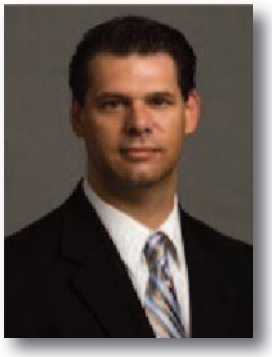
STATE BAR of TEXAS

BANKRUPTCY LAW
Section Newsletter

NOVEMBER 2019

IN THIS ISSUE

Welcome to the Bankruptcy Law Section of the State Bar of Texas. The section is open to practitioners and other professionals working in the area of bankruptcy law and insolvency.



Tom Rice

We welcome and congratulate the section's new chair, Tom Rice. Tom is a member of Pulman, Cappuccio and Pullen, LLP, in its San Antonio office. Learn more about Tom and his perspective as section chair in his *Letter from the Chair* posted at our section's website statebaroftexasbankruptcy.com

The section sponsors or supports numerous events throughout the year, including a biennial bench bar conference, the Elliott Cup moot court competition, "Moneywise" and many other programs.

This edition of our newsletter includes coverage of the upcoming Small Business Reorganization Act (by Aaron Kaufman), and we introduce what we hope will be a recurring feature from Greg Milligan of Harney Partners.

We have an extensive calendar of upcoming events here, but check our website regularly to keep up with bankruptcy-related events throughout the state! Highlights include:

- Westbrook Bankruptcy Conference – November 14-15 in Austin
- Young Lawyers Committee Reception – November 14 in Austin
- Elliott Cup Moot Court – February 21-22 in Houston
- Women of Bankruptcy Conference – January 11-12 in Bastrop
- Fifth Circuit Bench-Bar – February 21-22 in New Orleans

2019 BANKRUPTCY CODE AMENDMENTS

Earlier this year, President Trump signed numerous bills into law amending the Bankruptcy Code, including the Small Business Reorganization Act of 2019 ("SBRA"), and the Family Farmer Relief Act of 2019. The SBRA will take effect in early 2020.

*Aaron Kaufman, of Dykema's Dallas office, takes a deeper dive into SBRA in his feature article, ***New Bankruptcy Laws Offer Hope for Small Businesses, Family Farmers, and Service Members*** in this newsletter*

The basics:

Small Business Reorg. The amendments effectively create a new subchapter within Chapter 11, designed for small business debtors. The debt limit is $2,725,625.00, and not less than 50% of the debtor's obligation must have arisen from the debtor's commercial or business activity.

Perhaps most significantly, a trustee will be appointed in each designated small business case. The trustee remains until substantial consummation of a debtor's plan. On the other hand, no committees are appointed in new small business structure, absent cause.

The bulk of the SBRA will be codified at 11 U.S.C. § 1181-1195. New Section 1181 will list those Chapter 11 sections or subsections that will be inapplicable to the new small business cases. SBRA takes effect in February, 2020 – more detail follows in the Aaron Kaufman article.

Amendment to Section 547(b) – due diligence requirement. The following language has been added to Section 547(b) (preference actions) providing that the trustee or debtor-in-possession – in other words, the preference plaintiff – "*may, based on reasonable due diligence in the circumstances of the case and taking into account a party's known or reasonably knowable affirmative defenses under subsection (c)*, avoid any transfer . . ."

Venue – Small Avoidance Actions. 28 U.S.C. § 1409(b) has been amended to increase from $12,850.00 to $25,000.00 the minimum limit for a trustee to bring an avoidance action against a non-insider in a district other than where the defendant resides.

Family Farmer Revisions. The debt limit for "family farmers" is increased to $10 million (from a previous limit of approximately $4.4MM).

HAVEN Act. Among other things, amends the definition of "current monthly income" affecting certain service members. See the Kaufman article here, or *see Youngberg*, HAVEN Act's amendment to CMI. 38 Am. Bankr. Inst. J. 34 (November 2019).

UPCOMING BANKRUPTCY/INSOLVENCY EVENTS

2019

November 13-15, 2019
Westbrook Bankruptcy Conference

- Four Seasons Hotel (Austin)
- 13.0 hours CLE (2.50 ethics)
- Credit approved for TX, OK, and CA
- utcle.org

November 14, 2019
8:30 p.m. – 11:00 p.m.
State Bar of Texas Bankruptcy Section – Young Lawyers Committee Annual Reception

- The Line Hotel – Dean's One Trick Pony (Austin)
- statebaroftexasbankruptcy.com

Upcoming date to be announced
Webinar – Getting the Deal Done

- Practical Considerations in Real Property Sales Under Section 363
- Frances Smith (Ross & Smith; Anne Burns (Cavazos Hendricks Poirot)
- 1 hour CLE
- Check section website for updates
- statebaroftexasbankruptcy.com

December 5-6, 2019
Oklahoma – 34th Annual Advanced Bankruptcy Seminar

- Oklahoma Bar Center (Oklahoma City)
- Up to 6.0 hours CLE per day (daily registration available)
- TX credit available
- Webcast available
- okbar.org/cle

