Bankruptcy Circuit Update
Featuring cases from February 2019

We will be convening our next section-wide conference call on **Friday, April 26th, 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.

Second Circuit

In re Picard,
17-2992(L), 917 F.3d 85 (2nd Cir., February 25, 2019)

In cases arising from the fallout of Bernard Madoff's Ponzi scheme, the Second Circuit vacated the judgments of the bankruptcy court holding that the presumption against extraterritoriality and international comity principles limited the scope of section 550(a)(2) of the Bankruptcy Code such that the trustee of a domestic debtor cannot use it to recover property that the debtor transferred to a foreign entity that subsequently transferred it to another foreign entity.

Following the collapse of Bernard Madoff's Ponzi scheme in 2008, the Securities Investment Protection Corporation, acting pursuant to the Securities Investor Protection Act of 1978 ("*SIPA*"), petitioned the district court for a protective order placing Bernard L. Madoff Investment Securities LLC ("*Madoff Securities*") into liquidation. After the district court issued the protective order, it appointed Irving H. Picard as Trustee (the "*Trustee*") and referred the case to the bankruptcy court.

Generally, SIPA establishes procedures for the expeditious and orderly liquidation of failed broker-dealers, while providing special protections to their customers. In a SIPA liquidation, a fund of "customer property" consisting of cash, securities, and related proceeds, is established for priority distribution exclusively among customers. The SIPA trustee allocates the customer property so that customers share ratably in the property to the extent of their respective net equities. To ensure that unlawful transfers of customer property prior to the formation of a liquidation estate do not prevent a trustee from ratably distributing such property, SIPA authorizes trustees to recover any property transferred by the debtor which, were it not for such transfer, would have been customer property if and to the extent that such transfer is voidable or void under the provisions of the Bankruptcy Code. The Bankruptcy Code, in turn, provides various means for trustees to avoid a debtor's transfers and, to the extent that a transfer is avoided, to recover the transferred property. Specifically, section 550(a)(1) of the Bankruptcy Code allows trustees to recover property from the debtor's initial transferee, and section 550(a)(2) of the Bankruptcy Code permits a trustee to recover property from any subsequent transferee.

Though Bernard Madoff's Ponzi scheme has spawned extensive litigation, these cases centered on eighty-eight consolidated appeals from dozens of related orders of the bankruptcy

court. At issue in those appeals was the Trustee's argument that Madoff Securities fraudulently transferred billions of dollars to foreign investors, including several foreign feeder fund networks, each of which had later initiated separate foreign liquidation proceedings. Prior to initiating those liquidations, these feeder funds, the initial transferees of that property, subsequently transferred it to other foreign investors, a group that included the hundreds of defendants in these cases. The Trustee asserted that such transfers were avoidable as fraudulent under section 548(a)(1)(A) of the Bankruptcy Code, and thereby sought to recover the property from the defendants pursuant to section 550(a)(2) of the Bankruptcy Code.

The district court withdrew the reference to the bankruptcy court to determine whether section 550(a)(2) of the Bankruptcy Code allows the Trustee to recover this property. In a July 2014 decision, the court held on two grounds that the Trustee could not proceed with these actions. First, it held that the presumption against extraterritoriality limits the scope of section 550(a)(2), such that a trustee may not use it to recover property that one foreign entity received from another foreign entity. Second, and alternatively, the court held that international comity principles limit the scope of section 550(a)(2) of the Bankruptcy Code on these facts. The district court did not dismiss any of the Trustee's complaints, but instead remanded them to the bankruptcy court for further proceedings consistent with its opinion.

Consistent with that directive, the bankruptcy court dismissed claims against defendants that invested with certain feeder funds on international comity grounds, finding that the United States did not have any interest in regulating the relationship between these funds and their investors or the liquidation of these funds and the payment of their investors' claims. The bankruptcy court also found that the foreign nations where those entities were in liquidation proceedings had a greater interest than the United States in regulating the activities that gave rise to the Trustee's subsequent transfer claims, particularly the validity or invalidity of payments by the funds to their investors and service providers. Second, the bankruptcy court dismissed the recovery claims against the remaining defendants under the presumption against extraterritoriality. Interpreting Second Circuit precedent and the district court's opinion, the bankruptcy court concluded that the factors relevant to determining whether the transactions were extraterritorial were the locations from which the transfers were made and sent, and the location or residence of the initial and subsequent transferee. The bankruptcy court dismissed the Trustee's claims because he had not alleged facts sufficient to support a domestic nexus under these criteria.

