BANKRUPTCY CASE LAW REVIEW

Presented by:

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U.S. Bankruptcy Judge
Northern District of Texas

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State Bar of Texas
30th ANNUAL
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September 13-14, 2012
Houston

CHAPTER 1

[1] Mr. Gilbert, Mr. Schneider, and Ms. Johnson served as Summer 2012 interns to the Hon. Jeff Bohm, U.S. Bankruptcy Judge (SDTX).

RUSSELL F. NELMS

Judge Nelms has received no honors or awards during his tenure on the bench. He is not a member of any organization whose membership is limited to professionals who have demonstrated exemplary service. Nevertheless, Judge Nelms has a dog and two cats who are very fond of him.

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PRACTICE
Corporate Reorganization and Creditors' Rights

PRACTICE DESCRIPTION
Demetra Liggins has over a decade of experience in business finance and restructurings for a variety of large and small public and private companies. She helps navigate her clients through complex corporate reorganization and distressed acquisitions. She works on both in-court and out-of-court restructurings. Demetra is highly regarded for her ability to quickly and efficiently help clients assess the effects of a bankruptcy on their corporate and financial transactions. She is a trusted business partner who works with her clients to identify and achieve their goals in the bankruptcy process.

REPRESENTATIONS
Working with financial institutions, public and private companies, partnerships, and private-equity funds, Ms. Liggins has a broad range of experience. She helps clients both purchase and sell assets in distressed situations, secure financing, and negotiate structure and implement cash collateral orders and debtor-in-possession financing agreements on behalf of both a company and a financial institution. Ms. Liggins also helps clients draft plans of reorganizations and with out of court restructuring. Her clients include health care systems, retail corporations, financial institutions, and oil and gas companies.

Recently, Ms. Liggins played a leading role in Thompson & Knight's representation of both Baseline Oil & Gas and Cross Canyon Energy Corp. Both bankruptcy cases involved pre-negotiated and packaged plans of reorganization (a "pre-pack") and both of the companies exited from bankruptcy in less than 60 days.
For a list of more extensive representations, please click here.

DISTINCTIONS/HONORS
Law Firm Rainmakers, *Diversity & the Bar*; 2011
Texas Rising Stars® by Thomson Reuters (Bankruptcy & Creditor/Debtor Rights); 2005, 2007-2011
Houston's "Top Lawyers," *H Texas Magazine*; 2010-2012
President's Award, Houston Bar Association; 2005-2006
Lawyer on the Fast Track, *H Texas Magazine*; 2004

PRESS RELEASES/IN THE NEWS
T&K Attorneys Recognized as Houston's "Top Lawyers"; August 01, 2012
"Newsmakers" section, *Texas Lawyer*; April 16, 2012
"People on the Move," *Houston Business Journal* ; April 11, 2012

T&K Attorney Named 2012 Leadership Council on Legal Diversity Fellow; April 10, 2012
"Cano Petroleum Seeks Ch. 11 Sale Amid Cash Woes," *Law360*; March 08, 2012
T&K Partner Named One of Nation's Top Diverse Rainmakers; December 01, 2011
T&K Attorneys Recognized as Houston's "Top Lawyers"; July 05, 2011
Thirty-One T&K Attorneys Listed in *Texas Rising Stars*® 2011; March 18, 2011
T&K Names New Partners; February 21, 2011
T&K Guides Baseline Oil & Gas Through Pre-Pack Chapter 11 Process; October 01, 2009

PUBLICATIONS/PRESENTATIONS

"Chapter 11: Maneuvering through Objections to Proofs of Claims," 2nd Annual Bankruptcy Paralegal Seminar, HABP, Houston, Texas, November 2011
"Plans and Confirmation," Bankruptcy 101 Course, TexasBarCLE, September 2011
"Conflicts," Advanced Business Bankruptcy Course, TexasBarCLE, September 2011
"Credit Bidding," 29th Annual Jay L. Westbrook Bankruptcy Conference, UTCLE, Austin, Texas, November 2010
"Personal Injury & Bankruptcy," 26th Annual Personal Injury Law Course, July 2010
"Employment and Payment of Professionals," Panelist, 28th Annual Advanced Business Bankruptcy Course, Dallas, Texas, June 2010
"Bankruptcy & Restructuring for Real Estate Professionals," New York City Bar CLE and Webinar, February 2010
"Inadvertent Disclosure of Attorney-Client Information," 28th Annual Jay L. Westbrook Bankruptcy Conference, UTCLE, Austin, Texas, November 2009

BLOGS

The Insolvency Blog, www.theinsolvencyblog.typepad.com

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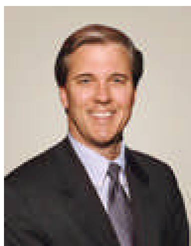

Bill Wallander is a Partner and the Practice Group Leader of the Restructuring & Reorganization Practice Group of Vinson & Elkins L.L.P. Bill has over 20 years of restructuring and reorganization experience across a broad spectrum of clients and industry lines. Bill's practice consists of complex restructuring and reorganizations. Bill represents debtors, agents and lending groups, bondholder and noteholder groups, funds and committees. Bill has also served as an expert witness in Bankruptcy Court. Bill's industry experience includes aerospace, agriculture, chemicals, commodities, construction, defense, energy (upstream, mid-stream and downstream), derivatives, ethanol, financial services, healthcare, hotel, legal, manufacturing, mining, mortgage finance, power, public finance, real estate (commercial and housing), retail, shipping, technology, and transportation. Bill is recognized in Chambers Global "The World's Leading Lawyers for Business, Chambers USA "America's Leading Lawyers for Business"; Woodard White "Best Lawyers in America"; Texas Lawyer "Superlawyer", "Who's Who Legal in Texas" for insolvency and reorganization law, Legal Media Group "Guide to the World's Leading Insolvency & Restructuring Lawyers", Euromoney Insolvency and Restructuring Expert Guide, and Martindale-Hubbell (AV Preeminent). Bill is a member of the American Bar Association; State Bar of Texas; New York Bar Association; Dallas Bar Association; Dallas Bar Association Bankruptcy and Commercial Law Section; American Bankruptcy Institute; Texas Bar College; and Turnaround Management Association. Bill is a Life Fellow of the Dallas Bar Foundation; Chancellor's Council of the University of Texas; Keeton Fellow; and member of the Dean's Roundtable of the University of Texas School of Law. Bill is authorized to practice before the Texas Supreme Court; Supreme Court of the State of New York; U.S. Court of Appeals for the Fifth and Tenth Circuits; U.S. District Courts for the Northern, Eastern, Western and Southern Districts of Texas; U.S. District Court of Arizona. Bill received his B.A. in Economics and Political Science with minors in Mathematics and Latin from the University of Pittsburgh in 1981. Bill received his J.D. from the University of Texas School of Law 1984. While practicing law full time, Bill earned an MBA in 2001 from the University of Phoenix. Bill is a frequent author and speaker for industry groups, bar associations, and clients. Bill is an active supporter of The Dallas Regional Chamber and other charitable and community organizations. For additional information visit the Vinson & Elkins website at www.velaw.com.

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<u>RECENT SUPREME COURT DECISIONS</u>

***Radlax Gateway Hotel, LLC v. Amalgamated Bank*, 132 S.Ct. 2065, 182 L.Ed. 2d 967, 2012 U.S. LEXIS 3944 (2012)**

JUDGES: Justice Scalia delivered the opinion of the Court, in which all other Members joined, except Justice Kennedy, who took no part in the decision of the case.

> The Debtors in their Chapter 11 bankruptcy cases pursued a cramdown plan over the objection of a secured creditor through its trustee, Amalgamated Bank ("Bank"). The Bank had a lien on substantially all of the Debtors' property in connection with a $142 million loan to finance the construction of a parking structure at Los Angeles International Airport. The plan proposed selling substantially all of the Debtors' property at an auction and using the sale proceeds to repay the Bank. Under the proposed auction procedures, the Bank would not be permitted to credit bid for the property. The bankruptcy court denied the Debtors' sale and bid procedures motion, finding that the restriction on credit bidding violated §1129(b)(2)(A)'s cramdown requirements. On direct appeal, the Seventh Circuit affirmed. The Supreme Court affirmed, holding that, while plans confirmed over the objection of a "class of secured claims" must meet one of the three requirements in §1129(b)(2)(A)(i)-(iii), when the debtor proposes selling the secured creditor's collateral free and clear of liens, §1129(b)(2)(A)(ii), the specific provision dealing with the sale of collateral and that provides that such sale is subject to the rights of the secured creditor to credit bid under § 363(k), must be satisfied. The debtor may not elect to satisfy §1129(b)(2)(A)(iii), a general provision allowing the plan to provide the secured creditor with the "indubitable equivalent" of their claim, as a substitute. Because clause (ii) is subject to §363(k), which provides "unless the court for cause orders otherwise the holder of such claim may [credit bid at the auction of the collateral]", any sale of collateral must provide the secured with an opportunity to credit bid. The Court did not allow the petitioner to satisfy clause (iii) instead of clause (ii) because to do so would allow the general, clause (iii), to govern the specific, clause (ii), which is contrary to established canons of statutory construction.

***Hall Et Ux. v. U.S.*, 132 S. Ct. 1882; 182 L. Ed. 2d 840, 2012 U.S. Lexis 3781 (2012) (Chapter 12)**

JUDGES: Justice Sotomayor delivered the opinion of the Court, in which Chief Justice Roberts and Justices Scalia, Thomas, and Alito joined. Justice Breyer filed a dissenting opinion, in which Justices Kennedy, Ginsburg, and Kagan joined.

> Debtors sold their farm shortly after filing for bankruptcy under Chapter 12 and proposed a reorganization plan that used the proceeds of the sale to pay off outstanding liabilities. The IRS objected, asserting a claim for income taxes on the capital gains from the farm sale. The Debtors amended their plan, proposing that the tax be treated as a general, unsecured claim, payable to the extent that funds were available. The IRS objected once more, and the bankruptcy court sustained the objection because a Chapter 12 estate cannot "incur" taxes for the purposes of § 503(b). Therefore, these taxes are not eligible to be stripped of their priority under § 1222(a)(2)(A). The district court reversed the

decision. On appeal, the Court of Appeals for the Ninth Circuit reversed the district court. The Supreme Court affirmed the Ninth Circuit's ruling, holding that a tax "incurred by the estate" is a tax for which the estate itself is liable. The Court reasoned that these taxes are neither collectable nor dischargeable in a Chapter 12 plan because the Internal Revenue Code makes it clear that Chapter 12 estates are not liable for taxes; the debtor, not the trustee, is liable for taxes and files the only tax return. (*See* 26 U.S.C. §§ 1398 and 1399). The Court also draws support from the treatment of taxes in Chapter 13 cases and the interplay between Bankruptcy Code § 346 Internal Revenue Code §§1398 and 1399.

ADMINISTRATIVE CLAIMS

In re Scopac, 649 F.3d 320 (5th Cir. 2011)

This appeal involved a dispute over compensation for diminution in the value of collateral during the pendency of a Chapter 11 bankruptcy. Appellants, holders of notes secured by the timber and non-timber assets of Scotia Pacific Co., LLC ("Scopac"), sought review of the district court's dismissal of their appeal for lack of subject matter jurisdiction and contended that the bankruptcy court erred in denying their "superpriority" admin claim against the bankruptcy estate. The Fifth Circuit held that (a) the pendency of a confirmation appeal did not deprive the district court of subject matter jurisdiction over an appeal from denial of a superpriority claim (despite the fact that allowance of the claim could affect the plan); (2) appeal was not subject to dismissal for equitable mootness because of, among other considerations, the possibility of even a fractional recovery; (3) noteholders' lien on proceeds from postpetition sales had to be recognized in fixing value of superpriority admin claim; (4) payments made to creditors' professionals out of cash collateral proceeds were improperly deducted in calculating superpriority admin claim; and (5) determination that value of collateral had not declined postpetition was not clearly erroneous. The Fifth Circuit then vacated and remanded with "instructions to enter judgment for the Noteholders for a $29.7 million administrative priority claim against the reorganized debtors." 624 F.3d 274 (5th Cir. Oct. 19, 2010). On August 4, 2011, the Fifth Circuit modified its earlier opinion to read "instructions to enter judgment for the Noteholders and against the reorganized debtor for an administrative priority claim of *up to* $29.7 million." 649 F.3d 320, 322. In both opinions, the Fifth Circuit "recognized that, in appeals from substantially consummated plans, courts may fashion whatever relief is practicable for the benefit of appellants." By allowing partial recovery, the court could avoid the problem of equitable mootness. "So long as there is the possibility of fractional recovery, the Noteholder need not suffer the mootness of their claims." Partial recovery may be necessary, however, if an award of full recovery would be impractical or would undermine the plan. The Fifth Circuit had not intended to rule that the entire $29.7 million was due.

In re Quincy Med. Ctr., 466 B.R. 26 (Bankr. D. Mass 2012)

Former employees of Chapter 11 debtor were not entitled to the allowance of administrative expense claims under Bankruptcy Code § 503(b)(1) for severance pay due

them under the debtor's executive severance policy because those claims were unrelated to their salaries and length of service.

***In re Momenta, Inc.*, 455 B.R. 353 (Bankr. D. N.H. 2011)**

A vendor of debtor was not entitled to allowance of an administrative expense claim pursuant to Bankruptcy Code § 503(b)(9) for goods delivered directly to the debtor's customers because the record failed to establish, or even suggest, any physical or constructive possession of the goods by the debtor in reference to any of the transactions.

AUTOMATIC STAY

***Halo Wireless, Inc. v. Alenco Communs. Inc., et al (In re Halo Wireless, Inc.)*, 684 F.3d 581(5th Cir. 2012)**

Various privately-owned telephone companies initiated twenty separate suits against telecommunications company Halo Wireless, Inc. ("Halo") before ten state public utility commissions ("PUCs") regarding the type of service Halo provides and whether or not Halo was properly compensating local companies for the call traffic it transfers to them. Halo filed for bankruptcy as a result of these actions, and then removed the various PUC actions to federal court and filed motions to have those actions transferred to the bankruptcy court. Thereafter, the telephone companies requested that the bankruptcy court determine that the various PUC actions were excepted from the automatic stay under Bankruptcy Code § 362(b)(4) (police and regulatory power). The bankruptcy court found that the Bankruptcy Code § 362(b)(4) exception applies to the PUC proceedings, because "[i]t is the nature of the action[, not] the identity of the parties which initially precipitat[e] [in] the action[,] that determines whether Bankruptcy Code § 362(b)(4) applies." The bankruptcy court ruled that, although the PUC proceedings could go forward, the PUCs may not issue any ruling or order to liquidate the amounts of any claims against Halo or take any actions that would affect the debtor-creditor relationship. Halo filed a notice of appeal, which the bankruptcy court certified for direct appeal to the Fifth Circuit (as a question of law with no controlling precedent pursuant to 28 U.S.C. § 158(d)(2)). The Fifth Circuit affirmed.

As framed by the Fifth Circuit, the two main issues on appeal were (1) whether the PUC proceedings are being "continued by" a governmental unit and (2) whether those proceedings are in furtherance of states' police and regulatory powers.

As to issue (1), Halo argued that none of the PUC proceedings should be exempted from the stay because an action must be prosecuted by and in the name of a governmental unit in order to qualify. The Fifth Circuit, however, found this argument unpersuasive, citing to, among other cases, actions seeking to vindicate workers' rights. Courts have recognized that these types of actions may have similarities to private litigation, but they also promote the public interest by enforcing state laws and regulations. Further, the PUC proceedings were "continued by" a governmental unit, as the PUCs continued to preside over them. Finally, the language of Bankruptcy Code § 362(b)(4) itself excepts

suits continued by a governmental unit, without regard to who initially filed the complaint.

