

2020 Midwestern Virtual Bankruptcy Institute

Case Law Update

Hon. Brian T. Fenimore, Moderator

U.S. Bankruptcy Court (W.D. Mo.) | Kansas City

Hon. Bonnie L. ClairU.S. Bankruptcy Court (E.D. Mo.) | St. Louis

Hon. Terrence L. Michael U.S. Bankruptcy Court (N.D. Okla.) | Tulsa

Hon. Thomas L. Saladino U.S. Bankruptcy Court (D. Neb.) | Omaha

Hon. Bonnie L. Clair United State Bankruptcy Court 2020 Eastern District of Missouri Midwestern Hon. Brian T. Fenimore United States Bankruptcy Court Western District of Missouri Bankruptcy Hon. Terrence L. Michael United States Bankruptcy Court Institute Northern District of Oklahoma Case Law Update Hon. Thomas L. Saladino United States Bankruptcy Court District of Nebraska



Ritzen Group, Inc.

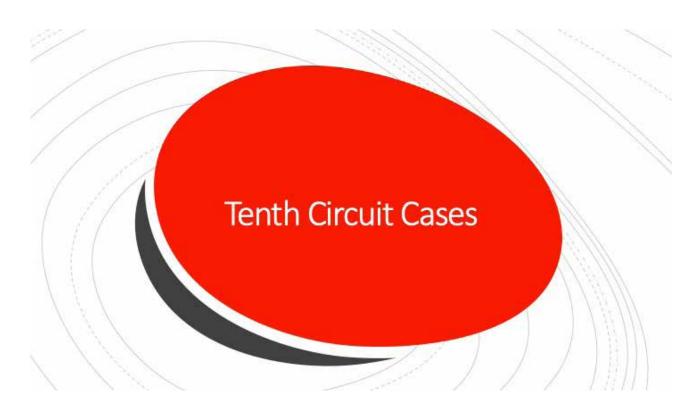
v. Jackson

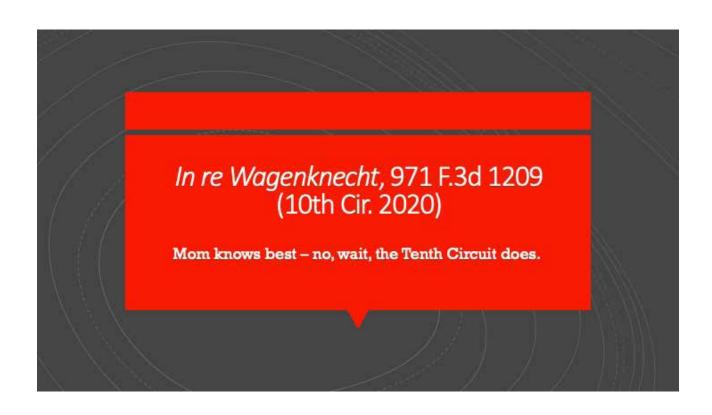
Masonry, LLC,

140 S. Ct. 582

(2020)
Held: A bankruptcy court's order denying relief from the automatic stay constitutes a final and immediately appealable order under 28 U.S.C. § 158(a).
Finality for purposes of appeal from a bankruptcy court order remains subject to scrutiny.
Bullard v. Blue Hills Bank, 575 U.S. 496 (2015), remains a keystone on this issue.

- Catholic
 Archdiocese
 of San Juan v.
 Acevedo
 Feliciano,
 140 S. Ct. 696
 (2020)
- Held: The Court of First Instance, a Puerto Rico trial court, lacked jurisdiction to issue payment and seizure orders after a pension benefits proceeding was removed to federal district court but before the proceeding actually was remanded back to the Court of First Instance.
- The holding in this case belies the key takeaway from this ruling: the Supreme Court stated that *nunc pro tunc* orders only can address "a decree allowed, or ordered, but not entered, through inadvertence of the court."
- The ruling raises practical questions for bankruptcy administration going forward.





SE Property Holdings, LLC v. Stewart (In re Stewart), 970 F.3d 1255 (10th Cir. 2020)

 Silence isn't so golden (in fact, silence makes gold disappear).

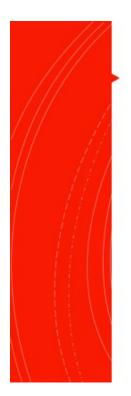
In re Morreale, 959 F.3d 1002 (10th Cir. 2020)

 Chapter 7 Trustees and Chapter 11 liquidations don't mix.

 Reading this case comes with a free migraine at no extra charge. Matter of Generation Resources Holding Company, LLC, 964 F.3d 958 (10th Cir. 2020)

In re Hafen, 616 B.R. 570 (B.A.P. 10th Cir. 2020)

Only you can prevent forest fires, and only a bankruptcy judge may determine whether a cause of action is property of the estate.

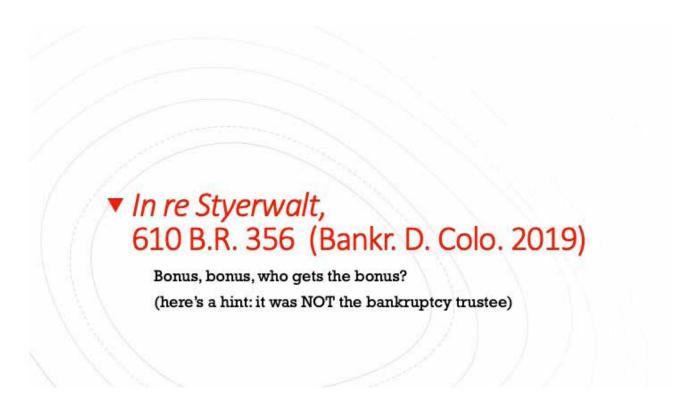


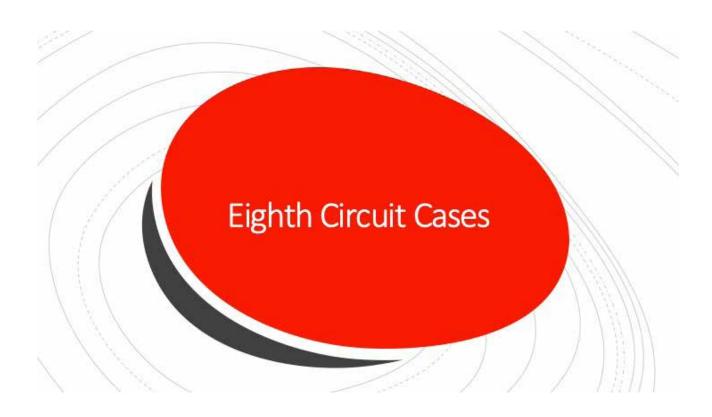
In re Kearney, 2020 WL 3637890 (Bankr. D.N.M. June 18, 2020)

 An end around the confirmed plan was crushed by the middle linebacker (er, I mean the bankruptcy judge).

In re Roman Catholic
Church of the
Archdiocese of Santa Fe,
615 B.R. 644
(Bankr. D.N.M. 2020)

Bankruptcy debtors are not immune to the coronavirus, and the Small Business Administration is not immune to the law.





- ▼ The Bank of Missouri v. Family Pharmacy, Inc. (In re Family Pharmacy, Inc.), 614 B.R. 58 (B.A.P. 8th Cir. 2020)
- Bankruptcy auction produced proceeds sufficient to pay first and second lienholders in full at non-default rates, leaving additional proceeds to be distributed. Those funds claimed by senior lienholder as default interest.
- On appeal, the BAP reversed, saying that the Supreme Court held in *United States v. Ron Pair Enters., Inc.*, 489 U.S. 235 (1989), that all oversecured creditors are entitled to collect interest on their claims and that right is "unqualified." The BAP endorsed the view post-Ron Pair that "the pre-confirmation interest rate to be applied under § 506(b) to an oversecured creditor whose claim is evidenced by a promissory note or similar loan agreement is the contract (both non-default and default) rate set forth in the note or loan agreement, to the extent enforceable under applicable law."

- ▼ The Bank of Missouri v. Family Pharmacy, Inc. (In re Family Pharmacy, Inc.), 614 B.R. 58 (B.A.P. 8th Cir. 2020)
- BAP found no Missouri or federal law that would apply a liquidated damages analysis to default interest rate provisions. BAP further cited numerous Supreme Court cases cautioning courts to refrain from using equitable considerations to venture outside the boundaries of the statutory language.
- Specifically, the BAP opined that "no section of the Bankruptcy Code gives the bankruptcy court authority, equitable or otherwise, to modify a contractual interest rate prior to plan confirmation."

Rucker v. Belew (In re Belew), 943 F.3d 395 (8th Cir. 2019)

- The chapter 7 trustee discovered the debtor failed to disclose a few assets, including "cash held in a safe at Debtor's residence." Debtor amended his schedules and claimed the assets as exempt.
- The trustee objected to the exemptions on the basis that debtor claimed the exemptions in bad faith and the exemptions were prejudicial to creditors, relying on Eighth Circuit precedent found in Kaelin v. Bassett (In re Kaelin), 308 F.3d 885, 889 (8th Cir. 2002) (stating that the bankruptcy court has discretion to deny a debtor's amended exemptions if they are proposed in bad faith or would prejudice creditors).

Rucker v. Belew (In re Belew), 943 F.3d 395 (8th Cir. 2019)

- The bankruptcy court overruled the trustee's objections, relying on Law v. Siegel, 571 U.S. 415 (2014), for the proposition that federal law provides no authority for bankruptcy courts to deny an exemption on a ground that is not specified in the bankruptcy code. The BAP affirmed.
- The Eighth Circuit began (and ended) its decision by concluding that Law abrogates Kaelin. Law held that neither § 105(a) nor the court's inherent power to issue sanctions may be used to contravene express statutory provisions authorizing exemptions.

Murray Kentucky Energy, Inc. v. Ceralvo Holdings, LLC (In re Armstrong Energy Inc.), 613 B.R. 529 (B.A.P. 8th Cir. 2020);

and

County of San Mateo, California v. Peabody Energy Corp. (In re Peabody Energy Corp.), 958 F.3d 717 (8th Cir. 2020).

- Murray involved a confirmed plan that called for the sale of assets and the assumption and assignment of debtor's mineral leases. Buyer and landlord later disputed whether certain ongoing indemnity obligations in the leases were still in effect.
- Peabody involved question of whether certain lawsuits relating to pre-petition activity of the debtor were included in a plan confirmation discharge carveout for certain governmental and environmental claims.

Murray Kentucky Energy, Inc. v. Ceralvo Holdings, LLC (In re Armstrong Energy Inc.), 613 B.R. 529 (B.A.P. 8th Cir. 2020);

and

County of San Mateo, California v. Peabody Energy Corp. (In re Peabody Energy Corp.), 958 F.3d 717 (8th Cir. 2020).

- The facts of each are unique and complicated, but the moral of the story is that a bankruptcy court's interpretation of its own order – here confirmation orders, but could be sale orders, etc.—is reviewed under an abuse of discretion standard.
- If the bankruptcy court's interpretation is reasonable and supported by the record, it will be affirmed.

Conway v. Heyl (In re Heyl), 609 B.R. 194 (B.A.P. 8th Cir. 2019)

- One of many reported decisions in a dispute over an investment scheme.
- Takeaway from this case is that pro-se parties are entitled to some deference, but still need to follow the rules and comply with deadlines.
- In addition, recognizing that courts generally afford pro se filings liberal construction, such litigants should at least cite the correct rules on which their relief is based. "[T]he court need not act as a clairvoyant, trying to read the tea leaves of a pro se motion to determine what the movant actually seeks."

- Debtor filed Chapter 7 in Illinois in 1990 and Missouri in 2009. Received discharge in both cases.
- Debtor filed a state court sexual abuse claim against a high school in 2014. Debtor did not list the claim in either bankruptcy because of suppressed memories that Debtor later recovered.
- After Debtor disclosed the abuse claims in the state court abuse case the bankruptcy cases were reopened and the Defendant said Debtor does not have standing. Trustee of the second case stepped in and settled the claim.

Boisaubin v. Blackwell (In re Boisaubin), 614 B.R. 557 (B.A.P. 8th Cir. 2020)

- Debtor objected to the settlement saying the claim was not property of the Missouri bankruptcy estate.
- Opinion contains a good discussion of what happens when a case is closed without administering an asset, among other things. At the end of the day, it was determined that the Missouri bankruptcy estate had "a contingent reversionary interest" in the claim and the trustee had the right to settle it.

Boisaubin v. Blackwell (In re Boisaubin), 614 B.R. 557 (B.A.P. 8th Cir. 2020)



City of Chicago v. Fulton (In re Fulton), 926 F.3d 916 (7th Cir. 2019), cert. granted sub nom. City of Chicago v. Fulton, 140 S. Ct. 680 (2019)

- This is the only bankruptcy case scheduled for argument in the first part of the Supreme Court's 2020 term.
- Decision on this case may resolve a split in the Circuits.
- At issue is whether a person holding estate property as of the petition date in a bankruptcy case has an affirmative obligation to turn that property over to the debtor or trustee immediately upon the filing of the bankruptcy petition or whether that person passively can retain that property without violating 11 U.S.C. § 362.



CSI Worldwide, LLC v. TRUMPF Inc., 944 F.3d 661 (7th Cir. 2019), cert. denied, TRUMPF, Inc. v. CSI Worldwide, LLC, 2020 WL 5882311 (Oct. 5, 2020)

- Held: Pursuit of a bankruptcy claim does not prevent action against or payment from third party guarantors or jointly responsible persons.
- The District Court below found that pursuit of a claim in bankruptcy equated to abandonment of claims against any other potential debtor on a "judicial estoppel" basis.
- Reversing the decision below, the Seventh Circuit found judicial estoppel inapplicable because the creditor had not recovered in the bankruptcy court and because the creditor asserted joint liability by the debtor and the non-debtor third party.

Hazelton v. Board of Regents, 952 F.3d 914 (7th Cir. 2020)

- Held: Based on Bullard, order remanding discharge violation action for determination of proper sanctions lacked finality because the bankruptcy court needed to conduct more than ministerial acts to complete its work below.
- The Seventh Circuit specifically referenced that the bankruptcy court needed to determine whether the Board met the objectively reasonable basis test set forth by Taggart v. Lorenzen, 139 S.Ct. 1795 (2019) to evaluate the propriety of sanctions and indicating that the bankruptcy court needed to determine whether there was "no fair ground of doubt" about any violation of the automatic stay before imposing those sanctions.

In re Pike, No. 17-40736 (Bankr. S.D. III. Aug. 7, 2020)

- Held: Timely filed proofs of claim in the Chapter 13 still can receive payment even if the Chapter 7 discharged the debts covered by those claims.
- Discharge releases a debtor from personal liability, but does not eliminate the debt entirely.
- Permitting a debtor to use Chapter 7 to get a discharge and then convert to Chapter 13 before final liquidation would provide the debtor with all of the benefit of Chapter 7 without any of the consequences.

