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THE OFFICIAL PUBLICATION OF THE NATIONAL ASSOCIATION OF BANKRUPTCY TRUSTEES

IN THIS ISSUE

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FROM THE EDITOR'S DESK

Andrea Dobin

This is only my second column for the Journal and I'm not quite used to it. I don't have a wealth of subjects to draw from. I wait for inspiration. The inspiration for this column comes from the fact that the submission for this issue from the Office of United States Trustee was written by Sam Crocker on the occasion of his retirement. In fact, by the time you receive this Journal in your mailbox, Sam will have left his office for the last time. I know that I speak for the entirety of the NABT wishing him a long, happy and fulfilling retirement and thanking him for his years of service to this organization and the bankruptcy system. What may surprise you is that I don't really know Sam…personally, that is.

I joined this organization in 1999 immediately after being appointed to the Panel of Chapter 7 Trustees in my district. I sat wide-eyed at my first Annual Conference that year shocked by the body of knowledge that the more experienced trustees in attendance seemed to have at their finger-tips. I was sure that I would never be like them. I *could* never be like them. The voices of these dignitaries ring in my ear…. Sam's voice is only one of the ones I hear. They have a variety of tones and accents, but I hear them very clearly. I won't try to name them because invariably I will miss one and be embarrassed by it later, but you know who you are – the leaders of the 1990s are largely still active today.

Fast forward almost 20 years and I am serving as the Editor in Chief of this Journal, responsible for gathering and disseminating a body of knowledge to our membership. I take this charge seriously and am proud of the work that my editorial board and I do fulfilling our mission. I hope that you find the information in each and every Journal useful. However, there is nothing that is more valuable than coming to the Annual Conference, hearing the *voices* of your colleagues sharing their knowledge and experience. The voices of the future can be heard there. It is an invaluable experience. You may even hear my voice this year….***wink wink***

Happy Spring! 🏛

Very best regards,

Andrea Dobin
Editor in Chief

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BK Assets
216 N. Center
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dab@bkassets.com

Secretary
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Murray & Murray, LLC
One American Place
301 Main Street, Suite 810
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dmm@murraylaw.net

Directors

Marc E. Albert
Stinson Leonard Street LLP
1775 Pennsylvania Ave, NW Suite 800
Washington, DC 20006-4605
(202) 728-3020 • Fax: (202) 785-9163
malbert@stinson.com

Marc Barmat
2255 Glades Road, 337W
Boca Raton, FL 33431
(561) 417-1567 • Fax (561) 338-7532
mbarmat@furrcohen.com

Leslie Gladstone
Financial Law Group
401 Via Del Norte • La Jolla, CA 92037
(858) 454-9887 • Fax (858) 454-9596
Leslieg@flgsd.com

Jason L. Pettie
Jason L. Pettie, PC
951 Glenwood Ave, #1101 • Atlanta, GA 30316
((404) 638-5984 • Fax (404) 378-0651
jasonpettie@gmail.com

William (Bill) Schwab
811 Blakeslee Blvd. Dr. East
Lehighton, PA 18235
(610) 377-5200
schwab@uslawcenter.com

Gary Seitz
Gellert Scali Buskenkell & Brown
1201 N. Orange Street, Suite 300
Wilmington, DE 19801
(215) 238-0011
gseitz@gsbblaw.com

Darcy D. Williamson
510 SW 10th Ave
Topeka, KS 66612
(785) 233-9908 • Fax (785) 233-2613
darcy@williamson-law.net

Partners

George Adams
Adams Levine Surety Bonds
4501 Cartwright Road, Suite 402 Missouri
City TX 77459
(281) 499-7199 • Fax (281) 499-9124
george@georgeadamsinsurance.com

Jill Bauer
Epiq Systems, Inc.
501 Kansas Avenue
Kansas City, KS 66105
(913) 621-9920
Jbauer@epiqsystems.com

Sara DeJarnette
International Sureties, Ltd.
One Shell Square, 701 Poydras St., Ste. 420
New Orleans, LA 70139
(504) 581-4227 • Fax (504) 581-1876
sdejarnette@internationalsureties.com

Kristi Singal
TrusteSolutions
1770 St. James Place, Suite 625
Houston, TX 77056
(713) 552-0100 • Fax (713) 552-0011
ksingal@trustesolutions.com

David Watkins
Bankruptcy Mangement Solutions
8 Corporate Park, Suite 230
Irvine, CA 92606
(800) 634-7734 x 2015 • Fax (800) 585-5353
david.s.watkins@bms7.com

Trustee Asst. Liaison

Roberta J. Kickbush
Sr. Paralegal / Office Manager
Laderer & Fischer, P.C.
401 E. Colfax Avenue, Suite 305
South Bend, IN 46617
(574) 284-2354
roberta@ladfislaw.com

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American Bankruptcy Trustee Journal

EDITOR IN CHIEF – Andrea Dobin
adobin@trenklawfirm.com

ASSOCIATE EDITORS
Brian A. Bash
bbash@bakerlaw.com
Deborah J. Caruso
dcaruso@rubin-levin.net
Chris Hughes
chughes@nossaman.com
Landon Raiford
lraiford@jenner.com
Stacia Yoon
trustee_yoon@comcast.net

STAFF EDITOR/NABT EXECUTIVE DIRECTOR
Jennifer Brinkley
jbrinkley@nabt.com

NABT Headquarters
7433 Spout Springs Road
Suite 101 #67
Flowery Branch, GA 30542
(888) 566-2993

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PRESIDENT'S COLUMN

Ronald R. Peterson

I have had a busy quarter. The Legislative Committee and our lobbyists planned a fly in for May 8, 2018, to meet with key Congressmen and Senators. We had our own private meeting room on Capitol Hill. We had a big turnout from the trustees and made a great impression the members of the Judiciary Committees and their staffs. I shall report to the results of the fly in at our next town hall meeting. I suspect we shall have a hearing in the House this calendar quarter. Some members have complained that our pay raise is an impossible dream. Wayne Gretzky, the Great One, said that he missed 100% of all the shots he didn't take. Your leadership and the Legislative Committee will continue to shoot the puck until we get our well-earned raise.

We are also working on a redesign of our logo and web page which we hope to roll out this summer. We are also making a major overhaul of our 20th Century by-laws. I want to thank Jennifer Brinkley and David Birdsall for getting our finances and accounting in order. We are having a good year. Ray Obuchowski is chairing a special task force to develop more sources of revenue so that we can put on ever better programs

Our convention is August 16 through 19 at beautiful Amelia Island, Florida. Mark your calendar now. We have put together a great education and social program!

Finally, our next Journal is going to touch on two important issues – the new tax law and what it does to trustees (and it's not good) and "Where Worlds Collide, Criminal and Civil Forfeiture and Bankruptcy". We are always looking for great new articles.

I want you to know that your whole board has worked extremely hard this year to make this a great organization for which you can be extremely proud and the Board thanks you for your support.

Ronald R. Peterson
NABT President

FROM THE DESK OF NABT

Jennifer N. Brinkley

I am cautiously optimistic that Spring has finally "sprung" here in the southeast. The warmer temperatures are feeling much better for this southern girl and the yellow coat of pollen on my car certainly alludes to a future of blossoming flowers and trees. All of which makes me think of new beginnings and reminds me it is time for some good ole' fashioned spring cleaning, both at home and in NABT.

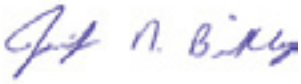
You may have noticed we are trying to reach out to our members in various ways these days; much of this is an attempt to clean up our records and make sure we are not missing anyone. We are sending information out via the listserve, mailers, our website and electronic newsletter. If you are not hearing from us on a regular basis, we might not have the best contact information for you and would appreciate you letting us know.

Our website overhaul project is nearing completion and we are looking forward to revealing a new world of opportunities to stay connected with your NABT community. We are removing the outdated material on the site and refreshing the look to offer a more user-friendly experience.

In February, we attended the NABT Spring Seminar in Las Vegas. It was our first real introduction to the members of NABT and we were overwhelmed by the welcoming, inclusive spirit of our members. If you have not experienced this first hand, I encourage you to attend the upcoming Annual Conference in Amelia Island where you are guaranteed to find, "Trustee Treasures at the Ritz." Better yet, share this experience with a colleague by inviting them to attend with you. There are special discounts available for potential members and first-time attendees.

Please let us know your ideas on how NABT can blossom in the future! I look forward to seeing you in Amelia Island!

Very truly yours,



Jennifer N. Brinkley
Executive Director

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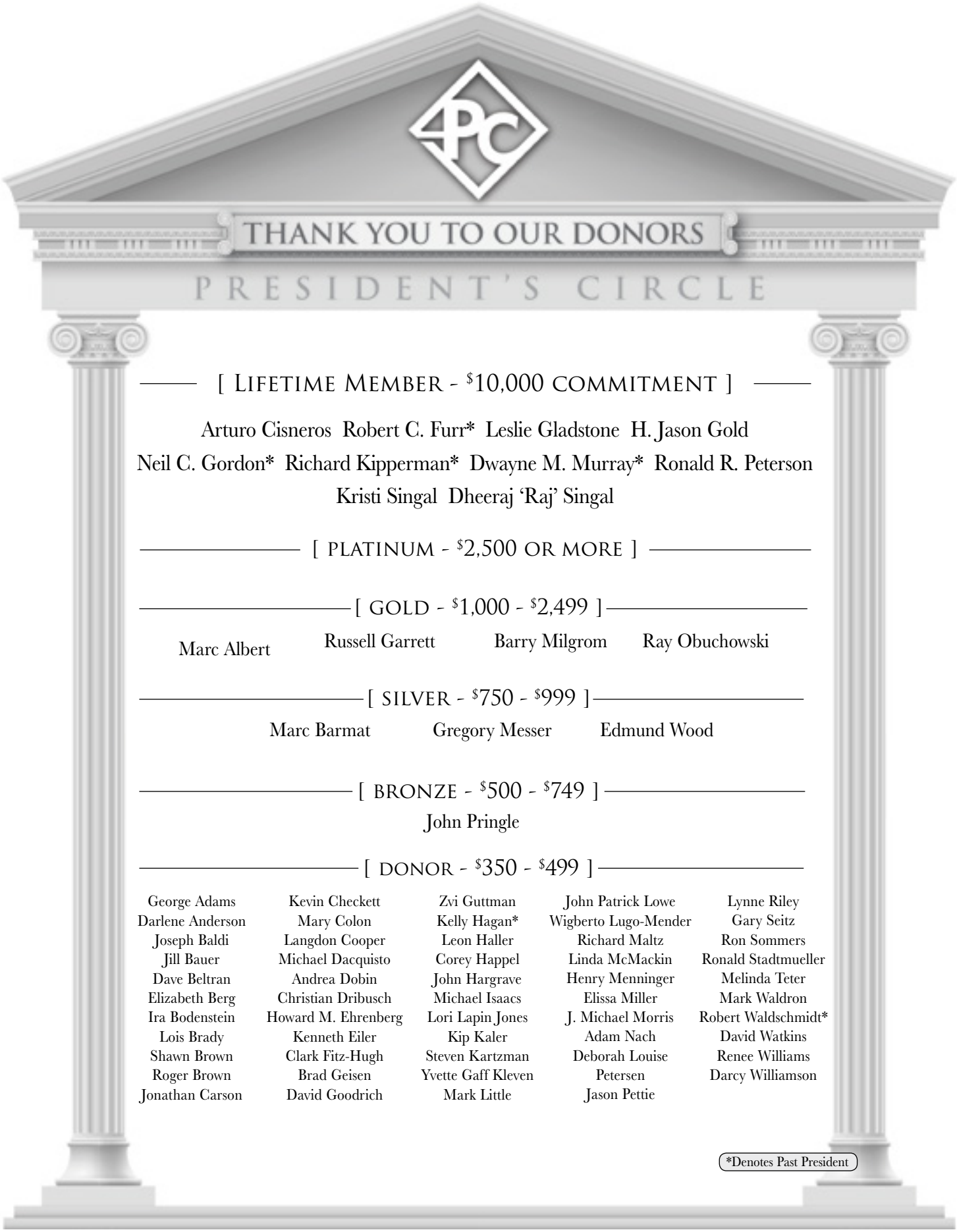

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HUMOR

"Just think of the fun you could have whipping this into shape!"

NABT PEOPLE

Tell us your news and we'll print it! Send your submissions (with headshots) to jbrinkley@nabt.com.

David W. Ostrander recently participated in the M. Ellen Carpenter Financial Literacy Program in a simulated bankruptcy meeting conducted at the U.S. Bankruptcy Court in Springfield, Mass. Students from two area high schools traveled to Springfield for the event. Ostrander appropriately acted as bankruptcy trustee at a mock 341 meeting and questioned the debtor about her financial circumstances. A question and answer with the students was conducted after the mock meeting. The Financial Literacy Program has various modules designed to provide high school students with information to help them make good financial decisions now and in the future. Ostrander has practiced bankruptcy law since 1990, and has been a bankruptcy trustee since 1997. He has been a member of the NABT for over 18 years. He is board certified in business and consumer bankruptcy law by the American Board of Certification.

Jon Porter and Dan Mauer, NABT Legislative Liaisons

The theme of this update is engaging with your federal decision makers. This article will discuss two ways in which the trustee community can communicate with their federal representatives to support NABT's legislative goal. The first way is to attend a planned day on Capital Hill to speak with representatives, senators and their staff. As of this writing, NABT and Porter Group are busy planning a day on Capitol Hill for NABT members to speak with representatives, senators and their staff about H.R. 3553, the Bankruptcy Administration Improvement Act of 2017, and the importance of its passage for our country's bankruptcy system. I use the term "as of this writing" because, by the time you read this, our Hill Day will have already happened (it is on May 8th). We first spoke to trustees about this effort in February at the annual spring meeting in Las Vegas during our legislative update panel.

The Hill Day program will kick off with a welcome reception on Monday, May 7th to discuss talking points, answer questions and go over the following day's events. On Tuesday morning, we will meet at the Porter Group offices and head over to our reserved room in the US Capitol building to meet with members of Congress and their staff. It is our expectation that we will be hearing from at least eight to ten individual offices, which will be chosen by members of NABT and the Porter Group. The following offices and individuals will be invited to participate: (1) House Judiciary/Chairman Goodlatte; (2) House Judiciary/ranking member and Bankruptcy Subcommittee chairman, Jerry Nadler; (3) Bankruptcy Subcommittee chairman (and author of our bill) Tom Marino; (4) Bankruptcy Subcommittee ranking member David Cicilline; and (5) Representative Ed Perlmutter, who is the prime Democratic co-sponsor of the bill. Beyond this core group, invitations will also be sent to members and staff of the House and Senate Judiciary Committees.

We've received incredible interest from trustees from all over the country who are willing to travel to the Capitol and tell their personal stories of why it is so imperative that the chapter 7 trustees are fairly compensated. As your representatives in Washington DC, we are thrilled to know that this group is dedicated and determined to answer our call for additional voices. As I have said before, it is far more compelling for the members of Congress and their staff to hear directly from the chapter 7 trustees. So, here's an advanced thank you to all those trustees and NABT partners who took the time to participate and lend their voices in support of the bill.

The second way you're able to contribute is by outreach to your state and local representatives–something you can do from the comfort of your own home or office. In anticipation of Hill Day, we have spoken and interacted with numerous trustees who have reached out to their representatives, spoken or sent emails to the legislative staffer who works on bankruptcy issues, or attended local public forums organized by their representative. That type of grassroots outreach can pay major dividends by creating relationships with those who have influence over the passage of the bill. If you are interested in becoming more involved in the legislative push, the Legislative Committee and Porter Group will guide you and answer any questions you may have. It really can be as easy as making a quick call and/or sending a brief email!

Engagement at the individual trustee level is going to become more important as the push to get H.R. 3553 signed into law continues to gain steam. We look forward to giving you good news in the next NABT publication when we will report on Hill Day and highlight stories of how trustees are engaging with their federal policy makers.

About the Author

Congressman Jon Porter (Ret.) possesses a unique set of skills formed during his 30-plus years of experience in business, public policy and politics. He built and ran a multi-million dollar insurance business and was elected to a variety of government and private sector leadership positions, including three terms as a U.S. Congressman. He understands the pressures and challenges of running a business and, at the same time, possesses sharp political instincts based on his many years in office. This differentiated set of experiences gives him the ability to see a path to a solution with far greater clarity than others.

Samuel K. Crocker, United States Trustee

'78 Code To BAPCPA and Beyond: The Before, Now, and Hereafter in American Bankrutpcy Jurisprudence

The Greek philosopher Heraclitus is quoted as saying, "Change is the only constant in life"; also translated, "The only constant is change." My mother used to say, "The more things change, the more they stay the same."

Heraclitus is also credited with a more poetic, allegorical expression of this concept: "No man steps into the same river twice, for it's not the same river and he's not the same man." Willie Nelson wrote and sang, "Time rolls on like a river…" I say, "If you step in twice, regardless of whether it's the same river, you will get wet both times."

As I reflect back on my time in the bankruptcy community, I am struck by all that has changed. The following chronology summarizes important events in my career as a bankruptcy practitioner:

1978: Began practicing law.

1984-2010: Became panel trustee and specialized my practice exclusively to bankruptcy law. Acted as a chapter 7 trustee, representing primarily myself and other trustees, as well as debtors in chapters 7 and 11.

1988: United States Trustee Program (USTP) began operating in my jurisdiction.

1989-2010: Began to get appointments and serve as trustee in chapter 11 cases, which became an increasingly large component of my practice.

1998-2010: Wrote quarterly Recent Cases article for *NABTalk* magazine.

1999-2010: Served as Director on NABT Board.

2007-2008: Served as President of NABT.

2011-2018: Served as U.S. Trustee (UST) for Region 8 (Tennessee and Kentucky) and as a member of the USTP Private Trustee Working Group and Trustee Liaison Committee.

2014-2018: Served as UST for Region 20 (Kansas, New Mexico, and Oklahoma) in addition to Region 8.