The Trustee appealed the orders dismissing the recovery actions, and the Second Circuit consolidated those appeals. On appeal, the question before the Second Circuit was whether, where a trustee seeks to avoid an initial property transfer under section 548(a)(1)(A) of the Bankruptcy Code, either the presumption against extraterritoriality or international comity principles limit the reach of section 550(a)(2) of the Bankruptcy Code such that the trustee cannot use it to recover property from a foreign subsequent transferee that received the property from a foreign initial transferee.

I. The Presumption Against Extraterritoriality

The Second Circuit began its substantive analysis by first addressing the presumption against extraterritoriality, which is a canon of statutory construction providing that, absent clearly

expressed congressional intent to the contrary, federal laws will be construed to have only domestic application. Pursuant to this canon of statutory construction, an action may proceed if either the statute indicates its extraterritorial reach or the case involves a domestic application of the statute. In these cases, the courts below found that neither criterion was satisfied and accordingly dismissed these actions.

The Second Circuit noted that, pursuant to *WesternGeco LLC v. ION Geophysical Corp.*, 138 S. Ct. 2129 (2018), a court must look to a statute's "focus" to determine whether a case involves a domestic application of that statute. In that case, the Supreme Court noted that the focus of a statute is "the object of its solicitude," which can include the conduct it seeks to regulate, as well as the parties and interests it "seeks to protect" or vindicate. Further, when determining the focus of a statute, a court should not analyze the provision in a vacuum, but should instead assess it in concert with any other provision it works in tandem with. The Second Circuit noted that *WesternGeco* is useful in resolving two issues relevant to these cases: (1) whether a court should look to the pertinent avoidance provision (here, section 548(a)(1)(A) of the Bankruptcy Code) in determining the focus of section 550(a) of the Bankruptcy Code, and (2) the focus of section 550(a) of the Bankruptcy Code in this appeal.

Here, the Second Circuit noted that no one would dispute that, in an action where a trustee seeks to recover property under section 550(a) of the Bankruptcy Code, a court must at a minimum look to that section. Instead, the dispute is whether a court must additionally look to the avoidance provision that enables a trustee's recovery. The Second Circuit noted that section 550(a) of the Bankruptcy Code applies only "to the extent that a transfer is avoided" under an applicable avoidance provision in the Bankruptcy Code. In other words, a trustee cannot use section 550(a) of the Bankruptcy Code to recover property unless the trustee has first avoided a transfer under one of these provisions.

As such, based on the reasoning in *WesternGeco*, the Second Circuit held that the Bankruptcy Code's avoidance and recovery provisions work "in tandem." Thus, to determine section 550(a)'s focus in a given action, a court must also look to the relevant avoidance provision. The district court had found that section 550(a) focuses on "the property transferred" and "the fact of its transfer." On this theory, the district court concluded that a recovery action under section 550(a)(2) regulates the subsequent transfer of property: that from the initial transferee to the subsequent transferee.

However, the Second Circuit noted that the harm to the estate as a result of its unlawful depletion began with the initial transfer, not the subsequent transfer. Accordingly, the Second Circuit held that, in recovery actions where a trustee alleges a debtor's transfers are avoidable as fraudulent under section 548(a)(1)(A), section 550(a) regulates the fraudulent transfer of property depleting the estate. When section 550(a) operates in tandem with section 548(a)(1)(A), recovery of property is merely the means by which the statute achieves its end of regulating and remedying the fraudulent transfer of property. Thus, in actions involving both provisions, the Second Circuit held that section 550(a) regulates the debtor's initial transfer. While the subsequent transfer may indirectly harm creditors by making property more difficult to recover, it is the initial transfer that fraudulently depletes the estate. The Second Circuit also pointed out that only the initial transfer involves fraudulent conduct by the debtor.

The Second Circuit noted that, consequently, when a trustee seeks to recover subsequently transferred property under section 550(a), the only transfer that must be avoided is the debtor's initial transfer. While the lower courts held, and the defendants argued on appeal, that the relevant Bankruptcy Code provisions regulate the subsequent transfer of property, the Second Circuit held that such readings erroneously overlook the ways in which section 548(a)(1)(A) shapes the focus of section 550(a) in this context. Accordingly, the Second Circuit held that the district court erred when concluding that the appropriate "transaction" to determine the extraterritoriality question was the subsequent transfer. Instead, the Second Circuit held that the only transfer section 548(a)(1)(A) is concerned with is the initial transfer, as this is the only transfer that was actually made by the debtor.