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2020

January 10-11, 2020
Women of Bankruptcy Conference

- Hyatt Lost Pines (Bastrop)
- Program in process – check website for details!
- statebaroftexasbankruptcy.com

January 20, 2020
11:45 a.m. – 1:00 p.m., West Texas Bankruptcy Bar Association CLE Luncheon

- Lubbock Women's Club
- Topic: Small Business Reorganization Act

January 23, 2020
Handling Your First (or Next) Consumer or Small Business Bankruptcy Case 2020—State Bar of Texas

- Texas Law Center, 1414 Colorado Street (Austin)
- 6.4 hours CLE (tentative/application pending)
- Live webcast available
- texasbarcle.com

January 23-24, 2020
Rocky Mountain Bankruptcy Conference

- Four Seasons Hotel (Denver)
- abi.org

February 5-7, 2020
Fifth Circuit Bankruptcy Bench-Bar Conference

- JW Marriott (New Orleans)
- cailaw.org

February 21-22, 2020
Elliott Cup Moot Court

- Houston
- Contact: Jessica Lewis (jessica.lewis@judithross.com)

February 29 – March 2, 2020
Conrad Duberstein Moot Court

- St. John's University School of Law (New York)
- Contact: Iris Dinz (718-990-1950)
- stjohns.edu/law/duberstein

April 30, 2020
6:30 p.m., Retirement Reception – The Honorable Barbara J. Houser

- Perot Museum of Nature & Science (Dallas)
- Event contact: Frances A. Smith (214-593-4976)

New Bankruptcy Laws Offer Hope for Small Businesses, Family Farmers and Service Members

***By Aaron M. Kaufman** **
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Over the years, much has been written about the Bankruptcy Code's treatment of small businesses, and the American Bankruptcy Institute Commission's testimony to Congress this summer made clear that the existing law fell short of providing necessary relief for small businesses. For example, of the 18,000 small business bankruptcy cases filed between 2008 and 2015, less than 27% of those cases resulted in confirmed plans of reorganization. And these numbers excluded countless small businesses that, for a variety of reasons, did not or could not seek bankruptcy relief. *See* Robert J. Keach, *ABI Testifies on Family Farmers and Small Business Reorganizations,* XXXVIII ABI Journal 8, 8-9, August 2019, *available at abi.org/abi-journal/abi-testifies-on-family-farmers-and-small-business-reorganizations* (subscription required).

On August 23, 2019, the President signed four bipartisan bankruptcy bills into law, providing the first significant amendments to the Bankruptcy Code since the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (and not counting the Bankruptcy Technical Corrections Act of 2010).

The first bill is the Small Business Reorganization Act (H.R. 3311; S. 1091) (SBRA), which is intended to "simplify the process for small businesses to use bankruptcy as a means of reorganization."1 The SBRA adds new Subchapter V (11 U.S.C. §§ 1181-1195) to the Bankruptcy Code. The full text of the SBRA can be found here:
congress.gov/bill/116th-congress/house-bill/3311/text.

The SBRA maintains the existing definition of a "small business debtor" as a person engaged in commercial or business activities with aggregate noncontingent liquidated debts below $2,725,625 (subject to adjustment every three years), although the ABI Commission has suggested that a natural breaking point might be closer to a $10 million debt level. Under the new law, a small business seeking relief under the Bankruptcy Code will have more flexibility to negotiate a consensual plan of reorganization, and will be assisted and monitored by a standing trustee.

Under the SBRA, many provisions that apply to individual chapter 11 cases and larger commercial chapter 11 cases will not apply to small businesses. Perhaps most notably, the "absolute priority rule"—which generally requires full payment of creditors for existing owners to maintain their ownership—will not prevent a small business from reorganizing. Rather, new sections 1190-1194 will provide a "projected disposable income" calculation to determine whether a plan is "fair and equitable," mimicking the formula prescribed for chapter 13 cases.

Also somewhat like chapter 13 cases, new Subchapter V will appoint a standing "small business" trustee to perform new specialized duties, such as facilitating the development of a consensual plan, ensuring that plan payments are made timely, reporting fraud or mismanagement to the court and, if the debtor ceases operations, performing certain of the duties sometimes required of a chapter 7 or 11 trustee.

On the whole, the new law should make access to the bankruptcy courts much more feasible for small businesses in need of relief. A final change to the Bankruptcy Code under the new law is that attorneys owed less than $10,000 will not be disqualified from representing the debtor post-bankruptcy.

The SBRA will take effect on February 19, 2020, which is 180 days from the date of enactment. Stay tuned for further updates on the SBRA and other bankruptcy laws.

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[1] *Cline, Cicilline Introduce Bipartisan Small Business Reorganization Act* (Press Release, June 19, 2019) https://cline.house.gov/media/press-releases/cline-cicilline-introduced-bipartisan-small-business-reorganization-act (last visited Aug. 23, 2019).

