy court dismissed involuntary petitions, and Rosenberg and NMI received damages under § 303(i) after the court found that the involuntary petitions were filed in bad faith.

Shortly after the damages award, appellants Sara Rosenberg (Maury Rosenberg's wife), an affiliated family-owned trust, and several real estate partnerships who owned the medical imaging facilities that NMI operated (collectively, the "Rosenberg Affiliates") filed a tortious interference claim against DVI and U.S. Bank, alleging that they suffered monetary losses as a result of the filing of the involuntary bankruptcy petitions.

Although the Rosenberg Affiliates were not parties to the involuntary bankruptcy cases, their complaint alleged that DVI and U.S. Bank filed the involuntary petitions with the intent to cause the affiliated real estate partnerships to default on their underlying mortgages. Most notably, the Rosenberg Affiliates claimed that as a result of the involuntary petitions, the partnerships were declared in default of the mortgages and lost all but one of the properties.

The narrow issue before the Court was whether Congress intended § 303(i) to preempt non-debtor's state law claims. Section § 303(i) provides that if the court dismisses an involuntary bankruptcy petition that was filed in bad faith, the debtor may recover attorney's fees, costs, and damages from the creditors who filed the petition. 11 U.S.C. § 303(i)(2).

The district court dismissed the Rosenberg Affiliates' claim, finding that the damages awarded to Maury Rosenberg and NMI pursuant to § 303(i) preempted their subsequent claim for tortious interference. The district court adopted the Ninth Circuit's reasoning in *In re Miles* that:

> Because Congress intended the Bankruptcy Code to create a whole scheme under federal control that would adjust the rights and duties of creditors and debtors alike . . . we can infer from Congress's clear intent to provide damage awards only to the debtor in federal proceedings predicated upon the bad faith filing of an involuntary petition that Congress did not intend third parties to be able to circumvent this rule by pursuing those very claims in state court.

Rosenberg v. DVI Receivables, XIV, LLC, 2015 WL 3513445, at *4 (quoting *In re Miles*, 430 F.3d 1083, 1091 (9th Cir. 2005).

On appeal, the Third Circuit reversed and remanded, holding that § 303(i) does not preempt the state law claims of non-debtors predicated on the filing of an involuntary bankruptcy

petition. In its analysis, the Court emphasized that the strong presumption against inferring Congressional preemption also applies in the bankruptcy context. *Id.* at 9 (citing *In re Fed.-Mogul Glob. Inc.*, 684 F,3d 355, 365 (3d Cir. 2012)). Thus, in examining precedent on preemption, the Court found the presumption against preemption can only be overcome when the Congressional intent to preempt is "clear and manifest." *Id.* at 9.

First the court examined the text of § 303, noting that its silence "as to potential remedies for non-debtors harmed by an involuntary bankruptcy petition" is a suggestion that "when Congress passed the provision it either did not intend to disturb the existing framework of state law remedies for non-debtors or (more likely) was not thinking about non-debtor remedies at all." *Id.* at 10. Accordingly, the Court refused to infer that Congress' silence as to non-debtors was "clear and manifest" intent to deprive them of a state court remedy.

Next, the Court examined the underlying purpose of § 303(i) and the structure of the Bankruptcy Code. It noted its purpose was to discourage abuse of involuntary petitions and that there was nothing in the Code to suggest concern about protecting non-debtors from effects of involuntary petitions. Thus, it concluded that "[i]t would be inconsistent with the remedial purpose § 303(i) to preempt state law remedies for non-debtors that can likewise be harmed by involuntary bankruptcy petitions." *Id.* at 11.

By so holding, the Court also rejected the appellees' textual argument comparing § 303(i) with the automatic stay provisions of § 362(k). The appellees argued that because Congress created the broad remedy in § 362(k)—which covers any individual (not just a debtor) harmed by a violation of the automatic stay—Congress intentionally chose not to do the same for § 303(i). The Third Circuit countered that although this reading was "plausible" it still did not evince clear and manifest congressional intent that is a prerequisite for finding field preemption.

Lastly, the Court explicitly rejected the Ninth Circuit's analysis of the same issue in *In re Miles*, discussed above. It concluded that "if we apply faithfully the presumption against preemption, silence on the part of Congress should be the end of the analysis" and the Ninth Circuit's failure to do so was "inconsistent with the presumption against preemption." *Id.* at 13. As such, the Third Circuit reversed and remanded to the district court to consider a statute of limitations argument that it did not address in its opinion.

