BANKRUPTCY NEWSLETTER

MAY 2018

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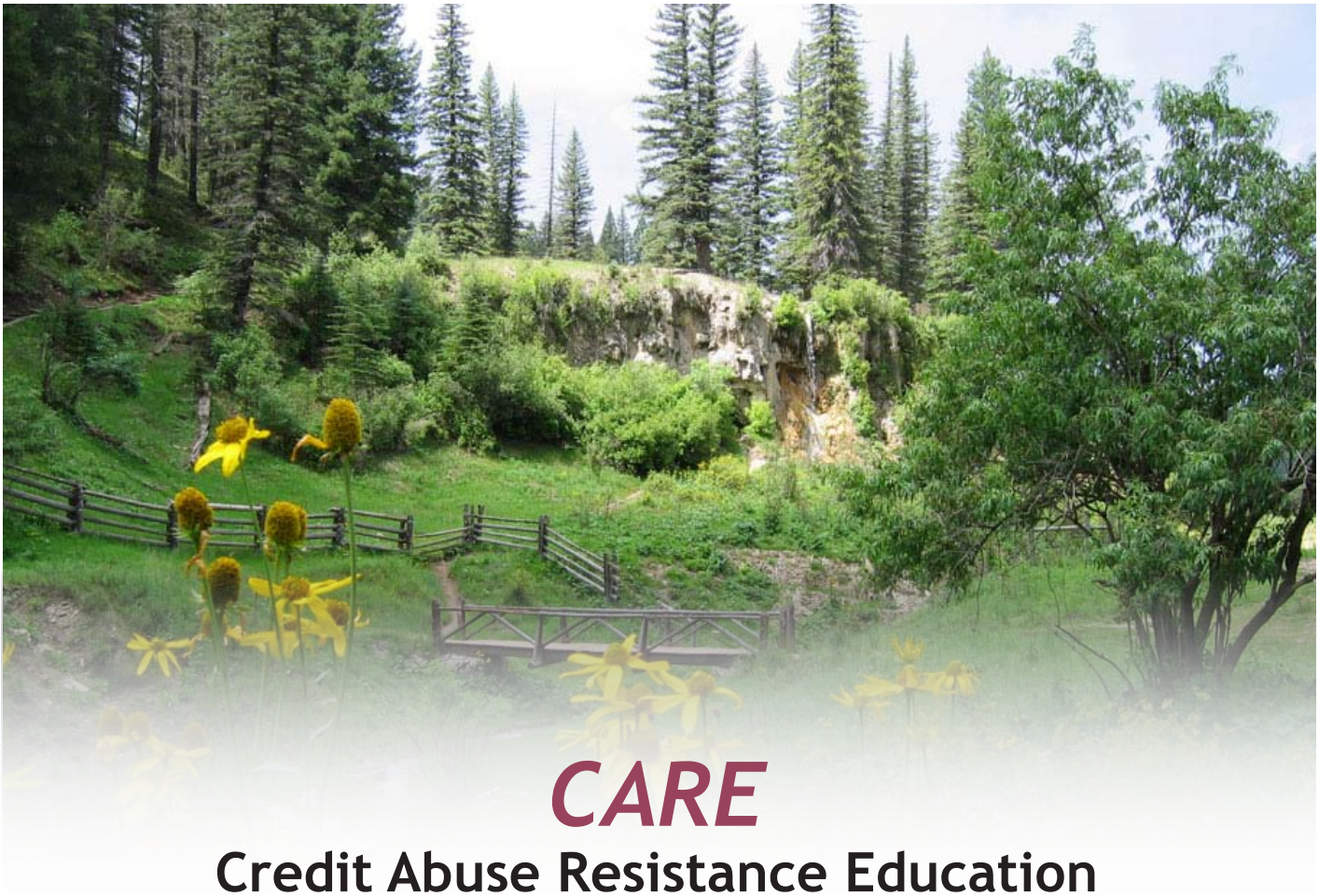


CARE

Credit Abuse Resistance Education

Albuquerque Chapter Launched

As of May 1, 2018, the State Bar of New Mexico bankruptcy law section has launched the newest chapter of CARE, Credit Abuse Resistance Education, a national 501(c)(3) associated with the American Bankruptcy Institute and dedicated to educating high school and early college age young adults about credit, debt, budgeting, and loans. Currently, New Mexico's CARE chapter covers the Albuquerque metro area, but is seeking volunteers and plans to expand into the Santa Fe area by the end of 2019.

