Summer 2017

The Cramdown

The Newsletter of the Tampa Bay Bankruptcy Bar Association

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PRESIDENT'S MESSAGE

by Kelley Petry
Kelley Petry, P.A.

The end is bittersweet. I have had such a wonderful experience serving as your President this year. The opportunities to interact with you at the many activities the Association has hosted this year have expanded my perspective of not only the great body of members that this Association is fortunate to have, but also the practice of bankruptcy in the big picture. The community and comradery of this Association is priceless. Many of you have affected me, my life, and my practice in such fantastically positive ways, and you probably didn't even realize it. I was initially a bit intimidated at the prospect of carrying the mantle of the impressive list of past Presidents of the Association and their legacies. I finish feeling a debt of gratitude to each of you for helping me along the way, and hope that I have given the position of President the dignity and responsibility that history has built around it.

I would also like to recognize our Judiciary for being so generously available to us. Their case load is large and dedication to their work great. Despite the heavy responsibility of being a Federal Bankruptcy Judge, each of our local Judges has continued to be so very giving of their time and knowledge. We are truly fortunate to practice in their courtrooms.

Our incoming President, Scott Stichter, is imminently qualified for the position. Nonetheless, I continue to be available to anyone who needs help. Please feel free to contact me to discuss any issue that needs to be addressed.

I look forward to seeing you at the Annual Dinner on June 1, 2017. It is back at Palma Ceia Country Club, but with a few changes. The Board has attempted to be responsive to feedback from membership, to host our biggest yearly event in the most satisfying and consensus-building ways possible. If you haven't already, please visit www.TBBBA.com to register by no later than May 25, 2017.

It has been my pleasure. Thank you.

In This Issue

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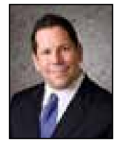

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Can we Dismiss Structured Dismissals? *The Scope of* Czyzewski v. Jevic Holding Corp

by Matthew B. Hale

"Structured dismissals" have become commonplace as a means of effecting a quick exit from a chapter 11 case without other viable exit options. People may differ on the precise definition of a structured dismissal, but generally any dismissal which alters the bankruptcy code's typical effect of dismissal[1] could be considered "structured." Many structured dismissals are offered as a quick way to distribute sale or settlement proceeds without delaying distribution through a chapter 7 trustee or diminishing the distribution through the chapter 11 plan process. In other cases, like the bankruptcy case of Jevic Holding Corp., the structured dismissal is approved as the best of all bad options.

The Supreme Court's recent decision in *Czyzewski v. Jevic Holding Corp.*[2] confronted the structured dismissal trend. The Court's 6-2 decision, authored by Justice Breyer, reversed the bankruptcy court's approval of a structured dismissal which distributed funds but failed to follow bankruptcy priority rules. This article will first examine the Supreme Court's opinion, then provide some observations about its scope.

Background

Jevic Holding Corp. was a trucking company purchased in a leveraged buy-out by a private equity firm, Sun Capital Partners, which was financed with a loan from CIT Group. After the leveraged buy-out, the Jevic's business declined and it eventually filed a chapter 11 petition with virtually no unencumbered hard assets.[3]

Jevic's bankruptcy case contained two key pieces of litigation. First, a group of the debtor's terminated truck driver employees sought and obtained a $12.4 million judgment against the debtor under the Worker Adjustment and Retraining Notification Act ("WARN"). The bankruptcy court deemed part of the judgment a priority wage claim,[4] although the court eventually stymied the drivers' efforts to hold Sun Capital liable by dismissing Sun from the WARN litigation (this will be important later). Second, the unsecured creditor's committee pursued Sun Capital and CIT on preference and fraudulent transfer theories, arguing the leveraged buy-out caused the debtor's demise by saddling it with unmanageable debt.

With the estate falling into administrative insolvency, the debtor, the committee, Sun Capital, and CIT reached a settlement of the fraudulent transfer litigation. Under the settlement, the debtor's remaining cash—$1.7 million of Sun Capital's cash collateral—and another $2 million paid by CIT, would go to pay professionals, tax and administrative creditors, and if anything was left, general unsecured creditors. Notably absent from the distribution were the drivers and their priority wage claims.

