# 2017 STATE BAR OF TEXAS BANKRUPTCY SECTION

# TEXAS BANKRUPTCY BENCH BAR CONFERENCE

## SAN ANTONIO, TEXAS

# RECENT DEVELOPMENTS

# SUPPLEMENTAL CASE LAW UPDATE

Judge Ronald B. King

Judge Tony M. Davis

Janet S. Northrup

Rakhee V. Patel

Deborah D. Williamson

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## 1. <u>STRUCTURED DISMISSALS</u>

***Czyzewski v. Jevic Holding Corp.*, 137 S. Ct. 973 (2017) (Breyer, J.)**

In *Jevic*, the Supreme Court determined that bankruptcy courts cannot approve non-consensual structured dismissals that violate the Bankruptcy Code's priority scheme. In this case, the bankruptcy court approved a structured dismissal that paid some, but not all, unsecured creditors. Notably, the settlement went outside the Bankruptcy Code's priority scheme in § 507 when it failed to disburse funds to unsecured creditors who recently obtained a wage claim judgment against the debtor. Accordingly, the wage priority claimants objected to the settlement. Alternatively, the creditors in support of the settlement argued that the Code does not address whether § 507 applies when approving structured dismissal settlements under Bankruptcy Rule 9019.

Ultimately, the bankruptcy court approved the structured dismissal and both the district court and the Third Circuit Court of Appeals affirmed. The Third Circuit reasoned that the priority rules of § 507 are applicable to plan confirmation under § 1129(b)(2)(B)(i), but that neither Congress nor the Supreme Court have applied it to settlements under Rule 9019. Moreover, the Third Circuit determined that although § 349 revests estate property to the prepetition status quo upon dismissal, it has the discretion to alter dismissal effects "for cause" under § 105.

The Supreme Court reversed. The Court found that it is impermissible to approve a structured dismissal that violates the Code's priority system without creditors' consent. Justice Breyer, writing for the majority, published a limited opinion that applies only to non-consensual structured dismissals in violation of the priority rules. The Court's opinion left many questions for bankruptcy courts to answer. For example, is a consensual structured dismissal approvable? Additionally, the opinion's dicta briefly referenced whether critical vendor motions and gift plans are permissible.

Currently, two noteworthy opinions have analyzed *Jevic*: *In re Pioneer Health Servs*., discussed first day wage orders, and *In re Fryar*, denied approval of a settlement in violation of the priority scheme. A third unpublished decision in *In re Constellation Enterprises, LLC,* a chapter 11 Delaware case, recently disapproved a structured dismissal that involved gifting and payments outside the Code's priority scheme.

***In re Pioneer Health Servs*., 2017 WL 1279030 (Bankr. S.D. Miss. Apr. 4, 2017) (Olack, J.)**

Under the analysis of *Jevic*, the Bankruptcy Court in the Southern District of Mississippi determined that critical vendors may be paid outside the priority scheme, but that emergency room doctors did not satisfy the critical vendor test. The court found that emergency room doctors were not critical vendors because: (1) the hospital had an alternative procedure to continue the employment of the doctors without the critical vendor provision; and (2) the motion was not filed until ten months after the commencement of the case, which the court found to be an exorbitant amount of time for an actual critical vendor. The *Pioneer* opinion indicated that *Jevic*'s dicta condoned an interim distribution in violation of § 507 if a significant Code-related objective exists.

***In re Fryar*, 2017 WL 1489822 (Bankr. E.D. Tenn. April 25, 2017) (Rucker, J.)**

In *Fryar*, the Bankruptcy Court in the Eastern District of Tennessee denied a mid-case settlement that did not follow the priority scheme. The settlement would have sold certain assets and applied the funds to a specific secured creditor's deficiency claim. The unsecured creditors objected because the settlement would have paid the secured creditor's deficiency claim ahead of the unsecured creditors' similarly situated claims. Although the settlement would have actually provided a greater distribution to all creditors, the court found that the settlement was unacceptable because the debtor did not sufficiently explain (1) why all the settlement funds should be paid to the creditor, (2) why the settlement would help the debtor create a confirmable plan, or (3) how the plan would ultimately follow the priority scheme. In pertinent part, the court articulated the standard as:

> In light of the Supreme Court's recent ruling in *Jevic*, parties who seek approval of settlements that provide for a distribution in a manner contrary to the Code's priority scheme should be prepared to prove that the settlement is not only "fair and equitable" based on the factors to be considered by the Sixth Circuit, *Bauer*, 849 F.2d at 441, but also *that any deviation from the priority scheme for a portion of the assets is justified because it serves a significant Code-related objective*. The proposed settlement should state that objective, such as enabling a successful reorganization or permitting a business debtor to reorganize and restructure its debt in order to revive the business and maximize value of the estate. The proposed settlement should state how it furthers that objective and should demonstrate that it makes even disfavored creditors better off.