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New Bankruptcy Laws
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The other bills signed into law on the same date included: (1) the Family Farmer Relief Act of 2019 (H.R. 2336; S. 897), which increases the debt eligibility limit for chapter 12 family farmers to $10 million; (2) the National Guard and Reservists Debt Relief Extension Act of 2019 (H.R. 3304), which exempts certain debtors serving in the Armed Forces from means-testing requirements when seeking bankruptcy relief; and (3) the Honoring American Veterans in Extreme Need Act of 2019 (H.R. 2938), which excludes certain Veterans Administration and Department of Defense benefits from the calculation of "current monthly income" in the means-test calculation.

* **Aaron Kaufman** is a member of Dykema, based in its Dallas office. Before joining Dykema, Aaron served as law clerk to the Honorable Leif M. Clark.

NON-ATTORNEY MEMBERSHIP PERSPECTIVES

By: Greg Milligan

Attorney members of the Section collaborate every day with non-attorneys, such as CROs, financial advisors, trustees, accountants, auctioneers, appraisers, expert witnesses, and other professionals to effectively manage a wide variety of cases. This recurring column will be written and/or curated by the Section's Non-Attorney Members Advisor, Greg Milligan, CTP, Executive Vice President of Harney Partners.

Below is the first installment of a three-part series which has been adapted from materials co-authored by Bill Patterson, CTP, CPA, CIRA and Erik White, CIRA of Harney Partners.

The Elements of a Successful Turnaround

How to determine whether a company has what it takes to find a new path forward.

The time has come to ask that critical question: can this business be saved, or is it time to let it go? Getting to a realistic and actionable answer can seem like an overwhelming task. But there are really only four basic elements that determine whether you have what you need in place for a successful business turnaround: (1) a viable core business, (2) adequate financing, (3) the right resources within the company, and (4) help from a professional restructuring advisor, if you need it. When you're working for or with a company that's in distress and considering its options, start by asking these four questions:

"Do you have one or more viable core businesses?"

This is the most urgent question, which needs an answer as quickly as possible. Start by conducting a breakeven analysis by product or service line, using activity-based costing rather than company financials. Then determine whether activities currently below breakeven can be converted into ones with a positive margin. For example, are you providing services where labor and related direct costs cannot be recouped? Are certain locations or business segments continuously unprofitable? A "four-wall analysis" will assess the profitability by locations to determine both locations that require adjustment to remain open, but also locations that should be closed.

Outside forces which play a role in determining the viability of the business must also be examined. For instance, if you are in the pager business, will that business be impacted by dramatically increasing cell phone usage? Conduct a market analysis of historical and projected market trends to determine if the business has a future, and a price analysis to determine whether prices are on the decline or can be increased. It doesn't matter that a company can profitably sell laptop hardware next quarter if sales are declining 20% every year. Are there increasing government regulations? Could this business be impacted by current tariffs or other trade war activities?

The overall question to ask is whether you can find an element of the company that can emerge as a profitable and sustainable business, with the ability to finance its capital and liquidity needs.

"Can you get adequate bridge financing?"

Even if a company can demonstrate a viable core business, it may not have the liquidity it needs to restructure. The reasons vary: historical lending sources may have lost faith that the company or industry can generate a profit or sufficient returns in the long term, or assets used as collateral may have decreased in value. To survive, the company may need bridge financing until conditions improve.

To proceed along this path, you must get to cash flow neutrality and determine the cost of getting there. Assess your immediate liquidity by creating a weekly cash flow forecast. Evaluate each cash disbursement to identify areas where liquidity can be preserved: How critical is each use of cash? What would happen if the disbursement is delayed or eliminated? Then look for supplemental sources of cash, such as the sale of non-core assets including business divisions, owned real estate, planes or vehicles, surplus equipment and excess inventory. Be sure to take a fresh look at accounts and notes receivable to accelerate collection efforts. Other cash flow options may include new lender or owner financing.

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Non-Attorney Membership Perspectives
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"Do you have sufficient people and resources?"
Just as important as assessing liquidity and financing resources is whether the company has the resources to assemble a Turnaround Management Team (TMT) capable of implementing a successful change in direction. There will be hard decisions to make, and having the discipline within the organization to adhere to changes in policies and procedures is critical. Has key talent already left the company? Is there someone still in place who has credibility with the remaining internal and external stakeholders? Are potential team members willing to follow a new direction, or will entrenched past practices impede progress? The TMT leader must look at senior and middle management as well as strategic or influential staff throughout the organization to help implement and enforce the new direction. The TMT must understand the problems and objectives, have the discipline and will to make tough decisions, and continually evaluate if the right people are on the team, or if players need to be changed.

While people are a significant part of theturnaround assessment, the TMT must also evaluate the company's processes, products and financial systems. Is the company relying on a dysfunctional enterprise resource planning system? Are there adequate controls in place? Can a low-margin, high-throughput business track costs and expenses well enough to spot the source of losses? Are financial reports useful, accurate and timely? If there are systems, procedures or policies that could hamstring a turnaround effort, assess whether it will be possible to improve or replace them, and the cost to do so.