The debtor asked the bankruptcy court to approve the settlement and approve the distribution—not through a chapter 11 plan, but rather through a dismissal order. The drivers objected, arguing that by not providing any distribution for their priority claim, the deal was a short-cut around the bankruptcy code's distributional priority requirements. The bankruptcy court nonetheless approved the deal as the least bad alternative. The district court affirmed.[5]

The drivers appealed to the Third Circuit, which affirmed the bankruptcy court in a 2-1 decision.[6] The Third Circuit relied on the bankruptcy court's

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1 See generally 11 U.S.C. § 349.
2 580 U.S. ___,137 S. Ct. 973 (2017).
3 At filing, the debtor owed approximately $53 million in secured debt to Sun and CIT, and another $20 million to tax creditors and general unsecured creditors.
4 See 11 U.S.C. § 507(a)(4).
5 In re Jevic Holding Corp., No. BR 08-11006(BLS), 2014 WL 268613 (D. Del. Jan. 24, 2014).
6 In re Jevic Holding Corp., 787 F.3d 173 (3d Cir. 2015).

findings and conclusion that the dismissal was truly the best of all bad options.[7] Rejecting a bright-line rule against class-skipping structured dismissals, the appellate court held that in exceptional circumstances, a bankruptcy court may approve a class-skipping settlement that deviates from the bankruptcy code's priority scheme only if they have 'specific and credible grounds to justify the deviation.[8] The drivers appealed again to the Supreme Court; the Court granted *certiorari*.[9]

The Supreme Court's Decision

The issue before the Supreme Court in *Czyzewski v. Jevic Holding Corp*.[10] is clearly stated: whether a bankruptcy court has the legal power to order a priority-skipping distribution in connection with a chapter 11 dismissal order.[11] Although the Court plainly answered this question in the negative, the ultimate scope of the *Jevic's* holding leaves a few key unanswered questions for practitioners to wrestle with in future cases.

Do the drivers have standing?

Before addressing the primary issue, the Court first addressed standing: did the drivers suffer any injury from the dismissal?[12] If unsecured creditors had no hope of receiving *anything* in a chapter 7, and no plan was confirmable, how did the settlement and dismissal injure drivers? Because the funds distributed were Sun Capital's cash collateral and CIT's settlement payment, the respondents maintained that even if the settlement were unwound, no redress would be available to the drivers. Sun Capital and CIT would simply take their money off the board.

The Supreme Court disagreed. The Court first questioned why the settlement skipped the drivers in the first place. Sun Capital's claimed that the drivers' pending WARN claims against it cause the drivers to be left out; Sun didn't want to fund litigation against itself. But this argument no longer proved tenable. The WARN claims against Sun Capital had since been dismissed.[13] The Court further observed that a potentially valuable asset had been overlooked: the committee's fraudulent transfer and preference claims against CIT and Sun Capital. In a conversion or straight dismissal, the Court observed that the lawsuit could provide the drivers with an opportunity to recover.[14] This loss was enough of an injury to provide standing.

Are priority-skipping structured dismissals permissible?

Turning to the primary question: can a bankruptcy court approve a dismissal order that distributes funds to creditors but fails to follow bankruptcy code priority? The Supreme Court's "simple answer to this complicated question is 'no.'"[15]

The beginning of the Court's answer explores the fundamental importance of the bankruptcy code's priority structure. Chapter 7 has clear-cut distribution priorities,[16] and in chapter 11 cases, the code's cramdown requirements (codifying the absolute priority rule) impose priority rules when a creditor dissents.[17] The Court searched the bankruptcy code and legislative history, but could find no evidence that Congress intended to absolve dismissal orders from this priority structure.[18] "The importance of the priority system leads us to expect more than simple statutory silence if, and when, Congress were to intend a major departure."[19]

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7 Id. at 178–79.
8 Id. at 184 (quoting In re Iridium Operating LLC, 478 F.3d 452, 466 (2d Cir. 2007)).
9 Note that Justice Thomas, in his dissent, argues that the Court never should have granted cert because the courts of appeal have not yet had a meaningful chance to develop jurisprudence on the issues raised. See Czyzewski v. Jevic Holding Corp., 580 U.S. ___,137 S. Ct. 973, 987–88 (2017) (Thomas, J., dissenting).
10 580 U.S. ___,137 S. Ct. 973 (2017).
11 Id. at 983.
12 Id. at 982–83.
13 See id. at 983 ("If Sun's given reason for opposing distributions to petitioners has disappeared, why would Sun not settle while permitting some of the settlement money to go to petitioners?").
14 See id. ("They lost a chance to obtain a settlement that respected their priority. Or, if not that, they lost the power to bring their own lawsuit on a claim that had a settlement value of $3.7 million.").
15 Id. at 983.
16 See id. (citing 11 U.S.C. §§ 725, 726).
17 See id. (citing 11 U.S.C. § 1129(b)).
18 Id. at 984.
19 Id.

