

Bankruptcy Circuit Update
Featuring cases from January 2019

First Circuit

Altair Global Credit Opportunities Fund (A), LLC et. al. v. The Financial Oversight and Management Board for Puerto Rico, as Representative for the Employees Retirement System of the Government of the Commonwealth of Puerto Rico (In re: The Financial Oversight and Management Board for Puerto Rico, et. al.)

Case Nos. 18-1836, 18-1837, --- F.3d ----, 2019 WL 364029 (January 30, 2019)

In this case, the First Circuit Court of Appeals considered whether under Article 9 of Puerto Rico’s version of the Uniform Commercial Code, bondholders perfected certain security interest assets of the Employees Retirement System of the Government of the Commonwealth of Puerto Rico (“System” or “ERS”) and whether the bondholders’ security interests could be avoided under the Puerto Rico Oversight, Management, and Economic Stability Act’s (“PROMESA”), which incorporates parts of the Bankruptcy Code, including 11 U.S.C. section 544(a).

The pertinent facts are as follows. The System is a trust and government agency created by the 1951 Enabling Act and is structured to provide pensions and retirement benefits to employees of Puerto Rico’s government. Seeking to decrease an unfunded liability of almost \$10 billion, a Resolution was adopted that allowed for the issuance of bonds. The System then executed a Security Agreement that purported to grand bondholders a security interest in “Pledged Property.” The Security Agreement did not define “Pledged Property,” but stated that all capitalized words in the Security Agreement would have the same meaning as that ascribed to them in the Resolution. Two financing statements (“2008 Financing Statements”) were filed with the Puerto Rico Department of State. The 2008 Financing Statements described the collateral as “the pledged property described in the Security Agreement attached as Exhibit A hereto...” The Security Agreement was attached as Exhibit A but it did not describe the “Pledged Property” except as it purported to do so by reference to the Resolution that was not attached to the 2008 Financing Statements.

After the filing of the 2008 Financing Statements, the Puerto Rico legislature amended the Enabling Act in 2013. The English version of the 2013 Enabling Act refers to the System in various places as the Employees Retirement System of the Government of the Commonwealth of Puerto Rico and in other places as the Retirement System for Employees of the Government of the Commonwealth of Puerto Rico (“RSE”). In 2015 and 2016, the System filed amendments to the 2008 Financing Statements (“Amendments”). Between the filing of the 2008 Financing Statements and the Amendments, Puerto Rico repealed its earlier versions of Article 9 and enacted a revised version.

The System through PROMESA brought this case in federal district court seeking declarations on the status and validity of the bondholders’ security interest. First, the district court held that any security interest the bondholders might possess was not perfected by the 2008 Financing Statements because those statements did not contain an adequate description of the collateral as required by Article 9. Second, the court determined that the Amendments did not

perfect the security interest either because they did not identify the debtor by its correct legal name, which the court determined was RSE. The Court then held that the oversight board could avoid the lien under the strong arm provision.

The First Circuit agreed with the district court and held that the 2008 Financing Statements did not perfect the bondholders' security interest. The version of Article 9 operative in 2008 required that financing statements contain "a statement indicating the types, or describing the items, of collateral." The Circuit stated that there was no literal compliance with the rule because (a) the 2008 Financing Statements do not describe the types of collateral (example "equipment"); (b) they do not attach the Resolution referenced as describing the collateral; and (c) they do not tell interested parties even where to find the referenced document. The Circuit explained that the goal of the filing system is to provide notice to other creditors and "requiring interested parties to contact debtors at their own expense about encumbered collateral, with no guarantee of a timely or accurate answer, would run counter to the notice purposes of the UCC." At best, the 2008 Financing Statements "gives an interested party notice about an interest in some undescribed collateral, but does not adequately specify what collateral is encumbered." (emphasis in original).

The First Circuit however held that the subsequent Amendments cured the defects in the 2008 Financing Statements. Revised Article 9 provides that a financing statement is sufficient only if it provides the name of the debtor and the secured party, and where it "indicates the collateral covered by the financing statement." (citing §2322(a)). A collateral description is sufficient "whether or not it is specific, if it reasonably identifies what is described" but a "[s]upergeneric description [is] not sufficient." (citing §2218). One of the "[e]xamples of reasonable identification" under Article 9 is a "[s]pecific listing" of the collateral. (citing §2218). Here, Exhibit A to the Amendments contained a detailed definition of "Pledged Property" to include "Revenues," "Funds," "Accounts," "Subaccounts" etc. Thus, "Pledged Property" satisfied one of the examples of reasonable identification by providing a specific listing of the collateral.

