Benchnotes

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Eleventh Circuit Clarifies that New Value Need Not Be Unpaid

It seems that the Eleventh Circuit Court of Appeals has put to rest (at least in this circuit) the question of whether new value must remain unpaid in order to reduce a preference liability. In *Kaye v. Blue Bell Creameries Inc. (In re BFW Liquidation LLC)*,[1] the Eleventh Circuit held that the plain language of 11 U.S.C. § 547(c)(4) precludes recovery on a preference if, "after such transfer, such creditor gave new value to or for the benefit of the debtor ... [that is] not secured by an otherwise avoidable security interest."

In addition, the language "on account of which new value the debtor did not make an otherwise avoidable transfer"[2] does not require that the new value advanced remain unpaid. The plaintiff trustee in the preference action had successfully argued in bankruptcy court that the Eleventh Circuit's prior opinion in *In re Jet Florida Systems Inc.*,[3] in which the Eleventh Circuit had considered a different issue of new value (whether a landlord had provided new value to a tenant after collecting rent merely by making the leased space available vs. having the tenant actually use and occupy the space) and had recited the elements of a new value defense, including a statement that "the new value must remain unpaid."[4]

In *BFW Liquidation*, the Eleventh Circuit held that because the paid-vs.-unpaid distinction was not in controversy in *Jet Florida Systems*, its prior recitation of this element in its decision was merely *dicta* and nonprecedential, therefore paving the road for the Eleventh Circuit to consider the issue anew.[5] Upon review, the Eleventh Circuit found that "nothing in the language of § 547(c)(4) indicates that an offset to a creditor's § 547(b) preference liability is available only for new value that remains unpaid."[6]

The Eleventh Circuit found that its plain terms only limit the new value defense for paid new value that is paid with an otherwise unavoidable transfer."[7] The *BFW Liquidation* decision now aligns the Eleventh Circuit with the Fourth, Fifth, Eighth and Ninth Circuits, leaving the Seventh and Third Circuits to stand alone as precluding a new value defense for new value that has been paid, regardless of the avoidability of such payment.[8]

1 --- F3d. ----, 2018 WL 3820101 (11th Cir. 2018).
2 *Id.* at *4.
3 841 F.2d 1082 (11th Cir. 1988).
4 *Id.* at 1083.
5 *In re BFW Liquidation LLC* at *5.
6 *Id.* at *6.
7 *Id.*

Miscellaneous

• *In re Simmons*, 584 B.R. 295 (Bankr. N.D. Ill. 2018) (distinguishing contrary authority from California, bankruptcy court held that same-sex couple that had obtained "certificate of civil union" under Illinois law, but not "certificate of marriage," were substantively in state of marriage with each other under Illinois law and thus qualified as "spouses" who were eligible to file joint bankruptcy petition);

• *Keach v. Wheeling & Lake Erie Railway Co. (In re Montreal, Maine & Atlantic Railway Ltd.)*, 888 F.3d 1 (1st Cir. 2018) (in case applying Maine Uniform Fraudulent Transfer Act (UFTA), court held that bankruptcy court did not err in finding that transferred assets were not "assets of the debtor" because secured creditor's lien encumbered such assets at time they were transferred; under the UFTA, an "asset" includes "property of a debtor" but does not include "[p]roperty to the extent that it is encumbered by a valid lien"; moreover, court held that debtor did not hold interest in the assets prior to transfer that was avoidable under § 544(b) because it held such assets solely as bailee);

• *Kimzey v. Premium Casing Equipment LLC*, 2018 WL 1321971 (W.D. La. March 14, 2018) (noting split in case law regarding whether actual use of leased equipment by debtor is required, district court ruled that equipment lessor was entitled to administrative expense for rental value of leased equipment during the first 60 days of the case (§ 365(d)(5) expressly requires equipment lessees to be paid after first 60 days), notwithstanding fact that equipment was unused during such period; court reasoned that retention of equipment provided intangible benefit to debtor because access to leased equipment provided debtor with additional capacity to service its customers, and enhanced inherent value of company);