"Do you need to call in outside help?"
The company might determine it doesn't have the necessary bandwidth to manage a turnaround on top of the daily activities required to operate the underlying business (both of which can be full-time jobs), and it's time to hire a professional Turnaround Management Team. An outside manager or organization can be a valuable resource to offer a fresh perspective and new discipline to the process, as well as providing additional, experiences, resources, and skillsets. They will have experience with turnarounds, know how to spot potential landmines, and be able to improve communications with all stakeholders.

Look for a partner with the background to fully understand and assess –*and potentially manage*– the organization during this critical transitional period, including interacting with the management, employees, vendors, customers and Board of Directors. The turnaround manager should also have connections to and experience with lenders to distressed companies, negotiating forbearance agreements, credit agreement amendments, waivers, new financing terms and related experiences. The company should also look for someone the organization can trust. While it's common for management to assume that employees will leave if they know the company is in trouble, employees are frequently relieved to learn that someone is taking responsibility for trying to fix the situation. However, to maintain their trust and cooperation, it's critical for the turnaround professional to be able to articulate a clear vision and to communicate with staff regularly and openly.

If, after a thorough review, you are not sure the company is a reorganization candidate, here are additional points to consider:

- Can you stabilize the company in order to find a strategic rather than financial buyer?
- Is this a case for a sale in Chapter 11 to draw a line between assets and liabilities?
- Is an orderly liquidation possible? Can you complete work in process and sell inventory, finish out projects, or conduct a going-out-of-business sale?
- If other options aren't feasible, is it best to just pull the plug?

Conclusion
There's an old saying: "*When you find yourself in a hole, the first step is to stop digging.*" Taking the time to honestly and accurately assess your business, financing and resources can give you the perspective you need to decide if a turnaround is the right choice for the company. If so, a professional turnaround manager can expand that perspective, helping you to consider every angle to find a restructured business to create a healthy return going forward.

What's next?
If you've explored these four core questions and found that the answer to each is "yes," in the next installment we will explore "*How to Develop a Turnaround Plan.*"

Stipulated Judgments Surviving Bankruptcy

By: Sahrish Khan Soleja*

As parties enter into stipulated judgments, the issue of whether stipulated judgments are deemed nondischargeable as a matter of law in bankruptcy arises. The issue was recently highlighted in *In re Wlodarczyk*, 2019 WL 3082156 (S.D. Cal. July 15, 2019), a case out of the Southern District of California.

In *Wlodarczyk*, the debtor executed a personal and corporate guaranty with plaintiff involving cross-border motion picture financing in which the debtor would act as an intermediary. *Id.* When the agreement fell through, the plaintiff asked for a refund, which the debtor did not honor. *Id.* In response, the plaintiff sued the debtor in state court for breach of contract, conversion, fraud, and negligence. *Id.* The parties resolved the state court litigation and entered into a stipulated judgment. *Id.* Two months later, the debtor defaulted on the settlement payments. *Id.* As a consequence, the state court entered a $200,000 judgment in favor of the plaintiff. *Id.*

Ultimately, the debtor filed for bankruptcy protection under Chapter 7 of the Bankruptcy Code. *Id.* at 2. The plaintiff timely filed an adversary complaint seeking to enforce the nondischargeability of the stipulated judgment pursuant to section 523(a)(2)(A). *Id.* Soon thereafter, the plaintiff filed a partial motion for summary judgment in the adversary proceeding and argued that the stipulated judgment should be given issue preclusive effect and the debt should be deemed nondischargeable as a matter of law. *Id.* In denying the motion, the bankruptcy court held that factual disputes remained as to the plaintiff's claim. *Id.* The case proceeded to a bench trial, and the bankruptcy court ordered judgment in favor of the debtor and concluded that plaintiff failed to prove the elements of his nondischargeability claim. *Id.* The plaintiff appealed to the district court. *Id.*

In affirming the bankruptcy court, the district court held that stipulated judgments are generally not afforded issue preclusive affect. *Id.* at 4. Upon review, the court noted that the only facts included in the state court stipulated judgment showed that the debtor solicited plaintiff to participate in the financing; the plaintiff placed the investment funds into an escrow account; the plaintiff's investment was improperly released from escrow; and the plaintiff filed the action to enforce the personal and corporate guarantees made by the debtor. *Id.* at 3. Ultimately, the court determined that the issue of fraud was neither actually nor necessarily decided by the state court because the stipulated judgment assessed facts supporting the breach of contract claim, but provided no facts supporting the judgment on the fraud claim. *Id.* at 8.

Although the ruling in *Wlodarczyk* is not binding in the Fifth Circuit, it begs the question—can a stipulated judgment automatically be given issue preclusive effect in bankruptcy? The answer is no.