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Fifth Circuit

***In re Vitro Asset Corp.*,**
--- Fed. App'x. ---, 2016 WL 4169129 (5th Cir. Aug. 5, 2016).

United Independent School District ("UISD") a taxing entity, issued two tax bills to Vitro Packaging, an affiliated debtor of Chapter 11 debtor Vitro Asset Corporation, seeking a total of $464,709.97 (the "Base Taxes"). Pursuant to Texas law, UISD's claims were secured by a statutory lien on Vitro Packaging's property.

UISD filed a proof of claim against Vitro Asset Corporation seeking Base Taxes, penalties and interest, and collection fees. This proof of claim, however, erred in several respects as (1) it was directed to Vitro Asset Corporation when the property subject to the claimed taxes was actually owned by Vitro Packaging and (2) improperly included amounts for post-petition interest, fees, and penalties. Vitro Packaging paid UISD the Base Taxes claimed in the tax bills that had been issued by UISD. Subsequently, UISD filed an amended proof of claim correcting the errors in its initial proof of claim; as a result, the amended proof of claim sought only the amount of the Base Taxes.

The Debtors filed their First Amended Joint Chapter 11 Plan of Reorganization. Section 3.5 of the Plan provided deadlines for creditors such as UISD to seek "payment of either postpetition interest or reimbursement of attorney's fees and other costs associated with such claimant's Allowed Claim" within 30 days after the "Effective Date" of the Plan. The bankruptcy court confirmed the Plan. Pursuant to Federal Rule of Bankruptcy Procedure 8002, any appeal from the bankruptcy court's order confirming the Chapter 11 plan must have been filed within 14 days after entry of the confirmation order. UISD neither objected to the plan nor filed a notice of appeal. The confirmed Plan became effective on December 19, 2013 (the "Effective Date"). UISD did not file a claim with the bankruptcy court for post-petition interest, penalties, or collection fees within 30 days of the Effective Date, as required by the Plan. The bankruptcy court closed the proceedings.

In June 2014, UISD sent a letter to Vitro Packaging asserting that its earlier payment of the Base Taxes in April 2013 was insufficient due to the accrual of interest, penalties, and fees. The Reorganized Debtors petitioned the bankruptcy court to reopen their bankruptcy cases and sought an order enforcing the confirmed plan. In response, UISD argued that application of Section 3.5 of the confirmed plan to its claims violates 11 U.S.C. §§ 502, 503, and 506, and the Fifth Circuit's decision in *Financial Security Assurance, Inc. v. T-H New Orleans Ltd. Partnership (In re T-H New Orleans Ltd. Partnership)*, 116 F.3d 790 (5th Cir. 1997), by improperly impairing UISD's claims.

The Fifth Circuit, affirming the district court, noted that "the threshold issue is whether UISD's arguments are barred by res judicata." *"[R]*egardless of whether a provision of the plan is inconsistent with the bankruptcy laws," *because UISD* failed to timely object to, or appeal from, the confirmation of a bankruptcy plan, its challenge to the "propriety or legality" of the plan was "foreclosed." The Fifth Circuit noted that res judicata does not generally apply to secured creditors who possess a lien. *However,* 11 U.S.C. § 1141(c), which provides that "after

confirmation of a plan, the property dealt with by the plan is free and clear of all claims and interests of creditors," has the effect of invalidating a lien where four conditions are met. These four conditions are as follows: (1) the plan must be confirmed; (2) the property that is subject to the lien must be dealt with by the plan; (3) the lien holder must participate in the reorganization; and (4) the plan must not preserve the lien. Because all four conditions were met here, the court held that UISD's lien was discharged as part of the reorganization and that res judicata therefore applied to UISD's claims.

The court noted that res judicata will bar a claim where the following elements are met: (1) "the parties must be identical in both suits," (2) "the prior judgment must have been rendered by a court of competent jurisdiction," (3) "there must have been a final judgment on the merits" and, (4) "the same cause of action must be involved in both cases." The requirement of having "identical [parties] in both suits" was met even though UISD was not a formally named party to the bankruptcy because it participated as a creditor. Thus, res judicata barred UISD's claim.

***Matter of Ritz*,**
--- F.3d ---, 2016 WL 4253552 (5th Cir. Aug. 10, 2016).

Between 2003 and 2007, Husky sold its products to Chrysalis Manufacturing Corp. (Chrysalis), and Chrysalis incurred a debt to Husky of $163,999.38. Chrysalis, which was under the financial control of Daniel Ritz at the time, did not pay its debts as they became due. Rather, between 2006 and 2007, Ritz drained Chrysalis of assets it could have used to pay its debts to creditors like Husky by transferring large sums of Chrysalis' funds to other entities Ritz controlled. When Ritz filed for Chapter 7 bankruptcy, Husky initiated an adversary proceeding objecting to Ritz's discharge under 11 U.S.C. § 523(a)(2)(A), which excepts from discharge "any debt . . . for money, property, services, or an extension, renewal, or refinancing of credit, to the extent obtained by . . . false pretenses, a false representation, or actual fraud."

