Greetings Committee Members,

We hope this email finds you well. We are the 2017-2018 Co-Chairs of the ABA Young Lawyers Division Bankruptcy Law Committee. We wanted to take this opportunity to introduce ourselves and the Bankruptcy Law Committee leadership for the coming year. Lauren Kawano (Co-Chair – lkawano@lozanosmith.com) is from Lozano Smith LLP in Sacramento, California, and Peter Keane (Co-Chair – pkeane@pszjlaw.com) is from Pachulski Stang Ziehl & Jones LLP in Wilmington, Delaware. Our goal this year is to help communicate and provide you with the valuable benefits that Committee membership offers, including networking opportunities, continuing education credits, and publication opportunities. We look forward to serving you this upcoming year and please do not hesitate to contact us with any questions or concerns. Our Committee leadership this year also includes Myles MacDonald (Vice Chair - MMacDonald@coleschotz.com) from Cole Schotz, P.C. in Wilmington, Delaware, and James Roberts (Content Editor – jroberts@burr.com) from Burr & Forman LLP in Birmingham, Alabama.

James will periodically be sending emails to solicit content for the Committee’s quarterly newsletters and 101/201 Practice series articles. This is an excellent opportunity for younger lawyers to get published and make themselves known in the restructuring community. We encourage you to submit content for consideration.

We hope to make this a productive year and provide you with great resources to expand your network and sharpen your skills as young lawyers. We welcome participation, so if you'd like to get involved in the Committee—whether by suggesting a topic for a webinar or program or sharing a bankruptcy law-related event—please get in touch with us.

Please feel free reach out to us with any questions about the Committee.

Best regards,

Lauren Kawano (lkawano@lozanosmith.com)

Peter J. Keane (pkeane@pszjlaw.com)
TABLE OF CONTENTS

ARTICLES >>
S.D.N.Y. Bankruptcy Court Provides Guidance on Fixture Classification and Valuation—pp. 3-4
By: Peter J. Keane
Southern District of New York Bankruptcy Court Clarifies Valuation Methodologies and Offers Fixture Determinations for Secured Creditors

Eleventh Circuit Moves Toward Bright Lin Rule that Debtors Cannot Retain Real Property Post-Discharge without Reaffirming the Mortgage Debt—pp. 5-7
By: Jonathan Sykes and Lauren Reynolds
Eleventh Circuit Rules Surrenders of Property Cannot Contest Foreclosure

NEWS AND ANNOUNCEMENTS >>
Did You Attend the ABA YLD Fall Conference in Denver? What Are You Most Looking Forward to in Vancouver?—p. 8

CLE Opportunity – The Delaware Update: Hot Issues Business Litigators Need to Know—p. 8
S.D.N.Y. Bankruptcy Court Provides Guidance on Fixture Classification and Valuation
By: Peter J. Keane

In an incredibly detailed and lengthy 205-page post-trial ruling, Judge Martin Glenn of the Southern District of New York Bankruptcy Court delved into the weeds of a dispute between the Avoidance Action Trust (the “Trust”)—a body serving on behalf of Old GM’s unsecured creditors—and certain secured term lenders of Old GM in Motors Liquidation Co. Avoidance Action Trust v. JPMorgan Chase Bank, N.A. (In re Motors Liquidation Co.), No. 09-50026, 2017 WL 4280934 (Bankr. S.D.N.Y. Sept. 26, 2017). The defendant term lenders initially held a security interest in approximately $1.5 billion of Old GM’s assets, with a perfected security interest originating from a UCC-1 financing statement filed in Delaware. Id. at *3. In an earlier stage of the litigation, the perfected security interest was terminated when a UCC-3 termination statement was mistakenly filed. Id. Despite the termination statement, the term lenders argued that at the time of the historic section 363 sale of GM’s assets in 2009, they held a perfected security interest in over 200,000 fixtures at various GM plants because of 26 fixture filings in counties where the disputed assets were located. Id.

In the dispute before Judge Glenn, the parties argued about two overarching issues: (1) whether the assets were fixtures or realty; and (2) how to value the assets. Id. Because it was impractical to litigate fixture and valuation issues for each and every one of the 200,000 assets, in pretrial proceedings the court directed the parties to designate 40 sample “representative” assets to be subject to a trial. Id. at *4. The representative assets included metal presses, conveyor systems, machining systems, robots, furnaces, and paint shop assets, among other items, all of which were used in the auto manufacturing process. In re Motors Liquidation Co., 2017 WL 4280934 at *16-38. The parties then agreed that after the court issued its opinion, they would attempt to settle as to the remaining disputed assets using the court’s guidance in its ruling. Id. at *4. The court received significant amounts of evidence at trial, including competing expert reports and opinions on various methods of valuation. Id. at *86. Further, as part of the trial, the court even conducted an on-site visit to two of the Old GM facilities in Michigan. Id. at *10.