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The court then looked to the statutory mechanics. Courts approving structured dismissals rely on Section 349 of the bankruptcy code, which prescribes the typical effect of dismissal—"unless the court, for cause, orders otherwise."[20] Examining Section 349, the Court found that the overall result of a typical dismissal is restoration of "the pre-petition financial status quo."[21] Simple "cause," the Court stated, does not provide bankruptcy courts with discretion to order "general end-of-case distributions of estate assets to creditors...let alone final distributions that do not help to restore the *status quo ante* or protect reliance interests acquired in the bankruptcy..."[22] "[T]he word 'cause' is too weak a reed upon which to rest so weighty a power."[23]

The Court later addressed the inadequacy of the Third Circuit's rule.[24] The Third Circuit limited approval of priority-skipping dismissals only in the "rare case" where "sufficient reasons" were shown.[25] The present case provided the Supreme Court with a great example of why such a flexible standard could lead to abuse. The bankruptcy court's key assumptions—that the parties couldn't settle without skipping the drivers, and that there were no other sources of recovery—proved largely unsupported. The reason for cutting out the drivers—their WARN claims pending against Sun Capital—no longer existed. And the fraudulent transfer claims against Sun Capital and CIT could indeed provide recovery for drivers in a chapter 7 case or after dismissal.

Limitations on the Supreme Court's Holding in Jevic

Perhaps the most important takeaways from the *Jevic* decision can be gleaned from teasing out what the Supreme Court did *not* hold. The Court was careful to clarify the impact of its holding on other bankruptcy practices touching on priorities. And a closer look reveals other important limitations on *Jevic's* precedential value.

First, the Court's opinion does not prohibit interim distributions that may violate priority rules, so long as they advance "Code-related objectives".[26] Specifically referenced were orders granting first-day motions to pay pre-petition employee wages, orders approving payments to "critical vendors," and "roll-ups" which allow DIP-lenders' to receive interim payments on account of their pre-petition claims.[27] Unlike end-of-case class skipping distributions through a structured dismissal, these distributions "enable a successful reorganization and make even the disfavored creditors better off."[28]

Second, the *Jevic* opinion did not completely rule out distributions under Court-approved compromises which might stray from priority rules. Distinguishing the Second Circuit's decision in *In re Iridium Operating, LLC*,[29] the Court found that the distribution of settlement proceeds there helped fund a litigation trust which, in turn, pursued litigation on behalf of the estate.[30] And because the claims in the case were not "fully resolved," it was difficult to hold strictly to priorities when the claims against the estate were not set.[31]

Third, are structured dismissals permitted if they strictly follow the bankruptcy code priority rules? This answer is less clear. Early in its opinion, the Court plainly states: "We express no view about the legality of structured dismissals in general."[32] But on the other hand, the *Jevic* decision contains a lengthy discussion of Section 349(b)'s limitations,

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20 11 U.S.C § 349(b).
21 Jevic, 137 S. Ct. at 984.
22 Id. at 984–85.
23 Id. at 985.
24 Id. at 986.
25 Id. (citing In re Jevic Holding Corp., 787 F.3d 173, at 175, 186 (3d Cir. 2015)).
26 Id. at 985.
27 See id.
28 Id. (quoting In re Kmart Corp., 359 F. 3d 866, 872 (7th Cir. 2004)).
29 478 F. 3d 452 (2d Cir. 2007).
30 Jevic, 137 S. Ct. at 985.
31 Id.
32 Id. at 985.

Student Loan Sidebar

by: Christie Arkovich
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New Florida precedent: *In re Lysiuk* (Case No. 6-16-ap-00124-CCJ (discharge of private student loans for attendance at a non-accredited, non-eligible Caribbean medical school).

In re Decena Update: We now have Florida precedent allowing for the discharge of private student loan debt for an unaccredited foreign medical school that is non-eligible for federal funding.

On March 23, 2017, Judge Cynthia Jackson ruled in *In re Mark Lysiuk*, Case No. 6-16-ap-00124-CCJ, that private student loans were discharged when they were not made, insured or guaranteed by the government to attend an unaccredited foreign medical school. Defendant's loans were found not to be student loans that should be excepted from discharge pursuant to Bankruptcy Code §523 (a)(8), nor were they "qualified education loans" as that term is defined by the Internal Revenue Code.

New Florida precedent: In re Lysiuk (Case No. 6-16-ap-00124-CCJ (discharge of private student loans for attendance at a non-accredited, non-eligible Caribbean medical school).

