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In This Issue:

A SLIPPERY SUNNYSLOPE

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First Southern National Bank v. Sunnyslope Housing Ltd Partnership is an important decision for secured lenders. In that case, the debtor sought to retain and use, over the secured creditor's objection, the secured creditor's collateral in a "cram-down" chapter 11 plan. Now we all know that under Section 506(a) of the Bankruptcy Code a creditor's claim is treated as secured "to the extent of the value of such creditor's interest" and that such value is to be "determined in light of the purpose of the valuation and of the proposed disposition or use of such property". We also know that under the Supreme Court's decision in *Associates Commercial Corp. v. Rash* "replacement value" is to be used instead of "foreclosure value" in cram-down valuations. But what about if the foreclosure value exceeds the replacement value? That was the situation in *Sunnyslope* because a foreclosure would vitiate covenants requiring the secured property (an apartment complex) to be used for low income housing. The 9th Circuit en banc court concluded that replacement value must be used such that the plan should value the property assuming that it will continue to be used after the reorganization as low-income housing. And that seems to be the last word in the 9th Circuit on the subject since the United States Supreme Court denied certiorari on January 8, 2018.

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DISTRICT COURT DECLINES TO 'UPSET' AN UPSET TAX SALE

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Edwin O. Crespo v. Abijah Tafari Immanuel, et al. (In re Crespo), 569 B.R. 624 (E.D. Pa. 2017)

CASE SNAPSHOT

In *BFP v. Resolution Trust Corp.*, the debtor purports the property sale was a fraudulent transfer because it allegedly sold under market value (approximately 85% less). The United States Supreme Court held that the price received for real property at a mortgage foreclosure sale conducted in compliance with the state's mortgage foreclosure laws constitutes the reasonably equivalent value of the property for purposes of bankruptcy fraudulent transfer law. In this case, the United States District Court for the Eastern District of Pennsylvania held that the bankruptcy court did not err by extending the *BFP* rule to an upset tax sale conducted in compliance with Pennsylvania law.

FACTUAL BACKGROUND

The debtor defaulted on a payment plan for the repayment of delinquent property taxes owed to the Lehigh County Tax Claim Bureau. The property, which was unencumbered and had an alleged fair market value of $175,000, was thereafter sold at a tax upset sale for $27,000. After an unsuccessful petition to set aside the sale in Pennsylvania state courts, the debtor filed a bankruptcy petition under chapter 13 of the United States Bankruptcy Code. The debtor initiated an adversary proceeding against the tax sale purchaser, seeking to set aside the sale as a fraudulent transfer pursuant to section 548(a)(1)(B) of the Bankruptcy Code on the basis that the property had been sold for less than a "reasonably equivalent value." After a trial, the Bankruptcy Court held that the tax sale was not avoidable.

COURT ANALYSIS

Section 548(a)(1)(B) of the Bankruptcy Code authorizes a bankruptcy trustee to avoid "any transfer … of an interest of the debtor in property" made within two years prior to the bankruptcy filing, if the debtor voluntarily or involuntarily "received less than a reasonably equivalent value for such transfer" and was insolvent on the date that the transfer was made or became insolvent as a result thereof. The District Court began its analysis with a thorough explanation of the Supreme Court's holding in *BFP,* where the Supreme Court held that "reasonably equivalent value" for real property is the price received at the foreclosure sale so long as all requirements of the state's foreclosure laws have been complied with. In so holding, the Supreme Court declined to apply a fair market value standard (because foreclosure sales are inherently different from fair market sales) or a "reasonable foreclosure price" standard (because such a standard would impermissibly require the Bankruptcy Court to make policy decisions about the appropriate sale price). Although the Supreme Court emphasized that its decision was limited to mortgage foreclosure sales, other federal courts (including courts within the Third Circuit) have extended the rationale of *BFP* to tax sales where the applicable state tax sale law provided for procedural protections similar to those provided by the state's mortgage foreclosure laws – including that the sale be conducted publicly with competitive bidding.

In this case, the debtor argued that the Bankruptcy Court erred in extending *BFP* to tax sales conducted under the Pennsylvania Tax Sale Law, because upset tax sales do not tend to actually generate competitive bidding. An upset tax sale purchaser

CONTINUED ON PAGE 2

CHAPTER 11 FILED SOLELY FOR LITIGATION PURPOSE WAS FILED IN BAD FAITH

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CASE SNAPSHOT

In *Greenberg v. U.S. Trustee (In re Greenberg)*, Bankr. No. 3:15-bk-06578-MM 2017 WL 3816042 (8th Cir. BAP Aug. 31, 2017), the Eighth Circuit Bankruptcy Appellate Panel ("BAP") upheld the dismissal of an individual's chapter 11 bankruptcy on the basis of bad faith. The BAP agreed with the bankruptcy court that where a debtor had only one disputed claim, the sole claim was based on state law, and the debtor's purpose in filing was to litigate the validity of the claim, not restructure the debt – the bankruptcy case had been filed in bad faith.

FACTUAL BACKGROUND

Mr. Greenberg's mother had taken out a reverse mortgage, but the deeds of trust failed to accurately describe the encumbered real property (the "Property"). Upon the mother's death, Mr. Greenberg inherited the Property and embarked upon extensive litigation with the lender regarding the validity of the deeds of trust. In the course of that litigation, Mr. Greenberg filed several bankruptcy cases, including a chapter 7 bankruptcy proceeding, in which he received a discharge. The chapter 11 proceeding, from which the instant appeal arose, was Mr. Greenberg's fourth bankruptcy case in two years.

After filing his chapter 11 bankruptcy, Mr. Greenberg allowed the exclusivity period to lapse without filing a plan. However, he did file a claim on behalf of the mortgage lender, to which he promptly filed an objection. In response, the mortgage lender obtained an order lifting the stay to allow its action to reform the deeds of trust to proceed in state court. When Mr. Greenberg did eventually file, the plan purported to pay the mortgage lender a single dollar.

The bankruptcy court denied confirmation of Mr. Greenberg's plan, and held that the plan was filed in bad faith as it was merely a means to litigate the mortgage lender's claim, and reorganize Mr. Greenberg's debt to the mortgage lender. Because of Mr. Greenberg's chapter 7 discharge, he had no creditors other than the mortgage lender. Upon this ruling, the U.S. Trustee informed the court of its intent to file a motion to dismiss the case for bad faith. The bankruptcy court dismissed the chapter 11 case for bad faith on the same grounds that it denied confirmation of the plan: that the case was not filed for any proper bankruptcy purpose.

COURT ANALYSIS

As an initial matter, the BAP reaffirmed that the test for whether a case had been filed in bad faith was a test of subjective intent, with the key inquiry being "whether the debtor is seeking to achieve… objectives outside the legitimate scope of the bankruptcy laws."[1] The bankruptcy court's analysis should be based on the totality of the circumstances. The standard of review on appeal is whether the bankruptcy court had committed clear error.

In regard to Mr. Greenberg's filing, the BAP agreed entirely with the bankruptcy court. They found that Mr. Greenberg did not intend to reorganize or restructure the mortgage by, for example, renegotiating interest or payment terms. Instead, Mr. Greenberg's sole object was to litigate the validity of the mortgage lien. The BAP noted that this was solely a state law dispute, better litigated – and already being litigated – in state court. The court found that in filing a bankruptcy case with no object other than to dispute a single claim governed by state law, Mr. Greenberg's filing did not have a proper reorganizational purpose. The dismissal was upheld.

PRACTICAL CONSIDERATIONS

While the BAP stated that not all two-party bankruptcy cases are per se filed in bad faith, *Greenberg* reminds us that a bankruptcy court will look with suspicion on two-party cases. Here, the BAP and bankruptcy court both specifically found that the key factor was that Mr. Greenberg's intent was solely to litigate the validity of the loan, not restructure or reorganize the claim.

1 *Id.* at *11.

District Court Declines to 'Upset' an Upset Tax Sale—continued from page 1

takes the property subject to existing liens, but is not notified of the existence or extent of such liens in advance, which the debtor argued chills bidding. The District Court disagreed, noting that the Pennsylvania Tax Sale Law contains procedural protections to produce competitive bidding, such as the statute's notice requirements and the fact that a property cannot be sold unless the upset price is met. The District Court also noted that a potential bidder can investigate the status of the title before bidding. Moreover, the District Court emphasized that Pennsylvania law creates a presumption that the price received at a duly advertised tax sale is the highest and best obtainable, and prohibits courts from setting aside such sales solely on the basis of an alleged inadequacy of price. Therefore, given the similarities between the procedural protections applicable to upset tax sales and foreclosure sales in Pennsylvania, the District Court found that the Bankruptcy Court correctly extended *BFP* to tax sales. The District Court then went on to find that this particular tax sale was conducted in compliance with the Pennsylvania Tax Sale Law.

PRACTICAL CONSIDERATIONS

This decision is the latest one to extend the *BFP* rule to non-mortgage foreclosure forced sales. If the state statute authorizing the forced sale contains protections similar to mortgage foreclosure sales – such as notice requirements, minimum bidding requirements, a right to challenge the sale afterward – a bankruptcy court is likely to extend *BFP* to a sale conducted in accordance with the applicable statute. This should provide potential bidders at such sales comfort, so long as the bidder is comfortable that the sale has been conducted in accordance with the respective statute.

UNSECURED CREDITORS COMMITTEE BRINGING CLAIMS ‘ON BEHALF OF DEBTOR’ SEEKS DISCOVERY OF DEBTOR’S PRIVILEGED DOCUMENT

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Official Committee of Unsecured Creditors of HH Liquidation v. Comvest Group Holdings, LLC (In r*e HH Liquidation, LLC*), Adv. Pro. No. 16-51204 (KG), Bankr. Case No. 15-11874 (KG) 571 B.R. 97 (Bankr. D. Del. May 8, 2017)

CASE SNAPSHOT

The Official Committee of Unsecured Creditors sought discovery of documents from a pre-petition law firm in connection with bringing claims “on behalf of the debtor” against the debtor’s officers and directors via derivative standing approved by the Delaware Bankruptcy Court. The Bankruptcy Court held that the Committee was not entitled to attorney-client privileged documents created during any time period when the debtor was solvent, but opened the door to discovery of attorney-client privileged documents during any time period when the debtor was insolvent.

