BANKRUPTCY

R. Patrick Vance*

Once again, the Fifth Circuit handed down many decisions on bankruptcy issues during the survey period.[1] The author has reviewed most of the cases, but has omitted discussion of several cases where the results were too fact-intensive. Unlike last year's results where there were almost as many reversals as affirmances, this year's trend was overwhelmingly in favor of affirming the lower courts. When one factors in those cases that were affirmed in part and reversed in part, there appears to have been twenty-four affirmances and only five reversals.

An issue that cropped up more frequently than others in this year's batch of cases was the question of finality—that is, whether the order appealed from was a final or an interlocutory order. This is an area of considerable doubt and confusion. Oftentimes the distinction between an interlocutory and a final order is relatively obscure and certainly confusing. There is still no bright-line test that shines a beacon for practitioners. The facts still weigh heavily on the analysis, and one worries that docket control creeps into the disposition of the issue. With the National Bankruptcy Review Commission looking closely at the Code, perhaps this is an area for revision.

APPEALS

In a case of first impression in the Fifth Circuit, Judge Reynaldo G. Garza wrote that "the appointment of a trustee in a Chapter 11 case is an immediately appealable final order."[2] In *In re Cajun Electric Power Cooperative, Inc.*, the district court had withdrawn the reference and handled the bankruptcy case. Consequently, the appellate jurisdiction of the Fifth Circuit was governed by 28 U.S.C.§ 1291 rather than 28 U.S.C. § 158(d).[3] The uniqueness of this situation gave the parties latitude to argue whether the

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* Partner, Jones, Walker, Waechter, Poitevent, Carrère & Denègre, L.L.P. and member of the Louisiana Bar. Mr. Vance is a conferee of the National Bankruptcy Conference, a fellow of the American College of Bankruptcy, and a fellow of the American Law Institute.

1 The survey period includes cases from May 1995 to April 1996.

2 Cajun Elec. Power Coop., Inc. v. Central La. Elec. Co. (*In re* Cajun Elec. Power Coop., Inc.), 69 F.3d 746, 748 (5th Cir. 1995), *modified*, 74 F.3d 599 (5th Cir. 1996), *cert. denied*, 65 U.S.L.W. 3224, 3256 (U.S. Oct. 7, 1996) (No. 95-1727).

3 *Id.* at 747.

liberalized rules of finality in bankruptcy cases, as applied by courts interpreting § 158(d), should be extended to an appeal based on § 1291.[4]

The court first acknowledged that the usual rule of finality—a final order is one that ends the litigation—has been liberalized because of considerations unique to bankruptcy appeals.[5] The appellees, relying on *In re Hawaii Corp.*,[6] argued that the so-called liberal rule should only apply to an appeal from a bankruptcy court to a district court pursuant to 28 U.S.C. § 158(d), "not to appeals from a district court sitting in bankruptcy pursuant to section 1291."[7] The court followed the First,[8] Third,[9] Fourth,[10] and Seventh[11] Circuits in rejecting the reasoning of *In re Hawaii Corp.*[12]

Judge Garza then turned his attention to whether the liberalized concept of finality should permit the immediate appeal of an order supporting a trustee.[13] First, the court had to deal with one of its earlier opinions in which it had found that the appeal of the appointment of an interim trustee in a Chapter 7 case was not a final order.[14] The *In re Delta Services Industries* decision was promptly and properly distinguished from the *Cajun Electric* case.[15]

The Fifth Circuit found that it was in good company in treating the order as a final order since four other circuits had blazed the trial.[16] The court was especially persuaded by the First Circuit's rationale for asserting appellate jurisdiction,[17] The court first noted that "the appointment of a trustee in a Chapter 11 case is 'a decision of a significant and

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4 *Id.* at 747-48.
5 *Id.*
6 Cannon v. Hawaii Corp. (*In re* Hawaii Corp.), 796 F.2d 1139, 1141-42 (9th Cir. 1986).
7 *In re* Cajun Elec. Power Coop., 69 F.3d at 748.
8 Tringali v. Hathaway Mach. Co., 796 F.2d 553 (1st Cir. 1986).
9 *In re* Amatex Corp. 755 F.2d 1034 (3d Cir. 1985).
10 A. H. Robins Co. v. Piccinin, 788 F.2d 994 (4th Cir.), *cert. denied*, 479 U.S. 876 (1986).
11 *In re* UNR Indus., Inc., 725 F.2d 1111 (7th Cir. 1984).
12 *In re* Cajun Elec. Power Coop., 69 F.3d at 748.
13 *Id.*
14 Foster Sec., Inc. v. Sandoz, (*In re* Delta Serv. Indus.), 782 F.2d 1267 (5th Cir. 1986).
15 *In re* Cajun Elec. Power Coop., 69 F.3d at 748.
16 *In re* Plaza de Diego Shopping Ctr., Inc., 911 F.2d 820 (1st Cir. 1990); *In re* Sharon Steel Corp., 871 F.2d 1217 (3d Cir. 1989); *In re* Oklahoma Ref. Co., 838 F.2d 1133 (10th Cir. 1988); Dalkon Shield Claimants v. A. H. Robins Co., 828 F.2d 239 (4th Cir. 1987).
17 *In re* Cajun Elec. Power Coop., 69 F.3d at 748 (citing *In re* Plaza de Diego Shopping, Ctr., 911 F.2d at 826).

discrete dispute.'"[18] Furthermore, the Fifth Circuit found the following reasoning from *In re Plaza de Diego Shopping Center* persuasive:

> It seems plain that the decision of an appeal from the court's order [appointing a trustee] could not be meaningfully postponed until the end of the entire Chapter 11 proceeding. If an appeal were postponed until a plan of reorganization [was] confirmed, there would be no satisfactory way to vindicate the [debtor's rights].[19]

As the Fifth Circuit noted, without an immediate appeal, there is no effective relief from the trustee appointment.[20] Applying the non-liberal rule of finality would leave the debtor in the position of having to wait to appeal until after plan confirmation.[21] The impracticability of such a scenario drove the Fifth Circuit to the easy conclusion that the district court's appointment order was a final order for appeal purposes.[22]

In *In re Aegis Specialty Marketing Inc.*,[23] the per curiam decision of the court resulted in the dismissal of yet another appeal. The court held that the district court's order remanding the case to the bankruptcy court for further proceedings was not a final order for purposes of appeal.[24] In *In re Aegis Specialty Marketing, Inc.*,, the debtor appealed the district court's reversal of the bankruptcy court's confirmation of a reorganization plan under Chapter 11.[25] A creditor had appealed the confirmation order, arguing that the good faith requirement of section 1129(a)(3)[26] had not been met.[27] The district court reversed because the bankruptcy court had placed the burden of proof of establishing the good faith element of section 1129(a)(3) on the objecting creditor.[28] The district court

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18 *Id.* (quoting *In re* Plaza de Diego Shopping Ctr., 911 F.2d at 826).

19 *Id.* (quoting *In re* Plaza de Diego Shopping Ctr., 911 F.2d at 826).

20 *Id.*

21 *Id.*

22 *Id.*

23 Aegis Speciality Mktg. Inc. v. Ferlita (*In re* Aegis Speciality Mktg. Inc.), 68 F.3d 919 (5th Cir. 1995) (per curiam).

24 *Id* at 921.

25 *Id.* at 920.

26 Section 1129(a)(3) provides in pertinent part that "(a) The court shall confirm a plan only if all of the following requirements are met: .... The plan has been proposed in good faith and not by any means forbidden by law." 11 U.S.C. § 1129(a)(1994).

27 *In re* Aegis Specialty Mktg., 68 F.3d at 920.

