AMERICAN BANKRUPTCY INSTITUTE

Southwest Bankruptcy Conference 2021

CONCURRENT SESSION

Consumer Session

Consumer Cases in the Headlines

Louis M. Bubala III
Kaempfer Crowell; Reno, Nev.

Kathleen A. Cashman-Kramer
Sullivan Hill Rez & Engel; San Diego

Hon. Natalie M. Cox
U.S. Bankruptcy Court (D. Nev.); Las Vegas

Philip J. Giles
Allen Barnes & Jones, PLC; Phoenix

2021

ABI SOUTHWEST BANKRUPTCY CONFERENCE

August 26, 2021
9:45 – 11:00 p.m. PDT

Consumer Cases In The Headlines

Panelists:

Louis Bubala, Esq.
Kaempfer Crowell Law, Las Vegas, Nevada

Philip J. Giles, Esq.
Allen Bares & Jones, Phoenix, Arizona

Kathleen A. Cashman-Kramer, Esq.
Of Counsel
Sullivan Hill Rez & Engel, San Diego, California

Moderator:
Honorable Natalie M. Cox
United States Bankruptcy Court, D. Nevada

Vexatious litigants in Bankruptcy Courts

Koshkalda v. Schoenmann (In re Koshkalda), 622 B.R. 749 (9th Cir. BAP 2020).[1]

How much frivolous litigation does a party need to put up with from a litigant who is sufficiently savvy of the court system and the bankruptcy rules, and who manages to draw out litigation for improper purposes and at a great cost? The BAP in this case was careful to note that no court could put a number on the amount of frivolous pleadings that would constitute harassment; rather, the frivolous filings had to be "inordinate" in number (Id. at 760) and it would not set a minimum numbers of filings to determine if the litigant was vexatious. (Id. at 765).

The Bankruptcy Appellate Panel for the Ninth Circuit ("BAP")[2] remanded in part and reversed in part the decision of the bankruptcy court for the Northern District of California that entered a pre-filing order upon a finding that a chapter 7 debtor was a vexatious litigant.

The facts demonstrate a lengthy history of litigation that began with an action filed by creditors Seiko Epson Corporation and Epson America, Inc. (jointly "Epson") against Artem Koshkalda and others for trademark infringement and counterfeiting, and other claims. The disputes started In the district court and moved to the bankruptcy court after, in January 2018 Koshkalda filed a chapter 11 case. Epson did three things: First, it moved to dismiss the bankruptcy case as a bad faith filing; however, the court instead converted the case and appointed a chapter 7 trustee. Next, Epson sought and was granted relief from stay to have the default judgment (entered without notice of the bankruptcy filing) retroactively validated entered. (Koshkalda appealed that judgment, but the Ninth Circuit affirmed it in December 2019. *See Seiko Epson Corp. v. Koshkalda*, 799 F.App'x 463 (9th Cir. 2019), cert. denied, 141 S.Ct. 956, 208 L.Ed.2d 494 (2020)

Finally, in May 2018, Epson also filed an adversary proceeding in connection with the bankruptcy case seeking to deny Koshkalda a discharge (the "Epson Adversary"). Ultimately, Epson was granted summary judgment on the Section[3] 727 claims. The Ninth Circuit BAP affirmed the judgment portion, but vacated the bankruptcy court's denial of costs to Epson, and remanded it to allow Epson to submit its bill of costs. *See Koshkalda v. Epson*, 2020 Bankr. LEXIS 1382 * (9th Cir. BAP May 26, 2020); appeal dismissed by *Koshkalda v. Seiko Epson Corp. (In re Koshkalda)*, 2020 U.S.App. LEXIS 30433 (9th Cir., Sept. 23, 2020); decision reached on appeal by, remanded by the instant case.

While Epson's adversary proceeding was pending, the Chapter 7 trustee had troubles of her own with Koshkalda. The debtor Koshkalda bjected to most of the trustee's efforts to sell property, to pay claims, and to pay professionals. He also filed numerous motions to try to force the trustee to abandon her efforts, and continued to file similar motions even after having received repeated explanations from the court of what he needed to establish. The final straw happened when Koshkalda objected to the continued employment of the trustee and her counsel and, after those efforts were denied by the court, filed a motion to vacate the court's order approving retention of the trustee's counsel. When the trustee filed her opposition to Koshkalda's motion to vacate the employment order, she also requested that the court enter "a pre-filing order . . . requiring that he obtain court-permission before being permitted to file any further papers in this bankruptcy case." Id.

[1] Appeal taken to the Ninth Circuit; at the time these materials were prepared it is pending as case no. 21-60002.

[2] All references to "BAP" are to the U.S. Bankruptcy Appellate Panel for the Ninth Circuit, unless otherwise specified.

[3] All references to "Section" are to the Bankruptcy Code, 11 United States Code, unless otherwise specified.

at 756. The trustee listed eleven separate motions Koshkalda filed in the bankruptcy case, as well as those he filed in the Epson Adversary as evidence of vexatious conduct, as well as the fact that the bankruptcy court and the district court had previously imposed other forms of sanctions against Koshkalda but that these lesser sanctions had not proven successful in curbing Koshkalda's vexatious conduct. *Id*.

After denying Koshkalda's motion to vacate the employment order, the bankruptcy court set the vexatious litigant motion for hearing, but vacated the hearing and took the matter under submission.

On February 18, 2020, the bankruptcy court entered its Vexatious Litigant Ruling, in which it granted the trustee and Epson the relief they requested. In its decision, the bankruptcy court detailed the history of Koshkalda's actions and examined roughly 44 of Koshkalda's filings in the bankruptcy case and in the Epson Adversary Proceeding. In almost every instance, the bankruptcy court found that each specific paper was frivolous, filed with the intent to harass, or both.

The court then explained that the impetus for its ruling was not the sheer volume of papers Koshkalda filed, but "[r]ather, it is the lack of merit, falsity, and duplicative nature of the disputes instigated by Mr. Koshkalda that forces the court to its conclusion." The court went on to elaborate:

> Each and every time, Mr. Koshkalda raised arguments the court rejected, sometimes several times over. He made factual allegations that were half-true or completely untrue. He lied to the court repeatedly in order to evade Seiko Epson's efforts to trace allegedly fraudulent transfers in which Mr. Koshkalda had involved his parents. In this judge's seven years on the bench, no single litigant has soaked up and wasted more resources than Mr. Koshkalda.

Id. at 756-57. The court specifically found that it was Koshkalda's "frivolous and harassing litigation" that directly led to estate funds being used to pay administrative expenses rather than the claims of unsecured creditors. The court therefore determined that entry of a pre-filing order in the bankruptcy case and in the Epson Adversary was warranted. Koshkalda timely appealed both orders.

After discussing at length the applicable standard in the Ninth Circuit in connection with vexatious litigious conduct, the BAP then carefully addressed, discussed and concluded that all of Koshkalda's grounds for appeal had no merit because: (1) he had adequate notice and opportunity to oppose the motions for pre-filing orders; (2) the bankruptcy court presented an adequate record on review; and (3) the bankruptcy court's findings of frivolousness and harassment were not clearly erroneous. Id. at 758-761. In doing so, the BAP cited considerable details of the conduct by Koshkalda up to that time which had led to, and supported the bankruptcy court's findings.

The BAP declined to follow the bankruptcy court on one ground: it found that the bankruptcy court's pre-filing order was not sufficiently narrowly tailored in two respects: (1) as to the pre-filing order issued in the Epson Adversary, the court found no need for a pre-filing order, since the adversary proceeding was no longer pending, and (2) as to the pre-filing order in both cases, the BAP found them to be overbroad because they impermissibly violated the prohibition against pre-filing merits-screening of pleadings. While the BAP ultimately found that Koshkalda was indeed a vexatious litigation, it vacated and remanded the case pre-filing order with instructions for the bankruptcy court to remove the merit review provision, and to only include papers filed in the chapter 7 case. It also reversed the order in the Epson Adversary as being no longer necessary in light of the case completion.

****

Creditor, as Prevailing Party, Was Entitled to Award of Attorneys' Fees in Section 523(a)(2)(A) Non-dischargeabilty Action.

In *In re Sarria*, 624 B.R. 250 (D. Ct. D. Idaho 2020), the District Court affirmed the decision of the bankruptcy court for the District of Idaho finding that a successful creditor in a non-dischargeability proceeding was entitled to an award of attorneys' fees in prosecuting the action. Specifically, creditor Leku Ona ("Leku") brought an action against the Chapter 7 debtor Sarria and his wife under Section 523(a)(2)(A) alleging that Sarria fraudulently billed Leku for food and wine that he never delivered, and for which Leku had paid. The adversary proceeding was hotly litigated, including significant discovery and motions. Ultimately, the bankruptcy court concluded that Sarria had committed fraud and awarded Leku a non-dischargeable judgment in the amount of $2,490. Id at 252. Leku then moved for an award of attorneys fees in the amount of $223,076.50 under Idaho Code section 12-120(3). The court concluded that fees were authorized by the statute, but reduced the amount sought, and awarded fees of $125,153. Id at 252-53.

Sarria did not appeal the underlying amount of the judgment; rather, on appeal he raised two issues: (1) Leku was not the prevailing party, and (2) the bankruptcy court erred in awarding attorneys fees and costs. The court quickly disposed of the "prevailing party" issue, finding that the bankruptcy court had correctly analyzed and applied the law as to "claim by claim" analysis in this case, noting that the creditor had only asserted one claim, and prevailed on that claim, and that Sarria had presented no counterclaim. As a result, there was single claim, and a single judgment, and warranted a finding that Leku was the prevailing party. Id. at 254. On the other issues, the district court rejected Sarria's arguments finding that the differences between the amount Leku sought from Sarria and the judgment awarded was not as significant as Sarria claimed:

The court then disposed of the issue of the amount sought vs. the amount awarded when it found that it was "not a surprise" that damages were low because it was "represented by [Leku Ona] pretty early on that this was a low damage case." Dkt. 10, at 2. The court also recognized that Leku Ona was "candid throughout the proceedings that problems of proof" made the amount of damages difficult to determine. Dkt. 9-4, at 13. Thus, the record makes abundantly clear that the difference between the damages sought and the judgment of $2,490 was not as significant as the court was lead to believe. It also noted that the bankruptcy court had specifically considered the reasonable fee award factors in Idaho R. Civ. P. 54(e)(3), and explicitly considered the disparate amounts of the judgment and fee award when it determined that Idaho law did not require the amount of attorneys' fees awarded to be proportionate to a damages award. As a result, the district court fully affirmed the bankruptcy court's determination that Leku was the prevailing party, and that the award of attorneys' fees in the reduced amount was appropriate and reasonable.

