

Bankruptcy Circuit Update
Featuring cases from November 2016

Special Announcement
Group Section Conference Call to Discuss Significant Cases

This month our writers Circuit Writers and Section Leaders will be convening our fourth section-wide conference call on **Friday, January 27, 2016, 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. Volunteers will be summarizing significant or interesting cases. The presenters will be open for questions and lead discussion of key points. We hope you will join us for this call. The call-in information is: **dial in 866-690-2070 – code 787-594-2077**. If any section–members, whether or not you are a Circuit Writer, would like to volunteer to discuss a significant case or recent bankruptcy development, please e-mail us at csullivan@diamondmccarthy.com.

First Circuit

Mission Prod. Holdings v. Tempnology LLC (In re Tempnology LLC)
BAP NO. NH 15-065, 559 BR 809 (B.A.P. 1st Cir., November 18, 2016)

The debtor developed chemical-free cooling fabrics for use in consumer products. Pre-petition, the debtor and Mission Product Holdings, Inc. (“Mission”) entered into a marketing and distribution agreement. The debtor moved to reject the executory contract a day after filing and sought approval of the sale of substantially all of its assets. Mission objected to the sale and filed a § 365(n)(1)(B) election notice arguing that the sale would be subject to Mission’s rights under the agreement. The bankruptcy court approved the sale and the rejection of the agreement, but subject to Mission’s right to preserve its rights under § 365(n). Ultimately, the bankruptcy court granted the debtor’s motion seeking a determination that Mission’s rights after its § 365(b) election were very narrow.

As an initial matter, there was no disagreement that Mission retained its rights under the IP license granted to it in the agreement. Mission, however, argued that it was entitled to the exclusive product distribution rights under the agreement and its rights to use the debtor’s trademark and logo. It also argued that the debtor should have been required to file an adversary proceeding to seek a determination of Mission’s rights.

Mission’s first argument was that § 365(n) permitted it as a licensee of intellectual property to retain its “right to enforce any exclusivity provision” of the agreement. However, the BAP noted that the agreement at issue included provisions relating to more than just the licensing of intellectual property and gave several examples. Also, it rejected Mission’s attempt to recharacterize its exclusive distribution rights as intellectual property rights. Therefore, the BAP held that the bankruptcy court did not err in holding the exclusive product distribution rights were not protected by § 365(n).

Mission fared better on the second issue it challenged on appeal. The dispute arose because § 365(n) does not define “intellectual property,” however § 101(35A) does. That section does not include trademarks and trade names in the definition. Thus, the question was whether trademarks are protected under § 365(n). The BAP provides a detailed review of the legislative history and the split of opinions on the issue. Ultimately, it concluded that the debtor’s trademark and logo were included in the categories of intellectual property entitled to protection under § 365(n) and the rejection of the agreement did not “vaporize Mission’s trademark rights under the Agreement. Whatever post-rejection rights Mission retained in the Debtor’s trademark and logo are governed by the terms of the Agreement and the applicable non-bankruptcy law.” The bankruptcy court’s ruling that Mission’s rights were terminated by the rejection of the agreement was in error.

As to the procedural argument, the BAP held that even if an adversary proceeding should have been filed, it was harmless error not to require it to do so. Practically speaking, “[r]equiring the Debtor to file an adversary proceeding would only have delayed resolution of the critical issues in dispute and added unnecessary expense on both sides.”

Parkview Adventist Med. Ctr. v. United States
No. 16-1731, 2016 WL 6962086 (1st Cir., November 29, 2016)

Pre-petition, the debtor sent a letter to the Centers for Medicare & Medicaid Services (“CMS”) indicating that it was closing and was ending its participation in Medicare. In response, CMS terminated the debtor’s provider agreement four days later because it no longer met the definition of a hospital under the Medicare statute. The debtor then informed CMS that it was not terminating the agreement because of the negative impact on its bankruptcy. CMS indicated it would reverse the termination if the debtor began accepting inpatients. The debtor filed a motion to compel CMS to honor the provider agreement arguing that the agreement was an executory contract under § 365 and therefore it had a right to assume or reject the agreement.

The First Circuit held that CMS did not violate the automatic stay when it violated the provider agreement because the action fell within the police and regulatory powers exception of § 362(b)(4). The Court then turned to the debtor’s argument that CMS violated the non-discrimination provisions of §525(a). This argument failed: “[The debtor’s] argument that CMS discriminated against it, because CMS took notice of the filing of the bankruptcy petition in its termination decision, fails on its face. That CMS used information from that filing in considering the termination in question is admirable and not discrimination.”

