SMU Law Review

Volume 63 | Issue 2 Article 6

January 2010

Bankruptcy

Joseph J. Wielebinski

Davor Rukavina

Recommended Citation

Joseph J. Wielebinski & Davor Rukavina, *Bankruptcy*, 63 SMU L. REV. 309 (2010)
https://scholar.smu.edu/smulr/vol63/iss2/6

This Article is brought to you for free and open access by the Law Journals at SMU Scholar. It has been accepted for inclusion in SMU Law Review by an authorized administrator of SMU Scholar. For more information, please visit http://digitalrepository.smu.edu.

BANKRUPTCY

*Joseph J. Wielebinski**
*Davor Rukavina***

TABLE OF CONTENTS

I. INTRODUCTION 310
II. APPEALS 310
In re San Patricio County Community Action Agency 310
III. AVOIDANCE ACTIONS 312
Spicer v. United States (In re Motion Marketing Solutions, Inc.) 312
IV. AUTOMATIC STAY AND STANDING 313
A. *St. Paul Fire & Marine Ins. Co. v. Labuzan* 313
B. *Bailey v. Barnhart Interest, Inc.* 314
V. CHAPTER 11 PLANS 316
A. Absolute Priority Rule—Cram Down 316
In re Pacific Lumber Co. 316
B. Non-Debtor Releases 318
In re Pacific Lumber Co. 318
C. Retention of Claims and Causes of Action 319
In re Manchester, Inc. 319
VI. INSIDER COMPENSATION 320
In re Pilgrim's Pride Corp. 320
VII. INVOLUNTARY BANKRUPTCY 321
In re Smith 321
VIII. JURISDICTION 322
Travelers Indemnity Co. v. Bailey 322
IX. PROFESSIONALS 324
In re Energy Partners, Ltd. 324
X. PROPERTY OF THE ESTATE 325
A. *In re Amaravathi Ltd. Partnership* 325
B. *In re Nowlin* 326
XI. SALES 327
A. *In re Gulf Coast Oil Corp.* 327

* Shareholder, Munsch Hardt Kopf & Harr, P.C., Dallas, Texas; B.A., Temple Univ.; M.P.A., Maxwell School of Syracuse University; J.D., Syracuse Univ. College of Law.

** Shareholder, Munsch Hardt Kopf & Harr, P.C., Dallas, Texas; B.A., Whitman College; J.D., Texas Tech University School of Law. The authors wish to thank Barbara M. Boudreaux for her editorial assistance.

B. *INDIANA STATE POLICE PENSION TRUST V. CHRYSLER LLC* 330
XII. STATUTE OF LIMITATIONS AND REPOSE 331
STANLEY V. TRINCHARD 331
XIII. CONSUMER 332
A. *IN RE CAMP* 332
B. *IN RE MILLER* 333
XIV. CONCLUSION 334

I. INTRODUCTION

THIS Survey period saw a record number of bankruptcy filings, including sizeable public companies in the automobile and retail sectors, among others. In Texas, while the total number of bankruptcy cases filed increased dramatically from the prior year, the substantive importance of the rulings issued during the Survey period was surprisingly limited. The cases discussed in this Article reflect a broad cross-section of Texas bankruptcy decisions, from the Fifth Circuit's evaluation of the permissible scope of non-debtor releases in a Chapter 11 plan[1] to the determination by the Houston Fourteenth Court of Appeals of a trustee's standing in a consumer bankruptcy case following the death of the debtor.[2] Perhaps the most important decision from a bankruptcy practitioner's perspective is *Moglia v. Keith* (*In re Manchester, Inc.*), which interpreted recent guidance from the Fifth Circuit on the retention of claims and causes of action under a Chapter 11 plan.[3] The authors expect that the rulings emanating from the cases filed during the next Survey period will provide a wealth of important legal precedent.

II. APPEALS

In re San Patricio County Community Action Agency

Most bankruptcy practitioners are well acquainted with the doctrine of equitable mootness, usually in the context of plan confirmation or sales.[4] *In re San Patricio County Community Action Agency* addressed the doctrine with respect to a court-approved settlement between the trustee and the directors and officers (D&O) insurance carrier.[5]

The lenders purchased vehicles from the debtor, a nonprofit organization, and leased the vehicles back to the debtor.[6] The debtor believed

[1] *See* Bank of N.Y. Trust Co., NA v. Official Unsecured Creditors' Comm. (*In re* Pac. Lumber Co.), 584 F.3d 229, 251-53 (5th Cir. 2009).

[2] *See* Bailey v. Barnhart Interest, Inc., 287 S.W.3d 906, 908, 914 (Tex. App.—[14th Dist.] 2009, no pet.).

[3] *See* No. 09-3027-BJH, 2009 WL 2243592, at *2-6 (Bankr. N.D. Tex. July 16, 2009).

[4] *In re* San Patricio County Cmty. Action Agency, 575 F.3d 553, 556-58 (5th Cir. 2009).

[5] *See id.* at 557-58.

[6] *Id.* at 555.

that it held title to the vehicles. However, because the debtor had originally purchased the vehicles with funds lent by the State of Texas, the debtor was without authority to transfer the title to the vehicles. Under a theory of negligent misrepresentation, the lenders sued the debtor's officer who had entered into the transaction, and the lenders sought to recover from the debtor's D&O liability insurance.[7] There was no dispute that the insurance did in fact cover the alleged liability. After the debtor filed a Chapter 7 case, the trustee intervened and initiated various actions against the debtor's directors and officers for mismanagement.[8] The trustee then reached a settlement with the insurance carrier, which was approved by the bankruptcy court, and an interim distribution of the settlement funds was made to the trustee's counsel and the state of Texas.[9] The lenders appealed on various grounds, the principal one concerning the approval of the settlement. The district court dismissed the appeal on equitable mootness grounds.[10]

The Fifth Circuit noted that whether the doctrine of equitable mootness is relevant to a Chapter 7 liquidation case is a "threshold issue."[11] Noting that the doctrine usually applies to Chapter 11 reorganization plans, the Fifth Circuit nevertheless refused to hold that the doctrine cannot apply to Chapter 7 liquidation.[12] The circuit then turned to the application of the doctrine, which, at its core, provides for the dismissal of an appeal—no matter how meritorious the appeal may be—when the appellate court cannot grant effective relief.[13] However, even in the realm of confirmed Chapter 11 plans, where the doctrine is perhaps the strongest, the Fifth Circuit noted that the doctrine may not apply even where a plan has been substantially consummated, and that it may not apply where the situation concerns professional fees or plan releases.[14]

The Fifth Circuit stated that the principal factors in assessing equitable mootness are "(1) whether a stay has been obtained, (2) whether the plan has been 'substantially consummated,' and (3) whether the relief requested would affect either the rights of parties not before the court or the success of the plan."[15] Aside from applying these factors, the circuit noted, "Equitable mootness is, to be redundant, an equitable doctrine."[16] Here, the lender had challenged the trustee's actions, the parties paid by the interim distribution were the trustee's counsel and the state of Texas (both presumably able to return the funds), and the lender's appeal should have been heard.[17] Although the Fifth Circuit did not foreclose

[7] *Id.* at 555-56.

[8] *Id.* at 556.

[9] *Id.* at 556-57.

[10] *Id.* at 557.

[11] *Id.* at 558.

[12] *See id.*

[13] *See id.*

[14] *Id.*

[15] *Id.*

[16] *Id.* at 559.

[17] *Id.* at 556, 559-60.

the potential of applying the doctrine of equitable mootness to non-plan, Chapter 7 settlement orders, it noted that stronger equitable mootness factors were required than the ones before it.[18] Although not addressed in the opinion, it can be imagined that changed circumstances or the practical inability to return distributions may provide such factors.

