CASE LAW UPDATE

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ABSTENTION AND REMAND

***Firefighters' Ret. Sys. v. Citco Grp. Ltd.*, 796 F. 3d 520 (5th Cir. Aug. 6, 2015).** (Haynes, J.)

Issue: Can remand orders be reviewed by an appellate court?

Holding: Ordinarily, remand orders are not reviewable by an appellate court. However, the Fifth Circuit applied a limited exception to the general rule, because the district court exceeded its statutory authority. Since 2005, permissive abstention under 28 U.S.C. § 1334(c) has been limited. The statute clearly provides that such abstention is not allowed "with respect to a case under chapter 15 of title 11." The Fifth Circuit recognized that this addition is consistent with the primary goal of chapter 15 bankruptcies—i.e., to centralize litigation into a single forum in the United States. Allowing permissive abstention and equitable remand in the face of a chapter 15 exceeded the district court's statutory mandate and, thus, could be reviewed by the Fifth Circuit.

Facts: The plaintiffs were investors in a Cayman Island feeder fund that was part of a larger Cayman Island arbitrage fund. The ultimate parent fund was a debtor in a chapter 11 bankruptcy case pending in New York. The plaintiffs sued the defendants, which included the two smaller Cayman Island funds and various parties related to the transaction. In an effort to defeat diversity, the plaintiffs added Skadden, but the defendants removed the lawsuit to federal district court in Louisiana based on Skadden's improper joinder, diversity and bankruptcy jurisdiction. The plaintiffs filed a motion to abstain and remand the lawsuit back to Louisiana state court. Before the magistrate issued its report and recommendation, the feeder and arbitrage funds filed chapter 15 bankruptcy petitions in New York, and submitted additional briefing to the magistrate concerning the impact of their chapter 15 filings. Without addressing the significance of the chapter 15 filings, the magistrate recommended permissive abstention under section 1334(c) and equitable remand under section 1452(b). Over the defendants' objections, the district court accepted the report and remanded the lawsuit back to state court. The defendants appealed.

On the merits, the plaintiffs argued that the subsequent chapter 15 filings were irrelevant, because remand should be determined based on the status of the case when it was removed. The Fifth Circuit flatly rejected that argument, explaining that a party's ability to remove a case is entirely distinct from the court's ability to remand a properly removed case. See Buchner v. F.D.I.C., 981 F.2d 816, 818 (5th Cir. 1993). In this appeal, the lawsuit was properly removed as being "related to" the parent fund's chapter 11 case. Had the district court remanded the lawsuit at that time, the result may have been different. However, the Court explained that "the propriety of the district court's remand order is judged at the time of that order, not the time of the original removal." In this case, by the time the district court considered remand, the chapter 15 petitions had been filed. Thus, it was improper to remand in the face of the chapter 15 filings. The district court's remand order was vacated.

ATTORNEY'S FEES

***Baker Botts LLP v. ASARCO, LLC*, 135 S Ct. 2153 (2015).** (Justice Thomas 5-3 decision)

Issue: The question before us is whether §330(a)(1) permits a Bankruptcy Court to award attorney's fees for work performed by court appointed professionals in defending a fee application in court.

Holding: Under the American Rule, absent express statutory authority, fees for defending a challenge to professional fees in a bankruptcy case are not awarded a party. The Supreme Court finds no express statutory authorization to award under §330(a) and therefore Bankruptcy Courts are not permitted to award compensation for this litigation.

Facts: 2 law firms employed by Debtor, who had been instrumental in obtaining successful result in litigation which allowed creditors to be paid in full, filed fee applications. The Debtor, now controlled by the Defendant in the litigation, the parent corporation, objected. The Court conducted a 6-day trial and the parties conducted extensive discovery. The Court awarded the actual fees incurred, an additional enhancement for the successful result and over $5 million for time spent litigating the fee applications.

Reasoning: Nothing in text of statute overrides American Rule that each party pays his own fees, win or lose, unless a statute or contract provides otherwise.

***Barron & Newburger, P.C. v. Texas Skyline, Ltd. (In re Woerner)*, 783 F.3d 266 (5th Cir. 2015).** (Prado, J.) (en banc).

Issue: Whether *Pro-Snax* holding that no fees may be allowed if no results are obtained, should be revisted.

Holding: Fifth Circuit adopts flexible "prospective" standard for evaluating attorney's fees, rather than hindsight benefits test of *Pro Snax*.

Facts: On the eve of a major state-court judgment against the debtor, Woerner filed a voluntary chapter 11 bankruptcy petition. During the year in chapter 11, before the case was converted to chapter 7, Woerner's bankruptcy counsel, Barron & Newburger ("B&N") incurred over $130,000 in legal fees and expenses. B&N filed an application for compensation after the case converted to chapter 7, but the UST and Texas Skyline (the largest unsecured creditor) objected on the basis that the fees did not provide an "identifiable, material benefit" to the estate. The bankruptcy court, despite its comment that the quality of work was not objectionable, reduced the fees by 85% and awarded only $20,000 based on the retrospective Pro-Snax standard applicable in the Fifth Circuit. B&N appealed.

This was a rehearing en banc, after the Fifth Circuit affirmed the district court's judgment in 2014. The district court affirmed the bankruptcy court's initial order of an 85% fee reduction under the retrospective Pro-Snax standard, concluding that B&N failed to prove an "identifiable, tangible, and material benefit to the estate."

In this "Anti-Snax" decision by the 5th Circuit, sitting en banc, the Fifth Circuit reversed its retrospective attorney's-fee rule from In re Pro-Snax Distributors, Inc., 157 F.3d 414 (5th Cir. 1998), adopting in its place the prospective, "reasonable at the time" standard endorsed by other circuits. In doing so, the Court noted that Pro-Snax was wrongly decided at the time, having relied upon In re Melp, Ltd., 179 B.R. 636 (E.D. Mo. 1995), which was decided under the statute prior to the Bankruptcy Reform Act of 1994.

The Fifth Circuit discussed the legislative history of the Bankruptcy Reform Act, as it applied to § 330, and explained that "[t]he legislative process therefore strongly suggests that Congress could not have intended the language of § 330 to impose an actual-benefit requirement determinable by a court only at the completion of the case." In view of this legislative history and the application of the statute in other circuits, the Court concluded that the prospective "reasonable at the time" standard must apply. And, based on that conclusion, the Court determined that remand to the bankruptcy court was necessary "out of an abundance of caution given the complex facts of the case before us . . . to evaluate whether B&N is entitled to fees under the prospective, 'reasonable at the time' standard."

AVOIDANCE ACTIONS

***In re Tusa-Expo Holdings, Inc.,* 811 F.3d 786 (5th Cir. January 28, 2016).**

Issue: Whether trustee proved that creditor received more than it would have received in the Ch. 7 case under 11 U.S.C. § 547(b)(5).

Holding: In this preference avoidance action, the Fifth Circuit affirmed the lower court's ruling that there was no preference because the Trustee failed to satisfy her burden under 11 U.S.C. § 547(b)(5) that the creditor receive more than it would have received in a chapter 7 case.

Facts: Knoll sold furniture to Debtor Tusa pursuant to an agreement which granted Knoll a lien of all assets of Debtor, including proceeds. Debtor had a third party lender who took a lien on all assets and Knoll subordinated its lien except as to certain accounts upon which Knoll retained a first lien. All receipts from accounts were put into a lockbox. Lender would withdraw funds, apply to its line of credit, then re-advance funds, which Debtor then used to pay Knoll, which would allow Debtor to place orders for additional inventory with Knoll. Trustee argued that that monies paid to Knoll were not proceeds of Knoll's collateral under Texas UCC definition of proceeds, because the funds went into lockbox, which were taken out by Lender and then re-advanced to Debtor who paid Knoll. The Court holds the taking out and re-advancing did not strip lien on proceeds of Knoll. Court applied source rule of *El Paso Refining* case to affirm decision of Bankruptcy Court that under the plain language of UCC section 9.332(b) and the subordination agreement between Knoll and the Lender. Court also ruled that District Court erred when it applied 547(c)(5) defense, because under the plain language of the Code section, section 547(c)(5) applies only to transfers that create a security interest. Court reasons result is required under plain wording of section of Bankruptcy Code.

***Williams v. First Nat'l Bank (In re Positive Health Mgmt.)*, Civil Action No. H-11-3436, (S. D. Tex., Houston Division, January 5, 2015.)** (Atlas, J.)

Issue: Whether the trustee is entitled to an award of attorney's fees under TUFTA when his recovery is based upon 11 U.S.C. § 548 and not TUFTA.

Holding: No, in order to recover attorney's fees under TUFTA, the fees must be generated from a claim arising under TUFTA.

Facts: The Trustee sought an award of $278,793.00 in attorneys' fees pursuant to the Texas Uniform Fraudulent Transfers Act (TUFTA), TEX. BUS. & COMM. CODE § 24.013, which permits the court to award costs and reasonable attorneys' fees as are equitable and just. During a previous stage of the case, the District Court ruled against the Trustee on his TUFTA claim, holding that the Defendant FNB had proven its TUFTA § 24.009 affirmative defense. On appeal of an issue of first impression under section 548(c) and not under TUFTA, the Fifth Circuit rendered judgment in the Trustee's favor in the net amount of $114,348.02. The Trustee did not appeal the district court's ruling against the Trustee on his TUFTA claim and the Fifth Circuit's opinion did not address the district court's ruling on the § 24.009 defense. The Court held that TUFTA section 24.013 does not apply to TUFTA claims on which the party seeking to recover fees did not prevail. Further, the FDIC was appointed receiver for FNB while the appeal was pending. An award of fees against the FDIC as receiver for a failed bank is disfavored and is permitted only in limited circumstances not present here.

***Janvey v. Golf Channel, Inc.*, *et al,* No. 15-0489 (Tex. April 1, 2016).**

Issue: The 5th Circuit certified to the Texas Supreme Court the question of what showing of "value" is sufficient for a transferee to prove the elements of the good faith affirmative defense under § 24.009(a) of TUFTA.

Holding: "The reasonable equivalent value requirement in § 24.009(a) of TUFTA is satisfied when the transferee fully performed, in an arms-length transaction, in the ordinary course of its business at market rates". Court rejected the rule that there are different standards in assessing "value" or "reasonably equivalent value" based on whether debtor was operating Ponzi scheme. "Value must be determined objectively at the time of the transfer and in relation to the individual exchange at hand rather than viewed in the context of the debtor's entire enterprise, viewed subjectively from the debtor's perspective, or based on a retrospective evaluation of the impact it had on the debtor's estate."

Facts: Debtor operated notorious Ponzi scheme. Debtor paid Golf Channel $5.9 million under media services contract, which services Golf Channel had fully performed, including advertising, and recognition at tournaments covered by the cable channel. Receiver sued Gold Channel for fraudulent transfer seeking to recover the amounts paid. The District Court determined value was provided because services were provided, in good faith, at market value and in the ordinary course of business. Fifth Circuit reversed citing rule that services provide zero value to a Ponzi scheme creditor. On panel rehearing, Fifth Circuit vacated and certified the question of what value must be shown to negate fraudulent transfer. Texas Supreme Court rules that value is not determined by whether any services benefited creditors or depleted the estate but objectively under test set forth above.

CHAPTER 13 ISSUES

CH. 13 FUNDS UPON CONVERSION TO CH. 7

***Harris v. Viegelahn*, 135 S.Ct. 1829 (2015).**

Issue: When a debtor converts his chapter 13 case to chapter 7, must the trustee distribute debtor's accumulated wage payments to case creditors per the Chapter 13 plan or must she remit them to the debtor?

Holding: The Supreme Court held that under the governing provisions of the Bankruptcy Code, a debtor who converts to Chapter 7 is entitled to return of any post-petition wages not yet distributed by the Chapter 13 trustee.

