The Cramdown

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PRESIDENT'S MESSAGE

by Stephenie Biernacki Anthony, Esquire, Anthony & Partners, LLC

A Reflection in Time

Now that my term as President of the Tampa Bay Bankruptcy Bar Association has come to an end, I find myself reflecting on my career to date as a bankruptcy practitioner, beginning with my position as a Law Clerk for the Honorable Alexander L. Paskay, Chief Judge Emeritus, in May 1997. Following my two year clerkship with Judge Paskay, I began my career in private practice with my partner, and now husband, John A. Anthony. If you had asked me 17 years ago where I thought I would be today, I am sure I would not have predicted that I would have had the privilege of serving this Association and its members as the 2013 - 2014 Tampa Bay Bankruptcy Bar Association President.

For the privilege of serving this Association, I would like to thank the Judges and lawyers that make up our membership for their confidence in my ability to lead the Association, the other 2013 - 2014 Officers and Directors of the Tampa Bay Bankruptcy Bar Association for their hard work and dedication to the Association, my mentor, Judge Paskay, who took me under his wing and helped make me the bankruptcy practitioner I am today, the past Presidents of the Association for their wisdom and guidance, my family for loving and believing in me, and, last but not least, my wonderful friends and partners at Anthony & Partners who have supported me throughout this past year by attending and participating in the monthly CLE luncheons, by volunteering in our Pro Bono Clinic, and by submitting articles for our publication, The CramDown.

In closing, it is my hope that after another 17 years go by, the 2013 – 2014 Board is remembered for its contribution of hundreds of volunteer hours in connection with the startup and staffing of the Tampa Bay Bankruptcy Bar Association's Pro Bono Clinic, during its kickoff year, and for the financial contributions raised at the Tampa Bay Bankruptcy Bar Association's Annual Installation Dinner for the benefit of the Bankruptcy Law Educational Series Foundation, Inc., otherwise known as BLES, a not for profit organization formed to promote bankruptcy legal education and to fund pro bono and other public service projects relating to the practice of bankruptcy in the Middle District of Florida.

Congratulations on another successful year as an Association, and good luck Edward Peterson! Hail to the Chief!

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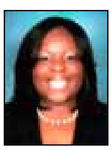

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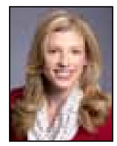

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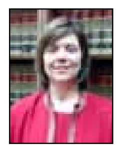

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Eleventh Circuit Denies Rehearing En Banc in McNeal

by G. Thomas Curran Jr.
Shumaker Loop & Kendrick, LLP

On May 20, 2014, the Eleventh Circuit in *In re McNeal* entered an order denying the pending petitions for rehearing and rehearing en banc, allowing chapter 7 debtors to continue stripping off wholly unsecured mortgages. In May of 2012, the Eleventh Circuit issued its opinion in *McNeal*, creating widespread controversy by adopting the minority view and allowing a chapter 7 debtor to strip off a wholly unsecured lien.[1] The Court relied on its decision in *Folendore v. United States Small Bus. Admin.*, 862 F.2d 1537 (11th Cir. 1989), which held that a wholly unsecured lien was voidable under the plain language of 11 U.S.C. § 506(d) rather than the Supreme Court's decision in *Dewsnup v. Timm*, 502 U.S. 410 (1992), which addressed the issue of a "strip down" of a partially secured lien.

Until now, bankruptcy courts within the Eleventh Circuit have been reluctant to follow *McNeal* because of its controversial and unsettled nature. The first court to express such a concern was the Southern District of Florida in *In re Bertan*, stating that, "[w]hile this Court believed the reasoning in *Dewsnup* was controlling under the circumstances presented in this case, it has come to understand, through *McNeal*, that the Eleventh Circuit Court of Appeals does not believe it is."[2] Other bankruptcy courts have agreed, with one court going so far as to say that *McNeal* was "wrongly decided," but ultimately recognizing that it could not ignore an Eleventh Circuit decision reviving *Folendore*, a published opinion.[3] Even Judge Jennemann in the Middle District of Florida hesitated to welcome *McNeal* when she granted a chapter 7 lien strip, "provided the Eleventh Circuit or the Supreme Court has not at the time of the discharge vacated the opinion or otherwise overruled or limited the holding of *In re McNeal*."[4]

McNeal has continued to progress over the last two years despite many obstacles. At its inception, many courts ignored the decision as persuasive only, but not binding, because it was unpublished. To make matters worse, in February of 2013, the Eleventh Circuit stayed all pending proceedings against GMAC indefinitely due to GMAC's own chapter 11 bankruptcy. The stay remained in place until July of 2013, after which the Eleventh Circuit Court of Appeals finally ordered that the *McNeal* opinion be published and considered for rehearing en banc. Now that rehearing en banc has been denied, GMAC must seek certiorari to the Supreme Court to pursue any further relief.

However, even though the Eleventh Circuit has solidified its position on chapter 7 lien stripping, it will likely have to address the issue again. In just April and May of 2014, the Court has ruled on four separate appeals analyzing the exact same facts as *McNeal*, but quickly dispensing of the issue by referring to the prior panel precedent rule[5] and, in some cases, inviting the appellants to seek reconsideration by the en banc court or certiorari from the Supreme Court.[6] Bank of America seems to be leading the charge by filing three of the four aforementioned appeals.[7]

There is no question that *McNeal* represents the minority view on the issue of chapter 7 lien stripping. Before *McNeal* was decided, three circuits had already held that *Dewsnup* precluded a chapter 7 debtor from stripping off a wholly unsecured lien.[8] Since *McNeal*, the Seventh Circuit has also sided with the majority.[9] As of today, no other circuits have joined *McNeal*'s minority view. Given the broad and substantial pushback from lenders like Bank of America and the bankruptcy courts within the Eleventh Circuit, it would be reasonable to expect a petition for certiorari to be forthcoming. In the meantime, debtors may rejoice in yet another victory for Ms. McNeal while lenders should proceed with caution when deciding whether to take a junior lien on under-water properties.

1 *In re McNeal*, 735 F.3d 1263 (11th Cir. 2012).
2 2013 WL 216231, *2 (Bankr.S.D.Fla. 2013).
3 *In re Williams*, 488 B.R. 492, 496-97 (Bankr.M.D.Ga. 2013); see also *In re Campbell*, 498 B.R. 370, 372 (Bankr.N.D.Ga. 2013); *In re Malone*, 489 B.R. 275, 280 (Bankr.N.D.Ga. 2013) (adding that "[i]n the absence of the *McNeal* decision, this court would apply *Dewsnup*'s section 506(d) analysis to these facts").
4 *In re Bustamante*, 2013 WL 1110886, *2 (Bankr.M.D.Fla. 2013).
5 The prior panel precedent rule states that "a later panel may depart from an earlier panel's decision only when the intervening Supreme Court decision is 'clearly on point.' " *McNeal*, 735 F.3d at 1265 (quoting *Atl. Sounding Co., Inc. v. Townsend*, 496 F.3d 1282, 1284 (11th Cir. 2007)).
6 See *In re Caulkett*, 2014 WL 2109054 (11th Cir. 2014) (lien holder acknowledged that the panel was bound by the *McNeal* and *Folendore* decisions, "but reserve[d] the right to seek reconsideration of the issue by the *en banc* Court); *In re Toledo-Cardona*, 2014 WL 1924640 (11th Cir. 2014); *In re Malone*, 2014 WL 1778982 (11th Cir. 2014); *In re Bello*, 2014 WL 1492738 (11th Cir. 2014).
7 Bank of America was listed as the appellant in *Caulkett*, *Toledo-Cardona*, and *Bello* as cited above. The fourth appeal, *Malone*, was filed by Wilmington Trust, National Association.
8 *See Ryan v. Homecomings Fin. Network*, 253 F.3d 778 (4th Cir. 2001); *Talbert v. City Mortg. Serv.*, 344 F.3d 555 (6th Cir. 2003); *Laskin v. First Nat'l Bank of Keystone*, 222 B.R. 872 (9th Cir. BAP 1998).
9 *See Palomar v. First Am. Bank*, 722 F.3d 992 (7th Cir. 2013).

Regulatory and Commercial Law Concerns Relating to Bitcoin and Internet Payment Systems©

by Robert N. Gilbert and Alexandra D. Blye,
Carlton Fields Jorden Burt, P.A.

I. Introduction

Recently there has been wide spread interest in the propagation of virtual currency based payment systems, including most notably, Bitcoin. Advocates of Bitcoin suffered a significant setback in February 2014 when Mt. Gox, formerly the most active Bitcoin exchange in the world, filed for bankruptcy in Japan after suffering losses of approximately $473 million.[1] In the wake of the Mt. Gox collapse, the value of a bitcoin has fallen from a high of $1000 to around $500.[2] Even so, interest in Bitcoin remains surprisingly resilient.

