Bankruptcy Circuit Update
Featuring cases from March 2016

First Circuit

Gil-De La Madrid v. Bowles Custom Pool & Spa (In re Gil-De La Madrid),
--- F.3d ---, 2016 WL 1169377 (1st Circuit P.R., March 25, 2016)

The Court of Appeals for the First Circuit ("First Circuit") affirmed the bankruptcy court's decision to extend the filing deadline for proofs of claim after the debtor's Chapter 13 case was reinstated following the expiration of the 90 day period to file claims. However, the First Circuit declined to adopt a specific test for the calculation of the proof of claim deadline when a case has been reinstated. In addition, the First Circuit denied the appellee's motion for attorneys' fees, costs and/or sanctions holding that the appellee offered no evidence that the debtor or his counsel "engaged in unreasonable or vexatious behavior meriting sanctions."

O'rorke v. Porcaro (In re Porcaro),
--- B.R.---, 2016 WL 1089407 (B.A.P. 1st Cir., March 21, 2016)

The Bankruptcy Appellate Panel for the First Circuit adopted the 5th Circuit's approach set forth in *Watson v. Ault*, 525 F.2d 886 (5th Cir. 1976), for implementing the in forma pauperis statute (28 U.S.C. § 1915). This approach requires a two part inquiry: (1) whether the in forma pauperis affidavit demonstrates economic eligibility and (2) if so, whether the asserted claim is frivolous or malicious. The Panel held that the debtor's affidavit which demonstrated that his monthly expenses exceeded his income by $1.00 met the first requirement for obtaining in forma pauperis relief. As to the second part of inquiry, screening the debtor's claims, the Panel held that the debtor's appeal of the bankruptcy court's grant of summary judgment was not frivolous and could proceed. However the Panel dismissed as frivolous the debtor's appeal of the denial of the debtor's election to have the appeal heard by the district court because the debtor missed the deadline to make such election.

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Second Circuit

Wenegieme v. Wells Fargo Home Mrtg.,
--- Fed.Appx. ----, 2016 WL 1039578 (March 16, 2016)

The Second Circuit affirmed the judgment of the district court dismissing the complaint of Celestine Wenegieme ("Wenegieme"), proceeding pro se, for lack of subject matter jurisdiction pursuant to the Rooker-Feldman doctrine. Wenegieme had sued Wells Fargo Home Mortgage ("Wells Fargo"), alleging that the foreclosure sale of property that he and his sister owned was unlawful because his sister had filed for bankruptcy and the sale violated the automatic stay.

The Second Circuit noted that under the Rooker-Feldman doctrine, lower federal courts lack subject matter jurisdiction over claims that effectively challenge state court judgments. The doctrine applies when: (1) the federal court plaintiff lost in state court; (2) the plaintiff complains of injuries caused by a state court judgment; (3) the plaintiff invites the federal court to review and reject that judgment; and (4) the state court judgment was rendered prior to the commencement of proceedings in the federal court. Here, the district court had held that all four requirements were satisfied and that it therefore did not have subject matter jurisdiction over Wenegieme's claim.

On appeal, Wenegieme did not contest any of these elements and therefore waived any challenge to the district court's ruling on this issue. Instead, Wenegieme only argued that the district court had jurisdiction because the complaint involved a bankruptcy matter. However, Wenegieme did not file a bankruptcy petition; his complaint invoked the court's diversity jurisdiction and challenged the state foreclosure action. He contended that the foreclosure sale violated the automatic stay, but the Second Circuit affirmed that this did not present a basis for federal court jurisdiction under these circumstances.

***Binder & Binder, P.C. v. Colvin*,**
--- F.3d ----, 2016 WL 1085764 (March 21, 2016)

The Second Circuit affirmed the district court's grant of summary judgment in two related cases in which Binder & Binder ("Binder"), a law firm that represents claimants before the Social Security Administration ("SSA"), sought past attorney's fees for its successful representation of claimants who later declared bankruptcy and had their debts, including those owed to Binder, discharged by bankruptcy courts. When Binder sought to hold the SSA liable for the fees, the district courts below granted summary judgment to the SSA on the basis of sovereign immunity. Both courts followed two circuit courts of appeals that have explicitly held that 42 U.S.C. § 406(a) does not constitute a waiver of the SSA's sovereign immunity, which, if not waived, precludes such lawsuits. Conversely, though the Second Circuit has not previously addressed this issue, the Eastern District of New York had previously held that 42 U.S.C. § 406(a) of the Social Security Act does waive sovereign immunity.

The Second Circuit began its analysis by noting that waivers of sovereign immunity must be unequivocally expressed in statutory text and cannot simply be implied. The Second Circuit found no such express waiver in 42 U.S.C. § 406(a), and further noted that Binder was confusing rights and remedies; though Binder may be entitled to its statutorily awarded legal fees, such a right does not means that the SSA itself is liable to Binder for such fees. In other words, though 42 U.S.C. § 406(a) may create a statutory duty on the part of the SSA, absent an express waiver of sovereign immunity 42 U.S.C. § 406(a) does not establish a corresponding remedy of money damages against the SSA for a breach of that duty. As such, the Second Circuit noted that even though there may a wrong here (the SSA's alleged failure to disburse fees), to successfully pursue the remedy (damages from the SSA) that Binder sought for this wrong, Binder had to demonstrate a waiver of sovereign immunity, which it failed to do.

Ahuja v. LightSquared, Inc.,
--- Fed. Appx. ----, 2016 WL 1105109 (March 22, 2016)

The Second Circuit affirmed the order of the district court affirming the confirmation of the plan of reorganization of debtor LightSquared Inc. ("LightSquared") over the appeal by equity holder Sajov Ahuja ("Ahuja"). On appeal, Ahuja claimed that the plan should not have been confirmed because (1) it did not satisfy 11 U.S.C. § 1129(b)'s fair and equitable rule, and (2) it did not satisfy 11 U.S.C. § 1123(a)(4)'s equal treatment rule. LightSquared denied those claims and argued that Ahuja's appeal should have been dismissed as equitably moot.

The Second Circuit first addressed LightSquared's equitable mootness argument, describing it as a prudential doctrine under which a court may dismiss a bankruptcy appeal when, even though effective relief could conceivably be fashioned, implementation of that relief would be inequitable. A bankruptcy appeal is presumed equitably moot when the debtor's reorganization plan has been substantially consummated as defined by Section 1101(2) of the Bankruptcy Code. The presumption of equitable mootness can be overcome, however, if all five of the "Chateaugay factors" (see In re Chateaugay Corp., 10 F.3d 944, 952-53 (2d Cir. 1993)) are satisfied, which include the following: (1) the court can still order some effective relief; (2) such relief will not affect the re-emergence of the debtor as a revitalized corporate entity; (3) such relief will not unravel intricate transactions so as to knock the props out from under the authorization for every transaction that has taken place and create an unmanageable, uncontrollable situation for the court; (4) the parties who would be adversely affected by the modification have notice of the appeal and an opportunity to participate in the proceedings; and (5) the appellant pursued with diligence all available remedies to obtain a stay of execution of the objectionable order if the failure to do so creates a situation rendering it inequitable to reverse the orders appealed from.