Facts: The Supreme Court determined that in a good faith conversion to Chapter 7 after chapter 13 plan confirmation any undistributed funds held by the Chapter 13 trustee must be refunded to the debtor. A debtor's post-petition earnings do not become property of the Chapter 7 estate. A terminated trustee can only return the debtor's earnings to the debtor. No reason of policy would suggest that creditor should not be put back in the same position as had the debtor never sought to repay his debts under Chapter 13.

CHAPTER 13 PLAN

***In re Gaetje*, 2015 LEXIS 2027 (Bankr. S.D. Tex. 2015).**

The Bankruptcy Court found that a proposed plan could not be confirmed because the interest rate proposed for the debtor's principal residence was changed from adjustable to fixed. Bankruptcy Code §1322 allows modification of secured claims unless the claim is secured solely by the debtor's principal residence. The Court also decided that the debtor is allowed, during the plan period, to pay the loan in full before the maturity date because the loan agreement included language allowing for prepayment.

DOMESTIC SUPPORT OBLIGATIONS §1322(b)(10)

***In re Lightfoot,* Case No. 13-32970, 2015 Bankr. LEXIS 1918 (Bankr. S.D. Tex. June 10, 2015).**

Issue: Can interest be paid on domestic support obligations when unsecured creditors are not being paid in full?

Holding: Yes. The Bankruptcy Court held that §1322(b)(10) does not prevent confirmation of a Chapter 13 plan that includes state-mandated interest on domestic support obligations even when the plan does not provide for full payment of all allowed claims.

Facts: The Court wrote to address an apparent conflict in the Bankruptcy Code regarding whether interest could be paid on domestic support obligations when unsecured creditors are not being paid in full. §1322(b)(10) provides that a plan may provide for payment of interest on non-dischargeable claims only to the extent that the debtor has disposable income available to pay such interest after making provision for full payment of allowed claims. §1322(a)(2) requires that the plan provide for full payment of all claims entitled to priority under §507, which includes domestic support obligations that are owed or recoverable as of the date of the filing of the petition. §101(14A) defines domestic support obligations to include interest, so in a plan that pays creditors less than 100% of their claims, §1322(b)(10) seems to prohibit the payment of interest on domestic support obligations while §1322(a)(2) seems to require it. The Court harmonized these provisions by finding that because a domestic support obligation is already defined to include post-petition interest, such interest is considered part of the underlying claim and is not considered interest on a claim, which would be prohibited by §1322(b)(10). Therefore, interest on domestic support obligations is not only allowed by the Bankruptcy Code, but is actually required by the Bankruptcy Code.

CLAIMS IN BANKRUPTCY

ESTIMATING CLAIMS

***Mud King Prods. Inc. v Nat'l Oilwell Varco, LP.* 2015 US Dist. LEXIS 23855 (S.D.Tex. February 27, 2015).** (Atlas, J.)

Issue: Does the Bankruptcy Court have discretion to estimate a claim and select the methodology to estimate the claim?

Holding: Yes. The District Court affirms bankruptcy court order estimating National Oilwell's (NOV) claim at $74,434.95, plus pre judgment interest, plus $1,000,000 in statutory damages plus attorney's fees and costs, estimated at $330,893.00. District Court rules that bankruptcy court has discretion in estimating claim and in selecting methodology to estimate claim, which will only be reversed for abuse of discretion. District Court rules that standard of review is narrow based on Congress' intent for wide latitude to bankruptcy court in estimating claims.

Facts: Mud King employee had taken proprietary drawings from NOV. NOV sued for misappropriation of trade secrets under federal law, conversion, violation of the Computer Fraud and Abuse Acts Texas Theft Liability Act, conspiracy, aiding and abetting and unjust enrichment. After an extensive evidentiary hearing over 8 days, the Bankruptcy Court estimated claim. Both parties appealed the bankruptcy court's estimation. District Court analyzed the law on trade secrets and found, after properly invoking the Bass Texas Supreme Court's 6 factor test, that most of the drawings were trade secrets. District Court further affirmed findings on damages for trade secrets as limited to Mud King's profits from use of the misappropriated trade secrets and estimation of claim under Computer Act at zero because NOV failed to present evidence that it incurred costs in connection with an impairment of its data or an interruption in computer service, as required to prove loss under Computer Fraud Act.

§726(a)(1) PRIORITY

***In re Clark,* 2015 Bankr. LEXIS 1928, 2015 WL 3745383 (Bankr. S.D. Tex. June 12, 2015).**

Issue: Is the deadline set forth in 11 U.S.C. § 726(a)(1)(A) merely the date on which a discrete administrative event occurs or does it embody a due process element that requires actual notice to affected creditors?

Holding: The bankruptcy court vacated its prior decision and allowed Ms. Pate's and Ms. Clark–Thigpen's proofs of claim as tardily-filed unsecured claims entitled to distribution under 11 U.S.C. § 726(a)(2).

Facts: The Bankruptcy Court for the Southern District of Texas held that the deadline to file proofs of claims in 726(a)(1) does not embody a due process element that requires actual notice to affected creditors. The two creditors in this case were each a mother to one of the Debtor's children, and each had a claim for child support arrears. Neither of the creditors were sent notice of the Debtors bankruptcy case, and neither had actual knowledge of the bankruptcy case in time to file a timely proof of claim. When they found out about the bankruptcy, both went to the Illinois Department of Healthcare and Family Services (IFHS), which assured them they that they did not need lawyers and the IFHS would take care of everything. An employee of the IFHS filed proofs of claim for both creditors, apparently without authority to do so, listing IFHS as the creditor and signing the proof of claim as agent for Creditor. The Chapter 7 Trustee objected to the late-filed claims, and the Court allowed the claims but held that they would only be entitled to distribution under 726(a)(3). After the creditors obtained counsel, they filed a motion to vacate the Court's order. The creditors also filed documents purporting to adopt the proofs of claim filed by the IFHS. The basic argument that the creditors were making was that they should be allowed to 726(a)(1) priority for their claims because they were not served with notice of the bankruptcy and this lack of notice was not remedied by the fact that notice was given to IFHS. The Court first found that IFHS was indeed an agent of the creditors as effectively acknowledged in their adoption of the IFHS proofs of claim. The Court went on to find that the deadlines in 726(a)(1) are not founded in due process. As a result, it really does not matter whether the creditors were properly served with notice of the bankruptcy case. The Court buttressed this interpretation by noting that 726(a) does not disallow untimely claims, and it in fact provides for distributions to creditors that received notice of the bankruptcy as well as those that received no notice at all. Therefore, the Court held that the creditor's claims should be allowed as tardily-filed claims entitled to distribution under either 726(a)(2) or 726(a)(3). In light of the notices and the situation with IFHS, the Court ultimately held that the creditor's claims should be entitled to distributions under §726(a)(2).

DISCHARGE

§523 (a)(2)(A) ACTUAL FRAUD EXCEPTION (PENDING DECISION FROM SUPREME COURT)
***Husky International Electronics, Inc. v. Ritz*, 787 F.3d 312 (5th Cir. 2015) cert. granted, 2015 US LEXIS 7036 (Nov. 6, 2015)**
Issue: Whether the "actual fraud" bar to discharge under § 523(a)(2)(A) of the Bankruptcy Code applies only when the debtor has made a false representation, or whether the bar also applies when the debtor has deliberately obtained money through a fraudulent transfer scheme that was actually intended to cheat a creditor.
Holding: Fifth Circuit ruled there must be express misrepresentation for actual fraud to apply to except discharge under §523(a)(2)(A). Supreme Court heard oral arguments on this issue in March 2016 and a ruling is imminent. There is a split in authority between the Fifth Circuit and the First and Seventh Circuits. First and Seventh Circuit hold that fraudulent transfer scheme that actually intends to cheat a creditor satisfies actual fraud element for exception to discharge.

DISCHARGE OF TAX LIABILITIES
***In re Kemendo*, 542 B.R. 395 (S.D. Tex. August 21, 2015)**. (Miller, J.)
Issue: Whether debtor's substitute tax returns prepared by the IRS in 1998 were done so pursuant to IRC § 6020(a), making the debts dischargeable, or done so under IRC § 6020(b), making the debts non-dischargeable.
Holding: Because the issue is dependent on the material fact of whether Kemendo cooperated with the IRS and filed his tax returns in June 1998, the Bankruptcy Court's order granting summary judgment to Kemendo is vacated and the case is remanded to the Bankruptcy Court.
Facts: Several years prior to debtor's Chapter 13 bankruptcy, IRS prepared substitute returns with cooperation of the debtor. At end of debtor's Chapter 13, IRS disputed whether his § 1328(a) discharge included tax liabilities for the periods in which substitute returns had been prepared and argued that they were late filed returns excepted from discharge under § 1328(a)(2). The bankruptcy court held that the substitute returns were proper returns for dischargeability purposes and that they had been filed more than two years before the commencement of the bankruptcy case and were therefore not subject to § 523(a)(1)(B). Accordingly, the tax liabilities were found to be discharged. The IRS appealed.

ASSIGNMENT & VIOLATION OF DISCHARGE INJUNCTION
***BANCO Popular, North America v. Kanning*, --- Fed. Appx.--- 2016 WL 373505 (5th Cir. January 29, 2016).** Before Davis, Barksdale, and Dennis, Circuit Judges. Per Curiam.
Issue: Two main issues were presented on appeal. First, given that the lower court found the assignment unenforceable against the policy issuer, could it nevertheless be enforceable against the named beneficiary? Second, did Banco violate Mrs. Kanning's bankruptcy discharge by pursuing its conversion action to obtain the proceeds?

Holding: A collateral assignment of a life insurance policy is enforceable against the named beneficiary even if it is unenforceable against the policy issuer. The assignment creates a lien against the policy proceeds that survives the named beneficiary's bankruptcy discharge so that an in rem action to obtain possession of the policy proceeds does not violate the bankruptcy discharge injunction.

Facts: Kanning, as president of BEMK, Inc. d/b/a All About Diamonds, a Texas jewelry store, obtained a loan from Banco on December 3, 2007, in the amount of $695,900. Mr. and Mrs. Kanning guaranteed the loan. Before closing the loan, Banco asked Kanning for an assignment of a life insurance policy in the amount of the loan. Kanning could not get a policy in that amount so offered Banco his existing policy issued by USAA in the amount of $500,000, that named Mrs. Kanning as beneficiary. Banco accepted and Kanning delivered the policy to the bank. The policy contained the following statement about assignments:

> We will not be responsible for the validity or sufficiency of any assignment. To be binding on us, an executed assignment must be by Written Request and consented to by any Irrevocable Beneficiary. Your rights and any Beneficiary's interest will be subject to the assignment.

According to the policy, a "Written Request" is one "received by us" that is "signed, dated, and notarized (if required by the form) on a form satisfactory to us or provided by us." Kanning executed a USAA form assignment of the policy to Banco, but USAA found fault with the assignment and did not accept it. At closing, Kanning gave Banco a notarized "Post-Closing Affidavit," stating, "I guarantee to provide Lender with the original Life Insurance Policy and the Assignment of Life Insurance in the amount of $695,900 listing Banco Popular North America as the beneficiary and lost [sic] payee of such life insurance policy." By letter sent in February 2010, Banco again asked Kanning for an assignment of the policy. In July 2010, BEMK filed Chapter 7 and Banco received $13,592.40.

Kanning died in January 2012. Mrs. Kanning claimed the policy proceeds as beneficiary executing a "Claimant's Statement" that the policy was not pledged as collateral for a loan. USAA approved her claim and paid her the proceeds. In August 2012, Mrs. Kanning filed chapter 7. Mrs. Kanning scheduled the policy proceeds and claimed them as exempt under Texas law. She listed Banco as an unsecured creditor with a claim of $577,591.36. In November 2012, Mrs. Kanning used some of the insurance proceeds to buy a home and used the remainder to pay off existing debt and for home improvements. Mrs. Kanning was discharged in December 2012. Banco did not seek any relief against Mrs. Kanning in her bankruptcy.

