Bankruptcy Circuit Update

Featuring cases from June 2015

Supreme Court

Bank of America, N.A. v. Caulkett, 135 S. Ct. 1995 (2015)

In Bank of America, *N.A. v. Caulkett*, the Supreme Court unanimously held that § 506(d) does not permit a debtor to "strip off" a junior lien that is wholly underwater if the creditor's claim is both secured by a lien and allowed under § 502 of the Bankruptcy Code. 135 S. Ct. 1995 (2015). In adhering to the precedent set in *Dewsnup v. Timm*, 502 U.S. 410 (1992), the Court reversed the Eleventh Circuit Court of Appeals and remanded the case for further proceedings consistent with its opinion. *Caulkett*, 135 S. Ct. at 2001.

The Court's opinion resolves two identical cases where the debtors each had two mortgages on their respective houses. *Id*. at 1998. In each case, the junior mortgage was wholly underwater because the senior lien amount was greater than the home's value. *Id*. After filing Chapter 7 bankruptcy, debtors moved to void the underwater junior liens pursuant to § 506(d) of the Bankruptcy Code. *Id*. The issue on both cases was "Whether a debtor in a Chapter 7 bankruptcy proceeding may void a junior mortgage under § 506(d) when the debt owed on a senior mortgage exceeds the present value of the property." *Id*.

Section 506(a)(1) provides: "To the extent that a lien secures a claim against the debtor that is not an allowed secured claim, such lien is void." (Emphasis added). In answering the issue presented, the Court relied on its previous interpretation of the phrase "allowed secured claim" in *Dewsnup v. Timm*, 502 U.S. 410 (1992). In *Dewsnup*, the Court considered a case where the debtor sought to strip down a partially underwater lien to the current-market value of her home. 502 U.S. at 412-13. The *Dewsnup* Court, relying on policy considerations and pre-Code practice rather than adopting the statutory definition of "secured claim" in § 506(a), concluded that if a "claim has been 'allowed' pursuant to § 502 and is secured by a lien with recourse to the underlying collateral, it does not come within the scope of § 506(d)." Dewsnup, 502 U.S. at 415.

The Court held that "Dewsnup's construction of 'secured claim' resolves the question presented here." *Caulkett*, 135 S. Ct. at 1999. Because the Bank's claims were "allowed" pursuant to § 502 and were secured by a lien on the properties, they are "allowed secured claims" for purposes of § 506(d) and cannot be voided. *Id.*

Baker Botts L.L.P., et al. v. ASARCO, LLC, 135 S.Ct. 2158 (June 15, 2015)

In this case, the Supreme Court answered a question of great interest to bankruptcy practitioners: does 11 U.S.C. § 330(a)(1) permit a bankruptcy court to award attorney's fees for work performed in defending a fee application? In its 6-3 opinion, the Court held that 11 U.S.C. § 330(a)(1) does not, on its own, permit an award of attorney's fees for work performed in

defending a fee application. *Baker Botts L.L.P., et al. v. ASARCO, LLC*, 576 U.S. _____, No. 14-103, slip op. at 1 (2015).

ASARCO, L.L.C., ("ASARCO") is a copper mining, smelting, and refining company that filed Chapter 11 bankruptcy in 2005. Baker Botts, L.L.P. and Jordan, Hyden, Womble, Culbreth & Holzer, P.C. (collectively "Debtor's counsel") served as ASARCO's counsel in the Chapter 11 bankruptcy. Among other services, Debtor's counsel successfully pursued fraudulent transfer litigation against ASARCO's parent company and obtained a judgment against the parent company between $7 and $10 billion. This judgment contributed to ASARCO's successful reorganization and paid all creditors in full.

In addition to a core fee award of approximately $120 million plus a $4.1 million fee enhancement for exceptional performance, the bankruptcy court awarded — and district court affirmed—over $5 million for time spent litigating in defense of Debtor's counsel's fee applications. The reorganized debtor ASARCO, once again controlled by its parent company, appealed the award of attorney's fees for time spent litigating in defense of counsel's fee applications to the Fifth Circuit Court of Appeals. The Fifth Circuit determined that, under the standards for fee awards in § 330, Debtor's counsel was not entitled to fees for time spent litigating in defense of counsel's fee applications. *In re ASARCO, L.L.C.*, 751 F.3d 291 (5th Cir. 2014). Debtor's counsel appealed the Fifth Circuit's determination and the Supreme Court granted certiorari.

