

Bankruptcy Circuit Update
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Second Circuit

***Wilk Auslander LLP v. Murray (In re Murray),
17-1272 (2nd Cir., August 14, 2018)***

The Second Circuit affirmed the judgment of the district court affirming the bankruptcy court's dismissal of the chapter 7 involuntary bankruptcy case of Matthew Murray ("Murray") over the objection of creditor Wilk Auslander LLP ("Wilk Auslander"), who had filed under Bankruptcy Code section 303(a) against Murray.

Wilk Auslander LLP sought to enforce a \$19 million judgment against Murray that arose out of a Financial Industry Regulatory Authority arbitration that awarded Murray's former employer, Rodman & Renshaw LLC ("Rodman"), with \$10.7 million in damages for New York tort claims. The arbitral award was subsequently affirmed by the New York state courts and augmented with interest. After filing for Chapter 7 bankruptcy, Rodman's estate assigned the judgment against Murray to Rodman's law firm, Wilk Auslander, as part of a settlement of outstanding fees.

Murray, who was unemployed and had no income, had not made any payments towards his debt. His sole asset was a residential cooperative apartment in Manhattan, the corresponding shares of which he held with his wife in a tenancy by the entirety. Wilk Auslander secured a lien on the shares, and as part of an effort to collect on its judgment, later filed an involuntary bankruptcy petition against Murray. Wilk Auslander's purpose in filing the petition was to take advantage of bankruptcy remedies that would allow it to force a sale of the apartment—notwithstanding Murray's wife's interest, which would be recognized after the sale—rather than state law remedies that would permit it to execute on Murray's interest only. Murray moved to dismiss the petition.

In January 2016, the bankruptcy court dismissed the case for cause under Bankruptcy Code section 707(a) after concluding that the petition was simply a judgment enforcement tactic for a two-party dispute. The bankruptcy court also held that there were adequate remedies under state law for enforcing the judgment and that continuing the case would not serve any bankruptcy purposes such as ensuring equal distribution among creditors or otherwise protecting assets from depletion.

Wilk Auslander appealed to the district court, arguing that the bankruptcy court erred in dismissing its petition for cause because the petition met the statutory requirements of Bankruptcy Code section 303, was not found to have been filed in bad faith, and would provide Wilk Auslander with relief not available outside of bankruptcy. The district court affirmed, agreeing with the bankruptcy court that New York law provided a sufficient means for Wilk Auslander to enforce its judgment and Wilk Auslander's inability to execute on Murray's wife's interest under that law did not justify a need for relief in bankruptcy court.

On appeal in the Second Circuit, the Court began its analysis by addressing the requirements of Bankruptcy Code section 707(a), noting that the Bankruptcy Code does not define “cause” for dismissal, and such dismissals are to be instead guided by equitable considerations and the sound discretion of the bankruptcy court. Cause is a fact-specific inquiry as to which a variety of factors may be relevant, including the purpose for which the petition was filed and whether state proceedings adequately protect the parties’ interests. Wilk Auslander argued that the bankruptcy court abused its discretion by dismissing its petition under Bankruptcy Code section 707(a) absent a finding of bad faith because Wilk Auslander’s interests as a creditor would be prejudiced if it were denied access to the remedies available in bankruptcy court.

The Second Circuit concluded that New York remedies were sufficient in this case because they did not substantially prejudice Wilk Auslander’s interests, they better advanced the interests of the debtor, the bankruptcy court, and the public, and no other factors provided a basis for disturbing the bankruptcy court’s discretionary ruling that cause existed to dismiss the petition. The Second Circuit also held that a court need not find that a petition was filed in bad faith in order to dismiss it for cause, particularly where misuse of the bankruptcy process is only one of a number of factors supporting the dismissal. Here, the bankruptcy court noted that Wilk Auslander’s petition was part of a long-running, two-party dispute, there were no other creditors to protect, and the involuntary bankruptcy filing had been brought solely as a judgment enforcement device for which adequate remedies existed in state law. The bankruptcy court also noted that Murray did not want or need a discharge and no other goals of bankruptcy, such as *pari passu* distribution among competing creditors, would be served by continuing the petition.