In March 2013, Banco sued Mrs. Kanning for conversion and a declaratory judgment and that it was the rightful possessor of the policy proceeds. Mrs. Kanning counterclaimed for contempt for violation of her discharge. Mrs. Kanning brought in USAA as a defendant on a third-party complaint. The trial court found the assignment unenforceable as to both USAA and Mrs. Kanning, in part because USAA had not accepted the assignment. The court dismissed USAA from the lawsuit and dismissed Banco's declaratory judgment action and conversion action, but held that Banco had a lien on the proceeds that survived bankruptcy, so its actions to enforce the lien did not constitute contempt. Both parties appealed.

As to Mrs. Kanning's argument that the assignment was not enforceable against her as beneficiary since the lower court had ruled that it was unenforceable against the policy issuer, the 5th Circuit, while conceding that Texas courts have not directly addressed this issue and that it could not find any "analogous precedent," ruled that Mrs. Kanning had "arguably waived" this argument because of her inadequate briefing of the issue and her failure to "cite analogous precedent to support her assertion." The 5th Circuit then ruled that all of the cases cited by the lower court on this issue were distinguishable and that regardless of whether the assignment was effective as to USAA, it was effective as to Mrs. Kanning.

The 5th Circuit then determined that as a result of the enforceable assignment, Banco had a lien against the policy proceeds sufficient to maintain an action for conversion against Mrs. Kanning, that the conversion action was in rem and did not violate the bankruptcy discharge, and that Banco met the elements of its conversion claim. As to Mrs. Kanning's argument that money cannot be the subject of an action for conversion unless it can be identified as a "specific chattel," the 5th Circuit found the facts of the Kanning's case to be analogous to those of Paschal v. Great Western Drilling, Ltd., 215 S.W.3d 437 (Texas Civ. App. -- Eastland, 2006). In Paschal a jury awarded a constructive trust over life insurance policy proceeds to an employer whose embezzled funds were used to purchase the policies. The embezzler's wife was the named beneficiary in the policies and another jury awarded the employer judgment against her for civil conspiracy and conversion. Admitting that there were some factual distinctions between the Kanning's case and Paschal, the 5th Circuit nevertheless found that both cases involved a third party with a right to policy proceeds and that both involve policy beneficiaries who made claims to proceeds which they had no right to receive.

The 5th Circuit held that Banco is entitled to summary judgment and remanded for a determination of the form and amount of the resulting relief to be awarded to Banco and noted that Banco seeks immediate possession of the proceeds, an equitable lien on Mrs. Kanning's house and post-judgment interest.

DISCHARGE – VIOLATION AND DAMAGES

***Fauser v. Green Tree Servicing, LLC*, 545 B.R. 907; 2016 Bankr. LEXIS 492 (Bankr. S.D. Tex. Feb. 16, 2016).**

Issue: Whether Green Tree's violation of the discharge injunction was sufficiently willful to support an award of damages. And if so, what amount of damages should be awarded.

Holding: The Court awarded the debtor $41,905 in actual damages, $4,500 in punitive damages, $65,512 in attorney's fees and any future violated would subject Green Tree to a $1,500 sanction per communication plus attorney's fees.

Facts: Green Tree serviced a mortgage on property a Chapter 7 owned and violated the discharge injunction imposed by §524 when it made telephone calls and sent the debtor demands for payment after the debtor received his discharge and abandoned the property in question.

DISCHARGE – FRAUDULENT INTENT IMPUTED

***Res-TX One LLC v. Hawk (In re Hawk),* 534 B.R. 697 (Bankr. S.D. Tex. 2015).**

Issue: If one debtor is ineligible for discharge due to fraud, can the intent be imputed to the joint debtor?

Holding: While one debtor will be denied a discharge due to his violation, this denial cannot be imputed to his wife simply because they are husband and wife.

Facts: The Bankruptcy Court found that a debtor was ineligible for discharge when the debtor transferred funds with the actual intent to defraud a creditor. The debtors, husband and wife, filed for Chapter 7 bankruptcy. A creditor filed an objection to discharge because the debtors transferred property with the intent to defraud the creditor. The debtors transferred exempt property to another account under their control so that it would not be garnished. The wife did not have the necessary intent and thus she will receive a discharge.

DISCHARGE – DISCHARGE OF JUDGMENT LIEN DOESN'T AFFECT LIEN RIGHTS
***Thaw v. MD Leslie Schachar*, 620 Fed. Appx. 304; 2015 U.S. App. LEXIS 17385 (5th Cir. September 30, 2015)**
Issue: Did §52.042 of the Texas Property Code cancel and release the judgment lien that Creditor held on Debtors' property?
Holding: No. 5th Circuit affirmed the district court and bankruptcy court's judgment that §52.012 doesn't release a judgment lien from property not established as homestead at the time the judgment lien was established.
Facts: Appellee obtained a judgment lien on appellant's non-homestead property on 11/5/09 and recorded it on 11/11/09. Appellants filed Chapter 7 on 12/2011 and argued that the judgment lien wasn't secured. Appellants had a homestead exemption already on another property and were buying 2 houses at the same time.

DISMISSAL

***Jeffrey Tre Krueger, Appellant v. Michael Torres, Appellee (In re: Jeffrey Krueger),* 812 F. 3d 365, 2016 WL 232014 (5th Cir. Jan. 19, 2016)**. (Jones, J.)
Issue: Whether debtor's behavior before and during his bankruptcy constituted "cause" to dismiss his case under § 707.
Holding: Yes.
Facts: Jeffrey Krueger and Michael Torres were engaged in state court litigation over control of Cru Energy, Inc. The state court twice ordered Krueger to stop transferring funds from Cru's bank account and ultimately prohibited Krueger from calling a shareholders meeting or contacting investors. Krueger formed a new company, Kru, with Cru's investors and business plan. The state court scheduled a hearing to hold Krueger in contempt and Krueger filed chapter 7. After the stay was lifted, the state court held Krueger in contempt twice and put him in jail. Krueger was released by the state appellate court. After his release from jail, Krueger called a meeting of Cru's shareholders. At the meeting Krueger voted his shares and proxy shares, Torres was removed from the board, Krueger was made board chair, and Krueger replaced Torres as president and CEO. In addition, the board fired Cru's attorneys and decided to sue Torres and dismiss Cru's suit against Krueger. Meanwhile, in Krueger's bankruptcy, two Torres controlled companies, one of which was Cru, filed a dischargeability complaint. The second company settled. When Cru fired its attorneys, Torres tried to substitute himself as plaintiff, but he had no personal claims against Krueger so the case was dismissed.
Torres moved to dismiss Krueger's case 11 U.S.C. § 707(a). After discovery and a three day trial, the court dismissed Krueger's bankruptcy. Krueger complains on appeal that he was not afforded due process and that his behavior could not be considered as "cause" for dismissal under § 707(a) because that subsection provides an exclusive list of activities that constitute

cause.

The 5th Circuit rejected each of Kruger's arguments. The 5th Circuit found that Krueger's behavior, including (1) failing to list his officer and director positions in his statement of financial affairs; (2) exercising control over property of the estate by voting his shares; (3) listing a fictitious address in state court and in bankruptcy court; (4) perjuring himself repeatedly; and (5) threatening a witness during the hearing on dismissal of his case by saying "You're next, buddy. I'm going to sue the s___ out of you," were properly considered as cause for dismissal of his case. The 5th Circuit found that the three grounds listed in § 707(a), "unreasonable delay by the debtor that is prejudicial to creditors;" "nonpayment of any fees or charges" required to file a case, and "failure of the debtor in a voluntary case to file" schedules and creditor lists, are illustrative, not exclusive. Courts have broad authority to determine "cause" under § 707(a). "Cause" is any reason cognizable to the equity power and conscience of the court as constituting an abuse of the bankruptcy process. Courts may consider the debtor's entire course of conduct—before, during, and after the filing, including filing petitions that "serve no legitimate bankruptcy purpose," even if the acts or omissions are covered by more specific provisions of the Code.

***In re Hayes*, No. 13-80035, 2015 Bankr. LEXIS 161 (Bankr. S.D. Tex. Jan. 16, 2015).**

Issue: Can a bankruptcy be dismissed for abuse under §707(b)(3)(B) - a totality of the circumstances test?

Holding: Yes.

Facts: The Bankruptcy Court dismissed the Debtor's bankruptcy case under 11 U.S.C. §707(b), finding that granting relief under Chapter 7 would constitute an abuse of its provisions. In this case, the Debtor converted his bankruptcy case from Chapter 13 to Chapter 7 after filing four amended Chapter 13 plans. The Chapter 13 Trustee objected to all four amended plans on the basis that they did not provide for payment of all secured and priority debts. The Debtor's secured debts consisted primarily of a first and second mortgage on the residence he was awarded through his divorce and an improvement loan secured by the residence for construction of a pool and spa. After the Chapter 13 Trustee's fourth objection, the Debtor filed a notice of conversion to Chapter 7. The U.S. Trustee then moved to dismiss the case under §707(b). As a threshold matter, the Bankruptcy Court adopted the view of a majority of courts and determined that §707(b) applies to cases converted from Chapter 13 to Chapter 7. The Bankruptcy Court noted that the plain language of the section was susceptible to either view, but determined that the rationale of those courts applying its terms to converted cases was persuasive.

The Bankruptcy Court determined that the Debtor had not filed his bankruptcy case in bad faith and therefore, under §707(b)(3)(B), considered whether abuse would occur under a totality of the circumstances test. Under this test, the Bankruptcy Court analyzed eleven factors, including the reasonableness of the Debtor's proposed family budget, the Debtor's ability to repay a substantial portion of his debts under a Chapter 13 plan, and whether the Debtor's expenses could be deducted without depriving him of his basic necessities. Some factors weighed against dismissal, the Bankruptcy Court found, such as the accuracy of the Debtor's schedules as a whole and lack of evidence that the Debtor incurred consumer advances and purchases in excess of his ability to repay, other than construction of the Debtor's home and improvements.

The totality of the circumstances, however, weighed in favor of dismissal because the Debtor's proposed family budget provided for payment of more than 55% of the Debtor's take-home pay on his home and utilities. The Debtor's maintenance of a luxury home well above the median-value for the area, and of housing expenses more than triple the IRS local standards, could not be justified where no distribution was being made to creditors. Accordingly, the Bankruptcy Court dismissed the case.

EXEMPTION AND 11 U.S.C. 522(o)

***In re Van Erem,* No. 14-35191, 2015 Bankr. LEXIS 876 (Bankr. S.D. Tex. Mar. 18, 2015).**

Issue: Did pre-bankruptcy planning reflect a fraudulent intent in order to force Debtors to limit their exemption claim in their Texas homestead?

Holding: No. The Bankruptcy Court refused to apply 11 U.S.C. §522(o) to eliminate the Debtors' exemption claim in the equity in their Texas homestead, finding that the Debtors' purchase of the Texas homestead with non-exempt funds was not made with an intent to hinder, delay or defraud.

Facts: Leading up to the bankruptcy case, the Debtor husband quit his job with U.S. Bancorp Investments in New Mexico, and the two parties entered into arbitration regarding the Debtor husband's liability for payback of a $600,000 gross bonus and his claims against the bank for fraudulent inducement. Before making this decision to quit, the Debtor husband obtained employment with Chase Bank in Texas and the Debtors sold their New Mexico home, for no net profit, and purchased a Texas homestead for greater value. The Debtor husband lost the arbitration and began negotiating settlement because he did not have the funds to pay back the full bonus amount. After the Debtors filed bankruptcy, the Chapter 7 Trustee moved to limit the Debtors' exemption claim in their Texas homestead because it had been purchased with an intent to hinder, delay or defraud creditors. The Bankruptcy Court noted that the lifestyle of the Debtors, albeit irresponsible, had been consistent before and during the dispute with U.S. Bancorp Investments and differed from an intent to hinder, delay or defraud. Pre-bankruptcy planning in and of itself, the Bankruptcy Court stated, did not reflect a fraudulent intent. Referencing *Law v. Siegel, 134 S. Ct. 1188 (2014)*, the Bankruptcy Court explained that its analysis for purposes of limiting or obviating the Debtors' exemption claim under §522(o) was not based upon principles of equity or fairness. Instead, the Bankruptcy Court considered the Debtors' intent in purchasing the Texas homestead under eleven badges of fraud. The Bankruptcy Court found that six factors weighed in favor of the Debtors, based on the fact that their purchase of the Texas homestead still left the Debtors with $90,000 in non-exempt assets, the Debtors did not abscond or conceal their move or purchase of the Texas homestead, the difference in value between the two homesteads was not great, and the Texas homestead was not acquired after the threat of a lawsuit but after the Debtor husband obtained a new job in Texas. Five factors weighed in favor of the Chapter 7 Trustee, including concealment of assets as the Debtor husband had not revealed to U.S. Bancorp Investments during settlement discussions a Chase Bank checking, savings, and retirement account opened in the name of the Debtor wife after moving to Texas. The Bankruptcy Court refused to find a fraudulent intent under these circumstances, determining that the factors in favor of the Debtors outweighed those in favor of the Chapter 7 Trustee. As a result, the Debtors were permitted to claim the entirety of their home equity as exempt.