After holding that, in this appeal, section 550(a) focuses on the debtor's initial transfer of property, the Second Circuit then noted that it must decide whether Madoff Securities' transfers took place in the United States such that regulating them involves a domestic application of that statute. The lower courts, assuming the relevant transaction was the subsequent transfer, weighed the location of the account from which and to which the subsequent transfer was made, and the location or residence of the subsequent transferor and transferee. The Second Circuit declined to adopt this balancing test.

Instead, the Second Circuit held that a domestic debtor's allegedly fraudulent transfer of property from the United States is domestic activity for the purposes of sections 548(a)(1)(A) and 550(a) of the Bankruptcy Code. The Second Circuit reasoned that the relevant conduct in this appeal is the debtor's fraudulent transfer of property, not the transferee's receipt of property. When a domestic debtor commits fraud by transferring property from a U.S. bank account, the conduct that section 550(a) regulates takes place in the United States. Madoff Securities is a domestic entity, and the Trustee alleged it fraudulently transferred property to the feeder funds from a U.S. bank account. Accordingly, the Second Circuit deemed such transfers to be domestic activity. Because section 550(a) regulates domestic conduct, these cases therefore involved domestic applications of the statute. The presumption against extraterritoriality therefore does not prohibit that debtor's trustee from recovering such property using section 550(a), regardless of where any initial or subsequent transferee is located.

Accordingly, the Second Circuit held that the lower courts erred by dismissing these actions under the presumption against extraterritoriality. However, because the Second Circuit found that this appeal involved a domestic application of section 550(a), the Court expressed no opinion on whether section 550(a) clearly indicates its extraterritorial application.

II. International Comity

The Second Circuit then addressed the second issue, which was whether the district court erroneously dismissed these actions on international comity grounds. The Second Circuit noted that though it applies international comity principles in two ways, only one was relevant to these cases, namely "prescriptive comity." As a canon of construction, prescriptive comity asks a question of statutory interpretation: should a court presume that Congress, out of respect for foreign sovereigns, limited the application of domestic law on a given set of facts?

As a threshold issue, the Second Circuit noted that international comity comes into play only when there is a true conflict between American law and that of a foreign jurisdiction. A true conflict exists if compliance with the regulatory laws of both countries would be impossible. Here, the Second Circuit noted that the record was unclear about whether issues litigated in the feeder funds' liquidation proceedings abroad would yield outcomes irreconcilable with the relief the Trustee demanded in these cases. While the defendants alleged that there were in fact conflicts, the Second Circuit elected to assume that such conflicts existed without actually deciding that issue.

The Second Circuit also noted that comity in bankruptcy proceedings is especially important for two reasons: first, deference to foreign insolvency proceedings will, in many cases, facilitate equitable, orderly, and systematic distribution of a debtor's assets, and second, Congress explicitly recognized the importance of the principles of international comity in transnational insolvency situations when it revised the bankruptcy laws. In light of these considerations, the Second Circuit noted that U.S. courts should ordinarily decline to adjudicate creditor claims that are also the subject of a foreign bankruptcy proceeding, because the equitable and orderly distribution of a debtor's property requires assembling all claims against the limited assets in a single proceeding.

To enforce these principles, courts (including the lower courts in these cases) apply a choice-of-law test that takes into account the interests of the United States, the interests of the foreign state, and those mutual interests the family of nations have in just and efficiently functioning rules of international law.

Here, the Second Circuit noted that the United States has a compelling interest in allowing domestic estates to recover fraudulently transferred property. The prospect of recovery assures creditors and investors that they will receive their fair share of property in the event an American entity enters into bankruptcy or liquidation. Providing this safeguard is an important goal of the Bankruptcy Code's avoidance and recovery provisions. These features consequently benefit the American economy by making domestic entities more attractive to creditors and investors. In fact, the Second Circuit noted that protecting these individuals, and therefore protecting the U.S. securities market, are the key purposes of SIPA.

However, when a debtor in American courts is also in liquidation proceedings in a foreign court, the foreign state has at least some interest in adjudicating property disputes. The Second Circuit noted that in appropriate cases, that interest will trump U.S. interests. But the Second Circuit found that no such parallel proceedings existed here because the feeder funds, not Madoff Securities, were the debtors in the foreign courts. The Second Circuit noted that the absence of such proceedings seriously diminished the interest of any foreign state in a U.S. court choosing to resolve the Trustee's claims.