The Bankruptcy Code provides a new beginning to "the honest but unfortunate debtor." *Matter of Cowin*, 864 F.3d 344, 349 (5th Cir. 2017) (citing *Grogan v. Garner*, 498 U.S. 279 (1991)). Section 523(a) identifies exceptions from discharge, including but not limited to, debts obtained through fraud, misrepresentation, or false pretenses. 11 U.S.C. § 523(a). Whether a debt is nondischargeable under section 523(a) must be determined upon the filing of a complaint no later than 60 days after the first date is set for the meeting of creditors. 11 U.S.C. § 523(c)(1); Fed. R. Bankr. P. 4007.

When considering whether a state court stipulated judgment has issue preclusive effect, the bankruptcy court is not confined to a review of the judgment and the record from the state court proceeding to determine dischargeability of a debt. Brown v. Felsen, 442 U.S. 127, 138 (1979). A bankruptcy court can weigh additional evidence against a debtor in order to make an independent determination of the dischargeability of the debt. *Id.*

The Fifth Circuit has expressly held that a consent judgment does not ordinarily rise to the level of issue preclusion or collateral estoppel. *In re Pearson*, 120 B.R. 396, 398 (Bankr. N.D. Tex. 1990). The central inquiry is the intent of the parties as manifested in the judgment and whether the consent agreement specified the factual findings in sufficient detail. *Id.*

In *Carey Lumber Co. v. Bell*, 615 F.2d 370 (5th Cir. 1980), the Fifth Circuit held that the bankruptcy court properly considered the state court consent judgment as evidence in its determination of dischargeability. The judgment contained a detailed recitation of the findings upon which it was based, and the findings closely paralleled the language under federal bankruptcy law. The court affirmed the bankruptcy court's holding that the debt was nondischargeable. *Id.*

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Stipulated Judgments Surviving Bankruptcy
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Similarly, the Fifth Circuit held that collateral estoppel is properly invoked if the issues necessary to the determination of dischargeability (such as fraud) were actually litigated in the state court proceeding. *In the Matter of Shuler*, 722 F.2d 1253, 1256 (5th Cir. 1984). In finding that the state court judgment contained conclusory statements, the court affirmed the bankruptcy court's ruling that collateral estoppel did not apply. *Id.*

In a later case, the Fifth Circuit held that collateral estoppel applied to a state court judgment because the judgment was based on facts submitted to the state court. *In re Lacy*, 947 F.2d 1276, 1277 (5th Cir. 1991). The parties submitted extensive pleadings, depositions, and exhibits to the state court prior to the court's decision. *Id.* at 1278.

The law is well-settled in the Fifth Circuit that a stipulated judgment does not ordinarily rise to the level of issue preclusion, and the determination of dischargeability rests with the bankruptcy court. To ensure that a stipulated judgment survives bankruptcy, the parties should manifest their intent in writing, include language mirroring section 523(a) of the Bankruptcy Code, and ensure the judgment contains a detailed recitation of the findings upon which it is based (or ensure the issues were actually litigated). Finally, including waivers or nondischargeability provisions in the stipulated judgment will not have issue preclusive effect. Courts have refused to give preclusive effect to contractual nondischargeability terms because they violate public policy. *See In re Pearson*, 120 B.R. at 399. Ideally, parties should anticpate the potential of a future bankruptcy filing and take appropriate protective measures from the expense of additional litigation in the bankruptcy court to determine the dischargeability of the stipulated judgment.

*Law clerk to the Honorable Edward L. Morris, United States Bankruptcy Court, Northern District of Texas. JD, Texas Southern University School of Law.

Sealing Documents Pursuant to 11 U.S.C. § 107. Public Access to Papers

By: Haley Caradonna

(SMU Law School and Extern to Bankruptcy Judge Stacey G.C. Jernigan, ND TX)

November 7, 2019

I. Introduction—the Right to Public Access

The Supreme Court recognizes a general, broad, but not absolute, right of the public to inspect documents, including court documents, called the Right to Public Access.[1] The general right stems from the First Amendment and the public's right to know about administration of justice.[2] It allows the public to act as a watchdog, safeguarding the judicial system.[3] Practicality also favors the Right to Public Access because sealing court records is a costly burden on the judicial system.[4]

Public Access is especially important in the bankruptcy context, as unrestricted access promotes confidence and fairness in bankruptcy proceedings.[5] In fact, the Right to Public Access is contemplated, codified, and preempted by the Bankruptcy Code,[6] as Section 107 "speaks directly to and conflicts with significant aspects of the common law right of access."[7]

Section 107(a) of the Bankruptcy Code broadly expands the Right to Access and mandates that all papers, not merely judicial documents, are to be kept open to examination.[8] On the other hand, Section 107(b) also mandates that a bankruptcy court protect papers that fall under one of its exceptions, as opposed to the more deferential balancing test used by the common law.[9] Importantly, in accordance with public policy,[10] the appropriate remedy to protect a paper that falls within a 107(b) exception is **redaction**, when possible, and **not wholesale sealing of documents**.[11] The 107(b) exceptions are:

(1) a trade secret or confidential research;
(2) development;
(3) commercial information; or
(4) scandalous or defamatory matter. § 107(b).

This article discusses only what constitutes "***commercial information***."

