Bankruptcy Circuit Update
Featuring cases from December 2018

We will be convening our next section-wide conference call on **Friday, January 25th, at 3:30 E.S.T./12:30 P.S.T.** to present and discuss notable cases from the past few months of the summaries. We are seeking volunteers to summarize significant or interesting cases. Please send an email to csullivan@diamondmccarthy.com if you are interested in presenting. The call-in information is: **dial in 866-690-2070 – code 787-594-2077**.
We hope you will join us for this call.

Fifth Circuit

***U.S. ex rel Bias v. Tangipahoa Parish Sch. Board*, ____ Fed. Appx. ____, No. 17-30982, 2018 WL 6431033 (5th Cir. Dec. 5, 2018).**

Four years after appellant Ronald Bias's chapter 13 bankruptcy plan was confirmed, but before he received a discharge, Bias initiated suit against the Tangipahoa Parish School Board, asserting, inter alia, a violation of the False Claims Act (FCA) based on an employment dispute. The district court held Bias's suit was barred by judicial estoppel, and Bias appealed.

The Fifth Circuit affirmed, holding the three elements of judicial estoppel were satisfied. First, the Court held Bias had asserted a legal position that was plainly inconsistent with a prior position because, by failing to disclose his FCA claim to the bankruptcy court, he had impliedly represented he had no such claim. The Court found Bias's argument that disclosure was not warranted because post-petition causes of action belong to the debtor, not the estate, irrelevant because chapter 13 debtors have a duty to disclose post-confirmation assets in all events. Second, the Fifth Circuit found the bankruptcy court had accepted Bias's prior position by granting him a discharge. Third, the Court found Bias acted intentionally and with a financial motive because he knew of the facts underlying his FCA claim during his bankruptcy and admitted that his plan required any judgment or settlement of the FCA action in his favor to be disclosed. Thus, the Court found Bias had a motive to conceal his claim and prolong the litigation to avoid having the claim included in his bankruptcy estate.

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Havens v. Maritime Commc'ns/Land Mobile L.L.C.
***(In re Maritime Commc'ns/Land Mobile L.L.C.)*,**
____ Fed. Appx. ____, No. 17-60742, 2018 WL 6720703 (5th Cir. Dec. 20, 2018).

Warren Havens ("Havens") filed suit against debtor Maritime Communications/Land Mobile L.L.C. ("Maritime") in the United States District Court for the District of New Jersey (the "New Jersey Case") regarding certain executory contracts and licenses. In addition, Havens participated in proceedings before the Federal Communications Commission ("FCC Proceedings") related to licenses at issue in Maritime's bankruptcy case. The district court dismissed Havens' claims in the New Jersey Case. Havens was also denied relief in the FCC Proceedings.

Havens filed a proof of claim in Maritime's bankruptcy case based on his claims in the New Jersey Case, along with his interest in "any legal and/or administrative proceedings." When the bankruptcy court confirmed Maritime's plan of reorganization, Havens appealed several bankruptcy orders to the district court. The district court dismissed Havens' appeals because he lacked standing. The district court also entered an order denying Havens' request for rehearing. Havens appealed the district court's orders to the Fifth Circuit.

To have standing to appeal an order of the bankruptcy court, the appellant must show, pursuant to the "person aggrieved test," that he was "directly and adversely affected pecuniarily by the order of the bankruptcy court." After Havens was denied relief for his claims in the New Jersey Case and in the FCC Proceedings, he had no remaining claims against Maritime. As such, the Fifth Circuit affirmed the district court's finding that Havens failed to allege facts sufficient to demonstrate standing. The Fifth Circuit also affirmed the district court's finding that Havens failed to identify "mistaken use of facts or law" in the prior decision that would support the necessity of a rehearing under Federal Rule of Bankruptcy Procedure 8022.

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Eighth Circuit

***Frakes v. Arch Coal, Inc.*, (*In re Arch Coal, Inc*)**
No. 18-6020, 592 B.R. 853 (B.A.P. 8th Cir. 2018)

Appellant creditors ("Appellants") appeal an order of the bankruptcy court denying their motion seeking determination that a Chapter 11 confirmation order did not bar them from filing and prosecuting a proposed state court complaint. The Appellants argued that the debt was of the

kind described in § 1141(d)(6), a self-effectuating exception to discharge. The bankruptcy court held that "an action for a declaratory judgment on the issue of dischargeability of a debt also must be timely brought in an adversary proceeding, pursuant to Rule 7001(9)" and therefore denied the motion without prejudice as to the filing of the adversary proceeding.