Here, the Second Circuit held that Ahuja had met his burden of showing that the first, fourth, and fifth factors for overcoming the presumption of mootness were satisfied. The Second Circuit also agreed with Ahuja's argument that the second and third factors were also met because the Second Circuit was still able to order effective relief without affecting the re-emergence of the LightSquared as a revitalized corporate entity by awarding money damages to Ahuja (even if only a nominal amount). The Second Circuit thus held that Ahuja had overcome the presumption of equitable mootness.

The Second Circuit then briefly considered and rejected Ahuja's arguments based on the "fair and equitable" rule and the "equal treatment" rule. Regarding the "fair and equitable" rule, the Second Circuit explained that this requirement is a rule of priority, mandating that no junior class receive distributions prior to a more senior class. Ahuja, however, was in the most junior class under the plan, and as such the "fair and equitable" rule was not violated with regard to his treatment. Regarding the "equal treatment" rule, the Second Circuit explained that this rule requires that any reorganization plan "provide the same treatment for each claim or interest of a particular class, unless the holder of a particular claim or interest agrees to a less favorable treatment of such particular claim or interest." 11 U.S.C. § 1123(a)(4). The Second Circuit found that this claim failed on the merits, as the interests of all common equity holders in LightSquared (including Ahuja) were cancelled under the plan.

Camden Asset Mgmt. LLP v. Owners
(In re Tribune Co. Fraudulent Conveyance Litigation),
--- F.3d ----, 2016 WL 1226871 (March 24, 2016)

In an appeal from a dismissal by the district court of state law claims and fraudulent conveyance claims brought by certain creditors (the "Creditors") against former shareholders (the "Shareholders") of debtor corporation the Tribune Media Company ("Tribune") who had been cashed out in a leveraged buyout ("LBO"), the Second Circuit rejected the district court's holding that the Creditors lacked statutory standing but affirmed the dismissal on other grounds, finding that the Creditors' claims were preempted by Section 546(e) of the Bankruptcy Code.

The disputed payments in this case were made by Tribune to the Shareholders who had purchased all of its stock in the LBO, which occurred shortly before Tribune's bankruptcy filing. The purchase price of the stock (over $8 billion) was above its trading range, and was transferred to a "securities clearing agency" or "other financial institution" as those terms are used in Section 546(e) before those entities paid the funds to the Shareholders in exchange for their shares which were then returned to Tribune.

In the bankruptcy court, the committee of unsecured creditors (the "Committee") sought to avoid all the LBO-related payments as intentional fraudulent conveyances. Later, the Creditors separately filed state law claims and constructive fraudulent conveyance claims in various courts. The bankruptcy court lifted the automatic stay with regard to these clams because the Committee had elected not to bring the constructive fraudulent conveyance actions within the applicable two-year limitation period. After the plan of reorganization was confirmed and the pursuit of the intentional fraudulent conveyance claims was transferred to a litigation trust, the Creditors pursued these claims in the district court, which rejected such claims on the grounds that the Creditors lacked statutory standing. The district court reasoned that the automatic stay deprived the Creditors of statutory standing while the litigation trust was pursuing the avoidance of the same transfers, albeit under a separate legal theory. The Creditors appealed from this dismissal, and the Shareholders cross-appealed from the district court's rejection of its argument that the Creditor's claims were preempted.

On appeal, the Second Circuit considered (i) whether the Creditors were barred by the Bankruptcy Code's automatic stay provision from bringing state law claims and constructive fraudulent conveyance claims while avoidance proceedings against the same transfers brought by a party exercising the powers of a bankruptcy trustee on an intentional fraud theory are ongoing; and (ii) if not, whether the Creditors' state law claims and constructive fraudulent conveyance claims were preempted by Bankruptcy Code Section 546(e).

Regarding the first issue, the Second Circuit held that the Creditors were not barred by the automatic stay because they had been freed from its restrictions by three explicit orders of the bankruptcy court, none of which had been objected to by the Shareholders, and by Tribune's confirmed reorganization plan, which expressly allowed the Creditors to pursue "any and all" LBO-related claims arising under state fraudulent conveyance law.

However, regarding the second issue, the Second Circuit held that the Creditor's claims were preempted by Bankruptcy Code Section 546(e), which shields transfers by or to financial intermediaries effectuating settlement payments in securities transactions or made in connection with a securities contract, except through an intentional fraudulent conveyance claim, from avoidance proceedings brought by a bankruptcy trustee. The district court had rejected this argument, holding that the prohibitions in Section 546(e) only applied to a bankruptcy trustee and that Congress had declined to extend Section 546(e) to state law claims and fraudulent conveyance claims brought by creditors.

However, under the doctrine of implied preemption, a preemptive effect may be inferred in statutes where it is not expressly provided, as in Section 546(e). The Second Circuit reasoned that once a party enters bankruptcy, the Bankruptcy Code constitutes a wholesale preemption of state laws regarding creditors' rights. As such, the Creditors' state law claims were preempted when the Chapter 11 proceedings commenced and were not dismissed. When Tribune entered bankruptcy, the Creditors' avoidance claims were vested in the federally appointed trustee, who could pursue a constructive fraudulent conveyance claim under Section 544. Although such a claim borrows applicable state law standards regarding the transfer, the claim itself is a federal law claim.

Based in part on the foregoing, the Second Circuit found that the Creditors' understanding of Section 546(e) was both ambiguous and conflicted with the purposes of Bankruptcy Code Sections 544, 362, and 548. As such, the Second Circuit rejected the Creditors' argument that fraudulent conveyance actions revert to creditors if either the two-year statute of limitations passes without an exercise of the bankruptcy trustee's powers under Section 544, or if the Section 362(a) automatic stay is lifted by the bankruptcy court. Firstly, the Second Circuit held that the language of the automatic stay provision applies only to actions against "the debtor," which was not the case here. The Second Circuit also held that the Bankruptcy Code does not contain any language that supported the Creditors' "reversion" theory, and that such theory directly conflicts with the purposes of Section 544, which vests avoidance powers in the trustee to simplify proceedings, reduce the costs of marshalling the debtor's assets, and assure an equitable distribution among creditors. Specifically, any trustee would have significant difficulties in negotiating more than a nominal settlement for a federal avoidance claim based on intentional fraudulent conveyance if it could not preclude state claims from attacking the same

transfers but not requiring a showing of actual fraudulent intent. Furthermore, based on the plain language of the Bankruptcy Code, the Second Circuit held that the trustee cannot pass on, or "allow" to revert through passivity, a right the trustee does not have, namely the ability to pursue the claims at issue.

For these and other reasons (including upholding the important Congressional intent to protect securities transactions from unwinding that underlies Section 546(e)), the Second Circuit held that the Creditors' claims were preempted by Section 546(e) of the Bankruptcy Code.

