

Bankruptcy Circuit Update
Featuring cases from March 2019

We will be convening our next section-wide conference call on **Friday, April 26th, at 3:30 E.S.T./12:30 P.S.T.** to present and discuss notable cases from the past few months of the summaries. We are seeking volunteers to summarize significant or interesting cases. Please send an email to csullivan@diamondmccarthy.com if you are interested in presenting. The call-in information is: **dial in 866-690-2070 – code 787-594-2077.**

We hope you will join us for this call.

Second Circuit

Mulligan v. Jalbert (In re Mulligan),
18-1657, 2019 WL 1034746 (2nd Cir., March 5, 2019)

The Second Circuit affirmed the judgment of the district court affirming the bankruptcy court's ruling that certain debts owed by pro se debtor Lawrence Mulligan ("Mulligan") to creditors Bruce and Pamela Jalbert (together, the "Jalberts") were not dischargeable in bankruptcy pursuant to section 523(a)(4) of the Bankruptcy Code.

Prior to his bankruptcy filing, Mulligan acted as the Jalberts' attorney, including in an action concerning an easement on the Jalberts' land. In connection with that work, the Jalberts and Mulligan agreed that, in the event the Jalberts' title insurance company would not pay for the needed representation, the Jalberts would compensate Mulligan with construction services rather than cash. After Mulligan was provided with construction work valued at \$84,750, Mulligan received a letter from the title insurance company informing him that it had already hired representation for the Jalberts and would not compensate any other counsel. Mulligan did not show that letter to the Jalberts, and instead told them that he would continue to represent them and that the title company, which had now agreed to pay for the Jalberts' representation, had merely hired an attorney to assist him.

Mulligan then asked the Jalberts for \$85,000 in order to show the title company that the Jalberts had paid for his work, explaining that he could not make a claim for payment based on the construction services that he had received. The Jalberts transferred the money with the understanding that it would be returned following settlement of the easement litigation. The attorney hired by the title company then negotiated a settlement in which the Jalberts received \$100,000; the Jalberts gave Mulligan \$50,000 from that sum in compensation for the legal work that they believed he had done for them.

One year later, the Jalberts filed a state court action against Mulligan alleging fraud and several related causes of action in connection with the easement litigation. A few years later, while that action was pending, Mulligan and his wife filed for bankruptcy. The Jalberts then initiated an adversary proceeding, arguing that Mulligan's debt to them was not dischargeable in bankruptcy pursuant to section 523(a)(4) of the Bankruptcy Code. The parties later agreed to lift the automatic stay and litigate the Jalberts' state court lawsuit. Accordingly, the Jalberts filed an amended complaint in the state court action alleging conversion, statutory theft, violation of the Connecticut

Unfair Trade Practices Act, fraud, and false pretenses. Three years later, the state court found in favor of the Jalberts on all counts except fraud.

The Jalberts then moved for summary judgment in the bankruptcy court adversary proceeding, which the court partially granted in favor of the Jalberts. Applying the doctrine of collateral estoppel, the bankruptcy court held that the state court's finding that Mulligan had committed statutory theft compelled the conclusion that he had also committed defalcation while acting in a fiduciary capacity pursuant to Bankruptcy Code section 523(a)(4). Accordingly, the bankruptcy court determined that Mulligan's debt to the Jalberts pursuant to the state court judgment was not dischargeable in bankruptcy, and the district court later affirmed the bankruptcy court's decision.

On appeal in the Second Circuit, the Court first addressed the issue of collateral estoppel, noting that it prohibits the relitigation of an issue when that issue was actually litigated and necessarily determined in a prior action between the same parties upon a different claim. Here, the bankruptcy court accorded collateral estoppel effect to the state court's factual findings. Mulligan argued that prior to doing so, the bankruptcy court was required to inquire into the record underlying the state court's judgment to determine whether the issues were fully and fairly litigated. The Second Circuit, however, held that Mulligan waived such arguments when he agreed before the bankruptcy court that the state court's factual findings were not in dispute, and that the only issue to be decided was whether those findings satisfied the requirements of Bankruptcy Code section 523(a)(4). Furthermore, the Second Circuit noted that even absent such waiver, Mulligan's arguments lacked merit because he misrepresented the state court record, such as by contending that certain allegations (such as the claim that he failed to inform the Jalberts that their title company had assumed their defense and that he had agreed to in-kind payment for legal services) were not pleaded in the Jalberts' complaint, when such allegations were explicitly included in the complaint.