The only foreign jurisdictions potentially interested in these disputes were those where a feeder fund that served as an initial transferee was in liquidation. However, the Second Circuit did not find such interests to be compelling, because the Trustee is not a creditor and his claims were not the subject of a foreign bankruptcy or liquidation proceeding. Nor was the Trustee

duplicating the liquidations of the feeder funds, because the U.S. and foreign proceedings had very different means and goals. While the Trustee's task was tracing property of the estate to net winners among the feeder funds' investors, the feeder funds' liquidations proceeded pursuant to those funds' organizing documents, which were unlikely to discriminate between net winners and net losers.

Further, the Second Circuit reasoned that the deference usually given to foreign liquidation proceedings to promote equitable and orderly distributions of all of a debtor's property in a single proceeding were not applicable here because consolidating the Trustee's claims in federal court was more "equitable and orderly" than forcing him to litigate different claims in different countries. The Second Circuit also noted that SIPA and the Bankruptcy Code envision a unified proceeding, and courts would frustrate this goal if they limited the reach of section 550(a) in actions such as these. Though the Second Circuit noted that the nations adjudicating the feeder funds' liquidations do have certain interests in these disputes, as they may wish to ensure that the feeder funds' creditors can recover as much property as possible, the Second Circuit held that those are not the comity concerns U.S. precedent discusses in explaining when and why the Bankruptcy Code should give way to foreign law.

The Second Circuit therefore held that prescriptive comity poses no bar to recovery when the trustee of a domestic debtor uses section 550(a) to recover property from a foreign subsequent transferee on the theory that the debtor's initial transfer of that property from within the United States is avoidable under section 548(a)(1)(A), even if the initial transferee is in liquidation in a foreign nation, because the United States' interest in applying its law to such disputes outweighs the interest of any foreign state.

The Second Circuit held that the lower courts, which found that the jurisdictions adjudicating the feeder funds' liquidations had a greater interest in resolving these disputes than the United States, erroneously focused on the subsequent transfers. The Second Circuit noted that this conclusion relied on incorrect premises: that a court should look only to section 550(a), assume the United States has purely remedial interests, and focus on the subsequent transfer of property. As the Second Circuit explained in the first portion of this opinion, section 548(a)(1)(A) informs section 550(a)'s focus in these actions, and such focus is on regulating and remedying a debtor's fraudulent transfer of property, and this means the relevant transfer is the debtor's initial transfer. The domestic nature of those transfers, and the United States' compelling interest in regulating them, tipped the scales of the choice-of-law test in favor of domestic adjudication. Similarly, while the district court found that investors in the foreign funds had no reason to expect that U.S. law would apply to their relationships with the feeder funds, the Second Circuit noted that such premise was inaccurate because U.S. law is not regulating the investors relationships with the feeder funds, but rather the debtor's transfers of property to the feeder funds.

In sum, the Second Circuit held that prescriptive comity considerations did not limit the reach of the Bankruptcy Code provisions in these actions, and accordingly, the Second Circuit vacated and remanded the bankruptcy court's judgments dismissing these actions.

***Speer v. Seaport Capital Partners* (*In re Speer*)**
17-1440 (L), --- Fed.Appx. ----, 2019 WL 974674 (2nd Cir., February 27, 2019)

The Second Circuit affirmed the judgment of the district court (i) affirming the bankruptcy court's orders denying the motions filed by debtor Sheri Speer ("*Speer*") to quash the subpoenas filed by Seaport Capital Partners ("*Seaport*") seeking financial records from People's United Bank, N.A. and Bank of America, N.A., and subsequent orders denying Speer's motions for reconsideration of the same, in an adversary proceeding in which Seaport alleged that Speer concealed and withheld information about her assets and finances in the underlying bankruptcy proceeding, and (ii) dismissing Speer's appeal from the bankruptcy court's order denying Speer's motion to quash Seaport's subpoena seeking financial records from Liberty Bank and a subsequent order denying Speer's motion for reconsideration of the same in the adversary proceeding.

On appeal in the Second Circuit, Speer asserted three arguments: first, that the bankruptcy court should have quashed the subpoenas because of Seaport's purported failure to serve them on her before serving them on the banks, which she claimed was required under Rules 30 and 45 of the Federal Rules of Civil Procedure; second, that the subpoenas were overbroad; and third, that the bankruptcy court should have quashed the subpoenas to protect Speer's privacy interests in the information Seaport sought.

