Northeast Bankruptcy Conference and Consumer Forum

Consumer Track

Recent Case Law

Hon. Heather Zubke Cooper
U.S. Bankruptcy Court (D. Vt.) | Rutland

Andrea M. O'Connor
Fitzgerald Law, P.C. | East Longmeadow, Mass.

Kara S. Rescia
Rescia Law, P.C. | Enfield, Conn.

Micah A. Smart
Eaton Peabody | Portland, Maine

CONCURRENT SESSION

2023

Hon. Heather Z. Cooper (VT)
Andrea M. O'Connor
Kara S. Rescia
Micah A. Smart

Recent Consumer Case Law

Northeast Consumer Forum 2023

Overview

- Discharge Developments
- Fraudulent Conveyance Considerations
  - Tax Lien Foreclosure
  - Aggressive Bankruptcy Planning
- Fee Issues
  - Disgorgement
  - Bifurcation
- Notice
- Chapter 13 Sale Plans
- Tribal Immunity meets Automatic Stay

Discharge Developments
Bartenwerfer v. Buckley, 143 S.Ct. 665 (2023)

- Chapter 7 filed by Kate and David Bartenwerfer, husband and wife and business partners to "flip" home in San Francisco.
- Remodel did not go according to plan. Buyer sues Bartenwerfers in state court prepetition.
- Kate apparently did not offer evidence as to her innocence or the lack of a business partnership with David, but allegedly had disparate involvement.
- Jury found in favor of Buyer on claims of breach of contract, negligence, and nondisclosure of material facts, leaving Bartenwerfers jointly and severally liable.
- Buyer filed Adversary Proceeding alleging judgment non-dischargeable as to both Debtors under §523(a)(2)(A).

§523(a)(2)(A)

A discharge under section 727. . . of this title does not discharge an individual from any debt. . .

(2) for money, property, services, or an extension, renewal or refinancing of credit, to the extent obtained by –

(A) false pretenses, a false representation, or actual fraud, other than a statement respecting the debtor's or an insider's financial condition.

Bartenwerfer Holding

- Supreme Court held that, because the provision omits the phrase "of the debtor" with respect to the fraud and is drafted in the passive voice, "§ 523(a)(2)(A) turns on how the money was obtained, not who committed fraud to obtain it."
- Up shot: Innocent people are sometimes held liable for fraud they did not personally commit and if they declare bankruptcy, §523(a)(2)(A) bars discharge of that debt.

Commercial Bank v. Colquitt, No.21-30235-JPS, 2023 WL 2361103 (Bankr. M.D. Ga. Mar. 2, 2023).

- Debtor provided Hill with financing for a business by making a series of short-term loans. Debtor opened a bank account with Plaintiff, which account was used to fund the loans.
- Series of deposits, transfers, and promissory notes between the Debtor and Hill.
- Hill deposits checks totaling $550k; Debtor withdraws $535k in a cashier's check; Hill's deposits bounce; the account was overdrawn $440k.
- Plaintiff alleged that Defendant's debt to Plaintiff was incurred through check kiting scheme and therefore, his debt was not dischargeable.
- Crux of the issue: Whether Defendant had fraudulent intent to engage in a check kiting scheme?

Colquitt Analysis

- Several courts have held that a check kiting scheme is actual fraud within the meaning of the Code.
- Test for fraudulent intent: totality of circumstances, absent Debtor's admission of actual intent

Here:

- The facts establish that the majority of the time during which defendant and Hill dealt with each other there was no check kiting
- The Defendant admitted that he had become suspicious towards the end of the relationship.
- The Court found that because of Hill and the Defendant's long-time relationship and the fact that their past transactions had been successful, the Defendant's reliance on Hill was reasonable and there was no attempt to defraud the Plaintiff.
- The Plaintiff did not submit any evidence that the Defendant was a knowing participant.

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- The Plaintiff did not submit any evidence that the Defendant was a knowing participant.

