AMERICAN BANKRUPTCY INSTITUTE

Southeast Bankruptcy Workshop

Case Law Update

Hon. Denise E. Barnett
U.S. Bankruptcy Court (W.D. Tenn.) | Memphis

Prof. Kara J. Bruce
University of Oklahoma School of Law | Norman, Okla.

Hon. Pamela W. McAfee
U.S. Bankruptcy Court (E.D.N.C.) | Raleigh

PLENARY SESSION

2023

CASE LAW UPDATE

ABI SOUTHEAST BANKRUPTCY WORKSHOP

AMELIA ISLAND, FLORIDA

JUNE 23, 2023

Hon. Denise Barnett, U.S. Bankruptcy Court, W.D. Tenn.
Hon. Pamela McAfee, U.S. Bankruptcy Court, E.D. N.C.
Prof. Kara Bruce, University of Oklahoma School of Law

BIFURCATED FEES

- ***Jonathan P. Schultz and Ovation Law LLC v. U.S. Trustee (In re Suazo)***, 2023 WL 1961198 (D. Colo. Feb. 13, 2023)
- ***In re Siegle***, 639 B.R. 755 (Bankr. D. Minn. May 9, 2022)
- ***U.S. Trustee v. Shepherd (In re Shepherd),*** 644 B.R. 130 (Bankr. W.D. Pa. Sept. 26, 2022)
- ***In re Rosema, et al.***, 641 B.R. 896 (Bankr. W.D. Mo. July 8, 2022)

ATTORNEY'S FEES

- ***Dordevic and Peraica v. U.S. Trustee (In re Dordevic)***, 62 F. 4th 340 (7th Cir. Mar. 9, 2023)
- ***In re Village Apothecary***, 45 F.4th 940 (6th Cir. Aug. 16, 2022)
- ***In re Welch***, 647 B.R. 673 (Bankr. D. S.C. Jan. 4, 2023)
- ***In re Montilla***, 2022 WL 12165276 (Bankr. N.D. Ill. Oct. 12, 2022) (Now on the District Court)
- ***Utah Power Systems, LLC vs. Lang et al. (In re Lang)***, 642 B.R. 76 (M.D. Fla. Aug. 5, 2022)
- ***In re Spurlock***, 642 B.R. 269 (Bankr. S.D. Ohio Aug. 1, 2022)

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- ***Evans v. McCallister (In re Evans)***, 2023 WL 3939837 (9th Cir. Jun. 12, 2023)
- ***Goodman v. Doll (In re Doll)***, 57 F.4th 1129 (10th Cir. Jan. 18, 2023)
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CHAPTER 13 APPRECIATION AND RELATED ISSUES

- ***In re Klein***, 2022 WL 3902822 (Bankr. D. Colo. Aug. 23, 2022)
- ***In re Marsh***, 647 B.R. 725 (Bankr. W.D. Mo. Jan. 17, 2023)
- ***In re Castleman***, 2022 WL 2392058 (W.D. Wash. July 1, 2022) (on appeal to the 9th Cir.)
- ***Goetz v. Weber (In re Goetz)***, 2023 WL 3749296 (8th Cir. BAP June 1, 2023)
- ***Masingale v. Munding (In re Masingale)***, 644 B.R. 530 (9th Cir. BAP Nov. 2, 2022) (on appeal to the 9th Cir.).

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- ***Keystone Gas Gathering LLC v. Ad Hoc Committee of Opco Unsecured Creds, et al (In re Ultra Petroleum Corp.)***, 51 F.4th 138 (5th Cir. Oct. 14, 2022).
- ***In re Hertz Corp.***, 21-50995 (Bankr. D. Del. Nov. 21, 2022) (certified for direct appeal)
- ***In re Latex Foam Int'l, LLC***, 2023 WL 2403757 (D. Conn. Mar. 8, 2023)

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- ***United States v. Alicea***, 58 F.4th 155 (4th Cir. Jan. 19, 2023)
- ***In re Szczyporski***, 34 F.4th 179 (3d Cir. May 11, 2022)
- ***In re Sears Holdings Corp.***, 2023 WL 3470475 (Bankr. S.D.N.Y. May 15, 2023)
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- ***In re Mastro-Edelstein***, 645 B.R. 603 (Bankr. N.D. Ill. Nov. 7, 2022)
- ***In re Parker***, 2022 WL 17591603 (Bankr. W.D. Tenn. Dec. 8, 2022)
- ***In re Landron***, 2023 WL 1460543 (Bankr. D.P.R. Feb. 1, 2023)
- ***In re Flores***, 649 B.R. 534 (Bankr. N.D. Ind. Mar. 8, 2023)
- ***In re Ryan Christopher***, 2023 WL 2911655 (Bankr. M.D. Fla. April 12, 2023)
- ***In re Malmborg***, 650 B.R. 707 (N.D. Ill. May 4, 2023)

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- ***Bartenwerfer v. Buckley***, 143 S. Ct. 665 (Feb. 22, 2023)
- ***Kassas v. State Bar of California (In re Kassas)***, 49 F.4th 1158 (9th Cir. Sept. 26, 2022)
- ***Nationwide Judgement Recovery v. Sorrels (In re Sorrells)***, 644 B.R. 158 (Bankr. E.D. Tex. Sept. 27, 2022)
- ***Anderson v. Hardwick (In re Hardwick)***, 648 B.R. 175 (Bankr. E.D. Tex. Jan. 27, 2023)
- ***Spring Valley Produce v. Forrest (In re Forrest)***, 47 F.4th 1229 (11th Cir. Aug. 31, 2022)
- ***Turney v. Vulaj (In re Vulaj)***, 2023 WL 3764662 (Bankr. S.D. Cal. June 1, 2023)

APPLICABILITY OF § 523 TO CORPORATE DEBTORS IN SUBCHAPTER V

- ***Cantwell-Cleary Co. v. Cleary Packaging, LLC (In re Cleary Packaging, LLC)***, 36 F.4th 509 (4th Cir. Jun. 7, 2022)
- ***Lafferty v. Off-Spec Solutions LLC (In re Off-Spec Solutions LLC)***, 2023 WL 4360311 (9th Cir. B.A.P. July 6, 2023)
- ***BenShot, LLC v. 2 Monkey Trading, LLC (In re 2 Monkey Trading, LLC)***, 2023 WL 3947494 (Bankr. M.D. Fla. June 12, 2023) (Certified for direct appeal)
- ***Avion Funding v. GFS Indus. (In re GFS Indus.)***, 647 B.R. 337 (Bankr. W.D. Tex. Nov. 10, 2022)

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- ***MOAC Mall Holdings LLC v. Transform Holdco LLC***, 143 S. Ct. 927 (Apr. 19, 2023)
- ***Litton Loan Svc'g v. Schubert (In re Schubert)***, 2023 WL 2663257 (6th Cir. Mar. 28, 2023).
- ***Clifton Capital Grp. V. Sharp (In re E. Coast Foods, Inc.)***, 66 F.4th 1214 (9th Cir. May 8, 2023).
- ***Esteva v. UBS Fin. Servs. (In re Esteva)***, 60 F. 4th 664 (11th Cir. Feb .16, 2023).

QUESTIONS?

2023 Southeast Bankruptcy Workshop
Caselaw Update

Table of Cases
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A. Attorney Fees and Sanctions

1. *In re Dordevic*, 62 F.4th 340 (7th Cir. 2023).
    - *See* App'x, Hon. William Houston Brown, Consumer Law Update, January 1 to March 31, 2023, at 10.
2. *U.S. Trustee v. Delafield*, et al., 57 F.4th 414 (4th Cir. 2023).
    - *See* App'x, Hon. William Houston Brown, Consumer Law Update, January 1 to March 31, 2023, at 11.
3. *In re Village Apothecary, Inc*., 45 F.4th 940 (6th Cir. 2022).
    - *See* App'x, Richard Levin, Recent Developments in Bankruptcy Law, October 2022, at 12.
4. *In re Suazo*, ___ F.Supp.3d ___, 2023 WL 1961198 (D. Colo. Feb. 13, 2023).
    - *See* App'x, Hon. William Houston Brown, Consumer Law Update, January 1 to March 31, 2023, at 6.
5. *In re Welch*, 647 B.R. 673 (Bankr. D. S.C. 2023).
    - *See* App'x, Hon. William Houston Brown, Consumer Law Update, January 1 to March 31, 2023, at 11.
6. *In re Spurlock*, ___ B.R. ___, 2022 WL 3041256 (Bankr. S.D. Ohio Aug. 1, 2022). *See In re Metts*, ___ B.R. ___, 2022 WL 3648420 (Bankr. D. S.C. June 30, 2022).
    - *See* App'x, Hon. William Houston Brown, Consumer Law Update, July 1 to September 15, 2022, at 9-10.
7. *In re Kelly*, ___ B.R. ___, 2023 WL 2724350 (Bankr. E.D. Pa. Mar. 31, 2023).
    - *See* App'x, Hon. William Houston Brown, Consumer Law Update, January 1 to March 31, 2023, at 11.
8. *In re Montilla*, ___ B.R. ___, 2022 WL 12165276 (Bankr. N.D. Ill. October 12, 2022).
    - *See* App'x, Hon. William Houston Brown, Consumer Law Update, September 15 to December 31, 2022, at 10-11.
9. *In re Frantz*, 648 B.R. 91 (Bankr. C.D. Cal. 2023).
    - *See* App'x, Hon. William Houston Brown, Consumer Law Update, January 1 to March 31, 2023, at 11.
10. *In re Young*, ___ B.R. ___, 2022 WL 17730742 (Bankr. W.D. Pa. Nov. 15, 2022).
    - *See* App'x, Hon. William Houston Brown, Consumer Law Update, September 15 to December 31, 2022, at 11.
11. *Utah Power Systems, LLC vs. Lang et al. (In re Lang),* 642 B.R. 76 (M.D. Fla. Aug. 5, 2022) (Steele, J.)