As to issue (2), courts have applied two related and overlapping tests when determining whether proceedings fall within the police or regulatory power exception: (1) the pecuniary purpose test, which asks whether the government is effectuating public policy rather than adjudicating private rights, and (2) the public policy test, which asks whether the government primarily seeks to protect a pecuniary interest, as opposed to the public safety and health. The Fifth Circuit found that the PUC actions passed both tests because the suits are not strictly pecuniary (particularly since, per the lower court's order, the PUCs could not take any actions to affect the debtor-creditor relationship) and the proceedings contemplate exercise of the PUC's regulatory powers. Further, the Federal Telecommunications Act, 47 U.S.C. §§ 151 et seq. ("FTA") and various state statutes indicate that regulation of telecommunications carriers serves the public interest.

Halo also argued that, in any event, some of the claims made by the telephone companies would need to be decided by a federal court. The Fifth Circuit noted that this may be correct, but the FTA contemplates a "federal-state balance" that "erects a scheme of cooperative federalism." The telephone companies brought claims under both federal and state telecommunications law, and interpretation and enforcement of interconnection agreements ("ICAs") is entrusted in the first instance to state commissions, with state PUC rulings being subject to federal court review. Thus, Halo was not being denied a federal forum by the requirement that it first subject to the jurisdiction of the PUCs (to whose jurisdiction it had consented by doing business in the various states). In conclusion, the Fifth Circuit held that "[i]f Halo is permitted to stay all of the PUC proceedings, it will have used its bankruptcy filing to avoid the potential consequences of a business model it freely chose and pursued."

***In re Slabaki*, 466 B.R. 572 (1st Cir. BAP 2012)**

The Bankruptcy Appellate Panel affirmed the Bankruptcy Court's decision that a creditor had not violated debtor's stay by having debtor arrested for failure to appear on behalf of the corporate entity in which debtor was sole officer. The Court held that creditor was seeking to enforce a debt against the corporate entity and the arrest of the corporate representative was provided for by state law.

***In re Rodriguez*, 2011 Bankr. LEXIS 5077 (Bankr. S.D. Tex. 2011)**

Chapter 11 debtors filed a motion to extend the automatic stay as to all creditors. A bank holding promissory notes secured by real property objected. The debtors filed a joint case under Chapter 11 within one year after a preceding Chapter 11 joint case was pending. The court granted the motion to all creditors and conditioned the motion as to the bank. The stay was extended as to the bank if the debtors made a set monthly payment during the course of the case until a plan was confirmed or the bank was paid in full. The court concluded that the presumption of bad faith filing did not apply under § 362(c)(3)(C)(i)(III). The preponderance of the evidence supported the debtors' contention that the current case would be concluded with a confirmed plan that would be

fully performed. The debtors entered into listing agreements to sell their homestead and all of their business properties, and their schedules reflected that the value of their assets substantially exceeded their liabilities. Thus, the debtors rebutted the presumption that the case was filed in bad faith.

***In re LeBlanc*, 2011 Bankr. LEXIS 5076 (Bankr. S.D. Tex. 2011)**

Debtor claimed real property as exempt. HK Investment Partnership, Ltd held a security interest in the property and conceded that the Debtor had approximately $5,712.13 equity in the property. HK Investment Partnership, Ltd sought relief from the automatic stay on the basis that the Debtor had not paid the real property taxes for 2009 and 2010 and had failed to provide a certificate of insurance reflecting insurance coverage on the property as required under the Debtor's Deed of Trust. HK's motion to lift the stay was denied on condition of Debtor modifying plan to provide for tax payment. The court found that the Debtor had offered adequate protection in the form of modifying her plan to include payment of the taxes for 2009 and 2010. As to the 2011 taxes, because of the contingent nature of receiving a refund and the amount thereof, and the Debtor not having used her 2009 or 2010 tax refunds to pay Movant, the court found that the proposal did not provide the Movant with adequate protection that the 2011 taxes would be paid.

***LSREF2 Baron, LLC v. Alexander SRP Apts., LLC (In re Alexander SRP Apts., LLC)*, 2012 Bankr. LEXIS 2466 (Bankr. S.D. Ga. Apr. 21, 2012)**

Movant argued that debtor waived its right to object to a motion for relief from stay by agreeing to do so when entering into a pre-petition forbearance agreement. The court examined relevant case law and found that the cases permitting the enforcement of pre-petition waivers "in appropriate circumstances" were persuasive and that, here, the waiver should be enforced because the debtor retained the right to a hearing that permitted the debtor to present evidence that the forbearance agreement should not be enforced before any determination that the stay should be lifted. The court ultimately held that the debtor's pre-petition waiver should be enforced.

***In re TTM MB Park, LLC*, 2012 Bankr. LEXIS 1012 (Bankr. S.D. Ala. Mar. 12, 2012)**

Creditor sought an order that chapter 11 debtor's two apartment complexes qualified as "single asset real estate" (SARE) under Bankruptcy Code § 101(51B). The Court found that to be considered a "single project," the properties had to be linked together in some fashion in a common plan or scheme involving their use and that the mere fact of common ownership, or even a common border, would not suffice. The Court found it was significant that the properties shared financing, ownership, and management structures, but that the physical distance between the properties weighed against a finding of a common use or scheme, particularly considering the paucity of precedent finding geographically separated properties to be SARE. The Court found that the facts and arguments were equally persuasive, but ultimately held that the creditor did not meet the preponderance of the evidence standard and denied the motion.

AVOIDANCE ACTIONS

***Enron Creditors Recovery Corp. v. Alfa, S.A.B. de C.V.*, 651 F.3d 329 (2nd Cir. 2011)**

Safe harbor in Bankruptcy Code § 546(e) protected from avoidance payments made by debtor to redeem, prior to maturity, commercial paper because the payments constituted the transfer of cash made to complete a securities transaction and were settlement payments within the meaning of Bankruptcy Code § 741(8).

***In re Longview Aluminum, LLC*, 657 F.3d 507 (7th Cir. 2011)**

The Court of Appeals affirmed the district court holding that a member of an LLC could be a statutory insider within the meaning of Bankruptcy Code § 101(31)(B). The Court of Appeals noted that "when the position held by the alleged insider is not enumerated in the statute, the relevant inquiry for the court is to consider whether the relationship at issue is similar to or has characteristics of any of the defined relationships." *Longview Aluminum, LLC.,* 657 F.3d at 510. Applying this test the district court looked to Delaware corporate and LLC law and analogized a director of a corporation to a member of an LLC and concluded that because members generally have the authority to manage an LLC, like directors generally have the authority to manage a corporation, a member is analogous to a director. Even though the majority of the board of managers of the LLC executed a formal written consent excluding the member from viewing the LLC's books and records, the Court held that the effect was not enough to remove the member's status as an insider since he still had rights and control over the LLC as a member on the board.

***Siegel v. Russell Ville Steel Co. (In re Circuit City Stores, Inc.)*, 2012 Bankr. LEXIS 2491 (Bankr. E.D. Va. 2012)**

Preference payments were not ordinary and debtor's supplier was not entitled to the protection of Bankruptcy Code § 547(c)(2) because the 82.75 day average of the days-to-pay invoices during the preference period was nearly three times as great as the days-to-pay during the period preceding the date that the debtor experienced a significant change in its liquidity.

***Appalachian Oil Co. v. Kentucky Lottery Corp. (In re Appalachian Oil Co.)*, 2012 Bankr. LEXIS 1709 (Bankr. E.D. Tenn. Mar. 23, 2012)**

The debtor filed adversary proceedings against the Kentucky Lottery Corporation ("KLC"), seeking a determination that it was entitled to recover transfers relating to lottery ticket sales from its convenience stores. The court held that under Kansas law and pursuant to a license agreement signed by the debtor, certain electronic funds transfer payments made to the KLC were trust funds because the payments were made through a trust fund account established to pay lottery funds even though no tracing had been demonstrated. Payments made from a general operating account, however, were not trust funds.

***Dill v. Brad Hall & Assocs. (In re Indian Capitol Distrib.)*, 2011 Bankr. LEXIS 3892 (Bankr. D.N.M. Oct. 5, 2011)**

Debtor purchased petroleum products from a vendor and paid the vendor with estate funds after the court had prohibited use of cash collateral. The trustee filed a complaint under Bankruptcy Code §§ 549 and 550 to avoid the postpetition transfer. The court, *sua sponte,* examined whether U.S. Const. art. III's standing requirements were satisfied, and found that the trustee failed to show an injury-in-fact. The Court found that the amount transferred was for payment of gasoline delivered to the debtor postpetition, and that the amount was the reasonably equivalent value of the gasoline delivered to the estate. The secured creditor had a lien on both cash and inventory, including the proceeds of the sale of the inventory. Therefore, the Court found that from the secured creditor's perspective, the value of its collateral was unchanged by the payments. From the estate's perspective, instead of cash, it had that amount of gasoline to sell and had the estate not paid for the gasoline, it would have faced an administrative claim.

BANKRUPTCY CODE § 1111(b)(2) - ELECTION OF SECURED STATUS

***In re Warkentin*, 461 B.R. 636 (Bankr. D. Or. 2011)**

Creditor elected to have its undersecured claim treated as fully secured pursuant to Bankruptcy Code § 1111(b)(2). The confirmation order provided that the creditor's claim was allowed as a secured claim in the full amount. Subsequently, the creditor filed an amended proof of claim and increased its secured claim to include post-petition attorney's fees and costs. The debtor objected, arguing that since the creditor was undersecured, it was not entitled to post-petition attorney's fees pursuant to Bankruptcy Code § 506(b). Citing the Ninth Circuit Bankruptcy Appellate Panel, the court held that the claim for post-petition attorney's fees and costs should be allowed because to disallow any claim, a basis of disallowance must be found in Bankruptcy Code § 502, and absent such basis, the claim must allowed. The claim also had to be allowed as secured pursuant to Bankruptcy Code § 1111(b)(2) because the statutory language of Bankruptcy Code § 1111(b)(2) unequivocally stated that if the court allows a claim and a Bankruptcy Code § 1111(b) election appropriately is made, the claim is a secured claim.

BANKRUPTCY RULE 9024 RELIEF FROM JUDGMENT OR ORDER

***In re Patel*, 2012 Bankr. LEXIS 2767 (Bankr. D. Ariz. June 15, 2012)**

Movant bank, a secured creditor of chapter 11debtor, was not permitted to set aside earlier stipulation between bank and debtor as to the secured value of its claim under Bankruptcy Rule 9024. The bank sought relief under Bankruptcy Rule 9024 arguing that it had mistakenly underestimated the property's value and that it discovered the error approximately six months after entry into the stipulation with the debtor as to the property's value. The court denied relief noting that normal negligence by counsel did not provide grounds for Rule 60 relief and that the bank failed show that relief was merited.

BANKRUPTCY CODE § 506(c) SURCHARGE

***In re Harbour East Dev., Ltd.*, 2011 Bankr. LEXIS 4775 (Bankr. S.D. Fla. Dec. 5, 2011)**

Chapter 11 debtor in a single-asset real estate case filed a motion to use cash collateral for capital improvements on certain property and for the recovery of maintenance and preservation expenses from property securing allowed claims pursuant to Bankruptcy Code § 506(c). First-priority mortgage holder on the property objected. Court held it would not permit the funding of capital improvements from cash collateral without the creditor's consent or a replacement lien to protect against the diminishment in the creditor's cash collateral. The Court held that the debtor's effort to rely upon surcharge was premature as the debtor had not yet shown that the expenses increased the value that the creditor realized from its collateral.

***In re Computer Systems*, 446 B.R. 837 (Bankr. N.D. Ohio 2011)**

Debtors' financial adviser filed a fee application, which was objected to by debtors' secured creditor. The court's prior order approving the sale of substantially all of the debtors' assets provided that the proceeds of the sale would be paid to secured creditors except for an amount carved-out to pay professionals in accordance with the budget established pursuant to the cash collateral order. The financial advisor's expenses exceeded the amount budgeted under the cash collateral order. The financial advisor argued that the secured creditor must pay its fees because the secured creditor did not object to the retention application of the financial advisor or, alternatively, pursuant to a Bankruptcy Code § 506(c) surcharge. The Court held that there was no language in the retention order or in any other pleading that required the secured creditor to pay the fees and that the financial advisor lacked standing to bring a claim under Bankruptcy Code § 506(c), as only the trustee has standing to do so.

CASH COLLATERAL

***In re Gow Ming Chao*, 2011 Bankr. LEXIS 4543 (Bankr. S.D. Tex. 2011)**

Chapter 11 case was *sua sponte* converted to Chapter 7 due to debtor's material failures to comply with bankruptcy requirements, including, among other things, failing to (1) take credit counseling, (b) file a certificate from an approved nonprofit budget and credit counseling agency, (c) maintain insurance on their properties, (d) close prepetition books, records, and accounts and opening new DIP accounts, and (e) obtain authority to use cash collateral. The debtors moved for reconsideration of the conversion order and contended that they were represented by inexperienced counsel who failed to advise them of the duties of debtors in possession and that their failure to comply with Chapter 11 requirements was due to their inability to comprehend the English language. The court denied the motion for reconsideration and held that each party voluntarily chooses his own attorney and is deemed bound by the acts of that attorney, including being considered to have notice of all facts (notice of which can be charged upon the attorney). Since bad legal advice does not relieve the client of the consequences of his own acts, the remedy for bad legal advice lies in malpractice litigation.

<u>CHAPTER 15</u>

***Sistemas Integrados De Salud Del Suroeste, Inc. v. Medical Educ. & Health Servs. (In re Medical Educ. & Health Servs.)*, 2012 U.S. Dist. LEXIS 46584 (D. P. R. 2012)**

Debtor's claim for breach of lease agreement was a core proceeding under 28 U.S.C.S. § 157(b)(2) because debtor claimed that the lease agreement constituted the main asset of its bankruptcy estate; because the removed state court proceeding was a core proceeding, the requirements for mandatory abstention under 28 U.S.C.S. § 1334(c)(2) were not met.

***In re Cho-Min Lee & Hwang Lee*, 2012 Bankr. LEXIS 2505 (Bankr. D. Mass. 2012)**

Granting of turnover motion filed by the foreign representatives of foreign debtor's estate pursuant to Bankruptcy Code §§ 1521(a)(5) and (b) would not precipitate transfers triggering defaults under loan documents and provisions governing the rights of first refusal, and thus not affect the interests of creditors and interested parties.

***Awal Bank, BSC v. HSBC Bank USA (In re Awal Bank, BSC)*, 455 B.R. 73 (Bankr. S.D.N.Y. 2011)**

Where an external administrator in a claim ancillary to a foreign proceeding under § 1511, sought to recover a $13 million wire transfer allegedly made in error to a United States bank, a large creditor of the debtor, the bankruptcy court held that the administrator could pursue an adversary claim brought under Bankruptcy Code § 553(b).

***In re Fairfield Sentry Ltd.*, 452 B.R. 52 (Bankr. S.D.N.Y. 2011)**

In a case of first impression, the bankruptcy court held that the tolling provisions of Bankruptcy Code § 108 of the Bankruptcy Code become automatically available to "Foreign Representatives" under Bankruptcy Code § 103(a) in chapter 15 cases. Fairfield Sentry was a feeder fund that invested its assets with Bernard Madoff, and was placed into liquidation proceedings in the British Virgin Islands after Madoff's fraudulent activities were discovered. The Bankruptcy Court granted the foreign representatives the benefit of Bankruptcy Code § 108's tolling provisions because it determined that a foreign representative under chapter 15 is functionally indistinguishable from a bankruptcy trustee.

<u>CHOICE OF LAW RULES</u>

***Statek Corp. v. Dev. Specialists, Inc. (In re Coudert Bros. LLP)*, 673 F.3d 180 (2nd Cir. 2012)**

Where a claim before a bankruptcy court was wholly derived from a legal claim pending in a parallel, out-of-state, non-bankruptcy proceeding, and the pending original claim was filed before a bankruptcy case was filed, bankruptcy courts were to apply the choice of law rules of the state where the underlying pre-petition claim was filed.