*Fryar*, *6 (emphasis added). Notably, this standard is applicable to both settlements and structured dismissals where the court indicated that plan confirmation was "highly unlikely."

Accordingly, it appears that settlements which deviate from the priority scheme will only be approved if there is a significant Code-related objective.

## 2. VIOLATIONS OF THE FDCPA

### *Midland Funding, LLC, v. Johnson*, 2017 WL 2039159 (U.S. May 15, 2017) (Breyer, J.)

In *Midland Funding*, a creditor filed a proof of claim that it knew was time-barred. The debtor subsequently sued the creditor under the Fair Debt Collection Practices Act (FDCPA), and argued that the claim was time-barred under the Alabama statute of limitations. The district court dismissed the cause of action. The Eleventh Circuit Court of Appeals reversed and found that the FDCPA and the Bankruptcy Code can be interpreted together, without conflict. The creditor appealed.

Following the majority of courts of appeals, the Supreme Court reversed the Eleventh Circuit. The Court held that filing a time-barred proof of claim is not "false, deceptive, or misleading," nor is it an "unconscionable" or "unfair" means to collect a debt under the FDCPA.

First, the Court addressed how the Bankruptcy Code defines "claim" as "a right to payment." The Court determined it was not false, deceptive, or misleading for the creditor to file a proof of claim since, under the relevant state law of Alabama, a creditor has the right to payment of a time-barred debt. Second, the Court determined that a time-barred claim is not "unfair" or "unconscionable" because a chapter 13 bankruptcy is different from a consumer civil suit and the Code and the FDCPA have different purposes. The Court concluded that a contrary holding would detrimentally alter the balance between the FDCPA and the Bankruptcy Code.

***Henson v. Santander Consumer USA, Inc.*, 817 F.3d 131 (4th Cir. 2016) (Niemeyer, J.)**

In *Henson*, a secured creditor was forced to foreclose on several debtors' houses who had defaulted on their home loans. These foreclosures resulted in a deficiency claim. The creditor sold the notes to Santander and Santander attempted to collect on the debts. The debtors sued Santander under the FDCPA and alleged that Santander mispresented the ownership and amount of debt. The district court, however, found that the complaint failed to establish that Santander was a debt collector as defined by the FDCPA, and dismissed the case. In response, the debtors asserted that Santander qualified as a debt collector since the debts were purchased after default. The court determined that Santander is not a debt collector because it purchased the notes and was collecting debts on its own behalf.

The Fourth Circuit Court of Appeals affirmed. The Supreme Court granted certiorari and heard oral arguments on April 18, 2017. The question presented is: "Whether a company that regularly attempts to collect debts it purchased after the debts had fallen into default is a 'debt collector' subject to the Fair Debt Collection Practices Act." The docket number is 16-349.

***Owens v. LVNV Funding, LLC*, 832 F.3d 726 (7th Cir. 2016) (Flaum, J.)**

*Owens* analyzed multiple FDCPA violation claims. In *Owens*, the debtors argued that filing a time-barred claim constituted a false, misleading, or deceptive act that facilitated the collection of an unenforceable obligation. The district court dismissed the debtors' FDCPA claim. The Seventh Circuit Court of Appeals affirmed and held that the creditor did not violate the FDCPA when it filed a time-barred proof of claim—even if collection of the debt outside of bankruptcy would be a violation.

In its analysis, the court relied upon the Code's definition of a claim, which includes a claim that may not be enforceable in state court. Accordingly, the court determined that a proof of claim—absent inaccurate information or any other deceptive act—is not misleading or deceptive. The debtors filed a petition for writ of certiorari on August 26, 2016. The docket number is 16-315.