FACTUAL BACKGROUND

The debtor and the defendants argued that the documents were protected by their joint right to assert the attorney-client privilege. The Committee countered that it was standing in the shoes of the debtor, the debtor was not a defendant, and, thus, the Committee should have access to the documents in the possession of the debtor’s pre-bankruptcy law firm.

COURT ANALYSIS

The Bankruptcy Court reached such conclusion after reviewing Supreme Court, Fifth Circuit, and Third Circuit precedents.

First, the Bankruptcy Court explained that the Supreme Court held that a chapter 7 trustee has the power to waive a debtor’s attorney-client privilege as to pre-bankruptcy communications. While the Bankruptcy Court agreed that the granting of “standing to the Committee to bring claims ‘on behalf of the Debtors’ places the Committee in proximity with the position of a chapter 7 trustee,” the Bankruptcy Court viewed the holding of the Supreme Court as limited to chapter 7 trustees, and was not persuaded to extend such holding to the Committee.

Second, the Bankruptcy Court explained that the Fifth Circuit has held that there may be cause to invade the attorney-client privilege in lawsuits by shareholders that charge the defendant corporation and its officers and directors with breaches of their fiduciary duty. The Bankruptcy Court agreed that the Committee bringing claims “on behalf of the debtor” against its directors and officers was an analogous situation and, if the Fifth Circuit standard applied for such invasion, the Bankruptcy Court would grant the Committee’s requested relief. However, the Bankruptcy Court was not convinced that the Fifth Circuit precedent could be followed by it because of Third Circuit precedent.

The Bankruptcy Court finally explained that the Third Circuit has held that corporations and their officers and directors do not owe fiduciary duties to the corporation’s creditors until the corporation is insolvent or in the zone of insolvency. The Bankruptcy Court then reasoned that the analogy to the Fifth Circuit precedent only extended to time periods when the debtor was insolvent.

Because the Committee had failed to present any evidence of insolvency, the Bankruptcy Court denied the motion. However, the Bankruptcy Court was clear the motion would have been granted had the Committee proved insolvency.

PRACTICAL CONSIDERATIONS

An interesting note to this case is that the Committee was granted derivative standing to bring the claims against the defendants by stipulation with the debtor and the defendants. Going forward, similarly situated defendants considering any such stipulation would be well advised to make clear in the stipulation that the Committee is not entitled to discovery of documents for which the defendants can jointly claim attorney-client privilege with the debtor. Otherwise, the Committee may have a right to such documents for any period where the debtor was insolvent.

SUNSHINE HEIFERS CLARIFIES THE PARAMETERS OF WHAT A BANKRUPTCY COURT CAN DO AND DECIDE ON REMAND, BASED ON THE MANDATE PASSED DOWN FROM THE APPELLATE COURT

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Sunshine Heifers, LLC v. Citizens First Bank (*In re Purdy*), 870 F.3d 436 (6th Cir. 2017)

CASE SNAPSHOT

In *Sunshine Heifers*, two creditors had a disptute over proceeds from the sale of a dairy farmer's remaining cattle. The Sixth Circuit held that the Bankruptcy Court did not violate the tenet of the law of the case doctrine known as the "mandate rule" by conducting an evidentiary hearing on remand to decide an issue that was related to the court of appeals' holding, but that was neither explicitly or implicitly decided by the court of appeals.

FACTUAL BACKGROUND

Sunshine Heifers arose in the context of a chapter 12 case in which the debtor was a dairy farmer. Before filing his petition, the debtor sold off a substantial portion of his dairy cattle to keep operations afloat. After filing, conflict arose between two creditors: on one side, Citizens First Bank (the "Bank"), who provided a purchase money loan to the debtor secured by all assets, including current and future cattle owned by the debtor; and on the other side, Sunshine Heifers, LLC ("Sunshine"), who leased to the debtor several hundred dairy cattle for the debtor to use alongside the other cattle debtor owned. Specifically, both the Bank and Sunshine claimed that they were entitled to proceeds stemming from the post-petition auction and sale of a substantial portion of debtor's remaining cattle.

The Bankruptcy Court sided with the Bank, concluding that the lease terms were not akin to true leases, and were in actuality per se security interests. Accordingly, the Bankruptcy Court held that the Bank had prior perfected liens on the disputed cattle and thus priority on the proceeds of their sale. However, on appeal, the Sixth Circuit remanded, finding that the Bank did not carry its burden in showing that Sunshine's leases should be treated as security interests instead of true leases.

On remand, and under the assumption that the leases were true leases, the Bankruptcy Court held an evidentiary hearing to decide whether the majority of the disputed cattle were owned by debtor (and thus subject to the Bank's security interests), or if they were owned by Sunshine per the leases. First, the Bankruptcy Court found that it was impossible to use the branding and tagging of the cattle as a reliable means to separate which of the remaining disputed cows were owned by Sunshine pursuant to the leases. Without this evidence of ownership, the Bankruptcy Court concluded that the Bank's security interest in the disputed cattle attached before Sunshine acquired rights in the cattle, because the debtor had comingled funds derived from the sale of the leased cattle with funds that were derived from the debtor's dairy operation, and subject to the Bank's security interest.

Again denied by the Bankruptcy Court, Sunshine appealed, this time on the basis that the Sixth Circuit's mandate on remand did not permit the Bankruptcy Court to decide the issue of ownership. Specifically, Sunshine argued that ownership of the disputed cattle was already decided by the Sixth Circuit and the Sixth Circuit's remand order was so narrow that it precluded the Bankruptcy Court from considering the issue of ownership. In support of its argument, Sunshine pointed to portions of the Sixth Circuit's opinion postulating that if the leases were true leases, then Sunshine retained a significant reversionary interest in the disputed cattle.

COURT ANALYSIS

The Court of Appeals rejected Sunshine's arguments, taking the opportunity to reiterate the parameters of the "mandate rule," which is a specific application of the "law of the case" doctrine. The mandate rule requires that a district court is bound to the scope of the remand issued by the court of appeals.

In determining aberration from the scope of the mandate, appellate courts consider (1) whether the issue was expressly or impliedly decided by the appellate court; and (2) whether mandate is so narrow as to preclude the lower court from deciding the issue.

Given this framework, the Sixth Circuit first held that it never expressly decided the issue of ownership during the first appeal. It explained that portions of the opinion stating that Sunshine may have a reversionary interest in the cattle were simply explanatory, and not critical to its holding. The Sixth Circuit further emphasized that it did not previously decide the issue of ownership because "at no point in the opinion did we determine which, if any, of the cattle were owned by Sunshine and therefore subject to the [leases]." Further, the court found that it did not impliedly decide question of ownership because ownership was not "so closely related to its previous decision" regarding whether the leases were true leases or security interests.

Lastly, the Sixth Circuit determined that the Bankruptcy Court was within its power to decide ownership because its remand was "general" and not "narrow." Namely, the remand was not to be narrowly construed because the Sixth Circuit's first opinion did not (1) explicitly outline the issues to be addressed by the lower court; (2) create a narrow framework within which the court was required to operate on remand; or (3) require that further proceedings be consistent with its opinion.

PRACTICAL CONSIDERATIONS

The Sixth Circuit in *Sunshine Heifers* provides Bankruptcy Courts with substantial latitude to decide issues related to the appellate court's holding on remand absent very clear direction and control from the Court of Appeals in narrowing issues to be addressed and decided on remand.

Sunshine treated the Sixth Circuit's finding in dicta that it had maintained a reversionary interest in the cattle as an explicit mandate for the Bankruptcy Court to find in its favor. However, the only "law of the case" decided by the Sixth Circuit in *Sunshine Heifers* was the narrow determination of whether the leases were true leases or security interests. The Bankruptcy Court could not, and did not, directly contravene this holding, opting instead to examine ownership of the cattle as the ultimate outcome determinant.

Given the Sixth Circuit's decision to invalidate the Bankruptcy Court's findings on remand, careful attention should be given to how an appellate court sets forth its instructions on remand. If the remand is "general," like the one in *Sunshine Heifers*, a practitioner should not be complacent in relying on certain aspects of the appellate court's opinion and be prepared to address a wide variety of other related issues not decided at the appellate level.

BANKRUPTCY COURT ENJOINS LENDER FROM SUING GUARANTORS WHO RAN THE DEBTOR'S OPERATIONS

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In re Bailey Ridge Partners, LLC, 571 B.R. 430 (Bankr. N.D. Iowa 2017)

CASE SNAPSHOT

The Iowa Bankruptcy Court enjoined debtor's lender from pursuing claims against guarantors and a co-borrower under Bankruptcy Code section 105(a), after determining that the guarantors and co-borrower were essential to the operation of the debtor, who was likely to successfully reorganize and fully repay the lender.

FACTUAL BACKGROUND

Dubuque Bank loaned about $11.4 million to debtor, a pig-feeding and housing operation. The loan was secured by property worth approximately $11.5 million. The debtor's members guarantied its debts to the lender, and one of the members took out a separate loan from Dubuque Bank for purposes of advancing it to the debtor. Dubuque Bank sued the guarantors and co-borrower in state court and sought to foreclose on the real property, but the debtor filed a chapter 11 bankruptcy petition and sought to stay the guarantor/co-borrower litigation by "extending" the automatic stay to its guarantors and co-borrower under Bankruptcy Code section 105(a). Upon considering the testimony of each of the members, the court determined that Dubuque Bank had an equity cushion on the real property, and that the debtor was likely to successfully reorganize and would be able to fully repay Dubuque Bank's loan.

