We Can Go 'Round and 'Round About That...

Jeffrey W. Warren, Moderator
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U.S. Bankruptcy Court (M.D. Fla.); Tampa

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Hon. Michael G. Williamson
U.S. Bankruptcy Court (M.D. Fla.); Tampa

Consumer Corner

By Bonnie L. Clair and Bryon E. Hale[1]

Supreme Court Finally Takes Up Chapter 13 Confirmation Finality

Bonnie L. Clair
Summers Compton Wells LLC; St. Louis

Bryon E. Hale
Summers Compton Wells LLC; St. Louis

Bonnie Clair is a principal and Bryon Hale is an associate with Summers Compton Wells LLC in St. Louis.

Every chapter 13 debtor must file[2] and seek confirmation of a plan at the outset of the case.[3] A bankruptcy court's denial of confirmation[4] leaves most debtors with a choice between proposing an amended plan, which may or may not be acceptable to the debtor or confirmable, or suffering a dismissal or conversion of the bankruptcy case.[5] However, some chapter 13 debtors seek to appeal from orders denying plan confirmation.

The issue of a debtor's ability to appeal confirmation denial first made it to a court of appeals relatively quickly after the modern Bankruptcy Code's Oct. 1, 1979, effective date. In 1982, a divided Second Circuit panel in *Maiorino v. Branford Savings Bank* found an order denying confirmation of a chapter 13 plan to be interlocutory and thus, not appealable.[6] Multiple circuit courts of appeals followed *Maiorino*,[7] but a divided Fifth Circuit panel in the 2000 case of *In re Bartee* split from existing precedent to permit a debtor to proceed to an immediate appeal from an order denying plan confirmation.[8]

This split continues to date, with six circuits taking the *Maiorino* position and three circuits taking the view espoused in *Bartee*.[9] However, the U.S. Supreme Court's recent granting of *certiorari* in *Bullard v. Hyde Park Savings Bank* should conclude the debate about this issue during its current term.[10]

Statutory History and Background

Before the Bankruptcy Reform Act of 1978, a chapter 13 debtor only could seek confirmation of a "wage earner's plan" after obtaining written approval of the plan from a majority of his/her secured and unsecured creditors.[11] With the Bankruptcy Reform Act of 1978, Congress attempted to correct what it viewed as a serious defect in chapter 13 by permitting chapter 13 debtors to propose a "reasonable plan for debt repayment based on that individual's exact circumstances"[12] and gave parties-in-interest the right to object to plan confirmation.[13]

When a bankruptcy court denies confirmation of a chapter 13 plan, it typically either directs the debtor to file an amended plan by a certain date, or requires a conversion or dismissal of the case.[14] The issue of appellate jurisdiction arises in cases where the debtor decides to appeal the order denying confirmation instead of filing an unwanted or undesirable plan or risking dismissal of the case, as well as the loss of the automatic stay and other protections under the Bankruptcy Code.[15]

Standard for Appellate Jurisdiction over Bankruptcy Matters

Section 158 of title 28 governs appellate jurisdiction for appeals from bankruptcy courts. Debtors may appeal final judgments, orders or decrees to a bankruptcy appellate panel (BAP) or district court as a matter of right,[16] but may only appeal interlocutory orders and decrees with a bankruptcy court's leave.[17] The courts of appeals then have jurisdiction over appeals from final decisions, orders, judgments and decrees by a BAP or district court,[18] but only have jurisdiction over interlocutory orders and decrees if a lower court certifies after motion or *sua sponte* that the order or decree at issue involves a question of law with no controlling authority, involves a matter of public importance or a question of law requiring resolution of conflicting decisions, or finds that immediate appeal materially should advance the case's progress.[19]

Courts of appeals generally apply a flexible standard in determining whether an order or decree is final