With respect to whether the Amendments contained a sufficient name of the debtor, the Circuit held it did. Article 9 contains different requirements for the names of registered organizations and for the names of individuals. The System was a registered organization formed under the 1951 Enabling Act. Under the UCC, when the debtor is a registered organization, the financing statement must provide "the name that is stated to be the registered organization's name on the public organic record most recently filed..." (citing §2323(a)(1)).

The Amendments, like the 2008 Financing Statements, identified the debtor as the ERS. The System asserted that this was an incorrect name and argued that the 2013 Enabling Act changed the debtors name to "RSE" as the act states that a "retirement and benefit system be designated as" "RSE." It argued that other sections of the 2013 Enabling Act, which referred to the debtor as ERS were irrelevant. The Circuit explained that in determining what name of the debtor is stated in the public organic record, the UCC does not direct focus to only one clause in a statute, but rather to the entire public organic record. The Circuit looked at the entire statute and found that ERS was used far more often than RSE, ERS was the official name of the debtor for over 60 years, and there is no explanation in the 2013 Enabling Act that it intended to change the name of the System to RSE.

Ultimately, because the bondholders satisfied Article 9's perfection requirements, their secured interests could not be avoided under PROMESA's incorporation of §544(a). A judicial creditor's lien is superior to a prior unperfected security interest, and only where a creditor has an unperfected lien on a debtor's property does the Bankruptcy Code empower a trustee to avoid the lien for the benefit of the estate.

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Second Circuit

Paca Tr. Creditors of Lenny Perry's Produce, Inc. v. Genecco Produce Inc., 17-1949, 17-2051, 913 F.3d 268 (2nd Cir., January 9, 2019)

In an appeal from a judgment in an adversary proceeding involving plaintiff and defendant creditors who each bought from and sold produce to a chapter 7 debtor, the Second Circuit affirmed the judgment of the district court (i) granting summary judgment to plaintiffs seeking to disallow the defendants from fully offsetting mutual debts that arose from the defendants' sales of produce to the debtor because the money owed to the defendants constituted assets of a trust governed by the federal Perishable Agricultural Commodities Act, 7 U.S.C. § 499 ("PACA") and (ii) permitting the defendants to recover a pro rata share of the trust that arose for their benefit under the terms of PACA (the "PACA Trust").

The plaintiffs and defendants in this case were both creditors of debtor Lenny Perry's Produce, Inc. ("LPP"). Prior to LPP's bankruptcy filing, defendant Genecco Produce, Inc., ("GPI") and LPP regularly sold produce to one another for resale to their respective customers. Because the produce consisted of perishable agricultural commodities, these transactions were governed by PACA. In connection with each transaction, the seller issued an invoice to the other party with a notice of intent to preserve its PACA rights. Instead of paying each other after each transaction, GPI and LPP accumulated mutual debts intended to offset one another. At the time of the bankruptcy filing, those debts totaled \$204,774.88, owed by GPI to LPP, and \$263,061.92, owed by LPP to GPI — a net balance of \$58,287.04 in GPI's favor.

The plaintiffs in this case were also merchants dealing in perishable agricultural commodities. Like GPI, they sold fresh produce to LPP. When LPP filed for bankruptcy, it owed the plaintiffs an estimated \$292,417.39.

After LPP filed for bankruptcy, the plaintiffs filed a motion to establish a PACA claims procedure, which the bankruptcy court granted (the "Claims Procedure Order"). Under the Claims Procedure Order, LPP was required to provide the plaintiffs' counsel with names and addresses of all potential PACA claimants not already listed in the bankruptcy petition, and the plaintiffs were

required to provide notice of the Claims Procedure Order to potential PACA claimants. Although the plaintiffs timely served GPI with notice of the Claims Procedure Order, GPI elected not to file a PACA claim but to pursue its offset claim instead, which it had already been seeking prior to the entry of the Claims Procedure Order.

The plaintiffs then filed an adversary proceeding against the defendants alleging that the \$204,774.88 owed by GPI to LPP constituted assets of the PACA Trust. In response, the defendants asserted that section 553(a) of the Bankruptcy Code and New York state law, specifically N.Y. Debt. & Cred. L. § 151, entitled them to a complete offset of any amount otherwise due to the PACA Trust by amounts that had been due to the defendants from LPP.

After several hearings in this case in both the bankruptcy court and the district court, the bankruptcy court issued a final report concluding that “the [PACA Trust’s] rights are not now, and never were, subject to the limitations that [LPP] suffered as to [GPI], or the defenses that [GPI] had against [LPP].” According to the bankruptcy court report, “every item of perishable commodities [LPP] ever handled was held by it in trust, as were any proceeds realized from those items,” so that “everything that [LPP] received from [GPI] or was entitled to receive from [GPI] on account of perishable commodities delivered to [GPI] was subject to the statutory PACA Trust in favor of growers, cooperatives, etc.[,] which were owed money for those commodities.” The bankruptcy court also noted that the PACA Trust existed “from the moment that [LPP] bought or sold commodities subject to PACA.”