The denial of the motion to compel was affirmed.

OCTOBER:

Hannon v. ABCD Holdings, LLC (In re Hannon)
No. 15-2269, 839 F.3d 63 (1st Cir., October 7, 2016)

During the bankruptcy case, the company that financed the purchase of a recycling company and the accompanying land owned by the debtor, assigned its warrant rights to purchase a 50.1 percent interest in each company to a new entity (“New Entity”). That entity then exercised the warrants. However, the debtor continued to operate the recycling company for several months. At issue on appeal was the debtor’s response to the question on his Monthly Operating Report (“MOR”) requiring disclosure of disbursements made for his benefit from any account other than the DIP account. The debtor disclosed small amounts paid by the recycling company on a couple of reports and made no disclosures on other reports. The New Entity filed an adversary proceeding claiming that in fact the debtor diverted far more of the company’s revenues than he disclosed and sought a denial of the debtor’s discharge under 11 U.S.C. § 727(a)(4). The bankruptcy court granted New Entity’s summary judgment motion which was affirmed by the district.

The debtor first attempted to argue for the first time on appeal that the certification on the MOR is not the type of certification required by § 1746 and therefore his MORs were not made under oath which is required to support a “false oath claim”. This argument was meritless as the debtor raised the argument for the first time on appeal and therefore it was waived. The BAP noted, however, that even if the argument had not been waived, it would likely have failed stating “We do not discern any principled basis upon which to draw a meaningful distinction between the certification language used on the MOR form, from that used on a debtor’s schedules, and think the nearly identical language used on the MOR form would likely constitute a verification under oath for § 727(a)(4)(A).”

The debtor’s second argument challenged the finding that he “knowingly and fraudulently” made a false oath when he filed the false MORs. The Court’s analysis large focused on the debtor’s intent and the caution that is exercised when granting summary judgment on the issue of intent. Even with the benefit of construing all reasonable inferences in favor of the debtor, the First Circuit held that summary judgment was appropriate. The fact that the debtor disclosed small disbursements made for his benefit, but not larger disbursements, weighed heavily against him. “At issue here is not a simple failure to report minor expenditures for miscellaneous expenses. Rather, [the debtor] repeatedly failed to report thousands of dollars diverted from the business for his benefit, while he controlled those businesses.”

The denial of the debtor’s discharge was affirmed.

Keach v. New Brunswick Southern Ry. Co. (In re Montreal, Me. & Atl. Ry., Ltd.)
BAP NO. EB 16-015, 558 B.R. 473 (B.A.P. 1st Cir., October 21, 2016)

The debtor owned and operated the freight railroad system involved in a derailment in Lac-Megantic, Quebec that resulted in the death of 47 people. The derailment caused a drastic downturn in the debtor’s business which resulted in a Chapter 11 filing. At issue in this case was bankruptcy court’s holding that the claims of a railroad had priority status over other unsecured claims under § 1171(b). The opinion provides a detailed description of the workings of the Interline Settlement System which formed the business relationship between the creditor and the debtor. It also provides a history of § 1171(b) and the “Six Months Rule” which has its roots in railroad receiverships.

The issue on appeal was whether the bankruptcy court correctly ruled that interline charges are eligible for priority under § 1171(b). The BAP agreed with the bankruptcy court that the charges could be eligible for priority if they satisfied a three part test, to wit:

“(1) it represent[ed] a current operating expense necessarily incurred, (2) was incurred within six months before the reorganization petition was filed, and (3) the goods or services were delivered in the expectation that they would be paid for out of current operating revenues of the railroad, and not in reliance on the [rail]road's general credit”

Applying the test, the BAP found the claims met all three criteria based on the specific facts of the case and affirmed the order overruling the objections to the claims.

Premier Capital, LLC v. Crawford (In re Crawford)
No. 16-1285, 841 F.3d 1 (1st Cir., October 25, 2016)

Pre-petition debtor had two retirement accounts with Wells Fargo – a 401(k) and a Cash Balance Plan (“CBP”). The statements received by debtor itemized the accounts but also provided a cumulative balance. The debtor disclosed the 401(k) account on Schedule B, but listed the cumulative balance. The CBP was not disclosed. A creditor objected to the debtor’s discharge under §§ 727(a)(4)(A) and (a)(2)(A).