[1] Hon. William Houston Brown's Consumer Law Update for the period of April 1 – June 30, 2023 appears in the appendix but is not incorporated in this Table of Cases.

- A judgment creditor moved to require disgorgement of debtor's attorney fees and for sanctions related to the filing of two Chapter 13 cases, but the District Court affirmed denial of that motion, holding that the statutory predicate for disgorgement is § 329(b)'s evaluation of whether the fee exceeded reasonable value of the legal services.

12. *In re Baum*, ___ B.R. ____, 2022 WL 1447379 (Bankr. E.D. Mich. May 6, 2022).
    - *See* App'x, Hon. William Houston Brown, Consumer Law Update, April 1 to June 30, 2022, at 13-14.
13. *In re Siegle,* 2022 WL 1589381 (Bankr. D. Minn. May 19, 2022)
    - (The Court disapproved attempts at bifurcation of fees. The Court found the agreements violated 11 U.S.C. § 526(a)(2) and (a)(3) because they contain "untrue and misleading statements about the attorney's services terminating at filing under the pre-petition agreement, and affirmatively misrepresent well-settled law about withdrawal and the scope of services in bankruptcy cases." The Court held the bifurcation agreement was void.
14. *In re Shepherd*, 644 B.R. 130 (Bankr. W.D. Pa. 2022).
    - *See* App'x, Hon. William Houston Brown, Consumer Law Update, September 15 to December 31, 2022, at 8.
15. *In re Rosema*, 641 B.R. 896 (Bankr. W.D. Mo. 2022).
    - *See* App'x, Hon. William Houston Brown, Consumer Law Update, July 1 to September 15, 2022, at 5-6.

B. Automatic Stay

1. *Lac du Flambeau Band of Lake Superior Chippewa Indians v. Coughlin,* 599 U.S. ___ (June 15, 2023).
    - The Bankruptcy Code abrogates the sovereign immunity of all governmental entities, including federally recognized Indian tribes. Debtor's motion asserting that tribal-affiliated lender violated the automatic stay is *not* barred by tribal sovereign immunity.
2. *Coughlin v. Lac Du Flambeau Band of Lake Superior Chippewa Indians (In re Coughlin)*, 33 F.4th 600 (1st Cir. 2022) (affirmed, 599 U.S. ___ (2023)).
    - *See* App'x, Hon. William Houston Brown, Consumer Law Update, April 1 to June 30, 2022, at 2.
    - *See* App'x, Richard Levin, Recent Developments in Bankruptcy Law, July 2022, at 9.
3. *In re Fogarty*, 39 F.4th 62 (2d Cir. 2022).
    - *See* App'x, Hon. William Houston Brown, Consumer Law Update, July 1 to September 15, 2022, at 2.
4. *Sheehan v. Breccia Unltd. Co. (In re Sheehan)*, 48 F.4th 513 (7th Cir. 2022).
    - *See* App'x, Richard Levin, Recent Developments in Bankruptcy Law, October 2022, at 1.
5. *Censo, LLC v. Newrez, LLC (In re Censo, LLC)*, 638 B.R. 416 (9th Cir. B.A.P. 2022).

- *See* App'x, Richard Levin, Recent Developments in Bankruptcy Law, July 2022, at 1.

6. *Windstream Holdings, Inc. v. Charter Commc'ns Inc. (In re Windstream Holdings, Inc.)*, 2022 U.S. Dist. LEXIS 183574 (S.D.N.Y. Oct. 6, 2022).
   - *See* App'x, Richard Levin, Recent Developments in Bankruptcy Law, October 2022, at 1.
7. *Freedom Mortgage Corp. v. Dean*, 647 B.R. 780 (M.D. Fla. 2023).
   - *See* App'x, Hon. William Houston Brown, Consumer Law Update, January 1 to March 31, 2023, at 2.
8. *In re Hoover*, 645 B.R. 656 (W.D. Wash. 2022).
   - *See* App'x, Hon. William Houston Brown, Consumer Law Update, September 15 to December 31, 2022, at 2.
9. *In re Toppin*, ___ B.R. ___, 2022 WL 16696068 (E.D. Pa. Nov. 3, 2022).
   - *See* App'x, Hon. William Houston Brown, Consumer Law Update, September 15 to December 31, 2022, at 3.
10. *In re Mariner Health Central, Inc.*, ___ B.R. ___, 2023 WL 187175 (Bankr. N.D. Cal. Jan. 12, 2023).
    - *See* App'x, Richard Levin, Recent Developments in Bankruptcy Law, April 2023, at 1.
11. *3M Occupational Safety LLC v. Those Parties Listed on Appendix A to the Complaint (In re Aearo Techs. LLC)*, 642 B.R. 891 (Bankr. S.D. Ind. 2022).
    - *See* App'x, Richard Levin, Recent Developments in Bankruptcy Law, January 2023, at 1.
12. *In re Harrison*, 643 B.R. 399 (Bankr. E.D. N. Car. 2022).
    - *See* App'x, Richard Levin, Recent Developments in Bankruptcy Law, October 2022, at 1.
13. *In re Conway*, 648 B.R. 318 (Bankr. N.D. Ill. 2023).
    - *See* App'x, Hon. William Houston Brown, Consumer Law Update, January 1 to March 31, 2023, at 2.
14. *In re Rios*, ___ B.R. ___, 2023 WL 2358825 (Bankr. E.D. Wisc. Mar. 3, 2023).
    - *See* App'x, Hon. William Houston Brown, Consumer Law Update, January 1 to March 31, 2023, at 2.
15. *In re Wood*, ___ B.R. ___, 2023 WL 2435682 (Bankr. E.D. Mich. Mar. 9, 2023).
    - *See* App'x, Hon. William Houston Brown, Consumer Law Update, January 1 to March 31, 2023, at 2.
16. *In re Giles-Flores*, ___ B.R. ___, 2022 WL 12025689 (Bankr. S.D. Tex. Oct. 20, 2022).
    - *See* App'x, Hon. William Houston Brown, Consumer Law Update, September 15 to December 31, 2022, at 2.
17. *In re Hamby*, ___ B.R. ___, 2022 WL 17428947 (Bankr. N.D. Ga. Nov. 29, 2022).
    - *See* App'x, Hon. William Houston Brown, Consumer Law Update, September 15 to December 31, 2022, at 2.

18. *In re Nyamusevya*, 644 B.R. 375 (Bankr. S.D. Ohio 2022). *Compare In re Tavera*, 645 B.R. 299 (Bankr. M.D. Fla. 2022).
    - *See* App'x, Hon. William Houston Brown, Consumer Law Update, September 15 to December 31, 2022, at 2-3.
19. *In re Cattron*, ___ B.R. ___, 2022 WL 17861742 (Bankr. E.D. Mich. Dec. 22, 2022).
    - *See* App'x, Hon. William Houston Brown, Consumer Law Update, September 15 to December 31, 2022, at 3.
20. *In re Jardins*, ___ B.R.___, 2022 WL 16579457 (Bankr. D. Idaho Nov. 1, 2022).
    - *See* App'x, Hon. William Houston Brown, Consumer Law Update, September 15 to December 31, 2022, at 3.
21. *In re Schneorson*, 645 B.R. 146 (Bankr. E.D. N.Y. 2022).
    - *See* App'x, Hon. William Houston Brown, Consumer Law Update, September 15 to December 31, 2022, at 3.
22. *In re Merlo*, ___ B.R. ___, 2022 WL 16857102 (Bankr. E.D. N.Y. Nov. 10, 2022).
    - *See* App'x, Hon. William Houston Brown, Consumer Law Update, September 15 to December 31, 2022, at 3-4.
23. *In re Busby*, ___ B.R. ___, 2022 WL 3030971 (Bankr. E.D. Pa. Aug. 1, 2022).
    - *See* App'x, Hon. William Houston Brown, Consumer xLaw Update, July 1 to September 15, 2022, at 2.
24. *In re Wright*, 642 B.R. 172 (Bankr. E.D. Mich. 2022).
    - *See* App'x, Hon. William Houston Brown, Consumer Law Update, July 1 to September 15, 2022, at 2-3.
25. *In re Madsen*, ___ B.R. ___, 2022 WL 1272583 (Bankr. E.D. Cal. Apr. 27, 2022).
    - *See* App'x, Hon. William Houston Brown, Consumer Law Update, April 1 to June 30, 2022, at 2.
26. *In re Thomas*, ___ B.R. ___, 2022 WL 1272145 (Bankr. S.D. N.Y. Apr. 28, 2022).
    - *See* App'x, Hon. William Houston Brown, Consumer Law Update, April 1 to June 30, 2022, at 3.

