Bankruptcy Circuit Update

Featuring cases from December 2016

Special Announcement
Group Section Conference Call to Discuss Significant Cases

This month our writers Circuit Writers and Section Leaders will be convening our next section-wide conference call on **Friday, March 31, 2017, 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. Volunteers will be summarizing significant or interesting cases. The presenters will be open for questions and lead discussion of key points. We hope you will join us for this call. The call-in information is: **dial in 866-690-2070 – code 787-594-2077**. If any section–members, whether or not you are a Circuit Writer, would like to volunteer to discuss a significant case or recent bankruptcy development, please e-mail us at csullivan@diamondmccarthy.com.

First Circuit

***In re Fraher (Above-All Transportation, Inc. v. Fraher),* Case No. 14-14241-FJB, BAP No. MB 16-026, 2017 WL 715059 (1st Cir. B.A.P. February 21, 2017)**

The First Circuit Bankruptcy Appellate Panel followed the bedrock principle that absent "extraordinary circumstances, it is apodictic that legal theories not squarely addressed and litigated below cannot be raised for the first time on appeal." In the case of *Fraher*, the plaintiff in its statement of issues on appeal stated that the bankruptcy court had erred in failing to conclude that one of the defendant's debts were non-dischargeable under 11 USC section 523(a)(2)(A) (debts arising from false representations). In its opening brief, for the first time, the plaintiff raised issues of imputed fraud, although not developing the argument fully. The Bankruptcy Appellate Panel ("BAP") held that because the plaintiff never raised the issue of imputed fraud in its complaint, in a joint pre-trial statement, and at trial, and barely in its appellate briefs, plaintiff waived the theory of imputed fraud. Moreover, because the appeal did not present issues of constitutional magnitude or matters of great public moment, the BAP would not grant relief from waiver.

***In re Zatrau (Zutrau v. Zutrau),* Case No. 11-11815-FJB, BAP No. MB 16-029, 563 B.R. 431 (1st Cir. B.A.P. February 16, 2017)**

In *Zatrau*, the Bankruptcy Appellate Panel ("BAP") affirmed the bankruptcy court's judgment, finding in favor of the plaintiff and determining that certain debts owed by the debtor to his sister were non-dischargeable under 11 USC section 523(a)(2)(A) (debts arising from false representations) and 523(a)(6)(debts arising from willful and malicious injury). In *Zatrau*, the debtor's sister loaned the debtor a considerable amount of money as evidenced by five promissory notes, all of which remained unpaid except for one. Despite the debtor's statements that he intended to repay the debt from the sale of a particular property after he repaid his bank loans, the the BAP held that the totality of circumstances evidenced that the debtor did not intend to honor his representations, and he intended to deceive his sister in order to induce her to make more

loans. Although the debtor's breach of promise, by itself, was insufficient to infer fraudulent intent, his breach combined with actions including incurring additional debt and granting mortgages on the subject property without his sister's knowledge, and making no attempt to execute and record mortgages for his sister on the property as promised, demonstrated a pattern of deception.

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Second Circuit

In re Ampal-American Israel Corp. **(Merhav Ampal Grp., Ltd. v. Merhav Ltd.), No.16-979-bk, 2017 WL 549020 (2d Cir., February 9, 2017)**

The Second Circuit affirmed the district court's judgment affirming the bankruptcy court's grant of summary judgment in an adversary proceeding in favor of plaintiff Merhav Ampal Group, Ltd., ("MAG"). Defendants Merhav (M.N.F.) Limited and Yosef Maiman (collectively "Merhav") appealed from the judgment, arguing that there was no basis for the bankruptcy court's "related to" subject matter jurisdiction over the adversary proceeding because there was no preponderance showing that a recovery by MAG, which was in the process of winding up, could conceivably affect the debtor's estate in the purportedly related Chapter 7 proceeding of MAG's parent, Ampal-American Israel Corporation ("Ampal").

