Moller-Foltz American Inn of Court
Team Four Presentation
February 27, 2018

How Would You Rule?
(An Assortment of 2017/2018 Cases)

In re: Yemisi Ayobami,
16-20589 (5th Cir. January 3, 2018)

The Facts:
Yemisi Ayobami, filed a Chapter 13 Petition on October 16, 2015. Her Schedule C claimed an exemption[1] of real property. She checked the box labeled "100% of fair market value, up to any applicable statutory limit".

In the original schedules no specific dollar amount was identified as exempt. The Chapter 13 Trustee objected to the claimed exemptions. The Debtor filed amended schedules to list a claimed amount within the statutory limit in the "Specific laws that allow exemption" column.

Status:
The Bankruptcy Court certified a specific question for appeal to the Fifth Circuit. "May a debtor claiming federal exemptions under §522 of the Bankruptcy Code ever exempt a 100% interest in an asset?" The Fifth Circuit answered in the affirmative to the specific certified question, but declined to address whether or not such an exemption entitles the debtor to clear title in the asset and any post-petition appreciation.

Background principles:

1. The 100% FMV box was added to Schedule C after the Supreme Court's decision in *Schwab v. Reilly*, 560 U.S. 770 (2010). In *Schwab* the Court considered whether a Chapter 7 Debtor had exempted 100% of cooking equipment. The Court held the dollar amount exempted represented the Debtor's exempt interest in the cookware and any excess would be preserved for the Estate. The Court suggested language that could potentially exempt the entirety of an asset.

2. 11 U.S.C. §1306. Property of the Estate
(a) Property of the estate includes, in addition to the property specified in section 541 of this title – (1) *all property* of the kind specified in such section *that the debtor acquires after the commencement of the case but before the case is closed*, dismissed, or converted to a case under chapter 7, 11 or 12 of this title, whichever occurs first; …

Issues:

1. When a debtor claims federal exemptions under §522(b)(2) of the Bankruptcy Code wherein the value of the allowable exemptions are equal to or greater than the value of the asset, is the debtor entitled:
(a) to clear title to the asset?
(b) to any post-petition appreciation?

2. When a debtor claims federal exemptions under §522(b)(2) of the Bankruptcy Code wherein the value of the allowable exemptions are less than the value of the asset, is the debtor entitled:
(a) to post-petition appreciation of the asset, in whole or in part?
(b) to credit against any post-petition appreciation for contribution to maintenance of the asset (such as mortgage payments, taxes and insurance)?

How would you rule?

Cristina Rodriguez
Keeling Law Firm

[1] Under 11 U.S.C. §§ 522(d)(1), (3)-(5).

In re: Franchise Services of North America, Inc.,
2018 WL 485959 (Bank. S.D. Miss., January 17, 2018)

The Facts:

Franchise Services of North America, Inc. is a Delaware corporation. Its charter includes a provision, sometimes known as a "golden share," allowing a minority shareholder to block approval to file a Chapter 11 petition. The holder of the "golden share" is also a major creditor.

The company filed a Chapter 11 petition over the objection of the holder of the "golden share," and that party then moved to dismiss the case.

Status:

The bankruptcy court granted the motion to dismiss but has certified the case for appeal to the Fifth Circuit.

Background principles:

1. The right to file bankruptcy cannot be waived.

2. But, corporate authority and state-law limits on such authority are recognized in bankruptcy.

Issues:

1. Is a golden share provision valid and enforceable, or is it contrary to federal public policy?

2. Should the result be different if the shareholder is also a creditor?

3. Under Delaware law, is the golden share provision valid, and if so, does the holder of the share owe a fiduciary duty to exercise the bankruptcy-blocking right in the best interests of the corporation?

How would you rule?

H. Miles Cohn
Crain, Caton & James, P.C.

FTI Consulting, Inc. v. Merit Management Group, LP
830 F.3d 690 (United States Court of Appeals, Seventh Circuit. July 28, 2016)

The Facts:

Prior to filing for bankruptcy, debtor acquired a competitor by purchasing the competitor's equity. Trustee for debtor's estate brought adversary proceeding, seeking to avoid debtor's allegedly constructive fraudulent transfer of the acquisition purchase price paid to Merit Management Group, LP, a partial owner of the acquired competitor. The transfer of funds and securities went through financial intermediaries.

Merit raises a defense under the Section 546(e) safe harbor. Section 546(e) protects from avoidance transfers of "settlement payments" that are made "by or to (or for the benefit of)" a financial institution, except where there is actual fraud.