In the end, this opinion is significant for two reasons. First, it specifically refused to preclude the application of the doctrine of equitable mootness to Chapter 7 cases.[19] Second, it demonstrates that the Fifth Circuit may be turning toward a more skeptical and limited application of equitable mootness, at least outside of a Chapter 11 plan that has been substantially consummated.[20]

III. AVOIDANCE ACTIONS

A. *Spicer v. United States (In re Motion Marketing Solutions, Inc.)*

In *Spicer*, the Chapter 7 trustee sought to avoid, as a preference, the perfection of a tax lien by the Internal Revenue Service (IRS) under § 6323 of the Internal Revenue Code.[21] Although the IRS's lien arose under § 6321 of the Internal Revenue Code, the trustee attacked not the underlying lien itself, but rather its perfection.[22]

The crux of the dispute concerned § 547(c)(6) of the Bankruptcy Code, which provides that the trustee may not avoid, as a preference, a transfer "that is the fixing of a statutory lien that is not avoidable under section 545 of [the Bankruptcy Code]."[23] The trustee argued that the term "fixing" referred only to the creation of the underlying lien pursuant to § 6321 of the Internal Revenue Code, and that it did not refer to the perfection of that lien, since the Bankruptcy Code uses the term "perfection" in multiple instances but does not use it in § 547(c)(6).[24] The Government, on the other hand, pointed to multiple opinions for the blanket proposition that a trustee may not use § 547 to avoid a statutory IRS lien that is not avoidable under § 545 of the Bankruptcy Code.[25]

The court analyzed statutory language and analogous case law and concluded that the term "fixing," as used in the statute, included the "perfection" of a lien.[26] Accordingly, § 547(c)(6) insulates from preference avoidance the "perfection" of a statutory lien and not just its underlying creation, unless the lien is otherwise avoidable under § 545 of the Bankruptcy Code.[27] Although the result may not be surprising, the court's

[18] *Id.* at 559.
[19] *See id.*
[20] *See id.*
[21] Spicer v. United States (*In re* Motion Mktg. Solutions, Inc.), 403 B.R. 403, 405-06 (Bankr. N.D. Tex. 2009).
[22] *Id.* at 406.
[23] *See* 11 U.S.C. § 547(c)(6) (2006); *Spicer*, 403 B.R. at 406.
[24] *Spicer*, 403 B.R. at 406.
[25] *Id.* at 406-07.
[26] *Id.* at 413.
[27] *See id.*

construction of the term "fixing" is of importance to the bankruptcy practitioner, especially in light of other Bankruptcy Code provisions applying this phrase.

IV. AUTOMATIC STAY AND STANDING

A. *St. Paul Fire & Marine Insurance Co. v. Labuzan*

In *St. Paul Fire*, the Fifth Circuit considered the question, which it labeled as one of first impression, of when a creditor of the estate has standing to seek recovery for a violation of the automatic stay under § 362(k) of the Bankruptcy Code.[28] Two individuals, who were both creditors of the debtor and owners of the equity of the debtor, asserted claims against the insurer for allegedly violating the automatic stay by contacting account debtors of the Chapter 11 debtor. The insurer's action arguably resulted in the account debtors' not paying their accounts to the Chapter 11 debtor, which ultimately led to the conversion of the case. The district court dismissed on standing grounds, finding that the individuals lacked standing to assert the § 362(k) claim, because the creditors were owned by the debtor's estate.[29] The Fifth Circuit vacated the district court's judgment.[30]

First, the Fifth Circuit reaffirmed that "§ 362(k) creates a private remedy for automatic-stay violations."[31] Nevertheless, although a private remedy existed, the question remained as to who could bring an action on account of such a remedy. In this respect, the Fifth Circuit held, "To establish standing pursuant to § 362(k), the [claimants] are required to meet both constitutional and prudential requirements."[32]

With respect to constitutional standing, "'a plaintiff must show (1) an injury in fact (2) that is fairly traceable to the actions of the defendant and (3) that likely will be redressed by a favorable decision.'"[33] These elements were "easily satisfied" by the claimants.[34] Prudential standing, a judicially created doctrine that operates in addition to constitutional standing, creates limits on standing and concerns

> [(1)] whether a plaintiff's grievance arguably falls within the zone of interests protected by the statutory provision invoked in the suit, [(2)] whether the complaint raises abstract questions or a generalized grievance more properly addressed by the legislative branch, and [(3)] whether the plaintiff is asserting his or her own legal rights and interests rather than the legal rights and interests of third parties.[35]

[28] St. Paul Fire & Marine Ins. Co. v. Labuzan, 579 F.3d 533, 536 (5th Cir. 2009).

[29] *Id.* at 537.

[30] *Id.* at 545.

[31] *Id.* at 538 (citing Pettitt v. Baker, 876 F.2d 456, 457-58 (5th Cir. 1989)).

[32] *Id.* at 538-39 (citing Proctor & Gamble Co. v. Amway Corp., 242 F.3d 539, 560 (5th Cir. 2001)).

[33] *Id.* at 539 (quoting *Proctor & Gamble*, 242 F.3d at 560).

[34] *Id.*

[35] *Id.* (internal quotation omitted).

Importantly, however, "Congress can 'modify or even abrogate prudential standing requirements, thus extending standing to the full extent permitted by Article III'."[36]

St. Paul Fire therefore focused on the language of the statute and, in particular, the use of the word "individual" in § 362(k) of the Code.[37] The Fifth Circuit noted that the Bankruptcy Code employs this term to refer to both debtors and non-debtors.[38] However, since the phrase was not specifically defined, the Fifth Circuit looked also to congressional intent and legislative history, as well as detailed case law, to conclude that the claimants had standing to seek damages for the alleged stay violation: "[T]he congressional purposes behind § 362(k) were debtor, as well as creditor, protection . . . ."[39] The Fifth Circuit did, however, recognize an important distinction with respect to the individuals' status as both creditors and equity holders: "[The individuals], as *pre-petition creditors* of [the debtor], have standing to assert a claim against [the insurer] . . . . [T]o the extent the [individuals'] claims are based on their status as *owners/equity holders* of [the debtor], § 362(k) cannot be invoked."[40]

B. *Bailey v. Barnhart Interest, Inc.*

In *Bailey*, the Houston Fourteenth Court of Appeals considered the standing of a bankruptcy trustee to pursue the debtor's personal injury claim following the debtor's death, after the trustee had filed a no-asset report on the debtor's estate.[41] The debtor filed suit in May 2003 for personal injuries allegedly sustained from mold exposure while working in a building managed by the Barnharts. In November 2004, the debtor filed for Chapter 7 bankruptcy relief yet failed to include her pending state court action against the Barnharts in her listing of the bankruptcy estate's assets. The debtor died in January 2005 before her Chapter 7 case or her suit against the Barnharts had been resolved.[42] The trustee

[36] *Id.* (quoting *Proctor & Gamble*, 242 F.3d at 560).

[37] *Id.* at 539-40.

[38] *Id.*

[39] *Id.* at 543-44.

[40] *Id.* at 545. It is worth noting that the Fifth Circuit also addressed whether the claims at issue were property of the bankruptcy estate and, if so, whether they were protected by the automatic stay such that only the trustee could assert them. *See id.* at 544-45. In a nutshell, the Fifth Circuit decided that both the trustee and the individuals had standing and that the claims at issue were necessarily postpetition claims, while the property-of-the-estate analysis applied more to prepetition property. *Id.* This decision is of particular importance because, in this case, the bankruptcy court approved a settlement between the trustee and the insurer which compromised the stay-violation claim. The insurer, having paid the trustee to settle the stay-violation claim pursuant to court order, nevertheless found itself facing a stay-violation claim from the individuals, although it does not appear that there was a bar order entered or that the Fifth Circuit analyzed the effects of the estate releases to great degree. Rather, the Fifth Circuit concluded that the claims at issue were personal to the individuals as an injury to them separate and apart from the injury to the estate. *See id.* at 545.

[41] Bailey v. Barnhart Interest, Inc., 287 S.W.3d 906, 908 (Tex. App.—Houston [14th Dist.] 2009, no pet.).

[42] *Id.*

filed a no-asset report, and the debtor's estate was closed; upon learning of the state court suit, the trustee filed a motion to withdraw his no-asset report and reopen the bankruptcy estate. The bankruptcy court granted the trustee's motion and reopened the case, authorizing the trustee to pursue the suit against the Barnharts; however, the trial court later granted the Barnharts' summary judgment motion for judicial estoppel and denied the trustee's request for a new trial.[43]

The court of appeals began its analysis with a discussion of the role of the Chapter 7 trustee as "the real party in interest and the only party with standing to prosecute causes of action belonging to the estate."[44] According to the court, "If a debtor fails to schedule an asset and the trustee later discovers the omission, the trustee may reopen the bankruptcy case."[45] Next, the court addressed judicial estoppel, a process designed to prevent a party from "'playing fast and loose' with courts to suit the party's own purposes."[46] The court applied the Fifth Circuit's three-element test wherein "[a] party is judicially estopped when (1) its position is clearly inconsistent with a previous one; (2) the court accepted the previous position; and (3) the non-disclosure was not inadvertent."[47] The Barnharts argued that because the trustee "steps into the shoes" of the debtor, the trustee's claims should be denied because the debtor's failure to list her suit gave rise to judicial estoppel, citing the Fifth Circuit's decision in *In re Superior Crewboats, Inc.*[48] The court of appeals instead applied the Fifth Circuit's reasoning in *Kane v. National Union Fire Insurance Co.*,[49] determining, "Once [the debtor] filed her bankruptcy petition, [her] suit against the Barnharts became an asset of the bankruptcy estate."[50] All rights held by the debtor were extinguished unless abandoned by the trustee, and the trustee had never abandoned the debtor's claims.[51] Therefore, the trustee, as representative of the debtor's bankruptcy estate, had standing to prosecute the claim and was not estopped from pursuing the suit against the Barnharts.[52]

[43] *Id.* at 908-09.