FEE AWARDS

***In re Delta Produce, L.P.*, ___F.3d ___ 2016 WL 945185, Case No. 14-51079 (5th Cir. March, 11, 2016).**

Issue: Whether PACA special counsel could be paid from PACA trust fund assets over objection of PACA trust fund claimant.

Holding: Fifth Circuit affirms District Court's vacating final fee award of special PACA counsel as to objecting party's proportionate share of trust funds set aside under Perishable Agricultural Commodities Act (PACA) for trust fund claimants.

Facts: Bankruptcy Court approved fees of special PACA counsel appointed to collect and distribute PACA assets in 2 interim fee awards and one final award. The fees were to be paid first out of PACA trust fund assets. District Court vacated award ruling that PACA beneficiaries are entitled to full payment before any others, including special PACA counsel, can be paid from PACA Trust assets.

On the jurisdiction issue, Fifth Circuit held that parties consented to bankruptcy court determination. The objecting party, Kingdom Fresh (KF), filed PACA claim in proceeding in which original parties consented to bankruptcy court jurisdiction. When KF filed its claim and did not object to jurisdiction, KF impliedly consented. Fifth Circuit further holds no jurisdiction in District Court to determine appeals from interim fee awards because interim fee awards are not final orders and no leave to appeal was granted and leave to appeal cannot be implied by District Court ruling on merits of dispute.

On merits, Fifth Circuit affirms ruling that PACA trust funds cannot be utilized to pay special PACA counsel fees ahead of trust beneficiaries because clear intent of Congress is that no one is to be paid ahead of trust beneficiaries, including PACA special counsel. Fifth Circuit limits KF's appeal to KF's proportionate share of PACA trust fund because KF only has standing as party aggrieved to object to the fees awarded that would otherwise not be paid to them from PACA trust fund due to bankruptcy court fee award.

***In re McMillan*, 614 Fed.Appx. 206 (5th Cir. July 15, 2015).** (Per curiam.)

Issue: Alleged debtor filed motion for costs under section 303(i).

Holding: Alleged debtor not entitled to award of fees against assignees of default judgment absent adversary proceeding.

Facts: Aigner obtained a default judgment against McMillan. McMillan, Schmidt, and Wafford were embroiled in a business dispute. Schmidt and Wafford and obtained an assignment of Aigner's rights under his default judgment in order to file and control an involuntary petition against McMillan. Aigner filed an involuntary petition against McMillan as the sole petitioner. Schmidt and Wafford did not join the petition, but asserted they had standing in bankruptcy court based on their assignment. The bankruptcy court found that Aigner's assignment violated Rule 1003(a) and dismissed the involuntary petition. The bankruptcy court also found that Schmidt and Wafford were not petitioning creditors because they had not signed the involuntary petition. McMillan moved for costs under section 303(i). The bankruptcy court denied McMillan an award of fees and costs against Schmidt and Wafford. The district court dismissed McMillan's appeal without reaching the merits, concluding that, because Schmidt and Wafford were not "petitioning creditors," a motion under section 303(i) was insufficient to exercise jurisdiction over them. Instead, an adversary proceeding was required. The Fifth Circuit held that due process requires an adversary proceeding with service of the complaint and summonses under Bankruptcy Rule 7004(a)(1). The majority also agreed that Schmidt and Wafford were not "petitioning creditors" under 303(b) or (c), because they did not sign the original petition or join the petition after the initial filing. Judge Dennis, dissenting, argued that an adversary proceeding should not be required to exercise jurisdiction over two parties who essentially sought the benefits of the bankruptcy forum ,but declined to sign an actual bankruptcy petition, comparing such acts to willful violations of the automatic stay, which bankruptcy courts routinely sanction under section 362(k) of the Bankruptcy Code, without requiring adversary proceedings.

FINALITY OF ORDER

***Bullard v. Blue Hills Bank*, 135 S. Ct. 1686 (2015).**

Issue: The question presented is whether such an order denying confirmation is a "final" order that the debtor can immediately appeal.

Holding: We hold that it is not.

Facts: Chapter 13 debtor sought confirmation of plan to bifurcate debtor's home mortgage into a secured claim for the current value of the house, for which the lender would receive payment in full through the Debtor's regular mortgage payments extending beyond the term of the plan, and an unsecured claim for the balance of the claim, which would receive as much as the debtor's income would allow over the term of the plan. Lender objected. Bankruptcy court denied confirmation. Bankruptcy Appellate Panel noted that the order denying confirmation was not a final order, but exercised its discretion to review the order anyway and affirmed. On appeal to 1st Circuit, the court dismissed for lack of jurisdiction because the order was not final and the BAP did not certify the appeal under 28 U.S.C. § 158(d)(2). The 1st Circuit concluded that an order denying confirmation is not a final order so long as the Debtor remains free to propose another plan. The Supreme Court characterized the nature of bankruptcy proceedings as an aggregation of individual controversies. At issue for finality purposes is whether each proposed plan presented for confirmation should be considered a discrete proceeding concluded with the order granting or denying confirmation or whether the overall plan process is the proceeding to be considered. The Supreme Court concluded that the relevant proceeding is the overall plan process primarily because the status quo is altered and the rights and obligations of parties are restructured only when a plan is confirmed or a case is dismissed.

JUDICIAL ESTOPPEL

***Long v. GSDMIdea City, L.L.C.,* 798 F.3d 265 (5th Cir. 2015).**

Issue: Whether debtor had a financial motive to conceal his post-confirmation claims from the bankruptcy court or instead acted inadvertently for application of judicial estoppel.

Holding: The district court did not err in finding that debtor had a financial motive to conceal his claims, therefore application of judicial estoppel was proper.

Facts: Chapter 13 debtor confirmed a 100% plan. Roughly three years into the five-year plan, the debtor filed a whistleblower lawsuit alleging that his employer had defrauded the United States government on contracts. Debtor did not amend his bankruptcy schedules or otherwise disclose his interest in the lawsuit. Shortly before trial, the defendant discovered that debtor had failed to disclose the lawsuit in his bankruptcy case and move to dismiss based on judicial estoppel. Focusing on whether the debtor had any motive to conceal the lawsuit, the circuit court held that the that the debtor was not required to pay interest on his debts, was given the full five years to repay the principal on his debts, and had $4,504.91 in unsecured claims discharged constituted sufficient motive to justify judicially estopping the debtor from prosecuting the whistleblower lawsuit.

***Allen v. C&H Distributors, LLC*, 813 F.3d 566(5th Cir. Dec. 23, 2015).**
Issue: Did the district court abuse its discretion when it dismissed claim based on judicial estoppel?
Holding: No. The 5th Circuit analyzed requirements of judicial estoppel and held that plaintiffs: 1) had an affirmative duty to disclose their personal injury claim to the bankruptcy court and did not do so; 2) failed to disclose their personal injury claim which led the court to accept the inconsistent position that there was no such claim; and 3) could not have shown that their failure to disclose their suit was inadvertent because they knew of the facts underlying the claim during the pendency of the bankruptcy proceedings, and plaintiffs' motivation for concealment was the potential financial benefit resulting from the nondisclosure.
Facts: The Allens filed for bankruptcy on 7/14/09 and confirmed their plan on 9/29/09. They subsequently amended their plan 3 times on 1/11/11, 12/19/11 and 1/17/13. The Bankruptcy case was closed on 4/21/14 without a discharge because debtors failed to file their financial management certificate. On 10/21/10, (after BK was filed), debtors filed an unrelated personal injury lawsuit against C&H Distributors for an incident that occurred on 10/21/09 (which was after confirmation of the plan, but before all 3 amendments of the plan). Defendants contended that the personal injury claim was barred by judicial estoppel because the Allens had never disclosed the suit to the bankruptcy court. The District Court dismissed the Allens' lawsuit finding that judicial estoppel barred the Allens from pursuing their personal injury claim. On appeal, the 5th Circuit affirmed.

JURISDICTION

Wellness International Network, Ltd., et al., Petitioners, v. Richard Sharif, 135 S.Ct. 1932 (May 26, 2015) (6-3 decision)
Issue: Whether Article III allows the bankruptcy judges to adjudicate certain claims with the parties' consent.
Holding: Supreme Court rules that a party can waive objection to having Article I court determine *Stern* type claims, but waiver must be "knowing and voluntary." "Article III is not violated when the parties knowingly and voluntarily consent to adjudication by a bankruptcy judge." The inquiry is "whether the litigant or counsel was made aware of the need for consent and the right to refuse it, and still voluntarily agreed to try the case before the non-Article III adjudication" Id at 1948. Consent can be express or implied. Waiver can be based on actions, rather than words. Bankruptcy courts may adjudicate *Stern* claims with the parties' knowing

and voluntary consent.
Facts: Judgment creditor sued Debtor for, *inter alia*, alter ego. After ruling in favor of creditor, *Stern* was decided. Issue raised was whether the bankruptcy court had jurisdiction to constitutionally determine the alter ego claim and whether Defendant had waived *Stern* objection by failing to raise in court below.

***NSJS Ltd. P'ship v. Waco Town Square Partners, LP (In re Waco Town Square Partners, LP)*, 536 B.R. 756 (S.D. Tex. Houston Division September 11, 2015). (**Atlas, J.)
Issue: Whether the bankruptcy court had jurisdiction to order a non-debtor to dismiss its state court lawsuit against non-debtors.
Holding: On appeal, the district court held that the bankruptcy court did not have jurisdiction to order the dismissal of a lawsuit that involves only non-derivative claims by a non-debtor against a non-debtor.
Facts: NSJS sued multiple defendants, including WTSP II, in state court over a failed investment. WTSP and WTSP II filed Chapter 11 in the Southern District of Texas. WTSP II removed NSJS's state court lawsuit to the bankruptcy court in the Western District of Texas. Judge Gargotta, in the Western District, ordered the lawsuit remanded to state court, but WTSP II sought reconsideration claiming that NSJS's lawsuit involved derivative claims that were property of the bankruptcy estate. Meanwhile, debtors sought confirmation of a plan of reorganization in Houston. The plan required dismissal of all lawsuits. Seeking to preserve its claims against non-debtors in its state court lawsuit, NSJS objected to debtors' plan and the order confirming the plan included language to preserve NSJS' lawsuit, but also required NSJS to amend its pleadings to remove any derivative claims in the removed lawsuit. If NSJS failed to amend its pleadings within 45 days, "all claims contained in the NSJS Lawsuit shall be deemed [derivative claims] and must be immediately dismissed with prejudice in accordance with Article 13.9 of the Plan." Fifteen days after entry of the confirmation order, Judge Gargotta found that NSJS's claims in the lawsuit were not derivative, denied reconsideration of his order of remand and the case was sent to state court. Despite Judge Gargotta's order of remand and findings, upon expiration of the 45 day deadline, WTSP II's counsel demanded that NSJS dismiss its state court lawsuit because it had not amended its pleadings. To placate counsel, NSJS amended its pleadings. Nevertheless, debtors sought to hold NSJS in contempt of the order confirming the plan and the bankruptcy court ordered NSJS to dismiss its state court lawsuit. NSJS appealed that order and the district court remanded the case to the bankruptcy court to further consider its order requiring NSJS to dismiss its lawsuit. The bankruptcy court again ordered the lawsuit dismissed and found that NSJS could not challenge jurisdiction because it had not appealed the confirmation order. On appeal, the district court held that NSJS did not waive its right to challenge the bankruptcy court's jurisdiction by not appealing the order confirming the plan because NSJS was not presented with an appealable adverse ruling until debtors sought to hold it in contempt and sought dismissal of its lawsuit. The district court held that NSJS did not consent to the bankruptcy court's jurisdiction to order dismissal of the lawsuit under *Wellness Int'l Network, Ltd. v. Sharif*, 135 S. Ct. 1932 (2015) because the key inquiry is whether the litigant or counsel was made aware of the need for consent and the right to refuse it, and still voluntarily consents. Consenting to the order confirming plan was not consent to the bankruptcy court's order requiring NSJS to dismiss its state court lawsuit which involved only

non-derivative claims by a non-debtor against non-debtors. Further, the confirmation order required only dismissal of claims against the debtors, and at the time the bankruptcy court ordered NSJS to dismiss its lawsuit that lawsuit did not contain any claims against the debtors. The district court also found the bankruptcy court erred in finding that NSJS did not demonstrate excusable neglect and did not rely on Judge Gargotta's order in failing to amend its complaint.