Nicolaus v. U.S. (In re Nicolaus), 963. F.3d 839 (8th Cir. 2020)

- Under pre-12/31/2017 version of FRBP 3007, debtor's service of objection to IRS claim on the IRS at the address in the proof of claim (but not to U.S. Attorney or Attorney General) is sufficient.
- Unless you have a pre-12/31/2017 claim objection, this decision has only historical value.
- Current FRBP 3007 is more robust and incorporates the FRBP 7004 service requirements for claim objections where claimant is U.S. (or any of its officers or agencies) or insured depository institution.

Paczkowski v. Garven (In re Paczkowski), 611 B.R. 619 (B.A.P. 8th Cir. 2020)

Spooky tale of the § 362(e) deadline.

Lauter v. Wells Fargo Bank (In re Gas-Mart USA, Inc.), 613 B.R. 168 (B.A.P. 8th Cir. 2020)

 Good primer on the contemporaneous exchange of new value defense to preference liability.

▼ Dooley v. Luxfer MEL Technologies (In re Fansteel Foundry Corp.), 617 B.R. 322 (B.A.P. 8th Cir. 2020)

Good primer on the ordinary course of business defense to preference liability.



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2020 Midwestern Bankruptcy Institute Case Law Update

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I. Supreme Court Cases

A. State Law, Not Federal Common Law, Governed Ownership of Affiliated Entities' Joint Tax Refund. *Rodriguez v. F.D.I.C.*, 140 S. Ct. 713 (2020) (Gorsuch, J.)

At issue was the ownership of a federal tax refund. The IRS issued the refund to a group of affiliated entities, including a parent company and a subsidiary that was in receivership, that had filed consolidated returns. The refund was the result of a subsidiary's net operating losses, but the entity group's tax allocation agreement was ambiguous. After the parent company filed bankruptcy, the chapter 7 trustee initiated an adversary proceeding against the subsidiary's receiver, the Federal Deposit Insurance Corporation (FDIC), arguing the tax refund was property of the parent's bankruptcy estate. Noting that the bankruptcy code fails to specify the legal and equitable ownership of a tax refund when an affiliated group files a consolidated return, and applying the federal common law "Bob Richards" rule, the Tenth Circuit Court of Appeals determined the refund belonged to the subsidiary as "the company responsible for the losses that form the basis of the refund."

The Supreme Court reversed and remanded. "As [the Supreme Court] has put it, there is 'no federal general common law." Because state law governs the determination of property rights in the assets of a bankruptcy estate, and the Internal Revenue Code "creates no property rights," state law governed the determination of the dispute. The Court vacated the Tenth Circuit's decision and remanded, instructing the lower court to determine the appropriate resolution under applicable state law. On remand, the Tenth Circuit determined the refund belonged to the subsidiary and its receiver under state law. Rodriguez v. F.D.I.C. (In re United W. Bancorp, Inc.), 959 F.3d 1269 (10th Cir. 2020).

B. Order Conclusively Denying a Motion for Relief from the Automatic Stay is a Final, Appealable Order. *Ritzen Grp., Inc. v. Jackson Masonry, LLC*, 140 S. Ct. 582 (2020) (Ginsburg, J.)

The issue of what constitutes a final order for purposes of appeal appeared before the Supreme Court again this term. Ultimately the court held that a bankruptcy court's order denying relief from the automatic stay constitutes a final and immediately appealable order under 28 U.S.C. § 158(a).

The facts themselves appeared ordinary. Ritzen Group ("<u>Ritzen</u>") entered a contract to buy land in Nashville from Jackson Masonry. The sale fell through. Ritzen sued Jackson Masonry in Tennessee state court alleging breach of contract.

Shortly before trial, Jackson Masonry commenced a Chapter 11 bankruptcy. Section 362(a) of Title 11 of the U.S. Code ("Bankruptcy Code") automatically stayed the Tennessee state court litigation; Ritzen filed a motion for relief from the automatic stay with the bankruptcy court, and the bankruptcy court denied the motion.

Ritzen did not appeal at this point; instead, Ritzen opted to file a proof of claim and an adversary proceeding against Jackson Masonry. In the adversary, the bankruptcy court found that Ritzen actually breached the contract and thus disallowed Ritzen's claim.

Ritzen appealed the denial of the motion for relief and the ruling in the adversary, but the district court affirmed the bankruptcy court, finding the appeal from the motion for relief untimely. Ritzen appealed to the Sixth Circuit Court of Appeals and the Sixth Circuit affirmed the district court. Ritzen appealed to the Supreme Court of the United States pointing to a significant circuit split on the issues.

Building on its own precedent from *Bullard*, the Supreme Court affirmed the lower courts. The Supreme Court found that a motion for relief from the automatic stay constitutes a discrete proceeding separate from the other activities in a bankruptcy case—even if those activities involve the merits of the creditor's claim. Therefore, any denial of relief from the automatic stay constitutes a final decision subject to the rules for immediate appeal.

C. Nunc Pro Tunc Orders Prohibited Unless Court Inadvertently Failed to Enter a Previous Order. *Roman Catholic Archdiocese of San Juan v. Acevedo Feliciano*, 140 S. Ct. 696 (2020) (per curiam)

This case received a decision without argument. The Supreme Court held that the Court of First Instance, a Puerto Rico trial court, had no jurisdiction to issue payment and seizure orders after a pension benefits proceeding was removed to federal district court but before the proceeding actually was remanded back to the Court of First Instance; therefore the orders were void.

This important case may remove a long-used remedy from consideration in all circumstances. The remedy? Using *nunc pro tunc* orders to ask a court's forgiveness for taking action when the party should have first asked for permission. Now practitioners should be on their toes to look to get the permission first.

The case arose from a 2016 suit brought by active and retired Catholic school employees as a result of the elimination of their pension benefits as a result of the termination of their pension plan by the trust created in 1979 by the Office of the Superintendent of Catholic Schools of the Archdiocese of San Juan for that purpose. The suit named the Roman Catholic and Apostolic Church of Puerto Rico, the

Archdiocese of San Juan, the Superintendent, certain schools, and the trust as defendants.

Initially the Court of First Instance heard the matter and denied a preliminary injunction to compel the defendants to pay out specified benefits. The Puerto Rico Court of Appeals affirmed, but the Puerto Rico Supreme Court reversed and remanded to the Court of First Instance for a ruling on which defendant had pecuniary responsibility for the payments.

At that point, the Archdiocese removed the case to the United States District Court for the District of Puerto Rico, alleging the trust's Chapter 11 bankruptcy created federal jurisdiction over the matter. However, the bankruptcy case was dismissed on March 13, 2018.

Within days after the dismissal, the Court of First Instance issued orders allocating liability for the pension payments and directing disbursements, requiring certain deposits into a court registry, permitting seizure of assets and funds to make the payments. Additional appeals to the Puerto Rico Court of Appeals and the Puerto Rico Supreme Court followed.

During the course of those proceedings, the District Court entered an order on August 20, 2018 remanding the case to the Puerto Rico courts *nunc pro tunc* to the March 13, 2018 bankruptcy dismissal. The Archdiocese then petitioned for certiorari from the Puerto Rico Supreme Court's ruling, arguing claims under the First Amendment, and the Solicitor General filed an amicus brief agreeing with the Archdiocese.

The Supreme Court did not address any of the First Amendment issues. Instead, the Court ruled that the Court of First Instance lacked jurisdiction to enter the disputed orders on payment and seizure because the matter had not been remanded to it from the District Court at that point. The Supreme Court further found that the District Court's *nunc pro tunc* order did not cure that defect because *nunc pro tunc* orders only can address "a decree allowed, or ordered, but not entered, through inadvertence of the court".

The Supreme Court did not order a ban all uses of *nunc pro tunc* orders, because the Supreme Court seems to state that *nunc pro tunc* orders may still be appropriate if the record clearly reflects prior authorization for the order.

Aside from the implications of the ruling in the matter at bar, the unusual facts and convoluted procedural history of this case make it difficult to ascertain what the larger impact of this ruling will be. Arguably, the record must reflect some prior authorization for the order in order for the doctrine properly to be invoked. However,

the broadest reading of the ruling raises many practical questions with substantial implications in bankruptcy cases going forward.

D. Supreme Court to Determine Whether Stay Passive Retention of Property of the Estate Violates the Automatic Stay. City of Chicago v. Fulton (In re Fulton), 926 F.3d 916 (7th Cir. 2019) (Flaum, J.), cert. granted sub nom., City of Chicago v. Fulton, 140 S. Ct. 680 (2019)

Scheduled for argument originally in April 2020, this case's argument moved to October 2020. The case presents the issue of whether a person holding estate property as of the petition date in a bankruptcy case has an affirmative obligation to turn that property over to the debtor or trustee immediately upon the filing of the bankruptcy petition or whether that person passively can retain that property without violating 11 U.S.C. § 362. The case also implicates the turnover provision of 11 U.S.C. § 542 and whether that provision automatically comes into play under all chapters of the Bankruptcy Code once the automatic stay applies.

This case matters a great deal to practitioners in the Midwest region, because practitioners often practice in multiple circuits that take opposing views. The majority position taken by the Second, Seventh, Eighth, Ninth and Eleventh Circuits finds that passive retention of property by an entity does violate the automatic stay. In contrast, the Third, Tenth, and D.C. Circuits take the minority view that passive retention of property by an entity does not violate the automatic stay.

The case provoked numerous *amici*, many of which are worth reading. While these materials go to print before oral argument in the case, it is likely that the Supreme Court will have to sort through both textual and policy arguments before taking the matter under submission.

II. Eighth Circuit Cases

CLAIMS AND CLAIM OBJECTIONS

A. Pre-December 2017 Version of Rule 3007(a) Only Required Debtor to Serve Objection to IRS Proof of Claim on Notice Address Set Forth in Proof of Claim. Also Discusses Final, Appealable Order in Contested Matters. *Nicolaus v. United States (In re Nicolaus)*, 963. F.3d 839 (8th Cir. 2020) (Stras, J.)

The IRS filed a proof of claim, and the debtor objected. The debtor served the objection on the IRS at the address set forth on the IRS's proof of claim. The

bankruptcy court sustained the objection when no one responded to the objection within 21 days after it was filed and served. Nearly a year later, the IRS moved to vacate the order disallowing its claim, arguing the bankruptcy court lacked personal jurisdiction over the IRS because the debtor never properly served the IRS by sending the objection to the Attorney General and the local U.S. Attorney. The bankruptcy court agreed and vacated its earlier order disallowing the claim, leaving the IRS's claim intact as a nondischargeable claim. The debtor appealed to the District Court, which affirmed.

On appeal, the 8th Circuit initially determined that it had jurisdiction to hear the appeal because the bankruptcy court's order was a final, appealable order in that it ended the discrete dispute (contested matter) over the IRS's claim and there was nothing left for the bankruptcy court to do. *Id.* at 842 (citing *Ritzen Group, Inc. v. Jackson Masonry, LLC*, 140 S.Ct. 582, 586 (2020)).

Unlike current Rule 3007 of the Federal Rules of Bankruptcy Procedure, which incorporates Rule 7004(b)(4) and (5), the version of Rule 3007 in effect (before December 1, 2017) when the debtor objected to the IRS's claim provided:

An objection to the allowance of a claim shall be in writing and filed. A copy of the objection with notice of the hearing thereon shall be mailed or otherwise delivered to the claimant, the debtor or debtor in possession, and the trustee at least 30 days prior to the hearing.

Because the debtor mailed the objection to the IRS at the address set forth in the proof of claim, nothing more was required under the plain language of the old version of Rule 3007. And because an objection to a claim is not a motion, Nicholaus's objection was not governed by the additional service requirements of Rule 9014 and, by extension, Rule 7004. Consequently, the debtor succeeded in bringing the IRS within the jurisdiction of the bankruptcy court by serving the objection on the address set forth in the proof of claim. Accordingly, the 8th Circuit reversed and remanded with instructions for the bankruptcy court to reinstate its original order disallowing the IRS's claim.

B. Absent Compelling Reasons, Oversecured Creditor May Collect Default Rate of Interest if Note is in Default and Loan Documents Provide for Default Interest. Absent State Law to the Contrary, Court Should Not Apply Liquidated Damages v. Penalty Analysis to Interest Rate. Court Should Not Consider Equitable Factors in Determining Interest Rate Under § 506(b). The Bank of Mo. v. Fam. Pharmacy, Inc. (In re Fam. Pharmacy, Inc.), 614 B.R. 58 (B.A.P. 8th Cir. 2020) (Saladino, J.)

Bank of Missouri (BOM) held an approximately \$11 million first lien against the debtors' inventory, equipment, and real estate used in operating pharmacies in southwest Missouri. Cardinal Health held a second lien for approximately \$1 million. JM Smith Corporation and Smith Management Service, LLC were the debtors' primary supplier and together held the third lien for approximately \$18 million. The relevant parties quickly agreed that the estate should auction the assets to the highest bidder. Smith provided DIP financing and served as the stalking horse bidder for the sale with an \$8 million opening bid. The auction exceeded everyone's wildest dreams and netted enough to pay off BOM's first lien (including principal, non-default interest, and certain fees and expenses under a stipulation with the debtors) and Cardinal's second lien, and leaving excess sale proceeds of approximately \$556,000.

Before the auction, it appeared BOM was undersecured, and BOM did not assert that it was owed interest at the default rate. But after it became apparent that BOM was oversecured, and because the parties reserved any issues as to BOM's entitlement to default interest and other fees and charges, BOM filed a motion under § 506(b) seeking additional post-petition attorneys' fees (\$18,271.19) and default interest (\$442,843.51). The debtors and Smith objected. The bankruptcy court denied BOM's request for default interest as an unenforceable penalty under Missouri law and, alternatively, on equitable grounds.

The BAP reversed. As to the denial of default interest as an unenforceable penalty, the BAP stated that under *United States v. Ron Pair Enters., Inc.*, 489 U.S. 235 (1989), "the pre-confirmation interest rate to be applied under § 506(b) to an oversecured creditor whose claim is evidenced by a promissory note or similar loan agreement is the contract (both non-default and default) rate set forth in the note or loan agreement, to the extent enforceable under applicable law." 614 B.R. at 67. Because the BAP believed applicable state law (Missouri) did not support applying a liquidated damages vs. penalty analysis to a default interest rate set forth in a promissory note, the BAP reversed the bankruptcy court on that ground. As to applying equitable considerations, the BAP acknowledged that "the bankruptcy court was following what is likely the majority position since *Ron Pair*... a presumption in favor of the contract rate subject to rebuttal based upon equitable considerations." 614 B.R. at 65. And noting that the Eighth Circuit has not ruled on this issue, the BAP cited numerous Supreme Court cases cautioning courts to refrain from using equitable considerations to venture outside the boundaries of the statutory language.