Comparing to *Bartenwerfer*

- The court found that the Plaintiff failed to meet his burden of proving that the Defendant knowingly participated in a check kiting scheme and committed actual fraud.
    - The Defendant's liability does not stem from another's fraud and is a direct liability on the note that he signed to cover the overcharge to his account.
- *Bartenwerfer* does not change the need for the Plaintiff to show actual fraud committed by the Defendant.

Key Take Away:
Actual fraud is still required to be proven even when the person is directly liable and not an agent or partner.

In re Beach, No.21-2103-beh, 2023 WL 2780880 (Bankr. E.D. Wis. April 3, 2023).

- Brian Beach purchased a property for a restaurant and a home using money from Mother and Step-Father.
- Subsequently, Brian and his operating company applied for a series of loans from Plaintiff.
- During the loan process, Brian did not mention the money received from Mother and Step-Father.
- Theresa was not involved in the loan application process and only assisted Brian on general business communications with the bank regarding the loans.

- Weeks after securing the SLK loan, Brian executed a $160,000 mortgage in favor of his mother and stepfather on the real estate to secure repayment of the $125,000 purchase price plus $35,000 advanced for the business startup.
- Brian defaulted on his loan to SLK, who then obtained a judgment against Beach.
- Brian and Theresa file BK; SLK seeks determination that both owe a debt and that it should be excepted from discharge pursuant to §523(a)(2)(A).

Are Theresa and/or Brian both liable for the debt owed to SLK?

Theresa: No evidence that Theresa had an ownership interest in business at the time SLK made the loans, and SLK has no state court judgment against Theresa.

- Court finds that Theresa has no liability for the debt. Therefore, no need to get to dischargeability issue.
- Distinguishes *Bartenwerfer*, which relied on CA partnership law, from WI law which says the liabilities of LLC are solely owed by the LLC.

Brian: Judgment = debt owed. BUT dischargeable because SLK did not meet burden re: materially *false* statement or Brian *intended* to deceive SLK

Key Take Aways

- If an individual does not have an interest in a business, then they are not subject to debt incurred.
- Under §523(a)(2)(B), even if a plaintiff reasonably relies on written statements of the defendant, if the defendant did not have the intent to deceive the court may find that the debt is dischargeable.

Fraudulent Conveyance Considerations

§ 548(a)(1)(B)

The trustee may avoid any transfer . . . of an interest of the debtor in property . . . that was made or incurred on or within 2 years 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 or obligation; and . . . was insolvent on the date that such transfer was made . . . or became insolvent as a result of such transfer . . .* (**bold** added).

Tax (or Condo) Lien Foreclosure

- *Tyler v. Hennepin County*, 22-166, 2023 WL 3632754 (U.S. May 25, 2023)
  - Hennepin County, Minnesota, sold Geraldine Tyler's (94-year-old woman) home for $40,000 to satisfy a $15,000 tax bill. Instead of returning the remaining $25,000, the County kept it for itself.
- In a unanimous opinion, the Supreme Court, Chief Justice Roberts, held that:

  1. Taxpayer plausibly pleaded a classic pocketbook injury sufficient to give her standing to sue;

  2. County's retention of the money remaining after the condominium was sold was a classic taking for which taxpayer was entitled to just compensation; and

  3. Taxpayer did not constructively abandon her condominium by failing to pay property taxes.

In re Riendeau, 645 B.R. 321, 324 (Bankr. D. Me. 2022)

- Town recorded two tax liens against Debtors' property and conducted a foreclosure auction. Debtors filed bankruptcy 4 days after the winning bid was submitted and within 2 years from the date the first lien was recorded, valuing their foreclosed property at $110,000. Total tax liability was $4,500 and the winning bid was $38,100. Debtors brought adversary proceeding against the town, among others, for multiple claims including fraudulent transfer under § 548. Parties agreed that the transfer was within 2 years of the filing, that Debtors were insolvent, that the total tax debt was $4,500, and that the fair market value at the time of the transfer exceeded $4,500; the sole question was whether the "reasonably equivalent value" element was satisfied.
- No Final Judgment, no appeal.

Fraudulent Transfer?