The decision raises the question: would the result be the same under California law? A brief survey of cases under California law regarding whether an award of attorneys' fees may be appropriate in a bankruptcy case, including one asserting fraud and non-dischargeability, yields many, many cases – too many to distill here at this time. One recent case, however, contains language that suggests that the Sarria result might be different in California. Specifically, in *Mack v. Unruh (In re Mack)*, 2020 Bankr. LEXIS 2038* (9th Cir. BAP July 29, 2020), the BAP considered the question of whether attorneys' fees would be recoverable in bankruptcy court for a fraud claim, finding that they

requested neither attorneys' fees nor interest, and neither California law nor the Notes supported an attorneys' fee award based on a fraud recovery. On the other hand, the BAP has previously held that prevailing party attorneys' fees may be recovered where the 523 action is based on fraud in inducing a party to enter a contract and the underlying contract has a broad provision for attorneys' fees provision. See *Arciniega v. Clark (In re Arciniega)*, No. CC-15-1123-KiGD, 2016 Bankr. LEXIS 343, at *37-39 (BAP 9th Cir. Feb. 3, 2016).

Practice Pointer: Be forewarned: do not assume from the result in Sarria that a prevailing creditor under a Section 523 case will automatically be entitled to attorneys' fees. Do your homework first and be careful to plead the right to attorneys' fees under any applicable statute or contract.

****

The Battle Between the City of Chicago and Chapter 13 Debtors

In the *City of Chicago, Illinois, vs. Fulton*, 141 S.Ct. 585 (January 14, 2021), the United States Supreme Court reversed the Seventh Circuit's decision regarding the City of Chicago's refusal to turn over impounded vehicles to Chapter 13 debtors, finding that the City of Chicago did not violate the automatic stay. The Court held that the stay does not impose affirmative turnover obligations but preserves the status quo.

The facts are simple: vehicles were impounded by the City of Chicago for failure to pay fines for motor vehicle infractions. After the vehicles were impounded, the individual owners filed chapter 13 petitions and sought return of the vehicles. The debtors contended that Chicago's continued possession, and refusal to turn over the vehicles to the debtors, constituted a violation of the automatic stay under Section 362(a)(3). In all four cases, the bankruptcy court agreed with the debtors, and found that Chicago had violated the automatic stay by refusing to turn over the vehicles. Chicago appealed, and the Seventh Circuit affirmed the bankruptcy court's order in a consolidated opinion. See *In re Fulton*, 926 F.3d 916 (7th Cir. 2019). In doing so, the Seventh Circuit specifically found that "by retaining possession of the debtors' vehicles after they declared bankruptcy," Chicago had acted "to exercise control over" respondents' property in violation of Section 362(a)(3). Id., at 924–925.

The Supreme Court granted Chicago's petition for certiorari in order to resolve a split among the Second, Third, Seventh, Eighth, Ninth, and Tenth Circuits over whether an entity that retains property seized pre-petition violates Section 362(a)(3). Id. Ultimately, the Supreme Court vacated the Seventh Circuit decision, and engaged in a detailed discussion regarding the interplay between Section 362(a)(3) and Section 542. Specifically, the Court started out by noting that the language of Section 362(a)(3) did not state that merely retaining possession of estate property violated the automatic stay. It went on to note that the language of Section 362(a)(3) required one to "exercise control" over the property of the estate and, as a result, concluded that Section 362(a)(3) prohibits affirmative acts that would disturb the status quo of estate property as of the time when the bankruptcy petition was filed. Id. at 3.

The Court then went a step further and noted that, while sometimes an "omission" can qualify as act, as the term "control" can mean "to have power over," it concluded that the language of Section 362(a)(3) "implies that something more than merely retaining power is required to violate the disputed provision." Id. at 4. While not conceding that Section 362(a)(3) was in any way ambiguous, the Court noted that Section 542 of the Code, which deals with turnover of estate property, supports the Court's

interpretation of Section 362(a)(3). Specifically, the Court cited to Section 542 as the go-to section for a trustee to obtain from "an entity, other than a custodian, in possession, custody, or control, during the case, of property that the trustee may use, sell, or lease under section 363 of this title" and such entity shall deliver such property to the trustee. The Court went on to note that there was only one way to reconcile Section 362(a)(3)'s "retention" issue with Section 542's turnover issues:

> First, [respondents' reading] it would render the central command of §542 largely superfluous. "The canon against surplusage is strongest when an interpretation would render superfluous another part of the same statutory scheme." Yates v. United States, 574 U.S. 528, 543 (2015) (plurality opinion; internal quotation marks and brackets omitted). Reading "any act . . . to exercise control" in §362(a)(3) to include merely retaining possession of a debtor's property would make that section a blanket turnover provision. But as noted, §542 expressly governs "[t]urnover of property to the estate," and subsection (a) describes the broad range of property that an entity "shall deliver to the trustee." That mandate would be surplusage if §362(a)(3) already required an entity affirmatively to relinquish control of the debtor's property at the moment a bankruptcy petition is filed.

Id. at 5.

Second, respondents' reading would render the commands of §362(a)(3) and §542 contradictory. Section 542 carves out exceptions to the turnover command, and §542(a) by its terms does not mandate turnover of property that is "of inconsequential value or benefit to the estate." Under respondents' reading, in cases where those exceptions to turnover under §542 would apply, §362(a)(3) would command turnover all the same. But it would be "an odd construction" of §362(a)(3) to require a creditor to do immediately what §542 specifically excuses. *Citizens Bank of Md. v. Strumpf*, 516 U.S. 16, 20 (1995). Respondents would have us resolve the conflicting commands by engrafting §542's exceptions onto §362(a)(3), but there is no textual basis for doing so.

Id. at 6.

The Court addressed the addition of the phrase "or to exercise control over property of the estate" that was added by amendment to Section 362(a)(3) in the 1984 amendment. Specifically, it stated that it believes Congress would have had to do more than simply include the "turnover" provision that the respondents wanted read into Section 362(a)(3) merely by adding the "exercise control" language, it made no such attempt to link Section 362(a)(3) to Section 542(a), which it would have done had it intended to make Section 362(a)(3) an "enforcement arm of sorts" for Section 542(a). Id. at 6-7. It concluded that the way to read and apply both sections consistently was to find that "the 1984 amendment, by adding the phrase regarding the exercise of control, simply extended the stay to acts that would change the status quo with respect to intangible property and acts that would change the status quo with respect to tangible property without "obtain[ing]" such property." Id. at 6-7.

Finally, the Supreme Court concluded that it need not decide any issues regarding the application of Section 542 or any other subsections of §362(a), and made clear that its decision was narrowly tailored to the issue of retention of estate property – possession of which was acquired pre-petition – after the filing of a bankruptcy petition, and that the mere retention was not a violation of the automatic stay.

COMMENT: The Ninth Circuit decision *In re Del Mission Ltd.*, 98 F.3d 1147 (9th Cir. 1996), cited by the Supreme Court in footnote 1, was a decision that aligned with the Seventh Circuit's ruling in the

underlying case because the Ninth Circuit found that "a creditor's knowing retention of property of the estate constitutes a violation of' § 362(a)(3)." Id. at 1151 [citations omitted]. The facts in *Del Mission* involved a state taxing agency's refusal to turn over a tax refund to a bankruptcy trustee. In short, the Ninth Circuit followed the respondents' desired interpretation of the "exercise control" language added to Section 362(a)(3) by the 1984 amendments. Because the Supreme Court rejected this interpretation of "exercise control," future Ninth Circuit decisions in this regard will no longer be able to rely on *Del Mission* or similar cases that construed the broader idea of "exercise control." Bankruptcy estates and debtors will now bear the cost and burden of obtaining turnover of estate property and the threat of sanctions for violating the stay may no longer be on the table. This decision is going to also have substantial ramifications for Chapter 7 trustees and will be a big change from the last 24 years of practice under the *Del Mission* case.

*****

The Battle Between Bankruptcy Code Sections 348(e) and 1326(a)(2).

In *In re Evans*, 618 B.R. 493 (Bankr. E.D. Mich. 2020), the Bankruptcy Court for the Eastern District of Michigan determined that, after conversion of the case from chapter 13 to chapter 7, the chapter 13 trustee was required to pay allowed attorneys' fees of the debtor's chapter 13 counsel from the funds that the chapter 13 trustee had on hand, and then pay the balance of those funds to the debtor.

Evans filed a chapter 13 case, and voluntarily converted it to chapter 7 nine months later. The court had not confirmed a chapter 13 plan. Post-conversion, the court issued an order allowing attorneys' fees to the debtor's chapter 13 counsel in the amount of $6,248.00 as a chapter 13 administrative claim. The chapter 13 trustee, out of an abundance of caution, filed a motion seeking an order "Directing Disbursement of Funds on Hand." In the motion, the chapter 13 trustee sought the Court's direction as to how to disburse those funds, in light of the U.S. Supreme Court's decision in *Harris v. Viegelahn*, 575 U.S. 510, 135 S. Ct. 1829, 191 L. Ed. 2d 783 (2015). The chapter 13 trustee was concerned that the Harris decision could bar payment of the allowed attorneys' fees to the debtor's counsel, and instead require the chapter 13 trustee to disburse all of the funds that he had on hand directly to the debtor. The debtor supported payment of the allowed attorneys' fees to the debtor's counsel before paying anything to the debtor.

The court in *Evans* ordered that the chapter 13 trustee must first pay the allowed attorneys' fees to the debtor's chapter 13 counsel, and then pay the remaining balance to the debtor. In doing so, the court reviewed the reasoning behind the U.S. Supreme Court's decision in *Harris*. It found that the *Harris* court's requirement that the chapter 13 trustee could only turn the funds over to the debtor, and not to anyone else, could be reconciled because *Harris* involved a confirmed plan followed by conversion to chapter 7, so the Chapter 13 trustee could not distribute funds on hand to creditors as called for by the confirmed plan, but rather had to return the funds to the debtor. Because no plan was confirmed in Evans, the court found that *Harris* was inapplicable, and that the third sentence of Section 1326(a)(2)[4] controlled the chapter 13 trustee's disbursement of funds on hand from the debtor's pre-confirmation plan payments, which required the trustee to pay the allowed attorneys' fees of the debtor's counsel before paying the debtor. Id. at *494 (citing *In re Arnold*, 618 B.R. at 494).