28 *Id.* at 921.

concluded that the plan proponent has the burden of proof on whether a plan is proposed in good faith.[29] Thus, the case was remanded for further proceedings to determine the good faith issue.[30]

The Fifth Circuit raised the issue of jurisdiction *sua sponte* and required supplemental briefs of the parties.[31] The court concluded that it was without jurisdiction to reach the merits of the appeal.[32] As framed by the Fifth Circuit, the jurisdictional question it faced was whether "the district court's order reversing and remanding 'for further proceedings to determine whether such [reorganization] plan meets the requirements of 11 U.S.C. § 1129 is a 'final order' for purposes of appeal."[33]

The court pointed to prior Fifth Circuit precedent in reaching its conclusion.[34] The court had previously stated that when a district court, sitting as a court of appeal in bankruptcy, remands a case to the bankruptcy court for "significant further proceedings, the remand order is not 'final' and therefore, not appealable under [28 U.S.C.]§ 158(d)."[35] Additional fact-finding is "significant further proceedings" and, thus, not a final resolution.[36] However, "if the remand involves only ministerial proceedings, such as the entry of an order by the bankruptcy court in accordance with the district court's decision, then the order should be considered final."[37] The court explained that it was not holding that a reversal of the confirmation order is never a final order.[38] Rather, a case-by-case analysis is necessary and the court must look closely to the scope of the remand order to determine whether the order is final or interlocutory.[39]

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29 *Id*.
30 *Id.*
31 *Id.*
32 *Id*.
33 *Id*. (quoting the district court's Memorandum Opinion and Order at 5-6 (Mar. 29, 1995)).
34 *Id*. (citing Conroe Office Bldg., Ltd. v. Nichols (*In re* Nichols), 21 F.3d 690 (5th Cir.), *cert. denied*, 115 S.Ct. 422 (1994).
35 *Id*. Section 158(d) provides that "[t]he courts of appeals shall have jurisdiction of appeals from all final decisions, judgments, orders, and decrees entered under subsection (a) and (b) of this section." 28 U.S.C. § 159 (d) (1994)).
36 *In re* Aegis Specialty Mktg., 68 F.3d at 921.
37 *Id*. (citing Allegheny Int'l Credit Corp. v. Bowman (*In re* Bowman), 821 F.2d 245, 247 (5th Cir. 1987) (holding that a final order is one in which all that remains to be done is the mechanical entry of judgment)).
38 *Id.*
39 Heartland Fed. Sav. & Loan Ass'n v. Briscoe Enter., Ltd., II (*In re* Briscoe Enter., Ltd, II), 994 F.2d 1160 (5th Cir.), *cert denied*, 510 U.S. 992 (1993).

The court also concluded that it did not have jurisdiction under the collateral order exception.[40] The debtor had argued alternatively that if jurisdiction was not proper under section 158(d), the court had jurisdiction under the collateral order exception.[41] For the collateral order exception to apply, the order appealed from must: "conclusively determine the disputed question"; "resolve an important issue completely separate from the merits of the action"; and, "be effectively unreviewable on appeal from a final judgment."[42] These requirements are conjunctive; that is, all three must be present to establish jurisdiction under the collateral order exception.[43] Since it found that the third element was not met in this case, the Fifth Circuit concluded that the collateral order exception was inapplicable.[44]

The issue of whether an order is final or interlocutory is not an infrequent theme in bankruptcy appeals. Often the distinction is hairline thin and obscure simply because of the nature of a bankruptcy case, which has multiple disputes within the case, each of which are in various stages of finality. Once again, the Fifth Circuit was faced with the issue in *In re Eagle Bus Manufacturing, Inc.*[45]

The bankruptcy court had established a bar date for the filing of proofs of claim.[46] However, several creditors filed after the bar date.[47] Some of these creditors filed motions to allow a late-filed claim.[48] The bankruptcy court allowed certain untimely claims based upon due process grounds and excusable neglect.[49] The bankruptcy court's order allowing some of these untimely claims was then appealed to the district court, which affirmed.[50] The debtor, Greyhound, then appealed to the Fifth Circuit.[51]

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40 *In re* Aegis Specialty Mktg., 68 F.3d at 922.

41 *Id.* at 921.

42 Aucoin v. Southern Ins. Facilities Liquidating Corp. (*In re* Aucoin), 35 F.3d 167, 170 (5th Cir. 1994) (quoting Richardson-Merrell, Inc. v. Koller, 472 U.S. 424, 431 (1985)).

43 *In re* Aegis Specialty Mktg., 68 F.3d at 922 (citing *In re* Delta Servs. Indus., 782 F.2d 1267, 1272 (5th Cir. 1986)).

44 *Id.*

45 Greyhound Lines, Inc. v. Rogers (*In re* Eagle Bus Mfg., Inc.), 62 F.3d 730 (5th Cir. 1995).

46 *Id.* at 732.

47 *Id.*

48 *Id.*

49 *Id.* at 733.

50 *Id.*

51 *Id.*

Judge Reynaldo G. Garza wrote for the court that the Fifth Circuit "views finality in bankruptcy proceedings in a practical and less technical light to preserve judicial and other resources."[52] As previously pronounced, the Fifth Circuit has "determined that 'an order which ends a discrete judicial unit in the larger case concludes a bankruptcy proceeding and is a final judgment for the purposes of [28 U.S.C.] § 158(d).'"[53] Thus, finality is not contingent upon the conclusion of the entire bankruptcy litigation, but rather on the termination of an adversarial proceeding within the bankruptcy case.[54] Otherwise, all orders coming out of a bankruptcy case would be viewed as interlocutory until a plan confirmation order is entered.

The Fifth Circuit looked at an untimely creditor's—Rogers'—claim to see if excusable neglect was present. Rogers had argued that an "order allowing the [c]laimants to file untimely proofs of claim is not a final appealable order because it does not 'conclusively' settle the claims before the bankruptcy court."[55] The Fifth Circuit disagreed with Rogers and, in doing so, pointed out that the cases cited by Rogers contemplated significant judicial activity in the bankruptcy court to resolve the creditor's claim.[56] The court distinguished the First Circuit's *Giles*[57] case, finding that the bankruptcy court in the *In re Eagle Bus Manufacturing, Inc.* matter "was left with no dispute or issue to resolve after entering the order" because Greyhound's reorganization plan had already been confirmed, and under the plan, all proofs of claim were to go through alternative dispute resolution (ADR).[58] Pursuant to the plan, if a claim is settled in ADR, there would be no further bankruptcy court involvement in the handling of the claim.[59] Consequently, the court held that the bankruptcy court's order granting the motions to file untimely proofs of claim was a final, appealable order.[60]

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52 *Id.* at 733 (citing England v. FDIC (*In re* England), 975 F.2d 1168, 1171 (5th Cir. 1992)).

53 *Id.* (quoting *In re* England, 975 F.2d at 1172). Section 158(d) provides that "[t]he courts of appeals shall have jurisdiction of appeals from all final decisions, judgements, orders, and decrees entered under subsections (a) and (b) of this section." 28 U.S.C. § 158(d) (1994).

54 *In re* Eagle Bus. Mfg., (citing *In re* England, 975 F.2d at 1172).

55 *Id.*

56 *Id.* at 733-34.

57 Giles World Mktg. v. Boekamp Mfg., 787 F.2d 746 (1st Cir. 1986).

58 *In re* Eagle Bus Mfg., 62 F.3d at 734.

59 *Id.*

60 *Id.*

MANDAMUS

The Supreme Court's 1992 decision of *Connecticut National Bank v. Germain*[61] compelled the Fifth Circuit to unexpectedly pirouette in its view of its appellate jurisdiction over interlocutory orders entered by district courts in bankruptcy matters.[62] Prior to *Germain*, the Fifth Circuit declined to dance with appellants at the bankruptcy ball when the district court order was not a final order.[63]

The *Germain* Court made it clear that 28 U.S.C. § 1292[64] permits circuit court review of district court interlocutory bankruptcy orders.[65] The Supreme Court found, contrary to the Fifth Circuit's prior position,[66] that 28 U.S.C. § 158(d),[67] which provides for circuit court jurisdiction over final orders from the district court, does not preempt section 1292.[68] The *Germain* Court reasoned that section 158(d), when it spoke of final orders, was simply silent as to interlocutory orders.[69] The Fifth Circuit has previously reasoned, quite logically it seems to this writer, that the reference solely to "final" orders in section 158(d) excluded "interlocutory" orders.[70] Otherwise, the statute could have included both types of orders had Congress so intended.

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61 503 U.S. 249 (1992).

62 *See infra* notes 71-77 and accompanying text for a discussion of *In re* El Paso Electric Co.

63 *In re* Jensen, 946 F.2d 369 (5th Cir. 1991); *In re* Hester, 899 F.2d 361 (5th Cir. 1990).

64 28 U.S.C. § 1292 provides:

> (a) Except as provided in subsections (c) and (d) of this section, the courts of appeals shall have jurisdiction of appeals from: (1) Interlocutory orders of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, or of the judges thereof, granting, continuing, modifying, refusing or dissolving injunctions, or refusing to dissolve or modify injunctions, except where a direct review may be had in the Supreme Court.

28 U.S.C. § 1292 (1994).

65 *Germain*, 503 U.S. at 254.

66 *In re* Jensen, 946 F.2d 369; *In re* Hester, 899 F.2d 361.

67 28 U.S.C. § 158(d) provides that "[t]he courts of appeals shall have jurisdiction of appeals from all final decisions, judgments, orders, and decrees entered under subsections (a) and (b) of this section." 28 U.S.C. § 158(d) (1994).

68 *Germain*, 503 U.S. at 254.

69 *Id.*

70 *In re* Hester, 899 F.2d at 365; *In re* Jensen, 946 F.2d at 371.

