STATE BAR of TEXAS

BANKRUPTCY LAW Section Newsletter

March 2015 — Volume 14 • No. 1

IN THIS ISSUE

A MESSAGE FROM YOUR CHAIR

Dear Section Members,

With this edition of the Newsletter we welcome back Eric Van Horn. All is right with the Section. I shall preview several upcoming Section events.

February 18 through 20 we will hold a trio of CLE events in Houston. On Wednesday the 18th, Bankruptcy 101, Nuts and Bolts, a conference designed for bankruptcy beginners. On Thursday and Friday, the 19th and 20th, the Advanced Consumer Bankruptcy Conference and the Advanced Business Bankruptcy Conference.

March 12–21 the International Bankruptcy Seminar will travel to Bali, Indonesia.While this seminar traditionally sells out quickly, some slots may still be available.

May 28 and 29 will be the biennial Section Bench Bar Conference. All of the Texas Bankruptcy Judges are committed to attend, even Judge Lynn. The Planning Committee has scoured the country to find talented speakers. The brochure will be available shortly by both email and in the Section's website. The conference will be at the Lost Pines Resort in Bastrop, Texas. Don't miss it.

In December we held the first of three small workshop CLE events in El Paso. The event was well attended and well received. Two more are being planned for different locations.

Finally, it cannot be said too often how hard many members and officers of this Section work on Pro Bono Projects, seminar planning, financial education, fund raising and a myriad of other Section projects. The Bankruptcy Lawyers of the State of Texas are true professionals.

Message About BLS' Amicus Curiae Brief in Baker Botts v. ASARCO

On December 10, 2014, the Bankruptcy Law Section ("BLS") of the State Bar of Texas ("SBOT") filed, as Amicus Curiae, a brief (the "BLS Amicus Brief") in support of the petitioners in the case of Baker Botts L.L.P. and Jordan, Hyden, Womble, Cubreth & Holzer P.C. (the "Petitioners") v. ASARCO L.L.C. (the "Respondent") pending before the United States Supreme Court (the "Court") (Case No. 14-103 (the "Case")). The BLS Amicus Brief, along with the brief filed by the BLS on August 29, 2014 requesting that the Court grant the Petition for a Writ of Certiorari, are available at the BLS website at: http://statebaroftexasbankruptcy.com/?page_id=1035.

This message provides additional details about the BLS' process in deciding to support the request for the Court to review the Case, and in deciding to support the Petitioners as Amicus Curiae.

On July 29, 2014, the Petitioners filed a Petition for Writ of Certiorari (the "Petition") requesting the Court to review the decision by the Fifth Circuit to deny the award of fees incurred by the Petitioners in defending their applications for compensation against the Respondent in order to resolve a split with the Ninth Circuit which allows for such fees to be awarded.

The BLS, through its Council, heard, discussed, and voted to approve a motion to file a brief in support of granting the Petition, and authorizing the law firms of Vinson & Elkins LLP and Gardere Wynne Sewell LLP to draft and file the brief on a pro bono basis. (The following officers and members of the BLS Council abstained from taking part in any of the discussions of the BLS regarding the motion, or any votes related to it: the Honorable Richard S. Schmidt, the Honorable Craig A. Gargotta, Omar J. Alaniz, and Mark F. Salitore.) The BLS then sought, and obtained, authority from the SBOT to file the brief in support of the Petition. The BLS filed the brief in support of the Petition on August 29, 2014. That brief is linked below.

On October 2, 2014, the Court granted the Petition. Subsequently, the BLS, through its Council, heard, discussed, and voted to approve a motion to file a brief in support of the Petitioners, and authorizing the law firm of Vinson & Elkins LLP to draft and file the BLS Amicus Brief on a pro bono basis. (The following officers and members of the BLS Council abstained from taking part in any of the discussions of the BLS regarding the motion, or any votes related to it: the Honorable Richard S. Schmidt, the Honorable Craig A. Gargotta, Omar J. Alaniz, and Mark F. Salitore.) The BLS then sought, and obtained, authority from the SBOT to file the BLS Amicus Brief. The BLS filed the BLS Amicus Brief on December 10, 2014. That brief is linked below.

As detailed in the BLS Amicus Brief, and in the BLS brief in support of the Petition, the issue of whether fees incurred by bankruptcy professionals in defense of their fee applications is one of significant importance to the BLS' members because the Case involves section 330(a) of the Bankruptcy Code which "governs the compensation of all officers; thus, the answer to the question presented will directly affect the compensation of all officers—a much broader group than attorneys—and also will have a substantial impact on the

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Message About BLS Amicus Curiae Brief in Baker Botts v ASARCO
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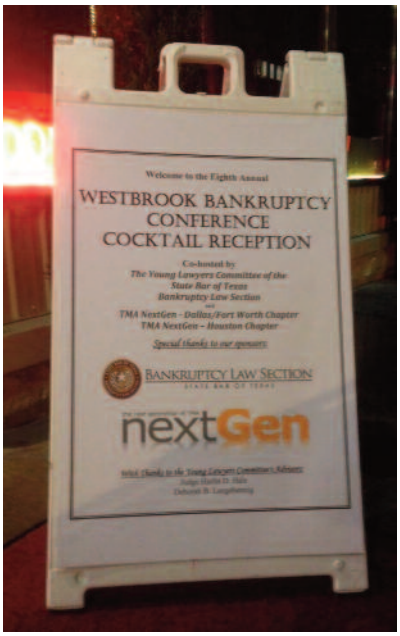
structuring of fee arrangements between bankruptcy attorneys and their trustee, debtor in possession, and official committee-clients." BLS Amicus Brief at 2. The Fifth Circuit's decision to deny such fees therefore "has direct adverse consequences for attorneys who are licensed to practice law in the State of Texas (many of whom practice in bankruptcy courts nationwide)…." Id. at 3. As a result, the BLS voted in favor of, and filed the BLS Amicus Brief.

This is the first time the BLS has ever filed an amicus curiae brief in the Court, and appears to be only the second time any law section of the SBOT has ever done so.

Oral arguments before the Court were heard on Wednesday, February 25, 2014.

33rd ANNUAL JAY L. WESTBROOK BANKRUPTCY CONFERENCE



The University of Texas CLE held the 33rd Annual Jay L. Westbrook Bankruptcy Conference on November 20-21, 2014 at the Four Season Resort & Spa in Austin, Texas. Josiah M. Daniel III chaired the conference. Michael P. Cooley, Demetra L. Liggins, the Hon. John C. Akard (retired), Rebecca A. Roof, and Sabrina L. Streusand served as this presiding officers.

The conference featured speakers from throughout Texas and across the country, and was widely attended by several hundred, including many of our Texas bankruptcy judges and many of our new non-lawyer bankruptcy professionals. The conference was a great success with its stellar line up of speakers, presentations and networking opportunities.

On Thursday night, attendees were treated to a special performance of a reunited band of bankruptcy professionals and judges, including the Hon. Richard Schmidt and the Hon. Leif M. Clark (retired) at the annual Westbrook Bankruptcy Conference Cocktail Reception co-hosted by the Young Lawyers Committee and Turnaround Management Association's nextGen organization.

Conference photos are included herein. Conference materials are available through UT CLE and the brochure with a full list of presentation sand speakers is here: https://utcle.org/conferences/BK14/brochure.

JAY L. WESTBROOK AWARDED BANCO ROTTO AWARD

One of the many highlights, if not the highlight of the conference, was the presentation of the Bankruptcy Law Section's Banco Rotto Award to Professor Jay L. Westbrook. This award is presented to a Texas bankruptcy legend who has had a lasting impact on the development of the

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33rd Annual Jay L. Westbrook Bankruptcy Conference
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Texas bankruptcy practice."Banco Rotto" is Italian for "broken bench" and is the earliest phrase that is associated with the concept of bankruptcy, and is the phrase from which our English term "bankruptcy" is derived. Just as we can trace the origins of bankruptcy to this phrase, the Bankruptcy Law Section honors the recipients of the Banco Rotto award for their contributions to, and their lasting impact on, the bankruptcy profession. Professor Westbrook received this year's award for his outstanding service, leadership, and accomplishments as a bankruptcy practitioner and scholar.