[4] The third sentence of Section 1326(a)(2) provides: "If a plan is not confirmed, the trustee shall return any such payments not previously paid and not yet due and owing to creditors pursuant to paragraph (3) to the debtor, after deducting any unpaid claim allowed under section 503(b) [11 USCS § 503(b)]."

Relying on this statutory language and the court's conclusion in the *Arnold* case that *Harris* does not apply to cases converted to chapter 7 pre-plan confirmation, the *Evans* court ordered the chapter 13 trustee to pay the attorneys' fees from the funds he was holding that otherwise would belong to the debtor.

Problem: the Evans' court ignored significant language in Harris that may have called for a different result. Specifically, the Harris court considered and rejected a similar argument by the chapter 13 trustee in that case when it found:

> When a debtor exercises his statutory right to convert, the case is placed under Chapter 7's governance, and no Chapter 13 provision holds sway. §103(i) ("Chapter 13 . . . applies only in a case under [that] chapter."). Harris having converted the case, the Chapter 13 plan was no longer "bind[ing]." §1327(a). And Viegelahn, by then the former Chapter 13 trustee, lacked authority to distribute "payment[s] in accordance with the plan." §1326(a)(2); see §348(e).

Id. at 793. Because the services of the chapter 13 trustee were terminated upon conversion under Section 348(e), the chapter 13 trustee was stripped of authority to provide any "service," and all funds the chapter 13 trustee had on hand were to be returned to the debtor. In doing so, the Harris court appeared unconcerned about whether the conversion of the case happened before or after confirmation: the significant fact to the Harris court was the fact of a conversion, which caused Section 348(e) to come into play.

COMMENTARY: This decision highlights a split among courts on how to construe Harris. Specifically, while the Evans' court relied on the third sentence in Section 1326(a)(2) as authority for the chapter 13 trustee to pay the attorneys' fees, that appears to be a minority view. The majority of courts follow the Section 348(e) language from Harris, and thus the contrary result. [Conflicting citations available upon request.]

*****

Title: Chapter 13 Trustee Can Modify Chapter 13 Plan Late in the Game to capture stock option payments that would pay creditors in full.

In *Berkley v. Burchard (In re Berkley)*, 613 B.R. 547 (9th Cir. BAP 2020), the BAP affirmed the bankruptcy court's granting of the chapter 13 trustee's motion to modify the debtors chapter 13 plan to require the debtor to pay $202,000 from a $3.8 million payment the debtor was receiving in the 57th month of the plan, so that his creditors could be paid in full. The $3.8 million payment was for stock options that the debtor earned for post-petition services acquired prior to the Trustee's motion to modify. His confirmed plan had only provided for a dividend of approximately 1% of unsecured nonpriority claims. The chapter 13 trustee brought the motion to modify under Section 1329(a) as "changed circumstances" that warranted modification of the plan. The debtor opposed, on the grounds that the money he received from the stock options was not property of the estate and, as a result, he could not be forced to pay any of it into his plan. The bankruptcy court disagreed, overruled the debtor's opposition, and granted the chapter 13 trustee's motion. The debtor appealed.

In affirming the modification of the chapter 13 plan and the grant of the Chapter 13 trustee's motion, the BAP found that the bankruptcy court did not abuse its discretion when it granted the trustee's motion to modify the plan under Section 1329. It based its affirmance on two separate but related grounds: (1) it first dealt with the debtor's argument that confirmation of his plan meant that any

increase of his earnings after that time were his and his alone, and he could not be compelled to turn any of it over to his creditors by way of a modified plan. In concluding that confirmation of the cases did not in fact shield increases in his oncome, the BAP discussed Ninth Circuit decisions construing Section 1329, including those that specifically stated that the trustee could capture post-petition increases in income. Id. At p. 554. It also reminded the debtor that the Bankruptcy Code required debtors pay into their plans for whatever their applicable commitment period was (i.e., 36 months for below median and 60 months for above median debtors), and that modifying plans under Section 1329 was consistent with this mandate. See, id., at p. 554. It also referred to the fact that "the bankruptcy court's decision is consistent with the Bankruptcy Abuse Prevention & Consumer Protection Act of 2005's primary goal of helping "ensure that debtors who can pay creditors do pay them." [citation omitted]." Id. At 554. The debtor also raised the argument that, because confirmation of his plan vested property of the estate back in him, since the $3.8 million windfall was post-petition, it was therefore not property of the estate.

The BAP agreed with the initial premise, saying that, although the court had adopted the so-called "estate termination approach," which recognizes "the vesting of all estate property in the debtor at confirmation (unless the plan or confirmation order provides otherwise) and the concomitant termination of estate property . . . . ," it noted that nothing in the Code provides that plan payments may only be funded by estate property, and that under § 1329, the bankruptcy court can approve a plan modification that increases the debtor's plan payments due to a postconfirmation increase in the debtor's income, whether or not the additional income is property of the estate. The BAP then concluded that there was no inconsistency between this authority and its affirmance of the bankruptcy court's decision, and the BAP rejected the debtor's argument that the revesting provision barred any modification of the plan.

*****

Creditor's attorney's fees were wholly nondischargeable.

In *Bartenwerfer v. Buckley (In re Bartenwerfer)*, 613 B.R. 730 (9th Cir. BAP Apr. 23, 2020), the Bankruptcy Appellate Panel for the Ninth Circuit—in the third appeal in the case relating to the nondischargeable judgment—determined that the creditor's attorney's fees were wholly nondischargeable. Since the factual predicates for the creditor's state court fraud and non-fraud claims were inextricably intertwined, apportioning the fees was impossible. Because the debtors failed to meet their burden to identify or explain why the creditor's fees were unrelated to his nondischargeable fraud claim and failed to make specific objections to the creditor's fee request, the BAP affirmed the bankruptcy court's determination that the creditor was entitled to his attorney's fees as part of the nondischargeable judgment.

Pre-petition, appellant-debtors remodeled and sold a home in San Francisco to appellee Buckley, who later discovered significant defects in the property. A lengthy and complicated three-year battle then ensued in state court, including debtors' cross-complaints against Buckley and the debtors' contractors, culminating in a 19-day state court trial. At the conclusion, the jury found in Buckley's favor on his breach of contract, negligence, and failure to disclose claims, awarding damages which the state court reduced to $234,671, plus prejudgment interest, attorney's fees, and costs. Before the state court could hear Buckley's motion for attorney's fees, the debtors filed a chapter 7 case. Buckley then filed an adversary proceeding to have the judgment determined to be nondischargeable.

After trial in the adversary proceeding, the bankruptcy court entered judgment in favor of Buckley declaring the state court judgment nondischargeable under Section 523(a)(2)(A). Buckley then moved to have his attorney's fees and costs of $378,491 incurred in the state court litigation added to the judgment as a nondischargeable debt. The debtors opposed. The bankruptcy court sided with Buckley, subject to a determination that his fee request was reasonable, which resulted in a reduced award of $348,483.53 to eliminate clerical and travel fees. The bankruptcy court amended the nondischargeable judgment to award Buckley his nondischargeable fees.

After remand to shift the burden to the debtors to specify which time entries or fee categories were not attributable to the debtors' fraudulent conduct, the bankruptcy court found that the debtors failed to meet their burden and awarded Buckley his fees in full, plus prejudgment interest at the rate of 10% per annum from the date of entry of the state court judgment. The debtors appealed and the BAP affirmed, finding the bankruptcy court applied the correct legal standard governing apportionment of fees. While the BAP agreed that Buckley, as the prevailing party at trial, bore the initial burden of establishing that his fees stemmed from the nondischargeable fraud claims, it also noted specifically that "[F]ee apportionment is not required if the issues in the various claims are 'so inextricably intertwined that it would be impractical or impossible to separate the attorney's time into compensable and noncompensable units,' [citation omitted]."

The BAP then examined the record below and ultimately concluded that a significant overlap of facts and issues existed between the claims in the state court action and the adversary proceeding. The bankruptcy court painstakingly articulated the overlapping factual predicates and issues in the claims asserted by the parties to conclude that Buckley was not required to apportion his fees because his claims were premised on a common core of facts that were inextricably intertwined.

The BAP then found that the debtors: (1) did not make specific objections to specific time entries; (2) argued generally that the time entries contained block billing; and (3) identified only broad categories of fees as "extraneous" to the fraud claims, without identifying why they were objectionable. As a result, the BAP held that the debtors failed to carry their burden. The BAP ultimately concluded that the bankruptcy court did not abuse its discretion in finding that the fees could not be apportioned and that the debtors failed to make specific objections to the time entries. Therefore, the fees requested were allowed in full.

*****

Treatment of Community Property When Couples File Separate, Overlapping Cases.

In *In re Moreno*, 622 B.R. 903 (Bankr. C.D. Cal. 2020), the bankruptcy court held that where a married couple files overlapping, separate bankruptcy petitions (1) the bankruptcy estate, of the spouse who files his or her petition first, obtains a property interest in all community property; (2) the spouse who files his or her petition second, then obtains a contingent and reversionary right to that community property; (3) upon closure of the first bankruptcy case, the second spouse's contingent and reversionary right to all community property arises; and (4) if the second spouse's bankruptcy case remains open, the community property re-vests with the bankruptcy estate in his or her case.

Here, the husband filed a chapter 7 bankruptcy petition initiating a bankruptcy case in December 2018, and in February 2019, the wife filed a chapter 13 petition initiating a second, overlapping bankruptcy case. The first case was pending when the second case was filed. In her chapter 13 case, the proposed treatment of a secured claim in connection to a community property vehicle was

paramount. The vehicle and associated secured claim were properly disclosed in both sets of schedules, and in the wife's proposed chapter 13 plan, the wife sought to modify the secured claim. However, when the petition and plan were filed, the husband's case had not yet been closed.