***Daugherty v. Convergent Outsourcing, Inc.*, 836 F.3d 507 (5th Cir. 2016) (Dennis, J.)**

In *Daugherty*, the creditor mailed the debtor a letter regarding a time-barred debt. The creditor told the debtor to contact its office regardless of whether it could pay the debt. Notably, the letter included, in bold and in all caps, a statement that indicated the creditors intent to collect the debt. The debtor claimed the letter was deceptive and violated the FDCPA because it did not disclose tax implications or state that making partial payment would revive the debt. The district court dismissed the complaint and found that absent threatening to file a suit or actually filing suit, a creditor can attempt to collect a time-barred debt without violating the FDCPA.

The Fifth Circuit Court of Appeals reversed the district court, and held that the attempt to collect a time-barred debt can be deceptive and misleading unless the creditor disclosed that it is time-barred. The court remanded the case to the district court to allow the case to go to trial.

## 3. <u>SAFE HARBOR PROVISIONS</u>

***FTI Consulting, Inc. v. Merit Mgmt. Grp.*, 830 F.3d 690 (7th Cir. 2016) (Wood, J.)**

Valley View Downs, LP, sought to acquire a competing racetrack, Bedford Downs. Valley View Downs, LP, borrowed money from various lenders, including Merit Management Group, a 30%

shareholder of Bedford Downs. Shortly after the transfer, Valley View Downs, LP, filed for chapter 11. The trustee sought to avoid the transfer from Merit Management Group, alleging Merit Management Group's transfer to Valley View Downs, LP, which then went to Bedford Downs, L.P., and essentially back to Merit Management Group, is avoidable under §§ 544, 548(a)(1)(b), and 550. The shareholders asserted that the safe harbor provision protected them from an avoidance suit.

The Seventh Circuit Court of Appeals held that § 546(e) does not provide non-named entities a safe harbor against avoidance of transfers where a named entity merely acts as a conduit for a transfer. Merit Management Group sought and the Supreme Court granted Certiorari on May 1, 2017. The Seventh Circuit's ruling is similar to the law within the Eleventh Circuit, but the Second, Third, Sixth, Eighth, and Tenth Circuits provide safe harbor to the non-named entities under § 546(e). The Supreme Court presented the following question: "Whether the safe harbor of Section 546(e) of the Bankruptcy Code prohibits avoidance of a transfer made by or to a financial institution, without regard to whether the institution has a beneficial interest in the property transferred, consistent with decisions from the U.S. Courts of Appeals for the 2nd, 3rd, 6th, 8th, and 10th Circuits, but contrary to the decisions from the U.S. Courts of Appeals for the 7th and 11th Circuits." The docket number is 16-784.

## 4. <u>HOMESTEAD EXEMPTIONS</u>

### ***Kim v. Dome Entm't Ctr., Inc. (In re Kim)*, 657 F. App'x. 287 (5th Cir. 2016) (Higginson, J.)**

In *Kim*, the debtor was forced into involuntary bankruptcy by a judgment creditor. The creditor promptly objected to the exemption of the debtor's homestead because the home was purchased during the lookback period—preceding 1,215 days before filing. The bankruptcy court agreed with the creditor and limited the exemption to $136,875.00. After the court limited the exemption, the debtor sought declaratory relief to determine his non-debtor spouse's interest in the property. The bankruptcy court determined that the debtor's spouse did not have a separate interest in the property beyond the exemption the debtor claimed. The Fifth Circuit Court of Appeals affirmed. Therefore, the home was subject to a forced sale due to the homestead cap.

### ***Hennigan v. Smith (In re Smith)*, 668 F. App'x. 105 (5th Cir. 2016) (per curiam)**

The debtor in *Hennigan* claimed as his homestead his home that he had lived in for the seven years preceding bankruptcy. However, the opposing parties claimed that the property did not qualify as exempt because the debtor had the future intent to sell the home and return to Australia. In rebuttal, the debtor proved that he owned the home and that he had no definite plan to sell his home in order to return to Australia. The bankruptcy court held that the property did indeed qualify as homestead. The district court affirmed. The Fifth Circuit Court of Appeals affirmed and determined that at the time the debtor filed, he had the requisite intent to keep the property as his homestead and any future desire to sell the property did not abandon the homestead.