We represented the debtor in this case of first impression in Florida and I am pleased to report that our client will benefit tremendously from the discharge of several hundred thousand in private student loans. Our client was unable to pass his medical boards and works a job in an unrelated field now making $10-$12 an hour. At least now he can get on with his life and utilize an income based plan for his remaining federal loans with debt forgiveness.

Navient Admits it is a Debt Collector for the Department of Education in a pending CFPB lawsuit.

In perhaps the worst marketing decision next to United's violent removal of its overbooked passenger this month, Navient's response to the CFPB lawsuit is that it isn't being paid enough to explain to borrowers the various income based/debt forgiveness plans. Navient responded to the CFPB lawsuit that "there is no expectation that the servicer will act in the interest of the consumer." Bloomberg reports that Navient said its job is to get the DOE paid, and that it never agreed to offer the customer service the CFPB wants.

There are several income based plans (ISR, IBR, Paye, RePaye, ICR and IBR for New Borrowers) and not all of them have debt forgiveness. The terms of each vary. Please help to explain to student loan clients that IBR is not a one size fit all proposition and that they should fully understand the differences between the plans to make their own decision as to what is best for their family. Trusting their servicer to choose for them is giving control to “the debt collector”.

Navient Now Requires Borrowers to Be Current in Payments or to Specifically Request a Forbearance Separately Before An Income Based Plan Can Be Approved.

In a March 21, 2017 Fact Sheet released by Navient, it now requires borrowers to **separately request a forbearance** if they are late in payments when seeking an income based plan. Unfortunately, the current Income-Driven Repayment (IDR) Plan Request form (available at ifap.ed.gov) despite being 10 pages in length does not have a section addressing this. Many borrowers will likely send in this form only to have it denied if they are late in payments. This change will likely result in an uptick in unnecessary defaults of borrowers whose income is low enough to otherwise qualify for an income based plan with debt forgiveness – which adds 25% to the loan balance.

IDR Certification IRS data retrieval tool down for 2017.

Borrowers seeking approval of an IDR plan will have a longer wait than usual as the IRS data retrieval tool is anticipated to be down for much of 2017 as the system is being revamped to address privacy concerns. This will require that paper applications be mailed which will lead to servicing related delays and errors.

The 2016 Defense to Repayment Regulations are Safe for Now.

A key deadline passed in April that would have allowed Secretary DeVos and the Trump administration to roll back the final regulations that were announced November 1, 2016. No action was taken to reverse the new regulations. A portion of the regulations is already in effect with borrowers filing DTR applications for false representations from schools such as ITT and Corinthian, with the remainder of the regulations going into effect this summer.

SAVE THE DATE

Tampa Bay Bankruptcy Bar Association
ANNUAL DINNER

Thursday, June 1, 2017
6:00 p.m. – Cocktail Hour
7:15 p.m. – Dinner

Palma Ceia Golf and Country Club
1601 South MacDill Avenue
Tampa, Florida 33629

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More details to follow. If you have any questions, please contact:

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Chapter 13 Seminar
April 21

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which appears to restrict the kinds of relief available through a dismissal order.[33] Nevertheless, the Court's express limitation on its holding may leave room for dismissals with some "bells and whistles" as a cost-effective, expeditious exit from chapter 11.[34]

One final, related question—what about consensual structured dismissals? The Supreme Court cited the bankruptcy court decision *In re Buffet Partners, L. P.*,[35] where the bankruptcy court approved a structured dismissal where no "party with an economic stake" objected.[36] The *Buffet Partners* court approved a structured dismissal distributing sale proceeds, over the United States Trustee's lone objection, where "the parties with skin in the game" consented.[37] While consensual structured dismissals may raise different concerns (i.e., adequate disclosure), they could still be permissible in the right case.

Conclusion

The Supreme Court's decision in *Czyzewski v. Jevic* Holding Corp. certainly limits the flexibility and utility of structured dismissals, but it may not shut the door on all dismissals that stray from the express terms of Section 349. And, although the Court was careful to limit its holding, parties will likely face uphill battles in the future when seeking relief that touches on priority, such as settlements that distribute funds. As bankruptcy courts interpret and apply *Jevic*, only time will tell if we can truly dismiss structured dismissals.