The First Circuit first held that the debtor gave his implied consent to the issue of the non-disclosure of the CBP to be considered at trial because his objections focused on the duplicative nature of the account statements instead of the admission of the issue as an unpleaded claim. The bankruptcy court also applied the correct burden shifting standard.

On the issue of whether the debtor made a false oath, the BAP held that he did. The fact that the debtor disclosed the value, but not the account was not helpful to him. It also did not matter that the account was one which was exempt. “Listing one retirement account held with a financial institution does not signal the existence of a second account held with the same institution. To hold otherwise would be at odds with the principles of a rule rooted in honest disclosures.”

The denial of the debtor’s discharge under § 727(a)(4)(A) was affirmed. As a result, the First Circuit did not review the § 727(a)(2)(A) issue.

Mission Prod. Holdings v. Old Cold, LLC (In re Old Cold, LLC)
BAP NO. NH 15-069, 558 B.R. 500 (B.A.P. 1st Cir., October 25, 2016)

Mission Product Holdings, Inc. (“Mission”) objected to the sale of substantially all of the debtor’s assets arguing that the winning bidder was not a good faith purchaser. The winning

bidder was the debtor's majority equity owner, largest unsecured creditor, post-petition DIP financier and stalking horse bidder.

The BAP first noted that Mission was not required to seek a stay of the sale order pending appeal because it objected to the sale on the grounds that the buyer was not a good faith purchaser. However, the issue on appeal was limited to whether to the buyer's good faith status. Also, the BAP rejected the appellees argument that the appeal was equitably moot stating "We are not convinced the transactions which have occurred since the closing of the sale are incapable of being unwound."

As to Mission's argument that the buyer was not acting in good faith, the BAP was not convinced. The bankruptcy court issued a long and detailed opinion which outlined the sale process. Instead of interfering with the sale process, the buyer agreed to extend DIP financing so that the debtor's assets could be fully marketed, it agreed to modification of the sale process and modified its offer to allow the auction to proceed. "The bankruptcy court's findings, which were based upon a well-developed record, were not clearly erroneous and we will not disturb them."

Submitted by:

Sabrina C. Beavens, Esquire

Iurillo Law Group, P.A.

125 Brewery Lane, Suite 7

Portsmouth, NH 03801

Email: sbeavens@iurillolaw.com

Second Circuit

Fletcher v. Davis (In re Fletcher Int'l, Ltd.),

Case No. 15-2991, 2016 WL 6536372 (2d Cir., November 3, 2016)

The Second Circuit affirmed the judgment of the district court affirming the bankruptcy court's order denying the motions filed by Alphonse Fletcher, Jr., proceeding pro se ("Fletcher"), to (i) vacate the appointment of the Chapter 11 trustee (the "Trustee") and the professionals he retained pursuant to 11 U.S.C. § 327(a), and (ii) disgorge their fees and expenses.

The Second Circuit first held that the bankruptcy court did not abuse its discretion in denying Fletcher's motion on the ground that Fletcher had repeatedly failed to file proper papers and comply with the bankruptcy court's orders in connection with his motions. Specifically, Fletcher did not timely object to the appointment of the Trustee or the professional firms he retained as his counsel and special consultant (collectively, the "Retained Professionals"). Instead, Fletcher raised his conflict-of-interest allegations more than a year after the court approved those appointments and only after the Trustee filed a report finding that Fletcher had defrauded his investors and proposed a liquidation plan that deeply subordinated Fletcher's claims.

The Second Circuit noted that the bankruptcy court nevertheless afforded Fletcher multiple opportunities to present his allegations in appropriate papers, culminating in the bankruptcy court's instruction at an April 2, 2014 conference to file a brief within 30 days specifying the relevant statutory provisions, the manner in which they had been allegedly violated, and the relief sought. Fletcher did not comply, and the bankruptcy court entered an order on June 24, 2014 denying Fletcher's motions. The Second Circuit stated that the bankruptcy court was well within its discretion to deny Fletcher's motions for these reasons alone.

The Second Circuit next held that the bankruptcy court did not abuse its discretion in determining that Fletcher's various filings did not give rise to any viable theory of conflict. The Trustee's alleged conflicts of interest were primarily based on professional relationships between the firm at which he was formerly a partner, Weil Gotshal & Manges LLP, and entities in some way affiliated with the defendants in an unrelated litigation brought by Fletcher involving his cooperative apartment building (the "Dakota Litigation"). However, the Trustee had retired from Weil nine months before he was appointed, and Fletcher failed to explain how any connection to the Dakota Litigation (to which the debtor was not a party) could have rendered the Trustee or the Retained Professionals adverse to the estate.

