Bankruptcy Circuit Update

Featuring cases from July 2015

First Circuit

Scotiabank De Puerto Rico v. Lorenzo, (In re Lorenzo),
2015 WL 4537792 (1st Circuit B.A.P., July 24, 2015)(Not for Publication).

Bankruptcy Appellate Panel for the First Circuit Court of Appeals ("BAP") affirmed the Bankruptcy Court's orders disallowing the creditor appellant's amended proof of claim and related motions. Creditor had objected to confirmation asserting the debtor's Chapter 13 plan was underfunded because it did not provide for payment of its pre-petition fees. Debtor objected to the proof of claim related to the fees. At the confirmation hearing, which the creditor failed to appear, the court granted the debtor's objection to the proof of claim and overruled the creditor's objection to confirmation. Later, the creditor filed an amended proof of claim and Rule 59(e) motion, both of which were denied. In essence, creditor was using the Rule 59(e) motion to rehash the same arguments which did not satisfy the requisites of such motion. A separate hearing, other than the confirmation hearing, was not required to address the creditors claims, and the creditor failed to appear, after having been given notice of the hearing, failing to prosecute its position as required by local rule.

Sauer Inc., v. Lawson (In re Lawson),
--- F.3d ----, 2015 WL 3982395 (1st Cir., July 1, 2015).

Court of Appeals for the First Circuit vacated the Bankruptcy Court's order dismissing the creditor's adversary proceeding against the debtor for non-dischargeability, and remanded based on its opinion. The First Circuit joined the Seventh Circuit holding as non-dischargeable debts incurred as a result of the debtor knowingly accepting a fraudulent conveyance intended to defraud the transferor's creditors. Pre-petition, debtor's father incurred a judgment and transferred cash to his daughter's (debtor) corporation to apparently avoid paying the judgment, which transfer as to the father was deemed fraudulent by the state court. The daughter transferred much of the money then to herself. The judgment creditor then pursued the daughter for the money, and she thereafter filed Chapter 13 and listed the father's creditor as a debt to be discharged. The First Circuit was asked to resolve the narrow but significant issue of whether a debt that is not discharged in Chapter 13 as a debt for money or property obtained by actual fraud extends beyond debts incurred through fraudulent misrepresentation to also include debts incurred as a result of knowingly accepting a fraudulent conveyance that the transferee knew was intended to hinder the transferor's creditors, and the First Circuit concluded that it does.

Franklin California Tax-Free Trust, et al., v. Commonwealth of Puerto Rico, et al.,
--- F.3d ----, 2015 WL 4079422 (1st Cir., July 6, 2015).

Court of Appeals for the First Circuit ruled that Puerto Rico's enactment of its own bankruptcy laws was preempted by 11 U.S.C. Section 903(1), which section ensures the

uniformity of federal bankruptcy laws by prohibiting state municipal debt restructuring that bind creditors without their consent. Because Puerto Rico may not authorize its municipal utilities to file Chapter 9, it attempted unsuccessfully through the law's enactment to allow the utilities to restructure under state law.

Sitka Enterprises, Inc., et al., v. Miranda, et al.,(In re Gonzalez, Reyes),
--- F.3d ----, 2015 WL 4597594 (1st Cir., July 31, 2015).

Court of Appeals for the First Circuit ("First Circuit") ruled that it had no jurisdiction over the appeal as the orders at issue were not final orders. The court below had denied a jury trial and had denied remand to the state court of the action at issue.

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Second Circuit

***Dedvukaj v. GECMC 2007 C-1 Burnett Street (In re Hoti Enterprises, L.P.)*,**
605 Fed.Appx. 67 (2nd Cir., July 6, 2015)

The Second Circuit affirmed the district court's holding that the bankruptcy court did not err when it ordered debtor Victor Dedvukaj ("Dedvukaj") and the debtor corporations of which he was a principal to pay damages. The bankruptcy court had issued the order after finding that Dedvukaj and the debtor corporations violated the terms of a previous order confirming the chapter 11 reorganization plan and multiple subsequent contempt orders.

On appeal, Dedvukaj challenged the payment order as unduly onerous and not compliant with the standards for civil contempt damages, arguing that the attorney's fees and expenses awarded as damages were excessive and that the bankruptcy court failed to consider his financial circumstances as required by law. The Second Circuit was not persuaded by either of these arguments and instead found that the record reflected that the bankruptcy court had carefully and independently reviewed the attorney time and expense reports to ensure that they were reasonable and commensurate with the tasks undertaken and the hourly rates of competitors in the marketplace. Though Dedvukaj claimed that the bankruptcy court had merely "rubber stamped" the disputed fees, the Second Circuit found that bankruptcy court had thoroughly assessed the submitted time records, identifying vague and non-reimbursable entries and commensurately reducing the amount of damages.

The Second Circuit also rejected Dedvukaj's argument based on the bankruptcy court's failure to consider his financial circumstances, holding that Dedvukaj conflated the type of compensatory damages levied here with punitive sanctions imposed to coerce compliance with a court's order, only the latter of which requires a court to "consider the amount of defendant's financial resources and the consequent seriousness of the burden to that particular defendant." United States v. United Mine Workers of Am., 330 U.S. 258, 304 (1947). Finding both of Dedvukaj's arguments unpersuasive, the Second Circuit thus affirmed the district court's order.