The Bankruptcy Law Section was proud to recognize Professor Westbrook's significant contributions to the bankruptcy profession and his impact on the development of bankruptcy law within the State of Texas (nationally and internationally) by awarding him the Bankruptcy Law Section's highest and most distinguished award, the Banco Rotto Award.

SIX BANKRUPTCY CASES GRANTED CERTIORARI BEFORE THE UNITED STATES SUPREME COURT IN 2014

By:

Jordan Montgomery Lewis, Esq., Law Clerk to the Honorable Harlin DeWayne Hale, (Jordan_Lewis@txnb.uscourts.gov)

James Mattox, May 2015 J.D. Candidate, Southern University Law Center, Extern to the Hon. Harlin DeWayne Hale, Fall 2014

Georgina Stephenson, May 2016 J.D. Candidate, Southern University Law Center, Extern to the Hon. Harlin DeWayne Hale, Fall 2014

***Wellness Int'l Network, Ltd. v. Sharif*, 727 F.3d 751 (7th Cir. 2013) *cert. granted in part*, 134 S. Ct. 2901 (2014). Status: Oral argument heard January 14, 2015.**

On July 1, 2014, the United States Supreme Court granted certiorari to consider two issues on appeal from the United States Court of Appeals for the Seventh Circuit.[1] The first issue is whether the presence of a subsidiary state property law matter in an adversary proceeding, brought under 11 U.S.C. § 541, means that a bankruptcy court has no constitutional authority to enter a final order on that matter.[2] The second issue is whether Article III of the Constitution permits a bankruptcy court to exercise the judicial power on the basis of litigant consent; and if so, whether a litigant's consent may be implied.[3]

Prior to the bankruptcy case and subsequent appeals, Wellness International Network, Ltd. ("Wellness") obtained a judgment and attorneys' fees against Richard Sharif ("Sharif") in Texas federal courts.[4] However, when Wellness tried to collect against Sharif, Sharif filed chapter 7 bankruptcy in the Northern District of Illinois.[5] Wellness pursued Sharif in bankruptcy court, filing a § 727 objection to his discharge and seeking a declaratory judgment that certain assets Sharif claimed in trust were actually part of the estate.[6] The bankruptcy court entered a default judgment against Sharif after he failed to respond to discovery requests by Wellness and discovery orders by the court.[7] The default judgment found that the assets held by Sharif were property of the estate.[8] Sharif appealed, but the district court affirmed the bankruptcy court.[9]

Sharif then appealed to the United States Court of Appeals for the Seventh Circuit, finally arguing that the bankruptcy court lacked constitutional authority to declare whether certain assets were property of Sharif's bankruptcy estate, despite the language in § 541 of the Bankruptcy Code.[10] The Seventh Circuit affirmed the judgment denying Sharif a discharge, but held that the bankruptcy court did not have constitutional authority to decide whether assets in the debtor's possession were property of the bankruptcy estate, as property determinations involve questions of state law.[11] The Seventh Circuit further held that Sharif could not have waived his constitutional objection to the court's judicial power, since the ability of bankruptcy courts to wield judicial power implicates separation of powers principles that are not waivable.[12]

Central to the Seventh Circuit's discussion was the United States Supreme Court's 2011 holding in *Stern v. Marshall*[13] that § 157(b)(2)(C) unconstitutionally permitted the bankruptcy court to enter final judgment on a state counterclaim. Though the Seventh Circuit acknowledged the Supreme Court's previous rulings do provide for concepts of consent and waiver under Article III, § 1, they denied that consent and waiver were available under Article III, § 2.[14] Central to the Seventh Circuit's consideration was the Supreme Court's opinion in *Commodity Futures Trading Comm'n v. Schor*,[15] in which a party effectively waived his right to an Article III court and consented to adjudication of its claims before an Article I tribunal.[16] The Seventh Circuit observed that the Supreme Court explained in its decision that consent and waiver were not dispositive to the issue, however, due to structural interests protected by Article III, § 1. The Seventh Circuit then considered the opinions of two other circuits that had taken up the issues of waiver and consent after the *Stern* opinion. The court noted that both opinions had relied upon *Schor*, yet with diverse outcomes.[17] Thus, the Seventh Circuit first reviewed the Sixth Circuit's interpretation of *Schor* in light of *Stern*, in which it held that and objection to the bankruptcy court's constitutional authority is a structural principle and therefore not waivable.[18] The Seventh Circuit then compared that analysis to one performed by the Ninth Circuit, which interpreted the *Schor* decision in light of *Stern* to mean that, even if a litigant has the right to have an Article III judge decide a matter, such right can be waived under Article III, § 1.[19] The Seventh Circuit decided that the Sixth Circuit possessed the better view,[20] accepting the idea that *Stern* represents a departure from interpretations of *Schor* which previously held that the statutory scheme granting bankruptcy judges authority to enter final judgment in core proceedings did not implicate structural concerns where the core proceeding at issue was based on common law.[21] The Seventh Circuit consequently held that a party may not waive a *Stern* objection and consent to final adjudication of a core proceeding by a bankruptcy court, and that a bankruptcy court lacks constitutional authority to enter final judgment on a state law claim.[22]

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BANKRUPTCY LITIGATION – USING THE FRUITS OF BANKRUPTCY RULE 2004 DISCOVERY IN CONTESTED MATTERS AND ADVERSARY PROCEEDINGS

By: Bruce W. Akerly, Cantey Hanger LLP
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Bankruptcy Rule 2004[1] is a great tool to gain information concerning a debtor's pre-petition financial and business affairs. The results of Bankruptcy Rule 2004 discovery often leads to information which serves as the basis for filing a contested matters (*e.g.*, objections to exemptions) or adversary proceedings (*e.g.*, objections to discharge or the dischargeability of debts and challenges to the validity, extent and priority of liens). However, all too often, there is push back from Courts and opposing counsel to admitting the fruits of Bankruptcy Rule 2004 discovery into evidence. This reluctance is misplaced and begs the need to revisit the underpinnings of and justifications for admitting Bankruptcy Rule 2004 discovery into evidence.

A. Scope of Bankruptcy Rule 2004

Bankruptcy Rule 2004 provides, in pertinent part:

> (a) EXAMINATION ON MOTION. On motion of any party in interest, the court may order the examination of any entity.
>
> (b) SCOPE OF EXAMINATION. The examination of an entity under this rule or of the debtor under § 343 of the Code may relate only to the acts, conduct, or property or to the liabilities and financial condition of the debtor, or to any matter which may affect the administration of the debtor's estate, or to the debtor's right to a discharge. In a family farmer's debt adjustment case under chapter 12, an individual's debt adjustment case under chapter 13, or a reorganization case under chapter 11 of the Code, other than for the reorganization of a railroad, the examination may also relate to the operation of any business and the desirability of its continuance, the source of any money or property acquired or to be acquired by the debtor for purposes of consummating a plan and the consideration given or offered therefor, and any other matter relevant to the case or to the formulation of a plan.
>
> (c) COMPELLING ATTENDANCE AND PRODUCTION OF DOCUMENTS. The attendance of an entity for examination and for the production of documents, whether the examination is to be conducted within or without the district in which the case is pending, may be compelled as provided in Rule 9016 for the attendance of a witness at a hearing or trial. As an officer of the court, an attorney may issue and sign a subpoena on behalf of the court for the district in which the examination is to be held if the attorney is admitted to practice in that court or in the court in which the case is pending.

What discovery is permitted under Bankruptcy Rule 2004? On its face, Bankruptcy Rule 2004 permits "examination of any entity."[2] It does not specifically provide for paper discovery – e.g., interrogatories, requests for production, and requests for admission – *per se*, although subsection (b) provides that Bankruptcy Rule 9016 may be used to compel the attendance of an examinee and "the production of documents."[3] But is that a limitation? Traditionally, the production of documents is sought in connection with an oral examination.[4] But does the rule preclude interrogatories or requests for production? Not necessarily.