The Second Circuit found that each of these arguments was without merit. First, the Second Circuit noted that Rule 45 of the Federal Rules of Civil Procedure required Seaport to serve on Speer a notice and a copy of the subpoenas before it served them on the respective banks. The Second Circuit found that Speer did not adequately explain how Seaport's purported failure—providing simultaneous, or nearly simultaneous, notice to Speer and the banks, rather than advance notice to Speer—caused her any prejudice. The Second Circuit noted that courts in this Circuit routinely decline to quash subpoenas automatically based on noncompliance with notice requirements absent some showing of prejudice. Accordingly, Seaport's alleged technical noncompliance did not prevent Speer from moving to quash and vigorously litigating the propriety of the subpoenas at issue in these appeals.

Second, the Second Circuit found that the bankruptcy court did not abuse its discretion by declining to conclude that Seaport's subpoenas were overbroad. The Second Circuit noted that, contrary to Speer's characterization, the subpoenas sought specific categories of documents within a limited timeframe. More significantly, Speer had not made a clear showing that the documents Seaport sought were so untethered to the allegations in the adversary proceeding complaint that the bankruptcy court was compelled to quash the subpoenas.

Finally, the Second Circuit found that Speer's argument regarding her privacy interests also lacked merit. First, the Second Circuit noted that Speer had not provided any legal authority for the proposition that she had a privacy interest in the records of the limited liability companies that were subject to the subpoenas. Second, as to the records relating to Speer's personal financial information, Speer argued that her privacy interest was sufficient to provide her with standing to contest the subpoenas and pursue these appeals. However, the Second Circuit noted that Speer had not explained how that privacy interest made the financial records an inappropriate subject of discovery in the adversary proceeding, given the substance of Seaport's allegations. Accordingly, the Second Circuit affirmed the judgments and orders of the district court in their entirety.

Submitted By:
Bram A. Strochlic
Skadden, Arps, Slate, Meagher & Flom LLP
Four Times Square
New York, NY 10036-6522
Email: bstrochl@skadden.com

Fifth Circuit

In the Matter Of: Ondova Limited Company,
914 F.3d 990, (5th Cir. 2019)

In a matter of first impression, the Fifth Circuit addressed immunity for acts taken by a bankruptcy trustee, whether or not pursuant to a court order. Appellant Jeffrey Baron appealed the lower courts' dismissal of his adversary proceeding against the trustee ("Trustee") responsible for administrating the estate of Ondova Limited Co. Baron complained of the Trustee's decision to seek a receivership over him, alleged falsehoods made during the receivership process, and the use of the receivership to liquidate assets.

The Fifth Circuit held that because the Trustee was acting under the supervision and subject to the order of the bankruptcy judge, he was entitled to absolute immunity during his tenure. Further, the Court held that even acts not taken pursuant to a court order were entitled to qualified immunity, as long as the Trustee was acting within the scope of his official duties. Only *ultra vires* acts are not entitled to immunity, the Court found. The Court also found this immunity extended to the Trustee's attorneys under the theories of derivative judicial immunity and the separate doctrine of attorney immunity.

In the Matter Of: Sneed Shipbuilding, Incorporated,
916 F.3d 405 (5th Cir. Feb. 5, 2019)

The trustee in Sneed Shipbuilding's bankruptcy proceeding elected to settle a dispute with the probate estate of Sneed's principal in order to sell one of the company's shipyards in Channelview, Texas. After the bankruptcy court approved the settlement, unsecured creditor New Industries unsuccessfully objected to the disbursement of funds to the probate estate, but it did not seek a stay of the bankruptcy court's order.

On appeal, the trustee argued the appeal was either equitably moot or moot under 11 U.S.C. § 363(m), which limits appellate review of the sale of estate property when the order approving the sale is not stayed. The Fifth Circuit rejected the notion of equitable mootness, noting that because no plan had been proposed in Sneed's case, there was no risk an appeal would undermine the plan and the parties' reliance on it. While noting other circuits have applied equitable mootness to appeals addressing settlement agreements, the Court found the agreement at issue was not sufficiently complex, and reversal would affect only a few parties who had actively participated in the bankruptcy proceedings.

Turning to § 363(m), the Fifth Circuit explained that the purpose of the statute is to assure purchasers that once a court-approved sale is consummated (i.e., not stayed), no appellate court can later second-guess the transaction. New Industries argued § 363(m) did not apply because it was not appealing the sale, but merely the disbursement of cash to the probate estate. But the Court rejected this argument, finding the payoff of the estate an essential part of the sale. Accordingly, the Court dismissed the appeal as moot under § 363(m).