***Collins v. Sidharthan (In re KSRP, Ltd.)*, 804 F.3d 263 (5th Cir. December 15, 2015)**. (Haynes, J.)
Issue: Whether bankruptcy court had "related to" jurisdiction over alleged cross claims for indemnity and contribution in removed state court action.
Holding: Bankruptcy court had "related to" jurisdiction over removed lawsuit because jurisdiction is examined separately from the merits of the case and the merits of the claim is not ruled upon at the jurisdictional stage.
Facts: Collins had a contract and power of attorney signed by Sidharthan on behalf of KSRP to represent KSRP in making storm damage claims against its insurers. Collins partially performed under the contract, but was prevented from completing performance by Sidharthan. KSRP did not pay Collins any fees provided for in the contract. Collins sued Sidharthan and KSRP in state court for breach of contract and other causes of action. Collins non-suited KSRP and after it was dismissed from the case, KSRP filed chapter 11. The day KSRP filed bankruptcy, Sidharthan removed the state court case to bankruptcy court on the basis of "related to" jurisdiction.
One year after removal of the state court case, the bankruptcy court held a two day trial determining the merits of Collins' and Sidharthan's causes of action. The bankruptcy court issued a report and recommendation adopted by the district court, which awarded Collins $1.00 in damages against Sidharthan for defamation and dismissed all other claims by both parties. Collins appealed, alleging the lower courts did not have "related to" jurisdiction over his lawsuit because Sidharthan's claims had no merit whatsoever.
Under the 5th Circuit's broad "conceivable effect" test, "related to" jurisdiction includes any litigation where the outcome could alter, positively or negatively, the debtor's rights, liabilities, options, or freedom of action or could influence the administration of the bankrupt estate. The 5th Circuit held that Collins' contention that Sidharthan's claim for indemnity from the debtor had no basis and was completely meritless, was an argument that improperly conflated the analysis of whether jurisdiction exists with the merits of the case. Finding the absence in Sidharthan's state court pleadings of any claim for indemnity as immaterial to a determination of "related to" jurisdiction, the 5th Circuit held that the "well-pleaded complaint" rule, otherwise governing a determination of federal court jurisdiction, is inapplicable to a determination of the existence of "related to" jurisdiction. "Related to" jurisdiction is determined instead by the removed state court pleadings which "need only raise the facts necessary for a court to determine that a suit between third parties may conceivably have an effect on a bankruptcy estate." The 5th Circuit found that Collins' allegations provided a sufficient basis to find that "related to" jurisdiction exists. Specifically, the 5th Circuit identified the following as establishing "related to" jurisdiction, "[Collins'] factual allegations about Sidharthan's role at KSRP, Sidharthan's role in signing the contract, and Sidharthan's actions in allegedly converting insurance proceeds that should have gone to either KSRP or Collins." Based on Collins' "factual allegations," the 5th Circuit found that "Sidharthan's indemnity claim on

removal was not immaterial, made solely for the purpose of obtaining jurisdiction, or wholly insubstantial and frivolous."

***In re Collazo*, ___F. 3d ___, 2016 WL 1358459 (7th Cir. April 5, 2016).**

Issue: Whether bankruptcy court, post-*Stern,* has constitutional and statutory authority to enter a money judgment in a case governed by state law that arises in the context of a dischargeability proceeding.

Holding: The bankruptcy court may: (1) decline to award money damages and remit the case to state court because 28 U.S.C. §1334(c)(1) does not prohibit a district court from abstaining from hearing a particular proceeding arising in, under, or related to a case under title 11; (2) determine whether the parties consent to bankruptcy court adjudication of the claim; or (3) submit proposed findings of fact and conclusions of law to the district court.

***COMPARE* – *In re Morrison*, 555 F.3d 473 (5th Cir. 2009)** (Fifth Circuit, pre-*Stern,* holds that bankruptcy court has jurisdiction to enter money judgment in dischargeability proceeding.)

11 U.S.C. §506

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

Issue: These consolidated cases present the question whether a debtor in a Chapter 7 bankruptcy proceeding may void a junior mortgage under § 506(d) when the debt owed on a senior mortgage exceeds the present value of the property.

Holding: We hold that a debtor may not, and we therefore reverse the judgments of the Court of Appeal.

Facts: Chapter 7 debtors own homes encumbered by senior and junior mortgage liens. The value of each home is less than the amount owed on the senior mortgage. Debtors seek to void the junior mortgages under §506. Noting that it had previously held that §506 did not entitle debtors to strip down underwater liens, the Court rejected the debtors argument that such ruling should only apply where the liens were partially underwater and instead held that a Chapter 7 debtor may not void a junior mortgage lien even when the debt owed on the senior lien exceeds the current value of the collateral.

***In re Domistyle,* 811 F. 3d. 691 (5th Cir. Dec. 29, 2015).**

Issue: Should the bankruptcy estate or secured creditor pay real property maintenance expenses incurred while Trustee was trying to sell the property?

Holding: Expenses directly incurred to maintain and preserve property while trustee sought sale of property satisfied 506(c) standard so surcharge of secured creditor's collateral was proper.

Facts: Plan confirmed which allowed liquidating trustee time to sell property, which all parties in case believed had substantial equity. Sale did not materialize. Trustee abandoned property and sought to surcharge property under 506(c) for all expenses incurred to maintain property since beginning of case. This issue had been expressly reserved in the confirmed Plan. Secured party objected to surcharge. Parties settled in part as to certain expenses as of a date certain but the issue was tried as to expenses incurred before that date. Court granted surcharge in form of priming lien on property for the bankruptcy estate. Secured creditor appealed.

Reasoning: Section 506(c) provides narrow and extraordinary exceptions to general rule that administrative expenses cannot be charged to secured creditors. The three part test of Delta

Towers requires Trustee to prove (1) the expenditures were necessary; (2) the amounts expended were reasonable and (3) the creditor benefitted from the expenses. *In re Delta Towers, Ltd., 924 F.2d 74, 76 (5th Cir. 1991)*. Court rejects argument that secured creditor did not benefit from the expenses because the expenses were incurred primarily for the benefit of the secured creditor because all expenses were incurred to preserve property. Court also rejects that Trustee failed to quantify the extent of the benefit because repairing roof, mowing lawn, etc. all benefitted the property.

ELECTION UNDER §1111(b)

***Baker Hughes Oilfield Ops. v. Morton (In re R.L. Adkins Corp.)*, 784 F.3d 978 (5th Cir. 2015)** (Reavley, J.)

Issue: Whether the Bankruptcy Court erred in not allowing Baker Hughes to elect under §1111(b) after confirmation and the sale of assets.

Holding: The Fifth Circuit affirmed because Baker Hughes did not timely submit a credit bid to the trustee before the collateral was sold. The 5th Circuit further agreed that there is no right under the Bankruptcy Code to make an § 1111(b) election when the assets are being sold pursuant to a plan as they were in this case.

Facts: Baker Hughes held mechanics' lien rights against certain mineral leases and one well owned by the debtor. The debtor listed Baker Hughes' total claim at $321,000, but its secured claim at only $39,000. Under the plan, the liquidating trustee was to sell all leases and wells free and clear of all existing liens, claims and encumbrances. Baker Hughes did not object to the plan or attempt to credit bid on the assets sold by the liquidation trustee.

After confirmation and the sale of the assets, Baker Hughes argued that it never had a meaningful credit bid right and, thus, should be allowed to elect under § 1111(b) to have its entire claim treated as secured. The bankruptcy court rejected that argument because: (a) Baker Hughes never attempted to make a credit bid prior to the sale; and (b) section § 1111(a)(2)(B)(ii) provides that no election can be made if the collateral is to be sold under a plan.

Concurring opinion: Judge Jones noted that the majority decision perhaps overbroadly reads § 1111(b)(1)(B)(ii) by assuming that all plans proposing to sell collateral adequately protect secured creditors' interests so that § 1111(b) elections are unnecessary. "The majority so holds only because the reorganization plan and confirmation order both perfunctorily incant § 363 of the Bankruptcy Code, and the Supreme Court holds that a secured creditor has a statutory right to credit bid against a proposed sale of its collateral in order to confirm a 'cramdown' plan."

In reality, however, Judge Jones explained that many bankruptcy sales are structured in a manner to make it virtually impossible, if not highly impractical, for undersecured creditors to make meaningful credit bids. Just as a third-party lien holder in a real property foreclosure, Baker Hughes here would not likely make a credit bid where it would have to pay cash to the other lien holders to take a larger piece of property free and clear of the other liens. Nevertheless, without changing the outcome of this case (because Baker Hughes clearly waived its right to credit bid or make an election), Judge Jones suggested three points of consideration to ensure protection of secured creditors' statutory rights: (1) any timely election under § 1111(b) must be resolved on or before confirmation; (2) if the proposed terms of sale under the plan are found to be "wanting in protection of credit bid rights," a secured creditor should be allowed to make an election under § 1111(b); and (3) it is highly recommended, albeit not required, for plans proposing to sell collateral to include transparent bid procedures to "test the market for valuations as well as secured creditors' sincerity about credit bidding."

Houston SportsNet Fin. v. Houston Reg'l Sports Network (In re Houston Reg'l Sports Network), Civil Action H-14-3133 (S.D. Tex. August 20, 2015.)

Issue: Whether bankruptcy court erred in valuing Comcast's intangible collateral as of the petition date at zero instead of valuing the collateral on the effective date of the plan at $54.3 million for purposes of treatment of its $100 million loan under the plan.

Holding: Bankruptcy Court properly valued collateral as of petition date because secured creditor is entitled to be paid the value as of the petition date. Further, the bankruptcy court did not err in valuing the collateral at zero because of the expenses charged against the value of the collateral between the filing date and the effective date of the plan.

Facts: EDITUnder chapter eleven, to protect a creditor from the court's undervaluing its collateral, the code allows a creditor to elect under 1111(b) to not bifurcate its claim. Under 1111(b) a creditor may elect to have its entire claim treated as secured unless its collateral is being sold or has inconsequential value. Comcast elected to treat its claim as fully secured, but the bankruptcy court disallowed the election finding that Comcast's collateral was worth nothing on the petition date. The bankruptcy court found that on the effective date of the plan, Comcast's collateral was worth $54.3 million. Comcast argues that the proper date to determine the value of its collateral was the effective date of the plan.

The Bankruptcy Code does not specify when the collateral must be valued.