1 The views expressed in this article do not reflect the views of Summers Compton Wells LLC or any of its clients.
2 *See* 11 U.S.C. § 1321.
3 *See* 11 U.S.C. § 1324(b).
4 *See generally* 11 U.S.C. § 1325 (setting out mandatory criteria for confirmation of chapter 13 plan).
5 *See* 11 U.S.C. § 1307(c) (enumerating grounds for conversion or dismissal of chapter 13 case, including denial of confirmation of plan under § 1325 of Bankruptcy Code).
6 *See Maiorino v. Branford Sav. Bank*, 691 F.2d 89, 90 (2d Cir. 1982).
7 *See Bullard v. Hyde Park Sav. Bank (In re Bullard)*, 752 F.3d 483, 485-86 (1st Cir. 2014), *cert. granted*, 83 U.S.L.W. 3100, 2014 WL 3817549 (U.S. Dec. 12, 2014) (No. 14-116); *In re Gordon*, 743 F.3d 720, 724 (10th Cir. 2014), *petition for cert. filed*, 82 U.S.L.W. 3709 (U.S. May 21, 2014) (No. 13-1416), *In re Lindsey*, 726 F.3d 857, 859 (6th Cir. 2013); *In re Pleasant Woods Assocs. Ltd. P'ship*, 2 F.3d 837, 838 (8th Cir. 1993); *In re Lievsay*, 118 F.3d 661, 662 (9th Cir. 1997).
8 *See In re Bartee*, 212 F.3d 277, 283-84 (5th Cir. 2000).
9 *Id.*; *see also In re Armstrong World Indus. Inc.*, 432 F.3d 507, 511 (3d Cir. 2005); *Mort Ranta v. Gorman*, 721 F.3d 241, 248 (4th Cir. 2013).
10 The Supreme Court granted *certiorari* in *Bullard* on Dec. 12, 2014. At that time, the petition pending in *Gordon* also sought review of the identical issue. Although filed two months prior to the *Bullard* petition, the *Gordon* petition remained pending for further conference by the Supreme Court as of the submission of this article with any grant or denial of *certiorari* or other action, such as consolidation with *Bullard*.
11 The Bankruptcy Act, 11 U.S.C. § 1052 (repealed 1978); *see, e.g., In re Teegarden*, 330 F. Supp. 1113, 1114 (D. Ky. 1971).
12 S. Rep. No. 95-989, at 13 (1978).
13 *See* 11 U.S.C. § 1324(a).
14 *See, e.g.*, 11 U.S.C. §§ 1307(c) and 1323(a).
15 *See Mort Ranta*, 721 F.3d at 248.
16 *See* 28 U.S.C. § 158. Section 158(b) allows a circuit's judicial council to establish a bankruptcy appellate panel comprised of bankruptcy judges from the district to hear appeals from a single bankruptcy judge's rulings.
17 28 U.S.C. § 158(a)(3).
18 28 U.S.C. § 158(d)(1).
19 28 U.S.C. § 158(d)(2).

in bankruptcy cases.[20] In applying this flexible standard, they deem an order or decree final if it finally disposes of a discrete dispute within a larger bankruptcy proceeding.[21] For example, case law finds an order denying a panel trustee's motion to dismiss a bankruptcy case as abusive under § 707(b) to be final and appealable because it finally and conclusively resolves a discrete issue within a chapter 7 case.[22] However, this finality standard does not necessarily suffice to permit chapter 13 debtors to proceed to immediate appeals when a bankruptcy court denies plan confirmation under existing precedent.

Majority View: No Jurisdiction over Debtors' Appeals from Confirmation Denials

The *Maiorino* decision comprised the first court of appeals decision on the issue and established the current majority view.[23] In that case, the Second Circuit found the bankruptcy court's order below denying confirmation of the debtor's chapter 13 plan interlocutory and not appealable.[24] Five other circuits, including the First Circuit in *Bullard*, now follow *Maiorino*'s rationale to bar immediate appeals from orders denying chapter 13 plan confirmations.[25]