Neither Bankruptcy Rule 2004 nor the Bankruptcy Code define the term "examination." Black's Law Dictionary defines "examination" generally to mean interrogation of a witness.[5] Logic dictates that a person or entity could, technically, be "examined" in different contexts. Merriam Webster Dictionary defines "examination" to mean "a close and careful study of someone or something."[6] Therefore, the term "examination" would appear to include discovery tools such as interrogatories, requests for inspection of property, and requests for production of document and things.

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JUDGE BARBARA J. HOUSER RECEIVES THE JUDGE WILLIAM L. NORTON, JR. JUDICIAL EXCELLENCE AWARD

By: Frances A. Smith: Shackelford, Melton, McKinley & Norton, LLP
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Chief Judge Barbara J. Houser has received the Judge William L. Norton, Jr. Award for Judicial Excellence. The Norton Award was presented to Judge Houser at the October 2014 National Conference of Bankruptcy Judges. The Norton Award is given annually to a bankruptcy judge, based upon a career of lifetime achievement, who has distinguished himself or herself, as an educator, writer, or scholar.

Judge Houser has had an outstanding career and achieved success in all three of those areas. She lectures and publishes frequently on corporate restructuring and insolvency law. She is a past chairman of the Dallas Bar Association's Committee on Bankruptcy and Corporate Reorganization, a member of the Dallas, Texas and American Bar Associations, and is a fellow of the Texas and American Bar Foundations. She is a contributing author to *Collier on Bankruptcy* and has taught Creditors' Rights as a Visiting Professor at the SMU Dedman School of Law.

Judge Houser was elected a fellow of the American College of Bankruptcy in 1994 and has served as an officer and member of its Board of Directors. In 1996, she was elected a conferee of the National Bankruptcy Conference, an organization of nationally recognized scholars and experts in the bankruptcy field, and currently serves on its Executive Committee. She is a member of the Board of Directors of the American Bankruptcy Institute and recently became a member of the Executive Committee of that board. The National Law Journal named her as one of the fifty most influential women lawyers in America in 1998.

After becoming a bankruptcy judge in 2000, she joined the National Conference of Bankruptcy Judges and served as President in 2009-2010. She continues to be actively involved in the National Conference of Bankruptcy Judges, serving the organization in various capacities. In February, 2011 she received the Distinguished Alumni Award for Judicial Service from the SMU Dedman School of Law.

Judge Houser currently serves on the Judicial Conference Committee on the Administration of the Bankruptcy System and is a member of the faculty that the Federal Judicial Center selected to teach new bankruptcy judges.

MESSAGE REGARDING TEXAS BAR CONNECT REPLACING LISTSERVE

Last year, Judge Schmidt announced that the Bankruptcy Law Section began beta-testing Texas Bar Connect as an upgraded service in place of the listserve. The beta-testing is complete, and going forward, Texas Bar Connect will be the exclusive online service for posting and responding to messages from members of the Section. Below are instructions for participating in discussions and customizing your profile for receiving messages.

Participate in a discussion or start a new discussion:

1. Go to connect.texasbar.com and click on the login button at the top. You will be redirected to your My Bar Page. Log in using your My Bar Page credentials and then you will be redirected back to Texas Bar Connect.
2. Click "Participate" from the navigation bar, click on "Post a Message," select Bankruptcy Law Section in the "To" field, and then write your message and hit "Send."
3. Log in to Texas Bar Connect, click "Communities" from the navigation bar, click on "My Communities," then go to the Collaborative Law Section, click on Discussions, and then click on any thread. Use the buttons in the drop down menu on the right to join the discussion.
4. You can respond to Texas Bar Connect posts via email.
5. You can use the Texas Bar Connect app, which is available at the iPhone or Android app store by searching for "Texas Bar Connect."

Click the profile icon at the top right of the home page, then click on "Profile" to customize your personal preferences:

- Receive emails in real time or receive an email digest of discussions for the day*
- Choose to visit the website and view or participate in discussions at your own leisure
- Choose to opt-out

**Your profile is currently set to receive real-time discussions.*

Members can email connect@texasbar.com with any issues or questions.

HOT (AND OCCASIONALLY HUMOROUS) TOPICS ON TEXAS BAR CONNECT

This is a new feature of the newsletter. When topics generate a lot of discussion, we will list them here. Some of the topics below were on the Listserve prior to the conversion to Texas Bar Connect.

1. Proposal for Nationwide Mandatory Uniform Model Chapter 13 Plan
2. Discussion of case citation for demand letter to drop pre-discharge mortgage lender's attorney's fees
3. Automatic Stay and Criminal Proceedings
4. Rejection of Lease Post-Confirmation
5. Homestead and Reverse Mortgages
6. Chapter 14 Post Petition Mortgage Payments
7. Bank Froze Exempt Bank Accounts
8. Post-Discharge Release of Lien on Homestead by Bank
9. *Thaw v. Mosier*: Possible Answer to Unanswered Question in *Dome v. Kim* (*i.e*, whether the non-filing spouse is entitled to compensation for the forced sale of a homestead interest under BC § 363(j)).
10. Insurmountable Cable Company Problem
11. "Liquidation Test" at the end of a Chapter 13
12. On a lighter note: collection of humorous/memorable bankruptcy anecdotes. Examples include: (i) a debtor's daughter being listed as collateral for a loan (presumably the debtor meant co-signor; and (ii) a debtor seeking six reaffirmations, including a lien on a dog for $1,500. Review the Listserve messages for many others.

Calendar of Upcoming Events

Feb. 25-27	**VALCON** Las Vegas, Nevada
March 12-21	**Bankruptcy Section** State Bar of Texas, International Seminar, Bali, Indonesia
April 16-19	**ABI's Annual Spring Meeting** Washington, DC
May 27-29	**Bankruptcy Section** State Bar of Texas, Bench Bar Conference, Bastrop, Texas
July 1-4	**50th Annual National Association of Chapter Thirteen Trustees Seminar** The Grand America – Salt Lake City, UT
Aug 1-4	**American Bar Association's Annual Meeting** Chicago, IL
Sept. 10-12	**ABI's Southwest Bankruptcy Conference** Four Seasons – LasVegas, LasVegas, NV
Sept. 27-30	**89th Annual National Association of Bankruptcy Judges Conference** Fontainebleau – Miami Beach, Miami, FL
Dec. 3-5	**ABI's Annual Winter Leadership Conference** Arizona Biltmore – Scottsdale, AZ

Troop Movement

Brian Kilmer, J. Meritt Crosby, and **Eric D. Walker** formed Kilmer Crosby Walker (Dallas and Houston).

Cameron Kinvig has joined X-Subsea USA LLC as General Counsel and Interim Chief Financial Officer.

Kelly McDonald has joined Milbank, Tweed, Hadley, McCloy LLP (London) as Associate.

Mark A. Platt has joined McGuireWoods LLP (Dallas) as Partner.

Thomas Rice has joined Pulman, Cappuccio, Pullen, Benson & Jones, LLP (San Antonio) as Partner.

Ian E. Roberts has joined Hewlett-Packard (Dallas) as Senior Counsel.

Brandon J. Tittle has joined Reid Collins & Tsai LLP (Dallas) as Associate.

Eric M. Van Horn has joined McCathern PLLC (Dallas) as Of Counsel.

Call for Articles and Announcements

The State Bar of Texas Bankruptcy Law Section is dedicated to providing Texas practitioners, judges, and academics with comprehensive, reliable, and practical coverage of the evolving field of bankruptcy law. We are constantly reviewing articles for upcoming publications. We welcome your submissions for potential publication. In addition, please send us any information regarding upcoming bankruptcy-related meetings or events. We also invite any announcements for our "Troop Movement" section.

Please format your submission in Microsoft Word. Citations should conform to the Blue Book and Texas Rules of Form and the Manual on Usage, Style & Editing.

Please visit our website: **http://www.txbankruptcylawsection.com/**.

