Benchnotes

By Anupama Yerramalli, Patrick A. Clisham and Paul R. Hage

Coordinating Editor Anupama Yerramalli
New York

Coordinating Editor Patrick A. Clisham
Engelman Berger, PC
Phoenix

Coordinating Editor Paul R. Hage
Jaffe Raitt Heuer & Weiss; Southfield, Mich.

Anupama Yerramalli is a New-York based attorney. Patrick Clisham is managing shareholder of Engelman Berger, PC in Phoenix. Paul Hage is a partner with Jaffe Raitt Heuer & Weiss in Southfield, Mich. Ms. Yerramalli and Mr. Hage are 2017 ABI "40 Under 40" honorees.

Standard for the Appointment of a Future Claimants Representative Continues to Evolve

The New Jersey District Court affirmed the bankruptcy court in *In re Duro Dyne Nat'l Corp.* and concluded that the standard for the appointment of a future-claimants representative is disinterestedness.[1] Pre-petition, Duro Dyne selected Lawrence Fitzpatrick as the future-claimants representative to negotiate a chapter 11 plan that would contain a channeling injunction and asbestos trust.[2] Fitzpatrick negotiated a term sheet and a variety of related plan documents.[3] After commencing chapter 11 cases, Duro Dyne filed a motion to appoint Fitzpatrick as the future claimants representative pursuant to § 524(g). The U.S. Trustee objected, citing lack of sufficient evidence to demonstrate that Fitzpatrick was conflict-free.[4]

After discovery and an evidentiary hearing, the bankruptcy court found that Fitzpatrick was disinterested, had significant experience in the role, had no contact with the debtors prior to the role, had no contact with the attorneys involved, was represented by counsel, had an indemnity to ensure independence and had no control over the whether the company filed for bankruptcy, along with the fact that his fees were not capped.[5] In addition, his negotiation and consent to the term sheet did not preclude him from seeking modifications if they were in the best interest of the future claimants.[6] The U.S. Trustee appealed.

Several issues were addressed on appeal. First, the district court determined that a future-claimants representative nominated by the debtor could be approved without the need for solicitation or hearing on other candidates despite no prescribed process set forth in the Bankruptcy Code.[7] In this case, where there was a motion filed, discovery taken and a hearing held on the candidacy, consideration of other candidates was not necessary.[8]

The bankruptcy court considered Fitzpatrick's qualifications and whether he had "disqualifying entanglements" with the debtors or the personal-injury attorneys.[9] The court did not "rubber stamp" the debtors' candidate, but instead appointed the debtors' candidate after a full hearing.[10]

Second, the district court agreed that disinterestedness is the appropriate standard for appointment of a future claimants representative. The Court considered the recent decisions in *In re Fairbanks Co.*,[11] where the bankruptcy court stated that the standard should be that used for the appointment of a guardian *ad litem*, and *In re Imerys Talc*,[12] where the bankruptcy court stated that independence and undivided loyalty are paramount.[13] Ultimately, the district court determined that the asbestos trustee and future-claimants representative should be held to the same standard of disinterestedness, rather than the future-claimants representative being held to a higher standard.[14]

Applying this standard, the bankruptcy court found that Fitzpatrick was disinterested because he was not a creditor, equityholder or insider, nor was he an employee of the debtor. In addition, he had no promise of future work and his fees were not capped. Finally, his service pre-petition did not create a material adverse interest to future claimants. His ability to address modifications was not impacted by his pre-petition work or the possibility that he could serve in the role post-confirmation.[15]

Miscellaneous

• *Hackler v. Arianna Holdings Co. LLC (In re Hackler)*, 2019 U.S. App. LEXIS 27514, __ F.3d __ (3d Cir. Sept. 12, 2019) (Third Circuit affirmed lower courts' rulings that tax foreclosure is voidable preferential transfer pursuant to § 547; appellant's arguments covered principles of federalism, including whether state law remedy should be honored and whether there was violation of Tax Injunction Act; Third Circuit found that Code's plain meaning governed and did not conflict with state statutes in overruling appellant);