C. Avoidance

1. *Berley Assocs. Ltd. v. 62-74 Speedwell Ave. LLC (In re Pazzo Pazzo Inc.)*, ___ Fed. App'x ___, 2022 U.S. App. LEXIS 34619 (3d Cir. Dec. 15, 2022).
    - *See* App'x, Richard Levin, Recent Developments in Bankruptcy Law, January 2023, at 1.
2. *Ogle v. Morgan (In re Evergreen Helicopters Int'l Inc.)*, 50 F.4th 547 (5th Cir. 2022).
    - *See* App'x, Richard Levin, Recent Developments in Bankruptcy Law, January 2023, at 1-2.
3. *Auriga Polymers Inc. v. PMCM2, LLC*, 40 F.4th 1273 (11th Cir. 2022).
    - *See* App'x, Richard Levin, Recent Developments in Bankruptcy Law, October 2022, at 3.

4. *Warsco v. Creditmax Collection Agency, Inc*., 56 F.4th 1134 (7th Cir. 2023)
    - *See* App'x, Richard Levin, Recent Developments in Bankruptcy Law, January 2023, at 2.
    - *See* App'x, Hon. William Houston Brown, Consumer Law Update, January 1 to March 31, 2023, at 2-3.
5. *1944 Beach Blvd., LLC v. Live Oak Banking Co. (In re NRP Lease Holdings, LLC)*, 50 F.4th 979 (11th Cir. 2022).
    - *See* App'x, Richard Levin, Recent Developments in Bankruptcy Law, January 2023, at 2.
6. *Georgelas v. Desert Hill Ventures, Inc*., 45 F.4th 1193 (10th Cir. 2022).
    - *See* App'x, Richard Levin, Recent Developments in Bankruptcy Law, October 2022, at 1-2.
7. *Kelley v. Safe Harbor Managed Account 101*, Ltd., 31 F.4th 1058 (8th Cir. 2022).
    - *See* App'x, Richard Levin, Recent Developments in Bankruptcy Law, July 2022, at 1.
8. *Matter of Mance*, 31 F.4th 1014 (7th Cir. 2022).
    - *See* App'x, Hon. William Houston Brown, Consumer Law Update, April 1 to June 30, 2022, at 3.
9. *Gunsalus v. County of Ontario*, N.Y., ___ F.4th ___, 2022 WL 2296945 (2d Cir. June 27, 2022).
10. *See* App'x, Hon. William Houston Brown, Consumer Law Update, April 1 to June 30, 2022, at 3-4.
11. *In re Tillman*, 53 F.4th 1160 (9th Cir. 2022).
    - *See* App'x, Hon. William Houston Brown, Consumer Law Update, September 15 to December 31, 2022, at 4.
12. *In re Barclay*, 52 F.4th 1172 (9th Cir. 2022).
    - *See* App'x, Hon. William Houston Brown, Consumer Law Update, September 15 to December 31, 2022, at 4.
13. *Montoya v. Goldstein (In re Chuza Oil Co.)*, 639 B.R. 586 (10th Cir. B.A.P. 2022).
    - *See* App'x, Richard Levin, Recent Developments in Bankruptcy Law, July 2022, at 2.
14. *Miller v. Mott* (*In re Team Sys. Int'l, LLC*), ___ B.R. ___, 2023 Bankr. LEXIS 229 (Bankr. D. Del. Jan.31, 2023).
    - *See* App'x, Richard Levin, Recent Developments in Bankruptcy Law, April 2023, at 1.
15. *In re J and M Supply of the Carolinas, LLC*, ___ B.R. ___, 2022 Bankr. LEXIS 3469 (Bankr. E.D.N.C. Dec. 8, 2022).
    - *See* App'x, Richard Levin, Recent Developments in Bankruptcy Law, January 2023, at 2-3.
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16. *Shuford v. Kearns (In re JTR1, LLC)*, 643 B.R. 403 (Bankr. W.D. N. Car. 2022).
    - *See* App'x, Richard Levin, Recent Developments in Bankruptcy Law, October 2022, at 2.

17. *Petr v. BMO Harris Bank, N.A. (in re BWGS, LLC)*, 2022 Bankr. LEXIS 2313 (Bankr. S.D. Ind. Aug. 18, 2022).
    - *See* App'x, Richard Levin, Recent Developments in Bankruptcy Law, October 2022, at 2.
18. *Nelms v. TXU Retail Energy Co. LLC (In re Gritty Energy LLC)*, 2022 Bankr. LEXIS 2888 (Bankr. S.D. Tex. Oct. 6, 2022).
    - *See* App'x, Richard Levin, Recent Developments in Bankruptcy Law, October 2022, at 2-3.
19. *Harker v. GYPC, Inc. (In re GYPC, Inc.)*, 639 B.R. 739 (Bankr. S.D. Ohio 2022).
    - *See* App'x, Richard Levin, Recent Developments in Bankruptcy Law, October 2022, at 3.
20. *Center City Healthcare, LLC v. McKesson Plasma & Biologics LLC (In re Center City Healthcare, LLC)*, 2022 Bankr. LEXIS 1638 (Bankr. D. Del. June 13, 2022).
    - *See* App'x, Richard Levin, Recent Developments in Bankruptcy Law, July 2022, at 1-2.
21. *Brady v. United States, SBA (In re Specialty's Café & Bakery, Inc.)*, 639 B.R. 548 (Bankr. N.D. Cal. 2022).
    - *See* App'x, Richard Levin, Recent Developments in Bankruptcy Law, July 2022, at 2.
22. *Hall v. Meisner*, 51 4th 185 (6th Cir. 2022).
    - *See* App'x, Hon. William Houston Brown, Consumer Law Update, September 15 to December 31, 2022, at 4.
23. *In re Riendeau*, 645 B.R. 321 (Bankr. D. Maine, 2022).
    - *See* App'x, Hon. William Houston Brown, Consumer Law Update, September 15 to December 31, 2022, at 4.
24. *In re Shippy*, 2022 WL 14146881 (Bankr. W.D. Wash. Oct. 24, 2022).
    - *See* App'x, Hon. William Houston Brown, Consumer Law Update, September 15 to December 31, 2022, at 5.
25. *In re Liss*, 641 B.R. 384 (Bankr. N.D. Ill. 2022).
    - *See* App'x, Hon. William Houston Brown, Consumer Law Update, July 1 to September 15, 2022, at 3.
26. *In re Taylor*, ___B.R. ___, 2022 WL 3363683 (Bankr. W.D. Ark. Aug. 15, 2022).
    - *See* App'x, Hon. William Houston Brown, Consumer Law Update, July 1 to September 15, 2022, at 3.

D. Case Commencement and Eligibility

1. *In re LTL Mgmt., LLC v. Official Committees* (*In re LTL Mgmt., LLC*), 58 F.4th 581 (3d Cir. 2023).
    - *See* App'x, Richard Levin, Recent Developments in Bankruptcy Law, April 2023, at 2.
2. *NetJets Aviation, Inc. v. RS Air, LLC (In re RS Air, LLC)*, 638 B.R. 403 (9th Cir. B.A.P. 2022).
    - *See* App'x, Richard Levin, Recent Developments in Bankruptcy Law, July 2022, at 3.

3. *In re Ventura*, ___ B.R. ___ (E.D.N.Y. Apr. 21, 2022).
    - *See* App'x, Richard Levin, Recent Developments in Bankruptcy Law, July 2022, at 3.
4. *In re Nash Engineering Co*., 2022 U.S Dist. LEXIS 139985 (D. Conn. Aug. 5, 2022).
    - *See* App'x, Richard Levin, Recent Developments in Bankruptcy Law, October 2022, at 4.
5. *In re Free Speech Sys., LLC*, ___ B.R. ___, 2023 Bankr. LEXIS 892 (Bankr. S.D. Tex. Mar. 31, 2023).
    - *See* App'x, Richard Levin, Recent Developments in Bankruptcy Law, April 2023, at 2.
6. *In re The Hacienda Co., LLC*, ___ B.R. ___ (Bankr. C.D. Cal. Jan. 20, 2023).
    - *See* App'x, Richard Levin, Recent Developments in Bankruptcy Law, April 2023, at 2-3.
7. *Nat'l Med. Imaging, Holding Co., LLC v. United States Bank, N.A. (In re Nat'l Med. Imaging, LLC)*, 644 B.R. 94 (Bankr. E.D. Pa. 2022).
    - *See* App'x, Richard Levin, Recent Developments in Bankruptcy Law, January 2023, at 3.
8. *In re Knott,* 2022 WL 2293994 (Bankr. W.D. Va. June 24, 2022).
    - *See* App'x, Hon. William Houston Brown, Consumer Law Update, April 1 to June 30, 2022, at 10.