### ***Wiggains v. Reed (In re Wiggains)*, 848 F.3d 655 (5th Cir. 2017) (Southwick, J.)**

Prior to filing bankruptcy, the husband and wife recorded a partition agreement to alter the ownership of their house from community to separate property. Notably, the couple purchased their home within the 1,215 day lookback period. Then the husband filed for chapter 7 and the trustee sold the home. Pursuant to the partition, the husband claimed his homestead exemption and the non-debtor spouse claimed the remaining proceeds as her separate property. The bankruptcy court held that the partition was a fraudulent transfer and determined that the non-debtor spouse was prohibited from collecting any proceeds under § 363(j). The wife appealed and claimed that she was entitled to part of the sale proceeds under the Texas homestead exemption.

The Fifth Circuit Court of Appeals affirmed, and held that a non-debtor spouse is not entitled to additional compensation beyond the debtor's capped homestead exemption when community property is sold under § 363(j). Additionally, the court analyzed § 363(h) and determined that since it did not include "community property," that a non-debtor spouse is not protected. Consequently, the transfer was avoided, the house became property of the estate under § 541(a)(2), and the spouse was not entitled to compensation.

***Lowe v. Deberry*, No. 5:15-cv-1135-RCL (W.D. Tex. Mar. 10, 2017) (Lamberth, J.)**

In *DeBerry*, the debtors filed a chapter 7 bankruptcy and claimed their home as exempt under Texas law. Subsequently, the debtors sold their home, but did not reinvest the proceeds into another home. Consequently, the trustee sought to recover the proceeds for the estate. The trustee claimed that the debtors forfeited the exempt status of the funds since they failed to reinvest the proceeds within six months. The bankruptcy court determined, however, that the sale proceeds were not property of the estate simply because the debtors failed to reinvest the proceeds. Since the case was a chapter 7, the bankruptcy court found that *In re Frost*, 744 F.3d 384 (5th Cir. 2014) (Clement, J.), did not apply.

The district court reversed, applying *Frost* in chapter 7 cases. The district court determined that the proceeds became nonexempt and were property of the chapter 7 estate.

## 5. <u>LATE FILING AND EXCUSABLE NEGLECT</u>

***Intense Printing, Inc. v. Sherman (In re Prism)*, 666 F. App'x. 355 (5th Cir. 2016) (per curiam)**

After the fourteen-day deadline for filing had passed, counsel filed a notice of appeal. Counsel requested enlargement of the deadline and argued that the error was due to excusable neglect because he thought the deadline was 28 days instead of 14 days. The bankruptcy court declined to extend the time, and the Fifth Circuit affirmed. The Fifth Circuit determined that "confusing bankruptcy procedure with civil procedure does not constitute excusable neglect."

***In re Norton*, 2017 WL 354320 (Bankr. N.D. Tex. Jan. 24, 2017) (Jones, J.)**

In *Norton*, the debtor sought to file a late proof of claim and the trustee objected. Ultimately, the court allowed the filing of a late claim. First, the court analyzed the Code and determined that it does not require a secured creditor to file a proof of claim, but that a proof of claim must be filed if the debt will be paid through the chapter 13 plan. Second, the court found that while it does not have authority to extend the time for a creditor to file a proof of claim in a chapter 13 case, it does have the authority to allow a debtor's late filed claim due to excusable neglect. Then, the court analyzed the factors of excusable neglect: (1) if the movant acted in good faith; (2) whether the non-movant would be prejudiced; (3) potential impact on judicial proceedings and length of delay; and (4) reason for delay and if delay was within reasonable control of the movant. Based on these factors, the court allowed the late filed claim.

## 6. ABANDONMENT OF ACCELERATION

***Hernandez v. Select Portfolio Servicing, Inc.*, 2017 WL 1437279 (5th Cir. Apr. 24, 2017) (per curiam)**

In 2004, the debtor executed a promissory note and deed of trust. In 2008, the debtor stopped making her mortgage payments and the lender accelerated the loan. In 2010, and again in 2012, she received notices to cure the default with partial payment or the note would be accelerated. In 2014, she received a third letter. The day before the foreclosure sale, the debtor filed suit. She claimed that (1) the statute of limitations had run, and (2) that past conduct waived the right for timely payment and the right to accelerate based on past due amounts. The district court found that while the lender started acceleration in 2008 it was abandoned and, thus, the statute of limitations did not run.