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Six Bankruptcy Cases Granted Certiorari Before The United States Supreme Court In 2014
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***ASARCO, L.L.C. v. Baker Botts, L.L.P. (In re ASARCO, L.L.C.)*, 751 F.3d 291 (5th Cir.) *cert. granted sub nom. Baker Botts, L.L.P. v. ASARCO, L.L.C.*, 135 S. Ct. 44 (2014). Status: Oral Argument heard February 25, 2015.**

The United States Supreme Court granted certiorari on October 2, 2014 to decide whether 11 U.S.C. § 330(a) grants a bankruptcy judge discretion to award compensation for the costs counsel or professionals bear to defend their fee applications in bankruptcy.[23] The petition for certiorari filed by Baker Botts, L.L.P. ("Baker Botts") came after the United States Court of Appeals for the Fifth Circuit held that a bankruptcy court is prohibited by the "American Rule" from awarding fees to a prevailing party absent statutory authority, contractual authorization, or special circumstances.[24] Baker Botts argues that the Bankruptcy Code specifically grants bankruptcy courts broad discretion to award professional compensation, displacing the American Rule.[25]

The case revolves around the debtor ASARCO, LLC ("ASARCO"), an integrated copper mining, smelting, and refining company, and its parents ASARCO Incorporated, Americas Mining Corporation, and Grupo Mexico (collectively, ASARCO's "Parents").[26] In 2005, ASARCO entered into chapter 11 bankruptcy in the Southern District of Texas facing cash flow deficiencies, various environmental liabilities, and tax and labor problems.[27] During the bankruptcy, Baker Botts successfully prosecuted a complex fraudulent transfer claims suit, obtaining a judgment against ASARCO's Parents valued between $7 and $10 billion, the largest in chapter 11 history at the time.[28] Additionally, Baker Botts and co-counsel helped ASARCO emerge from bankruptcy pursuant to the plan of reorganization with little debt, $1.4 billion in cash, and the successful resolution of its other problems.[29]

In their fee applications, Baker Botts and co-counsel sought lodestar fees, expenses, a 20% fee enhancement, and fees and expenses for preparing and litigating their final fee applications.[30] ASARCO, now controlled by its Parents and not joined by the United States Trustee, challenged the fees.[31] After a six-day fee trial, the bankruptcy court rejected all of ASARCO's objections, awarding Botts over $113 million and $7 million to co-counsel for core fees and expenses.[32] The court then awarded Baker Botts and co-counsel an enhancement for part of the case, and authorized fees and expenses for the firms' litigation in defense of their attorneys' fee claims.[33] ASARCO appealed to the district court, which affirmed the fees to defend core fees; however, the district court held that attorneys' fees were improperly awarded for any pursuit of the fee enhancement, and remanded back to the bankruptcy court to determine whether any part of Baker Botts' defense-fee award related to its enhancement.[34] The bankruptcy court concluded that the entirety of the defense-fee award compensated Baker Botts solely for defending core fees, and the district court affirmed the final award.[35] ASARCO subsequently appealed to the Fifth Circuit.[36]

There, ASARCO argued that the precedent set forth by the Supreme Court's opinion in *Perdue v. Kenny A. ex rel Winn*[37] prohibits court-awarded fee enhancements subject to only three exceptions, not applicable here.[38] The Fifth Circuit, reiterating its previous holding in *CRG Partners Group, L.L.C. v. Neary (In re Pilgrim's Pride)*,[39] reaffirmed that *Perdue* did not overrule the circuit's bankruptcy precedent authorizing fee enhancements under other circumstances pursuant to § 330(a). The court noted its opinion in *Pilgrim's Pride* did not indicate that the *Perdue* opinion had removed the bankruptcy court's discretion to award a fee enhancement in rare and exceptional circumstances.[40]

However, the Fifth Circuit held that Baker Botts was still not entitled to its fee defense fees, relying upon the language of subsection (3) of § 330(a).[41] The Fifth Circuit observed that the bankruptcy court must consider "all relevant factors" concerning professional services rendered, including whether the services were necessary for the administration of—or beneficial toward the completion of—the case, and whether the compensation is reasonable based on charges by comparable practitioners in non-bankruptcy cases.[42] Here the Fifth Circuit noted that compensation is not allowed for services not reasonably likely to benefit the debtor's estate or necessary to case administration,[43] and that any compensation awarded for the preparation of a fee application must be based on the level and skill reasonably required to prepare the application.[44] The court concluded that a straightforward reading of the statute strongly suggests that fees for defense of a fee application are not compensable from the debtor's estate.[45] The Fifth Circuit bolstered its opinion by pointing to the Eleventh Circuit's holding in what it felt was a factually similar case, *Grant v. George Schumann Tire & Batt. Co*.[46]

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Six Bankruptcy Cases Granted Certiorari Before The United States Supreme Court In 2014
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***Bullard v. Hyde Park Sav. Bank (In re Bullard)*, 752 F.3d 483 (1st Cir. 2014) *cert. granted sub nom. Bullard v. Hyde Park Sav. Bank*, No. 14-116, 2014 WL 3817549 (U.S. Dec. 12, 2014). Status: Oral argument set for April 1, 2015.**

On December 12, 2014, the Supreme Court granted certiorari to decide whether an order denying confirmation of a bankruptcy plan is a final order appealable pursuant to 28 U.S.C. § 158(d)(1). The petitioner, Louis Bullard ("Bullard'), filed his chapter 13 petition in December of 2010. A dispute broke out between Bullard and Hyde Park Savings Bank ("Hyde Park"), the holder of a mortgage on Bullard's property, as to the value of the property securing Hyde Park's claim. Bullard amended the plan three times due to this dispute, until Bullard's ultimate plan proposed to bifurcate Hyde Park's secured claim into a secured and unsecured claim. Hyde Park objected, and the bankruptcy court held that Bullard's plan could not be confirmed.[47]

On appeal to the bankruptcy appellate panel (the "BAP"), the BAP affirmed.[48] Bullard next appealed the BAP's decision to the United States Court of Appeals for the First Circuit. The First Circuit denied the appeal, reasoning that an order denying confirmation was not a final order that could be appealed without leave of the bankruptcy court.[49] The court went on to suggest that "any rule that routinely treats the denial of confirmation as a final order would introduce its own form of inefficiency."[50]

***Viegelahn v. Harris (In re Harris)*, 757 F.3d 468 (5th Cir. 2014) *cert. granted sub nom. Harris v. Viegelahn*, No. 14-400, 2014 WL 5148211 (U.S. Dec. 12, 2014). Status: Oral argument set for April 1, 2015.**

On December 12, 2014, the Supreme Court granted certiorari to decide whether, when a debtor in good faith converts a bankruptcy case to chapter 7 after confirmation of a chapter 13 plan, undistributed funds earned post-petition and held by the Chapter 13 trustee are refunded to the debtor or distributed to creditors.[51] The case centers around Charles E. Harris, III ("Harris"), who successfully converted his chapter 13 bankruptcy case in the Western District of Texas to chapter 7 in November of 2011.[52] Harris then sought to have the chapter 13 trustee, Mary Viegelahn ("Viegelahn"), turn over the $4,319.22 of garnished post-petition wages in her possession that had not been distributed to creditors as of the date of the conversion.[53] Notwithstanding the conversion, Viegelahn distributed the wages to creditors. Harris then sought and obtained an order requiring Viegelahn to refund the money distributed to creditors, and Viegelahn appealed.[54]

The district court affirmed the bankruptcy court's order requiring Viegelahn to refund the money.[55] Viegelahn then appealed to the United States Court of Appeals for the Fifth Circuit, who ultimately reversed both lower courts and remanded the case to the district court.[56] The Fifth Circuit pointed out that there is no provision requiring that undistributed payments made pursuant to a confirmed Chapter 13 plan be returned to the debtor upon conversion.[57] Instead, the court noted that while the Chapter 13 plan was no longer in force after conversion, the plan wasn't unraveled back to the beginning of the case either.[58] Thus, the trustee was permitted to distribute cash she had received pursuant to the plan up until the time of conversion.