FirstBank Puerto Rico v. Barclays Capital, Inc. (In re Lehman Bros. Holdings, Inc.),
--- Fed. Appx. ----, 2016 WL 1212079 (March 29, 2016)

The Second Circuit affirmed the judgment of the district court affirming the bankruptcy court's denial of the claims by FirstBank Puerto Rico ("FirstBank") to recover from defendant Barclays Capital, Inc. ("Barclays") certain securities that FirstBank pledged to Lehman Brothers Special Financing Inc. ("LBSF") as security for an interest rate swap agreement. FirstBank also sought to overturn the bankruptcy court's imposition of sanctions for contempt on FirstBank.

The bankruptcy court held, and the district court affirmed, that LBSF's sale of the securities that FirstBank initially posted as collateral to Lehman Brothers Inc. ("LBI") cut off FirstBank's interest in the collateral against LBI (or any subsequent transferee) pursuant to the International Swaps and Derivatives Association Master Agreement and Credit Support Annex. The bankruptcy and district courts also held that the securities at issue were transferred to Barclays as part of its purchase of assets in the underlying bankruptcy proceedings. The Second Circuit held that the appropriate venue to litigate whether such securities were transferred as part of the sale was bankruptcy court, not a district court proceeding.

The Second Circuit also affirmed the order for sanctions requiring FirstBank to pay Barclays's "reasonable counsel fees and costs incurred in defending against this litigation that has been pursued knowingly by FirstBank in violation of a sale order. As noted by the district court, (i) the sale order clearly prohibited suits with respect to "Purchased Assets" as defined in the Purchase Agreement, (ii) the sale order clearly incorporated a "clarification letter" into its definition of the "Purchase Agreement," and (iii) the clarification letter clearly defined "Purchased Assets" to include the collateral. Moreover, the Second Circuit found that the sanctions were appropriate because they were imposed only after extensive discovery and after Barclays offered FirstBank an opportunity to withdraw its lawsuit without sanctions.

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Third Circuit

In re Skinner,
2016 WL 850950 (3d Cir. Mar. 4, 2016)

Thomas Skinner and his wife, Anna Skinner, allegedly misappropriated the funds of Dorothy Skinner, Thomas' mother. They also placed her in Saint Joseph's Manor, an assisted living facility, and proceeded to misappropriate the insurance funds that were intended to pay for Dorothy's care. As a result of her non-payment, Dorothy was evicted with an outstanding balance of $25,049.69. Saint Joseph's Manor filed a lawsuit in the Court of Common Pleas of Montgomery County against Dorothy Skinner, Thomas Skinner, and Thomas Skinner's brother, William. Thomas Skinner subsequently filed for Chapter 7 bankruptcy protection, and William filed a non-dischargeability complaint against Thomas, alleging that Thomas had a non-dischargeable obligation to reimburse him for any liability that he may owe Saint Joseph's Manor. The Bankruptcy Court dismissed the complaint for lack of standing to challenge the dischargeability of Thomas' debts, and the District Court and the Third Circuit affirmed. The Third Circuit ruled that only a party to whom a claim is owed may seek to make its claim non-dischargeable under Section 523 of the Bankruptcy Code. Additionally, the Third Circuit ruled that William did not have standing to bring a claim under the UFTA, which allows the creditor of a debtor to avoid any fraudulent transfers made by the debtor, because William was not a creditor of Dorothy's estate.

In re Red Rock Services, Co, LLC (Holber v. Suffolk Construction Co., Inc.),
2016 WL 908965 (3d Cir. Mar. 10, 2016)

Red Rock was a demolition services contractor and Suffolk was a general contractor on two construction deals. Due to unexpected problems during the first demolition project, Red Rock needed to change its demolition methods at significant expense to Red Rock. However, Red Rock did not timely notify Suffolk of its intent to seek a change order. When Red Rock did ultimately provide notice to Suffolk, Suffolk worked with Red Rock to prepare a change order request, which culminated in a submission of the request to the owner of the project several months later. The owner rejected the change order as untimely. Suffolk subsequently notified Red Rock that Red Rock was in default of the contract. On the second demolition project, Red Rock fell behind on several deadlines. Suffolk notified Red Rock that Red Rock was in default on the second contract and terminated the contract two days later. Subsequently, Red Rock filed for bankruptcy protection.

Red Rock filed an adversary proceeding as to the two contracts. At a bench trial, the Bankruptcy Court ruled in favor of Red Rock as to the first contract, in favor of Suffolk on the second contract, and ordered that the parties could offset the awards. Additionally, on the issue of fees, the Court found that neither company had differentiated the fees and costs incurred as to each contract, so the Court granted both parties the full amount of their requested fees. The Third Circuit affirmed the District Court on all matters, and ruled as follows:

(1) The Bankruptcy Court had authority to decide the matter under *Stern v. Marshall* because the state law claims were inextricably linked with the claims from the adversary proceeding;
(2) By communicating with Suffolk about the change order issue on the first project, Red Rock did not waive its right to seek a change order;
(3) Suffolk was collaterally estopped from challenging the validity of the change order on the first project because Suffolk's silence during continued negotiations was tantamount to a voluntary representation on which Red Rock relied to its detriment;
(4) Suffolk waived its rights to challenge the change order by failing to act on its contractual right to do so;
(5) There was no error in the Bankruptcy Court's denial of Suffolk's motion *in limine* and the admission the testimony of Red Rock's damages expert because even though Red Rock's expert did not testify during Red Rock's case-in-chief, Red Rock had no surviving claims at the time of trial;
(6) A contingent fee arrangement between Red Rock and its counsel that had never been approved by the Bankruptcy Court did not bind the Bankruptcy Court with regard to its fee awards; and
(7) The Bankruptcy Court's allowance of both parties' fees was acceptable because both contracts had "prevailing party" provisions, the fees and costs were reasonable, and neither party properly itemized their fee requests by matter.

Mathis v. Philadelphia Electric Co.,
2016 WL 1027962 (3d Cir. March 15, 2016)

Derrick Mathis (the "Debtor") filed a Chapter 7 bankruptcy proceeding. During that proceeding, the Philadelphia Electric Company ("PECO") filed a claim for approximately $7,500. The Debtor repeatedly objected to the claim as fraudulent and accused the Chapter 7 Trustee of misconduct in connection with the claim. The Bankruptcy Court overruled the objections and ordered the Chapter 7 Trustee to pay the claim. The bankruptcy case was subsequently closed and the Debtor did not appeal. Over one year after the case was closed, the Debtor filed a civil action and then an amended complaint against PECO and the Chapter 7 Trustee alleging that the $7,400 claim was fraudulent and that PECO and the Chapter 7 Trustee conspired to bring the fraudulent claim before the bankruptcy court. Additionally, the Debtor alleged that PECO had violated the Fair Debt Collection Practices act by attempting to collect on the same debt twice, and that PECO had violated several criminal statutes. The District Court dismissed the Debtor's complaint, concluding that it lacked jurisdiction over the claims and that the Debtor failed to state a federal claim as to PECO. The Third Circuit affirmed the District Court's dismissal of the Debtor's amended complaint as to PECO, stating that the District Court properly determined that the criminal statutes that were invoked do not provide a private right of action and that the Debtor failed to state a claim under the FDCPA. The Third Circuit also affirmed the District Court's dismissal of the Debtor's amended complaint as to the Chapter 7 Trustee because the validity of PECO's claim was established during the bankruptcy and the Debtor did not timely appeal the Bankruptcy Court's ruling at that time. Moreover, the Third Circuit ruled that the Debtor did not specify how the Chapter 7 Trustee had allegedly defrauded the Bankruptcy Court.