The Second Circuit then addressed Wilk Auslander’s assertion that its interests were prejudiced by the dismissal because New York’s judgment enforcement remedies for property owned in a tenancy by the entirety are not adequate when compared to remedies available under the Bankruptcy Code. The Second Circuit noted that, as a judgment creditor, Wilk Auslander had the right under New York law to execute on Murray’s shares in his apartment and to cause those shares to be sold in a judgment execution sale. However, neither Wilk Auslander nor any third-party purchaser of those shares would have the right to execute on Murray’s wife’s interest in the apartment, to force a partition or sale of the apartment, or to inhabit the apartment. Furthermore, because Murray’s wife maintained her right of survivorship in the apartment, she would own the apartment free and clear of any third party’s interest if Murray predeceased her. Because of these complications, most courts conclude that a debtor’s interest in a tenancy by the entirety is essentially the debtor’s own survivorship right, which could be as low as 5% of the total value of the property, especially when factoring in the non-debtor spouse’s age, gender, and other actuarial data.

Unlike New York law, the Bankruptcy Code permits the sale of both the debtor’s interest and the interest of any spouse or other co-owner in the property, including in a tenancy by the entirety. However, pursuant to Bankruptcy Code section 363(h), such sale is permitted only if: (1) partition in kind is impracticable; (2) sale of the estate’s undivided interest would realize significantly less for the estate than sale of such property free and clear of the interests of co-owners; and (3) the benefit to the estate of a sale of the property free and clear of other interests outweighs the detriment, if any, to such co-owners.

Accordingly, the Second Circuit reasoned that if this case were allowed to proceed in bankruptcy court, it was by no means certain that Wilk Auslander would be authorized to sell the apartment for at least two reasons: (1) the detriment to Murray's wife might be deemed to outweigh the value to the estate; and (2) it was unclear that any sale under section 363 of the Bankruptcy Code would value Murray's interest any higher than would a sale under New York law. The Second Circuit therefore held that Wilk Auslander had not shown that its interests would be substantially prejudiced if it were denied access to bankruptcy remedies. The Court further noted that Wilk Auslander's preference for bankruptcy remedies to solve a two-party dispute cannot outweigh the lack of any other bankruptcy-related purpose. Finally, the Second Circuit held that Wilk Auslander's argument regarding the importance of maximizing the value of a bankruptcy estate was not persuasive because this proposed estate should not have been in bankruptcy court to begin with. Thus, the Second Circuit concluded that Wilk Auslander had not shown that it would be substantially prejudiced if it had to resort to New York remedies.

Finally, the Second Circuit addressed the requirement of Bankruptcy Code section 707(a) to balance the competing interests at stake in determining whether there is cause to dismiss. The Second Circuit agreed with the bankruptcy court that the interests of the debtor and of the bankruptcy system as a whole would be advanced by dismissal of Wilk Auslander's petition. Specifically, the Court held that the bankruptcy court appropriately recognized the interest of the bankruptcy system, and thus the public interest, in preventing parties from exploiting the bankruptcy system for non-bankruptcy-related reasons, especially when adequate remedies exist in state courts.

Accordingly, the Second Circuit affirmed the judgment of the district court in all respects.