So, you ask, what does any of this toe-dancing have to do with the request for an order of mandamus in *In re El Paso Electric Co?*[71] The debtor, El Paso Electric Company, after a series of dizzying procedural two-steps too complicated to recite in this article, found itself in this position: the district court had denied El Paso's motion to withdraw the reference of El Paso's action against Central and Southwest Corporation (CSW) from the bankruptcy court.[72] Contending that the district court's order denied its right to a jury trial, the debtor filed a writ of mandamus to the Fifth Circuit.[73]

According to the Fifth Circuit, the district court's order was interlocutory, as distinguished from a final order.[74] Because a writ of mandamus will only issue where the district court has committed a clear abuse of discretion and after a showing that there is no adequate alternative means to obtain relief, the court focused on whether the writ request was a proper invitation to gain admittance at the ball.[75]

The Fifth Circuit, having to strike *In re Hester* and *In re Jensen* from its dance card and citing *Germain* as its rationale, concluded that the debtor should have requested that the district court certify an interlocutory appeal under section 1292(b).[76] Because an adequate alternative means of obtaining relief existed—that is, an appeal—the debtor's resort to a mandamus, an extraordinary remedy, was improper procedurally: writ denied;[77] invitation rejected—next dancer, please.

ATTORNEY-CLIENT PRIVILEGE

Whether a Chapter 7 trustee in a limited partnership case can waive the attorney-client privilege on behalf of the partnership was the issue addressed in *United States v. Campbell*.[78] In holding that the trustee can waive the privilege, the Fifth Circuit invoked

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71 77 F.3d 793 (5th Cir. 1996) (per curiam).
72 *Id.*.
73 *Id.* at 794.
74 *Id.*
75 *Id.* (citing Mallard v. United States Dist. Court, 490 U.S. 296, 309 (1989)).
76 *Id.* at 794-95.
77 *Id.* at 795.
78 73 F.3d 44 (5th Cir. 1996) (per curiam).

Commodity Futures Trading Commission v. Weintraub,[79] in which the Supreme Court held that the trustee of a corporation in bankruptcy has the power to waive the corporation's attorney-client privilege.[80] The Fifth Circuit justified its application of the *Weintraub* rule in the *Campbell* case by concluding that a limited partnership is an inanimate entity, similar to a corporation, that can act only through its agents.[81]

AUTOMATIC STAY

In *In re Jones*,[82] the debtors appealed a judgment that retroactively approved a post-petition foreclosure on the debtors' real property.[83] After dismissal of their Chapter 13 case, the debtors defaulted on a mortgage note. The note holder instituted a state court foreclosure. The debtors filed a second Chapter 13 case, but failed to notify the note holder. The foreclosure went forward and the note holder purchased the debtors' property at the sale.[84]

After notice was given to the note holder, he sought to evict the debtors from the property. The debtors took the position that the foreclosure sale was void because it occurred post-petition.[85] However, the bankruptcy court declined to set aside the sale because the note holder was a good faith purchaser under section 549(c) of the Bankruptcy Code.[86] The district court affirmed.[87]

Judge Politz, writing for the court, took a different tack from the two courts below.[88] He swiftly invoked prior circuit authority[89] that provided that actions taken in

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79 471 U.S. 343 (1985).
80 *Campbell*, 73 F. 3d at 47 (citing *Weintraub*, 471 U.S. at 358).
81 *Id.*
82 Jones v. Garcia (*In re* Jones), 63 F.3d 411 (5th Cir. 1995), *cert. denied*, 116 S. Ct. 1566 (1996).
83 *Id.* at 412.
84 *Id.*
85 *Id.*
86 *Id.*
87 *Id.*
88 In fact, he noted that section 549(c) really did not apply under the facts of this case. *Id.* at 413 n.6.
89 Picco v. Global Marine Drilling Co., 900 F.2d 846 (5th Cir. 1990); Sikes v. Global Marine, Inc., 881 F.2d 176 (5th Cir. 1989).

violation of section 362(a)[90] are voidable, not void, since the bankruptcy court has the power to annul the automatic stay under section 362(d).[91] Judge Politz noted that

> [o]f particular significance to today' disposition is the power of the courts' *a quo* to terminate, annul, modify, or condition that automatic stay, insofar as it concerns "an act against single asset real estate," in favor of "a creditor whose claim is secured by an interest in such real estate."[92]

Further, because the note holder was not a commercial lender, but an individual, and because he had not received notice of the Chapter 13 filing, the court found this mix of facts to overcome an abuse of discretion argument.[93]

EXECUTORY CONTRACTS

In *Bilski v. Commissioner of Internal Revenue*,[94] the Fifth Circuit disposed of a narrow issue that it[95] and other circuits had previously addressed. At issue was whether Treasury Form 872-A, otherwise known as Special Consent to Extend the Time to Assess Tax, was an executory contract governed by 11 U.S.C. § 365.[96]

The debtors had executed a Form 872-A that the IRS had mailed them with a notice that the IRS needed additional time to determine the debtors' deficiencies in their 1982 joint tax return.[97] Three years later, the debtors filed a Chapter 7 petition and ultimately received a discharge. A year later, the IRS sent the debtors a Notice of Deficiency for 1982 taxes.[98]

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90 Section 362(a) provides in part that: "[a] petition ... operates as a stay ... of ...." 11 U.S.C. § 362(a) (1994).

91 *In re* Jones, 63 F.3d at 412 n.3. Section 362(d) provides in part that: "[o]n request of a party in interest ... the court shall grant relief from the stay provided under subsection (a) of this section, such as by terminating, annulling, modifying, or conditioning such stay ... for cause ...." 11 U.S.C. § 36(d) (1994).

92 *In re* Jones, 63 F.3d at 413 (quoting 11 U.S.C. § 362(d)(3)).

93 *Id.*

94 69 F.3d 64 (5th Cir. 1995).

95 *See* Buchine v. Commissioner, 20 F.3d 173 (5th Cir. 1994).

96 *Bilski*, 69 F.3d at 66.

97 *Id.*

98 *Id.*

The debtors contended in Tax Court that their bankruptcy petition had terminated the Extension Agreement sixty days after the bankruptcy petition was filed.[99] In affirming the tax court's finding, Judge Weiner held, as had the Third[100] and Ninth[101] Circuits, that a Form 872-A is not an executory contract, but rather a "'unilateral waiver of a defense by the taxpayer'"[102] Thus, the discharge had no effect on the tax liability since the debtors had not properly rescinded[103] their waiver of the affirmative defense of a time-bar under the applicable statute of limitations.[104]

CLAIMS

In *In re Alliance Operating Corp.*,[105] after the bar date for filing proofs of claim in a Chapter 11 case, Highlands Insurance Company, a creditor, attempted to amend its original proof of claim.[106] Highlands' amendment sought a change in status from an unsecured creditor to a priority claim for workmen's compensation premiums. The bankruptcy court refused to permit the amendment, and the district court affirmed.[107]

Judge Benavides, writing for the Fifth Circuit, first acknowledged that amendments to proofs of claim are freely allowed to cure defects in the original claim or to describe the claim with greater particularity.[108] Despite this liberality in allowing the amendment of proofs of claim, the court noted that bar dates are not to be undone by amendments that introduce wholly new grounds of liability.[109] An amendment to a proof of claim that changes the nature of the claim from an unsecured status to a priority status sets forth a

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99 *Id.* Section 365(d)(1) reads, in part: "In a case under chapter 7 ... if the trustee does not assume or reject an executory contract ... within 60 days after the order for relief ... then such contract ... is deemed rejected." 11 U.S.C. § 365(d)(1) (1994).

100 Holof v. Commissioner, 872 F.2d 50 (3d Cir. 1989).

101 Kelley v. Commissioner, 45 F.3d 348 (9th Cir. 1995).

102 *Bilski*, 69 F.3d at 68 (quoting *Buchine*, 20 F.3d at 179).

103 "For a taxpayer to terminate [a Form] 872-A, he must send the IRS a Treasury Form 872-T, Notice of Termination of Special Consent to Extend the Time to Assess Tax (872-T)." *Id.*

104 *Id.*

105 Highlands Ins. Co. v. Alliance Operating Corp. (*In re* Alliance Operating Corp.), 60 F.3d 1174 (5th Cir. 1995).

106 *Id.* at 1174-75.

107 *Id.*

108 *Id.* at 1175 (citing *In re* Kolstad, 928 F.2d 171, 175 (5th Cir. Cir.), *cert. denied*, 502 U.S. 958 (1991).

109 *Id.* (citing *In re* Kolstad, 928 F.2d at 175).

new claim, according to the court.[110] Thus, the liberal rule has its limits. The court affirmed the lower courts and denied Highlands' request for an amendment.[111]

FILING OF APPEALS

Only one bite at the apple is a legal rule in more than one context, especially when it comes to tolling the time for filing a notice of appeal. This is old news to most but bears repeating for those struggling with post-judgment motions practice. *In re Stangel*[112] is a chilling reminder that malpractice is only a stutter step away.