The bankruptcy court further decided that LPP’s and GPI’s method of doing business by maintaining mutual debts was not consistent with PACA, which requires timely payments “so that all providers of perishable agricultural commodities to [LPP] had a chance to receive cash payments from [GPI] for what they provided.” It concluded that “equity requires treatment that PACA would seem to require,” which here would be a judgment against GPI equal to “the difference between what [GPI] owed [LPP] on the date of the Chapter 7 petition (and therefore owes to the PACA Trust) and the amount that [GPI] would receive as a PACA Trust beneficiary.”

The district court adopted the bankruptcy court’s report and recommendation that summary judgment be granted to the plaintiffs. The district court further concluded that the defendants were not entitled to a full offset of their mutual unpaid debts, but only to a pro rata share of the PACA Trust along with other unpaid LPP produce suppliers. Both the defendants and the plaintiffs appealed, the former on the grounds that they were entitled to a full off-set, and the latter on the grounds that the defendants should not be entitled to even a pro rata share of the PACA Trust because they did not comply with the terms of the Claims Procedure Order.

On appeal in the Second Circuit, the Court first considered whether the district court erred in concluding that LPP’s accounts receivable constituted PACA Trust assets and that the defendants were therefore not entitled to a statutory offset of their debts to LPP against LPP’s debts to them. The defendants asserted that the district court erred because New York state law and section 553(a) of the Bankruptcy Code entitle them to a complete offset of any amounts they owed LPP or the PACA Trust. In the alternative, they argued that questions of fact regarding the transfer of accounts receivable into the PACA Trust rendered the district court’s grant of summary judgment improper.

The Second Circuit disagreed with both of the defendants' arguments, holding first that because PACA assets are held in trust for the benefit of unpaid produce suppliers generally and never become part of a bankruptcy estate, and because such PACA creditors enjoy priority over non-PACA creditors, the defendants' offset defense under section 553 of the Bankruptcy Code and New York state law was unavailing, because trust law governed. Due to the fact that PACA provides unpaid produce sellers with priority over other creditors and establishes that the disposition of PACA assets is governed by trust law, the Second Circuit concluded that the district court did not err in deciding that the defendants were not entitled to the offset they sought under federal bankruptcy law and New York state law.

Second, the Second Circuit held that any factual dispute as to whether the defendants asserted their offset claim before the district court issued the Claims Procedure Order was immaterial. The Second Circuit reasoned that even if the defendants' offset claim predated the Claims Procedure Order, the PACA Trust arose immediately upon the sale of produce from the parties to LPP—long before the defendants asserted their offset claim—such that the accounts receivable associated with those transactions would not be subject to that defense. Accordingly, the Second Circuit determined that the district court correctly found that the defendants' and debtor's claims against each other were not subject to the statutory offset sought by the defendants.

The Second Circuit then addressed the issue of whether the district court erred in allowing the defendants to recover a pro rata share of the PACA Trust. While the plaintiffs did not dispute that the defendants, like the plaintiffs, were PACA creditors, they contended that the defendants were barred from recovery because they did not file a proof of claim pursuant to the Claims Procedure Order, which, as noted above, established deadlines for the plaintiffs' counsel to issue written notice to potential PACA claimants and for prospective claimants to file proofs of claim.

The Second Circuit again disagreed, noting that the defendants preserved their PACA claims by providing the statutorily required notice to the debtor in each invoice at issue and filed a proof of claim with the bankruptcy court before the district court had issued the Claims Procedure Order. The Second Circuit noted that based on ambiguities in the Claims Procedure Order, the defendants reasonably, although mistakenly, thought that they could have vindicated their rights as PACA creditors using a bankruptcy offset and elected not to file a PACA proof of claim. Under these circumstances, as the district court concluded, the Second Circuit held that PACA's statutory purpose would best be realized if the defendants were permitted to collect their pro rata shares of the PACA assets.

Accordingly, the Second Circuit affirmed the judgment of the district court in its entirety.

Seven Oaks Partners, LP v. Licata (In re Seven Oaks Partners, LP),
18-342, --- Fed.Appx. ----, 2019 WL 384060 (2nd Cir., January 30, 2019)

The Second Circuit affirmed the judgment of the district court affirming the bankruptcy court's denial of a claim filed by Cynthia Licata ("Licata") against chapter 11 debtor Seven Oaks Partners ("Oaks") because such claim was untimely.