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Fifth Circuit

***Saenz v. Gomez*, 899 F.3d 384 (5th Cir. 2018)**

This appeal involved a dispute between Appellants Humberto Saenz and Estrella Ventures, LLC (collectively, "Saenz") and Appellees Jose Maria Gomez and JMG Ventures, LLC (collectively, "Gomez") regarding the Gomez's purchase of a pizza franchise from Saenz. To finance the purchase, Gomez applied for a loan that required certain documentation from Saenz, including a profit and loss income statement. The documentation Saenz provided was of questionable accuracy. Additionally, Saenz hid the fact of the sale to Gomez from his franchisor, in violation of the franchise agreement. After these and other discrepancies came to light, Gomez sued Saenz for, *inter alia*, fraud and misrepresentation seeking losses arising from his purchase of the franchise. When Saenz filed for bankruptcy, the case was removed to bankruptcy court, and

Gomez filed an adversary proceeding seeking an exception to discharge under 11 U.S.C. § 523. Following a bench trial, the bankruptcy court found for Gomez on the issues of misrepresentation, fraud, and discharge. After a limited remand to address jurisdictional issues, the district court affirmed.

Before reaching the substantive issues, the Fifth Circuit first confirmed—on the facts presented—that the bankruptcy court had jurisdiction to issue its final judgment. Specifically, the Court found all parties impliedly consented to jurisdiction because they (1) submitted pre-trial statements in which they did not raise any jurisdictional issues; (2) were represented by experienced bankruptcy counsel; (3) voluntarily participated in the proceedings, including by filing Rule 12(b)(6) motions; and (4) did not express any limitations on their consent throughout trial. In light of this consent, the Court expressly did not address *Stern v. Marshall* implications or consider a “new rule” concerning a bankruptcy court’s authority to issue a final judgment that liquidates a state law claim excepted from discharge.

Turning to the substantive issues, the Court first rejected Gomez’s argument that the evidence was insufficient to establish fraud under Texas law. In short, the Court deferred to the bankruptcy court’s determination of witness credibility, which was buttressed by the documentary evidence, to find the evidence on the issues of reliance and material representation sufficient.

Second, the Court held the requirements of § 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”, were satisfied. Specifically, the court found the same evidence supporting the bankruptcy court’s finding of common law fraud likewise supported a finding of dischargeability.

***Porter Dev. Partners, L.L.C. v. Cage,*
734 F. App’x 309 (5th Cir. 2018)**

Appellants Wayne English and James Colling each invested \$100,000 into the debtor, Wallace Bajjali Investment Fund II, L.P. (“Fund II”). After Fund II declared bankruptcy, one asset of its estate was the settlement of litigation claims Fund II had against another third-party debtor entity, Kaleta Capital Management (“Kaleta”).

The Kaleta receiver filed a motion to approve a final distribution plan in that entity’s bankruptcy, which would pay more than \$124 million to the Fund II estate, which the Kaleta court granted. Two months later, Appellants tardily objected to the motion, arguing Fund II was not entitled to the settlement and they should receive the funds directly. The Kaleta court overruled their objection as untimely, and the settlement was distributed to Fund II. Appellants then moved the Fund II bankruptcy court to disperse the funds to them, arguing the estate had no claim on the proceeds and, thus, the distribution to Fund II was invalid. The Fund II court found Appellants’ arguments barred by *res judicata*. The district court affirmed, holding Appellants had no standing to recover directly from Kaleta because they had not invested directly in that entity.

The Fifth Circuit affirmed, summarily rejecting all of Appellants' arguments, because they "failed to offer any valid legal reason for why Fund II's bankruptcy estate should distribute the funds to them." In short, Appellants' claims of entitlement had "no foundation" in either the bankruptcy code or case law. And, because they never directly invested in a Kaleta entity, they had no legal claim to the funds.

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In re Kayla Glenn,
No. 17-60533, 900 F.3d 187 (5th Cir. August 13, 2018)

On appeal was whether, under 11 U.S.C. § 506(a), delivery and setup costs of a Chapter 13 debtor's mobile home should be included in the valuation of the mobile home for the purpose of determining the amount of the secured claim held by the secured lender on the mobile home.

Debtor Kayla Glenn purchased a used mobile home for the "base price" of \$29,910. The base price included the cost of delivering, blocking, leveling, and anchoring the mobile home as required by Mississippi law. Debtor's purchase of the mobile home was financed by 21st Mortgage Corporation ("21st Mortgage"), and 21st Mortgage retained a purchase-money security interest in the mobile home.