With respect to § 523(a)(2)(A), which is the only bankruptcy provision at issue on remand, the bankruptcy court held that Husky could not prevail under this provision because Ritz was not liable to Husky pursuant to Texas Business Organizations Code § 21.223(b). Husky argued that: (1) Ritz's transfers of Chrysalis's funds were fraudulent transfers under the Texas Uniform Fraudulent Transfer Act ("TUFTA"), *see* Tex. Bus. & Com. Code § 24.005; (2) these fraudulent transfers under TUFTA allowed Husky to pierce the corporate veil and hold Ritz personally liable for Chrysalis's debt, *see* Tex. Bus. Org. Code § 21.223(b); and (3) 11 U.S.C. § 523(a)(2)(A) bars Ritz from discharging his debt to Husky. The bankruptcy court held that, based on the absence of a misrepresentation, Husky could not pierce the corporate veil of Chrysalis to hold Ritz responsible for Chrysalis's debt to Husky. Because Husky could not pierce the corporate veil, Husky had "'failed to establish any liability against the debtor'; therefore, 'there was no debt to discharge.'"

The case was ultimately taken to the Supreme Court. The Supreme Court held that "the term 'actual fraud' in § 523(a)(2)(A) encompasses forms of fraud, like fraudulent conveyance schemes, that can be effected without a false representation." The Court interpreted "actual fraud" to encompass fraudulent conveyance schemes, even when those schemes do not involve a

false representation." On remand the Supreme Court instructed the Fifth Circuit Court to specifically address whether Ritz is liable to Husky under Texas state law.

The Fifth Circuit reasoned that to succeed in denying Ritz a discharge under § 523(a)(2)(A), Husky must first show that Ritz is liable for the debt owed by Chrysalis to Husky. To show that Ritz is liable for the debt, Husky relied on Texas Business Organizations Code § 21.223(b), which allows a plaintiff to pierce the corporate veil and hold a shareholder, such as Ritz, liable for the debts of a corporation. The circuit court held that the district court "erred in concluding that Ritz was liable to Husky under the Texas veil-piercing statute because, in so concluding, it relied on a fact finding that the bankruptcy court did not actually make."

Generally, corporate shareholders may not be held liable for debts of the corporation. However, the shareholder may be held personally liable for the business's obligations "'if the obligee demonstrates that the . . . beneficial owner . . . caused the corporation to be used for the purpose of perpetrating and did perpetrate an *actual fraud* on the obligee primarily for the *direct personal benefit* of the . . . beneficial owner.'" Thus, the court reasoned, if Husky could show that Ritz perpetrated an actual fraud for his direct personal benefit, Ritz would be liable for Chrysalis's debt to Husky under Texas law.

Reasoning that in the context of piercing the corporate veil, "actual fraud is not equivalent to the tort of fraud" but instead "involves 'dishonesty of purpose or intent to deceive,'" the Fifth Circuit held that establishing that a transfer is fraudulent under the actual fraud prong of TUFTA is sufficient to satisfy the actual fraud requirement of veil-piercing. This is because a transfer that is made "with the actual intent to hinder, delay, or defraud any creditor" under Tex. Bus. & Com. Code § 24.005(a)(1) "necessarily involves dishonesty of purpose or intent to deceive."

Ultimately, the Fifth Circuit held that because the bankruptcy court never drew an inference of actual fraud, even if its factual findings were consistent with such inference, the district court erred in holding that Ritz was liable to Husky under Texas law. It therefore remanded the case for additional fact finding as to whether Ritz's conduct satisfied the actual fraud prong of TUFTA.

***Janvey v. Golf Channel, Inc.*,**
--- F.3d ---, 2016 WL 4435633 (5th Cir. Aug. 22, 2016).

Stanford International Bank, Limited paid $5.9 million to The Golf Channel, Inc., in exchange for a range of advertising services aimed at recruiting additional investors into Stanford's multi-billion dollar Ponzi scheme. After the scheme was uncovered by the SEC and the district court seized Stanford's assets, the court-appointed receiver filed suit under the Texas Uniform Fraudulent Transfer Act (TUFTA) to recover the $5.9 million. The district court granted Golf Channel's motion for summary judgment, having determined that although Stanford's payments were fraudulent transfers under TUFTA, Tex. Bus. & Com. Code § 24.005(a)(1), Golf Channel had established the affirmative defense that it received the payments "in good faith and for a reasonably equivalent value," *id.* § 24.009(a).

The Fifth Circuit initially reversed, but later vacated its opinion and certified the following question to the Supreme Court of Texas:

> 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?