The Second Circuit began its analysis by setting forth the standard for "related to" jurisdiction under 28 U.S.C. § 1334(b), which confers jurisdiction upon bankruptcy courts over "civil proceedings . . . related to cases under title 11," pursuant to 28 U.S.C. § 157(c). The Second Circuit has held that litigation falls within a bankruptcy court's "related to" jurisdiction if it has a significant connection with a pending bankruptcy proceeding such that its outcome might have any conceivable effect on the bankrupt estate.

Applying this standard to the facts in this case, the Second Circuit held that the bankruptcy court possessed "related to" jurisdiction over the adversary proceeding because there was a "conceivable possibility" that the bankruptcy trustee would pay some or all of the net proceeds of any recovery to Ampal in partial satisfaction of its $62 million claim against MAG, which would directly affect the distributions in the bankruptcy case. In support of this holding, the Second Circuit highlighted the unrebutted sworn declaration of MAG's Managing Director, who averred that if MAG prevailed in the adversary proceeding, approximately $10 million would remain to make a payment on the capital notes to Ampal and the other subsidiaries after MAG satisfied its tax and third-party liabilities. Furthermore, the Second Circuit noted that even if the remainder of the proceeds were distributed pari passu among MAG's affiliated creditors, Ampal would still stand to receive 16% of the distribution, i.e., $1.6 million. The Second Circuit was not persuaded by any of the cases finding no "related to" jurisdiction that were cited to by the defendants, as no such

cases involved an unrebutted sworn declaration that at least part of the recovery in the adversary proceeding would be administered as part of a wind-up to benefit the debtor's estate. Accordingly, the Second Circuit held that the possibility for Ampal to receive a distribution of at least $1.6 million constitutes a "conceivable effect" on the debtor's estate supporting "related to" jurisdiction and affirmed the judgment of the district court.

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Third Circuit

In re Money Center of America, Inc., et al. **Case No.: 14-10603 (CSS), Adv. Proc. Case Nos.: 14-50437 (CSS), 16-50410 (CSS), 2017 WL 775780 (3d Cir., February 28, 2017)**

This case arises out of two motions to dismiss preferential actions brought by the Chapter 11 Trustee in the context of two separate, but similar, adversary proceedings. The debtors, Money Centers of America, Inc. ("Money Centers") and its wholly-owned subsidiary, Check Holdings, LLC, ("Check Holdings") engaged in the business of processing cash advance transactions. The movants are two casinos associated with Indian tribes who engaged in business with the debtors and were creditors of the estates— the Quapaw Casino Authority ("QCA"), an alleged governmental subdivision of the Quapaw Tribe of Oklahoma; and Thunderbird Entertainment Center, Inc. ("Thunderbird"), a wholly owned entity of the Absentee Shawnee Tribe of Oklahoma.

QCA filed its adversary action against Check Holdings to recover funds on the basis that such funds were not property of Check Holdings' estate. In response, the Chapter 11 Trustee counterclaimed seeking to recover alleged preferential transfers made to QCA. In regards to Thunderbird, the Chapter 11 Trustee initiated an adversary proceeding to recover alleged preferential transfers. Both QCA and Thunderbird subsequently filed motions to dismiss based on the grounds that the Trustee's claims were barred by sovereign immunity.

The Court ultimately reached the conclusion that the tribes were entitled to sovereign immunity. It and separated its opinion into three parts: (1) whether the casinos had a sufficient relationship with their respective Indian tribes to enjoy sovereign immunity; (2) whether the Bankruptcy Code abrogated sovereign immunity for Indian tribes; and (3) whether QCA waived its sovereign immunity in any way by filing its complaint and proof of claim.

(1) *Whether QCA and Thunderbird Had a Sufficient Relationship with Their Tribes*

First, the Court analyzed whether QCA and Thunderbird were entitled to sovereign immunity. As a preliminary matter, the Court examined whether QCA's and Thunderbird's claims of sovereign immunity should be reviewed as a subject matter jurisdiction challenge or as an affirmative

defense. The Court held that sovereign immunity can be reviewed on either the basis of subject matter jurisdiction or as an affirmative defense. However, because QCA and Thunderbird made facial attacks on subject matter jurisdiction, the Court could review corporate documents attached to the pleadings by QCA and Thunderbird in determining whether the Court has jurisdiction without having to proceed with trial. Based on this documentation, the Court held that QCA and Thunderbird were sufficiently related to their respective tribes to enjoy the tribes' sovereign immunity.