Submitted by:
Sarah Williams
Kirkland & Ellis LLP
609 Main St., Suite 4500
Houston, TX 77002
Email: sarah.williams@kirkland.com

In re Buffets, LLC,
No. 16-50557-RBK, 2019 WL 518318 (Bankr. W.D. Tex. Feb. 8, 2019),
***appeal docketed*, No. 5:19-cv-00173 (W.D. Tex. Feb. 22, 2019).**

Buffets, LLC and its affiliates ("Reorganized Debtors") filed chapter 11 petitions on March 7, 2016. Reorganized Debtors confirmed a plan of reorganization on April 27, 2017. In October 2017, Congress amended 28 U.S.C. § 1930(a)(6)(B) to provide:

> During each of fiscal years 2018 through 2022, if the balance in the United States Trustee system fund as of September 30 of the most recent full fiscal year is less than $200,000,000, the quarterly fee payable for a quarter in which disbursements equal or exceed $1,000,000 shall be the lesser of 1 percent of such disbursements of $250,000.

Application of § 1930(a)(6)(B) to Reorganized Debtors' subsequent disbursements resulted in Reorganized Debtors paying 833 percent more in United States Trustee ("UST") fees than was required at the time of filing the case or confirmation of the plan. Reorganized Debtors filed a motion requesting the court determine that the word "disbursements" in § 1930(a)(6)(B) be limited to funds disbursed under the plan, which would cause Reorganized Debtors' quarterly-fee liability to decrease from $250,000 to $4,875. The bankruptcy court denied that motion, holding that quarterly fees should be calculated based on all disbursements made during the quarter. Reorganized Debtors filed a motion to reconsider and subsequent brief arguing that § 1930(a)(6)(B) violated the Uniformity Clause and that the retroactive effect violated constitutional protections of due process and prohibition against takings.

The bankruptcy court found that § 1930(a)(6) violated the Uniformity Clause because the increase in UST quarterly fees applied only to U.S. Trustee districts and not Bankruptcy Administrator program districts for the first three quarters of 2018.[1] As such, Reorganized Debtors were not required

[1] Presently, there are two co-existing programs that provide post-petition supervision of chapter 11 cases: the UST program and the Bankruptcy Administrator ("BA") program. Alabama and North Carolina operate under the BA program. Otherwise, the UST program is implemented in all

to pay the $250,000 in fees for the first three quarters of 2018 but rather the uniform quarterly fee of $30,000.

The court also found that, under *Landgraf v. USI Film Prods.*, 511 U.S. 244 (1994), § 1930(a)(6) violates the presumption against retroactivity because nothing in the statute or legislative history indicated that Congress intended retroactive application. Moreover, the amendment's possible retroactive application violated the Due Process Clause because Reorganized Debtors did not have sufficient notice of the increased fees prior to filing for bankruptcy or confirming a plan. The UST filed an appeal on these issues that is presently pending in district court.

***Cox v. Richards*,**
No. 18-60394, 2019 WL 495136 (5th Cir. Feb. 7, 2019).

In September 2009, Suzanne Cox ("Plaintiff") filed for bankruptcy. In her schedules, she failed to list a number of assets received in a divorce settlement. The Trustee prevailed in an adversary proceeding against Plaintiff on a 11 U.S.C. § 727(a)(5) claim, under which the Court found that Plaintiff failed to satisfactorily explain loss of assets obtained through her divorce proceedings.

In 2016, Plaintiff filed a Complaint against Wells Richards and Canucanoe Rental Cabins (collectively "Defendants") seeking to obtain repayment of a loan of $251,550.14 that was allegedly extended from Plaintiff to Mr. Richards in September 2009. Canucanoe filed an answer. Defendants then filed a motion to dismiss, asserting the defense of judicial estoppel on the grounds that Plaintiff failed to disclose the loan to Mr. Richards on her schedules in her September 2009 bankruptcy filing. The district court granted the motion and dismissed the case with prejudice, taking judicial notice of Plaintiff's representations in the bankruptcy proceedings and concluding that Plaintiff was judicially estopped from asserting a claim against Defendants.
On appeal, Plaintiff argued first that the district court's application of judicial estoppel was an abuse of discretion. The Fifth Circuit affirmed the district court's ruling, finding that: (1) Plaintiff's position in the lawsuit against Defendants was inconsistent with her sworn representations in her bankruptcy proceedings; (2) the bankruptcy court believed Plaintiff's prior position; and (3) Plaintiff did not act inadvertently because she had multiple opportunities to disclose the loan to Mr. Richards in her 2009 bankruptcy but chose not to disclose it.