<u>CLAIMS – ALLOWANCE</u>

Gentry v. Siegel, 668 F. 3d 83 (4th Cir. 2012)

Former employees of Circuit City Stores sought to allow the filing of class proof of claims by the claimants and on behalf of similarly situated claimants for unpaid overtime wages. The debtors objected to the allowance of a class proof of claims, and argued that the bankruptcy claims allowance process was superior to the class-action process. The bankruptcy court denied the claimants right to file a class proof of claim. The District Court affirmed, and the case was appealed to the Fourth Circuit Court of Appeals. The Fourth Circuit held that class proofs of claim were authorized under the Bankruptcy Code. This is in accord with the majority view that if an agent can execute a proof of claim, then so can a putative agent of a class. The Court, however, in reviewing the record of the Bankruptcy Court, determined that the bankruptcy claims process was superior to the class certification process in this case, and thus affirmed the District and Bankruptcy Courts' decision to deny certification.

<u>CLAIMS – PRIORITY</u>

United States v. Smith, 2011 U.S. Dist. LEXIS 138623 (E.D. Tex. 2011)

A mortgagor defaulted on a mortgage held by the United States on a vessel. The mortgagor filed for bankruptcy after the US filed suit to foreclose. The bankruptcy court entered an order abandoning the estate's interest in the vessel, which was sold at auction for $3.3 million. Plaintiff, acting on behalf of a vacation plan and a retirement plan, argued that unpaid contributions to the plans should constitute seaman wage's that take priority over the mortgage with respect to the proceeds. Although court's generally find that contributions paid to and commingled in union benefit plans are not wages entitled to priority, the contractual provisions of the vacation plan made it distinguishable from the plans analyzed in prior cases (including, among others, provisions that the payments were based entirely on service to the vessel, there were no administrative fees or expenses payable, and the employee was directly liable to the seaman, not the trustee). The unpaid contributions to the vacation plan were found to be wages, whereas the unpaid contributions owed to the retirement account plan were found not to be seamen's wages.

In re Carolina Internet, Ltd., 2012 Bankr. LEXIS 3147 (Bankr. E.D.N.C. 2012)

Bankruptcy court denied a Chapter 11 corporate debtor's motion seeking permission to distribute $44,578 to its shareholders so they could pay tax liabilities they owed to the North Carolina Department of Revenue. Approving the debtor's motion would have contravened the priority scheme that was embodied in Bankruptcy Code §§ 507 and 1129(b)(2)(B)(ii).

***Morrison v. SL Liquidating, Inc. (In re SL Liquidating, Inc.)*, 2012 Bankr. LEXIS 453 (Bankr. S.D. Ohio Feb. 6, 2012)**

Court held that deferred compensation deposited by debtor into a rabbi trust for an employee that retired over 180 days prior to the bankruptcy filing was not entitled to priority status under Bankruptcy Code § 507. The Court noted that the only possible basis for priority was Bankruptcy § 507(a)(5), which accorded priority for unsecured claims for employee benefit plan contributions, but that the claim at issue did not qualify for such treatment because it was not for services rendered within 180 days before the filing of the bankruptcy case.

CLAIMS – CHARACTERIZATION OF DEBT AND EQUITY

***In re Lothian Oil Inc.*, 650 F.3d 539 (5th Cir. 2011)**

The Fifth Circuit held that equitable subordination and recharacterization "are directed at different conduct and have different remedies." One – equitable subordination – is remedial and aimed at righting inequitable conduct of a claim holder, while the other – recharacterization – has little to do with inequitable conduct and more to do with whether a "claim" should be properly characterized as equity under state law. Here, the bankruptcy court had disallowed the claim of a non-insider creditor and recharacterized the claim as equity. The district court reversed the bankruptcy court's recharacterization of the claim, "declin[ing] to extend the concept of debt recharacterization to a non-insider creditor."

The Fifth Circuit reversed the district court and affirmed the bankruptcy court's recharacterization of the claim to equity. In doing so, the Fifth Circuit looked to § 502(b)(1), which provides for the allowance of a claim, unless, among other reasons, it should be disallowed because it is unenforceable under any agreement or "applicable law." The court noted that under the Supreme Court case of *Butner v. United States*, 440 U.S. 48, 54, 99 S.Ct. 914, 918, 59 L.Ed.2d 136 (1979), "applicable law" is *state* law. If under state law, the "claim" is unenforceable because state law would classify it as equity rather than debt, the bankruptcy court must disallow the claim as a claim, but allow it, or recharacterize it, as equity in the debtor. The court rejected the district court's conclusion that a debt may only be recharacterized as equity if that debt was held by an insider, stating, "Unless state law makes insider status relevant to characterizing equity versus debt, that status is irrelevant in federal bankruptcy proceedings." The court ultimately concluded that "[b]ecause Texas law would not have recognized Grossman's claims as asserting a debt interest, the bankruptcy court correctly disallowed them as debt and recharacterized the claims as equity interests."

The Fifth Circuit declined to follow other courts that have relied on their equitable powers under Bankruptcy Code § 105(a) to recharacterize debt as equity, given that recharacterization was required in the instant case under state law and § 502(b)(1). Recharacterization, unlike equitable subordination, is not so much an equitable remedy to address inequitable conduct as it is a characterization (or recharacterization) of debt as equity when, under state law, the debt was equity all along and simply misnamed or

mischaracterized by the holder of the equity.

Equitable subordination under Bankruptcy Code § 510(c)(1), on the other hand, is an equitable remedy that permits a bankruptcy court to subordinate a claim to a claim or an equity interest to an equity interest: "after notice and a hearing, the court *may* – (1) under principles of equitable subordination, subordinate for purposes of distribution all or part of an allowed claim to all or part of another allowed claim or all or part of an allowed interest to all or part of another allowed interest." (emphasis added) Under the plain language of § 510(c), a bankruptcy court cannot subordinate a claim to equity, but only to another claim or claims.

Whereas a bankruptcy court *must* disallow a claim, as a claim, under Bankruptcy Code § 502(b)(1) if, under state law, the claim would be characterized as equity, it is within the court's discretion to subordinate a claim under Bankruptcy Code § 510(c).

The Fifth Circuit applies a three-pronged test for equitable subordination:

1. the claimant must have engaged in inequitable conduct;

2. the misconduct must have resulted in injury to the creditors of the bankrupt or conferred an unfair advantage on the claimant; and,

3. equitable subordination of the claim must not be inconsistent with the provisions of the Bankruptcy Code.

Wooley v. Faulkner (In re SI Restructuring, Inc.), 532 F.3d 355, 360-61 (5th Cir. 2008). Further, equitable subordination is remedial, not penal, in nature: a claim may be subordinated to another claim only to the extent necessary to offset the harm that the debtor or its creditors has suffered as a result of the inequitable conduct of the claimant. *Id.* at 361 (citing *Benjamin v. Diamond (In re Mobile Steel Co.)*, 563 F.2d 692, 701 (5th Cir. 1977)). If there is no harm, then equitable subordination is not permitted. *Id.* As a practical matter, the Fifth Circuit has permitted equitable subordination in only three circumstances: "(1) when a fiduciary of the debtor misuses his position to the disadvantage of other creditors; (2) when a third party controls the debtor to the disadvantage of other creditors; and (3) when a third party actually defrauds other creditors." *Official Committee of Unsecured Creditors v. Cajun Electric Power Cooperative, Inc. (In re Cajun Electric Power Cooperative, Inc.)*, 119 F.3d 349, 357 (5th Cir. 1997).

***CIT Group Inc. v. Tyco Int'l Ltd. (In re CIT Group Inc.)*, 460 B.R. 633 (Bankr. S.D.N.Y. 2012)**

The court addressed the question of whether the claimant, the debtor's former indirect parent company, bargained for the risks and rewards of a holder of equity rather than a holder of debt. The court concluded that because the former parent contracted for the status of a creditor, its claim thus did not come within the scope of § 510(b).

COLLECTIVE BARGAINING

In re Hostess Brands, Inc., 2012 Bankr. LEXIS 2869 (Bankr. S.D.N.Y. 2012)

The court in this case held that expired collective bargaining agreement could not be rejected because Bankruptcy Code §§ 365 and 502(g) governed only rejections of current contracts and so were not applicable. The court further noted that the better interpretation of Bankruptcy Code § 1113(f) did not allow the debtors to unilaterally alter the provisions of the collective bargaining agreement where key provisions of the collective bargaining agreement remained in effect under the NLRA.

In re T.A. Brinkoetter & Sons, Inc., 467 B.R. 668 (Bankr. C.D. Ill. 2012)

Chapter 11 debtor employed union members under a collective bargaining agreement (the "CBA") until it converted its case to case under Chapter 7 of the Bankruptcy Code. The debtor paid post-petition wages, but did not make required benefit contributions and took no action under Bankruptcy Code § 1113 to reject or modify the CBA in the chapter 11 case. Movants argued that interest and penalties imposed by the CBA resulting from the debtor's breach of the CBA were entitled to administrative priority status. The Court found that a debtor's obligation to comply with the terms of a CBA under Bankruptcy Code § 1113 does not preempt the priority scheme of Bankruptcy Code§ 507 and that postpetition liability from the breach of a CBA may be accorded priority status only if they qualify for priority treatment under Bankruptcy Code § 507. The Court held that interest qualified for administrative priority under Bankruptcy Code § 503(b)(1) "as compensation for the use of money and, as such… a fair *quid pro quo* for a debtor's failure to pay its obligations on a timely basis, which failure [was] beneficial to the estate and a detriment to the creditor," but that liquidated damages penalties did not qualify as an administrative expense as such expense was not necessary to preserve the estate. *T.A. Brinkoetter & Sons*, 467 B.R. at 671

DEFAULT INTEREST ON SENIOR LENDER CLAIM

In re Croatan Surf Club, LLC, 2012 Bankr. LEXIS 2369 (Bankr. E.D.N.C. 2012)

Senior lender's claim for default interest of 7.25% was allowed because it was within the range of reasonableness, primarily because the difference between the default and pre-default rates was a mere 3% and therefore did not appear to be intended as a penalty.

DISCHARGE – EXCEPTIONS TO THE DISCHARGE

In re Ritz, 459 B.R. 623 (Bankr. S.D. Tex. 2011)

This adversary proceeding concerned an individual Chapter 7 debtor who authorized transfers of funds out of one corporation into the accounts of several other companies—all of which he controlled. As a result of these transfers, the one corporation was drained of all of its cash and could not pay its creditors. One of these creditors, Husky, filed suit against the debtor, alleging that, because of the debtor's actions, he has become

personally liable for the debt owed by the corporation and this debt was nondischargeable under 11 U.S.C. §§ 523(a)(2)(A), (a)(4), and (a)(6). The court held that debtor had no liability to creditors under § 21.223(b) of the Texas Business and Commerce Code ("TBOC") and, thus, no debt to discharge. Previously, Texas law allowed for the corporate veil to be pierced under three expansive categories: "(1) the corporation is the alter ego of its owners and/or shareholders; (2) the corporation is used for illegal purposes; and (3) the corporation is used as a sham to perpetrate a fraud." However, TBOC §21.223(b) imposes a new requirement for parties seeking to pierce the corporate veil on a breach of contract claim, such as the one at issue in this case. The plaintiff must now also establish that the defendant shareholder "caused the corporation to be used for the purpose of perpetrating and did perpetrate an actual fraud on the obligee primarily for the direct personal benefit of the holder." The record did not include any misrepresentation of a material fact from the debtor to the plaintiff that would satisfy the elements of fraud. Thus, the court held that the plaintiff's common law fraud claim failed. The court also held that debtor did not owe a fiduciary duty to the plaintiff and, therefore, Husky cannot prevail under 11 U.S.C. § 523(a)(4). In its holding, the court cited to both *Conway v. Bonner,* 100 F.2d 786, 787 (5th Cir. 1939) ("holding that directors do not owe a fiduciary duty to creditor "so long as [the corporation] continues to be a going concern, conducting its business in the ordinary way, without some positive act of insolvency, such as the filing of a bill to administer its assets….) and *Carrieri v. Jobs.com, Inc.*, 393 F.3d 508, 534 n.24 (5th Cir. 2004) (stating, in dicta, that "[o]fficers and directors that are aware that the corporation is insolvent, or within the 'zone of insolvency' as in this case, have expended fiduciary duties to include the creditors of the corporation."), finding that the *Carrieri* statement was not binding because (1) the statement was dicta and (2) where two previous holdings conflict, the earlier opinion controls. Moreover, the company was still operational at the time of the subject transaction, making the trust fund doctrine inapplicable. Finally, the court held that Husky failed to prove that debtor committed willful and malicious injury to Husky or to Husky's property and, therefore, Husky cannot prevail under 11 U.S.C. § 523(a)(6) (noting that the court found no case law where an unsecured trade creditor obtained a judgment for nondischargeability under § 523(a)(6) where the debtor simply failed to honor a contractual obligation to pay).

DISMISSAL AND CONVERSION

In re Bray & Jamison, PLLC, 2012 Bankr. LEXIS 103 (Bankr. S.D. Tex. 2012)

The bankruptcy court issued an order to show cause why a Chapter 11 debtor's case should not be dismissed pursuant to § 1112(b) in light of the appearance that the debtor had almost no operations other than continuing with a few state court lawsuits and that the debtor might have filed the case in order to obtain unfair advantage in litigation it commenced in state court. The debtor, a law firm, was engaged in litigation against its former clients. The litigation was commenced in state court and removed to the bankruptcy court. The debtor also had two other litigation matters pending in which it sued its former clients to collect fees. The debtor's other operations consisted of seeking new business, but it had not yet obtained any new business. The court found that there was no indication of any ongoing business to reorganize. The court dismissed the debtors' Chapter 11 case. Were the instant case to remain in Chapter 11, the court likely

would be compelled to appoint a Chapter 11 trustee because of the apparent self-dealing between the debtor and other entities owned by its two partners. The court could not compel the individual partners to practice law solely through the debtor entity, and the evidence indicated that they had practiced, both separately and together, through other entities. The court concluded, under the totality of the circumstances, that the Chapter 11 case should be dismissed.

***In re Tex. EMC Mgmt., LLC*, 2012 Bankr. LEXIS 700 (Bankr. S.D. Tex. 2012)**

On November 30, creditors filed involuntary petitions under Chapter 7 against debtor. Separate judgments were entered providing for the court's abstention and dismissing the cases. Bankruptcy Code § 305(a)(1) provided that the court, after notice and a hearing, could dismiss a case under Title 11, or could suspend all proceedings in a case under Title 11, at any time if the interests of creditors and the debtor would be better served by such dismissal or suspension. Courts determining whether the interests of creditors and the debtor would be better served by dismissal or suspension had considered the totality of the circumstances, including seven listed considerations. In the instant case, all of the alleged creditors were either limited partners in the alleged debtor entities, purchased assets of the debtor in foreclosure, or were affected by a state court suit. It was clear that one of the petitioning creditors' reasons for filing the involuntary petitions had to do with obtaining leverage against the alleged debtors in the suit filed in Montgomery County, Texas. The involuntary bankruptcy cases did not appear to have been filed in order to reorganize debt or to provide for an orderly disposition of assets. The court concluded that the alleged debtors and the creditors were better served by dismissal of the involuntary petitions.

***In re Sundale, Ltd.*, 2012 Bankr. LEXIS 524 (Bankr. S.D. Fla. Feb. 13, 2012)**

Court held that pursuant to Bankruptcy Code § 1112(b)(4), it could convert a chapter 11 bankruptcy case after substantial consummation if the plan was in material default. Reorganized debtors argued that conversion was not in the best interest of creditors because there would be no assets for a chapter 7 trustee to administer. The court held that in the absence of an express provision in the plan or confirmation order to the contrary, upon conversion, assets that vested in the reorganized debtor upon substantial consummation of a confirmed chapter 11 plan did not revest in the estate to be administered by the chapter 7 trustee. Nevertheless, the court held that even though there was likely little value for unsecured creditors, conversion was appropriate because it was possible that a chapter 7 trustee could facilitate resolution of conflicts with creditors.