The Supreme Court commenced its analysis by first stating that the "basic point of reference when considering the award of attorney's fees is the bedrock principle known as the American Rule: Each litigant pays his own attorney's fees, win or lose, unless a statute or contract provides otherwise." *ASARCO*, No. 14-103, slip op. at 3 (*quoting Hardt v. Reliance Standard Life Ins. Co.*, 560 U.S. 242, 252-53 (2010)). Second, the Court recognized that departures from the established American Rule require "specific and explicit provisions for the allowance of attorneys' fees in selected statutes." *Id.* at 4 (*quoting Alyeska Pipeline Serv. Co. v. Wilderness Soc'y*, 421 U.S. 240, 260 (1975)).

The majority then held that the language of § 330(a)(1) of the Bankruptcy Code is insufficient to warrant displacing use of the American Rule in fee-defense litigation. *Id.* at 5. Specifically, the Court determined that the phrase in § 330(a)(1) permitting bankruptcy courts to award "reasonable compensation for actual, necessary services rendered" does not "specifically nor explicitly authorize courts to shift the costs of adversarial litigation from one side to the other." *Id.* at 4-5. Rather, the Court held that the qualification of this phrase by the word "services" requires that the fees sought must be as "labor performed for" the client. *Id.* at 5. Thus, the majority flatly rejected Debtor's counsel's argument that the phrase "services rendered" encompassed even adversarial fee-defense litigation. *Id.* Specifically, the majority noted that Debtor's counsel's reading would render even time spent on an unsuccessful fee-application defense compensable because the statute lacks any language directing fee shifting to a "prevailing party." *Id.* at 7-8.

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First Circuit

***Bank of America, N.A., v. Casey (In re Pereir),* 2015 WL 3917392 (1st Cir., June 26, 2015)**

Court of Appeals for the First Circuit held that certification of questions to the Supreme Judicial Court in Massachusetts were warranted relevant to whether a mortgage that has not been properly acknowledged can be cured by the notary subsequently recording a corrective affidavit, all under Massachusetts state law. Certification arose in context of the Chapter 7 trustee attempting to avoid a mortgage held by the appellant, which mortgage contained a material defect in that the acknowledgement did not include the names of the borrowers. After the mortgage was recorded, the notary recorded an affidavit attesting that the debtors had signed the mortgage personally and voluntarily. The questions are whether under Massachusetts state law the affidavit can cure the defective acknowledgement or otherwise provide constructive notice to a bona fide purchaser; and if not, then the Chapter 7 trustee asserts she can avoid the mortgage under 11 U.S.C. Section 544(a)(3).

***Charbono v. Sumski (In re Charbano),* 2015 WL 3653610 (1st Cir., June 15, 2015)**

Court of Appeals for the First Circuit ("First Circuit") affirmed the District Court's affirmance of the bankruptcy court's order sanctioning the Chapter 13 debtor $100 for failing to timely provide his income tax returns or an extension of said returns to the Chapter 13 trustee. The First Circuit opined that the court, whether District of Bankruptcy, has the inherent power to sanction, to issue punitive, non-contempt sanctions i.e. the inherent power to sanction without a finding of contempt. A finding of bad faith was not required as the absence of bad faith does not serve to undermine the inherent-power sanction imposed herein by the bankruptcy court. The First Circuit concluded, however, that courts are to be cautious in using the inherent power to sanction.

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Second Circuit

***Mohammed v. Great Atlantic & Pacific Tea Company*, 14-3415, 2015 WL 3604442 (2nd Cir. June 10, 2015)**

The Second Circuit affirmed the District Court's order granting the motion to dismiss Mohammed's employment discrimination claims filed by debtor Great Atlantic & Pacific Tea Company ("A&P"). The District Court had granted the motion because it held that the confirmation order entered in A&P's Chapter 11 bankruptcy proceedings discharged and released A&P from all of Mohammed's claims because they arose prior to the effective date by which payment requests for existing claims were due and Mohammed never filed a claim with the bankruptcy court.