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Fourth Circuit

***Providence Hall Assocs. Ltd. P'ship v. Wells Fargo Bank, N.A.*, --- F.3d ----, 2016 WL 930196 (4th Cir. March 11, 2016)**

On March 11, 2016, the Fourth Circuit held that § 363 sale orders entered in a bankruptcy are afforded a preclusive effect through *res judicata* and barred lender liability claims against a debtor's secured creditor. During the bankruptcy case, a chapter 11 trustee moved to sell two parcels of property that were collateral of Wells Fargo, and the proceeds, after expenses, would be paid to Wells Fargo. The bankruptcy court approved the sales and the distributions to Wells Fargo in satisfaction of its debt. Previously, the debtor had filed lender liability claims against Wells Fargo, but the trustee consented to dismissal of that suit without prejudice.

Subsequently, after the chapter 11 case was dismissed, the debtor filed a lender liability complaint against Wells Fargo in state court, which Wells Fargo removed to federal court. The District Court granted Wells Fargo's motion to dismiss that complaint based on *res judicata*, and the debtor appealed that decision to the Fourth Circuit. The Fourth Circuit affirmed dismissal on *res judicata* grounds, finding persuasive holdings from the Fifth, Sixth, and Seventh Circuits. The Court held that the chapter 11 trustee bound the debtor as its privy and that the sale motions "effectively conceded the validity" of the debtor's obligations to Wells Fargo, which obligations were satisfied by the sale proceeds. The debtor's claims could have been asserted in the bankruptcy proceeding but were precluded because they were based on the same transaction as the sale orders.

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Fifth Circuit

***Judgment Factors, L.L.C. v. Athol Packer (In the Matter of Athol Packer)*, __ F.3d ___, 2016 WL 929606 (5th Cir. Mar. 10, 2016)**

Judgment Factors L.L.C. ("JF") filed an adversary proceeding (i) seeking to prevent the entry of a Chapter 7 discharge order for the debtor Athol W. Packer on the grounds that he failed

to disclose assets and made false oaths and (ii) requesting the court reverse pierce the corporate veil of various entities owned by Packer and purportedly operating as his alter ego. After the bankruptcy court dismissed JF's alter ego claims and granted summary judgment in favor of Packer on JF's discharge objections, the district court and Fifth Circuit both affirmed.

As to JF's alter ego argument, the Fifth Circuit held JF lacked standing to bring alter ego and reverse veil piercing claims because they belong to the debtor, are property of the estate, and lie within the control of the trustee. Although the Court recognized limited circumstances in which a creditor can bring such claims, it held those circumstances were not present here. Additionally, JF failed to seek leave from the court to pursue the claims, providing an additional basis for dismissal.

JF's discharge objections under 11 U.S.C. § 727 were premised primarily on the notion that Packer used his business entities to hide assets from creditors. The Court found these arguments unavailing because Packer not only disclosed the existence of his corporate entities, but he also was forthcoming during his § 341 meeting with the trustee and other creditors regarding the existence of those entities, their valuation, and his interactions with them. Additionally, there was no evidence he concealed or transferred assets. The Fifth Circuit also found Packer's forthcoming attitude at the creditors meeting sufficient to overcome JF's contention he made false oaths during his bankruptcy.

***Mandel v. Mastrogiovanni Schorsch & Mersky (In the Matter of Mandel)*, ___ Fed. App'x ___, 2016 WL 874359 (5th Cir. Mar. 7, 2016)**

The Fifth Circuit held a Chapter 7 debtor-out-of-possession had standing to appeal the bankruptcy court's allowance of claims against his estate where it had not yet determined whether the debt at issue in the allowance order was dischargeable.

The appeal involved several levels of court proceedings. First, the debtor, Edward Mandel, was involved in a state court litigation (the "State Court Litigation") regarding outstanding attorneys' fees. While that case was pending, Mandel filed for Chapter 11, and his state court opponents filed a claim against his estate for their fees. The bankruptcy court allowed the claim (the "Allowance Order"), and Mandel appealed (the "Allowance Appeal"). Nevertheless, the bankruptcy court appointed a Chapter 11 trustee, who ultimately decided not to pursue the Allowance Appeal, leaving the question of whether Mandel had standing to pursue the appeal on his own. Mandel's bankruptcy was subsequently converted to a Chapter 7, and the bankruptcy court dismissed the Allowance Appeal as moot, finding he lacked a sufficient interest in the Allowance Order to establish standing.

Importantly, during the Chapter 11 case, Mandel's opponents in the State Court Litigation filed an objection to the dischargeability of their claims pursuant to § 523 (the "Discharge Complaint"), on which the bankruptcy court had not yet ruled. The Fifth Circuit found this fact determinative on the question of standing. Although the Court recognized a debtor-out-of-possession rarely meets the "person aggrieved" bankruptcy standing test because he typically lacks a concrete interest in how the court divides his estate, here, two factors conferred Mandel standing.

First, a successful appeal of the Allowance Order would have a dispositive impact on the bankruptcy court's adjudication of the Discharge Complaint because, if the court found in favor of Mandel, there would be no claim to find nondischargable. The Fifth Circuit pointed to precedent holding that the "person aggrieved" test is satisfied if a successful appeal would impact an individual's bankruptcy discharge. Second, the Allowance Order functioned as an adjudication of the fee claim against Mandel because, if the stay was lifted, Mandel's State Court Litigation opponents could pursue their claim against him individually, and challenges to nondischargable debt are not moot where there is the possibility of future direct actions against the debtor. Moreover, the Fifth Circuit held Mandel's Allowance Appeal was not moot because the debt could still be found nondischargable, given that the bankruptcy court had not yet ruled on the Discharge Complaint. Although the appeal could become moot in the future if the relevant debt was discharged, that did not impact Mandel's standing at present.

***In the Matter of Robert Lewis Adkins*,**
____ F. App'x ____, 2016 WL 1042321 (5th Cir. Mar. 14, 2016)

Robert Adkins, who owned and operated several corporations, including R.L. Adkins Corporation, was involved in simultaneous personal and corporate bankruptcy proceedings in the same court. McLoba Partners, Ltd. was a creditor in both cases, seeking repayment of loans. In the corporate bankruptcy, the trustee filed an adversary proceeding against McLoba, objecting to and seeking to subordinate its claim. In response, McLoba filed a counterclaim against the trustee and a third-party complaint against Adkins. Adkins argued the third-party complaint in the corporate bankruptcy violated the automatic stay in his personal bankruptcy. McLoba countered that the Fifth Circuit precedent in *Campbell v. Countrywide Home Loans, Inc*., 545 F.3d 348 (5th Cir. 2008), permitted the action because the third-party complaint in the corporate bankruptcy was in the same court as Adkin's personal bankruptcy.