On April 28, 2018, I will retire from the USTP. That's roughly 40 years of participation in the U.S. bankruptcy system, in various roles. That experience has allowed me to view the system from distinctly different perspectives. I have witnessed significant changes, happening often and regularly enough to substantiate Heraclitus's time/change theory. While maybe not "constant," the dynamic of change, whether potential or actual, has been an ever-present force during my bankruptcy practice tenure.

On April 28, 2018, I will retire from the USTP. That's roughly 40 years of participation in the U.S. bankruptcy system, in various roles. That experience has allowed me to view the system from distinctly different perspectives. I have witnessed significant changes, happening often and regularly enough to substantiate Heraclitus's time/change theory. While maybe not "constant," the dynamic of change, whether potential or actual, has been an ever-present force during my bankruptcy practice tenure.

I can also argue the truth of my mother's maxim. Representatives of particular bankruptcy philosophies and constituencies are always at work to effectuate changes to better the system, which is effectively counter balanced by resistance from competing constituencies with opposing notions of what is "better." However, in the midst of this push and pull, some fundamental, over-arching principles remain unchallenged. The more things change, at least in detail, the more they stay the same in general purpose and ideal.

I will now discuss what I consider to be the major events affecting the U.S. bankruptcy system during my career, essentially following my above chronology. This discussion will be primarily limited to matters that directly concern panel trustee practice. It neither purports nor attempts to be a thorough investigation or scholarly review. It is meant only as an anecdotal description of important, recurring trustee issues discussed in their historical context. It also represents my personal opinions, and not necessarily those of the USTP.

A. The Bankruptcy Code of 1978:

I started practicing around the same time bankruptcy law underwent its most sweeping change in decades. The Bankruptcy Code of 1978 ("Code") replaced the Bankruptcy Act of 1898 as the uniform bankruptcy law of the Unite States. The Code was more than a "fix" of the prior law. It was the origin of a new system. The Code radically revised longstanding responsibilities and relationships among

About the Author

Sam Crocker has served as the U.S. Trustee for Region 8 (Tennessee and Kentucky) since 2011 and Region 20 (Kansas, New Mexico, and Oklahoma) since 2014. The views expressed in this article are his own and do not necessarily reflect the views of the U.S. Trustee Program.

key bankruptcy system players, while introducing a new player with a vital function to fulfill.

Before the Code was enacted, private trustees were appointed and supervised by the bankruptcy judges. Many commentators and practitioners considered this problematic, certainly in appearance if not reality, since the judges also decided cases and other matters where the trustee was a party, including determination of trustee fees. This perceived problem was addressed by creation of a new government agency independent of the judiciary, to hire, monitor and supervise trustees: the USTP. Though created as part of the Code, the USTP was initially limited in its operation to a few "pilot" districts to test how well it worked.

The Code made another significant change that immediately affected trustees. Under the Act, the judges could appoint anyone they chose as a chapter 7 trustee, in any frequency. The Code provided for "panels" of trustees to handle all chapter 7 cases. Panels were created everywhere, not just in USTP pilot districts. I remember it well because my partner at the time, Bob Waldschmidt, was appointed to the first trustee panel in Nashville.

In 1984, I became a member of the Nashville panel. That was four years before the USTP began to operate in Tennessee. The judges still appointed and supervised the trustees, but the trustees received appointments on a regular rotation that gave each of them a roughly equal share of cases. This and similar administrative matters were overseen by the Estate Administrator, an employee of the court.

This pre-USTP time period amounted to a hybrid system, with essentially the same panel of trustees that exists today coupled with court supervision of case administration. Through these years, the judges initially reviewed and decided administrative matters, regardless of whether any party objected.

The USTP expanded virtually nationwide in 1987–1988. It is fair to say that a significant level of uncertainty existed between trustees and the USTP in those early days. I experienced it first hand from the private trustee perspective. In retrospect, and after being on the USTP side, I compare those days to the days after the birth of my first child, when no instructions came with the baby.

The USTP set about to effectuate the broad statutory mandate to supervise trustees. I think neither side knew exactly what to expect, what to do, or the best way to get it done. That took time and effort to sort out before it began to come together. There will always be a natural tension between the regulator and the regulated, but it benefits both to respect and understand what each other does. I have watched that begin to happen and continue to grow from my time with NABT through my USTP days, improving the system for everyone in the process.

B. Post-Code, Pre-BAPCPA Amendments:

After the enactment of the Code, but before the next major revision of American bankruptcy law in 2005, there were several amendments to specific Code provisions. These amendments were very important, not only as substantive changes to the law, but as indicators of evolving policy concerns and positions, many of which came later to fruition. Though I encourage examination of these post-Code, pre-BAPCPA amendments in both their historical and legal context, I will note and discuss only one of them, which involves what I believe to be the most longstanding and vital issue trustees continue to face.

A 1994 amendment raised compensation for trustees in all cases they administered. The no asset fee went from $45 to $60, and the §326 commission percentages were also increased. That was the last time trustees received a raise. The lack of any compensation increase since 1994, in spite of NABT's continuing dedicated efforts to obtain one, has certainly and profoundly impacted trustees and their practices immeasurably.

I am a decades-long, very close observer of this situation, from both the actor (NABT) and monitor (UST) perspectives. My personal assessments and opinions are thereby based on myriad experiences over those years. Without talented and dedicated independent fiduciaries to administer cases, the present U.S. bankruptcy system cannot properly function. Private trustees are absolutely fundamental to the proper operation of an essential social, cultural, and economic institution–the American bankruptcy system.

C. BAPCPA:

The Bankruptcy Abuse Prevention and Consumer Protection Act (BAPCPA) became law in 2005, with most of its provisions immediately effective. Like the 1978 Code, BAPCPA was a major revision of the existing bankruptcy law. However, unlike the Code, it was more of a statutory "fix" than the creation of a new system. Said another way, the basic structure of the Code remained after BAPCPA, but with significant changes based on statutory amendments.

The post-BAPCPA Code reflects answers to philosophical and policy concerns much different from those on which the Code was premised. The notion of a "means test" to enter chapter 7 and the expanded definition of an abusive bankruptcy filing are but two examples of such differences. I will not comment otherwise on these and other controversial aspects of BAPCPA, and will continue to limit this article specifically to important trustee issues. I will say I am sometimes surprised at how BAPCPA, thirteen years after the controversies that attended its inception, operates as smoothly as it does today.

There was much in BAPCPA that significantly affected private trustee practice–some positive, some not. I remember NABT being directly responsible for the "commission" language change in §330, as well as the language in §507 which made sure trustees received payment priority over domestic support obligation (DSO) recipients from funds they collected for DSO claimants. Both of those provisions were beneficial to trustees. I also remember, after passage but before the effective date of BAPCPA, USTP Director Cliff White's speech at the NABT convention in New York in which he formally stated the USTP position of support for trustees per the amended commission language. I remember that promise coming true in 9th Circuit Bankruptcy Appellate Panel and 4th Circuit cases when the issue was tested. The appellate courts found for the trustee, citing the USTP position as an important factor in their decisions.

I encourage anyone interested in the

continued on page 42

Scott Myers, Attorney/Advisor, Bankruptcy Judges Division

News from the Advisory Committee on Bankruptcy Rules

Review of Items Published for Comment in August 2017

At its April 3, 2018 meeting in San Diego, California, the Advisory Committee made recommendations concerning proposed amendments to Rules 2002, 4001, 6007, 9036 and 9037, and Official Form 410 that were published for comment in August 2017. As described below, the Advisory Committee recommended that the proposed changes to Rules 2002 and Official Form 410 be held in abeyance for now, and that the remaining proposals go into effect with some minor changes. If ultimately approved by the Standing Rules Committee, the Judicial Conference, the Supreme Court and Congress, the recommended changes to Rules 4001, 6007, 9036 and 9037 would go into effect December 1, 2019.

Rule 4001(c) (Obtaining Credit)

The Advisory Committee received a suggestion concerning Rule 4001(c) and its application to chapter 13 cases. Rule 4001(c) details the process for obtaining approval of post-petition credit in a bankruptcy case. It requires a motion that contains specific disclosures and information. The suggestion posited that many of the required disclosures are unnecessary for most chapter 13 cases, and they should be made inapplicable in chapter 13.

The Advisory Committee reviewed the history of Rule 4001(c), which shows that the provision was designed to address issues particular to chapter 11 cases. Committee members agreed that, regardless of whether a motion for post-petition credit is required under §364 in all chapter 13 cases, Rule 4001(c) is not well suited to address typical financing issues that arise in chapter 13 cases. Accordingly, the Advisory Committee published an amendment creating a new Rule 4001(c)(4) that makes subdivision (c) inapplicable to chapter 13 cases.

There were no comments filed in response to this proposed change, and the Advisory Committee has recommended final approval.

Rules 2002(g) (Addressing Notices) and 9036 (Notice by Electronic Transmission) and Official Form 410 (Proof of Claim)

The Advisory Committee proposed amendments to Rules 2002(g), 9036, and Official Form 410 to facilitate notice and service by electronic means. The proposed amendment to Rule 2002(g) would allow a creditor or equity interest holder to elect to receive notices by email in particular cases by making an appropriate designation on a proof of claim or proof of interest form. Official Form 410 would be amended to provide a checkbox the creditor could use to consent to electronic notice in the case in which the claim is filed. The proposed amendments to Rule 9036 would permit electronic notice on registered users of the court's electronic-filing system who have appeared in a case and, with the consent of the person served, allow for electronic service by other means such as by email from the serving party.

There were four comments filed with respect to these changes. After considering the comments, the Advisory Committee recommended that the proposed amendments to Rule 9036 go into effect with minor changes, and that the proposals with respect to Rule 2002(g) and Official Form 410 be held in abeyance pending developments concerning noticing under consideration by the Administrative Office and the Judicial Conference's Committee on Court Administration and Case Management ("CACM").

Rule 6007(b) (Motion to Abandon Property)

The Advisory Committee received a suggestion concerning the process for abandoning estate property under §554 of the Bankruptcy Code and Bankruptcy Rule 6007. The suggestion highlights the inconsistent treatment afforded notices to abandon property filed by the bankruptcy trustee and motions to compel the trustee to abandon property filed by parties in interest. Specifically, Rule 6007(a) identifies the parties that the trustee is required to serve with its notice to abandon, but Rule 6007(b) is silent regarding the service of a party in interest's motion to compel abandonment. The Advisory Committee's proposed amendment to Rule 6007(b) would more closely align the two subdivisions by specifying the parties to be served with the motion to compel abandonment and notice of the motion, and by establishing an objection deadline.

Five comments were submitted in response to the proposed changes. After considering the comments, the Advisory Committee recommended final approval of the proposed amendment as published.

Rule 9037(h) (Motion to Redact a Previously Filed Document)

In response to a suggestion from CACM, the Advisory Committee proposed a new subdivision (h) to Rule 9037 (Privacy Protections for Filings Made with the Court). The proposed amendment would provide a procedure for redacting personal identifiers in documents that were previously filed without complying with the rule's redaction requirements.

There were three comments filed in response to the proposed rule. The Advisory Committee made several stylistic changes to the published version of the rule to clarify that a motion to redact include as an attachment a sanitized replacement document for filing, and recommended final approval.

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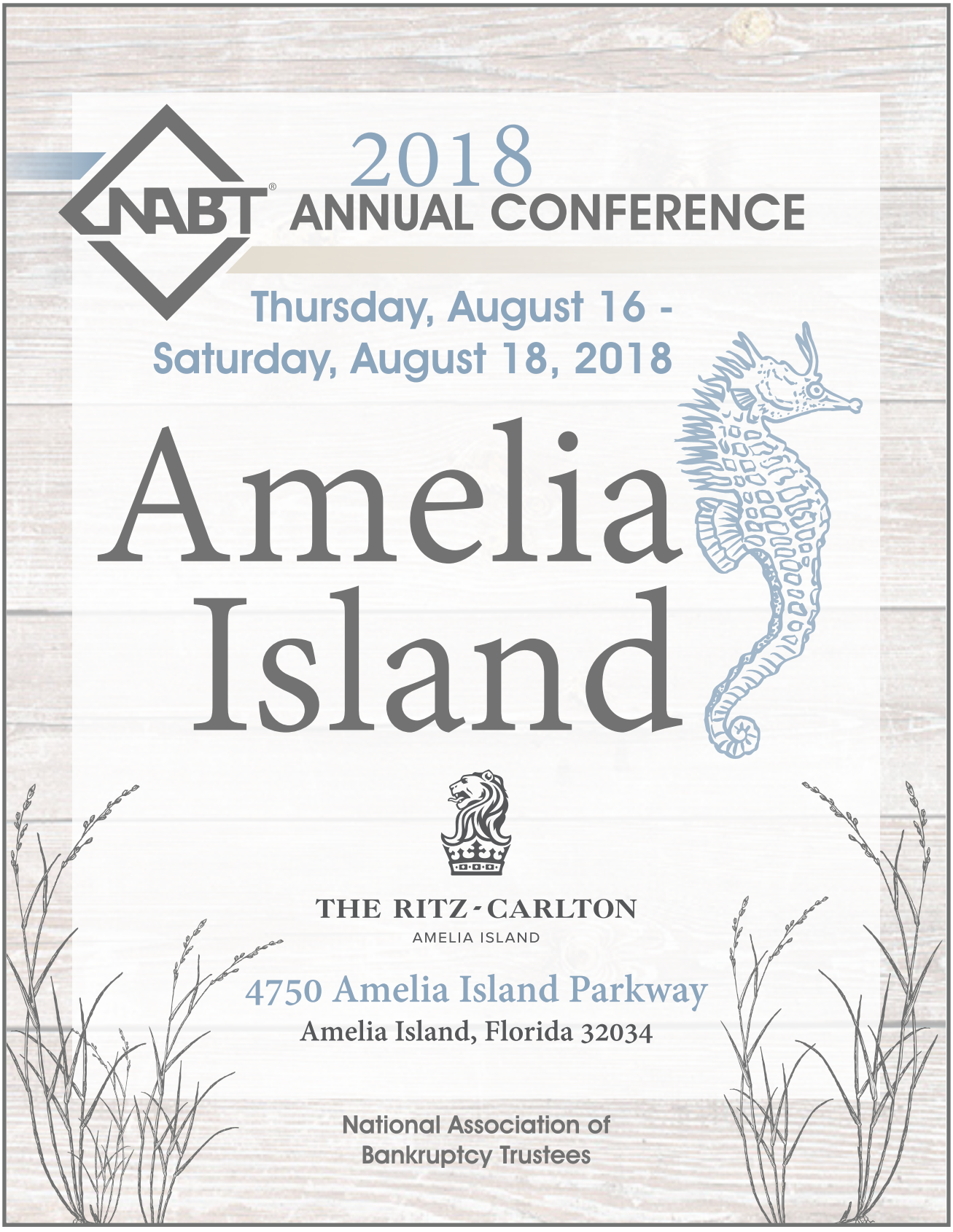
Scott Myers is an attorney with the Rules Committee Staff of the Administrative Office of the U.S. Courts. He supports the Judicial Conference's Committee on Rules of Practice and Procedure and its Advisory Committee on Bankruptcy Rules.
(Scott_Myers@ao.uscourts.gov)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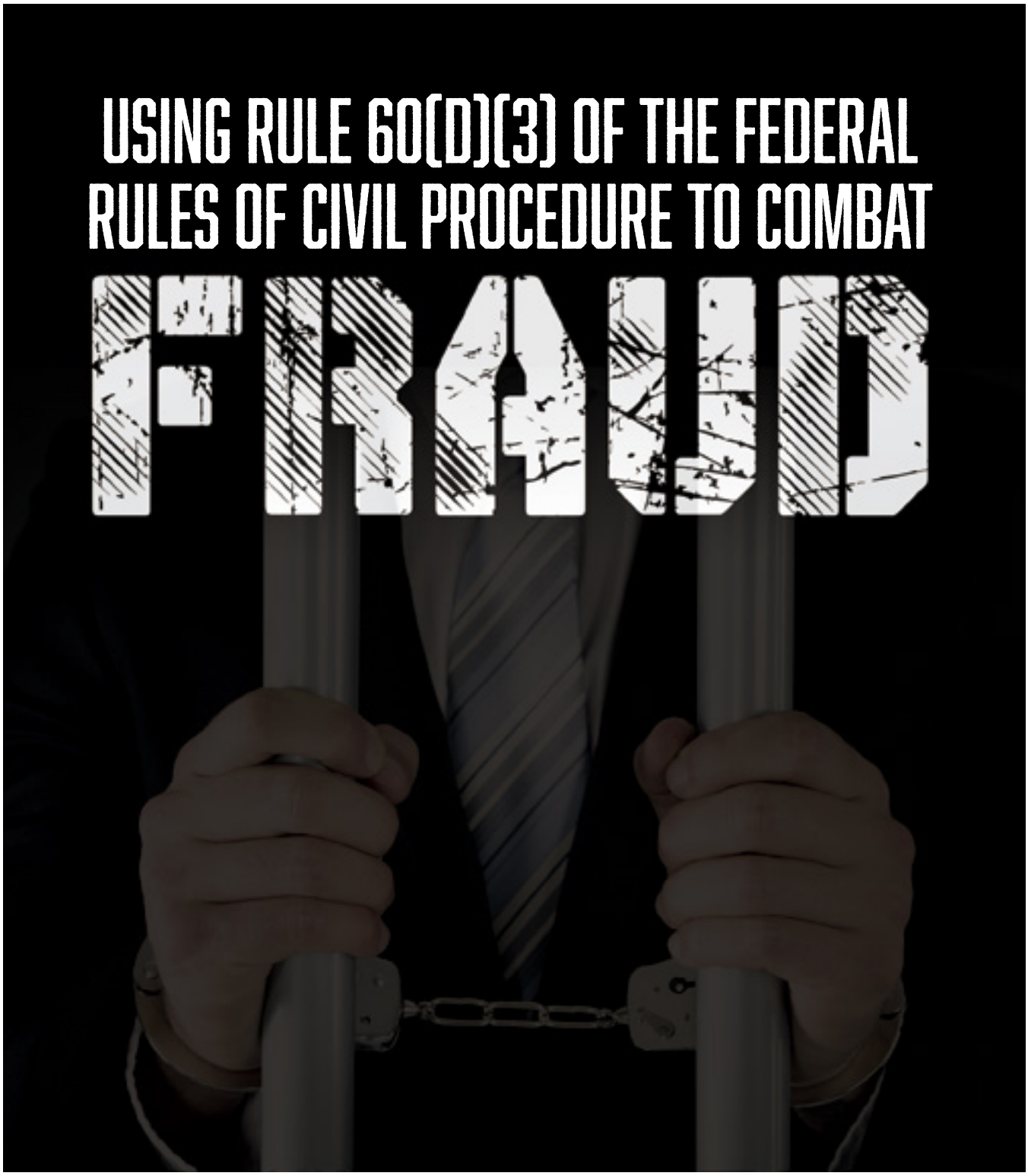

By Daniel A. Lev, Esq., Trustee,
SulmeyerKupetz, Los Angeles, CA

When Howard Ehrenberg was asked to be the trustee in two reopened cases, little did he know that a tool rarely used by trustees - Rule 60(d)(3) of the Federal Rules of Civil Procedure - would be the key to unraveling a twenty-one-year-old fraud.