The Second Circuit also affirmed the District Court's holding that Mohammed failed to rebut the presumption, established by A&P's evidentiary submissions, that Mohammed had received notice of the effective date, since mere denial of receipt is insufficient. Additionally, the Second Circuit held that the District Court correctly rejected Mohammed's argument that his claims survived because A&P engaged in conduct exempted from discharge by Section 523(a)(6) of the Bankruptcy Code. This was because Mohammed had failed to establish why A&P, a corporate entity, was susceptible to the Section 523 discharge exemption, which only applies to "individual" debtors, i.e. natural persons.

***Carval UK Limited v. Giddens (In the Matter of Lehman Brothers, Inc.)*, 14-890, 2015 WL 3938079 (2nd Cir. June 29, 2015)**

The Second Circuit affirmed the District Court's holding that Doral Bank and Doral Financial Corporation (collectively, "Doral") did not qualify as "customers" of the failed broker-dealer Lehman Brothers ("Lehman") under the Securities Investor Protection Act ("SIPA").

In 2000 and 2001, Doral entered into a series of six repurchase agreements involving the sale of securities to Lehman coupled with an agreement to repurchase the securities back from Lehman at a later date. These transactions were governed by industry-standard master repurchase agreements, which described the relationship between Doral and Lehman as

"contractual" and made no mention of a fiduciary relationship. Under these agreements, Doral sold several hundred million dollars' worth of securities to Lehman, with the expectation that Lehman would resell the securities back to Doral at the conclusion of the transactions. However, the financial crisis struck while the repurchase agreements were still outstanding, and Lehman failed and entered liquidation under SIPA before Doral could repurchase the securities.

The Second Circuit began its analysis by describing the history and purpose of SIPA. Enacted in 1970, SIPA was designed to protect investor customers who entrust their assets to a broker-dealer. If the broker-dealer experiences financial difficulties, SIPA authorizes the speedy return of the customer's property and ensures that investors will be made whole if the assets are lost. Doral's successor's appeal thus turned on the issue of whether Doral was a "customer" of Lehman under SIPA. If Doral was a customer of Lehman, then under SIPA it would be entitled to the prompt return of any property that Lehman was holding on Doral's behalf — i.e., the securities that Lehman failed to resell to Doral, less the contractual repurchase price. Conversely, if Doral was not a customer of Lehman, then Doral's only recourse would be to pursue a claim for those unreturned securities in the ordinary course of Lehman's bankruptcy proceedings.

SIPA defines a "customer" as "any person (including any person with whom the debtor deals as principal or agent) who has a claim on account of securities received, acquired, or held by the debtor in the ordinary course of its business as a broker or dealer from or for the securities accounts of such person for safekeeping, with a view to sale, cover consummated sales, pursuant to purchases, as collateral, security, or for purposes of effecting transfer." The Second Circuit has consistently held that to be a customer under this definition, an investor must have "entrusted" property to the broker-dealer.

The Second Circuit found that Doral did not entrust anything to Lehman, holding that mere delivery is not sufficient, as entrustment must bear the indicia of the fiduciary relationship between a broker and his public customer. This "fiduciary relationship," in turn, arises out of the broker's obligation to handle the customer's assets for the customer's benefit. Here, there was no fiduciary relationship between Doral and Lehman. Instead, Doral merely sold the securities to Lehman, which acquired full legal title. Lehman thereafter owned the securities and had discretion to use the securities as it saw fit, even in situations where Lehman and Doral's interests were adverse.

As such, the Second Circuit held that Lehman and Doral were arms-length contractual counterparties who both entered into the repurchase agreements for their own benefit. Because Lehman was acting for its own interests, it had no obligation to use the securities on Doral's behalf, and its relationship with Doral thus bore none of "the indicia of the fiduciary relationship between a broker and his public customer." Doral's successor attempted to evade this conclusion by invoking Lehman's supposed general fiduciary duty to consummate the repurchase agreement. The Second Circuit was not swayed by this argument, finding that the repurchase agreements imposed, at most, a contractual obligation on Lehman to resell the underlying securities back to Doral at the conclusion of the repurchase agreement term.

The Second Circuit thus concluded that an investor who delivers securities to a broker dealer as part of a repurchase agreement is not protected by SIPA because the investor did not entrust assets to the broker-dealer.