The Supreme Court of Texas answered the question, stating that TUFTA's "reasonably equivalent value" requirement can be satisfied with evidence that the transferee (1) fully performed under a lawful, arm's-length contract for fair market value, (2) provided consideration that had objective value at the time of the transaction, and (3) made the exchange in the ordinary course of the transferee's business. The court clarified that the "value" inquiry under TUFTA does not depend on "whether the debtor was operating a Ponzi scheme or a legitimate enterprise,"[2] so long as "the services would have been available to another buyer at market rates" had they not been purchased by the Ponzi scheme. Accordingly, the transfer was for "value" as viewed from the reasonable creditor's perspective, even if the advertising services "only served to deplete Stanford's assets because acquiring new investors . . . ultimately extends the Ponzi scheme."

Noting that the Supreme Court of Texas's answer interpreted the concept of "value" under TUFTA differently than the Fifth Circuit has otherwise understood "value" under other states' fraudulent transfer laws and under section 548(c) the Bankruptcy Code, the Fifth Circuit held that it was bound to accept the Supreme Court's interpretation of "value" under TUFTA for this case. However, the Fifth Circuit made clear that its prior decisions under other laws would not be affected by the Supreme Court of Texas's answer to its certified question. Indeed, the Fifth Circuit stated that "[w] hen interpreting a federal statute or a statute from a different state, 'we are not bound by a state court's interpretation of a similar—or even identical—state statute.'"

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***In re Smith*,**
--- F. App'x ---, 2016 WL 4394560 (5th Cir. Aug. 17, 2016)

The Fifth Circuit held that under the facts presented the debtor was permitted to claim as his homestead a property he planned to sell. The debtor, Robert Smith, a former resident of Australia, inherited a residence from his aunt. After her death, a dispute arose between Smith

and the executor of the estate which required Smith to retain counsel. After four years of litigation, the dispute settled, with Smith retaining ownership of the residence. Shortly thereafter, Smith filed for Chapter 7 bankruptcy, claiming the property—which he had lived in during the lengthy litigation—as his homestead.

In the bankruptcy, his former attorneys sought to recover what they claimed from their contingency-fee contract with Smith. Specifically, they argued Smith could not claim the residence as homestead because he intended to sell the property and return to Australia. In holding the exemption applied, the Fifth Circuit explained the constitutional and statutory provisions that protect homesteads are liberally construed. Considering the facts as they existed on the date the bankruptcy was filed, the determinative issue is whether the debtor shows both overt acts of homestead usage and an intent to claim the land as homestead. Although Smith stated it was his intent to sell the property eventually and return to Australia, there was no evidence that on the date the bankruptcy was filed, he lacked the intent to make the property his homestead. A party's desire to sell the property and move did not defeat the exemption.

In re Green,
--- F. App'x ---, 2016 WL 4375018 (5th Cir. Aug. 16, 2016).

The Fifth Circuit dismissed the debtor's interlocutory appeal as moot after he failed to prosecute the underlying action. In his bankruptcy, Alvin Green claimed a community property interest in a home owned by his wife, which was in foreclosure. Despite Green's bankruptcy filing, the foreclosure sale proceeded and the home was purchased by a buyer who then sought relief from the automatic stay. The bankruptcy court granted that relief, and Green appealed.

The district court denied Green's motion for stay pending appeal, which asserted he was likely to succeed on the merits and other factors weighed in favor of a stay. Green appealed that denial to the Fifth Circuit but otherwise failed to prosecute his challenge to the bankruptcy court's order in the district court. Consequently, the district court dismissed the appeal, allowing Green 21 days to reinstate it. He did not do so.

Under the circumstances, the Fifth Circuit held Green's interlocutory appeal was moot because the district court's final judgment eliminated the controversy raised by the appeal.

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***Somers v. Bank of America*,**
--- F.3d ---, 2016 WL 4501677 (5th Cir. Aug. 26, 2016).

Brad Jones appealed the denial of both his motion to intervene and the order granting the stipulation of dismissal. Jones sought intervention in a suit between the Chapter 7 Trustee for his company, Exquisite Designs, and Bank of America. The Trustee had sued Bank of America in state court, but after mediation, the parties filed a stipulation of dismissal on November 2, 2015. On November 4, the district court granted the dismissal, and Jones subsequently filed both a motion to intervene on November 18, and a notice to appeal the order granting stipulation on December 30.