Next, the Second Circuit turned to the issue of defalcation under section 523(a)(4) of the Bankruptcy Code, noting that such provision precludes an individual from obtaining a bankruptcy discharge from a debt for fraud or defalcation while acting in a fiduciary capacity, embezzlement, or larceny. The Second Circuit noted that, in this context, defalcation includes a requirement for a culpable state of mind, specifically, knowledge of, or gross recklessness in respect to, the improper nature of the applicable fiduciary behavior.

Here, Mulligan argued that, even if collateral estoppel applied, the facts found by the state court did not establish the requisite mental state for defalcation under Bankruptcy Code section 523(a)(4). The Second Circuit held that such argument was meritless, noting that when the state court found that Mulligan was liable for statutory theft, the court necessarily found that Mulligan, an attorney, intentionally misled the Jalberts, his clients, with the intent to deprive them of property. The Second Circuit found that such conduct was an obvious breach of fiduciary duty. Accordingly, the Second Circuit held that the bankruptcy court did not err in deciding that the state court's findings also established that Mulligan possessed the required mental state for defalcation, and therefore affirmed the judgment of the district court.

Equal Overseas Consulting, Ltd. v. Huber (In re Sagecrest II LLC),
18-1208, 2019 WL 1062354 (2nd Cir., March 6, 2019)

The Second Circuit affirmed the judgment of the district court affirming the bankruptcy court's order sustaining the objection of debtor SageCrest II LLC ("SageCrest") to the proof of claim filed by creditor Equal Overseas Consulting, Ltd ("Equal") and holding that the consulting agreement upon which Equal's claim was based was unenforceable.

This case arose out of two agreements involving the sale of a Canadian hotel property pursuant to a Canadian bankruptcy proceeding. During the sale process, two bidders, SageCrest and Jean-Daniel Cohen ("Cohen"), entered into an agreement (the "Settlement Agreement"), pursuant to which Cohen and his affiliate, Equal, agreed to withdraw their financial support of a competing bid and to refrain from submitting their own bid or supporting any alternative bid. In return, SageCrest agreed to pay Cohen several payments, each styled as a retainer or consulting fee, when a SageCrest affiliate took ownership of the property. SageCrest resubmitted its bid for the property, but neither SageCrest nor Cohen informed the Canadian court of the Settlement Agreement. The Canadian court thereafter approved SageCrest's bid, and SageCrest acquired the property.

One month later, as contemplated by the Settlement Agreement, SageCrest and Cohen entered into a consulting agreement (the "Consulting Agreement") that named Equal as SageCrest's redevelopment consultant and incorporated the Settlement Agreement's payment provisions. The Consulting Agreement also contained a choice of law provision, stipulating that Canadian law governed.

Two years later, SageCrest and its affiliate filed for bankruptcy in jointly administered cases in the United States. Equal then filed a proof of claim based on SageCrest's failure to make the second retainer and consulting payments required by the Consulting Agreement. Without determining whether Canadian or American law applied, the bankruptcy court held that under both Canadian and American law, the Consulting Agreement was unenforceable because it was the product of collusion and was not supported by consideration. The district court, without reaching the question of consideration, later affirmed, holding that American law applied and the Consulting Agreement was the product of collusion and therefore unenforceable.

On appeal in the Second Circuit, the Court was faced with three issues: (1) whether American or Canadian law applied; (2) whether the Consulting Agreement was the product of collusion; and (3) whether the Consulting Agreement lacked consideration.

The Second Circuit first addressed the choice of law question, noting that Equal's principal argument on appeal was that Canadian law should apply per the Consulting Agreement's choice of law provision, rather than American law, the law of the forum. After noting that the bankruptcy court did not resolve the choice of law issue based on its conclusion that the application of either country's law would result in the same conclusion, the Second Circuit held that it agreed that no conflict existed because the Consulting Agreement was unenforceable under both Canadian and American law, as discussed in more detail below.