***Food Employers Labor Relations Association v. The Great Atlantic & Pacific Tea Company,* --- Fed.Appx. ----, 2015 WL 4038579 (2nd Cir., July 2, 2015)**

The Second Circuit affirmed the district court's holding that the bankruptcy court properly denied the claim for administrative expenses filed by the Food Employers Labor Relations Association and United Food and Commercial Workers Pension Fund ("FELRA"). FELRA sought administrative expense treatment for an amount that it claimed was properly attributable to post-petition operations conducted by the debtor, The Great Atlantic & Pacific Tea Company ("A&P"), and thus to the post-petition labor of FELRA's members.

Section 503(b) of the Bankruptcy Code provides that, "[a]fter notice and a hearing, there shall be allowed administrative expenses, . . . including . . . the actual, necessary costs and expenses of preserving the estate including . . . wages, salaries, and commissions for services rendered after the commencement of the case." In the Second Circuit, claims for administrative expenses arising out of transactions between a creditor and a debtor-in-possession are limited to the consideration supplied to the debtor-in-possession for use in the operation of the debtor's business. Additionally, a debt can only be an administrative expense if the debtor received the consideration for the obligation after the commencement of bankruptcy proceedings.

Here, FELRA's proposed calculation method for its claim amount involved performing the operations necessary to arrive at A&P's total withdrawal liability using the presumptive method described in The Employee Retirement Income Security Act of 1974 ("ERISA"), but stopping once FELRA's share of the unfunded vested benefits allocated to the year 2011 had been calculated. The Second Circuit was not convinced by this calculation method, finding that it bore no causal relationship to the post-petition consideration provided by the covered employees, either in terms of hours worked or in terms of the employees' willingness to work at all; as such, FELRA was not able to meet its burden of showing that A&P received the consideration for FELRA's claim after the commencement of bankruptcy proceedings. The Second Circuit was also not persuaded by FELRA's claim that its calculation method was the only method that complied with ERISA, because FELRA's own expert admitted that ERISA had nothing to say about how a withdrawal liability claim should be partitioned for bankruptcy purposes. Furthermore, the Second Circuit reasoned that the ERISA presumptive method is intended to provide a total withdrawal liability amount, and the various subtotals that go into that final total serve no independent purpose in the statute. As such, the Second Circuit found that the bankruptcy court did not err in denying FELRA's claim for administrative expenses and therefore affirmed the order of the district court.

Crest One SpA v. TPG Troy, LLC, (In re TPG Troy, LLC)
--- F.3d ----, 2015 WL 4220619 (2nd Cir., July 14, 2015)

The Second Circuit affirmed the bankruptcy court's order denying the involuntary chapter 7 petition filed by creditors Crest One SpA, Lansdowne Capital SA, and SPQR Capital (Cayman) Ltd. (together, the "Creditors") against debtors TPG Troy, LLC and T3 Troy, LLC (together, the "Troy Entities"). The Second Circuit also denied the Creditors' motion to withdraw the reference to bankruptcy court and affirmed the bankruptcy court's award of attorneys' fees and costs to the Troy Entities pursuant to Section 303(i)(1) of the Bankruptcy Code.

This case was one of several commenced by the Creditors and others to recover losses incurred when subsidiaries of Hellas Telecommunications, SARL ("Hellas") defaulted on notes valued at approximately €1.3 billion (the "Notes"). Though the Troy Entities claimed that they did not issue or guarantee the Notes and had sold their interest in Hellas long before the default, the Troy Entities did partially own Hellas at the time the Notes were issued.

On December 21, 2012, the Creditors filed involuntary petitions against the Troy Entities in bankruptcy court pursuant to Section 303 of the Bankruptcy Code, asserting that the Troy Entities were liable for the debts of the Hellas companies based on an alter ego theory. The Troy Entities moved to dismiss the petitions, and the bankruptcy court granted the motion to dismiss on two grounds. First, the bankruptcy court concluded that dismissal was appropriate under Bankruptcy Code § 303(b)(1), finding a bona fide dispute as to whether a debt was owed based on the "plethora of ongoing litigation," and the factual showing made by the Troy Entities as to whether they engaged in the transaction at issue. Second, in the alternative, the bankruptcy court concluded abstention pursuant to Bankruptcy Code § 305(a)(1) was proper, given that litigation regarding the same transaction was already in progress in multiple other forums, and the primary issues implicated state, not federal, law. After the bankruptcy court dismissed the involuntary petitions, the Troy Entities moved to recover attorneys' fees, costs, and punitive damages pursuant to Bankruptcy Code § 303(i). The bankruptcy court declined to award punitive damages, but awarded the Troy Entities $513,427.16 in attorneys' fees and costs, finding that the fee award was reasonable "[b]ased on the totality of the circumstances."

The Creditors appealed the dismissal of the involuntary petitions and the award of attorneys' fees and costs to the district court, which affirmed the bankruptcy court's verdict. On appeal in the Second Circuit, the Creditors argued (i) that the court lacked jurisdiction to consider their own appeal on the basis of mootness, (ii) that they were entitled to a jury trial to determine whether attorneys' fees were warranted, and (iii) that the bankruptcy court erred in awarding attorneys' fees.

The Second Circuit first considered whether a finding of abstention under Section 305(a) of the Bankruptcy Code bars review of an attorneys' fee award. The Second Circuit had addressed a similar issue in *Calabro v. Aniqa Halal Live Poultry Corp.,* 650 F.3d 163, 165 (2d Cir. 2011), where the court held that though it lacked appellate jurisdiction to review a district court order remanding a case to state court pursuant to 28 U.S.C. § 1447(d), it nevertheless

possessed jurisdiction to review the statutorily-authorized award of attorney's fees and costs made by the district court when it found removal improper. Similarly, here the attorneys' fees and costs at issue were expressly authorized by Section 303(i), and there was no discernable basis for treating the Second Circuit's jurisdiction differently. Additionally, the Second Circuit noted that other circuits have held that a money judgment for attorneys' fees and costs provides a court with a live controversy capable of review even if the underlying issues raised by the appeal are moot.