Courts taking the majority view state that an order denying confirmation of a chapter 13 plan cannot be considered final if the debtor can propose an amended plan without his/her case being dismissed.[26] Those courts find that rejection of a plan fails completely to dispose of a discrete dispute within a chapter 13 case because any amended plan that a debtor proposes remains subject to creditors' objections and confirmation proceedings in front of the bankruptcy court.[27]

Courts in the majority also believe that allowing debtors immediate appeals from confirmation denials inevitably results in judicial inefficiency.[28] Indeed, as far back as *Maiorino*, the Second Circuit warned that courts should eschew construing jurisdictional statutes — especially those involving direct appeals to the courts of appeals — too liberally, "otherwise, at every stage of the bankruptcy proceedings the parties will run to the court of appeals for higher advice."[29] The courts holding the majority view often note that debtors have a safety valve in the event of extraordinary circumstances because they can seek certification for an appeal under 28 U.S.C. § 158(d)(2) if a substantive plan provision involves a question of law with no controlling authority.[30]

Minority View: Jurisdiction Exists over Debtors' Appeals from Confirmation Denials

The minority view began taking shape with the Fifth Circuit's decision in *Bartee*.[31] The Third and Fourth Circuits subsequently followed *Bartee* in holding that orders denying plan confirmation are final and appealable and allowing those appeals to proceed to decision.[32]

Courts holding the minority view take the position that allowing debtors to appeal confirmation denials is "all but compelled by considerations of practicality."[33] Those courts find that the unavailability of an immediate appeal from a confirmation denial forces a debtor to "choose between filing an unwanted or involuntary plan and then appealing his own plan, or dismissing his case and then appealing his own dismissal."[34] Courts espousing the minority view counter the majority view's efficiency argument with one of their own: They argue that forcing a debtor to propose and obtain confirmation of an unwanted plan in order to obtain an appellate review also results in the debtor wasting scarce resources.[35] Those courts also find the prospect of incurring dismissal equally unappealing, especially considering that the debtor could lose the protection of the automatic stay.[36] Forcing the debtor to appeal his/her own plan or dismissal also raises standing issues for the minority courts.[37]

Courts taking the minority view also urge that principles of fairness and equity to all parties-in-interest in a bankruptcy case dictate a debtor's right to an immediate appeal of a confirmation denial. Specifically, creditors have the ability to take immediate appeals as of right from chapter 13 plan confirmations over their objections.[38] Considering the Bankruptcy Code's stated goal of aiding consumer debtors, it creates an inconsistency and makes little sense to give creditors the unfair advantage of immediate access to appellate review.[39]

Finally, in response to the inefficiency argument propounded by courts sharing the majority view, the Fourth Circuit in *Mort Ranta* pointed out that a debtor facing denial of confirmation will not waste scarce resources on gratuitous appeals simply because the option to appeal exists.[40] The Fourth Circuit further asserted that the alternative of a debtor appealing confirmation of an amended, unwanted plan presents even fewer economies than an immediate appeal because that situation simply delays the inevitable in cases where the debtor finds the amended plan unacceptable.[41]

Bullard Brings the Issue to Supreme Court

In *Bullard*, a chapter 13 debtor submitted a plan proposing a "hybrid" payment scheme to bifurcate his residential lender's secured claim into a secured claim in an amount equal to the market value of the residence and an unsecured claim for the amount owed in excess of the market value.[42] The plan proposed that the debtor continue making payments under the applicable loan documents until he satisfied the secured component of the claim in full, and then treat the unsecured portion of the claim the same as the other unse-