The bankruptcy court held McLoba read *Campbell* too broadly and, thus, violated the automatic stay by filing the third-party complaint and awarded Adkins attorneys' fees. It subsequently certified the issue on interlocutory appeal to the Fifth Circuit. After the appeal was authorized by the motions panel, McLoba informed the Court in his briefing that he settled with Adkins, waiving all but $1 of the awarded fees. The Fifth Circuit thus overturned the motion panel's authorization of the appeal, finding an appeal was no longer authorized in light of the changed circumstances.

In the Matter of Delta Produce,
____ F.3d ___, 2016 WL 945185 (5th Cir. Mar. 22, 2016)

The bankruptcy court appointed a special Perishable Agricultural Commodities Act ("PACA") counsel to collect and liquidate the debtor's assets that were part of the PACA trust, evaluate PACA creditors' claims, and disburse PACA funds at the rate of $350 hour to be paid out of the PACA fund. One creditor, Kingdom Fresh, objected to the special counsel's interim and final fee applications, arguing (i) the bankruptcy court lacked jurisdiction to disburse PACA trust assets, which were not part of the debtor's estate and (ii) counsel could not be paid out of the PACA trust but was instead limited to recovery from the estate.

The Fifth Circuit began by addressing two jurisdictional issues. First, it questioned the bankruptcy court's jurisdiction under *Stern v. Marshall*, noting PACA assets are not part of the bankruptcy estate and PACA claims "exist [] without regard to any bankruptcy proceeding." Nevertheless, it did not "resolve doubts" about the court's constitutional authority to adjudicate the PACA claims because it found the claimants had consented to the bankruptcy court's jurisdiction. Second, it held the district court lacked appellate jurisdiction to review the bankruptcy court's interim fee awards because they were not final orders. Kingdom Fresh claimed the district court had impliedly granted leave to appeal under 28 U.S.C. § 158(a)(3) by issuing a lengthy order on the merits. The Fifth Circuit rejected this contention, explaining a district court must explicitly grant or deny leave to appeal, and vacated the district court's orders on the two interim fee applications.

Turning to the final fee award, the Court noted Kingdom Fresh was the only claimant objecting to the special counsel's fee; the others had consented to its payment out of the PACA trust. Therefore, it held Kingdom Fresh only had standing to challenge the portion of the award that related to the percentage of trust assets it held pursuant to the "person aggrieved" test. In short, Kingdom Fresh could not claim to be affected financially by the other claimants' consent to pay the counsel.

Further, based on an examination of authority from other jurisdictions, the Fifth Circuit found it necessary to examine the special counsel's precise duties to determine whether his fees could be paid from the PACA fund before all claimants had been made whole. This was because case law drew a "somewhat blurred" distinction between individuals who were a "PACA trustee or [its] functional equivalent" (with fiduciary duties to PACA claimants) and those whose "primary role [was] outside the PACA trustee framework." Here, it found the counsel was the equivalent of a PACA trustee by virtue of his authority to take steps to preserve and collect PACA trust assets, including filing adversary proceedings and examining and objecting to claims. Thus, his fees could not be paid from the trust before all claimants had been paid in full as required by PACA's express terms.

***In the Matter of Skyport Global Commc'n, Inc.*,**
___ F. App'x ___, 2016 WL 1042526 (5th Cir. Mar. 14, 2016)

The Fifth Circuit affirmed the bankruptcy court's issuance of sanctions against minority shareholders who filed a state court petition bringing derivative claims alleging mismanagement of the corporate debtor. The bankruptcy court found the state court suit was a collateral attack on the confirmation order, which enjoined such claims, and issued sanctions in the form of attorneys' fees and costs.

The shareholders argued on appeal that the bankruptcy court lacked the power to exercise its inherent authority to sanction over an action in state court. The Fifth Circuit disagreed, explaining a court has power to sanction a party's bad faith conduct beyond that occurring in trial if the conduct is in direct defiance of its orders. Here, the state court action directly contravened the bankruptcy court's confirmation order, granting it the power to assess sanctions. The Court likewise summarily dismissed the shareholders' contention that the sanctions order failed to make specific findings of bad faith, pointing to the bankruptcy court's repeated observation that

the state court petition directly violated the injunction provisions contained in the confirmation order and was an "end-run around § 1144 of the bankruptcy code."

***Whitaker v. Moroney Farms Homeowners' Ass'n (In the Matter of Whitaker)*, ___ Fed. App'x ___, 2016 WL 1085742 (5th Cir. Mar. 18, 2016)**

The debtor, Whitaker, sought to discharge debts arising from a $30,000 judgment that breached his fiduciary duty as president and director of his homeowner's association ("HOA"). The HOA objected to the discharge and, after a trial on the merits, the bankruptcy court ruled the debt was non-dischargeable. The district court affirmed.

On appeal to the Fifth Circuit, Whitaker complained of the bankruptcy court's decision to bar him from relitigating the essential facts of the state court action underlying the judgment in the dischargability proceeding. The Court held Texas's rule of preclusion was properly applied by the bankruptcy court because the facts sought to be litigated in the dischargeability action were: (i) "fully and fairly litigated" in the state court and (ii) essential to the judgment against Whitaker. Moreover, Whitaker and the HOA were adversaries in both actions.

Whitaker also disputed his debt was non-dischargable under 11 U.S.C. § 523(a)(4), which pertains to "fraud or defalcation while acting in a fiduciary capacity." The Fifth Circuit explained that while Whitaker's fiduciary status was a question of federal law, federal law recognized Texas's codification of HOA directors as fiduciaries. In light of the state court's findings that Whitaker knowingly neglected his fiduciary duties to the HOA, the Fifth Circuit concluded his debt was non-dischargeable.

***In re Am. Lebanese Syrian Associated Charities, Inc.*, ___ F.3d ____, 2016 WL 850864 (5th Cir. Mar. 3, 2016)**

In a case arising out of R. Allen Stanford's Ponzi scheme, several charitable organizations sued by the Official Stanford Investors Committee, an assignee of the receiver, sought mandamus relief for the district court's determination that 28 U.S.C. § 754 conferred subject matter jurisdiction for assigned claims. The Fifth Circuit denied the writ for mandamus, holding the charities failed to satisfy the requirements for the "extraordinary remedy." Specifically, they failed to show the district court "clearly and indisputably erred" because neither party cited any controlling authority interpreting § 754. Because the Fifth Circuit found the "answer to the question far from clear," mandamus relief was not appropriate.

***Alsenz v. Aurora Bank, FSB, et al.*, ___ F. App'x ___, 2016 WL 833297 (5th Cir. Mar. 3, 2016)**

Richard Alsenz filed a state court action seeking a temporary restraining order and asserting other claims against several lenders after they initiated foreclosure proceedings on his home. After the TRO was granted, the lenders removed the action to federal court and sought to dismiss Alsenz's complaint for failure to state a claim. When Alsenz failed to respond, the motion was deemed unopposed and granted. The trial court subsequently denied his motion to alter or amend the judgment.