33 See id. at 984–85.
34 The most innocuous of these "bells and whistles" are provisions for retention of jurisdiction and continuing effect of bankruptcy court orders. See, e.g., In re Naartjie Custom Kids, Inc., 534 B.R. 416, 420 (Bankr. D. Utah 2015) (approving provision that "all of the Court's orders will remain in full force and effect"); In re Petersburg Regency LLC, 540 B.R. 508 (Bankr. D.N.J. 2015) (retaining jurisdiction "for the limited purposes of awarding administrative expenses and enforcing and interpreting the terms of its related orders"). More questionable orders might include releases or exculpation provisions. See Naartjie, 534 B.R. at 420 (approving provision for "exculpation clauses and general releases . . . as contemplated in the Settlement Agreement").
35 2014 WL 3735804 (Bankr. N.D. Tex., July 28, 2014).
36 Jevic, 137 S. Ct. at 985 (citing and quoting Buffet Partners, at *4).
37 Buffet Partners, 2014 WL 3735804, at *4.

Narrowing the Scope of Spokeo

by Megan Murray, Trenam Law

In 2016 the Supreme Court clarified in *Spokeo v. Robins*, 136 S. Ct. 1540 (2016), that a "concrete" and "particular" injury is necessary to confer Article III standing for a procedural or statutory violation. Thomas Robins, a Virginia resident, filed a lawsuit against Spokeo, a "people search engine," contending Spokeo violated the federal Fair Credit Reporting Act ("FRCA") when it published false personal information about him which allegedly impacted his job search. Robins argued Spokeo's publication of this inaccurate information violated FRCA's requirements to "follow reasonable procedures to ensure maximum possible accuracy" of the information that it makes available for use in credit reports.

The district court dismissed Robins' case on the ground he lacked standing to bring a case because he could not show any actual harm from the inaccurate publication. The Ninth Circuit Court of Appeals reversed and remanded Robins' case, finding the statutory violations constituted injury in fact and an individualized harm, and Robins had alleged causation and redressability sufficient to confer Article III standing.

In a six-to-two decision, the Supreme Court vacated and remanded the decesion, finding the Ninth Circuit only addressed particularity but failed to appreciate the distinctness of the two requirements (concreteness and particularity) in its decision. On remand, Robins was required to show he suffered a concrete "injury in fact" from Spokeo's publication of inaccurate information. While "concrete" is not necessarily "tangible," the Supreme Court noted not all statutory FRCA violations will automatically result in a concrete harm.[1]

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1 A plaintiff invoking federal jurisdiction (Article III standing) bears the burden of establishing the "irreducible constitutional minimum" of standing by demonstrating (1) an injury in fact, (2) fairly traceable to the challenged conduct of the defendant, and (3) likely to be redressed by a favorable judicial decision. Spokeo, Inc. v. Robins, 136 S. Ct. 1540, 1543 (2016) (citing Lujan v. Defenders of Wildlife, 504 U.S. 555, 560–561 (1992)). The injury-in-fact requirement requires a plaintiff to show that he or she suffered "an invasion of a legally protected interest" that is "concrete and particularized" and "actual or imminent, not conjectural or hypothetical." Id. at

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Given the ruling in *Spokeo*, there is no bright line test on whether a statutory violation is a concrete injury. Instead, statutory violations "can be sufficient in some circumstances to constitute injury in fact; in such a case, a plaintiff need not allege any additional harm beyond the one identified by Congress." *Spokeo*, 136 S. Ct. at 1544. Rather than deeming procedural violations sufficient across the board, the harm resulting from a procedural or statutory violation must be determined on a case-by-case basis.

The most recent opinion on the sufficiency of a procedural violation to confer Article III standing comes from *Meeks v. Ocwen Loan Servicing LLC*, 2017 WL 782285, at *1 (11th Cir. Mar. 1, 2017). In that case, plaintiff Charles Meeks ("Meeks") filed a complaint in the Southern District of Florida against Ocwen Loan Servicing ("Ocwen") for alleged violations of 12 C.F.R §1024.36(c), Regulation X of the Real Estate Settlement Procedures Act ("RESPA"), alleging Ocwen failed to properly or timely acknowledge receipt of his Request for Information ("RFI"). 12 C.F.R. 1024.36(c) requires a loan servicer to provide a written response acknowledging receipt within five days of receiving the RFI. Ocwen signed and returned a certified return receipt and nine days later sent a substantive response to the RFI. Meeks nevertheless disputed Ocwen's actual acknowledgement of receipt of the RFI, contending that the late, signed certified return receipt was insufficient under Regulation X to constitute "acknowledgement of receipt." The district court rejected Meeks' argument and found Ocwen's signed return receipt satisfies 12 C.F.R §1024.36(c), such that Meeks had not alleged a sufficient concrete injury to confer Article III standing to merit entitlement to statuary damages. The court then granted Ocwen's motion to dismiss with prejudice.