In *In re Stangel*, the court reviewed the debtor's two post-judgment motions challenging the bankruptcy court's judgment to dismiss his case, which were both denied, to determine if the notice of appeal to the district court had been timely filed.[113] The debtor, within seven days of entry of final judgment, filed a motion to reconsider.[114] Twenty days later, the bankruptcy court denied the motion to reconsider. Not willing to take no for an answer, eight days later, the debtor filed a second motion to reconsider and also asked that the denial of the first motion to reconsider be reconsidered. The bankruptcy court then denied this second motion. Within eight days of this latest order, the debtor filed a notice of appeal.[115]

Obviously, the debtor thought by filing his notice of appeal within eight days of entry of the last order he was well within Bankruptcy Rule 8002's ten-day rule.[116] In fact, according to Bankruptcy Rule 8002(b), the time for appeal is tolled by the filing of a timely motion to amend or make additional findings of fact, to alter or amend the judgment,[117] or

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110 *Id.* (citing *In re* Walles & All, Inc., 127 B.R. 115, 118, (Bankr. W.D. Pa. 1991); *In re* Metro Transp. Co., 117 B.R. 143, 148 (Bankr. E.D. Pa. 1990)).

111 *Id.* at 1177.

112 Stangel v. United States (*In re* Stangel), 68 F.3d 857 (5th Cir. 1995) (per curiam).

113 *Id.* at 857-58.

114 *Id.* at 858.

115 *Id.*

116 Federal Rule of Bankruptcy Procedure 8002 provides that a notice of appeal in a bankruptcy proceeding must be filed "within 10 days of the date of the entry of the judgment, order, or decree appealed from." FED. R. BANKR. P. 8002(a).

117 Bankruptcy Rule 9023 provides that Federal Rule of Civil Procedure 59 applies in bankruptcy cases. FED. R. BANKR P. 9023. A motion to reconsider is a motion to alter or amend the correctness of a judgement. Edward H. Bohlin Co. v. Banning Co., 6 F.3d 350, 353 (5th Cir. 1993) (citing FED. R. BANKR. P. 9023).

for a new trial.[118] The court observed that there were no cases in the Fifth Circuit addressing successive post-judgment motions under Rule 8002(b), but that several cases had addressed the issue of successive motions under Federal Rule of Appellate Procedure (FRAP) 4(a)(4), which contains similar language to Rule 8002(b).[119] Noting that this circuit had already ruled that successive motions for reconsideration under Federal Rule of Civil Procedure 59(e) do not toll the appeals period under FRAP 4(a)(4), the court invoked the interests of finality as being the rationale behind these decisions.[120]

The debtors argued that his second motion to reconsider was, in addition to being a request to review the original order, also a motion seeking a review of the first order rejecting reconsideration.[121] The debtor had hoped this argument would convince the court that his notice of appeal was at least timely as to the denial of the second motion to reconsider.[122] However, the court found that the second motion was essentially a rehash of the first motion and could not toll the period of time for filing of a notice of appeal.[123] Query: if the second motion to reconsider brings up new matters that could have been raised initially, is there an argument for tolling? This author does not wish to push that envelope to the edges, nor does your malpractice carrier. Better safe than sorry—file the notice of appeal.

DISCHARGE ABILITY

Bankruptcy Code § 523(a)(1)(C)

Dr. No was reconstructed by the surgery of the Internal Revenue Service in *In re Bruner*.[124] The debtors failed to file any tax returns or to pay taxes for eight years. No discharge of the debt to the Internal Revenue Service had been received when Dr. Bruner and his wife filed a Chapter 7 bankruptcy petition.[125]

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118 *In re* Stangel, 68 F.3d at 858 (citing FED. R. BANKR. P. 8002(b)).
119 *Id.* at 859.
120 *Id.* (citing United States v. One 1988 Dodge Pickup, 959 F.2d 37, 39 (5th Cir. 1992); Charles L.M. v. Northeast Indep. Sch. Dist. 884 F.2d 869, 871 (5th Cir. 1989)).
121 *Id.*
122 *Id.*
123 *Id.*
124 Bruner v. United States (*In re* Bruner), 55 F.3d 195 (5th Cir. 1995).
125 *Id.* at 196.

Pursuant to § 523(a)(1)(C) of the Bankruptcy Code,[126] the bankruptcy court, after trial, excepted from discharge Dr. Bruner's tax liabilities for five years "because the Bruners had willfully attempted to evade or defeat their taxes for those years."[127] Judge Stewart, writing for the Fifth Circuit, summarized the issue before the court as "whether the district court correctly affirmed the bankruptcy court's conclusion that the Bruners 'willfully attempted' to evade or defeat their taxes, such that their tax liabilities are excepted from discharge."[128] Specifically at issue on appeal was whether the bankruptcy judge's three-prong test was correct.[129]

The bankruptcy court concluded that the proper test to apply in a case where a debtor, who is financially able to pay his taxes, chooses not to do so, is: "(1) the debtor had a duty under the law, (2) the debtor knew he had that duty, and (3) the debtor voluntarily and intentionally violated that duty."[130] Because Dr. Bruner was a high-compensated surgeon and had the financial resources to pay the taxes, the bankruptcy court found that the failure to pay was willful.[131] Incidentally, the good doctor had also set up a shell entity, Three-L-Ministries, for hiding income and assets.[132] Coupled with numerous cash transactions, the whole sordid picture suggested only one result; no dischargeability.

On appeal, Dr. Bruner urged the court to follow the test set out in *In re Gathwright*[133] that would require proof of an "affirmative act" by the debtors to evade or defeat their taxes.[134] Dr. Bruner also argued that mere non-payment should not constitute willful evasion since the failure to pay any tax debt would result in nondischargeability.[135] The Fifth Circuit rejected this argument, pointing out that a majority of courts that have addressed this issue have rejected the *Gathwright*

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126 Section 523(a)(1)(C) provides that "discharge under section 727 ... does not discharge an individual debtor from any debt (1) for a tax ... (C) with respect to which the debtor made a fraudulent return or willfully attempted in any manner toe evade or defeat such tax." 11 U.S.C. § 523(a)(1)(c) (1994).

127 *In re* Bruner, 55 F.3d at 197.

128 *Id.*

129 *Id.*

130 *Id.*

131 *Id.* at 197-98.

132 *Id.* at 198.

133 Gathwright v. United States (*In re* Gathwright), 102 B.R. 211 (Bankr. D. Or. 1989).

134 *In re* Bruner, 55 F.3d at 198.

135 *Id.*

decision.[136] The court then invoked the Sixth Circuit's decision of *In re Toti*.[137] The *Toti* court "held that § 523(a)(1)(C) includes [both] acts of commission and acts of *omission*."[138] Judge Stewart went on to indicate that the Fifth Circuit would not adopt the Eleventh Circuit's holding in *In re Haas*[139] that had rejected the *Toti* court's reasoning.[140] The Eleventh Circuit had "held that the language of § 523(a)(1)(C) ought to be construed consistently with the criminal provisions of the Internal Revenue Code."[141] Since the circuits are clearly split on the issue, it is only a matter of time before the United States Supreme Court will resolve the differences between Dr. No and the Eleventh Circuit.

Bankruptcy Code § 523(a)(2)(B)

In *In re Norris*,[142] the debtor attempted to engraft a proximate cause element onto 11 U.S. C. § 523(a)(2)(B) and was roundly rejected by the Fifth Circuit. One of the exceptions to dischargeability is for a debt "for money, property, services, or an extension, renewal, or refinancing of credit, to the extent obtained," by use of written statement that is materially false concerning the debtor's financial condition.[143] The debtor must have had an intent to deceive and the creditor must reasonably have relied[144] on the false financial statement.[145]

In *In re Norris*, the debtor relied on a Ninth Circuit case, *In re Siriani*, [146] in which the debtor's surety, who relied upon false documentation in renewing a surety bond, was required to prove "'that damage proximately resulted from the

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136 *Id.* at 199 (citing *In re* Griffith, 161 B.R. 727, 732 (Bankr. S.D. Fla. 1993); *In re* Berzon, 145 B.R. 247, 250 (Bankr. N.D. Ill. 1992); *In re* Jones, 116 B.R. 810, 814-15 (Bankr. D. Kan. 1990)).

137 24 F.3d 806 (6th Cir.), *cert. denied*, 115 S. Ct. 482 (1994).

138 *In re* Bruner, 55 F.3d at 199 (citing *In re* Toti, 24 F.3d at 809).

139 48 F.3d 1153 (11th Cir. 1995).

140 *In re* Bruner, 55 F.3d at 200.

141 *Id.* at 199 (citing *In re* Haas, 48 F.3d at 1155-57).

142 Norris v. First Natl Bank in Luling (*In re* Norris), 70 F.3d 27 (5th Cir. 1995).

143 11 U.S.C. § 523(a)(2)(B) (1994).

144 The United States Supreme Court in *Field v. Mans*, 116 S. Ct. 437, 439, 447 (1995), held that Section 523(a)(2)(A) does not require reasonable reliance, but the lesser standard of "justifiable reliance." Section 523(a)(2)(B) specifically requires "reasonable reliance" 11 U.S.C. § 523(a)(2)(B) (1994).