Finally, with respect to Fletcher's efforts to vacate the appointments of the Retained Professionals based on their connections with various third parties, the Second Circuit held that Fletcher's conclusory allegations failed to raise any presently held conflict with the debtor's estate.

Submitted by:

Bram A. Strohlic

Skadden, Arps, Slate, Meagher & Flom LLP

Four Times Square

New York, NY 10036-6522

Email: bstrochl@skadden.com

Third Circuit

Precedential Opinion

Delaware Trust Company v. Energy Future Intermediate Holding Co LLC, et. al.

(In re Energy Future Holdings Corp.),

Case No. 16-1351, 2016 WL 6803710 (November 17, 2106).

Energy Future Intermediate Holding ("EFIH") filed Chapter 11, in part, for the stated purpose of triggering acceleration clauses in certain lien indentures and their notes in order to refinance the same without payment of a redemption premium (a "make-whole" premium). Shortly after filing the chapter 11, the bankruptcy court granted the debtor leave to refinance the lien indentures. Prior to the completion of the refinancing, the indenture trustees filed adversary proceedings seeking declarations that the refinancing of the notes would trigger the make-whole premiums. The question was one of interpretation of contractual provisions under New York

law. Both the bankruptcy court and the district court found that because the acceleration provision of the indenture did not reference the make-whole premium provision, the indenture trustees were not entitled to the make-whole premium upon the refinancing of the notes after acceleration thereof.

In a detailed analysis of the contractual terms and applicable New York state contractual law, the Third Circuit reversed the lower courts and remanded the case to the bankruptcy court for further proceedings. The Court reasoned that the primary objective of the court is to give effect to the intent of contractual parties as revealed by the language of their agreement. If EFIH had wanted its duty to pay the make-whole premium terminate on acceleration of its debt, it needed to make clear that the acceleration provision of the indenture trumped the make-whole provision. Absent clear language, the acceleration clause did not override or eliminate the obligation to pay the make-whole premium payment on a voluntary redemption, even after acceleration.

Non Precedential Opinion

***Aiello v. Aiello*, Case No. 16-1502, 2016 WL 6933939 (November 28, 2016).**

In 2010, Maria Aiello obtained a judgment of over \$1 million against her late husband's brother, David Aiello, for damages related to self-dealing and breach of fiduciary duty of Mr. Aiello as the executor of Ms. Aiello's late husband's estate. In 2012, Mr. Aiello filed a Chapter 7 petition and in 2014, Ms. Aiello timely filed a complaint to determine dischargeability of the debt owed to her pursuant to § 523(a)(4). The Bankruptcy Court granted Ms. Aiello's motion for summary judgment in the adversary proceeding, applying the doctrine of collateral estoppel and that the state court's findings and record were sufficient to establish the requisite scienter.

While the state court judgment clearly serves as collateral estoppel for key issues such as wrongfulness of conduct and Mr. Aiello's status as a fiduciary, on appeal Mr. Aiello challenged the court's finding of an intentional wrong on summary judgment. The question was whether there was sufficient evidence to show an intentional wrong under *Bullock v. BankChampaign, N.A.*, 133 S. Ct. 1754 (2013). The Third Circuit found that record from the state court showed sufficient circumstantial evidence of intent to support the bankruptcy court's finding, as a matter of law, that Mr. Aiello had the requisite scienter and upheld the lower court's decision.

Submitted by:

Elizabeth L. Gunn

Office of the Attorney General

Email: elizabeth.gunn@dss.virginia.gov

Fourth Circuit

***Han v. Yancey (In re Kang)*,**

No. 15-2345, 2016 WL 6958438 (4th Cir. Nov. 29, 2016):

On November 29, 2016, the Fourth Circuit, in a *per curiam* opinion, affirmed the lower courts' rulings that held that a prepetition transfer by the debtors of certain of their interest in two LLCs was void for violating the terms of one of the LLC's operating agreement.

Prepetition, in 2009, the individual, joint debtors sold 60% their interest in the two LLCs to two individuals. In October 2010, the debtors filed under chapter 11. Initially, the unsecured creditors' committee filed a complaint against the two individual transferees seeking to deem the 2009 sale invalid, which complaint and litigation was later taken over by a chapter 11 trustee. After trial, the bankruptcy court found that the relevant LLC operating agreement was effective, and, thus, the 2009 transfer was null and void because it violated the terms of the operating agreement. The district court affirmed.