The chapter 13 trustee moved to deny confirmation of the plan, and the court denied confirmation of the plan, holding that the vehicle at issue did become property of the wife's bankruptcy estate on the Chapter 13 petition date nor when the plan had been proposed, but on a later date. Consequently, the court held that the plan, which attempted to modify the secured claim associated with that vehicle, was not confirmable. First, the court held that "when a married couple files separate bankruptcy cases, all of their community property becomes property of the bankruptcy estate in the case filed first." Id. At 907. As such, the vehicle, as community property, was an asset of the husband's bankruptcy estate because his petition had been filed first, and the wife held a contingent and reversionary property right in the vehicle because the husband's case was still open, and Section 554 (providing that "any property…not otherwise administered at the time of the closing of a case is abandoned to the debtor…" did not yet come into play.

Since the wife and her Chapter 13 estate only held a contingent and reversionary right to the vehicle, when her plan had been proposed, the vehicle had not yet been swept into the wife's bankruptcy estate and, therefore, her plan improperly attempted to modify the related secured claim. (However, the subsequent closure of the husband's case caused the community property interest in the vehicle to transfer or vest with the wife pursuant to Section 541(a), and became property of the wife's bankruptcy estate upon closure of the husband's case under Section 1306(a) applies strictly to chapter 13 cases (property "that the debtor acquires after the commencement of the case but before the case is closed, dismissed, or converted…").

*****

Section 348(f)(1)(A), that defines property of the estate at the time of conversion, includes funds that were fraudulently transferred out of the voluntary estate in order to avoid creditors.

The Ninth Circuit, after more than 6 years of litigation that started with a chapter 13 case filed in San Diego in 2013, made this determination in *Brown vs. Barclay (In re Brown)*, 953 F.3d 617 (9th Circuit 2020). There, during the Chapter 13 case, the Debtor Jason Brown made unauthorized and fraudulent transfers to his three brothers, one of whom was Kenneth Brown, the appellant herein. The source of those funds was an inheritance received by the Debtor Jason several months after the Chapter 13 was filed.[5] When the Chapter 13 trustee learned of the transfers of more than $37,000, he moved to convert the case to chapter 7; the motion was granted with a finding that Jason's conduct had been in bad faith, and Mr. Barclay was appointed as the Chapter 7 trustee. First the bankruptcy court, then later the BAP, held that the transferred funds remained part of the converted estate and, as a result, the Chapter 7 trustee could recover the funds for the Chapter 7 estate.

Kenneth's appealed the bankruptcy court's order to the BAP. The bankruptcy court had ruled, alternatively, and offered two different reasons why the funds remained part of the bankruptcy estate: (1) because the transfers were not for ordinary living expenses permitted by statute, but were made in bad faith to avoid creditors, they should be regarded as property of the converted estate; and (2)

[5] Prior to the Chapter 13 filing, the three non-debtor brothers, including Kenneth, abandoned their interest in the inheritance to Jason.

alternatively, because Jason's estate had a claim to recover the funds from his brothers, the funds could be said to have remained within his possession or control within the meaning of Section 348 (f)(1)(A). On the first appeal, the BAP agreed with the bankruptcy court's first reason, and affirmed.

On appeal to the Ninth Circuit, appellant Kenneth urged that Section 348(f)(1)(A) must be construed to mean that the post-conversion estate only contains property that "remains in the possession of or is under the control of the Debtor," and does not include funds the Debtor had transferred pre-conversion, regardless of whether the transfers were fraudulent. Id at 624. The Ninth Circuit disagreed, affirming the BAP, which had affirmed the bankruptcy court's decision.

While the Ninth Circuit arrived at the same conclusion as the bankruptcy court and the BAP, it came to that result by a different rationale. It noted that the appellant never challenged the bad faith finding of the bankruptcy court, and his sole argument on appeal is that the funds would not be considered property of his brother Jason's converted estate because the funds were not in Jason's possession or control at the time of the transfer and that, as a result, Section 348(f)(1)(A) required a finding that the spent funds were not property of the converted estate. In considering this, the Ninth Circuit looked at the history of the application of Section 348(f)(1)(A), including *In re Salazar*, 465 B.R. 875, 878–79 (BAP 9th Cir. 2010), which was the first BAP case to construe Section 348(f)(1)(A).

The Ninth Circuit then considered Appellant's argument that the BAP should have discussed the Supreme Court's decision in *Law v. Siegel*, 571 U.S. 415 (2014), namely, that the Bankruptcy Court and BAP committed a similar error by using their equitable authority to override an express provision of the Bankruptcy Code. It noted that "[t]he Code reflects a firm policy of not rewarding fraud or bad-faith debtors—which it realizes in numerous provisions, including the structural relationship between Chapter 13 and Chapter 7. In both Chapter 13 and Chapter 7 proceedings, unauthorized transfers of estate property by the debtor can be recovered by the trustee. See Section 549(a). Under both, a delay of discharge may be obtained where a debtor fraudulently transfers funds. See Section 523(a)(2)(A)."

The Ninth Circuit then concluded that, because the Code permits the court to order conversion to Chapter 7 when the debtor fraudulently transfers funds during the case, had the case remained in Chapter 13, the trustee could have recovered those funds, and had the case been filed been initially in Chapter 7, the trustee could have also recovered the funds, "[t]here is thus no basis in the structure, policy, or purpose of the Bankruptcy Code for treating the fraudulent transfers as beyond the reach of the creditors merely because the estate was converted." The Ninth Circuit then looked outside the Bankruptcy Code[6] to reach the conclusion that the funds remained within his constructive

[6] In its analysis the Ninth Circuit looked at "statutes penalizing the possession of contraband and statutes penalizing laundering of money that has been in the defendant's possession," and where courts have utilized the concept of "constructive" control or possession, whereby an individual is deemed to possess items even when the individual does not actually have immediate physical possession of the item. See, e.g., U.S. v. Vasquez, 654 F.3d 880, 885–86 (9th Cir. 2011), citing 21 U.S.C. § 841(a)(1), where courts rejected the argument that defendants could only be convicted if they had actual possession of the contraband; see also U.S. v. Disla, 805 F.2d 1340, 1350 (9th Cir. 1986) (observing that "[w]e have upheld many convictions [under § 841(a)(1)] under the theory of constructive possession"); and U.S. v. Ruiz, 462 F.3d 1082, 1088 (9th Cir. 2006) (defined possession as having actual or constructive control). It also looked at money laundering - 18 U.S.C. § 1957(f)(2) (defining "criminally derived property" as "any property constituting, or derived from, proceeds obtained from a criminal offense") – and noted that courts have concluded that constructive control of fraudulently obtained funds is sufficient and may be inferred where transfers are made pursuant to a scheme of fraud that the defendant participated in or directed. See U.S. v. Smith, 44 F.3d 1259, 1266; U.S. vs. Prince, 214 F.3d 740, 748 (6th Cir. 2000) (holding that the defendant "did not need to have physical possession of the money before it could be considered proceeds"); U.S. v. Howard, 271 F. Supp. 2d 79, 83 n.4 (D.D.C. 2002) (explaining that "the defendant need not be in actual possession of the proceeds of the funds derived from the specified unlawful activity; constructive control of the funds is sufficient").

possession or control, and hence should be considered property of the converted estate under Section 348(f)(1)(A).

After its analysis, the Ninth Circuit concluded that the debtor Jason's transfer of funds out of his actual possession to a close family member, in an effort to avoid payments to his creditors that would have otherwise been required under the Bankruptcy Code, was analogous to criminal cases where defendants attempted to evade the operation of law by disguising ownership of fraudulently obtained funds or contraband. Hence, it gave rise to a rebuttable presumption that funds remained within the debtor's possession or control – a presumption that the Debtor never challenged. Ultimately, the Ninth Circuit held that the funds remained within his constructive possession or control, and hence should be considered property of the converted estate under Section 348(f)(1)(A).

******

Cannabis in Bankruptcy

In a relatively short period of time, the United States Court of Appeals for the Ninth Circuit decided two reorganization cases involving the growing and sales of marijuana in very different manners, and for very different reasons.

U.S. Bankruptcy Appellate Panel for the Ninth Circuit ("BAP") affirmed a bankruptcy court's dismissal of a chapter 13 case filed by individual debtors that owned the majority interest in Agricann, LLC ("Agricann"), an entity that was engaged in cultivating and selling marijuana – an action that is illegal under the federal Controlled Substances Act, 21 U.S.C. sections 801 et seq., in particular, section 841(a). In *In re Burton*, 610 B.R. 633 (9th Cir. BAP Jan. 14, 2020), the bankruptcy court issued an order to show cause why the case should not be dismissed due to the Burtons' majority ownership interest in Agricann, a marijuana-related business.[7] The Burtons had scheduled a potential gross recovery of $31 million from state court lawsuits in which Agricann was the plaintiff, but asserted that recovery from those lawsuits was "unlikely." The bankruptcy court rejected this assertion as not credible, and concluded that any recovery from those lawsuits would be derived from conduct that is illegal under federal law. The bankruptcy court reasoned that if the case were allowed to continue, the bankruptcy court and the trustee would be required to become involved in such illegal conduct. As a result, the bankruptcy court found dismissal was proper. The debtors appealed the order dismissing the case to the BAP.

In affirming the dismissal, the BAP considered the recent Ninth Circuit decision in *Garvin vs. Cook*, 922 F.3d 1031 (9th Cir. 2019). There, the court affirmed the bankruptcy court's order confirming a chapter 11 plan, over the objection of the United States Trustee, even though one of the chapter 11 debtors had a tenant who leased property from the debtor for use in a marijuana growing operation. Specifically, the chapter 11 debtor planned to use income from that lease to fund the plan. The United States Trustee objected that the lease violated federal drug law – namely, the Controlled Substances

---

Accordingly, the Ninth Circuit concluded that proceeds from money laundering may be within the defendant's constructive control or possession, even though the funds were never placed in the defendant's account. Smith, 44 F.3d at 1266.

[7] The order to show cause was issued by the court after a creditor of the Burtons filed a motion to convert the case to chapter 7 on the basis that the Burtons were not eligible under Section 109(e) because their debts exceeded those allowable for a chapter 13 case. The creditor also asserted the case was filed in bad faith, and that the Burtons had failed to disclose their projected recovery from the state court action which was based upon their marijuana business.

Act – and the plan was therefore unconfirmable under Section 1129(a)(3) because it was proposed by means forbidden by law.