- Motion for Judgment on the Pleadings as to the Town denied, as Debtors adequately pled a case for fraudulent transfer.
- *BFP v. Resolution Trust Corp*, 511 U.S. 531 (1994), does not dictate that a noncollusive tax lien foreclosure sale in conformance with state statute establishes reasonably equivalent value regardless of the sale price.
- The Bankruptcy Code does not exempt municipal taxing authorities from the fraudulent transfer statute.

Other Cases

- *In re BLD Realty Inc*., NO. 22-00802 (MCF), 2022 WL 17996551 (Bankr. D.P.R. Dec. 29, 2022)
- *Marshall v. Abdoun*, No. CV 22-0010, 2023 WL 2588166, at *8 (E.D. Pa. Mar. 20, 2023)
- *In re Yourelo Your Full-Serv. Relocation Corp*., No. 19-13602-CJP, 2020 WL 6927549, at *4 (Bankr. D. Mass. Nov. 23, 2020)
- *Gunsalus v. Cnty. of Ontario, New York*, 37 F.4th 859 (2d Cir.), *cert. denied*, 214 L. Ed. 2d 254, 143 S. Ct. 447 (2022) & *Hampton v. Cnty. of Ontario, New York*, No. 20-3868-BK, 2022 WL 2443007, at *2 (2d Cir. July 5, 2022)
- *In re Wright*, No. 20-12415-ABA, 2023 WL 3560551, at *5 (Bankr. D.N.J. May 18, 2023)

Aggressive Bankruptcy Planning

Miller v. Wylie (In re Wylie), 649 B.R. 852 (Bankr. E.D. Mich. 2023)

- *Debtors rolled $41,000 of tax refunds from an overpayment to the year after filing. They claimed the refund amount was unknown in their schedules and at their 341.*
- *Denial of Discharge was granted, even though Debtors turned over the refunds, because they made a post-petition transfer pursuant to §727(a)(2)(B), but not pursuant to § §727(a)(2)(A), or 727(a)(4)(A).*

In re Attairiwala, 648 B.R. 335 (Bankr. D.C. 2023).

- Debtor made several months of prepayments on her mortgage, car loan, HOA fees, and spouses' student loans in the months before filing.
- Mere fact that pre-bankruptcy planning has occurred is not indicative of bad faith.
- "There is nothing inappropriate in an individual planning for the worst and hoping for the best."

In re Cotton, 647 B.R. 767 (Bankr. W.D. Wash. 2022).

- Debtors filed five days after increase in homestead exemption, which allowed them to avoid judicial liens in full.
- "Pre-bankruptcy planning does not automatically indicate an abuse of the Bankruptcy Code and the Court is not prepared to find that Debtors filed their petition in bad faith."

WiscTex LLC v. Galesky (In re Galesky), 648 B.R. 643 (Bankr. E.D. Wis. 2022).

- Facing a lawsuit with a sizeable demand and fearing for his future, Debtor liquidated real property and purchased a $100,000 annuity with the net proceeds and withdrawals from personal accounts, a brokerage account after the sale of stock, and a business account within one year of filing.
- "A debtor's mere use of available exemptions does not evidence an intent to hinder, delay, or defraud his creditors under § 727(a)(2). . . . [A] debtor should not be denied a discharge or otherwise punished for acting as the law allows with respect to his property . . ."

Rasmussen v. Lamantia (In re Lamantia), 623 B.R. 1 (Bankr. Me. 2020).

- Facing a lawsuit, Debtor made a series of withdrawals totaling $30,647.48 over a period of 10 days to empty his bank accounts, then prepaid his mortgage, car loan, and a year of private school for his daughter; filled his freezer and oil tanks; and hired several lawyers on the eve of filing with the intent to keep those funds out of the hands of the plaintiffs.

- "…[E]mptying bank accounts and using the resulting cash to prepay living expenses may be permissible, but only up to a point. Here, the Defendant went too far, forfeiting the ability to present himself as an 'honest but unfortunate' debtor and instead demonstrating behavior consistent with a pattern of playing 'fast and loose' with his assets and the reality of his financial affairs."