Following his appointment, Mr. Ehrenberg quickly learned that two brothers (Harry and Theodosios Roussos) engineered a scheme aimed at divesting a former partner of his interests in two valuable apartment buildings located in the beach front

continued on next page

KEY POINTS

Key points when determining if an over-encumbered property should be sold:

1. Confirm the debtor's true intentions
2. Determine if the sale is likely to materially benefit the estate
3. Rule out problematic co-owners of the property
4. Establish a strategy with short sale negotiator

communities of Los Angeles. The brothers created sham entities, filed individual chapter 11 cases, and then sought an order approving sales of the properties to the bogus entities for virtually no consideration. The sale motion was granted pursuant to an order entered on August 5, 1994. As it turns out, the then-presiding court based its decision to approve the motion largely on the brothers' separate declarations stating that (i) the sales were arms-length, third party transactions, (ii) neither Harry nor Theodosios were insiders of, or held interests in, either of the two entities, (iii) prior to the sales, neither Harry nor Theodosios knew the purchasers or their insiders, and (iv) the properties were over-encumbered. After the cases were reopened at the urging of the defrauded partner's widow, Mr. Ehrenberg determined that these statements were knowingly false at the time they were made.

In order to remediate the evident fraud, Mr. Ehrenberg filed adversary proceedings in August 2015 against the brothers, their spouses, and the entities which still held title to the properties twenty-one years later. Among other claims, Mr. Ehrenberg sought to vacate the 1994 sales for fraud on the court pursuant to Rule 60(d)(3), applied to bankruptcy cases by Rule 9024 of the Federal Rules of Bankruptcy Procedure. What followed were a series of motions by the debtors and the entities seeking to thwart the trustee's ability to unwind the 1994 sales and have the adversary proceeding dismissed. While not necessarily disputing the allegations of fraud, the debtors argued that the trustee's claims could only arise under Rule 60(b)(3), with its one-year statute of limitations, not Rule 60(d)(3), which allows a court "to set aside a judgment for fraud on the court" and has no limitations period. *Valerio v. Boise Cascade Corp.*, 80 F.R.D. 626 , 640 n.10 (N.D. Cal. 1978), *aff'd*, 645 F.2d 699 (9th Cir. 1981) ("[t]here is no statute of limitations for fraud on the court. And jurisdiction exists to consider such a claim even if there are no adversary parties then present before the court.")

Rule 60(d)(3) is a codification of the court's "inherent power... to investigate whether a judgment was obtained by fraud." *Universal Oil Products Co. v. Root Ref. Co.*, 328 U.S. 575, 580, 66 S. Ct. 1176, 90 L. Ed. 1447 (1946). As explained by the Ninth Circuit in *United States v. Estate of Stonehill*, 660 F.3d 415, 444-45 (9th Cir. 2011), "[m]ost fraud on the court cases involve a scheme by one party to hide a key fact from the court and the opposing party." Perjury or nondisclosure of evidence may constitute fraud upon the court if "that perjury or nondisclosure was so fundamental that it undermined the workings of the adversary process itself." *Id.* at 445.

"As explained by the Ninth Circuit in *United States v. Estate of Stonehill*, 660 F.3d 415, 444-45 (9th Cir. 2011), "[m]ost fraud on the court cases involve a scheme by one party to hide a key fact from the court and the opposing party." Perjury or non-disclosure of evidence may constitute fraud upon the court if "that perjury or nondisclosure was so fundamental that it undermined the workings of the adversary process itself." *Id.* at 445."

The bankruptcy court found ample reason to deny the motions to dismiss. The court not only found that Mr. Ehrenberg alleged facts sufficient to state claims for fraud on the court under Rule 60(d)(3), but the alleged false declarations made it impossible for the presiding court to "perform in the usual manner its impartial task of adjudging" the sale motion. *Anand v. CITIC Corp. (In re Intermagnetics Am., Inc.)*, 926 F.2d 912 (9th Cir. 1991). The original court's impartial review was fatally compromised by its lack of awareness of a crucial fact - that the purported arms-length sales were, in reality, sales to entities directly controlled by the debtors and their spouses.

Moreover, the bankruptcy court noted that a sale to insiders is fundamentally different from an arms-length sale. In an arms-length transaction, the asset's exposure to the marketplace insures that the price is reasonable whereas insider sales, by their very nature, lack this characteristic. Insiders do not have an incentive to aggressively market the assets to obtain the highest price. Their incentive is just the opposite - the less marketing, and the lower the price, the better. Consequently, although nothing in the Bankruptcy Code prohibits a sale to insiders, insider sales are subject to "heightened scrutiny to the fairness of the value provided by the sale and the good faith of the parties in executing the transaction." *In re Family Christian, LLC*, 533 B.R. 600, 622 (Bankr. W.D. Mich. 2015).

As a result of the brothers' false declarations, the original court could not apply the heightened scrutiny necessary to ensure that the insider sales yielded optimal value for creditors. *See Simantob v. Claims Prosecutor, LLC (In re Lahijani)*, 325 B.R. 282, 288-89 (B.A.P. 9th Cir. 2005) ("The court's obligation in § 363(b) sales is to assure that optimal value is realized by the estate under the circumstances.") By preventing the court from applying the correct legal standard, the debtors' "perjury ... was so fundamental that it undermined the workings of the adversary process itself." *Stonehill*, 660 F.3d at 445.

About the Author

Daniel A. Lev is a member of SulmeyerKupetz, A Professional Corporation. Mr. Lev specializes in business reorganization, restructuring, and other insolvency matters and represented Howard M. Ehrenberg in his capacity as chapter 7 trustee in the Roussos brothers' cases. He can be reached at dlev@sulmeyerlaw.com; 213-617-5231. Howard M. Ehrenberg is the managing partner of SulmeyerKupetz, A Professional Corporation, and has been a member of the panel of trustees in the Central District of California since 1995.

In allowing the adversary case to proceed, the court noted similarities between the Roussos brothers' conduct and another case -- *Levander v. Prober (In re Levander)*, 180 F.3d 1114 (9th Cir. 1999) -- where Rule 60(d)(3) was applied where the debtors' perjury was part of a scheme to "hide a key fact from the court and the opposing party." *Stonehill*, 660 F.3d at 445. In *Levander*, the key hidden fact was that a corporation had transferred its assets to a related partnership that neither the court nor the parties knew existed. *Levander*, 180 F.3d at 1120. As a result of the perjured statement that the assets had not been transferred, the *Levander* court imposed attorney's fees upon the wrong party. The perjury was serious enough to constitute fraud upon the court because it was impossible for the court or parties to be aware of the deception.

The false statements presented by the Roussos brothers' fraud were at least as material as those in *Levander*. Similar to *Levander*, the presiding court did not know, and could not have known, that the sham entities purportedly purchasing the properties at arms-length were, in fact, secretly controlled by the debtors. As a result of these hidden facts, the bankruptcy process could not function in its normal fashion as no one knew the true nature of the transactions.

The bankruptcy court's ruling also is noteworthy in that it declined to follow the Seventh Circuit's decision in *Gekas v. Pipin (In re Met-L-Wood Corp.)*, 861 F.2d 1012 (7th Cir. 1988), where that Circuit Court held that it would be fraud against creditors, but not the trial court, for a debtor's controlling officer "to use his control to walk off with [the debtor's] principal assets for a song, shucking off the unsecured creditors in the process." *Id.*, at 1019. As a rationale for its limited holding, *Gekas* points to the necessity of finality in bankruptcy sales to maximize the sales price. *Id.*, at 1019. The bankruptcy court, however, believed that *Gekas* pays insufficient attention to the decreased sale price that inevitably results when debtors collusively sell assets to entities under their secret control. As highlighted, debtors in such schemes have no incentive to aggressively market the assets so that the estate obtains optimal value. Therefore, immunizing fraudulent and collusive sales from later attack decreases sale prices. And allowing the court to remain infected by such serious fraud undermines the legitimacy of the bankruptcy sales process, further deterring serious bidders.

The bankruptcy court also rejected the argument that it was bound to follow the Ninth Circuit's decision in *Robertson v. Isomedix, Inc. (In re Int'l Nutronics, Inc.)*, as restated in *Stan Lee Media, Inc. v. Conan Sales Co., LLC*. *Robertson v. Isomedix, Inc. (In re Int'l Nutronics, Inc.)*, 3 F.3d 306 (9th Cir. 1993); *Stan Lee Media, Inc. v. Conan Sales Co.*, LLC, 2012 U.S. Dist. LEXIS 191257 (C.D. Cal. Feb. 8, 2012) (unpublished disposition), *aff'd*, 546 Fed. Appx. 725 (9th Cir. 2013). In *Nutronics*, a chapter 7 trustee rejected two competing offers to purchase the debtor's assets. *Nutronics*, 28 F.3d at 967. The trustee then instructed the bidders to submit new bids. Upon learning that they were the only two bidders, the bidders formed a joint venture and submitted a much lower combined bid, which the trustee ultimately accepted. The trustee then sought and obtained approval of the combined bid from the court. In so doing, the trustee expressed no objection to the joint bid. Twenty-two months after obtaining court approval of the sale to the joint venture bidders, the trustee filed an action against the bidders seeking to invalidate the sale. The trustee alleged that the combined bid constituted an unlawful business combination in violation of the Sherman Anti-Trust Act and the sale should be avoided under Section 363(n) of the Bankruptcy Code, which provides that sales may be avoided "if the sale price was controlled by an agreement among potential bidders at such sale."

The Ninth Circuit affirmed the dismissal of the trustee's complaint. *Nutronics*, 28 F.3d at 971. The Court explained that the trustee's claim under Section 363(n) was more appropriately characterized as a motion for relief from a final order under Rule 60(b)(3). *Id.*, at 969. As such, the claim was barred by Rule 60(b)'s one-year statute of limitations. The Ninth Circuit also found that the claims were barred by *res judicata*. *Id.*, at 970. In making this finding, the Court emphasized that the trustee was fully aware of the collusive behavior at the time he sought court approval of the sale order. As the Court explained, "[i]If the joint bid was unduly low because of unlawful collusion, and that fact was known to the trustee at the time, then it should have been brought to the attention of the bankruptcy court." *Id.*, at 970.

The bankruptcy court found that the Roussos brothers' case bore little similarity to *Nutronics*. The trustee's complaint in *Nutronics* did not even assert a claim for fraud on the court under Rule 60(d)(3), which was the centerpiece of Mr. Ehrenberg's efforts to invalidate the 1994 sales. Importantly, the Ninth Circuit based its decision upon Rule 60(b), not Rule 60(d)(3), and upon the fact that the trustee was precluded from asserting the collusion claim as a result of his failure to do so previously. In determining that the trustee's complaint could be characterized only as a motion under Rule 60(b), the Ninth Circuit implicitly concluded that whatever fraud may have occurred was not serious enough to constitute fraud on the court. By rejecting the application of *Nutronics*, the bankruptcy court noted that the fraud alleged by the trustee in *Nutronics* (bid rigging) was far less serious than the fraud alleged by Mr. Ehrenberg (the creation of sham entities and the submission of perjurious declarations). To hold otherwise would eviscerate the bankruptcy court's broad equitable powers to cleanse itself of fraud and would render Rule 60(d) meaningless, at least with respect to bankruptcy sales.

Having survived multiple attempts to strip away various claims, especially the Rule 60(d)(3) claims, the debtors and the sham entities capitulated and entered into a series of court-approved settlements with Mr. Ehrenberg which (i) voided, *ab initio*, the 1994 sales, (ii) cancelled the grant deeds conveying title to the two sham entities, and (iii) confirmed that the buildings were property of the individual estates. A sale of one of the recovered buildings ensued, and creditors left holding the bag in 1994 will now receive significant distributions due to the extraordinary power of Rule 60(d)(3).

Conclusion

A guiding principle in bankruptcy is that what is done, is done. What the saga of the Roussos brothers shows, however, is that a court is never precluded from protecting itself from fraud. This tool can be very powerful if a trustee is presented with a case where a party obtained relief by defrauding the court. 🏛

CONFESSIONS OF A FOREIGN ASSET BOUNTY HUNTER

By John A. Palumbo, Principal, Bankruptcy Asset Management, Jacksonville, FL

KEY POINTS

Items to Consider in Administering a Foreign Real Estate Asset:

1. Unlicensed Agents
2. Language Barriers
3. Currency Exchanges
4. Procedures–Notaries vs. Notaires
5. Ethics
6. Expedited Services
7. Need for All-Cash Buyers

"In most foreign asset cases that I have been involved, the discovery of the asset's existence was the result of a tooth pulling exercise performed by the trustee. Through conversations with debtors, I have come to realize that the reason they have reluctantly disclosed the foreign asset was because they do not feel as though properties they own abroad should be included in a bankruptcy in the United States."

This article is based on a lecture I gave at a recent NABT general session. In the writing of this article, I am taking into account the positive and negative comments received after the lecture in order to give you the full perspective and better insight into tracking, finding, and liquidating foreign assets, namely real estate.

As a trustee, you are charged with administering bankruptcy cases and making meaningful distributions to the creditors. The majority of cases are fairly routine. A piece of real estate located within 50 miles of your office is usually a standard asset to administer, just like a Rolex watch or an RV.

What I have discovered, after nearly thirty years spent navigating the world of bankruptcy, is that foreign assets present a unique challenge for the trustee. In my conversations with trustees, they often say that they had assets in a foreign country that they were unable to do anything with and were ultimately left to abandon the estate's interest.

I want to share with you some interesting discoveries I have experienced when dealing with assets outside of the United States.

DISCOVERY

In most foreign asset cases that I have been involved, the discovery of the asset's existence was the result of a tooth pulling exercise performed by the trustee. Through conversations with debtors, I have come to realize that the reason they have reluctantly disclosed the foreign asset was because they do not feel as though properties they own abroad should be included in a bankruptcy in the United States. We all know this is not true, but that still does not remove the fact that, overwhelmingly, this is the debtor's mindset. Discovery is the first hurdle that needs to be overcome.

LOCATION

Here's another universal experience: very rarely has a debtor disclosed the exact location of the subject property. Understanding the formatting of overseas addresses is one thing, verifying an incomplete or incorrect address is another. This is another reason the trustees end up abandoning – they simply can't make sense of the asset or how to find it.

LIQUIDATION

While it may seem relatively simple to contact a real estate agent in a foreign country and ask them to give you an opinion of price, it's not usually as easy as it sounds. The first of many issues is the language barrier. However, once a connection has been made with someone who speaks English and has access to the information needed, you're well on your way.

The issue, then, is real estate agents in many other countries are not required to hold any form of license. In the United States, Real Estate Commissions in almost every state help to standardize and regulate the sale of property, as well as protect both the buyer and seller. This just doesn't exist in many foreign countries.

The biggest caveat: net listings. These have been outlawed in the United States, but in foreign countries, net listings allow the broker to give a price of what it would take to sell the property and, once you agree, they can move forward and sell it for any price they choose, as long as they net you the agreed price. This is a common practice in many countries around the globe.

If you have been fortunate enough to find a competent English-speaking real estate professional, your next steps will include the following:

1. Determine whether there is equity in the property.

2. Verify that there is a viable market in which the property can be sold; and

3. Make the determination that the net equity will be worth the time, trouble, and expenses to the estate at the end of the day.

As you can imagine, it will be far costlier to administer this asset in a foreign country than it would be in the United States.

continued on next page

About the Author

John A. Palumbo is the principal of Bankruptcy Asset Management, based in Jacksonville, Florida, as well as one of the nation's leading authorities on the evaluation and liquidation of unusual assets in bankruptcy. His ability to recover and monetize assets (oftentimes deemed unworthy) has helped trustees achieve the maximum value for countless asset cases. He is a member of the National Association of Bankruptcy Trustees and is invited regularly to their Spring Seminars and Annual Conventions as an expert speaker. Currently serving attorneys, CPAs, and bank trust officers nationwide, John consults, advises, and serves as principal in matters of bankruptcy, probate, and trust estates with banks, and has assisted in liquidating assets in foreign countries such as Greece, Jamaica, Morocco, Italy, Guam, and Mexico, just to name a few.

That, coupled with the currency and applicable exchange rate, become fundamental considerations.

PROCEDURE

Perhaps the biggest challenge presented to the trustee comes after buyer and seller have agreed on a price. The process by which paperwork is legalized is different in every country, and it's common that U.S. bankruptcy documents and final orders will have to be completely redone in order to be legalized according to the law where the property is located. A notarized document may also require an Apostille.

> "An Apostille is a certificate issued by a designated authority in a country where The Hague Convention Abolishing the Requirement for Legalization of Foreign Public Documents, Apostille Convention, is in force. See a model Apostille. Apostilles authenticate the seals and signatures of officials on public documents such as birth certificates, notarials, court orders, or any other document issued by a public authority, so that they can be recognized in foreign countries that are parties to the Convention."
>
> – U.S. Department of State
>
> *Source:* https://travel.state.gov/content/travel/en/legal/travel-legal-considerations/internl-judicial-asst/authentications-and-apostilles/Notarial-and-Authentication-Apostille.html

This process can take months. I've personally been involved with cases where it took years. This is a daunting undertaking for any trustee.

