



BANKRUPTCY NEWSLETTER

JUNE
2016

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SCOTUS:

Husky International v. Ritz

On May 16, 2016, the Supreme Court decided *Husky International Electronics Inc. v. Ritz* (No. 15-145). In *Husky*, the Supreme Court held that “actual fraud” as used in § 523(a)(2)(A) does not include a requirement of false representation. The basis of the Supreme Court’s decision, that 523(a)(2)(A) already included exceptions to discharge for money, property, services, or credit obtained by “false pretenses” or “false representation” before Congress added “actual fraud,” may seem like common sense to some and, indeed, was already the rule in the Tenth Circuit under *In re Vickery*, 488 B.R. 680 (BAP 10th Cir. 2013), but overturns Fifth Circuit precedent to the contrary. For our purposes in the Tenth Circuit, *Husky* is notable for the fact that it explicitly states that a fraudulent transfer is “actual fraud” under 523(a)(2)(A) and does not limit this holding to “actual fraudulent transfers.” As a result, and as Justice Thomas points out in his dissent, *Husky* may be interpreted to hold that a constructive fraudulent transfer, for which no showing of actual fraudulent intent is required, constitute “actual fraud” for nondischargeability purposes if the transfer is used as a means of obtaining money, property, services, or credit.



Native American Tribes No Shield for Payday Lenders

In April, Charles M. Hallinan was indicted on Federal racketeering charges in Philadelphia. Hallinan charged 700% interest through his payday lending enterprise, which included business names like “Easy Cash,” “My Payday Advance” and “Instant Cash USA,” and had attempted to use Native American tribes as the purported lenders, in order to benefit from tribal sovereign immunity.

\$470m Federal-State Mortgage Settlement with HSBC

In February, the Justice Department, together with the Department of Housing and Urban Development, the Consumer Financial Protection Bureau, 49 state attorneys general and the District of Columbia's attorney general, settled claims for mortgage abuses with HSBC Bank USA N.A. and its affiliates for \$470 million, filed as a consent judgment, with penalties for noncompliance. This mirrors a similar \$968 million settlement with SunTrust Mortgage Inc. in June 2014. Included in the settlement are new requirements for pre-filing review of bankruptcy documents, a requirement that HSBC attempt loss mitigation before foreclosing, and require HSBC to introduce mortgage servicing, foreclosure, and mortgage origination standards to help prevent abuses.



BITCOINS Not Cash, but Personal Property

Also in February, Bankruptcy Judge Dennis Montali from the Northern District of California ruled that bitcoins, a form of so-called “digital currency,” are “intangible personal property” rather than cash. This distinction has a key impact on the case because, in ‘clawback’ actions, under 11 U.S.C. § 550(a), a plaintiff may recover “the property transferred, or, if the court so orders, the value of such property.” Given the dramatic fluctuations in the value of Bitcoin compared to conventional currencies, this ruling may be of significant benefit to clawback plaintiffs in cases involving Bitcoin. As of June 13, 2016, Bitcoin was at a two-year high of \$690.74 per Bitcoin, down from its all-time high of over \$1,100 per bitcoin in November 2013 on the now-defunct Mr. Gox bitcoin exchange.



Sports Authority: Consignment Goods in Bankruptcy

This spring, retail vendor Sports Authority filed for bankruptcy. Its vendors had supplied it with about \$85 million worth of goods on consignment. During the first few weeks of the case, the vendors argued that the portion of the proceeds the vendors were due, based on their pre-petition agreements, was not property of the estate, and should go back to them, rather than be used to satisfy Sports Authority's prebankruptcy lenders, Bank of America, Wells Fargo Bank, and JP Morgan Chase. Sports Authority disagreed, and filed more than 160 adversary proceedings against its vendors to determine priority and validity of the vendors' liens. Although Sports Authority has now closed all its stores due to failure to find a buyer, it is easy to see how this issue could arise in another bankruptcy case. This serves as an important reminder for consignment vendors dealing with insolvent companies to file UCC-1s within thirty days of shipment to ensure that they wind up with a first priority lien on their goods.



11th Circuit: Bankruptcy Code Does Not Preclude FDCPA Actions for Proofs of Claim on Time-Barred Debts

Certain bankruptcy courts outside of our jurisdiction have held that it is permissible for a creditor to file a proof of claim on a debt the creditor knows to be time-barred. The argument goes, roughly, that a proof of claim is merely evidence of a debt, not an attempt to collect the debt, and that therefore even though collection of the debt is time-barred, filing a proof of claim is not, and that the debtor bears the burden of objecting to these known time-barred claims. Naturally, consumer

protection bodies, trustee's and debtors' counsel have taken some umbrage at this idea. On May 24, 2016, the Eleventh Circuit held that when a "debt collector" under the FDCPA files a proof of claim that it knows is time-barred, it is subject to claims under the FDCPA for doing so. The case is *Johnson v. Midland Funding, LLC*, Case No. 15-11240 (11th Cir. 2016).