Status:

Certiorari Granted *Merit Mgmt. Grp., LP v. FTI Consulting, Inc.*, 137 S. Ct. 2092, 197 L. Ed. 2d 894 (2017).

Argued on November 6, 2017.

Background principles:

1. The trustee's avoidance powers serve the broad purpose of ensuring the equitable distribution of a debtor's assets.

2. Limitations on the trustee's avoidance powers are imposed to protect securities and commodities markets to prevent cascading effects that could harm these markets.

Issues:

1. Should the term "settlement payment" include exchange of stock for consideration?

2. Does a transfer qualify under the Section 546(e) safe harbor if the financial institution is just a conduit and has no beneficial interest in the transfer?

3. Does it matter if the transaction is public or private?

How would you rule?

Charles M. Rubio
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Lamar v. Appling (In re R. Scott Appling)
848 F.3d 953 (11th Cir. 2017), *cert. granted*
2018 U.S. Lexis 626, January 12, 2018

The Facts:

R. Scott Appling hired the law firm Lamar, Archer & Cofrin, LLP, to represent him in litigation against the former owners of his new business. Appling agreed to pay Lamar on an hourly basis with invoices for fees and costs due monthly. Appling became unable to keep current on the mounting legal bill and as of March 2005, owed Lamar $60,819.97. Lamar threatened to terminate the firm's representation and place an attorney's lien on all work product unless Appling paid the outstanding fees.

Appling and his attorneys held a meeting in March 2005. The bankruptcy court found that during this meeting Appling stated he was expecting a tax refund of "approximately $100,000," which would be enough to pay current and future fees. Lamar contends that in reliance on this statement, it continued its representation and did not begin collection of its overdue fees. When Appling and his wife submitted their tax return, they requested a refund of only $60,718 and received a refund of $59,851 in October. The Applings spent this money on their business. They did not pay Lamar.

Appling and his attorneys met again in November 2005. The bankruptcy court found that Appling stated he had not yet received the refund. Lamar contends that in reliance on this statement, it agreed to complete the pending litigation and forego immediate collection of its fees but refused to undertake any additional representation. In March 2006, Lamar sent Appling his final invoice for a principal amount due of $55,303.66 and $6,185.32 in interest.

Five years later, Lamar filed suit against Appling in a superior court in Georgia. In October 2012, Lamar obtained a judgment for $104,179.60. Three months later, the Applings filed for bankruptcy. Lamar initiated an adversary proceeding against Appling in bankruptcy court.

Status:

The bankruptcy court ruled that because Appling made fraudulent statements on which Lamar justifiably relied, Appling's debt to Lamar was nondischargeable, *11 U.S.C. § 523(a)(2)(A)*. The district court affirmed.

The district court rejected Appling's argument that his oral statements "respect[ed] . . . [his] financial condition," *11 U.S.C. § 523(a)(2)(B)*, and should have been dischargeable. The district court ruled that "statements respecting the debtor's financial condition involve the debtor's net worth, overall financial health, or equation of assets and liabilities. A statement pertaining to a single asset is not a statement of financial condition." The district court agreed with the bankruptcy court that Appling made material false statements with the intent to deceive on which Lamar justifiably relied.

The Eleventh Circuit reversed the lower courts holding that section 523(a)(2)(B) must be read broadly. Thus, "a statement regarding financial condition" includes any statement pertaining to a single asset as well as overall statements of net worth. This led to an odd result in Appling. Since subsections (a)(2)(A) and (a)(2)(B) are mutually exclusive, and statements regarding a debtor's financial condition are excluded from subsection (a)(2)(A), and since the debtor in Appling did not put his promise in writing, it did not fall within subsection (a)(2)(B), which requires the statement to be in writing, the debt was dischargeable. The Debtor lied, but got his discharge anyway.

The plaintiff filed an application for writ of certiorari on the grounds that there is a split in the circuit courts of appeals. The application was granted by the U.S. Supreme Court on January 12, 2018.

Issues:

Should section 523(a)(2)(B) be read "narrowly" to mean that the written statement must be about the Debtor's overall financial condition such as net worth or should it be read "broadly" to mean a written statement about any asset or part of the Debtor's financial condition?

How would you rule?