This article will briefly explore the intersection between efforts to develop a new and improved digital medium of exchange and the existing regulatory and commercial law environment. As will be seen, existing law provides only partial answers as to the rights, remedies and obligations of parties using virtual currencies.

II. The Emergence of Bitcoin

The term "Bitcoin" or "bitcoin" can be used in two ways: capitalized Bitcoin refers to the technology and network used to make and process Bitcoin transactions, while lowercase bitcoin refers to the unit of digital currency itself.[3] Bitcoin was initially proposed and created by Satoshi Nakamoto (an alias) in 2009 as a digital medium of exchange referred to as a "cryptocurrency."[4] It was intended to be an electronic peer to peer payment system based upon cryptographic proof.[5] The system would supposedly eliminate the need for trusting a financial intermediary, like a bank or credit card company, to handle such payments.[6] The basic premise was that the system would be non-reversible, less expensive than conventional bank and credit card transactions, and inflation free.[7]

III. How Bitcoin Works

The Bitcoin system was designed to create an electronic trail for each bitcoin back to its point of origin. This type of trail would make double spending a bitcoin extremely difficult. While the digital history of each bitcoin is available in a public ledger called the "block chain," each Bitcoin transaction is designed to be anonymous. The block chain maintains a record of every transaction ever processed, allowing Bitcoin users to authenticate each transaction.[8] The validity of each transaction is protected by digital signatures corresponding to the sending addresses, providing Bitcoin users full control over sending bitcoins from their own Bitcoin addresses.[9] Moreover, once consummated, the transaction cannot be reversed.[10]

Bitcoin can be acquired in various ways, including, accepting it as payment for goods and services, buying it from an exchange, trading traditional currency, or acquiring it by "mining."

Logistically, transfers of bitcoins between people or companies may be accomplished using a virtual "wallet" stored on a personal computer, mobile app or the web. Bitcoin exchanges and money transmitters evolved in order to facilitate these transactions by offering Bitcoin users a platform for the purchase and sale of bitcoins using different currencies. Since Bitcoin's inception, exchanges have become the most common means for acquiring bitcoin. At one time, Mt. Gox was the largest of these exchanges.

Mining, another means for acquiring bitcoin, is a process by which software is run through specialized hardware on a user's computer, using its computing power to process and verify transactions, secure the Bitcoin

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1 Verified Petition for Recognition and Chapter 15 Relief ¶ 9, In re: MtGox Co., Ltd., Case No. 3:14-bk-31229 (Bankr. N.D. Tex. Mar. 9, 2014), ECF No. 2; see also Robert McMillan, The Inside Story of Mt. Gox, Bitcoin's $460 Million Disaster, Wired Enterprise (March 3, 2014, 6:30 AM), http://www.wired.com/wiredenterprise/2014/03/bitcoin-exchange/ (noting that it is believed that the millions in losses at Mt. Gox resulted from skimming by hackers over several years).
2 Joshua Brustein, True Believers Cheer the Fall of Bitcoin Exchange Mt. Gox (Feb. 25, 2014), Bloomberg Businessweek, http://www.business week.com/articles/2014-02-25/bitcoin-exchange-mt-dot-gox-falls-true-believers-cheer
3 Maria Bustillos, The Bitcoin Boom, The New Yorker (April 2, 2013), http://www.newyorker.com/online/blogs/elements/2013/04/the-future-ofbitcoin.html.
4 Satoshi Nakamoto, Bitcoin: A Peer-to-Peer Electronic Cash System, https://bitcoin.org/bitcoin.pdf .
5 Id.
6 Id.
7 Id.
8 Frequently Asked Questions: How Does Bitcoin Work?, available at https://bitcoin.org/en/faq
9 Id.
10 Id.

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network, and keep all users in the system synchronized together.[11] In exchange, new bitcoins are created and issued to those users. The recipients of these newly minted bitcoins are known as miners.[12] Notwithstanding the creation of new bitcoins through mining, the system is engineered so that no more than 21 million bitcoins will ever exist.[13] Consequently, as more people sign up to become miners, the mining process will yield less and less new bitcoins. However, because bitcoin is not a physical currency, bitcoins can be divided infinitely.[14]

IV. Regulation of Bitcoin

Since Bitcoin is not created by any government or central bank, laws which regulate banking and the financial industry may not be applicable to Bitcoin and Bitcoin transactions. For example, the FDIC has indicated, at least in one context, that a money transmitter such as PayPal is not acting as a bank for purposes of federal banking laws.[15] Similarly, Federal Reserve Chairwoman Janet Yellen provided testimony before the Senate in February 2014 that the Federal Reserve does not have regulatory authority over Bitcoin since it takes place outside the banking system.[16] As a result, parties dealing in bitcoin cannot expect any protection for deposits or investments from the Federal Deposit Insurance Corporation ("FDIC").[17] However, the Federal Trade Commission, the Consumer Financial Protection Bureau, the Securities and Exchange Commission and the Commodity Futures Trading Commission are all currently studying the potential need for virtual currency regulation.[18] Additionally, due to the slow pace at which federal regulations may evolve, state governments in New York and California are rapidly exploring possible state regulations for virtual currency.[19]

Notwithstanding the current lack of government regulation, it is believed that Bitcoin and other virtual currencies, especially when traded through an exchange, are subject to moneylaundering rules under the Bank Secrecy Act.[20] In March 2013, the Financial Crimes Enforcement Network ("FinCEN") of the U.S. Treasury Department released a statement that virtual currency administrators and transmitters (i.e. exchanges) must register with FinCEN as a money services business ("MSB") and report large or suspicious transactions.[21] This is not surprising considering Bitcoin's anonymity and irreversibility, which make it susceptible to use in criminal transactions, including laundering money from illegal sales of drugs, firearms, weapons and stolen personal information. But for these same reasons, it is unclear how a Bitcoin exchange can fully comply with such reporting requirements since Bitcoin transfers are anonymous by design.

The recent charges brought by the U.S. Attorney in New York against underground Bitcoin user Robert M. Faiella a/k/a "BTCKing," and Charlie Shrem, the CEO and Compliance Officer for U.S. Bitcoin exchange BitInstant, highlight the potential complications involved in regulating Bitcoin and prosecuting illegal Bitcoin activity.[22] Faiella and Shrem were both charged with conspiracy to commit money laundering and operating an unlicensed money transmitting business in connection with an alleged scheme to sell over $1 million in bitcoins

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11 Frequently Asked Questions: What is Bitcoin mining? and How does Bitcoin mining work?, available at https://bitcoin.org/en/faq
12 Id.: see also Sam Biddle, What is Bitcoin?, Gizmodo Magazine (May 19, 2011), available at http://gizmodo.com/5803124/what-is-bitcoin.
13 Sunny Freeman, What is Bitcoin? 11 Things You Need to Know about the Digital Currency, The Huffington Post (Jan. 26, 2014, 11:21PM), http://www.huffingtonpost.ca/2014/01/26/what-is-bitcoin_n_4661604.html.
14 Freeman, supra.
15 Pamela J. Martinson & Christopher P. Masterson, The Hazards of Lending to Bitcoin Users, American Banker (Jan. 2, 2014, 10:00 AM), http://www.americanbanker.com/bankthink/the-hazards-of-lending-to-bitcoin-users-1064622-1.html (citing Troy Wolverton, Feds: PayPal not a Bank, CNET (March 12, 2002), http://news.cnet.com/2100-1017-858264.html.
16 Steven Rusolillo, Yellen on Bitcoin: Fed Doesn't Have Authority to Regulate It in Any Way, The Wall Street Journal, http://blogs.wsj.com/moneybeat/2014/02/27/yellen-on-bitcoin-fed-doesnt-have-authority-to-regulate-it-in-any-way/ (Feb. 27, 2014, 12:43 PM).
17 It is also unlikely that parties engaging in Bitcoin transactions would be entitled to customer protection by the Securities Investor Protection Corporation ("SIPC").
18 Ryan Tracy & Stephanie Armour, Losses Mobilize the Bitcoin Police, The Wall Street Journal, March 3, 2012, also available at http://online.wsj.com/news/articles/SB10001424052702304585004579415422696315770.
19 Carter Dougherty, New York Vying With California to Write Bitcoin Rules, Bloomberg News (Jan. 27, 2014 8:18PM), http://www.bloomberg.com/news/2014-01-27/new-york-duels-california-to-write-bitcoin-rules.html; see also Carter Dougherty, New York to Accept Bitcoin-Exchange Proposals to Speed New Rules, Bloomberg News (Mar. 11, 2014 2:19 PM), http://www.bloomberg.com/news/2014-03-11/new-york-to-accept-bitcoin-exchange-proposals-to-speed-new-rules.html.
20 Tracy & Armour, supra.
21 U.S. Dept. of Treas., Guidance No. FIN-2013-G001, Application of FinCEN's Regulations to Persons Administering, Exchanging, or Using Virtual Currencies (March 18, 2013), available at http://fincen.gov/statutes_regs/guidance/html/FIN-2013-G001.html; see also Tracy & Armour, supra.
22 U.S. Attorney's Office (S.D.N.Y) Press Release, Manhattan U.S. Attorney Announces Charges Against Bitcoin Exchangers, Including CEO of Bitcoin Exchange Company, For Scheme To Sell And Launder Over $1 Million In Bitcoins Related To Silk Road Drug Trafficking (Jan. 27, 2014), available at http://www.justice.gov/usao/nys/pressreleases/ January14/SchremFaiellaCharges PR.php; see also Mukund H. Sharma, United States: Bitcoins and Liability in the Wake of Recent Silk Road Arrests (Feb. 16, 2014), http://www.mondaq.com/unitedstates/x/293076/IT+internet/Bitcoins+and+ Liability+in+the+Wake+of+Recent+Silk+Road+Arrests
23 Id.