Debtor filed for bankruptcy under Chapter 13. Debtor's plan provided that Debtor would retain the mobile home and pay 21st Mortgage the secured value, plus 5% interest over the life of the plan. 21st Mortgage objected to confirmation of Debtor's plan because it disputed Debtor's valuation of her mobile home. Specifically, 21st Mortgage alleged that the cost of necessary delivery and setup services for the mobile home should be included in the valuation for the purposes of determining the amount of the secured value of the mobile home.

The bankruptcy court determined that including delivery and setup costs in the valuation of a mobile home that has already been delivered set up would be inconsistent with both the plain language of § 506(a)(1) and the Supreme Court's decision in *Assoc. Commercial Corp. v. Rash*, 520 U.S. 953, 117 S. Ct. 1879, 138 L.Ed.2d 148 (1997)¹. The district court affirmed the bankruptcy

¹ The Supreme Court in *Rash* held that determination of secured status under § 506(a)(2) "requires a replacement-value standard when a debtor exercises the 'cram down' option provided by § 1325(a)(5)(B) of the Code and thus 'seeks to retain and use the creditor's collateral in a Chapter 13 plan.'" *In re Kayla Glenn*, No. 17-60533, 2018 WL

court's decision. 21st Mortgage filed an appeal with the Fifth Circuit Court of Appeals.

The Fifth Circuit considered valuation of the mobile home “§ 506(a)(2)’s specific replacement-value standard and in light of the property’s ‘proposed disposition or use’” under § 506(a)(1). The Fifth Circuit affirmed the district court and concluded that delivery and set up costs for a mobile home must be excluded from the mobile home valuation under § 506(a).

***In re Pioneer Health Serv., Inc.,*
No. 17-60824, 2018 WL 3747537(5th Cir. Aug. 7, 2018)**

In this matter, the Fifth Circuit examined whether a non-debtor, who was a party to a contract with debtor, pleaded sufficient factual information to allow the court to infer that the non-debtor party was entitled to an administrative expense claim under 11 U.S.C. §§ 365(d)(5), 503(b)(1), and/or 503(b)(8).

The debtor, Pioneer Health Services, Inc. (“Debtor”), owned a number of healthcare facilities throughout the southeastern United States. Pre-petition, Debtor entered into several contracts with McKesson Technologies, Inc. (“McKesson”) to purchase a “limited, nonexclusive, nontransferable, non-sublicensable, perpetual license” that would allow it to use an information system for billing, scheduling, and record retention and organization (the “Paragon System”).

To fund its purchase of the Paragon System from McKesson, Debtor entered into three contracts with Med One Capital Funding, LLC (“Med One”). Two of Debtor’s contracts with Med One were labeled “CONDITIONAL SALES AGREEMENT” (“Conditional Sales Agreements”). The two Conditional Sales Agreements characterized the Paragon System as “equipment,” and provided that the sale of the Paragon System from McKesson to Debtor was “non-cancelable” and “may not be terminated for any reason.” The same two contracts also provided that Debtor’s completion of installment payments would cause title to the “equipment” to transfer to Debtor. Until installment payments were complete, however, Med One “[retained] title to the equipment for legal and security purposes.” The third contract, which written as a letter, stated Debtor “acknowledges that it has entered into a financing agreement” with Med One. Med One later assigned the agreements to Republic Bank, who was the predecessor-in-interest to Appellant Guaranty Bank.

In the bankruptcy case, the court granted McKesson’s motion to compel Pioneer Health to pay administrative expenses for technology services. Subsequently, Med One and First Guaranty filed a motion to compel, which argued that payments under the three contracts were “actual, necessary costs of preserving the estate” and “actual, necessary costs and expenses of preserving or transferring patient records during the closing a [sic] health care business.” In addition, Med

One and First Guaranty argued that the three contracts were unexpired leases under § 365(d)(5). The bankruptcy court denied the motion, holding that the relevant agreements were not “true leases.” Med One and First Guaranty filed a motion for reconsideration, which the bankruptcy court denied. The district court summarily confirmed. First Guaranty appealed the district court’s judgment.