145 § 523(a)(2)(B) (1994), *amended by* Pub L. No. 104-193, T10 Stat. 2105 (1996).

146 Siriani v. Northwestern Ins. Co. (*In re* Siriani), 967 F.2d 302 (9th Cir. 1992).

misrepresentation.'"[147] The debtor contended that the bank, to be entitled to relief under § 523(a)(2)(B), had to show that it had suffered damage as a proximate result of the misleading financial statement when it renewed the note.[148]

Judge Politz, writing for the court, joined the First[149] and Tenth[150] Circuits in rejecting the *In re Siriani* analysis, stating that engrafting a "proximate causation" element onto the statute actually duplicates the "materiality" and "reasonable reliance" elements of section 523(a)(2)(B).[151] In the absence of any compelling reason for adding language to the statute, the court declined to adopt the debtor's argument.[152]

Bankruptcy Code § 523(a)(9)

Congress already has a bill[153] pending to overrule the effect of *In re Greenway*.[154] In this per curiam decision, the Fifth Circuit declined to extend the scope of non-dischargeability in 11 U.S.C. § 523(a)(9)[155] to include death or personal injury caused by the debtor's operation of a motorboat.[156] Applying the "plain meaning" rule of statutory construction, the court parsed the definition of "motor vehicle"[157] found in § 523(a)(9) and concluded [158] that had Congress intended to include motorboats, "they would have either defined the term 'motor vehicle' to include motorboats or added motorboats to the exception."[159]

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147 *In re* Norris, 70 F.3d at 29 n.6 (quoting *In re* Siriani, 967 F.2d at 304).

148 *Id.* at 30.

149 *In re* Goodrich, 999 F.2d 22 (1st Cir. 1993).

150 *In re* Gerlach, 897 F.2d 1048 (10th Cir. 1990).

151 *In re* Norris, 70 F.3d at 29 n.6.

152 *Id.*

153 H.R. 234, 104th Cong., 1st Sess. (1995).

154 Boyce v. Greenway (*In re* Greenway), 71 F.3d 1177 (5th Cir.) (per curiam), *cert. denied*, 116 S. Ct. 2499 (1996).

155 11 U.S.C. § 523(a)(9) provides: "for death or personal injury caused by the debtor's operation of a motor vehicle if such operation was unlawful because the debtor was intoxicated from using alcohol, a drug, or another substance." 11 U.S.C. 523(a)(9) (1994).

156 *In re* Greenway, 71 F.3d at 1180.

157 The court used the dictionary definition of motor vehicle.

158 This was an issue of first impression in the Fifth Circuit.

159 *In re* Greenway, 71 F.3d at 1180.

PROPERTY OF THE ESTATE

A case of some significance for personal injury plaintiffs was penned by Judge Edith Jones in *In re Wischan*.[160] At issue was the trustee's claim that a pre-petition cause of action for personal injuries was property of the estate, even though the judgment awarding damages occurred post-petition.[161]

Judge Jones made short shrift of the debtor's argument and found that pre-petition causes of action that bear fruit post-petition in settlement or judgment are not transformed into post-petition property of the debtor.[162] Thus, the proceeds are property of the estate[163] and are available to be distributed by the trustee to the debtor's creditors.[164]

The debtor also argued that because a portion of the judgment was specifically for *future* pain and suffering, at least those damages should be excluded from the estate.[165] Judge Jones noted that though some states and the federal government [166] have created an exemption for pain and suffering damages, Louisiana opted out of the federal exemptions.[167] Absent a state law exemption,[168] the court concluded that the debtor was not entitled to relief and found that a personal injury award could not be apportioned to exclude from the estate future pain and suffering damages.[169]

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160 Wischan v. Adler (*In re* Wischan), 77 F.3d 875 (5th Cir. 1996). This matter was consolidated with DeNicola v. Adler which had similar facts as *Wischan*.

161 *Id.* at 876-77.

162 *Id.* at 877.

163 11 U.S.C. § 541 (1994).

164 *In re* Wischan, 77 F.3d at 877.

165 *Id.*

166 *See* 11 U.S.C. § 522(d)(11)(D)(1994).

167 *In re* Wischan, 77 F.3d at 877. *See* La. REV. STAT. ANN § 13:3881(B)(West 1991 & Supp. 1995).

168 The court rejected the debtor's attempt to argue by analogy to the Louisiana case law involving the apportionment of the community in divorces. *See* West v. Ortego, 325 So.2d 242 (La. 1975).

169 *In re* Wischan, 77 F.3d at 877-78.

RECOUPMENT

Round two[170] of *In re United States Abatement Corp.*[171] found the debtor in the same position as the first round —supine, feet in the air, on the canvas. Some fighters never learn how to settle their disputes without putting on the boxing gloves.

This punch-drunk pugilist/debtor went down for the count as the Fifth Circuit, in a per curiam decision, reversed the district court and essentially affirmed the original bankruptcy court decision.[172] At issue was the little-understood doctrine of recoupment that the court permitted Mobil to exercise, leaving the debtor swiping at the air.[173]

The debtor had entered into written contracts with Mobil to sandblast and paint a number of drilling platforms. The contracts provided that the debtor had to indemnify Mobil for any liens arising from the work.[174] To give some teeth to the indemnification clause, Mobil was permitted by the contracts to withhold thirty percent retainage.[175] Not surprisingly, the debtor did not pay all his subcontractors or suppliers and thus, liens were placed on Mobil's platforms. Moreover, the debtor audaciously insisted on payment of the retainage, putting Mobil at risk of having to pay double on account of the liens.[176]

Mobil institutes lawsuit against debtor; Chapter 11 case filed; debtor institutes turnover complaint against Mobil seeking the retainage; bankruptcy court permits Mobil to recoup so it does not pay twice; district court, inexplicably, reverses; Fifth Circuit reinstates bankruptcy court order.[177] This is the path taken to the ring.

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170 Round one was reported in United States Abatement Corp. v. Mobil Exploration & Producing U.S., Inc. (*In re* United States Abatement Corp.), 39 F.3d 556 (5th Cir. 1994). The case was noted in Vance, *Fifth Circuit Symposium: Bankruptcy*, 41 LOY. L. REV. 443, 460 (1995).

171 United States Abatement Corp. v. Mobil Exploration & Producing U.S., Inc., (*In re* United States Abatement Corp.), 79 F.3d 393 (5th Cir. 1996) (per curiam).

172 *Id.* at 395.

173 *Id.*

174 *Id.* at 396.

175 *Id.*

176 *Id.*

177 *Id.* at 396-97.

In the Fifth Circuit, the primary issue was "whether Mobil [was] entitled to recoup the amount of its payment to the lien claimants by withholding it from the sum owed to [the debtor]."[178] First, the Fifth Circuit noted that recoupment had originated as an equitable rule of joinder that allowed adjudication in one suit of two claims that technically called for separate actions[179] Second, the court found that the doctrine of recoupment had evolved to permit Mobil to offset a claim that arose from the same transaction as the debtor's claim.[180] Recoupment allows one party to reduce the claim asserted against it by asserting a claim arising out of the same transaction.[181]. The doctrine of recoupment is an exception to the rule that all unsecured creditors stand on equal footing because an unsecured creditor with aright of recoupment has the opportunity to reap a larger dividend.[182] It is also different from set-off since set-off contemplates two independent transactions or mutual debts between the parties.[183]

The rationale for the exception, according to the court, is that recoupment is essentially a defense to the debtor's claim.[184] Based on Fifth Circuit precedent, the trustee "'take the property subject to the rights of recoupment'"[185] Moreover, if a creditor has a right of recoupment, "the debtor has no interest in the funds."[186]

If you asked yourself where the doctrine's roots spring from since the word "recoupment" is found nowhere in the Bankruptcy Code, the answer must be in state law. According to the court, there is a trilogy of Louisiana cases that conclude that an owner has the right to retain the amount of the liens from the sums it owes the contractor.[187] Eight, nine, ten—you're out!

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178 *Id.* at 398.

179 *Id.*

180 *Id.* at 399.

181 *Id.* at 398.

182 *Id.*

183 11 U.S.C. § 553 (1994). Set-off is the extinguishment or reduction of a claim by asserting as a defense another claim from a different transaction. *In re* United States Abatement Corp., 79 F.3d at 398 n.16.

184 *In re* United States Abatement Corp., 79 F.3d at 398.

185 *Id.* (quoting Holford v. Powers, 896 F.2d 176, 179 (th Cir. 1990)).

186 *Id.*

187 *Id.* at 399 (citing Dooley Tackaberry, Inc. v. Freeport-McMoran Oil & Gas Co., 802 F. Supp. 1438 (E.D. La. 1992); Temple Drilling Co. v. L&S Offshore Caterers, Inc., 67 B.R. 25 (Bankr. W.D. La. 1986); *In re* Energy Contractors, Inc., 49 B.R. 139 (Bankr. M.D. La. 1985)).