(2) *Whether the Bankruptcy Code Abrogated Sovereign Immunity for Indian Tribes*

Next, the Court examined whether Congress has abrogated tribal sovereign immunity through section 106 of the Bankruptcy Code. The Court recognized that tribes are exempt from suit without Congressional authorization, and that "[a]brogation by Congress of sovereign immunity cannot be implied, but must be 'unequivocally expressed' in 'explicit legislation.'" (citation omitted).

Under section 106(a) of the Bankruptcy Code, sovereign immunity is abrogated to a "governmental unit" as further set forth in that section. Section 101(27) defines "governmental unit." Section 101(27) does not include the term "Indian tribes," but includes the terms "other foreign or domestic government."

The Court noted that there is a split of authority on whether "governmental unit" includes Indian tribes. The Court noted that the Ninth Circuit in *Krystal Energy Co. v. Navajo Nation*, 357 F.3d 1055, 1057-58 (9th Cir. 2004) held that Indian tribes are considered "other foreign or domestic governments" through the following four-step deductive process: (1) the Supreme Court had referred to tribes as "domestic dependent nations"; (2) Congress enacted sections 106 and 101(27) with that reference in mind; (3) Congress abrogated sovereign immunity as to states, foreign states, and other foreign or domestic governments; and therefore (4) Congress must have intended to include Indian tribes as "other foreign or domestic governments."

However, the Either Circuit, in *In re Whitaker*, 474 B.R. 687, 693-95 (B.A.P. 8th Cir. 2012) disagreed with *Krystal Energy*. The court in *Whitaker* held that by enacting section 106 Congress did not unequivocally express its intent to abrogate the sovereign immunity of tribes. Similarly, in *In re Greektown Holdings LLC*, 532 B.R. 680 (E.D. Mich. 2015), the court reasoned that although congress does not need to use "magic words" to state its intent to abrogate, "there is not a single example in which the Supreme Court has found that Congress intended to abrogate a tribe's sovereign immunity without specifically using the words "Indians" or "Indian tribes." *Id.*

Here, the Court sided with *Whitaker* and *Greektown*, and held that Congress "has not unequivocally abrogated the sovereign immunity of Indian tribes under section 106(a) and 101(27) of the Bankruptcy Code. The Court further reasoned that "neither the terms 'Indian' nor 'Indian tribes' were included in the language of section 101(27)[.]" By so doing, the Court rejected the Ninth Circuit's four-step reasoning in *Krystal*. Therefore, the Court concluded that neither sections 106(a) or 101(27) abrogated QCA's and Thunderbird's sovereign immunity

(3) *Whether QCA Waived its Sovereign Immunity in Any Way by Filing its Complaint and Proof of Claim*

Lastly, the Court examined the issue of whether QCA had its waived sovereign immunity regarding the Trustee's Counterclaim by filing its proof of claim or its complaint. The Court, based on examining analogous cases from the Tenth and Third Circuits, held that QCA could only waive its sovereign immunity to the extent that its claims are subject to recoupment arising out of a single integrated transaction or occurrence, an issue on which the Court did not have sufficient information to make a determination. Thus, the court denied the motion to dismiss the QCA counterclaims in order to make a determination whether the claim arose out of a single transaction. However, the Court noted that the Trustee could not avoid an amount in excess of QCA's claims against the debtors.

In addition, the Court rejected the Trustee's argument that QCA waived its sovereign immunity by merely filing a proof of claim, echoing its analysis as to why Indian tribes do not fall under the abrogation set forth in sections 106(b) and 101(27): "the Bankruptcy Code refers to a 'governmental unit' that files a proof of claim, not a 'sovereign.' Thus, again, we must refer back to Section 101(27) which, as held above, does not include Indian tribes in its definition."