Finding it had jurisdiction to decide the remaining issues, the Second Circuit next considered whether the Creditors were entitled to a jury trial to determine whether attorneys' fees and costs should have been awarded. The Second Circuit rejected the Creditors' argument that the bankruptcy court lacked the constitutional authority to deem their jury demand waived, finding that the argument was foreclosed by the U.S. Supreme Court's opinion in *Wellness International Network v. Sharif*, 135 S.Ct. 1932 (2015). In that case, the Supreme Court clarified that "Article III is not violated when the parties knowingly and voluntarily consent to adjudication by a bankruptcy judge…the key inquiry is whether the litigant or counsel was made aware of the need for consent and the right to refuse it, and still voluntarily appeared to try the case before the non-Article III adjudicator." Here, the Second Circuit found that Creditors' counsel had explicitly consented to allowing the bankruptcy court to determine the issue of attorneys' fees and costs in the absence of a punitive damages award.

For the purpose of deciding whether there was a basis for the award of attorneys' fees and costs pursuant to Section 303(i) of the Bankruptcy Code, the Second Circuit then turned to the issue of whether there was a bona fide dispute requiring dismissal of the involuntary petitions. Here, the Creditors challenged the finding of a bona fide dispute by arguing that the bankruptcy court failed to examine the pending related litigation to determine if there was a bona fide dispute regarding alter ego liability. The bankruptcy court had found that a bona fide dispute existed based not only on the pending litigation, but also on the Troy Entities' vigorous assertion that they were not liable under the contracts as alter egos of the Issuers because no facts supported alter ego liability. The Second Circuit thus found no error in the bankruptcy court's findings.

Finally, the Second Circuit held that the bankruptcy court did not abuse its discretion in awarding attorneys' fees, noting that nothing in the record supported the Creditors' arguments against the award. Moreover, the Second Circuit reasoned that such an award would serve to discourage the filing of involuntary petitions to force debtors to pay on a disputed debt. The Second Circuit thus agreed with the bankruptcy court that "aggressive litigation conduct" by the Creditors' counsel had "substantially increased the attorneys' fees and costs expended to defend the Troy Entities against the improperly filed involuntary petitions," and as such, the award of attorneys' fees was proper.

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Fourth Circuit

***Houck v. Substitute Trustee Servs., Inc.*,**
--- F.3d ----, 2015 WL 3973527 (4th Cir. 2015):

On July 1, 2015, a unanimous panel of the Fourth Circuit vacated a decision of the U.S. District Court for the Western District of North Carolina, that granted a defendant's motion to dismiss a complaint filed by a chapter 13 debtor seeking damages for violation of the automatic stay under 11 U.S.C. § 362(k).

Several days after the debtor's second *pro se* chapter 13 filing within 180 days, the debtor's home was sold at a foreclosure sale. After unsuccessful attempts to void that sale, the debtor did not contest dismissal of the bankruptcy case. Subsequently, the debtor filed a complaint in district court against the substitute trustee that conducted the foreclosure and the related lenders asserting a claim under § 362(k) for violation of the automatic stay. First, the district court dismissed the complaint on the substitute trustee's motion to dismiss that the complaint failed to state the fact that the substitute trustee had notice of the bankruptcy. As to the other defendants, the district court dismissed the complaint for lack of subject matter jurisdiction, stating that the debtor's § 362(k) claim did not create a private right of action that could be heard outside of the bankruptcy court. The Fourth Circuit dismissed an earlier appeal as to those rulings because the orders were not final.

As to the instant appeal, the Fourth Circuit determined that it did have jurisdiction to hear the appeal, recalling its earlier mandate and relying on the doctrine of cumulative finality. Further, the Fourth Circuit, with the benefit of *amicus* briefing, held that the bankruptcy court does not have exclusive jurisdiction to hear § 362(k) claims. Thus, the district court, below, had jurisdiction over the debtor's complaint.

As to the motion to dismiss, the Fourth Circuit held that the debtor had sufficiently alleged that the substitute trustee had notice of the bankruptcy filing when it conducted the foreclosure sale. The Fourth Circuit wrote that that district court "incorrectly undertook to determine whether a lawful alternative explanation appeared more likely." Yet, "[t]o survive a motion to dismiss, a plaintiff need not demonstrate that her right to relief is probably are that alternative explanation are less likely . . . ." The Fourth Circuit held that the debtor stated a plausible claim for relief under § 362(k) and reversed and remanded the matter for further proceedings.

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Fifth Circuit

***Riverbend Condominium Assoc. v. Green* (*In re Green*)**
--- F.3d ---, 2015 WL 4231760 (5th Cir., July 13, 2015)

The Fifth Circuit affirmed the district court's ruling that, as a matter of first impression under Louisiana law, condominium association's lien against debtor's condominium unit was statutory, and thus could be modified pursuant to debtor's plan. Specifically, the Fifth Circuit found that a creditor's lien on Debtor's Condominium is based on the privilege granted to it by the Louisiana Condominium Act, making it a statutory lien. Accordingly, the anti-modification provision of 11 U.S.C. § 1322 does not apply.

Bodin Concrete, L.P. v. Concrete Opportunity Fund II, LLC,
--- Fed. Appx. ---, 2015 WL 41539 (5th Cir., July 10, 2015).