AVOIDANCE POWERS

Yet another "plain meaning" analysis was applied by the court in *In re Hailes*.[188] In a per curiam opinion, the court addressed the plain meaning of a little interpreted exception to the preference avoiding powers found in 11 U.S.C. § 547(c)(8)[189] In the process, the court even admitted to looking at the legislative history to bolster its interpretation.[190]

> A preferential transfer is defined in section 547(b) as:
>
> > any transfer of an interest of the debtor in property—(1) to or for the benefit of a creditor; (2) for or on account of an antecedent debt owed by the debtor before such transfer was made; (3) made while the debtor was insolvent; (4) made—(A) on or within 90 days before the date of the filing of the petition; or (B) between ninety days and one year before the date of the filing of the petition, if such creditor at the time of such transfer was an insider; and (5) that enables such creditor to receive more than such creditor would receive if—(A) the case were a case under Chapter 7 of this title; (B) the transfer had not been made; and (C) such creditor received payment of such debt....[191]

Creditors scour section 547(c)'s provisions for an exception to the trustee's avoiding powers in the hopes that they can retain payments made within the ninety days before bankruptcy. Section 547(c)(8) provides a paltry exception if the transfer is less than $600:

> The trustee may not avoid under this section a transfer—
> ...
> > (8) if, in a case filed by an individual debtor whose debts are primarily consumer debts, the aggregate value

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188 Electric City Merchandise Co. v. Hailes (*In re* Hailes), 77 F.3d 873 (5th Cir. 1996) (per curiam).
189 *Id.* at 874.
190 *Id.* at 875.
191 11 U.S.C. § 547(b) (1994).

> of all property that constitutes or is affected by such transfer is less than $600.[192]

This short provision contains a number of factors that all must be met for the exception to apply. The debtor was indeed an "individual" debtor as distinguished from a corporate or partnership debtor. The debt owed was a "consumer debt"[193] as it was debt incurred by the individual debtor primarily for a personal, family, or household purpose. There were multiple transfers that had been made pursuant to a writ of garnishment, none of which exceeded $600.[194] So, all factors were met so that the exception applies? Wrong.

At issue was whether, under the exception of section 547(c)(8), one looks at each transfer of debtor's property in isolation or in the aggregate "to determine whether the creditor received $600 in value in the pre-filing period."[195] The creditor took the position that the court's focus should be on each individual transfer of the debtor's garnished wages. Because each of the transfers was less than $600, the creditor sought refuge within the exception.[196]

The Fifth Circuit, in applying the plain meaning rule of construction, observed that there were two lines of cases that arrived at different conclusions.[197] Obviously, what is plain to some is not plain to all. One issue in dispute was whether the writ of garnishment was the "transfer" or whether the transfer was each act of transfer pursuant to the writ.[198] The court looked first to section 102(7)—the Bankruptcy Code rules of construction—which states that "the singular includes the plural"[199] and concluded

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192 11 U.S.C. § 547(c)(8) (1994).

193 11 U.S.C. § 101(8) (1994).

194 *In re* Hailes, 77 F.3d at 874.

195 *Id.*

196 *Id.*

197 *Id.* at 874-75. *Compare* Christians v. American Express Travel Related Serv. (*In re* Djerf), 188 B.R. 586 (Bankr. D. Minn. 1995); Alarcon v. Commercial Credit Corp. (*In Re* Alarcon), 186 B.R. 135 (Bankr. D.N.M. 1995); Wilkey v. Credit Bureau Sys. Inc. (*In re* Clark), 171 B.R. 563 (Bankr. W.D. Ky. 1994); Howes v. Hannibal Clinic (*In re* Howes), 165 B.R. 270 (Bankr. E.D. Mo. 1994) (holding that debtor *cannot* aggregate multiple transfers); *In re* Bunner, 145 B.R. 266 (Bankr. C.D. Ill. 1992) (holding that debtor *can* aggregate multiple transfers).

198 *In re* Hailes, 77 F.3d at 874.

199 11 U.S.C. § 102(7) (1994).

plainly that "the term 'transfer' in Section 547(c)(8) can mean more than one transfer."[200] So much for that dispute since the rule of contraction compels one to aggregate all property received by a single creditor within the preference period.

Moreover, to embrace the creditor's argument is to render the words "aggregate" and "all" to have no meaning. As icing on the cake, the court concluded by peeking at the legislative history and exclaiming that the creditor's interpretation would clearly be contrary to Congress's intentions.[201]

In another case dealing with preferences, *In re Southmark Corp.*,[202] the issue was whether a $400,000 payment made in connection with the termination of an employment contract was a voidable preference under 11 U.S.C. § 547(b).[203] Southmark and Marley signed an employment contract in 1982. On April 28, 1989 the parties executed a settlement agreement. Marley was tendered a check for $400,000 which was eventually cleared by the payor bank on May 4, 1989. Southmark filed a Chapter 11 case on July 14, 1989.[204] Thus, the check to Marley fell within the ninety day pre-petition period.

In response to a preference suit, the bankruptcy court decided that the payment to Marley was a contemporaneous exchange for a new value,[205] which is an exception that prevents avoidance.[206] As a contemporaneous exchange for value, the element of antecedent[207] debt is missing.[208]

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200 *In re* Hailes, 77 F.3d at 875.

201 *Id.*

202 Southmark Corp. v. Marley (*In re* Southmark Corp.), 62 F.3d 104 (5th Cir. 1995) *cert. denied*, 116 S. Ct. 815 (1996).

203 11 U.S.C. § 547(b) (1994).

204 *In re* Southmark Corp., 62 F.3d at 104.

205 Section 547(c) provides:

> The trustee may not avoid under this section a transfer - (1) to the extent that such transfer was - (A) intended by the debtor and the creditor to or for whose benefit such transfer was made to be a contemporaneous exchange for new value given to the debtor; and (B) in fact a substantially contemporaneous exchange.

11 U.S.C. § 547(c) (1994).

206 *In re* Southmark Corp., 62 F.3d at 105.

207 Section 547(b) provides in part: "Except as provided in subsection (c) of this section, the trustee may avoid any transfer of an interest of the debtor in property ... (2) for or on account of an antecedent debt owed by the debtor before such transfer was made ...." 11 U.S.C. § 547(b) (1994).

208 *In re* Southmark Corp., 62 F.3d at 104.

The bankruptcy court determined that Southmark's debt actually arose when it terminated Marley.[209] Southmark contended that the debt arose in 1982 when the employment contract was first executed.[210] Southmark argued in the alternative that the transfer did not occur until May 4th when the check cleared the bank.[211]

Judge Duhe, writing for the court, first noted that a debt is antecedent "if the debtor incurs it before making the alleged preferential transfer."[212] Thus, the court said there were two points of reference that had to be determined: the date the debt was incurred and the date the transfer occurred.[213] Interestingly, Judge Duhe said that these determinations involved mixed questions of law and fact.[214]

The court first looked to the definition of "debt" which is defined in section 101 as a "liability on a claim."[215] As the Fifth Circuit previously noted in *In re Emerald Oil Co.*,[216] "a debtor incurs a debt when he becomes legally obligated to pay it."[217] In addition, since a party to an executory contract, like an employment contract, has a claim against the debtor only when the debtor has rejected the contract, the court concluded that the original date of execution of the contract was not the proper reference point.[218] Rather, the record had to be reviewed to determine exactly when Southmark terminated Marley. Since this was a contested issue of fact, and the court found no clear error by the bankruptcy court, the conclusion that termination occurred upon execution of the settlement agreement on April 28 was affirmed.[219]

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209 *Id.* at 105.
210 *Id.* at 106.
211 *Id.*
212 *Id.* (citing Intercontinental Publications v. Perry (*In re* Intercontinental Publications), 131 B.R. 544, 549 (Bankr. D. Conn. 1991); Tidwell v. AMSouth Bank (*In re* Cavalier Homes), 102 B.R. 878, 885 (Bankr M.D. Ga. 1989)).
213 *Id.*
214 *Id.* (citing Barnhill v. Johnson, 503 U.S. 393, 396-98 (1992)).
215 *Id.* (citing 11 U.S.C. § 101(12) (1994)).
216 Sandoz v. Fred Wilson Drilling Co. (*In re* Emerald Oil Co.), 695 F.2d 833 (5th Cir. 1983). The case was noted in Vance, *Fifth Circuit Symposium; Bankruptcy*, 29 Loy. L. Rev. 619, 638 (1983).
217 *In re* Emerald Oil Co., 695 F.2d at 837.
218 *In re* Southmark Corp., 62 F.3d at 106.
219 *Id.*