E. Chapter 11

1. *Hanson Permanente Cement, Inc. v. Kaiser Gypsum Co, Inc. (In re Kaiser Gypsum Co., Inc.),* 60 F.4th 73 (4th Cir. 2023).
    - *See* App'x, Richard Levin, Recent Developments in Bankruptcy Law, April 2023, at 3.
2. *Braun v. America-CV Station Group, Inc. (In re America-CV Station Group, Inc.)*, ___ F.4th ___, 2023 U.S. App. LEXIS 230 (11th Cir. Jan. 5, 2023).
    - *See* App'x, Richard Levin, Recent Developments in Bankruptcy Law, January 2023, at 4.
3. *Ad Hoc Committee of Holders of Trade Claims v. Pac. Gas & Elec. Co. (In re Pac. Gas & Elec. Co.)*, 46 F.4th 1047 (9th Cir. 2022).
    - *See* App'x, Richard Levin, Recent Developments in Bankruptcy Law, October 2022, at 5.
4. *Ultra Petro. Corp. v. Ad Hoc Comm. (In re Ultra Petro. Corp.)*, ___ F. 4th ___, 2022 U.S. App. LEXIS 28604 (5th Cir. Oct. 14, 2022).
    - *See* App'x, Richard Levin, Recent Developments in Bankruptcy Law, October 2022, at 5.
5. *NexPoint Advisors, L.P. v. Highland Cap. Mgmt., L.P. (In re Highland Cap. Mgmt., L.P.)*, ___ F.4th ___, 2022 U.S. App. LEXIS 23237 (5th Cir. Aug. 19, 2022).
    - *See* App'x, Richard Levin, Recent Developments in Bankruptcy Law, October 2022, at 5-6.

6. *Legal Service Bureau, Inc. v. Orange County Bail Bonds, Inc. (In re Orange County Bail Bonds, Inc.)*, 638 B.R. 137 (9th Cir. B.A.P. Apr. 27, 2022).
    - *See* App'x, Richard Levin, Recent Developments in Bankruptcy Law, July 2022, at 5.
7. *Ad Hoc Group of Unsecured Claimants v. LATAM Airlines Group, S.A. (In re LATAM Airlines Group., S.A.)*, 2022 U.S. Dist. LEXIS 157534 (S.D.N.Y. Aug. 31, 2022).
    - *See* App'x, Richard Levin, Recent Developments in Bankruptcy Law, October 2022, at 6.
8. *In re Endo Int'l plc*, __ B.R. ___, 2022 Bankr. LEXIS 3093 (Bankr. S.D.N.Y. Nov. 2, 2022).
    - *See* App'x, Richard Levin, Recent Developments in Bankruptcy Law, January 2023, at 3.
9. *In re Comedymx, LLC*, ___ B.R. ___, 2022 Bankr. LEXIS 3551 (Bankr. D. Del. Dec. 16, 2022).
    - *See* App'x, Richard Levin, Recent Developments in Bankruptcy Law, January 2023, at 4.
10. *In re Celsius Network LLC*, 2022 Bankr. LEXIS 2672 (Bankr. S.D.N.Y. Sept. 28, 2022).
    - *See* App'x, Richard Levin, Recent Developments in Bankruptcy Law, October 2022, at 4-5.
11. *In re Nat'l Small Bus. Alliance, Inc*., 2022 Bankr. LEXIS 1811 (Bankr. D.D.C. June 29, 2022).
    - *See* App'x, Richard Levin, Recent Developments in Bankruptcy Law, July 2022, at 3-4.
12. *In re Player's Poker Club, Inc*., 636 B.R. 811 (Bankr. C.D. Cal. 2022).
    - *See* App'x, Richard Levin, Recent Developments in Bankruptcy Law, July 2022, at 4.
13. *Beyha v. Conestoga Title Ins. Co. (In re Beyha)*, 2022 Bankr. LEXIS 635 (Bankr. E.D. Pa. 2022).
    - *See* App'x, Richard Levin, Recent Developments in Bankruptcy Law, July 2022, at 4.

F. Chapter 13

1. *In re Bagsby*, 40 F.4th 740 (6th Cir. 2022).
    - *See* App'x, Hon. William Houston Brown, Consumer Law Update, July 1 to September 15, 2022, at 6-7.
2. *In re Peralta*, ___ F.4th ___, 2022 WL 4090304 (3d Cir. Sept. 7, 2022).
    - *See* App'x, Hon. William Houston Brown, Consumer Law Update, July 1 to September 15, 2022, at 8.
3. *In re Lang*, 642 B.R. 76 (M.D. Fla. 2022).
    - *See* App'x, Hon. William Houston Brown, Consumer Law Update, July 1 to September 15, 2022, at 10.
4. *In re Blumsack*, 647 B.R. 584 (Bankr. D. Mass. 2023).

- *See* App'x, Hon. William Houston Brown, Consumer Law Update, January 1 to March 31, 2023, at 7.

5. *In re Brown*, 645 B.R. 524 (Bankr. D. S.C. 2022).
   - *See* App'x, Hon. William Houston Brown, Consumer Law Update, September 15 to December 31, 2022, at 9.
6. *In re Giles*, 641 B.R. 255 (Bankr. S.D. Fla. 2022).
   - *See* App'x, Hon. William Houston Brown, Consumer Law Update, July 1 to September 15, 2022, at 7.
7. *In re Emiabata*, ___ B.R. ___, 2022 WL 2914361 (Bankr. D. Conn. July 22, 2022).
   - *See* App'x, Hon. William Houston Brown, Consumer Law Update, July 1 to September 15, 2022, at 7.
8. *In re Knott*, 2022 WL 2293994 (Bankr. W.D. Va. June 24, 2022).
   - *See* App'x, Hon. William Houston Brown, Consumer Law Update, April 1 to June 30, 2022, at 10.
9. *In re Poole*, ___ B.R. ___, 2022 WL 5224087 (Bankr. N.D. Tex. Sept. 30, 2022).
   - *See* App'x, Hon. William Houston Brown, Consumer Law Update, September 15 to December 31, 2022, at 9.
10. *In re Lay*, 645 B.R. 661 (Bankr. D. Kan. 2022).
    - *See* App'x, Hon. William Houston Brown, Consumer Law Update, September 15 to December 31, 2022, at 10.
11. *In re Nelson*, ___ B.R. ___, 2022 WL 6795096 (Bankr. E.D. Wisc. Oct. 11, 2022).
    - *See* App'x, Hon. William Houston Brown, Consumer Law Update, September 15 to December 31, 2022, at 10.
12. *Matter of Terrell*, 39 F.4th 488 (7th Cir. 2022).
    - *See* App'x, Hon. William Houston Brown, Consumer Law Update, July 1 to September 15, 2022, at 8-9.
13. *In re Bohinski*, ___ B.R. ___, 2022 WL 1435605 (Bankr. E.D. Mich. Apr. 25, 2022),
    - *See* App'x, Hon. William Houston Brown, Consumer Law Update, April 1 to June 30, 2022, at 12.
14. *In re Jenkins*, ___ B.R. ___, 2022 WL 1196578 (Bankr. E.D. Tex. Apr. 21, 2022).
    - *See* App'x, Hon. William Houston Brown, Consumer Law Update, April 1 to June 30, 2022, at 12.
15. *In re Villarreal*, ___ B.R. ___, 2022 WL 1102223 (Bankr. S.D. Tex. Apr. 12, 2022).
    - *See* App'x, Hon. William Houston Brown, Consumer Law Update, April 1 to June 30, 2022, at 12-13.

G. Chapter 15

1. *In re Comair Ltd*., ___ B.R. ___, 2023 Bankr. LEXIS 363 (Bankr. S.D.N.Y. Feb. 12, 2023).

- *See* App'x, Richard Levin, Recent Developments in Bankruptcy Law, April 2023, at 8-9.