EXECUTORY CONTRACTS

***Cousin Props. v. Treasure Isles HC, Inc. (In re Treasure Isles HC, Inc.)*, 462 B.R. 645 (B.A.P. 6th Cir. 2011)**

The Bankruptcy Appellate Panel considered whether the deadline in Bankruptcy Code § 365(d)(4) for assuming a nonresidential real property lease was satisfied by the filing of the motion to assume the lease or whether the court order approving the motion had to be

entered prior to the deadline. The panel held that under both pre- and post-BAPCPA versions of Bankruptcy Code § 365(d)(4), only the motion had to be filed prior to the deadline. The Court found that allowing trustees to signify their intentions by filing motions to assume satisfied the goal of Bankruptcy Code § 365(d)(4) to let lessors know a trustee's intention with respect to their property within a reasonable, certain time frame.

***Regen Capital I, Inc. v. UAL Corp. (In re UAL Corp.)*, 635 F.3d 312 (7th Cir. 2011)**

AT&T assigned its unsecured claim arising from a prepetition default by the debtor on a series of contracts to a claims trader. The debtors' bankruptcy plan provided that plan confirmation constituted approval of the proposed treatment of executory contracts and set a cure bar date for any creditor claiming a default on an assumed executory contract. Attached as an exhibit to the plan was a list of assumed executory contracts; the AT&T executory contracts were on the list, but no cure amounts were stated. The debtors' plan also included a reservation of rights allowing it to reject any executory contract at the later of fifteen days after the date the parties agreed to the cure amount or the issuance of a final order from the bankruptcy court establishing the cure amount. After the plan was confirmed, the claims trader believed the debtors would assume the contract and filed a "cure claim" in the bankruptcy case. The debtors then rejected the AT&T contracts. The bankruptcy court denied the trader's cure claim holding that the contracts forming the basis of the claim had not been assumed and, in any event, AT&T had not assigned the claims trader a right that entitled it to file for cure under Bankruptcy Code § 365 and that only AT&T as a party to the contracts could seek to cure if the contracts were assumed. On appeal, the debtors argued that because a separate filing is required to seek a cure claim, the cure claim is disconnected from the assignment of the general unsecured claim. The Court of Appeals held that the language of the claim assignment contract was broad enough to cover not only the prepetition amount of the claim but also any right to cure amounts, should such rights exist, but that the claims trader was not entitled to recover because under the terms of the plan the contracts had been rejected.

***In re Roomstore, Inc.*, 2012 Bankr. LEXIS 2518 (Bankr. E.D.Va. 2012)**

An option contract giving a creditor the right to purchase debtor's interest in a limited liability company formed under Va. Code Ann. §§ 13.1-1000 - 13.1-1080 (2012), was held to be executor. The court also held that the debtor's rejection notice pursuant to Bankruptcy Code § 365(a) and Bankruptcy Rule 6006 was effective to reject the agreement.

***Shults & Tamm v. Brown (In re Hawaiian Telcom. Communs., Inc.)*, 2012 Bankr. LEXIS 380 (Bankr. D. Hawaii Jan. 30, 2012)**

The Court held that severance payments due to an employee terminated four months prior to the bankruptcy filing were pre-petition debts. The Court held that the terminated employment agreement, which provided for noncompetition and nonsolicitation clauses and required safeguarding of confidential information, did not rise to the level of future material obligations, and, therefore, the contract was not an executory contract subject to assumption under the debtor's plan.

<u>FRAUDULENT CONVEYANCES</u>

***U.S. Bank Nat'l Ass'n v. Verizon Communications, Inc.*, 817 F.Supp. 934 (N.D. Tex. 2011)**

U.S. Bank, as the trustee ("Trustee") for the litigation trust created under the Chapter 11 plan of Idearc, Inc. (a former subsidiary of Verizon Communications, Inc. in the business of publishing domestic print and internet yellow pages directories), brought action against corporation's former parent and two former affiliates and former sole director of Idearc's board in connection with spin-off transaction, asserting claims for actual and constructive fraudulent transfer under the Bankruptcy Code and the Texas Business and Commerce Code, and breach of fiduciary duty, aiding and abetting breach of fiduciary duty, and unlawful dividend under Delaware law. Defendants moved to dismiss under Fed. R. Civ. P. 9(b) the claims for actual fraudulent transfer as not having been plead with sufficient particularity and under Fed. R. Civ. P. 12(b)(6), with respect to the remaining claims other than claims based upon constructive fraud, for failure to state a claim for which relief can be granted. After noting that the Fifth Circuit had not yet addressed whether the heightened pleading rule of Rule 9(b) applies to claims for fraudulent transfer based upon actual fraud, the district court held that, in any event, the Trustee had alleged with sufficient particularity, even under Rule 9(b), an actual intent to defraud by parent that was imputed to the Debtor under the control rule which required allegations that (i) the controlling transferee possessed the requisite intent to hinder, delay, or defraud the debtor's creditors, (ii) the transferee was in a position to dominate or control, and (iii) the domination and control related to the debtor's disposition of the property. As to the remaining claims, the district court found that (a) the Trustee had standing to assert breach of fiduciary duty claim against the former sole director; (b) the Trustee adequately alleged breach of fiduciary duty claim against director and that parent knowingly aided and abetted director's breach of fiduciary duty; (c) in pari delicto doctrine did not bar claim against parent for aiding and abetting breach of fiduciary duty; and (d) the trustee adequately alleged that spin-off involved payment of "dividend," as required to state unlawful dividend claim under Delaware law. The district court noted that in order to survive a Rule 12(b)(6) dismissal the well-pleaded facts must lead the court to conclude that there is more than a mere possibility that misconduct has occurred – the allegations should "nudge" the claims against the defendant "across the line from conceivable to plausible."

***In re Pitt Penn Holding Company Inc., et. al.*, 2012 WL 204095 (Bankr. D. Del. Jan. 24, 2012).**

In this case, the Bankruptcy Court held that the two-year "look-back" period of Bankruptcy Code § 548(a) could not be equitably tolled. Thus, transfers that occurred outside of the two-year period were not subject to avoidance. The court observed that Bankruptcy Code § 548 did not set forth a statute of limitations, but rather sets forth the "universe of transfers that are avoidable" under Bankruptcy Code § 548. In comparing Bankruptcy Code § 548 to Bankruptcy Code § 546, the court noted that Bankruptcy Code § 546 was a "true statute of limitations" which indeed distinctly set forth a time frame for

the trustee to bring actions under Bankruptcy Code § 548 (among other sections), and which time period could be tolled.

***PSN Liquidating Trust v. Intelsat Corp. (In re PSN United States, Inc.)*, 2011 Bankr. LEXIS 3473 (Bankr. S.D. Fla. Sept. 9, 2011)**

Parent corporation held broadcast rights to certain sporting events and operated under a contract with defendant satellite services providers to provide uplinking services to satellites for broadcasting. The debtor operated the channel that broadcasted the sporting events and directly paid the satellite service providers the amounts due under the providers' contract with the parent corporation. The Liquidating Trustee sued the satellite service providers for constructive fraudulent transfers arguing that the debtor did not receive reasonably equivalent value in exchange for its payments because only the parent "owned" the satellite services under the contracts and was, therefore, the entity receiving benefits thereunder. The Court held that the debtor's use of the services was reasonably equivalent value because the debtor could not have distributed its programming without such services and granted the providers' motion for summary judgment.

INJUNCTIONS UNDER BANKRUPTCY CODE § 105

***In re Eastman Kodak Co.*, Chapter 11, 2012 Bankr. LEXIS 2746 (S.D.N.Y. 2012)**

The court held in this case that Bankruptcy Code § 105 did not empower the bankruptcy court to issue an order "in aid of" sale of debtors' patents under § 363 to the effect that claimants had no interest in such patents. Federal Rule of Bankruptcy Procedure 7001 requires the filing of an adversary complaint to determine the validity, priority or extent of all property interests. The court concluded that the matter was not properly determined under § 105.

***In re Redco Dev. Co., LLC*, 2011 Bankr. LEXIS 4963 (Bankr. D. Colo. Dec. 15, 2011)**

The Court held it lacked power under Bankruptcy Code § 105(a) to enjoin post-confirmation collection activities against a non-debtor guarantor, and, therefore, a plan containing such injunction could not be confirmed because the injunction violated Bankruptcy Code § 524(e) and Ninth Circuit case law. However, the Court had subject matter jurisdiction and power under Bankruptcy Code § 105 to approve an injunction against any collection actions made against a note that was integral to the debtor's reorganization and was property of the estate itself. The Court found that enjoining such actions would preserve the amounts due from the note to be used pursuant to debtor's plan.

JURISDICTION AND CONSTITUTIONAL AUTHORITY; ABSTENTION AND REMAND

***Parmalat Capital Fin. Ltd. v. Bank of Am., Corp.*, 671 F.3d 261 (2nd Cir. 2012)**

Mandatory abstention under 28 U.S.C.S. § 1334(c)(2) was required, given the complexity of the state law issues, the deference owed to state courts in deciding state law issues

where possible, and the minimal effect of the state cases on the federal bankruptcy action and on the administration of the underlying estates.

***Kirschner v. Agoglia*, 2012 U.S. Dist. LEXIS 65148 (S.D.N.Y. 2012)**

An adversary proceeding was returned to the bankruptcy court because the fraudulent conveyance claims were core claims and the bankruptcy court had already spent three years working on the proceeding and was intimately familiar with its details. The District Court noted that it could withdraw the reference if and when a trial was necessary.

***Adelphia Recovery Trust v. FLP Group, Inc.*, 2012 U.S. Dist. LEXIS 10804 (S.D.N.Y. 2012)**

Bankruptcy court lacked the constitutional power to render a final judgment as to fraudulent transfer claims because the claims involved a private right and would not necessarily be decided in ruling on a third-party proof of claim, and defendants had not consented to the bankruptcy court's final adjudication.

***Retired Partners of Coudert Brothers Trust v. Baker & McKenzie LLP (In re Coudert Bros. LLP)*, 2011 U.S. Dist. LEXIS 110425 (S.D.N.Y. 2011)**

A bankruptcy court's dismissal of a trust's claims against a debtor was vacated because the trust's claims that the debtor transferred assets were claims involving private rather than public rights, and therefore, the bankruptcy judge lacked the power under Article III to enter a final order dismissing the claims.

***Weisfelner v. Blavatnik (In re Lyondell Chem. Co.)*, 467 B.R. 712 (Bankr. S.D.N.Y. 2012)**

Although defendants were correct that the bankruptcy court could not enter final judgment on most of the fraudulent conveyance claims, on any non-core claims, and possibly on other claims, given the extensive experience the bankruptcy court had acquired in the matter, withdrawal would have resulted in inefficiencies and was inappropriate.

***In re Apex Long Term Acute Care-Katy, L.P.*, 2011 Bankr. LEXIS 5162 (Bankr. S.D. Tex. 2011)**

Plaintiff trustee filed four separate adversary proceedings against defendant businesses, seeking a determination that transfers made by the debtor to them in the 90 days before the debtor sought relief under Chapter 11 of the Bankruptcy Code were preferential transfers that could be avoided under Bankruptcy Code § 547. The trustee sought dismissal of three of those adversary proceedings that had been settled with prejudice and a default judgment in the fourth adversary proceeding. Two of the defendants had filed proofs of claim, while the other two defendants had not. The court held that it had the authority under *Stern v. Marshall* to enter separate orders that dismissed the three adversary proceedings that were settled with prejudice and to issue a default judgment in favor the trustee in the fourth adversary proceeding. In so holding, the court stated that

> [t]he determination of avoidance [of preferential transfers] falls within the bankruptcy court's *in rem* jurisdiction over the estate. Because the preferentially transferred property is part of the bankruptcy estate, a turnover order under § 550(a) would be in furtherance of the bankruptcy court's *in rem* jurisdiction. And even when the defendant has not filed a proof of claim, the preference action is necessary to determine the amount of the defendant's claim against the estate on the basis of the antecedent debt.

The court further stated that "[p]reference actions stem from the bankruptcy itself and would necessarily be resolved in the claims allowance process. They fall within the boundaries of the public rights doctrine."

***Special Value Continuation Partners, L.P. v. Jones*, 2011 WL 5593058 (Bankr. S.D. Tex. 2011)**

Adversary proceeding was related to a bankruptcy case in Delaware. The lawsuit was originally filed in Texas state court, after the filing of the Delaware bankruptcy, against former officers and directors of the debtor. The defendants, as former officers and directors, had filed proofs of claim in the bankruptcy case seeking contribution, reimbursement, and indemnity, so the outcome of the adversary proceeding would affect the bankruptcy case. The defendants therefore removed the state court lawsuit to the bankruptcy court in the Southern District of Texas. The plaintiffs filed a motion to abstain and/or remand the proceeding to state court. The defendants then filed a motion to transfer the proceeding to the Delaware bankruptcy court.

The court first decided the motion to transfer. Because the proceeding was not core, transfer under 28 U.S.C. § 1412 was inapplicable. The court also found that transfer under 28 U.S.C. § 1404 was inappropriate. The defendants did not prove that the Delaware bankruptcy court was a more convenient venue under the private and public interest factors. The defendants argued that it should be presumed that the home bankruptcy court could more easily, expeditiously, and inexpensively try a "related to" proceeding. The court held, however, that after *Stern v. Marshall*, the bankruptcy judge's lack of constitutional authority to decide the case negated such a presumption. Other private interest factors were neutral or weighed slightly in favor of transfer. Public interest factors did not favor transfer, and Texas had a stronger local interest in the lawsuit. Therefore, only two of the § 1404 factors weighed in favor of transfer, and the others were neutral or weighed against. Because the defendants did not show that the Delaware bankruptcy court was clearly more convenient, the court denied the motion to transfer.

The court granted the motion to abstain and remand. Although mandatory abstention did not apply because the lawsuit was filed after the bankruptcy case, the discretional abstention factors weighed towards abstention and remand. In addition to noting that the case involved state law issues, a factor strongly in favor of abstention and remand, the court noted that under Stern, the bankruptcy judge's lack of authority to enter a final

judgment in the proceeding negated any detrimental effect of abstention and remand to the efficient administration of the estate.

***Flagship Hotel, Ltd. V. City of Galveston (In re Flagship Hotel, Ltd)*, 2012 WL 2149908 (Bankr. S.D. Tex. 2012)**

Bankruptcy court abated adversary proceeding between debtor, Flagship Hotel, Ltd. and the City of Galveston where debtor sought turnover of $215,920.15, asserting it was entitled to a refund of amounts it alleged were overpaid for water and sewer services. Over a year post-confirmation, the City filed a motion to dismiss, arguing that the court lacked subject matter jurisdiction because relief pursuant to Bankruptcy Code § 542 was not available for a claim that had not been determined by a court of competent jurisdiction (there had been protracted, unresolved litigation among the parties prior to and during the bankruptcy cases, which had served as the basis for abatement). The court granted the motion to dismiss, finding that resolution of the claim did not turn on bankruptcy law, and there were no considerations of plan compliance or with completion of the reorganization (which had long since concluded and the case closed). Thus, the court lacked subject matter jurisdiction.