COURT ANALYSIS

Although the court acknowledged that the automatic stay does not generally extend to actions against third parties, and that a court may nevertheless extend the automatic stay under Bankruptcy Code section 362 and enjoin actions under Bankruptcy Code section 105(a) when there are "unusual circumstances" warranting such relief. The court determined that an injunction against third-party litigation would be appropriate "where a determination is made that failure to so enjoin would adversely affect the bankruptcy estate and pressure the debtor through that third party."

Applying the traditional four-factor injunction test, the court determined that: (1) the debtor was likely to successfully reorganize; (2) there was a likelihood of imminent and irreparable harm to the estate if judgments were entered against guarantors and co-debtor, since it would lead to the cessation of the debtor's operations; (3) the balance of harms favored debtor because Dubuque was fully secured by its collateral; and (4) the public interest favored the debtor because it was likely to repay the lender if the litigation against the guarantors was enjoined.

PRACTICAL CONSIDERATIONS

The Bankruptcy Court acknowledged that third-party injunctions were disfavored under section 105(a), and the majority of the circuits agree that third-party injunctions are rarely appropriate. Secured lenders can generally count on bankruptcy courts permitting them to proceed against third-party guarantors, even while a bankruptcy case is pending; but secured lenders with an equity cushion are often faced with a hostile bench. It is often said that "bad facts make bad law," and it appears that the court, here, was inclined to side with a sympathetic debtor over an oversecured lender.

BANKRUPTCY COURT DOES NOT APPROVE 363 SALE THAT DOES NOT PAY SECURED CREDITOR IN FULL

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In re Lutz, Case No. 16-26969 (JNP) 2017 WL 3316046 (Bankr. D.N.J. May 3, 2017)

CASE SNAPSHOT

In a chapter 11 case, the Debtor sought Bankruptcy Court approval of a sale of its real estate for $1.3 million under section 363 of the Bankruptcy Code. The senior secured creditor objected to the sale on the basis that the purchase price was less than the full amount of its claim of more than $2.3 million. The Bankruptcy Court held that the sale could not be approved over such objection.

FACTUAL BACKGROUND

Section 363 of the Bankruptcy Code provides that a debtor may sell its property free and clear of liens if, among other options, (a) the lienholder consents or (b) "the price at which such property is to be sold is greater than the aggregate value of all liens on such property." In the Lutz case, the debtor and the senior secured lender stipulated that the senior secured lender did not consent, and the sale could only be approved under option (b) above.

The debtor argued that the value of the senior secured lender's lien referred to the "economic value" – a value lower than the face amount of the debt secured by the property. The senior secured lender argued for the opposite interpretation, where value meant the face amount of the debt secured by the property.

COURT ANALYSIS

The Bankruptcy Court agreed with the senior secured lender and reasoned that "the price at which such property is to be sold" would never be "*greater than* the aggregate value of all liens on such property," if such value was "economic value" determined by the purchase price. As a result, the Bankruptcy Court held that the aggregate value of all liens on such property meant the face amount of the debt secured by such liens.

PRACTICAL CONSIDERATIONS

If followed, the Bankruptcy Court's opinion gives senior secured lenders effective veto power over 363 "short" sales.

SECURITY INTEREST UNPERFECTED WHERE DEBTOR'S NAME WAS ON WRONG LINE OF FINANCING STATEMENT

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CASE SNAPSHOT

In *Lanser v. First Bank Financial Centre* (*In re Voboril*), Adv. No. 16-2418 568 B.R. 797 (Bankr. E.D. Wisc. Mar. 17, 2017), the Bankruptcy Court found that a UCC financing statement was "seriously misleading" where the name of the individual debtor had been entered on a line reserved for corporate debtors. As a result, the lien was deemed to be unperfected, and the chapter 7 Trustee could avoid the same.

FACTUAL BACKGROUND

Stephen Voboril, the chapter 7 debtor, had provided First Bank Financial Centre ("First Bank") with a security interest in a certain note. First Bank did not have possession of the note, but instead sought to perfect its security interest through filing a financing statement. In Wisconsin, the Department of Financial Institutions' filing office requires a person filing a financing statement to designate whether a debtor is an individual or an organization. This designation is important as the Department of Financial Institutions separates its debtor database into two sections: one for individuals and one for organizations. In filing its financing statement, First Bank inserted Mr. Voboril's name on the line for organizations, not individual debtors. Upon Mr. Voboril filing bankruptcy, the chapter 7 trustee discovered the issue with the financing statement, and sought to avoid First Bank's lien.

COURT ANALYSIS

Under Wisconsin's version of the Uniform Commercial Code ("UCC"), a financing statement is not effective if errors render it "seriously misleading." A financing statement is seriously misleading if it fails to sufficiently provide the name of the debtor, unless a search under the filing office's search logic would disclose the financing statement. First Bank asserted that because the debtor's legal name was fully and correctly provided on the face of the financing statement, the financing statement was not seriously misleading. However, the trustee noted that because the filing office's database was divided between individuals and organizations, a search for an individual named Stephen Voboril would not uncover the financing statement. As a result, the financing statement was seriously misleading.

The court held that the financing statement was, in fact, seriously misleading. The court rejected First Bank's argument that having the debtor's correct legal name on the financing statement, albeit on the wrong line, was sufficient. As the court noted, under such an argument, having the debtor's name in the creditor field on a financing statement would also sufficiently provide the name of the debtor.

As for the UCC section 506 safe harbor for financing statements uncovered by a correct search, the Bankruptcy Court found that because a searcher in Wisconsin's database had to indicate whether a debtor was an individual or an organization as part of his search, and because a search for an individual debtor named Stephen Voboril would not uncover the financing statement, the financing statement was seriously misleading.

PRACTICAL CONSIDERATIONS

This case emphasizes the narrowness of the UCC section 506 safe harbor. In filing a financing statement, a creditor must take care to understand the search logic of the filing state, and ensure that the financing statement will be discoverable under a correct search under the relevant search logic.

7TH CIRCUIT ALLOWS PARALLEL DEFAULT PROCEEDINGS IN BRAZIL AND INDIANA

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1st Source Bank v. Joaquim Salles Leite Neto, 861 F. 3d 607 (7th Cir. 2017)

CASE SNAPSHOT

Seventh Circuit Court of Appeals affirms denial of defendant's request for antisuit injunction to prevent creditor from proceeding with its default litigation in Brazil.

FACTUAL BACKGROUND

In 2009, Neto, the defendant in this action, entered into a trust agreement with Wells Fargo to purchase an airplane. Pursuant to the trust agreement, Wells Fargo borrowed $6 million from 1st Source to purchase the airplane and pledged the plane as collateral for the loan. In 2011, Neto signed a personal guarantee for the loan. The guarantee contains a choice-of-law and venue provision that says Neto "agrees that all legal proceedings" arising from this guarantee "shall be brought in" Indiana federal court; "provided however that [1st Source]" shall have the option to sue "in any jurisdiction where the [Neto] maintains . . . any asset."

In June 2012, the Brazilian government seized the airplane. Neto continued to make payments on the loan until December 2014. In June 2015, 1st Source initiated an action in the Northern District of Indiana against Neto to recover the $3 million balance on the loan. The parties engaged in light discovery and attempted to resolve the dispute. In July of 2016, 1st Source commenced a substantially similar action in Sao Paolo, Brazil.

In October 2016, Neto sought antisuit injunctive relief in the Indiana District Court to prevent 1st Source from proceeding with both actions simultaneously. The district court denied the motion and Neto appealed. In the motion, Neto argued that antisuit injunctive relief was warranted because (i) the choice-of-law and venue provision of the guarantee prevented the Brazil action, and (ii) the Brazil litigation was vexatious.

CONTINUED ON PAGE 12

PROFIT-SHARING LEASE PROVISION RULED UNENFORCEABLE PURSUANT TO SECTION 365(F)(1)

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CASE SNAPSHOT

In *Antone Corp. v. Haggen Holdings, LLC (In re Haggen Holdings, LLC)*, No. BR 15-118874 (KG), 20174 WL 3730527 (D. Del. Aug. 30, 2017), the U.S. District Court for the District of Delaware held that a profit-sharing provision contained within a commercial real estate lease was an unenforceable restriction on assignment, and unenforceable as a matter of law.

FACTUAL BACKGROUND

Haggen Holdings, LLC and certain affiliates (Debtors) owned and operated 164 grocery stores at the time they filed voluntary petitions for chapter 11 relief in September 2015. On October 3, 2015, Debtors filed a motion seeking, *inter alia*, approval of bidding procedures governing the sale of certain stores, as well as the assumption and assignment of certain executory contracts and unexpired leases in connection therewith. Antone Corporation was the lessor of one of these stores and objected to the assignment of its commercial property lease. The lease contained a provision that required Debtors to share with Antone 50 percent of the net profit realized upon any lease assignment. Antone argued that any assumption or assignment of the lease must be conditioned upon the full performance and compliance of all lease terms. Rather than cite any case law or authorities, Antone relied upon declarations that demonstrated that the profit-sharing agreement was a bargained-for element given in exchange for below-market rent.

Conversely, Debtors argued that the profit-sharing provision in the lease was unenforceable as an anti-assignment provision under section 365(f)(1) of the Bankruptcy Code. Citing long-standing precedent holding profit-sharing provisions unenforceable, Debtors urged the Bankruptcy Court to overrule Antone's objection.