• *Sabine Oil & Gas Corp. v. Nordheim Eagle Ford Gathering LLC (In re Sabine Oil & Gas Corp.)*, 2018 WL 2386902 (2d Cir. May 25, 2018) (Second Circuit affirmed lower court decisions finding that oil-and-gas producer could reject midstream gathering contracts, agreeing that they were executory contracts as opposed to "real covenants that run with the land");

• *Lamar, Archer & Cofrin LLP v. Appling*, 201 L. Ed. 2d 102, 112, 2018 U.S. LEXIS 3384 (June 4,

8 *See Hall v. Chrysler Credit Corp. (In re JKJ Chevrolet Inc.)*, 412 F.3d 545, 551-52 (4th Cir. 2005); *Jones Truck Lines Inc. v. Cent. States Se. & Sw. Areas Pension Fund (In re Jones Truck Lines Inc.)*, 130 F.3d 323, 329 (8th Cir. 1997); *Mosier v. Ever-Fresh Food Co. (In re IRFM Inc.)*, 52 F.3d 228, 231-33 (9th Cir. 1995); *Laker v. Vallette (In re Toyota of Jefferson Inc.)*, 14 F.3d 1088, 1090-93, 1093 n.2 (5th Cir. 1994); *In re Prescott*, 805 F.2d 719, 727-28 (7th Cir. 1986); *P.A. Bergner & Co. v. Bank One, Milwaukee NA (In re P.A. Bergner & Co.)*, 140 F.3d 1111, 1121 (7th Cir. 1998); *N.Y.C. Shoes Inc. v. Bentley Int'l Inc. (In re N.Y.C. Shoes Inc.)*, 880 F.2d 679, 680 (3d Cir. 1989).

2018) (parsing "plain meaning" of 11 U.S.C. § 523(a)(2)(A), U.S. Supreme Court held that phrase "a statement respecting the debtor's ... financial condition" can include any false statement concerning a single asset — in this case, debtor's tax refund, which debtor alluded to in order to entice creditor law firm to continue its representation of debtor; because false statement regarding debtor's tax return was never made in writing, but *did* "respect" or "concern" debtor's overall financial well being, court concluded that § 523(a)(2)(A) did not apply, thus debt was dischargeable);

• *Smart-Fill Mgmt. Grp. Inc. v. Froiland (In re Froiland)*, 2018 Bankr. LEXIS 2049 (Bankr. W.D. Tex. July 6, 2018) (bankruptcy court dismissed dischargeability complaint because it was filed one day after federal holiday; court explained that Rule 9006(a)'s extension did not apply where deadline had been extended by agreed orders and thus was "fixed" by court order; parties had agreed on deadline of Jan. 15, 2018, which was a federal holiday; when creditor filed its complaint next business day, on Jan. 16, 2018, court held that filing was untimely and had to be dismissed as such);

• *Beckford v. Bayview Loan Servicing LLC (In re Beckford)*, 2018 U.S. App. LEXIS 18368 (2d Cir. July 6, 2018) (court affirmed dismissal of debtor's complaint for lack of standing; chapter 7 debtor's various federal law claims against his mortgage-servicing company under TILA, HOEPA, RESPA, FCRA and RICO — as well as other state law claims for breach of contract, breach of fiduciary duty, fraudulent misrepresentation and unjust enrichment — all accrued well before debtor filed his bankruptcy petition in 2013; only bankruptcy trustee could pursue such claims, and chapter 7 debtor lacked standing to pursue them on behalf of estate);

• *McCormick v. Starion Fin. (In re McCormick*), 2018 U.S. App. LEXIS 18151, 2018 WL 3233105 (8th Cir. July 3, 2018) (reorganized debtor objected to payment of oversecured creditor's attorneys' fees under 11 U.S.C. § 506(b), arguing that pre-petition notes and mortgages "merged" into pre-petition judgments and that because judgments did not specifically provide for payment of lender's fees, there was no "agreement" as required by § 506(b); court of appeals rejected "merger" argument, concluding that various notes, agreements and mortgages still provided for payment of attorneys' fees as contemplated by § 506(b), and moreover, confirmed chapter 11 plan was another "agreement" providing for payment of such fees; in all, court noted that it was "disingenuous" of debtors to oppose paying such attorneys' fees after "agreeing to do so following a plan objection that specifically raised that issue"; lower courts' award of fees was affirmed);