Because the notice of appeal was not timely filed, the Fifth Circuit did not have jurisdiction to review the order granting stipulation. Therefore, the only issue to decide was the motion to intervene. The court noted that there is a difference between intervention as of right and permissive intervention. However, because Jones did not initially address why the district court's denial of permissive intervention was in error, the issue was deemed as waived. Turning to intervention as of right, the court determined it would be appropriate in two situations: 1) when a federal statute gives the unequivocal right to intervene, and 2) when a person "claims an interest relating to the property or transaction that is the subject of the action, and is so situated that disposing of the action may as a practical matter impair or impede the movant's ability to protect its interest, unless existing parties adequately represent that interest." FED. R. CIV. P. 24(A)(2).

No statute gave Jones the right to intervene, so the court analyzed the following four-prong test that would allow intervention under Rule 24(a)(2): 1) The intervention must be timely; 2) The applicant must have some interest in the property or transaction at issue in the suit; 3) The applicant must intervene because, without it, his disposition would impair the protection of his interest; and 4) In the present suit, the interest of the applicant must be inadequately represented. Further, the court noted the following factors in evaluating timeliness: 1) When the applicant knew or should have known of their interest in the case, prior to filing for intervention; 2) Prejudice that the existing parties may suffer for applicant not filing as soon as he knew or should have known to intervene; 3) The prejudice that the intervenor would suffer should intervention be denied; and 4) Any unusual circumstances. In applying these tests, the court upheld the district court's determination that Jones's motion was untimely and that Jones would not be prejudiced by the denial of intervention.

***In re Kim*,**
--- Fed. App'x ---, 2016 WL 4409295 (5th Cir. Aug. 18, 2016).

The Court of Appeals for the Fifth Circuit affirmed the district court's conclusion that, in a prior decision, the Fifth Circuit had not awarded the Kims the relief set forth in the parties' settlement agreement. Following a civil judgment against them for $5,000,000, the Kims purchased a $1,048,028.36 home. During the Chapter 11 proceeding Mr. Kim claimed an unlimited homestead exemption under Texas 11 U.S.C. § 522(b)(3) and Texas law. Dome Entertainment, the Plaintiff in the civil suit, objected and the exemption was limited to $136,875 because § 522(p) is meant to supplant the full effect of homestead exemptions under state law,

during a bankruptcy proceeding. This led Mrs. Kim to seek a declaratory judgment regarding Mrs. Kim's rights and claims due to her separate property interest in the home.

The bankruptcy and district courts both held that § 522(p) applied despite Mrs. Kim's homestead interest. However, during the appeal to the district court, the Kims and Dome Entertainment entered into a settlement agreement wherein Mr. Kim executed a promissory note on the house, payable to Dome. The agreement also provided that there would be a reduction in the note if the final order provided Mrs. Kim with nonmonetary relief. The Fifth Circuit then affirmed and Dome entertainment filed a motion for summary declaratory judgment, requesting a determination of whether monetary or nonmonetary relief was given to Mrs. Kim. Both the bankruptcy and district courts held that the Fifth Circuit did not award Mrs. Kim any type of relief. The Kims, however, argued that nonmonetary relief was given when the Fifth Circuit stated that "[h]omestead rights have some value to a spouse, separate and apart from an ownership in real property on which homestead rights are impressed." *Kim v. Dome Entertainment Center, Inc. (In re Kim)*, 748 F.3d 647, 661 (5th Cir. 2014).

In the case at bar, the Fifth Circuit affirmed their determination that Mrs. Kim "had a possessory interest in the real property by virtue of its homestead character." *Id*. However, the judgment of the district court was confirmed as the Kims did not address whether "the determination by Congress to permit an exemption of $136,875 for a debtor such as Mr. Kim would not be just compensation for Mrs. Kim's homestead interest since $136,875 in proceeds would be impressed with her homestead rights." The court also affirmed its determination that Mrs. Kims homestead interest did not preclude a forced sale.

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Eighth Circuit

Caldwell v. DeWoskin et al. (In re Caldwell),
Case No. 15-1962, 2016 WL 4150920 (8th Cir. August 5, 2016).

On appeal from the United States District Court for the Eastern District of Missouri, the issues was whether the bankruptcy court had jurisdiction to consider a complaint filed by a former chapter 13 debtor against his ex-wife and attorney for violation of the automatic stay, § 362(k), during the pendency of his bankruptcy case. Pre-petition an order was entered by the Missouri state court ordering him to pay spousal maintenance and attorneys' fees arising out of a divorce proceeding. The debtor refused to pay and a hearing on a contempt motion was set. One week prior to the contempt hearing, the debtor filed chapter 13. After oral argument and research, the state court held that the automatic stay did not prevent it from holding the debtor in

contempt and ordered the debtor to jail. Additional hearings were held on other attempts to collect the maintenance due, including a second hearing on contempt and an appeal of the contempt order. On appeal, the contempt order was reversed. Two months later the chapter 13 case was dismissed.