Agreeing with Debtors, the Bankruptcy Court overruled Antone's objection, holding that the provision at issue was akin to profit-sharing provisions previously held by other courts to be unenforceable anti-assignment provisions. In so holding, the Bankruptcy Court stated that enforcing such a provision would defeat the purpose of section 365(f)(1), thereby preventing a debtor from realizing the full value of its assets. Accordingly, the Bankruptcy Court entered an order approving the sale, authorizing the assumption and assignment of the lease, and prohibiting the enforcement of the profit-sharing provision. Antone promptly appealed.

On appeal, Antone argued that the Bankruptcy Court erred by failing to consider the facts and circumstances of the transaction in connection with its analysis of the enforceability of the profit-sharing provision. In response, Debtors argued that the Bankruptcy Court correctly determined that the profit-sharing provision was a de facto anti-assignment provision that was unenforceable under section 365(f)(1).

COURT ANALYSIS

The district court affirmed the Bankruptcy Court's decision, noting that section 365(f)(1) not only addresses provisions that prohibit assignment, but it is also concerned with any clause that restricts or conditions assignment. Antone argued that the profit-sharing provision should be enforced because no evidence was introduced showing that the assignment would be impaired by sharing profits realized from the assignment. The district court expressly rejected this argument, citing *Shaw Group, Inc. v. Bechtel Jacobs Co. (In re IT Group, Inc.)*, 350 B.R. 166, 178-79 (Bankr. D. Del. 2006) ("[T]he offending provision may not necessarily be one that directly prohibits assignment of a contract, but may be one that indirectly interferes with a debtor's ability to realize the value of its assets. De facto anti-assignment provisions may be found in a variety of forms including lease provisions that limit the permitted use of the leased premises, lease provisions that require payment of some portion of the proceeds or profit realized upon assignment, and cross-default provisions.") (internal quotes omitted).

The district court concluded that in accordance with the plain language of section 365(f)(1), the provision clearly conditioned assignment because it required Debtors to pay Antone 50 percent of net profits received if the Debtors assigned the lease, and was therefore unenforceable as a matter of law; and if enforced, the provision would prevent Debtors from realizing the full value of its asset.

PRACTICAL CONSIDERATIONS

A fundamental benefit of chapter 11 is a debtor's ability to maximize value through assumption and assignment of executory contracts and unexpired leases, even when a contract may contain otherwise valid anti-assignment terms. The *Haggen* decision illustrates the bankruptcy policy of balancing the interests of all parties by subordinating the interests of a single creditor for the benefit of the estate and all creditors. Lessors should therefore be cognizant that economic risk mitigation strategies such as profit-sharing lease provisions must yield to bankruptcy policy considerations that maximize value.

CONTRACT DEFINITIONS DO HAVE MEANING?

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Hartman v. Ultra Petroleum Corp. (In re Ultra Petroleum Corp.), Bankr. Case No. 16-32202 571 B.R. 755 (Bankr. S.D. Tex. May 16, 2017)

CASE SNAPSHOT

The owners of an interest in net profits under a contract that encumbered a series of oil and gas leases sued the debtor alleging that the debtor, by not including gains from its hedging activity, underreported the amount of money it owed to the plaintiffs. In response, the debtor argued that its hedging agreements were purely financial transactions that are separate from the oil and gas from which they derive their value. Restated, the hedging agreements have nothing to do with the production of oil and gas; therefore, profits derived therefrom are not used to calculate the net profits owed to the plaintiffs. The court interpreted the contract that provided the plaintiffs with their net profits interest and ruled the debtor's gains and losses from its hedging activities were properly excluded from the calculation of "net profits." Accordingly, the court granted the debtor's motion for summary judgment and did not require it to recalculate the net profits payment made to the plaintiffs.

FACTUAL BACKGROUND

Through various assignments of prior parties' interests, the plaintiffs and debtor became party to an agreement pursuant to which the plaintiffs own a 2.49 percent net profits interest that burdens leases operating within Pinedale, Wyoming (the "Pinedale Contract"). In 2006, the plaintiffs sued Ultra Petroleum ("Ultra") in Wyoming state court. The complaint asserted multiple claims for relief, including a determination of the amount owed by Ultra to the plaintiffs. The court determined that Ultra owed almost $5 million to the plaintiffs. On appeal, the Wyoming Supreme Court reversed and remanded the lower court's damages' award for recalculation. None of the state courts was asked to interpret the revenue provisions of the Pinedale Contract.

Ultra filed a voluntary chapter 11 petition April 29, 2016. The plaintiffs filed the Adversary Proceeding against Ultra to recover monies allegedly due to them from Ultra under their net profits interest after Ultra refused to include in the net profits interest accounting, the full fixed-price hedge gains it had received. Ultra filed a motion to dismiss the adversary complaint that, at the parties' agreement, the court treated as a motion for summary judgment.

COURT ANALYSIS

The court followed the universally adopted legal position on summary judgment; summary judgment is to be granted only if the movant shows there is no genuine dispute as to any material fact, and that the movant is entitled to judgment as a matter of law. For cases involving contract interpretation, summary judgment is only appropriate where the language of the contract is unambiguous. Because contract law is a matter of state law, the court applied Wyoming law.

Under Wyoming law, when interpreting an unambiguous mineral interests contract, the court must give effect to all of the contract's provisions so that no part of the contract is rendered meaningless. In reviewing the plain terms of the Pinedale Contract, the court determined that the plaintiffs' net profits interest was related solely to unit operations. Restated, the plaintiffs were entitled only to profits derived from the physical production of oil and gas at the covered leases.

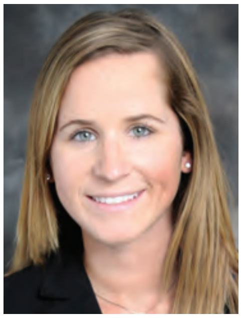
Ultra entered into hedge transactions to minimize its exposure to the volatile and unpredictable prices of oil and gas in the marketplace. The hedging transactions are purely financial and do not affect the market value of the gas at the well, and do not generate any profits from actual production at the wellhead.

Because Ultra's hedging transactions were determined to be purely financial transactions, the court held the plaintiffs were not entitled to include Ultra's hedging gains in their calculation of net profits. In interpreting the Pinedale Contract, the court looked to the contract's plain language, which did not support the plaintiffs' desired outcome. The plaintiffs were entitled only to profits derived from production of gas under the Pinedale Contract.

PRACTICAL CONSIDERATIONS

The key takeaway from this case is the importance of a contract's plain language. Courts are not in the business of rewriting contracts and will defer to the contract's plain language whenever possible. Accordingly, when drafting a contract, it is imperative for a party to ensure the contract is clear and reflects its negotiated bargain.

THIRD CIRCUIT ANALYZES MECHANICS' LIENS AND THE AUTOMATIC STAY



Lauren S. Zabel
Associate, Philadelphia

In re Linear Elec. Co., Inc., 852 F.3d 313 (3d Cir. 2017)

CASE SNAPSHOT

Third Circuit addresses the interplay between the New Jersey Construction Lien Law (mechanics' liens) and bankruptcy law and, finds that the Bankruptcy Court properly rejected the lien claimants' arguments that they as suppliers to the bankrupt contractor are entitled to payment for outstanding balances from the lien claim fund. The Third Circuit also finds that the post-petition filing of the liens against the real property of the debtor's customers violated the automatic stay by impacting the accounts receivable owed to the debtor by its customers.

FACTUAL BACKGROUND

Two suppliers sold electrical materials to a contractor, which the contractor incorporated into several construction projects. The contractor filed a bankruptcy petition before receiving full payment from the development owner for its work on the projects, and before the contractor had fully paid the suppliers for the materials supplied. After the bankruptcy filing, the suppliers filed construction liens on the developments into which the debtor had incorporated the materials that it had purchased from the electric supply companies, and the debtor filed a motion seeking to discharge the liens as having been filed in violation of the automatic stay. The Bankruptcy Court granted the motion. The debtor thereafter collected the full amounts owed to it by the development owners, and the Bankruptcy Court thereafter issued an order holding that the construction liens were void *ab initio* for violation of the automatic stay. The suppliers appealed the Bankruptcy Court's orders.

COURT ANALYSIS

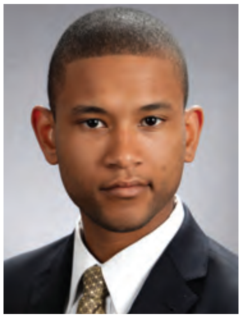
As an initial matter, the Third Circuit rejected the debtor's argument that the issues presented were moot, and that the bankruptcy judge lacked constitutional authority to invalidate the suppliers' liens. The Third Circuit then turned to the issue of whether the filing of the construction liens violated the automatic stay. Under the Bankruptcy Code, the filing of a bankruptcy petition creates a bankruptcy estate that consists of all property of the debtor, and automatically stays, among other things, any acts to create or perfect any lien against property of the estate. Under New Jersey law, any contractor, subcontractor or supplier who provides work, services, material or equipment pursuant to a contact is entitled to a lien for the value of the unpaid portion of work or services performed, or materials or equipment furnished (as determined by the contract), which lien attaches to the interest of the owner or unit owner of the real property development. That is, in this case, both the debtor (as a first tier claimant) and the suppliers (as second tier claimants) could file liens against the development owner. To discharge such a lien, the development owner pays into a lien claim fund, which is disbursed among first and second tier claimants in accordance with the New Jersey mechanics' lien statute.