20 *See Bullard*, 752 F.3d at 485-86; *Mort Ranta v. Gorman*, 721 F.3d 241, 246 (4th Cir. 2013). The Tenth Circuit is the exception to the rule as it has refused to apply a flexible or relaxed finality standard to bankruptcy cases. *See In re Gordon*, 743 F.3d 720, 723-24 (10th Cir. 2014).
21 *See Bullard*, 752 F.3d at 485-86; *see also Mort Ranta*, 721 F.3d at 246. Presumably, the Supreme Court's adjudication of *Bullard* will address the propriety of the flexible standard for finality.
22 *McDow v. Dudley*, 662 F.3d 284, 289 (4th Cir. 1983).
23 *Maiorino*, 691 F.2d at 90.
24 *Id.*
25 *See Bullard*, 752 F.3d at 489; *Gordon*, 743 F.3d at 724; *Lindsey*, 726 F.3d at 859; *Pleasant Woods Assocs.*, 2 F.3d at 838; *Lievsay*, 118 F.3d at 662.
26 *Bullard*, 752 F.3d at 486.
27 *Id.* at 486-87.
28 *Id.* at 489; *see also Maiorino*, 691 F.2d at 91.
29 *Maiorino*, 691 F.2d at 91.
30 *Bullard*, 752 F.3d at 487; *see also In re Lindsey*, 726 F.3d at 860.
31 *See In re Bartee*, 212 F.3d 281-84.
32 *See In re Armstrong World Indus.*, 432 F.3d at 511; *Mort Ranta*, 721 F.3d at 250.
33 *Mort Ranta*, 721 F.3d at 248 (citing *Bartee*, 212 F.3d at 283).
34 *Id.*
35 *Mort Ranta*, 721 F.3d at 248.
36 *Id.*
37 *Id.* at 248 n.10 (noting that appellant must be "aggrieved person" to have standing to appeal).
38 *Id.* at 249.
39 *Id.*
40 *Id.*
41 *Id.*
42 *Bullard*, 752 F.3d at 484.

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cured claims by receiving a *pro rata* share of distributions over the life of the plan.[43] The bankruptcy court rejected the plan on the basis that the "hybrid" payment scheme violated § 1322(b) of the Bankruptcy Code.[44]

On initial appeal, the First Circuit BAP affirmed the ruling,[45] noting that the order denying confirmation lacked finality under 28 U.S.C. § 158(a)(1) and instead comprised only an interlocutory order subject to a review on appeal with leave of court.[46] The debtor filed a motion for leave to appeal with the BAP on the grounds that courts in the circuit were divided over the issue of whether "hybrid" plans are confirmable.[47] The BAP then granted the debtor's motion for leave and affirmed the order denying confirmation on the merits.[48] The debtor subsequently appealed to the First Circuit,[49] which dismissed the debtor's appeal due to the absence of jurisdiction for an appeal of an interlocutory order absent a certification from the BAP that the order involved a question of law not covered by any controlling decision from the court of appeals or the Supreme Court.[50]

43 Petition for *Writ of Certiorari*, *Bullard v. Hyde Park Savs. Bank*, at 4 (No. 14-116).
44 *Id.*
45 *In re Bullard*, 494 B.R. 92, 101 (B.A.P. 1st Cir. 2013), *appeal dismissed*, 752 F.3d 483 (1st Cir. 2014).
46 *Id.* at 95.
47 *Id.*
48 *Id.*
49 Petition for *Writ of Certiorari*, at 6.
50 *Id.*

Practicality and Fairness Compel Adoption of the Minority View

Many of the Supreme Court's recent bankruptcy decisions focus more heavily on statutory language and interpretation rather than policy.[51] However, the Court should give weight to the practicality and policy considerations associated with the issues before it in *Bullard*. Presumably, the Bankruptcy Code seeks to place debtors and creditors in comparable positions in comparable situations. As a result, all parties should have comparable access to prompt appellate review on plan-confirmation issues without having to go through the machinations to obtain it. Chapter 13 cases comprise more than 30 percent of all bankruptcy filings,[52] and any decision on *Bullard* may extend to confirmation denials in chapter 11 cases as well,[53] so the Supreme Court's final word on finality will finally have far-reaching effects. abi