DEBTOR RELATIONS

Each country offers its own unique challenges for closing a transaction through the bankruptcy court. Depending on your buyer and your relationship with the debtor, it can be easier to allow the debtor to assist in the closing of the transaction in a foreign country, rather than going through the complete procedures of the court. Not only will this simplify the process, it prevents it from becoming overly complicated and costly to the estate. Keep in mind that the objective here is to maximize the monetary recovery to the estate. In suggesting this, I fully understand that the debtor may not be willing to cooperate or assist in closing the property transaction. However, I have seen cases where it did work, and I would always advise employing this strategy whenever possible.

Another strategy that can be used to help maximize efficiencies in closing a property transaction in a foreign country is the simple execution of a proxy and/or power of attorney by the debtor. This would allow someone else to go into the foreign country and act on the debtor's behalf in order to close the transaction, rather than completing administration through the bankruptcy court.

These tips alone are worth the price of reading this article, should you end up with assets in another country.

EXPEDITED SERVICES

Major slowdowns are to be expected in closing a foreign real estate transaction between the buyer and seller. It is a complex process and can take a tremendous amount of time. And while nobody will like to read what I'm about to say, it needs to be said because the fact of the matter is that it is a reality in many countries around the world except the United States. Because of the complexity of the paperwork involved and lack of experience by the sellers and buyers, many months can go by without closing, leaving you in a position where you may have to pay for what I will refer to as expedited services. No one wants to use the word "bribes" because they are neither legal nor ethical. But you may find yourself needing to pay for some expedited services to get the transaction completed. These fees, by the way, are considered an ethical and normal part of the process in many other countries. You will simply have to be the judge of when and if you are willing to incur these kinds of expenses.

"Each country offers its own unique challenges for closing a transaction through the bankruptcy court. Depending on your buyer and your relationship with the debtor, it can be easier to allow the debtor to assist in the closing of the transaction in a foreign country, rather than going through the complete procedures of the court. Not only will this simplify the process, it prevents it from becoming overly complicated and costly to the estate. Keep in mind that the objective here is to maximize the monetary recovery to the estate."

CASH BUYERS

Another fact in dealing with foreign real estate transactions is that, more than likely, you are going to be dealing with all-cash buyers. Getting bank financing in foreign countries for these types of transactions is nothing like getting bank financing in the U.S.

If you've read this far, you're either thinking of the foreign asset cases you've handled in the past, or the ones you'll likely encounter in the near future. The United States has become more of a melting pot than ever before in history, and more and more trustees will see cases in which foreign assets will appear. Remember, it's not just limited to foreigners coming to the United States leaving assets or inheritances behind. More and more today, there are U.S. residents who own property abroad such as second and third homes, future retirement homes, or investment properties.

I know this simply scratches the surface of questions that can arise in recovery of foreign assets, including fractional interests, remainder interests, and inheritances, but hopefully you will have a better understanding of the process by which you can obtain sizeable monetary gains for the estate. While foreign assets do require far more patience and due diligence, they have great potential to deliver huge gains for the estate. If you have a more specific question regarding the nuances of recovering foreign assets, you're welcome to drop me a note at *palumboj@aol.com*.

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NABT THANKS YOU FOR YOUR SUPPORT

The Kind Worth Liquidating:
Identifying & Liquidating Viable Over-Encumbered Real Property Assets

By Richard M. Dauval, Esq., LeavenLaw, St. Petersburg, FL

KEY POINTS

Key points when determining if an over-encumbered property should be sold:

1. Confirm the debtor's true intentions
2. Determine if the sale is likely to materially benefit the estate
3. Rule out problematic co-owners of the property
4. Establish a strategy with short sale negotiator

It's been ten years since the burst of the real estate bubble in this country, and chapter 7 trustees are still finding themselves appointed to estates containing surrendered, non-exempt homes. These homes typically do not have any equity for the trustee to liquidate, but this doesn't mean the property is of no value to the estate. The trustee can still sell the property, negotiate advantageous lien release prices, and a §506(c) surcharge (or "carve out") for the benefit of the unsecured creditors of the estate. Unless the lienholders on the property are accessible enough for the trustee to truly collaborate with on a future sale, the trustee is going to have to market and get the property under contract for sale before initiating the short sale/carve out negotiation with the lienholders. This may seem like a long shot, but these days the mortgage servicers and other lienholders are almost always willing to consider a short sale offer and most have systems and processes for analyzing these offers. I don't recommend the trustee manage the short sale negotiation themselves. The process is very time consuming and there are real estate professionals who are willing to manage the short sale negotiation process without additional costs to the estate. I strongly recommend that you enlist such a professional when pursuing a short sale. The aim of this article is to discuss the practical side of trustee short sales and how to avoid and overcome common problems inherent to the practice.

It is important to start by noting that chapter 7 trustees liquidating over-encumbered assets for the benefit of unsecured creditors is a controversial practice that some would say is tantamount to profiteering and mischief by the trustee. Whereas others would say the sale of over-encumbered assets is exactly how a chapter 7 trustee should exercise his or her fiduciary duty to the unsecured creditors and utilize their unique position to assist in liquidating collateral for the secured creditors. Late last year, a Tenth Circuit Bankruptcy Appellate Panel in *Jubber, et. al v. Bird*, 577 B.R. 365 (10th Cir. 2017), took on the issue of whether a chapter 7 trustee's sale of over-encumbered homestead properties was appropriate given the circumstances of that case. The court viewed the issue through the lens of the trustee's fee applications, and ultimately sided with the bankruptcy court's decision to deny the applications, finding that the fees and costs sought were for services that weren't likely to benefit the estate or necessary for the administration of the case.

To be fair, neither the bankruptcy court nor the B.A.P. in *Jubber* were tasked with determining the general appropriateness of short sales for the benefit of the unsecured creditors of the estate. *Jubber* was a very fact specific case. Ultimately it was upon those specific facts, and not the applicable statutes, that the courts denied the trustee's fee applications. In fact, when the courts did discuss the general concept of trustee short sales, both acknowledged that there are appropriate circumstances where such sales would have a meaningful benefit to the estate. I encourage all trustees who are considering selling over-encumbered property to start by familiarizing themselves with the *Jubber* opinion and facts. The case is a good summary of the equitable concerns associated with the practice.

Selling real property, even in an up market, is a laborious process, and the last thing you want is to embark on such a challenge only to find out later that your Herculean effort is going to result in a Greek tragedy. So as a trustee looking to liquidate a home for the benefit of the estate, the first analysis that must be done is verifying the intent of the debtor. Many debtors and their counsel don't realize a home without equity is at risk of being liquidated by a chapter 7 trustee, and they may fail to claim it as exempt or make an error in their chapter choice. The §341 meeting of creditors is great opportunity to confirm the debtor's intentions with regard to the home, as well as the general condition of the home, the color of the pool, the number of raccoons living in the garage, and how crazy the neighbors are–all relevant questions.

Next is the value of the home. In the end, you or your agent will be attempting to negotiate a §506(c) carve out that will net a meaningful distribution to the unsecured creditors of the estate, and that carve out needs to come from somewhere. This is not a traditional measure of equity in the property, but rather an estimate on a likely gross sale price. The debtor's schedules and online resources should give you an idea of what kind of value range the property is in, but by no means are they definitive for this analysis. To truly get a sense of value in the property the trustee should consult a local listing agent to confirm the condition and value of the home. Physical inspection of the home is a must, not only to confirm condition but to also confirm vacancy. (My CPA friends would remind me at this point to verify the estate's tax consequences for selling the home for its estimated value–significant gains are possible!)

Upon finding that there's enough value to the home to generate an appropriate carve out for the case, do a basic analysis of the ownership interests of the property. Many of the properties surrendered in bankruptcy were once the subject of a divorce and could still be owned in conjunction with an estranged or ex-spouse. Ex-spouses on title can be problematic given the level of cooperation that may be required of them (to be read as: *any* cooperation). Typically, the ex-spouse has some lingering liability for the liens on the surrendered home and being able to negotiate away their personal liability (which is a common accommodation) will incentivize them enough to sign and notarize

continued on next page

About the Author

Richard M. Dauval, Esq. is board certified in consumer bankruptcy law by the American Board of Certification. He obtained an LL.M. in Taxation from University of Florida Levin College of Law and is a partner with the LeavenLaw law firm in St. Petersburg, Florida. Richard has represented bankruptcy debtors and chapter 7 trustees since 2003 and has served as a chapter 7 trustee in the Middle District of Florida since 2011.

a few documents. Without the cooperation of co-owners, the trustee has to file an adversary proceeding and seek relief under §363(h) to try and get a home sold free of all interests. While surely possible, the legal costs associated with a §363(h) action would likely frustrate the economics of the sale and are not recoverable under the reasoning of *Jubber*.

The last common issue worth discussing about trustee short sales is when a junior lienholder refuses to cooperate or expressly objects to the sale. Here's a typical fact pattern: nonexempt home surrendered by the debtor has a value of $750,000. The home is encumbered by a first mortgage in favor of Big Bank, with a balance owed of $600,000; a second mortgage in favor of Little Bank, with a balance owed of $400,000; and a judgment lien in favor of Credit Bank with a balance owed of $100,000. In this scenario, if the home were proposed to be sold for $750,000, and the lienholders were to be paid according to their order of priority, the first mortgage to Big Bank would be paid in full, the second mortgage would only receive $150,000 on the total $400,000 that is owed, and the judgment lienholder would receive nothing. In proposing such a sale, the trustee is likely to gain the consent of the Big Bank first lienholder, however Little Bank isn't likely to consent to the sale given that they're only receiving partial payment on their loan. Judgment lienholder Credit Bank also would likely withhold consent to the proposed sale given that they would stand to receive nothing.

When faced with the objection or withheld consent from a junior lienholder, the trustee is not wholly without remedy. Pursuant to §363(b)(1) of the Bankruptcy Code, a trustee, after notice and hearing, may use, sell or lease property of the estate other than in the ordinary course of business. Additionally, pursuant to §363(f) of the Bankruptcy Code, the trustee may sell property free and clear of any interest in such property of an entity other than the estate if (1) permitted under applicable non-bankruptcy law, (2) the party asserting such interest consents, (3) the interest is a lien and the purchase price of the property is greater than the aggregate amount of all liens on the property, (4) the interest is subject of a bona fide dispute, or (5) the party asserting the interest could be compelled, in a legal or equitable proceeding, to accept a money satisfaction for such interest. Section 363(f) of the Bankruptcy Code is stated in the disjunctive. Thus, it is only necessary for the trustee to satisfy one of the five conditions of §363(f).

Under the circumstances above, Little Bank's and Credit Bank's lack of consent could be overcome if the sale terms proposed would nonetheless satisfy §363(f)(5). With the consent of the first mortgagee Big Bank the sale of the property free and clear of liens could occur pursuant to §363(f)(5), so long as the trustee could establish that Little Bank and Credit Bank could be compelled to take a money judgment for its interest in the property under applicable law. Here in Florida, junior lienholders can be compelled to accept a money judgment and have their liens extinguished under our state's foreclosure and enforcement statutes (*see* Fla. Stat. Ann. §§673, 702), and therefore should also expect similar treatment under a sale authorized under §363(f)(5).

Section 363(f)(5) provides that so long as the junior lienholder could hypothetically be compelled to accept a payment of less than the full amount of the security interest, the court could approve such a sale. *See In re: Levitt & Sons, LLC*, 384 B.R. 630, 648 (Bankr. S.D. Fla. 2008). "Furthermore, if the legal or equitable proceeding contemplated by §363(f)(5) would result in a junior lienholder receiving nothing, then a §363(f)(5) sale that pays them nothing … appear[s] to be permissible." *See Scherer v. Federal National Mortgage Association* (*In re: Terrace Chalet Apartments, Ltd.*), 159 B.R. 821, 829 (Bankr. N.D. Ill 1993). *See also In re: Gulf States Steel*, 285 B.R. 497, 508 (Bankr. N.D. Ala. 2002) (*noting* that "§363(f)(5) permits a sale free and clear of [of liens] if the trustee can demonstrate the existence of another legal mechanism by which a lien could be extinguished without full satisfaction of the secured debt.")

As you can see, there are many practical reasons why a chapter 7 trustee should be wary of attempting to complete a short sale of encumbered property, but when done correctly and negotiated properly, the endeavor can yield a fantastic result for the creditors of the estate and the trustee. As mentioned earlier, one way to make the process significantly easier is to bring in a third party to manage the negotiated short sale with a surcharge or carve out to the estate. Typically, these professionals will agree to be paid a portion of the commission that would otherwise go to a real estate agent employed by the estate and, therefore, end up being a net-neutral cost to the estate. As when hiring any professional, it is important to consider the person's or firm's experience in negotiating such deals. This industry hasn't been around too long, so it may be challenging to find someone with a great deal of direct experience, but some experience is a must. (Certainly some consideration should be given to those firms that sponsor the NABT and its efforts) When interviewing a short sale negotiator it is important to ask about their proposed negotiation strategy. There are various ways to negotiating a short sale with a carve out and some are more effective than others depending on the property to be sold. In some cases, the negotiator has a direct line to the decision makers at the mortgage servicers, and they rely on these relationships to get the deals considered and approved. Having a direct line to a decision maker surely has its advantages, but as discussed below, there can be downsides to having a short sale proposal evaluated at the highest levels.

Some negotiators use the respective mortgage servicer's short sale application system that's available to the public. While this may not sound like a strategy that would be as effective as a direct line to a decision maker, in my experience it can be an effective strategy and can at times yield larger than average carve outs. When applying for the short sale, the negotiators will usually characterize the carve out as a closing cost to be paid by the would-be buyer (much like a home warranty policy or some other additional cost to the buyer). This strategy can have the effect of cloaking the carve out from the mortgage servicer since mortgage servicers typically ignore such closing costs when deciding to approve a short sale. This can be an effective way to obtain a large carve out from a mortgage servicer that typically would not allow for such an accommodation. In the end, no two short sales are the same and an experienced short sale negotiator should be able to tailor a short sale negotiation strategy based on the value of the home and the specific mortgage servicer or servicers associated with the property.

UPDATED

Policy for Approving the Filing of Amicus Briefs by NABT

Requests for an Amicus Brief

A request for an amicus brief should be made to the chair of the amicus committee, who will then circulate the request to all members of the committee. A request will not be considered unless it contains the following information:

1. The style of the case, and the state, district, and circuit involved.
2. The name of the trustee involved.
3. A brief description of the underlying facts of the case.
4. The legal issue to be briefed by NABT.
5. The national significance of this issue to all trustees.
6. The name and address of the person who will be preparing the brief, if an author has been identified.
7. The nature and amount of any fees or expenses to be paid to the author, if any, and the proposed source of those funds. (An author is expected to provide services on a pro bono basis. NABT will reimburse authors for reasonable and necessary expenses, including the printing, filing, and service of briefs and related pleadings.)
8. The timetable for the filing of briefs.

Consideration by the Committee

The amicus committee shall consider all proper requests as soon as practicable. The committee will make one of three decisions:

1. Approve the request, by consensus.
2. Deny the request, by consensus.
3. Refer the matter to the executive board or full board for its consideration and comment, after which the request shall be returned to the amicus committee for its final approval or denial by consensus.

Factors to be Considered by the Committee

In its consideration of each request, the amicus committee shall consider, among all relevant factors, including (but not limited to) the following:

1. Whether the requesting party is a member in good standing with NABT.
2. Whether the issue involved is legal, or whether it is fact-sensitive.
3. Whether the pleadings are "clean" and whether there are any procedural impediments to a determination of the legal issue.
4. Whether the legal issue is of national significance to all trustees.
5. Whether the decision will hinge on state law, or other matters which may only be relevant to trustees in certain districts.
6. Whether the fees and costs being requested, if any, are appropriate.

THE RESULTS ARE IN!

Congratulations to the Reelected Candidates to the 2018/2019 Board or Directors

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(Incumbent)
Furr & Cohen, PA

H. Jason Gold
(Incumbent)
Nelson Mullins

Jason Pettie
(Incumbent)
Jason L. Pettie, PC

N. Neville Reid
(Incumbent)
Fox Swibel

Welcome NABT *Ambassadors!*

NABT WELCOMES ITS TEAM OF AMBASSADORS!

The following people have volunteered to be Ambassadors for the NABT. Please contact any member of the team if you have questions or suggestions for NABT, if you need referrals in your practice, or if you would just like to chat with a seasoned professional. Thank you from all of us at NABT for your dedication and support!!