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Layng v. Pansier (In re Pansier), 613 B.R. 119 (Bankr. E.D. Wis. 2020).

- Debtors failed to disclose their interests in certain personal property, real estate, and income which they willfully directed to several trusts and LLCs before and after filing.
- Discharge denied pursuant to §§ 727(a)(2) and (a)(4)(A).

Fee Issues

Are Chapter 11 Retainers Subject to Disgorgement after Conversion?

Section 726(b) provides that payments specified in certain paragraphs of section 507 (including administrative claims) shall be made pro rata among claims of a kind specified in a particular paragraph, except that following, conversion to Chapter 7, Chapter 7 administrative claimants shall have priority over other administrative claimants.

In re Dick Cepek, Inc., 339 Bankr. Ct. 730 (2006)

- A retainer is not subject to disgorgement if the claimant holds a security interest in it.
  - *In re Zukoski* – held that if a case is converted to Chapter 7 from Chapter 11, a security interest in a retainer allows a Chapter 11 professional to avoid the subordination provisions of section 726(b) to the extent that services were provided and approved by the bankruptcy court.
  - A prepetition retainer taken by a debtor's lawyer generally is intended to secure future payment of fees awarded by the court.

- The debtor's attorney becomes a secured creditor by taking possession of the prepetition retainer.
- *In re North Bay Tractor, Inc.,* 191 B.R. 186, 188 (1996): rejecting argument "that since retainer is property of the estate, attorney must disgorge [it] so that other claimants of equal priority receive equal dividends" because "such a rule *would undermine the purpose of retainers and chill the willingness of many professionals to undertake representation of Chapter 11 debtors.*"

Key Takeaways

- **Must** have a valid security interest in the retainer.
- **Must** provide full and timely disclosure of the details of any given arrangement.

Lack of Disclosure Leads to Disgorgement

In re Level 8 Apparel, LLC, No. 16-13164, 2023 WL 2940489 (Bankr. S.D. N.Y. April 13, 2023).

- RSS = bankruptcy counsel to Level 8 Apparel, LLC and World Cross Cultures, Inc. (Debtors)
- RSS represented Debtors and Kim in litigation that resulted in judgment.
- Debtors filed Chapter 11 after entry of nearly $2 Million Judgment against them and Sam Kim.
- RSS employed to represent Debtors in Ch. 11 case

In re Level 8 Apparel, LLC

- $70,000 Retainer paid to RSS by On Five Corp.
- Retention Application fails to mention:
  - On Five is an insider of the Debtors
  - On Five received transfers from the Debtors totaling $580k, for no apparent consideration, during the 8 months prepetition.
  - Prior representation
- Case Converts to Ch. 7 and RSS files Fee App
  - UST objects because RSS failed to disclose
  - RSS denies violated disclosure requirements

Rule 2014

In relevant part, that rule provides that the retention application shall state, "to the best of the applicant's knowledge, all of the person's connections with the debtor, creditors, any other party in interest, their respective attorneys and accountants, the United States trustee or any person employed in the office of the United States trustee."

The Court's Holding

- Prior representation not an "actual conflict"
- BUT RSS breached disclosure obligations under §329 and Rules 2014 and 2016 by failing to disclose relationships with Sam Kim, his wife, and On Five
- Under NY law, retainer is property of the Chapter 7 debtors' estates
  - "Pursuant to the terms of the Retention Order entered by this Court, the Retainer was merely a credit to future fees, and ownership of the Retainer did not pass to RSS until after the fees and expenses were approved by the Court."
- Court denies Chapter 7 Trustee's request to disqualify RSS but imposes sanctions for failure to meet disclosure mandates of Code and Rules.

Bifurcation Fee Agreements

United States Trustee v. Cialella (In re Anthony), 643 B.R. 789, 791 (Bankr. W.D. Pa. 2022)

- Atty. used bifurcated fee arrangements in her Chapter 7 cases.
- Atty. used Fresh Start as a third-party which offered a suite of related services designed to facilitate consumer bankruptcy law firms offering payment terms to their Chapter 7 debtors.
- Attorney used forms provided from Fresh Start but modified them to reflect her own practices. There were some inconsistencies including:
  - The client actually received fewer services under the *Post-Filing* Agreement than in the *Pre-Filing* Agreement.
- Court canvases the case law and adopts the majority view.