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to users of "Silk Road," a drug trafficking website.[23] In Faiella's case, the issue of liability for accepting payment for illegal items with Bitcoin may not be all that different than conventional theories of prosecution for money laundering against sellers who knowingly accept proceeds of illegal activity.[24] Shrem's case on the other hand, may have a more troubling impact on the Bitcoin system as whole, since it would potentially subject all virtual currency exchanges to prosecution for abuse and misuse by their users.[25] In this context, an exchange's degree of knowledge of and involvement with suspicious activity will likely be the key factors determining criminal liability.

At the present time, "bitcoin and other digital-payment systems are operating in a sort of regulatory vacuum, with exchanges and money transmitters free to start up and solicit U.S. customers without the same type of oversight or protections that apply to credit cards, banks or other financial service business."[26] In this vacuum, the doctrine of caveat emptor cannot be overly emphasized.

V. Treatment of Bitcoin under Existing Commercial Law

Just as in the regulatory sphere, there is uncertainty as to how Bitcoin and related transactions will be regarded under existing commercial laws which were not enacted or designed to specifically address virtual payment systems. A fundamental inquiry in this regard must ask what exactly is a bitcoin? It does not have a tangible or physical manifestation, yet it has the capacity to act as a store of value and as a financial medium for the exchange of goods and services. In a bankruptcy context, bitcoin held by a debtor upon filing, would likely qualify as property of a bankruptcy estate since the debtor would have a legal or equitable interest therein.[27] Accordingly, a bankruptcy trustee should be able to assert control over a debtor's bitcoins (or the value thereof) and liquidate them for the benefit of the estate and creditors. Trustees would also be well advised to question debtors as to existing or past Bitcoin investments or transactions. Failure of an individual debtor to schedule or adequately explain the absence of previously held bitcoins, or turnover existing bitcoins to the trustee, could provide grounds to object to the debtor's discharge.[28] Pre-bankruptcy transfers of bitcoins by a debtor may also provide a basis for a trustee to pursue preference or fraudulent conveyance actions against the recipients of the bitcoins.[29] Again, such actions may be complicated by the anonymous nature of Bitcoin transfers and the inability to identify a recipient.

Under non-bankruptcy law, bitcoins are likely to be classified as a general intangible[30] or payment intangible[31] for purposes of Article 9 of the Uniform Commercial Code ("UCC") in most jurisdictions. As such, a creditor seeking to take bitcoin as collateral would need a security agreement with the debtor sufficiently identifying the collateral. Perfection of the security interest will require the filing of a UCC-1 Financing Statement in the state where the debtor is located as prescribed under the UCC. Failure to perfect may render the creditor's security interest subject to avoidance by a subsequently appointed bankruptcy trustee. Moreover, since it is not uncommon for a secured lender to take a blanket security interest in all property of a debtor, including general intangibles, many banks and financial institutions may already hold security interests in a debtor's bitcoins without even realizing that their security interest may extend to cover such property.

At least one commentator has also pointed out that because money transmitters or exchanges may not constitute banks as it relates to Bitcoins transactions, bitcoin held by an exchange would not qualify as a "deposit account" under the UCC, but rather as a "payment intangible." Thus perfection in virtual currency of a debtor held on such a platform cannot be accomplished through the usual method of perfection for deposit accounts by an account control agreement.[32] Consequently, the

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24 Sharma, supra.
25 Id.
26 Tracy & Armour, supra.
27 Under 11 U.S.C. § 541, property of the estate is broadly defined to include all legal and equitable interests of the debtor as of the commencement of the case, which includes all types of property, including tangible and intangible. See 5 Collier on Bankruptcy ¶ 541.03 (Lawrence P. King et al. eds., 15th ed. rev. 1997).
28 11 U.S.C. § 727(4)(A), (5) and (6)(A).
29 11 U.S.C. §§ 547, 548 and 550.
30 Section 9-102(a)(42) of Revised Article 9 of Uniform Commercial Code defines a "general intangible" as: "any personal property including things in action, other than accounts, chattel, paper, commercial tort claims, deposit accounts, documents, goods, instruments, investment property, letter-of-credit rights, letters of credit, money and oil, bas, or other minerals before extraction. The term includes payment intangibles and software."
31 Section 9-102(a)(61) of Revised Article 9 of the Uniform Commercial Code defines a "payment intangible" as: "a general intangible under which the account debtor's principal obligation is a monetary obligation."
32 Martin & Masterson, supra.

absence of an account control agreement may make it more difficult for a secured creditor to realize upon its collateral in the event of a default by a debtor who is performing Bitcoin transactions through an exchange.

In light of the significant fluctuations in value of bitcoin and the difficulty secured creditors may experience in gaining control over and liquidating bitcoin, the use of bitcoin as collateral in conventional lending transactions remains highly suspect. Cautious lenders may also wish to consider including representations and covenants in lending agreements which prohibit or limit a borrower's acceptance or use of bitcoin in its operations.[33]

VI. The Mt. Gox Catastrophe

Mt. Gox, formerly the largest Bitcoin exchange in the world, filed for bankruptcy in Tokyo in February 2014 after nearly half a billion dollars worth of cryptocurrency (at that time) disappeared from customer accounts.[34] In the same month, Mt. Gox was sued in federal court in Chicago by an Illinois resident alleging a class action lawsuit for misappropriation and fraud, among other claims.[35] Prior to the Illinois lawsuit, the company was sued by CoinLab, Inc. in Washington for an alleged $75 million breach-of-contract claim under an exclusive licensing agreement for the U.S. and Canada.[36] As a result of this proceedings Mt. Gox filed for bankruptcy protection in Dallas, Texas on March 9, 2014, under Chapter 15 of the U.S. Bankruptcy Code, which allows debtors to shield U.S. assets while the main bankruptcy proceeding is resolved in another country.[37] The U.S. petition listed approximately $37.7 million in assets and $63.9 million in liabilities, noting that almost 750,000 customer bitcoins and 100,000 of its own, about 7 percent of all bitcoins in existence worldwide, were missing and probably stolen.[38] Mt. Gox's U.S. bankruptcy filing was targeted at protecting its U.S. assets from creditors and halting the two U.S. lawsuits pending against the exchange.[39] That relief was temporarily granted by the Texas Bankruptcy Court on March 10, 2014.[40] Given the recent fall of Mt. Gox and increased awareness with respect to the possible security pitfalls of Bitcoin and other cryptocurrencies, it remains to be seen whether virtual currencies and the exchanges that trade them will survive and how they might evolve.

VII. Conclusion

The above limited analysis demonstrates that parties currently conducting transactions using Bitcoin (or similar cryptocurrencies[41]) are subject to significant risk and uncertainty as to their rights, remedies and obligations under current statutes, regulations and commercial law. Future legislation and case law development will likely provide more clarity with respect to many issues. Until this occurs, however, parties should exercise a high degree of caution when contemplating virtual currency transactions.