Licata possessed a \$500,000 judgment against Oaks when it filed for bankruptcy in 2012, but Oaks did not initially list her as a creditor. About six months later, Oaks added Licata as holding a "disputed" and "unliquidated" claim, and the court set a bar date by which she could file a proof of claim for about eight months later. Licata did not file a proof of claim by the bar date, and instead did so about two months after the bar date. Oaks objected to Licata's claim on the basis of untimeliness, the bankruptcy court sustained the objection, and the district court subsequently affirmed.

The question on appeal in the Second Circuit was whether Licata's failure to timely file her proof of claim was the result of excusable neglect. Licata argued that the bankruptcy court abused its discretion in disallowing her proof of claim because Oaks first omitted listing her claim, then improperly scheduled her claim as one that was disputed and unliquidated rather than as liquidated and reflected in a final judgment, and then failed to properly notify her of the proceeding.

The Second Circuit began its analysis by noting that the burden of proving excusable neglect for the filing of a proof of claim after an applicable bar date lies with the claimant. Whether neglect is excusable is an equitable determination, that takes into consideration, among other factor (i) the danger of prejudice to the debtor; (ii) the length of the delay and its potential impact on judicial proceedings; (iii) the reason for the delay, including whether it was within the reasonable control of the claimant; and (iv) whether the claimant acted in good faith. The ultimate focus of the inquiry is whether the claimant was responsible for the delay.

Here, the Second Circuit found that Licata was responsible for the delay. The Second Circuit first noted that Licata had notice of the bankruptcy proceedings before the bar date through service on her lawyer, and such notice included the allegedly erroneous scheduling of her claim. Indeed, the bankruptcy court found that Oaks served notice on Licata at five different addresses, including that of her lawyer. Licata's lawyer also appeared in court prior to the expiration of the bar date where he discussed Oaks' bankruptcy, its impact on Licata's \$500,000 judgment, and the scheduling of Licata's claim. Accordingly, the Second Circuit held that Licata was on notice several months before the bar date passed, and that her neglect in filing the proof of claim past such date was inexcusable.

Licata argued that Oaks mischaracterized her claim in bad faith, and that if Oaks had scheduled her claim as undisputed, Licata's filing would have been unnecessary. The Second Circuit noted, however, that the improper scheduling of a claim does not excuse an untimely filing where the creditor has notice or actual knowledge of the bankruptcy with sufficient time to file a proof of claim before an applicable bar date—in such circumstances, the debt will be discharged even though it is not listed or scheduled, listed or scheduled improperly, or listed or scheduled tardily. Here, regardless of Licata's allegations of bad faith, once Licata possessed actual knowledge of Oaks' bankruptcy and the scheduling of her claim, it was her responsibility to file a

proof of claim and correct Oaks' mistaken characterization of her claim as disputed and unliquidated before the established bar date.

Accordingly, the Second Circuit held that Licata failed to demonstrate excusable neglect and affirmed the judgment of the district court.

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Fifth Circuit

In re: Ultra Petroleum Corp.,
913 F.3d 533 (5th Cir. 2019)

The issue before the Fifth Circuit was whether the creditors of a newly solvent debtor are “impaired” within the meaning of the Bankruptcy Code by a plan that gave them everything allowed by the Bankruptcy Code, but did not award everything to which the creditors would have been contractually entitled outside of the bankruptcy context. The Bankruptcy Court of the Southern District of Texas held that the creditors were impaired by the plan, concluding that “unimpairment ‘requires that [creditors] receive all that they are entitled to under state law,’” even if disallowed by the Bankruptcy Code. *Ultra*, 913 F.3d at 539. The Fifth Circuit disagreed, holding that creditors are not impaired by a plan that gives them all that they are allowed under the Bankruptcy Code and no more, choosing to “follow the monolithic mountain of authority holding the Code – not the reorganization plan – defines and limits the [creditor’s] claim in these circumstances.” *Id.* at 537.

This case involved the bankruptcy of Ultra Petroleum Corporation (the “Debtors”), an oil and gas company who voluntarily petitioned for Chapter 11 bankruptcy when the cost of crude oil sharply dropped from over \$100 per barrel to less than \$30 per barrel at a time when the company was burdened with a large amount of debt. However, during the bankruptcy, there was “a lottery-like rise in commodity prices,” and the Debtors became solvent again – a rare occurrence in a bankruptcy proceeding. *Id.* at 537-38. The Debtors proposed a reorganization plan to (1) pay the outstanding principal on their obligations, (2) pay pre-petition interest at a rate of 0.1%, and (3) pay post-petition interest at the federal judgment rate, and in doing so, treated their creditors as “unimpaired” and, thus, unable to object to the plan. *Id.* at 538.

