

**The University of Texas School of Law  
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**CONSUMER BANKRUPTCY CASES**  
**Recent Developments in Consumer Bankruptcy Law**  
**June 2018 – May 2019**

United States Supreme Court  
5th Circuit Court of Appeal  
Texas Federal District Courts  
Texas Bankruptcy Courts

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## Appeals

*Germain v. US Bank Nat'l Ass'n*, 920 F.3d 269 (5th Cir. 2019) (Weiner)

### Appeals

In 2005, Debtor executed a Note secured by a Deed of Trust in favor of Lender to refinance his home loan. Debtor frequently defaulted on the Note after 2009 and made his last mortgage payment in 2014. Loan Servicer initiated foreclosure proceedings. Over the years, Debtor submitted four loss mitigation applications. Loan Servicer denied each application but informed Debtor of other options. Debtor failed to take advantage of any assistance and filed bankruptcy. Bankruptcy court dismissed Debtor's case and a year later Loan Servicer accelerated the loan and posted the property for foreclosure. Debtor sued Loan Servicer and Trustee to prevent foreclosure. Debtor alleged that Loan Servicer and Trustee violated (i) the Real Estate Settlement Procedure Act ("RESPA"), the Texas Debt Collection Act ("TDCA"), and the Declaratory Judgement Act. District court dismissed Debtor's claims and granted Loan Servicer and Trustee judgment. Debtor appealed to the Fifth Circuit.

The Fifth Circuit affirmed district court's holding. Fifth Circuit held that RESPA regulations were not an affirmative defense for Debtors. The Fifth Circuit found that Loan Servicer and Trustee complied with § 1024.41(c)(1) of RESPA by informing Debtor in writing, that: (i) his loan was assessed for all available loss mitigation options; (ii) owner of the loan did not allow for loan modification; and (iii) a short sale was an option. Additionally, Loan Servicer and Trustee were only required to comply with the notice requirements once over the course of the loan. Further, Loan Servicer and Trust's compliance with RESPA prevented Debtor's claim under the TDCA and Debtor failed to show they intended to deny his applications.

*In re Ondova Ltd. Co.*, 914 F.3d 990 (5th Cir. 2019) (per curiam)

### Appeals

Former Owner filed a chapter 11 bankruptcy case for Company in 2009. Soon after, Former Owner lost his debtor-in-possession status. Bankruptcy court appointed a Chapter 11 Trustee, which employed Law Firm. Former Owner initiated an adversary proceeding against Trustee, Law Firm, and Trustee's surety bond issuer. Complaint alleged that Trustee breached a Global Settlement Agreement ("GSA"), that Trustee and Law Firm made fraudulent misrepresentations to Owner, and committed gross negligence by allegedly neglecting the bankruptcy case. Defendants filed motions to dismiss, which district court granted. Former Owner appealed district court's dismissal. The Fifth Circuit affirmed, holding that bankruptcy trustees are entitled to qualified immunity for personal harms caused by actions that fall within the scope of their official duties. Trustee's immunity also extended to the attorneys who represented him through both derivative immunity from Trustee and independent attorney immunity.

*Pendergraft v. Network of Neighbors, Inc. (In re Pendergraft)*, 745 F. App'x 517 (5th Cir. 2018) (per curiam)

**Appeals/Discharge**

Debtors served on the board of Nonprofit. Debtors used their positions and authority to have Nonprofit enter into contracts with their privately held business. Ultimately no goods and services were provided under the contracts and Nonprofit's funds were diverted and spent for Debtors' personal benefit. When Nonprofit discovered the self-dealing, it filed an adversary in Debtors' existing bankruptcy case to hold amounts owed nondischargeable under 11 U.S.C. § 523(a)(4). The Fifth Circuit held that Debtors knowingly diverted funds from the nonprofit for their personal gain, satisfying the standard for mental culpability. Further, because Debtors committed individual torts, veil piercing was not applicable and Debtors' business was not a party. The Fifth Circuit held that sufficient grounds for recusal did not exist because Debtors' allegations of bias were based solely on their attorney's perception. Further, Debtors' recusal motion was untimely because it was filed after judge issued nondischargeability judgment.

*Tanguy v. West (In re Davis)*, 746 F. App'x. 392 (5th Cir. 2018) (per curiam)

**Appeals**

Trustee recovered property from Debtors and sought to sell the property under 11 U.S.C. § 363(f). Debtor objected, but bankruptcy court ruled that Debtor's objection was estopped by prior representations. Bankruptcy court allowed sale of property, which debtor did not seek to stay pending appeal. After sale closed, Debtor appealed to district court. District court ruled appeal was moot under § 363(m) because Debtor failed to request a stay of sale. Debtor appealed to the Fifth Circuit, challenging the good faith basis of the sale. The Fifth Circuit held that Debtor had failed to preserve the good faith argument for appeal in bankruptcy court. Debtor had an opportunity to create a record challenging good faith, but failed to submit evidence, file motions, or seek to stay bankruptcy court's sale order to challenge good faith. Although Debtor's appeal challenged Trustee's good faith it failed to address the purchaser's good faith as required under § 363(m). Accordingly, the Fifth Circuit held Debtor's claims were moot.

*Marshall v. Gurley*, 2018 WL 4762858 (E.D. Tex. Sept. 30, 2018) (Clark)

**Appeals/Procedure**

Debtor filed chapter 7 bankruptcy and listed a 118-acre tract of land in his bankruptcy schedules. The land was divided into 24 acres, which Debtor claimed as his exempt homestead along with an additional 94 acres. A lien encumbered the entire 118-acre tract of land, which secured the payment of a \$600,000.00 promissory note executed in favor of Noteholder. Prior to Debtor's bankruptcy filing, Business Partner obtained a state court judgment against Debtor for breach of fiduciary duty, which bankruptcy court found exempt from discharge under 11 U.S.C. § 523(a)(2)(A). In Debtor's bankruptcy case, Trustee reached an agreement to sell the 94-acre tract of land for \$25,000.00 plus assumption of the \$600,000.00 lien to Corporation, which was formed by Noteholder's financial adviser. Bankruptcy court entered a sale order; Debtor received his discharge; Trustee was discharged; and bankruptcy case was closed. Business Partner attempted to collect on non-dischargeable judgment and learned through discovery that Debtor was leasing the property from Corporation for \$10.00 a year. Debtor's bankruptcy case was reopened and Business Partner filed a motion for relief from the stay to pursue TUFTA litigation. State court

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First appeared as part of the conference materials for the  
15<sup>th</sup> Annual Consumer Bankruptcy Practice session

"Case Summaries, Part I"