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Third Circuit

In re Li
2015 WL 36009498 (3d Cir. June 10, 2015)

The Third Circuit affirmed the decisions of the New Jersey Bankruptcy and District Courts denying an individual debtor a discharge in his bankruptcy proceeding. The Debtor was an attorney barred in New Jersey and New York. Prior to his bankruptcy, the Debtor helped a group of litigants secure a $3.5 million judgment, a large portion of which constituted prejudgment interest. The Debtor included the prejudgment interest in the calculation of his contingency fee. His clients disagreed with this position and filed suit in New Jersey state court to reclaim that portion of the award. The New Jersey Superior Court ordered the Debtor not to dissipate the funds pending resolution of the dispute. Notwithstanding this order, the Debtor transferred the funds to bank accounts in China. The New Jersey Supreme Court ultimately disbarred the Debtor because of his conduct. The Debtor thereafter filed for bankruptcy protection in New Jersey. The New Jersey Bankruptcy Court denied the Debtor's discharge petition pursuant to Bankruptcy Code sections 727(a)(4) and 523(a)(4) because the Debtor knowingly and fraudulently made a false oath and engaged in a knowing misappropriation of client funds. The District Court affirmed. In a short opinion, the Third Circuit concluded that the New Jersey Supreme Court's fraud findings had a collateral estoppel effect in the Bankruptcy Court such that discharge had to be denied for fraud pursuant to section 523(a)(4).

Regis Corp. v. Southern El Dorado Corp. (In re Trade Secret Inc.)
2015 WL 3605722 (3d Cir. June 10, 2015)

The Third Circuit affirmed the decisions of the Delaware Bankruptcy and District Courts holding a purchaser of assets liable for a post-closing arbitration award against the Debtors. Prior to bankruptcy, the Debtors entered into two franchise agreements with the appellees. Around 2008, the Debtors and the appellees participated in an arbitration proceeding in which the appellees sought damages from the Debtors on account of alleged breaches of the franchise agreements. The Debtors filed for chapter 11 protection while the arbitration proceeding was pending. Regis Corporation purchased the Debtors' assets during the bankruptcy and, pursuant to the asset purchase agreement approved by the Bankruptcy Court, assigned the assets to two companies in which Regis assumed a security interest. The asset purchase agreement defined

Regis as the "Purchaser" and indicated that Regis would be relieved of any liability after the assignment. Following the sale, the Court entered a dismissal order specifying that the Purchaser shall be deemed to have assumed the franchise agreements and liable for any subsequent arbitration award. Six months later, an arbitration award was entered against the Debtors and the appellees sought to collect the damages and attendant attorneys' fees from the Purchaser. The Bankruptcy and District Courts found that Regis was liable for the damages and fees pursuant to the clear language of the asset purchase agreement and the dismissal order. The Third Circuit affirmed in summary fashion.

In re Syntax-Brillian Corp.
2015 WL 3918963 (3d Cir. June 26, 2015)

The Third Circuit reversed decisions of the Delaware Bankruptcy and District Courts dismissing the appellants' appeal as untimely. The Debtors filed for bankruptcy protection in 2008 and subsequently filed and received Bankruptcy Court approval of a chapter 11 liquidating plan. The appellant objected to the plan initially, but the Bankruptcy Court overruled the objections. Thereafter, the appellant filed numerous motions for reconsideration or amendment of the order confirming the Debtors' plan. The Bankruptcy Court denied the motions on January 14, 2013. Pursuant to Bankruptcy Rule 8002, January 28, 2013 was the appellant's deadline to file an appeal. The appellant ultimately appealed, but the Court clerk did not stamp the notice until January 29, 2013. The appellant presented a certified mail tracking sheet showing that the appeal had been timely received by the Bankruptcy Court, but that it was incorrectly docketed late. The District Court granted the Appellee's motion to dismiss the appeal as untimely, but did not specifically address the tracking sheet evidence. The Third Circuit reversed, finding that the notice of appeal was filed as of the time it was actually received in the clerk's office even though it was designated as filed by the clerk's office at a later date.