Nevertheless, the creditors did object, arguing that their claims were impaired because the plan did not require the Debtors to pay post-petition interest at the contractual rate or to pay a contractual “Make-Whole Amount”, which required the Debtors, upon bankruptcy, to also pay the

interest the creditors would have received had regular payments continued. The bankruptcy court agreed with the creditors and ordered the Debtors to pay the Make-Whole amount and post-petition interest at contractual rates. *Id.* at 539.

The Fifth Circuit overturned this ruling on appeal, holding that the creditors were “unimpaired” within the meaning of the Bankruptcy Code and remanding to the bankruptcy court to determine the correct amount of post-petition interest due to the creditors. The Fifth Circuit started by examining the language of 11 U.S.C. § 1124(1) which states that “‘a class of claims or interests’ is not impaired if ‘the plan... leaves unaltered the [claimant’s] legal, equitable, and contractual rights.’” *Id.* at 540 (*quoting* 11 U.S.C. § 1124(1)). Consistent with the opinions of the Third Circuit and bankruptcy courts across the country, the Fifth Circuit interpreted this language to mean that “[i]mpairments result from what the *plan* does, not what the [bankruptcy] statute does.” *Id.* (*quoting In re Am. Solar King Corp.*, 90 B.R. 808, 819 (Bankr. W.D. Tex. 1988)). Thus, “[w]here a plan refuses to pay funds disallowed by the Code, the Code – not the plan – is doing the impairing.” *Id.* at 542.

The Court then turned to “whether the [Bankruptcy] Code disallow[ed] the creditors’ claims for the Make-Whole Amount and post-petition interest at the contractual default rates...” The Fifth Circuit provided guidance but ultimately remanded to the bankruptcy court to decide these questions. The Court first examined the common law and statutory history of post-petition interest in the bankruptcy context as a guide to current statutory interpretation.

The Fifth Circuit made clear that the creditors could only recover the Make-Whole Amount if the common law “solvent-debtor exception,” allowing interest to continue accruing at a contractual rate post-petition for a solvent debtor, survived Congress’s enactment of 11 U.S.C. § 502(b)(2). That statute “requires a bankruptcy court to disallow a claim ‘to the extent that [it seeks] unmatured interest.’” *Id.* at 547 (*quoting* 11 U.S.C. § 502(b)(2)). Because the Make-Whole Amount represented “the value of the interest the Noteholders would have eventually received if the Notes had not been prepaid,” and was not due on the day the Debtors filed their Chapter 11 petitions, it would be expressly barred as unmatured interest by § 502(b)(2) unless the English common law “solvent-debtor exception” survived the statute’s enactment. The Court expressed doubt about the exception’s survival based on “Congress[’s] careful[] incorporat[ion] [of] some pre-Code principles but not others,” as well as its creation of a motion-to-dismiss procedure for bad faith filings – the core concern motivating courts to develop the solvent-debtor exception in the first place. *Id.* at 549.

Additionally, the Court reasoned that the legislative history of 11 U.S.C. § 1124(3) indicates that the creditors are entitled to some post-petition interest on their bankruptcy award, as the parties agree, but leaves open two potential paths for determining the amount of post-judgment interest due. The first would apply the general post-judgment interest statute which “allows interest ‘on any money judgment in a civil case recovered in a district court’ and sets a rate by reference to certain Treasury yields.” *Id.* at 550 (*citing* 28 U.S.C. § 1961). The second approach would apply equity to determine an appropriate post-petition interest rate taking into account the circumstances of the case.

With this guidance, the Fifth Circuit remanded the case to the bankruptcy court for determination of whether the Bankruptcy Code disallows the Make-Whole Amount or post-petition interest, and if not, how much the Debtors must pay to creditors.

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Buccaneer Res., L.L.C. v. Burton (In re Buccaneer Res., L.L.C.),
912 F.3d 291 (5th Cir. 2019)

In this matter, the issues before the Fifth Circuit were: (1) whether a tortious interference with contract claim brought against a third-party secured lender by a debtor's former CEO was a cause of action that belonged to the debtor's bankruptcy estate; and (2) whether the tortious interference claim was subject to bankruptcy court jurisdiction.

Before Buccaneer Resources LLC ("Debtor") filed for chapter 11 bankruptcy, it fired its CEO, Curtis Burton. Mr. Burton alleged that his firing was improper, and contended that Debtor's primary secured creditor, Meridian Capital CIS Fund ("Meridian"), was involved in Debtor's decision to fire him.

During Debtor's bankruptcy, Debtor and Meridian entered into a settlement that released Meridian from any potential claims that Debtor may have had against it (the "Meridian Settlement"). The Meridian Settlement was incorporated into Debtor's bankruptcy plan. Meanwhile, Mr. Burton filed a claim in Debtor's bankruptcy for breach of contract; he later withdrew his claim and filed the tortious interference claim in state court against Meridian. Meridian removed the case to federal court, arguing that Mr. Burton's tortious interference claim belonged to Debtor's estate and was thus released in the Meridian Settlement. The bankruptcy court sent the tortious interference claim back to state court, concluding that the claim belonged to Mr. Burton and should be litigated in state court. The district court affirmed.