Should they be permitted?

- **UST Guidelines**: Permissible so long as fees charged under the agreements are fair and reasonable, the agreements are entered into with the debtor's fully informed consent and the agreements are adequately disclosed.
- ***In re Slabbinck***: Considered two separate agreements and could be permitted but would depend upon whether bifurcation would violate attorney's duty of competency and whether attorney had provided adequate consultation for the debtors as to what the bifurcation entailed and whether debtors had given informed consent.

- ***In re Hazlett***: Firm offered three options, one of which was a "zero down" option. Court declined to encourage or prohibit bifurcation agreements but if used, attorneys must have four essential practices:
    1. Any method of payment offered must be in the client's best interest
    2. All legal fees must be reasonable and necessary
    3. All fee agreements must be fully revealed and
    4. If the debtor elects to proceed pro se, the attorney must take the proper steps to immediately withdraw.

"[B]ifurcated fee agreements in consumer Chapter 7 cases to effectuate affordable legal services are not *per se* prohibited by the Bankruptcy Code and applicable law, they do not *per se* implicate ethical issues, and they are not *per se* unfair."

Bifurcation Agreements Generally allowed, with limitations

- ***In re Brown***
  - Reasonableness must be analyzed on the basis of the services provided with respect to each flat fee, not compared to each other.
  - Competency component: minimum level of services had to be included in pre-filing agreement regardless of whether Debtor signed post-filing agreement.

- ***In re Suazo***
  - Debtors must be fully informed, treated fairly, and agreements disclosed to the Court.
  - Disgorged fees because scope of services were inconsistent and debtors not fully informed.

Notice

Twitter?

In re Three Arrows Cap., Ltd., 649 B.R. 143 (Bankr. S.D.N.Y. 2023)

Service of the Subpoena was in fact reasonably calculated to provide notice to Davies as served.

"With respect to service via Twitter, the Foreign Representatives have shown that Davies' use of his Twitter account since the Subpoena was served make it highly likely that he has notice of the Subpoena for three reasons: (1) the Twitter account has posted frequently since service; (2) the posts appear to be from Davies himself based on their content; and (3) there has been additional activity that would have drawn additional attention to the Subpoena for a frequent Twitter user like Davies. While Twitter is a relatively new platform for service of process, these facts bearing on control, frequency of use, and likelihood of receipt that were considered in the email context by the court in Morse are similarly relevant here." Id. at 147-48.

Email?

In re Cyber Litigation, Inc., No. 20-12702 (CTG), 2021 WL 5047512, at *1-2 (Bankr. D. Del. Oct. 28, 2021)

Although the notice to Hansen Networks complied with the requirements of due process, it is nevertheless inadequate because it failed to comply with Bankruptcy Rule 2002(a)(7) because the notice was sent by e-mail and not mail.

"But meeting the constitutional due process standard is not the only requirement. The debtor is also obligated to comply with the Federal Rules of Bankruptcy Procedure. And Bankruptcy Rule 2002(a)(7) provides that "the clerk, or some other person as the court may direct, shall give the debtor, the trustee, all creditors and indenture trustees at least 21 days' notice *by mail* of ... (7) the time fixed for filing proofs of claim pursuant to Rule 3003(c)." Fed. R. Bankr. P. 2002(a)(7) (emphasis added). This Court's bar date order authorized the Debtor, with the assistance of the claims agent, to provide that notice. D.I. 145 ¶ 12. And fairly read, the term "notice by mail" does not include email." *1

"In order to show that the failure to provide proper service by mail was harmless, however, it is insufficient to demonstrate that the creditor was sent notice by some other means by which he *might* or *should* have learned of the bar date. In the absence of a showing that the creditor obtained actual, subjective knowledge of the bar date, the Court is unable to conclude that the failure to meet the specific requirements of the rules may be treated as a no-harm-no-foul situation."