Both the Fifth Circuit and Harris in his Petition acknowledge that the outcome in this case conflicts with the Third Circuit's *In re Michael* opinion issued in 2012.[59] In that case, the court held that "undistributed plan payments held by a chapter 13 trustee at the time of conversion must be returned to the debtor absent bad faith."[60] The critical divergence is due to the Fifth Circuit's rejection of the Third Circuit's conclusion that property held by the Chapter 13 trustee after plan confirmation is under the control of the debtor as of the date of conversion for the purposes of § 348(f)(1).[61]

***Bank of Am., N.A. v. Caulkett (In re Caulkett)*, 566 F. App'x 879 (11th Cir. 2014) *cert. granted sub nom. Bank of Am., N.A. v. Caulkett*, No. 13-1421, 2014 WL 2207208 (U.S. Nov. 17, 2014); consolidated with *Bank of Am., N.A. v. Toledo-Cardona (In re Toledo-Cardona)*, 556 F. App'x 911 (11th Cir. 2014) *cert. granted sub nom. Bank of Am., N.A. v. Toledo-Cardona*, No. 14-163, 2014 WL 3965212 (U.S. Nov. 17, 2014). Status: Oral argument set for March 24, 2015.**

On Nov. 17th, 2014, the United States Supreme Court granted certiorari in and consolidated two cases involving lien stripping: *Bank of Am., N.A. v. Caulkett*[62] and *Bank of Am., N.A. v. Toledo-Cardona*.[63] Pursuant to the dual cases from the United States Court of Appeals for the Eleventh Circuit, the Supreme Court will decide whether a Chapter 7 debtor is allowed to "strip off" a second priority lien on his home, when the first priority lien exceeds the current value of the property. Though it appears on first glance that there is a circuit split on the issue in which the Eleventh Circuit has gone one way and the Fourth, Sixth,

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and Seventh Circuits have gone the other, the debtors in the cases now before the Supreme Court have proposed to reconcile all of the holdings with existing Supreme Court precedent.

Bank of Am., N.A. v. Caulkett (In re Caulkett)

In June 2006, David Caulkett ("Caulkett") and his wife (together, the "Caulketts") purchased their home for $249,500, financing $199,600 through one mortgage and $49,000 through a second, with both mortgages issued by different divisions of Countrywide Financial. Shortly after the Caulketts purchased their home, petitioner (Bank of America, NA, referred to as "Bank of America") acquired Countrywide Financial and the rights to both mortgages. In 2013, the Caulketts filed for bankruptcy under chapter 7 and filed a motion to strip Bank of America's junior lien pursuant to 11 U.S.C. § 506 (a) and (d). The Caulketts, in doing so, relied heavily on the Eleventh Circuit's decisions in *McNeal v. GMAC Mortg., LLC (In re McNeal)*[64] and *Folendore v. United States Small Business Admin*.[65] At the time of the filing the home held as collateral possessed a value of $98,000, while the outstanding balances owed on the first and second mortgages were $183,264 and $47,855, respectively.

The bankruptcy court granted the motion to strip the junior lien, and the district court affirmed. The Eleventh Circuit agreed with the lower courts that, pursuant to 11 U.S.C. §§ 506(a) and (d), an entirely underwater second mortgage is voidable as a wholly unsecured junior lien.[66] The court likewise reiterated its line of opinions under *McNeal* and *Folendore*.[67] Bank of America acknowledged that this was well-established precedent in the Eleventh Circuit, but reserved the right to seek reconsideration of the issue.[68]

Bank of Am., N.A. v. Toledo-Cardona (In re Toledo-Cardona)

Like the debtor in *Caulkett*, Edelmiro Toledo-Cardona possessed property subject to two liens and filed a bankruptcy case under chapter 7. The value of the first lien likewise exceeded the fair market value of the property.[69] Bank of America's junior lien was wholly "underwater," and so Mr. Toledo Cardona moved to strip the junior lien. The bankruptcy court granted; on appeal the district court affirmed. Bank of America then appealed to the United States Court of Appeals for the Eleventh Circuit, seeking to overturn the court's precedent set forth in *McNeal*[70] and *Folendore*[71] in light of the United States Supreme Court's ruling in *Dewsnup v. Timm*,[72] which held that a chapter 7 debtor could not "strip down" a creditor's lien on real property where the value of the property is less than what is due to be paid to the creditor.[73] In affirming the lower courts, the Eleventh Circuit pointed out that it was bound to follow its decision in *McNeal*, which had reaffirmed *Folendore* despite the holding in *Dewsnup*.[74]

While both *Caulkett* and *Toledo* involve debtors who have successfully avoided (stripped down) a second priority lien on a property in chapter 7 bankruptcy, the other courts of appeal have been divided on this issue for some time. The Fourth, Sixth and Seventh circuits have taken the stance of applying *Dewsnup*. Specifically, the Fourth Circuit in *Ryan v. Homecomings Financial Network (In re Ryan)* embraced *Dewsnup*'s articulation that "a lien passes through bankruptcy unaffected … [and] any increase in value of the real property should accrue to the benefit of the creditor" instead of the debtor.[75] Likewise, the Sixth Circuit in *Talbert v. City Mortgage Services* pointed out that in the "case of strip down, to permit a strip off would mark a departure from the pre-Code rule that real property liens emerge from bankruptcy unaffected."[76] And in 2013, the Seventh Circuit, in its opinion in *Palomar v. First Am. Bank,* expressed that "section 506(d) is best interpreted as confirming the venerable principle … that bankruptcy law permits a lien to pass through bankruptcy unaffected."[77]

However, as previously mentioned, both Caulkett and Toledo-Cardona propose that the Eleventh Circuit's *McNeal* opinion is not in tension with *Dewsnup* and the other circuits that have issued opinions denying lien stripping. Caulkett, echoing Toledo-Cardona, points out in his *Brief in Opposition* (the "Brief") to Bank of America's Petition for Certiorari that the aforementioned decisions of the other circuits do not address cases dealing with wholly underwater junior liens, and thus are not in conflict with the Eleventh Circuit's line of opinions.[78] Caulkett finds it significant that in both the *Talbert* and *Ryan* cases, the second mortgages were only slightly underwater.[79] In Caulkett's Brief, he also notes that the Supreme Court has already denied certiorari this year to the petitioner in *Bank of Am. v. Sinkfield*,[80] an almost identical Eleventh Circuit decision.[81] Regardless of the outcome, it is almost certain that Caulkett and Toledo-Cardona would have preferred that the United States Supreme Court had done the same with their cases.