Next, the Second Circuit turned to the issue of whether the Consulting Agreement was the product of collusion. The Second Circuit noted that the bankruptcy court had held that the Consulting Agreement was not enforceable under the doctrine of *in pari delicto*, which is recognized under both American and Canadian law. Under the *in pari delicto* doctrine, a plaintiff who has participated in a wrongdoing equally with another may not recover damages resulting from the wrongdoing from that person. Here, the bankruptcy court found that the Settlement Agreement was a “collusive thwarting of a rival bid” because it was a side-deal between SageCrest and Cohen under which, for a pay-off, Cohen agreed to cease competing with SageCrest for the hotel. The Second Circuit held that such factual finding was not erroneous, because, pursuant to the Settlement Agreement and the Consulting Agreement, Cohen agreed to withdraw his support for all competing bids and to refrain from submitting a bid himself in exchange for a guaranteed payment of more than \$3.5 million. The Second Circuit noted that under American law, such an agreement is antithetical to the Bankruptcy Code and clearly violates Bankruptcy Code section 363(n).

Relying exclusively on *In re GSC, Inc.*, 453 B.R. 132 (Bankr. S.D.N.Y. 2011), Equal argued that the Settlement Agreement was not collusive because it resulted in a higher recovery, which is “antithetical to the notion of collusion.” In *In re GSC*, the bankruptcy court considered an agreement between two bidders resulting in a single bid in exchange for consideration, finding that such agreement did not constitute collusion because the resulting single bid raised the sale price. The Second Circuit noted, however, that *In re GSC* was inapposite, because SageCrest and Cohen did not submit a joint bid. Instead, SageCrest induced Cohen to withdraw from the bidding process, which may have ultimately resulted in a lower final price for the property. Accordingly, the Second Circuit held that the Settlement Agreement was not enforceable under American law. Moreover, the Second Circuit held that the Settlement Agreement also violated Canadian law, which makes it a crime to engage in bid-rigging — because the Settlement Agreement required Cohen to refrain from submitting a competing bid or supporting any alternative bid, in return for a substantial payment, the Second Circuit held that a Canadian court also would have found the Settlement Agreement unenforceable.

Because the Second Circuit affirmed the bankruptcy court’s decision on the grounds that the Consulting Agreement was the product of collusion and unenforceable, the Court did not address the question of consideration, and instead affirmed the judgment of the district court.

***Jaroslawicz v. Steinberg (In re Steinberg)*,
18-865, 756 Fed.Appx. 90 (Mem) (2nd Cir., March 7, 2019)**

The Second Circuit affirmed the order of the district court affirming the bankruptcy court’s order dismissing the objection filed by certain creditor parties (the “Creditors”) in the chapter 7 bankruptcy of Samuel Steinberg (“Steinberg”) to the discharge of Steinberg’s debt.

Steinberg was the “man on the ground” for the Creditors’ unsuccessful Romanian real estate venture. Although he kept records of transactions relating to the venture, Steinberg gave those records to the judicial administrator of the venture’s insolvency proceedings in Romania, and did not make copies. The Creditors then commenced adversary proceedings in Steinberg’s Chapter 7 bankruptcy case, arguing that Steinberg’s debts should not be discharged because he

unjustifiably failed to keep or preserve sufficient records from which his financial condition or business transactions might be ascertained pursuant to Bankruptcy Code section 727(a)(3). The bankruptcy court disagreed, concluding that Steinberg did produce sufficient records and that any potential failure was justified. On appeal, the district court affirmed the bankruptcy court's determination that Steinberg produced sufficient records.

The Second Circuit noted that in the context of claims under Bankruptcy Code section 727(a)(3), the creditor bears the initial burden of showing that the debtor failed to keep and preserve books or records sufficient to ascertain the debtor's financial condition or business transactions. The burden then shifts to the debtor to show that the failure was justified.

In this case, although he was no longer in possession of the accounting files for the venture's investment vehicles, the Second Circuit noted that Steinberg nonetheless produced 1,494 pages of business records and 4,112 pages of emails prior to the bankruptcy court's four-day trial. This production included eight years of joint tax returns, bank account statements, and credit card statements, as well as five years' worth of bank account statements for each of the limited liability companies involved in the venture. Steinberg also prepared a chart summarizing bank records and land contracts produced in discovery and describing the venture's transactions, itemizing the costs of each purchase, and describing the source of funding for each purchase.