33 Id.
34 Tom Hals, Mt. Gox files U.S. bankruptcy, opponents call it a ruse, Reuters (March 10, 2014), http://www.reuters.com/article/2014/03/10/usbitcoin-mtgox-bankruptcy-idUSBREA290WU20140310; see also Verified Petition for Recognition and Chapter 15 Relief ¶ 9, In re: MtGox Co., Ltd., Case No. 3:14-bk-31229 (Bankr. N.D. Tex. Mar. 9, 2014), ECF No. 2.
35 Hals, supra.; see also Complaint, Greene v. Mt. Gox, Inc., et al., Case No. 1:14-cv-1437 (N.D. Ill. Feb. 27, 2014), ECF No. 1.
36 Hals, supra.; see also Complaint, LabCoin, Inc. v. Mt. Gox KK, et al., Case No. 2:13-cv-0777 (W.D. Wash. May 2, 2013), ECF No. 1.
37 Chapter 15 Petition for Recognition of Foreign Proceeding, In re: MtGox Co., Ltd., Case No. 3:14-bk-31229 (Bankr. N.D. Tex. Mar. 9, 2014), ECF No. 1.
38 Verified Petition for Recognition and Chapter 15 Relief ¶¶ 6 & 9, In re: MtGox Co., Ltd., Case No. 3:14-bk-31229 (Bankr. N.D. Tex. Mar. 9, 2014), ECF No. 2.
39 Chapter 15 Petition for Recognition of Foreign Proceeding, and Declaration of Robert Marie Mark Karpeles, In re: MtGox Co., Ltd., Case No. 3:14-bk-31229 (Bankr. N.D. Tex. Mar. 9, 2014), ECF Nos. 2 & 3; Hals, supra.
40 Order Granting Application For Provisional Relief, Scheduling Recognition Hearing, and Specifying Form and Manner of Notice, In re: MtGox Co., Ltd., Case No. 3:14-bk-31229 (Bankr. N.D. Tex. Mar. 10, 2014), ECF No.13.
41 While there are numerous alternatives to Bitcoin, some of the more commonly known cryptocurrencies include Dogecoin, Litecoin, Namecoin, Freicoin, Quarkcoin and Peercoin. Ryan W. Neal, Bitcoin Competitors: What You Should Know About 6 Alternative Cryptocurrencies, International Business Times (Jan. 15, 2014 5:53 PM), http://www.ibtimes.com/bitcoin-competitors-what-you-should-know-about-6-alternativecryptocurrencies-1540168

Annual TBBBA Installation Dinner
June 5, 2014
Palma Ceia Golf and Country Club

Going Once, Going Twice... And The Winner is B.L.E.S.!

by: Stephanie C. Lieb, and Megan W. Murray, Trenam Kemker

This year's Annual TBBBA Installation Dinner was held on June 5th at the Palma Ceia Golf and Country Club, and it was without a doubt a smashing success. We thanked and honored those who spent the last year laboring tirelessly to serve Tampa Bay's bankruptcy bar and the community at large. Edward Peterson of Stichter Riedel Blain & Prosser, P.A. took the reins from Stephenie Anthony of Anthony & Partners, LLC to lead the TBBBA into 2015.

Harley Riedel introduced Johnathan "Boomer" Hart, a third year Stetson University Law Student, who awarded the Judge Alexander L. Paskay Bankruptcy Scholarship Award. The award was presented by Judge Paskay's widow, Rose.

The live and silent auction components were an exciting new addition to this year's festivities. Stephanie Lieb of Trenam Kemker served as Auction Chair. Rose White of Moecker Auctions served as Auctioneer for the night, auctioning seven live auction items generously donated by our local bankruptcy community. The following items were auctioned during the evening (in alphabetical order by donor):

Beach Vacation
valued at $2,200.00
Donated by ANTHONY & PARTNERS
Select from five locations for a one week beach house stay, including beach chairs and goodies.

Anna Maria Getaway
valued at $1,800.00
Donated by GRIMES GOEBEL GRIMES HAWKINS GLADFELTER & GALVANO
One week vacation at three bed/two bath home on Anna Maria Island, complete with beach gear.

High Tech Fun in the Sun
valued at $865.00
Donated by HILL WARD HENDERSON
iPad mini, waterproof case, waterproof Bluetooth speaker, beach bag, hat and towels.

Let's Go Fishing
valued at $600.00
Donated by MCINTYRE THANASIDES
Full day fishing trip with captain for three, food and drinks, and outdoor world gift card.

Busch Gardens Family Fun
valued at $ PRICELESS
Donated by OSCHER CONSULTING
Rare opportunity to experience being "Vet for a Day" to the park's animals, tickets and goodies.

Pamper Yourself
valued at $650.00
Donated by SHUMAKER, LOOP & KENDRICK
Full day of spa and relaxation for two, including lunch at Safety Harbor Resort & Spa.

Bankruptcy Geek's Dream
valued at $512.00
Donated by the TAMPA BANKRUPTCY JUDGES
A collection of six Chapter 11 books published by the American Bankruptcy Institute, autographed by our judges, together with a one-time cut-in-line court order, good for one use per judge.

The response to the live auction items was overwhelming. Over $10,500 was raised in the live auction alone. In response to the competitive bidding, the Tampa Bankruptcy Judges sweetened the pot and doubled their "nerdy" gift, garnering a total of $2,900. John Anthony also threw in a second week-long stay at any one of his five beach houses. A huge thanks to the donors and successful bidders of all of our live auction items, as well as our event sponsors, Tranzon Driggers, Larry S. Hyman, CPA, PA, and Moecker & Associates.

An impressive twenty eight gift baskets were donated for the silent auction as well, which ran throughout the evening. Bankruptcy bar members donated baskets of coffee, sporting goods and event tickets, skincare and spa items, trips to local parks, meals, shows, travel gear, and the consummate crowd pleaser, wine. The baskets ranged in value from $50 to $750, with literally something for everyone. Over $2,800 was raised in the silent auction.

At the end of the evening, a total of $13,410 was raised for the beneficiary of this year's auction, The Bankruptcy Law Educational Series Foundation, Inc. ("BLES"). BLES was incorporated in Florida in 2012 by the voluntary Bankruptcy Bar Associations throughout the Middle District of Florida. It is a not for profit entity with IRC 501(c)(3) recognition. The purpose of BLES is to promote bankruptcy legal education and to fund pro bono and other public service projects relating to the practice of bankruptcy in the Middle District of Florida. BLES received start-up funding by way of generous contributions from the Business Law Section of the Florida Bar, the Jacksonville Bankruptcy Bar Association, the Central Florida Bankruptcy Law Association, the Tampa Bay Bankruptcy Bar Association and the Southwest Florida Law Association. Thanks to the overwhelming success of our auction, BLES will sustain its mission and fund pro bono and other public service projects right here in our community. Kudos to all of our members, and their generous support and participation in this event!

Bad Karma: Exploring the Boundaries of Fisker

by: Christopher Broussard
Suzy Tate, P.A.

A secured creditor's inequitable actions came back to haunt it when the Delaware Bankruptcy Court limited its credit bid rights in *In re Fisker Auto. Holdings, Inc.*, Case No. 13-13087-KG, 2014 Bankr. LEXIS 230 (Bankr. D. Del. Jan. 17, 2014) ("*Fisker*"). To make sense of *Fisker* and its significance going forward, this article reviews its facts and progression, examines one of the first cases interpreting its conclusion, and contemplates a possible threshold analysis arising in its wake.

Facts of the Case

The Fisker saga began on October 11, 2013, when Hybrid Tech Holdings, LLC ("Hybird") purchased a $168.5 million secured claim against Fisker Automotive Holdings, Inc. ("Debtor") for $25 million (i.e., for $0.15/$1.00). The debtor then entered bankruptcy on Friday, November 22, 2013, to accomplish a sale of substantially all of its assets to Hybrid in exchange for a $75 million credit bid. The debtor filed a sale motion requesting a private sale to Hybrid, concluding the cost and delay arising from an auction or pursuit of a purchaser other than Hybrid was unlikely to result in an increased sale price. The debtor insisted hearings on the sale motion and confirmation occur no later than January 3, 2014.

The creditor's committee, appointed on December 5, 2013, immediately opposed both Debtor's sale motion and Hybrid's right to credit bid, proposing, as an alternative, a competitive auction with Wanxiang America Corporation ("Wanxiang"). Wanxiang recently spent $300 million acquiring certain assets of A123 Systems, which include, significantly, the primary component of Debtor's electric cars: the lithium ion battery.[1] Wanxiang was thus an attractive and willing auction participant with a vested interest in purchasing Debtor's assets.

Both sides stipulated that failure to cap Hybrid's right to credit bid eliminated any realistic possibility of an auction. If, however, Hybrid was unable to credit bid or its credit bid was capped at $25 million, there was a strong likelihood of an auction with a solid chance of creating material value for the estate "over and above the current Hybrid bid."[2] The parties also agreed the entirety of assets available for sale included assets subject to properly perfected Hybrid liens, assets not subject to properly perfected Hybrid liens, and assets where there is a dispute as to whether Hybrid had a properly perfected lien that was unlikely to be resolved quickly or easily.