PREFERENCES

***Compton v. Mustang Eng'g Ltd. (In re MPF Holdings US LLC)*, Civil Action H-13-1964, (S.D. Tex., August 29, 2015).**

Issue: Whether the trustee can avoid as preferences pre-petition payments debtor made on a contract when the contract was assigned in the plan of reorganization to a third party.

Holding: Trustee cannot avoid as preference payments made on a lease that is assumed and assigned in bankruptcy, as under the facts of this case, the assumption and assignment constitutes a novation of the earlier obligation.

Facts: A trustee of a litigation trust created by debtor's plan, sued Mustang Engineering Ltd. for money debtor paid on a pre-petition contract to design a ship for oil exploration. As part of the reorganization, Mustang's contract with MPF was acquired by Dalian. The exchange was essentially that Dalian paid cash for MPF's rights in the Mustang contract and the partially built ship. Another part of the plan created a litigation trust. The trustee sued Mustang to recover as preferences payments by MPF to Mustang before the bankruptcy. The bankruptcy court dismissed the suit because assumption of Mustang's contract barred this suit and the preference claim against Mustang was released by the reorganization. The trustee on appeal argued that the contract was not assumed and assigned under the bankruptcy rules. The district court found that the contract was assumed and assigned under the plan, the plan recognized the novation of the contract as a settlement of all claims under the contract, and the plan says that settled and released claims are excluded from those retained by the litigation trust. Bankruptcy court's dismissal affirmed.

PROPERTY OF THE ESTATE

***Cantu v. Schmidt (In re Cantu),* 784 F.3d 253 (5th Cir. 2015).**

Issue: Whether claims against debtor's attorney belonged to the estate or the debtors.

Holding: The resolution of the question depends on timing. If the causes of action against Stone arose before conversion of the Cantus' bankruptcy to a chapter 7, the settlement belongs to the estate; otherwise, the Cantus own the proceeds. Finding that the estate suffered injuries from Stone's representation that would have allowed it to assert claims against her prior to conversion, the 5th Circuit affirmed.

Facts: After Chapter 11 case was converted, bankruptcy court denied debtors their discharge for making omissions, misstatements, and unnecessary controversies in their case. Debtors sued their bankruptcy attorney for malpractice and eventually settled. Applying the accrual approach, the 5th Circuit held that the widespread misconduct alleged against the attorney had resulted in numerous injuries to the bankruptcy estate during the pendency of the Chapter 11 case and caused the claim to accrue pre-conversion and therefore it belongs to the bankruptcy estate.

SANCTIONS

***In re Skyport Global Communication, Incorporated*, --- Fed.Appx. ---- 2016 WL 1042526, Case No. 15-20246 (5th Cir. March 14, 2016)(unpublished opinion).**

Issue: Whether bankruptcy court had authority to sanction minority shareholders for filing post-confirmation lawsuit that contravened order confirming plan.

Holding: Fifth Circuit affirms sanctions award in form of attorney's fees ruling Bankruptcy Court has inherent authority to police practitioners who act in direct contravention of its orders. Minority shareholders of debtor filed state court action post confirmation which Bankruptcy Court determined contravened plan confirmation order because derivative claims were asserted which were enjoined under confirmed Plan. Fifth Circuit rules Bankruptcy Court acted properly and within its discretion in imposing sanctions.

***In re White Robinson*, 777 F.3d 792 (5th Cir. 2015)** (per curiam).

Issue: Authority of the bankruptcy court to issue contempt sanctions.

Holding: 5th Circuit held that the sanctions were well within the bankruptcy court's power, and that exercising such jurisdiction and authority was necessary for the bankruptcy court to coerce the attorney's compliance with its prior orders.

Facts: This was the second time for the Fifth Circuit to consider sanctions issued against an attorney in connection with discovery abuses and frivolous pleadings. In the first decision from 2014, the Fifth Circuit affirmed the lower courts' sanctions, and the Supreme Court denied certiorari. This opinion addressed the events that occurred in the interim. While the sanctions were up on appeal, the attorney failed to pay them, despite failing to post bond or obtain a stay pending appeal. In fact, the district court had denied the attorney's request to stay the orders pending appeal. Thus, the bankruptcy court entered a second order of contempt and issued more sanctions against the attorney, which she appealed, as the Fifth Circuit noted "predictably."

In this appeal, the attorney argued that the second contempt order could not stand because (1) the bankruptcy court lacked jurisdiction to hold her in contempt; (2) the sanctions violated the prohibitions on imprisonment for a debt; and (3) the sanctions were an abuse of the bankruptcy court's discretion. The Fifth Circuit rejected all three arguments. In affirming the bankruptcy court's second contempt order, the 5th Circuit held that the sanctions were well within the bankruptcy court's power, and that exercising such jurisdiction and authority was necessary for the bankruptcy court to coerce the attorney's compliance with its prior orders. The 5th Circuit also emphasized that the sanctions did not violate the Texas constitution's prohibition on debtor imprisonment because, even assuming arguendo that the sanctions could be considered a "debt," the sanctions order did not impose (or even threaten) imprisonment and, thus, was not a violation of 28 U.S.C. § 2007, which prohibits debtor jails. The Court found counsel's contention that she was threatened with imprisonment as disingenuous.

SEALING DOCUMENTS

Mujtaba Ali Khan v. Xenon Health, LLC (In Re Xenon Anesthesia of Texas, PLLC),
Case No. 13-37697-H3-7, Adv. No. 16-3010. Judge Paul (February 3, 2016).

Issue: Whether documents filed with court should be sealed.

Holding: Court rules none of the requirements of Bankruptcy Code or Rules required sealing of documents in this case.

Facts: Party filed document under seal. Court found it should not have been filed under seal. Court describes application of rules. Fed. R. Bankr. Rule 7026 and Fed. R. Civ. P. Rule 26(c) provides that the court may, for good cause, enter an order sealing a deposition or requiring parties to file documents in sealed envelopes. Bankruptcy Code §107 provides that a paper filed in a case is a public record open to examination by an entity at reasonable times without charge. Bankruptcy Rule 9018 provides that the court may make any order which justice requires to protect among other things, trade secrets or other confidential information or to protect one from scandalous or defamatory matters contained in any paper filed in a case under the Code. None of these matters is at issue in this case, therefore sealing is denied.

SOCIAL MEDIA ACCOUNTS

***In re CLTI, LLC*, 528 B.R. 359 (Bankr. S.D. Tex. 2015).** (Bohm, J.)

Issue: Can the former owner of the debtor be compelled to turnover social media account credentials following confirmation of a plan that changed ownership and control of the Debtor?

Holding: Social media accounts belong to the reorganized debtor and must be turned over under the Plan.

Facts: Pre-petition, the debtor was owned jointly by two individuals: Alcede and Wilson. Alcede was the majority shareholder and managed the day-to-day business. But through the confirmed bankruptcy plan, under which Wilson infused $1.5 million of new cash, Wilson ousted Alcede from management and cancelled his ownership interests. This matter arose when the reorganized debtor (through Wilson, as the plan agent) sought to compel Alcede to turn over the debtor's FaceBook, Twitter and other social media account credentials. The issue presented was whether the social media accounts belonged to the debtor (and, by extension under the plan, the reorganized debtor), or to Alcede, personally. Regarding Facebook, the

Court recognized the Facebook offers accounts for both individuals and businesses. In this case, Alcede had both his personal profile, as well as a separate page for the debtor's business. Similarly, Alcede had created a Twitter handle for the debtor's business, which he used to generate "followers" for the debtor's business. While there were no Texas decisions on point, Judge Bohm looked to recent New York and Florida decisions comparing social media accounts to property interests. Judge Bohm noted that the social media accounts were like property interest of the debtor's, particularly in light of the subscriber lists of current, past and potential future customers. The Court also distinguished Alcede's personal profiles from the business profiles generated on behalf of the business, and added that the fact that the business page was created in the name of the debtor (even though Alcede changed it immediately before or following confirmation) "places it squarely in the category of property of the Debtor's estate (and now property of the reorganized Debtor) and not personal property of Mr. Alcede." Judge Bohm continued by considering what interest, if any, Alcede had in the business social media accounts, and concluded that such interests were limited to "an interest in professional goodwill." To the extent Alcede had created his own personal goodwill through the debtor's social media accounts, the Court concluded that Alcede was not precluded from establishing his own new accounts and continuing the goodwill under those newly created accounts. However, the Court ordered Alcede to turn over control of the accounts to Wilson (as the plan agent for the reorganized debtor) and stop posting further statements on the site that could harm the company's reputation. The building, from selling tickets in a disputed area near the building pending the landlord's appeal of an unfavorable order, despite the clear harm it would suffer to its reputation and goodwill from the debtor's ongoing ticket sales. In support of this decision, the court explained that the landlord failed to demonstrate its likelihood of success on the merits of the appeal, nor could it show the absence of harm to the debtor if an injunction was issued.

STANDING

***Rossco Holdings, Inc. v. McConnell*, 613 Fed. Appx. 302 (5th Cir. 2015).** (per curiam)

Issue: Can Debtors pursue claims not listed in their confirmed chapter 11 plan?

Holding: California debtors lacked standing to pursue Texas defendants under their confirmed plans, applying Fifth Circuit (not Ninth Circuit) precedent.

Facts: The plaintiff appellants attempted to pursue negligent misrepresentation and malpractice claims against their Texas attorneys in connection with a bankruptcy case initially filed in the Western District of Texas. In this decision, the 5th Circuit concluded that the plaintiffs failed to "specifically and unequivocally" reserve those claims in their bankruptcy plans and, thus, lacked standing to prosecute the malpractice claims. Plaintiffs Leonard Ross and his trust were guarantors of commercial debts relating to certain hotel properties owned by Rossco Holdings. When the lender posted the hotel properties for foreclosure, Rossco filed bankruptcy in the Western District of Texas. One of Ross's goals in the bankruptcy was to revive his right to challenge the deficiency claims under his guarantees, a right he and his trust had waived. In the Texas bankruptcy case, the defendants (representing Ross and his trust) negotiated an agreed order, which Ross believed gave him the right to challenge the lender's deficiency claims. Ross and his trust filed their own chapter 11 cases in California, and Rossco's chapter 11 case was transferred to California to be administered together. In the meantime, the lenders foreclosed on the hotel properties and asserted deficiency claims in Ross and his trust's bankruptcy cases. Ross objected to the deficiency claims against himself and his trust, but ultimately lost on summary judgment with the California bankruptcy court ruling that the agreed order in Rossco's Texas bankruptcy case did not revive Ross's right to challenge the deficiency, as Ross had believed. Thus, the lender ended up with substantial deficiency claims against Ross and his trust. Ross, his trust and Rossco then confirmed chapter 11 plans in their respective cases, but none of the plans reserved or even mentioned potential claims against the defendants for potential malpractice claims. Thus, when Ross and his trust sued the defendants in Texas federal district court, the defendants moved to dismiss for lack of standing, which the district court granted. This appeal followed. In affirming dismissal, the Fifth Circuit applied United Operating and its progeny to conclude that the plans failed to specifically and unequivocally reserve claims against the defendants for malpractice. Ross tried to argue that less stringent Ninth Circuit law should apply because his bankruptcy plans were confirmed in California, but the Fifth Circuit rejected that argument because Ross failed to raise it before the district court. And, the Fifth Circuit explained that its refusal to apply the "choice of law" argument did not constitute manifest injustice because the proper "choice of law" was not plain or obvious, but merely debatable. Thus, because Ross failed to raise the argument in the first instance, the Fifth Circuit applied its own precedent and concluded that the district court properly dismissed the lawsuit for lack of standing.