The Second Circuit found that the Creditors' generalized and conclusory allegations were insufficient to carry their burden. Although some of the venture's transactions were made in cash, the Second Circuit held that the Creditors had not proven that the cash transactions, which Steinberg testified amounted to less than five percent of the venture's business, were material to assessing the venture's financial condition. The Second Circuit also found the Creditors' complaint that the summary chart only accounted for the venture's "major transactions" to be unsupported by evidence. Accordingly, the Second Circuit affirmed the judgment of the district court.

Wiener v. Ocean Rig UDW Inc. (In re Ocean Rig UDW Inc.),
18-1374, 2019 WL 1276205 (2nd Cir., March 19, 2019)

The Second Circuit affirmed the district court's dismissal of the appeal filed by pro se shareholder Tally Mindy Wiener ("Wiener") from the bankruptcy court's orders recognizing the Cayman Islands-based reorganization of Ocean Rig UDW Inc. ("UDW") and three of its subsidiaries (together with UDW, the "Debtors") and providing related relief.

The bankruptcy court had previously recognized the Debtors' Cayman Islands-based reorganization as a foreign main proceeding under Chapter 15 of the Bankruptcy Code. In a separate order, the district court granted related relief, including an automatic stay of all proceedings against the Debtors in the United States. Wiener, a purported shareholder of UDW, appealed to the district court, which dismissed her appeal for lack of appellate standing and due to equitable mootness.

On appeal, the Second Circuit focused on the issue of standing, noting that in order to have standing to appeal in this context, one must be an "aggrieved person" meaning that one must be

directly and adversely affected pecuniarily by the challenged order of the bankruptcy court. Wiener argued that, as a shareholder, she was aggrieved by the automatic stay imposed in the United States. However, the Second Circuit noted that just because Wiener was subject to the stay did not, without more, make her an “aggrieved person.” Instead, the Second Circuit noted that Wiener must demonstrate that her pecuniary interests were directly and adversely affected by the injunctive relief. Wiener had not pursued any action against UDW that was stayed because of the injunctive relief, and her brief did not identify any action that she planned to pursue. Wiener also failed to identify any other way her pecuniary interests had been directly and adversely affected by the challenged orders.

Finding none of Wiener’s arguments persuasive, the Second Circuit held that the district court correctly dismissed Wiener’s appeal for lack of appellate standing.

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Fifth Circuit

Poretto v. Williams (In re Poretto),
—F. App’x—, No. 17-20770, 2019 WL 1125331 (5th Cir. Mar. 11, 2019).

Rosemarie Poretto (“Ms. Poretto”) and her husband (“Mr. Poretto”) sold their daughter Sonya the family’s concession and tourism business in exchange for a down payment of \$250,000 and a promissory note for \$4.25 million. After Mr. Poretto passed away, the probate court issued an order listing the value of the promissory note as \$2.8 million based on a filed estate inventory (the “Probate Order”).

Four years after Sonya purchased the family business, she became delinquent on payments of the promissory note and filed for bankruptcy. On her amended Schedule D, Sonya represented that Ms. Poretto had a secured claim of \$1.019 million; Ms. Poretto, however, filed a proof of claim asserting that she held a secured claim of \$3 million.¹ The Trustee objected to Ms. Poretto’s claim. At the hearings on Ms. Poretto’s objection, Ms. Poretto relied on the Probate Order as evidence that her claim was valued at \$3 million. The bankruptcy court found that Ms. Poretto’s claim was allowable in the amount listed on Sonya’s amended Schedule D of \$1.019 million. The district court affirmed.

On appeal to the Fifth Circuit, Ms. Poretto argued that the bankruptcy court erred by relitigating the unpaid balance of the promissory note and failing to give the Probate Order the deference required under the Full Faith and Credit Act and the United States Constitution.

¹ Ms. Poretto’s \$3 million claim included the \$2.8 million value provided in the Probate Order plus interest and attorney’s fees.