The bankruptcy court overruled the objection and confirmed the chapter 11 plan. The Ninth Circuit affirmed, concluding that Section 1129(a)(3) directs bankruptcy courts to police the means of a reorganization plan's proposal, not its substantive provisions. The panel specifically found that the plan was not proposed by any means forbidden by law, despite the alleged violations of federal law.

In finding that the Garvin case did not support a reversal of the dismissal of the Burton's case, the BAP in Burton noted:

> The sole issue before the Ninth Circuit in Garvin was whether the plan at issue violated § 1129(a)(3)'s requirement that a chapter 11 plan be proposed "not by any means forbidden by law." The Circuit held that § 1129(a)(3) directs courts to look only to the proposal of a plan, not its terms. The Circuit specifically rejected the notion that § 1129(a)(3) forecloses confirmation of a plan that relies on income from criminal activity, as held by some bankruptcy courts considering whether to dismiss a case based on a debtor's involvement in the marijuana business. The court acknowledged that there may be consequences arising from a debtor's connections with criminal activity, but denial of confirmation under §1129(a)(3) is not one of them.

Id. at 640, n. 8. (citations omitted).

The BAP in *Burton* recognized that there seemed to be a split in authority among courts from other circuits, and stated that it appeared to the BAP that the Ninth Circuit was reluctant "to adopt per-se bright line rules requiring the immediate disposition of bankruptcy cases in which marijuana activity is present . . ." Id. at 641. The BAP concluded that the Burtons had failed to demonstrate that the proceeds derived from activity illegal under federal law – the selling of marijuana – would not become part of the estate, nor that the court and the trustee would be absolved of the duty to administer those assets.

Comment: The United States Trustee frequently objects to any filing by any party – individual or entity – which derives income from the sale of marijuana or related products. It does not appear that this is changing anytime soon.

****

Debtor could not avoid creditor's pre-petition levy on his IRA.

In *Elliott vs. Pacific Western Bank*, 969 F.3d 1006 (9th Cir. 2020), the Ninth Circuit Court of Appeals affirmed the district court's affirmance of the bankruptcy court's dismissal of a Chapter 7 debtor's adversary proceeding, where the bankruptcy court found that the debtor could not avoid a state court judgment creditor's pre-petition levy on his IRA under Sections 522(h) or (f), and could not establish that the levy constituted a preferential transfer under Section 547. The lien was not subject to being avoided because it was satisfied prior to the petition date, and the debtor had no interest in the property as of the petition date.

Pacific Western Bank ("Bank") obtained a state court judgment against the debtor, obtained a writ of execution, and had the sheriff levy on the debtor's individual retirement account ("IRA"). Debtor filed his state court exemption claim[1] and the sheriff held the funds until the state court denied the exemption claim, at which time it released the funds to the Bank, the judgment creditor. The debtor

then filed a chapter 7 case 26 days after the Bank received the funds. In his schedule C, he asserted the IRA funds were exempt under California Code of Civil Procedure section 703.140(b)(10)(E) and Bankruptcy Code Section 522(b)(3)(C).

After the chapter 7 trustee closed the case as no-asset, the debtor commenced an adversary proceeding against the Bank, asserting that he could avoid the transfer of the levied funds to the Bank under either Sections 522(f) or (h). The bank filed a motion to dismiss for failure to state a claim, which the bankruptcy court granted, dismissing the adversary proceeding. The district court affirmed the dismissal. Id. at 1008-9.

On appeal the Ninth Circuit affirmed the district court, noting that the debtor could not establish that the transferred property was of a kind that the debtor would have been able to exempt from the estate if the trustee (as opposed to the debtor) had avoided the transfer pursuant to one of the statutory provisions in Section 522(g). Id. At 1011. The Ninth Circuit also noted that, in order to avoid a lien under Section 522(f), the lien must impair an exemption as of the petition date, and that this required an inquiry whether the debtor had any property interest in the levied funds on the petition date.

This, in turn, required the court to look to applicable state law. In doing so, the Ninth Circuit found that any interest the debtor had in the IRA funds terminated either when the funds were paid to the Sheriff under C.C.P. section 700.140(f), or after the state court denied the debtor's exemption claim. The Ninth Circuit stated that, either way, since both of those dates occurred pre-petition, the debtor had no interest in the IRA funds as of the petition date. And since the lien was satisfied by virtue of C.C.P. section 700.140(f), there was no lien to avoid. As a result, the Ninth Circuit concluded that: (1) the debtor could not use Section 522(f) because the lien was satisfied; (2) the debtor could not establish a preferential transfer under Section 547; and (3) the debtor could not state a claim under Section 522(h). Id. at 1011-12.

****

Dismissal of Complaint Appropriate when Procedures and Rules Not Followed.

In *People's Bail Bonds v. Dobos (In re Dobos)*, 830 Fed.App'x 928 (9th Cir. 2020), the United States Court of Appeals for the Ninth Circuit agreed with the Ninth Circuit Bankruptcy Appellate Panel's affirmance of a bankruptcy court's order dismissing a plaintiffs' adversary complaint. In a decision focused on timeliness and procedural compliance, the lower courts' decisions were affirmed because the plaintiffs' opposition to a motion to dismiss was time barred under the local bankruptcy rules when the opposition was filed the day before the noticed hearing, and not 14 days prior to the hearing.

People's Bail Bonds and Harry Kassabian (the "Judgment Creditors") obtained a prepetition state-court judgment against the individual debtor Agneta Dobos and six years later the debtor filed for bankruptcy under Chapter 7. The debtor scheduled the Judgment Creditors with a secured debt totaling $52,437.98, and obtained an order avoiding the Judgment Creditors' lien on her residence under Section 522(f). The Judgment Creditors were served but did not oppose the Motion to Avoid Lien. The debtor received her discharge in February 2014, and the bankruptcy court closed her case.

More than a year later one of the Judgment Creditors filed a motion to reopen the debtor's bankruptcy case, but waited more than two years to prosecute the motion to reopen the bankruptcy

case. On January 2, 2018, the Judgment Creditors[8] filed an adversary complaint seeking to declare the judgment debt nondischargeable; two months later the bankruptcy court granted the motion to reopen. The debtor filed a motion to dismiss the adversary proceeding complaint which the bankruptcy court granted, and dismissed the Judgment Creditors' complaint pursuant to Local Bankruptcy Rule 9013-1(h), because the Judgment Creditors did not file opposition at least 14 calendar days before the scheduled hearing on the motion to dismiss (they filed it the day before the hearing without "explaining the delay" or obtaining an order to file a late opposition).

Judgment Creditors appealed the bankruptcy court's order dismissing the adversary complaint to the BAP arguing that they did not have notice of the debtor's bankruptcy petition or the avoidance of their judgment lien but timely filed their complaint as soon as they became aware of the debtor's bankruptcy case. The BAP affirmed the dismissal and agreed with the debtor that the Judgment Creditors' judgment had expired, so they could no longer enforce the judgment. Therefore, the bankruptcy court was correct to dismiss their nondischargeability complaint. Judgment Creditors appealed the BAP's order, which was affirmed by the Ninth Circuit due to lack of a timely opposition to the motion to dismiss under local bankruptcy rules and the expiration of the state court judgment under California law.

The Court of Appeals found the Judgment Creditors' procedural delays in opposing the motion to dismiss and lack of timely prosecution of the state court judgment to be sufficient reasons to affirm the decision by the BAP (and the bankruptcy court) granting the motion to dismiss. Here, the Judgment Creditors whose lien had been avoided years earlier filed a motion to reopen the debtor's bankruptcy case but then failed to take further action for two years, during which time the judgment expired under state law and the expiration was not tolled based on the automatic stay. Finally, the Court of Appeals commented that the Judgment Creditors did not provide any reason for the delay in prosecuting the claim after re-opening the case and also waiting until the day before the hearing on the motion to dismiss to file an opposition.

Practice pointer: Don't ignore deadlines in applicable rules; they are there for a reason.

****

Collateral Estoppel: Stipulated facts which support a state court finding of fraud and a stipulated judgment will also support a judgment for nondischargeability under Section 523(a)(2)(A).

In *Yang v Fund Management International, LLC (In re Yang)*, 847 Fed.Appx. 419 (9th Cir. Feb. 26, 2021), the United States Court of Appeals for the Ninth Circuit affirmed the BAP's affirmance of the bankruptcy court's entry of a judgment of nondischargeability under Section 523(a)(2)(A).

Debtor and his wife operated a company which purportedly used investment funds to make auto title loans. He induced Fund Management International (FMI) to loan almost $4 million by promising the funds would be used for that purpose, but instead he used all the funds for personal purposes, including supporting his lifestyle. FMI learned of the misuse and sued the Debtor and his wife in California state court for breach of contract, fraud and other claims. The parties agreed to settle the

[8] In the interim, prior to 2018, the judgment lien expired pursuant to state law as it was not tolled beyond the 10-year period pursuant to California Code of Civil Procedure section 683.020.

case for a $3 million Stipulated Judgment, and the Debtor specifically stipulated to the facts pled in the complaint for the fraud claim:

> [Debtor] stipulates to the facts supporting the claims made against him and that said facts and claims allege liability for, that he is admitting liability for and that the facts and claims are within the meaning of 11 U.S.C.A. 523….[Debtor] agrees that this stipulation can be used in favor of FMI…and against [Debtor] in any action in which [Debtor]…is a party to an action for protection under the Bankruptcy Code.

The Debtor and his wife later filed bankruptcy but FMI did not learn of the proceeding until nine years later due to a failure of notice. FMI moved for the case to be reopened, and promptly filed an adversary proceeding for nondischargeability under Section 523(a)(2)(A). While the bankruptcy court denied FMI's motion for summary judgment based on the issue preclusive effect of the Stipulated Judgment, it granted FMI's motion for entry of judgment based on the stipulated facts, which was subsequently granted. The 9th Circuit BAP affirmed, but the Ninth Circuit reversed and remanded (*Yang v. Fund Mgmt. Int'l, LLC (In re Yang)*, 698 Fed. Appx 374 (9th Cir. 2017)), holding that under California law, stipulated facts in one case may be given preclusive effect in a different case only "when the parties manifest an intent to be collaterally bound by its terms." It remanded the case to the bankruptcy court to determine that issue.