On appeal to the Fourth Circuit, the remaining defendant argued that (i) the chapter 11 trustee lacked standing; (ii) the relevant operating agreement did not control the 2009 transfer; and (iii) even if the operating agreement did control, the transfer was not null and void. The Fourth Circuit rejected each argument. First, the chapter 11 trustee had standing to assert the rights of debtors and creditors under applicable Virginia law. Second, the operating was effective because it properly bound the defendant, and the defendant assented to its terms. Third, the court rejected the notion that, if the operating agreement were effective, the sale was merely voidable because the acts taken were done so "outside the authority conferred by the operating agreement" and was thus *ultra vires*. On that basis, the Fourth Circuit affirmed the holding that the transfer was null and void.

AUGUST:

Dubois v. Atlas Acquisitions LLC, (In re Dubois) No. 15-1945834 F.3d 522 (4th Cir. August 25, 2016):

On August 25, 2016, the Fourth Circuit affirmed the bankruptcy court's ruling via a direct appeal, which held that the filing of proofs of claim based on stale debt did not violate the Fair Debt Collection Practices Act (the "FDCPA").

In two similar but separate chapter 13 cases, Atlas filed proofs of claim based on loans and debts that originated with other lenders. In each case, the debts were not listed on the debtors' respective schedules, and Atlas did not receive notice of the bankruptcy cases from the debtors. Further, it was undisputed that, as to both debtors, the debts were beyond Maryland's applicable 3-year statute of limitations; nonetheless, Atlas filed proofs of claim in the cases. Each debtor filed adversary complaints alleging that the filing of the proofs of claim violated the FDCPA. The bankruptcy court granted Atlas's motion to dismiss, holding that the filing a proof of claim does not constitute debt collection activity within the meaning of the FDCPA.

Initially, the Fourth Circuit discussed the statutory framework of the FDCPA and the Bankruptcy Code, also noting that federal courts have held that a debt collector violates the FDCPA by filing suit on a time-barred debt. The Fourth Circuit expressly found "that filing a proof of claim is debt collection activity regulated by the FDCPA."

Next, the court addressed whether filing a proof of claim after the expiration of the applicable statute of limitations violated the FDCPA. And, in response to that question, the court held that “a time-barred debt still constitutes a ‘right to payment’ and therefore a ‘claim’ that the holder may file under the Bankruptcy Code.” In reaching that conclusion, the Fourth Circuit relied on Maryland law and its interpretation of a statute of limitations defense, noting that the defense does not extinguish an underlying debt but, instead, bars the remedy. The court also noted that stale debts may be revived in certain circumstances, and stale debts fall within the Code’s definition of a claim.

Finally, the court addressed “whether filing a proof of claim on a stale debt violates the FDCPA notwithstanding that the Bankruptcy Code permits such filing.” After considering how chapter 13 cases function, the court held that “filing a proof of claim in a Chapter 13 bankruptcy based on a debt that is time-barred does not violate the FDCPA when the statute of limitations does not extinguish the debt.”

The dissent argued, however, that Atlas’s conduct is a violation of the FDCPA. The dissent also stated its view that the Bankruptcy Code does not preclude or preempt the filing of FDCPA lawsuits in the bankruptcy courts, an issue that the majority did not reach.

***PEM Entities LLC v. Province Grande Olde Liberty, LLC*,
No. 15-1669, 655 Fed.Appx. 971 (4th Cir. Aug. 12, 2016):**

On August 12, 2016, the Fourth Circuit, in a *per curiam* opinion, affirmed the lower courts’ rulings that recharacterized a purported debt claim as an equity interest. In doing so, the court applied the 11 factor test set out in *In re Official Committee of Unsecured Creditors for Dornier Aviation (N. Am.), Inc.*, 453 F.3d 225 (2006).

Prepetition, the debtor entered into a settlement agreement with a bank, an insider, and other entities, which included the bank’s sale of its loan to an entity (“PEM”) controlled by an insider of the debtor. The debtor transferred approximately \$200,000 to PEM, and PEM shortly thereafter “re-advanced” \$50,000 to the debtor for operating expenses, as well as later transfers and re-advances. When the debtor filed bankruptcy, the debtor scheduled PEM as having a \$7,000,000 claim. Two other creditors, not part of the settlement agreement, asserted claims of \$500,000 each, and later filed claims for equitable subordination and recharacterization against PEM. The bankruptcy court granted summary judgment in favor of the two creditors, which the district court affirmed.