Here, the BAP opined that "no section of the Bankruptcy Code gives the bankruptcy court authority, equitable or otherwise, to modify a contractual interest rate prior to plan confirmation." 614 B.R. at 66.

AUTOMATIC STAY

C. Filing New Chapter 13 Case While Prior Chapter 7 Case is Still Pending Can Violate the Automatic Stay. *In re Benitez*, 611 B.R. 106 (B.A.P. 8th Cir. 2020) (Schermer, J.)

The bankruptcy court granted secured creditor relief from stay to foreclose on commercial property owned partially by individual pro se chapter 7 debtor. Two weeks later, the debtor filed a "motion to reconsider," and the bankruptcy court denied that motion. While the chapter 7 case was still pending and the chapter 7 trustee was still trying to determine whether the debtor had any nonexempt assets to administer, the debtor filed a chapter 13 petition to stay the foreclosure sale. Because of the debtor's history of delay and repeated failures to cooperate with the chapter 7 trustee, the court issued an order requiring the debtor to appear and show cause why the court should not dismiss the chapter 13 case as a violation of the automatic stay in the already-pending chapter 7 case. The secured creditor also filed a motion asking the court to determine that the stay relief order entered in the chapter 7 case was unaffected by the chapter 13 filing.

At the show cause hearing the court dismissed the case on two grounds—first, because the debtor's filing of the chapter 13 case was void as a violation of the automatic stay in the chapter 7 case and, second, based on findings in the chapter 7 case, for bad faith as a scheme to manipulate and abuse the Bankruptcy Code and the bankruptcy system to the detriment of his creditors, particularly the secured creditor trying to foreclose on its collateral.

The BAP affirmed dismissal concluding that based on the facts of this case—the debtor's attempt to take control of property while it was still property of the chapter 7 estate—the debtor's filing of the chapter 13 case was a violation of the automatic stay in the chapter 7 case and therefore void. *In re Benitez*, 611 B.R. 106, 109 (B.A.P. 8th Cir. 2019) *citing LaBarge V. Vierkant (In re Vierkant)*, 240 B.R. 317, 320 (B.A.P. 8th Cir. 1999) (concluding that an action take in violation of the automatic stay is void ab initio).

The BAP also concluded that the bankruptcy court should not have considered the alternative ground for dismissal—bad faith—because the bankruptcy court did not include that alternative ground in the order to show case. *Id.* **This case is on appeal to the Eighth Circuit (20-2184).**

D. Automatic Stay Terminates by Operation of Law (§ 362(e)). Paczkowski v. Garven (In re Paczkowski), 611 B.R. 619 (B.A.P. 8th Cir. 2020)

Creditors filed a motion for relief from the automatic stay to pursue a fraudulent transfer action in state court on June 5, 2019. The bankruptcy court granted that motion on September 19, 2019. The debtor appealed.

In exercising its independent duty to examine its jurisdiction, the BAP reviewed the record and concluded that, because the record does not reflect that the 60-day period in § 362(e)(2) was extended either by agreement of the parties in interest or by the bankruptcy court for a specific period of time for good cause, "the automatic stay terminated by operation of law on August 5, 2019, rendering the bankruptcy court's later order lifting the stay superfluous." The BAP did recognize existing case law holding that movants may waive the protections of § 362(e), but the debtor did not raise that issue before the bankruptcy court. So, the appeal was moot, and the BAP dismissed the appeal for lack of jurisdiction.

EXEMPTIONS

E. The Court Cannot Bar a Debtor from Claiming an Otherwise Permissible Exemption Based on Bad Faith Alone. Rucker v. Belew (In re Belew), 943 F.3d 395 (8th Cir. 2019) (Melloy, J.)

After the chapter 7 trustee discovered the debtor failed to disclose a few assets, including "cash held in a safe at Debtor's residence," the debtor amended his schedules and claimed the assets as exempt. The trustee objected to the exemptions on the basis that debtor claimed the exemptions in bad faith and the exemptions were prejudicial to creditors, relying on Eighth Circuit precedent found in *Kaelin v. Bassett* (*In re Kaelin*), 308 F.3d 885, 889 (8th Cir. 2002) (stating that the bankruptcy court has discretion to deny a debtor's amended exemptions if they are proposed in bad faith or would prejudice creditors). The bankruptcy court overruled the trustee's objections, relying on *Law v. Siegel*, 571 U.S. 415 (2014), for the proposition that federal law provides no authority for bankruptcy courts to deny an exemption on a ground that is not specified in the bankruptcy code. The BAP affirmed. *Rucker v. Belew (In re Belew)*, 588 B.R. 875 (B.A.P. 8th Cir. 2018).

The Eighth Circuit began (and ended) its decision by concluding that Law abrogates Kaelin. Law held that neither § 105(a) nor the court's inherent power to issue sanctions may be used to contravene express statutory provisions authorizing exemptions. Law, 571 U.S. at 421. The trustee tried to distinguish Law on the ground that Law addressed equitable surcharge, not amendment to claimed

exemptions. The Eighth Circuit viewed this distinction as meaningless. *Belew*, 943 F.3d at 397. Affirmed.

F. Property Must be Valued as of the Petition Date for Lien Avoidance Analysis. Waltrip v. Sawyers (In re Sawyers), 609 B.R. 331 (B.A.P. 8th Cir. 2019) (Dow, J.)

The debtor reopened her chapter 7 case to avoid a judgment lien because it impaired her homestead exemption. A prepetition fire caused significant damage to the home. The home was still a wreck and worth less than her claimed \$15,000 homestead exemption when she filed bankruptcy. She received her discharge, and her no-asset case was closed. She later received insurance proceeds for the repair and restoration of the home, which increased in value to approximately \$100,000. The judgment creditor argued the home value for purposes of the lien avoidance formula should be the value of the rebuilt home, rather than the home's value on the petition date. The bankruptcy court disagreed, and the BAP affirmed. The BAP held using the petition date is not only grounded in law but is also logical; if the debtor sold her property on the petition date, the price would be based on the property as-is, not factoring in the amount of insurance proceeds. And because the debtor used the insurance proceeds, which were not subject to the judgment lien, to repair the home, the resulting increase in value of the home did not provide a windfall to the debtor. Consequently, the appropriate day for valuing the property for purposes of the lien avoidance analysis was the petition date. This case is on appeal to the 8th Circuit (20-1130) and is briefed and awaiting scheduling for oral argument (as of 9/3/2020)

G. Exemption of retirement account acquired in divorce. *Lerbakken v. Sieloff and Assocs.*, *P.A. (In re Lerbakken)*, 949 F.3d 432 (8th Cir. 2020) (Benton, J.)

A Minnesota state court entered a divorce decree awarding Lerbakken one of his ex-wife's IRA accounts and half of her 401(k). Lerbakken refused to comply with the state court's order to submit a Qualified Domestic Relations Order (QDRO), leaving him with only a domestic relations order. Moreover, Lerbakken apparently took no other action to obtain title or possession of the accounts. Lerbakken didn't pay his divorce lawyers, prompting the state court to award them an attorney's lien and expressly permitted them to recover the unpaid fees from Lerbakken's interests in the 401(k) and the IRA. The unpaid fees exceeded the total of Lerbakken's interests. Undeterred, Lerbakken filed a chapter 7 petition and claimed that his interests in the 401(k) and the IRA were exempt as "retirement funds" under § 522(b)(2)(C). Lerbakken's divorce lawyers objected to the exemptions.

The bankruptcy court disallowed the exemptions, ruling that Lerbakken's interests in the IRA and 401(k) are not "retirement funds." In affirming, the Bankruptcy Appellate Panel stated that Lerbakken's interest in the accounts "resulted from nothing more than a property settlement," construed *Clark v. Rameker*, 573 U.S. 122 (2014), to mean § 522(b)(3)(C) applies only to the person who created and contributed to the retirement account, and concluded that the 401(k) and IRA accounts here "are not retirement funds which qualify as exempt under federal law." *Lerbakken v. Sieloff and Assocs.*, *P.A. (In re Lerbakken)*, 590 B.R. 895, 898 (B.A.P. 8th Cir. 2018).

The Eighth Circuit begins its analysis by reminding us that the Supreme Court in Clark v. Rameker instructs that the exemption in § 522(b)(3)(C) "requires that funds satisfy not one but two provisions to be exempt: the funds must be 'retirement funds,' and they must be held in a covered account." Lerbakken v. Sieloff and Assocs., P.A. (In re Lerbakken), 949 F.3d 432, 435 (8th Cir. 2020). The court also reminds us that exemptions are determined based on the conditions that exist on the petition date. Id. at 435-36. So the court analyze the IRA and the 401(k) separately to determine whether each satisfied the "three significant legal characteristics of ordinary retirement funds" which require the account holder to (1) be able to make additional contributions to the funds, (2) not be obligated to withdraw the funds, and (3) pay a penalty to make an early withdrawal (before age 59 1/2).

Lerbakken's interest in the IRA did not meet any of the criteria. Lerbakken could not make any additional contributions to the IRA so his interest lacked the first characteristic. Lerbakken's interest in the IRA also lacked the second characteristic because the dissolution decree and the court-ordered attorney's lien defined Lerbakken's interest as a debt to his divorce counsel and required him to withdraw the funds to pay counsel. And because he had not taken any action to transfer the account to his own name, Lerbakken was not subject to any penalty for, or any restrictions against, withdrawing the funds before retirement. The court was also troubled by the fact that Lerbakken had not renamed the IRS or transferred it to his own name—two commonly used methods of transferring IRA assets to a former spouse.

Lerbakken's failure to submit a QDRO for the 401(k) also proved problematic for him because he could not access his interest in the account without the QDRO, leaving it to state law to determine his property interest in the 401(k). *Id.* at 437. Looking at the three characteristics of retirement funds, Lerbakken could not make additional contributions, he was obligated to withdraw the funds to pay his attorney's fees, and without the QDRO he could not make a withdrawal when he filed his bankruptcy case.

The court concluded that Lerbakken's interests in the IRA and 401(k) lacked the necessary legal characteristics of "retirement funds" under § 522(b)(3)(C).

AVOIDANCE ACTIONS

H. Bankruptcy Appellate Panel Agrees with Bankruptcy Court that the Contemporaneous Exchange of New Value Defense Protects Payments Made to Junior Lienholder in Connection with Sale of Assets When Junior Lienholder's Release of Liens and Claims Against Third Parties Allowed Debtor to Consummate Sale and Reap Its Benefits. Lauter v. Wells Fargo Bank, NA (In re Gas-Mart USA, Inc.), 613 B.R. 168 (B.A.P. 8th Cir. 2020) (Schermer, J.)

Trustee of creditor trust appointed under confirmed plan sought to avoid and recover as alleged preferential transfers certain payments the debtor made to Wells Fargo in connection with a prepetition sale of assets and related transactions. Wells Fargo held junior liens against substantially all of the debtor's assets to secure claims arising from overdrafts on debtor's accounts at Wells Fargo. Wells Fargo asserted that its release of junior liens against the debtor's FF&E and claims against third parties, all of which were instrumental in allowing the debtor to close a sale of its assets and related transactions, provided the debtor with new value and that such new value was intended by it and the debtor to be substantially contemporaneous with the payments Wells Fargo received in connection with the sale and related transactions.

affirmed the bankruptcy court's decision The BAP applying the contemporaneous exchange of new value defense to protect Wells Fargo from incurring preference avoidance and recovery liability. In doing so, the BAP agreed with the bankruptcy court that: (1) Wells Fargo provided new value by releasing its junior liens where a senior lienholder voluntarily released its liens for less than full payment of its debt; (2) Wells Fargo provided new value to the debtor when the IRS, a secured creditor senior to Wells Fargo, was paid from the proceeds of the sale of debtor's assets and voluntarily released its lien; (3) a \$100,000 payment by the debtor to Wells Fargo one day before a sale closing was intended to be a contemporaneous exchange and was substantially contemporaneous; and (4) Wells Fargo's release of claims against Phillips 66 and KCRC (a Phillips 66 affiliate) resulted in new value in the form of a restructured credit relationship between debtor and Phillips 66 beneficial to the debtor and was intended by the debtor and Wells Fargo to be a contemporaneous exchange.

I. Bankruptcy Court Should Explain Rationale When Determining Whether Preference Payments Are Protected by Ordinary Course of Business Defense. *Dooley v. Luxfer MEL Techs. (In re Fansteel Foundry Corp.)*, 617 B.R. 322 (B.A.P. 8th Cir. 2020) (Schermer, J.)

The Trustee of the WDC Liquidation Trust sued Luxfer to avoid and recover alleged 90-day preference payments totaling approximately \$2.5 million. Luxfer asserted the subsequent new value and ordinary course of business defenses. After trial, the Trustee conceded that subsequent new value of approximately \$1.8 million could be credited to reduce Luxfer's preference liability. The bankruptcy court concluded that the remaining approximately \$682,000 was not protected by the ordinary course of business defense and entered judgment for that amount plus interest.

The defendant in a preference action has the burden of proving nonavoidability of a transfer under § 547(c). 11 U.S.C. § 547(g). While "[t]here is no precise legal test" for determining whether payments were made in the ordinary course of business, the defendant "needs to demonstrate some consistency with other business transactions between the debtor and the creditor." *Id.* slip op. at 4 (quoting *Official Plan Comm. v. Expeditors Int'l of Wash., Inc. (In re Gateway Pac. Corp.)*, 153 F.3d 915, 917 (8th Cir. 1998) and *Lovett v. St. Johnsbury Trucking*, 931 F.2d 494, 497 (8th Cir. 1991).

The BAP stated that the bankruptcy court "appropriately compared the average time from the date of invoice to payment during the baseline [the three-year period running from four years to one year before the preference period] and preference periods" to find that the average days from invoice to payment increased by 40% from the baseline average (43 days) to the preference period average (60 days). But the BAP said the bankruptcy court failed to explain why it adopted 47 days as the cutoff for determining whether payments were made in the ordinary course of business. The BAP says it doubts that an increase of only four days in the average payment length (from 43 to 47 days) "is substantial enough to take all 27 [remaining preference period] payments out of the ordinary course." Consequently, the BAP remanded the "matter back to the bankruptcy court to set forth the method by which it adopted 47 days as the ordinary course cut-off or, alternatively, determine which preferential transfers were made in the ordinary course of business" and to "determine the Trustee's entitlement to recovery under § 550." *Id.* slip op. at 8–9.