51 *See, e.g.*, *Clark v. Rameker*, 134 S. Ct. 2242, 2248 (2014) (holding that Bankruptcy Code's text and purpose supersede policy arguments), *Ransom v. FIA Card Serv. NA*, 562 U.S. 61, 131 S. Ct. 716, 723 (2011) (finding that interpretation of Bankruptcy Code starts "with the language of the statute itself") (internal quotations omitted); *Milavetz, Gallop & Milavetz PA v. U.S.*, 559 U.S. 229, 239 (2010) (stating that Supreme Court only will consider constructions of a statute that are "fairly possible").
52 Administrative Office of the U.S. Courts, Bankruptcy Statistics, *available at* www.uscourts.gov/uscourts/Statistics/BankruptcyStatistics/BankruptcyFilings/2014/0914_f2.pdf (last visited Dec. 24, 2014).
53 There were 6,504 chapter 11 cases, including more than 1,000 individual filings, during the year ending Sept. 30, 2014. *Id.*

Feature

By Eric W. Anderson and Joshua J. Lewis

You Can't Bootstrap Yourself into Bankruptcy Court

Eric W. Anderson
Parker Hudson Rainer & Dobbs LLP; Atlanta

Joshua J. Lewis
Parker Hudson Rainer & Dobbs LLP; Atlanta

Eric Anderson is a partner and Joshua Lewis is an associate with Parker, Hudson, Rainer & Dobbs LLP in Atlanta. Mr. Anderson is also a member of ABI's Southeast Bankruptcy Workshop's advisory board and Mr. Lewis serves as newsletter editor for ABI's Secured Credit Committee.

Bankruptcy practitioners take for granted that a bankruptcy court's "related-to" subject-matter jurisdiction is quite broad, but the U.S. Supreme Court in *Celotex* reminded judges and practitioners alike that "related-to" jurisdiction is not limitless. In the recent case of *In re TMT Procurement Corp.*,[1] the Fifth Circuit articulated the boundaries of "related-to" jurisdiction in a manner that could have far-reaching effects. This decision, while admittedly addressing unusual facts, could be read expansively to support the collateral attack of bankruptcy court orders constituting the adjudication of nondebtor rights in non-estate property (*e.g.*, certain third-party releases, adverse claims to property contributed by equity sponsors of a plan, etc.), without regard to the relatedness of the orders to a bankruptcy proceeding or the purported provision of due process to those adversely affected by the orders. *TMT* also serves as a cautionary reminder to debtor-in-possession (DIP) lenders and purchasers of DIP assets that the mootness protections afforded to "good-faith" lenders and purchasers under §§ 363(m) and 364(e) may not extend to those with notice of an "adverse claim" to property pledged or purchased.

Factual Background

In 2012, Vantage Drilling Co. brought an action in Texas state court against Hsin-Chi Su (Su) alleging a breach of fiduciary duty, fraud, fraudulent inducement, negligent misrepresentation and unjust enrichment (the "Vantage litigation")[2] in connection with Vantage's entry into contracts with companies controlled by Su for the acquisition of certain offshore drilling rigs and drill ships.[3] In those transactions, Vantage issued approximately 100 million shares of Vantage stock to F3 Capital, an entity owned and controlled by Su, and granted Su three seats on Vantage's board of directors.[4] Su's misrepresentations allegedly placed Vantage in severe financial distress and disrupted its ability to perform on several critical contracts, creating a situation that Su then leveraged to extract additional Vantage stock and other benefits.[5] In the subsequent lawsuit, Vantage sought the imposition of a constructive trust upon the Vantage stock held by Su.[6]

In 2013, 23 companies owned directly or indirectly by Su filed voluntary petitions for chapter 11 relief. At an evidentiary hearing on a motion to dismiss the bankruptcy cases, Su offered to place approximately 25 million shares of Vantage stock held by F3 Capital into escrow, which was to be administered by the bankruptcy court to secure compliance with court orders and serve as collateral for post-petition borrowing or working capital.[7] The bankruptcy court denied the motion to dismiss with respect to all but two of the debtors, and ordered that the 21 remaining debtors "must cause non-estate property (the 'Good-Faith Property') with a fair market value of $40,750,000 to be provided to the Estates," and that if the good-faith property was not provided in cash, then it "must include at least 25,000,000 shares of the common stock of Vantage."[8]