The Fifth Circuit Court of Appeals affirmed. The court found that acceleration was abandoned because the notices to cure "unequivocally manifested an intent to abandon the previous acceleration" and allowed the debtor to cure the default and avoid foreclosure. Therefore, when acceleration was abandoned the statute of limitations ceased to run.

***Caldwell-Blow v. Wells Fargo Bank, N.A. (In re Caldwell-Blow)*, 2017 WL 1476172 (5th Cir. Apr. 25, 2017) (per curiam)**

The court allowed the lender to enforce the deed of trust lien when it determined that prior acceleration was abandoned when the lender sent a letter rescinding acceleration. The debtor argued that she made no payments on the note following acceleration, which undermines a finding of abandonment. The court dismissed her argument, and stated that payment by a mortgagor to a mortgagee is not a necessary factor for abandonment.

***Justice v. Wells Fargo Bank Nat'l Ass'n.*, 2016 WL 7240195 (5th Cir. Dec. 14, 2016) (per curiam)**

After multiple notices of acceleration, the lender attempted to foreclose. The debtor claimed that the statute of limitations had run and therefore the lender could not foreclose. First, the court noted that the lender effectively accelerated the loan when it sent a notice of intent to accelerate and notice of acceleration. Second, the court found abandonment of acceleration was established when the bank accepted payments and refused to pursue remedies against the debtor.

***Alcala v. Deutsche Bank Nat'l Trust*, 2017 WL 1279227 (5th Cir. Apr. 6, 2017) (per curiam)**

Prior to bankruptcy, the lender sent the debtors several notices of intent to accelerate. The debtors argued that the lender could not accelerate and foreclose due to the statute of limitations. The debtors asserted that since they filed suit in opposition to the 2009 acceleration unilateral abandonment is prohibited. The court determined, however, that since another notice of default was sent in 2012, to which the debtors did not object, the lender had the intent to abandon the 2009 acceleration. The Fifth Circuit Court of Appeals affirmed and held that the lender's foreclosure was not time barred.

## 7. STATUTE OF LIMITATIONS

***Ocwen Loan Servicing v. Berry*, 852 F.3d 469 (5th Cir. 2017) (King, J.)**

In *Berry*, the lender sought to foreclose on a home, but the borrower filed a counterclaim and asserted multiple affirmative defenses for various violations of the Texas Constitution home equity loan provisions. The district court determined that the debtor's counterclaims and affirmative defenses were barred by a four-year statute of limitations. In the time between the district court's ruling and the Fifth Circuit's ruling, however, the Texas Supreme Court released the opinion in *Wood v. HSBC Bank USA, N.A.*, 505 S.W.3d 542 (2016). In *Wood*, the Texas Supreme Court held that the statute of limitations did not apply to a case that asserted an invalid home equity loan due to a violation of the Texas Constitution. This opinion undermines the Fifth Circuit's precedent in *Preister v. JP Morgan Chase Bank, N.A.*, 708 F.3d 667, 674 (5th Cir. 2013) (Smith, J.).

The Fifth Circuit Court of Appeals applied *Wood*. Additionally, the court addressed how the outcome would have differed under *Priester*, which *Wood* disapproved. Therefore, the Fifth Circuit determined that the statute of limitations does not apply for borrowers who allege a violation of the Texas Constitution for a home equity loan. The court vacated the district court's judgment and remanded the case.

## 8. FORFEITURE

***Garofolo v. Ocwen Loan Servicing, L.L.C.*, 497 S.W.3d 474 (Tex. 2016) (Brown, J.)**

In *Garofolo*, the debtor completed payments on her home equity loan, but the bank failed to send the debtor a release of lien in recordable form. Subsequently, the debtor notified the bank that it failed to send the release. Ultimately, the bank failed to send the release within 60 days as required by Texas law. The court determined, however, that the stipulation for forfeiture within the Texas Constitution did not apply because the bank did not attempt to foreclose and the debtor had timely paid the loan in full.

After the Texas Supreme Court received a certified question from the Fifth Circuit Court of Appeals, the court ruled that the Texas Constitution does not allow a homeowner to claim forfeiture and receive repayment of the loan because a lender failed to release a lien within the proper timeframe. The court discussed that the loan protections of the Texas Constitution are not rights, but instead are defenses against foreclosure of a home equity lien secured by a constitutionally noncompliant loan.