PLAN CONFIRMATION, SALES, AND FINANCING

J. The Debtors' Plan did not Violate the Equal-Treatment Rule and was Proposed in Good Faith when Appellants could have Participated in the Plan's "Private Placement" Election, when the Right to Participate in this "Private Placement" was Consideration for Valuable New Commitments, and when the Debtors Mediated the Plan's Terms Until a Consensus was Reached by Creditor Majority. Ad Hoc Comm. of Non-Consenting Creditors v. Peabody Energy Corp. (In re Peabody Energy Corp.), 933 F.3d 918 (8th Cir. 2019) (Melloy, J.)

In a mediation to resolve a security-interest dispute, the parties expanded the negotiation to include forming a reorganization plan. The plan essentially provided a means for the debtors to raise significant funds to pay distributions under the plan and fund operations. To do this, two sales would take place: a sale of common stock at a discount and an exclusive sale of discounted preferred stock to qualifying creditors ("Private Placement" offering). As it relates to Private Placement, the debtors agreed to pay creditors who participated, certain premiums "in consideration for" their agreements. The appellants, members of the Ad Hoc Committee, did not participate in the mediation, elected not to sign the various agreements, and thus, never qualified to participate in Private Placement. Rather, they proposed numerous other reorganization plans to the debtors; all of which were examined and found to be ineffectual.

When the bankruptcy court confirmed the plan (which received approval of all twenty classes of creditors), the Ad Hoc Committee appealed on the grounds that the plan violated the equal-treatment rule found in § 1123(a)(4) and was not proposed in good faith. Affirming the bankruptcy court and the district court, the Eighth Circuit reasoned, on the issue of equal-treatment, that the opportunity to participate in Private Placement was not "treatment for" the participating creditors' claims. Rather, this was new consideration for valuable new commitments by creditors, which included promises to support the plan, to buy preferred stock that did not sell to others, and to backstop the Rights Offering. The plan, therefore, did not violate the equal-treatment rule.

As to good faith, the Court said we must consider the "totality of the circumstances" surrounding the creation of the plan and whether "there is a reasonable likelihood that the plan will achieve a result consistent with the standards prescribed under the Code." Ad Hoc Comm. of Non-Consenting Creditors v. Peabody Energy Co. (In re Peabody Energy Co.), 933 F.3d 918, 927 (8th Cir. 2019). In Peabody, the debtors developed the plan through extensive mediation efforts and input from the negotiating parties. The Ad Hoc Committee's members could have intervened in the mediation but chose not to do so. The debtors permitted alternative plans to be proposed by others, including the Ad Hoc Committee, and all the alternative plans were considered by the debtors and their advisors at board meetings. The official

committee of unsecured creditors independently reviewed the Ad Hoc Committee's proposals and found them to be inferior to the debtors' proposed plan. The one circumstance that gave the Eighth Circuit pause was that in order to take part in the Private Placement, creditors had to elect to do so (and thus make their significant commitments) before the bankruptcy court approved the agreements and the disclosure statement. But the debtors and the official committee of unsecured creditors convinced the Court that time was of the essence given the volatile nature of the coal market and the likelihood that Private Placement parties might have been lured to sabotage the plan and obtain breakup fees should coal-market conditions worsen if there were no support agreement restrictions in place. Based on all these circumstances, the Court held that the bankruptcy court did not clearly err in finding that the debtors proposed their plan in good faith.

K. Bankruptcy Court's Interpretation of Confirmed Plan Entitled to Deference Under Abuse of Discretion Standard as the Court's Interpretation of Its Own Order. *Murray Ky. Energy, Inc. v. Ceralvo Holdings, LLC (In re Armstrong Energy Inc.)*, 613 B.R. 529 (B.A.P. 8th Cir. 2020) (Saladino, J.)

The chapter 11 debtors subleased coal mines in Kentucky. The subleases were subject to ongoing litigation and included an indemnification provision that required debtors to fund, among other things, the lessors' litigation expenses. Under debtors' confirmed plan, Appellants purchased substantially all of the debtors' assets, and debtors assumed and assigned the subleases to Appellants. Portions of the leases and subleases were later amended, but the indemnification provision was not amended. Lessors made demand on Appellants to honor the indemnification obligations relating to the ongoing litigation. So Appellants asked the bankruptcy court to enforce the confirmation order and enjoin the lessors from asserting liability for pre-confirmation obligations on the grounds that the confirmed plan released them from pre-effective date claims, obligations, and liabilities.

The bankruptcy court denied the Appellants' motion to enjoin the assertion of claims for four reasons: (1) the discharge provision of § 1141(d) applies only to debtors, not to third parties such as Appellants, and § 524(e) states that a debtor's discharge does not affect the liability of any other party for a debt; (2) the plan did not release Appellants' pre-effective date contingent liability obligations; (3) Kentucky law (applicable state law) would not consider an unmatured contractual indemnity obligation to be one that has accrued, so the contingent litigation expenses were post-effective date obligations that were not released under the plan; and (4) there was no evidence the parties intended to release the indemnity obligations arising from the sublease litigation.

The BAP's focus was whether the bankruptcy court abused its discretion in holding that the indemnification obligations were not released. In reviewing that issue, the bankruptcy court's interpretation of the confirmed plan is entitled to deference as an interpretation of its own order. *Id.* at 533–34 (citing *JCB*, *Inc. v. Union Planters Bank*, *NA*, 539 F.3d 862, 869 (8th Cir. 2008)). The BAP reviewed each aspect of the bankruptcy court's decision and concluded that the "bankruptcy court's analysis is logical, sound, and supported by the record" and its factual findings are "plausible in light of the record viewed in its entirety" and therefore not subject to reversal. *Id.* at 536.

L. Eighth Circuit Upholds Under Abuse of Discretion Standard Bankruptcy Court's Interpretation of Confirmed Plan to Determine Post-Confirmation Lawsuits Against Reorganized Debtor Are Not Included in Discharge Carveout for Governmental Claims Under Environmental Laws. County of San Mateo, California v. Peabody Energy Corp (In re Peabody Energy Corp.), 958 F.3d 717 (8th Cir. 2020) (Arnold, J.)

Peabody Energy Corporation filed chapter 11 in April 2016. Shortly after Peabody emerged from bankruptcy, three California municipalities sued Peabody and several other energy companies in California state courts in separate but nearly identical lawsuits for alleged contributions to global warming. The nearly identical lawsuits were based on strict liability and negligence for failing to warn; strict liability for a design defect; negligence; trespass; and private nuisance, as well as two public-nuisance claims, one on behalf of the people of California seeking abatement of the nuisance, and the other on behalf of the municipalities seeking, among other things, damages and disgorgement of profits—all focusing on Peabody's actions from 1965 to 2015, except for the lone allegation that Peabody still exports coal from California. Peabody asked the bankruptcy court to enjoin the lawsuits against it as having been discharged under the confirmed plan. The bankruptcy court agreed with Peabody and enjoined the municipalities from pursuing their claims against Peabody. The district court affirmed.

Applying an abuse of discretion standard to the bankruptcy court's interpretation of the confirmed plan, the 8th Circuit affirmed. The primary issue was whether the municipalities' claims were included in a plan carveout from the discharge for governmental claims brought "under any applicable Environmental Law to which any Reorganized Debtor is subject." The plan defined Environmental Law as "all federal, state and local statutes, regulations and ordinances concerning pollution or protection of the environment, or environmental impacts on human health and safety, including [ten federal statutes] and any state or local equivalents of the foregoing." The sample list of the federal statutes includes the Atomic Energy Act; the Clean Air Act; the Comprehensive Environmental Response, Compensation,

and Liability Act; and the Federal Insecticide, Fungicide, and Rodenticide Act. The 8th Circuit concluded that the bankruptcy court acted within its discretion when it determined that the common-law claims, including the nuisance claims (which have their roots in common law), against Peabody do not fit within that definition for the carveout. The 8th Circuit also upheld as reasonable the bankruptcy court's determination that the municipalities were not proceeding under any "police or regulatory law", which was also excepted from Peabody's discharge in the plan because, if successful, the municipalities would obtain a pecuniary advantage over other creditors by seeking "damages and disgorgement of fifty-years-worth of profits."

DISCHARGE

M. Spouses Who Are Jointly and Severally Liable on Judgment Arising from Lease Are Both Liable for Claim in Successive Bankruptcy Cases, Subject to § 502(b)(6) Cap in Each Case. Wigley v. Lariat Cos., Inc. (In re Wigley), 951 F.3d 967 (8th Cir. 2020) (Benton, J.)

This case follows more than a decade of litigation that generated at least three lawsuits, four bankruptcy cases, and thirteen appeals. Lariat Companies, Inc. obtained a \$2.2 million lease-guaranty judgment against Mr. Wigley in 2011. In 2013, a Minnesota state court held Mr. and Mrs. Wigley jointly and severally liable under the Minnesota Uniform Fraudulent Transfer Act (MUFTA) for fraudulent transfers Mr. Wigley made to Mrs. Wigley —resulting in the fraudulent-transfer judgment of approximately \$800,000. Mr. Wigley then filed bankruptcy, Lariat's lease-guaranty judgment claim was capped under § 502(b)(6) at approximately \$550,000, and Mr. Wigley paid the capped amount (plus interest) and received a discharge. The Wigleys then sought to vacate the fraudulent-transfer judgment. The Minnesota state court ruled that Mr. Wigley's discharge did not retroactively extinguish the fraudulent-transfer judgment. Mrs. Wigley then filed her own bankruptcy petition, and Lariat filed a claim for slightly more than \$1.0 million, based on the fraudulent-transfer judgment plus accrued interest. The bankruptcy court allowed Lariat's claim but ruled that § 502(b)(6) capped the claim at the stipulated amount of \$308,805. The BAP reversed on the grounds that Mr. Wigley had already paid the capped amount, thus satisfying the predicate claim and leaving Lariat with no claim against Mrs. Wigley.

On appeal the 8th Circuit began with the proposition under § 524(e) that a debtor's discharge does not affect the liability of any other person or entity on the discharged debt, and the longstanding principle that "discharge destroys the remedy, but not the indebtedness." *Id.* at 970 (quoting *Zavelo v. Reeves*, 227 U.S. 625, 629, 33 S.Ct. 365 (1913)). So, while Mr. Wigley's discharge extinguished his liability on the lease-guaranty judgment, it did not discharge Mrs. Wigley's liability on the fraudulent-transfer judgment. The 8th Circuit also concluded, however, that because

Lariat's claim is that of a lessor—albeit a step removed from the lease itself—it is subject to the § 502(b)(6) cap and should be allowed in the capped amount of \$308,805.

N. Debtors Denied Discharge Under § 727(a)(3), (4), and (5) For Failing to Maintain Adequate Records, For Failing to Disclose Transfers to Children, and For Failing to Document What Happened to Expensive Watches and Jewelry. Snyder v. Dykes (In re Dykes), 954 F.3d 1157 (8th Cir. 2020) (Loken, J.)

The bankruptcy court denied debtors their discharge under § 727(a)(3) for failure to maintain adequate records concerning a series of expensive watch purchases over several years, under § 727(a)(4) for failing to disclose substantial transfers for the benefit of their adult children, and under § 727(a)(5) for failing to document what happened to five valuable watches and failing to provide an accounting of assets allegedly lost when a storage company auctioned off 'hundreds of thousands of dollars' worth of household goods in portable storage containers. The BAP agreed with the bankruptcy court's findings, as well as its characterizations of the watch transactions as "sloppy and informal" and affirmed the denial of discharge under § 727(a)(3) without addressing §§ 727(a)(4) and (a)(5). The 8th Circuit affirmed the BAP.

Having never addressed § 727(a)(3), the 8th Circuit began by observing that an objecting party presents a prima facie case by showing "(1) that the debtor failed to maintain and preserve adequate records, and (2) that such failure makes it impossible to ascertain the debtor's financial condition and material business transactions. The test is whether there is available written evidence made and preserved from which the present financial condition of the bankruptcy, and his business transactions for a reasonable period in the past may be ascertained. The debtor is required to take such steps as ordinary fair dealing and common caution dictate to enable the creditors to learn what he did with his estate. If the [objecting party] meets that initial burden, the burden of production shifts to the debtor to offer a justification for his record keeping (or lack thereof); however, the objecting party bears the ultimate burden of proof with respect to all elements of this claim." *Id.* at 1163 (internal quotations and citations omitted).

The 8th Circuit stated that while the individual debtors did not have "the same duty to create and preserve records of their watch and jewelry transactions as a Chapter 7 debtor operating a business with substantial assets... even in a consumer bankruptcy, the debtor has a greater duty to keep records of a sudden and large dissipation of assets." *Id.* (internal quotations and citations omitted). The court opined that returning twenty-seven valuable watches and a \$68,000 bridal collection ring to a judgment creditor constitutes a "sudden and large dissipation of assets." *Id.* Moreover, Mr. Dykes was not a typical consumer—he was a sophisticated collector of

highly valuable watches and jewelry whose jewelry transactions had a significant impact on the debtors' financial condition. Having determined that the trustee met the initial burden of establishing a failure to maintain and preserve adequate records thus leaving the bankruptcy court without any way to determine the exact transactions between the debtors and the jeweler, the 8th Circuit then agreed with the BAP and the bankruptcy court that the debtors failed to justify their failure to keep adequate records.

RULES, PROCEDURE, AND JUDICIAL DISCRETION

O. Where Debtor Failed to Obtain Stay Pending Appeal of Sale Order, Bankruptcy Appellate Panel Lacked Jurisdiction Over Appeal. *Belew* v. Rucker (In re Belew), 608 B.R. 206 (B.A.P. 8th Cir. 2019) (Nail, J.)

Citizen's Bank made an offer to the chapter 7 trustee in the debtor's case to purchase "all of the bankruptcy estate's causes of action . . . and any and all residual assets of the estate" for \$11,000. The only other offer was from the debtor for \$10,000. Believing the bank's offer to be in the best interests of the estate, the trustee filed a motion seeking the bankruptcy court's approval of the sale to the bank. The debtor objected. Following an evidentiary hearing, the court entered an order approving the sale to the bank. The debtor timely appealed but did not ask the bankruptcy court to stay the order or the sale. The trustee and bank completed the sale.

Section 363(m), known as "the finality rule," provides that "[t]he reversal or modification on appeal of an authorization . . . of a sale . . . of property does not affect the validity of a sale . . . unless such authorization and such sale . . . were stayed pending appeal." According to the BAP, this rule prevents a court from undoing a completed sale to a good-faith purchaser, absent a stay pending appeal. Because the debtor-appellant did not obtain a stay pending appeal, dispute the sale's completion, or suggest the bank was not a good faith purchaser, the BAP concluded that the sale could not be undone, and the appeal was moot. In addition, raising the issue sua sponte, the BAP held that the debtor lacked standing to appeal because, given that there would be no surplus out of the chapter 7 estate for the debtor, he had no financial stake in the order and, therefore, was not a "person aggrieved."

