

6th Circ. Remands Casino Case After High Court Ruling

By **Joyce Hanson**

Law360 (April 22, 2019, 10:21 PM EDT) -- The Sixth Circuit said Monday that a U.S. Supreme Court decision resolves a circuit court split over the correct interpretation of the U.S. Bankruptcy Code's "safe harbor" provision and overturns circuit court precedent on which two courts relied in a trustee's suit against a tribe and casino.

The three-member panel vacated a district court judgment and remanded to bankruptcy court a case involving the bankrupt Greektown Casino in Detroit, owned by the Sault Ste. Marie Tribe, and the allegedly fraudulent transfer of \$177 million to the tribe and its gaming authority.

In handing down its order, the Sixth Circuit cited the high court's February 2018 decision in Merit Management Group LP v. FTI Consulting Inc. , which ruled that a transaction can be undone in bankruptcy if funds simply move through a financial institution without benefiting it. The decision resolved a circuit split over how to interpret the "safe harbor" provision of the Bankruptcy Code, and instructed courts to look at the overarching transfer instead of its component parts when deciding whether it can be clawed back.

"Merit Management squarely addresses the dispositive issue in this case and abrogated the Sixth Circuit precedent on which both the bankruptcy court and district court relied," the panel's order said.

Greektown Casino LLC filed for Chapter 11 bankruptcy protection in 2008. The casino claimed that construction setbacks and cost overruns on an expansion had pushed it into financial trouble. At the time of its petition, the casino listed estimated assets of less than \$50,000 and estimated liabilities between \$100 million and \$500 million.

The bankruptcy led to an adversary suit in Michigan district court, where Buchwald Capital Advisors LLC as litigation trustee pursued claims against the Sault Ste. Marie Tribe and the Kewadin Casino Gaming Authority for \$177 million and related parties Dimitrios and Viola Papas for \$94.3 million and Ted and Maria Gatzaros for \$60.7 million. Buchwald seeks to claw back the \$155 million of prebankruptcy transfers the casino made in 2005 to the Papases and the Gatzaroses as final payment on a 2000 buyout of the couples' stakes.

In September 2015, Buchwald asked the Michigan bankruptcy court to reopen the bankruptcy case involving the casino, which had been administratively closed in June 2015. Buchwald aimed to secure permission to extend the trust for three more years, saying that without an extension, the trust would be unable to complete its duties before the existing deadline, including the adversary suit alleging the \$177 million was fraudulently transferred after Greektown Casino went bankrupt.

But days after Buchwald made its request, the casino told the bankruptcy court that it should deny Buchwald's bid, arguing that the trustee had ample time to make the request when the case was still open. Greektown Casino also argued that the trust improperly filed its motion on an ex parte basis, cutting off Greektown's notice and opportunity to object or otherwise respond despite knowing that Greektown may incur liability to the U.S. trustee if the case is reopened.

In November 2015, the bankruptcy court granted summary judgment in favor of the Papases and the Gatzaroses, who sold their interests in the casino for \$250 million, and the district court affirmed that decision in January 2018, according to Buchwald.

Buchwald filed its notice of appeal in February 2018.

"From 2000 to 2005, the casino's owners failed to make timely payments owed to the Papases and Gatzaroses," Buchwald said in its Oct. 29 appellant's brief. "By 2005, the situation reached a breaking point, and the casino refinanced its debts. The Papases and Gatzaroses, who had considerable

contractual leverage, walked away from that transaction with \$155 million in cash. The casino's direct owner, Greektown Holdings was left insolvent, with negative equity of \$138 million."

The brief also said the case presented the Sixth Circuit its first opportunity to consider the statutory safe harbor in the Bankruptcy Code — which protects certain transfers from avoidance by a bankruptcy or litigation trustee — in light of the Supreme Court's Merit Management decision.

The Sixth Circuit's order followed on Monday, saying that on Feb. 27, 2018, two weeks after the appeal was filed, the Supreme Court decided Merit Management and resolved the circuit split over the correct interpretation of the relevant portion of the Bankruptcy Code.

Counsel for Buchwald, the Papases and Gatzaroses did not respond Monday to requests for comment.

Circuit Judges R. Guy Cole Jr., Jane Branstetter Stranch and Chad A. Readler sat on the panel for the Sixth Circuit.

Buchwald Capital Advisors is represented by Michael K. Kellogg, Gregory G. Rapawy and Julius P. Taranto of Kellogg Hansen Todd Figel & Frederick PLLC, Joel D. Applebaum and Linda M. Watson of Clark Hill PLC, and Mark N. Parry of Moses & Singer LLP.

Dimitrios Papas, Viola Papas, Ted Gatzaros and Maria Gatzaros are represented by H. William Burdett Jr. of Howard & Howard Attorneys PLLC.

The appellate case is Buchwald Capital Advisors LLC v. Dimitrios Papas et al., case number 18-1167, in the U.S. Court of Appeals for the Sixth Circuit.

The bankruptcy case is In re: Greektown Holdings LLC et al., case number 2:08-bk-53104, in the U.S. Bankruptcy Court for the Eastern District of Michigan. The adversary suit is Sault Ste. Marie Tribe of Chippewa Indians et al. v. Buchwald Capital Advisors LLC, case number 2:14-cv-14103, in the U.S. District Court for the Eastern District of Michigan.

--Additional reporting by Caroline Simson and Alex Wolf. Editing by Nicole Bleier