• *In re Traversa*, 585 B.R. 215 (Bankr. E.D. Pa. 2018) (court denied chapter 7 debtor's motion to reopen bankruptcy case to file two adversary proceedings against persistent creditors, concluding that motion was futile because debtor alleged no actual damages or injuries caused by storage company's post-petition and post-discharge notices of default; court also noted that second proposed complaint — against a municipal court judge based on pre- and post-petition communications regarding traffic violations and fines — was frivolous on its face);

• *Keystone Mine Co. Ltd. v. Parker (In re Keystone Mine Mgmt.)*, 2018 U.S. App. LEXIS 17933, 2018 WL 3195920 (9th Cir. June 29, 2018) (appeal of sale order was properly dismissed as statutorily moot under § 363(m); secured creditor presented only bid for sale of debtor's mining rights and thus purchased rights by credit bid; court rejected appellant's challenge to bankruptcy court's "good faith" findings because there was ample evidence in record supporting trustee's business judgment, including his review of secured creditor's claims, investigation of potential claims against secured creditor and its principals, and consideration of alternatives; court also rejected appellant's argument that trustee was required to prove absence of adequate remedy of law; while such appellee might need to demonstrate such absence in appeal of foreclosure judgment, no such requirement exists for statutory mootness under 11 U.S.C. § 363(m));

• *Furlough v. Cage (In re Technicool Sys. Inc.)*, 2018 U.S. App. LEXIS 16852 (5th Cir. June 20, 2018) (quoting "Mo Money Mo Problems" by rapper Notorious B.I.G, court held that insider could not purchase claim after fact to retroactively obtain "person aggrieved" standing to object to trustee's application to employ special litigation counsel; trustee employed creditor's law firm to pursue claims against insider; court held that even though insider purchased claim, claim was not purchased until appeal; thus, insider lacked standing at relevant time and was not truly "person aggrieved" by order);

• *Carns v. McNally (In re McNally)*, 2018 U.S. App. LEXIS 15830 (10th Cir. June 13, 2018) (in action by creditor to determine dischargeability of debt pursuant to § 523(a)(3)(B), due to improper notice, or, alternatively, to revoke debtor's discharge under § 727(d)(4)(A), court of appeals held that debtor's delayed bankruptcy notice to creditor through creditor's attorney, who had been inactive in any litigation for more than four years, was nevertheless "reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and [to] afford them an opportunity to [respond]"; on revocation under § 727(d)(4)(A), court held that bankruptcy court did not err in concluding that creditor failed to carry his burden of proving fraudulent intent and materiality of omissions, given that the only assets omitted from debtor's schedules were two small transfers and interests in unsuccessful and worthless businesses);

• *Weakley v. Eagle Logistics*, 894 F.3d 1244 (11th Cir. 2018) (Eleventh Circuit rejected argument that voluntary dismissal of bankruptcy petition rendered district court's application of judicial estoppel as abuse of discretion; plaintiff had intentionally failed to disclose two civil lawsuits from his bankruptcy filings and made no efforts to amend his petition to disclose these lawsuits to the bankruptcy court until defendants relied on omission as grounds for dismissal of lawsuits; consequently, district court dismissed plaintiff's civil lawsuits under doctrine of judicial estoppel; plaintiff appealed, arguing that because he had voluntarily dismissed his bankruptcy petition, judicial estoppel issue was moot and its application was abuse of discretion; rejecting these arguments, Eleventh Circuit explained that judicial estoppel serves to "prevent the perversion of the judicial process and protect its integrity," and "[i]t cannot serve that purpose

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as well if a duplicitous debtor is assured that he can always avoid the doctrine's bite by dismissing his bankruptcy petition after his duplicity is found out");