First, The Fifth Circuit reviewed First Guaranty’s argument that it was entitled to payment under § 365(d)(2) for “obligations of the debtor . . . first arising from or after 60 days of the order for relief in a case under chapter 11 of this title under an expired lease of personal property . . . until such lease is assumed or rejected.” The Fifth Circuit looked to state law to determine whether the contracts between Debtor and Med One, which were assigned to Republic Bank and eventually to predecessor-in-interest Guaranty Bank, were, in fact, leases². Applying Utah law, which has adopted the Uniform Commercial Code, the Fifth Circuit examined the form of the Conditional Sales Agreements and determined that they were security interests, not leases. Therefore, First Guaranty had failed to provide facts supporting its ability to receive payment as a lessor under § 365(d)(5).

The Fifth Circuit next determined whether First Guaranty was entitled to receipt of payments in the Conditional Sales Agreements under § 503(b)(1)(A) as an “actual, necessary cost and expense of preserving the estate.” Because the costs and expenses related to the Conditional Sales Agreement did not arise post-petition and through a transaction with the debtor-in-possession, the Fifth Circuit found that § 503(b)(1)(A) did not apply³.

Finally, the Fifth Circuit considered whether Debtor would be required to make payments to First Guaranty on the Conditional Sales Agreements on the grounds that payment would constitute “the actual, necessary costs and expenses of closing a health care business incurred by a trustee or by a Federal agency . . . or a department or agency of a State or political subdivision thereof” under § 503(b)(8). First Guaranty did not advance any facts indicating that Pioneer Health or any of its facilities were closing or preparing to close. Instead, First Guaranty suggested that it might be entitled to payment under section 503(b)(8) *if* Pioneer Health were to close a facility. The Fifth Circuit found mere speculation of Pioneer Health’s facilities closing to be insufficient to state a claim to payment under § 503(b)(8).

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² Contract issues in bankruptcy proceedings are determined by state law. *See United Airlines, Inc. v. HSBC Bank USA, N.A.*, 416 F.3d 609, 615 (7th Cir. 2005); *cf. Valley Educ. Found., Inc. v. Eldercare Props. Ltd. (In re Eldercare Props. Ltd.)*, 568 F.3d 506, 515 (5th Cir. 2009). In the present case, there was a choice of law issue regarding whether Utah law or Mississippi law applied. The bankruptcy court assumed without deciding that Utah law applied. On appeal, Pioneer Health stated that “Mississippi’s and Utah’s version of the UCC are almost identical.” As such, for the purposes of examining the legal issues, the Fifth Circuit also assumed without deciding that Utah law applied.

³ Here, the Fifth Circuit interpreted § 503(b)(1)(A) to impose a temporal limitation in that administrative expenses arising under that section of the United States Bankruptcy Code must occur post-petition.

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Ninth Circuit

***Hunsaker v. United States (In re Hunsaker)* 2018 WL 4122882, —F.3d— (9th Cir. 2018)**

In *Hunsaker*, the Ninth Circuit reversed the district court and held that under §106, Congress waived sovereign immunity for emotional distress damages awarded under §362(k).

After being notified of debtors' chapter 13 filing, the IRS continued to demand payment and threaten enforcement including a levy on Social Security benefits. Debtors responded by filing an adversary proceeding seeking damages for willful violation of the automatic stay. The government conceded the IRS's conduct violated the stay but asserted sovereign immunity. The bankruptcy court denied the sovereign immunity claim and awarded debtors \$4,000 damages based solely on emotional distress. The district court reversed on the basis of sovereign immunity.

The Ninth Circuit reversed and held that because §362(k) is included in the waiver of sovereign immunity under §106(a)(1), the appeal turned on whether the bankruptcy court's award fell within the scope of the waiver under §106(a)(3), which authorizes the court to "issue against a governmental unit an order, process or judgment under such sections...,including an order or judgment awarding a money recovery, but not including an award of punitive damages."

