



BANKRUPTCY NEWSLETTER

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STATE BAR
of NEW MEXICO

RAJALA VS. GARDNER:

Even a Contingent Interest is an Interest

On August 31, the 10th Circuit handed down its decision in *Rajala v. Gardner et al.* Relying on the principle that “property of the estate” under § 541 is broad and should be generously construed, the Tenth Circuit found that even a contingent interest in proceeds from development of a project could be sufficient “property” to be fraudulently transferred under Kansas’ version of the Uniform Fraudulent Transfer Act. The Tenth Circuit also found that the trustee’s failure to plead for relief under 11 U.S.C. § 550 was not fatal to the trustee’s claims, since the relevant facts were plead, and upheld an award of prejudgment interest in favor of the trustee, dating back to the original date of the defendants’ breach of fiduciary duty.

State AG Hector Balderas Fights Alleged Foreclosure Fraud Scheme

On July 22, the State of New Mexico filed suit against a group of defendants including Khalsa Mukhtiar Singh, Paul A. Lucero, Joshua R. Simms P.C., and Praedium Preservation. In general, the complaint alleges that the defendants operated a fraudulent scheme by which Praedium convinced consumers that it would hire Mr. Simms to “fight the foreclosure” for them, but instead placed family or friends in their homes to live rent-free, while failing to take any action to fight the foreclosure. The complaint further alleges that Praedium’s strategy involved sham lawsuits, and fraudulent or deceptive documents filed both in court and in county clerk’s offices, which were intended to delay foreclosure or to induce courts to fraudulently convey title to the houses. Further allegations include unauthorized practice of law by the non-attorney defendants, and that Simms appeared on behalf of the homeowner in some of the foreclosure cases without the knowledge or consent of the owner. On August 31, a temporary restraining order and preliminary injunction was issued preventing defendants Khalsa, Lucero and Molinar, or any of their companies, including Praedium Preservation from providing legal services, or debt relief counseling, and enjoining Mr. Simms from representing any person or entity in foreclosure litigation without meeting with his client, entering into a written fee agreement and complying closely with applicable law. The case is presently in discovery. Case No. D-202-CV-2016-04537.

Albuquerque § 341 Meetings on *MONDAYS ONLY*

Owing to the continually-declining amount of Chapter 7 filings, the Office of the United States Trustee is consolidating Albuquerque § 341 meetings to a single day of the week: Monday. This is good news for dedicated Friday golfers, who previously faced the peril of having to interrupt their weekly golf schedules to attend meetings of creditors. The Albuquerque meeting room has also been repainted and stripped of its asbestos-laden insulation, and the Office of the U.S. Trustee is looking into upgrading the chairs. Work is also in progress on moving the Santa Fe § 341 meeting room or providing chairs, and on a videoconference link for Farmington § 341 meetings.



RETIREMENT of Chapter 7 Panel Trustee *RICHARD PARMLEY*

Chapter 7 panel trustee Richard Parmley, a long-time fixture of Chapter 7 practice in Farmington has retired from practicing as a trustee in order to focus on his employment law and personal injury practice. A send-off for Mr. Parmley was held on October 15, 2016 at annual section picnic, and he was presented with a small gift from the section members.



Florida Decision Distinguishes *Baker Botts*

At the end of October, 2016, the Bankruptcy Court for the Middle District of Florida released a decision which will be favorably received by debtor's counsel nationwide. In the John D. Stanton case, the Office of the United States Trustee objected to a fee application by Debtor's counsel because it did not contain enough detail. Debtor's counsel then filed a new fee application which included a bill of \$27,250 for amending their prior fee application to resolve the US Trustee's objections. The US Trustee argued that the fees for amending their first fee application were not allowable under the Supreme Court's decision in *Baker Botts v. ASARCO*. The bankruptcy court disagreed, and allowed the entire fee application, including the \$27,520 incurred in supplementing the first fee application. The opinion is Doc. No. 751 in Case No. 8:11-bk-22675 before the US Bankruptcy Court for the Middle District of Florida, Tampa Division.

Scott v. King (In re Amerson): Debtors can waive Spendthrift Trust Exclusion

In re Amerson, decided by the Tenth Circuit on October 28, is something of a cautionary tale for debtor's counsel in this circuit. In Amerson, the Debtors failed to list any interest in trusts. The trustee then questioned one of the debtors at the meeting of creditors, who, under questioning, did not disclose any interest in an estate or trust to the Trustee. Accordingly, the Trustee issued a no-asset report. During the pendency of the case, one of the Debtors and another family member filed a probate contest. Subsequently, the chapter 7 case was closed, and one of the Debtors filed a pro se Chapter 13 case, in which she represented the probate contest was of no value or negative value. The Debtors then reopened their chapter 7 case, causing the Trustee to substitute into the probate contest.

The Trustee then settled the probate contest, over the Debtors' objection. The Debtors argued, on appeal, that because interests in spendthrift trusts are excluded from property of the estate under § 541(c)(2), that the bankruptcy court lacked jurisdiction to approve the settlement. The Tenth Circuit held that exclusion under § 541(c)(2) is permissive rather than mandatory, and that by amending their Schedule B to include their interest in the probate dispute, and by failing to argue the § 541(c)(2) exception until appeal, the debtors made their interest in the spendthrift trust property of the estate when it otherwise would not have been. This stunning conclusion is a cautionary tale for debtors' counsel, who may now wish to be very careful about what is and is not placed on a debtor's schedules.

Upcoming Change to Fed. R. Bankr. P. 9006

Effective December 1, 2016, amendments to Fed. R. Bankr. P. 9006 become effective which remove the time-honored “three days for mailing” when service has been made electronically only. When service is made by mail, such as on a pro se party, the extra three days for mailing will continue to apply to the deadline. We urge you to make your staff aware of this upcoming change in how deadlines are computed.

UPCOMING EVENTS

Consumer Debt/Bankruptcy Workshops

Albuquerque: 6–8 p.m., State Bar Center, 5121 Masthead NE, Albuquerque, 87109
January 27, February 24, March 23, April 27, May 25, June 22, July 27, August 24,
September 28, October 26, December 14.

To attend the workshops, call 1-800-876-6657

To volunteer for the workshops as an attorney, call 505-797-6047
U.S. Bankruptcy Court for the District of New Mexico, 10th Floor

Call for Topic Submissions

Did you or a friend do something fun? Take a great photo? Go someplace cool? Win an award? Know something interesting that’s happening and want to let everyone know? Write to me at dwhite@askewmazelfirm.com and your vacation, award, cool event, activity, or photo could be featured in the next quarter’s newsletter.