• *Illinois Dep't of Revenue v. Hanmi Bank*, --- F3d. ----, 2018 WL 3340935 (7th Cir. 2018) (Seventh Circuit held that while Illinois Department of Revenue (IDOR) was likely entitled to some portion of proceeds from bankruptcy sales to compensate IDOR for taxes owed by sellers, bankruptcy court properly denied its claims for lack of evidence regarding amount of IDOR's interest; although Illinois's Bulk Sales Provisions gave IDOR right to pursue purchaser for state taxes owed by seller, bankruptcy court allowed sales to proceed free and clear of interests held by any entity other than bankruptcy estates, pursuant to § 363(f); IDOR argued that values of properties were increased by removing IDOR's interests, and that IDOR was consequently entitled to share of sales proceeds pursuant to §§ 361 and 363(e); Seventh Circuit agreed that IDOR potentially had interest in subsequent price increase of properties, but found that IDOR had not given realistic assessment of value of its interest; because court was skeptical that IDOR would have recovered 100 percent of taxes owed and IDOR offered no evidence to establish what its potential recovery might have been, court held that IDOR's claims had been properly denied for want of evidence, enabling bankruptcy court to assign reasonable value to its interest for purposes of § 363(e));

• *In re Lehman Bros. Holdings Inc.*, --- F3d. ----, 2018 WL 3469004 (2d Cir. 2018) (Second Circuit held that email sent to mediator constituted legally binding agreement, even in absence of a written agreement; utilizing framework provided in *Winston v. Mediafare Entm't Corp.*, 777 F.2d 78 (2d Cir. 1985), which governs issue of whether parties intended to be bound by settlement in absence of document executed by both sides, court analyzed these following factors: "(1) whether there has been an express reservation of the right not to be bound in the absence of a writing; (2) whether there has been partial performance of the contract; (3) whether all of the terms of the alleged contract have been agreed upon; and (4) whether the agreement at issue is the type of contract that is usually committed to writing"; finding that first and third factors supported finding binding agreement, court emphasized that email in question neither expressly reserved right not to be bound, nor identified any outstanding issues; court affirmed district court's ruling that agreement constituted binding settlement);

• *Matter of Lindsey*, --- F3d. ----, 2018 WL 3409995 (5th Cir. 2018) (Fifth Circuit affirmed dismissal of case by finding that pleadings fell short of heightened pleading requirements when alleging fraud under § 523(a)(2); court explained that when alleging fraud, plaintiff's well-pleaded facts must permit court to infer more than mere possibility of misconduct that harmed plaintiff; plaintiff must allege "more than an unadorned, the defendant-unlawfully-harmed-me accusation"; although plaintiff had alleged that defendant lied under oath, court found explanations of how this conduct harmed plaintiff "conclusory");

• *Goudelock v. Sixty-01 Ass'n of Apartment Owners*, --- F3d. ----, 2018 WL 3352883 (9th Cir. 2018) (adopting Seventh Circuit's approach, Ninth Circuit held that condominium association (CA) assessments that have become due after filing of chapter 13 petition are dischargeable; court rejected approach taken by Fourth Circuit that obligation to pay CA assessments ran with land and arose each month from debtor's continued post-petition ownership of property; instead, court reasoned that obligation to pay CA assessments was unmatured contingent debt under Bankruptcy Code that arose pre-petition (when debtors purchased this property) and that merely became mature when assessments became due post-petition, therefore making debt for future assessments dischargeable; court also noted that under chapter 13, there is no discharge exception for personal debt arising from CA assessments, although there is under chapter 7; court found that absence of chapter 13 exception appeared purposeful and therefore held that discharges were not excepted, reasoning that Congress could change Code if it did not like court's interpretation);