In its ruling, after examining the factual background regarding the relevant GM plants and describing the representative assets, the court analyzed the relevant legal standards for fixtures under both Michigan and Ohio law – the two states at issue where the disputed assets were located. Id. at *39. Under Michigan state law, property is a fixture if: (1) it is annexed to the realty, whether the annexation is actual or constructive; (2) its adaptation or application to the realty being used is appropriate; and (3) there is an intention to make the property a permanent accession to the realty. Id. Ohio state law on fixtures has a similar three-part test for fixtures: (1) annexation to some extent to the realty; (2) application to the use or purpose to which the realty to which it is attached, is devoted; and (3) actual or apparent intention upon the part of the owner of the chattel in affixing it to the realty to make such chattel a permanent part of such realty. Id. at *41.

---

1 Peter J. Keane is an attorney at Pachulski Stang Ziehl & Jones in Wilmington, Delaware and is a 2017-2018 Co-Chair of the ABA YLD Bankruptcy Committee.

© 2017 by the American Bar Association. Reproduced with permission. All rights reserved. This information or any portion thereof may not be copied or disseminated in any form or by any means or stored in an electronic database or retrieval system without the express written consent of the American Bar Association.
After canvassing each state’s law, the court distilled several guiding principles in fixture determinations, including the following: (1) “concrete pits, trenches, slabs, or specialized foundations are strong indications that an asset is a fixture”; and (2) “when a particular asset is closely integrated, assimilated, or interlocked with other assets, the notion that the asset was intended to remain in place is reinforced. On the other hand, where an asset stands apart from other assets and the assembly line processes generally, and has a lower level of integration and assimilation, there is less of an apparent intent for an asset to remain in place indefinitely.” In re Motors Liquidation Co., 2017 WL 4280934 at *50-52. In reaching its fixture determinations for the 40 representative assets, the court reached various results for each asset.

The court then determined the appropriate valuation method for the assets. Id. at *75-97. The primary dispute between the parties on valuation was whether the assets sold to New GM should be valued at liquidation value or going-concern value. Id. at *75. The Trust argued that because the U.S. Government paid an above-market price in the section 363 sale, the court should imagine that the section 363 sale never took place at all and value the representative assets as if Old GM had liquidated. Id. By contrast, the defendant term lenders argued that going-concern value was appropriate, and they urged the court to use RCNLD amounts2 developed as an interim step by KPMG in a contemporaneous fresh start exercise.3 Id. The court agreed with the Trust that the above-market portion of the section 363 sale price should not be relied upon as an indicator of the value of the representative assets but would not value the Representative Assets under the assumption that Old GM would have liquidated—a hypothetical outcome that was never the intended disposition of the assets. Id. at *5. Instead, the court agreed with term lender defendants that going-concern value is appropriate for those assets that were sold to New GM, but it disagreed that the interim RCNLD amounts are the best measure of that value. In re Motors Liquidation Co., 2017 WL 4280934 at *5. The court instead used KPMG’s final valuation—which included a significant reduction for the earning power of the business upon emerging from bankruptcy in the midst of the Great Recession—as the best available evidence of the value of the fixtures sold to New GM. Id. For the two representative assets that were intended to remain with the Old GM estate and never to continue operating, the court found that OLVIE was the appropriate premise for the value of those assets, in keeping with the principle that assets should be valued according to their proposed disposition on the valuation date and not based on a hypothetical outcome.4 Id.

This latest decision in the long-running GM bankruptcy saga provides helpful guidance to practitioners dealing with fixture and valuation issues. In addition, the unique procedure used by the court and the parties to set up a guidance ruling with certain sample assets from a much larger group of assets that had to be valued can serve as a model in future bankruptcy litigations where individualized determinations are not feasible in liquidations of large manufacturing companies. Although the Trust has sought leave to appeal the court’s decision to use the selected valuation method, the court’s ruling will most likely lead to future settlements for the remaining assets, which will save the parties and the court much time and expense in bringing the dispute to its conclusion.


3 KPMG was retained by New GM in 2009 following the closing of the section 363 sale to provide an opinion regarding the fair value of certain assets acquired by New GM, including hundreds of thousands of individual assets, as well as 33 of the representative assets. Id. at *5.