The Third Circuit explained that under New Jersey Law, absent a bankruptcy filing, if the debtor had not filed its own lien claim against the development owner, the suppliers' liens (as second tier claimants' liens) would have been satisfied through the fund, and the amount of the debtor's claim would have been reduced accordingly. In other words, payment of the suppliers' claims would have reduced the accounts receivable owed to the debtor, and therefore the lien constituted a lien against the debtor's accounts receivable. The Third Circuit explained that "[w] here, as here, a lien will be paid by transferring part or all of an asset from the bankruptcy estate to the lienholder, the lien is against property of the bankruptcy estate." Based upon the foregoing, the Third Circuit held that the suppliers' filing to perfect their liens violated the automatic stay, a result the Third Circuit noted was supported by prior cases and the purpose of the automatic stay. In so holding, the Third Circuit rejected the suppliers' arguments that the liens attached to the property of the development owners and not to interests of the debtor, and therefore did not violate the automatic stay. The rationale for rejecting this argument was twofold: first, because of the Third Circuit's conclusion that suppliers' liens were against the debtor's accounts receivable (i.e., interests of the debtor), and, second, because the automatic stay applies to any lien "against" the debtor's interest in property, not solely those that "attach" to the debtor's interests in property (and the New Jersey statute contemplates that the lien may be against something to which it does not attach).

PRACTICAL CONSIDERATIONS

Circumstances in which the automatic stay applies are not always intuitive or cut and dry. In circumstances where it may appear as though the lien would encumber property of a non-debtor party, the lien may impact the debtor's interests in property and therefore implicate the automatic stay. In light of the breadth of the definition of property of the bankruptcy estate and interpretation of the scope of the automatic stay, creditors should use extreme caution and consult bankruptcy counsel before taking any actions to create or perfect liens once a bankruptcy has been filed by any party having involvement in the transaction at issue.

BETTING THE FARM: BANKRUPTCY COURT AUTHORIZES USE OF CASH COLLATERAL FOR FARMERS



Reginald Sainvil
Associate, Pittsburgh

In re Karl A. Blake and Jenna K. Blake, No. 16-60425 (LKG) 2017 WL 1906603 (Bankr. S.D. Ill. May 8, 2017)

CASE SNAPSHOT

In a chapter 12 farm reorganization, the Bankruptcy Court for the Southern District of Illinois authorized the debtors to use a secured lender's cash collateral to fund crop input costs for the 2017 crop year. The Bankruptcy Court held that adequate protection existed for the use of cash collateral in the form of a lien on: (1) all of the debtors' as-yet-unplanted crops; (2) all government crop payments owed to the debtors; and (3) any crop insurance proceeds. The Bankruptcy Court also awarded an administrative expense priority claim in favor of the secured lender to protect against an adequate protection shortfall.

FACTUAL BACKGROUND

On November 2, 2016, Karl A. Blake and Jenna K. Blake (the "Debtors") filed a voluntary petition for relief under chapter 12 of title 11 of the United States Code, 11 U.S.C. section 101 *et seq*. (the "Bankruptcy Code"). As of the petition date, First Financial Bank, N.A. (the "Secured Lender") held a pre-petition lien on the Debtors' 2015 and 2016 crop and proceeds, and a lien on certain government payments in which the Debtors held an interest.

The Debtors were unable to find a crop lender to finance crop input costs, as well as certain rent costs in 2017. As a result, on March 31, 2017, the Debtors filed a motion seeking authority to use the Secured Lender's cash collateral to finance crop input costs for the 2017 crop year. The Debtors proposed to provide to the Secured Lender adequate protection in the form of a security interest in the 2017 crop, crop insurance, and government payments in which the Debtors have an interest, and grant a first lien on the 2017 crops and related collateral. In addition, the Debtors proposed to pay interest at the rate of 5.25 percent, and allow a priority administrative expense claim to the extent other collateral may be insufficient to repay the Secured Lender.

On April 10, 2017, the Secured Lender filed an objection to the Debtors' cash collateral motion, taking the position that the requested relief should be denied because (1) a bare replacement lien on non-existent crops is not enough protection to allow the Debtors to proceed on a cash collateral motion, and (2) the Debtors consistently lose money and have amassed a net operating loss in excess of $750,000.

COURT ANALYSIS

Upon evaluating the Debtors' cash collateral motion and the Secured Lender's objection, Bankruptcy Judge Laura K. Grandy determined that adequate protection existed such that the Debtors' proposed use of collateral was appropriate under the circumstances. Judge Grandy opined that the Debtors were able to demonstrate that the Secured Lender's interest in the cash collateral was adequately protected by providing more than a bare replacement lien in non-existent crops. Not only did the Debtors propose a replacement crop lien in favor of the Secured Lender as adequate protection for the use of the crop proceeds, but the Debtors also proposed to provide additional security in the form of an assignment of any and all government payment for the 2017 crop year, crop insurance proceeds, and a priority administrative expense claim. In view of the additional security provided by the Debtors, the Bankruptcy Court was satisfied that the Debtors had met their burden of demonstrating that the Secured Lender's cash was adequately protected.

PRACTICAL CONSIDERATIONS

The use of cash collateral requires a showing that the secured lender's interests are adequately protected. While debtors typically bear a heavy burden to demonstrate that secured lenders are adequately protected, secured lenders may face new challenges in chapter 12 cases, to the extent that bankruptcy courts provide that several forms of security that do not typically constitute adequate protection may be combined to constitute adequate protection.

THIRD CIRCUIT REJECTS OIL PRODUCERS' CLAIMS OF AUTOMATICALLY PERFECTED LIENS

Christopher A. Lynch
Associate, New York

Arrow Oil & Gas, Inc. v. J. Aron & Co.
(*In re SemCrude L.P.*), 864 F.3d 280
(3d Cir. July 19, 2017)

CASE SNAPSHOT

The U.S. Court of Appeals for the Third Circuit's recent decision in *In re SemCrude, L.P.* underscores the need to adequately document transactions for the physical sale of crude oil to protect the producer in the event of a purchaser's insolvency, including taking steps to properly perfect the producer's security interest. In most cases, perfection will require the filing of a financing statement in the jurisdiction where the debtor is located, and it should not be presumed that local non-uniform statutes that purport to grant automatic perfection will be effective.

FACTUAL BACKGROUND

SemCrude, L.P. and its affiliates (together, "SemGroup") provided "midstream" oil services – they purchased oil from producers and resold the oil to downstream purchasers. The producer/appellants consisted of thousands of oil producers who sold SemGroup oil from thousands of wells in Texas, Kansas and Oklahoma. SemGroup would move the oil to aggregation centers from where it would be sold to downstream purchasers, including appellees J. Aron & Company and BP Oil Supply Company (together, "Buyers"). The oil sold to Buyers was represented to be "free from all royalties, liens and encumbrances." SemGroup paid the producers on the 20th of the month following delivery; likewise Buyers paid SemGroup on the 20th of the month following delivery. SemGroup always paid the producers on time.

In addition, SemGroup sold Buyers call options for the right to purchase oil at a fixed price at a future date. In the years preceding its bankruptcy, SemGroup "bet" incorrectly on the direction of the price of oil, and by July 2008 faced potential exposure of $2.8 billion under the options. As its exposure increased, SemGroup had to pledge cash collateral to margin accounts to cover its exposure, eventually running out of funds to meet those margin obligations, which resulted in bankruptcy. In 2007 and 2008, J. Aron and BP, respectively, entered into master agreements with SemGroup under which the purchasers could set off any outstanding amount due for oil purchases with the amount SemGroup owed on the options. Until SemGroup's default, Buyers always paid in full for the physical deliveries of oil and never exercised a setoff right.

In July 2008, J. Aron requested SemGroup provide adequate assurance of performance. When SemGroup failed to respond, J. Aron called a default and exercised its setoff rights. This was soon followed by SemGroup's bankruptcy filing, that triggered a default with BP, which then exercised its setoff rights.

Faced with receiving a small fraction of what they were owed, the producers commenced numerous separate actions against Buyers, that were transferred to the Bankruptcy Court. The Bankruptcy Court filed proposed finding of facts and conclusions of law recommending summary judgment be entered in favor of Buyers, concluding that they purchased the oil from SemGroup free of any purported liens, whether as buyers for value or as buyers in the ordinary course. The district court adopted the Bankruptcy Court's recommendations.

On appeal, the Texas and Kansas producers asserted that, under their states' nonuniform amendments to the UCC, they were given automatically perfected security interests in the oil sold to SemGroup, and that Buyers took subject to those interests. Because SemGroup did not pay the producers in full, the producers argued, they had the right to reclaim from Buyers the oil (or its value) used to set off options debt with SemGroup.

COURT ANALYSIS

In finding that Buyers qualified as buyers for value, the court first examined whether the Texas and Kansas producers had perfected their security interests in the oil. The court noted that, just as with every other state, Texas and Kansas had adopted the choice-of-law provision found in UCC Article 9 (section 9-301), which provides in relevant part that "while a debtor is located in a jurisdiction, the local law of that jurisdiction governs perfection, the effect of perfection or nonperfection, and the priority of a security interest in collateral." Because SemCrude and its affiliates were registered in Delaware or Oklahoma, they were subject to those states' perfection laws, which (for the collateral at issue) require perfection by filing a financing statement. As the Texas and Kansas producers did not file financing statements, much less in Delaware or Oklahoma, their purported security interests were unperfected. The court rejected the producers' argument that their respective states' automatic perfection laws "necessarily displace" the choice-of-law rule, finding these local laws apply only when the debtor is located in Texas or Kansas, or where the debtor had a preexisting interest in the oil before extraction, such that the oil constitutes as-extracted collateral.

Next, the court found that Buyers had given value for the oil as they acquired it on credit per industry custom. This was a dismissal of the producers' argument that the oil was collateral for the options trades between SemGroup and Buyers, which the court found mischaracterized Buyers' business relationship with SemGroup.

Finally, the court found that there was no evidence Buyers had actual knowledge of the producers' security interests in the oil sold to SemGroup, or that Buyers acquired the oil as a secured party. Under the circumstances, the court held that Buyers were "buyers for value" within the meaning of UCC section 9-317(b), and purchased the oil from SemGroup free from any liens.