On appeal, Alsenz argued his complaint satisfied federal pleading requirements. But the Fifth Circuit found only one of his claims--unreasonable collection--was addressed in his brief. This claim was properly dismissed, the Court reasoned, because it lacked the required allegations of willful, wanton, and malicious harassment. The Fifth Circuit also held Alsenz waived certain statutory claims raised for the first time on appeal. It likewise dismissed Alsenz's argument that he should have been granted leave to replead, noting he never sought leave, failed to amend as a matter of right, and repeatedly asserted the adequacy of his pleadings even after being put on notice they were lacking. Finally, it summarily rejected Alsenz's claim Rule 12(b)(6) could not be applied under *Erie* due to its conflict with Texas's procedural rules in light of established Supreme Court precedent holding federal law governs in such conflicts as long as it represents a valid exercise of Congress' rulemaking authority.

In re Deepwater Horizon,
___ F. App'x ____, 2016 WL 889605 (5th Cir. Mar. 8, 2016)

The Fifth Circuit held the Deepwater Horizon Settlement Program (the "Program") and the district court did not abuse their discretion in denying a deckhand's request for an extension of time to file his proof of claim. Johnny Sexton filed an incomplete "Seafood Claim" pursuant to the Deepwater Horizon Economic and Property Damages Class Action Settlement ("Settlement Agreement") for his damages resulting from the oil spill. Specifically, his submission did not include the required sworn Claim Form. He did not discover this error until the bar date had passed, and his request for an extension to correct his claim was denied by both the Program and the district court.

On appeal to the Fifth Circuit, Sexton claimed the claims administrator and court improperly (i) applied the Program's "excusable neglect" standard for untimely claims and (ii) failed to treat the filing of his claim registration form and supporting documents, albeit incomplete, as a timely claim. The Court disagreed, holding the terms of the Settlement Agreement governed the claims administration process and did not provide a basis for reversal. First, the Settlement Agreement set forth a clear bar date. Second, it specified the Claim Form must be filed by the bar date. Third, although it provided a window to submit omitted supporting materials at a later date, it did not contain a similar scheme for missing Claim Forms. Thus, the event that "trigger[ed] the recognition of a claim [was] the filing of the Claim Form," and the Settlement Agreement did not support treating the filing of Sexton's supporting materials as a claim. Fourth, because the Settlement Agreement itself did not provide a procedure for requesting an extension of the claims deadline, there was no basis to determine the claims administrator improperly applied the Program's "excusable neglect" standard. Application of that standard was left entirely to the discretion of the administrator, and Sexton's attempt to invoke case law on the standard as applied in various federal rules and statutes failed because the standard was "tailored to fit the requirements of the Seafood Compensation Program" in this instance.

Ishee v. Fed. Nat'l Mortg. Ass'n**,**
___ Fed. App'x ____, 2016 WL 1040266 (5th Cir. Mar. 14, 2016)

Portia Ishee brought numerous claims against Fannie Mae, the owner of her promissory note, and its two loan servicers, GMAC and Green Tree, related to a wrongful attempted

foreclosure on her home. Although GMAC was the sole wrongdoer, Ishee claimed Fannie Mae was liable for its servicer's actions under Mississippi agency law. She likewise claimed Green Tree was liable as GMAC's successor in interest. The district court granted summary judgment in favor of Fannie Mae and Green Tree.

Explaining that Mississippi law focused on the element of control to determine whether an agency relationship exists, the Fifth Circuit found there was a genuine issue of material fact regarding whether Fannie Mae exercised control over GMAC. Specifically, there was evidence Fannie Mae was the ultimate decision maker regarding how to handle insurance proceeds, which were at issue in the case. In light of its decision that summary judgment was improper on the agency issue, the Court also reversed summary judgment on several vicarious liability claims that were dismissed due to the supposed absence of an agency relationship.

With respect to Ishee's vicarious liability claims against Green Tree, the Fifth Circuit affirmed summary judgment. First, the Court found Green Tree could not be liable as GMAC's successor in interest because it purchased the servicing rights in GMAC's bankruptcy free and clear of any liability. Second, the Court dismissed Ishee's contention Green Tree ratified GMAC's conduct because once it assumed control of her account, it ceased foreclosure procedings and sought to make her whole. The Fifrth Circuit also affirmed judgment in Green Tree and Fannie Mae's favor on: (i) breach of contract claims, finding there was no evidence of breach in the record; (ii) SAFE Act claims, holding there was no private right of action under the statute; and (iii) Real Estate Settlement Procedures Act claims, because Ishee's complaint only made a passing reference to the statute.

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<u>Sixth Circuit</u>

In re McVicker,
546 B.R. 46, 2016 WL 660102 (Bankr. N.D. Ohio Feb. 17, 2016)

The Bankruptcy Court for the Northern District of Ohio denies a creditor's motion to dismiss a chapter 7 for bad faith. The debtors in the case filed a chapter 7 to discharge two debts: (i) a guaranty of a commercial real estate loan totaling $125,000; and (ii) a general unsecured debt totaling little more than $2,000. The commercial loan was borrowed nearly eight years earlier to refinance existing obligations pertaining to the debtors' rental properties in Toledo. The creditor asserted that the debtors' use of chapter 7 to essentially discharge one debt, in spite of their ability to pay given exempt retirement benefits and homestead property, constituted bad faith. The Bankruptcy Court disagreed, holding that Congress and the states make "policy

choices which elevate the protection of [a] debtor's exempt property over the interests of creditors in being paid". Therefore, asserting exemption rights is not itself conduct that can be characterized as egregious or in bad faith.

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<u>Seventh Circuit</u>

***In re Patricia Jepson*,**
2016 WL 1105311 (7th Cir. March 22, 2016)

On March 22, 2016, the Seventh Circuit affirmed in part and reversed in part the decisions of the bankruptcy and district courts, holding that the lower courts had properly determined that the debtor lacked standing to challenge the validity of the assignment of her mortgage pursuant to the Purchase and Sale Agreement ("PSA") governing transfer of that mortgage, but that those courts should have either proceeded to determine debtor's additional challenges to the assignment's validity which did not depend on the PSA, or abstained from deciding those claims in favor of the state court foreclosure action instead. Specifically, the debtor had entered into a mortgage which was subsequently bundled and sold. She stopped paying her mortgage and in 2008, foreclosure proceedings began. In 2012, debtor filed for bankruptcy and opposed the mortgagee's request for relief from the automatic stay on the grounds that it had not been properly assigned the mortgage. One set of arguments hinged on the PSA itself; the other set of arguments did not arise out of the PSA. The Seventh Circuit agreed that debtor lacked standing to challenge the PSA under New York law (which governed the PSA) because the PSA was merely voidable, not void; however, neither court went on to address the debtor's other challenges. As such, the Seventh Circuit remanded the case to the bankruptcy court, but expressly noted that the bankruptcy court could abstain and have those issues decided in the state court foreclosure action instead.