***Old Cutters, Inc. v. City of Hailey (In re Old Cutters, Inc.)*, 2012 Bankr. LEXIS 2810 (Bankr. D. Idaho June 18, 2012)**

Debtor filed an adversary seeking a determination that (i) it did not owe the city/creditor certain annexation fees, (ii) the city's lien on debtor's property was invalid, and (iii) the debtor was not required to comply with the community housing requirements of its annexation agreement. The court held that all matters were "core," because the actions were to determine the validity of the city's proof of claim and the validity, extent, and priority of the city's lien on the property. The Court also held that even if the adversary proceedings were only "related to" the bankruptcy case, the court had statutory and constitutional authority to enter final judgments under 28 U.S.C.S. § 157(c)(2) because the city had expressly consented to the court's entry of final judgments in the adversary proceedings.

***Spanish Palms Mktg. LLC v. Kingston (In re Kingston)*, 2012 Bankr. LEXIS 755 (Bankr. D. Idaho Feb. 27, 2012)**

Creditors filed an adversary proceeding against chapter 11 debtor seeking a determination of nondischargeability under Bankruptcy Code § 523(a)(2)(B) and (a)(6). The debtor asserted counterclaims in which the debtor sought an adjustment or elimination of the creditors' claims and to recover costs and damages arising as a result of his bankruptcy filing under a breach of an implied covenant of good faith and fair dealing. The court determined that all of the claims and counterclaims were core proceedings and that it could issue final judgments on the counterclaims, even those based on state law, because each counterclaim addressed allowance of the claims in the bankruptcy case. Because the issues were so integrally related to the allowance process, the court held it had constitutional authority to issue a final judgment on each counterclaim. Also, the court found that even if it did not have the power to enter a final judgment on any

counterclaim, the parties expressly consented to the court's entry of judgment under 28 U.S.C. § 157(c)(2) and to the court's entry of a final judgment regarding their claims to attorneys' fees and costs.

***Phoenix Energy Servs. v. Phoenix Envtl., LLC (In re Phoenix Envtl., LLC)*, 2012 Bankr. LEXIS 437 (Bankr. D.N.M. Jan. 31, 2012)**

Creditor filed a state law cause of action against a debtor prepetition and a writ of replevin was issued as to the debtor's property. Before the state judge ruled on a motion to dismiss the writ, the debtor filed its bankruptcy petition and a notice of removal. The bankruptcy court held that although there were issues associated with the state law claims which could impact the bankruptcy case, such as who was entitled to the debtor's equipment, the case was not a core proceeding because the causes of action did not arise under or in the chapter 11 case. Because the state court already committed significant resources to deciding the merits of the issues and allocated additional time to complete that adjudication, the action had to be remanded. The crux of the dispute also involved whether an enforceable contract existed between the parties. The Court held that while decisions to assume or reject an executory contract may be core matters, the potential executoriness of the contract was not sufficient to support an argument that the removed action must stay in the bankruptcy court because there might be core matters to be decided. Although the existence of a contract and whether or not the contract would be assumed or rejected are sometimes determined in the same proceeding, there was no requirement that such occur.

***Heller Ehrman LLP v. Arnold & Porter, LLP (In re Heller Ehrman LLP)*, 2011 Bankr. LEXIS 3764 (Bankr. N.D. Cal. Sept. 28, 2011)**

Bankruptcy Court Holding: Reorganized debtor filed fraudulent transfer action under Bankruptcy Code §§ 544, 548, and 550 and California state law. The Defendants filed a motion to withdraw the reference arguing that pursuant to *Stern v. Marshall*, the bankruptcy court lacked jurisdiction over the proceeding. The bankruptcy court held that (i) the fraudulent transfer actions were "core" matters; (ii) *Stern v. Marshall* was limited to an interpretation of 28 U.S.C. § 157(b)(2)(C) (counterclaims against the estate) and did not affect the court's power to hear the claims; (iii) the bankruptcy court had authority to enter final judgment on the fraudulent transfer proceedings; and (iv) even if the bankruptcy court could not enter a final judgment, any findings of fact could be treated as "proposed" as appropriate under 28 U.S.C. § 157(c)(1). *The district court's conclusions on consideration of the bankruptcy court's report and recommendation are below.*

***Heller Ehrman LLP v. Arnold & Porter, LLP (In re Heller Ehrman LLP)*, 464 B.R. 348 (N.D. Cal. 2011)**

District Court Holding: On consideration of the bankruptcy court's report and recommendation of withdrawal of the reference, the District Court held that (i) fraudulent conveyance actions are "private rights" and therefore do not fall into the "public rights" exception to the exercise of Article III judicial power; but (ii) that *Stern* implies that the bankruptcy court lacks constitutional authority to enter final judgment on the fraudulent

conveyance claims presented. Therefore, the District Court held that withdrawal of the reference was not required or warranted and the bankruptcy court had the statutory authority to hear the case and issue proposed findings of fact and conclusions of law under *Stern.*

LIENS

Trilogy Dev. Co., LLC v. J.E. Dunn Constr. Co. (In re Trilogy Dev. Co., LLC), 468 B.R. 835 (B.A.P. 8th Cir. 2012)

Pursuant to a sale order, a potential bidder for the debtor's property posted an earnest money deposit. When the original bidder failed to close, the deposit was retained as liquidated damages and the debtor closed on the sale with the approved backup bidder. The bankruptcy court held that the deposit was part of the sale proceeds and pursuant to the sale order, the deposit was subject to the lien claims. The debtor sought a determination that mechanic lien claims did not attach to the deposit and that the deposit was an unencumbered estate asset. The debtor argued that because state statutory law was the source of law for creation of a mechanic's lien, the lien claimants must demonstrate that the state statute established a lien against the deposit. The appellate panel reviewing the bankruptcy court held that state lien law was relevant only to the issue of the extent and priority of the various liens, which had already been decided in an adversary proceeding, and that the bankruptcy court was correct in interpreting the phrase "sale proceeds" in its own order and holding that it included the deposit to which lien claims attached.

Pioneer Austin East Dev. I, Ltd. v. Pioneer, Inc. (In re Pioneer Austin East Dev. I, Ltd.), 2012 U.S. Dist. LEXIS 19110 (N.D. Tex. 2012)

The district court reviewed the bankruptcy court's recommendations and proposed findings and conclusions in a non-core matter involving a lien priority dispute. The dispute was between two creditors: one, Grencorp ("Grencorp"), who was the assignee of certain deeds of trust and related notes in 2005 but who did not record the deeds of trust until August of 2007 and the other creditor, Liberty Bankers ("Liberty") who claimed to have an equitable lien on the property based on a loan made in 2006, but where the deeds of trust filed referred to a different parcel of land (allegedly by mistake), and the corrected deeds were not recorded until October of 2007. The district court adopted the bankruptcy court's recommendation and concluded that because the Grencorp's lien was created before Liberty's alleged equitable lien and was filed of record before Liberty recorded its corrected deed, it was superior to Liberty's alleged equitable lien.

In re Bigler, L.P., 458 B.R. 345 (Bankr. S.D. Tex. 2011)

Prepetition secured lender to Chapter 11 debtors ("Amegy") brought adversary proceeding to determine the priority of its liens with respect to liens of creditor that supplied and installed process piping system at the debtors' petrochemical plant ("Shaw") and creditor that furnished industrial boilers and related equipment to the plant ("Halgo"). Amegy's lien was properly perfected. Shaw admitted that it failed to timely perfect its

statutory lien, but the parties stipulated that Shaw was a "mechanic" or "artisan" entitled to a constitutional lien on the process piping system. The parties stipulated that Halgo was a "materialman" but not a "mechanic" or "artisan" (Halgo sized and packaged boiler units to meet its customers' needs, but did not manufacture). Shaw and Halgo each requested that the court enter a judgment declaring that they supplied "removables" to the debtors' plant and, therefore, their liens have priority over Amegy's. Following trial, the court found that Halgo had a valid and properly perfected statutory lien (but did not meet the requirements for a constitutional lien). Although Shaw failed to perfect its statutory lien, the court found it was entitled to a constitutional lien. A constitutional mechanics' lien is self-executing and arises independently and apart from any legislative act and can exist even if the lienholder fails to comply with the legislative requirements for statutory liens. A party is entitled to a constitutional lien if: (1) is qualifies as a "mechanic," an "artisan," or a "materialman," and (2) makes repairs to an "article" or "building." An M&M lien is superior to a prior recorded deed of trust lien if the materials furnished can be removed without material injury to the land, the preexisting improvements, or the materials themselves. After an analysis of the relevant factors, the court found: (1) Shaw's piping system was not removable, (2) Halgo's boiler system was not removable, and (3) the boilers themselves were removable.

***Sprint Nextel Corp. v. U.S. Bank Nat'l Ass'n (In re Terrestar Networks, Inc.*, 457 B.R. 254 (Bankr. S.D.N.Y. 2011)**

Because a creditor may perfect a lien in the private economic value of an FCC license to the extent that such lien does not violate the FCC's public right to regulate transfers of such licenses, the court found that claimant/noteholders had a valid lien on the economic value of the debtor's FCC license, and nothing in § 552 invalidated this lien.

PLAN CLASSIFICATION OF CLAIMS AND INTERESTS

***Wells Fargo Bank v. Loop 76, LLC (In re Loop 76, LLC)*, 465 B.R. 525 (B.A.P. 9th Cir. 2012)**

Creditor's unsecured deficiency claim was placed in a separate class from other general unsecured creditors. The creditor objected to the plan arguing that its claim was classified separately solely to gerrymander an affirmative vote on the plan. The bankruptcy court held that because the objecting creditor had a third-party source of repayment of its unsecured claim (a guaranty), its claim was dissimilar from other unsecured creditors without such alternative sources of payment. The Bankruptcy Appellate Panel held that the bankruptcy court was permitted to consider third-party sources of payment, including a guaranty, when evaluating whether unsecured claims are substantially similar under Bankruptcy Code § 1122(a).

***In re Croatan Surf Club, LLC*, 2011 Bankr. LEXIS 4517 (Bankr. E.D.N.C. 2011)**

First lien creditor was not entitled to vote to reject a debtor's plan on behalf of a second lien creditor despite a subordination agreement which provided for such voting, since the enforceability of the agreement under Bankruptcy Code § 510 did not override the plan confirmation and voting requirements of Bankruptcy Code §§1126 and 1129.

***In re Derby Dev. Corp.*, 2012 Bankr. LEXIS 3034 (Bankr. D. Ct. 2012)**

The court disregarded the vote of secured creditor to accept the debtor's plan since the secured creditor's entity's was created solely to purchase a lien from a relative of the debtor's principal. This creditor was the sole member of impaired class of creditors. The bankruptcy court said that this classification and vote was not in good faith and a sham and was intended to allow the impaired class to accept the plan without the vote of an insider.

***In re Christian Love Fellowship Ministries, Inc.*, 2011 Bankr. LEXIS 4261 (Bankr. E.D. Mich. Nov. 9, 2011)**

The court held that the separate classification of mortgage creditor's deficiency claim and trade claims was not justified. The Court found that supposed differences were either done for gerrymandering purposes, which was evident from a claims analysis and facts of the case, or to purposefully provide for dissimilar treatment among similar claims.

***In re 4th Street East Investors, Inc.*, 2012 Bankr. LEXIS 2144 (Bankr. C.D. Cal. May 15, 2012)**

Starting with the following two propositions: (i) claims have to be separately classified if they are found as a factual matter to be not substantially similar; and (ii) even if claims are substantially similar, a plan may place those claims in different classes in some circumstances where the debtor can show a business or economic justification for doing so, the Court held that under Ninth Circuit precedent, a separate classification of deficiency claims is not required by law, and, based on the facts of the case, the deficiency claim in question was substantially similar to other general unsecured claims to preclude a separate classification.

PLAN CONFIRMATION

***Bank of N.Y. Mellon Trust Co. NA v. Humboldt Redwood Co.*, 2012 U.S. Dist. LEXIS 2032 (S.D. Tex. 2012)**

The Fifth Circuit remanded to the bankruptcy court the question of "the value of [the] administrative priority claim and the extent to which relief is available." The Fifth Circuit expressed concern that an unpaid account of $11.1 million owed to the Debtor by another affiliated debtor was not properly added into the collateral valuations used to determine the amount of the Indenture Trustee's secured claim claim(s) for purposes of determining whether the plan satisfied the cramdown requirements in Bankruptcy Code § 1129(b). Under Bankruptcy Code § 1129(b), the plan needed to provide for the payment in full of the secured claim, valued as of the confirmation date. On remand, the bankruptcy court held that the $11.1 million amount was properly considered in the mathematical calculation and that the original valuation of the collateral and the consequent determination of the Indenture Trustee's claim(s) stood. The district court affirmed the bankruptcy court's holding on remand that the calculations were correct.

The evidence produced at bankruptcy court showed that the $11.1 million asset (accounts receivable) was properly included in the calculation of the value of the collateral as of the petition date. The district court noted that the bankruptcy court could have set the value of the secured claim and then reduced it by the secured creditor's administrative claim to get to a value for the secured claim as of the confirmation date. However, it was deemed not necessary because "when the dust settled, using the petition-date values rather than the confirmation-date values compensated the Indenture Trustee for its secured claim and its administrative claim in one evaluation that maximized the Indenture Trustee's position."

***In re Olde Prairie Block, LLC*, 464 B.R. 337 (Bankr. N.D. Ill. 2011)**

The debtor attempted to confirm a plan which provided for a partial strip-off of a creditor's lien in exchange for partial payment in cash. The debtor asserted that the plan qualified as fair and equitable under Bankruptcy Code § 1129(b)(2)(A)(i) because the Code requires only that the creditor retain its liens to the extent of the allowed amount of its claim and that under the debtor's plan after the creditor was paid in cash, the balance of its claim would be protected by liens on other property. The court rejected the debtor's argument and strictly interpreted Bankruptcy Code § 1129(b)(2)(A)(i), holding that because the debtor's plan provided that the debtor would retain possession of the collateral securing the creditor's claim, the plan must provide that the creditor retain its liens to permit the plan to be confirmed over the creditor's objection. The Court also held that the plan could not be confirmed under Bankruptcy Code § 1129(b)(2)(A)(ii) because the plan deprived the creditor of its right to credit-bit its claim. The debtor argued that its plan provided for a recapitalization of assets, and therefore, Bankruptcy Code § 1129(b)(2)(A)(ii) did not apply. The Court, however, found that the transaction contemplated in the plan was actually a sale. The Court held that the plan was not fair and equitable pursuant to Bankruptcy Code § 1129(b)(2)(A)(iii) because the plan did not provide for a possibility of substitution of collateral that could be considered the "indubitable equivalent" of the creditor's claim, but rather provided only for lien stripping.

***In re Eugene Pipe LLC*, 2012 Bankr. LEXIS 2014 (Bankr. D. Or. May 7, 2012)**

Over a creditor's objection, the Court approved the debtor's second amended plan of reorganization, which provided for the sale of debtor's assets. The objecting creditor had submitted a competing offer, which appeared to be offering more cash to unsecured claimants, but was subject to contingencies. The objecting creditor argued that because it was providing more cash, the debtor could not satisfy the best interests test in Bankruptcy Code § 1129(a)(7). The Court found that the risks were too great that the competing offer could not be consummated in a timely manner and for the amounts proposed to use it as a basis for the liquidation amount in the best interest test of Bankruptcy Code § 1129(a)(7) and approved the debtor's plan.

***In re Randi's, Inc.*, 2012 Bankr. LEXIS 2920 (Bankr. S.D. Ga. June 27, 2012)**

The Court examined whether Congress, when amending Bankruptcy Code § 1121(e) in the 2005 Amendments, altered to whom the 300-day small business plan filing deadline applied. The Court found that courts have an independent duty to ensure that a confirmable Plan has been filed and held that once the 300-day time period ended and there was no plan filed by *any* party in interest, "cause" for dismissal existed under Bankruptcy Code § 1112(b)(4)(J).