• *In re Prosser*, --- B.R. ---, 2018 WL 3041067 (D.V.I. 2018) (district court held that bankruptcy court could not force sale of exempt property to pay damages to estate after debtor dissipated and destroyed collection of fine wines that had been adjudicated to be property of bankruptcy estate; bankruptcy court found debtor to be in contempt after destroying wine and authorized trustee to sell exempt property to satisfy nearly $420,000 damages award; debtor argued that there was no exception in Bankruptcy Code allowing court to surcharge debtor's exempt property for diminution in value of other nonexempt assets, even when that diminution is asserted to have been caused by debtor's bad faith or contemptuous acts; citing *dicta* from Supreme Court's ruling in *Law v. Siegel*, 134 S. Ct. 1188 (2014), district court found that bankruptcy court lacked authority to deny or disallow exemption based on debtor's bad-faith conduct, and therefore could not use sale of exempt property to satisfy damages award to estate);

• *In re Williams*, 586 B.R. 355 (Bankr. S.D. Fla. 2018) (bankruptcy court held that payments made by National Football League to former player as part of settlement agreement arising from concussion injuries were exempt from his chapter 7 case under Florida law; while Florida has generally opted out of federal bankruptcy exemptions, it does provide exceptions for disability benefits; trustee argued that settlement agreement was simply resolving tort claim, for which there are no exemptions under applicable Florida law; noting structure of settlement agreement, which required players to "jump through a multitude of procedural hoops" in order to receive qualified diagnosis, court found that settlement agreement more closely resembled disability policy than traditional class action tort claim settlement; interpreting settlement agreement as disability policy, court held that the payments under agreement were exempted from bankruptcy);

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• *In re Lusk*, --- B.R. ---, 2018 WL 3323873 (Bankr. E.D. Cal. 2018) (bankruptcy court held that state court judgment in favor of debtor's ex-wife for her share of retirement benefits was nondischargeable under § 523(a)(4); although their divorce agreement provided that ex-wife had interest in retirement benefits, debtor withdrew funds from his retirement accounts without his ex-wife's knowledge and never paid her any portion; state court ruled that ex-wife was entitled to her portion of funds and awarded her $146,877; debtor subsequently filed chapter 13 petition and attempted to have state court award discharged; ex-wife argued that award should not be discharged because debtor's conduct constituted defalcation within meaning of § 523(a)(4); after finding that in addition to committing defalcation debtor had requisite culpable state of mind, court held that award was nondischargeable);

• *Chorches v. Catholic Univ. of Am.*, --- B.R. ---, 2018 WL 3421318 (D. Conn. 2018) (district court refused to dismiss avoidance action brought by trustee against Catholic University for payments that university received from bankruptcy debtors for their adult daughter's tuition; trustee's claim that the payments constituted constructive fraudulent transfer under 11 U.S.C. § 548(a)(1)(B) required trustee to plead facts showing that debtors received less than "reasonably equivalent value" in exchange for transfer; university filed motion to dismiss, arguing that parents do derive value from college education of adult child and that parental tuition payments on behalf of their children are societal and moral expectation; university additionally argued that family should be considered "single economic unit"; denying university's motion to dismiss, court explained that statute defines "value" in purely economic terms and that other courts have concluded that parents do not receive any "value" in exchange for tuition payments on behalf of adult child; moreover, court characterized notion of paying for child to obtain college degree to enhance financial well-being of child, which in turn will confer economic benefit on parent, as "speculative"); and

• *Hampton v. Ontario County*, --- B.R. ---, 2018 WL 3454688 (W.D.N.Y. 2018) (district court reversed bankruptcy court's ruling and found that county's conveyance of debtor's home in tax foreclosure might be constructively fraudulent under 11 U.S.C. § 548(a)(1)(B); section 548(a) provides statutory elements of fraudulent conveyance claim, which include debtor receiving less than "reasonably equivalent value" in exchange for transfer; bankruptcy court and county relied on *BFP v. Resolution Trust Corp.*, 511 U.S. 531 (1994), which established conclusive presumption of reasonably equivalent value for mortgage foreclosures of real estate when procedures of state foreclosure laws have been followed; however, district court declined to extend *BFP* to "materially different case" of strict tax foreclosure regime, as it would allow county to receive "windfall" at expense of other creditors; reasoning that state interests must be balanced against Bankruptcy Code's strong policy favoring equal treatment of creditors, court held that county was not entitled to conclusive presumption of having provided reasonably equivalent value for tax foreclosure of debtor's homes). abi