A year and a half after the dismissal of the debtor's chapter 13 case, he filed a complaint for violation of the automatic stay against his ex-spouse and her attorney. The claim was referred to the bankruptcy court for litigation. The bankruptcy court granted summary judgment to the defendants stating it lacked subject matter jurisdiction under the Rooker-Feldman doctrine, which states that the federal court cannot exercise subject-matter jurisdiction over an action that seeks review of, or relief from, state court judgments. The bankruptcy court considered the complaint an attempt to review the state court's judgment that the automatic stay did not apply to the contempt proceedings. The Eighth Circuit reversed, holding that the actions in question were the actions by the defendants in seeking and executing the state court orders, not the orders themselves. The case was remanded to determine whether the claims are precluded based on the state court's determination that the automatic stay did not bar contempt proceedings.

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Ninth Circuit

***Adeli v. Barclay (In re Berkeley Delaware Court, LLC)*,**
— F3d —, 2016 WL 4437616 (9th Cir. August 23, 2016)

In re Berkeley Delaware Court, LLC, the Ninth Circuit affirmed the district court's order dismissing the appeal as moot under §363(m). After settling with secured creditor First-Citizens Bank & Trust Company ("First-Citizens") in a prior bankruptcy, Debtor filed a second chapter 11 and a state court suit alleging fraud against First-Citizens. First-Citizens obtained stay relief, sold the subject property, and asserted a deficiency claim of approximately $7,000,000. The case was eventually converted to chapter 7, after which the trustee entered into a settlement to sell the cause of action to First-Citizens pursuant to Rule 9019 and §363(b) in exchange for payment of $108,000 and waiver of First-Citizens' deficiency and administrative claims. The bankruptcy court required the settlement to be subject to the provisions of §363(b), including an overbid procedure. There were no other bids and the court approved the settlement.

Debtor's principal, Adeli appealed but did not seek a stay of the sale. Adeli argued that the provisions of §363 should not be applied to the sale of a cause of action when there are no third party bidders, and that First-Citizens should not have been entitled to the good faith purchaser protections of §363(m).

The Ninth Circuit agreed with prior BAP precedent that a settlement involving an estate cause of action may be treated as a §363(b) sale. The Circuit found no error in the bankruptcy court's determination that First-Citizens was a good faith purchaser and held that when "a bankruptcy court invokes §363 for a sale of claims pursuant to a settlement agreement, all parties are bound by §363(m)'s requirement to seek a stay regardless of whether an outside party makes a bid on the sale."

Rivera v. Orange Co. Probation Dep't (In re Rivera)
— F3d —, 2016 WL 4205946 (9th Cir. August 10, 2016)

In *In re Rivera*, the Ninth Circuit reversed the BAP and held that the Debtor's liability to the Orange County Probation Department ("OCPD") for reimbursement of costs incurred as a result of her minor son's juvenile detention were not in the nature of support and therefore could be discharged. Under a California statute, Debtor was required to pay the OCPD for expenses incurred while her minor son was in custody of the OCPD, which totaled $16,372. Debtor sold her home and paid $9,508 but eventually had to file a no-asset chapter 7. OCPD continued efforts to collect the debt after discharge and Debtor reopened her case to seek sanctions for violation of the discharge injunction.

OCPD argued that because the costs imposed were limited to expenses to support Debtor's son, and BAPCPA modified the definition of domestic support obligation under §101(14A), the debt was not discharged pursuant to §523(a)(5).

The panel noted that although Congress expanded the definition of domestic support obligations to include those payable to a governmental unit, it did not change the analysis of whether an obligation is "in the nature of…support." Distinguishing *In re Chang*, 163 F.3d 1138 (9th Cir. 1998) and *In re Leibowitz*, 217 F.3d 799 (9th Cir. 2000), the Circuit held that any "support" the County provided was not integral to the creation of domestic support obligations and was incidental to the larger purpose of enforcing criminal law. Therefore it was not in the nature of support and was dischargeable.

The Court stated that not only would discharge vindicate the Code's purpose of granting a fresh start, but that excepting the debt from discharge would detract from Debtor's ability to fulfill her family support obligations. Finally, the Court noted a "recurring problem" of public entities imposing fiscal burdens on those who can least afford them which can undermine the credibility of government and the perceived integrity of the legal process.

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Liquidating Trust Committee of the Del Biaggio Liquidating Trust v. Freeman
(*In re William James Del Biaggio, III*),
2016 WL 4435904 (9th Cir. Aug. 22, 2016)

In this case, the Ninth Circuit affirmed the district court's affirmance of the bankruptcy court's summary judgment in an adversary proceeding and held that an individual creditor's general unsecured fraud claim was properly subordinated to other claims senior or equal to under 11 U.SC. § 510(b).