PRACTICAL CONSIDERATIONS

The Third Circuit's decision illustrates the need to properly document transactions for the physical sale of oil, comparing the efforts taken by the downstream buyers to protect themselves from the midstream supplier's potential insolvency, with the absence of any such efforts on the part of the upstream producers that sold the oil to the midstream supplier. It also reinforces the need to adhere to the UCC's choice-of-law rules, and look to the laws of the state in which the debtor is located to determine the correct manner in which to perfect security interests in oil.

CLASS MEMBERS DENIED STANDING TO INTERVENE IN APPELLANT'S SIDE-SETTLEMENT

Maura P. Nuño
Associate, Pittsburgh

Carol Rougvie, et al., v. Ascena Retail Group, Inc., et al., Case No. 15-724 (JK) 2017 WL 2624544 (E.D. Pa. June 16, 2017)

CASE SNAPSHOT

The court finds that class members' interest in a larger class settlement fund created by a successful appeal does not vest them with an interest in the privately negotiated appeal settlement proceeds.

FACTUAL BACKGROUND

Consumers filed class actions for consumer protection and breach of contract claims against Retail Group, Inc. and Tween Brands, Inc. After months of litigating and negotiating, the parties agreed to a final settlement. Several individuals objected to the fairness of the settlement, and after further deliberation, the court granted some objections and denied others.

Several objectors then appealed the denial of their objections, and after approximately eight months, the majority of the objectors settled their appeals (the "Settling Objectors"). Two non-appealing objectors (the "Putative Intervenors") moved to intervene in the Settling Objectors' appeals to assert cross-claims against the Settling Objectors on behalf of themselves and the class. The Putative Intervenors alleged that the settlement funds from the appeal constituted unjust enrichment because the Settling Objectors obtained those funds at the expense of the class. The Putative Intervenors did not, however, allege that the appeal settlement money came from the settlement funds established for the class.

COURT ANALYSIS

Applying the Supreme Court's recent holding in *Town of Chester v. Laroe Estate*, *Town of Chester v. Laroe Estates, Inc.*, 137 S. Ct. 1645 (2017), the court first sought to determine whether the Putative Intervenors had standing to assert their claims in the intervenor complaints. The Putative Intervenors argued that they had Article III standing because (1) the money paid to the Settling Objectors "equitably" belongs to the class, and (2) the delay damages caused by the Settling Objectors' eight-month appeal.

The court first assessed the Putative Intervenor's equitable interest argument using the same standard applied to motions to dismiss. The court found that the Putative Intervenors' alleged "equitable" interest in the settlement proceeds was a legal conclusion not entitled to the presumption of truth. The Putative Intervenors' argument that the settlement proceeds equitably belong to them because the benefit of any successful appeal would have belonged to the class, was equally unsuccessful. The court found this basis for standing to be too speculative. The Putative Intervenors failed to show that the Settling Objectors had a fiduciary duty to the class obligating them to provide the side-settlement proceeds to the class or that the Settling Objectors appealed on behalf of the class. The court recognized that "Congress did not intend bankruptcy appellants to use their appeal rights to increase their share of the estate at the expense of others under a reorganization plan," but found that these side settlements were not objectionable because proceeds of the side settlements did not draw from the class settlement fund.

The court next addressed the delay in distribution of the settlement fund caused by the Settling Objectors' eight-month appeal. The court found that the Putative Intervenors' argument failed because the alleged harm – the delay, is not causally connected to the alleged wrongful conduct – retention of the side-settlement proceeds.

PRACTICAL CONSIDERATIONS

Consistent with the Supreme Court's decision in *Laroe Estates*, class members will need to demonstrate standing for every claim and for each form of relief sought even as it relates to the class settlement.

7th Circuit Allows Parallel Default Proceedings in Brazil and Indiana—continued from page 6

COURT ANALYSIS

The court began with the disputed choice-of-law and venue provision in the guarantee. Applying principles of contract interpretation, the court found that the venue provision of the guarantee "plainly" gives 1st Source discretion to institute an action wherever Neto maintains assets. Next, the court addressed Neto's argument that even if venue is proper in Brazil, the venue provision prevents simultaneous actions. The court disagreed. The provision speaks of "'legal proceedings' in the plural, that can be taken 'in addition to' legal proceedings in Indiana." The court found this language to indicate that the guarantee contemplated the existence of multiple lawsuits simultaneously.

Turning to the vexatious litigation argument, the court noted that for an antisuit injunction, the movant does not have to show a likelihood of success on the merits. Instead, the movant must demonstrate the following factors weigh in favor of granting the injunction: (i) "whether or not the parties and the issues are the same, and (ii) whether or not the first action is dispositive of the action to be enjoined." E. & J. Gallo Winery v. Andina Licores S.A., 446 F.3d 984. 991 (9th Cir. 2006). Courts must then consider whether allowing the two suits to go forward would be "gratuitously duplicative" or "vexatious and oppressive."

The court recognized that the parties and issues in the cases were the same, but could not find the Brazilian litigation vexatious and oppressive. The court specifically noted that 1st Source subjected Neto to minimal discovery in Indiana before filing in Brazil, and Brazil, unlike Indiana, permits prejudgment attachment of assets. The strict reading of the venue provision of the guarantee and 1st Source's legitimate reason for filing a suit in Brazil did not support antisuit injunctive relief.

PRACTICAL CONSIDERATIONS

Contract interpretation canons and international-comity concerns formed the foundation of the Seventh Circuit's holding that antisuit injunctive relief was not appropriate. Absent contractual limitations or vexatious motives for pursuing parallel litigation, courts are not likely to enjoin creditors from suing in a forum with more advantageous remedies.

THIRD CIRCUIT ADOPTS PROBABILITY STANDARD FOR ANALYZING WARN ACT LIABILITY

Monique B. Howery
Associate, Chicago

CASE SNAPSHOT

On August 4, 2017, in *Varela v. AE Liquidation, Inc. (In re AE Liquidation, Inc.)*, 866 F.3d 515 (3d Cir. 2017), the U.S. Court of Appeals for the Third Circuit held that under the WARN Act, a mass layoff is "reasonably foreseeable" only if it is "probable."

FACTUAL BACKGROUND

Plaintiff-appellants were former employees of the debtor, Eclipse Aviation Corporation (Eclipse), who were laid off when Eclipse's section 363 sale to its largest shareholder, European Technology and Investment Research Center (ETIRC), failed to close. The sale was premised on ETIRC receiving funding from Vnesheconomban (VEB), a state-owned Russian bank to finance the sale. The sale would have allowed Eclipse to continue operating as a going concern.

On January 23, 2009, the Bankruptcy Court entered an order approving the sale to ETIRC pursuant to an asset purchase agreement. Over the course of the next month, Eclipse waited for the deal to go through with daily assurances that VEB's funding was imminent. Some members of Eclipse's board expressing concern about the delay in funding, resolved that if funding or "satisfactory confirmation" was not received by February 16, 2009, they would recommend (a) the sale be aborted and Eclipse's bankruptcy proceedings be converted to a liquidation under chapter 7 of the Bankruptcy Code; or (b) the furlough of a majority of Eclipse's employees to preserve Eclipse's remaining funds. Eventually, the assurances as to the imminency of funding failed to bear fruit, and the time came when Eclipse was forced to cease operations altogether. On February 24, 2009, Eclipse's board filed a motion to convert the chapter 11 case to a chapter 7 proceeding. Shortly thereafter, Eclipse emailed its employees informing them that effective February 19, 2009, the furlough was being converted to a layoff because the sale fell though and Eclipse had run out of funds.

Plaintiff-appellants filed a class action adversary proceeding alleging that Eclipse failed to provide the requisite 60-day notice before the layoff in violation of the Worker Adjustment and Retraining Notification Act (WARN Act). The Bankruptcy Court granted summary judgment in favor of Eclipse (*In re AE Liquidation, Inc.*, 522 B.R. 62 (Bankr. D. Del. 2014)), and the district court affirmed on appeal (*In re AE Liquidation*, Inc., 556 B.R. 609 (D. Del. 2016)).

COURT ANALYSIS

To ensure that displaced workers and their families receive "some transition time to adjust to the prospective loss of employment," the WARN Act requires employers to give 60 days' notice to all affected employees prior to a mass layoff or a plant closing. 29 U.S.C. § 2102(a). Eclipse did not comply with this notice requirement; however, Eclipse asserted that it was shielded from liability because of one of the exceptions to the notice requirement provided under the Act—the "unforeseeable business circumstances" exception.

In determining the applicability of the unforeseeable business circumstances exception, the Third Circuit addressed two legal questions. The first was the question of causation – Eclipse must prove that the unforeseeable event was the cause of the layoffs. The second was the question of foreseeability – whether it was reasonably foreseeable that the sale would not close.

In its ruling on causation, the Third Circuit rejected plaintiff-appellant's argument that provisions of the asset purchase agreement rebut any presumption that any employee would have been saved from termination. The court explained that the terms of the asset purchase agreement contemplated a going concern transaction, and the court presumed that the sale involved the hiring of Eclipse's employees unless something indicated otherwise, regardless of whether the seller had expressly contracted for the retention of Eclipse's employees. By applying this presumption, the court concluded that the layoff would not have occurred but for the sale falling through.

The Third Circuit's ruling on foreseeability, which requires a "reasonably foreseeable" event to be probable, brought the court in line with other circuits. Citing the test adopted by the Fifth Circuit in *Halkias v. General Dynamics Corp.*, 137 F.3d 333, 336 (5th Cir. 1998), the court explained that "anything less than a probability would be impracticable," reasoning that to do so would result in every company in bankruptcy, or considering bankruptcy, to send WARN notices to their employees in light of the potential for liquidation. The court discussed that this is not the burden the WARN Act was intended to impose, explaining the mere possibility of a layoff, while present, is not the most likely outcome; and any such premature warning has the potential to "accelerate a company's demise." Therefore, the court held Eclipse successfully demonstrated that ETIRC's failure to obtain financing to close the sale was not probable before it made its decision to lay off its employees. By so holding, the Third Circuit joined the Fifth, Sixth, Seventh, Eighth, and 10th Circuits in determining that "more probable than not" is the appropriate foreseeability standard under the WARN Act.