ARIZONA: David Birdsell
dab@azbktrustee.com

ARIZONA: Trudy Nowak
tnowak@bklaws.com

CALIFORNIA: Marchand Boyd
marchand.boyd@eastwestbank.com

CALIFORNIA: Howard Ehrenberg
hehrenberg@sulmeyerlaw.com

CALIFORNIA: Leslie Gladstone
leslieg@flgsd.com

CALIFORNIA: Mohammed Poonja
mp@poonja.us

CALIFORNIA: Ryan Stern
ryan.stern@eastwestbank.com

CALIFORNIA: Melinda Teterme
linda.teter@bmsadvantage.com

COLORADO: Robertson Cohen
trusteecohen@cohenlawyers.com

CONNECTICUT: Ron Chorches
cho690@aol.com

CONNECTICUT: Barbara Katz
barbarakatz@snet.net

DELAWARE: Jeff Burtch
jburtch@burtchtrustee.com

FLORIDA: Marc Barmat
mbarmat@furrcohen.com

FLORIDA: Robert Furr
rfurr@furrcohen.com

GEORGIA: Alicia Den Beste
alicia@oakpointpartners.com

GEORGIA: Neil Gordon
neil.gordon@agg.com

GEORGIA: Tamara Ogier
tmo@orratl.com

GEORGIA: Jason Pettie
jasonpettie@gmail.com

HAWAII: Dane Field
dfield@hawaii.rr.com

ILLINOIS: Ron Peterson
RPeterson@Jenner.Com

ILLINOIS: Neville Reid
nreid@foxswibel.com

INDIANA: Roberta Kickbush
roberta@ladfislaw.com

KANSAS: Darcy Williamson
darcy@williamson-law.net

KENTUCKY: Mark Little
trustee@littlelawky.com

LOUISIANA: Sara DeJarnette
sdejarnette@internationalsureties.com

LOUISIANA: Dwayne Murray
dmm@murraylaw.net

MAINE: Nate Hull
nhull@verrilldana.com

MARYLAND: Cheryl Rose
croseesq@aol.com

MASSACHUSSETTS: Joe Baldiga
jbaldiga@mirickoconnell.com

MICHIGAN: Gene Kohut
gkohut@conwaymackenzie.com

MISSOURI: Jill Bauer
Jbauer@epiqsystems.com

MISSOURI: Jill Olsen
trustee@olsenlawkc.com

NEVADA: Brian Shapiro
brian@trusteeshapiro.com

NEW JERSEY: John Hargrave
jhargrave@hargravelaw.com

NEW JERSEY: Steve Kartzman
skartzman@msklaw.net

NEW YORK: Jay Winston
jwinston@winstonandwinston.com

NORTH CAROLINA: James Lanik
jlanik@rhrlaw.com

NORTH DAKOTA: Kip Kaler
kip@kaler-doeling.com

PENNSYLVANIA: Corey Happel
corey.happel@bms7.com

PENNSYLVANIA: Gary Seitz
gseitz@gsbblaw.com

PUERTO RICO: Wigberto Lugo-Mender
wigberto@lugomender.com

SOUTH DAKOTA: Forrest Allred
fallred@qwestoffice.net

TENNESSEE: Lori Grahl
lori@rhwlawoffice.com

TENNESSEE: Bob Waldschmidt
rhw@rhwlawoffice.com

TEXAS: Kristi Singal
ksingal@trustesolutions.com

TEXAS: Linda Tow
ltow@rtowtrustee.com

TEXAS: Julie Warren
jwarren@rtowtrustee.com

UTAH: Duane Gillman
dgillman@djplaw.com

UTAH: Elizabeth Loveridge
eloveridge@wklawpc.com

VERMONT: Ray Obuchowski
ray@oeblaw.com

WASHINGTON: Russ Garrett
russ.garrett@jordanramis.com

WASHINGTON: Jason Gold
jason.gold@nelsonmullins.com

WISCONSIN: Brenda Zeddun
brenda.zeddun@chooselawadvisors.com

Restyling the Bankruptcy Rules

At its fall 2017 meeting, the Advisory Committee established a Restyling Subcommittee to consider restyling the Federal Rules of Bankruptcy Procedure. If undertaken, the project would be similar to the restyling projects that produced comprehensive amendments to the Federal Rules of Appellate Procedure in 1998, the Federal Rules of Criminal Procedure in 2002, the Federal Rules of Civil Procedure in 2005 and the Federal Rules of Evidence in 2011.

At the Advisory Committee's April 3, 2018 meeting, the Restyling Subcommittee recommended soliciting input from the bankruptcy community on the threshold issue of whether to move forward with restyling. To obtain appropriate feedback, the subcommittee has worked with the Standing Rules Committee's style consultants to develop a side-by-side comparison showing how restyling might affect an example rule. The Advisory Committee approved the subcommittee's plan to work with the Federal Judicial Center over the summer to solicit feedback from bankruptcy judges and clerks, as well as outside bankruptcy groups on whether the restyling project should move forward. The Advisory Committee will consider the results of that feedback at its fall 2018 meeting, and will then determine whether to begin drafting restyled rules for public comment in August 2019, or at a later date.

Help Us Celebrate the Important Moments!

So many significant events happen among the talented, driven community that this magazine serves. Use the *American Bankruptcy Trustee Journal's People* column to tell your colleagues about those events in your personal and professional life!

Email your written contributions as soon as possible (along with a color headshot or photo of an event) to NABT Executive Director **Jennifer Brinkley, (jbrinkley@nabt.com)** for publication in the next issue, so your colleagues can share those events with you and your organization...

...and thanks!

RECENT CASE SUMMARIES

Neil Gordon and Ron Peterson

The following cases have been selected from bankruptcy decisions that have been reported or decided within the last year, because of their relevance to chapter 7 trustees and their chapter 7 practices.

§§101(31); 1129(a)(10)

Supreme court affirms "clear error" standard of review on appeal for determination of insider

U.S. Bank National Association v. Village at Lakeridge, LLC, 138 S.Ct. 960 (2018)

Lakeridge was a corporate entity with a single owner, MBP Equity Partners. Lakeridge filed its chapter 11 petition with two substantial debts, over $10 million owed to U.S. Bank and $2.76 million owed to MBP. The reorganization plan submitted by Lakeridge proposed to impair the interests of both of these creditors. The bank refused the offer thus blocking the option for a consensual plan. Lakeridge then turned to the "cram-down" plan option for imposing a plan impairing the interests of a non-consenting class of creditors, but an "insider" would not count for that purpose. Here, MBP was an insider of Lakeridge and could not provide the necessary impaired class, so it sought to transfer its claim to a non- insider who could agree to the "cram-down" plan. An MBP board member, Kathleen Bartlett, was also a Lakeridge officer. She offered the claim to Robert Rabkin, a retired surgeon, for $5,000. The Bank objected on the basis that Rabkin was a non-statutory insider because he had a "romantic" relationship with Bartlett and the purchase was not an arm's length transaction. The bankruptcy court rejected that argument and confirmed the plan. The 9th Circuit affirmed applying a clear-error standard. The Supreme Court granted cert. to decide the proper standard of review and affirmed unanimously. It was noted that the question of non-statutory insider status was a mixed question of law and fact. Given all the basic facts found, the question was whether Rabkin's purchase of the MBP claim was at arm's length as if they were strangers to each other. Because the question was so factual, the Supreme Court agreed that it primarily belonged at the bankruptcy court level for determination because it had presided over the presentation of evidence, heard all of the witnesses, and had the closest and deepest understanding of the record.

However, in two concurring opinions joined in by four of the justices, it was made clear that the court was not necessarily agreeing that the correct standard for non-statutory insider qualification was applied. Justice Kennedy in his concurring opinion stated: "The Court's holding should not be read as indicating that the non-statutory insider test as formulated by the Court of Appeals is the correct standard to use in determining insider status. Today's opinion for the Court properly limits its decision to the question whether the Court of Appeals applied the correct standard of review, and its opinion should not be read as indicating that a transaction is arm's length if the transaction was negotiated simply with a close friend, without broader solicitation of other buyers." Justice Sotomayor, authored a separate concurring opinion joined in by three other justices to point out that they were concerned that the underlying test that was applied was not correct. This opinion notes that the Supreme Court had expressly declined to grant certiorari on the question of what the appropriate test was. The concurring justices were concerned that a romantic partner of an insider, even one who in all or most respects acted like a spouse, could be held not to be a non-statutory insider. Here, Bartlett approached only Rabkin with the offer to sell. "In a strict comparative analysis, Rabkin's interactions with Bartlett and MBP suggests that he may have been acting comparable to an enumerated insider, for example, like a relative of an officer of an insider." Her concurring opinion concluded: "In the event that the appropriate test for determining non-statutory insider status is different from the one that the Ninth Circuit applied, and involves a different balance of legal and factual work than the Court addresses here, it is possible I would view the applicable standard of review differently. Because I do not read the Court's opinion as foreclosing that result, I join it in full."

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About the Authors

Neil C. Gordon is a partner in the Atlanta law firm of Arnall Golden Gregory LLP. Mr. Gordon represents trustees and receivers throughout the country, including in Delaware litigation that recently settled for approximately $40 million. Mr. Gordon chaired the Bankruptcy Law Section of the Atlanta Bar Association from 1992 to 1993, and has been a panel trustee since 1994, and also serves as a SEC Receiver. Mr. Gordon was first elected to the Board of the National Association of Bankruptcy Trustees in 2000. He has held every office including President (2011-2012) and for eight years chaired its Amicus Committee. He served for three years ending in April 2015 as the Co-Chair of the ABI's Legislation Committee. He is a Lifetime Member of the ABI and the NABT President's Circle, a Master of the Bench in the Georgia Bankruptcy American Inns of Court, and a Fellow of the American College of Bankruptcy.

Ronald R. Peterson concentrates his practice in the areas of commercial, insolvency and bankruptcy law. He is the President-Elect of the National Association of Bankruptcy Trustees and a fellow of the American College of Bankruptcy. Mr. Peterson has been a member of the panel of Chapter 7 Trustees for the Northern District of Illinois, Eastern Division, since 1987. Mr. Peterson is a member of the American Bankruptcy Institute, Commercial Law League of America and the Business Bankruptcy Committee of the Business Law Section and the Bankruptcy Litigation Committee of the Litigation Section of the American Bar Association. He is a Director of the National Association of Bankruptcy Trustees and is also a member of INSOL (International Association of Restructuring, Insolvency & Bankruptcy Professionals).

Contributing Author – Landon S. Raiford

§546(e)

Supreme Court Narrows and Clarifies Application of Securities Safe Harbor

Merit Management Group, LP v. F.T.I. Consulting, Inc., 138 S.Ct. 883 (2018)

Valley View Downs L.P. and Bedford Downs Management Corp. both wanted to obtain the last harness- racing license available in Pennsylvania in order to open a "racino," a horse-racing facility with slot machines. Pennsylvania State Harness Racing Commission denied both applications, and the state supreme court upheld the rulings but allowed the two companies to reapply for the license. However, the two companies entered into an agreement under which Bedford Downs would withdraw as a competitor for the license, and Valley View would purchase all of Bedford Downs' stock for $55 million after Valley View obtained the license. The acquisition proceeded after Valley View was awarded the license by the Commission. Valley View arranged for the Cayman Islands Branch of Credit Suisse to finance the purchase price. Credit Suisse wired $55 million to Citizens Bank of Pennsylvania which served as the escrow agent. The shareholders of Bedford Downs, including Merit Management Group, LP deposited their stock certificates into the escrow. Valley View received the stock certificates and the bank disbursed to the shareholders of Bedford Downs including Merit which received a total of $16.5 million from the sale. The closing statement reflected Valley View as the buyer and Bedford Downs' shareholders as the sellers. However, the racino never opened because a separate gaming license for the operation of slot machines could not be obtained. Instead, Valley View filed a chapter 11 petition and confirmed a plan. FTI Consulting was appointed as trustee of the litigation trust. It filed suit against Merit seeking to avoid the $16.5 million transfer as constructively fraudulent under §548(a)(1)(B). It alleged that Valley View was insolvent when it purchased the shares and overpaid significantly. The district court accepted the Safe Harbor defense of §546(e) that Merit asserted on the basis that "financial institutions" transferred or received funds in connection with a "settlement payment" or "securities contract." The 7th Circuit Court of appeals reversed, 830 F.3d 690, holding that the Safe Harbor did not protect transfers in which financial institutions served as mere conduits. The Supreme Court affirmed. §546(e) in part states: "Notwithstanding Sections 544, 545, 547, 548(a)(1)(B), and 548(b) of this title, the trustee may not avoid a transfer that is a… settlement payment… made by or to (or for the benefit of) a… financial institution…or that it is a transfer made by or to (or for the benefit of) a… financial institution… in connection with a securities contract… except under Section 548(a)(1)(A)." The Court determined that the focus of the inquiry is on the transfer that the trustee seeks to avoid rather than whether the transfer involved or comprised a settlement payment or securities transaction covered under §546(e). The trustee, FTI plainly sought to avoid the $16.5 million Valley View transfer to Merit and did not seek to avoid the component transactions by which that over-arching transfer was executed. Because neither Valley View nor Merit was a financial institution or other covered entity, the transfer fell outside of the SafeHarbor.

Judicial Estoppel Analysis for Undisclosed PI Claim

Clark v. AII Acquisition, LLC, et al., 886 F.3d 261 (2d Cir. 2018)

In 2010, debtors filed a chapter 13 case and proposed a five-year plan under which their creditors would be paid in full with interest through monthly payroll deductions. The plan was confirmed. Only a few weeks before the 60th and final monthly deduction, the debtor husband was diagnosed with mesothelioma. He decided to sue the corporations believed responsible for exposing him to asbestos. He was unsure of whether his bankruptcy schedules should be updated, so he contacted his bankruptcy counsel and believed that his counsel would do whatever was required. However, counsel never amended the bankruptcy schedules to list the claim. The debtors made their 60th and final payment under the plan, but the case remained formally opened for another year. They received their discharge and the case was closed on August 5, 2016. One week earlier, they filed a personal injury action in New York state court against numerous corporations, including Boeing. Boeing moved to dismiss the PI suit on the grounds of judicial estoppel. The district court granted the motion, characterizing judicial estoppel as a "harsh rule." The 2nd Circuit Court of Appeals vacated the decision and remanded, noting that the nondisclosure had at most a *de minimis* effect on the prior bankruptcy proceeding. The Circuit Court announced that a district court's invocation of judicial estoppel would be reviewed only for abuse of discretion. Turning to the merits of the appeal, the Circuit Court noted that it was evident that the balance of equities were overwhelmingly in favor of the debtors. "And yet the district court found judicial estoppel to be required. What went wrong?" The district court had correctly set forth the two steps for application of judicial estoppel: (a) an inconsistent position in a prior proceeding by the party against whom estoppel was asserted, and (b) that such position was adopted by the first tribunal in some manner. The district court held that the failure to disclose the PI claim or cause of action to the bankruptcy court amounted to an implicit false representation that no such cause of action existed that was adopted by the bankruptcy court through the rendering of a chapter 13 discharge. Thus, the district court held *ipso facto* that the debtors' PI claims were estopped. That was held to be error by the circuit court: "Judicial estoppel is not a mechanical rule." The circuit court held that even where the pre- conditions for judicial estoppel are present, there, nevertheless, must be a balancing of the equities inquiry that begins by asking whether the prior inconsistent position gave the party to be estopped an "unfair advantage" over the parties seeking estoppel. The circuit court concluded that to hold the debtors' claims barred would be to deprive the concept of equity of any meaning." Thus, the ruling of the district court was vacated and the case remanded.

[*Author's comment:* This opinion confirms the trend throughout the country in no longer making mechanical applications of judicial estoppel principals. In September 2017, the 11th circuit retreated from its earlier positions to now apply a totality of the circumstances approach. This trend is expected to continue.]

Rooker-Feldman Doctrine

Third Circuit Refuses to Apply Rooker-Feldman Doctrine to Bar Fraudulent Transfer Suit

Philadelphia Entertainment & Development Partners, LP v. Commonwealth of Pennsylvania, 879 F.3d 492 (3d Cir. 2018)

In *Philadelphia Entertainment & Development Partners, LP. v. Commonwealth of Pennsylvania Department of Revenue*, the Third Circuit considered whether the Rooker-Feldman doctrine (which prohibits appellate review of state court decisions by federal courts other than the U.S. Supreme Court) barred a liquidating trustee from bringing a fraudulent transfer claim that would have required the bankruptcy court to invalidate a state court order approving the revocation of a Pennsylvania gaming license. The trustee argued that sections 544(b) and 548 of the Bankruptcy Code required the state to pay some value when it revoked the license, even though the revocation itself did not constitute an illegal taking. Without addressing the trustee's argument on the merits, the bankruptcy court dismissed the complaint under the Rooker-Feldman doctrine, and the district court affirmed.

On appeal, the Third Circuit applied the following four-factor test set forth in *Great Western Mining & Mineral Co. V. Fox Rothschild LLP, et. al.* to determine whether the Rooker-Feldman doctrine applied:

(1) did the federal plaintiff lose in state court?(2) did the plaintiff complain of injuries caused by the state court judgment?(3) was the state court judgment issued before the federal suit was filed? and(4)did the plaintiff invite the federal court to review and reject the state court judgment? Focusing on the fourth factor, the Court held that the fraudulent transfer complaint did not seek a determination that the state court misapplied law to fact. "Rather, the Bankruptcy Court could have started from the premise that the [state court] reached the correct result under state law. The Court then could have decided whether that revocation, which occurred because of valid state proceedings, could nonetheless be avoided under the Bankruptcy Code." Thus, the Third Circuit overturned the dismissal of the trustee's complaint and remanded for the bankruptcy court to adjudicate the case on the merits.

§707(a)

Fourth Circuit Affirms Denial of Motion to Dismiss Case for Alleged Bad Faith

Janvey v. Romero, 883 F.3d 406 (4th Cir. 2018)

In *Janvey v. Romero*, the Fourth Circuit affirmed the denial of a motion to dismiss a chapter 7 debtor's case for alleged bad faith.The debtor's consulting business performed work for Stanford Financial Group, which carried out a multi-billion dollar ponzi scheme. The debtor stopped doing business with Stanford in 2009, but Stanford's receiver sued the debtor in federal court and ultimately obtained a $1.275 million judgment against the debtor shortly before the debtor's chapter 7 filing in Maryland. The receiver moved to dismiss the debtor's chapter 7 case under 11 U.S.C. § 707(a), arguing that the petition was an abuse of process and filed in bad faith as an attempt to avoid the receiver's judgment. Denying the motion, the bankruptcy court found that, while the judgment was the primary factor for the filing, it was not the only factor. The debtor's wife was severely ill and disability policies were set to be terminated. The debtor did not lead an exorbitant lifestyle. Also, the fact that the majority of the debtor's assets were exempt was not an indication of bad faith. Ultimately, the bankruptcy court granted the debtor's discharge under § 727.