Thereafter, the debtors requested approval of an escrow agreement by which F3 Capital would deposit 25 million shares of Vantage stock (the "Vantage shares") with the clerk of the bankruptcy court to be held in *custodia legis* for the benefit of the debtors.[9] Vantage, which was not a creditor of any of the debtors, appeared as a party in interest before the bankruptcy court and opposed the debtors' proposed escrow of the Vantage shares.[10] The bankruptcy court overruled Vantage's objections, finding that the Vantage shares were not subject to a constructive trust as a matter of law, such that they could be placed in *custodia legis* "without complaint by any other party who has claimed ownership of the shares."[11] The bankruptcy court further found that because F3 Capital was not a party to the Vantage litigation and F3 Capital received the Vantage shares prior to the commencement of the Vantage litigation, due process prevented F3 Capital from being deprived of its property in the Vantage litigation.[12] Accordingly, the bankruptcy court entered an order (the "escrow order") authorizing the escrow of the Vantage shares and providing, among other things, that the stock would serve as collateral for the debtors' working-capital loans.

The district court withdrew the reference to the bankruptcy court, denied leave to appeal and set a hearing to reconsider, among other issues,

1 764 F.3d 512 (5th Cir. 2014).
2 *Id.* at 515.
3 *Id.*
4 *Id.*
5 *Id.* at 515-16.
6 *Id.* at 516.
7 *Id.*
8 *Id.*
9 *Id.* at 517.
10 *Id.*
11 *Id.*
12 *Id.*

Vantage's objections to the escrow order.[13] Before the hearing, the debtors filed an emergency motion requesting permission to borrow up to $20 million in post-petition financing secured by the Vantage shares.[14] The district court entered an interim order authorizing an initial loan of $6 million and granted Macquarie Bank Ltd. (the "DIP lender") a first-priority lien and security interest in the Vantage shares then held in escrow.[15] The interim order provided that the DIP lender's interests in the deposited Vantage shares could not be compromised by any subsequent order of the bankruptcy court or state court in the Vantage litigation, and that the DIP lender had extended financing to the debtors in good faith and was entitled to "the full protections of sections 363(m) and 364(e) of the Bankruptcy Code."[16]

The order further provided that if any provision of the order was reversed, modified, vacated or stayed, such action would not affect the validity or enforceability of the liens that were authorized or created.[17] The district court then re-referred the action to the bankruptcy court, where the bankruptcy court approved the extension to the debtors of the full $20 million post-petition financing requested by the debtors pursuant to the orders containing terms similar to those of the district court order.[18] Vantage timely appealed the orders of the district court and the bankruptcy court to the Fifth Circuit.[19]

The Issues on Appeal

On appeal, the debtors asserted that Vantage's appeal was moot under §§ 363(m) and 364(e) by virtue of Vantage's failure to seek or obtain a stay of any of the financing orders being appealed.[20] The debtors also argued that the Fifth Circuit should find that Vantage waived its right to contest the DIP lender's good faith because Vantage only raised the issue for the first time on appeal.[21] The Fifth Circuit found that Vantage sufficiently raised the issue of the DIP lender's good faith before the courts below by virtue of its repeated assertions that F3 Capital had fraudulently obtained the Vantage shares, Vantage had an adverse claim to the Vantage shares, and Vantage's right to assert a constructive trust over the Vantage shares would survive any attempt to pledge, sell or transfer the Vantage shares to a purchaser or lender that was on notice of Vantage's adverse claim.[22] The Fifth Circuit evaluated whether the DIP lender acted in "good faith" within the meaning of §§ 363(m) and 364(e), then addressed the challenges raised by Vantage as to whether the district and bankruptcy courts had jurisdiction to enter orders encumbering the Vantage shares.