## 9. PLAN MODIFICATION

***Molina v. Langehennig*, 2015 WL 8494012 (W.D. Tex. Dec. 10, 2015) (Hudspeth, J.)**

In *Molina*, the Debtors proposed a chapter 13 plan that paid unsecured creditors 100%, but the trustee objected because the proposed monthly payment was lower than the debtors' monthly disposable income. The plan was confirmed, but it included language that required the debtors to continue to pay 100% of unsecured debt if they ever requested a modification. The debtors appealed, and asserted that the bankruptcy court did not have discretion to add additional language to the plan if it met all of the conditions under § 1325. The district court affirmed and found that the bankruptcy court did not abuse its discretion when it included additional language in the confirmed plan. Accordingly, it is permissible to require unsecured claims to be paid in full when there is excess monthly income which is not paid into the plan.

***In re McCarthy*, 554 B.R. 388 (Bankr. W.D. Tex. 2016) (Gargotta, J.)**

Similar to *Molina*, the debtor proposed a plan payment that required less than the debtor's monthly disposable income for a period of 60 months. The trustee objected and requested that the court either shorten the plan period or require payment in full to unsecured creditors if the plan is subsequently modified. Following *Molina*, the court required that unsecured creditors remain fully paid if the plan is subsequently modified.

## 10. RES JUDICATA

***United Indep. Sch. Dist. v. Vitro Asset Corp. (In re Vitro Asset Corp.)*, 656 F. App'x. 717 (5th Cir. 2016) (per curiam)**

A creditor filed an amended proof of claim, but failed to include amounts for post-petition interest and fees for payments of taxes. The plan was confirmed and no objections were filed within the allowed period. The creditor sent the debtor a demand letter for payment of taxes after the deadline had passed. The debtor demanded that the creditor stop seeking payment since the debt was discharged, but the creditor continued to demand payment. In response, the debtor sought to reopen the bankruptcy case in order to enforce the provisions of the confirmed plan. After the case was reopened, the creditor asserted that the plan improperly impaired the creditor's lien, but admitted that it failed to object to confirmation before the deadline and failed to file a claim for interest before the bar date.

Ultimately, the bankruptcy court enjoined the creditor from attempting to collect any fees because the claim was released after the bar date. The district court affirmed, and found that the argument asserted in the reopened case was precluded by res judicata. The Fifth Circuit Court of Appeals affirmed. The court discussed that the lien was invalidated under § 1141(c), that the property subject to the lien was retained in the plan, that the lien holder participated in the reorganization, and that the plan did not preserve the lien. Since all of these facts were established, the creditor was precluded by res judicata.

***Kipp Flores Architects, L.L.C. v. Mid-Continent Cas. Co.*, 852 F.3d 405 (5th Cir. 2017) (Jones, J.)**

An architectural firm sued the debtor for copyright infringement, and the debtor filed a no-asset chapter 7 bankruptcy. The firm timely filed a proof of claim. No parties objected, and the case was closed. Then, a jury trial awarded damages against the debtor in the copyright infringement case. To recover on the judgment, the firm brought an action against the debtor's insurer as a third-party beneficiary. The firm claimed that since there were no objections to its proof of claim, the claim was "deemed allowed" and was a final judgment that, under res judicata, the insurer was required to pay. The insurer asserted that since the case was a no-asset chapter 7, the proof of claim did not result in a final judgment.

The court held that without a final judgment, the firm could not recover from the insurer, and that a "deemed allowed" claim did not constitute a final judgment in a no-asset case. The court discussed how if it adopted the firm's argument and provided it a "deemed allowed" claim that constituted res judicata against the insurer, it would require parties to monitor and litigate in no-asset cases in the future.

### 11. FRAUDULENT TRANSFERS

***Janvey v. Dillon Gage, Inc. of Dallas*, 2017 WL 1821498 (5th Cir. May 5, 2017) (Higginson, J.)**

The court-appointed receiver of the Stanford entities sued under the Texas Uniform Fraudulent Transfer Act (TUFTA) to set aside fraudulent transfers by Stanford Coins and Bullion (SCB) to a supplier of metals, bullion, and coins. The district court rendered judgment on the jury verdict that the transfers were not fraudulent. The Fifth Circuit affirmed and held that the receiver failed to prove either insolvency of SCB or that SCB failed to pay debts as they came due. The court further found that the jury instructions were proper and that the district court did not abuse its discretion in denying attorney's fees to the prevailing supplier.