Discussing the burden-shifting framework for analyzing a creditor's claim in bankruptcy, the court found that the bankruptcy court did not clearly err in finding that: (1) Ms. Poretto established a prima facie claim of \$3 million; (2) Trustee overcame Ms. Poretto's evidence with adequate rebuttal testimony, including Ms. Poretto's failure to dispute Sonya's testimony that the claim was valued at \$1.019 million and Ms. Poretto's inability to provide a payment history to show how the value listed in the Probate Order was calculated; and (3) Ms. Poretto failed to rebut Trustee's testimony and thus could not establish the value of her claim by a preponderance of the evidence. As such, the Fifth Circuit affirmed the judgment of the district court.

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U.S. ex rel Bias v. Tangipahoa Parish Sch. Board

**____ Fed. Appx. ____, 2019 WL 1324352, (5th Cir. 2019),
substituted for 2018 WL 6431033 (5th Cir. Dec. 5, 2018).**

Four years after appellant Ronald Bias's chapter 13 bankruptcy plan was confirmed, but before he received a discharge, Bias initiated suit against the Tangipahoa Parish School Board, asserting, inter alia, a violation of the False Claims Act based on an employment dispute (the "FCA litigation"). Because Bias did not disclose the FCA litigation to the bankruptcy court, the district court held Bias's suit was barred by judicial estoppel. Bias appealed.

The Fifth Circuit affirmed, holding the three elements of judicial estoppel were satisfied. First, the Court held Bias had asserted a legal position that was plainly inconsistent with a prior position because, by failing to disclose the FCA litigation to the bankruptcy court, he had impliedly represented that he had no FCA claim. The Court found Bias's argument that disclosure was not warranted because post-petition causes of action belong to the debtor, not the estate, irrelevant because chapter 13 debtors have an affirmative duty to disclose post-confirmation assets in all events. Second, the Fifth Circuit found the bankruptcy court had accepted Bias's prior position by granting him a discharge. Third, the Court found Bias acted intentionally and with a financial motive because he knew of the facts underlying the FCA litigation during his bankruptcy and admitted that his plan required any judgment or settlement of the FCA litigation in his favor to be disclosed. Thus, the Court found Bias had a motive to conceal and prolong the litigation to avoid having the claim included in his bankruptcy estate.

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Obduskey v. McCarthy and Holthus LLP, No. 17-1307, 139 S.Ct. 102, (Supreme Court of the United States March 20, 2019)

At issue was whether a business principally engaged in the enforcement of security interests is not a debt-collector for the purposes of all debt-collector provisions of the Fair Debt Collection Practices Act. The business at issue was a law firm that was hired by a mortgage lender to enforce the lender's security interest on a delinquent mortgage by way of a non-judicial foreclosure pursuant to Colorado's non-judicial foreclosure procedures. The Supreme Court held that a business principally engaged in no more than the kind of security-interest enforcement at issue here — non-judicial foreclosure — is, except for the limited-purpose definition of § 1629f(6), not subject to the debt-collector provisions of the Fair Debt Collection Practices Act. In reaching this holding, the Court found that: 1.) The limited-purpose definition of § 1629f(6) acts to narrow the primary definition of a “debt-collector” found in § 1629a(6) of the Act to the extent that all other debt-collector provisions of the Act do not apply to those businesses (such as the firm at issue here) engaged in no more than security-interest enforcement; 2.) Congress intended to avoid potential conflicts with state law non-judicial foreclosure procedures, as evidenced by the limited-purpose definition of § 1629f(6); and 3.) The legislative history of the Act supports that intent of Congress to avoid potential state law conflicts.

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Seventh Circuit

Matter of Steenes,

918 F.3d 554 (7th Cir. 2019)

This decision arises out of debtors using Chapter 13 to break traffic laws and avoid paying the fines. Specifically, seven debtors in the consolidated appeals incurred at least 72 fines and failed to pay the approximate \$12,000 to the City of Chicago.