The Fifth Circuit affirmed the Bankruptcy Court's decision to award Appellee a fee for substantially contributing to the Debtor's bankruptcy case under 11 U.S.C. § 503(b)(4).

McMillan v. Schmidt (In re Harry McMillan),
--- Fed. Appx. ----, 2015 WL 4480794 (5th Cir., July 23, 2015)

In *McMillan*, Thomas Aigner, a third party, entered into a Joint Prosecution Agreement with Appellees Donal Schmidt and Thimothy Wafford to petition McMillan for involuntary bankruptcy based on a default judgment McMillan owed Aigner. The bankruptcy court dismissed the petition because it determined that Aigner transferred a portion of his interest in the claim to Schmidt and Wafford with the intention of beginning an involuntary action against McMillan. McMillan sought fees, costs, and damages against Aigner, Schmidt and Wafford. The bankruptcy court denied McMillan's motion, and the district court affirmed as to Schmidt and Wafford. In affirming the district court's decision, the Fifth Circuit found that Schmidt and Wafford were not signatories to the original involuntary petition; therefore, the bankruptcy court could not impose costs, fees, and damages on Schmidt and Wafford without McMillan having to commence an adversarial proceeding against them under FED. R. BANKR.P. 7004(b)(1).

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Sixth Circuit

JUNE

***In re Broadrick*, 532 B.R. 60 (Bankr. M.D. Tenn. 2015)**

The Bankruptcy Court for the Middle District of Tennessee, confronted with whether a proof of claim for a stale debt was an FDCPA violation, held that it was not under the particular circumstances. As the Bankruptcy Court observed, the primary flaw in *Crawford* was "the idea that filing a proof of claim is deceptive and misleading to a debtor in bankruptcy in the same way that filing a lawsuit over a stale debt is unfair to a defendant in state court." The Middle District of Tennessee noted, among other things, that bankruptcy is a debtor-initiated forum, unlike a state court lawsuit, and that participation in the distribution of a bankruptcy estate rather than collecting personally against a debtor is the very nature of bankruptcy.

JULY

***In re Baker*, --- F.3d ----, Case No. 14-2149, 2015 WL 4033098 (6th Cir. July 2, 2015)**

The Sixth Circuit, affirming the decision of the Eastern District of Michigan affirming the Bankruptcy Court below, held that bankruptcy courts do not have authority to use equitable powers to disallow exemptions, or amendments thereto, based on a bankruptcy debtor's bad faith or other misconduct. After a bankruptcy case was closed, a trustee requested a case to be reopened so he could pursue a cause of action just learned of, which was not originally disclosed by the bankruptcy debtors. Once the case was reopened the debtors amended their claim of exemptions. The trustee objected on the basis of bad faith and fraudulent conduct. However, considering *Law v. Siegel*, --- U.S. ----, 134 S.Ct. 1188 (2014), the Sixth Circuit held that the trustee's objection to the debtors' claims of exemption could not be sustained.

***In re Perkins*, 533 B.R. 242 (Bankr. W.D. Mich. 2015)**

Declining to apply *Crawford v. LVNV Funding, LLC*, 758 F.3d 1254 (11th Cir. July 10, 2014), the Bankruptcy Court for the Western District of Michigan held that the filing of a stale proof of claim does not violate the Fair Debt Collection Practices Act (FDCPA). LVNV Funding, LLC and Resurgent Capital Services, L.P. filed "stale" (i.e., arguably unenforceable because of an applicable statute of limitations) proofs of claim in a chapter 13 debtor's bankruptcy. Although the debtor relied heavily on *Crawford*, the Bankruptcy Court distinguished *Crawford* because *Crawford* did not consider the many protections available under the Bankruptcy Code that defeat the debtor's FDCPA assertion.

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Seventh Circuit

***Peterson v. McGladrey, LLP*, 2015 WL 4092300 (7th Cir. July 7, 2015)**

On July 7, 2015, the Seventh Circuit Court of Appeals affirmed the decision of the district court, holding that because the *pari delicto* doctrine in Illinois does not require proof of the exact same misconduct, the bankruptcy trustee representing (now bankrupt) mutual funds that had been controlled by wrong-doers engaging in a Ponzi scheme could not sue the funds' auditors for not having figured out the funds' own scheme. However, the court specifically noted that the investors in those funds (rather than the funds themselves) were not in on the scheme and therefore their claims against the auditors could and should proceed.

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Eighth Circuit

In re Gatewood,
2015 WL 4496051 (8th Cir. BAP July 10, 2015)

In this matter the Bankruptcy Appellate Panel ("BAP") affirmed the bankruptcy court's holding that the filing of a time barred proof of claim is not itself a violation of the Fair Debt Collection Act ("FDCPA").

Before the bankruptcy court, the debtors brought an adversary proceeding against a debt collector asserting that the proof of claim filed by the debt collector was time barred under Arkansas state law regarding the collection of medical debts. The debtors argued that filing the proof of claim was a violation of the FDCPA as a "false, deceptive misleading, unfair and unconscionable debt collection practice." Following cross-motions for summary judgment, the bankruptcy court granted summary judgment for the defendant debt collector.

In its review of the bankruptcy court's ruling the BAP addressed two questions. The first question was whether the filing of a proof of claim is a "threat of litigation or actual litigation"

for the purposes of the FDCPA. The BAP answered this question in the affirmative following Eighth Circuit precedent that filing a proof of claim "arguably invokes the litigation machinery."