4 “OLVIE” stands for “Orderly Liquidation Value in Exchange.” Id. at *87.
Eleventh Circuit Moves Toward Bright Lin Rule that Debtors Cannot Retain Real Property Post-Discharge without Reaffirming the Mortgage Debt

By: Jonathan Sykes and Lauren Reynolds

Last year in the case of In re Failla, the Eleventh Circuit held that a debtor who files a statement of intention to “surrender” his or her house in bankruptcy may not oppose the secured creditor’s foreclosure proceeding in state court. 838 F.3d 1170, 1179 (11th Cir. 2016). Failla is a significant victory for secured creditors for two primary reasons. First, the Eleventh Circuit interpreted the meaning of “surrender,” as used in 11 U.S.C. § 521(a)(2), and concluded that a debtor who says he will “surrender” collateral must relinquish his rights in the property, including the right to possess and use it and the right to defend a foreclosure proceeding. Second, while secured creditors can ask state court judges to enforce a debtor’s statement of intention to surrender through the doctrine of judicial estoppel, the Failla opinion confirms that secured creditors may also seek to reopen bankruptcy cases to compel a debtor to surrender based, in part, on the bankruptcy court’s statutory authority to remedy abuses of the bankruptcy system.

About a month after the opinion in Failla was issued the Eleventh Circuit decided Jones v. CitiMortgage, Inc. 666 F. App’x 766 (11th Cir. 2016). In Jones, the debtor filed a statement of intention to reaffirm the secured debt on his home during bankruptcy, but a reaffirmation agreement was never actually filed. Years after the close of the bankruptcy case, the secured creditor began foreclosure proceedings, and the debtor subsequently sued the secured creditor to oppose the foreclosure process and to assert other related claims. The Failla Eleventh Circuit affirmed, in part, the district court’s dismissal of the debtor’s claims by considering, among other factors, the debtor’s failure to actually reaffirm the mortgage debt in bankruptcy. The court reasoned that because the debtor did not reaffirm the secured debt or redeem the property in bankruptcy, “it does not appear he has any basis to challenge a foreclosure action.” Jones, 666 Fed. Appx. at 776–77 (citing Failla). “Without reaffirming the debt or redeeming the collateral, the debtor has no right to retain the collateral, though the debtor can continue to maintain mortgage payments on a principal residence after discharge without reaffirming the debt, and a creditor can take such payments rather than pursue an in rem foreclosure, see 11 U.S.C. § 524(j).” Id. at 770 (internal citations omitted) (referencing the Failla opinion). Although this statement is arguably dicta, the Eleventh Circuit telegraphs in Jones its belief that a debtor loses the right to retain collateral and defend foreclosure, absent reaffirmation or redemption in bankruptcy.

Jones is consistent with an earlier district court decision, Bank of America, N.A. v. Rodriguez, 558 B.R. 945, 949 (S.D. Fla. 2016), in which the district court reversed the bankruptcy court’s denial of a motion to reopen the bankruptcy case to compel surrender. In Rodriguez, the debtor stated her intention to reaffirm the mortgage debt, but failed to actually file a reaffirmation agreement during her bankruptcy case. Years later, the creditor moved to reopen the bankruptcy case, which was denied by the bankruptcy court partly because the secured creditor sat on its rights and failed to show the court that the debtor failed to perform her statement of intention. On appeal, the district court reversed and determined that, despite the delay, the debtor’s failure to reaffirm the secured debt was a compelling enough reason to reopen the case, and that, without an enforceable reaffirmation agreement, the debtor had no choice but to surrender the property. The court further reasoned that the debtor was not prejudiced by the creditor’s delay in seeking to

---

5 Jonathan Sykes and Lauren Reynolds are attorneys of Burr & Forman LLP practicing in the firm’s Creditors’ Rights & Bankruptcy group and Financial Services Litigation group, respectively. © 2017 by the American Bar Association. Reproduced with permission. All rights reserved. This information or any portion thereof may not be copied or disseminated in any form or by any means or stored in an electronic database or retrieval system without the express written consent of the American Bar Association.
enforce the debtor’s duties under § 521(a)(2), and that, to the contrary, the debtor only benefitted by enjoying the free use of the property for years.

In a more recent bankruptcy court decision, *In re Thomas*, a secured creditor filed a motion to reopen a bankruptcy case to compel surrender of real property where the debtors did not file a statement of intention to either surrender or reaffirm with respect to the secured creditor’s collateral. 12-38513-EPK, 2017 WL 3309719 (Bankr. S.D. Fla. Feb. 10, 2017). Relying upon *Failla* and *Rodriguez*, the bankruptcy court concluded that the debtors were deemed to have surrendered their property because they did not redeem the property or reaffirm the secured debt during the bankruptcy case, without regard to any statement of intention. 2017 WL 3309719 at *1. However, the bankruptcy court permitted the debtors to defend the foreclosure on the sole ground that the secured creditor allegedly lacked standing (an issue that was not contested in *Failla* or *Jones*), reasoning that “*Failla* does not require a debtor to surrender his or her property to just any creditor, but to the creditor or creditors with standing to pursue rights in the subject property.” Id. at *2. The court in *Thomas* correctly points out that, according to the Eleventh Circuit’s opinion in *Failla*, the duty to surrender property is owed to the secured creditor, rather than a stranger to the mortgage.