An application for relief under Chapter 13 transfers most of a debtor's assets to the newly formed bankruptcy estate until the court confirms a plan of payment. Then, subject to an order providing otherwise, the confirmation of a plan vests all of the property of the estate in the debtor, meaning the debtor becomes personally responsible for the expenses of maintaining that property. 11 U.S.C. § 1327(b). The Bankruptcy Court for the Northern District of Illinois, however, has

adopted a form order reversing this presumption and maintaining the property in the estate for the duration of the plan. The debtors used this to avoid paying their traffic fines, asserting that the estates could ignore their tickets because a Chapter 13 plan does not provide for the payment of post-petition fines and that the automatic stay in section 362 prevents the cars from being towed or booted.

The Bankruptcy Court denied the City of Chicago's motions to vacate the orders keeping the vehicles in the estate. The Bankruptcy Court acknowledged it did not read Chicago's motions, and simply provided that the court as an institution routinely keeps all assets in all Chapter 13 estates. There was no mention of section 1327(b). The Seventh Circuit disagreed with the result, generally providing that immunity from traffic laws for the duration of a Chapter 13 plan is not a plausible outcome to be attributed to the Bankruptcy Code.

The Circuit stated with respect to ignoring the presumption of section 1327(b), a bankruptcy court's equitable power cannot be used to contradict rules in the code. *See Law v. Siegel*, 571 U.S. 415, 424–25 (2014). Further, the Circuit explained the outcome lacks rationale for why Chapter 13 would permit debtors to use particular assets to earn money without paying the assets' expenses, and that an effect is that the public, for example city parking providers, would not get what is owed to them. Moreover, concern was expressed that this result could also lead to involuntary creditors, such as victims of accidents caused by speeding or running red lights, being left without adequate remedy. Accordingly, the Circuit reversed.

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Ninth Circuit

IPC (USA), Inc. v. Ellis (In re Pettit Oil Company),
-- F.3d – (9th Cir. 2019).

In *IPC (USA), Inc. v. Ellis*, the Ninth Circuit affirmed the Bankruptcy Appellate Panel's affirmance of the bankruptcy court's summary judgment motion in favor of the trustee's adversary proceeding seeking avoidance of transfers. The debtor, a distributor of petroleum products, entered into a consignment agreement with IPA (USA), Inc., whereby IPC delivered fuel to "card lock" sites from which the debtor's commercial customers purchased fuel using access cards and IPC paid the debtor, Pettit, a monthly commission. When the debtor filed for bankruptcy relief, it had in its possession IPC fuel and proceeds, cash and account receivables, from fuel sold that had yet been forwarded to IPC. Prior to the bankruptcy, IPC did not file a financing statement with regards to its interests in the goods.

It is well established under bankruptcy law that if a consignee files for bankruptcy, any consigned goods in its possession become property of the bankruptcy estate unless the seller has previously provided public notice of its interest in the goods by filing a financial statement and thus perfecting its interest. The issue before the Ninth Circuit panel was whether the trustee was entitled to the proceeds from goods sold that were held by Pettit, the consignee, on the date it filed for bankruptcy. Unconvinced by IPC's two principal arguments, the court ultimately held that it did.

First, IPC argued that traditional property law and more specifically, bailment, should apply because proceeds are outside the purview of what constitutes a good under Section 9-319(a) of the U.C.C., which provides, "for the purposes of determining the rights of creditors of . . . a consignee, while the goods are in the possession of the consignee, the consignee is deemed to have rights and title to the goods identical to those the consignor had." To the Court, a narrow reading of Section 9-319 ignores several references throughout the U.C.C. that treats a consignment as a security interest for all practical purposes, including perfection and priority, unless the U.C.C. specifically provides otherwise. Furthermore, the "goods" provision cannot be read in a vacuum. Thus, the Court held that the term "goods," in Section 9-319(a) includes the proceeds of those goods, and that Article 9's priority and perfection rules apply with equal force to such proceeds.

Second, IPC contended that the trustee could not have an interest in the proceeds because 11 U.S.C. 544(a) does not contain a "reach back" provision that would allow it to claim an interest in cash and accounts receivable that arose before Pettit filed its bankruptcy petition. The Court rejects this argument on the basis that Section 544 grants the trustee "a judicial lien on all property on which a creditor on a simple contract could have obtained such a judicial lien." Under Section 9-319 of the U.C.C., the trustee's interest is identical to the interest held by IPC, and either the trustee or IPC could have secured a lien on the proceeds. Therefore, the lack of a so called "reach back" provision does not prevent the Trustee from claiming an interest in the proceeds that arose pre-Petition.