Fifth Circuit

***In re Chu,* --- Fed. App'x ---, No. 15-11001, 2017 WL 543227 (5th Cir. Feb. 9, 0217).**

In this matter, the Fifth Circuit affirmed the district court's denial of discharge of a Chapter 7 debtor based on the lower court's conclusion that the debtor "knowingly and fraudulently, in or in connection with the case—made a false oath or account" and "failed to explain satisfactorily . . . any loss of assets" under 11 U.S.C. § 727(a)(4) – (5). Chu was an orthodontist who primarily treated patients qualifying for Medicaid. In 2011, the Texas Health and Human Services Commission notified Chu of a payment hold because he allegedly engaged in Medicaid fraud, and Chu's practice quickly went downhill. In December 2012, Chu filed for Chapter 7 bankruptcy. Around the same time, the State of Texas commenced, a *qui tam* action against Chu; Bankruptcy Rule 2004 investigations followed. Thereafter, the State of Texas filed an adversary proceeding to contest Chu's request for discharge in the bankruptcy court, claiming that Chu had violated 11 U.S.C. § 727(a)(2) – (5).

Following trial, the bankruptcy court found "numerous and significant omissions" in the Schedules Chu had filed in connection with his Chapter 7 petition, including failures to disclose prepetition loans from Chu's brother; over $317,000 in income; a bank's foreclosure on a piece of valuable machinery; that Chu cashed in life insurance policies worth some $190,000; sale of a Cartier watch for $20,000; sale of two vehicles for $46,000 and $17,000; the fact that certain whole life insurance policies had cash values of $51,000 and $62,000; and numerous loans taken out against another life insurance policy totaling more than $90,000. The court also found that Chu had failed to explain a $33,500 discrepancy for "Antiques, Gold & Jewelry" between a 2009 personal financial statement and his Schedule B listing. Concluding that Chu had either acted with "fraudulent intent" or "reckless indifference for the truth," the bankruptcy court globally denied Chu's discharge pursuant to 11 U.S.C. § 727(a)(4) and (5). The district court affirmed.

On appeal to the Fifth Circuit, Chu challenged the State of Texas's standing to seek a global denial of discharge under § 727, arguing that any debt owed to the State fell under the 11 U.S.C. § 523(a)(7) exception, which applies to "fine[s], penalt[ies], or forfeiture[s] payable to and for the benefit of a governmental unit . . . ." Chu argued that because a debt to Texas would be completely non-dischargeable under Section 523(a)(7), the State would have nothing to gain from seeking a global denial of discharge under Section 727, and therefore lacked standing to bring an adversarial proceeding. The Fifth Circuit disagreed. Reasoning that no final determination had been made regarding the nature of Chu's liability to the State or its subsequent dischargeability, the court held that Texas "stood to gain by seeking global denial of discharge by way of adversarial proceeding" and therefore had standing to bring the same.

Finally, the Circuit Court addressed the bankruptcy court's findings that Chu had "knowingly and fraudulently, in or in connection with the case—made a false oath or account" and "failed to explain satisfactorily . . . any loss of assets" under 11 U.S.C. § 727(a)(4) – (5). The Fifth Circuit noted that while courts cannot "simply aggregate a debtor's mistakes to determine fraudulent intent" under Section 727(a)(4), such intent can be established by showing "actual intent of 'reckless indifference to the truth' based on 'the cumulative effects of false statements.'" (Quoting *In re Duncan*, 562 F.3d 688, 695 (5th Fit. 2009); *In re Beaubouef*, 966 G.2d 174, 178 (5th Cir. 1992)). Coupled with trial testimony and evidence from Rule 2004 examinations, Chu's failure to disclose multiple transactions in his Statement of Financial Affairs and Schedules supported the bankruptcy court's findings. Additionally, Chu argued that the State of Texas failed to carry its initial burden under 11 U.S.C. § 757(a)(5) of showing that Chu possessed "substantial, identifiable assets" now "unavailable for distribution to creditors," and thus, that the burden had not shifted for Chu to show a "satisfactory" explanation. However, the Fifth Circuit held that Chu had waived this argument by "implicitly" assuming that the State had met its burden: Chu had argued before the district court that his explanation was satisfactory. Moreover, the Circuit Court agreed that Chu had failed to satisfactorily explain the unavailability of watches, antique jewelry, and gold that he had valued at $34,500 on a September 2009 personal financial statement, but valued at only $1,000 on Schedule B. Finding no reversible error, the Fifth Circuit upheld the bankruptcy court's denial of Chu's discharge based on his violations of 11 U.S.C. § 727(a)(4) and (5).