On appeal, the Fourth Circuit affirmed those rulings and held that the lower courts were correct to focus on the substance of the transaction, meaning the settlement in which PEM acquired the loan, not the original bank loan as urged by PEM. In applying the *Dornier* factors, the court specifically cited (i) the naming of the settlement agreement; (ii) that the debtor’s principals negotiated the settlement agreement for the other entity; (iii) the debtor’s and PEM’s failure to adhere to corporate formalities; (iv) the debtor’s total reliance on PEM for money to meet operating expenses; (v) the identity of interests between PEM and the debtor; and (vi) the debtor’s pledge of security in connection with PEM’s purchase of the loan. The bankruptcy

correct “properly ‘looked beyond form’ to determine the ‘substance of the transaction’ was in fact the settlement agreement in which the debtor used PEM as an extension of itself” to satisfy the bank loan.

Submitted by:

Jed Donaldson

Spotts Fain PC

411 E. Franklin Street, Suite 600

Richmond, VA 23219

Email: jdonaldson@spottsfain.com

Fifth Circuit

Matter of Exquisite Designs by Castlerock & Co., No. 16-20353, 2016 WL 6591699 (5th Cir. Nov. 7, 2016)

Pro se appellant Brad Jones is the sole shareholder, president, and director of Exquisite Designs by Castlerock & Co. (“Exquisite”), which filed for Chapter 11 bankruptcy. As part of Exquisite’s confirmed Chapter 11 plan, it was to continue making payments on several promissory notes, which were secured by certain properties (the “Mortgaged Properties”), to creditor First Bank. After Exquisite’s bankruptcy case was converted to a Chapter 7, the appointed trustee moved to abandon the Mortgaged Properties, and the bankruptcy court entered an order lifting the automatic stay (the “Stay Order”).

Months later, however, Jones moved to vacate the Stay Order, claiming the bankruptcy court lacked jurisdiction over the Mortgaged Properties. He also filed a lis pendens on the Mortgaged Properties. First Bank argued in opposition that Jones failed to appeal the Stay Order in a timely manner. It also moved to expunge the lis pendens and sought sanctions against Jones.

The bankruptcy court denied Jones’s motion to vacate without explanation (the “Motion to Vacate Order”). It also expunged the lis pendens and found Jones had filed them merely for harassment, in violation of Federal Rule of Bankruptcy Procedure 9011. Jones appealed the Motion to Vacate Order to the district court, which determined his appeal was untimely. Jones then appealed to the Fifth Circuit.

As an initial matter, the Fifth Circuit explained that it had jurisdiction to consider Jones’s appeal, even though it was not filed within the time limit required by 28 U.S.C. § 158(c)(2). Specifically, because Jones was pro se and arguing the bankruptcy court lacked jurisdiction to issue the Stay Order, the Court liberally interpreted his motion to vacate as a Federal Rule of Civil Procedure 60(b)(4) motion appealing the bankruptcy court’s Motion to Vacate Order. This interpretation rendered Jones’s appeal timely.

Nevertheless, the Court held the bankruptcy court properly denied Jones's Rule 60(b) motion. Although Rule 60(b) allows a court to grant relief from a final judgment that is "void," it applies only in limited circumstances not present here. Jones had notice of and an opportunity to participate in the Stay Order proceedings. Because the facts presented did not illustrate a "total want of jurisdiction," Jones could not use a Rule 60(b) motion as "a substitute for a timely appeal" to challenge the bankruptcy court's jurisdiction.

Submitted by:

Sarah Williams
Kirkland & Ellis LLP
600 Travis, Suite 3300
Houston, TX 77002
Email: sarah.williams@kirkland.com

This summary is for general information purposes only and is not intended to be and should not be taken as Kirkland legal advice.

Eight Circuit

***In re O'Sullivan*, 841 F.3d 786 (8th Cir. November 14, 2016):**

In this case, the Eighth Circuit reversed a BAP's decision affirming the bankruptcy court's order granting a motion to avoid a judicial lien. Prior to the bankruptcy filing, the creditor, after obtaining a default judgment against the debtor and his business, sought to place a judicial lien on a property owned by the debtor and his wife as tenants in the entirety. Subsequently the debtor filed for bankruptcy which his wife did not join. During the bankruptcy the debtor claimed a homestead exemption in the property and sought to avoid the judicial lien under 11 U.S.C. § 522(f), asserting it impaired the claimed exemption. The bankruptcy court entered an order granting the debtor's motion, which was affirmed by the BAP. The creditor then appealed to the Eighth Circuit.