The Circuit disposed of the government's argument—that "money recovery" refers only to claims seeking to restore sums of money to the estate which are unlawfully in the possession of governmental entities—because such a construction would render §106(a)(3)'s exclusion of punitive damages meaningless.

Finally, the Ninth Circuit declined to adopt the First Circuit's temporal approach to §106(a) set forth in *United States v. Rivera Torres*, 433 F.3d 20 (1st Cir. 2005). The Ninth Circuit reasoned that §106(a)(5) does not restrict the waiver to remedies that were available at the time of the 1994 amendment and instead only states that §106(a) does not itself create any new causes of action or substantive claims for relief. Since §362(k) has always permitted recovery of damages for emotional distress, such relief is not created by §106, and not limited by §106(a)(5).

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Tenth Circuit

***William F. Sandavol Irrevocable Trust v. Taylor (In re Taylor),* No. 17-1241, 899 F.3d 1126 (10th Cir. Aug. 14, 2018)**

On direct appeal from the bankruptcy court, the Tenth Circuit held that, when calculating “all other liens on property” that impair exemptions under Section 522(f)(A)(ii) where a debtor is a partial owner of the property, the calculation must correspond to the debtor’s partial (here one-half) interest. The debtor, as trustee of an irrevocable trust, had misappropriated substantial funds and, as a result, had judgments entered against him. The debtor owned a house which he owned 50-50 with his ex-wife. The Tenth Circuit noted a split in the case law on whether the “all other liens on property” language referred to all liens including those that proportionally belong to a non-debtor joint owner, as held by the Tenth Circuit BAP, *Zeigler Eng’g Sales, Inc. v. Cozad (In re Cozad)*, 208 B.R. 495 (BAP 10th Cir. 1997), versus only that value of the liens attributable to the debtor’s 50% interest in the real property. The Tenth Circuit sided with the latter view, espoused by all three circuit courts to have addressed the issue, *Miller v. Sul (In re Miller)*, 299 F.3d 183, 186 (3d Cir. 2002), *Lehman v. VisionSpan, Inc. (In re Lehman)*, 205 F.3d 1255, 1257 (11th Cir. 2000); *Nelson v. Scala*, 192 F.3d 32, 34 (1st Cir. 1999), explaining that, “[i]f we read the term ‘property’ in § 522(f)(A)(ii) to refer to the debtor’s interest, rather than the undivided whole parcel, Congressional intent [to avoid judicial liens to the extent they impair a debtor’s exemption] is effectuated.” Conversely, to adopt the view espoused by the BAP in *Cozad* would be to sanction avoiding liens in excess of the debtor’s (homestead) exemption which would “‘extent the protection Congress sought to provide debtors and distort priorities between creditors.’” (quoting *In re Ware*, 274 B.R. 206, 209 (Bankr. D.S.C. 2001). Further, the Tenth Circuit explained that adopting the approach taken by the Third, Eleventh and First Circuits would be consistent with the Bankruptcy Code as a whole, which refers to “property” as property of the debtor, and “[i]nterpreting § 522(f) to allow avoidance of a lien based on a portion of that lien that ‘realistically should be regarded as someone else’s debt even if the debtor may be liable personally’ creates an unwarranted incongruity.” (quoting *Miller*, 299 F.3d at 186).

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Eleventh Circuit

***In re BFW Liquidation, LLC,* — F.3d —, No. 17-13588, 899 F.3d 1178 (11th Cir. Aug. 14, 2018)**

The trustee over the chapter 11 liquidating estate of a supermarket chain sued ice cream manufacturer Blue Bell to avoid over \$500,000 in payments as preferential transfers. Blue Bell asserted the “new value” defense, but the bankruptcy court—seizing on language from a prior Eleventh Circuit case—determined that the new value must “remain unpaid” as of the petition date to prevail under the “new value” defense of Section 547(c)(4) of the Bankruptcy Code. The Eleventh Circuit Court of Appeals granted a petition for direct appeal to resolve the issue.