On remand, the bankruptcy court held an evidentiary hearing and found that the parties intended the agreed facts to be binding in future proceedings: the Stipulation clearly referenced bankruptcy proceedings and Section 523(a)(2)(A). This time, however, the court granted judgment based on collateral estoppel, founded on the stipulated facts. The Debtors appealed that decision to the district court, which affirmed the bankruptcy court.

The Ninth Circuit affirmed the judgment, finding that the bankruptcy court had properly interpreted its mandate which was to decide whether the parties intended the stipulated facts to be binding in other proceedings. It also found that the bankruptcy court properly determined that the requirements of issue preclusion had been met, because it had made the necessary factual finding of intent to be bound, and that the facts demonstrating the fraud finding had been admitted. It also found that it was the stipulation to the underlying facts, not just the judgment, that made the application of collateral estoppel an exception to the rule against a prepetition waiver of discharge.

Practice Pointer: Creditors: obtain admissions of precise facts which will support a fraud claim for relief. Debtors: Never admit anything, even when settling the case.

****

Debtor can pursue a claim against a lender for failing to report a positive payment history during the bankruptcy proceeding and prior to discharge.

In *Steinmetz v. American Honda Finance Corp.*, 835 Fed.Appx. 199 (9th Cir. 2020) the Ninth Circuit affirmed the District Court's dismissal of a debtor's claims against a creditor and credit reporting agencies for failure to report payments after discharge, but reversed the District Court holding that a debtor cannot pursue a claim against a lender for failing to report a positive payment history during the bankruptcy proceeding and prior to discharge.

Debtor filed for a petition under chapter 13 and confirmed a plan of reorganization, under which he reaffirmed and continued making payments on two car loans. Debtor received a discharge and

thereafter continued making the car payments. Creditor Honda did not report the payments made post-petition – before or after discharge. The credit reporting agency, Experian Information Solutions, Inc. ("Experian"), did not report any positive payments on the two car loans but did list multiple charge offs.

Debtor filed suit in the United States District Court for the Southern District of California against Honda and Experian under the Federal Fair Credit Reporting Act "FCRA", 15 U.S.C. section 1681 et seq., as well as for Nevada state law claims. Debtor alleged that Honda as a "Furnisher" failed to accurately report the positive payments to Credit Reporting Agencies ("CRAs") and that Experian did not report positive payments made on the two car loans. The District Court noted that "[s]everal courts have held that after a debt is discharged, a CRA may report a $0 balance on an account and need not continue to report post-bankruptcy payments because the debtor no longer has personal liability on the account," and therefore held that "is not inaccurate to withhold information about payments made to accounts that were discharged in bankruptcy. *Steinmetz v. Am. Honda Fin.*, 447 F. Supp. 3d 994, 1004–05 (D. Nev. 2020). The District Court granted the defendants' motions to dismiss under Federal Rule of Civil Procedure 12(b)(6) and dismissed the complaint with prejudice.

On appeal, the Ninth Circuit affirmed dismissal of causes of action based on Nevada and Federal law relating to reporting of charge offs and for failure to report post-discharge payments, but it reversed the District Court's order dismissing claims against Honda and Experian for non-reporting of positive payments prior to discharge and against Experian for inconsistent bankruptcy inclusion dates. Specifically, it affirmed that Debtor did not state a claim for failure to report the post-discharge payments because those payments were "provided for" by the chapter 13 plan. The phrase "provided for" in Section 1328(a) provides a discharge for debts which are included in a chapter 13 plan. However, the Ninth Circuit found that the District Court erred in dismissing claims related to the defendants' failure to report positive payments made during bankruptcy and prior to discharge, reasoning that Debtor made those payments before the plan "provided for" the debts.

****

Creditors Must Show Cause to extend the deadline to file a complaint objecting to the dischargeability of a debt under Section 523 as required by Fed. R. Bankr. P. 4007(c).

In *Emond v. Ryan McCarthy Investments, LLC*, 2020 Bankr. LEXIS 1543 (May 21, 2020), the U.S. Bankruptcy Appellate Panel of the Ninth Circuit ruled that the bankruptcy court abused its discretion by granting a creditors motion to extend the deadline to file a Section 523 complaint, without an explanation as to why the creditor was unable to timely file the complaint within the 60-day deadline.

Creditor McCarthy filed a motion to extend the time to file a non-dischargeability complaint. The motion simply stated that the creditor, McCarthy, was evaluating testimony taken at the creditor meetings as well as the debtors' records to determine whether the filing of a non-dischargeability complaint was warranted, and that his counsel was in the process of moving from his current law firm and the debtors or other creditors would not be harmed from the granting of an extension. Debtors opposed the motion. The Bankruptcy Court granted McCarthy's motion to extend time but did not make any factual findings. The debtors timely appealed and on appeal, the BAP ruled that the trial court abused its discretion by granting the motion to extend the deadline without McCarthy presenting a showing of good cause, stating "[allowing a creditor to extend the deadline to determine 'whether or not [it] even had a viable argument for non-dischargeability – without any explanation why [it] could not have made this determination within the time set by Rule 4007 – would render the standard

toothless.'" Id. Since no evidence upon which a finding of cause was presented by McCarthy or ascertained by the trial court, the BAP concluded that the bankruptcy court abused its discretion by granting the motion. Therefore, it reversed the bankruptcy court's order extending the deadline to file a non-dischargeability complaint.

****

Debtor Cannot Claim a Homestead Exemption in Real Property Title In Name of Debtor's LLC.

In *Schaefers v. Blizzard Energy, Inc. (In re Schaefers)*, 2020 WL 7043564 (9th Cir BAP 2020), the BAP found that an interest of a debtor in a limited liability company which held title to the residence in which the debtor resided was not sufficient to support a homestead exemption in the despite a state court ruling that the LLC was the reverse alter ego of the debtor. The BAP reasoned that to recognize a homestead exemption in the LLC's property would reward the debtor for inequitable conduct.

Debtor amended his Schedule C exemptions, claiming the California automatic homestead exemption found in Cal. Code of Civil Procedure (CCP) § 704.730 applied to his residence, in the sum of $175,000. He did this after his largest creditor, who had obtained a state court judgment against him for almost $4 million, later obtained a ruling from the state court that the LLC was the reverse alter ego of the debtor, and added it as a judgment debtor. Of critical importance was the court's finding that the debtor's interest in the LLC was not an interest in real property; it was personal property, and the reverse alter ego ruling did not change that outcome. It also noted that an alter ego finding was a creditor's remedy for the debtor's inequitable conduct: "Alter ego principles almost never enable 'the persons who actually control the corporation to disregard the corporate form.' [citations omitted.]." It also noted that alter ego principles have been developed to prevent injustice, and it would be improper to reward the debtor with a homestead exemption based on his own inequitable conduct that led to the alter ego finding in the first place.

****

Some Private Student Loans Can Be Wiped Out in Bankruptcy

In *Homaidan v. Sallie Mae, Inc.*, 2021 WL 2964217 (2nd Cir. July 15, 2021), the Second Court of Appeals ruled that private student loans can be discharged through bankruptcy like other consumer debts, opening the door for more borrowers to obtain relief from educational debt, WSJ Pro Bankruptcy reported. The Court of Appeals sided with Hilal Homaidan who sought to eliminate through bankruptcy the $12,567 in private student loans he took on to finance his education. Homaidan's lender, Navient Solutions LLC, argued that his private loans should be treated the same way government backed-loans are treated. But the Second Circuit said that certain types of private educational loans, especially those that don't meet the tax code's definition of a qualified student loan, can be discharged through the bankruptcy process without a showing of undue hardship as required under Section 523.

****

Tribal Law Defined the Nature of a Tribe Member's Property Interest in Gaming Revenue

In *In re Brenda Jo Musel*, 2021 WL 2843847, Case No. 20-42761 (U.S. Bankruptcy Court, D. Minnesota, July 7, 2021), the court denied the trustee's attempt to have the debtor turn over her monthly payments representing her share of tribal gaming revenues.

In doing so, the bankruptcy court noted that, if tribal law is written correctly, a tribe member's share of gaming revenue is not estate property under Section 541(a), even if state law might give a different result. After a thorough analysis of the intersection between bankruptcy law and tribal law, the judge determined that, because the tribe is a sovereignty, the law of a tribe creates and defines a tribe member's property interest in his or her share of gaming revenue. In Minnesota, the court concluded that the debtor's monthly payments were not property of the estate, when it found that the Pokagon Band's Revenue Allocation Plan ("RAP") states that after funds needed for the benefit of the Band as a whole are deducted from net revenues, "the Band shall deposit fifty-seven per cent (57%) of remaining net gaming revenues in a Per Capita Payment Account." It further provides for monthly per capita payments which "shall be used to advance the current and long-term personal health, safety and welfare of Band members by providing to members a periodic payment of money from the net gaming revenues ... " and that payments "shall be made monthly ..." Finally, the RAP further states that "Nothing contained in this Code shall be construed to give any person a vested property right or interest in Band gaming revenues. All Band gaming revenues shall be held by the Band until disbursed pursuant to Band law and this Code."

****

Taggart 4: A New World?

In *Lorenzen v. Taggart (In re Taggart)*, 2020 U.S. App. LEXIS 40787 (9th Cir., Dec. 30, 2020), the United States Court of Appeals for the Ninth Circuit denied a petition for rehearing of its decision in *In re Taggart*, 980 F.3d 1340 (9th Cir. 2020) ("Taggart 4"), on remand from the decision of the United States Supreme Court in *Taggart v. Lorenzen*, 139 S. Ct. 1795 (2019) ("Taggart 3"), which reversed *Lorenzen v. Taggart (In re Taggart)*, 888 F.3d 438 (9th Cir. 2018) ("Taggart 2"). In Taggart 4, the Ninth Circuit affirmed the result in, although not the reasoning of, the BAP in *Emmert v. Taggart (In re Taggart)*, 548 B.R. 275 (9th Cir. 2016) ("Taggart 1").

In Taggart 4, after nine years of legal proceedings, the Ninth Circuit ruled that Bradley W. Taggart ("Taggart") was not entitled to civil contempt sanctions against Sherwood Park Business Center, LLC ("SPBC"), Terry W. Emmert ("Emmert"), Keith Jehnke ("Jehnke"), and their attorney (collectively, "SPBC Group") for violating the discharge injunction in Taggart's bankruptcy case. SPBC Group was not liable for civil contempt because SPBC Group had an objectively reasonable basis to conclude that the discharge injunction might not apply. Based upon the Ninth Circuit's denial of the petition for rehearing, this remains the law.