[44] *Id.* at 909.

[45] *Id.* at 910.

[46] *Id.* (quoting Kane v. Nat'l Union Fire Ins. Co., 535 F.3d 380, 385 (5th Cir. 2008) (per curiam)).

[47] *Id.* at 911 (citing *Kane*, 535 F.3d at 385-86).

[48] *Id.* In *Superior Crewboats*, the Fifth Circuit addressed whether debtors could pursue claims for their own benefit that had not been disclosed on the debtors' bankruptcy schedules and had been abandoned by the bankruptcy trustee; the court concluded that judicial estoppel barred these claims as a matter of law. 374 F.3d 330, 333-34, 336 (5th Cir. 2004).

[49] 535 F.3d 380 (5th Cir. 2008).

[50] *Bailey*, 287 S.W. 3d at 913. The Fifth Circuit distinguished *Kane* from *Superior Crewboats* on the basis that in *Superior Crewboats*, the debtors sought to pursue claims for their own benefit that they had failed to disclose in their bankruptcy schedules. *Id.* at 912 (citing *Kane*, 535 F.3d at 387). In *Kane*, the personal injury claim became an asset of the bankruptcy estate when the debtors filed their Chapter 7 petition, making the trustee the real party in interest. *Kane*, 535 F.3d at 387.

[51] *Bailey*, 287 S.W.3d at 913.

[52] *See id.*

V. CHAPTER 11 PLANS

A. Absolute Priority Rule—Cram Down

In re Pacific Lumber Co.

In *Pacific Lumber* (also discussed below for non-debtor releases), the bankruptcy court confirmed a plan under cram down as to a class of secured noteholders who objected to the plan and voted against it because they were not being paid in full and were not given credit bid rights.[53] Instead, the plan provided for a cash payment to the noteholders of approximately $510 million, representing the value of their collateral as found by the bankruptcy court.

Addressing confirmation under § 1129(b) of the Bankruptcy Code, the Fifth Circuit noted, "The absolute priority rule and the fair and equitable standard must both be satisfied before a court may 'cram down' a reorganization plan over the objection of a dissenting creditor class."[54] The Fifth Circuit further explained, "The absolute priority rule provides that 'a plan of reorganization may not allocate any property whatsoever to any junior class on account of their interests or claims in a debtor unless such senior classes receive property equal in value to the full amount of their allowed claims.'"[55]

Here, the noteholders argued that the plan violated the absolute priority rule because it directed some of the capital being injected by the plan funders to classes lower than those of the noteholders. The noteholders also argued that the plan was not fair and equitable within the meaning of § 1129(b) of the Bankruptcy Code because classes lower than the noteholders' were receiving a distribution without the noteholders' being paid in full.[56] Because the noteholders were secured claimants, § 1129(b)(2)(A) governed the "fair and equitable" question, which the Fifth Circuit described as allowing "[t]hree minimum alternatives," consisting of "cash payments having a present value equal to the value of the collateral," a sale "free and clear" with credit bid rights and replacement liens on proceeds, or the indubitable equivalent of the claim.[57] The bankruptcy court found that the sale provision had no application, because the plan effectuated a transfer of assets but not a sale.[58]

The Fifth Circuit held that the bankruptcy court had incorrectly found that the plan did not effectuate a sale: "That the transaction is complex does not fundamentally alter that it involved a 'sale' of the Noteholders' collateral. . . . [E]very sale of property involves a transfer, but not every

[53] Bank of N.Y. Trust Co., N.A. v. Official Unsecured Creditors' Comm. (*In re* Pacific Lumber Co.), 584 F.3d 229, 238-39 (5th Cir. 2009).

[54] *Id.* at 244.

[55] *Id.* at 244 n.20 (quoting 7 Lawrence P. King et al., Collier on Bankruptcy ¶ 1129,04[4][a] (15th ed. 2008)).

[56] *Id.* at 244-45.

[57] *Id.* at 245.

[58] *Id.*

transfer is a sale. Here, a sale occurred."[59] The noteholders argued that they should have been allowed to credit bid pursuant to § 363(k) of the Bankruptcy Code, as provided by the "free and clear" sale provision, § 1129(b)(2)(A)(ii).[60]

The Fifth Circuit rejected the noteholders' argument stating that, because the circuit "has subscribed to the obvious proposition that because the three subsections of § 1129(b)(2)(A) are joined by the disjunctive 'or,' they are alternatives."[61] The plan could therefore be confirmed on cram down if the "indubitable equivalent" standard was met, even if one of the alternative standards was not met.[62] The Fifth Circuit analyzed whether this standard was met, noting that the "such claims" language in § 1129(b)(2)(A)(iii) refers to secured claims which, under the Bankruptcy Code, equals the value of the collateral.[63] Here, the noteholders were paid cash equaling the value of their secured claim, as valued by the bankruptcy court.[64] The Fifth Circuit reasoned, "Whatever uncertainties exist about indubitable equivalent, paying off secured creditors in cash can hardly be improper if the plan accurately reflected the value of the Noteholders' collateral."[65] Moreover, with respect to the noteholders' argument that being cashed out for the value of their collateral removed any potential benefit to them from later increases in the value of their collateral, the Fifth Circuit noted that the Bankruptcy Code "does not protect a secured creditor's upside potential; it protects the 'allowed secured claim.'"[66]

Pacific Lumber is important not only because it confirms that the cramdown alternatives applicable to secured claims are in fact alternate routes to confirmation, even if one may be more applicable than another, but also because it confirms that cashing out a secured creditor for the value of his lien is the "indubitable equivalent" of the creditor's secured claim.[67] This issue appears not to have been addressed before by the Fifth Circuit or, for that matter, by many reported opinions by other courts. It must be noted, however, that the bankruptcy court held an extensive, evidentiary valuation hearing on which it predicated the value of the collateral, without which the indubitable equivalent standard would likely not have been satisfied.[68]

[59] *Id.*
[60] *Id.*
[61] *Id.*
[62] *Id.* at 246.
[63] *Id.*
[64] *Id.*
[65] *Id.* at 247.
[66] *Id.*
[67] *See id.* at 245-47.
[68] *See id.* at 238.

B. NON-DEBTOR RELEASES

In re Pacific Lumber Co.

In *Pacific Lumber*, the Fifth Circuit considered the permissible scope of non-debtor releases in a Chapter 11 plan.[69] The plan released the postpetition DIP financer, the plan proponents, the purchasers of the reorganized debtor, and the creditor committee members from liability for acts and omissions "related to proposing, implementing, and administering the plan," except for willful acts and gross negligence.[70] The released parties were not co-obligors with the debtor on prepetition debt.

The Fifth Circuit struck the releases with respect to the released parties other than the creditor committee members and, quoting § 524(e) of the Bankruptcy Code, noted that the discharge of a debtor does not discharge any other party.[71] The plan proponents argued that they would not have been willing to advance funding and proposed a plan without the releases. The Fifth Circuit sidestepped the argument, noting that the circuit's prior precedents "seem broadly to foreclose non-consensual non-debtor releases and permanent injunctions."[72] Of importance, the Fifth Circuit looked to whether any of the released parties were jointly liable for the debtor's prepetition debts, finding that they were not.[73] Presumably, therefore, the result in *Pacific Lumber* may have been different had the issue been a temporary injunction preventing the pursuit of claims against co-obligors to facilitate the reorganization, so long as the plan was being effectuated.[74]

The Fifth Circuit did, however, agree that members of the creditors' committee may be released, at least with respect to claims other than for willfulness or gross negligence.[75] Although the Fifth Circuit failed to fully articulate the difference between committee members and other parties, it noted that the Bankruptcy Code "implies [that] committee members have qualified immunity for actions [taken] within the scope of their duties."[76] Presumably, therefore, since leave of the court would be necessary to sue committee members anyway, and since their actions are in the nature of professionals or fiduciaries of the estate, the court has more power to grant broad releases for committee members than for those without qualified immunity or those that lack professional or fiduciary duties to the estate.[77]

[69] *Id.* at 236.

[70] *Id.* at 251.

[71] *Id.*

[72] *Id.* at 252.

[73] *Id.*

[74] *See id. Pacific Lumber* cannot be fairly read to reverse prior precedent on such temporary injunctions.

[75] *Id.* at 253.

[76] *See id.*

[77] *See id.*

C. Retention of Claims and Causes of Action

In re Manchester, Inc.