***In re John C. Jahrling*,**
2016 WL 1073240 (7th Cir. March 18, 2016)

On March 18, 2016, the Seventh Circuit affirmed the bankruptcy and district courts, holding that a legal malpractice judgment was not dischargeable because the judgment was for a "defalcation while acting in a fiduciary capacity" under 11 U.S.C. § 523(a)(4). The debtor, an attorney who spoke no Polish, represented a man who spoke only Polish in connection with the sale of his home. As such, the attorney did not communicate with his client at all and instead relied on the buyer's attorney for his information. The result was that the debtor drafted a contract in which the home was sold for about 25% of its fair market value and without the most

important thing to the seller: a remaining life estate. The bankruptcy court held that this legal malpractice was so obvious that it qualified as "defalcation" – and the district court and Seventh Circuit agreed. Specifically noting that the Supreme Court had held in *Bullock v. BankChampaign, N.A.*, 133 S. Ct. 1754 (2013), that "defalcation" "may be used to refer to *nonfraudulent* breaches of fiduciary duty," the Seventh Circuit affirmed the bankruptcy court's use of the Illinois Rules of Professional Conduct as the standard of care for determining whether the debtor consciously disregarded the substantial and unjustifiable risk to his client, and agreed that the debtor's "breaches of an attorney's fiduciary duty to his client were so basic and the risk of harm to the client so obvious that [debtor] must have recognized them and proceeded despite the risk."

In re Great Lakes Quick Lube, LP,
2016 WL 930298 (7th Cir. March 11, 2016)

On March 11, 2016, the Seventh Circuit reversed the decision of the bankruptcy court, holding that 11 U.S.C.§ 365(c)(3)'s provisions preventing the bankruptcy trustee from interfering with non-residential leases that were terminated pre-petition did not prevent the creditors' committee from seeking to avoid the termination of two leases within less than 90 days before bankruptcy because the creditors were seeking not to obtain the lease or the leased space, as contemplated by Section 365, but rather the value of the leases that were turned back to the landlord. Specifically, the debtor had run over 100 quick oil change locations prior to filing bankruptcy; during the bankruptcy that number was cut nearly in half. But within 90 days prior to filing, the debtor had given back two profitable leases to the landlord, ostensibly because the landlord was "irritating." The creditors' committee argued that the lease terminations were preferential and fraudulent transfers. The debtor argued that the creditors could not undo the lease termination in light of Section 365(c)(3), and the bankruptcy court agreed. The Seventh Circuit held, however, that, even if the reasoning behind termination was legitimate, Section 365(c)(3) was not controlling because the creditors were not seeking to "assume or assign" the leases but rather seeking to recover from the landlord the value of those leases. Therefore, the court reversed the bankruptcy court's decision and remanded the case for determination of the value of the leases transferred to the landlord, whether the debtor received reasonably equivalent value for the leases, and whether the landlord has any defenses to the creditors' claims.

Schaumburg Bank & Tr. Co., N.A. v. Alsterda**,**
2016 WL 850875 (7th Cir. March 4, 2016)

On March 4, 2016, the Seventh Circuit dismissed for want of jurisdiction an appeal from a bankruptcy court order overruling objections to the bankruptcy trustee's motion to approve a settlement. First, the Court discussed in depth the meaning of "final" for purposes of 28 U.S.C. § 158 and noted special circumstances specific to bankruptcy decisions, including the fact that (1) the Seventh Circuit has "jurisdiction over a bankruptcy appeal [only] if both the bankruptcy court's order and the district court's order reviewing the original order are final decisions" and (2) in the context of bankruptcy "[t]o be 'final,' the order, judgment, or decree in question must conclusively determine a separable dispute over a creditor's claim or priority.'" Applying that

"stand-alone dispute" standard, the Court held that it lacked jurisdiction to decide the instant appeal because a "decision rebuffing one objection to another litigant's request is not 'final' in the sense that matters for appellate review." The order had not determined the extent or order of priority for the funds underlying the proposed settlement being challenged; it had simply ruled that a set of challenges to the settlement failed.

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Eighth Circuit

***In re Web2b Payment Solutions, Inc.*,**
--F.3d---, 2016 WL853264 (8th Cir. March 4, 2016)

The debtor in this case was a provider automated clearing house and electronic-check services. In providing these services, the debtor maintained a bank account on behalf of the entities it serviced. Checks submitted by the debtor's customers would be combined into a single daily deposit into the bank account from which the debtor would make deposits into accounts held by its customers when the checks cleared. The creditor bringing this case was a customer of the debtor whose claim was based on the debtor's failure to remit the full amount of checks that it had submitted at the time of the bankruptcy filing. The creditor argued that its agreement with the debtor created an express or resulting trust, or alternatively, that a post-petition constructive trust should be imposed. The bankruptcy court ruled that no express or resulting was created and post-petition imposition of a constructive trust was not warranted. The bankruptcy court also held that whatever equitable interests the creditor had could be avoided by the Trustee's strong-arm powers.

The Eighth Circuit upheld the bankruptcy court's order. The Eighth Circuit determined that the agreement between the creditor and the debtor did not create an express trust and instead provided for a debtor-creditor relationship because the agreement provided that the creditor's funds would be commingled with other customer's funds and contained no explicit declaration of trust. The Eighth Circuit also found that the creditor's stated ignorance that its funds were commingled with other customers was not sufficient to establish an implied intention to create a trust so no resulting trust existed. Finally, the Eighth Circuit rejected the argument that post-petition constructive trust should be imposed. The creditor asserted that the funds in the account were converted property. The Eighth Circuit found, however, that by the creditor endorsing the checks over to the debtor, the debtor became the holder of the checks. The creditor then no longer had enforceable property rights in the checks to support a claim of conversion.

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Ninth Circuit

Ozenne v. Chase Manhattan Bank (In re Ozenne),
2016 WL 1169094 (9th Cir. Mar. 25, 2016).

The issue before the Ninth Circuit was whether the Bankruptcy Appellate Panel (BAP) possessed jurisdiction to issue a writ of mandamus, which it considered and then denied on the merits. The Ninth Circuit held that, because the BAP was not a "court[] established by Act of Congress" under the All Writs Act, 28 U.S.C. § 1651(a), it lacked jurisdiction to consider the petition. The underlying matter was a motion for sanctions filed by the debtor several years after his bankruptcy case was closed. The bankruptcy court denied the motion based on lack of jurisdiction. The BAP, relying on In re Salter, 279 B.R. 278 (BAP 9th Cir. 2002), held that it possessed jurisdiction under 28 U.S.C. § 1651 to consider the debtor's petition for writ of mandamus, and then denied the petition. In support of its holding that the BAP lacked jurisdiction, the Ninth Circuit noted that § 1651(a) provides that "[t]he Supreme Court and all courts established by an Act of Congress" may issue writs in support of their respective jurisdiction. The Ninth Circuit held that the BAP was *not* such a court. In so holding, the Ninth Circuit relied heavily on the fact that Congress gave the judicial council of each circuit the discretion to establish a bankruptcy appellate panel, citing 28 U.S.C. § 158(b)(1). The Ninth Circuit explained that § 158(b)(1) "does not simply mandate that the judicial council establish a BAP. Instead, a circuit's judicial council *may* establish a BAP based on its assessment of the judicial resources available in the circuit and whether the service would cause undue delay or increased cost to the parties." Slip Op. at 5 (Emphasis added). Continuing, the Ninth Circuit explained that "the BAP continues only so long as the Judicial Council of the Circuit wishes it to," and that "[t]he BAP is, in effect, a temporary panel to be sued only so long as the judicial council chooses to keep it operational." Id. The Ninth Circuit further explained that, "[b]ecause the BAP is a panel service established by the Judicial Council of the Ninth Circuit, not a 'court established by an Act of Congress,' it does not have writ power under the All Writs Act." Id. at 5-6. The Ninth Circuit said the BAP's prior decision in Salter in which it concluded it possessed mandamus power was wrong, explaining that because the BAP was created by the Ninth Circuit's Judicial Council based on its independent determination, it was not "established by an Act of Congress." Id. at 7. The Ninth Circuit overruled Salter. Id. at 17. In further support of its decision the Ninth Circuit noted that the exercise of power under the All Writs Act is "in aid of" jurisdiction and not an independent source of jurisdiction, and the fact that parties elect to proceed before a BAP (as opposed to an Article III District Court). Id. at 8-9. While concurring in the Judgment, a lengthy dissenting opinion by Judge Bybee. See id. at 18-36. Judge Bybee lampooned the majority for, according to him, not acknowledging that the BAP was a court. In conclusion, Judge Bybee stated that "[w]hen Congress established the BAP it necessarily authorized the BAP to 'issue all writs necessary or appropriate in aid of [its] respective jurisdiction[] and agreeable to the usages and principles of law." 28 U.S.C. § 1651(a)