Insofar as whether the transfer took place on April 28 (the date of the settlement agreement) or on May 4 (the date when the bank paid on the check), the court looked to state law concerning the rights and duties of parties to a check transaction.[220] Under the Uniform Commercial Code, the "obligee's receipt of a check suspends the underlying obligation so long as the check is presented to the drawee bank within a reasonable time."[221] In line with the *Barnhill v. Johnson* [222] case, the Fifth Circuit determined that the transfer took place on the date the check was honored, rather than the date of delivery.[223] However, that resolution did not determine whether the transfer was on account of an antecedent debt. The court reasoned that Marley's "taking of the check suspended Southmark's 'simultaneous obligation' to pay his severance benefits until the check was presented to the drawee bank."[224] When the check was honored, Southmark's "simultaneous obligation" was thereby discharged.[225] Thus, the transfer was a contemporaneous exchange for new value or a "simultaneous debt" rather than a transfer in payment of an antecedent debt.[226] Therefore, the bankruptcy trustee could not avoid the transfer.[227]

The concept of "simultaneous debt" strikes this writer as an invention to get to the right result. The debt was incurred upon termination, which the court said was April 28. How the debt was viewed as being incurred on May 4 because of the concept of "simultaneous debt" confuses the concept of suspension of the underlying obligation as contemplated by the Uniform Commercial Code. Suspension of the obligation does not operate to push back the date the obligation was incurred for the purpose of determining whether a debt is antecedent or "simultaneous." Code relates to discharge of the underlying obligation, not a point of reference for when the debt was incurred. While the result may be fair, the court's rationale seems weak.

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220 *Id.* at 107.
221 *Id.* (citing U.C.C. § 3-802(1)(b)(1991)).
222 503 U.S. 393 (1992).
223 *In re* Southmark Corp., 62 F.3d at 107.
224 *Id.*
225 *Id.*
226 *Id.*
227 *Id.*

In *In re T. F. Stone Co.,*[228] Judge Higginbotham extended the Supreme Court's analysis in *BFP v. Resolution Trust Corp.*[229] to a post-petition transfer of property. In *BFP*, the Supreme Court overruled the Fifth Circuit's *Durrett v. Washington National Insurance Co.*[230] case, which had set 70% of the fair market value as a benchmark for the "reasonably equivalent value" requirement of 11 U.S.C. § 548.[231] The *Durrett* rule compelled the avoidance of foreclosure sales under § 548 that occurred within the year before bankruptcy and yielded a foreclosure price less than 70% of fair market value.[232]

BFP rejected the *Durrett* rule by find that the "reasonably equivalent value" language of § 548 did not mean "fair market value" in the foreclosure context.[233] Rather, as Justice Scalia wrote for a 5-4 divided Court, "reasonably equivalent value" means that the property must sell for a price that approximates its wroth at the time of the forced sale, which is by definition less than under other circumstances.[234]

The precise question at issue in the Fifth Circuit's *Stone* case was "whether a peppercorn price received in a noncollusive, lawfully conducted tax foreclosure sale of the real property of a Chapter 11 debtor can constitute 'present *fair equivalent value'* within the meaning of § 549(c)[235] of the Bankruptcy Code."[236]

When the debtor filed its Chapter 11 petition, it listed the real estate at issue as having a value of $65,000. Further, though the debtor failed to pay *ad valorem* taxes,

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228 T.F. Stone Co. v. Harper (*n re* T.F. Stone Co.), 72 F.3d 466 (5th Cir. 1995).

229 511 U.S. 531 (1994).

230 621 F.2d 201 (5th Cir. 1980).

231 *Id.* at 203-04. § 548(a) reads, in pertinent part:

> The trustee may avoid any transfer of an interest of the debtor in property ... that was made ... within one year before the date of the filing of the petition, if the debtor voluntarily or involuntarily ... received less than a *reasonably equivalent value* in exchange for such transfer ... and was insolvent on the date that ... transfer was made ...

11 U.S.C. § 548(a) (1994) (emphasis added).

232 *Durrett*, 621 F.2d at 203-04.

233 *BFP*, 511 U.S. at 564.

234 *Id.* at 565.

235 Section 549(c) provides in part that "[t]he trustee may not avoid under subsection (a) of this section a transfer of real property to a good faith purchase without knowledge of the commencement of the case and for *present fair equivalent* value ...." 11 U.S.C. § 549(c) (1994) (emphasis added).

236 *In re* T. F. Stone Co., 72 F.3d at 467.

it also failed to list the taxing authority in Oklahoma as a creditor. The county never received notice of the existence of the bankruptcy.[237]

Pursuant to Oklahoma law, the county conducted a tax foreclosure sale that resulted in no bids. Under state law, title was transferred to the county. In addition, the debtor failed to exercise his rights under state law to redeem the property.[238] Later the county conducted a "Tax Resale" to third parties, who paid $325 to satisfy the debtor's delinquent tax debt.[239]

Finally, the debtor sought to avoid the effects of the county's sales by instituting an adversary complaint under § 548(a).[240] In its defense, the county relief on the exception contained in § 549(c) which provides that the trustee may not avoid a transfer of real property to a good faith purchaser without knowledge of the bankruptcy case and for present fair equivalent value.[241]

The debtor challenged the bankruptcy and district court's finding that *BFP* controlled the analysis—that the price obtained at a non-collusive tax foreclosure sale, conducted in compliance with state law, presumptively meets the "present fair equivalent value" standard in § 549(c).[242] The debtor argued that the "*reasonably* equivalent value" standard of § 548 is not the same as "*present fair* equivalent value" of § 549(c).[243] The debtor relied on the rule of construction that "Congress acts intentionally and purposely when it includes particular language in one section of the statute but omits it in another."[244]

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237 *Id.*.

238 *Id.*

239 *Id.* at 468.

240 Section 549(a) provides in part that "[e]xcept as provided in subsection (b) or (c) of this section, the trustee may avoid a transfer of property of the estate - (1) that occurs after the commencement of the case ...," 11 U.S.C. § 549(a) (1994).

241 *In re* T.F. Stone Co., 702 F.3d at 468 (citing 11 U.S.C. § 549(a) (1994).

242 *Id.* at 469.

243 *Id.*

244 *Id.* at 470 (quoting Chicago v. Environmental Defense Fund, 511 U.S. 328, (1994)).

The Fifth Circuit conceded that Congress probably meant something different by its use of "present fair" instead of "reasonably."[245] Nevertheless, the court then said it could see no meaningful difference as applied in a foreclosure sale and concluded that in the foreclosure context the terms were essentially interchangeable.[246] Musing that the *BFP* Court used the words "reasonably" and "fair" in tandem so that they must have the same meaning, the court saw no inconsistency with the "plain meaning" rule it often resorts to when reaching for a result.[247]

Not surprisingly, the court fully embraced the reasoning of *BFP* to reach a result that rejected using a fair market value benchmark in post-petition transfers.[248] Ultimately, as in *BFP*, the Fifth Circuit was concerned that federal law should not interfere with state foreclosure law even if property worth $65,000 is sold for a paltry $325.[249]

What about the overriding federal bankruptcy policy of equal distribution to creditors? What about federal preemption when state law interferes with federal policy? These issues are conveniently brushed aside in the rush to trumpet states' rights. *BFP* and its progeny will one day collapse when state law runs roughshod over federal policy. For the time being, *BFP* rules.

STATEMENT AGREEMENTS

The *In re Zale Corp.*[250] case is perhaps the Fifth Circuit's most important bankruptcy case decided during this survey period. It is certainly the longest[251] opinion which is an indication of just how fact intensive the case is. Judge Emilio Garza wrote the court's opinion reversing and remanding the lower courts' approval of a settlement and an injunction entered at a confirmation hearing.[252] At issue was the bankruptcy

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245 *Id.*
246 *Id.*.
247 *Id.* at 470-71.
248 *Id.* at 471-72.
249 *Id.*
250 Feld v. Zale Corp. (*In re* Zale Corp.), 62 F.3d 746 (5th Cir. 1995).
251 The opinion is twenty pages long.
252 *In re* Zale Corp. 62 F.3d at 749.

court's section 105 powers[253] and its jurisdiction. The bankruptcy court had entered an injunction to bar claims between non-debtor and non-creditor third parties [Feld[254] and NUFIC[255]] as part of an overall settlement and plan.[256] The district court had affirmed the order.[257]

The Fifth Circuit first considered the "related to" language of 28 U.S.C. § 1334[258] that gives the district court original, but not exclusive, jurisdiction of civil proceedings "related to" cases under title 11.[259] If the civil case is "related to" a bankruptcy case, the district court may refer the matter to the bankruptcy court under 28 U.S.C. § 157(a).[260] Even as broadly as the "related to" language can be construed, the court cautioned that there must be some nexus between the "related to" civil proceedings and the bankruptcy case for the bankruptcy court to have subject matter jurisdiction.[261] Otherwise, the federal courts would be hearing matters that should be left to state courts.[262]

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[253] Section 105(a) provides:

> (1) The court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title. No provision of this title providing for the raising of an issue by a party in interest shall be construed to preclude the court from, *sua sponte*, taking any action or making any determination necessary or appropriate to enforce or implement court orders or rules, or to prevent an abuse of process.