Chapter 11 practitioners know that courts have struggled with respect to the retention of claims and causes of action in a Chapter 11 plan and the application of the doctrines of standing, res judicata, judicial estoppel, and collateral estoppel. The Fifth Circuit's 2008 opinion in *In re United Operating, LLC*[78] appears only to have increased the confusion.

In *Manchester*, applying *United Operating*, the confirmed plan created a litigation trust and transferred a variety of the estate's claims and causes of action to the trust for eventual prosecution.[79] Subsequently, the litigation trustee filed suit against the defendants and asserted various avoidance causes of action, equitable subordination, claim objections, and recharacterization. The defendants moved to dismiss the causes of action, arguing, among other things, that the *United Operating* precedent compelled such dismissal because the litigation trustee lacked standing to assert those claims. Construing *United Operating*, Chief Judge Barbara Houser noted that, in order to preserve the claims and standing, the plan must "expressly retain the right to pursue such actions" and the reservation of the claims must be "specific and unequivocal."[80] The court noted that, although the issue of claims retention traditionally revolved around the doctrines of res judicata and collateral estoppel, *United Operating* phrased the inquiry in terms of standing.[81]

In *Manchester*, the plan broadly provided that "all Causes of Action shall be transferred to the Litigation Trust as of the Effective Date, to be pursued by the Litigation Trustee, as a representative of the Estates under section 1123(b)(3)(B) of the Bankruptcy Code for the benefit of Claims Holders as set forth in the Plan."[82] The plan further provided that the litigation trustee "shall have the exclusive right to prosecute" the estate's claims and causes of action so transferred, and the plan specifically defined both "causes of action" and "avoidance actions" broadly, but apparently without specifically naming the defendants or the applicable causes of action retained.[83]

The court held that "the Plan specifically and unequivocally preserved the Avoidance Actions for pursuit by the Litigation Trustee" because, in keeping with *United Operating* and other precedent, the plan did not have to name the actual defendants who were the subject of such causes of action in order to retain them.[84] "Thus, while creditors must be told in

[78] Dynasty Oil & Gas, LLC v. Citizens Bank (*In re* United Operating, LLC), 540 F.3d 351 (5th Cir. 2008).

[79] Moglia v. Keith (*In re* Manchester, Inc.), No. 09-3027-BJH, 2009 WL 2243592, at *1 (Bankr. N.D. Tex. July 16, 2009).

[80] *Id.* at *3 (quoting *United Operating*, 540 F.3d at 355).

[81] *Id.*

[82] *Id.* at *4 (emphasis and footnote omitted).

[83] *See id.* at *4-5 (noting that "the Plan did not identify the specific individuals or entities that the Litigation Trustee intended to sue").

[84] *Id.* at *5.

the plan of reorganization that avoidance actions will be pursued post-confirmation by the representative of the estate, the individual prospective defendants do not have to be identified in the plan."[85]

However, with respect to the non-avoidance actions, the court held that "the Plan failed to specifically and unequivocally retain the right to pursue those claims" within the dictates of *United Operating*.[86] Although the plan's definition of "causes of action" was broad enough to encompass the claims, the plan failed to specifically identify them and it failed to expressly transfer them to the litigation trust.[87] Thus, the court found an important distinction between avoidance and non-avoidance causes of action for retention purposes—hence the significance of *Manchester*.[88] Of interest, Chief Judge Houser noted that she reached her decision with "great reluctance," and, in a lengthy and detailed footnote, she urged the Fifth Circuit to reconsider its *United Operating* opinion.[89] Suffice it to say that neither *United Operating* nor *Manchester* will put these difficult and sometimes contradictory issues and precedents to rest.

VI. INSIDER COMPENSATION

In re Pilgrim's Pride Corp.

In re Pilgrim's Pride dealt with the Bankruptcy Code provision limiting insider benefits as administrative claims that was added as part of the Bankruptcy Abuse Prevention and Consumer Protection Act (BAPCPA).[90] Postpetition, the debtors' chief executive officer and chief operating officer resigned.[91] The debtors filed a motion seeking the court's approval to enter into consulting agreements with the two former officers, essentially continuing their prepetition compensation for a period of time postpetition.[92] Of interest, the debtors testified that they did not require consulting agreements from the former officers. Rather, they testified that the purpose behind the consulting agreements was to ensure that the former officers would not be able to solicit the debtors' clients on behalf of the debtors' competitors; in other words, the payments were essentially funds to obtain non-competition agreements from the former officers.[93]

The United States Trustee objected to the motion under § 503(c) of the Bankruptcy Code, added by Congress in 2005 to protect against postpetition "golden parachutes" and other perceived excess insider compensation and benefits.[94] In a nutshell, § 503(c) of the Bankruptcy Code limits

[85] *Id.*
[86] *Id.*
[87] *Id.*
[88] *See id.*
[89] *Id.* at *5 n.6.
[90] *In re* Pilgrim's Pride Corp., 401 B.R. 229, 233-35 (Bankr. N.D. Tex. 2009).
[91] *Id.* at 232-33.
[92] *Id.* at 233.
[93] *Id.*
[94] *Id.* at 232; *see id.* at 234.

postpetition insider compensation to induce the insider to continue providing services to the debtor (e.g., key employee retention plan (KERP) motions), unless: (i) the services of the individual are essential; (ii) the individual has a bona fide offer from another business for higher compensation; and (iii) the compensation does not exceed certain limitations imposed by the Bankruptcy Code.[95] The court, however, construed the question as relating not to postpetition insider compensation, but rather to the purchase of a non-compete agreement from the prior officers.[96] The court accordingly held that § 503(c)(1) did not apply to the facts at bar, since the trigger for that section is that the transfer be "for the purpose of inducing such person to remain with the debtor's business."[97] However, § 503(c)(3) did apply, because it addresses transfers outside the ordinary course to, among others, officers of the debtor.[98]

Section 503(c)(3) prohibits such transfers when not "justified by the facts and circumstances of the case."[99] The questions before the court were which factors to apply to this standard and whether the proposed transaction fell within the standard.[100] First addressing the traditional business judgment rule as normally applicable to postpetition business decisions, the court concluded that this normally deferential standard did not apply: "[E]ven if a good business reason can be articulated for a transaction, the court must still determine that the proposed transfer or obligation is justified in the case before it."[101]

Ultimately, the court approved the transaction.[102] Although the court did not set forth a list of factors or a litmus test to be used in determining what is justified by the "facts and circumstances," it looked at whether the transaction served the interests of creditors, whether it was in the estate's best interest, whether the debtors had other viable alternatives, and whether the negotiations were undertaken at arm's length.[103] The court also weighed the cost of the transaction (half a million dollars) against its benefit to the estates (the provision of the officers' freely soliciting the debtor's customers, even one of which may have been worth hundreds of millions of dollars).[104]

VII. INVOLUNTARY BANKRUPTCY

In re Smith

In re Smith provides an excellent discussion of the elements involved

[95] 11 U.S.C. § 503(c)(1) (2006). The Bankruptcy Code also limits postpetition transfers for severance payments to an insider. *Id.* § 503(c)(2).

[96] *In re Pilgrim's Pride*, 401 B.R. at 235.

[97] *Id.*

[98] *Id.* at 236.

[99] *Id.*

[100] *Id.* at 236-37.

[101] *Id.* at 237.

[102] *Id.*

[103] *See id.* at 237-38.

[104] *Id.* at 238.

with an involuntary petition.[105] It discusses numerous issues and factors governing which claims are included under § 303(b) and (h).[106]

Of all the issues addressed by *In re Smith*, the one that is perhaps the most novel concerns whether a prepetition judgment taken against the alleged debtor is the subject of a bona fide dispute under § 303(b) of the Bankruptcy Code in light of a prepetition appeal taken of the judgment.[107] The court reviewed applicable Texas precedent holding that "a judgment is final for the purposes of res judicata and collateral estoppel despite the taking of an appeal, unless the appeal consists of a trial de novo."[108] The court additionally reviewed persuasive case law and unpublished opinions from the Fifth Circuit, which had concluded that a prepetition judgment was not subject to bona fide dispute notwithstanding the pendency of an appeal of the judgment.[109]

Ultimately, the court concluded that the judgment was not subject to bona fide dispute even though it was appealed.[110] In the process, the court confirmed that it is normally not the province of a federal court to look behind the merits of a state court judgment:

> "[J]udgments go a long way toward establishing the absence of a bona fide dispute," and "it will be the unusual case in which a bona fide dispute exists in the face of claims reduced to state court judgments. . . . [T]he Court will not look behind the state court judgment and finds that it is not the subject of a bona fide dispute as to liability or amount.[111]

VIII. JURISDICTION

Travelers Indemnity Co. v. Bailey

In *Travelers Indemnity*, the U.S. Supreme Court confirmed the broad and continuing jurisdiction of the bankruptcy court and the finality of its orders, in this instance decades after the bankruptcy court entered an asbestos-related channeling injunction.[112] In 1986, the bankruptcy court confirmed a plan of reorganization for the Johns-Manville Corporation, a major supplier of asbestos. As part of the plan, the bankruptcy court approved a settlement whereby the debtor's insurers would contribute to the asbestos claimants' trust, and the bankruptcy court entered a channeling injunction which included a release of those insurers from any "Policy Claims," which were broadly defined as "claims" and "allegations" against the insurers "based upon, arising out of or relating to" the

[105] *Id.* at 237-38, 237 n.14.