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<u>Seventh Circuit</u>

Stoughton Lumber Co., Inc. v. Sveum,
No. 14-3339, 2015 WL 3500237 (7th Cir. June 4, 2015)

On June 4, 2015, the Seventh Circuit Court of Appeals affirmed the decision of the bankruptcy and district courts, holding that the debtor's "theft by contractor" under Wisconsin

law was considered both "fraud" and "defalcation" for purposes of barring discharge under 11 U.S.C. §523(a)(4). Specifically, Wisconsin requires general contractors to hold payments received from clients in trust for its subcontractors and other service providers until those subcontractors and service providers are paid in full. But debtor did not do so, committing "theft by contractor" by commingling and spending funds received. In affirming the lower courts, the Seventh Circuit agreed that the debtor had not, as he claimed, "committed an innocent mistake," especially in light of his having a college degree in business administration and having been in the building business for forty years. At best the debtor had engaged in willful blindness, which was a level of recklessness sufficient to sustain a claim of fraud, especially where, as here, the debtor falsely swore on owner affidavits and bank draw requests that all of the subcontractors had been paid in full when he knew that not to be the case. Thus, the debtor's "theft by contractor" was both fraud and defalcation (a form of embezzlement).

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Eighth Circuit

***Cutcliff v. Reuter*, 2015 WL 3953147 (8th Cir. June 30, 2015)**

This case arises from the effort of plaintiffs in an adversary proceeding to reach assets held in a revocable trust in which the bankruptcy estate had acquired the debtor's powers as co-trustee of the trust.

The plaintiffs, victims in a fraudulent investment scheme, initially brought this action in the district court against the debtor and an LLC in which the debtor was a member. The LLC failed to defend the action and the district court entered an order of default against it. The debtor's bankruptcy case was subsequently filed, at which time the district court closed the matter until resolution of the bankruptcy case.

During the bankruptcy case the plaintiffs brought the same claims against the debtor. The bankruptcy court determined the claims were non-dischargeable, and awarded actual and punitive damages against the debtor. The bankruptcy court also determined that the bankruptcy estate acquired the debtor's interest in a revocable trust into which assets had been transferred prior to the bankruptcy filing.

The court further concluded that the debtor's wife was a co-trustee and that the rights acquired by the bankruptcy estate were limited to the extent they were subject to the wife's consent, and that only the debtor's wife had the power to revoke the trust. At the request of the plaintiffs this matter was reopened and referred to the district court so the plaintiffs could to collect on the earlier default order entered against the LLC from assets held in the trust.

After receiving affidavits and documentary proof of the plaintiffs' losses, but without holding an evidentiary hearing, the bankruptcy court issued proposed findings of facts and conclusions of law awarding actual damages, punitive damages and attorney's fees. The district court adopted the proposed findings and conclusions, entering a default judgment against the LLC. Both the debtor and his wife appealed.

The first issue addressed by the Eighth Circuit was the appellants' standing to bring the appeal. The Eighth Circuit held that because the plaintiff was seeking assets in the possession of the trust, the debtor's wife had standing to appeal to her being a co-trustee of the trust with the sole power to revoke it. However, the Eighth Circuit held that the debtor did not have standing to pursue the appeal because his interest had been acquire by the estate, and though he was a member of the LLC against whom judgment had been entered, he was not himself aggrieved by judgment.

The Eighth Circuit then held that the district court had not erred in referring the case to the bankruptcy court. The Eighth Circuit found that the matter fell within the bankruptcy court's "related to" jurisdiction because the plaintiffs' intent was to use the default judgment to access a trust in which the bankruptcy estate had rights, holding the district did not err by concluding the matter could have a conceivable effect on the bankruptcy.

Finally the Eighth Circuit determined that there was no error in the bankruptcy court's decision to award actual or punitive damages without holding an evidentiary hearing because the actual damages were readily discernable and the bankruptcy court was already acquainted with the facts and issues, having awarded actual and punitive damages against the debtor in the early bankruptcy proceeding.

***In re Hardy v. Fink*, 2015 WL 3466015 (8th Cir. June 2, 2015)**

In this matter, the Eight Circuit reversed the bankruptcy court and BAP's ruling that the refundable portion of the federal Child Tax Credit ("CTC") is not exempt from the bankruptcy estate as a "public assistance benefit" under Missouri Law.