Distinguishing *Failla* on its facts, the bankruptcy court in *In re Ayala*, denied a secured creditor’s motion to reopen the bankruptcy case to compel surrender, where the motion was filed after trial in the state court foreclosure action, where the debtor defended on the basis that the debtor was not in default. 568 B.R. 870, 871 (Bankr. M.D. Fla. 2017). Notably, the court in *Ayala* does not mention *Jones* or *Rodriguez*. Even so, the Eleventh Circuit’s reference in *Jones* to § 524(j) indicates that even the Eleventh Circuit may not condone the foreclosure of a mortgage loan that is not in default, where the secured creditor continues to accept post-discharge mortgage payments in lieu of foreclosure.

While the decisions in *Thomas* and *Ayala* may present reasonable limits to the Eleventh Circuit’s opinion in *Failla*, the Eleventh Circuit’s statements in *Jones*, which are not addressed in *Thomas* or *Ayala*, are broad enough to infer that the Eleventh Circuit intends to move to a bright-line rule that debtors who do not reaffirm mortgage debt in bankruptcy lose the right to retain the property and defend a subsequent foreclosure action, presumably on any ground whatsoever. A case currently briefed and on appeal may be able to provide further clarification on this issue.

In *Woide*, the secured creditor prevailed on a motion to reopen the bankruptcy case to compel surrender of real property. 551 B.R. 865 (Bankr. M.D. Fla. 2016). The debtors filed a chapter 13 bankruptcy petition, but the case was later converted to chapter 7. The debtors did not file a statement of intention with respect to the property, but indicated in their schedules that they would surrender the property. After the close of the debtors’ bankruptcy case, the secured creditor initiated a foreclosure proceeding, which the debtors vigorously defended. The debtors also filed multiple lawsuits in state and federal court seeking to invalidate the note and mortgage, and even attempted to rescind the note and mortgage under TILA. The bankruptcy court entered an order reopening the bankruptcy case and compelling surrender of the real property, specifically prohibiting the debtors from taking “any action to impede, contest, or dispute the validity or enforceability of the note and mortgage . . . including, but not limited to, any action to rescind the note and mortgage pursuant to the Truth in Lending Act, 15 U.S.C. 1635[.]” [cite]

After the bankruptcy court ordered the debtors to surrender the property, the debtors appealed the bankruptcy court’s order to the district court, and the district court affirmed. *In re Woide*, 2017
WL 78798 (M.D. Fla. Jan. 9, 2017). The debtors then appealed to the Eleventh Circuit. *In re Woide*, No. 17-10776 (11th Cir. 2017). The primary issue on appeal is whether the debtors, who did not file a statement of intention regarding their property, but who did not otherwise reaffirm the mortgage or redeem the property during the course of their bankruptcy case, must still surrender the property. The case is now fully briefed on appeal, and many are hoping that the court provides greater insight and guidance on this issue.

**Conclusion**

Together, *Failla* and *Jones* are powerful tools for secured creditors. *Failla* confirms the mandatory nature of § 521(a)(2), and according to *Jones*, when a debtor fails to actually reaffirm secured debt on real property, the debtor must still surrender and loses the right to retain the property. A third case, *In re Woide*, which is now pending before the Eleventh Circuit, may provide the context for the Court to further clarify, and either expand or limit, the scope of a debtor’s duty to surrender real property in bankruptcy. 551 B.R. 865 (Bankr. M.D. Fla. 2016). Although the *Woide* case presents an extreme set of circumstances, the Eleventh Circuit will have an opportunity, in the context of post-*Failla* decisions that question the limits of *Failla*, to move towards the bright-line rule that the Court seems to suggest in *Jones*. 
NEWS AND ANNOUNCEMENTS >>
Did You Attend the ABA YLD Fall Conference in Denver? What Are You Most Looking Forward to in Vancouver?

The Rocky Mountains are obviously associated with the “Mile-High City,” but there is so much more to the city and so much more to the conference than the outstanding networking opportunities. What did you find most helpful? What do you want from our committee at the ABA YLD Mid-Year in Vancouver and future conferences? Start a dialogue and let us know!

CLE Opportunity – The Delaware Update: Hot Issues Business Litigators Need to Know

On October 19, 2017 from 1:00 – 2:00PM EST, an experienced panel of litigators will provide a review of recent cases and emerging trends in Delaware’s nationally prominent business courts and federal court, including discussion of important issues related to Delaware corporate law, settlements of class litigation, and intellectual property/trade secrets law. For more information and to register, click here.