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***In re Wiggains*, No. 15-11249, 848 F.3d 655 (5th Cir. 2017).**

This appeal stemmed from an adversary proceeding filed by the Chapter 7 Trustee to avoid a purported fraudulent transfer of debtor's interest in his residence held in community property with his wife. Prior to filing, The Wiggainses entered into a partition agreement in order to recharacterize their home as separate property so that one half of the property would belong to

each spouse. After filing for bankruptcy relief, Mr. Wiggains claimed an exemption regarding his singular interest in the home under Texas law, which caps the exemption at $155,675. It is important to note, that Mrs. Wiggains did not join in the bankruptcy, making her a non-filing spouse. After multiple objections regarding the homestead exemption, Mr. Wiggains agreed to limit the exemption to $130,675. The home was later sold by the Chapter 7 Trustee for 3.4 million, which resulted in $568,688.41 in cash proceeds.

Eventually, Mrs. Wiggains filed an adversary proceeding seeking a declaratory judgment that would recognize her one-half interest in the proceeds from the sale of property. The Chapter 7 Trustee subsequently filed a counterclaim to avoid the partition agreement and for a declaration that the remaining proceeds were property of the estate. At trial, the bankruptcy court declared the partition agreement avoidable as it was deemed a fraudulent transfer. The court also determined that Mrs. Wiggains was not entitled to any of the sale proceeds. The main reason for the court's decision was that the Wiggainses created the partition agreement right before filing for bankruptcy in order to shield assets from creditors. The court further stated that Mr. Wiggains "articulated intent to preserve for him and his family as much money as possible is the same as an intent to shield as much money" as he could from actual and potential creditors.

In its decision, the bankruptcy court did not determine Mrs. Wiggains' potential right to receive a distribution of sale proceeds under section 363(j), which requires the trustee to distribute sale proceeds to a debtor's spouse after the sale of certain property. At a later evidentiary hearing, however, the bankruptcy court determined that Mrs. Wiggains failed to show that she was entitled to a portion of the sale proceeds under 363(j).

On appeal, the Fifth Circuit agreed with the bankruptcy court's finding that the partition agreement should be avoided. The court examined § 548(a)(1)(A) to determine if the partition agreement was created "with actual intent to hinder, delay, or defraud." 11 U.S.C. § 548(a)(1)(A). Because the Chapter 7 Trustee stipulated that there was no intent to defraud, the Fifth Circuit focused on the bankruptcy court's assessment that there was actual intent to hinder or delay creditors. Mrs. Wiggains directed the court to a number of opinions that dealt with the issue of intent. The Fifth Circuit, however, agreed with a different court, which held that "when a debtor admits that they acted with the [necessary] intent. . .there is no need for the court to rely on circumstantial evidence or inferences in determining whether the debtor had the requisite intent." In re Adeeb, 787 F.2d 1339, 1343 (9th Cir. 1986). This agreement stemmed from the bankruptcy court's finding that Mr. Wiggains had articulated intent to shield money from creditors.

The court next turned to homestead interest under Section 363(j) of the Bankruptcy Code. Mrs. Wiggains argued that § 363(j) operates as a vehicle for distribution of proceeds to her as a non-filing spouse. The trustee defended the bankruptcy court's ruling by arguing that neither the *Kim (Kim v. Dome Entm't Ctr., Inc. (In re Kim),* 748 F.3d 647 (5th Cir. 2014)) or *Thaw (Thaw v. Moser (In re Thaw),* 769 F.3d 366 (5th Cir. 2014)) opinions control on the issue of compensation to Mrs. Wiggains above and beyond what was paid to her husband. The court agreed that the Chapter 7 Trustee as neither opinion addressed the exact terms and application of §363(j). The Chapter 7 Trustee then turned to the argument that §363(j) is actually inapplicable because subsections (g) and (h) are not relevant to Texas homestead interests. The court agreed.