***In re Mandel*, No. 15-40864 (5th Cir. March 07, 2016).** (Per Curiam).
Issue: Whether a chapter 7 debtor has standing to appeal an order allowing claims against his bankruptcy estate.
Holding: Mandel is a "person aggrieved" by the bankruptcy court's order and therefore has standing.
Facts: Mandel was involved in state court litigation concerning a company called White Nile Software, Inc. The state court appointed Rosa Orenstein as receiver for the company in the litigation; Orenstein hired the law firm Mastrogiovanni Schorsch & Mersky. The parties agreed to split Orenstein's and MSM's costs. Mandel filed a Chapter 11. Orenstein and MSM filed claims against Mandel's estate for their compensation and filed a discharge and dischargeability complaint against Mandel. The bankruptcy court allowed the claims and Mandel appealed to district court. The bankruptcy court appointed a Chapter 11 trustee. The parties moved to abate the appeal to allow the chapter 11 trustee to decide whether he would pursue it. The trustee decided not to pursue the appeal. Mandel's bankruptcy was converted to Chapter 7 and the Chapter 11 trustee became the Chapter 7 trustee. The district court dismissed the Claim Allowance Appeal as moot, finding that Mandel did not have a sufficient interest in the Claim Allowance Order to establish standing. Mandel timely appealed. At the time of Mandel's appeal to the 5th Circuit, the discharge/dischargeability complaint had not been tried.
The precise issue is whether Mandel has standing to pursue his appeal given that: (1) the debt at issue in the Claim Allowance Order may not be discharged, thus exposing him to personal liability for the balance; and (2) the bankruptcy court has yet to rule on whether the relevant debt is dischargeable. The 5th Circuit held that Mandel has standing for two reasons. First, a successful appeal of the Claim Allowance Order by Mandel will have a dispositive impact on the bankruptcy court's adjudication of the Discharge Complaint because if the district court sides

with Mandel on the merits of his appeal, there will be no claim to find non-dischargeable. Second, the Claim Allowance Order functions as an adjudication of Appellees' claim against Mandel. Absent the stay in the bankruptcy proceedings, the Appellees could march straight into court with the Claim Allowance Order in hand and pursue their claim directly against him individually. Courts have held that challenges to non-dischargeable debt are not moot precisely because of the possibility of future proceedings directly against the debtor. Although the debt may be discharged in the future, and Mandel's appeal becomes moot at that time does not impact Mandel's standing at this moment. Accordingly, we hold that Mandel is a "person aggrieved" by the Claim Allowance Order.

***In re Fortune Nat'l Res. Corp. v United States DOI, et al,* 806 F.3d 363 (5th Cir. Nov. 19, 2015).**
Issue: Whether a party to a Joint Operating Agreement with debtor had standing to appeal an order authorizing the sale of certain of Debtor's assets to a third party purchaser.
Holding: Fifth Circuit affirmed the district court's determination that Fortune did not have standing to appeal the order which authorized the sale of certain of the Debtor's assets to a third party purchaser No standing because Fortune failed to present sufficient evidence to show that Fortune was directly and adversely affected by the order of the Bankruptcy Court..
Facts: Arising out of the ATP Oil and Gas bankruptcy case, Bennu Oil and Gas, LLC. purchased certain assets of the Debtor which did not include any of Fortune's properties. Fortune was a party to a JOA with ATP whereby ATP was required to perform decommissioning of operations on certain properties. Fortune wanted to obtain some of the sales proceeds to be allocated to decommissioning of its wells. After overruling Fortune's objection, District Court dismissed appeal of the sale order for lack of standing holding that Fortune could not prove it was entitled to any of the sales proceeds. Because of this, approval of the sale order did not affect Fortune and Fortune was in the same position it would have been, absent sale. Court rejected Fortune's argument that the sale order violated substantive bankruptcy law because first Fortune was required to prove its standing, which it could not.

***Buescher v. First United Bank and Trust (In re Buescher)*, 783 F.3d 302 (5th Cir. 2015).**
Issue: Whether creditor of husband had standing to object to wife's discharge.
Holding: Texas is a community property state, and under Texas law, First United has an in rem claim against any community property that Dean jointly holds with Sherry. Because First United could satisfy its claim against Dean through an in rem suit against Sherry, First United is Sherry's creditor under § 727(c)(1).
2nd Issue: Could First United prove the Bueschers failed to keep financial records without personally seeking discovery from them?
Holding: First United was not required to personally seek discovery from the Bueschers in order to show that they failed to keep financial records under § 727(a)(3).
Facts: Husband and wife filed joint Chapter 7 bankruptcy petition. Bank filed an adversary complaint seeking to deny discharge to both debtors under §727(a)(2)-(5). Debtors moved to dismiss for failure to timely serve process; wife challenged Bank's standing to object to her discharge on the grounds that only the husband was personally liable to the bank. The court held that Texas community property law meant that the Bank could have sought repayment in Texas court through an in rem suit against the wife and therefore had standing to object to the

wife's discharge even though she was not personally liable to the bank. The court also held that the debtors could not complain that the bankruptcy court had granted the bank additional time to serve the complaint because the debtors had not updated their address and had purposefully avoided service. Finally, the court affirmed the ruling that the debtors had failed to keep financial records, noting that the trustee was on record stating that the information provided by the debtors had made it impossible to trace various proceeds from pre-petition sales of property and liquidation of IRAs.

***In re Demolition and Asset Recovery, LLC*, 2016 Bankr. LEXIS 381 (Bankr. S.D. Tex Feb. 5, 2016).**
Issue: Is a Defendant in state litigation considered a party in interest with authority to seek the reopening of a confirmed Chapter 11 case due to failure to properly reserve the cause of action being pursued against the Defendant in the state court litigation?
Holding: Court denies motion to reopen chapter 11 case post-confirmation because motion was filed by defendant who, for purpose of interpreting confirmed plan, was not a creditor in Ch 11 case for lack of standing. Court holds that non-creditor defendants are not protected by United Operating and Texas Wyoming holdings that claims are barred if not reserved in plan with proper language. Court holds that party in interest in reopening inquiry is narrowly construed to mean debtor, creditor or trustees. Court also analogizes to cases that hold that a defendant in litigation with the Debtor lacks standing to object to case reopening for the purpose of scheduling an undisclosed cause of action.
Facts: Defendant in state litigation sought to reopen Ch 11 case to have court interpret plan as not having properly reserved the post confirmation claim in its confirmed Plan asserted by the reorganized debtor. The Court reasoned that even if defendant fit under section 1109(b) of party in interest, that defendant must still show constitutional standing, that he is a party aggrieved. Because Defendants could not show actual or imminent injury, no standing.

SUBORDINATION

***Templeton v. O'Cheskey (In re American Housing Foundation),* 785 F.3d 143 (5th Cir. 2015).** (King, J.)
Issue: Was claim subordination warranted under § 510(b) where the claims were related to securities of an affiliate of the debtor?
Holding: Yes, the Fifth Circuit focused on the "or of an affiliate" portion of §510(b) to hold that a creditor's claims are properly subordinated under § 510(b), even though the claimant asserts a multitude of theories seemingly unrelated to the purchase of equity securities.
Rationale: Section 510(b) requires mandatory subordination of certain claims. In general, that provision allows a debtor or trustee to subordinate claims stemming from any purchase or sale of securities of the debtor or of an affiliate of the debtor. The rationale for mandatory subordination of such claims is premised on the understanding that: (a) shareholders and creditors have dissimilar risks and expectations; and (b) creditors should be entitled to rely on an equity cushion provided by shareholder investments. Many creditors attempt to avoid the perceived harsh treatment of this provision by liquidating the claims to judgment pre petition or even framing the claims under some alternative theory to disguise the relationship to the securities. In this case, the creditor's attempts were rejected in favor of subordination.
Facts: Templeton invested at least $2 million into the Network of companies controlled by AFH.

When AFH companies filed bankruptcy, Templeton asserted claims against AFH for fraud, breach of fiduciary duty, money had and received, and even breach of contract for investments that AFH had guaranteed. The Fifth Circuit looked behind the claims to determine that there was a nexus between Templeton's claims against AHF and his purchase of securities in the affiliate limited partnerships. Indeed, Templeton's briefing apparently admitted that there was a causal connection, or nexus, between his claim and his purchase of equity securities in the affiliates. In this decision, the Fifth Circuit affirmed the lower courts' decisions to subordinate the claims, noting that § 510(b) "applies whether the securities were issued by the debtor or by an affiliate of the debtor." Citing Alan N. Resnick & Henry J. Sommer, Collier on Bankruptcy § 510.04[04] (16th ed. 2014) (emphasis in the original). Here, there was no question that Templeton held securities in five affiliates of AFH. The Court then went step by step to explain why Templeton's claims against AFH were, in effect, the same damages that arose from the purchase of securities in AFH's affiliates. And, because Congress intended that claims arising from the purchase of securities of entities over which the debtor exercised sufficient control be treated no differently than claims arising from the purchase of securities of the debtor itself, the 5th Circuit concluded that the lower courts correctly applied section 510(b) and subordinated Templeton's claims.

SUBSTANTIAL CONTRIBUTION

***In re Bodin Concrete, L.P.*, 616 Fed.Appx. 738 (5th Cir. July 10, 2015).** (per curiam)

Issue: Did the lower courts err in granting a $50,000 substantial contribution claim to Concrete for its efforts to improve the terms of the plan?

Holding: The Fifth Circuit concluded that the bankruptcy court did not clearly err in granting a $50,000 substantial contribution claim to Concrete for its efforts to improve the terms of the plan deferring to the bankruptcy court's finding which was not clearly erroneous.

Facts: In the bankruptcy case, the debtor proposed its initial plan over a year after the petition date i.e., outside the exclusivity period initially proposing a 50% payout within 30 days of the effective date, and the remainder paid over five years. The plan immediately drew objections from unsecured creditors. Before the disclosure statement hearing, a third party, Concrete Opportunity Fund, acquired a small unsecured claim and proposed its own competing plan, proposing to infuse $750,000 cash to pay out 75% of claims within 10 days, and the remainder within 75 days. This sparked a bidding war between the debtor and Concrete Opportunity Fund, resulting in the debtor amending its plan three times, ultimately offering to pay 100% of claims within one day of the effective date. The debtor's amended plan was confirmed. This appeal came from the bankruptcy court's order allowing a $50,000 substantial contribution claim under 503(b)(4). The debtor, on appeal, argued that the bankruptcy court erred by allowing Concrete Opportunity Fund's counsel to testify, and by finding that the competing plan provided an actual substantial contribution. The Fifth Circuit rejected both arguments and affirmed the $50,000 award. In approving the substantial contribution award, the 5th Circuit first explained that substantial contribution is an issue of fact. This is critical, because it meant that the award was reviewed for clear error.

Rationale: On the specific points raised, the 5th Circuit concluded that the bankruptcy court did not clearly err by allowing Concrete Opportunity's attorney to testify because the attorney had personal knowledge of the events that transpired after he was retained, including Rule

2004 exams, the terms of the competing plan proposals, and his own fees. Moreover, the 5th Circuit held that the bankruptcy court did not clearly err in finding that Concrete Opportunity's efforts provided a "substantial contribution" to all unsecured creditors, explaining that that "the Bankruptcy Court was not required to trace benefit to limited classes of creditors in order to accord it diminished weight," as argued by the debtor, or make any specific findings on the value contributed by Concrete Opportunity. The 5th Circuit was satisfied with the bankruptcy court's findings that Concrete Opportunity's efforts "put pressure on the debtor to get its plan approved and fulfill its promises under the plan." Because substantial contribution is a fact specific, case by case inquiry, and because the bankruptcy court made specific findings in this case, the 5th Circuit affirmed as not clearly erroneous. Here, not all benefit could be quantified. The debtor's ability to continue operating was a clear benefit to the debtor, and the more rapid stream of payment to creditors was clearly more beneficial to the estate.

REVOCATION OF CONFIRMATION

In re CLTI, LLC, 534 B.R. 895 (Bankr. S.D. Tex. 2015). (Bohm, J.)

Issue: Former majority owner attempts to revoke confirmation of a plan that effectively displaced the Movant from ownership and control of the Debtor.