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On appeal, the Eleventh Circuit affirmed the lower court's ruling that Meeks did not suffer a concrete injury in fact. Relying on *Spokeo*, the Eleventh Circuit found that Meeks lacked Article III standing to claim statutory damages because his allegations were at most "a bare procedural violation" that do not give rise to a real, concrete injury. *Meeks*, 2017 WL 782285, at *3.

Although *Spokeo* gives courts broad discretion in construing the sufficiency of a concrete injury for purposes of Article III standing, the Eleventh Circuit's decision in *Meeks* demonstrates that procedural violations alone cannot confer standing. In other words, courts may not be so quick to stretch *Spokeo* to such limits that would permit a "gotcha" case against a defendant for a mere procedural violation that otherwise does no harm. The consumer finance industry, at least in the Eleventh Circuit, can breathe deep knowing a certified return receipt is sufficient to satisfy the acknowledgement and receipt requirement under RESPA.[2]

2 Regulation X [12 C.F.R §1024.36(c)] provides: "[w]ithin five days (excluding legal public holidays, Saturdays, and Sundays) of a servicer receiving an information request from a borrower, the servicer shall provide to the borrower a written response acknowledging receipt of the information request."

Borrowers More than Five Years in Default, Beware!

by Shawn Yesner, Yesner Law

On November 3, 2016, the Florida Supreme Court issued a creditor-friendly opinion that has a significant impact on mortgage foreclosure litigation in Florida. In *Bartram v. U.S. Bank National Association*, SC14-1265 (Fla. 2016), the Court answered the following question certified from the Fifth District Court of Appeals:

> DOES ACCELERATION OF PAYMENTS DUE UNDER A RESIDENTIAL NOTE AND MORTGAGE WITH A REINSTATEMENT PROVISION IN A FORECLOSURE ACTION THAT WAS DISMISSED PURSUANT TO RULE 1.420(B), FLORIDA RULES OF CIVIL PROCEDURE, TRIGGER APPLICATION OF THE STATUTE OF LIMITATIONS TO PREVENT A SUBSEQUENT FORECLOSURE ACTION BY THE MORTGAGEE BASED ON PAYMENT DEFAULTS OCCURRING SUBSEQUENT TO DISMISSAL OF THE FIRST FORECLOSURE SUIT?

The Court answered the certified question in the negative and held that the mortgagee, "was not precluded by the statute of limitations from filing a subsequent foreclosure action based on payment defaults occurring subsequent to the dismissal of the first foreclosure action, as long as the alleged subsequent default occurred within five years of the subsequent foreclosure action." Id. The Court reasoned that "When a mortgage foreclosure action is involuntarily dismissed pursuant to Rule 1.420(b), either with or without prejudice, the effect of the involuntary dismissal is revocation of the acceleration, which then reinstates the mortgagor's right to continue to make payments on the note and the right of the mortgagee, to seek acceleration and foreclosure based on the mortgagor's subsequent defaults." *Id*.

Based on the Court's decision, dismissal of the foreclosure action against the borrower "[H]as the effect of returning the parties to their pre-foreclosure complaint status, where the mortgage remains an installment loan and the mortgagor has the right to continue to make installment payments without being obligated to pay the entire amount due under the note and mortgage." Id.

On February 16, 2005, Mr. Lewis Bartram ("Bartram") obtained a $650,000 loan secured by a mortgage against his property and subsequently assigned to the plaintiff, US Bank National Association ("US Bank"). Bartram also executed a second position note and mortgage for $120,000 in favor of his ex-wife. Less than a year later, on January 1, 2006, Bartram defaulted on payments on the first-position mortgage. Bartram never made payments on the second mortgage, and also defaulted on his homeowners' association assessments. The association subsequently placed a lien against Bartram's property for the outstanding assessments. *Id*.

On May 16, 2006, US Bank filed its first foreclosure lawsuit. The case was involuntarily dismissed nearly five years later, on May 5, 2011, after attorneys for US Bank failed to appear at a case management conference. Bartram then filed a motion to cancel the promissory note and release the mortgage lien. The trial court denied Bartram's motion on August 29, 2011. *Id*.

Bartram's ex-wife had a foreclosure lawsuit pending against Bartram, US Bank, and the association. Approximately one year after the dismissal of US Bank's foreclosure case, Bartram filed a crossclaim in his ex-wife's foreclosure case against US Bank seeking declaratory relief to cancel US Bank's mortgage and to quiet title to the property, asserting that Florida's five-year statute of limitations (§95.11(2)(c), Fla.Stat. 2016) barred US Bank from filing a new foreclosure action. Bartram prevailed on a motion for summary judgment and after the trial court denied US Bank's motion for rehearing, the case was appealed to the Fifth District.