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Endnotes

1 *Wellness Int'l Network, Ltd. v. Sharif*, 134 S. Ct. 2901 (2014).
2 *Petition for a Writ of Certiorari, Wellness Intern. Network, Ltd. v. Sharif*, No. 13-935, 2014 WL 466827 at ii (U.S. Appellate Petition Feb. 5, 2014).
3 *Id*.
4 *Id*. at 5.
5 *Id*.
6 *Id*. at 6. Sharif refused to cooperate with the chapter 7 trustee who was seeking information as to assets of the estate. Sharif insisted that many of the assets identified as subject to his possession and control were in fact owned by various trust entities.
7 *Id*.
8 *Id*.
9 *Id*. at 7.
10 *Id*.
11 *Wellness Int'l Network, Ltd. v. Sharif*, 727 F.3d 751, 782 (7th Cir. 2013).
12 *Id*. at 771.
13 131 S. Ct. 2594, 2608, 180 L. Ed. 2d 475 (2011).
14 *Sharif*, 727 F.3d at 768.
15 *Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833, 848-57, 106 S.Ct. 3245, 92 L.Ed.2d 675 (1986).
16 *Schor*, 478 U.S. at 847-57, 106 S. Ct. at 3254-60; *accord Sharif*, 727 F.3d at 769-770.
17 *Sharif*, 727 F.3d at 770.
18 *Waldman v. Stone*, 698 F.3d 910, 918 (6th Cir. 2012) *cert. denied*, 133 S. Ct. 1604, 185 L. Ed. 2d 581 (2013).
19 *In re Bellingham Ins. Agency, Inc.*, 702 F.3d 553, 567 (9th Cir. 2012) *cert. granted sub nom. Executive Benefits Ins. Agency v. Arkison*, 133 S. Ct. 2880, 186 L. Ed. 2d 908 (2013) *and aff'd sub nom. Executive Benefits Ins. Agency v. Arkison*, 134 S. Ct. 2165, 189 L. Ed. 2d 83 (2014).
20 *Sharif*, 727 F.3d at 771.
21 "[W]e cannot agree with our colleagues on the Ninth Circuit that the allocation of authority between bankruptcy courts and district courts with regard to core proceedings does not implicate structural interests." *Sharif*, 727 F.3d at 771-72.
22 *Id*. at 773-76.
23 *See Baker Botts, L.L.P. v. ASARCO, L.L.C.*, 135 S. Ct. 44 (2014).
24 *ASARCO, L.L.C. v. Baker Botts, L.L.P. (In re ASARCO, L.L.C.)*, 751 F.3d 291, 302 (5th Cir.).
25 *See Brief for Petitioners, ASARCO L.L.C. v. Baker Botts, L.L.P. (In re ASARCO)*, No. 14-103, 2014 WL 6845689 at *15-41 (U.S. Appellate Brief Dec. 3, 2014).
26 *ASARCO, L.L.C.*, 751 F.3d at 293.
27 *Id*.
28 *Id*.
29 *Id*.
30 *Id*.
31 *Id*. at 293-94.
32 *Id*. at 294.
33 *Id*.
34 *Id*.
35 *ASARCO L.L.C., v. Baker Botts, L.L.P (In re ASARCO, L.L.C)*, No. 2:11-CV-290, 2013 WL 1292704, at *1 (S.D. Tex. Mar. 26, 2013).
36 *ASARCO, L.L.C.*, 751 F.3d at 294.
37 *Perdue v. Kenny A. ex rel. Winn (In re Perdue)*, 559 U.S. 542, 554-56 130 S. Ct. 1662, 176 L. Ed. 2d 494 (2010).
38 *ASARCO, L.L.C.*, 751 F.3d at 296; such exceptions include: 1) where the method used in determining the hourly rate employed in the lodestar calculation does not adequately measure the attorney's true market value; 2) when an attorney's performance includes an extraordinary outlay of expenses and the litigation is exceptionally protracted; and 3) in extraordinary circumstances in which an attorney's performance involves exceptional delay in the payment of fees. *Perdue*, 559 U.S. at 554-55.
39 *CRG Partners Group, L.L.C. v. Neary (In re Pilgrim's Pride Corp.)*, 690 F.3d 650 (5th Cir. 2012).
40 *Id*.
41 § 330(a)(3) provides a non-exclusive list of factors that bear upon a court's determination of the reasonable compensation for actual, necessary services and expenses rendered by attorneys and other court-supervised bankruptcy professionals. *ASARCO, L.L.C.*, 751 F.3d at 295; *see* 330(a)(1).
42 *ASARCO, L.L.C.*, 751 F.3d at 299-300; *see* 11 U.S.C. §§ 330(a)(3)(C) and (F).
43 *See* § 330(a)(4).
44 *See* § 330(a)(6).
45 *ASARCO, L.L.C.,* 751 F.3d at 330.
46 *Grant v. George Schumann Tire & Batt. Co.*, 908 F.2d 874, 882–83 (11th Cir.1990).
47 *Bullard v. Hyde Park Savings Bank (In re Bullard)*, 475 B.R. 304, (B.R. D. Mass. 2012).
48 *Bullard v. Hyde Park Savings Bank (In re Bullard)*, 494 B.R. 92, 101 (B.A.P. 1st Cir. 2013).
49 *Bullard v. Hyde Park Savings Bank (In re Bullard)*, 752 F.3d 483, 489, at * 7 (1st Cir. 2014).
50 *Id*.
51 *Harris v. Viegelahn*, No. 14-400, 2014 WL 5148211, at *1 (U.S. Dec. 12, 2014); *Petition for Writ of Certiorari, Harris v. Viegelahn*, No. 14-400, 2014 WL 5019826 (U.S. Appellate Petition Oct. 6, 2014) (hereinafter "Petition").

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52 *Petition*, at 4-5.
53 *Petition,* at 5-6.
54 *Petition*, at 6.
55 *Viegelahn v. Harris (In re Harris)*, 491 B.R. 866, 876 (W.D. Tex. 2013).
56 V*iegelahn v. Harris (In re Harris)*, 757 F.3d 468, 481 (5th Cir. 2014).
57 *Viegelahn,* 757 F.3d at 473.
58 *Id*. at 477.
59 *In re Michael*, 699 F.3d 305 (3d Cir. 2012)
60 *Michael,* 699 F.3d at 316.
61 *Id*., at 310.
62 No. 13-1421, 2014 WL 2207208 (U.S. Nov. 17, 2014); appealed from *Bank of Am., NA v. Caulkett (In re Caulkett)*, 566 Fed. Appx. 879 (11th Cir, Mem. Op.).
63 No. 14-163, 2014 WL 3965212, at *1 (U.S. Nov. 17, 2014); appealed from *Bank of Am., NA v. Toledo-Cardona (In re Toledo-Cardona)*, 556 F. App'x 911 (11th Cir. 2014).
64 *McNeal vv. GMAC Mortg.., LLC (In Re McNeal)*, 735 F.3d 1263, 1265-66 (11th Cir. 2012).
65 *Folendore v. United States Small Bus. Admin.*, 862 F.2d 1537 (11th Cir.1989).
66 *Caulkett*, 566 F. App''x at 880.
67 *Id*.
68 *Id*.
69 *Toledo-Cardona*, 556 F. App'x at 912.
70 *Supra*.
71 *Supra.*
72 *Dewsnup v. Timm*, 502 U.S. 410, 112 S.Ct. 773, 116 L. Ed. 2d 903 (1992).
73 *Toledo-Cardona*, 556 F. App'x at 912; *Dewsnup*, 502 U.S. at 417, 112 S. Ct. at 778.
74 *Toledo-Cardona*, 556 F. App'x at 912.
75 *Ryan v. Homecomings Financial Network (In re Ryan)*, 253 F.3d 778, 782-83 (4th Cir. 2011).
76 *Talbert v. City Mortgage Services, (In re Talbert)*, 344 F.3d 555, 561 (6th Cir. 2012).
77 *Palomar v. First Am. Bank, (In re Palomar)*, 722 F.3d 992, 993-94 (7th Cir. 2013).
78 *Brief in Opposition, Bank of Am, NA v. Caulkett*, No. 13-1421, 2014 WL 5077231 at *8 (U.S. Appellate Petition, Oct. 6, 2014).
79 *Id*. at *9.
80 *Bank of Am., N.A. v. Sinkfield*, 134 S. Ct. 1760, 188 L. Ed. 2d 593 (2014).
81 *Brief in Opposition*, 2014 WL 5077231 at *7.

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Further, while Bankruptcy Rule 2004 provides that the scope of examination "may relate only to the acts, conduct, or property or to the liabilities and financial condition of the debtor, or to any matter which may affect the administration of the debtor's estate, or to the debtor's right to a discharge,"[7] courts have held that discovery under Bankruptcy Rule 2004 is broader than that typically permitted under the Federal Rules of Civil Procedure,[8] amounting to a "lawful fishing expedition."[9] One would presume that this breadth of scope would include the tools necessary as a means to that end. Of course, this breadth is precisely why counsel for the respondents/defendants in contested matters/adversary proceedings frequently object to the use of Bankruptcy Rule 2004 discovery in evidentiary hearings/trials.

B. Contested Matters Versus Adversary Proceedings

The advisory committee notes accompanying Bankruptcy Rule 9014 provide: "Whenever there is an actual dispute, other than an adversary proceeding…the litigation to resolve that dispute is a contested matter."[10] An adversary proceeding," on the other hand, is a *lawsuit* filed within the bankruptcy case.[11]

Discovery in contested matters is governed by Bankruptcy Rule 9014(c), which provides:

> (c) APPLICATION OF PART VII RULES. Except as otherwise provided in this rule, and unless the court directs otherwise, the following rules shall apply: 7009, 7017, 7021, 7025, 7026, 7028–7037, 7041, 7042, 7052, 7054–7056, 7064, 7069, and 7071. The following subdivisions of Fed. R. Civ. P. 26, as

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> incorporated by Rule 7026, shall not apply in a contested matter unless the court directs otherwise: 26(a)(1) (mandatory disclosure), 26(a)(2) (disclosures regarding expert testimony) and 26(a)(3) (additional pre-trial disclosure), and 26(f) (mandatory meeting before scheduling conference/discovery plan). An entity that desires to perpetuate testimony may proceed in the same manner as provided in Rule 7027 for the taking of a deposition before an adversary proceeding. The court may at any stage in a particular matter direct that one or more of the other rules in Part VII shall apply. The court shall give the parties notice of any order issued under this paragraph to afford them a reasonable opportunity to comply with the procedures prescribed by the order.