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Tenth Circuit

Geringer v. Strong,

No. 17-4190, 2019 WL 1220792 (10th Cir. Mar. 14, 2019)

The Tenth Circuit held that a chapter 11 trustee was entitled to summary judgment on a breach of contract claim asserted by the debtor's former president because it was based on a Memorandum of Understanding (MOU) invalidated by an integration clause in a subsequently-executed land sale agreement. The former president and trustee entered into the MOU setting forth

the general terms under which the president would purchase land owned by the debtor. The MOU obligated the trustee to notify an entity with which the trustee had contracted to sell the property by a date certain; that deadline was not met. A detailed contract was entered into by the former president and the trustee; that agreement, however, contained an integration clause. The bankruptcy court effectively denied the trustee's motion to terminate the contract with the initial purchaser on the ground that it failed to meet its contractual obligations by continuing the hearing. The former president brought suit against the trustee in District Court asserting that the trustee breached the MOU by not giving timely notice to the initial counter-contract party of the decision to terminate the contract. The District Court rejected that claim based on the integration clause. On appeal, the Tenth Circuit affirmed, reasoning that the integration clause "strips the MOU of all legal effect" under applicable Utah law. The Tenth Circuit rejected the former president's argument that the land-sale agreement did not supplant the MOU, relying on language in the integration clause (i.e., that the MOU no longer had "force or effect") and explaining that the MOU and land-sale agreement covered the same subject matter—the former president's purchase of the property, the requirement of bankruptcy court approval and the trustee's ability to terminate the prior agreement. Finally, the Tenth Circuit declined to address the former president's claim that the land-sale agreement was void because it was first raised in his reply brief.

Agrawal v. Courts of Oklahoma,
No. 18-6144, 2019 WL 1125790 (10th Cir. Mar. 12, 2019),

The Tenth Circuit affirmed a district court's dismissal of an action asserting due process claims by a pro se litigant against an Oklahoma state court judge who presided over a wage and collection action in violation of the automatic stay. After rejecting Mr. Agrawal's due process claims based on the state court judge's refusal to recuse himself, the Tenth Circuit addressed the bankruptcy-related issue raised by Mr. Agrawal, that is, the state court judge was not entitled to absolute immunity because he took action during the pendency of an involuntary bankruptcy petition directed against Mr. Agrawal. The Tenth Circuit rejected that argument, explaining that the automatic stay did not deprive the state court judge of subject matter jurisdiction over the wage and collection action. Accordingly, the Tenth Circuit concluded that even if the state court judge were to take action in violation of the stay, such action would not be in clear absence of all jurisdiction which would render inapplicable the protections afforded by absolute immunity under applicable caselaw, *Stump v. Sparkman*, 435 U.S. 349 (1978).

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Eleventh Circuit

In re Kapila,
2019 WL 1312150 (11th Cir. Mar. 22, 2019)

Chapter 11 Trustee brought adversary proceeding against former professional advisors claiming their conduct exacerbated the financial demise of the corporate debtor. The Eleventh Circuit affirmed the district court's affirmance of The bankruptcy court held that the Chapter 11 Trustee's claims were barred by the doctrine of *in pari delicto*, which was affirmed by the district court and the Eleventh Circuit. "The equitable defense of *in pari delicto*, which literally means 'in equal fault,' is rooted in the common-law notion that a plaintiff's recovery may be barred by his own wrongful conduct." *In re Kapila*, 2019 WL 1312150, *2 (11th Cir. Mar. 22, 2019)(cites omitted).

Under Florida law, wrongdoing by a corporate officer is imputed to the company so long as the officer acts within the scope of his employment. An officer who acts to further the interests of the corporation necessarily is acting within the scope of his employment. Here, the Chapter 11 Trustee admitted that the corporate officers overbilled clients with the intent to increase corporate profits. The Chapter 11 Trustee argued that the professional advisors failed to take any meaningful steps to prevent the practice of overbilling. The bankruptcy court found by the Chapter 11 Trustee's own admission that both the corporate officers and the professional advisors were both engaged in the same wrongdoing. Thus, the doctrine of *in pari delicto* applied.

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