To get involved or learn more, contact Daniel A. White, dwhite@askewmazelfirm.com.

Chapter 7 Trustee Protected

by *Barton* Doctrine and Quasi-Judicial Immunity

Coll v. Franco (In re Franco), No. 03-13492 TR7, 2018 WL 1135497 (Bankr. D.N.M. Feb. 28, 2018)

In a dispute over the bankruptcy estate's interest in mineral rights, the transferees of land from the Debtor brought counterclaims against the Chapter 7 trustee personally, arguing that the trustee's assertion of an interest in the mineral rights slandered the transferees' title to the property. The counterclaim was barred for lack of jurisdiction. Noting that the transferees did not seek court approval before bringing the claim against the trustee personally, the Court applied the Barton doctrine, requiring court approval for claims alleging "misconduct in the discharge of the trustee's official duties." Additionally, the claim failed on quasi-judicial immunity grounds, where "except for breach of duty claims, so long as trustees act pursuant to their court appointed function and authority, they are immune from personal liability." In Franco, the Court found that the trustee clearly did not breach a duty by asserting that the estate had an interest in mineral rights.

Debt Purchaser,
Not Debt Collector

Henson v. Santander Consumer USA Inc., 137 S. Ct. 1718 (2017)

The United States Supreme Court unanimously settled a grammar dispute, weighing in that a past participle may be used to describe a present state, and finding that the Federal Fair Debt Collection Practices Act used a past participle in just that way. The FDCP's use of a past participle in its definition of a debt collector as anyone who "regularly collects or attempts to collect . . . debts owed or due . . . another" embraces one attempting to collect a debt currently owed to another, but not one attempting to collect a debt currently owed to oneself, despite that the debt was once owed to another. In Henson, et al. v. Santander Consumer USA Inc., Santander, consistent with industry practice arising since the 1977 passage of the FDCP, purchased defaulted debt and then attempted to collet that debt, in ways alleged to violate FDCP protections. Santander, thus held the Court, was collecting debt on its own account, and not for another, and was not subject to FDCP restrictions imposed on debt collectors. Further, the Court rejected policy arguments that the FDCP's purpose of protecting individuals from abusive debt collection practices would require treating debt purchasers like independent debt collectors and not like loan originators, reasoning that the arguments were speculative and that reasonable legislators could differ.

Judicial Estoppel Limits Tortfeasor Liability
After Debtor Omits Personal Injury Claim from Petition

Anderson v. Seven Falls Co., 696 F. App'x 341 (10th Cir. 2017)

The Tenth Circuit affirmed a district court's ruling on summary judgment limiting a Chapter 7 trustee's award to creditor claims, costs, and attorneys' and trustee's fees on prosecuting a debtor's unscheduled personal injury claim that accrued prepetition. In Anderson v. Seven Falls Co., the 10th Circuit recited that judicial estoppel may bar a party's recovery when 1) the party takes clearly inconsistent positions before two different courts, 2) creating the perception that one of the tribunals was misled, and 3) resulting in an unfair advantage in the litigation. Further, courts may consider whether a debtor's failure to disclose was due to mistake or inadvertence. On the issue of taking different positions, the court rejected the trustee's argument that the debtor's post-discharge amended petition disclosing the personal injury claim is the position that the court should compare to the position taken in the personal injury case. Rather, the 10th Circuit explained, "when assessing inconsistency in bankruptcy cases, we compare the debtor's filing upon which the bankruptcy court based the discharge to the debtor's position taken in the omitted civil proceeding excluded from the schedule of assets." (9). The debtor's amended petition filed post-discharge and upon reopening the case did not count for the judicial estoppel analysis. Likewise, reopening and disclosing the claim did not cure the debtor having misled the bankruptcy court. (11). Finally, although the Debtor argued judicial estoppel should not apply due to the debtor's inadvertence in omitting the claim from the petition, the Tenth Circuit upheld district court's finding that the debtor had knowledge of the undisclosed asset and had motive to conceal. In addition, judicial estoppel can be used flexibly by courts to protect courts from fraud, so that courts are free to consider or not consider the debtor's subjective intent. The maximum potential liability for the personal injury claim of $5,000,000 was thus limited by judicial estoppel to $45,662.04.

