

PROGRAM SUMMARY 1-28-23

By: Gary R. Wallace-Program Summary Committee Chair

***cdcbaa* Holds First Meeting and MCLE Program of 2023: "17th Annual Review of 9th Circuit Decisions on Bankruptcy in 2022"**

On January 28, 2023, the CDCBAA held its first members meeting and MCLE program of the year. To help mitigate the spread of COVID-19, the meeting and program were conducted as a live webinar via Zoom video. The program topic was: "17th Annual Review of 9th Circuit Decisions on Bankruptcy in 2022." The distinguished panel was led by our former president M. Jonathan Hayes along with guest speakers Honorable Laura Taylor and Honorable Sandra Klein. CDCBAA co-president and current board member Lucy Mavyan moderated. What follows are some of the highlights of the seminar.

Mr. Hayes led off with a discussion a jurisdictional issue raised in a good-faith purchaser dispute under section 363(m) in *MOAC Mall Holdings LLC v. Transform Holdco (In re Sears Holdings Corp)*, 2021 WL 5986997 (2nd Cir. 2021), which is now before the United States Supreme Court. Oral argument was heard in December, and a decision has not yet issued.

The next Supreme Court case discussed was *Bartenwerfer v. Buckley*. At the time of the seminar, the Supreme Court also had yet to issue an opinion. However, on February 22, 2023, the Supreme Court issued a slip opinion in which it held that section 523(a)(2)(A) precludes a debtor from discharging in bankruptcy a debt obtained by fraud, regardless of his/her own culpability. In *Bartenwerfer*, the background facts were that the debtor's partner (her husband) had been found liable for fraud in connection with the partnership's resale of a home that had undisclosed material defects. The husband's liability was then imputed to the wife (soon to be debtor) under a vicarious liability theory. The Supreme Court found that the legal context relevant to section 523(a)(2)(A)—the common law of fraud—has long maintained that fraud liability is not limited to the wrongdoer. It further found that Congress framed section 523(a)(2)(A) to "focu[s] on an event that occurs without respect to a specific actor, and therefore without respect to any actor's intent or culpability. Accordingly, the Court decided that the wife cannot discharge her imputed fraud liability in bankruptcy. It is worth noting that Judge Taylor's pre-decision discussion with our group as to how the oral argument before the Supreme Court was received by the Justices, as well as the Court's likely analysis of this issue, proved to be remarkably prescient.

The panel then turned to *Baroni v. Seror (In re Baroni)*, 36 F.4th 958 (9th Cir. 2022). There, the issue was: when a Chapter 11 case is converted to a Chapter 7 after a Chapter 11 plan has been confirmed, what is (and is not) property of the 7 estate? The Ninth Circuit found that the answer depends in part upon an interpretation of section 1141, which provides a default provision regarding when property of the estate reverts in the debtor. But that provision can be varied by the language of the plan. The Ninth Circuit found that the plan language here supported the bankruptcy court's decision to issue a turnover order in favor of the trustee.

The panel then turned to *United States of America v. Warfield (In re Tillman)*, 53 F.4th 1160 (9th Cir. 2022). There, the issue was: when the debtor exempts property, is the property thereby removed from the estate? The answer is yes. Thus, the trustee here cannot avoid an IRS tax penalty lien on the exempt homestead (which had been sold by the time of the Ninth Circuit's ruling).

The panel also discussed *Barclay v. Boskoski (In re Boskoski)*, 52 F.4th 1172 (9th Cir. 2022). There the Ninth Circuit ruled that the exemption amount used to compute how much judgment lien may be avoided under section 522(f) is the amount of the exemption at the time of the bankruptcy filing, not the amount at the time the lien attached. Notably, this ruling directly conflicts with California law, which sets the exemption amount in non-bankruptcy contexts as the time when the lien attaches. The Ninth Circuit's differing conclusion in bankruptcy settings was grounded in its interpretation of the "to which the debtor would have been entitled" language of section 522(f)(1).

Two decisions concerning amending exemptions were discussed next. In *Guevarra v. Whatley (In re Guevarra)*, 638 B.R. 120 (9th Cir. BAP 2022), the BAP found that a disagreement over the legal significance of known facts is not a sufficient reason to preclude a debtor from amending schedules to exempt property that, subsequent to the filing date, has been determined to be part of the debtor's estate. In a different case with different facts but a similar issue, bankruptcy court Judge Tighe in *In re Stoller*, 640 B.R. 412 (Bkrtcy, C.D. 2022) found that the facts supported application of the doctrines of equitable and judicial estoppel to preclude the debtor from amending exemptions.

The panel then moved on to chapter 11 and subchapter V cases. *In Netjets Aviation, Inc. v. RS Air, LLC (In re RS Air, LLC)*, 638 B. R. 403 (9th Cir. BAP 2022), the BAP held that the debtor qualified for subchapter V relief in part because it did satisfy the requirements of section 1182(1)(A)(1) even though it had no revenue or income going back to 2012. This is because it nevertheless had "commercial or business" activities. The BAP noted that the debtor's prior activities are not as relevant to eligibility as are its business or commercial activities at the time of filing. The panel also discussed *Legal Service Bureau, Inc. v. Orange County Bail Bonds, Inc. (In re Orange County Bail Bonds, Inc.)*, 638 B.R. 137 (9th Cir. 2022), in which the Ninth Circuit found in favor of the debtor on the issue of 1191(c)'s "fair and equitable" requirement.

The panel then moved to a case which touched on the sale overbidding requirements of section 363. *In Spark Factor Design, Inc. v. Hjelmeset (In re Open Medicine Institute, Inc.)*, 639 B.R. 169 (9th Cir. BAP 2022), the BAP found that the bankruptcy court's approval of a compromise which included a transfer of the estate's claims against other parties to the buyer without permitting overbids was appropriate because the court properly analyzed the compromise as a whole under Rule 9019 and did not need to evaluate the transfer of the litigation claims that were part of the compromise separately under section 363.

Other cases were discussed as well, and all presenters provided a number of candid and useful thoughts as to how practitioners might be guided in future client representations.

As usual, a very lengthy and detailed program outline containing summaries of the cases was provided to all registered participants.

The next CDCBAA members meeting and Zoom MCLE program will be held on February 25, 2023. The topic will be "**Administering Assets.**" Our speakers will be Wes Avery | Chapter 7 and Chapter 12 Trustee, Central District of California; Nancy Zamora | Chapter 7 Trustee, Central District of California; and Larry Simons | Chapter 7 Trustee, Central District of California. We hope you will join us.



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