In *Taggart* 4, the Ninth Circuit stated that civil contempt is a "severe remedy," and that, "correspondingly, the Supreme Court has set a significantly high hurdle for when it is imposed." *Taggart* 4, 980 F.3d at 1347 (citing *Taggart* 3, 139 S. Ct. at 1802). It noted that the objective standard for civil contempt sanctions appears to be subject to a significant exception for bad faith litigation tactics as set forth in *Chambers v. NASCO, Inc.*, 501 U.S. 32, 50 (1991), and the Supreme Court in *Taggart* 3 stated: "Our cases suggest, for example, that civil contempt sanctions may be warranted when a party acts in bad faith." Id., 139 S. Ct. at 1802.

Practice Pointer: A creditor unsure of the scope of a discharge injunction may still need to file an adversary proceeding for declaratory relief in the bankruptcy court that granted the debtor a discharge, despite the fact that the Supreme Court in *Taggart* 3 made an effort to do away with this need. See *Sterling-Pacific Lending, Inc. v. Moser (In re Moser)*, 613 B.R. 721, 727-728 (9th Cir. BAP

2020) ("[c]reditors are often well advised to seek the bankruptcy court's guidance in order to avoid an inadvertent violation of the discharge injunction").

In re Tillman

Headline: A debtor's homestead coupled with a tax lien – not quite exempt?

Citations:

- Bankruptcy Court Decision - *Warfield v. United States (In re Tillman)*, Nos. Chapter 7 Proceedings, 3:19-bk-01074-DPC, 3:20-ap-00038-DPC, 2020 Bankr. LEXIS 1902 (Bankr. D. Ariz. July 17, 2020)
- District Court Decision - *United States v. Warfield,* No. CV-20-08204-PCT-DWL, 2021 U.S. Dist. LEXIS 75039 (D. Ariz. Apr. 16, 2021)

Facts: The Debtor held homestead property ("Property") valued at $475,000 subject to a $371,350 mortgage in favor of Bank of America ("BoA"), which left no more than $103,650 of equity in the Property. In addition to the mortgage, the Property was encumbered by an involuntary federal tax lien in the amount of $24,686, including $19,915 in penalties. The Arizona homestead exemption protects $150,000 of equity in an applicable property. The Property became subject to various competing motions, including a motion to compel abandonment by the Debtor, a motion to sell from the Trustee, and a motion for relief from stay by the mortgage holder. The Trustee eventually filed an adversary complaint to avoid the tax lien under Section 724(a)[9] for the benefit of the estate.

Issue: Whether a trustee can avoid the penalty portion of a tax lien on otherwise exempt property for the benefit of the estate.

Controlling Statutes: Section 724(a) allows a trustee to avoid a lien that secures a claim of a kind specified in Section 726(a)(4). Section 726(a)(4) describes a claim for "any fine, penalty, or forfeiture, or for multiple, exemplary, or punitive damages . . . to the extent that such fine, penalty, forfeiture, or damages are not compensation for actual pecuniary loss." Section 551 provides that any lien avoided under Section 724(a) is "preserved for the benefit of the estate but only with respect to property of the estate."

Analysis:

I. Avoidance Power

The Arizona Bankruptcy Court began its analysis by looking to the public policy behind Section 724(a), specifically that "[e]nforcement of penalties against the estates of bankrupts, however, would serve not to punish the delinquent taxpayers, but rather their entirely innocent creditors." Bankruptcy Court Decision at *8 (quoting *Simonson v. Granquist*, 369 U.S. 38 (1962)). While they did not dispute the applicability of Section 724(a), the parties disputed the implication of Section 551.

[9] The term "Section" refers to Title 11 of the United States Code.

Section 541 provides that "all legal and equitable interests of the debtor in property" become property of the estate. Section 522(b) allows debtors to exempt certain property from the estate which then leaves the estate and revests with the debtor. *See In re Heintz*, 198 B. R. 581, 585 (9th Cir. BAP 1996). *Heintz* held that since exempt property constituted "property of the estate as of the commencement of the case," Section 551, though potentially limited by Section 522(f), still applied to exempt property even if it had left the estate through exemption.

Based on the Supreme Court's analysis in *Schwab v. Reilly*, 560 U.S. 770, 782 (2010) and the wording of Arizona's homestead exemption statute, the Bankruptcy Court found that the Debtor's exemption was "in the debtor's 'interest'--up to a specified dollar amount--in the assets described in the category, not as the assets themselves." Additionally, the Bankruptcy Court found that, based on its statutory framework, the Debtor's homestead exemption came after her mortgage and federal tax lien. Based on these principles, the Bankruptcy Court held that the Debtor's exempt interest in the property "never included the value of the lien positions occupied by [BoA] or the IRS," Bankruptcy Court Decision at *16, and such value was property of the estate for purposes of Section 551.

II. Preservation for the Estate

Notwithstanding Section 551's preservation on behalf of the estate, Section 522(g) provides that the debtor can exempt property recovered by the trustee, "to the extent that the debtor could have exempted such property" if the transfer was not voluntary and the debtor did not conceal the property.

In *In re Hannon*, 514 B.R. 69 (Bankr. D. Mass. 2014), a bankruptcy court held that, while the debtor could not avoid a penalty portion of a tax lien based on Section 522(c)(2)(B), once a trustee avoids the penalty through Section 724(a), a debtor could use Section 522(g) to claim an exemption in the equity left after the avoidance. As a result, "if the Trustee avoids the IRS lien on property in which the Debtors have claimed an exemption, the value of the avoided lien will accrue first to the Debtors exemptions, not the estate." *Hannon*, 514 B.R. at 79.

The Bankruptcy Court rejected the analysis of *Hannon* and instead appealed to the analysis of *DeMarah v. United States (In re DeMarah)*, 62 F.3d 1248 (9th Cir. 1995). In *DeMarah* the Ninth Circuit examined a debtor, not trustee's, power to avoid tax lien penalties under Section 522(h). The Ninth Circuit acknowledged the debtor could avoid the tax lien upon the following conditions:

> (1) the transfer cannot have been a voluntary transfer of property by the debtor; (2) the debtor cannot have concealed the property; (3) the trustee cannot have attempted to avoid the transfer; (4) the debtor must exercise an avoidance power usually used by the trustee that is listed within § 522(h); and (5) the transferred property must be of a kind that the debtor would have been able to exempt from the estate if the trustee (as opposed to the debtor) had avoided the transfer pursuant to one of the statutory provisions in § 522(g).

DeMarah, 62 F.3d at 1250. The *DeMarah* panel found the argument that the lien should be avoided because it satisfied all required elements "powerful, even conclusive, if § 522(h) existed in a vacuum." *DeMarah*, 62 F.3d at 1251. *DeMarah* then turned to Section 522(c)(2)(B) finding that, even property exempt from the estate continued to be subject to "a tax lien, notice of which is properly filed" without

distinction between the penalty or non-penalty portions of the lien. For such reasons, *Demarah* concludes that the debtor "may not avoid the lien for his tax penalties." *DeMarah*, 62 F.3d at 1252.

Drawing an analogy to the *DeMarah* holding, the Bankruptcy Court concluded that, because Section 522(g) only allows a debtor to claim property "the debtor could have exempted," and the Debtor cannot avoid the tax lien under Section 522(c)(2)(B), the Debtor cannot exempt the equity in the portion of the property subject to an avoided tax lien.

III. Appeal

The IRS appealed the Bankruptcy Court's ruling to the U.S. District Court for the District of Arizona. The District Court affirmed. The IRS first challenged the applicability of Section 551. The IRS argued that, while exempt property was property at the time of the petition, it was subsequently removed from the estate. Because it was not property of the estate during the relevant analysis under Section 551, Section 551 cannot apply. The District Court found that, because Section 541 determines property of the estate based upon the legal and equitable interests as of the petition date, Section 551, which does not have a temporal requirement, simply adopts the frame of reference in Section 541 (i.e., the petition date). The District Court also rejected the government's appeal to Section 522(c) which provides that exempt property should not be liable for any debt except for certain exceptions. The District Court, instead, concluded that, because the equity is subject to the government's interest, which preempts state exemption statutes, the Debtor did not actually have an interest in the equity encumbered by the tax lien that Section 522(c) could protect. The District Court also rejected the IRS's argument that Section 522(c)(2)(B) evidences that the Debtor's exemptions coexisted with the federal tax lien, which meant the property exited the estate and subject to the Debtor's exemption after the lien avoidance. The District Court found such interpretation would make the provisions of Section 522(g) and (h), which allows a debtor to claim exemptions in such property once the lien is avoided, superfluous. For these reasons, the District Court agreed that the Debtor's homestead, at least to the extent of the tax lien, was property of the estate for purposes of Section 551.

The District Court then turned to the question of Section 522(g). The District Court acknowledged "the government's argument has some force, and the outcome might be different if the Court were writing on a blank slate, [but] *DeMarah* compels the result that Debtor cannot recover the avoided Tax Lien under § 522(g)." District Court Decision at *34. Like the Bankruptcy Court, the District Court found that, because Section 522(c) "limited a debtor's ability to avoid a tax lien," "*DeMarah* compels the conclusion that Debtor may not exempt the Property under § 522(g)." District Court Decision at *36.

The IRS has appealed the District Court's ruling to the Ninth Circuit, case no. 21-16034.

In re Juarez

Headline: Exempt property is not properly included within the phrase "any property" under the absolute priority rule.

Citations:

- Bankruptcy Court Decision - *In re Juarez*, No. 0:17-bk-06277-BMW, 2018 Bankr. LEXIS 3292 (Bankr. D. Ariz. Oct. 25, 2018)
- BAP Decision - *Todeschi v. Juarez (In re Juarez)*, 603 B.R. 610 (B.A.P. 9th Cir. 2019)
- 9th Circuit Decision - *In re Juarez*, 836 Fed. App'x 557 (9th Cir. 2020)

Facts: The Debtor possessed $365,115.18 worth of assets as of the petition date. The Debtor's secured claims, including a $74,610.14 federal tax lien, totaled $246,428.76. The Debtor asserted that the federal tax lien encumbered any non-exempt equity in the Debtor's property leaving only exempt value, largely in the Debtor's homestead. The Debtor's plan did not propose full payment to general unsecured creditors, but the plan did propose a "new value" infusion of $15,000,[10] paid to general unsecured creditors, from a third party.