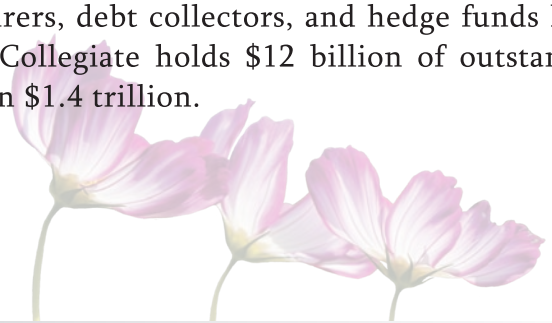
For Securities Safe Harbor from Avoidable Transfer, the Transfer that the Trustee Seeks to Avoid is the Only Relevant Transfer

Merit Mgmt. Grp., LP v. FTI Consulting, Inc., 138 S. Ct. 883 (2018)

In Merit Management Group, LP v. FTI Consulting, Inc., the United States Supreme Court effectively sided with the Seventh Circuit over the Second, Third, Fifth, and Tenth Circuits on application of the Section 546(e) safe harbor. Justice Sotomayor, writing for a unanimous Court, defined the question as whether a transfer between two parties to a leveraged buyout, where the parties used financial institutions to move funds between them, "implicates the safe harbor exception because the transfer was 'made by or to (or for the benefit of) a . . . financial institution.'" (9) Relying heavily on a textual and contextual approach to the statute, the Court held that "the relevant transfer for purposes of the §546(e) safe harbor is the same transfer that the trustee seeks to avoid pursuant to its substantive avoid powers." (18). In Merit, the trustee sought to avoid the leveraged buyout transaction between A and D, though A and D moved the buyout funds through B and C financial institutions. There was no safe harbor because neither A nor D were financial institutions, and it was that overarching transfer between A and D that the trustee sought to avoid under substantive provisions of Section 548(a)(1)(B) (allowing for avoidance of constructively fraudulent transfers). By narrowing the scope of the safe harbor to the scope of the substantive avoidance provision relied on by the trustee, this decision could have implications in avoidance actions more generally.

CFPB Enforcement Action Against Collector of Student Debt Pending

A consent judgment filed by the Consumer Financial Protection Bureau in Delaware's federal district court on September 18, 2017 for CFPB's settlement with the National Collegiate Student Loan Trusts continues to await court approval. The consent judgment finds that Transworld System, Inc., the debt collector for trusts under National Collegiate, filed more than two thousand lawsuits that they could not have won if contested for a variety of reasons, including being beyond the statute of limitations, missing documentation, and improper affidavits. National Collegiate and Transworld would have to pay $21.6 million in restitution, disgorgement and civil penalties. Further, 800,000 loans in National Collegiate's portfolio would undergo independent audit, with the prospect of many of those loans being written off as well. Banks, insurers, debt collectors, and hedge funds have now intervened seeking to stop the settlement. National Collegiate holds $12 billion of outstanding student loan debt, which nationwide now totals more than $1.4 trillion.



UPCOMING EVENTS

17th Annual Bankruptcy Law Section Golf Outing – June 9, 2018
Ladera Golf Course
3401 Ladera Dr. NW, Albuquerque, NM 87120
Golf and reception TBA
Caddy fee to golf, clubs not provided
RSVP by June 2 to Gerry Velarde, gvelarde@velardepc.com (505) 248-0050

Beers with the Bankruptcy Section
June 20, 2018, 5:30 p.m.
Starr Brothers Brewing
5700 San Antonio Dr. NE
Albuquerque, NM 87109

Tax for Bankruptcy Lawyers Brownbag
July 19, 2018, 12:00 Noon
GSA Conference Room
421 Gold Ave. SW
Albuquerque, NM 87102

New Mexico State Bar Annual Meeting
August 9-11, 2018 – Hyatt Regency Tamaya Resort & Spa
1300 Tuyuna Trail, Bernalillo, NM 87004
12 CLE Credits available
Details here: https://www.nmbar.org/AnnualMeeting

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 and your vacation, award, cool event, activity, or photo could be featured in the next quarter's newsletter.