[106] *In re* Smith, 415 B.R. 222 (Bankr. N.D. Tex. 2009).

[107] *See id.* at 229-31.

[108] *Id.* at 229 (citing Scurlock Oil Co. v. Smithwick, 724 S.W.2d 1, 6 (Tex. 1986)).

[109] *Id.* at 229-30.

[110] *Id.* at 231.

[111] *Id.* at 231 (quoting *In re* Byrd, 357 F.3d 433, 438 (4th Cir. 2004) (internal citation omitted)).

[112] Travelers Indem. Co. v. Bailey, 129 S. Ct. 2195, 2198, 2202 (2009).

Manville insurance policies.[113] The claimants, who had sued the insurers, argued that they were not prohibited from proceeding against the insurers, because those claims were not based on the debtor's wrongdoing but rather on the insurers' own alleged wrongdoing and breaches of state statutes and common law. The bankruptcy court nevertheless interpreted its prior order as enjoining such suits and entered a supplemental order enjoining the claimants' suits.[114]

The Court of Appeals for the Second Circuit concluded that the claims at issue fell within the scope of the original jurisdiction.[115] However, it concluded that the bankruptcy court could not enjoin actions over which it had no jurisdiction, in other words, that the claims were asserted against a non-debtor for its own alleged conduct and not for the debtor's alleged conduct.[116] Therefore, the Second Circuit, while agreeing that the bankruptcy court could interpret its prior orders, reversed the injunction and held that the bankruptcy court could not enjoin the instant claims, because they were not based on the debtor's alleged wrongdoing but rather on the insurers' alleged wrongdoing.[117]

The Supreme Court reversed the Second Circuit, although it agreed with the circuit that the bankruptcy court had continuing and appropriate jurisdiction to enforce its prior orders and enjoin the present suits.[118] With respect to the funds contributed by the insurers toward the asbestos claimants, the Court noted, "There would have been no such payment without the injunction at the heart of the present dispute."[119] The Court further agreed that the actions fell within the scope of the original injunction.[120] With respect to the ultimate issue, the Court noted that perhaps the Second Circuit would have been correct, and would have been able to examine the bankruptcy court's jurisdiction, were the Circuit reviewing the injunction on direct appeal.[121] Here, however, the challenge was not a direct-appeal challenge and was brought decades after the bankruptcy court's injunction became final and non-appealable.

The Court noted that when the injunctions became

> final on direct review (whether or not proper exercises of bankruptcy court jurisdiction and power), they became res judicata to the "'parties and those in privity with them, not only as to every matter which was offered and received to sustain or defeat the claim or demand, but as to any other admissible matter which might have been offered for that purpose.'"[122]

[113] *Id.* at 2199.
[114] *Id.* at 2201.
[115] *Id.* at 2202.
[116] *Id.*
[117] *Id.*
[118] *Id.* at 2203.
[119] *Id.* at 2199.
[120] *Id.* at 2203.
[121] *Id.*
[122] *Id.* at 2205 (quoting Nevada v. United States, 463 U.S. 119, 130 (1983) (in turn quoting Cromwell v. County of Sac, 94 U.S. 351, 352 (1877))).

It further held, "Those orders are not any the less preclusive because the attack is on the Bankruptcy Court's conformity with its subject-matter jurisdiction, for '[e]ven subject-matter jurisdiction . . . may not be attacked collaterally.'"[123] The Court noted that its holding was a limited one and that it was not resolving "whether a bankruptcy court, in 1986 or today, could properly enjoin claims against nondebtor insurers that are not derivative of the debtor's wrongdoing."[124] The effect of the Court's holding is therefore straightforward: A final, non-appealable order is just that, and, so long as due process was complied with in arriving at that order, a jurisdictional attack will not normally be successful by way of a collateral proceeding as opposed to direct review.[125]

The Court's holding is important given the long-term effects of bankruptcy court final orders, affecting numerous individuals in each case and the certainty that parties may have regarding the finality and enforceability of an order in light of threatened future piecemeal collateral attack. What *Travelers Indemnity* means to well-established principles which hold that a void order (here, void for lack of subject-matter jurisdiction) remains subject to collateral review is uncertain.[126]

IX. PROFESSIONALS

In re Energy Partners, Ltd.

Chances are that most bankruptcy professionals, whether they be attorneys, accountants, turnaround experts, or investment bankers, know in one fashion or another Judge Bohm's opinion in *Energy Partners, Ltd.*, in which he lambasted investment bankers for what he considered greedy and unconscionable fee structures.[127] The opinion is included here not only because of its notoriety, but because its result is likely to be seen again, even if not through so strongly worded an indictment. Bankruptcy courts are becoming warier of, and are applying greater scrutiny to, carte blanche fee structures involving investment bankers and similar professionals,[128] and they appear to be applying stricter scrutiny to compensation mechanisms proposed under § 328 of the Bankruptcy Code.

In *Energy Partners, Ltd.*, the creditors' committee and the equity committee sought to retain investment banking firms to provide valuations of the debtor's business and assets with compensation fixed under § 328 of the Bankruptcy Code. Although two other firms provided similar valuations, the investment bankers demanded nonrefundable fees aggregating $1 million, in addition to other compensation.[129]

[123] *Id.* (alteration in original) (quoting Kontrick v. Ryan, 540 U.S. 443, 455 n.9 (2004)).

[124] *Id.* at 2207.

[125] *See id.* at 2205-06.

[126] *See id.* at 2205.

[127] *See In re* Energy Partners, Ltd., 409 B.R. 211, 237-39 (Bankr. S.D. Tex. 2009).

[128] The authors are aware of other instances in which bankruptcy courts voiced the same concerns, albeit not by published opinion.

[129] *Energy Partners, Ltd.*, 409 B.R. at 215.

The opinion started off poorly for the investment bankers, and it only got worse from there. The court opened by stating:

> Oblivious to recent congressional and public criticism over executives of publicly-held corporations who are paid monumental salaries and bonuses despite running their companies into the ground, two investment banking firms now come into this Court requesting that they be employed under similarly outrageous terms. . . . This Court declines the opportunity to endorse such arrogance. The purse is too perverse.[130]

The court chastised the committees for forgetting to act with what the court labeled "a measure of frugality."[131] The court quoted with approval the following language: "The estate is not a cash cow to be milked to death by professionals seeking compensation for services rendered to the estate which have not produced a benefit commensurate with the fees sought."[132] The court's main criticism, however, was directed at the investment bankers:

> These two investment banking firms have become hogs. Indeed, the investment bankers in the case at bar appear to have embraced the outlook expressed by Michael Douglas's character, Gordon Gekko, in the film *Wall Street* that "Greed—for lack of a better word—is good. Greed is right. Greed works." That may be how Wall Street views the world, but it is not how this Court sees things.[133]

While *Energy Partners, Ltd.* is forceful, to say the least, ultimately it boils down to questions of duplication, pre-approval of fees, use of cash collateral, and benefits to the estate.[134] Setting aside the forceful language, this opinion offers a highly useful summary for the professional of various factors and standards governing the retention of professionals and regulating compensation schemes under § 328 of the Bankruptcy Code.