2. *In re Global Cord Blood Corp*., ___ B.R. ___, 2022 Bankr. LEXIS 3426 (Bankr. S.D.N.Y. Dec. 5, 2022).
   - *See* App'x, Richard Levin, Recent Developments in Bankruptcy Law, January 2023, at 8-9.
3. *King v. Exp. Dev. Can. (In re Zetta Jet USA, Inc.)*, 644 B.R. 12 (Bankr. C.D. Cal. 2022).
   - *See* App'x, Richard Levin, Recent Developments in Bankruptcy Law, January 2023, at 9.
4. *In re Modern Land (China) Co, Ltd*., 641 B.R. 768 (Bankr. S.D.N.Y. July 18, 2022).
   - *See* App'x, Richard Levin, Recent Developments in Bankruptcy Law, October 2022, at 14.
5. *In re Petition of Shimmin, as Liquidator of Comfort Jet Aviation, Ltd*., 2022 Bankr. LEXIS 2932 (Bankr. W.D. Okla. Oct. 14, 2022).
   - *See* App'x, Richard Levin, Recent Developments in Bankruptcy Law, October 2022, at 14-15.

H. Claims and Priorities

1. *United States v. Alicea*, 58 F.4th 155 (4th Cir. 2023).
   - *See* App'x, Hon. William Houston Brown, Consumer Law Update, January 1 to March 31, 2023, at 10.
2. *In re Laney*, 46 F.4th ___, 2022 WL 3500194 (7th Cir. Aug. 18, 2022).
   - *See* App'x, Hon. William Houston Brown, Consumer Law Update, July 1 to September 15, 2022, at 11.
3. *In re Szczyporski*, 34 F.4th 179 (3d Cir. 2022).
   - *See* App'x, Hon. William Houston Brown, Consumer Law Update, April 1 to June 30, 2022, at 14.
4. *Citibank, N.A. v. Brigade Cap. Mgmt, LP*, 49 F.4th 42 (2d Cir. 2022).
   - *See* App'x, Richard Levin, Recent Developments in Bankruptcy Law, October 2022, at 6.
5. *Ultra Petro. Corp. v. Ad Hoc Comm. (In re Ultra Petro. Corp.)*, ___ F. 4th ___. 2022 U.S. App. LEXIS 28604 (5th Cir. Oct. 14, 2022).
   - *See* App'x, Richard Levin, Recent Developments in Bankruptcy Law, October 2022, at 6.
6. *ESL Invs., Inc. v. Sears Holdings Corp. (In re Sears Holdings Corp.)*, ___ F.4th ___, 2022 U.S. App. LEXIS 28584 (2d Cir. Oct. 14, 2022).
   - *See* App'x, Richard Levin, Recent Developments in Bankruptcy Law, October 2022, at 7.
7. *Norcross Hospitality, LLC v. Jones (In re Nilhan Devs., LLC)*, 2022 U.S. App. LEXIS 22291 (11th Cir. Aug. 11, 2022).
   - *See* App'x, Richard Levin, Recent Developments in Bankruptcy Law, October 2022, at 8.

8. *TLA Claimholders Group v. LATAM Airlines Group S.A.*, 55 F.4th 377 (2d Cir. 2022).
    - *See* App'x, Richard Levin, Recent Developments in Bankruptcy Law, January 2023, at 4-5.
9. *Official Comm. v. Entrepreneur Growth Cap. (In re Latex Foam Int'l, LLC),* ___ B.R. ___, 2023 U.S. Dist. LEXIS 38488 (D. Conn. Mar. 8, 2023).
    - *See* App'x, Richard Levin, Recent Developments in Bankruptcy Law, April 2023, at 3-4.
10. *Fin. Of Am. LLC v. Mortgage Winddown LLC (In re Ditech Holding Corp.)*, 2022 U.S. Dist. LEXIS 172793 (S.D.N.Y. Sept. 23, 2022).
    - *See* App'x, Richard Levin, Recent Developments in Bankruptcy Law, October 2022, at 7.
11. *Worthy Lending LLC v. New Style Contractors, Inc*., ___ N.Y. ___, 2022 N.Y. LEXIS 2384 (Nov. 22, 2022).
    - *See* App'x, Richard Levin, Recent Developments in Bankruptcy Law, January 2023, at 5.
12. *In re Greenway Park, LLC*, 2022 Bankr. LEXIS 2734 (Bankr. W.D. Okla. Sept. 29, 2022).
    - *See* App'x, Richard Levin, Recent Developments in Bankruptcy Law, October 2022, at 7.
13. *Steward v. Art Van Furniture, LLC (In re Art Van Furniture, LLC)*, 638 B.R. 523 (Bankr. D. Del. 2022).
    - *See* App'x, Richard Levin, Recent Developments in Bankruptcy Law, July 2022, at 5.
14. *Sec. Investor Prot. Corp. v. Bernard L. Madoff Inv. Secs. LLC (In re Madoff)*, 638 B.R. 41 (Bankr. S.D.N.Y. 2022).
    - *See* App'x, Richard Levin, Recent Developments in Bankruptcy Law, July 2022, at 5.
15. *In re Sklar Exploration Co*., LLC, 638 B.R. 627 (Bankr. D. Colo. 2022).
    - *See* App'x, Richard Levin, Recent Developments in Bankruptcy Law, July 2022, at 5-6.
16. *In re White*, 641 B.R. 717 (Bankr. S.D. Ga. 2022).
    - *See* App'x, Hon. William Houston Brown, Consumer Law Update, July 1 to September 15, 2022, at 11-12.
17. *In re Peete*, ___ B.R. ___, 2022 WL 2387652 (Bankr. E.D. Wisc. June 30, 2022).
    - *See* App'x, Hon. William Houston Brown, Consumer Law Update, July 1 to September 15, 2022, at 12.
18. *In re LATAM Airlines Grp. S.A.*, 2022 Bankr. LEXIS 2528 (Bankr. S.D.N.Y. Sept. 13, 2022).
    - *See* App'x, Richard Levin, Recent Developments in Bankruptcy Law, October 2022, at 3-4.
19. *Pacificorp v. North Pacific Canners & Packers Inc.,* 2023 WL 1765691 (D. Or. Feb. 3, 2023)

- Electricity does not qualify as a "good" under § 503(b)(9) and is not entitled to priority.

I. Confirmation

1. *In re Bozeman*, 57 F.4th 895 (11th Cir. 2023).
   - *See* App'x, Hon. William Houston Brown, Consumer Law Update, January 1 to March 31, 2023, at 7.
2. *In re Nieves*, 647 B.R. 809 (B.A.P. 1st Cir. 2023).
   - *See* App'x, Hon. William Houston Brown, Consumer Law Update, January 1 to March 31, 2023, at 7.
3. In re Parker, No. 18-23444, 2022 WL 17591603 (Bankr. W.D. Tenn. Dec. 8, 2022)
   - The confirmation order controlled where creditor failed to file an amended proof of claim to increase the amount claimed and delayed in filing the amendment until after confirmation and allowance of the amendment would make it impossible for the debtor to complete the plan.
4. *In re Roby, et al*., ___ B.R. ___, 2023 WL 2542365 (Bankr. M.D. Ala. Mar. 16, 2023).
   - *See* App'x, Hon. William Houston Brown, Consumer Law Update, January 1 to March 31, 2023, at 7-8.
5. *In re Landron*, No. 19-05064, 2023 WL 1460543, at *1 (Bankr. D.P.R. Feb. 1, 2023)
   - Discussing the binding effect of a confirmed plan, the court concluded that the debtor's confirmed plan trumped her post-confirmation objection to the bank's proof of claim.
6. *In re Berry*, ___ B.R. ___, 2023 WL 2482645 (Bankr. E.D. Wisc. Mar. 13, 2023).
   - *See* App'x, Hon. William Houston Brown, Consumer Law Update, January 1 to March 31, 2023, at 8.
7. *In re Mastro-Edelstein*, 645 B.R. 603 (Bankr. N.D. Ill. 2022).
   - *See* App'x, Hon. William Houston Brown, Consumer Law Update, September 15 to December 31, 2022, at 9.
8. *In re Flores*, 649 B.R. 534 (Bankr. N.D. Ind. Mar. 8, 2023).
   - A secured creditor who did not file a proof of claim in the Chapter 13 case could not seek stay relief after the plan was confirmed).
9. *In re Ryan Christopher*, No. 2:22-bk-00511-FMD, 2023 WL 2911655, at *4 (Bankr. M.D. Fla. April 12, 2023).
   - "[T]he binding effect of an order confirming a Chapter 13 plan under Section 1327(a) encompasses all issues that were or could have been litigated in the bankruptcy case."
10. *In re Malmborg*, 650 B.R. 707, 713 (Bankr. N.D. Ill. May 4, 2023) (
    - An unnoticed creditor's due process rights, whose claim was not included in the Chapter 13 debtor's confirmed plan, were not violated, because the claim remained intact outside of Chapter 13.