Because the bankruptcy court did not reach the merits of the request for declaratory judgment on the discharge issue under 1141(d)(6) and determined that an adversary proceeding was necessary, the procedural ruling was not a final order. The BAP explained that the bankruptcy court did not direct entry of a final judgment or expressly determine there was no just reason for delay in entering a final judgment, and therefore the BAP explained it did not have jurisdiction to review it. Additionally, the parties did not seek leave to appeal pursuant to Fed.R.Bankr.P. 8001(b). The BAP dismissed the appeal as premature.

Finally, the BAP explained that the declaratory relief which was sought can properly be addressed if and when the plaintiffs file an adversary proceeding as was suggested by the bankruptcy court.

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Ninth Circuit

Easley v. Collection Serv. of Nevada,
910 F.3d 1286 (9th Cir. 2018)

In *Easley v. Collection Serv. of Nevada*, the 9th Circuit reversed the district court's order denying Debtors' motion for attorneys' fees incurred on appeal in successfully challenging the bankruptcy court's award of fees for a willful violation of the stay pursuant to §362(k).

The bankruptcy court initially awarded Debtors $1,295 in damages and $1,277 for attorneys' fees after determining that creditor CSN willfully violated the stay. Debtors appealed the award to the district court. While the appeal was pending, the Ninth Circuit decided *In re Schwartz-Tallard*, 803 F.3d 1095 (9th Cir. 2015). The district court remanded to the bankruptcy court for a new calculation of attorneys' fees.

However, the district court denied Debtors' motion for attorneys' fees and costs incurred in the appeal on the basis that *Schwartz-Tallard* only allowed for recovery of attorneys' fees incurred in *defending* an appeal and not where the Debtors appealed the bankruptcy court's award.

The district court also denied fees because it could not determine which fees were incurred in the appeal.

The Ninth Circuit reversed and held that Debtors' motion clearly sought only fees and costs for appellate work. The Circuit clarified that in addition to authorizing fees for defending an appeal of attorneys' fees, §362(k) also authorizes attorneys' fees and costs to the Debtor incurred on appeal in successfully challenging an initial award made pursuant to §362(k).

The Ninth Circuit reasoned that §362(k) operates like many fee-shifting statutes which generally include appellate attorneys' fees both when a party successfully challenges a district court's award and when it successfully defends a favorable judgment. The Panel stated that it was unaware of any authority suggesting that fees could be awarded under a fee-shifting statute for defending an award on appeal but not for successfully challenging an award as inadequate. The Circuit reasoned that §362(k) "seeks to make debtors whole, as if the violation never happened, to the degree possible" and this includes fees incurred in successfully appealing an inadequate award.

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Tenth Circuit

In Technology, Inc. v. Five Point Ventures, LLC (In re Social Networking Tech., Inc.),
Adv. Pro. No. 18-5091, 2018 WL 6492694 (D. Kan. Dec. 6, 2018)

The bankruptcy court denied motions to dismiss the trustee's complaint seeking to avoid liens because, notwithstanding that the defendant-lenders did not have any loan documents signed by the debtor, they filed secured proofs of claim asserting to be secured in all of the debtor's assets and the debtor filed UCC-1 financing statements describing its assets so there was a plausible basis for the complaint seeking to avoid liens. Specifically, each defendant signed a non-binding term sheet memorializing its intention to lend the debtor monies in return for convertible promissory notes (convertible to common stock in the debtor), secured by a lien on the debtor's assets. The debtor filed UCC-1 financing statements describing those assets. The defendants, in the aggregate, loaned the debtor $500,000. Despite advancing these funds, no promissory notes or any other loan documentation (i.e., a security agreement) was ever signed, which meant that the liens possessed by the defendants were not security interests under the Bankruptcy Code. However, the UCC-1 financing statements filed by the debtor might provide the basis for a "charge against or interest in property to secure payment," the definition of a "lien" in section 101(37) of the Bankruptcy Code. Each defendant filed a secured proof of claim as against "all assets of the debtor," which prompted the debtor to file the action to avoid the defendant's asserted liens. The court acknowledged the correctness of the defendants' position that the absence of a security agreement meant no "security

interest" attached to the debtor's assets, "[b]ut the defendants may be taken to assert some sort of interest based on their financing statements and, in the proofs of claim they signed and filed…, they claim liens in all the debtor's assets." Continuing, the court explained that defendants "cannot hide from the trustee's avoiding powers in the holes they left in their own transactional documents. However imperfect or unperfected their 'liens' may be, those remain fair game for the trustee to avoid and preserve under Chapter 5 of the Code."