• *First Midwest Bank v. Reinbold (In re I80 Equip. LLC)*, 2019 U.S. App. LEXIS 27415; __ F.3d __ (7th Cir. Sept. 11, 2019) (in matter of first impression, Seventh Circuit distinguished between financing statements and credit agreements in finding that reference to unattached credit agreement is sufficient for purposes of description of collateral in financing statement; credit agreements create security interest, while financing statements put creditors on notice of other interests in collateral; Seventh Circuit found plain meaning of Illinois statute to be met when financing statement pointed to where

1 *In re Duro Dyne Nat'l Corp.*, 2019 U.S. Dist. LEXIS 172168, *21-22 (D.N.J. Sept. 30, 2019).
2 *Id.* at *3.
3 *Id.* at *4.
4 *Id.* at *5-6.
5 *Id.* at *7-9.
6 *Id.* at *9-10.
7 *Id.* at *15-19.
8 *Id.* at *20-21.
9 *Id.* at *21.
10 *Id.*
11 601 B.R. 831 (Bankr. N.D. Ga. 2019).
12 2019 Bankr. LEXIS 1452 (Bankr. D. Del. 2019).
13 *Duro Dyne Nat'l Corp.* at *23.
14 *Id.* at *26.
15 *Id.* at *37-40.

description of collateral can be found, making the collateral "objectively determinable");

• *Leslie v. Mihranian (In re Mihranian)*, 2019 U.S. App. LEXIS 21708, __ F.3d __, (9th Cir. Sept. 9, 2019) (under Second Circuit test adopted by Ninth Circuit, notice of substantive consolidation and opportunity to object is required to be given to creditors of putative consolidated nondebtors; Ninth Circuit adopted majority view, citing that airness, due process and notice must be given for creditor to overcome presumption that there was no reliance on separateness of entities);

• *Cal. Self-Insurers' Sec. Fund v. Siegel*, 2019 U.S. Dist. LEXIS 167399 (E.D. Va. Sept. 27, 2019) (four corners of settlement agreement among self-insurance fund, liquidating trustee and California state agency responsible for workers'-compensation claims provided broad mutual release, which released any post-settlement claims against excess insurance carrier; district court found that extrinsic evidence was not necessary to resolve dispute and that self-insurance fund could not seek recoveries from excess insurance carrier);

• *Centrix Fin. Liquidating Trust v. Sutton*, 2019 U.S. Dist. LEXIS 154083 (D. Colo. Sept. 10, 2019) ("related to" jurisdiction is tested differently pre-confirmation and post-confirmation, with Ninth, Fourth and Second Circuits using "close nexus" test for post-confirmation; in addition, analysis differs for reorganized debtors versus liquidating trusts or liquidated debtors; courts have narrowed related-to jurisdiction for reorganized debtors to avoid misuse of bankruptcy jurisdiction by reorganized debtor that has re-entered market; implementation of plan or distribution to creditors satisfies standard for related-to jurisdiction post-confirmation; here, where pursuit of litigation by liquidating trust of one of its only assets relates more closely to chapter 11 cases since liquidating trust's main purpose is to liquidate assets and make distributions to creditors); and

• *In re Verity Health Sys. of Cal. Inc.*, 2019 Bankr. LEXIS 3321 (Bankr. C.D. Cal. Oct. 23, 2019) (under California state law, nonprofit health care entity is required to obtain state attorney general approval prior to consummation of sale; in earlier attempt to sell nonprofit hospitals, state attorney general imposed certain conditions; in September 2019, attorney general consented to sale subject to additional conditions, which were different from ones previously accepted by purchaser; these conditions would create significant financial burden that could not be met; ultimately, bankruptcy court determined that conditions were an "interest in ... property," which could be sold free and clear under § 363 because conditions were subject to *bona fide* dispute and any attempt to impose such conditions violated § 525 by constituting improper discrimination of debtor by governmental entity; bankruptcy court also found that conditions related to charity care or community benefit could be reduced to monetary value, thus assets could be sold free and clear of such interest; finally, imposition of additional conditions was attempt to impose successor liability, which was not available under California law; this decision has been certified for direct appeal to Ninth Circuit). abi

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