In determining whether Debtor's estate or Mr. Burton owned the tortious interference claim against Meridian, the Fifth Circuit applied the framework provided by *In re Seven Seas Petroleum, Inc.*, 522 F.3d 575 (5th Cir. 2008). Specifically, the Fifth Circuit examined whether Mr. Burton suffered a direct injury or one that was derivative of an injury to the Debtor. The Fifth Circuit determined that the tortious inference claim was based on an injury to Mr. Burton that was independent of any injury to Debtor; in other words, the claim involved a direct injury to Mr. Burton, not an injury that was derived from or dependent on harm to Debtor. As such, the Fifth Circuit found that the interference claim belonged to Mr. Burton and not Debtor's estate. Because

the tortious interference claim was not property of the estate, the Fifth Circuit found that there was no basis for bankruptcy court jurisdiction. The Fifth Circuit affirmed the district court's order remanding the case to state court.

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Sixth Circuit

In re Thomas,
No. 16-27850-K, 2019 WL 268578, (Bankr. W.D. Tenn. Jan. 18, 2019)

In January 2019, the United States Bankruptcy Court for the Western District of Tennessee discussed the analysis applicable to a finding of “cause” under 11 U.S.C. § 1104(a)(1). In *Thomas*, a prepetition judicial lien creditor filed a motion under 11 U.S.C. § 1104, seeking the appointment of a Chapter 11 trustee with “limited powers.” *Id.* In determining whether the trustee should be appointed in lieu of the debtor remaining in possession, under either the “cause” or “best interests of the creditors” prongs of section 1104, the court relied on precedent from the Third Circuit. *Id.* at *6-10 (analyzing *In re Marvel Entm't Group*, 140 F.3d 463 (3d Cir. 1998)). In *Marvel Entertainment*, the Third Circuit held that there “is no per se rule by which mere conflicts or acrimony between debtor and creditor mandate the appointment of a trustee,” and thus, the courts must determine whether cause exists on a case-by-case basis. *Id.* at *7 (citing *In re Marvel Entm't Group*, 140 F.3d at 473). Adopting the Third Circuit's analysis, the court held that similar to *Marvel Entertainment*, “there is no reasonable likelihood of any cooperation among the parties in the foreseeable future, and the parties have been working at cross-purposes since this case was transferring to this Court.” *Id.* at *8. As a result of the parties continuous bickering and numerous discovery disputes, the court found that sufficient “cause” indeed exists here to cause the appointment of a Chapter 11 trustee under 11 U.S.C. § 1104(a)(1). *Id.*

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Eighth Circuit

In re Curran,
595 B.R. 272 (B.A.P. 8th Cir. 2019)

Curran filed a voluntary chapter 7 petition with an application to waive the filing fee. The application was denied, and she was ordered to pay in four equal installments. After conducting the 341 meeting, the Chapter 7 Trustee filed objections to Curran's exemption claims and an adversary proceeding to recover real estate she transferred pre-petition. Curran moved to voluntarily dismiss her bankruptcy case which was denied as was her motion to reconsider that ruling.

When the third installment was not received a standard order was entered to show cause for why the case should not be dismissed. The Trustee filed a response requesting that automatic dismissal of the case for non-payment of the filing fee be denied. The Bankruptcy Court entered an order vacating the Order to Show Cause. Curran then asked the Bankruptcy Court to reconsider the order. Curran's filing was construed as a motion made under Federal Rule of Civil Procedure 60(b). The Court denied relief and Curran appealed.

On appeal, the B.A.P. explained that Rule 60(b) allows a court, in its discretion, to relieve a party from a final judgment, order or proceeding for "mistake, inadvertence, surprise, or excusable neglect[.]" and that the Rule includes a catchall provision that allows a court to grant relief where it is justified for any other reason. However, a reversal of a district court's denial of such motion is rare because Rule 60(b) authorizes relief only in exceptional cases where the movant establishes a meritorious defense and lack of prejudice to the plaintiff. Because Curran's brief failed to identify any clearly erroneous facts or incorrect applications of the law that would entitle her to relief under Rule 60(b), the B.A.P. affirmed the Bankruptcy Court's order.