P. Bankruptcy Court Erred in Ruling on Summary Judgment Without Reciting Specific Reasons for Ruling on Perfection of Security Interest in Crops. *Zaitz Trust, LLP v. Bremer Bank, NA (In re Solberg)*, 604 B.R. 355 (B.A.P. 8th Cir. 2019) (Dow, J.)

Landlord leased farmland to "Solberg Farms – Rick Solberg" in 2017. The lease granted the landlord a security interest in the crops being grown on the land, and the landlord filed a statutory lien notice against Richard Solberg, the debtor in these proceedings. Norcan Seeds, Inc. sold seed to "Solberg Farms [a "partnership" consisting of the debtor and his son], Rick Solberg [the debtor], and Kasey Solberg [the son]" and filed a UCC Financing Statement listing the three of them as debtors. Several years previous, Bremer Bank had made several loans to the debtor secured by virtually all the debtor's personal property, including crops, perfecting its security interest by filing a UCC Financing Statement under the name "Richard Allen Solberg."

The debtor filed chapter 11 and, pursuant to the interim cash collateral agreement entered in the case, the bank was granted a lien on the debtor's 2017 crop insurance payments. The landlord filed an adversary proceeding to assert its lien in the 2017 crops. The bank moved for summary judgment, asserting that Solberg Farms was a fictitious d/b/a of the debtor and, therefore, its lien was superior to all the other interests. The bankruptcy court granted the motion.

The BAP reversed. Noting that Rule 56(a) was amended in 2010 to add the directive that "[t]he court should state on the record the reasons for granting or denying the motion," the BAP concluded the bankruptcy court had not done that. Critical to the determination of lien priority was the factual issue whether a partnership existed between the debtor and his son called "Solberg Farms." Because the parties had submitted "alternative evidence" on that question, and the bankruptcy court did not state on the record what evidence it considered in reaching its conclusion that no genuine issues of material fact existed or the analysis the court undertook, summary judgment was not proper. Making such analysis on the record is particularly important when the case turns on a fact issue, which this case did. As a result, the BAP remanded for the court to specify the reasons for its ruling or to reconsider altogether.

Q. District Court Erred in Treating Local Rule Regarding Appeals as Jurisdictional in Nature, and Not Allowing Appellant to Cure Defect in Notice of Appeal. *Briggs v. Rendlen (In re Reed)*, 943 F.3d 849 (8th Cir. 2019) (Grasz, J.)

In long-running litigation involving the barring of attorney Ross Briggs from practice in the bankruptcy court, Briggs filed a single notice of appeal attempting to

appeal to the district court two separate orders of the bankruptcy court—an order denying his motion for reinstatement of his practice privileges and an order denying his motion to disqualify the bankruptcy judge from presiding over matters related to his request for reinstatement. He attached the two orders to the single notice and paid a single filing fee in violation of a local rule requiring separate notices of appeal and separate filing fees. The district court struck the notices and denied Briggs' motion to reconsider. Briggs appealed. The Eighth Circuit held that the local rule was valid because it was not contrary to the related federal rule of bankruptcy procedure, just more specific. However, when the district court refused to allow Briggs to cure the defects, it improperly treated the local rule as jurisdictional. The Eighth Circuit commented that it may be appropriate to strike a notice of appeal when, for example, a party willfully fails to comply with valid local rules, but the district court had made no such finding here. The court stressed that the court should not treat imperfections in the notice of appeal as fatal when the notice provides the basic necessary information—who is appealing, from what judgment, and to which appellate court.

R. Court Properly Denied Pro Se Creditor's Deficient Motions for Extension of Time. Conway v. Heyl (In re Heyl), 609 B.R. 194 (B.A.P. 8th Cir. 2019) (Saladino, J.)

At times acting through counsel, and sometimes acting pro se, creditors filed a nondischargeability complaint against the debtor in connection with a failed business transaction. After the bankruptcy court dismissed the case for failing to state a cause of action, the creditors filed several motions for extensions of time, motions to reconsider, and motions for new trial, all of which failed. The creditors appealed three of the bankruptcy court's orders. At least one of the appeals was untimely, but the creditors requested that the appeal be allowed for excusable neglect under Rule 8002. Affirming the bankruptcy court, and applying the *Pioneer* factors, the BAP concluded that the creditors did not make out a case for excusable neglect. First, although their counsel had sought permission to withdraw at the time of the untimely appeal, that request was not granted until after relevant rulings were made; therefore, the creditors were not pro se at the time, and were therefore not entitled to any special treatment sometimes afforded to pro se litigants. The BAP also affirmed the court's rejection of the creditors' claims of an ill mother and end-of-year timing causing the delay. In addition, recognizing that courts generally afford pro se filings liberal construction, such litigants should at least cite the correct rules on which their relief is based. "[T]he court need not act as a clairvoyant, trying to read the tea leaves of a pro se motion to determine what the movant actually seeks," the BAP said. Rather, "[a] litigant, even a pro se one, bears some responsibility for advocating for himself."

S. Eighth Circuit Summarily Upholds District Court's Decision to Deny Debtor's Motion to Reconsider Denial of Third Motion to Extend Briefing Schedule. Even When Movant Establishes Excusable Neglect, Court Still Has Discretion to Deny Untimely Request for Extension. Nora v. IRS, 782 F.App'x 512 (8th Cir. 2019) (per curiam)

The debtor (Nora) appealed the bankruptcy court's order denying her objection to an IRS claim and elected to go to the district court. After granting Nora two extensions of the deadline to file her opening brief, the district court denied Nora's untimely third motion for extension of time, gave her a few more days to file the opening brief, and warned that failure to file the opening brief by the new deadline would result in dismissal of her appeal. Nora asked the district court to reconsider, arguing that her untimely third motion for extension established excusable neglect under Rule 9006(b)(1), automatically entitling her to an extension. The district court concluded that Nora's proffered reasons for missing the deadline and needing additional time - a family birthday celebration, the death of a former client, and her attorney's demanding schedule – did not satisfy the *Pioneer* factors for excusable neglect: (1) the length of the delay and its potential impact on judicial proceedings, (2) the reason for the delay, including whether it was within the reasonable control of the appellant, (3) whether the appellant acted in good faith, and (4) the danger of prejudice to the appellee. The district court also opined that excusable neglect is a threshold requirement for granting an untimely motion; it does not *entitle* the movant to an extension. Rule 9006(b)(1) is clear that it is within the court's discretion to grant or deny the untimely request for an extension if the delay was the result of excusable neglect. Having concluded that Nora did not establish her delays in filing the opening brief were attributable to excusable neglect, the district court denied Nora's motion for reconsideration and dismissed her appeal. The Eighth Circuit summarily affirmed.

T. Bankruptcy Court's Dismissal with 180-day Bar Upheld. Steiner v. Wilmington Savs. Fund Society, FSB (In re Steiner), 613 B.R. 176 (B.A.P. 8th Cir. 2020) (Shodeen, J.)

The BAP affirmed the bankruptcy court's dismissal of the debtors' separate chapter 13 cases as well as their joint chapter 7 case, with a 180-day bar to refiling. Between 2010 and 2018, Deborah Steiner filed seven chapter 13 bankruptcy cases and Neil Steiner filed one, all to stymie one or more of their secured creditors from exercising their rights to foreclose liens on real estate collateral. All of those prior cases had been dismissed for failing to commence or make plan payments, and Deborah had previously been barred from filing another case for 180 days. Just prior to a scheduled foreclosure sale of the home in August 2019, Deborah filed her eighth chapter 13 case as a "quick-file" case with no schedules, statement of financial affairs, or other required filings. The lender filed an emergency motion to dismiss Deborah's

case with a bar to refiling or for relief from the automatic stay, and the court set that motion for an expedited hearing. Shortly thereafter, Neil filed his own separate chapter 13 case, also a quick-file, in an effort to further delay the lender, but the lender filed an identical emergency motion to dismiss and the bankruptcy court set the hearing for the same time as Deborah's hearing. The bankruptcy court held the hearing across two days, granted the lender relief from the automatic stay in both cases, and took the dismissal with prejudice under advisement, setting a telephone hearing for two days later to announce its ruling. Late in the afternoon on the day before the telephone hearing (which was also day before the continued foreclosure sale), Deborah and Neil filed a joint chapter 7 bankruptcy case. The lender filed an emergency motion to dismiss the chapter 7 case, and the court scheduled it for the already-scheduled telephone hearing the next morning. The bankruptcy court dismissed the joint chapter 7 bankruptcy case on bad faith grounds and because it violated the automatic stay in the recently-filed and pending chapter 13 cases. The court also dismissed both chapter 13 cases with a 180-day bar to refiling on the grounds that the filings were part of a "long-running scheme to manipulate and abuse the Bankruptcy Code and the bankruptcy system to the extreme detriment of their creditors, particularly [the home lender]." The BAP upheld the bankruptcy court's decision under the abuse of discretion standard.

U. Bankruptcy Appellate Panel Concludes State Courts Have Concurrent Jurisdiction to Interpret Confirmed Plans and the Rooker-Feldman Doctrine Prevents Debtors from Seeking Review and Rejection of State Court Judgment by Bankruptcy Court. Finstad v. Gord (In re Finstad), 613 B.R. 180 (B.A.P. 8th Cir. 2020) (Sanberg, J.)

In a long-running dispute over a North Dakota farm, the Finstads brought a quiet title action in North Dakota state court and lost. The Finstads then filed an action in U.S. District Court, which granted summary judgment against the Finstads because the state court decisions deciding ownership of the farm barred the federal action. The 8th Circuit affirmed. Finstad v. Beresford Bancorporation, Inc., 831 F.3d 1009 (8th Cir. 2016). Undeterred, the Finstads reopened their old chapter 12 bankruptcy case and filed an adversary complaint seeking, primarily, a declaratory judgment that they hold legal and equitable title to the farm. The bankruptcy court determined that federal bankruptcy law did not preempt the state court decision, that the Rooker-Feldman doctrine bared consideration of the Finstads' claim of ownership, and that the Finstads' claims were barred by res judicata.

The BAP initially determined that confirmed bankruptcy plans serve as a new contract between the debtor and the parties whose claims are addressed in the plan and that state courts have concurrent jurisdiction to interpret confirmed plans. *Id.* at 183–84. The plan here incorporated a settlement agreement and deed pertaining to the farm. The BAP next concluded that the bankruptcy court properly applied

state law (including the state's parol evidence statute) to determine ownership of the farm because property interests are created and defined by state law. *Id.* at 184 (citing *Butner v. United States*, 440 U.S. 48, 55, 99 S.Ct. 914 (1979)). Because the state courts had jurisdiction and determined the property interests in accordance with North Dakota law, preemption under the United States Constitution or federal bankruptcy laws does not apply. *Id.*

The BAP also determined that the *Rooker-Feldman* doctrine applies to prevent the Finstads, as the losers of their state court quiet title action, from seeking review and rejection of the state court judgment by the bankruptcy court, meaning the bankruptcy court "lacked subject matter jurisdiction over the Finstads' claim of ownership." *Id*.

Finally, the BAP concluded that, pursuant to the Full Faith and Credit Act (28 U.S.C. § 1738), North Dakota preclusion law applied to bar the Finstads' claims and causes of action because North Dakota law defines res judicata as encompassing both claim and issue preclusion, thus prohibiting the relitigation of claims or issues that were raised or could have been raised in the state court litigation. *Id.* at 185. **This case is on appeal to the 8th Circuit (20-1857)**

V. Debtor Did Not Have Standing to Appeal Bankruptcy Court's Order Overruling Her Objection to Chapter 13 Trustee's Final Report. *Marshall v. McCarty (In re Marshall)*, 613 B.R. 458 (B.A.P. 8th Cir. 2020) (Dow, J.)

The BAP dismissed the chapter 13 debtor's appeal of the bankruptcy court's order overruling her objection to the trustee's final report because the debtor failed to demonstrate how the bankruptcy court's order may have diminished her property, increased her burdens, or impaired her rights as to make her an aggrieved party with standing or how the order directly and adversely affected her pecuniarily.

W. Equitable Estoppel Prevents Debtor LLC's Managing Member from Asserting Ownership Interest in Debtor LLC's Property. *Richards v. Rabo AgriFinance, LLC (In re Kip and Andrea Richards Fam. Farm & Ranch, LLC)*, 613 B.R. 699 (B.A.P. 8th Cir. 2020) (Schermer, J.)

The LLC-debtor's confirmed chapter 11 plan required liquidation of substantially all of the debtor's machinery and equipment in cooperation with this lender, Rabo AgriFinance. The individual members of the LLC refused to cooperation in that liquidation and then claimed they personally owned much of the machinery and equipment. The BAP affirmed the bankruptcy court's determination that Kip

and Andrea Richards were equitably estopped from asserting ownership of numerous pieces of machinery and equipment because that equipment was included in the limited liability company's bankruptcy schedules, monthly operating reports, and post-petition tax returns, all of which were signed or prepared by Kip or Andrea; moreover, just before the LLC's amended chapter 11 plan was filed, Kip and Andrea signed individual balance sheets which did not include the machinery and equipment in question, and their individual tax returns did not include any depreciation for farm equipment.

The BAP agreed that Rabo met its burden of proving all six elements for equitable estoppel under Nebraska law, which include:

(1) conduct which amounts to a false representation or concealment of material facts or, at least, which is calculated to convey the impression that the facts are otherwise than, and inconsistent with, those which the party subsequently attempts to assert; (2) the intention, or at least the expectation, that such conduct shall be acted upon by, or influence, the other party or other persons; (3) knowledge, actual or constructive, of the real facts; (4) lack of knowledge and of the means of knowledge of the truth as to the facts in question; (5) reliance, in good faith, upon the conduct or statements of the party to be estopped; and (6) action or inaction based thereon of such a character as to change the position or status of the party claiming the estoppel.

X. Debtor's Unscheduled Sexual Assault Claim from 1970s Was Property of Debtor's Second Bankruptcy Estate When Successor Trustee Appointed in First Bankruptcy Case Chose Not to Administer the Claim, and Bankruptcy Court in Second Case May Approve Trustee's Settlement of Claim. *Boisaubin v. Blackwell (In re Boisaubin)*, 614 B.R. 557 (B.A.P. 8th Cir. 2020) (Sanberg, J.)