The District Court and Fourth Circuit affirmed the bankruptcy court's decision. In doing so, the Fourth Circuit rejected the receiver's objections that: (i) the debtor filed chapter 7 solely to avoid collection of the judgment;(ii) the debtor's attempts to settle the litigation exemplify bad faith;and(iii) the debtor has significant exempt assets and too much money. In affirming the Bankruptcy Court, the Fourth Circuit noted the Court's good and sound reasons for its ruling that were not an abuse ofdiscretion

§§326 and 330

Fifth Circuit Holds that the Commission Set Forth in §326(a) is not Simply a Maximum but a Presumptively Reasonable Fixed Commission Rate to be Reduced Only in Rare Instances

In re JFK Capital Holdings, L.L.C., 880 F.3d 747 (5th Cir. 2018)

Kelly allegedly operated an 80-plus entity single business enterprise to defraud his investors of millions of dollars. He filed chapter 7 in October 2014. Unlike most of his business entities, JFK Capital Holdings, LLC was solvent and awaiting receipt of an $876,000 settlement check related to a separate bankruptcy proceeding. The law firms that had negotiated this settlement were still waiting to be paid legal fees of $320,000. Seeking to preserve the settlement, the Kelly Trustee attempted to negotiate with the law firms but they eventually filed a state-court lawsuit to secure their claim against the settlement proceeds. In response, in April 2015, the Kelly Trustee filed a chapter 7 petition on behalf of JFK Capital, which stayed the state court litigation. The Kelly Trustee then sought to consolidate the JFK Capital bankruptcy with the Kelly bankruptcy, arguing that they were alter egos. The trustee for JFK opposed consolidation and sought to prioritize the law firm's interest in the settlement proceeds. The Kelly Trustee believed that the JFK Trustee had a fiduciary duty to the Kelly creditors and should not be placing the law firms ahead of them. Both trustees hired lawyers to resolve these issues. Nearly every aspect of the JFK bankruptcy was contested. At one point, the JFK Trustee and his counsel filed interim fee applications. No one objected to the trustee's application for fees of $15,597.74, but there were objections by the Kelly Trustee to the fees of counsel for the JFK Trustee. The bankruptcy court, without explanation, reduced the trustee's fees to $6,491.82 (being a reduction from 7% to 3% of the money distributed).

The JFK Trustee appealed to the district court which vacated and remanded due to the lack of an explanation for the basis for reducing the fees of the JFK Trustee. The District Court outlined its belief that the Bankruptcy Court had broad discretion, and in keeping with two early Texas bankruptcy court opinions, should require detailed analysis and make a determination of reasonableness. The JFK Trustee then appealed to the Fifth Circuit which affirmed the District Court order insofar as to vacate the Bankruptcy Court order but remanded for re-determination of an award consistent with the standards expressed in its opinion, which reflected a different approach to trustee compensation.

The Circuit Court first observed that in enacting BAPCPA, Congress had removed

Chapter 7 trustees from the list of professionals subject to §330(a) factors and introduced a new provision, §330(a)(7), requiring courts to treat the reasonable compensation awarded to trustees as a "commission, based on Section 326." The Court noted that different approaches had evolved for determining the appropriate "commission for Chapter 7 trustees. Under the approach which this court adopted, §326(a) was not simply a maximum fee but also a presumptively reasonable fixed commission rate to be reduced only in rare instances, citing *Mohns, Inc. v. Lanser,* 522 B.R. 594, 601 (E.D.Wis.), *Aff'd Sub Nom, In re Wilson,* 796 F.3d 818 (7th Cir. 2015). Other courts had held that the presumptively reasonable approach was nonetheless subject to adjustment in "extraordinary circumstances." Following this approach are *In re Rowe,* 750 F.3d 392, 397 (4th Cir. 2014) and *In re Salgado-Nava,* 473 B.R. 911, 921 (9th Cir. BAP 2012). Still other courts presume that the percentages are reasonable but perform a more in-depth review of the trustee's services to ensure the presumption is justified. *In re Scoggins,* 517 B.R. 206, 214 (Bankr. E.D.Cal.2014).

The approach adopted and articulated by the District Court had declined to presume §326(a) percentages were reasonable because the "bankruptcy court has discretion to award reasonable compensation *only* for actual and necessary services, and may award an amount less than that requested by the trustee."

The Circuit Court disagreed.

"Today, however, we adopt an interpretation aligned with the first approach that the percentage amounts listed in Section 326 are presumptively reasonable for Chapter 7 trustee awards. In particular, we find the reasoning of the *Mohns* court persuasive in addressing the statutory provisions at issue."

The Fifth Circuit followed *Mohns* and disagreed with the District Court here that bankruptcy courts were required to determine the commission by "grading" the trustee's performance. By Congress directing courts to utilize a commission-based approach as set forth in §330(a)(7), this would be best understood as a directive to simply apply the formula of §326 in every case. In adopting this approach, the Fifth Circuit stated that its interpretation "is guided by the nature of a commission-based award as amended in BAPCPA, contrary to the compensation based award pre-BAPCPA." As noted in *Mohns,* commission percentages 'are usually agreed to at the beginning of an engagement, before the actual amount of time spent on the matter could even be known.' 522 B.R. 602….while compensation denotes a portionality or connection between benefits received and services rendered. The shift to a commission-based approach signals congressional intent to award fees based on percentage. The district court's approach here would essentially apply the same working definition to commission as applied to compensation pre- BAPCPA, giving little practical effect to the amended language. We agree with the court in *Mohns* that '[i]n removing Chapter 7 trustee's from §330(a)(3) and directing courts to treat the trustee's compensation as a commission, Congress made clear that a trustee's compensation should be determined on the basis of a percentage, rather than on a factor-based assessment of the trustee's services[.] 522 B.R. 599. The Court again followed the reasoning in *Mohns* in stating that the trustee received the same level of compensation based on the §326 amount regardless of the time spent on the case and therefore the commission-based nature of the trustee's fee by itself prevented the court from awarding compensation for duplicative and unnecessary services.

The circuit court further addressed an issue arising from the Supreme Court decision of *Baker Botts*

L.L.P. v. Asarco LLC 135 S.Ct. 2158, 2168 (2015). "Indeed, habitual judicial review of the statutory commission for reasonableness would run counter to BAPCPA's statutory scheme in which bankruptcy professionals cannot be compensated for time spent litigating their fees." The Court went on to conclude that the District Court here had not articulated what sort of factors the bankruptcy court should utilize when exercising its "broad discretion". However, any sort of reasonable analysis would have required the court to utilize §330(a) factors which Congress had explicitly rejected for Chapter 7 trustees. The circuit court also found that the District Court's conclusion that §330(a)(7) was not signaling a standard commission rate to be applied in every case, but rather a maximum which the court could not exceed, would have rendered the language in §330(a)(7) superfluous since §330(a)(1) already required awards to be subject to §326. "[s]ection 330(a)(7) therefore treats the commission as a fixed percentage, using Section 326 not only as a maximum but as a baseline presumption for reasonableness in each case." As to the approach that allows for an adjustment in "extraordinary circumstances," the Circuit Court observed that to the extent any such determination of "extraordinary circumstances" utilized the factors articulated in §330(a)(3), such an approach would suffer the same flaws as the District Court's here. "There is little distinction between the departure from a commission-based approach under extraordinary circumstances versus the pre-BAPCPA reasonableness inquiry." The Court went on to conclude that any "reduction or denial of the full commission should be a "rare event." Finally, the Circuit Court explained that the commission-based framework facilitated more efficient Chapter 7 trustee compensation in the courts by "placing the burden on the trustee to avoid wasting resources, as their commission remains the same regardless of potentially duplicative or unnecessary services."

[*Author's comment:* When *Mohns* was decided by the district court in Wisconsin, I commented that it presented the strongest case for trustees receiving the full commission and the most reasonable explanation of the various statutes. That decision had been affirmed by the Seventh Circuit in a rather garbled opinion by Judge Posner, but the Fifth Circuit's adoption of the analysis and conclusion in that case is very clear and should help pave the way to fewer challenges.]

§§522 and 41.001(c) Texas Property Code

Sale Proceeds Not Reinvested Within Six (6) Months Still Exempt under Texas Law

Lowe v. DeBerry, et al. (*In re DeBerry),* 884 F.3d 526 (5th Cir. 2018)

Debtor had fully exempted his home under Texas law. He successfully moved to sell the home seven (7) months later. He did not reinvest the proceeds in another home, instead transferring the money to his wife and criminal defense attorneys. §41.001(c) of the Texas Property Code provides that the proceeds of the sale of

a homestead had to be reinvested in another home within six (6) months after the date of sale. The chapter 7 trustee commenced an AP against the wife and attorneys alleging they were not entitled to the funds. The bankruptcy court granted their motion to dismiss, holding that when a chapter 7 debtor sells his exempted Texas homestead post-petition, the proceeds were likewise exempted. The District Court reversed. The defendants further appealed. The Fifth Circuit reversed the district court, agreeing with the initial holding of the bankruptcy court. During the course of this litigation, the Fifth Circuit decided *Hawk v. Englehart (In re Hawk),* 871 F.3d 287 (5th Cir. 2017), holding that funds withdrawn from an exempted retirement account post-petition did not lose their exempt status even if the money was not redeposited into a similar account within sixty (60) days. In the subject case, the circuit court stated: "We see no reason why *Hawk's* analysis should not also apply to Texas' homestead exemption, which has much deeper roots than the protections afforded retirement accounts." The court observed that if a debtor, unlike the debtor in this case, had sold his homestead a month before filing bankruptcy and did not use the proceeds to obtain a new homestead within six (6) months, the funds would become part of the bankruptcy estate. However, here, on the petition date, the homestead was owned by the debtor and the proceeds rule was not invoked. As the Circuit Court noted: "The home was not sold until seven (7) months into the bankruptcy, which means that under the trustee's approach the status of the exemption could not be determined until the thirteenth month when the reinvestment period expires."

[*Author's comment:* It is hard to argue with the logic of the Circuit Court here. But it is equally true that if the debtor had sold the home one month pre-petition, you would not know until the fifth month of the bankruptcy the status of the exemption. There are several other states that have similar rules requiring re-investment of homestead sale proceeds within different time periods. At least one state requires the reinvestment within an eighteen-month time period. How long are these estates supposed to remain open just to determine debtor's continuing entitlement to the exemption?]

Notice

Eighth Circuit Specifies What Content Must Be Provided In Publication of Bar Date to Unknown Creditors

Dahlin v. Lyondell Chemical Co., 881 F.3d 599 (8th Cir. 2018)

In *Dahlin v. Lyondell Chemical Co.*, the Eighth Circuit considered the extent of information that must be provided in a publication notice of a claims bar date to protect the due process rights of unknown claimants. The published notice at issue listed out the names used by the debtor entities within the eight years prior to the petition date. Reversing the District Court, the Eighth Circuit found this information sufficient to satisfy the due process rights of unknown toxic tort claimants exposed to hazardous materials 14 to19 years before the petition date at a facility operated by an unaffiliated predecessor of the debtor.

The Court reasoned that bar notices are not generally required to list specific potential claims against the debtors. It also noted that such a requirement would impose an unreasonable burden on debtors to investigate every potential claim that could be brought against them.

§362(k)(1)

Attorney's Fees Awarded to Debtor for Ending a Willful Stay Violation, Prosecuting a Damages Violation, and Defending those Judgments on Appeal All Upheld

In re Horne, 876 F.3d 1076 (11th Cir. 2017)

Attorney Mary Mantiply ignored the automatic stay and filed a state-civil action against the chapter 7 debtors on behalf of her clients. Even after being informed of the stay, she refused to dismiss the lawsuit. Debtors moved for damages in the bankruptcy court under §362(k)(1) for this willful violation. The bankruptcy court awarded debtors damages of $81,714, inclusive of attorney fees of $41,714. Mantiply appealed to the District Court,which affirmed and awarded debtors an additional $34,551 in attorney fees. Additional attorney fees were afforded the debtors for further appeals. A further appeal was taken to the 11th Circuit,which affirmed. The Court rejected Mantiply's reliance on *Baker Botts L.L.P. v. Asarco LLC,* 135 S.Ct. 2158 (2015), which held that courts could not depart from the American Rule absent explicit statutory authority. Here, the Court found there was such explicit statutory authority under §362(k)(1) which allowed the debtor to recover "actual damages" and to which Congress had added the words "including costs and attorney's fees." Mantiply conceded this departure from the American Rule but further argued it should be narrowly construed to only allow the recovery of fees incurred in ending the stay violation itself and not in pursuing the damages remedy or defending the judgment on appeal. The Circuit Court disagreed because of the additional language "including costs and attorney's fees," which was deemed to have broadened the notion of actual damages beyond the immediate injury. As the Court stated: "This explicit, specific, and broad language permits the recovery of attorney's fees incurred in stopping the stay violation, prosecuting a damages action, and defending those judgments on appeal."

[*Author's comment*: Courts are evenly split on whether a trustee qualifies as an individual who can recover under §362(k)(1). All courts seem to agree that trustees can recover under §105(a), but it is questionable whether that general statute would allow for a departure from the American Rule that each party must bear its own costs.

Substantive Consolidation

Substantive Consolidation Held Not Possible Where Both Debtor and Non-Debtors Were Individuals

In re Kraetchmar, 579 B.R. 924 (Bankr. W.D.Okla. 2018) (Lloyd, J.)

The chapter 7 trustee and a creditor of the individual chapter 7 debtor commenced an adversary proceeding seeking substantive consolidation of the parents of the debtor into the debtor's chapter 7 estate. The parents moved to dismiss the complaint for failure to state a claim. The Court disagreed with the parents that only §303 concerning involuntary proceedings could force them into a bankruptcy case. However, the Court found that the complaint did not state a claim for substantive consolidation because both the debtor and the non-debtors were individuals. The Court agreed with the majority rule that under certain circumstances the Court had discretion to substantively consolidate

a debtor's estate with non-debtors in reliance on either alter ego theories or intermingled control and assets of the non-debtors. The overriding equitable consideration was that all creditors of both the current debtors and those to be made debtors by force would benefit. Nevertheless, the Court found it an "unprecedented situation" for substantive consolidation to be sought where both the debtor and the non-debtors were individuals. The Court observed that substantive consolidation had its genesis in the increased judicial recognition of the widespread use of interrelated corporate structures, arising from the non-bankruptcy remedy of piercing the corporate veil. The Court further noted that many of the factors considered for substantive consolidation made reference to corporate entities, inter-corporate guaranties, failure to observe corporate formalities, consolidated financial statements, and ownership between various corporate entities. The Court reasoned that it was difficult to conceptualize two or more individuals exercising their own free will as constituting one legal economic entity having no economic existence independent from the other. Accordingly, the complaint was dismissed.

[*Author's comment:* We are seeing with increasing frequency actions for substantive consolidation. It is difficult here to argue with the court's reasoning that would preclude individuals from being substantively consolidated with other individuals. If assets have been bled out or transferred to other individuals, fraudulent transfer actions can be brought without the need to resort to substantive consolidation of such individuals.]

§322(d)

Removal of Trustee for Cause Did Not Start Time Limit on Action to Recover on Trustee's Bond

In re IFS Financial Corp., 580 B.R. 483 (Bankr. S.D.Tex. 2017) (Isgur, J.)

Smith had been appointed the chapter 7 trustee for IFS and oversaw more than 100 adversary proceedings to recover assets for the bankruptcy estate. The Court removed Smith for cause under §342(b). Martinec was elected as the new chapter 7 trustee. He sought to recover funds that Smith allegedly misapplied while serving as chapter 7 trustee, initiating the subject lawsuit to collect part of this recovery through the surety bonds that Hartford provided Smith while he was acting as trustee in the case. The Bankruptcy Code required that trustees provide a bond "conditioned on the faithful performance of such official duties." §322(a). Hartford filed a motion for summary judgment, arguing that it had no liability under the bond because the two-year statute of limitations for the surety's liability under the Code had lapsed under §322(d). Martinec countered with his own summary judgment motion, claiming that because Smith had been removed but not discharged, Hartford remained liable under the bond. §322(d) provides: "A proceeding on a trustee's bond may not be commenced after two years after the date on which such trustee was discharged." Hartford claimed that Smith's removal also ended his legal obligations and had the practical effect of fitting squarely within the definition of discharge.

However, the Court determined that the terms "removal" and "discharge" were separate and distinct. Hartford argued that its bond obligation could theoretically never expire creating a systemic problem. The court viewed this concern as "vastly overstated." First, the Court observed that the removal of a trustee itself was a rare event, limiting the potential for systemic issues, and second, removal itself would provide Hartford with immediate notice that issues could arise under its bond. Moreover, Hartford could have included a provision in its bond that (i) limited its liability following removal; (ii) limited its liability for a failure to give notice; or (iii) imposed a two-year claim period following removal. The Court noted that none of these were included in its bond. The Court then examined a similar question in *In re San Juan Hotel Corp.,* 847 F.2d 931 (1st Cir. 1988) in which the trustee was appointed to oversee a hotel through chapter 11 bankruptcy. The Bankruptcy Court had allowed the trustee to serve without providing a bond despite the requirements in §322(a). After the case was converted to chapter 7, an election was held and a new trustee was voted in. The new trustee uncovered a significant number of issues with the estate such as inadequate record keeping, failure to pay taxes and self-dealing. Creditors filed suit to hold the original trustee personally liable, and the original trustee sought to assert the statute of limitations as a defense. The Circuit Court rejected this argument, holding that the trustee had not been discharged because he failed to comply with §704(9) and provide a final accounting and application for final compensation. The Circuit Court held that the trustee's removal did not invoke a comparable statute of limitations. Thus, the Bankruptcy Court here concluded that because Smith had not been discharged and the two-year statute of limitation had not even started.

§§502(f) and 503(b)(3)(D)

CFO Allowed Chapter 7 Administrative Claims for Gap Period

In re Health Trio, Inc., 2018 WL 539817 (Bankr. D.Colo. 2018) (Rosania, J.)

In early 2009, petitioning creditors filed an involuntary chapter 7 petition against Health Trio, Inc. in the District of Delaware. At the time, the principal debtor had engaged over the years in a scheme to manipulate the company's assets and defraud creditors. Nine months after the involuntary petition, the venue of the case was transferred to the District of Colorado. Without explanation, after the venue had been transferred to Colorado, the Delaware bankruptcy judge entered a December 2009 order for relief against the debtor under chapter 7. That lead to numerous appeals in numerous courts between Delaware, Colorado, and Circuit Courts of Appeals. Ultimately, the Colorado bankruptcy court vacated the order for relief and entered its own second order for relief, against debtor under Chapter 7 in May 2012. During this lengthy Gap period, Scruggs, a CPA who was employed as debtor's CFO since July 2004, continued to act in that capacity until the appointment of a chapter 7 trustee in December 2012.