Issue: Whether the plan met the fair and equitable requirement due to the Debtor's retention of approximately $120,000 of exempt value in his assets despite general unsecured creditors not receiving full return of their claims.

Controlling Statute: Section 1129(b)(2)(B)[11] provides that a plan is fair and equitable with respect to a class of unsecured claims if "(ii) the holder of any claim or interest that is junior to the claims of such class will not receive or retain under the plan on account of such junior claim or interest any property, except that in a case in which the debtor is an individual, the debtor may retain property included in the estate under section 1115, subject to the requirements of (a)(14) of this section."

Analysis: The Ninth Circuit recognizes a "new value" corollary to the so-called "absolute priority" rule of Section 1129(b)(2)(B). *In re Gen. Teamsters, Warehousemen & Helpers Union, Local 890*, 265 F.3d 869, 873 (9th Cir. 2001). A plan may be fair and equitable even when a junior interest holder retains an interest without full payment of higher priority interest if the junior interest holder offers additional value to the estate which is 1) new, 2) substantial, 3) money or money's worth, 4) necessary for a successful reorganization and 5) reasonably equivalent to the value or interest received. *In re Dunlap Oil Co., Inc.*, No. BAP AZ-14-1172-JUKID, 2014 Bankr. LEXIS 4931, 2014 WL 6883069, at *21 (B.A.P. 9th Cir. Dec. 5, 2014).

The Bankruptcy Court found the proposed infusion "'reasonably equivalent to the value or interest received' given that all of the Debtor's non-exempt assets are encumbered by a federal tax lien; thus, the Debtor would be retaining encumbered assets." Bankruptcy Court Decision at *28-29. On appeal, the creditors argued, among other things, that the bankruptcy court erred in not considering the value of the Debtor's exempt assets in the analysis.

[10] The original plan proposed $10,000 but was later amended to, among other things, increase the infusion to $15,000.
[11] The term "Section" refers to Title 11 of the United States Code.

The creditors relied on two cases in making their argument: *In re Gosman,* 282 B.R. 45 (Bankr. S.D. Fla. 2002) and *In re Ashton*, 107 B.R. 670, 674 (Bankr. D.N.D. 1989). *In re Gosman* found that Section 1129(b)(2)(B)'s use of "any property," and failure to reference exempt property of Section 522, indicated an intent "to be broad in scope and all encompassing." *Gosman*, 282 B.R. at 48. To support this conclusion, *Gosman* compared Section 1129(b)(2)(B)(ii) to Sections 541, 1207, and 1306 which all use a narrower "property of the estate," suggesting an intent to purposefully omit such phrase from the absolute priority rule. *In re Ashton* reached the same conclusion noting that "Section 1129(b)(2)(B)(ii) says that a debtor may not retain any property without qualification." *Ashton,* 107 B.R. at 675.

The Ninth Circuit BAP rejected the analysis in *Gosman* and *Ashton*, holding, instead, "exempt property is not properly included within the phrase 'any property' under the absolute priority rule." BAP Decision at 623. The BAP provided two reasons. First, the Court looked to the full language of Section 1129(b)(2)(B)(ii) which provides that the junior claim "will not receive or retain under the plan on account of such junior claim or interest any property." The Court noted that the debtor is entitled to retain exempt property "due to the exemption statutes" not "under the plan" or "on account of the debtor's interest." BAP Decision at 623. Regardless of the provisions of a plan, a debtor would be entitled to retain exempt property. In other words, it is not the plan that allows the debtor to retain his exempt interests. Second, the BAP found that subjecting exempt property to the new value consideration created conflict with Sections 522(c) and (k) which respectively state, with limited exceptions, that exempt property "is not liable during or after the case for any [pre-petition] debt of the debtor" and "is not liable for payment of any administrative expense."

The Ninth Circuit BAP noted that it joined a line of cases finding that, once property is properly exempted, it leaves the bankruptcy estate. As a result, the ability to retain exempt property no longer remains subject to the terms of the plan and confirmation requirements under Section 1129(b)(2)(B)(ii). The Ninth Circuit affirmed the BAP's conclusion noting its precedent of holding that exempt property "revests in the debtor," *In re Smith*, 235 F.3d 472, 478 (9th Cir. 2000), and is "withdrawn from the estate." *Owen v. Owen*, 500 U.S. 305, 308, 111 S. Ct. 1833, 114 L. Ed. 2d 350 (1991). The Ninth Circuit echoed the BAP's reasoning, "A debtor therefore obtains exempt property from the bankruptcy estate by virtue of the right to exempt certain property under § 522, not 'under the plan on account of [a] junior claim or interest' such that § 1129(b)(2)(B)(ii) is triggered." Ninth Circuit Decision at 562.

Faculty

Louis M. Bubala, III is Of Counsel with the Kaempfer Crowell in Reno, Las Vegas and Carson City, Nev. He represents individuals and businesses in and out of bankruptcy throughout Nevada. Mr. Bubala became sponsorship chair for ABI's Southwest Bankruptcy Conference in 2019 and a member of its advisory committee in 2016. He also co-chaired ABI's Consumer Conference in Las Vegas in 2013 and 2014. Previously, Mr. Bubala clerked for U.S. Magistrate Judge Valerie Cooke. Before law school, he was a reporter and editor in Indiana. While covering the courts, he got to know U.S. District Judge Gene Brooks, who was president of the National Conference of Bankruptcy Judges in 1978-79. He also interviewed Alan Dershowitz (who returned a call for a story about his client, Mike Tyson), Don King, Manute Bol and Dan Quayle. In his free time, Mr. Bubala is secretary of the Friends of Nevada Wilderness and treasurer of the Nevada Outdoor Business Coalition. He received his B.A. in 2000 from Indiana University School of Journalism and his J.D. in 2004 from the University of Oregon School of Law.

Kathleen A. Cashman-Kramer is Of Counsel with Sullivan Hill Rez & Engel, APLC in San Diego, where she practices in the areas of bankruptcy and other insolvency matters, as well as in commercial and real estate litigation. She has successfully tried matters in federal and state courts and participated in ADR proceedings before the American Arbitration Association (AAA) and other panels. Ms. Cashman-Kramer's representation in the bankruptcy court includes bankruptcy trustees, secured, priority and unsecured creditors, lessors, and bankruptcy debtors in commercial chapter 11, subchapter V and chapter 7 bankruptcy proceedings. She also served for four years as the staff attorney for one of the standing chapter 13 trustees for the U.S. Bankruptcy Court for the Southern District of California, and she represented title insurance companies as well as individual and corporate parties in business and real estate litigation. Having served on the Bankruptcy Mediation Panel for the U.S. Bankruptcy Court for the Southern District of California since 1995, Ms. Cashman-Kramer has also served as a *pro tem* judge for the Small Claims Department of the San Diego Superior Court. She regularly presents for the local San Diego Credit Abuse Resistance Education (CARE) affiliate and previously served on its Board of Directors from 2004-11. She served two three-year terms on the board of directors for the San Diego Bankruptcy Forum, including as president in 2003, secretary from 2001-02, treasurer in 1996 and vice president in 1997. Ms. Cashman-Kramer currently serves as the vice chair of San Diego County Bar Association's Bankruptcy Law Section, and has served as either the chair or the vice chair of its Bankruptcy Section since 1999. She also currently serves on the Insolvency Law and the Business Litigation Committees of the Business Law Section of the California Lawyers Association, and is a regular contributor of articles to the Business Litigation Committee's eBulletins. In addition, she has written numerous articles and authored materials for numerous programs on bankruptcy, real estate, and related issues. Ms. Cashman-Kramer is a member of the California Bankruptcy Forum, American Bar Association, Massachusetts Bar Association and District of Columbia Bar Association. She was admitted to the State Bar of California in 1987, the Commonwealth of Massachusetts in 1985 and the District of Columbia in 1993, and she is admitted to practice before all courts of the State of California, before the U.S. Supreme Court and the U.S. Court of Appeals for the Ninth Circuit, and before the U.S. District and Bankruptcy Courts for the Southern Districts of California. Ms. Cashman-Kramer received her B.A. in 1981 from Stonehill College and her J.D. in 1984 from New England School of Law.

Hon. Natalie M. Cox is a U.S. Bankruptcy Judge for the District of Nevada in Las Vegas, sworn in on Jan. 27, 2020. She previously had served as an Assistant U.S. Trustee in the Office of the U.S. Trustee in Nashville, Tenn., since April 2019, overseeing chapter 7 and 11 cases and supervising chapter 7 trustees. Judge Cox also gained vital insight as a trial attorney in the Office of the U.S. Trustee's field office in Wilmington, Del., where she managed and litigated chapter 11 cases. It was while Judge Cox engaged in private practice in Las Vegas as an associate, then partner, at Kolesar & Leathan, Chtd., and as an associate at Jolley, Urga, Wirth, Woodbury & Standish, that she developed an intense interest in bankruptcy practice. Judge Cox reeived her Bachelor's degree *summa cum laude* from Austin Peay State University in Clarksville, Tenn., and her J.D. *cum laude* from the University of Nevada William S. Boyd School of Law.

Philip J. Giles is a partner-member of the law firm of Allen Barnes & Jones, PLC, a Phoenix-based bankruptcy firm. He regularly serves as counsel for commercial and consumer debtors, secured and unsecured creditors, creditors' committees, trustees and other parties-in-interest in all chapters of bankruptcy proceedings, including trials and appeals. In addition to his bankruptcy practice, Mr. Giles maintains a commercial litigation practice focused on debtor/creditor and business disputes, and represents receivers in state court matters. He is a certified bankruptcy specialist with the Arizona Board of Legal Specialization, has been rated by his peers as AV-Preeminent, and has been recognized as a *Super Lawyers* "Rising Star" every year since 2017. Mr. Giles is licensed to practice in the states of Arizona and California. He received his B.S. in 2007 from Arizona State University and his J.D. in 2010 from Thomas Jefferson School of Law, where he was a member of the Moot Court Honors Society, a competitor in the 18th Annual Duberstein Bankruptcy Moot Court Competition in 2010 and an Alternative Dispute Resolution Team member and competitor from 2007-10, and he attended the San Diego Inn of Court College of Advocacy and Evidence Clinic in 2013.