POST-CONFIRMATION ISSUES

***In re Davis Offshore, L.P.*, 644 F.3d 259 (5th Cir. 2011)**

Chapter 11 plan, in which the family-owned debtor's assets were sold to an investor consortium including Gregg Davis, one of the family members, and the family members received approximately $31 million on account of their equity interests, was confirmed within less than a week from the petition date. One of the family member's trust (the "Trust"), the appellant, did not oppose the plan and did not appeal the confirmation order, which became final. All parties were represented by sophisticated legal counsel. Six months later, appellant sought to revoke the confirmation order based upon allegations of fraud. The bankruptcy court held that no fraud had occurred and refused to revoke the confirmation order. On appeal, the district court vacated the bankruptcy court's ruling but held that the appeal was moot because the plan had been substantially consummated. The Trust did not appeal. Instead, the Trustee filed a motion with the district court seeking leave to pursue damages against the buyers, including Gregg Davis, and an advisor for fraud. The district court referred the matter to the bankruptcy court because the matter involved an interpretation of the release and exculpation provisions of the plan and confirmation order. The bankruptcy court rejected the motion as an impermissible collateral attack on the confirmation order. The Trust appealed the bankruptcy court's order to the district court, but on the motion of the appellees, the Fifth Circuit certified the appeal for direct review under 28 U.S.C. § 158(d).

The Fifth Circuit first concluded that the bankruptcy court had jurisdiction over the Trust's motion for leave to file suit for damages post-confirmation because it had core jurisdiction to interpret the plan and the confirmation order. The Fifth Circuit then addressed whether the plan and confirmation order barred the assertion of fraud claims against the appellees and whether a confirmation order that goes beyond the terms of the plan prevails if the plan and confirmation order are inconsistent. The Fifth Circuit found that the mutual releases contained in the plan barred the Trust from pursuing its damages claims against all of the appellees except for Gregg Davis. The Fifth Circuit then looked to the exculpation provisions of the plan and found that these provisions did not bar the Trust from pursuing its fraud claims against Gregg Davis because it either excepted acts of willful misconduct and gross negligence or, as it applied to acts related to solicitation of acceptances of the plan (which did not except acts of willful misconduct or gross negligence) because Gregg Davis was not one of the parties to which the exculpation clause applied. The court then went on to address the confirmation order, which it found to separately and inconsistently with the plan to bar the fraud claims against Gregg Davis.

The bankruptcy court had adopted the reasoning that the confirmation order is always dispositive if the terms of a plan and confirmation order are in conflict. The Fifth Circuit rejected this legal conclusion for several reasons: there was only minimal and non-controlling authority cited by the bankruptcy court and if a confirmation order always controls over a plan if the two conflict, it would encourage errors and abuse. Thus, the Fifth Circuit did not defer to the bankruptcy court's ruling but nevertheless found that Gregg Davis had been exonerated from liability for fraud by the confirmation order. The court found that the confirmation order was ambiguous because it contained exculpation provisions that were inconsistent and different from the plan's exculpation provisions by, among other things, not excluding acts of willful misconduct or gross negligence. The court resolved the ambiguity in Gregg Davis' favor because (i) it was consistent with the stated goal of the plan to end all litigation that might get in the way of the sale, (ii) neither the plan nor confirmation order were "foisted on the Trust," and (iii) the Trust was at all times represented by sophisticated counsel and was routinely included in correspondence among the family members and their counsel.

***Sandburg Financial Corp. v. American Rice, Inc. (In re American Rice, Inc.)*, 2011 U.S. App. LEXIS 19590 (5th Cir. 2011)**

After the July 7, 1999 confirmation of debtor's reorganization plan, debtor entered into an indemnity and release contract and a covenant not to sue contract with Sandburg Financial, one of its creditors. Under the contracts, the debtor agreed to pay after June 30, 2008 any damages Sandburg Financial incurred and any judgment Sandburg Financial obtained against the debtor and reaffirmed its guarantee to pay after June 30, 2008, the obligations of its affiliated entities. In exchange, Sandburg Financial agreed not to execute upon or enforce any judgment, not to enforce any guaranty contracts, and not to sue or assert any claims against the debtor prior to June 30, 2008. On October 23, 2009, Sandburg Financial filed suit against the debtor in Texas state court seeking to collect amounts allegedly due from the debtor and its affiliates under certain pre-petition contracts. Upon the debtor's motion, the district court reopened the bankruptcy case and found that Sandburg Financial's petition in state court violated the discharge injunction and confirmation order.

On appeal, Sandburg Financial argued that the post-confirmation contracts were enforceable and did not violate the confirmation order or the discharge injunction because the contracts represent new contracts supported by new and independent consideration. The Fifth Circuit rejected this argument, agreeing with other courts that when even a part of the consideration for a contract is discharged debt, the contract must comply with the reaffirmation provisions of Bankruptcy Code § 524. Here, consideration for the post-confirmation contracts was at least, in part, discharged debt of the debtor. The contracts were not enforceable because the contracts failed to comply with the provisions of § 524, namely, they were not made before the discharge was granted, they were not filed with the court, and they did not contain the required disclosures. The Fifth Circuit also agreed with the district court's determination that, even if the "new and independent consideration" exception applied, the contracts at issue were not supported by new and independent consideration.

***Alderwoods Group, Inc. v. Garcia*, 682 F.3d 958 (11th Cir. 2012)**

The Eleventh Circuit Court of Appeals considered whether a bankruptcy court in one federal district (Southern District of Florida) has jurisdiction to determine whether a debt was discharged in a bankruptcy case prosecuted in another federal district (District of Delaware). The debtors filed a "complaint" in the bankruptcy court for the Southern District of Florida invoking the Declaratory Judgment Act and arguing that certain creditors' state court tort claims were discharged in the debtors' chapter 11 bankruptcy cases prosecuted in the District of Delaware. Finding that when a bankruptcy court enters an order confirming a plan, that court retains postconfirmation jurisdiction to complete actions pertinent to that plan and that the power to sanction contempt is jurisdictional, the Court of Appeals held that "the court that issued the injunctive order alone possesses the power to enforce compliance with and punish contempt of that order." *Garcia*, 682 F.3d at *971 (citing cases). The Court held that the creditors filing a state court action based on tort claims violated the discharge injunction contained in the confirmation order and that it was the Delaware Bankruptcy Court's injunction to enforce—not the Florida Bankruptcy Court's.

POST-PETITION INTEREST

***HSBC Bank USA, Nat'l Ass'n v. Bank of N.Y. Mellon Trust Co., Nat'l Ass'n (In re Bank of New England Corp.)*, 646 F.3d 90 (1st Cir. 2011)**

In *HSBD Bank v. BNY Mellon Trust*, the court considered and interpreted contractual language in a subordination agreement that subordinated the junior lien indebtedness to the senior lien indebtedness for certain items, including "interest due or to become due." More specifically, the subordination agreement generally provided for subordination to the "right of payment to the Company's obligations to the holders of Senior Indebtedness of the Company." The agreement then went on to describe the items that the Junior Bonds were subordinated to in more detail: "all principal (and premium, if any), sinking fund payments and interest due or to become due upon all Senior Indebtedness of the Company shall first be paid in full." The Junior Lenders argued that the intent of the parties was that "interest due or to become due" did not include postpetition interest. The amount at stake approximately $100 million in postpetition interest had accrued during the eight years the trustee took to pay off the principal on the Senior Bonds.

***In re SW Boston Hotel Venture, LLC*, 460 B.R. 4 (Bankr. D. Mass 2011)**

A secured creditor in a chapter 11 case was entitled to postpetition interest under Bankruptcy Code § 506(b), but only from the date of sale of a bankruptcy debtor's hotel since the sale was the earliest evidence that the creditor was over-secured. The contractual default interest rate was warranted since other creditors experienced no harm from this rate and the rate was not a penalty.

<u>PRIVILEGES - TRUSTEE</u>

***In re Golden Grove Pecan Farm*, 460 B.R. 349 (Bankr. M.D. Ga. 2011)**

The court found that a chapter 7 debtor's attorney could not assert the attorney-client or work-product privileges in an effort to halt the chapter 7 trustee from obtaining documents from the debtor. In relying upon *In re ANR Advance Transportation*, 302 B.R. at 616-617 (footnote and citations omitted), the court concluded that "law firms may not interpose the work product doctrine to deny the trustee access to the material he seeks. To grant the law firms work product immunity under the circumstances present here would not serve the purposes of the work product doctrine. Clients are not adversaries of their lawyers, and the zone of privacy that the work product rule protects was designed to shield lawyers from their opponents, not their clients. Thus, the doctrine has no applicability in the present context."

<u>PROFESSIONALS - COMPENSATION</u>

***CRG Partners Group, L.L.C. v. Neary (In re Pilgrim's Pride Corp.)*, 2012 U.S. App. LEXIS 16702 (5th Cir. Aug. 10, 2012)**

The Fifth Circuit Court of Appeals held that the U.S. Supreme Court's decision in *Purdue v. Kenny A. el rel Winn*, 130 S. Ct. 1662 (2010), which curtailed district courts' authority to award fee enhancements in federal fee-shifting cases, does not circumscribe bankruptcy courts' authority to grant fee enhancements in bankruptcy cases and upheld the bankruptcy court's award of a $1 million fee enhancement to CRG Partners Group, LLC for services to Pilgrim's Pride Company and its affiliates in their chapter 11 cases. The Court of Appeals noted that Fifth Circuit judges are bound by the "rule of orderliness" and may not unilaterally overrule or disregard established Fifth Circuit precedent and must "exercise restraint" when determining "whether a Supreme Court decision has produced an intervening change in the law." *CRG Partners Group, L.L.C.*, 2011 U.S. App. LEXIS 16702 at * 33. The Court thoroughly reviewed the history, precedent, and current requirements for an award of fees in bankruptcy cases and found that the bankruptcy fee award structure was sufficiently dissimilar from the federal fee-shifting considered in *Purdue* to decline to extend *Purdue* to bankruptcy cases.

***Waldron v. Adams & Reese, L.L.P. (In re Am. Int'l Refinery Inc.)*, 2012 WL 1034028 (5th Cir. 2012)**

Liquidating trustee brought adversary proceeding against former counsel for Chapter 11 debtors, seeking disgorgement of attorney fees awarded during the bankruptcy based upon allegations that: (a) law firm failed to timely disclose that its retainer was paid by a creditor of the estate, (b) law firm failed to disclose its relationship with creditor that paid the retainer, and (c) law firm's prepetition advice to debtor on how to characterize payments made to officers and directors disqualified it from serving as debtors' counsel. Following a bench trial, the U.S. Bankruptcy Court for the Western District of Louisiana ruled that law firm did not have a disqualifying adverse interest, but imposed sanctions of $135,000 for the firm's failure to adequately disclose various connections that it had to

debtors and creditors. The trustee appealed. The district court affirmed, and the trustee appealed. The Fifth Circuit also affirmed, holding: (a) addressing an issue of apparent first impression, in determining whether payment of a bankruptcy retainer by a third party is a disqualifying interest, the totality of the circumstances approach, as opposed to the *per se* approach, is the better test; (b) under the totality of the circumstances, creditor's payment of the bankruptcy retainer of debtors' counsel did not create a disqualifying interest (though failure to disclose this fact lead to sanctions); (c) law firm's previous representations of debtors did not create a disqualifying interest; and (d) $135,000 was an appropriate sanction for firm's failure to make adequate disclosures.

***In re ASARCO L.L.C.*, 457 B.R. 575 (S.D. Tex. 2011)**

In 2005, ASARCO filed for bankruptcy and shortly afterwards filed an application to retain Lehman Brothers as its financial advisor pursuant to a Letter of Engagement and Bankruptcy Code § 328. ASARCO agreed to pay Lehman $100,000 a month for twenty four months and $75,000 a month thereafter. ASARCO also agreed to pay Lehman a $4 million transaction fee, against which one hundred percent of the monthly fees for the first twenty four months would be credited, and thereafter fifty percent of the monthly fee. Barclays Capital (BarCap), through a sale in Lehman's bankruptcy case, became the assignee under the ASARCO contract, which it renegotiated with ASARCO. Under the new agreement, BarCap would be paid $225,000 a month and a $5 million transaction fee upon the sale of substantially all of ASARCO's assets or restructuring, no matter the value of the services provided. ASARCO won a judgment, which granted them stock in a successful copper mine. ASARCO then entered an agreement with BarCap to auction the judgment. This agreement provided that BarCap would be paid $6 million upon completion of the sale, although the bankruptcy court never approved the auction agreement.

ASARCO's plan was confirmed, pursuant to which its former parent reacquired ASARCO. In connection with its final fee application, BarCap applied for over $9 million in discretionary fees consisting of: (1) $1,202,500 for "unanticipated services" performed by Lehman; (2) a $2 million general "success fee"; and (3) a $6 million success fee in connection with the successful auction of the judgment. The Bankruptcy court awarded $975,000 for the unanticipated services performed by Lehman, but denied the other two fees. Both ASARCO's parent company and BarCap appealed.

The district court affirmed the bankruptcy court's award of the $975,000 for unanticipated services and its denial of the "discretionary" success fees. The court noted the strict standard in the Fifth Circuit for modifying a fee approved under Bankruptcy Code § 328: once the fee is approved under Bankruptcy Code § 328, the fee may be modified only upon a finding that the original agreement "prove[d] to have been improvident in light of developments not capable of being anticipated at the time of the fixing of such terms and conditions." The Fifth Circuit has also emphasized that this strict standard requires that circumstances actually be "incapable of anticipation, not merely unanticipated," a distinction that is "not insignificant."

The court found that the bankruptcy court's award of $975,000 in additional fees for

Lehman's services was proper because: (1) the bankruptcy court applied the correct standard in considering the fee award, and (2) there is ample evidence in the record to support the bankruptcy court's conclusions that the length and complexity of the bankruptcy were incapable of anticipation when Lehman entered into the engagement letter. The court also held that the bankruptcy court correctly considered BarCap's request for the Success Fee under the terms of the BarCap Engagement Letter. The BarCap Engagement Letter, like the Lehman Engagement Letter, was approved under Bankruptcy Code § 328, not Bankruptcy Code § 330. Additionally, the court held that the bankruptcy court considered the relevant factors in the BarCap Engagement Letter when it determined not to award the "success fee." The court agreed with the bankruptcy court that ASARCO's successful restructuring was the result of a "coalescence of factors" and not exclusively because of BarCap's services. Lastly, the court found that the judgment auction was covered by the initial BarCap Engagement Letter, that the Supplemental Engagement Letter was never approved and therefore never agreed to, and, despite the fact that the failed auction might have led the parent to propose its plan, the auction itself was not successful. Thus, the $6 million fee enhancement was not warranted.

***In re SBMC Healthcare, LLC*, --- B.R. ---, 2012 WL 2308682 (Bankr. S.D. Tex. June 18, 2012)**

The bankruptcy court approved the employment of a law firm ("Law Firm") by the debtor in possession in a Chapter 11 case even though the Law Firm had received a payment during the preference period and maintained a claim for payment of prepetition fees against the sole shareholder of the debtor that would be paid only if there were sufficient proceeds following the sale of estate assets to pay all creditors in full and result in a distribution to the shareholder. Here, the Law Firm had represented the debtor in prepetition state court litigation and had been paid $50,000 during the preference period but was still owed approximately $110,000 as of the petition date. The debtor filed an application to employ the Law Firm as general bankruptcy counsel for the debtor and disclosed the payment and the claim against the debtor for unpaid fees. The United States Trustee ("UST") objected to the application on the grounds that the Law Firm was a creditor of the estate and could not qualify under Bankruptcy Code § 327(a) as a disinterested person. The debtor filed an amended application that stated that the Law Firm agreed to waive any claim against the estate, but not against the individual shareholder, and that it would serve as special counsel while at the same time a different firm would be hired as general bankruptcy counsel. The Law Firm, while special counsel, would assist the other law firm (consisting of one attorney) with some bankruptcy matters. The UST continued to object, taking the position that although the Law Firm was no longer a direct creditor of the debtor, it was still not disinterested because it was looking in the first instance to payment of its claim out of estate assets. The Law Firm argued that because it waived its claim against the debtor, it was no longer a creditor of the debtor and, therefore, met the disinterestedness test.