Debtor and his then-wife filed a chapter 7 bankruptcy in Illinois in March 1990, and received a discharge in August 1990. Their case was initially closed in October 1990. Debtor filed a second chapter 7 bankruptcy in the Eastern District of Missouri in January 2009. The original trustee in the Missouri case filed a report of no distribution, and debtor received a discharge in April 2009. Debtor then filed a civil action in Missouri state court on April 9, 2014, alleging he had been sexually assaulted in the early 1970s by a faculty member at his high school. The sexual assault claim was not scheduled in either of the chapter 7 cases. After debtor disclosed both bankruptcy cases in the state court action, the defendant filed a motion

for summary judgment alleging the debtor lacked standing to bring the action. Both bankruptcy cases were ultimately reopened, and successor trustees were appointed. The trustee in the Illinois case filed a report of no distribution in September 2018. The Missouri case trustee then filed a motion to settle the claim. During the hearing on the settlement motion, the debtor argued for the first time that his claim is not property of the Missouri bankruptcy estate. The bankruptcy court held that the claim is property of the Missouri bankruptcy estate and applied the factors set forth in *Tri-State Fin.*, *LLC v. Lovald*, 525 F.3d 649, 654 (8th Cir. 2008), to conclude the settlement is in the best interest of the estate and fell within the range of reasonableness. The debtor appealed, arguing, among other things, that the bankruptcy court erred in finding the claim is property of the estate.

In affirming the bankruptcy court's decision that the claim is property of the Missouri bankruptcy estate, the BAP reasoned the alleged sexual assault (which occurred in the early 1970s) constitutes the cause of action, not the date debtor alleges to have recovered his memory of the alleged assault (which debtor claims to have occurred post-bankruptcy). When debtor filed his chapter 7 bankruptcy case in Missouri, he had a contingent reversionary interest in the claim because it had not yet been administered and remained property of the Illinois bankruptcy estate. But when the Illinois trustee chose not to administer the claim, it revested in the entity that held the contingent reversionary interest in the claim, which is the Missouri bankruptcy estate. The BAP also affirmed the bankruptcy court's decision to approve the settlement because the bankruptcy court made detailed findings and conclusions applying the *Lovald* factors to the facts of the case, which supported the reasonableness of the settlement.

III. Tenth Circuit Cases

A. Private Educational Loans Not "Funds Received as an Educational Benefit" under § 523(a)(8)(A)(ii). *McDaniel v. Navient Solutions, LLC (In re McDaniel)*, 973 F.3d 1083 (10th Cir. 2020) (Holmes, J.)

Siding with the Fifth Circuit, the Tenth Circuit Court of Appeals held that private educational loans do not qualify as an "educational benefit" and that the undue hardship standard for dischargeability for those loans is inapplicable. The Tenth Circuit also held that a confirmed and consummated Chapter 13 plan does not preclude dischargeability of a debtor's private educational loans.

At the time the debtors filed Chapter 13, they owed Navient ("Navient") over \$200,000 in various "educational" debts. Six of the loan accounts were private student loans designated as Tuition Answer Loans that one of the debtors used to pay college expenses. Notably, some of the debtors' other loan accounts comprised federally

insured student loans; there was no dispute that those obligations were nondischargeable.

The debtors' amended Chapter 13 plan categorized all student loans as unsecured, made payments on them late in the plan, and did not indicate whether any of the student loans were eligible for discharge. Navient filed multiple claims, all allowed in full. The court below confirmed the plan was confirmed in 2010 and in 2015 the debtors received a discharge, having paid Navient about \$27,000 in principal on its claims.

The discharge order contained standard language, including a brief reference it did not cover "[d]ebts for most student loans." Over the two years post-discharge, the debtors paid Navient over \$37,000 in additional funds on the Tuition Answer Loans.

In June 2017, the debtors reopened their case and filed an adversary seeking declaratory judgment that the Tuition Answer Loans were discharged, plus damages from Navient for allegedly violating the discharge injunction with collection efforts. The debtors argued that the Tuition Answer Loans did not comprise "qualified education loans" under 11 U.S.C. § 523(a)(8)(B) because they were made for purposes other than tuition.

Navient sought to dismiss the complaint on res judicata grounds, asserting that the confirmed plan showed the nondischargeable status of the loans. Navient also argued that 11 U.S.C. § 523(a)(8)(A)(ii) applied because the loans represented "an obligation to repay funds received as an educational benefit." The bankruptcy court denied the motion to dismiss, rejecting the res judicata argument because the confirmed plan failed to state whether the Tuition Answer Loans were discharged. The bankruptcy court also denied the statutory argument on plain language grounds. On direct appeal, the Tenth Circuit evaluated and rejected Navient's res judicata argument, primarily as unsupported by the record. The Tenth Circuit proceeded to analyze the text of § 523(a)(8)(A)(ii) and found that it does not contain the word "loan". The court reasoned that Congress did not intend to except any type of loan from discharge under § 523(a)(8)(A)(ii) because it had used that term elsewhere in § 523(a)(8). Thus, because the Tuition Answer Loans clearly comprise loans, they could not be excepted from discharge under § 523(a)(8)(A)(ii). The Tenth Circuit agreed with the bankruptcy court's reasoning that the statutory terms "education loan" and "obligation to repay funds received as an education benefit" have distinct meanings, highlighting Congress's use of the disjunctive "or" in the statute to signpost that intent.

The Tenth Circuit relied on the Fifth Circuit's opinion in *In re Crocker*, 941 F.3d 206 (5th Cir. 2019) to reject Navient's argument that the 2005 amendments to the Bankruptcy Code explicitly occurred to protect private student loan creditors. The

Tenth Circuit found the unpublished Second Circuit decision to that effect relied on by Navient unpersuasive because that panel did not analyze whether the student loan at issue involved "an obligation to repay funds received as an educational benefit."

B. Nondebtor's Payment of Debtor's Attorney's Fees Was Not a Fraudulent Transfer Under the Tenth Circuit's "Dominion/Control" and "Diminution of the Estate" Tests. Walters v. Stevens, Littman, Biddison, Tharp & Weinberg, LLC (In re Wagenknecht), 971 F.3d 1209 (10th Cir. 2020) (Ebel, J.)

In a rather advanced case of mom coming to the rescue, our heroine paid over \$21,000 in pre-petition attorneys' fees owed by her son. The son requested the money for the express purpose of paying these fees. Mom wrote the check directly to the law firm, and the son never got his hands on one dime. Son filed for Chapter 13 relief less than 90 days after the payment. Over a year later, the case was converted to Chapter 7. The Chapter 7 Trustee sued the law firm to recover the payment as a preferential transfer. The bankruptcy court sided with the trustee, and the Bankruptcy Appellate Panel affirmed. In a 2-1 decision, the United States Court of Appeals for the Tenth Circuit reversed.

All three courts agreed that the relevant inquiry in the case was "whether the payment to the Law Firm constituted a 'transfer of an interest of the debtor in property' as a matter of law under § 547(b)." As it reversed, the majority in the Tenth Circuit applied the test previously outlined in *Parks v. FIA Card Servs., N.A. (In re Marshall)*, 550 F.3d 1251, 1255 (10th Cir. 2008): (1) the "dominion/control" test and (2) the "diminution of the estate" test. Under these tests, the court first looks to see whether the debtor had any control over the transfer of the funds at issue. If the answer is no, the test is not met. Under the "diminution of the estate" test, the court determines whether the transfer "deprives the estate of resources which would otherwise have been used to satisfy the claims of creditors." The majority concluded that it was the mom, not the debtor, who maintained control over the funds at all times, and that the funds never became property of the estate and were therefore never available to satisfy the claims of general creditors. The majority thus determined that no preferential transfer had taken place.

The dissent argued that *Marshall* mandated a different result. The dissent opined that the agreement by mom to loan the funds to her son constituted an asset of the bankruptcy estate over which the debtor exercised dominion and control over by asking for the loan in order to pay a specific creditor. Because the promise to loan was an asset of the estate, the disbursement of the loan proceeds to the law firm deprived the estate of monies that could have been used to pay other creditors. The dissent went on to say that the effect of the majority opinion was to tacitly revive the

"earmarking" doctrine, a doctrine that has been met with diminishing favor by courts around the country.

C. Debtor Not Required to Include Uncertain Right to Future Bonus in Calculation of Disposable Income. *In re Styerwalt*, 610 B.R. 356 (Bankr. D. Colo. 2019)

This case deals with an issue often seen in Chapter 13 cases: whether bonuses that a debtor *might* receive in the future must be considered disposable income and paid to the Chapter 13 trustee for the duration of the Chapter 13 plan. The bankruptcy court, drawing heavily on the "forward looking" approach to disposable income adopted by the United States Supreme Court decision in *In re Lanning*, 560 U.S. 505 (2010), held that such bonuses need not be included in calculating disposable income, because receipt of the bonus is "not known or virtually certain." The bankruptcy court noted that the bonuses at issue were based upon company sales, varied from year to year, and that in two of the past five years (including at the time of plan confirmation) bonuses had not been or were not expected to be paid. The bankruptcy court also opined that the trustee and creditors were not left without a remedy, as they have the right under § 1329 to seek plan modification if an increase in the debtor's income (including but not limited to receipt of a bonus) justifies the request.

D. Chapter 7 Trustee Not Entitled to Compensation for Moneys Disbursed in Separate Chapter 11 Case of Single-Member LLC. Connolly v. Morreale (In re Morreale), 959 F.3d 1002 (10th Cir. 2020) (Moritz, J.)

Here's the blurb from last year:

This appeal involves a question of statutory interpretation of § 326(a), the Bankruptcy Code provision that limits the maximum amount of compensation a Chapter 7 trustee may receive to tiered commission rates applied to a base amount of "moneys disbursed or turned over *in the* case by the trustee" § 326(a). The Chapter 7 trustee appealed the bankruptcy court's compensation order that excluded monies disbursed in the Chapter 11 case of the Chapter 7 debtor's singlemember limited liability company from the compensation base. As a result, instead of receiving the \$265,115.91 in fees and expenses sought, the Trustee was awarded \$86,778.25, roughly one third of the amount sought. Ouch.

The BAP affirmed the bankruptcy court decision. Concluding that the language of § 326(a) is plain and unambiguous, the BAP held that the Chapter 7 trustee's commission base was limited to the case in which he was appointed trustee, the case in which he provided trustee services, and the monies he disbursed as trustee in the Chapter 7 case. It did not include moneys disbursed in a separate debtor's Chapter 11 case where the Chapter 7 trustee removed and replaced the Chapter 7 debtor as the manager of the Chapter 11 debtor and liquidated assets of the Chapter 11 debtor.

On May 15, 2020, the Tenth Circuit entered its order affirming the bankruptcy court and the BAP (actually, they never admit to affirming the BAP, but I was on that panel so I am counting it as a win). The Tenth Circuit focused on the plain meaning of "in the case" contained in § 326(a).

E. Sound Reasons and Evidentiary Hearing Required for Anything Less than Full Disgorgement of Undisclosed Attorney's Fees. *SE Property Holdings, LLC v. Stewart (In re Stewart)*, 970 F.3d 1255 (10th Cir. 2020) (Hartz, J.)

For those of you who represent debtors, if this case doesn't scare you, nothing will. An Oklahoma attorney received more than \$348,000 for representing debtors in their chapter 7 bankruptcy case (that is NOT a typo). A disgruntled creditor moved to have the fee disgorged on the basis that the attorney failed to disclose his fee arrangements and payments for over two years, and then only after being ordered to do so by the court. The bankruptcy court, without holding an evidentiary hearing relying on her experience as both a lawyer and a judge, sanctioned the attorney by reducing his fee by \$25,000. In doing so, the bankruptcy court analogized the sanction to a sanction under Bankruptcy Rule 9011, and found that the reduction was sufficient to deter such misconduct in the future. The creditor appealed, and the BAP affirmed. The matter was then taken to the Tenth Circuit.

In a very forceful opinion by Judge Harris Hartz, the bankruptcy court decision was reversed (since the circuit always talks about reviewing the decision of the bankruptcy court, we are not going to opine on whether the BAP decision was reversed as well). The most compelling part of the decision is the statement by Judge Hartz that "[t]his is not to say that full disgorgement is always appropriate for failure to disclose under § 329. But it should be the default sanction, and there must be sound reasons for anything less." (emphasis added). Judge Hartz found the failure to disclose "egregious," and remanded the matter to the bankruptcy court for the purpose of conducting an evidentiary hearing to determine whether the facts of the case justified a deviation from the general rule of full disgorgement.

F. Law Firm Paid from Fraudulently Transferred Right to Payment Not Liable Under § 550. Rajala v. Spencer Fane LLP (In re Generation Res. Holding Co., LLC), 964 F.3d 958 (10th Cir. 2020) (McHugh, J.)

In this case, a Chapter 7 Trustee filed an adversary proceeding against two law firms to recover over \$2 million (GASP!) paid to them by a debtor from monies the debtor admittedly received as the result of a fraudulent transfer. The underlying transactions dealt with the transfer of three wind energy projects in Pennsylvania. Generation Resources Holding Company, LLC ("Generation Resources") agreed to transfer the right to construct these projects to Edison Capital for approximately \$13 million. One of the projects did not go forward, and Generation Resources transferred its right to payment for the other two projects to Lookout Windpower Holding Company, LLC ("LWHC") and Forward Windpower Holding Company, LLC ("FWHC"), entities created by insiders of Generation Resources (if these facts seem complicated, it's because they are).

Things went bad, and litigation ensued between LWHC and Edison Capital over completion of one of the projects, with LWHC hiring both law firms over the course of the litigation. Eventually, LWHC prevailed, and judgment in excess of \$9 million was entered in its favor. Edison Capital paid the judgment to LWHC. Meanwhile, Generation Resources filed a petition for relief under Chapter 7, and the Chapter 7 Trustee in Generation Resources sought to freeze the monies paid to LWHC pending a determination as to whether all or any portion constituted property of Generation Resources' bankruptcy estate. The bankruptcy court denied the request, the monies were released to LWHC, and the law firms were paid.

The trustee brought an action against LWHC, FWHC, and the insiders who created these entities, claiming that the transfer of the rights in the power projects by Generation Resources to these entities was fraudulent. After considerable litigation, the parties settled and a judgment was entered allowing the trustee to avoid the transfers of the interests in the construction projects from Generation Resources to LWHC and FWHC. The trustee then sued the law firms to recover the monies paid to them from the proceeds of the judgment against Edison Capital. The trustee argued that the law firms met the definition in § 550 of the Bankruptcy Code of a "mediate or immediate transferee" of the property transferred. The law firms moved to dismiss the complaint on the basis that they were not transferees of the property received by the debtor, drawing a distinction between the right to receive monies under the assigned wind energy contracts (the "chose in action") and the money received thereunder. The bankruptcy court denied the motion to dismiss and certified an interlocutory appeal of the decision directly to the Tenth Circuit.