Finally the Fifth Circuit examined the bankruptcy court's consideration of whether there was something unique or special regarding Mrs. Wiggains homestead interest to make limiting the award confiscatory or onerous. The bankruptcy court determined that no such special circumstances existed in this case. The Fifth Circuit agreed. The Wiggainses actively participated in the sale of their home both before and after the bankruptcy petition was filed. Thus, there is nothing onerous or confiscatory about the sales process. Therefore, the Fifth Circuit affirmed the bankruptcy courts' ruling.

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Ninth Circuit

In re Kelley v. JP Morgan Chase Bank, N.A., No. 16-CV-1141-LHK, 2017 WL 784000 (N.D. Cal. Mar. 1, 2017)

The district court affirmed the bankruptcy court's principal holding that plaintiff/appellant's claims against JP Morgan Chase Bank (Bank) in an adversary proceeding were barred by the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 (FIRREA). Specifically, the Bank purchased loans made to plaintiff/appellant from the FDIC as Receiver for Washington Mutual Bank (WaMu). Plaintiff/appellant asserted that the loans were contractually invalid, and sought a declaratory judgment that the loans issued by WaMu were rescinded for violations of the Truth in Lending Act, and the Bank did not hold the loans after WaMu entered receivership. The bankruptcy court principally held that it lacked subject matter jurisdiction to entertain plaintiff/appellant's claims under 12 U.S.C. § 1821(d)(13)(D) due to his failure to exhaust remedies by failing to file an administrative claim pursuant to notice he received from the FDIC (timely or otherwise). After quoting § 1821(d)(13)(D), the district court examined the claims asserted by plaintiff/appellant and determined that they "relat[ed] to any act or omission of such institution or the [FDIC] as receiver" making FIRREA's administrative claims process applicable, relying upon the Ninth Circuit's decision in *Rundgren v. Wash. Mut. Bank*, 760 F.2d 1056 (9th Cir. 2014) (holding that FIRREA "bars judicial review of any non-exhausted claim, monetary or non-monetary, which is susceptible of resolution through the claims procedure," including claims for declaratory relief), with respect to the claims for declaratory relief. Alternatively, the district court affirmed the bankruptcy court's ruling for the Bank on the merits of plaintiff/appellant's claims even if they were not barred by FIRREA.

In re Armstrong v. Kaplon, No. 15-56475, 2017 WL 695103 (9th Cir. Feb. 22, 2017)

The Ninth Circuit affirmed the district court's affirmance of the bankruptcy court's order through which it held that a criminal restitution against the debtor was non-dischargeable under 11 U.S.C. § 523(a)(7), which contemplates a debt based on a "fine, penalty, or forfeiture payable to and for the benefit of a governmental unit, and is not compensation for actual pecuniary loss…." The Ninth

Circuit relied upon *Kelly v. Robinson*, 479 U.S. 36, 50 (1986) which held that "§ 523(a)(7) preserves from discharge any condition a state criminal court imposes as part of a criminal sentence." The Ninth Circuit explained that the Supreme Court based its holding on a "deep conviction that federal bankruptcy courts should not invalidate the results of state criminal proceedings," and cited to prior case law following *Kelly,* most recently *In re Silverman,* 616 F.3d 1001, 1008 (9th Cir. 2010). The Ninth Circuit found that *Kelly* foreclosed the debtor's contention that his criminal restitution as dischargeable because, unlike the state statute involved in *Kelly,* the California statute at issue provides for both "restitution" and a "restitution fine," pointing to the Kelly's "categorically held criminal restitution orders are nondischargeable," and that that holding was not premised upon the language of a particular state statute., but rather a desire for non-interference with state court's administration of their criminal laws.

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***In re Wharton (Wharton v. Schwartzer)*, BAP No. NV-16-1218-JuFY, BK No. 2:14-bk-18455-ABL, 563 B.R. 289 (BAP 9th Cir. 2017)**

In *In re Wharton*, the Ninth Circuit BAP affirmed the bankruptcy court's order sustaining the Chapter 7 trustee's objection to exemption under §522(g)(1)(A), and granting trustee's motion for turnover of Debtors' 1965 Corvette.