Missouri law exempts public assistance benefits from the bankruptcy estate, but the statute does not define such benefits. The debtor sought to exempt from the bankruptcy estate a tax refund attributable to the Additional Child Tax Credit ("ACTC"). The trustee objected to the exemption. The bankruptcy court sustained the objection, holding that the CTC was not a public assistance because it did not benefit only the "needy." On appeal the BAP upheld the bankruptcy court's decision, concluding that because non-needy families were potentially eligible for the credit, it did not qualify as public assistance. The Eighth Circuit reversed the bankruptcy court and BAP, finding that the refundable portion of the ACTC is exempt under Missouri law.

In so ruling, the Eighth Circuit agreed with lower courts conclusions that under Missouri law "public assistance benefits" are government benefits provided by the needy. However, the Court held that the bankruptcy court and BAP had failed to consider that following its initial passage, amendments to the CTC and the accompanying legislative commentary demonstrated that legislation modifying the ACTC had been made to benefit low income families.

***In re Wigley*, 2015 WL 3825117 (8th Cir. BAP June 19, 2015)**

In *Wigley* the BAP addressed the question of when damages resulting from the pre-petition termination of a lease are subject to Section 502(b)(6), which places a limitation on claims by landlords for damages resulting from the termination of a lease of real property.

The lessor creditor had entered into a commercial lease with a company owned by the debtor, Baja Sol Cantina, LLC ("Baja Sol"). Two years into the lease, Baja Sol defaulted and was evicted. Prior to the debtor's bankruptcy filing, the creditor brought a lawsuit against Baja Sol and the debtor for damages under the lease and the debtor's personal guaranty. The creditor received a judgment in its favor consisting of damages, pre- and post-judgment interest, and

attorney's fees. Subsequently, a separate lawsuit was filed by the creditor against the debtor and his wife for various fraudulent transfers under the Uniform Fraudulent Transfer Act ("UFTA"), as adopted by Minnesota; receiving a judgment consisting of damages, interest, and costs.

Following the two judgments, the debtor filed a chapter 11 petition. The creditor filed a proof of claim based on the prior judgments. The debtor objected to the proof of claim on the grounds that the amount sought based on the personal guarantee of the lease was subject to the cap under Section 502(b)(6), and because the amount sought based on the fraudulent transfer was duplicative of the amount sought on the lease.

The bankruptcy court sustained the debtor's objection. On review, the BAP sustained the bankruptcy court's ruling in part and reversed in part. In determining whether the Section 502(b)(6) cap applied, the BAP employed a test that looked at, assuming all other conditions remained constants, whether the landlord would have had the claim if the pre-petition termination of the lease had not occurred.

In doing so the BAP, separated the various components of the damages sought in the proof of claim for its analysis. The BAP reversed the bankruptcy court with respect to unpaid rent, common area maintenance, and late fees sought through the eviction date. The BAP concluded that items having accrued prior to the termination could not be said to have resulted from the termination of the lease. The BAP also reversed the bankruptcy court as to attorney's fees, costs and disbursements awarded in the action to recover these damages for the same reason.

The BAP agreed with the bankruptcy courts holding that interest on future rents constituted damages resulting from the termination of the lease because the creditor would not have any claim for future rents had the termination not occurred. The BAP also affirmed the bankruptcy courts determination that the debtor's liability for the fraudulent transfers was duplicative of the judgment for damages for breach of the lease because under Minnesota law the UFTA does not create a new claim. It serves as an alternative remedy for protecting preexisting creditor's rights.

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Ninth Circuit

***Aramid Entm't Fund Ltd. v. Tutor (In re R2D2, LLC)*, No. 13-55029, 2015 WL 3607080 (9th Cir. June 10, 2015).**

The matter before the Ninth Circuit was an appeal of an order by a bankruptcy court, affirmed by a district court, dismissing RICO, fraudulent inducement and alter ego claims brought by the appellants in the underlying bankruptcy cases. Some 3+ years after the district court's affirmance, the bankruptcy court dismissed the underlying bankruptcy cases and the next

day denied the Chapter 13 trustee's motions for stay pending appeal of the dismissal orders. The Ninth Circuit held that dismissal of the underlying bankruptcy cases rendered moot the claims asserted by the appellants, explaining that "[a]s these bankruptcy cases have now been dismissed, it would be impossible for this court to grant [the Appellants] any effective relief in the event that we were to decide the matter on the merits in favor of [the Appellants]." *Id.,* *1. The court noted that "'[t]he test for [constitutional] mootness of an appeal is whether the appellate court can give the appellant any effective relief in the event that it decides the matter on the merits in his favor.'" Id. (*quoting In re Burrell,* 415 F.3d 994, 998 (9th Cir. 2005)).