Scruggs filed an application for compensation of $94,000 for services rendered to debtor in the ordinary course of its business or financial affairs during the Gap period. Scruggs relied on §§502(f) and 503(b)(3)(D). Section 502(f) provides: "In an involuntary case, a claim arising in the ordinary course of the debtor's business or financial affairs after the commencement of the case but before the earlier of the appointment of a trustee and the order for relief shall be determined as

of the date such claim arises…" Scruggs argued that the wind-down of debtor's operations constituted the ordinary course of business or financial affairs of debtor during the Gap period. The Court agreed with cases holding that routine professional employee services provided for debts incurred in the Gap period in the ordinary course of the debtor's business or financial affairs were allowable, even if the involuntary debtor had begun to liquidate its business, concluding that "financial affairs" included the winding up of the debtor. The Court rejected the trustee's argument that the code section should be construed more narrowly. Turning to §503(b)(3)(D), the court first noted that the code section allowed administrative expenses, other than claims allowed under §502(f), including the actual, necessary expenses incurred by a creditor in making a substantial contribution in a case under Chapter 9 or 11. The Court recognized a Circuit Court split on whether the administrative expense claim could be allowed in a chapter 7 case, acknowledging that the majority view, led by the Third Circuit Court of Appeals, read the statute narrowly and concluded that it prohibited such a claim in a chapter 7 case (*In re Lloyd SEC, Inc.,* 75 F.3d 853 (3rd Cir. 1996); *Lebron v. Mechem Fin., Inc.* 27 F.3d 937(3rd Cir. 1994); nevertheless, the court found the minority view more persuasive as represented by the split panel decision in *In re Connolly N. America, LLC,* 802 F.3d 810 (6th Cir. 2015). The Court found Scruggs was entitled to an award under §502(f) but reduced the amount by 50% due to the lack of contemporaneous time records, thereby awarding him $46,959 under that code section. The Court also found Scruggs to be entitled to an award under §503(b)(3)(D) because he provided a substantial contribution to the estate by supporting the trustee's litigation claims and preserving the company's hard drive and documents and creating a chronology of an insider foreclosure. For the same reasons as the previous reduction, the court reduced the amount by 50% and awarded Scruggs $23,250 under this code section.

[*Author's comment:* The author has regularly criticized the 6th Circuit split panel opinion allowing chapter 7 administrative claims for substantial contribution.

However, it is hard to criticize the Court here when the Gap period was well over three years, presenting a most unusual and rare set of circumstances.]

§§503(b)(1)(B) and (C) and 510(c)

Trustee's Failure to Timely File Tax Return Results in Penalties of $356,695.46, But the Court Only Allows it as a General Unsecured Claim and Equitably Subordinates it to All Other Unsecured Claims

In re Colony Beach & Tennis Club, Ltd., 578 B.R. 909 (Bankr. M.D.Fla. Dec. 13, 2017) (May, J.)

Debtor was formed as a limited partnership in 1973 to manage and operate a resort in Longboat Key, Florida. Debtor filed for chapter 11 on October 5, 2009, but operated for only a few months before closing. On June 11, 2010, a trustee was appointed who converted the case two months later to chapter 7. The debtor was a pass-thru entity as any tax liability from its income was passed through to its 297 limited partners. Debtor was required annually to file a Form 1065 informational return and distribute Schedule K-1's to the limited partners. The deadline could be extended routinely for an additional five (5) months, as long as the taxpayer requested the extension prior to the original deadline. The trustee failed to do so even though he filed the return before the extension date had been requested. The IRS assessed late filing penalties that totaled $356,695.46, plus interest thereon. A small FICA balance of $1,535.15 was not in dispute. The IRS sought to have the penalty claim treated as an administrative expense to be paid in full. If such a request was granted, general unsecured creditors would receive a 68% dividend instead of a 100% dividend. The trustee first sought to argue that the return was late filed for "reasonable cause." The Court found no such reasonable cause existed noting that both the 2010 and 2011 returns were filed late with no extensions requested. Moreover, the estate's accountants had not yet been retained to file the extensions nor could the responsibility for the return be delegated. The Court also noted that the extension request was only a "very simple form, a low-level formality [that] doesn't even have to be signed." Accordingly, the Court found reasonable cause did not exist to waive the §6698 penalties. The Court then turned to the status of how the claim should be treated. It rejected the IRS position that it should be treated as an administrative expense. The Court determined that §503(b)(1)(C) only provided for administrative expense status for "any tax incurred by the estate." Here, the claim for §6698 penalties did not relate to tax owed by the debtor or the bankruptcy estate. This was simply an informational return with the tax liability passed through to the limited partners. Therefore, the penalty claim was not entitled to administrative expense status. The IRS next asserted that it should be allowed a "generic" administrative expense as was allowed in *In re 800Ideas.com,Inc.,* 527 B.R. 701,702 (Bankr. S.D.Cal. 2015). The Court declined to adopt the reasoning in that case. As §503(b)(1)(B) and (C) specifically stated what type of penalties were entitled to allowances as administrative expense, it would not be appropriate to include penalties excluded from that list that were unrelated to taxes owed by the bankruptcy estate. Allowing the administrative expense would not benefit the estate and would harm unsecured creditors who were without fault. Also observed that the impact of the penalty in the California case fell on the trustee because it reduced the amount of funds available to pay his compensation, whereas the trustee was being paid in full regardless of whether this claim for penalties was allowed administrative status or not. It would only prejudice the unsecured creditors who were innocent. The court then turned to §510(c) which allowed for subordination for purposes of distribution of all or part of allowed claim based on principles of equitable subordination. The Court noted that equitable subordination traditionally required a showing of misconduct by the creditor, but that was not a requirement for tax penalties, citing a long list of cases. Here, the Court determined that the claim would be allowed as a general unsecured claim and equitably subordinated to all other allowed claims in the case. In doing so, it noted that the magnitude of the penalty claim was based on the number of partners times the months delinquent times $195. Thus, a partnership with only 30 partners would be assessed 1/10 of the penalty of a non-compliant firm with 300 partners even though the number of partners was irrelevant to

the compliance with the filing deadlines that §6698 penalty was meant to coerce. It further had no bearing on the IRC collecting the underlying taxes in this situation where they were payable by the limited partners. Finally, the impact would be on the general unsecured creditors who had nothing to do with the late filing.

[*Author's comment:* We were critical of *In re 800Ideas.com, Inc.* when it was decided because it was an extreme and unnecessary outcome.

However, in that case, it did not appear that the trustee ever sought to have the claim equitably subordinated. Here, that is what happened and it was the right outcome.]

§506(c)

Is Trustee Permitted to Surcharge a Secured Creditor Following a "Short Sale" of Real Estate

In re Koonce, 582 B.R 239 (Bankr. W.D. Okla. 2018) (Lloyd, J.)

Trustee moved to sell certain real property for $340,000, an amount that would be insufficient to pay all of the creditors asserting liens against the Property in full, consisting of a first priority mortgage claim of $200,000, a senior judgment lien creditor and a junior judgment lien of $117,096 that had been obtained by a default judgment. It appeared to the trustee that the default judgment had been vacated by a state court, so the trustee requested authority to sell the property, no objections were filed, and an order was entered. Unfortunately for the trustee, after the sale it was determined that the junior judgment had not been vacated – only "opened." When the trustee sought to recover his statutory trustee fees and the fees and expenses of his counsel out of the portion of the sale proceeds that would otherwise have been paid to the junior judgment lienholder, as expressly authorized by the Court's earlier sale approval order, that creditor objected on a variety of grounds, including that the trustee should never had sought to sell fully encumbered property in the first place. The Bankruptcy Court only partially sustained the objection. While recognizing that trustees should not generally attempt to sell a fully encumbered asset, there were three reasons identified by the Court why this general rule would not apply under the circumstances of this case to prevent the trustee from recovering fees and costs from the proceeds otherwise payable to the junior judgment lien creditor. First, that creditor had not objected to the proposed sale, suggesting that it believed the sale was in its best interest. Second, at the time of sale, it appeared that the judgment had been vacated by the state court that entered it, and it was only post-sale that it was clarified that the default judgment had merely been "opened" rather than "vacated," resulting in the creditor retaining its lien. With respect thereto, the Bankruptcy Court noted that in more than 30 years of experience in the law, she had never been presented with a situation in which a distinction was drawn between "opened" and "vacated" judgments, so the Court would not punish the trustee for actions that seemed eminently reasonable when undertaken.

> "Trustees should not be punished, after the fact, for judgment calls which, at the time they were made, seemed reasonable. Adopting such a 'gotcha' policy would, in the long run, do more to jeopardize than to encourage efficient administration of bankruptcies by making trustees unduly tentative about every decision in action they take." *Id.* at 247 quoting *In re Melenyzer*, 140 B.R. 143, 155 (Bankr. W.D. Tex. 1992)

Third, the junior judgment lien creditor clearly benefitted from the trustee's sales efforts with full payment and release of all liens senior to the junior judgment lien creditor. Therefore, the Court determined that under §506(c) the sales proceeds otherwise payable to the junior judgment lien creditor could be surcharged for the reasonable cost of the sale, although not for expenses that the trustee incurred in unsuccessfully objecting to its lien, as that would not have conferred a benefit on the junior judgement lien creditor.

Additionally, the Court would not allow the surcharge to cover the statutory fee/commission but only the actual time related to the sale that was devoted by the trustee and his counsel.

[*Author's comment:* Trustees should make it their standard operating procedure to have a reservation of rights under §506(c) in every motion to sell free and clear. Further, the best practice is to assert the actual proposed surcharge in the motion itself. If the trustee represents that it is unwilling to proceed with a sale without the agreed surcharge, the judgment lien creditors will agree every time. Here, the trustee thought, with good reason, that the junior judgment lien was vacated and would have had no reason to negotiate a surcharge prior to the sale. The junior lienholder kept quiet until the trustee did all of the work and then complained, leaving the trustee no alternative but to litigate a contested surcharge under §506(c).]

§522 and Rules 1009(a) and 9006(b)(1)

On Reconsideration, Court Sustains Trustee's Objection to Exemptions on a Concealed Asset in Re-opened Case

In re Benjamin, 580 B.R. 115 (Bankr. D.N.J. 2018) (Ferguson, J.)

Less than two years prior to her chapter 7 filing, debtor had filed a personal injury lawsuit which she did not disclose in her schedules. A few months later, trustee filed a no distribution report and the case was closed. Over two years later, in January 2017, debtor executed a settlement agreement regarding the PI action that reflected an anticipated net recovery to her of $19,642.63. Still, the trustee was not informed nor were the schedules amended. In March 2017, a third party brought the settlement to the attention of the trustee, who had the bankruptcy case re-opened. Four months later, the schedules were amended to list the PI lawsuit as an asset and claim an exemption in the proceeds of the lawsuit in the full amount of the anticipated recovery. Ultimately, the trustee was able to settle the lawsuit for a net recovery to the estate of $37,817.63. A month after the trustee noticed the settlement, another amended Schedule C was filed asserting an exemption in the PI claim for $35,700. Trustee objected. The Court overruled the objection because the trustee was unable to adequately address how to reconcile *Law v. Siegel*, 134 S.Ct. 1188 (2014), with her position. The next day, the trustee moved for reconsideration citing two recent bankruptcy court cases that did precisely reconcile *Law v. Siegel* with the subject case. The Court determined it was appropriate to reconsider its

initial ruling "because this developing legal issue is a matter of first impression for this court and apparently in this District." The court noted that the newly cited decisions, *In re Dollman,* 2017 WL 4404242 (Bankr. D.N.M. Sept. 29, 2017); and *In re Awan,* 2017 WL 4179816 (Bankr. C.D.Ill. Sept. 20, 2017), articulated three approaches followed by courts in re-opened cases. The broad approach allowed a debtor to amend schedules in re-opened cases as a matter of course without limitation. The narrow approach disallowed all amendments in re-opened cases. The middle approach, adopted in the two cited cases and by the Court here, applied Rule 9006(b)(1) to regulate the ability of a debtor to amend schedules in a re-opened case. The court noted that the broad approach completely ignored the phrase in the Rule "at any time before the case is closed." The middle approach would not ignore the limiting language of Rule 1009. "Such an approach simply recognizes that a debtor in an open case may amend schedules without leave of the court, but in a re-opened case a debtor must file a motion to enlarge the time to amend and such motion must meet Rule 9006(b)(1)'s excusable neglect standard." The Court held that this would not run afoul of the *dicta* in *Law v. Siegel* and that Rule 9006 is a valid procedural rule. The Court observed that an objection predicated on non-compliance with bankruptcy rules was analytically distinct from an objection that bad faith conduct justified a sanction. "A debtor's conduct obviously comes into play in determining excusable neglect, but as the *Awan* court stated 'such is the consequence of applying the Rule itself rather than the exercise of any equitable powers.'" Thus, the motion for reconsideration was granted and the amended schedules were stricken. The court did allow debtors, if they chose, to file a motion for leave to file an amended Schedule C, but cautioned that before doing so it would be prudent to discuss settlement with the trustee "because excusable neglect may be difficult to establish on this record."

§541(a)

Products Liability Claim Held Not to be Estate Property

In re Bolton, 2018 WL 506601 (Bankr. D.Idaho 2018) (Pappas, J.)

Debtor received a new hip in October 2007, and the hip appeared to be doing well in his checkups in early 2008. He filed a chapter 7 petition in July 2, 2009 and received his discharge in 2011. On November 11, 2009, four months post-petition, debtor advised his doctor that he had been suffering hip pain that was getting worse over the past 6 months. The doctor's notes reflected that debtor had experienced pain since the surgery in October 2007 that had progressively gotten worse. Debtor had corrective hip surgery in early 2011. In early 2013, he filed a products liability action against the manufacturer of the components used in the first surgery. In March 2017, debtor's products liability counsel reported to the chapter 7 trustee a settlement with the manufacturer in the amount of $235,000, whereupon the bankruptcy case was reopened. Debtor amended his schedules to reflect the settlement and claimed it fully exempt. Trustee objected. The Court found the objection was moot because the claim against the manufacturer did not constitute property of the estate. The court determined that under Idaho law, the debtor could not have pursued a products liability claim against a manufacturer until he was "injured" by the defective hip device and that such damages had to be objectively ascertainable.

The trustee argued that the standard was met two months prior to the commencement of the chapter 7 case, but the Court ruled that the fact that debtor's pain began at that time was not sufficient to establish that the injury was objectively ascertainable on the day of the chapter 7 petition. Instead, the court found the doctor's notes and other information to be equivocal. The Court then turned to the next question as to whether the claim was nonetheless property of the estate because it was "sufficiently rooted in the pre-bankruptcy past" under the holding of *Segal v. Rochelle*, 382 U.S.C. 375(1966).

Again the Court ruled in favor of the debtor, finding that the claim had to have arisen from some pre- petition right or entitlement, but as of the petition date, there was only a nebulous possibility that the device would cause the debtor injury.

[*Author's comment:* This is one case of many in a growing trend to remove these older actions from estate property leaving the full recovery with the debtor. Here, the debtor claimed the entire settlement as exempt, which put the issue before the Court. Trustees facing more modest exemption claims would be well advised not to object and to proceed with the administration of the non-exempt portion of the claim.]

§544(a)(3)

Undocketed renewal judgment not properly perfected

In re Duthie, 581 B.R. 723 (Bankr. W.D.N.Y. 2018) (Bucki, C.J.)

Robert E. Duthie had acquired certain real property in May 1999 in Erie County, New York. Four months later, the Erie County Clerk of Court docketed a judgment for a bank against "Robert D.Duthie" in the amount of $268,041.55. After various transfers, the judgment was ultimately assigned to Cadles of Grassy Meadows II, LLC. Under New York law, a recorded judgment is effective for 10 years after its recording. If it remains unsatisfied, the creditor may commence a further action during the year prior to the expiration of the 10 year period that is designated a "renewal judgment" and is to be so docketed by the clerk. Properly done, that extends the lien for an additional 10-year period. Here, in 2009, Cadles moved to modify the judgment to designate the defendant's name properly as "Robert E. Duthie." It commenced an action which resulted in an order granting the renewal of the judgment that was entered on September 1, 2009. However, the county clerk never docketed the "renewal judgment." In 2010, Cadles initiated a special proceeding to determine the priority of its judgment as against mortgages that were recorded subsequent to the initial docketing of the original judgment in 1999 but prior to the renewal in 2009. The state court ruled that Cadles was in first position. Robert E. Duthie filed a chapter 7 petition in 2015, and the trustee obtained court authorization to sell the property to which Cadles consented. A condition of the sale was that "any valid and enforceable liens" would attach to the net proceeds. After the sale, trustee was holding proceeds of $130,428.53. The trustee then filed an adversary proceeding to avoid the judgment held by Cadles. Cadles answered and the parties cross-moved for summary judgment. The trustee argued that without

the proper docketing of the "renewal judgment" the lien of Cadles had expired in 2009 and no *bona fide* purchaser would have been aware of it. As a *bona fide* purchaser under §544(a)(3), the trustee asserted that he should prevail.

Cadles asserted that under the *Rooker-Feldman Doctrine*, the trustee was not able to challenge the prior state court order that put Cadles in first position. The Court found that the doctrine had no application because the trustee was never a party to the state court proceeding and the adversary proceeding here involved issues distinct from those decided by the state court. The record did not reflect the reasoning of the state court in the prior proceeding, and the Court surmised that the mortgagees may have had actual knowledge of the renewal judgment, whereas the bankruptcy trustee was a *bona fide* purchaser without knowledge. Further, the state court decision did not even address whether Cadles had perfected the renewal judgment as against the interest of a *bona fide* purchaser without knowledge of its claim.

Therefore, the trustee was granted summary judgment and Cadles was held to have only a general unsecured claim.

[*Author's comment:* Here again, this case demonstrates the strength derived by the trustee from his or her status as a *bona fide* purchaser under §544(a)(3).]

Standing and breach of fiduciary duty

§544(a)(3)

Trustee defeats equitable subrogation and lien claims to insurance proceeds

Sommers v. Dale, et al. (*In re Dahlin),* 582 B.R. 683 (Bankr. S.D. Tex. 2018) (Isgur, J.)