After James Del Biaggio, III ("Del Biaggio") filed for bankruptcy, Freeman filed a general unsecured claim against the estate seeking damages of over $38 million: $31 million in initial investments in Predator Holdings, Inc. ("Holdings") securities, $5 million of subordinated debt he issued to Holdings in exchange for a promissory note, and about $2.6 million paid in the first capital call. Del Baggio controlled roughly 27% of the voting securities of Holdings through another company. In response, the Liquidating Trust Committee of the Del Biaggio Liquidating Trust (the "Committee") filed a counterclaim and sough summary judgment against Freeman. The bankruptcy court granted the Committee's summary judgment and found Freeman's claim subject to section 510(b). The district court affirmed the order and judgment.

On appeal, Freeman mainly argued that his claim was not one "arising from the purchase or sale" of Holdings under section 510(b). The Ninth Circuit disagreed. Section 510(b) of the Federal Bankruptcy Code, in relevant part, provides that for the purposes of distribution, "a claim . . . of the debtor or of an affiliate of the debtor[] for damages arising from the purchase of sale of such a security[] . . . shall be subordinated to all claims or interests that are senior or equal the claim or interested represented by such security." According to the Court, "arising from" reaches broadly to subordinate damage claims involving qualifying securities. Furthermore, the basis of Freeman's claim for damages against Del Biaggio's estate is not Del Biaggio's fraudulent misrepresentations, but rather Freeman's detrimental reliance on those misrepresentations in form of his Holdings investments.

The Ninth Circuit also dismissed Freeman's argument that his claim was not one "arising from the purchase or sale" of securities of Del Biaggio's affiliate given that he purchased the Holdings securities from someone else rather than Del Biaggio. According to the Court, nothing in section 510(b) requires that the debtor be the seller of the security at issue.

Unpersuaded by a prior BAP decision to the contrary, the Ninth Circuit held that section 510(b) not only applies to corporate debtors but also to individual debtors. According to the Court, no recourse to sources outside the text is necessary given the statute's plain language.

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Tenth Circuit

In Rindlesbach v. Jones (In re Rindlesbach),
No. 15-4088, 2016 WL 4546645 (10th Cir. Aug. 30, 2016) (unpublished)

The Tenth Circuit dismissed a chapter 7 debtor's appeal of an order approving a settlement between a creditor and the chapter 7 trustee (Trustee) for lack of standing. Prepetition, the debtor obtained summary judgment on a claim against him on a guarantee he signed for an employee profit sharing plan (Plan), but a judgment was obtained against the Plan on the underlying loan. Subsequently, the plaintiff brought additional state suits against the debtor alleging that after verdict was rendered against the Plan, the debtor transferred assets from the Plan, and retained certain of the funds himself. The state court ordered the debtor to place $2.2 million in the court registry pending resolution of the claims; he failed to do so and was held in contempt. The debtor then filed a chapter 7 bankruptcy case which stayed the state court proceedings. The plaintiff asserted claims against the debtors estate, but settled with the Trustee providing the plaintiff with an allowed, subordinated claim. The bankruptcy court approved the settlement over the debtor's objection, made a final distribution and granted the debtor a discharge of his prepetition debts, including to the plaintiff. The debtor challenged two parts of the settlement, one modified the automatic stay and authorized the Trustee to stipulate to reversal of the summary judgment in favor of the debtor and entry of a judgment against the debtor by the trial court, the other allowed the Trustee to sell the estate's claims, including avoidance actions against third parties. Relying on Code § 524(e), and the discharge in bankruptcy granted the debtor, the Tenth Circuit rejected the debtor's challenge to the provision facilitating entry of a judgment against him because the plaintiff could not enforce the contemplated judgment against the debtor. The Tenth Circuit stated that "the remote possibility of future litigation [if Plaintiff sought to enforce the judgment] does not constitute sufficient impairment [of the debtor's rights] to grant [him] standing," and likewise for a possible hit to his credit rating which was holly speculative." Next, the Tenth Circuit rejected as sufficient to create "person aggrieved" standing, the test for appellate standing in bankruptcy, that the debtor might have to participate in discovery in any action against third parties, explaining that "nothing in the bankruptcy court order [approving the settlement] imposes any obligation on Debtor beyond that of every person to participate in discovery in civil litigation between other persons." Finally, in rejecting what appeared to be a challenge to the bankruptcy court's jurisdiction, the Tenth Circuit explained that "the bankruptcy court undoubtedly has subject matter jurisdiction to approve assignments of any asset of the bankruptcy estate."