To Attorney but not Creditor?

Debtor's listing of Attorney Proctor "for Vermont Center Wreaths, Inc." and the use of Attorney Proctor's mailing address on the schedules and Creditors Matrix was reasonable under the circumstances of this case due to his continued representation of Vermont Center in the Collection Litigation, which involved the very same claim that Vermont Center seeks to assert here. For these reasons, there was a sufficient nexus between Vermont Center's retention of Attorney Proctor and its Proof of Claim against the Debtor.

"Furthermore, the parties agree that Attorney Proctor received the Notice of Bankruptcy, which contained the Bar Date and other important dates, shortly after the bankruptcy filing and well before the expiration of the Bar Date. Under these circumstances, that was sufficient notice to inform Vermont Center of its duty to monitor the bankruptcy case. *See In re San Miguel Sandoval*, 327 B.R. at 510 (concluding that service of the notice of bankruptcy filing on the creditors' original counsel "constituted adequate notice" to the creditors and "was sufficient to impose upon [original counsel], successor counsel and the [c]reditors the obligation to monitor the proceedings and the deadlines")."

Old Address?

In re Jafroodi, No. 9:19-BK-11918-MB, 2023 WL 3310401, at *9 (Bankr. C.D. Cal. May 8, 2023).

- Mailing of summons and complaint to debtor at outdated address failed to satisfy due process requirements for service of process;
- Mailing of summons and complaint to trustee of debtor's private retirement trust to retail private mailbox listed on state bar's website failed to comply with service rule; and
- Sanctions were not warranted as condition to setting aside defaults.

Chapter 13 Sale Plans

Can a Chapter 13 Debtor file a "Sale Plan" with respect to his or her principal residence?

In re Materne, 640 B.R. 781 (Bankr. D. Mass Apr. 7, 2022)

- Under § 1325(a), the court shall confirm a plan if it meets the requirements of § 1325(a) and complies with the rest of the code. "The burden is on the debtor to prove that each of the statutory criteria for confirmation is met." *Austin v. Bankowski,* 519 B.R. 559, 563 (D. Mass. 2014).

- Two Plans:
  - Collateral= debtors' principal residences
  - Trustee Objected to each Plan
- Analysis
  - The equal periodic payments provision has been interpreted as both prohibiting and permitting balloon payments. The majority of courts have said that a balloon payment is not equal to the payment that preceded it, and thus violates § 1328(a)(5)(B)(iii)(I); however, courts have also held that a balloon payment satisfies the debt in full, and thus by definition cannot be repeated periodically, whether in equal amounts or otherwise. They submit that the final balloon payment is distinct and separate from the preceding periodic payments.

- Also, there are differing views of the ability to cure a default under § 1322(b)(3) notwithstanding § 1322(b)(2)'s prohibition of modifying a secured claim secured by real property that is the debtor's principal residence. The justification for **permitting** cure in § 1322(b)(3) is that curing is not modifying. The courts that **prohibit** cure in § 1322(b)(3) hold that the only permissible means to cure a secured claim, that is secured by real property that is the debtor's principal residence, is to cure the arrears within a reasonable time and maintain regular monthly payments under § 1322(b)(5).
- As to the argument that payments made directly are not "under the plan", Judge Panos held that proposing maintenance payments "provides for" treatment of such a claim, making satisfaction of § 1325(a)(5) a requirement.

- As to § 1325(a)(5)(B)(ii), (the value of property to be distributed is not less than the allowed claim), Judge Panos said the prospect of a sale may be a feasibility issue but providing for payment of a secured claim through a sale does not *per se* violate § 1325(a)(5)(B)(ii).
- As to § 1325(a)(5)(B)(iii), there's no legislative history explaining the equal periodic payments provision. Judge Panos opined that congress intended to give creditors more certainty and regularity as to any proposed stream of payments and was not intending to prohibit balloon payments.
- Judge Panos interpreted § 1322(b)(8) and § 1325(a)(5) to permit a secured claim to be paid in full through a sale that is in prospect at the time of confirmation or a reasonable time thereafter, subject to all other confirmation requirements such as feasibility and good faith.
- For findings of feasibility § 1325(a)(6) and good faith § 1325(a)(3), evidence may overlap. Courts will want to see the marketing efforts, the listing price and terms, a timeline for the proposed sale, and a default remedy or other alternative if the sale fails to close within the proposed time frame.