PRACTICAL CONSIDERATIONS

The potential for WARN Act violations is common in bankruptcy proceedings. The Third Circuit's holding brings certainty to the issues of causation and foreseeability with respect to the "unforeseeable business circumstances" exception. To invoke the exception, chapter 11 debtors must be vigilant in determining the point in time when the potential for layoffs shifts from being a mere possibility to a probability.

IT PAYS TO FOLLOW THE PLAIN LANGUAGE OF DOCUMENTS (AND IT DOESN'T PAY TO IGNORE THE LANGUAGE)

Jared S. Roach
Associate, Pittsburgh

Peterson v. Imhof, et al., Civ. Case No. 13-537 2017 WL 1837856 (D.N.J. May 8, 2017)

CASE SNAPSHOT

In litigation under Bankruptcy Code sections 362 and 549, where the debtor is a participating lender in a syndicated loan, the court held that the lead lender effected a "transfer" when it modified the loan by releasing the guarantors without the debtor's consent. In response to the guarantors' argument that the post-petition release of the guaranty was a permitted transfer under bankruptcy code section 550, the district court rejected the guarantors' argument because the guarantors were the initial transferees. The district court granted in part and denied in part the chapter 7 trustee's motion for summary judgment.

FACTUAL BACKGROUND

Defendant Kennedy Funding, Inc. ("Kennedy") was the agent and lender to a group of to-be-named lenders. Kennedy arranged for $47 million of financing to Clearwater Development ("Clearwater") for the development of a golf course in Colorado. The loan to Clearwater was guaranteed up to $23 million by three parties.

At the time, Kennedy arranged for the financing to Clearwater, it was the only lender, although the loan documents made clear that it would, and could, seek participants for the loan. The loan documents authorized Kennedy to modify or release the guarantors from their guaranty obligations upon obtaining a majority consent of the co-lenders, who at the time of the loan were either nonexistent or simply not listed in the contract, but whose existence and participation were likely anticipated by Kennedy.

Following funding by Kennedy, it did organize a group of co-lenders. Kennedy funded a majority of the debt, with the remaining substantial funding coming from KD8 (represented in this case by the chapter 7 trustee for its bankruptcy). Less than two years after funding, Clearwater defaulted on the loan. In order to restructure the loan, Kennedy agreed to cancel the guaranty agreements if the guarantors paid $500,000 to Kennedy and agreed to spend $3 million over two years to maintain the subject property so that it did not fall into disrepair.

The chapter 7 trustee, on behalf of KD8, filed an adversary proceeding in the United States Bankruptcy Court for the Northern District of Illinois. The case was ultimately withdrawn to the District Court for the Northern District of Illinois and then transferred to the United States District Court for the District of New Jersey. The trustee alleged, among other causes of action, Kennedy improperly dismissed the guarantors from their guaranty agreements without the trustee's required consent. The guarantors filed cross-claims against Kennedy, arguing that it should indemnify them against the trustee's legal action.

COURT ANALYSIS

The guarantors argued that the trustee lacked standing to sue because KD8 was not a party to the original loan documents. The court was not persuaded by the guarantor's argument. The court found that, while the original loan documents did not list any lenders other than Kennedy, the loan documents clearly contemplated that Kennedy would add other lenders to the syndication. Indeed, the loan documents gave Kennedy the right to add lenders at its discretion. Accordingly, the court held that the trustee, on behalf of KD8, had the requisite standing to sue the guarantors.

Regarding the bankruptcy claims, the trustee alleged Kennedy and the guarantors violated section 362(a)(3) and section 549 of the bankruptcy code. Section 362 operates as a stay of any action against estate property, and section 549 provides that a trustee "may avoid a transfer of property of the estate … that occurs after the commencement of the case[] and … that is not authorized by this title or by the court." Specifically, the trustee alleged that the modification that released the guarantors was a violation of sections 362 and 549.

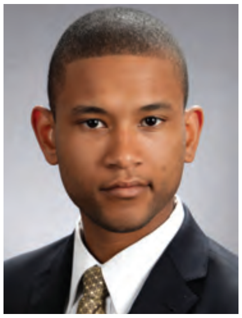
The court first held that the trustee's interest in the $23 million guaranty was transferred when Kennedy modified the loan and released the guarantors. The guarantors argued that the transfer was protected by the safe harbor found in section 550 of the bankruptcy code. Section 550 provides that a transfer will not be voided as to a subsequent transferee if that transferee takes for value, in good faith, and without knowledge of the voidability of the transfer. The court, however, found that the guarantors were the initial transferees and could not avail themselves of section 550. KD8 had a property interest in the loan, and KD8's property interest was transferred to the guarantors when Kennedy released the guaranty agreements.

The guarantors also argued that the trustee's complaint was time-barred under a two-year statute of limitations applicable to section 362 and 549 actions. The court, however, upheld the statute of limitation waiver clauses in the guaranty agreements. In upholding the waivers, the court held that such waivers can apply to bankruptcy-related causes of action.

PRACTICAL CONSIDERATIONS

This case highlights the importance of contract compliance. Had the lead lender, Kennedy, complied with the terms of the loan agreement, the case outcome may have been different outcome. Noncompliance with the unambiguous contract language, opened the agent itself (and the guarantors) up to liability under state law and bankruptcy law claims.

WHEN IN DOUBT, ABSTAIN: BANKRUPTCY COURT REFRAINS FROM RULING ON TEMPORARY RESTRAINING ORDER



Reginald Sainvil
Associate, Pittsburgh

Subculture, LLC v. Rogers Investments, a Nevada Limited Partnership a/k/a Rogers Investments NV LP and The Culture Project, Inc., No. 17-1029 (MEW) 571 B.R. 555 (Bankr. S.D.N.Y. May 10, 2017)

CASE SNAPSHOT

In a chapter 11 case where the debtor's request to assume a lease was denied because the debtor was unable to effect a cure of substantial rent arrearages under an unexpired lease, the Bankruptcy Court for the Southern District of New York decided to abstain from hearing the sub-lessee's request for a temporary restraining order to prevent the landlord from taking possession of the leased premises.

FACTUAL BACKGROUND

On June 16, 2016, the Culture Project, Inc. (the "Debtor") filed a voluntary petition for relief under chapter 11 of title 11 of the United States Code, 11 U.S.C. section 101 *et seq*. (the "Bankruptcy Code"). Prior to the petition date, the Debtor and Rogers Investments, a Nevada Limited Partnership a/k/a Rogers Investments NV LP (the "Landlord") entered into a lease (the "Lease") of the ground floor and basement of a building (the "Leased Premises"). The Debtor and SubCulture, LLC ("SubCulture") subsequently entered into a sublease (the "Sublease") of one of the performing arts theaters on the Leased Premises. SubCulture and the Landlord included several clauses in the Sublease to protect SubCulture in the event of a Lease termination. Specifically, the Sublease provided that SubCulture is entitled to receive prompt notice by the Landlord of a termination event, and will have the right to step into the shoes of the Debtor under the terms of the Lease, without assuming any responsibility for any prior default or breach under the Lease by the Debtor.

In January 2017, the Debtor sought authority to assume the Lease. The Debtor was not permitted to assume the Lease because the Debtor was unable to cure pre-petition defaults or provide adequate assurance of future performance under the Lease. On January 13, 2017, SubCulture sent the Landlord a notice, explaining that it was exercising its right to enter into the Lease as if named tenant thereunder upon the Debtor's imminent surrender of the Lease. The Landlord rejected SubCulture's notice, and asserted that the Sublease terminates if there is a termination of the Lease. In response, SubCulture filed an adversary proceeding seeking a declaration and injunction that it is entitled to possession, and a new lease for the Leased Premises under the terms of the existing Lease with the Debtor. SubCulture later amended its complaint seeking a determination with the parties' respective rights in certain theater equipment on the Leased Premises.

COURT ANALYSIS

The Bankruptcy Court began its analysis by addressing whether or not the court had jurisdiction over the issues. Bankruptcy Judge Michael E. Wiles found that he had subject-matter jurisdiction over the issues. Nevertheless, he determined that in the interest of justice and in respect of state law, it was appropriate to abstain from exercising such jurisdiction under the circumstances. In reaching this conclusion, Judge Wiles addressed the 12 factors that most courts look to in deciding whether abstention is appropriate. In the court's view, five of the factors relate to the presence of state law issues; four of the factors call for the court to weigh the effects on the bankruptcy case; and the last three factors address forum shopping concerns. First, Judge Wiles opined that SubCulture's claimed rights depend entirely on state law, not bankruptcy law. Second, he determined the dispute could result in claims against the estate. However, this was not enough to weigh in favor of the bankruptcy court addressing the dispute, because Judge Wiles assumed the ultimate effect would be the same, regardless of whether the dispute was before a state court or the bankruptcy court. Lastly, Judge Wiles found that the parties were not engaged in forum shopping. Considering all the factors, the Bankruptcy Court was satisfied that the best course was to abstain from addressing the dispute between the Landlord and SubCulture, and SubCulture's related request for a temporary restraining order.

PRACTICAL CONSIDERATIONS

In cases where a subtenant anticipates a lease rejection and asserts rights under the sublease, landlords and subtenants should be aware that courts, to deal with the conflicts of parallel federal and state court systems, may determine that permissive abstention is appropriate, even where the court has subject matter jurisdiction.