The second question the BAP addressed was whether filing a proof of claim on a time barred debt is false, deceptive misleading, unfair or unconscionable. The BAP held the filing an accurate proof of claim containing all the required information, including the timing of the debt is not itself a prohibited debt collection practice. As such the bankruptcy court's grant of summary judgment was affirmed.

In re Robb,
2015 WL 4287950 (8th Cir. BAP July 16, 2015)

This case addresses when a debtor has standing to appeal an order regarding the distributions to creditors. The debtor, having initially filed a petition under chapter 7 which was soon converted to chapter 13, brought an objection to an unsecured priority claim filed by the trustee for work completed prior to the conversion. The debtor argued that the trustee was not entitled to payment under 11 U.S.C. § 326 because no distributions were made prior to conversion. The bankruptcy court overruled the objection and allowed the claim. The debtor then appealed.

On review the BAP, rather than addressing debtor's argument, dismissed for lack of jurisdiction. The BAP held that under the person aggrieved doctrine, which limits standing to persons with a financial stake in the bankruptcy court's order, the debtor did not have standing to pursue the appeal. The BAP noted that generally a debtor does not have any financial interest in distributions of the estate assets, but may when, there is a surplus of assets, or in a chapter 13 case, where the debtor proposes to pay creditors less than the full amount of their claims. In this instance, the BAP held that the debtor lacked standing because the order allowing the trustee's claim did not alter the debtor's obligations under the chapter 13 plan and only diminished the amount of distributions to other creditors.

In re Broos,
2015 WL 4288726 (8th Cir. BAP July 16, 2015)

In this matter, the debtors filed a petition for Chapter 7 relief and subsequently received a discharge, including $249,085 in unsecured debt to the IRS. Following the discharge, several IRS employees issued IRS levies and filed Notices of Federal Tax Liens related to the debtor's federal tax debt. The debtors filed an adversary proceeding naming the IRS employees as defendants and seeking actual and punitive damages claiming a violation of 26 U.S.C. § 7433. The United States intervened asserting that it was the proper defendant and filed a motion to dismiss which the bankruptcy court granted. The debtor's appealed.

On appeal the BAP addressed three issues. First, whether the United States was the proper defendant. The BAP held the United States was the proper defendant because section 7433 of the Internal Revenue Code waives sovereign immunity as to the United States, but not for individual federal employees acting in their official capacity.

The second issue was whether the debtors were entitled to a default judgment against either the IRS employees or the United States. The BAP held that the debtors were not entitled to a default judgment against either. As to the IRS employees, they were not proper parties to the proceeding so there was no right of relief against them and no entitlement to a default judgment against the United States, who made a timely appearance before the bankruptcy court.

The final issue was whether or not dismissal of the complaint was proper. The BAP held that dismissal was warranted because the debtors had failed to exhaust administrative remedies before bringing an action for damages as required under 26 U.S.C. §7433. Further, the BAP noted that the claim for punitive damages would have to be dismissed even if the debtors had standing to bring an actual damages claim because the bankruptcy court is barred from awarding punitive damages.

In re Bowles Sub Parcel A, LLC,
2015 WL 4035375 (8th Cir. July 1, 2015)

In this matter the Eighth Circuit upheld the bankruptcy court's determination that a default-interest provision in a loan was a valid liquidated damages provision under Minnesota law. The debtors appealed from the bankruptcy courts allowance of a claim for default interest pursuant to a provision in the promissory notes providing for an additional 5 percent interest on the remaining principle, over the non-default rate of 5.04 percent.

The debtors argued that the bankruptcy court had erred by not requiring the creditor to prove actual damages. The Eighth Circuit, in affirming the bankruptcy court's ruling stated that the debtors misstated Minnesota law, which presumes that liquidated damages provisions are valid and can be enforced without proof of actual damages where (1) the amount fixed is a reasonable forecast of just compensation for the harm caused by the breach and (2) the harm caused by the breach is incapable or very difficult of accurate estimation. The Eighth Circuit held that the debtors had failed to present evidence sufficient to rebut the presumption and show the liquidated damages provision was an unreasonable penalty.

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Ninth Circuit

***Double Bogey, L.P. v. Enea, et al.*, No. 13-15809,**
2015 WL 4478055 (9th Cir. July 22, 2015)

The Ninth Circuit reviewed a judgment for defendants, principals of a real estate management firm, arising from losses on investments in two properties, in a non-dischargeability action under section 523(a)(4) because they were not fiduciaries of the investor-plaintiff. Specifically, the Ninth Circuit reviewed the bankruptcy court's holding that, while the individual defendants' company was a fiduciary of the investor-plaintiff, the fact that the investor-plaintiff established a prima facie case that the individual defendants were alter egos of their company under California law was insufficient to deem the individual defendants fiduciaries for section 523(a)(4) purposes. The Ninth Circuit framed the issue as whether a debtor can be considered a "fiduciary" under Section 523(a)(4) solely by application of California's alter ego doctrine. The Ninth Circuit explained that "the mere fact that state law places two parties in a relationship that may have some characteristics of a fiduciary relationship does not necessarily mean that the relationship is a fiduciary relationship under 11 U.S.C. § 523(a)(4)." The Ninth Circuit further explained that common law doctrines, like California's alter ego doctrine, "rarely impose trust-like obligations sufficient to create a fiduciary relationship under Section 523(a)(4)" and that "[i]n the few instances where we have recognized a fiduciary relationship in part based on common law doctrines, such doctrines merely heightened—in clear and express language—duties already imposed by statute." Distinguishing prior case law the Ninth Circuit explained that "California's alter ego doctrine merely acts as a procedural mechanism by which an individual can be held jointly liable for the wrongdoing of his or her corporate alter ego." The Ninth Circuit reasoned that "[r]egardless of the ends to which the alter ego 'procedural device' may be put in California state court, it does not clearly and expressly impose trust obligations prior to defalcation as required by Section 523(a)(4)" such that a finding of alter ego is insufficient to establish a "fiduciary" relationship contemplated by the Bankruptcy Code. Thus, even if a trustee can demonstrate that a corporate debtor is a fiduciary of a plaintiff, and that debtor's principal(s) is an alter ego of the debtor under state law (at least California law), evidence to that effect is an insufficient basis upon which to hold the debtor's principal(s) liable under Code section 523(a)(4) for defalcation in a fiduciary capacity.