The Fifth District relied on the Supreme Court's decision in *Singleton v. Greymar Associates*, 882

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Buyers Beware!

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So.2d 1004 (Fla. 2004), which held that the trial court's decision nullified US Bank's acceleration of future payments; "accordingly, the cause of action on the accelerated payments did not accrue and the statute of limitations did not begin to run on those payments, at least until default occurred on each installment." *Id*. at 1009-10. Relying on *Singleton*, the Fifth District explained that "a "new and independent right to accelerate" would mean that each new default would present new causes of action, regardless of whether the payment due dates had been accelerated in the first foreclosure action." *Id*. at 1013-14. Thus, the Fifth District reversed the lower court's judgment, remanded the case back to the trial court, and certified the question above to the Florida Supreme Court.

The Court first analyzed *Singleton*, concluding that the failure of a lender to foreclose based on an alleged default by the borrower did not mean the borrower automatically and successfully overcame his obligation to make continuing payments on the note. In applying its analysis to Florida's five-year statute of limitations, the Court held that the limitations period would not continue to run after an involuntary dismissal, meaning the mortgage-holder would not be barred from filing a subsequent foreclosure action premised on a "separate and distinct" default. Instead, the effect of the dismissal was to place the parties back in the same contractual relationship as before the dismissal. The residential mortgage remained an installment loan, and the acceleration of the mortgage declared in the previously unsuccessful foreclosure action was revoked. Finally, the Court looked to the significance of the involuntary dismissal and reinstatement provisions of the mortgage. The Court reasoned that ignoring the reinstatement provision contained in the mortgage would permit the lender only one opportunity to enforce the mortgage despite the occurrence of future defaults. As the Court cautioned in *Singleton*, "justice would not be served if the mortgagee was barred from challenging the subsequent default payment solely because he failed to prove the earlier alleged default." *Id*. at 1008.

After *Bartram*, lenders are still barred from pursuing alleged defaults that occurred prior to the five year statute of limitations. As a result, most foreclosure complaints seeking to address a payment default more than five years old simply allege a default date within five years from the filing of the new foreclosure lawsuit. By its decision, the Florida Supreme Court would appear to indicate that the best course of action is for the borrower to send his monthly contractual payments to the lender in hopes that the lender accepts the payments until after the expiration of the statute of limitations on the previous monthly payment default(s). Of course, this is a practical impossibility, so we'll simply have to wait to see how *Bartram* withstands future tests within the Florida District Courts and the Florida Supreme Court.

Thank You!

The Tampa Bay Bankruptcy Bar Association's Pro Bono Clinic would like to acknowledge and express our sincere gratitude for all of our volunteers who donate their time and knowledge in helping those less fortunate. Below is a list of the name of the volunteers who have signed up this calendar year through April 28, 2017. If there are ways of improving the Clinic, please forward your comments to tbkprobonoclinic@gmail.com.

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SAVE THE DATE

Happy Hour

May 25, 2017 – Location TBD

Holiday Party
December 1, 2017

Annual Dinner
June 1, 2017

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Revision of Florida's Proceedings Supplementary Statute

by: Paul P. Punzone, Holland & Knight LLP

On March 9, 2016, Governor Rick Scott signed into law another revision of Florida's proceedings supplementary statute. This latest revision, which became effective on July 1, 2016, seeks to clarify the procedural pitfalls and confusion that plagued former versions of Florida's proceedings supplementary statute. While this latest revision does not make any substantive changes, it makes a few helpful procedural changes.

First, the revised statute provides concrete definitions for previously undefined terms. For example, the former statute used the term "defendant" to refer to both the judgement debtor and the third-party in possession of the assets. The revised statute is more specific, and uniformly employs terms such as "judgement debtor," "judgement creditor," and "claimant." *See* Fla. Stat. § 56.0101.

Second, section 56.29(2) of the revised statute updates and codifies the procedure for commencing proceedings supplementary and impleading third parties. The revised section 56.29(2) provides that in a proceeding supplementary motion or in a supplemental affidavit, the judgement creditor must "describe any property of the judgement debtor not exempt from execution in the hands of any person or any property, debt, or other obligation due to the judgement debtor which may be applied toward the satisfaction of the judgment." Fla. Stat. § 56.29(2). After the motion and affidavit are filed, the court will issue a Notice to Appear, which directs the responding party to file an affidavit with the court by a certain date stating why the property debt or other obligation should not be applied to satisfy the judgement. Id. This Notice to Appear "must describe with reasonable particularity the property, debt, or other obligation that may be available to satisfy the judgement, must provide such person with the opportunity to present defenses, and must indicate that discovery as provided under the rules of civil procedure is available and that there is a right to a jury trial." *Id*. The responding affidavit "must raise any fact or defense opposing application of the property described in the Notice to Appear to satisfy the judgement, including legal defenses, such as lack of personal jurisdiction." *Id*.