Not so Fast: The *Fisker* Outcome

The basics of credit bidding are found at 11 U.S.C. § 363(k), which provides holders of allowed secured claims, the option to purchase property securing their claim and if they elect to do so, offset the purchase price of that property by the amount of their secured claim. Significantly, however, a secured creditor's right to credit bid is not absolute; instead, that right is subject to court approval and may be denied or modified "for cause."[4]

In *Fisker*, the Court used the "for cause" provision of § 363(k) to limit Hybrid's credit bid to $25 million, explaining the "evidence in this case is express and unrebutted that there will be no bidding – not just the chilling of bidding – if the Court does not limit the credit bid."[5] The Court further chided: "Hybrid as the proposed sale purchaser insisted on an unfair process, i.e., a hurried process, and the validity of its secured status has not been determined…A decision to authorize an uncapped credit bid under the facts of this case would be unprecedented and unacceptable."[6]

Hybrid immediately filed two emergency motions, seeking leave to appeal the bankruptcy court's ruling[7] and seeking a direct appeal to the Third Circuit.[8] The U.S. District Court for the District of Delaware denied both motions, reasoning that "interfering with the Bankruptcy Court's decision making at this early stage is more likely to impede, rather than hasten, resolution of the cases by delaying, for instance, the Bankruptcy Court's ability to resolve the issues remaining."[9]

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1 In re Fisker, 2014 Bankr. LEXIS 230, at *13-14.
2 Id. at *6-7.
3 Id. at *8.
4 In re Phila. Newspapers, LLC, 599 F.3d 298, 315 (3d Cir. Pa. 2010).
5 In re Fisker, 2014 Bankr. LEXIS 230, at *14.
6 Id. at *16-17.
7 Hybrid Tech Holdings, LLC v. Official Comm. of Unsecured Creditors of Fisker Auto. Holdings, Inc. (In re Fisker Auto. Holdings), Case No. 14-CV-99-GMS, 2014 U.S. Dist. LEXIS 15497 (D. Del. Feb. 7, 2014).
8 Hybrid Tech Holdings, LLC v. Official Comm. of Unsecures Creditors of Fisker Auto. Holdings, Inc. (In re Fisker Auto. Holdings, Inc.), Case No. 14-CV-99-GMS, 2014 U.S. Dist. LEXIS 17689 (D. Del. Feb. 12, 2014).
9 Id. at *11-12.

Bad Karma

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The District Court also expressly prohibited Hybrid from filing any additional motions on the credit bidding issue, characterizing their previous four emergency motions filed over three days as "[of] dubious merit and even more doubtful urgency," an unnecessary burden, and an impediment. The District Court further concluded: "It appears that Hybrid's persistent haste is not entirely out of character and may be part of the 'rush to purchase' and attempt to 'short-circuit the bankruptcy process' for which the Bankruptcy Court chastised Hybrid in its January 17th order."

Shortly after the District Court rulings, a three day auction was conducted with both Wanxiang and Hybrid participating. On February 14, 2014, Debtor submitted notice to the Court indicating Wanxiang won the auction with a final bid of nearly $150 million.

Pause the Cause: *In re Free Lance-Star*

In *Fisker*, the Court explicitly states the "for cause" basis for limiting Hybrid's credit bid is the freezing effect failure to do so would have on the auction process.[10] That result is troubling because a secured creditor will, of course, always chill bidding in any situation where they can credit bid the face value of debt against assets with a lower market value. Limiting credit bidding in that situation thus erodes a creditor's ability "to purchase collateral for what it considers the fair market price (up to the amount of its security interest) without committing additional cash to protect the loan," which is, essentially, a creditor's primary protection against the risk of their collateral being sold at a depressed price.[11]

Fortunately, additional facts in Fisker, such as, for example, Hybrid using a contrived deadline to force a pre-arranged sale process in the face of both

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10 In re Fisker, 2014 Bankr. LEXIS 230, at *14 (Bankr. D. Del. Jan. 17, 2014) ("Thus, the 'for cause' basis upon which the Court is limiting Hybrid's credit bid is that bidding will not only be chilled without the cap; bidding will be frozen.").
11 RadLAX Gateway Hotel, LLC v. Amalgamated Bank, 132 S. Ct. 2065, 2070 n.2 (U.S. 2012).

Tampa Bay Bankruptcy Bar Association 16th Annual Golf Tournament

April 25, 2014

MacDill Air Force Base

A special thanks to Mike Markham for the many years that he has coordinated the golf tournament

Bad Karma

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certain competition and a mixed bag of liens over the Thanksgiving, Christmas, and New Year's holidays, seemed to drive the Court's eventual conclusion.[12] In the case *In re Free Lance-Star Publ'g Co.*, Case No. 14-30315-KRH, 2014 Bankr. LEXIS 1611 (Bankr. E.D. Va. Apr. 14, 2014) ("*Free Lance Star*"), which is remarkably similar, factually, the Court reaches a similar conclusion, explaining: "The court in *In re Fisker* found 'cause' existed…where the secured lender has chilled the bidding process by inequitably pushing the debtor into bankruptcy so that it could short-circuit the bankruptcy process."[13] *Free Lance Star* then concludes a *confluence* of mixed liens, overly zealous loan-to-own strategy, and negative impact of misconduct on the auction process, requires curtailment of credit bid rights.[14]

Conclusion

As the body of case law interpreting and applying *Fisker* expands, its boundaries will become more defined. The confluence approach of *Free Lance Star* seems a comprehensive restatement of reasoning underlying the conclusion in *Fisker*. Accordingly, the factors discussed in *Fisker* and *Free Lance Star*, as opposed to merely a chilled sale process and nothing more, is primed to become a new threshold for determining whether, under *Fisker* and its progeny, cause exists to limit a secured creditor's right to credit bid. In other words, bad karma accrued from sustained inequitable conduct might now prove costly.[15]

12 See In re Fisker, 2014 Bankr. LEXIS 230, at *14-16.
13 In re Free Lance-Star, 2014 Bankr. LEXIS 1611, at *19.
14 Id. at *25-26.
15 Karma is, coincidentally, the name of Fisker's flagship hybrid automobile.

Was *Brown* a *Rash* Decision?

by: Nicole Mariani Noel
Kass Shuler, PA

The 11th Circuit recently decided the *Brown* case which challenges the long-standing belief that liquidation or foreclosure value is the correct standard to apply when determining the value of a surrendered vehicle. In *Brown*, the Debtor sought to surrender a 2006 Keystone Challenger recreational vehicle under § 1325(a)(5)(C) in full satisfaction of Creditor's claim.[1] The Debtor argued that the replacement value standard under § 506(a)(2) governed valuation of the vehicle and accordingly, Creditor was fully secured as the value at least equaled the debt.[2] The Creditor objected to confirmation of the Chapter 13 Plan arguing that foreclosure or liquidation value should be used to determine the vehicle's value, not replacement value.[3]

The Bankruptcy Court for the Middle District of Georgia agreed with the Debtor's assertion that replacement and not foreclosure value controlled in surrender situations.[4] In the unpublished opinion, the Bankruptcy Court gives credence to the Supreme Court's decision in *Associates Commercial Corp. v. Rash*, however, ultimately distinguishes *Rash* as it was decided pre-BAPCPA and prior to the addition of § 506(a)(2).[5] The District Court affirmed the Bankruptcy Court's decision and the Creditor appealed to the 11th Circuit.[6]

In deciding the *Brown* case, the 11th Circuit took an in depth look at the *Rash* decision, which in turn requires us to do so. *Rash* is an 1997 pre-BAPCPA case which involved a Chapter 13 Debtor who proposed to retain collateral under § 1325(a)(5)(B) and bifurcate the secured claim into a secured and unsecured claim based on the foreclosure value of the collateral.[7] The Supreme Court focused on the plain language contained in § 506(a)(1), specifically, that the "value shall be determined in light of the purpose of the valuation and of the proposed disposition or use of such property," holding that different value standards should be applied depending on the proposed treatment of the collateral.[8] Thus, if debtor were retaining the collateral, the replacement value, as opposed to the liquidation value, would determine the secured claim amount.[9] However, applying *Rash* to *Brown's* facts, the liquidation value would control because the property was surrendered.