The Tenth Circuit reversed the bankruptcy court decision and remanded with instructions to dismiss the adversary proceeding. The Tenth Circuit focused on the difference between the right to receive the monies and the monies themselves. The

circuit ruled that § 550 allows a trustee to recover "the property transferred," and determined that, in this case, the property transferred was not the money received by the law firms, but the right to receive that money from Edison Capital (if you are struggling with the difference between the two, you are not alone). The Tenth Circuit held that the law firms would have qualified as a "mediate or immediate transferee" only if they had received the contractual right to recover the monies from Edison Capital, rather than a portion of the monies themselves. The Tenth Circuit also rejected the notion that the monies received by the law firms constituted proceeds of property of the estate under § 541(a)(3), noting that assets recovered under § 550 were separately classified under § 541(a)(6).

G. Bad Faith in Chapter 11 Case Rendered Debtor Previously Displaced as Debtor-in-Possession Ineligible to Convert to Chapter 7. *In re Kearney*, 619 B.R. 487 (Bankr. D.N.M. 2020)

This case raises the fascinating question of whether a Chapter 11 debtor, displaced as the debtor-in-possession as the result of confirmation of a liquidating plan proposed by the unsecured creditors' committee, may effectively vacate the order of confirmation by seeking to convert the case from Chapter 11 to Chapter 7. The debtor argued that the right to convert under § 1112(a) was absolute, and that any inquiry as to his motives or bad faith in seeking conversion was not permitted as a matter of law.

The bankruptcy court disagreed and denied conversion, relying heavily on *Marrama v. Citizens Bank of Massachusetts*, 549 U.S. 365 (2007). As noted in *Marrama*, a debtor may convert from Chapter 7 to Chapter 13 only if the debtor is eligible to be a debtor under the chapter to which he seeks to convert. The court found that the debtor: (1) acted in bad faith throughout the Chapter 11 proceedings; (2) the bad faith exhibited by debtor would be cause for immediate dismissal of any Chapter 7 case; (3) debtor was not eligible to be a debtor under Chapter 7; and (4) therefore could not convert his case. The court also noted that § 1112(a)(1) did not give an absolute right to convert to a debtor who was not a debtor-in-possession. Finally, the court rejected the notion that failure to grant conversion would deny him the effective assistance of counsel in a criminal action pending against him.

The decision is presently on appeal.

H. Bankruptcy Court Had Exclusive Jurisdiction to Determine Bankruptcy Estate's Interest in Causes of Action Against Estate Assets. *Hafen v. Adams (In re Hafen)*, 616 B.R. 570 (B.A.P. 10th Cir. 2020) (Michael, J.)

Several years before seeking Chapter 7 relief, the debtor in this case engaged in a Ponzi scheme. Thereafter, he filed a Chapter 7 petition and received a discharge. The investors in the Ponzi scheme received notice of the bankruptcy and did not object to his discharge. Approximately 13 years later, some of the investors filed a motion to reopen the bankruptcy case, alleging that the debtor concealed or failed to disclose assets that Chapter 7 trustee should have administered. The bankruptcy court granted the motion to reopen and appointed a trustee; however, the trustee took no action to administer the assets allegedly omitted or concealed.

About a month before the bankruptcy court granted the motion to reopen, the investors filed an action in their own name in state court seeking to recover assets held by entities related to the debtor and assets the debtor failed to disclose in his bankruptcy schedules. Debtor responded by filing a motion for sanctions against the investors for violating the discharge injunction under § 524. In the motion, debtor raised the issue of the investors' standing to bring claims that ostensibly belong to his bankruptcy estate and which therefore may only be brought by the trustee in bankruptcy. The bankruptcy court denied the motion for sanctions, relying upon the investors' representations that they did not intend to collect the monies from the debtor personally. With respect to the issue of standing, the bankruptcy court declined to decide the issue, stating that it could be resolved in the state court litigation. Debtor appealed.

The BAP reversed, finding that the bankruptcy court had exclusive jurisdiction to determine whether any of the causes of action raised by the investors were property of the estate. The BAP remanded the case to the bankruptcy court for a determination of whether any or all of the causes of action were property of the bankruptcy estate, and to revisit the issue of any violation of the discharge injunction after making such a determination.

I. Small Business Administration's Refusal to Consider Chapter 11 Debtor's PPP Loan Application Violated § 525(a). Roman Catholic Church of the Archdiocese of Santa Fe v. U.S. Small Bus. Admin. (In re Roman Catholic Church of the Archdiocese of Santa Fe), 615 B.R. 644 (Bankr. D.N.M. 2020)

In this case, a Chapter 11 debtor sought a \$900,000 "Paycheck Protection Program" loan under the CARES Act. The Small Business Administration denied the request pursuant to an internal rule stating that applicants "presently involved in

any bankruptcy" are not eligible for such loans. The debtor filed an adversary proceeding and sought a preliminary injunction compelling the SBA to process its application. The bankruptcy court combined the request for preliminary injunction with a trial on the merits and granted debtor the relief it requested. The court found that the actions of the SBA in refusing to consider the application violated § 525(a) of the Bankruptcy Code, and that the SBA regulations declaring bankruptcy debtors ineligible for PPP loans were both "arbitrary and capricious" and beyond the statutory authority granted to the SBA.

IV. Seventh Circuit Cases

A. Bankruptcy, Not Remittitur, Is Appropriate Remedy for Insolvent Defendant. Sommerfield v. Knasiak, 967 F.3d 617 (7th Cir. 2020) (Wood, J.)

While not a bankruptcy case, the Seventh Circuit in *Sommerfield* squarely referenced bankruptcy as a remedy on a matter involving actions under 42 U.S.C. §§ 1981 and 1983. The plaintiff, an officer of the Chicago Police Department, sued the City of Chicago and his supervising police sergeant, Knasiak, due to discrimination, harassment, and retaliation suffered allegedly based on Sommerfield's heritage and Jewish background. Knasiak remained a defendant even after the City of Chicago's dismissal as a party. The jury returned a verdict in favor of Sommerfield, including an award of punitive damages over a half million dollars. The trial court declined to grant a remittitur. Knasiak appealed. The Seventh Circuit affirmed on multiple grounds. Of note to bankruptcy practitioners, the court reasoned that the decision to deny remittitur did not qualify as error because the financial resources of an individual defendant are not a factor in the applicable test. The Seventh Circuit specifically indicated that Knasiak could file bankruptcy if he became insolvent due to the jury verdict, including punitive damages, and allow the statutory system to marshal his debts.

B. Good Case-Specific Reasons Must Exist to Confirm Plan Proposing to Retain Property in Bankruptcy Estate After Confirmation. *In re Cherry*, 963 F.3d 717 (7th Cir. 2020) (Easterbrook, J.)

Chicago's parking fines just keep giving to bankruptcy jurisprudence, so much so that even Judge Easterbook opined that he hoped this decision would be the last in the trilogy. The trilogy thus far:

- First, In re Steenes, 918 F.3d 554 (7th Cir. 2019) (Steenes I) interpreted 11 U.S.C. § 1327(b). Steenes I arose as a result of language in the form Chapter 13 confirmation order in the Bankruptcy Court for the Northern District of Illinois that reversed the presumption that confirmation of a Chapter 13 plan vests estate property in a debtor. In the cases underlying Steenes I, the debtors incurred traffic and parking fines post-confirmation and then claimed not only that they did not need to pay those fines because their plans did not provide for payment of post-petition fines, but also that the automatic stay prevented towing or booting the vehicles for failure to pay those fines. The bankruptcy court denied requests by the City of Chicago to vacate the confirmation orders to remove the vehicles from the bankruptcy estates to permit enforcement of the City's remedies. On appeal, the Seventh Circuit reversed the ruling below on grounds that the record did not contain case-specific reasons as required by § 1327(b) to permit the debtors seek to keep vehicles in the estate and questioned why the statutory presumption about return of property to the debtor upon confirmation generally should not be in place. After Steenes I, the Bankruptcy Court for the Northern District of Illinois altered its Chapter 13 plan form to permit debtors to elect to have property remain in their bankruptcy estates during the pendency of their plans.
- Next, *In re Steenes*, 942 F.3d 834 (7th Cir. 2019) (*Steenes II*) interpreted § 507(a)(2) regarding the same fines at issue in *Steenes I. Steenes II* held that vehicular fines qualify as administrative expenses under § 507(a)(2).

In *Cherry*, the Chapter 13 debtor elected to have property remain in the bankruptcy estate post-confirmation. The City of Chicago objected to confirmation because no case-specific reason existed to depart from the usual presumption that property returns to a debtor post-confirmation. The bankruptcy court overruled the objection and stated that the reasoning in *Steenes I* requiring a finding in order to permit property to remain in a Chapter 13 estate post-confirmation applied only to judicial rulings, which debtors cannot make.

The City sought direct appeal to the Seventh Circuit, which the court granted. On the substance of the appeal, the Seventh Circuit reversed the ruling below, finding in accord with $Steenes\ I$ that § 1327(b) requires valid case-specific reasons to permit property to remain in a bankruptcy estate after confirmation, regardless of whether the plan or the confirmation order vests the property in the estate for that time period.

C. Debtor's Request for *In Forma Pauperis* Appeal Demonstrated Bad Faith in Filing Chapter 13 Case. *Bastani v. Wells Fargo Bank, N.A.*, 960 F.3d 976 (7th Cir. 2020) (Easterbrook, J.)

A person who files a Chapter 13 case but seeks *in forma pauperis* status for an appeal in that case under 28 U.S.C. § 1915 due to indigency, files that Chapter 13 case in actual bad faith according to the Seventh Circuit.

In *Bastani*, the debtor's previous Chapter 13 case dismissed less than a year before she filed her next Chapter 13 case. Therefore, the statute provided that the automatic stay would end 30 days after commencement of the new Chapter 13 case under § 362(c)(3)(B). The debtor sought to extend the automatic stay through judicial relief. The bankruptcy court and district court both denied the debtor's request to extend the automatic stay.

The debtor then appealed to the Seventh Circuit. However, she informed the court she could not afford the filing fee; the debtor claimed she only received \$200 in total income over the preceding 12 months. Therefore, she sought *in forma pauperis* ("IFP") for her appeal under 28 U.S.C. § 1915.

The Seventh Circuit reviewed the debtor's Chapter 13 case, finding that Chapter 13 cases require regular income to make regular payments, but the debtor apparently lacked the ability to make those payments if she could not pay the appeal filing fee. As a result, the court concluded that a person who files a Chapter 13 case cannot proceed IFP in an appeal absent extraordinary circumstances. In addition, the court found that the debtor had filed her Chapter 13 case in actual bad faith because she filed a case to make regular payments while lacking the income to do so. The court also pointed out that the IFP affidavit failed to disclose the debtor's real estate, notwithstanding that preventing foreclosure appeared to be the primary reason for the bankruptcy filing. The Seventh Circuit refused to "be bamboozled," denied the request for IFP status and affirmed the district court.

D. Bankruptcy Court's Adverse Rulings Were Not Evidence of Bias Against Debtor. *In re Grasty*, 799 F.App'x 426 (7th Cir. 2020) (per curiam)

Perhaps an unneeded reminder for some, but the Seventh Circuit thought it important to confirm that adverse rulings against a party do not comprise evidence of judicial bias against that party.

The debtor repeatedly failed to make plan payments under her Chapter 13 plan, and the bankruptcy court dismissed her case for material default. The district court affirmed on appeal. The debtor appealed again, alleging that both the bankruptcy court and district court exhibited a bias against her resulting in the adverse rulings

below. The Seventh Circuit found those arguments without merit because the record demonstrated that the debtor had been given numerous opportunities to propose a plan modification or make payments to cure the defaults that resulted in dismissal of her case.

E. District Court's Decision Remanding for Determination of Sanctions Not an Appealable Final Order. *Hazelton v. Bd. of Regents*, 952 F.3d 914 (7th Cir. 2020) (Sykes, J.)

Violations of discharge injunctions remain a hot area of the law. In *Hazelton*, the debtors sought to hold the Board of Regents for the University of Wisconsin System ("Board") liable for violating the discharge injunction for collecting on a debt related to courses taken on the equivalent of credit terms provided by the institution at issue. The bankruptcy court originally found this deferment plan comprised nondischargeable student loan related debt. The debtors appealed to the district court; the district court reversed the dischargeability determination and remanded to the bankruptcy court for a decision on the merits of sanctions for the Board's violation of the automatic stay by intercepting the debtors' tax refund for application to the debt.

The Board appealed to the Seventh Circuit. The Seventh Circuit dismissed the appeal finding that it lacked jurisdiction over the question of sanctions. Relying on *Bullard v. Blue Hills Bank*, 575 U.S. 496 (2015), the court reasoned that the district court's order on sanctions lacked finality because the bankruptcy court needed to conduct more than ministerial acts to complete its work below.

The Seventh Circuit did provide guidance for the bankruptcy court on remand, including referencing a need to determine whether the Board met the objectively reasonable basis test set forth by *Taggart v. Lorenzen*, 139 S.Ct. 1795 (2019) to evaluate the propriety of sanctions and indicating that the bankruptcy court needed to determine whether there was "no fair ground of doubt" about any violation of the automatic stay before imposing those sanctions.

F. DIP Financer's Pre-Petition First-Priority Lien and Post-Petition Super-Priority Lien Both Superior to Creditor's In Rem Rights of Reclamation. Whirlpool Corp. v. Wells Fargo Bank, Nat'l Assoc. (In re hhgregg, Inc.), 949 F.3d 1039 (7th Cir. 2020) (Sykes, J)

The Seventh Circuit affirmed both the district court and the bankruptcy court, addressing the interplay of reclamation and security interest rights.

Section 546(c) of the Bankruptcy Code governs reclamation. Originally a common law remedy and then codified in the Uniform Commercial Code, the right of

reclamation permits a seller seeks to exercise a limited in rem remedy to recover goods delivered to an insolvent purchaser within a finite time pre-petition. However, reclamation involves substantive, procedural, and temporal restrictions different from those applicable to creditors holding a purchase money or other security interest.

Whirlpool delivered goods on credit to hhgregg which would become a debtor in a Chapter 11 liquidating bankruptcy in the Southern District of Indiana. On the petition date, hhgregg owed Wells Fargo over \$60 million on a prepetition credit facility. That same day, March 6, hhgregg and Wells Fargo agreed to terms for debtor-in-possession financing; one day later, the bankruptcy court approved that financing on an interim basis. The debtor-in-possession financing agreement gave Wells Fargo an automatically and immediately perfected super-priority priming lien on all hhgregg's assets.

Whirlpool made a reclamation claim on March 10, seeking to recover \$16.3 million of merchandise delivered in the forty-five days pre-petition. Whirlpool also objected to the debtor-in-possession financing. When those actions did not yield satisfactory results, Whirlpool filed an adversary proceeding to have the bankruptcy court determine whether it had the highest priority in the reclaimed goods.