- For a good faith finding, the First Circuit uses a totality of the circumstances approach. Both mortgagees argued bad faith by the debtors. Gnaman's mortgagee argued that a plan that requires a sale in order to be feasible is not proposed in good faith. Materne's mortgagee argued that failure to address postpetition payments in a manner that would not increase postpetition arrears is bad faith.
- Judge Panos ruled that a sale plan proposing a sale period that could run through the last month of the term of the plan may constitute circumstances from which a lack of good faith might be inferred. (Judge Panos did not hold an evidentiary hearing and presumably that explains why he did not enter a finding on good faith.)

Conclusion

In *Materne*, not allowed. Court agreed with majority that a plan that contemplates periodic payments followed by a lump-sum payment is prohibited by § 1325(a)(5)(B)(iii). And he added that the plan did not provide for a specific sale process that would pay the secured creditors at or a reasonable time after confirmation. (Thus, the plans were in violation of the feasibility requirement of § 1325(a)(6)).

Tribal Immunity Meets Automatic Stay

Coughlin v. Lac du Flambeau Band of Lake Superior Chippewa Indians (In re Coughlin), No- 22-227, 2023 WL 4002952, S. Ct. June 15, 2023.

- In 2019, one of the Band's businesses "allowed" the Debtor to borrow $1,100 pursuant to a high-interest, short-term loan.
- Debtor filed bankruptcy before repaying the loan, triggering the automatic stay.
- The Band continued aggressive collection efforts notwithstanding the stay, causing substantial emotional distress.
- Debtor filed an adversary proceeding for willful violation of the stay.
- The Band moved to dismiss citing tribal sovereign immunity. The Bankruptcy Court (D. Mass; Bailey, J.) agreed and dismissed the adversary finding that the Bankruptcy Code does not "unequivocally" abrogate the Band's sovereign immunity.
- Debtor appealed and the 1st Circuit reversed in a divided opinion, siding with the 9th Circuit and splitting with the 6th Circuit. SCOTUS granted certiorari.

SCOTUS Decision = Abrogation

- Majority (Jackson, J.): Tribes are "governmental unit[s]" under 11 U.S.C. § 106(a).
  - No "magic-word requirement." I.e. the statute does not need to state "Tribes" to abrogate tribal sovereign immunity.
  - Here, intent to abrogate was "clearly discernable" from the statute itself
- Concurrence (Thomas, J.): Tribes may not have sovereign immunity in the first place; if so, it does not extend beyond their territory.
  - Tribal immunity is common law "developed by accident" and is subject to the other sovereign's law as a matter of comity.
- Dissent (Gorsuch, J.): Magic word! Plausible interpretation ≠ unequivocal expression.

Faculty

Hon. Heather Zubke Cooper is the Chief U.S. Bankruptcy Judge for the District of Vermont in Rutland. Prior to her appointment on March 14, 2022, she began her legal career as a briefing attorney to Justice David L. Richards of the Texas Court of Appeals, Second District. She then entered private practice with the firm of Dunn, Kacal, Adams, Pappas & Law, P.C. in Houston, followed by the firm of Murphy & King, P.C. in Boston. In 2004, Judge Cooper moved to Vermont and clerked for former Bankruptcy Judge Collen A. Brown (her predecessor). In 2006, Judge Cooper joined the firm of Facey Goss & McPhee P.C., a Vermont-based law firm, as an associate and then as a partner. Judge Cooper's practice focused on litigation with extensive and diverse bankruptcy law experience, with more than 20 years of experience in the financial and restructuring industry, representing individual and corporate debtors and creditors in loan workouts and restructurings, liquidations, foreclosures, litigation seizures and receiverships. During her partnership at Facey Goss & McPhee P.C., Judge Cooper served as managing partner and became certified in Consumer Bankruptcy Law by the American Board of Certification. She also served as the Bankruptcy Law Section Chair of the Vermont Bar Association from 2014-18 and on various task forces for the U.S. Bankruptcy Court for the District of Vermont since 2011. Judge Cooper received her B.A. from the University of Houston in 1993 and her J.D. *magna cum laude* from South Texas College of Law in 1998.