The 2005 revisions to the Bankruptcy Code under BAPCPA added Section 506(a)(2), which provides:

> If the debtor is an individual in a case under Chapter 7 or 13, such value with respect to personal property securing an allowed claim shall be determined based on the replacement value of such property as of the date of the filing of the petition without deduction for costs of sale or marketing. With respect to property acquired for personal, family, or household purposes, replacement value shall mean the price a retail merchant would charge for property of that kind considering the age and condition of the property at the time value is determined.[10]

The 11th Circuit found that § 506(a)(2) was specifically targeted to chapter 7 and 13 cases, thus mandating replacement value for personal property.[11] Where both § 506(a)(1) and (a)(2) apply, then the more specific language of § 506(a)(2) will control directing a replacement standard be utilized.[12] The *Brown* Court also addresses the argument that § 506 (a)(2) was added to the Bankruptcy Code to codify the *Rash* decision, stating that the "text of § 506 (a)(2) does not support that conclusion."[13]

Ultimately, *Brown* solidly states that for the purposes of chapter 7 and 13, replacement value is the correct standard when determining the value of personal

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1 In re Brown, 746 F.3d 1236, 1238 (11th Cir. 2014).
2 Id.
3 Id.
4 In re Brown, 2012 WL 6021469, (Bankr.M.D.Ga. Dec 04, 2012) (NO. 12-51926-JPS).
5 Associates Commercial Corp. v. Rash, 520 U.S. 953, 117 S.Ct. 1879 (1997).
6 Santander Consumer USA Inc. v. Brown, 2013 WL 3198000, Bankr. L. Rep. P 82,503 (M.D.Ga. Jun 21, 2013) (NO. 5:13-CV-68 CAR).
7 Associates Commercial Corp. v. Rash, 520 U.S. 953, 957, 117 S.Ct. 1879, 1883(1997).
8 Id.
9 Id.
10 11 U.S.C § 506(a)(2).
11 In re Brown, 746 F.3d at 1240.
12 Id 1240 - 1241.
13 Id. at 1241.

Rash Decision
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property. Regardless of the policy issues at play, the plain reading of the statue will control. However, *Brown* leaves open the possibility of other fact patterns where replacement value may not control.[14]

For instance, what are the ramifications for a 910 day vehicle? *Brown* touches on the subject and states that according to the "hanging paragraph," Section 506 does not apply to the claim for purposes of § 1325(a)(5). The question remains, however, whether § 506(a) not applying as the confirmation standard in chapter 13 would impact the allowance of a proof of claim under § 502(a) following disposition of the collateral. That question might seem to have been answered by the 11th Circuit's decision in the *Barrett* case in which the Debtor sought to argue that surrender of the Collateral (which could not be valued for chapter 13 plan purposes if the property were being retained) did not preclude the creditors right to bifurcate the claim for the purposes of having an unsecured claim if the collateral were surrendered.[16] Thus, *Brown* is not necessarily inconsistent with *Barrett*. What *Brown* does, however, is ignore the Uniform Commercial Code (UCC) and its commercially reasonable disposition test with respect to how a creditor following repossession may dispose of the collateral.

The 11th Circuit has provided clarity although not necessarily functionality in the *Brown* decision. The secured creditor is not typically in the vehicle sales business and performs functions typical to a mortgage servicer, collecting and applying payments to the outstanding account balance. Upon repossession or recovery of the vehicle, the secured creditor will liquidate the collateral, usually through auction and then file an unsecured deficiency claim for any remaining balance. By requiring replacement value, the court is imposing a new standard on the creditor that is not found under state law or the UCC. The effect of Brown has yet to be determined and it will be interesting to see if the vehicle market as a whole changes its form of liquidation to compensate for the new standard. Will lenders now store the vehicle and market over a period of time to allow for offers that are more reflective of replacement value? Or will they continue to pursue their former liquidation avenues and simply leave valuation to the Courts to determine the potential loss? It will be interesting to see the effects of this ruling and whether it is more academic in nature or if it has the same type of impact as its predecessors, *Rash* and *Barrett*.

14 Appellant, Santander Consumer USA Inc., moved for panel rehearing on April 16, 2014 in the Brown case for the court to examine the second issue on Appeal - Whether a debtor's plan may surrender such property 'in full satisfaction' of the creditor's secured claim.
15 In re Barrett, 543 F.3d 1239 (11th Cir.2008).

Supreme Court Clarifies Procedure for Deciding *Stern* Claims in Bankruptcy Courts, But Leaves Big Questions Unresolved

by Steven R. Wirth & John L. Dicks II
Akerman LLP

Introduction

Bankruptcy courts have jurisdiction over "core" and "non-core" proceedings. *See* 28 U.S.C. § 157. In "core" proceedings, bankruptcy courts can enter final judgments. *See* 28 U.S.C. § 157(b). In "non-core" proceedings, however, bankruptcy courts must make findings of fact and conclusions of law and send their rulings to the district court for *de novo* review. See 28 U.S.C. § 157(c).

In certain circumstances, Article III of the U.S. Constitution prohibits a bankruptcy court from entering a final judgment on a claim, even though it is designated as a "core" claim under § 157(b). *See Stern v. Marshall*, 131 S. Ct. 2594, 2608-20 (2011). In the vernacular, these claims are called "*Stern* claims." In the wake of Stern, there was no clear procedure for dealing with a *Stern* claim because lower courts assumed they were neither "core" nor "non-core" proceedings. *See In re Bellingham Ins. Agency, Inc.*, 702 F. 3d 553, 565 (9th Cir. 2012).

Holding

In *Executive Benefits Ins. Agency v. Arkison (In re Bellingham Ins. Agency, Inc.)*, 573 U.S. ____ (June 9, 2014), the Supreme Court clarified the procedure that bankruptcy courts should follow when they are presented with a Stern claim: they should proceed as if the claim were "non-core," sending findings of fact and conclusions of law to the district court for *de novo* review.

Background on Bankruptcy Courts' Jurisdiction

Before 1978, bankruptcy matters within the "summary jurisdiction" of the bankruptcy courts were referred by the federal district courts to specialized bankruptcy referees. *See Bellingham*, 573 U.S. at *4. In 1978, Congress enacted the Bankruptcy Reform Act which eliminated the "summary" distinction and mandated that "bankruptcy judges 'shall exercise' jurisdiction over 'all civil proceedings arising ender title 11 or arising in or related to cases under title 11.'" *See Bellingham*, 573 U.S. at *5.

In 1984, Congress enacted the Bankruptcy Amendments and Federal Judgeship Act, providing that federal district courts have original jurisdiction in bankruptcy cases and that they may refer to bankruptcy judges any "proceedings arising under title 11 or arising in or related to a case under title 11." *See Bellingham*, 573 U.S. at *6. In that act, Congress created "core" and "non-core" designations, which are codified in 28 U.S.C. § 157. *See Bellingham*, 573 U.S. at *6-7. As explained in *Bellingham*, the distinction between "core" and "non-core" is as follows:

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Deciding *Stern* Claims in Bankruptcy Courts

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> If a matter is core, the statute empowers the bankruptcy judge to enter final judgment on the claim, subject to appellate review by the district court. If a matter is non-core, and the parties have not consented to final adjudication by the bankruptcy court, the bankruptcy judge must propose findings of fact and conclusions of law. Then, the district court must review the proceeding de novo and enter final judgment.

Bellingham, 573 U.S. at *7. The distinction between "core" and "non-core" was clear until *Stern*.

Stern and the "_Stern_ Gap."

In *Stern*, the Supreme Court dealt with an apparent conflict between 28 U.S.C. § 157 and Article III of the U.S. Constitution. The Court held that Congress had violated Article III by granting the bankruptcy court the power to enter a final judgment on certain claims (e.g., a counterclaim for tortious interference against a creditor that had filed a proof of claim in the bankruptcy case). *See Bellingham*, 573 U.S. at *8 ("*Stern* made clear that some claims labeled by Congress as 'core' may not be adjudicated by a bankruptcy court in the manner designated by § 157(b)"). But the *Stern* Court did not explain what should be done when a bankruptcy court is presented with such a claim.

Confusion arose when lower courts attempted to apply the *Stern* holding. *See Bellingham*, 573 U.S. at *9. Since *Stern* claims are not "core," § 157(b) does not apply; and since *Stern* claims are not "non-core," § 157(c) does not apply. Lower courts called this the "*Stern* Gap." *See id*. In Bellingham, the Court resolved the confusion by holding that "[t]he statute permits *Stern* claims to proceed as non-core within the meaning of § 157(c)." *Id*.

Factual and Procedural Background of the Case

In *Bellingham*, the chapter 7 trustee brought claims for fraudulent conveyance against Executive Benefits Insurance Agency ("EBIA"), and others. *See Bellingham*, 573 U.S. at *2. Under the Bankruptcy Code, an action for fraudulent conveyance is a "core" proceeding. *See* 11 USC 157(b)(2)(H).