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Bos v. Board of Trustees,
--- F.3d ----, 2015 WL 4568015 (9th Cir. July 30, 2015)

The Ninth Circuit court, reversing the district court's judgment, held that the debtor was not a "fiduciary" under 11 U.S.C. § 523(a)(4) when he failed to make contractually required contributions to an employee benefits trust governed by the Employee Retirement Income Security Act (ERISA). Under Section 523(a)(4) of the bankruptcy code, Chapter 7 debtors may not discharge debts incurred due to the debtor's "fraud or defalcation while acting in a fiduciary capacity . . ." 11 U.S.C. § 523(a)(4). If an individual is a fiduciary under ERISA, an individual who "exercises any discretionary authority or discretionary control respecting management of a plan or exercises any authority or control respecting management o disposition of its assets" (29 U.S.C. § 1002(21)(A)(I), the individual is also considered a fiduciary under the code.

The Ninth Circuit has regularly held that unpaid contributions by employers to employee benefit funds are not plan assets. But several courts in the circuit have carved out an exception to this general rule: when the plan document expressly defines the fund to include future payments.

Whiles other circuits have recognized such an exception, the Ninth Circuit here declined to follow suit. First, this particular asset cannot be classified as the contractual right to collect payments once they become due because only the plan administer of the fund – not the debtor – has the authority to enforce the contractual right. Therefore, the debtor lacks the requisite control over such plan asset and cannot qualify as a fiduciary under either ERISA or § 523(a)(4). Second, this asset cannot be classified as unpaid past-due contributions because, as the Ninth Circuit noted, "[f]or a debtor to be held nondischargeable under section 523(a)(4), the debtor must have been a fiduciary ***prior*** to his commission of the fraud or defalcation." The event here that the debt was the same event that created fiduciary status. As a result, the debt cannot not fall under 523(a)(4). Finally, under property principles, until the time payment is due, the plan does not actually possess the money and has no present right to it.

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10th Circuit

JUNE

Redmond v. Jenkins (In re Alternate Fuels, Inc.)
789 F.3d 1139 (10th Cir. June 12, 2015)
(Appeal from the United States Bankruptcy Appellate Panel for the Tenth Circuit — BAP No. 12-110-KS).

Alternate Fuels, Inc. ("AFI"), a coal-mining business, went bankrupt in 1992. Thereafter, its owner provided the State of Missouri with reclamation bonds assuring that AFI would restore its mining sites to their original condition. To secure the bonds, the owner pledged 24 certificates of deposit, valued at $1.4 million.

Years later, AFI was purchased by the appellant, Jenkins, whose intention was to complete the reclamation process and obtain the proceeds from the certificates of deposit. Jenkins advanced funds to AFI, and in return, AFI executed a series of promissory notes in Jenkins' favor. Jenkins continued to fund AFI over the next few years and, as security, AFI assigned to Jenkins $3 million of its potential recovery in a pending lawsuit.

After recovering nearly $5 million in the lawsuit, AFI filed for a second bankruptcy to determine the priority of payments to its creditors. Among the creditors was Jenkins, who filed a proof of claim against AFI's bankruptcy estate in the amount of $4.3 million.

The bankruptcy court decided that the transfers evidenced by the promissory notes should be recharacterized as equity transfers. Alternatively, the court held: (1) that there was insufficient evidence as to the amount of Jenkins' claim, and (2) that Jenkins' claim should be equitably subordinated. The Tenth Circuit Bankruptcy Appellate Panel affirmed.

The Tenth Circuit reversed on all grounds. As a preliminary matter, the court reaffirmed: (1) that the court's authority to recharacterize putative debt arises under § 105(a), and (2) that the 13-factor *Hedged-Investments* test is the proper test for determining whether recharacterization is appropriate. The court rejected Jenkins' contention that *Hedged-Investments* had been implicitly overruled by the Supreme Court.

Applying the *Hedged-Investments* test, the court next concluded that recharacterization was inappropriate. The court identified five factors supporting Jenkins' contention that the advances were loans and not equity contributions: (1) the notes, each labeled "PROMISSORY NOTE," indicated they were instruments of indebtedness on their face; (2) Jenkins' advances did not give him increased participation in the management of AFI; (3) the notes had a fixed maturity date, which was valid despite the existence of a contingency; (4) the notes gave Jenkins the right to enforce payment, even though he did not enforce such right; and (5) the parties intended the transfers to be loans even though the amounts of the notes did not correlate with the loan amounts and even if Jenkins did not believe that AFI could repay the loans. The court emphasized the underlying policy considerations − namely, that a court should not discourage owners from trying to salvage a business by recharacterizing their loans as equity contributions.

Next, the court concluded that there was sufficient evidence proving the amount of Jenkins' claim − namely, copies of the three promissory notes and a copy of the assignment of the lawsuit proceeds. That Jenkins' advances may not correlate with the loan amounts did not undermine the sufficiency of the evidence of his claim.