11. *In re Collins*, ___ B.R. ___, 2022 WL 17842158 (Bankr. M.D. Ga. Dec. 21, 2022).
    - *See* App'x, Hon. William Houston Brown, Consumer Law Update, September 15 to December 31, 2022, at 9-10.
12. *In re Collins*, 641 B.R. 296 (Bankr. M.D. Ga. 2022).
    - *See* App'x, Hon. William Houston Brown, Consumer Law Update, July 1 to September 15, 2022, at 7-8.
13. *In re Materne*, ___ B.R. ___, 2022 WL 1102452 (Bankr. D. Mass. Apr. 7, 2022).
    - *See* App'x, Hon. William Houston Brown, Consumer Law Update, April 1 to June 30, 2022, at 10-11.
14. *In re Seaver*, ___ B.R. ___, 2022 WL 2068271 (Bankr. D. S.C. May 13, 2022).
    - *See* App'x, Hon. William Houston Brown, Consumer Law Update, April 1 to June 30, 2022, at 11.
15. *In re McGuire*, 2022 WL _____, Case No. 20-61183-6-DD (Bankr. N.D. N.Y. June 24, 2022).
    - *See* App'x, Hon. William Houston Brown, Consumer Law Update, April 1 to June 30, 2022, at 11-12.

J. Dischargeability and Discharge

1. *Bartenwerfer v. Buckley,* 598 U.S. _____, 143 S.Ct. 665 (Feb. 22, 2023).
    - *See* App'x, Hon. William Houston Brown, Consumer Law Update, January 1 to March 31, 2023, at 4-5.
2. *Cantwell-Cleary Co. v. Cleary Packaging LLC (In re Cleary Packaging LLC)*, 36 F.4th 509 (4th Cir. 2022).
    - *See* App'x, Richard Levin, Recent Developments in Bankruptcy Law, July 2022, at 6.
3. *Law Offices of Francis J. O'Reilly, Esq. v. Selene Fin., L.P. (In re DiBattista)*, 33 F.4th 698 (2d Cir. 2022).
    - *See* App'x, Richard Levin, Recent Developments in Bankruptcy Law, July 2022, at 6-7.
4. *U.S. Pipe and Foundry Co., LLC v. Holland (In re U.S. Pipe & Foundry Co.)*, 32 F. 4th 1324 (11th Cir. 2022).
    - *See* App'x, Richard Levin, Recent Developments in Bankruptcy Law, July 2022, at 7.
5. *In re Kupperstein*, 61 F.4th 1 (1st Cir. 2023).
    - *See* App'x, Hon. William Houston Brown, Consumer Law Update, January 1 to March 31, 2023, at 6.
6. *Fin. Oversight & Mgmt. Bd. v. Cooperativa de Ahorro (In re Fin. Oversight & Mgmt. Bd.)*, 41 F.4th 29 (1st Cir. 2022).
    - *See* App'x, Richard Levin, Recent Developments in Bankruptcy Law, October 2022, at 10.
7. *In re McDonald*, 29 F.4th 817 (6th Cir. 2022).
    - *See* App'x, Hon. William Houston Brown, Consumer Law Update, April 1 to June 30, 2022, at 7-8.

8. *In re Bi Battista*, 33 F.4th 698 (2d Cir. 2022).
    - *See* App'x, Hon. William Houston Brown, Consumer Law Update, April 1 to June 30, 2022, at 8.
9. *Kassas v. State Bar of California*, 42 F.4th 1123 (9th Cir. 2022).
    - *See* App'x, Hon. William Houston Brown, Consumer Law Update, July 1 to September 15, 2022, at 4-5.
10. *In re Kriss*, 53 F.4th 726 (1st Cir. 2022).
    - *See* App'x, Hon. William Houston Brown, Consumer Law Update, September 15 to December 31, 2022, at 7.
    -
11. *In re Parvizi*, 641 B.R. 729 (B.A.P. 1st Cir. 2022).
    - *See* App'x, Hon. William Houston Brown, Consumer Law Update, July 1 to September 15, 2022, at 5.
12. *In re Shove*, 638 B.R. 1 (B.A.P. 1st Cir. 2022).
    - *See* App'x, Hon. William Houston Brown, Consumer Law Update, April 1 to June 30, 2022, at 7.
13. *In re Arsenal Intermediate Holdings, LLC*, ___ B.R. ___, 2023 Bankr. LEXIS 752 (Bankr. D. Del. Mar. 27, 2023).
    - *See* App'x, Richard Levin, Recent Developments in Bankruptcy Law, April 2023, at 4.
14. *Digital Media Solutions, LLC. v. Dunagan*, ___ F.4th ___ (6th Cir. Feb. 7, 2023).
    - *See* App'x, Richard Levin, Recent Developments in Bankruptcy Law, April 2023, at 4.
15. *NexPoint Advisors, L.P. v. Highland Cap. Mgmt., L.P. (In re Highland Cap. Mgmt., L.P.)*, ___ F.4th ___, 2022 U.S. App. LEXIS 23237 (5th Cir. Aug. 19, 2022).
    - *See* App'x, Richard Levin, Recent Developments in Bankruptcy Law, October 2022, at 8.
16. *NexPoint Advisors, L.P. v. Highland Cap. Mgmt., L.P. (In re Highland Cap. Mgmt., L.P.)*, ___ F.4th ___,2022 U.S. App. LEXIS 23237 (5th Cir. Aug. 19, 2022).
    - *See* App'x, Richard Levin, Recent Developments in Bankruptcy Law, October 2022, at 8-9.
17. *Beckhart v. Newrez LLC*, 31 F.4th 274 (4th Cir. 2022).
    - *See* App'x, Richard Levin, Recent Developments in Bankruptcy Law, July 2022, at 6.
18. *In re Orslini*, ___ B.R. ___, 2023 WL 1428578 (Bankr. E.D. N.Y. Jan. 30, 2023).
    - *See* App'x, Hon. William Houston Brown, Consumer Law Update, January 1 to March 31, 2023, at 5.
19. *Reinhart Foodservice LLC v. Schlundt*, 646 B.R. 478 (E.D. Wis. 2022).
    - *See* App'x, Richard Levin, Recent Developments in Bankruptcy Law, January 2023, at 5-6.
20. *In re Ventrone*, 648 B.R. 30 (Bankr. E.D. Pa. 2023).

- *See* App'x, Hon. William Houston Brown, Consumer Law Update, January 1 to March 31, 2023, at 5.

21. *In re Anthony*, ___ B.R. ___, 2023 WL 2058902 (Bankr. S.D. Ohio Feb. 17, 2023).
    - *See* App'x, Hon. William Houston Brown, Consumer Law Update, January 1 to March 31, 2023, at 5.
22. *In re Mazloom*, 648 B.R. 1 (Bankr. N.D. N.Y. 2023).
    - *See* App'x, Hon. William Houston Brown, Consumer Law Update, January 1 to March 31, 2023, at 5-6.
23. *In re Piazza*, ___ B.R. ___, 2022 WL 16726739 (Bankr. M.D. Pa. Nov. 4, 2022). *Compare In re Sangha*, 644 B.R. 843 (Bankr. C.D. Cal. 2022).
    - *See* App'x, Hon. William Houston Brown, Consumer Law Update, September 15 to December 31, 2022, at 7.
24. *In re Haugen*, 645 B.R. 635 (Bankr. D. N.D. 2022).
    - *See* App'x, Hon. William Houston Brown, Consumer Law Update, September 15 to December 31, 2022, at 7.
25. *In re Heinle*, ___ B.R. ___, 2022 WL 16841384 (Bankr. D. Mont. Nov. 9, 2022).
    - *See* App'x, Hon. William Houston Brown, Consumer Law Update, September 15 to December 31, 2022, at 8.
26. *Aboud and Aboud PC v. Cary*, ___ F.Supp.3d ___, 2022 WL 17261415 (D. Ariz. Nov. 29, 2022).
    - *See* App'x, Hon. William Houston Brown, Consumer Law Update, September 15 to December 31, 2022, at 8.
27. *In re Homaidan*, 640 B.R. 810 (Bankr. E.D. N.Y. 2022).
    - *See* App'x, Hon. William Houston Brown, Consumer Law Update, July 1 to September 15, 2022, at 5.
28. *In re Golden*, ___ B.R. ___, 2022 WL 1272570 (Bankr. E.D. Cal. Apr. 27, 2022).
    - *See* App'x, Hon. William Houston Brown, Consumer Law Update, April 1 to June 30, 2022, at 6.
29. *In re Michelena*, ___ B.R. ___, 2022 WL 1815205 (Bankr. S.D. Tex. June 2, 2022).
    - *See* App'x, Hon. William Houston Brown, Consumer Law Update, April 1 to June 30, 2022, at 6-7.
30. *In re Ferro*, ___ B.R. ___, 2022 WL 1008280 (Bankr. N.D. Ill. Apr. 4, 2022).
    - *See* App'x, Hon. William Houston Brown, Consumer Law Update, April 1 to June 30, 2022, at 7.
31. *In re Sage*, ___ B.R. ___, 2022 WL 2155936 (Bankr. E.D. Pa. June 15, 2022).
    - *See* App'x, Hon. William Houston Brown, Consumer Law Update, April 1 to June 30, 2022, at 7.
32. *In re Tolbert*, 2022 WL 2125970 (Bankr. N.D. Ill. June 13, 2022).
    - *See* App'x, Hon. William Houston Brown, Consumer Law Update, April 1 to June 30, 2022, at 7.
33. *Anderson v. Credit One Bank, N.A.*, 2022 WL 1926608 (Bankr. S.D. N.Y. June 3, 2021).