The Bankruptcy Court heard the claims and granted summary judgment; EBIA appealed and the district court conducted a *de novo* review, affirming the bankruptcy court; EBIA appealed to the Ninth Circuit Court of Appeals, which affirmed the district court. *See Bellingham*, 573 U.S. at *2-3. While the case was on appeal, the *Stern* decision was issued. *See id*. at *3. In light of *Stern*, EBIA moved to dismiss for lack of jurisdiction. See id. The Ninth Circuit agreed that the fraudulent conveyance claims were *Stern* claims. *See id*. However, the Ninth Circuit denied the motion to dismiss because: (1) EBIA had impliedly consented to the Bankruptcy Court's jurisdiction; and (2) if the Bankruptcy Court's jurisdiction was limited to proceeding under § 157(c), it could be deemed to have done so since the district court indeed had conducted a *de novo* review. *See id*.

On review, the Supreme Court adopted the Ninth Circuit's holding that fraudulent conveyance claims were *Stern* claims, even though the Ninth Circuit did not make this point clear. See Bellingham, 573 U.S. at *11 ("The Court of Appeals held, and we assume without deciding, that the fraudulent conveyance claims in this case are *Stern* claims"). The Court ruled that because the claims were *Stern* claims and because they were handled in the manner set forth under § 157(c), with the district court conducting a de novo review (albeit on appeal), final judgment on the claim was proper. See id. at *12.

Implications

With *Bellingham* and *Stern*, bankruptcy lawyers have ample tools for arguing that certain claims, including *Stern* claims, must be sent to the district court for *de novo* review.

Lingering Issues

While *Bellingham* ends a significant legal uncertainty by confirming that Stern claims may be resolved pursuant to the statutory mechanics prescribed for non-core claims and provides assurance that a *de novo* review by the district court can cure any Article III deficiency in earlier proceedings, unresolved questions of consent and waiver remain. Under 28 U.S.C. § 157(c)(2), bankruptcy courts may enter final judgments on non-core and Stern claims if the parties consent. See *Bellingham*, 573 U.S. at *12. The Ninth Circuit Court of Appeals ruled that EBIA had consented to the bankruptcy court's jurisdiction, but the *Bellingham* Court declined to review this decision. *See id*. at 13 ("we need not decide whether EBIA's contentions [regarding waiver and consent] are correct…").

By not addressing whether EBIA consented to the bankruptcy court's jurisdiction – much less whether it *could* consent – the Court left unanswered the question of what constitutes "consent" under 28 U.S.C. § 157. Perhaps more important, however, the Court left unresolved an apparent split between the Circuit Courts of Appeal as to whether a party may consent to the bankruptcy court's jurisdiction over *Stern* claims at all. *See Waldman v. Stone*, 698 F. 3d 910, 918 (6th Cir. 2012) (Article III protections cannot be waived because they implicate "the integrity of judicial decision making" rather than mere personal rights).

In light of the continued uncertainty regarding bankruptcy courts' Constitutional powers, the risk of waiver should remain a significant factor in considering an early objection to a bankruptcy court's purported jurisdiction. Litigants should be particularly careful not to "consent" to a bankruptcy court's jurisdiction by failing to timely challenge the court's jurisdiction in accordance with language included in a court's standard pre-trial order. While *Bellingham* did not address the issue, many bankruptcy courts (including the Middle District of Florida, Tampa Division) include an "opt-out" provision in their pre-trial orders, which sets a deadline for a party to file a motion requesting that the court determine whether the proceeding is "core" or otherwise subject to the entry of final orders by the court, otherwise the parties are deemed to have consented to the entry of final orders in the proceeding. Litigants must be careful not to waive their fundamental rights to *de novo* review of their case before a district court judge …at least until the *Waldman* split is resolved.

Balloon Piercing in Chapter 13

by: Christopher Broussard
Suzy Tate, P.A.

The recent case *In re Spark*, Case No. 8:13-bk-06685, 2014 Bankr. LEXIS 1992 (Bankr. M.D. Fla. May 5, 2014) ("*Spark*") joins the national consensus regarding the 11 U.S.C. § 1325 prohibition on balloon and any other type of uneven periodic payments on account of secured claims in chapter 13.

Confirmation & Secured Claims

11 U.S.C. § 1325 outlines confirmation requirements with respect to chapter 13 plans. Treatment of allowed secured claims, in particular, is contemplated at § 1325(a)(5)(A) through (C), which requires either: (1) the claim holder accept the plan; (2) the plan complies with the provisions of § 1325(a)(5)(B); or (3) debtor surrender property securing the claim.[1]

Section 1325(a)(5)(B) provides, essentially, that a chapter 13 plan may be confirmed over the objection of a secured creditor with the debtor retaining their property, so long as the debtor proposes to distribute property on account of the secured creditor's claim in an amount not less than the allowed amount of their secured claim. Property distributed on account of a secured claim may come in the form of periodic payments. However, § 1325(a)(5)(B)(iii)(I) specifically provides that if the debtor makes periodic payments on account of a secured claim, those payments "shall be in equal monthly amounts."[2]

This equal monthly amount requirement was added to the Bankruptcy Code in 2005 by the Bankruptcy Abuse Prevention and Consumer Protection Act ("BAPCPA").[3] Its purpose was "to curb abuses resulting from confirmed plans with balloon payments, whereby the debtors dismissed the case if unable to timely sell or refinance, and worse, sometimes refiled and then asked for another four or five illusory years."[4]

Curing Default

11 U.S.C. § 1322(e) applies when a chapter 13 plan proposes to cure default, stating: "Notwithstanding subsection (b)(2) of this section and section 506(b) and 1325(a)(5) of this title, if it is proposed in a plan to cure a default, the amount necessary to cure the default shall be determined in accordance with the underlying agreement and applicable nonbankruptcy law."

Right on the heels of BAPCPA, *In re Davis*, 343 B.R. 326 (Bankr. M.D. Fla. 2006) ("Davis") concluded § 1322(e) has the effect of overriding § 1325(a)(5) when arrears on a long term debt are cured under § 1322(b)(5). Consequently, as per *Davis*, the requirement of equal periodic payments specified at § 1325(a)(5)(B)(iii)(I) is inapplicable to payment of arrears on long term debt.[5]

In *Spark*, Wells Fargo filed a claim in debtor's chapter 13 case in the amount of $310,868.36, which included $83,197.67 in arrearages. Their claim was secured by a first mortgage against debtor's property, which was valued by the court at $135,000.00. Under her plan, the debtor proposed to pay Wells Fargo $746 per month for fifty-nine months, with a balloon payment due on the sixtieth month.

In refusing to confirm debtor's plan, the court unambiguously disagreed with Davis, explaining: "§ 1322 does not contradict - much less override - § 1325(a)(5). Section 1322 addresses a debtor's right to cure arrearages on long-term, secured debt, whereas § 1325 addresses the manner in which debtors must provide for secured claims. So the plain text of §§ 1322 and 1325 do not support the *Davis* court's interpretation."[6] The court further confirmed that interpreting § 1322 to effectively override § 1325 is contrary to legislative history.[7]

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1 See e.g., In re Newberry, Case No. 07-10170, 2007 Bankr. LEXIS 2351, at *6-7 (Bankr. D. Vt. July 10, 2007) ("…a plan must first meet one of the three conditions set forth in subsections (A), (B) or (C), but then if, as here, the debtor is trying to satisfy the criteria of subsection (B), the debtor must satisfy all three of the subparts of that subsection - and two of those subparts have two components each.").
2 11 U.S.C. § 1325(a)(5)(B)(iii)(I) ("if…property to be distributed pursuant to this subsection is in the form of periodic payments, such payments shall be in equal monthly amounts." (emphasis added)).
3 See e.g., Hamilton v. Wells Fargo Bank, N.A. (In re Hamilton), 401 B.R. 539, 543 (B.A.P. 1st Cir. 2009) ("BAPCPA amended § 1325(a)(5)(B) by requiring that, with respect to every allowed secured claim provided for by the plan, periodic payments be made in equal monthly amounts.").
4 In re Bollinger, Case No. 10-62344, 2011 Bankr. LEXIS 3339, at *6-8 (Bankr. D. Or. Sept. 2, 2011).
5 In re Davis, 343 B.R. at 328.
6 In re Spark, 2014 Bankr. LEXIS 1992, at *4 (citing Hamilton, 401 B.R. at 545-46).
7 Id.

Balloon Piercing

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Conclusion

The result in Spark is consistent with conclusions reached by other courts throughout the country. Those courts similarly hold implementation of § 1325(a)(5)(B)(iii)(I) to prohibit balloon payments to secured creditors in chapter 13 is consistent with both plain meaning and legislative intent and helps alleviate certain abuses of the bankruptcy process, previously effectuated through back-loaded chapter 13 plans.