Plaintiff also brought a number of procedural challenges on appeal regarding Defendants' motion to dismiss. Plaintiff's first challenge asserted that because Canucanoe answered the complaint before filing a motion to dismiss, the motion to dismiss was untimely. The court found, however, that a motion to dismiss filed after a responsive pleading can be treated as a motion for judgment on the pleadings under Fed. R. Civ. P. 12(c). Plaintiff's second challenge argued that the district court erred by considering records in her prior bankruptcy instead of taking the allegations in her complaint as true. The court disagreed, finding that a district court may take judicial notice of public record. Plaintiff's third challenge contended that Defendants' failure to cite a rule of civil

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other states. The Bankruptcy Judgeship Act of 2017 amended § 1930(a)(6) to increase the UST quarterly fees, but the increase did not apply in BA districts until October 2018, which was nine months after the statute became effective in UST districts.

procedure in their motion to dismiss fails under the pleading standards. The court found that Defendants' motion gave Plaintiff the requisite notice of their intent to raise the affirmative defense of judicial estoppel.

Submitted by:

Erin E. Coughlin
Law Clerk to the Honorable Craig A. Gargotta
United States Bankruptcy Court for the Western District of Texas
615 E. Houston St., Room 505
San Antonio, Texas 78205
Email: Erin_Coughlin@txwb.uscourts.gov

Eighth Circuit

In re O'Sullivan,
914 F.3d 1162 (8th Cir. 2019)

The Bankruptcy Appellate Panel for the Eighth Circuit ("BAP") affirmed the United States Bankruptcy Court for the Western District of Missouri in holding that CRP Holdings ("CRP") had an unenforceable judicial lien against the real property of the debtor O'Sullivan ("O'Sullivan"), and avoided the lien pursuant to 11 U.S.C. § 522(f)(1).

CRP obtained a $765,151 default judgment against O'Sullivan in Platte County, Mo. The judgment did not include O'Sullivan's wife. CRP filed a notice of foreign judgment in Barton County in an attempt to obtain a judicial lien on the property, owned by the O'Sullivan's as tenants by the entirety. O'Sullivan filed a Chapter 7 petition and claimed a $15,000 homestead exemption under Mo. Rev. Stat. § 513.475 and 11 U.S.C. § 522(b)(3)(B). There were no objections to O'Sullivan's claimed exemptions. O'Sullivan also moved to avoid CRP's purported judicial lien pursuant to Section 522(f)(1), asserting that it impaired his homestead exemption.

The BAP agreed with the bankruptcy court and determined that while CRP did not have an enforceable lien under Missouri law because O'Sullivan's property was owned jointly with his spouse as tenants by the entirety, it affixed to the home. The BAP concluded that CRP's recording of the notice of foreign judgment created a cloud on O'Sullivan's title on his exempt homestead and that a cloud on title may warrant a court in removing it.

On appeal, the 8th Circuit looked at Section 522(f)(1) which says, in relevant part, "the debtor may avoid the fixing of a lien on an interest of the debtor in property to the extent that such lien impairs an exemption to which the debtor would have been entitled under [Section 522(b)], if such lien is ... a judicial lien." Section 101(37) defines "lien" as "a charge against or interest in property to secure payment of a debt or performance of an obligation." Therefore, the 8th Circuit

concluded that a lien does not need to be enforceable to be avoidable. All that is needed is a charge against or interest in the debtor's property.

Under Missouri law, there are times when courts "must act in equity to clear a cloud upon a title to real estate that is not apparent on the face of the document." *See Mahen v. Ruhr*, 293 Mo. 500, 240 S.W. 164 (1922). The 8th Circuit agreed with the BAP in finding that that the existence of the notice of foreign judgment could make it difficult for even an experienced title searcher to determine whether the property was liable for execution, affecting the property's value and marketability of title. Accordingly, the 8th Circuit found that CRP's recording of the foreign judgment created a cloud on the title under Missouri law and that application of Section 522(f) would clear the cloud on title to O'Sullivan's property. As a result, O'Sullivan's motion to avoid the lien was properly granted.