- *See* App'x, Hon. William Houston Brown, Consumer Law Update, April 1 to June 30, 2022, at 8.

34. *In re Ibarra*, ___ B.R. ____, 2022 WL 1787637 (Bankr. W.D. Tex. June 1, 2022).
    - *See* App'x, Hon. William Houston Brown, Consumer Law Update, April 1 to June 30, 2022, at 13.
35. *Nationwide Judgement Recovery Inc. v. Sorrells (In re Sorrells)*, 644 B.R. 158 (Bankr. E.D. Tex. 2022)
    - Dischargeability of security violation under § 523(a)(19).
36. *Turney v. Vulaj (In re Vulaj)*, 2023 WL 3764662 (Bankr. S.D. Cal. June 1, 2023)
    - Fraudulent intent of transferor not imputed to recipient of fraudulent transfer relevant to 523(a)(2); *Husky* still good law after *Bartenwerfer*.
37. *Anderson v. Hardwick (In re Hardwick)*, 648 B.R. 175 (Bankr. E.D. Tex. Jan. 27, 2023)
    - Settlement Agreement Without Denial of Liability May Result in Nondischargeable Debt under § 523(a)(19).

K. Dismissal and Conversion

1. *Evans v. McCallister (In re Evans),* 2023 WL 3939837 (9th Cir. Jun. 12, 2023)
    - A couple filed a chapter 13 petition and their case was voluntarily dismissed before confirmation. Debtors filed a motion to have the chapter 13 trustee disgorge the fees the trustee retained. The Bankruptcy Court concluded that chapter 13 trustee is paid only if a plan is confirmed. On appeal at the District Court, the Court reversed and held that 11 U.S.C. § 1326(a)(2) does not direct the Trustee to return it if the plan is confirmed. The debtors appealed at the Ninth Circuit. The Ninth Circuit joined with the Tenth Circuit and held that chapter 13 trustees are **not** paid their fees when cases are dismissed before confirmation.
2. *In re Doll*, 57 F.4th 1129 (10th Cir. 2023).
    - *See* App'x, Hon. William Houston Brown, Consumer Law Update, January 1 to March 31, 2023, at 9.
3. *Soussis v. Macco***,** 2022 WL 203751 (E.D. N.Y. Jan. 24, 2022)
    - The Court held that the chapter 13 trustee is entitled to compensation if the case is dismissed before confirmation. Debtors appealed and the district court affirmed the bankruptcy court's decision. Debtors appealed again to the Second Circuit. Oral arguments were conducted on February 14, 2023. A final judgment has not been made.)
4. *In re Skandis*, ___ B.R. ___, 2023 WL 2520521 (B.A.P. 6th Cir. Mar. 15, 2023).
    - *See* App'x, Hon. William Houston Brown, Consumer Law Update, January 1 to March 31, 2023, at 10.
5. *In re Powell*, 644 B.R. 181 (B.A.P. 9th Cir. 2022).
    - *See* App'x, Hon. William Houston Brown, Consumer Law Update, September 15 to December 31, 2022, at 10.
6. *Leavers v. McLaughlin*, ___ F.Supp.3d ___, 2023 WL 114068 (D. Maryland Jan. 4, 2023).

- *See* App'x, Hon. William Houston Brown, Consumer Law Update, January 1 to March 31, 2023, at 6.

7. *In re Higgins*, ___ B.R. ___, 2023 WL 2357740 (Bankr. E.D. Pa. Mar. 3, 2023).
   - *See* App'x, Hon. William Houston Brown, Consumer Law Update, January 1 to March 31, 2023, at 9-10.
8. *In re Bryant*, ___ B.R. ___, 2023 WL 2705943 (Bankr. S.D. Ga. Mar. 29, 2023).
   - *See* App'x, Hon. William Houston Brown, Consumer Law Update, January 1 to March 31, 2023, at 10.
9. *In re Le Fande*, 641 B.R. 430 (Bankr. S.D. Fla. 2022).
   - *See* App'x, Hon. William Houston Brown, Consumer Law Update, July 1 to September 15, 2022, at 6.
10. *In re Mammay*, 641 B.R. 569 (Bankr. W.D. Pa. 2022).
    - *See* App'x, Hon. William Houston Brown, Consumer Law Update, July 1 to September 15, 2022, at 10-11.
11. *In re Lee*, 2022 WL 4085882 (Bankr. E.D. Mich. Sept. 6, 2022).
    - *See* App'x, Hon. William Houston Brown, Consumer Law Update, July 1 to September 15, 2022, at 11.
12. *In re Lee*, ___ B.R. ___, 2022 WL 1499522 (Bankr. M.D. Ga. May 11, 2022).
    - *See* App'x, Hon. William Houston Brown, Consumer Law Update, April 1 to June 30, 2022, at 8-9.
13. *In re Ezell*, 2022 WL 2134539 (Bankr. D. Ore. June 14, 2022).
    - *See* App'x, Hon. William Houston Brown, Consumer Law Update, April 1 to June 30, 2022, at 13.
14. *In re Mammy,* 641 B.R. 569 (Bankr. W.D. Pa. 2022)
    - After winning the lottery during Chapter 13 case, debtor agreed to payment of creditors' claims and to dismissal of case)

L. Executory Contracts

1. *Argonaut Ins. Co. v. Falcon V, L.L.C. (In re Falcon V, L.L.C.)*, 44 F.4th 348 (5th Cir. 2022).
   - *See* App'x, Richard Levin, Recent Developments in Bankruptcy Law, October 2022, at 9.
2. *Gulfport Energy Corp. v. F.E.R.C.*, 2022 U.S. App. LEXIS 19986 (5th Cir. July 19, 2022).
   - *See* App'x, Richard Levin, Recent Developments in Bankruptcy Law, July 2022, at 7.
3. *Smart Cap. Invs. I v. Hawkeye Entert., LLC (In re Hawkeye Entert., LLC)*, 49 F.4th 1232 (9th Cir. Sept. 23, 2022).
   - *See* App'x, Richard Levin, Recent Developments in Bankruptcy Law, October 2022, at 9.
4. *Tutor Perini Bldg. Corp. v. N.Y. City Regional Center George Washington Bridge Bus Station and Infrastructure Development Fund, LLC (In re George Washington Bridge Bus Station Development Venture LLC),* ___ F. 4th ___, 2023 U.S. App. LEXIS 8428 (2d Cir. Apr. 10, 2023).

- *See* App'x, Richard Levin, Recent Developments in Bankruptcy Law, April 2023, at 5.

5. *In re Times Square JV LLC*, 648 B.R. 277 (Bankr. S.D.N.Y. Feb. 4, 2023).
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   - *See* App'x, Hon. William Houston Brown, Consumer Law Update, January 1 to March 31, 2023, at 3.
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3. *Kane v. Zions Bancorporation*, N.A., ___ F.Supp.3d ___, 2022 WL 4591787 (N.D. Cal. Sept. 29, 2022).
   - *See* App'x, Hon. William Houston Brown, Consumer Law Update, September 15 to December 31, 2022, at 6.
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5. *Clifton Capital Grp. V. Sharp (In re E. Coast Foods, Inc.)*, 66 F.4th 1214 (9th Cir. May 8, 2023).
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    - *See* App'x, Richard Levin, Recent Developments in Bankruptcy Law, January 2023, at 6.
7. *NexPoint Advisors, L.P. v. Highland Cap. Mgmt., L.P. (In re Highland Cap. Mgmt., L.P.)*, ___ F.4th ___, 2022 U.S. App. LEXIS 23237 (5th Cir. Aug. 19, 2022).

- *See* App'x, Richard Levin, Recent Developments in Bankruptcy Law, October 2022, at 11.

8. *S. Cent. Houston Action Council v. Oak Baptist Church*, 38 F.4th 471 (5th Cir. 2022).
    - *See* App'x, Richard Levin, Recent Developments in Bankruptcy Law, October 2022, at 11.
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    - *See* App'x, Hon. William Houston Brown, Consumer Law Update, September 15 to December 31, 2022, at 2.

