



# BANKRUPTCY NEWSLETTER

MAY  
2017

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STATE BAR  
of NEW MEXICO

# Supreme Court to Hear 546(e) Circuit Split

On May 1, 2017, the United States Supreme Court granted certiorari in *FTI Consulting, Inc. v. Merit Management Group, LP*, 830 F.3d 690 (7th Cir. 2016). In that case, the Seventh Circuit held that the safe harbor for avoidance actions under 11 U.S.C. § 546(e) does not apply to margin payments or settlement payments that were made through a financial institution but did not involve the financial institution as a direct party. In so holding, the Seventh Circuit held that the words “by or to (or for the benefit of)” are ambiguous and therefore § 546(e) can be read not to apply to defendants that acted as mere conduits, joining the Eleventh Circuit in so holding. The Second, Third, Sixth, Eighth and Tenth Circuits have held to the contrary. The Supreme Court is now poised to resolve this split of authority. The Supreme Court case number is 16-784.



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## CFPB Sues Ocwen

In the midst of political upheaval around its existence, the CFPB has struck out at troubled mortgage servicer Ocwen, filing suit against it on April 20, 2017 in the U.S. District Court for the Southern District of Florida, West Palm Beach Division, the district where Ocwen is headquartered. The ninety-three (93) page spans years of alleged misconduct by Ocwen, including failure to perform basic mortgage servicing tasks like sending accurate monthly statements, crediting payments, and handling escrowed taxes and insurance. Allegations include unlawful foreclosures, ignoring customers, and failure to disclose errors in its records when it has sold servicing rights to other companies. The case is 9:17-cv-80495.





# *Supreme Court*

## Supreme Court Cracks Down on Structured Dismissals: Czyzewski et al v. Jevic Holding Corp. et al.

On March 22, 2017, the Supreme Court issued its decision in *Casimir Czyzewski et al. v. Jevic Holding Corp et al.*, Case No. 15-649. In *Jevic*, the Supreme Court addressed the question of whether a bankruptcy court has the authority to order a structured dismissal with a distribution scheme that has a priority structure which differs from the priority scheme set forth in the bankruptcy code. The Supreme Court held that the bankruptcy court does not have the power to do so without the consent of the affected parties. While the *Jevic* decision is frequently, and erroneously, summarized as doing away with all structured dismissals, *Jevic* leaves open two potential avenues for structured dismissal: 1) structured dismissals which follow the priority scheme set forth in the bankruptcy code and 2) structured dismissals to which all parties who would be paid less than they are entitled to consent. Practitioners considering using structured dismissals would be well advised to carefully read *Jevic*. The citation is 137 S.Ct. 973.



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## A Trustee's New Best Friend: *Rupp v. Auld*

On January 3, 2017, the Bankruptcy Appellate Panel of the Tenth Circuit issued a decision in *Rupp v. Auld*, BAP No. UT-15-061. Critically for Trustees in this circuit, the BAP held that a debtor's obligations to "cooperate with the trustee" and "surrender to the trustee all property of the estate and any recorded information" are self-executing, "in other words, a debtor who has at any time during the case been in possession of property of the estate or recorded information has an affirmative duty to turn

it over, without first requiring a demand or turnover motion by the trustee." *Id.* at pp. 9-10. The BAP held that an order requiring turnover is merely a remedy for a debtor's noncompliance with that existing obligation. An obligation that the BAP has indicated should be taken very seriously: "[a] debtor who fails to comply with a turnover order risks being held in contempt or being denied a discharge for violating a court order." *Id.* at p. 10. The citation is 561 B.R. 512.

## **JACOBVITZ:** Unemployment Benefits are Current Monthly Income

On March 23, 2017, Judge Jacobvitz issued an opinion in *In re Novak et al.*, Case No. 16-11408, addressing the issue of whether Samara Novak's unemployment benefits were current monthly income for purposes of a chapter 13 plan. The Debtors contended that the unemployment benefits are "benefits received under the Social Security Act" and therefore excluded from current monthly income under 11 U.S.C. § 101(10A)(B). This issue had not previously been addressed by the 10th Circuit or 10th Circuit BAP. In ruling, Jacobvitz observed that the exclusion for benefits under the Social Security Act was ambiguous, but because New Mexico unemployment compensation benefits are administered and paid by a state agency, even though the Social Security Act provides substantial federal funding to states to administer unemployment compensation programs. The opinion is a good read for anyone looking to deepen their understanding of the unemployment compensation system. The citation is 2013 WL 1104052.



## **THUMA:** Pre-Petition Garnishments Subject to Avoidance under § 547

On April 14, 2017, Judge Thuma issued a decision in *Garcia v. P2 Properties (In re Garcia)*, Case No. 16-1067. In *Garcia*, Thuma held that even where a garnishment order was entered more than ninety (90) days prior to a bankruptcy filing, a creditor's recovery of garnished pre-petition wages earned and garnished during the ninety (90) day period are subject to avoidance as a preferential transfer under 11 U.S.C. § 547. The legal theory behind the ruling is that the garnishment lien attaches to the wages when earned. As a result, the holding would not apply to garnishment of wages earned outside the preference period but paid during the preference period. The citation is 2017 WL 1379332.







## **10<sup>th</sup> CIRCUIT:** **Bad Faith Insurance Claims** **Must be Specifically Disclosed**

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On January 12, 2017, the Tenth Circuit issued a decision in *Hermann v. Hartford Cas. Ins. Co.*, case no. 16-1145. In that case, the Debtor, Mr. Hermann, disclosed a “potential personal injury award” on his Schedule B, but did not disclose the claims against his insurer, Hartford Casualty Insurance Co. for unreasonable denying and delaying payment on his worker’s compensation claim. After his bankruptcy discharge was entered, Hermann sued Hartford in U.S. District

Court. That court ruled that Hermann was judicially estopped from bringing the claim as a result of his failure to disclose it (since the claim was not disclosed, it was not abandoned, and remained in the bankruptcy estate). The 10th Circuit affirmed. The citation is 2017 WL 117118.

## UPCOMING EVENTS

### 17th Annual Bankruptcy Law Section Golf Outing

June 16, 2017 – Desert Greens Golf Course

10036 Country Club, Ln. NW, Albuquerque

Golf starts at noon, reception at 4:30

\$35 to golf, clubs not provided

RSVP by June 9 to Gerry Velarde, [gvelarde@velardepc.com](mailto:gvelarde@velardepc.com) (505) 248-0050

### New Mexico State Bar 2017 Annual Meeting

July 27-29, 2017 – Inn of the Mountain Gods Resort

287 Carrizo Canyon Road, Mescalero, NM 88340

12 CLE Credits available

Details here: <https://www.nmbar.org/AnnualMeeting>

### American Bankruptcy Institute Winter Leadership Conference

November 30- December 2, 2017 – La Quinta Resort & Club

49499 Eisenhower Dr., La Quinta, CA 922523

Details TBA

### Consumer Debt/Bankruptcy Workshops

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

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

To volunteer for the workshops as an attorney, call 505-797-6047

## 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](mailto:dwhite@askewmazelfirm.com) and your vacation, award, cool event, activity, or photo could be featured in the next quarter's newsletter.