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Ninth Circuit

Cobb v. City of Stockton (City of Stockton),
909 F.3d 1256 (9th Cir. 2018)

In *Cobb v. City of Stockton*, the Ninth Circuit dismissed an appeal from the bankruptcy court's order denying an objection to the debtor's Chapter 9 confirmation plan as equitably moot. In July of 2012, the City of Stockton filed for relief under Chapter 9 of the bankruptcy code. The

ensuing Chapter 9 proceedings was “complex, costly, and contentious,” involving, among others, appellant’s objection to the city’s plan of confirmation.

The appellant’s father owned a parcel of land in the city of Stockton, and the City determined that the public necessity required the condemnation of a strip of land across that parcel for the purpose of building a road. The city of Stockton initiated a “quick-take” condemnation, where it took possession of the property after depositing \$100,000 in a fund. After the passing of appellant’s father, Michael Cobb (“Cobb”) inherited the parcel, substituted into the condemnation action, and withdrew previously deposited funds. Several years later, Cobb filed a complaint in Superior Court seeking relief for inverse condemnation, alleging that (1) the city had failed to prosecute the eminent domain action; and (2) the true market value of the parcel remained undetermined. As a result, Cobb had not received the just compensation due to him under California’s Constitution. The city demurred and the court sustained on statute of limitations grounds with respect to his inverse condemnation claim.

Cobb appealed the lower court’s dismissal of his inverse condemnation claim on statute of limitations grounds. The Court of Appeals reversed the dismissal finding that his claim was timely because it had not accrued until the city’s occupation of the property became wrongful, which did not occur until the eminent domain proceeding was dismissed. What remained of Cobb’s state court action was an unliquidated and unsecured monetary damage claim.

When the city filed its list of creditors in this case, it categorized Cobb’s claim as an unsecured, disputed liability claim of an unknown amount. Cobb filed a proof of claim for \$4,200,997.26, consisting of a principal of \$1.5 million for the parcel, \$2.2 million in interest on the principal, \$350,000 in attorney’s fees and expenses, \$13,000 in costs of suit, and \$15,000.00 in real estate taxes and maintenance and insurance costs. He did not assert in his proof of claim that it was secured. A year later, the city filed its first amended plan for adjustment of its debts, which listed 19 classes of claims and included Cobb’s claim in Class 12 as a general unsecured claim.

On February 11, 2014, Cobb filed an objection to confirmation of the plan, alleging that his “claims in inverse condemnation are protected by the Fifth and Fourteenth Amendments to the United States Constitution and cannot be impaired by the Plan.” He did not contest the listing of his claim as unsecured. The following year, the bankruptcy court overruled Cobb’s objection to confirmation of the pending plan of adjustment, explaining that Cobb was left with only a claim for more money for two reasons: (1) the road had long since been built on the parcel; and (2) by withdrawing the probable just compensation, he had waived by operation of law all claims except a claim for greater compensation. Cobb did not seek a stay of plan confirmation from the bankruptcy court. He timely appealed the bankruptcy court’s order overruling his objection to the plan to the district court for the Eastern District of California. He did not seek a stay of plan confirmation before the district court. Cobb and the city both stipulated that the appeal warranted proceeding directly to the Court of Appeals for the Ninth Circuit, which granted his motion for direct appeal. Cobb did not seek a stay of plan confirmation. The bankruptcy court confirmed the city’s plan of adjustment and issued a final judgment. Cobb again did not seek a stay following plan confirmation.

In the Ninth Circuit, four factors are examined in determining whether an appeal is equitably moot: (1) whether a stay was sought; (2) whether the plan has been substantially consummated; (3) the effect of the remedy on third parties not before the court; and (4) “whether the bankruptcy court can fashion effective and equitable relief without completely knocking the props out from under the plan and thereby creating an uncontrollable situation for the bankruptcy court.”

The court found that none of these four factors weighed in Cobb’s favor; it was not a close call. First, the court found that Cobb never sought a stay; he “did nothing.” Second, the panel noted that the Plan became effective in February 2015. Third, the court highlighted that a reversal of the Confirmation Order would undermine the settlements negotiated with the unions, pension plan participants and retirees, bond creditors, and capital market creditors, all of which were built into the reorganization plan. In addition to these creditors, reversal of the confirmation order would have a substantial effect on the citizens of Stockton, who depend upon the city for the provision of vital services. Finally, undoing the plan was precisely the remedy that Cobb sought. Though he had argued that he was only seeking monetary relief, the subject of Cobb’s appeal was the bankruptcy court’s order overruling his objection to the plan confirmation. To the court, sustaining the objection would mean disassembling the confirmed reorganization plan.