The Dales were friends of the debtor. On November 8, 2016, they entered into a written contract of understanding with the debtor in which they agreed to pay off the balance of Wells Fargo's mortgage on the debtor's home in return for a first priority lien. The Dales wired $188,000 to Wells Fargo, but debtor failed to contemporaneously execute a promissory note and deed of trust securing their interest in the home. Wells Fargo recorded its release of the loan on December 2, 2016, and the next day the home was destroyed by fire. On December 5, 2016, debtor met with her attorney and created a note and deed of trust securing the first priority lien of the Dales, but she also finalized her bankruptcy petition which was filed that same day before the note and deed of trust were delivered to the Dales. The Dales recorded the documents the following day, on December 6. Debtor ultimately received insurance proceeds of $333,687 for the fire damage. The debtor claimed this amount exempt under Texas law.

The chapter 7 trustee commenced an adversary proceeding to avoid the unperfected security interest of the Dales in the insurance proceeds. The parties filed cross motions for summary judgment. The Court ruled for the trustee, holding that as of the petition date, the Dales were merely holders of an unsecured claim and had no property interest in the insurance proceeds. This was because the lien which was held by the Dales under the contract of understanding was unrecorded as of the petition date and, therefore, avoidable by the trustee under §544(a)(3). Further, the lien recorded post-petition was avoidable under §549. While the Court agreed with the Dales that they were equitably subrogated to Wells Fargo with regard to the debt that they paid, such equitable rights were inferior to the trustee's position as a *bona fide* purchaser of real property who took free of any unperfected security interest under §544(a)(3).

There could be no constructive notice without an instrument properly recorded pre-petition, and since no document in the chain of title existed demonstrating any party other than the debtor as having an interest in the property, there was no inquiry notice for the trustee.

[*Author's comment:* Equitable subrogation rights and claims are frequently asserted against trustees with respect to trustee's efforts to avoid liens and interests in real estate. As made clear in this case (and many others), the bona fide purchaser status of the trustee defeats equitable rights and interests such as those given under claims of equitable subrogation. Some of the confusion is because equitable subrogation can defeat a trustee's status as a judicial lien creditor – but not the status of a *bona fide* purchaser.]

§§547 and 548

Court gives greater weight to 341 testimony than trial testimony

In re Johnson, 579 B.R. 796 (Bankr. W.D.Ky. Dec. 21, 2017) (Lloyd, J.)

Three weeks after debtor's second chapter 13 case was dismissed for failure to make plan payments, she deposited a federal tax refund check of $9,460.02 into her credit union account. Her son had no bank account so she also deposited his refund check of $5,433.03 into the same account on the same date.

That same day she remitted to her son his tax refund and used the remaining $9,006.97 to pay her son's bills. Less than 90 days later, she filed a chapter 7 petition in which she did not disclose the transfers, listed her residence as different than her son's, and listed no rental payments as part of her budget.

Debtor indicated in her testimony at her 341 meeting nothing of value that she received in exchange for the transfers. She gave no testimony indicating that she was living with her son or paid him rent. After the trustee sued to avoid the transfers under §§547 and 548, debtor asserted two defenses. The first was that the transfers constituted rental payments to the son in exchange for being allowed to live with his family; and the second, was the "no harm, no foul" defense that the funds could have been fully exempted had they not been transferred. At trial, debtor "gave long rambling answers, sometimes attacking the Trustee and his counsel about their actions in filing a lawsuit against the Defendant." The Court found that several badges of fraud were established and that the testimony at trial regarding the transfers being in return for being allowed to live with her son was not credible given that it contradicted the debtor's testimony at her 341 meeting. The Court found the 341 testimony to be more credible and found it "more likely" that the testimony concerning the form of rent or compensation for living with her son was "developed specifically for the purpose of defending the Trustee's claims at the trial in this case." The Court believed that the testimony at the 341 meeting, was more accurate because debtor had not yet realized her peril and had not been coached by her lawyers. The Court also rejected the "no harm, no foul" rule by following the major-

ity of courts have addressed the issue. The Court also rejected the fact that the rule could apply in a case where funds had been transferred, because recovery of those funds would not allow for an exemption under §522(g). Accordingly, the Court entered judgment in favor of the trustee and against the debtor's son.

[*Author's comment:* It is rare in the author's experience for a court to recognize what seems like common sense that the debtor's uncoached 341 testimony presents the truer version of the facts when inconsistent with trial testimony. The entire 341 meeting tape was played in the courtroom enabling the court to judge for herself which version was more credible. Although the court does not refer to the oft-cited case of *Tavenner v. Smoot,* 257 F.3d 401 (4th Cir. 2001), the Court does follow that same holding in rejecting the "no harm, no foul"defense.]

§548(a)(1)

Funds Transferred to University for Adult Child's Tuition by Means of a Federal Direct Parent PLUS Loan not a Fraudulent Transfer

Novak v. University of Miami (*In re Demitrus)*, 2018 WL 1121589 (Bankr. D.Conn. 2018) (Tancredi, J.)

Following the debtor's chapter 11 filing, the trustee brought an action to avoid as a fraudulent transfer tuition payments made on behalf of an adult child. The child was a student at the University of Miami. Debtor made a number of transfers to the University by means of a Federal Direct Parent PLUS loan to pay for the tuition. The trustee claimed that these payments constituted constructive fraudulent transfers under the Bankruptcy Code and Connecticut state law. Trustee sought to recover $66,616 of two such transfers. The University moved to dismiss the case for failure to state a claim. The only issue was whether the transferred funds constituted "an interest of the debtor in property." The Court explained that Parent PLUS loans were governed by the Higher Education Act of 1965 (20 U.S.C. §1001, *et seq*) and its implementing regulations (34 C.F.R. §685.100, *et seq*), under which a parent can borrow to pay for tuition and other qualified educational expenses. All loans under that program must be disbursed by either an electronic transfers of funds from the lender to the eligible institution or a check co-payable to the eligible institution and the graduate or professional student or parent borrower. The Court concluded that the funds allegedly disbursed to the University could not possibly have been the debtor's property, nor could those funds have ever been within the reach of creditors, following the holding in *Eisenberg v. Pennsylvania State University (In re Lewis),* 574 B.R. 536 (Bankr. E.D.Pa. 2017) (Fehling, J.), where the court determined that proceeds from such Parent PLUS loans were never in debtor's possession or control nor remotely available to pay his creditors and did not diminish his bankruptcy estate. The funds could only be used to pay the cost of the children's tuition and other qualified educational expenses and could not possibly be considered property of the estate. The Court here agreed and concluded that the debtor never exercised dominion or control over the funds, and the transfer of the funds did not diminish the debtor's estate nor constitute property of the estate. Accordingly, the motion to dismiss was granted.

[*Author's comment:* It is hard to argue with the court's conclusion regarding this specific type of loan program. However, the trustee could have successfully attacked it by seeking to avoid the obligation itself as a fraudulently incurred obligation because debtor may not have received reasonably equivalent value for the obligation incurred. If such an obligation was avoided, the trustee then could have sued to recover the loan repayments made by the debtor to the lender. However, the trustee would still not have a claim against the University just as these courts have ruled.]

28 U.S.C. §1930 (f)(1)

Debtor's Application for Waiver of Filing Fee Denied

In re Hayes, 581 B.R. 509 (Bankr. W.D.Mich. 2018) (Boyd, J.)

On February 6, 2017, debtor filed a chapter 7 petition and application to pay the filing fee in installments. The Rule 2016(b) disclosure form reflected that she paid her attorney $959 for the chapter 7 case. Debtor did not make any of the required installment payments, resulting in the Court issuing an order to show cause why her case should not be dismissed. At the hearing, debtor appeared without her attorney and explained that she did not recall receiving the order requiring her to pay the filing fee in installments, despite proper service at her address of record. More importantly, she had stated that her attorney had advised her that the filing fee would be waived. Because the attorney did not appear at this hearing, it was adjourned to the following month. In the interim, the attorney filed an application for waiver of the filing fee on September 28, 2017, indicating that debtor had increases in both her income and expenses. The Court consolidated the hearing on the application for the waiver of the filing fee with the show cause hearing that had been adjourned the previous month. At the hearing, it was learned that debtor had received a tax refund of $7,519 before the end of the month in which her petition was filed.

Her attorney advised that debtor was unable to make the installment payment from these funds because of "unexpected household expenses."

Because debtor's monthly income was less than 150% of the applicable poverty guidelines, the sole issue on the fee waiver was whether the debtor was unable to pay the filing fee in installments. The Court, like other cases before it, applied a totality of the circumstances approach. This included consideration of seven factors: (1) discrepancies between the debtor's application and the schedules as well as the debtor's testimony and other pleadings; (2) collateral sources of income from family or friends from which the filing fee could be paid; (3) excessive or unreasonable expenses that could be directed to the payment of filing fees; (4) whether the debtor agreed to pay a portion of her attorney's fee after the filing of the case; (5) whether debtor had any property from which the filing fee could be paid; (6) the debtor's historical spending of disposable income; and (7) whether the debtor's current or anticipated income or expenses were the result of temporary or extraordinary circumstances. The Court noted that the debtor had the burden of proving, by a preponderance of the evidence, that her circumstances satisfied that statutory requirements for waiver of the filing fee.

Debtor asserted that the post-petition changes in her financial situation warranted a waiver of the filing fee, however,

the Court found that the changes identified by the debtor actually resulted in a net increase in her monthly disposable income. "More importantly, the Debtor had assets at the time her petition was filed that she could have used to pay the filing fee, either in full or in installments." The court was specifically referring to the 2016 tax refund of $7,519. Thus, the court concluded that debtor had the "financial resources available to pay the filing fee, if she had chosen to do so." Debtor had offered no evidence of what the "unanticipated household expenses" were and no explanation as to why she preferred payment of those expenses over payment of her filing fee. Therefore, "the court can only conclude that the Debtor had the ability to pay the filing fee with proceeds from her tax refund, but chose not to do so." Citing *In re Lineberry,* 344 B.R. 487, 493 (Bankr. W.D.Va. 2006) holding that "it is the debtor's burden to show how tax refunds were spent and that they did not have the means to pay their filing fee from the proceeds".

Additional factors were that debtor's counsel was paid the full legal fee that he typically charged and did not reduce his normal fee, as attorneys often do when their clients are seeking fee waivers. There was no explanation for why this was done in such a simple-no asset case. Therefore, the court found that the debtor had failed to establish, under the totality of circumstances, that she was unable to pay her filing fee in installments, requiring her application for a waiver of the filing fee to be denied. Next, the Court considered whether to dismiss the case or extend the deadline for paying the filing fee in installments "for cause," under Rule 1006(b)(2). The Court observed that virtually all aspects of the debtor's case had been successfully completed, leaving as the only remaining impediment to a discharge of nearly $30,000 of unsecured debt, the payment of her filing fee. Therefore, the Court denied the application and directed the clerk to close the case without granting the discharge on June 1, 2018 if the filing fee were not paid prior to that date. That date was 83 days from entry of the Court's order. If the filing fee were paid ahead of the deadline, then the case could conclude with a discharge in the normal course.

[*Author's comment:* Frankly, it appears here that the attorney was trying to pull a fast one in being paid in full, applying for a waiver, and not disclosing the large tax refund until well after the court's initial hearing when the schedules were amended. Often times the unscheduled tax refund can result in the debtor no longer being eligible for the 150% threshold. That is because a debtor's net income is reduced by the amount of tax withholding. When the amount has been over-withheld, it results in a refund that is then added back into the debtor's annual net income.

Assignee of Mortgagee Loses at Trial and on Appeal in its Breach of Fiduciary Duty Claims Against Trustee

In re Modern Plastics Corp., 577 B.R. 270 (W.D. Mich. 2017) (Neff, J.)

When the debtor filed chapter 7 in January 2009, included among the assets were twelve (12) acres of real estate on which sat the debtor's offices, warehouse, and a manufacturing facility. Tom Tibble was appointed trustee. The property was encumbered by over $1.6 million in liens of which approximately

$1.3 million was owed to Bank of America. The remaining portion was owed to state and local taxing authorities. The building on the property was in need of maintenance and repair, with the roof leaking, resulting in pools of standing water in the facility. There were also significant environmental concerns. BOA determined that cleanup could cost more than $500,000. (A potential buyer discovered that a transformer was leaking PCBs and notified state environmental authorities. The EPA subsequently incurred over $600,000 in removal and cleanup costs.) BOA's realtor determined that the highest and best use for the property would be as a redevelopment site due to the age and condition of the building and poor market for old industrial buildings in that area, the one was significantly less than the liens. This view was confirmed by an appraisal obtained by BOA which reflected a value of $1,055,000. Shortly before the petition, a developer offered to purchase the property for $650,000. BOA agreed to the sale. After the petition, the trustee sought to consummate the sale with a $10,000 carve-out for the estate. The sale was not finalized. A second attempt to sell the property to the same party for $590,000, with a $20,000 carve-out was also agreed to by BOA, but the buyer did not exercise its option to purchase the property.

At the time of the petition, debtor notified the trustee and BOA that the property was uninsured. BOA initially maintained insurance but decided not to continue paying for coverage as it was not willing to put more money into the property. During Trustee Tibble's tenure, the property deteriorated substantially as a result of vandalism, theft, and a lack of maintenance. Large quantities of metal and other materials, including structural components of the building, were taken away and sold for scrap by thieves. One scrapper worked on the site for eight hours each day, five days a week, for seven months. Eventually, the roof of the building collapsed. During this time, Tibble made no effort to secure or maintain the property, and BOA took no action to exercise control over it. New Products had offices and a manufacturing facility across from the property. It initially held an unsecured claim against debtor for approximately $19,000. In March 2013, it purchased from BOA its loan documents with the debtor for $225,000. Soon thereafter, Tibble filed a report deeming the property to be abandoned. The Court approved the abandonment over the objection of New Products. New Products subsequently brought an adversary action against the estate, Tibble, and Tibble's surety seeking to recover any dimunition in value of the property during his tenure as trustee under the theory that he had breached his fiduciary duties to the estate and its creditors. Following several summary judgment motions and a bench trial, the Bankruptcy Court ruled in favor of the defendants. New Products appealed. The District Court affirmed.

The Bankruptcy Court held that New Products did not have standing as an unsecured creditor to assert a claim for breach of fiduciary duty, and did not have standing as a secured creditor until March 2013, the date that BOA assigned the loan documents to it. New Products contended that it had obtained BOA's rights to pursue a claim against Tibble. But, BOA only assigned its rights against the debtor under the loan agreements and not any rights against Tibble, let alone a right to recover from Tibble for breach of fiduciary duty. That

would be a tort claim against a third party based on a duty arising separate and apart from the mortgage agreement. The district court agreed with the bankruptcy court. Next, it agreed with the bankruptcy court's holding that New Products cannot pursue a claim against Tibble in its capacity as an unsecured creditor because the trustee represents the estate, not the creditors. The trustee who replaced Tibble in 2014 indicated that she was not going to pursue a claim against him. On appeal, New Products asserted for the first time that it was entitled to derivative standing to pursue the claim against Tibble. The district court determined it was not entitled to do so as it never even asserted that it made a demand on the trustee and that the trustee declined.

The bankruptcy court had also held that Tibble did not breach its fiduciary duties as trustee, particularly because the liens against the property far exceeded its value. Indeed, the district court noted that unsecured creditors could justifiably complain under those circumstances if the trustee had used estate property to benefit BOA at their expense. "Evidence that BOA had declined to insure the Property and that the building contributed relatively little to the Property's value provide[d] further support for the reasonableness of Tibble's actions. It would make little sense for a trustee to spend resources protecting fully-encumbered property that has minimal value for the secured creditor, let alone the estate." Moreover, neither BOA nor New Products ever sought adequate protection or stay relief in the bankruptcy case in order to obtain protection of its interests.

New Products suggested that Tibble should have abandoned the property as soon as he determined that it had no value for the estate, but the court noted that the Bankruptcy Code did not require him to do so and that most trustees left abandonment to occur at the closing of the case. It was particularly clear in this case that it was not unreasonable for the trustee to keep the property within the estate while seeking to negotiate some form of carve-out from the proceeds of the sale. New Products next argued that it was improper for Tibble to have attempted to sell the property with a carve-out, but never explained why that would be the case. The court observed that the estate could have benefited from a carve-out, and the party with the greatest interest in the terms of the sale, BOA, had approved it. Thus, there was no breach of any fiduciary duty by pursuing sales transactions with a carve-out for the estate. Further, just because Tibble was justified in not abandoning the property, it did not necessarily mean that he was required to protect the building on the property from looting, vandalism and deterioration. Nothing in the record reflected that Tibble had ever taken the position that he would maintain or protect the property. Thus, the court also rejected New Products' claim of equitable estoppel against the trustee. The court again pointed out that the realtor, appraiser and trustee all believed that the property had to be marketed as a redevelopment site, as the building added little value. The court was also skeptical that New Products had relied on the trustee in maintaining the property as it had purchased the loan documents from BOA without ever entering the property, reflecting that the condition of the building was immaterial to its decision. Therefore, the Bankruptcy Court was affirmed.

continued from page 11 **Sam Crocker Unleashed**

impact of BAPCPA on chapter 7 trustees to look at the article by Bob Waldschmidt and myself published in Volume 79, Issue 2, 2005 *American Bankruptcy Law Journal*, and also published in *NABTalk*. That article, written before BAPCPA became effective, discussed the statutory changes that appeared to directly affect trustees and predicted how BAPCPA would play out upon application.

D. Beyond BAPCPA:

So where does that leave us today? What is a panel trustee to do in the face of all that actual past change, and potential future change? Bob and I concluded our BAPCPA article this way: "…the basic role of the chapter 7 trustee remains the same: to serve as the "representative" of the bankruptcy estate…and to administer that bankruptcy estate…in accordance with the intention of Congress." That summarizes an unchanging aspect of the American bankruptcy system over my many years of work, and indeed even from well before my time.

Trustees deserve respect and fair compensation for the work they do to perpetuate this institution. The operational ability of the entire system was built on the fundamental notion of the propriety and effectiveness of independent fiduciary administration of debtors' estates. Panel trustees are the independent fiduciaries appointed and overseen by the USTP to meet the fundamentally important duty of estate administration. Though they struggle with smaller caseloads and no raises, they continue to step in the river, over and over, as time and change roll on, keeping the system afloat in the process.

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