Holding: Judge Bohm gave several reasons for denying the motion: (i) revocation could only be obtained through an adversary proceeding, per Bankruptcy Rule 7001(5); (ii) the fraud argument was res judicata based on the prior motion denied by the bankruptcy court; (iii) the movant failed to confer with the respondent before filing the motion, as required by local rule; and (iv) the issue was equitably moot because no relief could be granted without some detrimental impact on third parties.

Facts: Pre petition, Alcede was the majority owner of the debtor, and Wilson was a minority owner. During the case, Wilson proposed a plan under which he would infuse $1.5 million of new capital to pay off allowed priority and general unsecured claims, and refinance the company's secured working capital line. In exchange, Wilson's plan proposed to cancel existing equity and issue 100% ownership of the reorganized debtor to him, leaving Alcede with nothing. During the confirmation hearing, the Court heard testimony of Boyert, an individual responsible for the debtor's day to day operations. According to Boyert's testimony, he would remain responsible for day to day business operations, and Wilson would be responsible for implementing the plan (i.e. administering claims, etc.). The plan was confirmed, and became final without an appeal. Days after the plan was confirmed, however, Alcede filed a pro se document with the Court, which the Court interpreted as a motion to revoke confirmation due to fraud. The Court held an emergency hearing on the motion, during which the Court heard evidence that Wilson agreed to give Boyert 70% of his ownership in the Debtor. Finding that this new information was neither material to confirmation nor fraudulent, the Court denied the motion. Over the next six months, Wilson paid all claims. But on the 180th day after confirmation (the last date to seek revocation under section 1144 of the Bankruptcy Code) Alcede, this time represented by counsel, filed a second motion to revoke confirmation, citing the same grounds as his first motion i.e., that Boyert's receipt of 70% equity in the reorganized debtor was a material omission, and that the plan should never have been confirmed. Wilson responded, arguing several reasons to deny the second motion, including procedural defects, res judicata, and equitable mootness.

MISCELLANEOUS:

BANKRUPTCY RULE 9011

***In re Baker,* 2015 WL 1515287 (Bankr. S.D. Tex. 2015).**

Issue: Did Debtors' counsel violate Rule 9011 by not listing Debtors' prior bankruptcy cases?

Holding: Yes, Debtor's counsel was sanctioned and the Bankruptcy case was dismissed with prejudice.

Facts: Chapter 13 debtors filed their fifth case in three years. Only two of those prior filings were disclosed by the debtors, who failed to file payment advices and credit counseling certificates. After issuing an order to show cause and a hearing, the court concluded that the debtors had willfully failed to prosecute their prior bankruptcy cases in violation of §109(g) and accordingly dismissed the case with prejudice to filing another case within 180 days. In addition, the court found that the bankruptcy attorney had violated Bankruptcy Rules 9011(b)(2) and (b)(3) in that, even though he had represented the debtors in four prior cases, he signed the petition with disclosure of only two of those cases; debtors' counsel was also sanctioned with a prohibition against filing Chapter 13 cases in the district until he had completed 15 hours of CLE in consumer bankruptcy law.

UNREASONABLY OR VEXATIOUSLY MULTIPLYING PROCEEDINGS - 28 U.S.C. §1927

***In re Harris*, 2015 WL 2210339 (Bankr. S.D. Tex. 2015).**

Issue: Whether not timely withdrawing a lawsuit after concluding that there is no proof of causation violates 28 U.S.C. §1927.

Holding: Yes.

Facts: Debtor lied under oath regarding certain transfers of assets. When the trustee sought to have the debtor's discharge denied, the debtor eventually waived his discharge. It then became apparent that debtor's attorney knowingly filed schedules that omitted information regarding debtor's pre-petition divorce. Without first taking the attorney's deposition, the Chapter 7 trustee brought an adversary proceeding against her claiming malpractice. Debtor's attorney responded with a Rule 9011 letter. Trustee determined that he was unable to prove causation, but declined to withdraw the adversary proceeding prior to the Safe Harbor date and instead proposed that debtor's attorney disgorge her fees. On the attorney's motion for summary judgment, the court held that Rule 9011 only deals with the filing of papers and that the trustee had a good-faith basis for filing the adversary proceeding. However, the court went on to conclude that the trustee had violated 28 U.S.C. §1927 (unreasonably or vexatiously multiplying proceedings) by not withdrawing the lawsuit in a timely fashion after concluding that he could not prove causation. Calculating the date when the adversary complaint should have been withdrawn, the court awarded debtor's attorney her reasonable costs and fees as incurred thereafter.

***U.S. Trustee v. Williams (In re Steptoe),* 2015 Bankr. LEXIS 855 (Bankr. S.D. Tex. Mar. 18, 2015).**

Issue: What happens if attorneys don't disclose their representation?

Holding: The Court found on summary judgment that the attorney (1) violated §527(a)(1) by failing to provide the Debtor with the written notice required under §342(b)(1); (2) violated §527(a)(2) by failing to provide the notice to the Debtor regarding the necessity for accuracy, the requirement of due diligence, and the possibility of an audit; (3) violated §527(b) by failing to provide the detailed notice concerning fee agreements, eligibility, and other matters required by §527(b); (4) violated §527(c) by failing to advise the Debtor on how to value her assets, how to calculate amounts required on her schedules, how to complete her list of creditors, and how to determine the value of her exempt property; (5) violated §329, as implemented by Fed. R. Bankr. P. 2016, by failing to file the required information regarding his fees for representing the Debtor; (6) violated §528 by utilizing a fee agreement that failed to clearly and conspicuously explain the bankruptcy services that he was to provide; (7) violated §526(a)(2) by filing documents that contained untrue and misleading statements that, upon the exercise of reasonable care, the attorney would have known to be untrue and misleading; (8) aggravated his conduct by failing to give proper advice to the Debtor regarding the appropriate consumer Chapter for her bankruptcy filing; and (9) aggravated his conduct by instructing his client to lie about the nature of their professional relationship. The attorney was permanently enjoined from engaging in further violations of §329, §526, §527 and §528 of the Bankruptcy Code, ordered to pay the US Trustee's attorney's fees, and ordered to refund the Debtor's fees.
Facts: The Bankruptcy Court granted summary judgment to the United States Trustee and found that the Debtor's attorney violated §329 and §527 of the Bankruptcy Code. The Debtor's attorney agreed to provide the Debtor with both Chapter 7 bankruptcy services and foreclosure and real estate loan services. While the attorney did provide services to the Debtor, there were issues from the beginning. The bankruptcy petition does not disclose the attorney's representation but does list his phone number as the Debtor's. The documents that were filed by the attorney generally had the Debtor's signature on them, but the Debtor never authorized the attorney to sign on her behalf. In addition, the documents did not accurately reflect the information that the Debtor gave to the attorney. Finally the attorney asked the Debtor to claim she had not hired the attorney, but she refused.

BARTON DOCTRINE

***Villegas v. Schmidt (In re BFG Investments, L.L.C.)*, 788 F.3d 156 (5th Cir. May 28, 2015).** Before STEWART, Chief Judge, and SOUTHWICK and COSTA, Circuit Judges.
Issue: Whether the *Barton* Doctrine requires a plaintiff to obtain leave of the bankruptcy court before suing a bankruptcy trustee.
Holding: It is necessary to obtain leave from the bankruptcy court before bringing such a suit.
Facts: Michael Schmidt, Chapter 11 trustee, liquidated the bankruptcy estate of BFG Investments. Four years later, John Villegas, former BFG president, and BFG sued Schmidt in federal district court alleging that Schmidt committed gross negligence and breached his fiduciary duty as trustee of BFG because he failed to pursue a claim against Nationwide Insurance under an alleged policy that would have covered many of the creditors' claims. Nationwide denied that it had issued such a policy. The district court dismissed because the plaintiffs failed to obtain leave from the bankruptcy court that appointed Schmidt as the

bankruptcy trustee before filing suit against him. Plaintiffs appealed.
In *Barton v. Barbour*, 104 U.S. 126, 128 (1881), the Supreme Court held, "before suit is brought against a receiver leave of the court by which he was appointed must be obtained." The 5th Circuit applies this principle to bankruptcy trustees. See *Anderson v. United States*, 520 F.2d 1027, 1029 (5th Cir. 1975). The 5th Circuit rejected plaintiffs' argument that in *Stern v. Marshall*, --- U.S. ----, 131 S.Ct. 2594 (2011), the Supreme Court created an exception to the Barton doctrine as to "Stern claims" over which the bankruptcy court lacks final adjudicative authority because the Supreme Court prohibits appellate courts from concluding that one of the Court's later cases has, by implication, limited or overruled one of its earlier cases and the Supreme Court's statement in *Executive Benefits Ins. Agency v. Arkison*, --- U.S. ----, 134 S.Ct. 2165, 2168 (2014), that "Stern did not ... decide how bankruptcy or district courts should proceed when a 'Stern claim' is identified" suggests that Stern would not, in fact, limit the Barton doctrine. The 5th Circuit also flatly rejected plaintiffs' argument that the Barton doctrine did not apply when a party brings suit in the district court that exercises supervisory authority over the bankruptcy court that appointed the trustee, stating that every other circuit to address the issue has maintained the distinction between the bankruptcy court and the district court, holding that "a debtor must obtain leave of the bankruptcy court before initiating an action in district court when the action is against the trustee or other bankruptcy-court-appointed officer, for acts done in the actor's official capacity." *See Carter v. Rodgers*, 220 F.3d 1249, 1252 (11th Cir.2000) (collecting cases).

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§363 SALE

***Petfinders LLC v. Sherman (In re Ondova Ltd. Co*.), 620 Fed.Appx. 290 (5th Cir. Aug. 14, 2015).** (per curiam).

Issue: Mootness of sale objection.

Holding: Fifth Circuit affirmed dismissal as statutorily moot under section 363(m).

Facts: The bankruptcy trustee sought to sell a domain name that he believed the debtors owned. The appellant objected to the sale on the basis that someone else owned rights to the domain name. Bankruptcy court held an evidentiary hearing and found that the evidence supported the trustee's position that the domain was property of the estate and could be sold. The bankruptcy court also found that the sale was negotiated in good faith at arms-length, and thus approved the sale under section 363(m) of the Bankruptcy Code. Appellants filed an emergency appeal and initially obtained a stay pending appeal from the district court, but the stay was later vacated by the Fifth Circuit. With the stay order vacated, the trustee consummated the sale approved by the bankruptcy court before the district court heard the appeal. Thus, by the time the appeal came before the district court, it was moot, and the district court dismissed it as such. This appeal followed. The Fifth Circuit affirmed the district court's dismissal. The analysis was simple, the parties tried, but failed, to obtain a stay pending appeal, and the sale was consummated while no stay was effective. The appellants attempted to argue that the sale should not have been entitled to good faith protections under section 363(m), but the Fifth Circuit summarily rejected that argument because the appellants never challenged the good faith finding before the bankruptcy court.

COMPROMISE AND SETTLEMENT AND CLAIM/VALUATION ISSUES

In re Age Ref, Inc. 801 F.3d 530 (5th Cir. 2015) (2-1 decision, Judge Owen dissenting on §506 valuation issue).

Issue: In complex Chapter 11 case, whether bankruptcy court properly approved settlement between Trustee and Bank (secured creditor) and denied valuation and claim objection pursued by creditors committee.

Holding: Bankruptcy Court did not abuse its discretion in approving settlement because court analyzed both Jackson Brewing and Foster Mortgage factors. Bankruptcy Court does not need to "conduct a mini trial" on each issues waived in a settlement but must "apprise itself of the relevant facts and law" so it can make an "informed and intelligent decision". On the valuation issue, the Fifth Circuit held that the Court erred when it did not determine amount of claim, after committee objected, under plain wording of § 502(b). The Court ruled this error was harmless because the claim amount was implicitly determined when court approved settlement. On second textual argument, that 506(a) required court to determine amount of secured claim, Fifth Circuit ruled § 506(a) is not mandatory valuation section, but permissive. Judge Owen dissented on § 506 issue because Committee was arguing undersecured so determination of that issue was required to assess what the unsecured creditors might be entitled to in case.