Andrea M. O'Connor is an attorney with Fitzgerald Law, P.C. in East Longmeadow, Mass., where she concentrates her practice in commercial and consumer bankruptcy and insolvency matters. She has successfully represented debtors, creditors and trustees in reorganization, liquidation and litigation cases in Massachusetts and Connecticut. She also serves as a chapter 7 panel trustee in Connecticut. Prior to joining Fitzgerald Law, P.C., Ms. O'Connor was a shareholder at Hendel, Collins & O'Connor, P.C. She also clerked for the U.S. Bankruptcy Court for the District of Massachusetts. She also served as an adjunct professor at Elms College in Chicopee, Mass., where she taught advanced legal research and writing. Ms. O'Connor frequently serves as a panelist, lecturer and contributing author regarding various insolvency law matters. She has published numerous articles and a book chapter on the impact of bankruptcy on the landlord/tenant relationship. Ms. O'Connor is admitted to practice law in the Courts of the Commonwealth of Massachusetts and the State of Connecticut, the U.S. District Court for the Districts of Massachusetts and Connecticut, and the First Circuit Court of Appeals. She received her B.A. *cum laude* from the University of Connecticut and her J.D. *magna cum laude* from Western New England University School of Law, during which time she served editor-in-chief of the *Western New England Law Review*.

Kara S. Rescia is the principal of Rescia Law, P.C., with offices in Enfield, Conn., and Northampton, Mass. She focuses on consumer and business bankruptcy and alternatives, and small business representation. Since 1992, Ms. Rescia has concentrated her practice in bankruptcy, representing both debtors and creditors in business and consumer cases, as well as business and corporate law, including commercial financing and litigation. She is admitted to the bars for the Commonwealth of Massachusetts and the State of Connecticut, as well as the U.S. District Courts for the Districts of Massachusetts and Connecticut. Since 2010, Ms. Rescia has served as a chapter 7 panel trustee for the U.S. Bankruptcy Court for the District of Connecticut. She also serves as a subchapter V panel trustee and a chapter 12 trustee for the Connecticut Bankruptcy Court. Ms. Rescia is on the Executive

Committee of the Connecticut Bar Association's Commercial Law and Bankruptcy Section and is a past chair of the Bankruptcy Section of the Hampden County Bar Association, and she is a member of the Hampden and Hampshire County Bar Associations, the Connecticut Bar Association, ABI, the National Association of Bankruptcy Trustees and the International Women's Insolvency & Reorganization Confederation's New England and Connecticut Networks. She has been on the faculty of many seminars and has participated in numerous continuing legal education programs in the area of bankruptcy law. Ms. Rescia received her undergraduate degree in 1988 from the University of Southern Maine and her J.D. in 1992 from Western New England University School of Law.

Micah A. Smart is an associate in Eaton Peabody's Portland, Maine, office and focuses his practice primarily on bankruptcy and creditor rights. He represents a wide range of lending institutions, local businesses and individuals in both state and federal courts, with a particular emphasis on creditors in chapter 7, 11, 12 and 13 bankruptcies, commercial collections and workouts, and foreclosure. Ms. Smart externed during law school with Chief Judge Peter G. Cary of the U.S. Bankruptcy Court in Maine and Hon. Kermit V. Lipez of the First Circuit Court of Appeals. He received the Laurie A. Gibson Award for Excellence, whic his awarded for the highest score on the essay portion of the Bar Exam. Mr. Smart received his B.A. in criminal justice from Quinnipiac University and his J.D. *magna cum laude* from the University of Maine School of Law, where he received the Commercial Law Award. Prior to attending law school, he spent a year teaching English in rural Colombia.