Third, section 56.29(9) of the revised statute clarifies the procedure for commencing a fraudulent transfer claim in proceedings supplementary. Although the former proceedings supplementary statute stated that the court "may" entertain fraudulent transfer claims under Chapter 726 of the Uniform Fraudulent Transfer Act, it did not specify how section 56.29 and Chapter 726 would intertwine. For example, in *Biel Rio LLC v. Barefoot Cottages Dev. Co. LLC*, the trial court applied a four year statute of limitations, which is typically applied only to a fraudulent transfer claim, to declare the appellant's proceedings supplementary claims time-barred. 156 So. 3d 506, 510 (Fla. 1st DCA 2014). The First District Court of Appeals reversed, finding that it was error to apply the shorter statute of limitations to the proceedings supplementary. *Id*. at 511. The First District Court of Appeals held that the traditional twenty year statute of limitations applied to the proceedings supplementary regardless of whether a separate fraudulent transfer claim was filed. Id. Consistent with this ruling, Section 56.29(9) now specifies that fraudulent transfer claims brought during proceedings supplementary must be initiated under a supplemental complaint governed by Chapter 726. *See* Fla. Stat. § 56.29(9). The revised statute also clarifies that the supplemental fraudulent transfer proceeding shall be assigned "to the same division and judge assigned to the main case or domestic judgement." *Id*. These seemingly minor changes go a long way towards restoring procedural consistency.

Finally, the revised statute adds the newly created section 56.30, titled "Discovery in Proceedings Supplementary." Fla. Stat. § 56.30. Sections 56.29(2) and 56.20(4) of the former statute allowed a judgement creditor to examine a judgment debtor before the Court and "cover all matters and things pertaining to the business and financial interests of the judgment debtor which may tend to show what property he or she has and its location." Fla. Stat. § 56.29(2), (4) (amended 2016). The newly added section 56.30 consolidates these provisions from former sections 56.29(2) and 56.29(4), and further specifies that the examination of the judgement debtor will take place before the Notice to Appear is issued. *See* Fla. Stat. § 56.30.

It is clear that these new revisions are a step towards restoring procedural clarity to the Florida bankruptcy system. Time will tell if these new revisions are the remedy to Florida's historically flawed proceedings supplementary process.

People on the Go

Richard J. Cole, III, of Cole & Cole Law, P.A., has been promoted to be the ABI Consumer Committee's Education Director. He had served as its Special Projects Manager since 2015. Richard will also be speaking at the 2017 ABI Spring Meeting in Washington, D.C. on litigating the value of a single family home. If you wish to participate in an ABI webinar or are interested in other education opportunities, please contact him.

TBBBA Golf Tournament
April 28

CARE: News and Opportunity

Credit Abuse Resistance Education, or CARE, is a financial literacy program for students and young adults administered by the American Bankruptcy Institute and run locally by the Tampa Bay Bankruptcy Bar Association with help from Tampa Bay area judges and attorneys. CARE presenters speak at high schools, colleges and other young adult gatherings about the responsible use of credit and the impact that poor financial choices can have on a person's overall wellbeing.

The TBBBA's CARE Chapter is excited to announce the roll-out of three new sets of presentation materials (slideshows and corresponding presenter's guides). One presentation focuses on responsible credit card use, another focuses on the importance of budgeting, and the third touches on a new (and much needed) area: student loans. While drawing on themes familiar to all CARE presenters, the new materials were prepared by CARE's national office and look very sharp. The materials are available for download from the CARE website at https://care4yourfuture.org/curriculum.

Additionally, our local CARE chapter is looking for a co-chair to assist in securing presentation opportunities and coordinating those engagements with our enthusiastic presenters. Anyone who has a passion for financial education and is interested in taking on a leadership role with CARE should contact Brad deBeaubien at bdebeaubien@slk-law.com or 813-221-7425.

Finally, if you or someone you know may be interested in arranging a CARE presentation by TBBBA members to a high school, tech school, college/university, religious center, Boy Scout/Girl Scout troop, or other group, please contact Brad deBeaubien. Audience size may range from as few as 10 people to 100+.

The Cramdown
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