II. Full Statutory Text of 11 U.S.C. § 107

(a) Except as provided in subsections (b) and (c) and subject to section 112, a paper filed in a case under this title and the dockets of a bankruptcy court are public records and open to examination by an entity at reasonable times without charge.

(b) On request of a party in interest, the bankruptcy court shall, and on the bankruptcy court's own motion, the bankruptcy court may—

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1 *See Nixon v. Warner Communications, Inc.*, 435 U.S. 589, 597-98 (1978).

2 *Video Software Dealers Association v. Orion Pictures Corp. (In re Orion Pictures Corp.)*, 21 F.3d 24, 26 (2d Cir. 1994).

3 *Id.*

4 *See id.*

5 *Gitto v. Worcester Telegram & Gazette Corp. (In re Gitto Glob. Corp.)*, 422 F.3d 1, 7 (1st Cir. 2005).

6 11 U.S.C.A. § 107 (West 2019) (current as of October 3, 2019); *In re Gitto*, 422 F.3d at 6-7.

7 *See In re Roman Catholic Archbishop of Portland in Oregon*, 661 F.3d 417, 431 (9th Cir. 2011) (citing *In re Gitto Glob. Corp.*, 422 F.3d at 7-8).

8 *In re Gitto*, 422 F.3d at 6-7, 9-10.

9 *Id.* at 10.

10 *Nixon*, 435 U.S. at 597-98

11 *See, e.g., In re Borders Grp., Inc.*, 462 B.R. 42, 47 (Bankr. S.D.N.Y. 2011); *In re Faucett*, 438 B.R. 564, 569 (Bankr. W.D. Tex. 2010).

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Sealing Documents Pursuant to 11 U.S.C. § 107. Public Access to Papers
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(1) protect an entity with respect to a trade secret or **confidential research**, development, or **commercial information**; or

(2) protect a person with respect to scandalous or defamatory matter contained in a paper filed in a case under this title.

(c)(1) The bankruptcy court, for cause, may protect an individual, with respect to the following types of information to the extent the court finds that disclosure of such information would create undue risk of identity theft or other unlawful injury to the individual or the individual's property:

(A) Any means of identification (as defined in section 1028(d) of title 18) contained in a paper filed, or to be filed, in a case under this title.

(B) Other information contained in a paper described in subparagraph (A).

(2) Upon ex parte application demonstrating cause, the court shall provide access to information protected pursuant to paragraph (1) to an entity acting pursuant to the police or regulatory power of a domestic governmental unit.

(3) The United States trustee, bankruptcy administrator, trustee, and any auditor serving under section 586(f) of title 28—

(A) shall have full access to all information contained in any paper filed or submitted in a case under this title; and

(B) shall not disclose information specifically protected by the court under this title.[12]

III.§ 107(b)(1)—The "Commercial Information" Exception

"Commercial information has been defined as information which would cause an unfair advantage to competitors by providing them information as to the commercial operations of the debtor."[13] The moving party has the burden to prove that the paper contains commercial information.[14] To qualify as commercial information, the contested paper must be critical to the entity such that disclosure would unfairly benefit the entity's competitors, but does not have to rise to the level of trade secret.[15] Put more animatedly, when "[the] disclosure would expose the heart and soul of the commercial operations of [the] Debtor[.]"[16]

Further, Section 107(b)(1)'s authority is limited. For example, Section 107(b) does not protect a paper that would give a litigation advantage.[17] Additionally, during a 107(b)(1) argument, the court should give no weight to a threat to withdraw from the proceeding or agreement.[18]

What follows are summaries of cases from various circuits that examine the meaning of "commercial information" in Section 107(b)(1) and the subsection's applicability to various fact patterns.

[12] (West 2019) Current through P.L. 116-58 (9/26/2019) (emphasis added).

[13] *See In re Orion Pictures Corp.*, 21 F.3d at 27.

[14] *See id.* at 27-28 (moving party provided documents *in camera* to satisfy burden then rebutted by opposing party); *Dreier LLP v. Westford Asset Management LLC*, 485 B.R. 821, 823 (Bankr. S.D.N.Y. 2013) ("The moving party bears the burden of showing that the information is confidential.").

[15] *See In re Orion Pictures Corp.*, 21 F.3d at 28.

[16] *In re Northstar Energy, Inc.*, 315 B.R. 425, 429-30 (Bankr. E.D. Tex. 2004).

[17] *In re Faucett*, 438 B.R. at 569.

[18] *See In re Barney's, Inc.*, 201 B.R. at 709.

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A. Lack of Supreme Court and Fifth Circuit Cases

Neither the Fifth Circuit nor the Supreme Court have directly interpreted the words "confidential commercial information" as they are used in Section 107(b)(1).

B. Cases Where Sealing or Redaction was Appropriate

Although the Supreme Court and Fifth Circuit have not yet directly addressed the meaning of "commercial information" in Section 107(b)(1), opinions from other circuits are highly influential and widely cited. Here are summaries of cases where the courts found that sealing or redaction was appropriate.