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***Diaz v. Kosmala (In re Diaz)*,**
2016 WL 937701 (B.A.P. 9th Cir. Mar. 11, 2016).

The Bankruptcy Appellate Panel for the Ninth Circuit vacated and remanded the lower court's decision and held that in claiming California's homestead exemption, a debtor's inability to live on the property was not a relevant factor to be considered in evaluating whether the debtor had the requisite intent to live on property.

In this case, the debtor suffered two aneurysms that rendered him unable to walk and talk. Due to the debtor's precarious condition, he moved into his mother's home, while other relatives lived and maintained his residence. After some time, the debtor regained his abilities and filed for bankruptcy relief under chapter 7 shortly thereafter. In particular, the debtor claimed the homestead exception, which under California law is a $175,000 exemption. Certain creditors, however, joined by the trustee objected to this exemption because the debtor did not reside in the property on the petition date and his absence could and should not be considered temporary. Already suspicious of the occupying relatives, the bankruptcy court agreed. Highlighting California's substantial homestead exemption, the court found that the debtor was not living in the property on the petition date and the three years thereafter.

On appeal, the Bankruptcy Appellate Panel succinctly stated that physical occupancy on the petition date is neither a necessary nor sufficient condition of residency under section 704.710 of California's Civil Code. But the debtor must have an intention to reside there whether the debtor physically occupies the property or not. Furthermore, the Bankruptcy Appellate Panel emphasized that it is the objecting party's burden of proving that the exemption is improper. All said and done, the record insufficiently developed the issue of the debtor's intent to make the property his residence and should be remanded.

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Bos v. Board of Trustees,
—F.3d—, 2016 WL 1161262 (9th Cir. 2016)

The Ninth Circuit denied Bos's motion to recover attorneys' fees under Cal. Civ. Code §1717 and under the discretionary fee-shifting provisions of ERISA found in 29 U.S.C. §1132(g)(1).

In the underlying opinion on the merits, *Bos v. Bd. of Trs*., 795 F.3d 1006 (9th Cir.2015), the Ninth Circuit reversed the bankruptcy court's nondischargeable judgment made under the "fraud or defalcation while acting in a fiduciary capacity" provision of §523(a)(4). The Ninth Circuit held that Bos was not a fiduciary under ERISA and because the bankruptcy court specifically premised the ruling the ERISA definition of fiduciary, §523(a)(4) was inapplicable.

In distinguishing their prior ruling in *Penrod*, 802 F.3d 1084, the panel held that because the issue of the enforceability of the Trust Agreements and note was already decided in the superior court prior to the bankruptcy, the nondischargeability action depended entirely on federal bankruptcy law and therefore was not an "action on the contract," as required for fees under Cal. Civ. Code §1717.

The Ninth Circuit also held that although the decision ultimately turned on the construction of the ERISA definition of fiduciary, the nondischargeability action arose under the bankruptcy code, not ERISA. Because the §523(a)(4) determination could have been made under the embezzlement or larceny provisions and because the court could have found Bos to be a fiduciary under another statute, the action did not "necessarily depend" on resolution of a question under ERISA, and consequently, the fee-shifting provision of 29 U.S.C. §1132(g)(1) did not apply.

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11th Circuit

In re Transbrasil S.A. Linhas Aereas,
— Fed. App'x —, 2016 WL 827251 (11th Cir. Mar. 3, 2016).

In a chapter 15 ancillary action, the trustee sought discovery regarding allegedly misappropriated assets. The trustee filed discovery motions in the bankruptcy court under seal to prevent public dissemination of the trustee's investigation. The appellants, after learning they were the object of some of the discovery requests, moved to unseal the documents. The bankruptcy court denied the appellants' request.

The Eleventh Circuit affirmed, holding that 11 U.S.C. § 107(b)(1) allows a bankruptcy court to protect a broad category of "confidential research." Based on the facts of the case, this would appear to include discovery requests related to a trustee's research of the debtor's asset disposition. Further, the appellate court held that no "compelling interest" was required to gain protection under § 107(b)(1).

***Justice v. United States (In re Justice)*,**
— F.3d —, 2016 WL 1237766 (11th Cir. Mar. 30, 2016).

The chapter 7 debtor sought to discharge tax liability for the years 2000–2003. He did not file anything resembling "returns" for those years until he filed 1040s in 2007, after the IRS assessed tax deficiencies for those years. Section 523(a)(1) of the Bankruptcy Code prevents discharge of tax debts for which a return (i) was not filed or given, or (ii) was filed late, within two years prior to the petition date. Neither party disputed that the debtor filed the 1040s *prior* to the two-year period. The issue, however, was whether those 1040s met the definition of "return" within the meaning of the Bankruptcy Code. The bankruptcy court answered that question in the negative, and determined the tax debts non-dischargeable. The debtor appealed.

The Eleventh Circuit considered the four-factor *Beard* test, which established four requirements for a document to qualify as a tax return, and decided that only the fourth factor was in dispute: the document must represent an honest and reasonable attempt to satisfy the requirements of the tax law. The appeals court, without expressly deciding, declined to adopt the reasoning of the First, Fifth, and Tenth Circuits, which holds that a late-filed return *per se* fails to qualify as a "return" (the "one-day-late" rule). The Eleventh Circuit sided with the Fourth, Fifth, Seventh, and Ninth Circuits in deciding that the fourth *Beard* factor requires consideration of timeliness of the filing to determine whether the debtor honestly and reasonable attempted to comply with the tax law. In its holding, the court also declined to adopt the Eight Circuit's truncated time frame, instead holding that "the time frame for evaluation of a taxpayer's apparent effort to comply with the law under the fourth *Beard* factor includes all of the taxpayer's conduct with respect to the relevant tax years." *Id.* at *6.

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