X. PROPERTY OF THE ESTATE

A. *In re Amaravathi Ltd. Partnership*

In *Amaravathi*, the bankruptcy court considered an issue sure to be of increasing importance as commercial real estate defaults are projected to increase.[135] Specifically, the court considered whether postpetition rents from an apartment complex were property of the bankruptcy estate in light of a prepetition absolute assignment of rents.[136] Although the precise procedure before the court concerned the debtor's use of cash collat-

[130] *Id.*
[131] *Id.*
[132] *Id.* at 216 (quoting *In re* Chas. A. Stevens & Co., 105 B.R. 866, 871-72 (Bankr. N.D. Ill. 1989)).
[133] *Id.* at 237.
[134] *See id.* at 223, 235.
[135] *See In re* Amaravathi Ltd. P'ship, 416 B.R. 618, 621-22 (Bankr. S.D. Tex. 2009).
[136] *Id.*

eral, this issue turned on the question of whether the rents were property of the estate in the first instance.[137]

While the court acknowledged the general rule that state law defines property interests in bankruptcy, the court noted two important exceptions: "[T]here is an exception if Congress modifies state law through legislation enacted under Congress's 'authority . . . to establish "uniform laws on the subject of Bankruptcies throughout the United States,"'" and "state property law must relent 'if some federal interest requires a different result.'"[138] The court then analyzed § 541(a)(6) of the Bankruptcy Code, which provides that property of the estate includes "[p]roceeds, product, offspring, rents, or profits of or from property of the estate."[139] The postpetition rents were "rents" within the meaning of the Bankruptcy Code, for they derived from what was clearly property of the estate in the form of the apartment buildings.[140] In addition to this statutory application, the court noted multiple fundamental bankruptcy policies and goals supporting its construction, including that by removing rents from property of the estate, the estate would have no source of income and therefore no possibility to rehabilitate, while still being obligated to pay the operating expenses of the apartment buildings for the creditor.[141]

The court also analyzed Texas law and addressed the differences between an "absolute" assignment of rents and a "collateral" assignment of rents.[142] Although that analysis is important, the ultimate significance of *Amaravathi* is that postpetition rents under an assignment of rents are property of the estate under federal law, although, of course, they constitute cash collateral and the provisions of § 363 governing the use of cash collateral apply.[143]

B. *In re Nowlin*

In re Nowlin centers upon whether a bankruptcy court may consider a future event that is reasonably certain to occur when projecting a debtor's disposable income.[144] The debtor filed for Chapter 13 bankruptcy, and as an "above-median debtor," she was required to file a plan with a minimum applicable commitment period of five years. According to the debtor, a loan from her 401(k) account would be repaid within two years, freeing up $1,134.79 per month in her budget. She argued that these additional funds "should not be considered for confirmation purposes because the calculation of 'projected disposable income' under § 1325(b)(1)

[137] *Id.* at 621.

[138] *Id.* at 622 (quoting Butner v. United States, 440 U.S. 48, 54-55 (1979) (in turn quoting U.S. CONST. art. I, § 8, ch. 4)).

[139] 11 U.S.C. § 541(a)(6) (2006).

[140] *Amaravathi*, 416 B.R. at 623-24.

[141] *Id.* at 626.

[142] *See id.* at 628-30.

[143] *See id.* at 637.

[144] 576 F.3d 258, 260-61 (5th Cir. 2009).

should be mechanical, involving nothing more than (1) determining her current disposable income under § 1325(b)(2), and (2) multiplying that amount by the plan's term."[145] The trustee argued for a forward-looking approach to the definition of "projected disposable income" so that the funds in question would be allocated to repay the debtor's creditors.[146] The bankruptcy court denied the debtor's proposed plan, holding that "'projected disposable income' . . . requires the Debtor to account for any events which will definitely occur during the term of the Plan that would alter either the income or expense side of the disposable income calculation."[147] On the debtor's appeal, the district court confirmed the bankruptcy court's holding.[148]

The Fifth Circuit noted a split among circuit courts in the interpretations of the change Congress wrought in BAPCPA when it placed a new definition of "disposable income" in § 1325(b)(2) immediately following a reference to "projected disposable income" in § 1325(b)(1)(B).[149] The Fifth Circuit conducted an analysis of the definition of "projected" and adopted the forward-looking approach advocated by the trustee.[150] It noted that "disposable income" is a starting point and that a party may present evidence of reasonably certain future events that could change the debtor's financial position, yet it acknowledged that some future events may be too speculative to impact a debtor's budget.[151] The Fifth Circuit's decision aligns with holdings of the Eighth Circuit and Tenth Circuit; the Ninth Circuit, by comparison, adopted the mechanical approach to the new definition of "projected disposable income."[152]

XI. SALES

A. *In re Gulf Coast Oil Corp.*

Gulf Coast Oil Corp. is a significant opinion in the continuing question of sales of substantially all of a debtor's assets under § 363(b) of the Bankruptcy Code, as opposed to a plan.[153] After approximately six months in Chapter 11, and at a time when the bankruptcy court found

[145] *Id.* at 261.

[146] *Id.*

[147] *Id.* The Bankruptcy Code provision quoted was added by BAPCPA.

[148] *Id.*

[149] *Id.* at 261-62; *see* 11 U.S.C. § 1325(b) (2006).

[150] *Id.* at 262-63. The Fifth Circuit explained, "We recognize that both approaches create difficulties, but we are persuaded that the Trustee's approach best comports with the statutory language." *Id.* at 263.

[151] *Id.* at 260, 263, 266-67.

[152] *See id.* at 266 ("We join the Eighth and Tenth Circuits in adopting a forward-looking interpretation of 'projected disposable income' in § 1325(b)(1). . . . The position adopted by [the debtor] and the Ninth Circuit . . . overly emphasizes the modified definition of 'disposable income' without recognizing the independent significance of the word 'projected.'"). Of note, one month after *In re Nowlin*, the U.S. Bankruptcy Court for the Northern District of Ohio (Sixth Circuit) disagreed with the Fifth Circuit's statutory interpretation, evidencing a further split among courts. *See In re* Boyd, 414 B.R. 223, 231 (Bankr. N.D. Ohio 2009).

[153] *In re* Gulf Coast Oil Corp., 404 B.R. 407, 410-11 (Bankr. S.D. Tex. 2009).

that it had become "clear that a reorganization of Debtors' business was not possible," the debtors moved to sell substantially all of their assets to their sole secured lender under § 363(b) of the Bankruptcy Code.[154] The sale included assigning to the secured lender various valuable executory contracts, chosen by the lender. The lender would also choose which employees and vendors the debtors would continue doing business with. Of interest, the debtors' financial advisors objected to the proposed sale, arguing that it would not provide for the payment of all administrative claims.

The bankruptcy court *denied* the proposed sale, finding that it thwarted Chapter 11's reorganization scheme and that the debtors should have proposed a plan.[155] The court first noted that a bankruptcy sale may be effectuated under § 363(b) of the Bankruptcy Code or under a plan, and the court discussed the differences between the two, including the requirements for a plan: a disclosure statement, creditor voting, and a determination of whether the plan meets the statutory requirements.[156] The court further analyzed Fifth Circuit jurisprudence on sales outside a plan, *sub rosa* plans, and the *Braniff* precedent.[157] The court construed this precedent as addressing the Bankruptcy Code's "carefully crafted scheme for creditor enfranchisement where plans of reorganization are concerned."[158] According to the court, "when a transaction materially interfere[s] with that 'carefully crafted scheme', the transaction [may] not be authorized by a bankruptcy court under § 363(b)."[159] But the court pointed out that the Fifth Circuit in *Braniff* "expressly declined to hold that the sale of all property of the estate was per se improper."[160] The court continued reviewing applicable case law and persuasive authority, but it also noted something new, which bankruptcy practitioners are already familiar with:

> Unprecedented liquidity in the capital markets, investment strategies that include significant claims trading in large cases, alleged "loan to own" strategies, active participation in bankruptcy cases by hedge funds and other non-bank lending entities, and venue selection based on a court's perceived propensity to approve § 363(b) sales without requiring satisfaction of chapter 11 confirmation requirements have altered the landscape of chapter 11 in large cases. While these factors have initially appeared in the very large cases, the practice in smaller cases has followed the lead of the larger cases. . . . [T]he result has been a huge increase in motions to sell substantial parts (or all) of the estate under § 363(b) prior to plan confirmation.[161]

[154] *Id.* at 410-11.

[155] *Id.* at 427-28.

[156] *Id.* at 414-15.

[157] *Id.* at 415 (discussing *In re* Braniff Airways, Inc., 700 F.2d 935, 939 (5th Cir. 1983)). .

[158] *Id.* (quoting *Braniff*, 700 F.2d at 940).

[159] *Id.*

[160] *Id.*

[161] *Id.* at 418-19.