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Eleventh Circuit

***In re Walter Energy, Inc.*, No. 16-13483,**
— F.3d —, 2018 WL 6803736 (11th Cir. Dec. 27, 2018)

Walter Energy, a large coal mining company located in Alabama, filed chapter a 11 bankruptcy petition in 2015. In the chapter 11 case, Walter Energy sold its assets under § 363 of the Bankruptcy Code to an entity owned by its first lien creditor, Warrior Met. A key condition of the sale was that the purchaser would not be bound by Walter Energy's collective bargaining agreements, not be required to provide retiree health care benefits, and would be released from any obligations to pay Coal Act premiums to the multiemployer plans created by the Coal Act to provide retirees with health care benefits for life (the "Funds"). After unsuccessfully negotiating with the union and a retiree committee, Walter Energy also asked the bankruptcy court to enter an order terminating its collective bargaining agreements and its obligations to provide retiree health care benefits through its individual employer plan or pay Coal Act premiums to the Funds. The Court approved the sale free and clear of the collective bargaining agreements and any obligations to pay retiree health care benefits or pay premiums to the Funds. The bankruptcy court also entered an order terminating Walter Energy's collective bargaining agreement under § 1114 of the Bankruptcy Code, which terminated its obligations to provide retirees insurance through an individual employer plan as well as to pay premiums to the Funds. Additionally, the bankruptcy court ordered that Walter Energy was not obligated to pay premiums for retiree health care benefits to the Funds while it wound up its affairs.

The present appeal concerned the "1113/1114 order", which terminated Walter Energy's collective bargaining agreements and Coal Act premium obligations to the Funds. The district court affirmed the 1113/1114 order and the sale order, but the appellants had already voluntarily dismissed their appeal of the sale order following consummation of the sale.

The court first examined whether it had jurisdiction over the appeal in light of the Anti-

Injunction Act, which generally prohibits suits challenging the assessment or collection of a tax before the tax is collected. The appellants argued that Coal Act premiums are taxes; if correct, the Anti-Injunction Act would dictate that the bankruptcy court lacked jurisdiction to modify the premiums. The Eleventh Circuit engaged in a lengthy analysis of the Anti-Injunction Act, concluding that the bankruptcy court had the power to modify the Coal Act premiums because of an exception to the Anti-Injunction Act applicable when the party has no other alternative remedy to challenge the tax. Because the modification of retiree benefits is only available in a chapter 11 case under § 1114 of the Bankruptcy Code, the debtor had no alternative remedy to challenge the tax other than seeking relief from the bankruptcy court.

The court next considered the primary issue, whether the bankruptcy court had legal authority to terminate the debtor's obligations to pay Coal Act premiums under § 1114 of the Bankruptcy Code. The Funds challenged the bankruptcy court's decision under § 1114 of the Code, arguing that (1) the premiums the debtor paid to the Funds do not qualify as "retiree benefits," and (2) the termination was not necessary to permit the debtor's reorganization because it sought to sell substantially all its assets, not engage in a classic reorganization. The court considered, and rejected, numerous arguments of the Funds interpreting §1114's definition of "retiree benefits" based on several canons of statutory interpretation and congressional intent arguments. The Eleventh Circuit ultimately determined that Coal Act premiums qualify as "retiree benefits" under § 1114 of the Bankruptcy Code. The appellate court next turned to the Funds' last argument, that the debtor's chapter 11 liquidation pursuant to a § 363 sale did not qualify as a "reorganization" required by § 1114. The court engaged in a detailed analysis of the term "reorganization" compared to "liquidation," concluding that a liquidating chapter 11 case can qualify as a "reorganization" under the Bankruptcy Code, at least where the business is sold as a going concern. Thus, the term "reorganization" in § 1114's requirement (that termination of benefits be necessary to the debtor's reorganization) did not bar the bankruptcy court's termination of the debtor's obligation to pay Coal Act premiums. Affirmed.

***In re Dukes*,**
909 F.3d 1306 (11th Cir. 2018)

Chapter 13 debtor filed a plan that did not provide treatment for the bank's mortgages on her homestead, aside from stating that the debtor would pay the mortgage payments directly outside of the plan. A few years after confirmation of the chapter 13 plan, the debtor fell behind on the mortgage payments and, in 2013, the bank foreclosed on the home. Following foreclosure, the bank moved to reopen the bankruptcy case and filed an adversary proceeding to determine that the debtor's personal liability on the note had not been discharged. The bankruptcy court and the district court concluded that the debtor's personal liability was not discharged because the plan did not "provide for" the mortgage loan, and if it did, it would have violated the anti-modification clause in § 1322(b)(2) of the Bankruptcy Code.

The Eleventh Circuit affirmed the bankruptcy court's ruling on two alternative bases. First, the appellate court interpreted the term "provided for" in §1328(a), which states that a discharge covers "all debts provided for by the plan." The court reasoned that to "provide for" a debt, the plan must "make provision for" or "stipulate to" something with respect to the debt, which typically would mean a loan modification or stipulation of terms. The debtor's mere mention of the bank's mortgage did not "provide for" the debt. The court also held that the anti-modification provision in § 1322(b)(2) applicable to mortgages on a debtor's primary residence prevented the debt from being discharged. Affirmed.

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