In its review of the BAP decision, the Eighth Circuit considered an issue the bankruptcy court and the BAP did not address; whether the notice of foreign judgment filed by the debtor actually created a lien on the property under the relevant state law. The Eighth Circuit noted that under Missouri law state court judgment create liens upon the real estate of the person against whom the judgment is entered. The Eighth Circuit went on to state that since the property was owned by the debtor and his wife as tenants in the entirety, it is arguable that neither had a separate interest that a lien could attach to and that a judgment filed against only one spouse could not constitute a lien on the property.

The Eighth Circuit established that if the judgment failed to give rise to a judicial lien § 522(f) does not apply and the debt would be dischargeable through the bankruptcy proceedings. The Court declined to make a determination of whether or not the judgment had created a lien, remanding that question to the bankruptcy court.

Submitted by:

Matthew Sepuya
Diamond McCarthy

150 California St., Ste. 2200
San Francisco, CA 94111
Email: msepya@diamondmccarthy.com

Ninth Circuit

In re New Investments, Inc, No. 13-36194, 840 F.3d 1137 (9th Cir. 2016)

In *In re New Investments*, the Ninth Circuit reversed the bankruptcy court's confirmation order and held that a plan proposing to cure a default must provide payment of interest at the default rate. The Circuit held that its prior holding in *In re Entz-White Lumber*, 850 F.2d 1338 (9th Cir. 88), is no longer good law in light of later-enacted §1123(d).

Debtor's plan proposed to sell a hotel to a third party and pay the secured creditor's claim from proceeds in an amount which reflected interest at the pre-default rate.

The Ninth Circuit held that the plain language of §1123(d) that "the amount necessary to cure a default shall be determined in accordance with the underlying agreement and applicable non-bankruptcy law" renders void the *Entz-White* rule that a debtor could avoid post-default interest by curing a default. The agreement provided for default interest and state law allowed it.

Judge Berzon dissented that because the Code does not define "cure" the *Entz-White* construction that "curing a default" means "returning to pre-default conditions" should control. The *Entz-White* Court specifically rejected the idea that "cure" means paying a penalty triggered by the default because under that construction, post-default interest would not be a consequence of default that could be cured. Judge Berzon also cited legislative intent that "a cure pursuant to a plan should operate to put the debtor in the same position as if the default had never occurred."

Blixeth v. Brown (In re Yellowstone Mountain Club), No. 14-35363, 2016 WL 6936595 (9th Cir. 2016)

In *Blixeth*, the Ninth Circuit affirmed in part and vacated in part the district court's affirmance of the bankruptcy court's denial of Plaintiff's request for leave pursuant to *Barton v. Barbour*, U.S. 126 (1881), to sue a member of the unsecured creditor's committee ("UCC"). The Court also vacated and remanded the dismissal of the plaintiff's claims on the merits.

Defendant Stephen Brown was Plaintiff's former attorney who later became a member of the UCC. After the district court held that *Barton* applied to Plaintiff's claims against Brown, Plaintiff sought leave from the bankruptcy court to bring an action for prepetition torts related to Brown's representation of Plaintiff, and post-petition claims related to Brown's activities on the UCC. The bankruptcy court held that the claims were intertwined and denied leave. The bankruptcy court then dismissed the claims on the basis that Brown was entitled to derivative judicial immunity.

The Circuit held that the *Barton* doctrine applies to members of a UCC, but that Plaintiff's claims involving pre-petition conduct were clearly separated and could be brought in the district court without leave. The panel held that the bankruptcy court did not abuse its discretion in denying leave for the UCC-based claims and that bankruptcy courts have constitutional authority to decide *Barton* claims. However, the Panel remanded the case because Brown was not entitled to derived judicial immunity for *all* actions taken while on the UCC, only for those actions taken within the scope of his authority and candidly disclosed to the bankruptcy court.