CONTRACT PROVISIONS WAIVING MORTGAGOR'S RIGHT OF REDEMPTION UNENFORCEABLE UNDER NEW YORK LAW

Christopher A. Lynch
Associate, New York

The First Union Baptist Church of the Bronx v. TD Capital Group LLC (In re The First Union Baptist Church of the Bronx), 572 B.R. 79 (Bankr. S.D.N.Y. 2017)

CASE SNAPSHOT

The Bankruptcy Court for the Southern District of New York in the chapter 11 case of The First Union Baptist Church of the Bronx ("First Union") recently reaffirmed New York's long-standing rejection of contract provisions waiving a mortgagor's right of redemption. The court found that mortgagor First Union's delivery of a deed to be held in escrow pursuant to stipulation constituted a security arrangement, and did not amount to an absolute conveyance of the property. As such, the provisions of the stipulation that purported to waive the mortgagor's redemption rights were void and unenforceable. The court therefore ordered the recorded deed vacated and the property returned to the debtor.

FACTUAL BACKGROUND

First Union was a defendant in a foreclosure action concerning real property at which First Union operated a place of worship (the "Property"). A judgment of foreclosure had been entered and the sale was scheduled for October 1, 2012, the same date on which First Union filed its bankruptcy petition.

In June 2014, First Union and TD Capital Group, LLC, as mortgagee, ("TD Capital") reached an agreement memorialized in a stipulation approved by the court under Bankruptcy Rule 9019 (the "Stipulation"), which provided, among other things, that First Union would continue to own the Property and continue to have the right to refinance or sell the Property until the end of June 2015, at which time a balloon payment of $1.5 million would be due. First Union would continue until such time to make interest payments on the debt. Although such payments were due on the first of each month, the Stipulation provided for a 10-day grace period, and payment could be made after that grace period as long as it was made before the last day of the month and included a late charge. Failure to make payment so as to be received by TD Capital by the end of the month would be a default under the Stipulation.

Under the Stipulation, First Union also delivered to TD Capital a deed that purported to transfer the Property to TD Capital to be held in escrow (the "Escrowed Deed"). If First Union defaulted under the Stipulation in the first 180 days after the Stipulation was entered into, then TD Capital could pursue a sale of the Property under the prior foreclosure judgment, with First Union waiving defenses to the sale, but retaining its right of redemption, including the ability to exercise that right at any time before foreclosure sale. If, however, the default occurred after the first 180 days, TD Capital could either proceed with its foreclosure and sale remedies, or simply record the Escrowed Deed transferring title to the Property to itself.

A monthly payment was due May 1, 2015, but was not made then or during the 10-day grace period. TD Capital ultimately extended the deadline for the payment to June 2, but the payment did not arrive at TD Capital until June 3. After the close of business on June 2, TD Capital sent the Escrowed Deed to a title company for filing, and the deed was actually recorded June 8.

First Union commenced an adversary proceeding against TD Capital seeking, among other things, a declaratory judgment that the transfer of the Escrowed Deed is null and void, and that the Property still belongs to First Union for the following reasons: (1) the delivery of the Escrowed Deed was intended as a security arrangement and not an outright conveyance of the Property, and, under New York law, First Union retained a right of redemption that could not be extinguished other than through a foreclosure sale; and (2) the provision of the Stipulation that granted First Union the option of proceeding with a foreclosure sale, or recording the Escrowed Deed and taking ownership, was an unenforceable penalty.

COURT ANALYSIS

The court agreed with First Union that the Escrowed Deed was intended to only be a security arrangement. Under New York law, whether a deed is given for security or for an absolute conveyance, turns upon the intent of the parties. Although the court noted that the law is unclear on the standard of proof, the evidence presented, including the plain language of the Stipulation, made it "overwhelmingly clear" that the parties did not intend a conveyance of the Property when the Escrowed Deed was delivered. Among the indicia of such intent were provisions in the Stipulation that (1) permitted First Union to try to sell the Property, (2) provided TD Capital the right to submit an offer to buy the Property, and (3) permitted TD Capital to take title if a default occurred more than 180 days after the Stipulation was so-ordered – none of these provisions would be necessary if an absolute conveyance had already taken place.

As there was not an absolute conveyance, the court turned to the provisions of the Stipulation that waived First Union's right of redemption. At the outset, the court stated the long-standing rule that "New York law does not permit a waiver, in advance [of a foreclosure sale], of the right of redemption." This is so regardless of whether the agreement is "so-ordered" by a court. As the court noted, in approving the Stipulation, the prior judge merely determined whether First Union, as debtor, was authorized to enter into the Stipulation, not whether the provisions therein were enforceable under state law. For these reasons, the court found the waiver of the right of redemption unenforceable, and the provisions authorizing TD Capital to record the deed void and unenforceable.

The court also found unenforceable the provision of the Stipulation providing TD Capital the option to record the Escrowed Deed regardless of the value of the Property, or the debt outstanding at the time the option was exercised. First, there was no reason to expect difficulty in calculating damages, as the debt outstanding could be readily determined at any given time. Second, the court found that providing for the turnover of the Property and taking away the right of redemption regardless of the Property's value is not a "reasonable" means of approximating actual damages. Finally, the fact that TD Capital had the option to take the Property upon default was not a true liquidated damages provision. The court thus held that the recording of the Escrowed Deed must be vacated and the Property restored to First Union.

CONTINUED ON PAGE 17

ESTABLISHING AN INFORMAL PROOF OF CLAIM

Maura P. Nuño
Associate, Pittsburgh

In re Strickner, Case No. 16-20831 (PRW), 2017 WL 2643948 (Bankr. W.D.N.Y. June 19, 2017)

CASE SNAPSHOT

The debtor's acknowledgment of the creditor's debt in the schedules, coupled with the fact that the bankruptcy court granted the creditor's motion to lift the automatic stay before passage of the claims-bar date, does not operate to establish a timely informal proof of claim for a deficiency owed following foreclosure on the collateral.

FACTUAL BACKGROUND

On July 19, 2016, Strickner (the "Debtor") filed a voluntary petition for relief under chapter 13 of title 11 of the United States Code, 11 U.S.C. section 101 *et seq*. The Debtor's schedules listed a debt of $33,446.00 to Family First (the "Creditor"), secured by a 2015 Chrysler 200, which had been repossessed, but not liquidated. On July 28, 2016, the Creditor filed a motion for relief from stay seeking an order to allow the Creditor to enforce its lien on the Chrysler. Notably, the Creditor's motion was silent on whether the proceeds of the sale of the Chrysler would be sufficient to satisfy the Debtor's outstanding debt to the Creditor.

The court granted the Creditor's motion for stay relief, and the Chrysler was sold at an auction. Proceeds from the sale were applied to the outstanding debt, and after the bar date, the Debtor filed a proof of claim in the amount of $22,778.55 for the deficiency on the debt. On May 11, 2017, the trustee objected to the Creditor's proof of claim as untimely. The Creditor opposed the trustee's motion, arguing that it should be deemed to have filed a timely informal proof of claim by virtue of the motion for relief from stay, coupled with the inclusion of the debt in the Debtor's schedules.

COURT ANALYSIS

In a chapter 13 proceeding, the Bankruptcy Code requires creditors to file a proof of claim to receive a distribution in a timely manner. A filed document, not initially intended to be a proof of claim, can constitute an informal proof of claim under the Bankruptcy Code. To constitute an informal proof of claim, the filing must "(1) have been timely filed with the bankruptcy court and have become part of the judicial record; (2) state the existence and nature of the debt; and (3) state the amount of the claim against the estate, and (4) evidence the creditor's intent to hold the debtor liable for the debt." *In re Dana Corp.*, No. 06-10354, 2008 Bankr. LEXIS 2241, at *7 (Bankr. S.D.N.Y. July 23, 2008).

Applying the *Dana* elements to the facts of this case, the court found that the inclusion of the Creditor's debt in the Debtor's schedules was insufficient to establish an informal proof of claim. The inclusion of the debt in the Debtor's schedules fails to satisfy the fourth prong of the test because the listing did not "evidence the creditor's intent to hold the debtor liable for the debt." The court found that the creditor must make an affirmative demand rather than "sit idly by." Similarly, the motion for relief from stay fails to satisfy the fourth element of the *Dana* test because it did not evidence an intent to hold the debtor liable for any anticipated deficiency.

PRACTICAL CONSIDERATIONS

The amendment to Bankruptcy Rule 3002, which became effective December 1, 2017, requires all secured creditors to file a timely proof of claim to have an allowed claim.

Contract Provisions Waiving Mortgagor's Right of Redemption Unenforceable Under New York Law—continued from page 16

PRACTICAL CONSIDERATIONS

First Union was determined under New York law, which is "especially protective of a mortgagor's right of redemption in the event of default," though many jurisdictions also protect this important property right. Accordingly, in such jurisdictions, reliance should not be had on contract provisions that call for the waiver of a mortgagor's right of redemption upon default. In addition, if it is the parties' intent to absolutely convey the property to the mortgagee, the documentation should clearly evidence that present intent, and not contain contingencies that may cause the delivered deed to be deemed a security arrangement.

COUNSEL'S CORNER: NEWS FROM REED SMITH

On September 26 and 27, **Bob Simons** served as chairperson at the 40th Annual Coal Marketing Days Conference in Pittsburgh. The Conference drew significant international attendance and media attention due to the comeback the coal industry has experienced over the last year.

Kurt Gwynne co-moderated the panel discussion at the Association of Insolvency and Restructuring Advisors' (AIRA) 16th Annual Advanced Restructuring and Plan of Reorganization Conference in New York. The session titled "2017 – The Year in Review from the Perspectives of Judges and Attorneys" featured a panel of three Bankruptcy Court judges from New York and New Jersey, reviewed significant decisions of 2017, focusing on cases from the Supreme Court and the Second and Third Circuits.

On October 25th **Bob Simons** received the Life Time Achievement Award from the Turnaround Management Association for his " extraordinary contributions to the corporate restructuring community and TMA Pittsburgh."

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