***Eruchalu v. US Bank N.A.*,**
No. 2:15-CV-946-JCM, 2015 WL 3609909 (D. Nev. June 9, 2015).

The matter before the district court was a pro se motion seeking a TRO to prevent a scheduled foreclosure sale on real property (Property). Prior to dismissal of the debtor-appellant's chapter 13 case the debtor had filed an adversary proceeding to determine the validity of liens on the Property. US Bank, N.A. (Bank) moved to dismiss, after which a notice scheduling the foreclosure sale was filed. Approximately 2 weeks later the bankruptcy court granted the Bank's motion to dismiss. The Debtor filed a notice of appeal and 2 days later the bankruptcy court entered an order reopening the debtor's chapter 13 case for administrative purposes, noting the continued pendency of the adversary proceeding. Subsequently, the Bank moved for an order confirming that the automatic stay was not in effect; a hearing on that motion was set for July 9. Prior to that hearing date, the debtor filed his motion seeking entry of a TRO. After recounting the purpose of a TRO—to preserve the status quo prior to a hearing on preliminary injunctive relief—the district court concluded that the debtor was not entitled to a TRO. The court noted that the debtor did not substantiate his right entry of a TRO and, if anything, the documentation provided supported the conduct of a foreclosure sale, i.e., delinquency on loan payments. The court noted that the debtor took issue with the fact that, due to the reopening of his chapter 13 case he was unable to initiate another chapter 13 case and obtain the benefits of the automatic stay. The court explained that "[w]hether the pending foreclosure sale may be stayed is a separate issue from appellant's entitlement to a temporary restraining order," and that "[t]o the extent that appellant seeks a decision on the issue of a stay before the pending foreclosure sale, appellant should request such relief from the bankruptcy court." *Id.,* *3.

***Hart v. Bank of Am. Home Loans (In re Hart)*,**
No. CC-14-1343-TaKud, 2015 WL 3895476 (BAP 9th Cir. June 24, 2015).

The matter before the BAP was a bankruptcy court order dismissing the debtor's first amended complaint against several defendants. In 2006, the debtor's wife obtained a loan through which she purchased real property (Property) reflected in a promissory note and secured by a deed of trust which reflected the wife as the borrower who held title solely in her name. The debtor contemporaneously executed a quitclaim deed assigning any interest he held in the Property to his wife. After the wife defaulted on payments, the lender (Bank) acquired title via sale through the deed of trust. The Bank subsequently obtained a judgment for restitution and

possession of the Property. Four days later the husband filed a chapter 13 case; he scheduled the Property and listed the Bank as a secured creditor. Shortly thereafter the debtor converted his chapter 13 case to a case under chapter 7, then commenced the action alleging fraud such that the foreclosure was invalid. The Bank moved to dismiss, including challenging the debtor's standing given he held no interest in the Property. The debtor opposed the motion but did not address the standing argument. On appeal, the BAP found that the debtor waived the right to contest the bankruptcy court's determination that he lacked standing, but noted that he held no interest in the Property but, to the extent he did, it was insufficient to confer standing. The BAP explained that the underlying obligations to the Bank belonged to the non-debtor wife, and that even if the claims belonged to the debtor they belonged to his chapter 7 trustee who had not abandoned those (unscheduled) claims.

In re Montellano,
No. 2:15-bk-11049-RK, 2015 WL 3878412 (Bankr. C.D. June 23, 2015).

The matter before the court was the debtor's motion to recover an involuntary transfer of her wages via garnishment under Code section 547, granted to the debtor under Code section 522(h). The court denied the motion without prejudice to the debtor seeking the same relief by way of an adversary proceeding as contemplated by Bankruptcy Rule 7001(1).