- ***Video Software Dealers Association v. Orion Pictures Corp. (In re Orion Pictures Corp.)*, 21 F.3d 24 (2d Cir. 1994)**: Orion Pictures filed Chapter 11. During its bankruptcy, Orion made a deal granting McDonald's a license to reproduce, manufacture, distribute, and sell videocassettes of three films for $8 a copy. Orion moved for the documents to be sealed and the motion was granted. VSDA had previously purchased 500,000 cassettes of one of the films from Orion for $72 a copy. Upon hearing of the Orion and McDonald's deal, VSDA moved for the agreement to be unsealed.
  - Holding: The licensing agreement is commercial information and is to remain sealed. Id. at 28.
  - Reasoning: There is a direct link between Orion's ability to negotiate future, similar agreements and unsealing this licensing agreement. Id. Public access would give Orion's business competitors an advantage. *Id*. Therefore, the agreement is commercial information and was properly sealed. *Id*.
- ***In re Northstar Energy, Inc.*, 315 B.R. 425 (Bankr. E.D. Tex. 2004)**: The Debtor filed Chapter 11. The Debtor identifies prospective oil and gas properties for acquisition and development. The Debtor then uses a private list of investors to get investments. Once the Debtor obtains sufficient investment it obtains title to the property. Debtors looked to have the investors list sealed.
  - Holding: The investor list is commercial information and should be sealed. *Id*. at 427.
  - Reasoning: Because the investor list is crucial to Debtors success and that success would be hindered by the list becoming public, the list is commercial information. *Id.* 429. The list does not rise to the level of trade secret, but it goes to the heart of the financial success of the organization. *See id.* 429-30. Therefore, it is considered commercial information and should be sealed. *Id.* at 30.

C. Cases Where Sealing or Redaction was Rejected

***In re Faucett*, 438 B.R. 564, 569 (Bankr. W.D. Tex. 2010)**: Prior to Faucett filing for bankruptcy, Faucett and Wyndham were involved in state court litigation. The matter was removed as an adversary proceeding and, after removal to the bankruptcy court, Faucett filed a motion for summary judgment and exhibits challenging Wyndham's objection to debtor's discharge. Wyndham contended the attached exhibits are commercial information.

- Holding: Exhibit K, by admission of counsel, contains no commercial information and should not be sealed. *Id.* at 567. Exhibit B contains a sale policy manual that confers no competitive advantage and should not be sealed. *Id.* at 569. The Exhibits C and D contain screenshots of conversations with customers. *Id.* at 568-69. The customer identities are commercial identification and are to be redacted. *Id.* Exhibit L is to be sealed because it facially contains customer identifying information. *Id.* 567.

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Sealing Documents Pursuant to 11 U.S.C. § 107. Public Access to Papers
Continued from page 13.

- Reasoning: Under the commercial information exception of Section 107(b), exhibits that give no competitive advantage to competitors are not commercial information. *Id.* at 569. Exhibit K contains a report that Wyndham claimed was inaccurate. *Id.* at 567. If the document was inaccurate it cannot give competitive advantage to Wyndham's competitors and therefore is not commercial information. *See id.* As to Exhibit B, Wyndham is unable to explain why the sales policy manual gives competitors a competitive advantage, as opposed to a litigation advantage. *Id.* at 569. Additionally, Wyndham had not protected the manual as confidential. *Id.* As a result, the manual is not commercial information. *Id.* However, customer identifying information that gives the company a competitive advantage is commercial information. Therefore, sealing of Exhibit L, facially containing customer identifying information, is proper. *Id.* at 567. But if when the customer identifying information is redacted, the document gives competitors no advantage, redaction as opposed to wholesale sealing is proper. *Id.* at 568-69. Therefore, redaction of Exhibits C and D is proper. *Id.*

- ***In re Barney's, Inc.*, 201 B.R. 703, 709 (Bankr. S.D.N.Y. 1996)**: Debtors are a luxury retailer and filed for Chapter 11. Following extensive time and efforts spent in performing due diligence, a Potential Investor proposed a Preliminary Offer to Debtors. The Potential Investor's identity was only known to Debtors, their professionals, and creditors that obtained that information subject to a confidentiality agreement. Debtors will reveal the Potential Investor's identity in court documents in a § 363 motion and propose the motion to be filed under seal along with other protective measures, as the investor will withdraw if its identity is revealed to the public. The investor will also withdraw if the terms of the Preliminary Offer are made public. The Debtors contend the Preliminary Offer letter contains commercial information and should be sealed.

  - Holding: The identity of the investor and Preliminary Offer Letter are not commercial information and, therefore, should not be sealed. *Id.* at 709.

  - Reasoning: A paper must be commercial information to be concealed under § 107(b). *Id.* at 708. Investor's threat to withdraw has no bearing on the court's determination of commercial information. *Id* at 709. The court says commercial information for this particular debtor could include, "pricing formulae, short and long term marketing strategies and the terms of agreements with suppliers." *Id.* Additionally, if Debtor's creditors could benefit from the disclosure, the Preliminary Offer could be commercial information. *Id.* at 709. However, as the Preliminary Offer contains none of these examples or any portion of Debtor's commercial operations, it does not contain commercial information. *See id.* at 709.