Debtors originally scheduled the vehicle as nonexempt but encumbered by a secured claim held by Debtor's brother. After trustee discovered that the security interest was not perfected under state law. After negotiations with Debtors broke down, trustee filed a motion to compel turnover. In response to the turnover motion, Debtors amended their schedules to claim an exemption for the full value of the car. Trustee asserted in his reply that the exemption was improper, but never filed a formal objection to the claim of exemption.

After the parties submitted stipulated facts and briefs, the bankruptcy court sustained the objection to exemption and granted the motion to compel turnover. On appeal, the Debtors argued that the trustee had failed to timely file an objection to their claimed exemption under Rule 4003 and that §522(g) was inapplicable because they disclosed the vehicle and only took the exemption after they obtained an appraisal and realized they had not fully used their exemption.

The BAP held that Rule 4003(b) permits an exemption objection regardless of form as long as the debtor has timely notice that the trustee objects. The BAP further held that the requirements of §522(g)(1)(A) were met because Debtors voluntarily transferred the security interest as evidenced by language in the note and delivery of the original title and keys to Debtor's brother, and the unperfected security interest was "recovered" by the trustee under §550 after threat of an avoidance action.

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Eleventh Circuit

In re Lunsford, No. 16-11578, 848 F.3d 963 (11th Cir. 2017)

Pre-petition, the plaintiff purchased $300,000 of securities in a business—MIPCO—run by the defendant/debtor, Lunsford. The plaintiff filed a lawsuit against the defendant and MIPCO, arguing its investment was procured through documents that vastly overstated the value of MIPCO's assets. The plaintiff obtained a $600,000 judgment in state court for, among other things, violation of the Mississippi Securities Act and the offering and selling of unregistered securities. After Lunsford filed bankruptcy, the plaintiff filed a nondischargeability action against the defendant under Section 523(a)(19)(A) for violation of securities laws. The bankruptcy court, applying principles of issue preclusion in relying on the state court judgment, found the debt nondischargeable.

On appeal, the defendant argued that the state court judgment did not specifically find that *he* violated securities laws, but rather a third party—MIPCO—violated securities laws. The Eleventh Circuit found that the language of the arbitrator's award indeed included Lunsford in the securities law violation. The court went on to hold, alternatively, that even if Lunsford was not specifically found liable for the violation, his joint and several liability still would be nondischargeable as a "debt for" violation of securities laws regardless of whether the conduct was directly attributable to the debtor or a third party.

In re Appling, No. 16-11911, 848 F.3d 953 (11th Cir. 2017)

Plaintiff, a law firm, sued the defendant/debtor pre-petition for unpaid legal fees and obtained a $100,000 judgment. The defendant filed bankruptcy and the law firm instituted a nondischargeability proceeding, arguing the debt was nondischargeable under Section 523(a)(2)(A) of the Bankruptcy Code. The law firm asserted that the defendant orally represented he expected to receive a $100,000 tax refund that he intended to use to satisfy the unpaid legal fees and, based on that representation, the firm continued to perform work for the defendant.
The defendant argued that the statement regarding the tax refund was a statement "respecting [his] financial condition" and therefore fell under Section 523(a)(2)(B), which requires, among other things, that the statement be in writing. The Eleventh Circuit focused on the word "respecting" to conclude that a statement about a single asset indeed *can* (and in this case was) a statement "respecting" the debtor's financial condition. Therefore, because the statement was not in writing, the appellate court reversed the bankruptcy court's decision.

***Securities & Exchange Commission v. Wells Fargo Bank, N.A.*, No. 16-10942, 2017 WL 694486, at *4 (11th Cir. Feb. 22, 2017)**

The Eleventh Circuit decided, in a case of first impression, that a federal district court presiding over an equity receivership lacks authority to invalidate a creditor's mortgage for failure to file a claim in the receivership proceedings. Although not a bankruptcy case *per se*, the appellate court almost exclusively relied on bankruptcy law in reaching its decision. The court found, like in bankruptcy, security interests are governed by state law and pass through bankruptcy unaffected if the secured creditor fails to file a claim.

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