Indeed, the court observed, "Corporate reorganizations have all but disappeared. Giant corporations make headlines when they file for Chapter 11, but they are no longer using it to rescue a firm from imminent failure. Many use Chapter 11 merely to sell their assets and divide up the proceeds."[162] As held by the court, the debtor must show that there is a need for a sale prior to a plan, not just that it does not matter whether the sale is by motion under § 363(b) of the Bankruptcy Code or under a plan.[163]

Having reviewed the available precedent and guidance, and noting that it would be helpful for the Fifth Circuit to provide additional direction, the bankruptcy court looked at the following factors to determine whether a sufficient reason had been demonstrated to approve a sale of substantially all assets under § 363(b) of the Bankruptcy Code: (i) "Is there evidence of a need for speed?"; (ii) "What is the business justification?"; (iii) "Is the case sufficiently mature to assure due process?"; (iv) "Is the proposed [sale agreement] sufficiently straightforward to facilitate competitive bids or [is] the purchaser the only potential interested party?"; (v) "Have the assets been aggressively marketed in an active market?"; (vi) "Are the fiduciaries that control the debtor truly disinterested?"; (vii) "Does the proposed sale include all of a debtor's assets and does it include the 'crown jewel'?"; (viii) "What extraordinary protections does the purchaser want?"; (ix) "How burdensome would it be to propose the sale as part of confirmation of a chapter 11 plan?"; (x) "Who will benefit from the sale?"; (xi) "Are [s]pecial [a]dequate [p]rotection [m]easures [n]ecessary and [p]ossible?"; (xii) "Was the hearing a true adversary presentation?"; (xiii) "Is the integrity of the bankruptcy process protected?"; and (xiv) "Other factors that apply to the case at hand."[164]

Applying these factors, the court denied the sale motion.[165] As explained by the court,

> [T]he essence of the proposed transaction is a foreclosure supplemented materially by a release, by assignment of executory contracts (but only the contracts chosen by the secured lender), by a federal court order eliminating any successor liability, and by preservation of the going concern. Congress provided a process by which these benefits could be obtained. That scheme requires bargaining, voting, and a determination by the Court that Bankruptcy Code § 1129 requirements are met.[166]

Gulf Coast Oil Corp. is an important case, because it is rare that a bankruptcy court will deny a motion to sell substantially all assets, especially where, as here, the court finds that reorganization is not possible.[167]

[162] *Id.* at 419 (quoting Douglas G. Baird & Robert K. Rasmussen, *The End of Bankruptcy*, 55 STAN. L. REV. 751, 751 (2002)).

[163] *Id.* at 428.

[164] *Id.* at 422-27.

[165] *Id.* at 427-28.

[166] *Id.* at 428.

[167] *See id.*

One important question is whether the same result would have been obtained had the buyer not been the secured lender, or had the secured lender offered consideration to pay administrative claims at the least, and perhaps something for unsecured creditors. Many practitioners have voiced concerns over § 363(b) sales of substantially all assets, and *Gulf Coast Oil Corp.* considered a factual pattern that best brought these concerns to light.[168] As the opinion acknowledges, however, there are valid reasons for a sale of substantially all assets, and such a sale is not foreclosed by Fifth Circuit precedent.[169] A secured lender wishing to use bankruptcy as a clearinghouse for its collateral, however, will have added obstacles to achieving such a sale, even if those obstacles are only the philosophical and policy considerations that such a transaction implicates.[170]

B. *Indiana State Police Pension Trust v. Chrysler LLC*

The Survey period saw a flurry of bankruptcy activity with respect to the fast mega-cases of General Motors and Chrysler.[171] As was widely reported, the U.S. Supreme Court became involved, originally issuing a temporary stay of Chrysler's sale of substantially all of its operating business.[172] Shortly thereafter, however, the Court dissolved the temporary stay of the sale order[173] and effectively dismissed the appeal as moot.[174]

The Supreme Court's brief decisions in *Chrysler* do not set forth any particularly novel point of law, although the Court confirmed the elements applicable to the issuance of a stay pending appeal.[175] The decisions are of importance because they brought the Court into the frequent and customary bankruptcy world of the appeal of sale orders and the application of equitable mootness which frequently follows. The decisions are significant not for what they say or for what they do not say, but rather for what they effectuate: well-established bankruptcy law making it very difficult to reverse a sale order that has not been stayed or to obtain such a stay in the first place. In other words, the Supreme Court did what many appellate courts do in this situation, and the mere fact that it is the highest court in the land did not suffice to disrupt the bankruptcy sales process.

[168] *See id.* at 411-14.

[169] *See In re* Braniff Airways, Inc., 700 F.2d 935, 939-40 (5th Cir. 1983); *Gulf Coast Oil Corp.*, 404 B.R. at 415, 428.

[170] *See Gulf Coast Oil Corp.*, 404 B.R. at 428.

[171] *See generally In re* Chrysler, LLC, 576 F.3d 108 (2d Cir. 2009); *In re* Gen. Motors Corp., 407 B.R. 463 (Bankr. S.D.N.Y. 2009).

[172] *See* Ind. State Police Pension Trust v. Chrysler LLC, 129 S. Ct. 2275, 2276 (2009) (per curiam).

[173] *Id.* at 2276-77.

[174] Ind. State Police Pension Trust v. Chrysler, 130 S. Ct. 1015, 1015 (2009). Although the Court did not elaborate on its justification for the dismissal, it apparently employed the doctrine of equitable mootness, applied severely to asset sales in light of §363(m) of the Bankruptcy Code. *See* 11 U.S.C. § 363(m) (2006); *Chrysler*, 130 S. Ct. at 1015.

[175] *Chrysler*, 129 S. Ct. at 2276.

XII. STATUTE OF LIMITATIONS AND REPOSE

Stanley v. Trinchard

Practitioners are well aware of § 108 of the Bankruptcy Code and, in particular, the additional period specified by § 108(a) providing the trustee added time to commence a suit notwithstanding the expiration of a non-bankruptcy statute of limitations.[176] In *Stanley*, the Fifth Circuit broadly considered the related, but different, question of whether the § 108(a) enlargement period likewise applies to a statute of repose.[177]

Although the *Stanley* litigation had been the subject of an extensive line of Fifth Circuit and district court opinions, the facts at issue in this opinion were straightforward: The trustee commenced suit against the debtor's attorneys for breaches of professional and fiduciary duties after the applicable Louisiana limitations period had expired.[178] Of particular importance, the underlying statute provided that the limitations period was "peremptive"[179] and that such a period "may not be renounced, interrupted, or suspended."[180] The district court described this statutory provision as conferring a substantive property right and concluded, "In light of the fact that the rights attached to a peremptive period extinguish upon the expiration of that period and that peremptive periods cannot be interrupted or suspended, applying Section 108(a) to peremptive periods would impermissibly alter substantive property rights as defined by Louisiana law."[181] The district court therefore analyzed the situation as involving a substantive property right that is lost prepetition (similar to the expiration of a contract or lease right), a right which cannot be revived upon expiration.[182]

The Fifth Circuit, styling the underlying statute as a statute of repose, disagreed.[183] The Fifth Circuit reviewed prior precedent confirming that property rights are normally defined by non-bankruptcy law and noted that it was "sympathetic to the importance of preserving state law property rights intact in bankruptcy."[184] Nevertheless, the Fifth Circuit noted Congress's express constitutional power to provide for bankruptcy laws, and the circuit interpreted §108(a) broadly to include "any" period fixed by non-bankruptcy law.[185] Therefore, "bankruptcy law . . . takes precedence over state laws under the Supremacy Clause," and the statute itself is broad enough to encompass statutes of repose: "The statute's clear pur-

[176] *See* 11 U.S.C. § 108 (2006).

[177] Stanley v. Trinchard, 579 F.3d 515, 516-18 (5th Cir. 2009).

[178] *Id.* at 516-17.

[179] A peremptive period is the civil law's equivalent of a statute of repose. *Id.* at 518 n.3.

[180] *Id.* at 518 (quoting LA. REV. STAT. § 9:5605(b)).

[181] *Id.* at 517.

[182] *See id.* at 517-18.

[183] *Id.* at 518 & n.3 (noting that "[n]o legal distinction exists" between common-law statutes of repose and the civil-law "preemptive period").

[184] *Id.* at 519.