The court agreed with the debtor, rejecting a *per se* test of disinterestedness when a law firm receives a payment during the preference period and holds a prepetition claim (albeit indirect) and, instead, applied a "totality of the circumstances" test. After analyzing the application of fourteen factors, the court determined that, under the totality of the

circumstances, it would approve the amended application.

***In re IRH Vintage Park Partners, L.P.*, 456 B.R. 673 (Bankr. S.D. Tex. 2011).**

Secured creditor objected to the fee application filed by the Chapter 11 debtor's experts because the experts' services would be paid out of the secured creditor's cash collateral and the secured creditor realized no benefit from such services. The bankruptcy court ruled that the secured creditor was bound by the terms of the confirmed plan, which provided for payment in full of court-approved professional fees and other administrative expenses, and could not belatedly object on the grounds that the fees sought would be paid from its cash collateral. However, the experts could not adequately prove their fees. The court concluded that the services and expenses for which the experts sought compensation did not provide an identifiable, tangible, or material benefit to the debtors' estates because the plan for which experts testified was not confirmed and the testimony was neither mentioned in the court's oral findings nor relied upon for the court's ruling (thus failing the retrospective review under the *Pro-Snax* analysis).

***In re MSB Energy, Inc.*, 450 B.R. 659 (Bankr. S.D. Tex. 2011)**

WGB, counsel for debtor MSB, filed a fee application that was challenged by MSB's creditors. WGB attached fee statements to the fee application detailing the dates of services rendered, the professional providing the service, a comprehensive description of the services provided, the hours billed, rate charged, and total amount sought for each billing entry. The fee statements also itemize WGB's expenses for each month of service. Unlike counsel in *Pro-Snax*, WGB assisted the debtor in obtaining plan confirmation and in liquidating the debtor's assets. While the court acknowledged that the debtor did not achieve 100% payment to all creditors as originally contemplated in prior versions of the plan, the circumstances of the case did not place WGB in a position where it should have known from the outset that the proposed payout would not be achieved. Moreover, professional fees may be compensable even though unsecured creditors are not paid. The bankruptcy court held WGB's services resulted in an identifiable, tangible, and material benefit to the debtor's estate. Further, the actual, necessary fees and expenses WGB sought met the requirements set forth in § 330 and applicable Fifth Circuit law, and the court found no cause to either increase or decrease the total award. The court granted WGB's fee application in full.

***In re Broughton Ltd. P'ship*, 2012 WL 1437289 (Bankr. N.D. Tex. 2012)**

Debtor retained special counsel ("Firm") to negotiate the sale of 22 residential lots. Despite substantial efforts, negotiations failed and the sales did not close. Firm filed an application for compensation and the Office of the US Trustee objected on the grounds that Firm's efforts did not result in an "identifiable, tangible, and material benefit to the estate," as required by *Pro-Snax*. After analyzing the standards for fee awards applied by various circuits, the bankruptcy court made several observations. First, it seems clear that professionals serving a debtor or other fiduciary in a Chapter 11 case cannot be limited in their compensation to those activities that actually add to the estate. To do so would exclude from compensation many critical functions performed by professionals (such as

operational oversight, disputes respecting control, steps in the plan process such as extensions of exclusivity, and other actions). Second, work that a professional undertakes doesn't always lead to success. The very fact that Bankruptcy Code § 328(b) permits (but does not require) retention of professionals on a contingency basis demonstrates that Congress did not intend all professional services to be compensable only on that basis. With respect to the "benefit" requirement, the bankruptcy court looked to the *Melp* case, which was cited by the *Pro-Snax* Court. According to *Melp*, in undertaking a "benefit analysis," a court should consider (1) whether the debtor's attorney's actions duplicated the duties of the trustee or the trustee's counsel under § 1106, (2) whether the services have obstructed or impeded the administration of the estate, and (3) whether the debtor's attorney's actions are consistent with the debtor's duties under Bankruptcy Code § 521. With respect to "actual and necessary," the court construed the language in Bankruptcy Code § 330(a)(1)(A) in light of the identical language in Bankruptcy Code § 503(b)(2) and the Supreme Court's ruling in *Reading*, finding that success cannot be a prerequisite to compensation outside of a contingency arrangement. Rather, the conclusion that a professional was justifiably pursuing a legitimate, realizable goal of the fiduciary client should be enough benefit to the estate to satisfy *Pro-Snax.* In conclusion, the bankruptcy court held "that a professional provides an 'identifiable, tangible and material benefit' to a bankruptcy estate within the meaning of *Pro-Snax* through assisting the estate representative in administering an asset of the estate, whether or not the effect of administration of the asset is enhancement of the estate, so long as the professional's services are performed at the direction of the estate representative and the estate representative is acting in accordance with the Code and its sound business judgment."

***In re Whitley*, 2011 Bankr. LEXIS 4545 (Bankr. S.D. Tex. 2011)**

Bankruptcy court issued a show cause order as to why debtor's counsel should not disgorge all fees paid with respect to two separate bankruptcy cases filed on behalf of a Chapter 7 debtor. The court found that disgorgement was warranted because counsel violated his duty of disclosure under Bankruptcy Code § 329 by failing to timely disclose in either case his compensation received, including property transferred from the debtor to counsel in payment of fees, and his connections to the debtor. The court further found that, because no discharge was received and the cases only delayed foreclosure on the debtor's properties, the services rendered provided no reasonable value under § 330. The court ordered disgorgement of all fees, including the unwinding of various property transfers that had been made in payment to counsel.

***In re Bechuck*, 2012 WL 1144611 (Bankr. S.D. Tex. 2012)**

Chapter 7 panel trustee filed an application to employ general counsel under Bankruptcy Code § 327(a). Although the court found that the firm had no adverse interest to the estate and was disinterested, the court *sua sponte* denied the application, without prejudice, finding that additional disclosures were required under Rule 2014.

Specifically, Rule 2014 requires the trustee to include six categories of information in an application, of which the court focused on two: the specific facts demonstrating the necessity for employing the attorney and the reasons for selecting the attorney. The court

further found that case law requires the applicant "to come forward with facts pertinent to eligibility."

The application was denied under this framework because, among other things it (1) failed to provide any description of the applicant's past success in representing the trustee (instead giving vague references to the firm's general bankruptcy experience), (2) it lacked any discussion of how often the proposed attorneys had actually undertaken the specific tasks for which they were being retained, (3) it improperly recited as grounds for employment the trustee's friendship with the applicant firm (which the court found as an irrelevant basis), and (4) it was signed by one of the proposed attorneys with the trustee's permission (indicating the application was nothing more than a form document and the application was not the result of the trustee's concerted effort to fulfill his fiduciary duty to find the best counsel).

In its conclusion, the court reiterated that it has "substantial discretion in approving applications to employ" and that the opinion is not a bar to the employment of recently-licensed attorneys. The court noted that three key factors in the court's future analysis of applications, on a case-by-case basis, will be: "(1) How well have those less experienced attorneys done on those tasks on which they have already worked in other cases—that is, have their services rendered a tangible, identifiable, and material benefit?; (2) Do the less experienced attorneys have the willingness and savvy to aggressively prosecute the adversary proceeding and tenaciously negotiate with opposing counsel?; and (3) What are their hourly rates compared to the hourly rates of more experienced attorneys who are competing against them for trustee representation?"

***In re BLX Group, Inc.*, 2012 Bankr. LEXIS 953 (Bankr. D. Mont. Mar. 8, 2012)**

Chapter 11 Trustee filed an unopposed fee application seeking an award of fees and expenses in the amount of $730,000, which was calculated by including a secured creditor's credit bid on estate property in the amount of $10,676,157. The Court *sua sponte* requested briefing on the effect of the Bankruptcy Appellate Panel for the Ninth Circuit's decision in *United States Trustee v. Tamm (In re Hokulani Square, Inc.)*, which held that the plain meaning of "moneys disbursed" in Bankruptcy Code § 326(a), used to calculate trustee compensation, could not include secured creditors' credit bids. The Court held that *Tamm*, although not binding precedent, was the best approach and denied the Trustee's application, but allowed the trustee to refile by omitting the credit bid.

***In re MRDUCS LLC*, 2012 Bankr. LEXIS 188 (Bankr. W.D. Ky. Jan. 19, 2012)**

The bankruptcy court approved the debtor's application to retain a law firm as bankruptcy counsel, which application included a provision for compensation of a payment of $1,000 per month into the firm's escrow account. The Court held that the monthly payments did not constitute an "evergreen" retainer and were reasonable under Bankruptcy Code § 328, given that the fee arrangement was not constant or static, the law firm was not asking to be paid without prior court approval, and in light of the relatively small retainer the debtor paid the firm and the anticipated size of attorneys' fees the

debtor would incur. The Court also noted that the debtor's largest secured creditor did not oppose the proposed fee arrangement.

***In re Xavier PS, Inc.*, 2012 Bankr. LEXIS 721 (Bankr. D. Colo. Feb. 27, 2012)**

Prior chapter 11 debtors of dismissed chapter 11 case filed a motion to disgorge all of their former bankruptcy counsel's fee payments taken without court approval and disclosure. The former counsel filed a final application for allowance of attorney's fees and costs. First, the court noted that it retained jurisdiction to approve attorneys' fees under Bankruptcy Code § 330 even after the debtors' cases were dismissed. The court found that extenuating circumstances contributed to debtors' counsel's failure to disclose additional retainer amounts received during the cases and that debtors' counsel mistakenly believed that he was authorized to apply the retainers without first obtaining court approval based on language in a cash collateral order. Nevertheless, the Court concluded that debtors' counsel's failure to comply with the disclosure requirements of Bankruptcy Code § 329 and Bankruptcy Rule 2016(b) required forfeiture of his fees, as he did not confer a substantial benefit on the estate from his post-bankruptcy services.

***In re USHC, LLC*, 2011 Bankr. LEXIS 3595 (Bankr. W.D. Ky. Sept. 23, 2011)**

The Bankruptcy Court denied the portion of the debtor's application to retain counsel which required the debtor to escrow $2,000 per month as a post-petition retainer. The Court considered the following factors in determining whether to approve the retainer: (i) whether the case is an unusually large one in which an exceptionally large amount of fees accrue monthly; (ii) whether the court is convinced that waiting an extended period for payment would place an undue hardship on counsel; (iii) whether the court is satisfied that counsel can respond to any reassessment of the fee; and (iv) whether the fee retainer procedure itself is the subject of a noticed hearing prior to any payment thereunder. The Court held that the "rare" circumstances justifying a departure from typical fee arrangements and approve post-petition retainers under Bankruptcy Code § 328(a) did not exist.

PROFESSIONALS - EMPLOYMENT

***In re Duke Investments, Ltd.*, 454 B.R. 414 (Bankr. S.D. Tex. 2011)**

Debtor moved to disqualify attorney who had prepared proof of claim on creditor's behalf and attorney's firm from representing creditor in adversary proceeding challenging the propriety of default interest included in proof of claim, on ground that attorney would have to be called as witness. The bankruptcy court held that: (1) attorney was not a "necessary witness," as required for his disqualification under the Model Rules or under Louisiana law; (2) lack of evidence that attorney's testimony would substantially conflict with that of other employees of creditor who assisted attorney in preparing proof of claim, or would be substantially adverse to creditor's interests, prevented grant of disqualification motion over objection of creditor; and (3) even assuming that attorney had to be disqualified from representing creditor, that disqualification would not extend to attorney's entire firm.

***In re Boyd*, 2012 Bankr. LEXIS 600 (Bankr. S.D. Tex. 2012)**

American Property Locators, Inc. ("API") was in the business of locating funds and other property for creditors including some in the instant case. API filed a motion for authority to pay funds, which was denied by the court on findings that API had failed to provide sufficient documentation to establish the identity of the proper recipient. API amended its motion to name a second creditor as the recipient. The court denied the motion with prejudice and ordered API and its agent to show cause why they should not be required to submit all future claims and pleadings through counsel. After briefing, the court held that respondents might properly continue to file routine motions to pay unclaimed funds as such filings were administrative acts much like the filing of claims, acts that non-attorneys were authorized to undertake pursuant to Bankruptcy Rule 9010. However, where disposition of an application required consideration of non-routine or complex issues and/or a hearing, API would be required to appear through counsel. The court stated that it, not the filer, determines when the representation of counsel is necessary. Accordingly, it found that API is prohibited from filing a brief or appearing at any hearing, unless through an attorney.

***In re Trans Nat'l Communs. Int'l, Inc*, 462 B.R. 339 (Bankr. D. Mass 2011)**

Trustee seeking employment of professionals under Bankruptcy Code § 328(a) had to establish terms and conditions of employment were reasonable. An appropriate application by debtor, satisfying this and other requirements, would have allowed court to make an informed decision on compensation. The court found that based on this standard, the debtor's application to retain an investment banker was lacking.

***In re Vista Bella, Inc.*, 2012 Bankr. LEXIS 2391 (Bankr. S.D. Ala. May 29, 2012)**

Chapter 7 trustee sought to hire attorney pursuant to Bankruptcy Code § 327(e) to prosecute fraudulent transfer actions. The attorney had previously represented the debtor in a state-court lawsuit and was currently representing certain creditors in state-court actions that arose from similar facts as the fraudulent conveyance claims. The Court granted the application to employ under Bankruptcy Code § 327(e) finding that despite the prior and ongoing representations, the attorney did not represent or hold any interest adverse to the debtor or its estate in the fraudulent transfer actions. The Court noted there was an open question as to whether the attorney would have been disinterested under Bankruptcy Code § 327(a).

***In re Hollifield Ranches, Inc.*, 2012 Bankr. LEXIS 1863 (Bankr. D. Idaho Apr. 26, 2012)**

Court denied *nunc pro tunc* approval of special counsel under Bankruptcy Code § 327(e). The Court held that the debtor must show "exceptional circumstances" to qualify for *nunc pro tunc* approval by (i) demonstrating that the professional's services benefitted the bankruptcy estate in a significant manner; and (ii) explaining the debtor's failure to receive prior judicial approval. Although the court found that the benefit to the estate requirement was met, the Court found that debtor's management's own oversight was

likely the only explanation for the failure to timely request court approval of special counsel's employment and extraordinary circumstances had not been shown to justify *nunc pro tunc* approval.

PROPERTY OF THE ESTATE

In re IFS Financial Corp., 669 F. 3d 255 (5th Cir. 2012)

IFS Financial Corp. and seventeen affiliated organizations were debtors in a series of Chapter 7 cases. The question addressed was whether the Trustee was required to demonstrate that the debtors had legal ownership of bank accounts in order to establish that the funds in the accounts were property of the debtor. The case arose out of eight adversary proceedings brought by the Trustee for avoidance of fraudulent transfers. The bankruptcy court found that the debtor had sufficient control over the funds and determined that the funds had been fraudulently transferred to the defendants. The District Court affirmed. The Fifth Circuit, in framing the issue as "control of the accounts versus legal title to the accounts," held that "control" was sufficient evidence of "ownership." In affirming the Bankruptcy Court's decision, The Fifth Circuit stressed that this was a fact-based determination.

In re ASARCO, L.L.C., 650 F.3d 593 (5th Cir. 2011)

The Fifth Circuit affirmed district court's order affirming bankruptcy court order approving, over parent company's objection, motion by the debtor for authorization to reimburse the due diligence expenses of certain qualified bidders that participated in attempted auction of a judgment obtained by debtor against the parent company in a fraudulent transfer action.

As a preliminary matter, the Fifth Circuit rejected the parent company's argument it lacked appellate jurisdiction due to the district court's own lack of jurisdiction over the reimbursement order, which the parent company contended was not a final, appealable order of the bankruptcy court. The Fifth Circuit reaffirmed that its approach to determining whether an order is appealable in a bankruptcy case is flexible and viewed in a practical, less technical light and found that the reimbursement order at issue constituted a final disposition of a discrete dispute within the larger case.