Unfortunately, the § 1325(a)(5)(B)(iii)(I) equal payment requirement makes chapter 13 reorganization difficult, if not impossible, for debtors with seasonal income or with other, similar peculiarities in their income stream. However, because § 1325(a)(5) is disjunctive, it provides these debtors the option of either surrendering collateral or seeking consent to unequal payments.[10]

Finally, it's possible for a debtor to make a single payment in full at any time during the course of their plan.[11] In the event of an uneven income stream, it may be possible to time a large lump sum payment to coincide with peak income, thereby providing at least one option regarding uneven payments that could prove useful in the absence of consent.

8 See e.g., Hamilton, 401 B.R. at 543-45 (citing cases); In re Cupolo, Case No. 12-51633, 2013 Bankr. LEXIS 486, at *5 (Bankr. E.D. Ky. Feb. 5, 2013) ("Like the majority of courts, this court disagrees with Davis.").
9 See e.g., In re Lemieux, 347 B.R. 460, 465 (Bankr. D. Mass. 2006); In re Wagner, 342 B.R. 766, 772 (Bankr. E.D. Tenn. 2006); In re Gray, Case No. 07-07380-ESL, 2008 Bankr. LEXIS 3748, at *11-12 (Bankr. D.P.R. Nov. 24, 2008); In re Luckett, Case No. 07-24706-SVK, 2007 Bankr. LEXIS 3638, at *4 (Bankr. E.D. Wis. Oct. 24, 2007) ("The courts that have considered the equal monthly payment requirement have all agreed that balloon payments are not allowed over the objection of the secured creditor.").
10 See e.g., In re Rosa, 495 B.R. 522, 523 (Bankr. D. Haw. 2013) ("These requirements are stated in the disjunctive, so the plan need only satisfy one of the three tests.").
11 In re Bollinger, 2011 Bankr. LEXIS 3339, at *11 n.12 ("11 U.S.C. § 1325(a)(5)(B)(iii)(I) does not, of course, prohibit a single payment in full at any time during the course of the plan, assuming all other elements of §§1325 and 1322 have been complied with."); see also In re Lemieux, 347 B.R. at 465.

Realizing the Recovery: Recent Case Law from the Eleventh Circuit

by: Amanda Chazal and Daniel Fogarty
Stichter, Riedel, Blain & Prosser, P.A.

Section 362(k) provides for the recovery of actual damages by an individual injured by a willful violation of the automatic stay. Some recent decisions from the Eleventh Circuit provide guidance on who may benefit from a recovery, as well as what may be included in actual damages.

In Crouser v. BAC Home Loans Servicing (In re Crouser), No. 13-14304, 2014 WL 2444399 (11th Cir. June 2, 2014), the individual debtor recovered, but the creditors profited from a post-confirmation violation of the automatic stay. The debtor in Crouser filed an adversary proceeding against his mortgagor for a violation of the automatic stay. Ultimately, the debtor and the bank agreed to a settlement. Id at *1. The Chapter 13 Trustee opposed the proposed disbursement of the settlement proceeds, whereby the debtor would receive two-thirds of the proceeds, on the argument that the settlement funds were property of the estate. Id. The bankruptcy court determined that the proceeds resulting from the stay violation pursuant to § 362(k) were property of the estate, reasoning that the broad scope of § 1306(a)(1) encompasses proceeds from causes of action that a debtor acquires after the commencement of a case. The Eleventh Circuit, affirming the bankruptcy court's decision, noted that the debtor, not his estate, sued and obtained the settlement. Once the debtor had acquired the proceeds of the settlement, "his property vested in the estate, and the trustee was entitled to recover them." Id.

In Crouser, the debtor received none of the net proceeds following attorney fees, which instead funded a distribution to the unsecured creditors in an otherwise no asset case. If property of the estate can include proceeds from a post-petition stay violation, can unsecured creditors (or administrative expense claimants) potentially benefit from a debtor's emotional distress caused by a violation of the automatic stay? In Lodge v. Kondaur Capital Corp., No. 13-10919, 2014 WL 1813298 (11th Cir. May 8, 2014), the Eleventh Circuit considered a former chapter 13 debtors' recovery of actual damages for the emotional distress under § 362(k). The Eleventh Circuit ruled that emotional distress damages are appropriate, and adopted a test under which the plaintiff must (i) suffer significant emotional distress, (ii) clearly establish the significant emotional distress, and (iii) demonstrate a causal connection between the significant emotional distress and the violations of the automatic stay. Id. Although the Lodge court agreed with the lower court that the plaintiffs in Lodge did not make the requisite showing, the decision poses the question that if a debtor successfully recovers based on a claim for emotional damages during the pendency of the case, will the funds recovered go to compensate the debtor for the injury suffered or go to profit other creditors?

One way for the debtor to benefit would be to argue for a setoff. In another recent decision out of the Eleventh Circuit, property of the estate in a chapter 7 case included a Florida Consumer Collection Practices Act damages claim. Brook v. Chase Bank USA (In re Claudia Acosta—Garriga), No. 13-13538, 2014 WL 1910842 (11th Cir. May 14, 2014). In Brook, at issue was the bank's right to set off an FCCPA fine against its claim of $30,000 in dischargeable credit card debt. The Bankruptcy Court (Judge McEwen) denied the bank's request to set off the damage's award, stating that it would "be inequitable to permit" the bank to set off an award based on a violation of the FCCPA reasoning that it would allow the bank "to take illegal action without consequence." Id. at 3. The Eleventh Circuit cited to the bankruptcy court's reasoning, recognizing that "the FCCPA was enacted as a means of regulating the activities of consumer collection agencies within the state." Id. Reversing the district court's decision, the Eleventh Circuit affirmed the bankruptcy court's decision finding that the court's refusal to reduce the Trustee's FCCPA damages by the amount of credit card debt "was well within the bankruptcy court's reasoned and sound discretion." The fine was recovered by the trustee and administered to the estate. Id.

Although Brook involved a creditor's attempt to setoff damages under the FCCPA against a pre-petition claim in a chapter 7 case, the Eleventh Circuit upheld a decision on setoff as subject to the discretion of the bankruptcy courts. In Crouser, it does not appear that setoff was suggested as part of the settlement. Although not discussed, one possible option would have been for the debtor in Crouser to structure the settlement with the mortgagee that violated the stay in such a way as to benefit from a setoff. The debtor would have received a credit on its mortgage or other plan payments, and the mortgage holder would not have had any post-petition out-of-pocket costs. Courts have authorized debtors in chapter 13 cases to assert setoff of plan obligations against damages for willful stay violations. E.g., In re Seal, 192 B.R. 442, 457 (Bankr. W.D. Mich. 1996), and allowed creditors to do the same. In re Cox, 214 B.R. 635, 647 (Bankr. N.D. Ala. 1997) (applying recoupment to reduce compensatory damages of debtor by amount owed under plan to party violating automatic stay based on return of property seized).

Alternatively, the debtor could have attempted to allocate the settlement to its actual damages, and asserted a right to payment for those damages. E.g., In re Furgeson, 263 B.R. 28 (Bankr. N.D.N.Y. 2001) (payment of actual damages should be paid to debtor directly). Finally, although this certainly raises other potential arguments against the debtor, the debtor could have simply waited until the case was closed to pursue the claim, as was the case in Lodge.

People on the Go

The law firm of Shumaker, Loop & Kendrick, LLP, is pleased to announce that G. Thomas Curran, Jr., associate in the Tampa office, is the recipient of the Pro Bono Lapel Pin Award from the 13th Judicial Circuit Pro Bono Committee. This is the second year in a row Tom has received this award. The Pro Bono Lapel Pin Award is given to attorneys who donate between 50-99 hours toward pro bono work; Tom donated over 80 hours in 2013.

Tom primarily focuses his practice in bankruptcy, creditors' rights, and insolvency. Prior to joining Shumaker, Tom was with the law firm of Clark & Washington, LLC where he represented debtors in Chapter 7 and Chapter 13 bankruptcies. Tom received his J.D., cum laude, from Thomas M. Cooley Law School and his B.S., magna cum laude, from State University of New York at Brockport. While in law school, Tom was Senior Associate Editor of the Thomas M. Cooley Law Review, and he also interned for the Honorable David Lawson in the U.S. District Court for the Eastern District of Michigan.

Congratulations!

On May 21, 2014 Debtor's attorney Alan Borden along with his fiancé Juanita Ferrer brought Alan Nicolas Borden into the world at 8 lbs 3 ounces and 22 inches long.

May Tampa Bay Bankruptcy Bar Association Luncheon: Mediation Principles in Bankruptcy

Don Stichter and Harley Riedel present Shannon Cook with the Paskay Scholarship Award

Scott Shuker and John Anthony

The Cramdown
PO Box 1438
Tampa, FL 33601