[185] *Id.*

pose is to afford bankruptcy trustees extra time to assess and pursue potential assets of the debtor's estate. Congress drew no distinction among the state law vehicles that govern time limits for filing suit, whether statutes of limitations or prescription, repose or peremption."[186]

XIII. CONSUMER

A. *In re Camp*

In re Camp addressed the dismissal of a consumer Chapter 7 case under § 707 of the Bankruptcy Code and the changes made by BAPCPA.[187] The court addressed both the "means test" and grounds for dismissal for "substantial abuse" under § 707(b).[188]

Regarding the means test, the United States Trustee argued that the debtors' obligations relating to a home they had surrendered postpetition should not be considered when calculating disposable income. The court agreed that "the means test calculation should occur as of the filing of the trustee's motion to dismiss, and the court should consider any changed circumstances of the debtor between the filing of the petition and the filing of the motion."[189] With respect to a dismissal for substantial abuse, the court looked at the totality of the circumstances, meaning that "the debtor's post-petition surrender of the property may be considered in determining whether granting Chapter 7 relief is, in fact, abusive under the totality of the circumstances."[190] The issue of whether a postpetition surrender of a home should be used in determining whether there was a presumption that the filing of the petition was abusive did not directly have to be resolved.[191]

With respect to substantial abuse, the court noted that BAPCPA changed the test from "substantial abuse" to just "abuse," but the court considered the prior case law in addressing the lessened standard.[192] The applicable factors included:

> (1) Whether the Debtors could pay a substantial portion of their debts from future income in a hypothetical Chapter 13 case; (2) Whether the bankruptcy petition was filed due to sudden illness, calamity, disability, or unemployment; (3) Whether the Debtors incurred cash advances and made consumer purchases far in excess of their ability to repay; (4) Whether the Debtors' proposed family budget is reasonable; (5) Whether the Debtors are seeking to reaffirm a large amount of secured debt to the detriment of unsecured creditors; (6) Whether the Debtors' schedules and statement of current income and expenses reasonably and accurately reflect their

[186] *Id.*
[187] 416 B.R. 304, 305-06 (Bankr. E.D. Tex. 2009).
[188] *See id.* at 306 (addressing changes made by BAPCPA).
[189] *Id.* at 311 (citing *In re* Singletary, 354 B.R. 455, 466 (Bankr. S.D. Tex. 2006)).
[190] *Id.*
[191] *See id.*
[192] *See id.* at 311-12 (noting that such "preBAPCPA cases . . . remain instructive in an analysis under" the new standard).

> true financial condition; (7) Whether the Debtors have a stable source of income; (8) Whether the Debtors are eligible to file a Chapter 13 case; (9) Whether there are state remedies or private negotiations that the Debtors can invoke to ease their financial predicament; (10) Whether the Debtors' expenses can be reduced without depriving the Debtors of basic necessities; and (11) Whether the petition was filed in good faith.[193]

Here, the debtors' discretionary spending was high, they had stable employment and high income (the husband was a pilot for a major airline for many years), and they were spending money for luxury and retirement purposes. Thus, although the debtors were burdened with some financial problems, "they were enjoying a relatively affluent lifestyle."[194] Although the Bankruptcy Code does not require the dismissal of a case where a debtor has substantial financial means, debtors with substantial and stable employment "will be hard pressed to establish that they do not have the ability to pay some of their unsecured debt, such as through funding a Chapter 13 plan of reorganization."[195] Accordingly, the court ordered the dismissal of the case unless the debtors elected to convert to Chapter 11 or Chapter 13 within a specified timeframe.[196]

Of interest is what the court concluded in its summary:

> The Debtors have been living beyond their means, and the totality of the monthly expenses reported by the Debtors does not reflect significant belt-tightening. The Debtors likewise do not appear to have prioritized their expenses to fit within their monthly income. The Debtors enjoy a stable income and good health, and their creditors should not be forced to bear the burden of maintaining the same lifestyle that precipitated this bankruptcy.[197]

B. *In re Miller*

In *Miller*, the Fifth Circuit addressed whether the "hanging paragraph" of § 1325(a), added by BAPCPA, prevents a creditor with a purchase money security interest (PMSI) in a "910 vehicle" from obtaining a state-law deficiency judgment for the portion of a debt not satisfied by a sale of the surrendered vehicle.[198] The factual background centered upon the purchase of vehicle financed by DaimlerChrysler (DC). DC had a first-priority PMSI on the vehicle when the debtor filed a voluntary petition for Chapter 13 bankruptcy. The debtor proposed to surrender the vehicle in full satisfaction of his $34,000 debt, but DC objected to the plan. The bankruptcy court affirmed the debtor's plan and held that the hanging paragraph applied.[199] The Fifth Circuit took the case on direct appeal.[200]

[193] *Id.* at 312.
[194] *Id.* at 313.
[195] *Id.* (quoting *In re* Wadsworth, 383 B.R. 330, 333-34 (Bankr. N.D. Ohio 2007)).
[196] *Id.* at 314.
[197] *Id.*
[198] *In re* Miller, 570 F.3d 633, 635-36 (5th Cir. 2009).
[199] *Id.*
[200] *Id.* at 635.

It conducted an extensive statutory analysis of the hanging paragraph's instruction that § 506 does not apply to § 1325(a)(5) if the creditor has a PMSI securing a debt incurred within 910 days before the petition on a motor vehicle acquired for personal use.[201]

The Fifth Circuit noted two approaches to the issue and that the once-majority "full-satisfaction position" has been rejected by circuit courts in favor of the once-minority "deficiency position."[202] The former majority view held that a debtor could "surrender a 910 vehicle in full satisfaction of his debt regardless of whether the car was worth less than the total amount of debt," while the former minority view held that a creditor could "still pursue any remaining debt on a 910 vehicle under state law, regardless of the [inapplicability] of § 506."[203] The Fifth Circuit adopted the "deficiency position,"[204] although it rejected the reasoning of the Sixth Circuit's "equity-of-the-statute" approach to the deficiency position.[205] The Sixth Circuit's approach relied on "filling a gap" in the statute with prior bankruptcy law to conform to congressional intent; the Fifth Circuit rejected this approach as flawed and applied a plain-language interpretation.[206] *Miller* offers insight into how the Fifth Circuit may address the statutory interpretation of BAPCPA, legislation the Fifth Circuit acknowledged "has been criticized by some judges and commentators as being 'poorly drafted.'"[207]

The Fifth Circuit expressly joined the Fourth, Seventh, Eighth, Tenth, and Eleventh Circuits' adoption of the deficiency method and determined that state law applied when the Code did not supply a federal rule.[208] Applying a Louisiana statute, the Fifth Circuit determined that DC could pursue as an unsecured claim the gap between the value of the car upon its return and the debt to DC.[209] While the likelihood of the debt being paid in full is no more likely than for other unsecured debts, it could not be written off *in toto*.[210]

XIV. CONCLUSION

It is difficult to discern whether this year's opinions suggest the presence of any pattern or shift in Fifth Circuit and Texas bankruptcy cases. It may well be that there is none. However, it may be that greater scrutiny will be applied to Chapter 11 filings, given the continuing increase in such filings by heavily leveraged debtors, and given the continuous increases in the costs of administering Chapter 11 estates and the apparent

[201] *See id.* at 637.
[202] *Id.*
[203] *Id.*
[204] *Id.* at 641.
[205] *Id.* at 637-38.
[206] *Id.* at 638.
[207] *Id.* at 639.
[208] *Id.* at 641.
[209] *Id.* at 640-41.
[210] *See id.* at 641 (citing *In re* Wright, 492 F.3d 829, 833 (7th Cir. 2007)).

decreases in returns to unsecured creditors, as well as heightened criticism from courts and commentators. Certainly, opinions such as *Gulf Coast Oil Corp.*, which denied a section 363(b) sale,[211] *Energy Partners, Ltd.*, which criticized and refused to approve investment banker retention,[212] recent Fifth Circuit precedent apparently limiting the application of the equitable mootness doctrine,[213] Fifth Circuit precedent limiting non-consensual plan releases of non-debtors,[214] and bankruptcy court precedent strictly applying various doctrines to preclude the assertion of unpreserved causes of action postpetition,[215] suggest that some greater degree of scrutiny is being applied. Of course, this pattern may amount to pure coincidence.

In any event, given the large number of filings, it can reasonably be assumed that courts will have plenty of opportunities to further review various issues and to refine answers to multiple questions. The authors of this Article anticipate a year 2010 full of significant bankruptcy opinions. In the meantime, practitioners will continue to struggle with difficult cases, difficult facts, a difficult economy and lending market, and uncertainties regarding multiple legal issues affecting both business and consumer bankruptcies. The authors hope that this brief survey of 2009 developments will provide the practitioner with some assistance in addressing these difficult issues.

[211] *In re* Gulf Coast Oil Corp., 404 B.R. 407, 410-11 (Bankr. S.D. Tex. 2009).

[212] *In re* Energy Partners, Ltd., 409 B.R. 211, 237-39 (Bankr. S.D. Tex. 2009).

[213] *In re* San Patricio County Cmty. Action Agency, 575 F.3d 553, 559 (5th Cir. 2009). Due to the limits of this Article, only one recent Fifth Circuit opinion on equitable mootness is included. For those interested in additional recent precedent, the authors suggest a thorough review of the recent developments from the Fifth Circuit regarding this doctrine. Whether by coincidence or plan, the Fifth Circuit has recently issued several opinions limiting the application of the doctrine and striving to ensure that aggrieved parties are afforded their appellate remedies.

[214] *In re* Pac. Lumber Co., 584 F.3d 229, 236 (5th Cir. 2009).

[215] *In re* Manchester, Inc., No. 09-3027-BJR, 2009 WL 2243592, at *3, *6 (Bankr. N.D. Tex. July 16, 2009).