Matthew B. Probus
Wauson · Probus

Noble Energy, Inc. v. ConocoPhillips Co.,
__ S.W.3d __ (2017) 60 Tex. Sup. Ct. J. 1385

The Facts:

Conoco and a bankrupt swapped O&G interests in 1994, which included environmental indemnities. The recorded instrument made reference to this exchange agreement. The bankrupt files chapter 11 in 1999. Conoco was a party in the bankruptcy. In a bankruptcy auction in 2000, Noble buys the bankrupt's assets covered by the exchange agreement, including any agreements "in any way associated" with the assets". Assumed liabilities in the APA generically include liabilities under assumed executory contracts. The exchange agreement was never listed in the APA or bankruptcy schedules. Noble disclaims knowledge of the exchange agreement. The bankrupt's plan did not reject the exchange agreement. After the plan was confirmed Noble took actions consistent with duties imposed under the exchange agreement. After Noble refused a third indemnity demand from Conoco on assets covered by the exchange agreement, Conoco sued Noble, to recover the $63 million paid to settle an environmental claim covered by the exchange agreement indemnity. The trial court granted summary judgment for Noble-no liability. Conoco appealed. The 14th Court of Appeals, reversed and rendered summary judgment for Conoco. Noble appealed. Supreme Court rule—but let's see what the crowd thinks

Background principles:

1. The parties disagree over whether the Exchange Agreement is an executory contract and whether it was expressly assumed.

2. 363 buyers acquire the assets free and clear of claims and liabilities, except as they are assumed.

3. Noble argues, section 8.03 refers only to post-closing obligations.14 Except as provided by section 8.03, Noble did not "assum[e] any liability of [Alma] or related to the Assets of any kind or description whatsoever."

Issues:

1. The principal question in this case is whether, under the terms of a bankruptcy court order confirming a plan of reorganization and an agreement for sale of the debtor's assets, the purchaser was assigned an undisclosed contractual indemnity obligation of the debtor.

2. The Fifth Circuit has stated: "an agreement is executory if at the time of the bankruptcy filing, the failure of either party to complete performance would constitute a material breach of the contract, thereby excusing the performance of the other party. " Was the exchange agreement executory?

3. Does (i) the nondisclosure of the exchange agreement to the buyer or listing in the case schedules and SOFA and (ii) Conoco's status as a creditor with notice in the bankruptcy case, affect Noble's liability under the exchange agreement?

4. When does a claim for indemnity accrue—the date the contract is signed or the date after the indemnity claim becomes fixed and certain?

How would you rule?

By 5-3, the Supreme Court agrees with the court of appeals that the answer is yes and therefore affirm decision reversing and rendering judgment that the buyer of the bankrupt's assets remains liable for the indemnity.

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In re: Ultra Petroleum Corp,
575 B.R. 361 (Bankr. S. D. Tx. 2017)

The Facts:

Ultra issued a multiple series of unsecured notes (the "Notes") under a Note Purchase Agreement ("NPA"). The NPA allowed "prepayment" of the Notes at 100% of principal plus a **make-whole payment** calculated as an amount equal to the excess, if any, of the discounted present value of the remaining scheduled payments on the Notes over the amount of the principal being prepaid. The NPA was governed by New York law.

Debtors were solvent by the time they filed their Plan and proposed to pay their unsecured creditors in full, but, in the case of the Noteholders, without their Make-Whole Claim. The Bankruptcy Court confirmed the Debtors' Plan, which treated the Noteholders as unimpaired, without making any final determination on their Make-Whole Claim.

Debtors subsequently asserted that payment of the Make-Whole Claim was not required because such claim (i) represents unmatured interest barred by 11 U.S.C. § 502(b)(2); and/or (ii) arises from an unenforceable liquidated damages provision under governing New York law. The Debtors also asserted that any post-petition interest on the Make-Whole Claim should be assessed, at most, at the Federal Judgment Rate, which was materially lower than the NPA's default rate. Noteholders argued in response that: (i) for the Noteholders' claims to be unimpaired under the confirmed Plan, the Debtors were required to pay the full Make-Whole Claim due under New York law; (ii) § 502(b)(2) is inapplicable to the Make-Whole Claim; and (iii) the Make-Whole Claim is fully enforceable under New York law. The Noteholders also argued that post-petition interest should be allowed on the Make-Whole Claim at the NPA's default rate.

Status:

Judge Isgur sided firmly with the Noteholders but has certified the case for direct appeal to the Fifth Circuit.

Background principles:

1. The parties' contractual rights are determined under state law.
2. An unimpaired creditor is entitled to all of its rights under state law.

Issues:

1. Whether the Make-Whole Amount is fully enforceable under New York law;
2. Whether the Noteholders entitled to all of their non-bankruptcy rights under 11 U.S.C. § 1124(1) because they are treated as unimpaired by Debtors' chapter 11 plan; and
3. Whether the Make-Whole Amount should be disallowed as unmatured interest under 11 U.S.C. § 502(b)(2).

How would you rule?

Barnet B. Skelton, Jr.