IV. Conclusion

In conclusion, the broad general rule is that papers must be kept public in accordance with Section 107(a) and the common law Right to Public Access. However, courts must follow the narrow exception and seal papers that fall within the Section 107(b) commercial information exception. In the limited circumstances where removal from the public record is appropriate, redaction is favored over wholesale sealing.

Troop Movement and Mergers

Hal F. Morris retired after 25 years of service in the Office of the Texas Attorney General. He served as the Managing Attorney for the Bankruptcy Regulatory Section for the last 20 years.

Rachel Obaldo has been named Chief of the Bankruptcy and Collections Division of the Office of the Texas Attorney General. She will succeed **Ron Del Vinto**, who recently retired after 40 years of service to the State of Texas.

> [Ed. Note: the Section congratulates **Hal** and **Ron** on great careers representing the State of Texas very effectively. We wish them well.]

John Stern has been promoted to Managing Attorney for the Bankruptcy Tax Team of the Office of the Attorney General.

Judge Harlin D. Hale is the 2019 recipient of the Judge William L. Norton, Jr. Judicial Excellence Award, as announced by the American Bankruptcy Institute.

Michael C. Berthiaume is clerking for the Honorable Mark Mullin in the Northern District of Texas. He is a graduate of Mercer Law School.

Robert (Bobby) Biedrzycki is clerking for the Honorable Craig Gargotta in the Western District of Texas. He is a graduate of St. Mary's School of Law.

David Stevenson is clerking for the Honorable Ron King in the Western District of Texas. He is a graduate of the University of Texas School of Law.

Andrew G. Edson was promoted to member with Clark Hill (Dallas) earlier this year. Andrew formerly clerked for Judge Harlin D. Hale.

Lloyd T. Kraus was appointed Standing Chapter 13 Trustee for the Tyler/Beaumont divisions effective August 1, 2019.

Eric Van Horn joined Spencer Fane, LLP, in April of 2019.

Theda Page is serving as President of the Plano Bar Association; she is also a member of the State Bar of Texas Practice Management Committee.

Jan Pederson of Lemke & Pederson in McKinney is President-Elect of the Plano Bar Association.

Peter Ruggero presented "Turnover Receivership Case Studies" at the TexasBarCLE's Strategies for Collecting Judgments course on October 17, 2019.

Russell Perry, Senior Managing Director at Ankura, has been named to the ABI's Top 40 Under 40 list for 2019.

Byrnie Bass has relocated his office to Suite 505 of the Wells Fargo Bank Building in Downtown Lubbock.

Raymond Urbansk has joined Lathrop Gage in the firm's recently established Dallas office.

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Troop Movement and Mergers *(cont'd.)*

Andrea Cunha and **Evan Atkinson of Waller Landsen** (Austin) recently authored "Planning Cash Flow in Health Care Bankruptcies," published in the October 2019 edition of the ABI Journal.

Brad Timms has joined Underwood's Fort Worth office.

Demetra Liggins (Thompson & Knight-Houston) and **Professor Angela Littwin** (University of Texas) were inducted as Fellows of the America College of Bankruptcy.

Liz Boydston (K & L Gates) is president of the Dallas Area Young Bankruptcy Lawyers. **Katherine Hopkins** (Kelly Hart) is president-elect.

CALL FOR ARTICLES

The State Bar of Texas Bankruptcy Law Section publishes a periodic newsletter (2-3 times per year), and it maintains a website at statebaroftexasbankruptcy.com.

The section welcomes article submissions, and more specifically, it is seeking substantive articles for publication in the **Spring 2020 Bankruptcy Law Section** newsletter.

Articles pertaining to substantive issues of law should be in a format consistent with the following guidelines:

- **Length:** Substantive legal articles should be 1,500 words or less, excluding end notes.
- **Endnotes:** Endnotes should be limited, concise, and placed at the end of the article. Our formatting is not conducive to the use of footnotes, so endnotes will be used instead.
- **Content:** Articles should come from an objective perspective. Although critical commentary is welcome (or even encouraged), we will not publicize articles with direct criticism of sitting members of the judiciary by name.
- **Disclosures:** The section will not accept articles from authors regarding pending cases in which they are directly involved; authors who have been involved in past cases on which they are commenting should make a full disclosure in terms of their prior involvement.

NON-SUBSTANTIVE ARTICLES

"Newsy" articles regarding matters other than substantive legal issues are also welcome. Those articles should be shorter – preferable between 600 and 1,000 words. Biographical articles should be between 1,000 and 1,500 words. Photographs are encouraged.

SUBMISSION GUIDELINES

- **Word format:** Completed articles should be submitted in the form of a Word document.
- **No compensation:** No compensation is offered for any article.
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For more information: roger.cox@uwlaw.com

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