11 U.S.C. § 105(a) (1994).

[254] Alan D. Feld was a former director of Zale Corporation who had been excluded from the settlement. *In re* Zale Corp., 62 F.3d at 750. n8.

[255] NUFIC, or National Union Fire Insurance Company, was the excess insurer for the Zale Corporation's director and officer liability policy. *Id.* at 749.

[256] *Id.* at 750.

[257] *Id.* at 751.

[258] Section 1334(a) provides: "Except as provided in subsection (b) of this section, the district courts shall have original and exclusive jurisdiction of all cases under title 11." 28 U.S.C. § 1334(a) (1994).

[259] *In re* Zale Corp. 62 F.3d at 751.

[260] Section 158(a) provides:

> (a) The district courts of the United States shall have jurisdiction to hear appeals
> (1) from final judgments, orders, and decrees;
> (2) from interlocutory orders and decrees issued under section 1121(d) of title 11 increasing or reducing the time periods referred to n section 1121 of such title; and
> (3) with leave of the court, from other interlocutory orders and decrees; ... of bankruptcy judges entered in cases and proceedings referred to the bankruptcy judges under section 157 of this title . An appeal under this subsection shall be taken only to the district court for the judicial district in which the bankruptcy judge is serving.

28 U.S. C. § 158(a) (1994).

[261] *In re* Zale Corp. 62 F.3d at 752.

[262] *Id.* (citing Miller v. Kemira, Inc. (*In re* Lemco Gypsum, Inc.), 910 F.2d 784, 787-88 (11th Cir. 1990)).

Judge Garza then looked to the seminal case in the Fifth Circuit on "related to" jurisdiction, Judge Wisdom's opinion in *In re Wood*.[263] Therein, Judge Wisdom, borrowing from the Third Circuit,[264] held that a matter is "related to" if "the outcome of that proceeding could conceivably have any effect on the estate being administered in bankruptcy."[265]

Before a court is willing to approve an injunction as part of a settlement package, no matter how fair and equitable, there must first be at least "related to" jurisdiction.[266] In *In re Zale*, after the court reviewed the facts surrounding the tort and contract claims and controversies and the indemnifications, the court determined that the tort claims were not the property of the estate and thus, had no effect on the estate.[267] However, the contract claims were found to have an effect on the estate, giving the court "related to" jurisdiction.[268] As such, the Fifth Circuit found that the bankruptcy court had section 105 jurisdiction to enjoin the contract claims, but not the tort claims.[269]

Having decided that the bankruptcy court had jurisdiction over the contract claims, the court then turned to the merits, only to be met with another procedural hurdle. Feld and NUFIC argued that the injunction was improper because the judgement had been entered without the benefit of an adversary proceeding as required by Bankruptcy Rule 7001.[270] Most significantly, an adversary proceeding is commenced by the filing of a complaint as distinguished by a motion. In this case, the parties had merely included the injunction as part of a settlement agreement that was noticed to the creditors and the affected parties by motion.[271]

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263 Wood v. Wood (*In re* Wood), 825 F.2d 90 (5th Cir. 1987).
264 Pacor, Inc. v. Higgins, 743 F.2d 984 (3d Cir. 1984).
265 *In re* Wood, 825 F.2d at 93 (quoting *Pacor*, 743 F.2d at 994).
266 *In re* Zale Corp., 62 F.3d at 755 (citing *In re* Davis, 730 F.2d 176, 183-84 (5th Cir. 1984)).
267 *Id.* at 755-57.
268 *Id.* at 757-59.
269 *Id.* at 759.
270 *Id.* at 762, Bankruptcy Rule 7001 provides in part: "An adversary proceeding is governed by the rules f this Part VII. It is a proceeding ... (7) to obtain an injunction or other equitable relief ...." Fed. R. Bankr. P. 7001.
271 *In re* Zale Corp., 62 F.3d at 763.

The court restated its prior view that an objection to improper procedure can be waived,[272] but found, based on the facts, that Feld and NUFIC had not waived their right to litigate the matter by an adversary proceeding since they had raised several disputed facts that should have been aired in an evidentiary hearing.[273] The court cautioned that this holding does not mean that a bankruptcy court can never reach conclusions without a full-blown evidentiary hearing, but rather that a abbreviated review is only appropriate when a party does not present significant questions of disputed facts in its offer of proof.[274] Rather than attempt to modify the judgement, the court vacated the injunction and remanded the matter.[275]

Judge Reynaldo Garza's opinion in *In re Foster Mortgage Corp.*[276] sheds new light on the standard to which bankruptcy courts should adhere in approving settlements. No doubt what prompted the court to reverse the bankruptcy court's approval of the settlement was that the settlement was between a subsidiary (debtor) and its parent company (United Companies), and that the settlement was opposed by the unsecured creditors comprising 95% of the debtor's indebtedness.

The issue settled was a sophisticated business transaction that involved tax losses. The objecting creditors argued that the parent corporation owed loss payments to the debtor—its wholly owned subsidiary—in the range of $3.5 million to $28 million.[277] The bankruptcy court approved a settlement that resulted in a $1.65 million payment by the parent. The Fifth Circuit reversed, finding that the bankruptcy court had abused its discretion.[278] In so doing, the court elaborated on the appropriate standard first announced in *In re Jackson Brewing Co.*[279]

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272 *In re* Haber Oil Co., 12 F.3d 426, 440 (5th Cir. 1994).
273 *In re* Zale Corp., 62 F.3d at 763-64.
274 *Id.* at 764-66.
275 *Id.* at 766.
276 Connecticut Gen. Life Ins. Co. v. United Co. Fin. Corp. (*In re* Foster Mortgage Corp.), 68 F.3d 914 (5th Cir. 1995).
277 *Id.* at 916.
278 *Id.* at 917.
279 River City v. Herpel (*In re* Jackson Brewing Co.), 624 F.2d 599, 602-03 (5th Cir. 1980)).

Bankruptcy Rule 9019(a)[280] sets forth the procedure for approving settlements. However, the courts have set forth the standard to be applied in defining when a settlement is fair and equitable and in the best interest of the estate.[281] Judge Garza pointed out that the Fifth Circuit has applied the following three-part test:

> (1) the probability of success in the litigation, with due consideration for the uncertainty in fact and law, (2) the complexity and likely duration of the litigation and any attendant expense, inconvenience and delay, and (3) all other factors bearing on the wisdom of the compromise.[282]

The court acknowledged that its standard had been derived from an Eighth Circuit case[283] that had contained a fourth prong to the Fifth Circuit's standard—"the paramount interest of creditors with proper deference to their reasonable views."[284] This prong, implied the court, defines in part the third prong—"other factors bearing on the wisdom of the compromise."[285] While noting that it had no intention of creating a *per se* rule "allowing a majority of creditors in interest to veto a settlement,"[286] the court held that the bankruptcy court may not ignore the creditors' "overwhelming opposition to the settlement."[287] A bankruptcy court "should consider the amount of creditor support" as a factor bearing on the wisdom of the settlement.[288]

The appearance of an absence of arms-length bargaining between a debtor - subsidiary and its parent obviously added to the Fifth Circuit's concern about the wisdom of approving the compromise.[289] Such agreements must be carefully

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280 "On motion by the trustee and after notice and a hearing , the court may approve a compromise or settlement. Notice shall be given to creditors ... as provided in Rule 2002 ...." Fed. R. Bank. P. 9019(a).

281 United States v. AWECO, Inc. (*In re* AWECO), 725 F.2d 293 (5th Cir.)., *cert. denied*, 469 U.S. 880 (1984). For a discussion of *In re* AWECO, see Vance, *Fifth Circuit Symposium; Bankruptcy*, 30 Loy. L. Rev. 545, 572 (1984).

282 *In re* Foster Mortgage Co., 68 F.3d at 917 (citing *In re* Jackson Brewing Co., 624 F.2d at 609).

283 Drexel v. Loomis, 35 F.2d 800, 806 (8th Cir. 1929).

284 *In re* Foster Mortgage Co., 68 F.3d at 917.

285 *Id.*

286 *Id.* at 919.

287 *Id.* at 918-19.

288 *Id.*

289 *Id.* at 918-19.

scrutinized[290] and an appropriate record made. The court remanded the matter with instructions to the bankruptcy court to consider the creditors' overwhelming opposition to the settlement agreement and the close relationship of the parties to the settlement since the evidence did not reflect that these issues had been considered at all below.[291]

290 *In re* Drexel Burnham Lambert Group, Inc., 134 B.R. 493, 498 (S.D.N.Y. 1991).

291 *In re* Foster Mortgage Corp., 68 F.3d at 918-19.