Submitted by:
Quentin Roberts
Diamond McCarthy LLP
150 California Street, Suite 2200
San Francisco, CA 94111
Email: quentin.roberts@diamondmccarthy.com

Tenth Circuit

***In re Sunnyland Farms, Inc.*,**
No. 14-10231-t11, 2019 WL 507536 (Bankr. D. N.M. Feb. 8, 2019)

Applying the post-confirmation "close nexus" test, the bankruptcy court concluded that it lacked even "related to" subject matter jurisdiction to compel a third-party LLC to arbitrate a dispute with the debtor regarding a stock-swap transaction with that third party that received the debtor's assets. The court explained that the dispute did not affect the interpretation, implementation, execution, consummation or administration of the confirmed plan. Under that plan, the court explained, the debtor was free to, and in fact did, manage its affairs and sell its property. The court further explained that the stock swap transaction was not mentioned in, or part of the confirmed plan, and with respect to the dispute it should be adjudicated by a state court. Finally, the court further held that the retention of jurisdiction provisions in the plan could not be used to expand the court's jurisdiction beyond that contemplated by Section 1334.

Submitted by:
Paul Avron
Berger Singerman
One Town Center Road, Suite 301
Boca Raton, FL 33486
Email: PAvron@bergersingerman.com

Eleventh Circuit

In re Fundamental Long Term Care, Inc.,
753 Fed.Appx. 878 (11th Cir. Feb. 15, 2019)

The Eleventh Circuit affirmed the district court's affirmance of bankruptcy court's award of costs to the defendant— appellee of approximately $60,162.19 in costs, including deposition and hearing transcripts and related expenses.

In 2006, the estates of several deceased nursing home patients ("the Estates") filed wrongful death and negligence actions in state court against a nursing home company. In anticipation of adverse judgments, the defendants in that case transferred all the assets into a new entity, Fundamental Long Term Care, Inc. ("Fundamental"). The Estates also filed an involuntary bankruptcy petition against Fundamental. The bankruptcy court enjoined the Estates' pursuit of the state court claims and ordered that all of the Estates' claims against the defendants based on the 2006 transaction be litigated in an adversary proceeding before the bankruptcy court. Rubin Schron ("Schron") was named as a defendant in that adversary and was dismissed without prejudice from the adversary proceeding. The Trustee and the Estates appealed the order dismissing Schron. While on appeal, the remaining defendants settled the adversary proceeding and, and as part of the settlement approved by the bankruptcy court the Estates and the Trustee were barred from pursuing claims against Schron arising out of the nucleus of facts set forth in the adversary complaint. The district court and the Eleventh Circuit affirmed the order dismissing the Schron.

On this appeal, the Estates argued that deposition transcripts were not necessary because the bankruptcy court's 12(b)(6) analysis was inherently limited to an examination of the sufficiency of the operative complaint, the "use" of the transcripts would be impermissible. The Court affirmed, stating that the Estates have not shown that the depositions and hearings were unrelated to an issue in the case at the time they occurred, thus bankruptcy court did not abuse its discretion in awarding costs for deposition transcripts. In addition, the Estates argued that non-adversary proceeding transcripts and pretrial hearing transcripts would be impermissible, which the Court rejected since there had been ongoing litigation and appeals. Lastly, the Estates argued for equitable consideration, which the Court rejected since the Estates filed to raise this argument to the bankruptcy court.

Graddy v. Educational Credit Management Corp.,
2019 WL 949063 (11th Cir. Feb. 26, 2019).

The Eleventh Circuit reversed the district court's order dismissing the plaintiff's appeal in her student loan discharge case. The bankruptcy court entered judgment against the plaintiff, but the docket entry relating to the judgment erroneously noted "Judgment for plaintiff and against defendant," although the judgment itself accurately reflected the bankruptcy court's ruling against the plaintiff. The bankruptcy court corrected the docket entry, and the plaintiff filed a notice of appeal two days after the correction. The plaintiff's notice of appeal, however, was filed later than

the 14-day time period measured against the initial entry of the judgment and the erroneous docket entry. The district court nonetheless found that the plaintiff's notice of appeal was untimely and dismissed the appeal.

The Eleventh Circuit reversed the district court's dismissal, finding that the 14-day appeal period only began to run once the bankruptcy court corrected the docket entry. The Eleventh Circuit began with interpreting Federal Rule of Civil Procedure 58(a), which states that a judgment is "entered" when it "is entered on the civil docket under Rule 79(a)." Turning to Rule 79(a), the court considered when the docket entry "briefly show[ed] the "'substance' of the court's judgment, such that the judgment was 'entered in the civil docket.'" The appellate court found the defendant's arguments, that the erroneous docket entry was not the cause of the plaintiff's delay, were not supported by the text of the rules.

Submitted by:
Susan Heath Sharp & Matthew B. Hale
Stichter, Riedel, Blain & Postler, P.A.
110 East Madison Street, Suite 200
Tampa, Florida 33602
Email: SSharp@srbp.com
MHale@srbp.com