Bankruptcy Rule 7001 addresses discovery in adversary proceedings, providing, in part, that "[a]n adversary proceeding is governed by the rules of this Part VII."[12] Part VII includes, by reference therein, the discovery rules in the Federal Rules of Procedure that apply to adversary proceedings. Bankruptcy Rule 2004 is not mentioned in either of these rules. Query: Does the omission constitute a statement on admissibility?

C. Bankruptcy Rule 2004 Discovery Should Be Admissible In Contested Matters And Adversary Proceedings

Bankruptcy Rule 2004 discovery should be admissible in merit proceedings involving contested matters and adversary actions – this includes dispositive motions (*e.g.*, summary judgment), final hearings, and trials.

In dispositive motion practice, as with hearings and trials on the merits, evidentiary submissions are premised on the Federal Rules of Civil Procedure. For example, Rule 56 of the Federal Rules of Civil Procedure, adopted for application in contested matters and adversary proceedings, provides that a fact can be established by

> citing to particular parts of materials in the record, including depositions, documents, electronically stored information, affidavits or declarations, stipulations (including those made for the purposes of the motion only), admissions, interrogatory answers, or other materials.[13]

(emphasis added) Fed. R. Civ. P. 56(c)(1)(A).

Dispositive motions equate effectively to trials on the merits. While the standards of review applied by a court in evaluating such motions may be different from those at a final hearing or trial – *e.g.*, whether or to what extent claims have been well-pled and/or are plausible and whether there are genuine issues of material fact in dispute versus whether claims have been established by a preponderance of the evidence – the evidentiary analyzes are the essentially same.

1. Use of Bankruptcy Rule 2004 Testimony In Support of Dispositive Motions

While, technically, testimony given in a Bankruptcy Rule 2004 deposition may not qualify as a "deposition" taken under Federal Rule 30 that can be used as evidence under Rule 56(c)(1)(A), the testimony does frequently qualify and has the same reliability as an affidavit under the same provision.[14] Bankruptcy Rule 2004 examination testimony satisfies the requirements of Rule 56(c)(4) in that it is made on personal knowledge, sets out facts that would be admissible in evidence, and demonstrates that the declarant is competent to testify on the matters therein. In short, "[c]ertified testimony complying with Rule 56(e)...has the same evidentiary value and safeguards as affidavits provided for in Rule 56(e), supra, which do not afford an opportunity for cross-examination."[15]

The Ninth Circuit Court of Appeals addressed this issue directly in the case of *Hoover v. Switlik Parachute Co.*[16] In *Hoover*, plaintiff sued for injuries sustained while using a parachute. After certain depositions were taken in discovery, defendants Pioneer and Switlik were added as defendants.[17] Pioneer filed for summary judgment relying on deposition testimony taken before either it or Switlik Parachute Co. were parties.[18] Switlik argued that the depositions were not admissible because it did not have an opportunity to cross-examine the deponents.[19] On appeal, the Ninth Circuit Court of Appeals ruled that even though the depositions would not be admissible at summary judgment as depositions, they were still admissible as affidavits because they meet all the same qualifications under Rule 56.[20]

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Bankruptcy Rule 2004 testimony meets the requirements of an affidavit under Rule 56 and, therefore, should be admissible. If the other side disagrees with the testimony or evidence presented in connection with a motion for summary judgment they can assert or claim so with controverting summary judgment evidence which attempts to demonstrate an inability of the movant to recover on and controverts the very basis of its claims.

2. Other Bases For Permitting Introduction of Bankruptcy Rule 2004 Testimony

There are other numerous, sound arguments for the allowance of Bankruptcy Rule 2004 testimony at evidentiary hearing/trials of contested matters and adversary actions.

(a) Residual Hearsay Exception

Bankruptcy Rule 2004 testimony should be admissible under Rule 807 of the Federal Rules of Evidence,[21] the residual hearsay exception, which is adopted for application in both contested matters and adversary proceedings.[22] Rule of Evidence 807 provides that a hearsay statement that does not fall under Rules of Evidence 803 or 804 is still admissible, if:

a. The statement has equivalent circumstantial guarantees of trustworthiness;
b. It is offered as evidence of a material fact;
c. It is more probative on the point for which it is to be offered than any other evidence that the proponent can obtain through reasonable means; and
d. Admitting it will best serve the purposes of these rules and the interests of justice.

In *Johnson v. Nelson (In re Slatkin)*[23] the trustee filed an adversary proceeding against investors to recover fraudulent transfers of purported profits from the debtor's Ponzi scheme. The court held that the debtor's plea agreement filed in his criminal action was admissible at summary judgment under the Rule 807 residual exception to hearsay in order to prove that the debtor was involved in a Ponzi scheme.[24] The court held that the plea agreement where the debtor admitted he operated a Ponzi scheme was the most probative evidence on the issue, that it covered a material fact, had equivalent circumstantial guarantees of trustworthiness and furthered the general purposes of the rules of evidence.[25]

(b) Admission of a Party Opponent

Bankruptcy Rule 2004 testimony may also be deemed to constitute an admission of a party opponent under Rule 801(d)(2) of the Federal Rule of Evidence.[26] In *In re McLaren*[27] a creditor brought a claim against a chapter 7 debtor pursuant to 11 U.S.C. § 523(a).[28] At trial, the debtor chose not to testify and the creditor moved to admit portions of the debtor's Bankruptcy Rule 2004 examination testimony.[29] Acknowledging that Bankruptcy Rule 2004 examinations provide fewer protections than Rule 30 of the Federal Rules of Civil Procedure, the court held that the testimony was nevertheless admissible into evidence because the circumstances surrounding the taking of the examination provided the debtor with ample notice that the information was important to the creditor's case and that it would be used accordingly.[30]

(c) Witness Unavailability

Bankruptcy Rule 2004 testimony may also be admissible where the witness is unavailable to testify at trial in accordance with Rule 32(a)(4) of the Federal Rules of Civil Procedure and Rule 804 of the Federal Rules of Evidence.[31] In *Samson v. W. Capital Partners LLC (In re Blixseth)*,[32] a creditor examined a witness during a Bankruptcy Rule 2004 deposition prior to the commencement of an adversary proceeding.[33] When called to testify at trial, the witness refused to testify by invoking the Fifth Amendment.[34] The court distinguished the situation at bar from those where movants seek to circumvent the Federal Rules of Civil Procedure and held that the examination transcripts were admissible despite defendant's hearsay objections.[35]

(d) Waiver

Finally, if the other party was on notice of the proponent's intention to use the Bankruptcy Rule 2004 evidence and makes

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no objection, it could be said that they have waived any argument against the admissibility of the evidence at a hearing or trial. For example, if the Bankruptcy Rule 2004 discovery is used to support a motion for summary judgment or other evidence based pre-trial motion, without objection, why should the party later be permitted to object to its use at a final evidentiary hearing or trial on the merits? Similarly, if a party uses Bankruptcy Rule 2004 discovery to rebut an argument made by the other side or to controvert evidence placed before the Court, that party should not later be heard to argue that Bankruptcy Rule 2004 evidence is inadmissible, if the evidence is otherwise relevant to the issues before the Court.

D. Practice Tips

Because Bankruptcy Rule 2004 discovery is conducted in a vacuum and there is no way to determine whether the fruits of the examination will result in support for action to be taken, the examination should be approached as if it will be used in collateral proceedings. The following tips should be considered:

- In your motion to conduct discovery pursuant to Bankruptcy Rule 2004, note that you reserve the right to serve interrogatories, requests for production, depositions on written questions, as well as notices for oral deposition. Have the order provide that these discovery vehicles are available.

- Make sure the Bankruptcy Rule 2004 examination has as many *indicia* of an oral deposition under Federal Rule 30 as possible. To accomplish this, the target of a request for a Bankruptcy Rule 2004 examination should be *Mirandized* as to the intended scope and application of the deposition. Make clear that it is your intention that the fruits of the examination will be used to evaluate whether motions, objections and/or adversary actions may be filed. Broadcast this intention in the notice of and on the record at the beginning of the Bankruptcy Rule 2004 deposition. This will support a waiver argument later when the testimony is sought to be used.