The panel also affirmed the bankruptcy court’s conclusion that Cobb’s claim—that the Takings Clause exempted his unsecured claim from reorganization—failed on the merits. As the Court noted, both the City of Stockton and Cobb classified his claim as an unsecured monetary claim. He had never challenged the categorization of the claim as unsecured. Further, the Takings Clause is only implicated in bankruptcy if the creditor had actual property rights. Cobb had relinquished his property interest in the land more than 15 years before the bankruptcy was filed, when the City came in appraised the property, deposited funds, etc. Michael’s father never objected to the probably just compensation finding or judgment by the Superior Court. Cobb independently relinquished any property interest had had by allowing the City to actually construct the road and open the road to public use. In sum, Cobb’s purported property interest was really a claim for monetary relief.

Hunsaker v. United States,
902 F.3d 963 (9th Cir. 2018)

In *Hunsaker v. United States*, the Ninth Circuit reversed and remanded the district court’s reversal of the bankruptcy court’s award for emotional distress damages against the Internal Revenue Service of the United States (“IRS”) for violating the automatic stay by sending the debtors collection notices. The debtors, Jonathon and Cheryl Hunsaker, filed for relief under Chapter 13. Even though the IRS was notified of the debtors’ bankruptcy, it sent at least four notices to these debtors, demanding payment and threatening enforcement actions. The debtors filed an adversary proceeding against the IRS for willfully violating the automatic stay under section 362(k) of the bankruptcy code, seeking damages for their emotional distress. The IRS conceded sending the notices to the debtors but argued that sovereign immunity barred damages for emotional distress. Unpersuaded, the bankruptcy court awarded the debtors \$4,000 in damages. The IRS appealed. The district court reversed and found that Congress had not waived sovereign

immunity for emotional distress damages under Section 362(k). The debtors appealed to the Ninth Circuit.

Under Section 106(a), sovereign immunity is abrogated as to a government unit to the extent set forth in, among other statutes, Section 362 – the bankruptcy code’s automatic stay statute. A court may issue against the government unit an order, process, or judgment, including an order or judgment awarding a money recovery, but not including an award for punitive damages. Section 362(k) reads that an individual injured by any willful violation of a stay shall recover actual damages, including costs and attorneys’ fees. The Ninth Circuit in *Dawson v. Washington Mutual Bank, F.A. (In re Dawson)*, 390 F.3d 1139, 1148 (9th Cir. 2004), previously held that actual damages under Section 362(k) included damages for emotional distress. The panel must determine whether sovereign immunity prevents an award of emotional distress damages against the IRS for willful violation of the automatic stay.

The Ninth Circuit held that the award of emotion distress damages fell within the waiver of sovereign immunity. Section 106(a)’s text plainly waives sovereign immunity for court-ordered monetary damages (except for punitive damages) under the waiver’s enumerated provisions that included section 362(k). The court also rejected the IRS attempt to limit the scope of “monetary recovery” as to referring only to claims seeking to restore to the estate sums of money unlawfully in the possession of government entities. The court noted that section 106(a)(3) reference to punitive damages alone eliminates the IRS’s argument.

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Tenth Circuit

The Slovak Republic v. Loveridge (In re Eurogas, Inc.),

No. 17-4197, 2019 WL 103891 (10th Cir. Jan. 4, 2019) (unpublished)

The Tenth Circuit approved the decision by the bankruptcy court authorizing the trustee to abandon ownership interests, if any, in talc deposits located in the Slovak Republic that were undisclosed in the debtor’s prior, closed chapter 11 case. After investigation, the trustee concluded that the estate’s ownership of the talc deposits was uncertain and that claims to those deposits would be difficult and expensive to administer. As part of the abandonment, the trustee and the successor entity to the debtor entered into an agreement that, among other things, provided that claims to the talc deposits would be abandoned and funds would be paid to the estate by the purchaser of a claim held by a judgment creditor of the predecessor debtor entity. The Slovak

Republic purchased unrelated claims and then objected to the compromise and directly related notice of abandonment. Assuming without deciding that the Slovak Republic was an “aggrieved person” with standing to appeal, the Tenth Circuit rejected the proposed standard of review offered by the Slovak Republic (de novo) and the trustee (abuse of discretion) as to approval of the proposed abandonment. Instead, the Tenth Circuit adopted a step-by-step approach. First, the court explained that the definition of the terms “burdensome” and “inconsequential” as used in Code Section 554(a) was legal in nature and subject to de novo review. Second, the court explained that factual findings as to whether an asset is “burdensome” or of “inconsequential” value to the estate are reviewed for clear error. Third, the court explained that the bankruptcy court must determine whether its fact findings as to whether a particular asset is “burdensome” or of “inconsequential” value is a mixed question of fact and law, but because it was primarily factual in nature, that determination was also reviewed for clear error. Finally, the court explained that the ultimate determination of whether to approve or reject a proposed abandonment was reviewed for an abuse of discretion. The Tenth Circuit approved the bankruptcy court’s approval of the trustee’s abandonment under these standards of review.

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