Turning to the merits of the appeal, the parent company argued that the bankruptcy court should have considered the debtor's motion under Bankruptcy Code § 503(b), which applies to administrative expenses, and not under Bankruptcy Code § 363(b), the business judgment standard. The parent company further argued that even assuming Bankruptcy Code § 363(b) was the correct standard to apply, the bankruptcy court erred in finding that the debtor's motion satisfied the business judgment standard.

The Fifth Circuit concluded that the business judgment standard is the better fit for assessing the debtor's reimbursement motion. Bankruptcy Code § 363 addresses the debtor's use of the estate property, and in its motion the debtor sought authorization to make discretionary use of the estate's funds. Bankruptcy Code § 503, in contrast,

generally applies to third parties that have already incurred expenses in connection to the debtor's estate. In this case, the bankruptcy court issued the reimbursement order before any potential qualified bidders, including the intervenors, had incurred due diligence and work fees. In this context, the Fifth Circuit held that application of the business judgment standard was appropriate.

As to whether the bankruptcy court properly found that the reimbursement request satisfied the business judgment standard, the Fifth Circuit answered in the affirmative, finding no clear error in the bankruptcy court's conclusion that the debtor had demonstrated a compelling and sound business justification for the reimbursement authority. The district court had noted that there was no evidence in the record of self-dealing or manipulation among the parties who negotiated the reimbursement procedures; the reimbursement order facilitated, not hindered, the auction process; and the approved maximum available size of the reimbursement fee was reasonable in comparison to the size of the judgment.

On this record, the Fifth Circuit agreed with the district court that the bankruptcy court did not err in issuing the reimbursement order under the business judgment standard in § 363(b).

***In re South Side House, LLC*, 2012 Bankr. LEXIS 2734 (E.D.N.Y. 2012)**

Rents paid to the debtor belonged to estate under Bankruptcy Code § 541 despite a rent assignment clause favoring the secured lender. The court noted that state law did not require such assignments to be viewed as absolute. Whether payments made to a lender from rents were made under § 362 or as adequate protection, the payments still applied first to reduce the unsecured part of claim.

***LTF Real Estate Co. v. Expert S. Tulsa, LLC (In re Expert S. Tulsa, LLC)*, 456 B.R. 84 (Bankr. D. Kan. 2011)**

Debtor and creditor entered into agreement requiring the debtor to escrow 120 percent of the amount anticipated to construct certain improvements on an undeveloped site purchased prepetition by creditor from debtor. The court found that the debtor held only a contingent remainder interest in the escrow account as of the petition date and, therefore, held that the debtor had no vested interest in the escrowed funds and that the funds were not property of the estate. The creditor was permitted to exercise self-help, complete the site improvements, and seek reimbursement from the escrow account. The Court held that when the improvements were complete the debtor would have an interest in any surplus funds in the escrow account.

RES JUDICATA

***Weaver v. Tex. Capital Bank, N.A.*, 660 F.3d 900 (5th Cir. 2011)**

Dewey Weaver ("Weaver") and Walter Dootson personally guaranteed loans from Texas Capital Bank, N.A. ("Texas Capital") to SL Management that were secured by eleven

tracts of land in Texas (the "Collateral"). SL Management filed a petition for relief under Chapter 11. Under SL Management's confirmed plan, the debtor proposed to sell the Collateral to satisfy the outstanding loans. If a sale could not be completed, the plan proposed the Collateral would be surrendered to Texas Capital, and this would fully satisfy the debt. If the value of the land was less than the value of the claim, then Weaver would pay the difference. The sale did not go through and SL Management turned the property over to Texas Capital. During the bankruptcy, Texas Capital filed a state court action against Weaver to enforce the guaranty agreements. Weaver did not appear or respond and the state court entered a default judgment against him. After Texas Capital filed a collection action against him, Weaver filed an action to have the court declare the debt was fully satisfied by the surrender of SL Management's property to Texas Capital. The district court ruled in Weaver's favor and Texas Capital appealed. The Fifth Circuit held that *res judicata* applied and barred Weaver's request for declaratory judgment, reversing the lower court. The declaratory judgment action was brought on the exact same guarantees at issue in the Texas state court action. Because this action and the Texas action arose from the same transaction, the current claim (that the claim was paid and satisfied) needed to be raised as an affirmative defense in that earlier suit and could not now be brought as a separate claim for relief.

***In re Noram Res., Inc.*, 2011 WL 6936361 (Bankr. S.D. Tex. 2011)**

The Chapter 7 Trustee sued the debtor's major secured lender and a former director of the debtor for fraud, breach of fiduciary duty, civil conspiracy, and other causes of action. Prior to bankruptcy, the debtor had issued a Debenture in favor of the secured lender and had granted a security interest in virtually all of the debtor's assets. The Trustee alleged that the defendants conspired to induce the debtor to breach the terms of the Debenture in order to acquire the assets.

Earlier in the bankruptcy case, the Trustee had filed a motion to sell substantially all of the debtor's assets to the secured lender. The court issued an order granting the motion to sell. The defendants moved to dismiss the Trustee's claims, arguing that they were barred by res judicata as a collateral attack on the sale order.

The court dismissed all claims against the secured lender that were based on alleged breaches before the sale order. The sale order constituted a final judgment on the merits for res judicata purposes, even though the litigation of the sale order was not adversarial as between the Trustee and the secured lender. The court found that claims for breach of fiduciary duty, conspiracy, and fraud were part of the "same transaction" that was litigated with respect to the sale order. The court noted that the validity and status of the secured lender's claim were directly at issue in the sale order, and many of the Trustee's claims were based on the same issues.

The court did not dismiss the claims that were based on post-sale conduct, nor the claims against the former director. The claims that were based on post-sale conduct were not part of the same nucleus of operative facts at issue in the approval of the sale order. Moreover, the former director was not in privity with the secured lender for res judicata purposes, and therefore claims against the former director were not barred.

SETTLEMENTS PAYMENTS UNDER BANKRUPTCY CODE § 546(e) SAFE HARBOR

In re MacMenamin's Grill Ltd., 450 B.R. 414 (Bankr. S.D.N.Y. 2011)

The court held that Bankruptcy Code § 546(e)'s safe harbor for settlement payments does not apply to private leveraged buyouts (LBOs). The debtor, a closely-held corporation, funded a stock purchase agreement in the form of a LBO through a $1.15 million loan from a creditor, secured by a security interest in substantially all of debtor's assets. The lender transferred the loan proceeds directly to the bank accounts of three former shareholders that controlled 93% of debtor's stock. The court held that the LBO payouts were not settlement payments under Bankruptcy Code § 546(e) and were, therefore, avoidable as constructively fraudulent. The court reasoned that the plain meaning of Bankruptcy Code § 546(e), prevents trustees from avoiding LBO transactions involving small dollar amounts that pose absolutely no danger to financial markets, even though it lacks any relation to the purpose behind Bankruptcy Code § 546(e) and its 2006 amendment. Concerned that enforcing the plain meaning of Bankruptcy Code § 546(e) would lead to an absurd result, the court looked to the legislative history. The court concluded that because Congress intended to protect the financial markets and small, private LBOs do not pose a systematic risk to the financial markets, they are not protected under Bankruptcy Code § 546(e)'s safe harbor.

STANDING

MC Asset Recovery v. Commerzbank AF (In re Mirant Corp.), 675 F.3d 530 (5th Cir. 2012)

The Court of Appeals in *In re Mirant* held that a post-confirmation litigation entity had Article III standing to bring an avoidance action under Bankruptcy Code § 544(b) even though the debtor's creditors were paid in full, so long as the amounts recovered would benefit the debtor's estate. In noting that the right to avoid a transfer or obligation under Bankruptcy Code § 544 is assessed as of the petition date, the court said "the fraudulent transfer injures the estate and Bankruptcy Code § 550 ensures that the injury is redressed because a trustee may only avoid a transfer to the extent it benefits the estate." In declining to follow the Second Circuit in *Adelphia* (390 B.R. 80 (S.D.N.Y. 2008, aff'd 379 Fed. Appx. 10 (2nd Cir. 2010), the Fifth Circuit joined two other circuits (the Eighth and the Ninth) in finding standing exists in an avoidance action even where creditors have been paid in full.

Motor Vehicle Cas. Co. v. Thorpe Insulation Co. (In re Thorpe Insulation Co.), 677 F.3d 869 (9th Cir. 2012)

The Ninth Circuit Court of Appeals reversed the district court's holding that the debtors' bankruptcy plan was "insurance-neutral" and that certain insurers lacked standing to object to the plan. The Court of Appeals remanded the case to the district court with instructions that the district court return the case to the bankruptcy court to give the insurers the opportunity to present proof and argument.

The debtors distributed asbestos products for over twenty-five years, which led to substantial asbestos-related litigation. The debtors' plan provided for a Bankruptcy Code § 524(g) channeling injunction for asbestos claims, whereby asbestos claims would be channeled to a trust. In establishing the plan and the trust, the debtors reached settlements with a number of insurers which provided for an exchange of cash and securities to fund the trust in exchange for releases of claims and protection of the Bankruptcy Code § 524(g) injunction. The debtors' insurance rights were assigned to the trust, including policies with non-settling insurers.

The non-settling insurers objected to the plan arguing, *inter alia*, the plan did not comply with Bankruptcy Code § 524(g), that it was not "insurance-neutral" and, therefore, they held standing to object to the plan and to appeal. The Ninth Circuit Court of Appeals denied a motion for a stay pending appeal.

The plan became effective on October 22, 2010 and appellees file a motion to dismiss the appeal as moot in February 2011, arguing there had been "substantial confirmation" of the plan. The Court of Appeals held the appeal was not constitutionally moot as the court could reverse plan confirmation or require modification, thereby giving relief to Appellants. The court also held that the appeal was not equitably moot. The Court referenced the following considerations in evaluating equitable mootness:

> [W]hether a stay was sought, for absent that a party has not fully pursued its rights. If a stay was sought and not gained, we then will look to whether substantial consummation of the plan has occurred. Next, we will look to the effect a remedy may have on third parties not before the court. Finally, we will look at whether the bankruptcy court can fashion effective and equitable relief without completely knocking the props out from under the plan and thereby creating an uncontrollable situation for the bankruptcy court.

Thorpe, 677 F.3d at 881. The Court found that the factors weighed against a finding that the appeal was equitably moot and found that the plan had not been substantially consummated because "though distribution under the plan has commenced all or substantially all of the property the plan proposes to transfer has not been transferred. The plan involves $600 million in settlement proceeds, and, per the current record, only $135 million has been transferred to the trust." *Id.* at 882. The Court held that the plan may economically affect the appellants in substantial ways and, therefore, was not insurance neutral. Accordingly, the Court held that the appellants had parties-in-interest standing under Bankruptcy Code § 1109(b) and that the appellants had constitutional standing as the plan affects their financial rights.

***Alvarez v. Ward*, 2012 U.S. Dist. LEXIS 4557 (W.D.N.C. 2012)**

Buyers who purchased lots from a real estate development company that declared bankruptcy with its parent company did not have standing to sue parent company's officers for violations of the Interstate Land Sales Act, the North Carolina Unfair Trade

Practices Act, and negligent misrepresentation. The claims belonged to companies' bankruptcy estate.

***Cyber-Defender Corp.*, Case No. 12-10633 (Bankr. D. Del. 2012)**

The Delaware Bankruptcy Court recently addressed the issues of (1) whether a junior lienholder has standing to object to an asset sale, notwithstanding he terms of an intercreditor agreement, and (2) whether the court may authorize a sale of collateral free and clear of unsecured junior liens, where such lienholders do not consent to the sale. The Bankruptcy Court noted the importance of the intercreditor agreement and its nexus to the bankruptcy estate under Bankruptcy Code § 510(a). In drawing a distinction between waiver of a right to be heard and constitutional standing, the Court allowed the junior lienholders to be heard in connection with the asset sale. The Court went out of its way to note that this decision turned on the specific context presented, and if the matter was raised in another circumstance, the outcome may be different.

With respect to the second issue addressed, the Bankruptcy Court, Judge Shannon ruled that a sale free and clear of junior liens was authorized under Bankruptcy Code § 363(f)(5). The junior lienholders could be compelled to accept a monetary satisfaction of their claims, either under a cramdown or state court judicial foreclosure proceeding. The judge further noted that the value of the junior lienholders' interest is to be measured by the "actual value" – rather than by the face amount of the lien. This decision is in accord with *In re Becker Indus. Corp.*, 63 B.R. 474 (S.D.N.Y. 1985) and its progeny, and in contradiction to the Ninth Circuit BAP decision in *Clear Channel Communications*, 391 B.R. 25 (9th Cir. BAP 2008).

***In re Capco Energy, Inc.*, 2012 Bankr. LEXIS 348 (Bankr. S.D. Tex. 2012)**

Plaintiff, a Chapter 11 Trustee, filed an adversary proceeding against defendants, a buyer and guarantors, seeking to collect under a promissory note and for breach of contract. Defendants asserted counterclaims for breach and rescission of the purchase and sale agreement and cancellation of the note and guaranties. The trustee filed a motion to dismiss the counterclaims for cancellation of a note and certain guaranties under Fed. R. Civ. P. 12(b)(1), claiming the court did not have subject matter jurisdiction, arguing that the defendants did not have standing to assert the counterclaims for cancellation. The court agreed with the Trustee that the defendants did not have constitutional standing to sue for cancellation of a note and the other party's guaranty. The court noted that they would not have standing "if they have not asserted that they would be concretely and particularly injured if the Note and the guaranties are enforceable." Here, the guarantors were not injured by the enforcement of the other party's guaranty, and the guaranties explicitly provided that the guarantors' liability would not be affected by any change in terms that might be extended to the buyer or another guarantor by the debtor. Further, the language of the guaranties did not make the guarantors actual parties to the note (and, therefore, also did not have statutory standing under Texas law). Accordingly, the court dismissed those counterclaims based upon lack of subject matter jurisdiction.

<u>THIRD PARTY RELEASES</u>

***Behrmann v. National Heritage Foundation, Inc.*, 663 F.3d 704 (4th Cir. 2011)**

Nonconsensual third-party releases can be approved in the proper circumstances. The bankruptcy court had concluded that the releases (1) were "essential" to the reorganization and the plan, (2) were an "integral" element of the transactions, (3) conferred a "material benefit" on the estate, (4) were "important" in the plan's objectives, and, finally (5) were "consistent" with the requirements of the Bankruptcy Code. While the *Behrmann* court did not disagree that third-party releases could be approved based on the factors identified by the bankruptcy court, it noted the lack of underlying factual evidence to support those findings and remanded the matter to the bankruptcy court to take evidence. Like the Second and Sixth Circuit, the *Behrmann* court observed that nondebtor releases "should be granted cautiously and infrequently."

***In re Washington Mut., Inc.*, 442 B.R. 314, 352 (Bankr. D. Del. 2011)**

The court held that a plan of reorganization cannot include nonconsensual releases of third parties by creditors or other parties in interest.

***Vitro, S.A.B. de C. V. v. ACP Master, Ltd. (In re Vitro, S.A.B. de C.V.)*, 2012 U.S. Bankr. LEXIS 2682 (Bankr. N.D. Tex. 2012)**

The bankruptcy court considered the enforceability in the United States of third-party releases provided as part of a Mexican plan of reorganization. The court relied upon Bankruptcy Code § 1506 in deciding that the third-party release was unenforceable. It determined that such enforcement "would be manifestly contrary to the public policy of the United States." Citing Fifth Circuit cases, the court observed that "the policy of the United States is against discharge of claims for entities other than a debtor in an insolvency proceeding, absent extraordinary circumstances not present in this case."