- If you believe or have reason to believe that the debtor or other persons or entities may be targets of an action based on Bankruptcy Rule 2004 discovery, be sure to specifically notice and invite them to attend and ask questions. Make it clear on the record who is in attendance and that will be given an opportunity to examine the witness.

- Consider asking counsel in attendance if they will stipulate on the record at the Bankruptcy 2004 examination that the testimony and documents produced may be used in collateral proceedings.

- After the contested matter or adversary proceeding has been filed, ask counsel for the respondent/defendant whether they will stipulate to using Bankruptcy Rule 2004 discovery in the proceedings. If so, prepare and file a stipulation in the case or adversary proceeding to this effect. If they will not agree to do so, consider sending the respondent/defendant an interrogatory and/or a request for admission asking that they agree that the testimony provided in the Bankruptcy Rule 2004 deposition (as attached to the interrogatory or request for admission) is the truthful, correct, genuine, authentic, accurate testimony of the person or entity involved. This will force them to either admit the authenticity and admissibility or explain why they cannot do so and take steps to prove otherwise. If they cannot admit the request, the court can be asked to opine on the matter or the deposition can be retaken if necessary and the transcript marked as an exhibit. If they admit, then the burden will be on them to gain controverting testimony or other evidence.

- Make sure the transcription of Bankruptcy Rule 2004 testimony is certified by the court reporter and the other side has had an opportunity to review it and sign it before a notary and make any corrections to an *errata* page. On the record, indicate that you will be requesting a transcript and the review and signature of the deponent; otherwise, unless there is an objection, you will be permitted to use a certified copy of the original, unsigned testimony in lieu of the signed original in any further proceedings.

- Finally, consider designating the target of the Bankruptcy Rule 2004 examination as witness for hearing/trial. If required, designate specific pages and lines of the transcript. If exhibits used in the examination are desired to be used at the hearing/trial, separately designated as exhibits for the hearing/trial, as well as referencing them as an

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exhibit to the examination. In most districts, counsel is required to state objections to exhibits in advance of hearing/trial. If there is no objection, move for admission of the exhibit at the being of the hearing/trial and argue waiver of any objection.

E. Conclusion

Bankruptcy Rule 2004 is a great tool to gather information that may lead to the filing of contested matters and adversary proceedings. Taking steps beforehand to strengthen the right to use the fruits of such discovery will save time and money in the event the information proves beneficial to establishing your claims and causes of action.

The foregoing is presented for educational purposes only and should not be relied upon as legal advice. Although prepared by professionals, it should not be utilized as a substitute for professional services in specific situations. If legal advice or other expert assistance is required, the services of a professional should be sought.

ENDNOTES

1 Fed. R. Bankr. P. 2004 (**"Bankruptcy Rule 2004"**).
2 "Entity," is defined in the Bankruptcy Code to include "person, estate, trust, governmental unit, and United States trustee." 11 U.S.C. § 101(15).
3 Bankruptcy Rule 9016 provides: "Rule 45 Fed. R. Civ. P. applies in cases under the Code."
4 And, as will be noted, because a Bankruptcy Rule 2004 examination is not one taken under the Federal Rules of Civil Procedure, the temporal limitations in Federal Rule of Civil Procedure 30 and 34 (30 days to produce) do not apply to a request for production in connection with an notice of examination under Bankruptcy Rule 2004.
5 *See* Black's *Law Dictionary* (4th ed. 1968).
6 *See* www.merriam-webster.com.
7 Fed. R. Bankr. P. 2004(b).
8 Bankruptcy Rule 2004 affords both debtors and creditors broad rights of examination of a persons and entities with respect to the business and financial affairs of the debtor and administration of the estate. However, its scope is not limitless. For example, examinations cannot be used to harass or oppress the party and should not be used to obtain information for use in an unrelated case or proceeding pending before another tribunal. *In re Snyder*, 52 F.3d 1067 (5th Cir. 1995) (citations omitted). Under the Federal Rules of Civil Procedure, discovery is generally limited to information which is relevant to the claims asserted or is likely to lead to the discovery of relevant information. *See* Fed. R. Civ. P. 26(b)(1).
9 *See In re Bounds*, No. 09–12799, 2010 WL 3447683, at *5–6, 2010 Bankr. LEXIS 2983, at *14 (Bankr. W.D.Tex., August 31, 2010) (noting that numerous courts have likened a Bankruptcy Rule 2004 examination to a fishing expedition). *See also In re NE 40 Partners, Ltd. Partnership*, 440 B.R. 124, 129 (Bankr. S.D. Tex. 2010) ("[T]he discovery tools available to a creditor or trustee Chapter 7 trustee should allow a trustee to present the "who, what, where, when, and how," thus forcing trustees to do their homework before filing an adversary proceeding and subsequently improving judicial economy" citing *Benchmark Elecs.*, 343 F.3d at 724 (5th Cir.2003).").
10 Fed. R. Bankr. P. 9014, Advisory Committee Notes.
11 Fed. R. Bankr. P. 7001. *See also* 10 Collier on Bankruptcy ¶ 7001.01 (Alan N. Resnick & Henry J. Sommer eds., 16th ed. 2010) ("Adversary proceedings are separate lawsuits within the context of a particular bankruptcy case and have all the attributes of a lawsuit...."). Adversary proceedings are initiated with the filing of a complaint. Fed. R. Bankr. P. 7003; Fed. R. Civ. P. 3.
12 Fed. R. Bankr. P. 7001 (**"Bankruptcy Rule 7001"**).
13 (emphasis added) Fed. R. Civ. P. 56(c)(1)(A). Fed. R. Bankr. P. 7056 and 9014.
14 *See Menotte v. Leonard (In re Leonard)*, 418 B.R. 477 (S.D. Fla. 2009) (holding that the transcript of a Rule 2004 examination is admissible as a transcript under Rule 56(c) of the Federal Rules of Civil Procedure because it was "made with personal knowledge and set forth facts in evidence.").
15 *Steven v. Roscoe Turner Aeronautical Corp.*, 324 F.2d 157, 162 (7th Cir. 1963); *see also Shulins v. New England Insurance Co.*, 360 F.2d 781 (2nd Cr. 1966) (holding that the certified transcript of a court record was admissible as evidence at summary judgment).
16 663 F.2d 964 (9th Cir. 1981).
17 *Id.* at 966.
18 *Id.*
19 *Id.*
20 *Id.*
21 Fed. R. Evid. 807.

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22 *See* Fed. R. Bankr. P. 9017.

23 525 F.3d 805 (9th Cir. 2008).

24 *Id.* at 812.

25 *Id. Cf. Roberts v. Oliver (In re Oliver)*, 414 B.R. 361, 371 (Bankr. E.D. Tenn. 2009). Arguably, *Oliver* is limited to its facts and procedural situation. Most significant, however, is that the court in *Oliver* does not address or consider whether testimony given in a Bankruptcy Rule 2004 examination is admissible as an affidavit under Rule 56.

26 Fed. R. Evid. 801(d)(2). Federal Rule of Evidence 801(d)(7) provides that a statement made by a party is not hearsay if:

> The statement is offered against an opposing party and
>
> 1. Was made by the party in an individual or representative capacity;
> 2. Is one the party manifested that it adopted or believed to be true;
> 3. Was made by a person whom the party authorized to make a statement on the subject;
> 4. Was made by the party' agent or employee on a matter within the scope of that relationship; or
> 5. Was made by the party's coconspirator in furtherance of the conspiracy

27 3 F.3d 958, 964 (6th Cir. 1993).

28 *Id.* at 959.

29 *Id.*

30 *Id.* at 964.

31 Fed. R. Civ. P. 32(a)(4); Fed. R. Evid. 804.

32 489 B.R. 154, 181 (Bankr. D. Mont. 2013).

33 *Id.* at 182.

34 *Id.*

35 *Id. See also In re Avon Townhomes Venture*, 433 B.R. 269, 280 n. 13 (Bankr. N.D. Cal. 2010).