Mootness

Sections 363(m) and 364(e) provide protection to DIP lenders who in good faith extend loans that are secured by estate property, and good-faith purchasers of estate property, from any modification of their interests on appeal.[23] The proponent of "good faith" under each of these statutes bears the burden of proof.[24] The Bankruptcy Code does not define "good faith," but in the context of § 363(m), the Fifth Circuit has defined the term in two ways.[25] "On the one hand, [the Fifth Circuit has] defined a 'good-faith purchaser' as 'one who purchases the assets for value, in good faith, and without notice of adverse claims.' On the other hand, [the Fifth Circuit has] noted that 'the misconduct that would destroy a purchaser's good-faith status ... involves fraud, collusion [among] the purchaser and other bidders or the trustee, or an attempt to take grossly unfair advantage of other bidders.'"[26] In *TMT*, there was no suggestion of fraud, collusion or an attempt to take grossly unfair advantage by the DIP lender, but Vantage argued that the DIP lender's notice of Vantage's adverse claim to the Vantage shares destroyed its good faith.[27]

The aspect of the Fifth Circuit's opinion that might have the most far-reaching impact is the court's refusal to extend the bankruptcy court's "related-to" jurisdiction in a manner that would constitute the adjudication of Vantage's claim in the Vantage litigation.

The debtors urged the Fifth Circuit to hold that knowledge of an adverse claim should not preclude a finding of "good faith" because this requirement would undermine the purposes of §§ 363(m) and 364(e).[28] The court acknowledged "that there is some power in this argument" in light of the fact that § 363(m)'s stay requirement "is in furtherance of the policy of not only affording finality to the judgment of the bankruptcy court, but particularly to give finality to those orders and judgments upon which third parties rely," and the purpose of § 364(e) is "to overcome a good-faith lender's reluctance to extend financing in a bankruptcy context by permitting reliance on a bankruptcy judge's authorization."[29] Distinguishing situations in which a good-faith purchaser or lender has knowledge of the pendency of an appeal or in which there are objections to the transaction, which are not enough to constitute bad faith, the Fifth Circuit found that having knowledge of an "adverse claim" may preclude a finding of good faith.[30]

The court further noted that the DIP lender's knowledge was not simply limited to objections by creditors of the debtors, but rather that a third party, entirely unrelated to the bankruptcy proceedings, had an adverse claim to the Vantage shares.[31] Thus, on these facts, the Fifth Circuit maintained that both of its previously-expounded definitions of good faith had to be applied in evaluating the DIP lender's good faith,

13 *Id.* at 518.
14 *Id.*
15 *Id.*
16 *Id.*
17 *Id.*
18 *Id.* at 518-19.
19 *Id.*
20 *Id.* at 519.
21 *Id.* at 519-20.
22 *Id.* at 520.
23 11 U.S.C. § 363(m); 11 U.S.C. § 364(e).
24 764 F.3d at 520 (citation omitted).
25 *Id.* at 521 (citations omitted).
26 *Id.*
27 *Id.*
28 *Id.*
29 *Id.*
30 *Id.* at 522.
31 *Id.*

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and the court ultimately found that the DIP lender had notice of Vantage's adverse claim.[32] In so finding, the Fifth Circuit adopted the broad definition of "claim" — which includes a right to payment or a right to equitable remedy — in evaluating what constitutes an "adverse claim," and found that the DIP lender had adequate notice of Vantage's contentions that F3 Capital had fraudulently obtained the Vantage shares.[33]

Jurisdiction

Having established that Vantage's appeal of the bankruptcy and district court orders was not moot, the Fifth Circuit addressed Vantage's argument that the courts below lacked jurisdiction over the Vantage shares because the shares did not constitute property of the debtors' estates and adjudication of Vantage's claim in the Vantage litigation was not "related to" the debtors' chapter 11 proceedings.[34]

Property Pledged to Secure Post-Petition Financing Does Not Become Estate Property