In Diamond v. Vickery (In re Vickery),
No. 15-1069, 2016 WL 4413320 (10th Cir. Aug. 19. 2016) (unpublished)

The Tenth Circuit dismissed a debtor's appeal of a district court order affirming an order of a bankruptcy court determining that a $4.6 million judgment against the debtor was non-dischargeable pursuant to Code section 523(a)(6) because it was not a final, appealable order. Prepetition, Richard Diamond, as chapter 7 trustee for IVDS Interaction Acquisition Partners (IVDS), obtained a $4.6 million judgment that Terry Vickery and others conspired to make fraudulent transfers from IVDS to themselves. Subsequently, Mr. Vickers filed a chapter 7 bankruptcy case. Diamond, as IVDS trustee, sued seeking denial of Vickers' discharge under Code section 523(a)(2)(A), (a)(4), and (a)(6). The bankruptcy court ruled for Diamond under

section 523(a)(2)(A) and (a)(4), but for Vickers under section 523(a)(6). Vickery appealed the rulings against him and Diamond cross-appealed the ruling against him. Vickery's appeal was heard by the District Court, but Diamond's cross-appeal was heard by the Bankruptcy Appellate Panel (BAP) because of a defect in the statement of election to have the District Court hear his cross-appeal. The BAP affirmed the section 523(a)(4) ruling but reversed in part its section 523(a)(2)(A) ruling and remanding the matter to the bankruptcy court. Subsequently, the District Court entered an order affirming the bankruptcy court's ruling based on Code section 523(a)(6); it is from this order that Vickery appealed to the Tenth Circuit. The Tenth Circuit explained that because the District court's order only resolved one of the three claims in Diamond's non-dischargeability complaint, and one of those claims was before the bankruptcy court on remand, the district court's order was not final for purposes of appeal.

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Eleventh Circuit

***In re Gonzalez*,**
No. 15-14804, 2016 WL 4245422, at *1 (11th Cir. Aug. 11, 2016)

In this chapter 13 bankruptcy case, the bankruptcy court found the Florida Department of Revenue ("DOR") in contempt for violation of the order confirming the debtor's chapter 13 plan. This finding resulted from the DOR's post-confirmation collection efforts for the payment of a domestic support obligation ("DSO"), notwithstanding the fact that the debtor's chapter 13 plan provided for payment of the DSO arrearages and for payment of the continuing DSO obligations.

The DOR appealed the court's contempt finding, arguing 11 U.S.C. § 362's exception from the automatic stay for the collection of specified DSO obligations. The Eleventh Circuit ultimately affirmed the bankruptcy court's contempt findings, reasoning that the exception to the automatic stay does not have the same effect post-confirmation because section 1327(a) of the Code provides that the terms of a confirmed plan bind the debtor and the creditors. Thus, the automatic stay exception does not allow a DSO creditor to ignore the binding effect of a chapter 13 plan.

In re Ocean Warrior, Inc.,
No. 15-11891, 2016 WL 4490489 (11th Cir. Aug. 26, 2016)

Over 25 years ago, in 1990, the debtor, the owner of a commercial shrimping vessel, filed a chapter 11 bankruptcy petition following admiralty claims levied by a former employee. The admiralty claims resulted in a forced *in rem* sale of the vessel, but the debtor filed bankruptcy to

halt the sale. The bankruptcy court voided the sale, found that the vessel had substantial equity, and allowed the principal to continue operating the vessel so long as he carried appropriate insurance and kept it in U.S. waters around Washington state. The Washington court ultimately issued a judgment against the debtor, leading the bankruptcy court to order the debtor to deposit monies as security for the creditor's claim.

No money was ever deposited, no insurance was ever obtained on the vessel, and the vessel—and its principal, Gowdy—disappeared. The bankruptcy court and the Washington court issued warrants for Gowdy's arrest. The court converted the bankruptcy case to a chapter 7 case, and ultimately closed the case, retaining jurisdiction in the event the vessel or Gowdy was ever located. In 2011, Gowdy resurfaced. The bankrupty court issued an order to show cause why he should not be held in civil contempt. Following a hearing, the court ordered Gowdy to purge the contempt by producing the vessel or paying the creditor's judgment. The chapter 7 trustee was able to recover monies Gowdy was set to receive from a lawsuit in Texas, and ultimately used those to pay the creditor, its attorney fees, and trustee fees.

Gowdy's appeal alleged his due process rights were violated, that the bankruptcy court lacked authority to punish him for contempt, and that the bankruptcy court's award of fees to the trustee was improper. The Eleventh Circuit found that the evidentiary show-cause hearing provided sufficient due process and that the bankruptcy court's exercise of its contempt powers was a "core" proceeding over which the bankruptcy court had power to enter final orders. The appeals court did, however, reverse on the award of fees to the trustee, finding the trustee was not entitled to payment of all fees directly from the recovered funds.

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