Finally, the court concluded that the bankruptcy court erred in applying the doctrine of equitable subordination. The court emphasized that equitable subordination is an "extraordinary remedy," which is to be applied sparingly and only where there has been inequitable conduct on the part of the creditor. Because Jenkins had not engaged in any inequitable conduct, the doctrine did not apply.

Judge Phillips dissented. He would have recharacterized the loans as equity transfers, in large part because, in advancing the funds, Jenkins was acting for his own financial benefit − not AFI's. In Judge Phillips' view, the object of the promissory notes was not repayment, but rather, to protect Jenkins' certificates of deposit from AFI's creditors so that he could later elevate the claims under the notes to a secured status. Judge Phillips observed that the factors favoring Jenkins "largely concerned the name and form of the promissory notes," whereas, the factors weighing against Jenkins concerned "the real-world backdrop behind the notes." Judge Phillips would also have remanded to the bankruptcy court for a determination of the existence of an enforceable security interest.

JULY

Loveridge v. Hall, (In re Renewable Energy Development Corporation)
--- F.3d ---- 2015, WL 4153631 (10th Cir. July 28, 2015)
(Appeal from the United States District Court for the District of Utah — D.C. No. 2:12-CV-00771-RJS).

This case involves the boundary between public and private rights as it pertains to the jurisdictional ambit of Article I bankruptcy courts. Bankruptcy courts are empowered to resolve those aspects of the bankruptcy process that implicate public rights. However, not *every* proceeding that incidentally impacts a bankruptcy case implicates a public right.

The trustee in this case caused a conflict of interest with a client in a collateral matter. He argued that the claims arising from such conflict should be resolved in bankruptcy court because they were "factually intertwined with" the underlying bankruptcy proceedings. The court rejected this notion, finding it inconsistent with Supreme Court precedent. The court held that, absent waiver, cases properly in federal court but arising under state law and not necessarily resolvable in the claims-allowance process trigger Article III's protections.

Moshe Tal v. Frederick Kirby Harth, Jr. (In re Frederick Kirby Harth, Jr.)
--- Fed.Appx. ---- 2015 WL 4570011 (10th Cir. July 30, 2015)
(Appeal from the Bankruptcy Appellate Panel for the Tenth Circuit Court of Appeals — BAP No. 13-071-WO).

The Tenth Circuit Court of Appeals dismissed for lack of jurisdiction Moshe Tal's appeal of the Bankruptcy Appellate Panel's (BAP) order affirming an adverse judgment entered by the bankruptcy court following a bench trial, at which Moshe did not appear. Federal Rule of Appellate Procedure 6(b)(1) required Moshe to file a notice of appeal within thirty (30) days of the BAP's decision, but he did not file his notice of appeal until forty-eight (48) days after that decision. The Court also noted that while Moshe did file a post-judgment motion, which ordinarily would toll the notice of appeal filing deadline, Moshe's post-judgment motion was similarly filed late. And, Moshe's pro se status did not excuse him from complying with the filing deadline requirements of Federal Rule of Appellate Procedure 6. Consequently, the Court held that it lacked the jurisdiction to review Moshe's appeal.

Lisa Kay Brumfiel v. U.S. Bank,
--- Fed.Appx. ---- 2015 WL 4496197 (10th Cir. July 24, 2015)
(Appeal from the U.S. District Court for the District of Colorado—No. 1:12-CV-02716).

The Tenth Circuit Court of Appeals affirmed the United States District Court for the District of Colorado's decision to dismiss Lisa Kay Brumfiel's complaint against U.S. Bank, which alleged that a Colorado foreclosure proceeding violated her constitutional and state law rights. U.S. Bank filed a state court foreclosure action against Lisa after she stopped making payments on a home mortgage loan from U.S. Bank. Lisa opposed the foreclosure action, and then shortly thereafter, filed for chapter 7 bankruptcy relief. The foreclosure action was stayed but remained pending during Lisa's bankruptcy case. Later, Lisa received a discharge and her bankruptcy was closed.

Lisa then filed a federal lawsuit against U.S. Bank, seeking, among other relief, monetary damages allegedly caused by U.S. Bank violating her constitutional and state law rights in the state court foreclosure action. Lisa did not list the claims she asserted against U.S. Bank in the federal lawsuit in her bankruptcy schedules, and the bankruptcy trustee neither administered nor abandoned those claims at the close of Lisa's bankruptcy case. The Court, therefore, found that Lisa's claims against U.S. Bank remained property of Lisa's bankruptcy estate, and that the bankruptcy trustee (not Lisa) was the only proper party in interest to pursue those claims. Accordingly, the Court agreed with the District Court of Colorado that Lisa lacked standing to prosecute her federal lawsuit against U.S. Bank.

Expert South Tulsa, LLC v. Cornerstone Creek Partners, LLC
(In re Expert South Tulsa, LLC)
--- B.R. ----, 2015 WL 4412793 (10th Cir. BAP, July 20, 2015)
(Appeal from the United States Bankruptcy Court for the District of Kansas — Adversary No. 11-06208).