The bankruptcy court found that section 546(c) of the Bankruptcy Code required a determination that that reclamation demand remained "subject to" the prior rights of secured creditors. Thus, Wells Fargo held the priority position as to the goods pre-petition because of its first-priority, perfected floating lien on hhgregg's assets pursuant to the prepetition credit facility and post-petition because of the debtor-in-possession financing order. The District Court affirmed.

After discussing the history of reclamation, the Seventh Circuit explained that BAPCPA made it "crystal clear" that prior lienholders' rights prime a seller's reclamation claim under section 546(c)(1). The rule to live by: "if the value of any given reclaiming supplier's goods does not exceed the amount of debt secured by the prior lien, that reclamation claim is valueless." Applying this standard, the Seventh Circuit found that first Wells Fargo's pre-petition lien and then—simultaneously with the pre-petition lien and then alone—its post-petition lien came ahead of Whirlpool's reclamation claim.

G. Workers' Compensation Claim Exempt Even from Creditors Who Provided the Medical Care Associated with the Claim. *In re Hernandez*, 793 F.App'x 449 (7th Cir. 2020) (per curiam)

Under Illinois law, how does one exempt workers' compensation?

The debtor held a pending workers' compensation claim when she commenced her Chapter 7 bankruptcy; that claim settled two days post-petition. However, when she exempted the claim, multiple health care provider creditors objected to the exemption. The bankruptcy court sided with the creditors and denied the exemption. The district court affirmed.

When the issue reached the Seventh Circuit, the matter received a certification to the Illinois Supreme Court for clarification on whether the proceeds of a workers' compensation claim remain exempt from creditors who include health care providers associated with the claim at issue. The Illinois Supreme Court accepted the certification. The Illinois Supreme Court clearly ruled that workers' compensation claim proceeds remain exempt even from the creditors who assisted with the medical care associated with claim itself.

In a very brief opinion, the Seventh Circuit found the Illinois Supreme Court's interpretation of state law dispositive. As a result, the court reversed the rulings below and held the workers' compensation claim exempt under Illinois state law, even from the medical providers associated with the claim.

H. Illinios Exemption for Unpaid Wages Applied in Bankruptcy to Debtor's Interest in Vacation Pay. *In re Burciaga*, 944 F.3d 681 (7th Cir. 2019) (Easterbrook, J.)

A debtor filed a Chapter 7 bankruptcy shortly after losing his job. In his schedules, the debtor exempted eighty-five percent of the accrued vacation pay due and owing from his former employer; the trustee objected to that exemption.

Illinois requires debtors to use its exemptions. 735 I.L.C.S. § 5/12-803 permits exemption of eighty-five percent of a debtor's unpaid wages from collection; 735 I.L.C.S. § 5/12-801 defines "wages" to include all amounts an employer owes an employee.

Upholding the bankruptcy court, the district court found that the Illinois legislature had not intended to permit debtors in bankruptcy to exempt vacation pay because the statute did not reference bankruptcy. On appeal, the Seventh Circuit viewed the legislative intent as irrelevant because the statute itself was unambiguous, reversing the lower courts because Illinois state law clearly required classification of unpaid vacation pay as exemptible unpaid wages as of the petition date in a bankruptcy case. The opinion included an interesting discussion of the application of Illinois' statutory exemption language, noting that "the Bankruptcy Code is what it is and cannot be overridden in the name of equity."

I. Proof of Claim in Bankruptcy Did Not Estop Creditor in Suit to Collect Against Non-Bankrupt Third Party. CSI Worldwide, LLC v. TRUMPF Inc., 944 F.3d 661 (7th Cir. 2019) (Easterbrook, J.), cert. denied, TRUMF, Inc. v. CSI Worldwide, LLC, 2020 WL 5882311 (Oct. 5, 2020)

TRUMPF hired Lynch Exhibits ("<u>Lynch</u>") to appear at a Chicago tradeshow on its behalf. Lynch subcontracted CSI Worldwide ("<u>CSI</u>") to provide certain services related to that tradeshow.

CSI claims that it only agreed to do the work if TRUMPF paid directly or guaranteed Lynch's payment and that TRUMPF agreed to those terms. However, the record fails to include any writing to that effect.

This being a bankruptcy case, the work occurred, but payment of the over half million dollars due did not. CSI commenced an involuntary against Lynch; Lynch then filed a voluntary petition.

CSI filed a claim against Lynch it is bankruptcy case. CSI also sued TRUMPF to recover these funds on grounds of unjust enrichment and promissory estoppel. However, the district court dismissed the suit, reasoning that the claim in Lynch's bankruptcy constituted an abandonment of claims against any other potential debtor. The district court described its approach as judicial estoppel.

The Seventh Circuit disagreed, reversing the ruling below and remanding for a decision on the merits. The Seventh Circuit held that judicial estoppel did not bar CSI's suit against TRUMPF not only because CSI had not recovered in the bankruptcy court, but also because CSI consistently posited that TRUMPF and Lynch jointly held liability for the amounts due. The Court agreed with precedent recognizing that pursuing a bankruptcy claim does not prevent action against or payment from third party guarantors or jointly responsible persons.

J. Seven Million Dollar Punitive Damages Award for Violation of Discharge Injunction Held Excessive. Saccameno v. U.S. Bank N.A., 943 F.3d 1071 (7th Cir. 2019) (St. Eve, J.)

Distinguished less than a few weeks later by *Williams v. First Advantage LNS Screening Solutions Inc.*, 947 F.3d 735 (11th Cir. 2020), the Seventh Circuit here focused on an allegedly excessive punitive damages award.

The debtor completed her Chapter 13 plan, including curing a home mortgage delinquency and received a discharge. The mortgage lender erred in processing the discharge and proceeded to commence collection efforts and move toward foreclosure,

even though the debtor had cured all pre-bankruptcy defaults and even was ahead on payment as of her discharge.

The debtor commenced an action against the lender and took the matter to a jury trial. The jury returned a verdict consisting of \$582,000 in compensatory damages and \$3 million in punitive damages.

On appeal, the Seventh Circuit heard arguments on the allegedly excessive nature of the punitive damages award. The panel found the award excessive because there was no evidence of physical injury to the debtor. In addition, the court found that even though the record showed multiple instances where the lender failed to cease irresponsible behavior, the facts did not support a finding of malicious behavior. As a result, the Seventh Circuit remanded the case with directions to reduce the punitive damages award to an amount equal to the compensatory damages.

K. Claims Discharged in Chapter 7 Payable Following Post-Discharge Conversion to Chapter 13. *In re Pike*, No. 17-40736 (Bankr. S.D. Ill. Aug. 7, 2020)

What happens if a discharged Chapter 7 debtor converts to Chapter 13? According to the Bankruptcy Court for the Southern District of Illinois, timely filed proofs of claim in the Chapter 13 still can receive payment even if the Chapter 7 discharged the debts covered by those claims.

The debtor filed Chapter 7 case, but after receiving a discharge, amended his schedules to disclose an annuity and claim a portion of it as exempt. The Clerk of Court set a bar date for creditors to file proofs of claim. Several creditors did, but Crown Asset Management LLC ("<u>Crown</u>") failed to do so.

The Chapter 7 Trustee spent some time attempting to obtain information about the annuity's value, eventually filing a motion to compel. After receiving the information, the Trustee subsequently moved to compel turnover of the non-exempt portion of the annuity. At that point, the debtor moved to convert to a Chapter 13 case; the Trustee filed a Report of No Distribution.

After conversion, by operation of law, a Notice of Chapter 13 Bankruptcy Case issued setting a new claims bar date in the Chapter 13. Crown's agent filed unsecured claims totaling about \$2,000 before the bar date ran. The debtor objected to the claims as untimely filed because Crown did not assert the claims in the Chapter 7 and the Chapter 7 discharge order eliminated any debts.

The bankruptcy court considered the two opposing lines of case law on this issue, ultimately siding with case law out of a Virginia court that incorporated a detailed analysis of sections 502, 521, 541 and 706(a) of the Bankruptcy Code. See In

re Mosby, 244 B.R. 79 (Bankr. E.D. Va. 2000). The bankruptcy court's analysis focused on the fact that a discharge releases a debtor from personal liability but does not eliminate the debt entirely. The bankruptcy court specifically stated that liability may remain for a bankruptcy estate even if the debtor's personal liability was released. The bankruptcy court rejected the other line of cases and the debtor's position on grounds that permitting a debtor to use Chapter 7 to get a discharge and then convert to Chapter 13 prior to final liquidation would provide the debtor with all of the benefit of Chapter 7 without any of the responsibility.

The debtor then argued that Crown's failure to file proofs of claim during the Chapter 7 rendered it ineligible for distribution in the Chapter 13 case. The bankruptcy court found that position unsupported, determining that a creditor that filed timely proofs of claim in a Chapter 13 had completed all steps necessary to receive payment in that Chapter 13.

L. Purchaser of Debtors' Residual Assets Not Entitled to Reopen Bankruptcy Case to Litigate Its Entitlement to Disputed Funds. *In re TTC Ill. Inc.*, 617 B.R. 894 (Bankr. C.D. Ill. 2020)

The bankruptcy court addressed a motion to reopen brought by a successor to residual assets of a bankruptcy estate. The court denied the motion because there would be no recovery to the actual debtor or distribution for the benefit of creditors. TTC Illinois, Inc., and TTC Holdings, Inc., (together the "Debtors") had significant tax issues with the Illinois Department of Revenue ("IDOR") for many years prepetition, resulting in substantial payments under protest under the Illinois Protest Monies Act. The Debtors obtained a pre-petition injunction requiring the state treasurer to hold the taxes in a special account until the tax issues resolved; those issues remained open as of the bankruptcy filing.

The Debtors filed voluntary Chapter 11 petitions in September 2001. Issues continued in the bankruptcy case. The IDOR filed an amended claim years after the bar date ran, which the court disallowed as untimely. The Debtors and IDOR subsequently stipulated to a priority liability of approximately \$1.8 million.

Eventually, the secured creditor and administrative wage claims received payment in full, but only about half of the priority tax claims were paid. The Debtors filed motions for final decrees in 2015 and the court granted those motions, closing the cases in 2016. At that time, funds remained with the state treasurer.

In 2015, Oak Point purchased the Debtors' residual assets. Seeking reopening, Oak Point asserted that the funds held in the special account constituted its property. Oak Point argued that the bankruptcy case needed to be reopened to require the IDOR to turn over the funds for Oak Point to receive.

The bankruptcy court disagreed. The court noted that the state treasurer and IDOR were not acting as receivers, trustees, or assignees for the benefit of creditors. Instead, state law compelled the funds to be held and not for the benefit of the Debtors' creditors. The bankruptcy court also disagreed that the Protest Monies Act violated the discharge injunction because the statute did not constitute a suit or action against the Debtors. Ultimately, the bankruptcy court determined cause to reopen the case did not exist because the Debtors' creditors would not receive a new distribution and because there were significant questions about how the Protest Monies Act proceeding could go forward in the bankruptcy court.

M. Medical Bills Included as Consumer Debts in Determining Whether Means Test Applied. *In re Zgonina*, No. 19-90467, 2019 WL 6170776 (Bankr. C.D. Ill. Nov. 19, 2019)

In this Chapter 7 case, the debtor countered the United States Trustee's motion to dismiss for substantial abuse by arguing that her medical bills did not comprise consumer debts and, thus, she did not need to pass the means test because her debts did not constitute primarily consumer debts.

The debtor had income well over the median for her locality and, based on the United States Trustee's analysis, could pay over \$150,000-representing almost two-thirds of her unsecured debts-in a Chapter 13 case. However, the debtor claimed that her medical debts should not be treated as consumer debts because they comprised uninsured expenses for medically necessary treatments. The debtor compared the medical bills to taxes that some courts exclude from the definition of consumer debts on grounds that they are imposed, as opposed to incurred.

The bankruptcy court did not find this line of reasoning persuasive, contrasting taxes assessed for the public good with medical expenses incurred for the benefit of a debtor or her dependent. As a result, the bankruptcy court concluded that the debtor's medical bills comprised consumer debts and directed the debtor to file her means test unless the debtor wished to act on other options.

N. Use of Exempt Funds to Pay Off Lien on Debtor's Truck Entitled Debtor to Exempt the Truck as Property Traceable to the Exempt Funds. *In re Swanson*, 607 B.R. 325 (Bankr. C.D. Ill. 2019)

The bankruptcy court determined that a debtor may exempt a motor vehicle when the funds used pay off the vehicle came from exempt proceeds of a personal injury settlement.

Before filing bankruptcy, the debtor received a \$15,000 personal injury settlement. The debtor owned a truck valued at \$5,000 free and clear. He exempted

the first \$2,400 under the motor vehicle exemption, and the balance under Illinois's exemption which covers the debtor's "right to receive, or property that is traceable to" exempt personal injury funds. The chapter 7 trustee objected to the exemption.

The debtor provided evidence that he used funds from the settlement to make loan payments and pay off the truck's lien. The trustee did not contest this evidence, but instead asserted that because the debtor owned the truck prior to the settlement, the truck could not be traced to the proceeds from the settlement.

The court analyzed the statute through a textual statutory theory. The court found that the payment that cleared the lien clearly traced to the personal injury proceeds, characterizing the requirement as "follow the money". The court also declined to read any requirement into the statute that exempt property had to have been acquired with the funds in question, as opposed to paid down or paid off in order to be covered; the court found it sufficient that the debtor's equity in an asset increased because exempt funds paid off the lien.

In re Wagenknecht, ____ F.3d ____, 2020 WL 4930035 (10th Cir. August 24, 2020).
 Mom knows best – no, wait, the Tenth Circuit does.
 In re Stewart, ____ F.3d. ____, 2020 WL 4726521 (10th Cir. August 14, 2020).

Silence isn't so golden (in fact, silence makes gold disappear).

In re Morreale, 959 F.3d 1002 (10th Cir. 2020).

Chapter 7 Trustees and Chapter 11 liquidations don't mix.

Matter of Generation Resources Holding Company, LLC, 964 F.3d 958 (10th Cir. 2020).

Reading this case comes with a free migraine at no extra charge.

In re Hafen, 616 B.R. 570 (10th Cir. BAP 2020).

Only you can prevent forest fires, and only a bankruptcy judge may determine whether a cause of action is property of the estate.

In re Kearney, 2020 WL 3637890 (Bankr. D. N.M. June 18, 2020).

An end around the confirmed plan was crushed by the middle linebacker (er, I mean the bankruptcy judge).

In re Roman Catholic Church of the Archdiocese of Santa Fe, 615 B.R. 644 (Bankr. D.N.M. 2020).

Bankruptcy debtors are not immune to the coronavirus, and the Small Business Administration is not immune to the law.

In re Styerwalt, 610 B.R. 356 (Bankr. D. Colo. 2019).

Bonus, bonus, who gets the bonus? (here's a hint: it was NOT the bankruptcy trustee)