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<u>11th Circuit</u>

***In re Lorenzo,* --- Fed. Appx. ---, 2015 WL 3499756 (11th Cir. June 4, 2015)**

Wells Fargo Bank filed an adversary proceeding objecting to a debtor's discharge on the grounds that debtor had (1) destroyed business records that provided important details about her finances; (2) made false oaths about accounts and property she owned; and (3) attempted to conceal her ownership of real estate. The debtor failed to timely respond to the complaint and Wells Fargo moved for entry of default and default judgment, which the bankruptcy court entered. The bankruptcy court denied the debtor's motion to set aside the default judgment and the district court affirmed, as did the Eleventh Circuit.

Rather than filing a response, the debtor sought to settle her case with Wells Fargo, but Wells Fargo declined to settle. While debtor's counsel requested a $5,000 retainer to represent

her in this adversary proceeding, the debtor did not pay the attorney's retainer until after the deadline passed to file an answer and after Wells Fargo had moved for entry of default. Eleven days after the default was entered, the debtor retained counsel and filed an answer to the complaint. The debtor then moved to vacate the default. The bankruptcy court denied the debtor's motion and, after a hearing, entered a default judgment in favor of Wells Fargo.

Pursuant Fed.R.Civ.P. 55(c), there must be 'good cause" in order to set aside an entry of default. Courts consider a number of factors to determine whether a party has shown good cause to set aside an entry of default including whether the defaulting party presented a meritorious defense to the suit and whether the failure to act was willful. In this case the bankruptcy court determined that the debtor lacked a meritorious defense since she admitted that she deliberately destroyed some of the financial records when, in a fit of anger during the state court litigation, she used a hammer to smash the computer server containing financial records and failed to preserve others. The fact that she was upset and mad was no justification for destroying financial records. Because her defense lacked merit, setting aside the entry of default and litigating the adversary proceeding on its merits would simply waste judicial resources to reach exactly the same result. In addition, the bankruptcy court found that her failure to timely answer was willful since failed to pay her attorney's retainer until after Wells Fargo had already moved for entry of default.

***In re McFarland*, --- F.3d ---, 2015 WL 3825078 (11th Cir. June 22, 2015)**

The Chapter 7 trustee objected to various exemptions claimed by the debtor, including a specific exemption in an annuity pending resolution of a certified question to the Georgia Supreme Court. In resolving the question, the Georgia Supreme Court explained that in deciding whether a particular annuity is of the type intended to come within the exemption, the pertinent question is "whether it provides income as a substitute for wages." The bankruptcy court found and the district court affirmed that the annuity, in this case, did not qualify as an exemption because it was structured more like a future investment than a substitute for wages.

Approximately five years before filing this case, the debtor (age 64) had transferred funds from his mutual fund into a newly created annuity. The sole beneficiary was the debtor's wife and the payments under the annuity contract did not begin until January 15, 2032, at which point the debtor would be 90. The debtor had never drawn money from the annuity nor did he intend to withdraw any funds during his lifetime. Furthermore, the debtor stated that he got the "annuity mainly for my wife when I passed." Thus, the Eleventh Circuit agreed with the reasoning used by the bankruptcy court and affirmed the district court that the annuity was not intended to provide income as a substitute for wages.

***In re Chabre*,**
531 B.R. 875, 2015 WL 3486038 (Bankr. M.D. Fla. May 27, 2015)
(Published on June 23, 2015)

The Bankruptcy Court held that the debtor's additional expenses for the support of disabled family members and for treatment of her own medical conditions qualified as "special circumstance" sufficient to rebut §707(b)(2).

The office of the United States Trustee filed a motion to dismiss pursuant to §707(b)(1) based upon a showing that the debtor had annualized income of $107,123.88. After an evidentiary hearing, the Bankruptcy Court found special circumstances existed to adequately rebut the presumption of abuse. First, the debtor's mother, who was 81 years old, had insufficient income to provide for her own living expenses and the debtor had historically assisted with her mother's living expenses. In addition, the debtor historically provided family support for relatives who had disabilities that prevented them from employment. Lastly, the court found that the debtor suffered from serious medical conditions herself. The debtor's employment could be in jeopardy if she were unable to continue with her medical treatments. Although the debtor had insurance coverage through her employer, her medical condition created expenses and difficulties in addition to those covered by her insurance, and thus were allowable deductions in the means test calculation.

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