The debtors argued that the Vantage shares constituted property of the estate under § 541(a)(7) because the stock became an "interest in property that the estate acquire[d] after the commencement of the case" after it was deposited in escrow under the escrow order.[35] Vantage countered that the escrow order required the debtors to deposit "non-estate property" with the clerk of the court; property interests are created and defined by state law, which was Texas law in this case, pursuant to which the debtors acquired neither the right to control or retain the Vantage shares; and courts have consistently held that other forms of collateral do not constitute property of the estate under § 541.[36]

The Fifth Circuit ultimately determined that it was unnecessary to decide the question of state law raised by the parties, finding that, even if the debtors acquired an interest in the Vantage shares pursuant to the orders entered by the bankruptcy and district courts, the Vantage shares did not become property of the estate under § 541(a)(7) because "that provision is limited to property interests that are themselves traceable to 'property of the estate' or generated in the normal course of the debtor's business."[37]

The court also agreed with Vantage that the debtors could not rely on the orders as the means by which the Vantage shares purportedly became property of the estate because the bankruptcy court and the district courts had no authority to issue the orders unless the Vantage shares were already property of the estate.[38] Stated otherwise, the bankruptcy and district courts "could not manufacture *in rem* jurisdiction over the Vantage Shares by issuing orders purporting to vest the Debtors with a post-petition interest in the Vantage Shares," and as such, "jurisdictional bootstrap[s]" would impermissibly allow the district and bankruptcy courts to "exercise jurisdiction that would not otherwise exist."[39]

Restrictive Reading

The aspect of the Fifth Circuit's opinion that might have the most far-reaching impact is the court's refusal to extend the bankruptcy court's "related-to" jurisdiction in a manner that would constitute the adjudication of Vantage's claim in the Vantage litigation.[40] Recognizing that the Supreme Court read "related-to" jurisdiction broadly in *Celotex* to cover nondebtor actions involving non-estate property that nonetheless affects the estate, the Fifth Circuit found that no justifiable basis for exercise of jurisdiction over the Vantage litigation existed, given that the "only discernable [*sic*] link between the Vantage Litigation and the Debtors' Chapter 11 proceedings is that F3 Capital and the Debtors have a common owner," and that absent the bankruptcy court's actions, "the resolution in the Vantage Litigation would not have had any effect on the bankruptcy."[41]

In finding that "related-to" jurisdiction did not exist, the Fifth Circuit rejected the debtors' arguments that core jurisdiction to enter the orders in question existed because the orders dealt with administration of the estate, the acquisition of credit and the use of property, and the court instead found that the Vantage litigation was not even a non-core proceeding because there was no "related-to" jurisdiction.[42] The court was also not swayed by the debtors' argument that affording Vantage due process in the bankruptcy and district courts passed jurisdictional muster. The Fifth Circuit made it clear that a subject-matter jurisdiction inquiry must precede due-process inquiries and inquiries under 28 U.S.C. § 157 as to whether proceedings are core or non-core.

Conclusion

While the Fifth Circuit's decision in *TMT* is certainly based on unique facts, the opinion may have broader relevance in the ever-expanding arena of bankruptcy jurisdictional disputes. Indeed, *TMT* may portend a narrowing of "related-to" jurisdiction, as one can imagine, based on the logic of *TMT*, an increase in the number of direct and collateral attacks on bankruptcy court orders purportedly constituting the adjudication of nondebtor rights in non-estate property (such as third-party releases contained in reorganization or liquidation plans) without regard to the effect that such adjudication might have on a bankruptcy proceeding. Jurisdictional quagmires aside, practitioners should take note of *TMT* when conducting due-diligence inquires in connection with DIP loans and asset-purchases. This due diligence should involve the identification of the source of property that has been pledged or purchased in order to determine whether it is property of the estate, and whether any "adverse claims" have been asserted against the property. abi

32 *Id.*
33 *Id.*
34 *Id.* at 523-28.
35 *Id.* at 524 (citations omitted).
36 *Id.*
37 *Id.* at 524-25.
38 *Id.* at 525 (citations omitted).
39 *Id.*
40 *Id.* at 526 (citations omitted).
41 *Id.*
42 *Id.*