The appellate court held that the plain language of Section 547(c)(4) of the Bankruptcy Code does not require that new value “remain unpaid” in order to assert the defense to preference liability. First, the court found that their previous statement in *Charisma Investment Company, N.V. v. Airport Systems, Inc. (In re Jet Florida System, Inc.)*, 841 F.2d 1082 (11th Cir. 1988), in which they recited the “remain unpaid” prong as an element to the new value defense, was non-binding dicta. In analyzing the issue anew, the Eleventh Circuit reasoned that the plain language of the statute contains no “remain unpaid” requirement. Further, the court noted that their holding advanced the policy of encouraging creditors to continue extending credit to financially troubled companies. In general, this case contains an excellent analysis of applying Section 547(c)(4)’s new value defense and marks an important departure from what many considered settled law in the Eleventh Circuit based on the language in *Jet Florida System*. The court reversed the bankruptcy court’s ruling and remanded for a recalculation of Blue Bell’s preference liability.

***Bennet v. Jefferson County, Alabama,* No. 15-11690, 899 F.3d 1240 (11th Cir. Aug. 16, 2018)**

The confirmed plan in the chapter 9 bankruptcy proceeding of Jefferson County, Alabama provided for the issuance of new sewer warrants to retire old warrants at a discount. A key part of this arrangement included mandatory sewer rate increases over a 40-year period post-confirmation. Under the plan, the bankruptcy court retained jurisdiction and authority to, among other things, implement and enforce the approved rate structure and issuance of the new sewer warrants. A group of ratepayers appealed the confirmation order raising a host of constitutional arguments, and the County moved to dismiss the appeal under the equitable mootness doctrine arguing that the transactions (i.e., issuance of new sewer warrants to the market) could not be unwound. The district court denied the County’s motion to dismiss, and the County appealed to the Eleventh Circuit.

After a detailed review of the equitable mootness doctrine, the appellate court found that the equitable mootness doctrine indeed applied and warranted dismissal of the ratepayers' appeal. The court first found no justification for precluding the doctrine from applying to chapter 9 bankruptcy cases. Considering the case at issue, the court noted the ratepayers' failure to seek a stay of the confirmation as a persuasive, but not dispositive, factor that weighed in favor of dismissing the ratepayers' appeal. The Eleventh Circuit further reasoned that the County and other parties had taken significant and largely irreversible steps in reliance on the unstayed confirmation order and confirmed plan. The new warrants' value was inextricably tied to the plan's provisions for bankruptcy court oversight of the sewer rate increases, and the adverse effects to warrant holders from any court-imposed elimination of such provisions supported application of the equitable mootness doctrine to dismiss the ratepayers' appeal. Finally, the court found little merit in the ratepayer's constitutional arguments that the County could not bind itself to the rate increases contained in the plan.

In re Tucker,

No. 17-12020, 2018 WL 3861350 (11th Cir. Aug 14, 2018)

A *pro se* debtor in a chapter 13 bankruptcy case appealed the district court's dismissal of her appeal of bankruptcy court orders granting the mortgage lender post-confirmation relief from the automatic stay. The debtor also had sought sanctions against the mortgage lender for violating the 14-day stay of orders granting stay relief provided in Fed. R. Bankr. P. 4001(a)(1). The district court ultimately dismissed her appeal as moot because the underlying chapter 13 bankruptcy case had been dismissed.

The Eleventh Circuit affirmed the dismissal of the debtor's appeal, finding that the appeal of the order granting stay relief was rendered moot by the dismissal of her chapter 13 case. Although the debtor also argued the bankruptcy court erred by failing to order sanctions for violation of the 14-day stay, the Eleventh Circuit held that the debtor had not properly preserved the issue for appeal and had abandoned her sanctions claim by failing to argue the legal issues before the bankruptcy court.

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