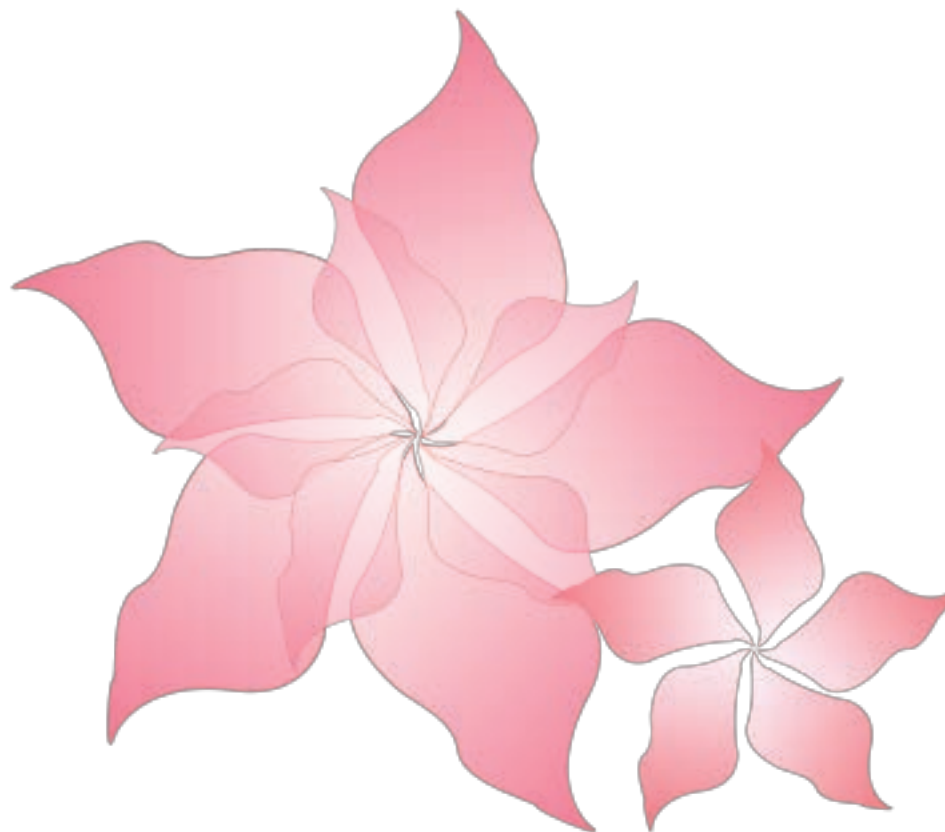
PASSWORD MANAGERS

Bankruptcy counsel regularly work with large amounts of confidential or personally-identifying information belonging to our clients, whether it be social security numbers, bank account numbers, bank statements, confidential intellectual property or trade secrets. Unfortunately, the large amounts of potentially valuable information law firms store, combined with their generally lax cybersecurity standards, have made law firms a target for hackers. One simple way to reduce the risk of a data breach (and, generally make your life easier) is to use a password manager. In general, password managers are programs which create, store, and even automatically fill in unique passwords for websites and other online services. Using a password manager enables you to easily use strong passwords, without the vulnerability of the common practice of using duplicate or weak passwords.



SUCCESSION PLANNING

As lawyers, we have a duty to make sure that disruptions in our lives don't cause undue disruptions in our clients' lives and legal affairs. On the day to day level, we generally carry out this duty by planning our absences in advance and putting measures in place for unexpected absences like family emergencies. However, planning for retirement, death, disability is equally, if not more, important. The New Mexico Supreme Court has a comprehensive succession handbook available here, which you may find helpful: <http://www.nmbar.org/nmbardocs/formembers/succession/successionhandbook.pdf>. The handbook includes sample forms, as well as checklists and information about other practice-closing concerns, such as document retention and destruction.



IN MEMORIAM:

Oralia Franco

In the early morning hours of March 18, 2016, Oralia Franco, a consumer bankruptcy lawyer in Las Cruces, passed away. Kind of spirit, Ms. Franco frequently provided consumer bankruptcy services to those who had difficulty affording a bankruptcy. Her valuable contributions to the wellbeing of consumers in southern New Mexico will be missed.

Retirement of Chapter 7 Panel Trustee

L I N D A B L O O M

Chapter 7 panel trustee Linda Bloom, a long-time fixture of Chapter 7 practice has retired. Cases formerly pending before Ms. Bloom have been assigned to other panel trustees. A send-off for Ms. Bloom was held on June 10, 2016 at the reception following the Golf Tournament, and she was presented with a small gift from the section members.

UPCOMING EVENTS

Isotopes Game

Saturday, July 16, 2016 at 6:00 p.m. Join us at the Captain's Corner in Isotopes Park in Albuquerque, for dinner, an Isotopes game, and fireworks. All you can eat hot dogs, hamburgers, BBQ pulled pork, boneless chicken breast, baked beans, pasta salad, tortilla chips and salsa, and brownies will be served. Soft drinks, as well as half a keg of blue moon beer (~62 pints), and a limited amount of wine also will be available. Tickets \$20 each. Contact dwhite@askewmazelfirm.com for tickets and more information.

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.