Submitted by:

Jeffrey J. Coe
Mesch Clark Rothschild
259 N. Meyer Avenue
Tucson, AZ 85701-1090
Email: jcoe@mcrazelaw.com

**Ozenne v. Chase Manhattan Bank (In re Ozenne),
No. 11-60039, 841 F.3d 810 (9th Cir. Nov. 9, 2016).**

In *Ozenne v. Chase Manhattan Bank*, the issue before the Ninth Circuit was whether a writ of mandamus could substitute for a timely appeal. In 2001, the debtor filed for chapter 13 bankruptcy. The bankruptcy court ultimately dismissed his case as a result of his failure to make timely payments to creditors. In November 2009, the debtor attempted to reopen the case by filing a motion for sanctions with the bankruptcy court for violations of the automatic stay under 11 U.S.C. § 362. In January 2011, the bankruptcy court denied the motion and reiterated that the case was closed and the court lacked jurisdiction to hear the motion. The debtor never appealed. Instead, in May 2011, the debtor filed a petition for writ of mandamus with the bankruptcy appellate panel requesting that the bankruptcy appellate panel order the bankruptcy court to hold a trial or hearing on the purported violations. The bankruptcy appellate panel held that it had the authority to issue a writ of mandamus but denied the debtor's petition.

The Ninth Circuit disagreed by finding that the bankruptcy appellate panel lacked jurisdiction to hear the debtor's mandamus petition. As a general matter, a writ of mandamus cannot substitute for a timely appeal. Thus, where a party has the option of filing a contemporaneous ordinary appeal, mandamus relief is not available

Submitted by:

Karen Diep
Diamond McCarthy LLP
150 California Street, Suite 2200
San Francisco, CA 94111
Email: kdiep@diamonddmccarthy.com

Tenth Circuit

Cooley v. Behrends (In re Behrends),
No. 15-1420, 2016 WL 6677596 (10th Cir. Nov. 14, 2016).

The Tenth Circuit affirmed the district court's affirmance of the bankruptcy court's grant of summary judgment in favor of plaintiffs based on collateral estoppel determining that debt owed by the chapter 7 debtor arising from an arbitration award for securities laws violations was non-dischargeable under section 523(a)(19). Despite notice and opportunity, the debtor elected not to defend the arbitration proceeding which, relevant here, resulted in adverse awards in favor of the plaintiffs. After the debtor filed his chapter 7 case the plaintiffs obtained stay relief to obtain judicial confirmation of the arbitration award, which was obtained without objection by the debtor. Plaintiffs then filed their non-dischargeability complaint for which they obtained summary judgment on collateral estoppel grounds. The Tenth Circuit explained that there was no bar to applying the arbitration award, noting Section 523(a)(19)'s reference to "any judgment," and noted that the debtor's failure to defend meant that he admitted all the facts pled by the plaintiffs in their arbitration claim. The Tenth Circuit further explained that while in a default situation a defendant is not precluded from challenging the legal sufficiency of a plaintiff's allegations, the debtor did not argue that the admitted facts were insufficient as a matter of law to establish the claimed securities law violations. Finally, the Tenth Circuit rejected the debtor's contention that the arbitration award stated that it was "for the information of the parties only and ... not precedential in nature," agreeing with the district court that that language did not preclude the use of the findings made by the arbitrator and the confirming judgment in the subsequent non-dischargeability proceedings. The Tenth Circuit explained that "[t]o hold otherwise would frustrate the plain meaning of the statute, § 523(a)(19), which does not require a published precedential decision but permits the use of 'any judgment,' or for that matter, 'any settlement agreement entered into by the debtor,' whether or not incorporated into a precedential decision."

In re Agrawal,
No. 16-11253, 2016 WL 6875917 (Bankr. W.D. Okla. Nov. 1, 2016).

In considering whether there were three petitioning creditors which held claims against the debtor not subject to a "bona fide dispute as to liability and amount," the bankruptcy court adopted the "clear" majority rule "that an unstayed, non-default state judgment on appeal is not a 'bona fide dispute' for purposes of 303(b)(1)." After citing to Tenth Circuit law defining the phrase "bona fide dispute," *Bartmann v. Maverick Tube Corp.*, 853 F.2d 1540 (10th Cir. 1988), the bankruptcy court found that unstayed judgments, and judgments not subject of an appeal, sufficed to establish that the underlying debts were not subject to a "bona fide dispute." Because this ruling covered 3 of the 4 petitioning creditors, the court did not address the issue of whether a judgment in the fourth case where further hearings were contemplated to consider awarding additional damages meant that the \$20,000 award was subject to a "bona fide dispute."

Submitted by:

Paul Avron
Berger Singerman
One Town Center Road, Suite 301
Boca Raton, FL 33486
Phone: (561) 241-9500
Email: PAvron@bergersingerman.com