The Bankruptcy Appellate Panel of the Tenth Circuit (the "BAP") affirmed the decision of the U.S. Bankruptcy Court for the District Kansas granting summary judgment in favor of defendant in the adversary below based on debtor/plaintiff's fraudulent transfer claim. Expert South Tulsa, LLC ("EST" or "Debtor") filed an adversary action against Cornerstone Creek Partners, LLC ("Cornerstone") alleging claims pursuant to 11 U.S.C. §548(a)(1)(B) (the "§548 Claim") and §544(b) asserting a claim under Oklahoma's Uniform Fraudulent Transfer Act (the "UFTA Claim") on the grounds that EST was insolvent at the time of the transfer and that Cornerstone had not provided "reasonably equivalent value" for the property. The Kansas Bankruptcy Court granted summary judgment in favor of Cornerstone on the grounds that the property was not an "asset" subject to the UFTA because it was fully encumbered at the time of the sale from EST to Cornerstone. The Bankruptcy Court further found that the §548 similarly failed where EST had indeed received the reasonable equivalent value for the sale.

On appeal, the BAP affirmed the Bankruptcy Court's ruling finding that at the time of the transfer, the security interest held by the lender had not been compromised and was in excess of the value of the collateral. Consequently, the property could not be considered an "asset" subject to avoidance under the UFTA. Furthermore, the BAP agreed that Debtor's claim pursuant to §548 failed because Debtor had in fact received the reasonably equivalent value for the sale. In so finding, the BAP confirmed that "reasonably equivalent value" is not synonymous with a simple calculation of purchase price compared to appraised value. Reasonably equivalent value is measured by all the benefits received by the seller, both direct and indirect. Here, the Bankruptcy Court reviewed the purchase price, the satisfaction of debt, and the release of liens. The BAP affirmed the Bankruptcy Court's analysis of reasonably equivalent value and found that the sale to Cornerstone could not be avoided under either the UFTA or §548.

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11th Circuit

***JPMCC 2006-LDP7 Miami Beach Lodging, LLC v. Sagamore Partners, Ltd. (In re Sagamore Partners, Ltd)*,**
--- Fed.Appx. ---, 2015 WL 4170215, (11th Cir. July 13, 2015).

The Eleventh Circuit affirmed the district court's determination that the debtor may be required to pay the default interest to cure and reinstate its loan, but reversed the district court's determination that the lender had waived the default interest. The lender objected to the debtor's bankruptcy plan that proposed to cure the default at the non-default interest rate and reinstating the original terms of the loan, and the bankruptcy court denied confirmation. The bankruptcy court confirmed the debtor's amended plan, which proposed to repay the indebtedness in full on terms and conditions determined by the court. In connection with the amended plan, the debtor filed an objection to the creditor's claim on the basis that the creditor was not entitled to both late fees and default rate interest. The bankruptcy court held that the creditor failed to demand default-rate interest and that the notice of default was defective, thus all that flowed from the defective notice was improper, including default interest. The district court disagreed with the bankruptcy court that the notice was defective; however, it affirmed that the creditor had waived its rights to default interest. Moreover, having asserted its entitlement to late fees, the creditor was precluded from also recovering default-rate interest. The Court held that the lender did not waive default interest rate since by the terms of the loan agreement, the lender was not required to provide any default notice, and expressly waived any notice requirement not explicitly called for by the loan agreement or applicable law. Thus, the Eleventh Circuit held that in order for a chapter 11 debtor to cure a default on a loan, the debtor must cure the default "in accordance with the underlying contract or agreement, so long as that document complies with relevant nonbankruptcy law."

***Green Point Credit, LLC v. McLean (In re McLean)*,**
--- F.3d ---, 2015 WL 4480920 (11th Cir. July 23, 2015).

In resolving a question of first impression, the Eleventh Circuit held that a lender violates the automatic stay when the lender files a proof of claim in which the underlying debt was discharged in a prior case. In their first bankruptcy, the debtors received a discharge of the unsecured debt owed to the lender. In the second bankruptcy, the lender filed a proof of claim for the same debt that was discharged in the first bankruptcy. The lender promptly withdrew its proof of claim when the debtors filed an adversary complaint for violation of the automatic stay and infliction of emotional distress. The bankruptcy court awarded the debtor both compensatory and non-compensatory damages described by the court as "coercive sanctions." The district court affirmed the damages on appeal.

The Eleventh Circuit affirmed the lower courts' ruling as to the violations of the automatic stay because the lender's proof of claim improperly pressured the debtor to pay on a debt to which the debtor was not personally liable notwithstanding the procedural protections

afforded to debtors under the Bankruptcy Code. However, the Court vacated both awards for compensatory and non-compensatory damages and remanded for further proceedings. After determining that the non-compensatory damages were punitive in nature rather than sanctions, the Court held that the bankruptcy court had not provided sufficient due process to the lender. While acknowledging that a debtor may receive compensatory damages for emotional distress caused by violations of the automatic stay, the Court also remanded the award of compensatory damages so that the bankruptcy court could consider the facts in light of the Eleventh Circuit's recent standard articulated in *Lodge v. Kondaur Capital Corp*, 750 F.3d 1263 (11th Cir. 2014).

***Bradford v. U.S. Dept. of Treasury I.R.S. (In re Bradford)*,**
2015 WL 4549603 (Bankr. M.D. Ga. July 20, 2015).

The Bankruptcy Court sustained the chapter 13 debtors' objection to the proof of claim for priority status filed by the IRS and held that amounts owed to the IRS for early withdrawal from an individual retirement account (the "Exaction") is neither income tax nor a penalty to compensate the government for actual pecuniary loss entitled to priority status. The court found that primary purpose of the Exaction was to punish or discourage certain conduct rather than to compensate the government. Furthermore, the government does not suffer any actual pecuniary loss because a flat percentage is applied to any tax payer for any early withdraw, regardless of age. Since any deterrent effect of the Exaction would be suffered by the general unsecured creditors, the court concluded that the government was not entitled to priority distribution for the Exaction.

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