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    - *See* App'x, Richard Levin, Recent Developments in Bankruptcy Law, April 2023, at 7.
2. *SR Construction, Inc. v. Hall Palm Springs, L.L.C. (In re RE Palm Springs II, L.L.C.)*, ___ F. 4th ___, 2023 U.S. App. LEXIS 9101 (5th Cir. Apr. 17, 2023).
    - *See* App'x, Richard Levin, Recent Developments in Bankruptcy Law, April 2023, at 7-8.
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4. *Anderson v. Morgan Keegan & Co., Inc. (In re Infinity Bus. Group, Inc.)*, 31 F.4th 294 (4th Cir. 2022).
    - *See* App'x, Richard Levin, Recent Developments in Bankruptcy Law, July 2022, at 9-10.
5. *Spark Factor Design, Inc. v. Hjelmeset (In re Open Medicine Inst., Inc.)*, 639 B.R. 169 (9th Cir. B.A.P. 2022).
    - *See* App'x, Richard Levin, Recent Developments in Bankruptcy Law, July 2022, at 10.
6. *In re Richards*, ___ B.R. ___, 2022 WL 3654827 (B.A.P. 6th Cir. Aug. 25, 2022).
    - *See* App'x, Hon. William Houston Brown, Consumer Law Update, July 1 to September 15, 2022, at 4.
7. In re Goetz, 2023 WL 3749296 (8th Cir. BAP June 1, 2023)
    - Postpetition appreciation goes to the chapter 7 estate on conversion from chapter 13.
8. *In re Castleman*, 2022 WL 2392058 (W.D. Wash. July 1, 2022), appeal filed to 9th Cir. Aug. 2, 2022.
    - *See* App'x, Hon. William Houston Brown, Consumer Law Update, July 1 to September 15, 2022, at 3-4.
9. In re Klein, 2022 WL 3902822 (Bankr. D. Colo. Aug. 23, 2022)
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10. *In re Celsius Network LLC*, ___ B.R. ___ (Bankr. S.D.N.Y. Jan. 4, 2023).
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    - *See* App'x, Hon. William Houston Brown, Consumer Law Update, January 1 to March 31, 2023, at 8-9.

17. *In re Gilbert*, ___ B.R. ___, 2022 WL 3637569 (Bankr. D. N.J. Aug. 23, 2022).
    - *See* App'x, Hon. William Houston Brown, Consumer Law Update, July 1 to September 15, 2022, at 4.
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19. *In re Dinio*, ___ B.R. ___, 2022 WL 1549404 (Bankr. W.D. N.Y. May 4, 2022).
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    - *See* App'x, Richard Levin, Recent Developments in Bankruptcy Law, January 2023, at 8.
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    - *See* App'x, Richard Levin, Recent Developments in Bankruptcy Law, January 2023, at 8.
3. *WPG Northtown Venture, LLC v. Cnty. of Anoka (In re Wash. Prime Grp., Inc.)*, 642 B.R. 771 (Bankr. S.D. Tex. 2022).
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    - *See* App'x, Richard Levin, Recent Developments in Bankruptcy Law, July 2022, at 12.
2. *In re Boy Scouts of America*, 35 F.4th 149 (3d Cir. 2022).
    - *See* App'x, Richard Levin, Recent Developments in Bankruptcy Law, July 2022, at 11.
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    - *See* App'x, Richard Levin, Recent Developments in Bankruptcy Law, October 2022, at 12-13.
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7. *In re Las Uvas Valley Dairies*, ___ B.R. ___, 2022 Bankr. LEXIS 3407 (Bankr. D.N.M. Dec. 2, 2022).
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10. *In re Madison Sq. Boys & Girls Club, Inc*., 642 B.R. 487 (Bankr. S.D.N.Y. 2022).
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July 23, 2023

Appendix of Supporting Materials

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Richard Levin, Recent Developments in Bankruptcy Law, April 2023

Richard Levin, Recent Developments in Bankruptcy Law, January 2023

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William Houston Brown, Consumer Law Update, Selected Cases April 1 to June 30, 2023[1]

William Houston Brown, Consumer Law Update, Selected Cases January 1 to March 31, 2023

William Houston Brown, Consumer Law Update, Selected Cases September 15 to December 31, 2022

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[1] Not incorporated in Table of Cases

JENNER&BLOCK

Recent Developments in Bankruptcy Law, April 2023

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1. AUTOMATIC STAY

1.1 Covered Activities

1.1.a **Court denies injunction against actions involving debtors' affiliates.** Shortly after filing their chapter 11 cases, the debtors in possession sought, in the alternative, extension of the automatic stay to the litigation against affiliates or stays of the litigation. The Ninth Circuit has questioned the authority to extend the stay and instead has directed the bankruptcy courts to proceed through the more settled form of a preliminary injunction. A preliminary injunction requires a showing of likelihood of success on the merits, potential for irreparable harm, a balance of equities, and the public interest. In a chapter 11 case, a likelihood of success on the merits means likelihood of confirming a plan. At the early stages of a case, that showing is all the more difficult. Similarly, because the nonbankruptcy litigation is in the early discovery stages, a showing of irreparable harm is also difficult. The debtor in possession here fails to make either showing adequately, so the court denies the injunction. *In re Mariner Health Central, Inc.*, ___ B.R. ___, 2023 Bankr. LEXIS 95 (Bankr. N.D. Cal. Jan. 12, 2023).

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2. AVOIDING POWERS

2.1 Fraudulent Transfers

2.1.a **Court issues asset freeze order in fraudulent transfer action.** The trustee brought a fraudulent transfer action against several insiders to avoid and recover specific real estate parcels that he alleged were purchased with the debtor's cash and to avoid and recover cash that had been transferred. In addition, due to the questionable state of the debtor's book and records, the trustee sought an accounting. The trustee sought a preliminary injunction to freeze the real estate parcels and the cash. Under *Grupo Mexicano de Desarrollo S.A. v. Alliance Bond Fund, Inc.*, 527 U.S. 308 (1999), a federal court may not freeze a defendant's assets in a legal action to recover on a claim for money damages but may seek a freezing order in an equitable action to recover specific property. An action to recover a fraudulent transfer may be both. Ordinarily, an action to recover cash is an action at law, even if the plaintiff invokes equity as a basis for the recovery, such as to impose a constructive trust on specific cash. Here, the trustee also seeks an accounting, which is an equitable remedy and which is needed because of the questionable state of the books and records. Finding that the trustee is likely to prevail on the fraudulent transfer action and that he would be irreparably harmed if the relief is not granted, the court grants the preliminary injunction freezing the assets. *Miller v. Mott (In re Team Sys. Int'l, LLC)*, ___ B.R. ___. 2023 Bankr. LEXIS 229 (Bankr. D. Del. Jan.31, 2023).

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4. CASE COMMENCEMENT AND ELIGIBILITY

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4.1.a **Good faith chapter 11 filing requires financial distress.** A consumer products company was subject to an increasing number of tort claims, some of which resulted from asbestos exposure. The litigation and liability costs exceeded the company's operating income. Using the Texas divisional merger statute to resolve all the tort claims without subjecting the entire enterprise to the bankruptcy process, the company divided into one company that continued the consumer products business, assuming all the assets and the ordinary course liabilities associated with that business, and another that received certain royalty streams and assumed all the tort liabilities. The continuing company was a highly valuable enterprise. It agreed, without any reimbursement rights, to fund a trust to resolve the other company's litigation and bankruptcy expenses and tort liabilities to the extent the other company's royalty streams and other assets were insufficient. The funding agreement was limited in amount to the value of the continuing company, which could increase over time. The ultimate parent company guaranteed the funding agreement. Immediately after completing the divisional merger, the other company filed a chapter 11 case with the goal of addressing the tort claims through an asbestos claims trust, funded by the royalty streams, the funding agreement, and insurance proceeds. A chapter 11 case that is not filed in good faith is subject to dismissal. Good faith depends on an objective analysis of whether the debtor remains within the equitable limitations of chapter 11, particularly whether the case serves a valid bankruptcy purpose and is not filed merely to obtain a tactical litigation advantage. A valid bankruptcy purpose does not require insolvency but at least sufficiently immediate financial distress of the kind that chapter 11 can address. Here, the funding agreement addressed all of the debtor's liabilities. The continuing company and its ultimate parent were extremely valuable, with sufficient assets and earnings to cover foreseeable tort liabilities, including litigation costs, for the foreseeable future. Therefore, the case was not filed in good faith and must be dismissed. *In re LTL Mgmt., LLC v. Official Committees (In re LTL Mgmt., LLC)*, 58 F.4th 581 (3d Cir. 2023).

4.1.b **Subchapter V eligibility is determined as of the petition date.** The debtor filed a chapter 11 petition and elected to proceed under subchapter V. During the case, a nonbankruptcy court entered judgment against the debtor in an amount far exceeding the eligibility cap for subchapter V, and the debtor's shareholder, who had liquidated debts also far exceeding the cap, filed his own chapter 11 case. Section 1182(1) contains the subchapter V eligibility requirements, including (A) subject to subparagraph (B), having aggregate noncontingent liquidated debts as of the date of the filing of the petition of not more than $7.5 million *and* (B) not being a member of a group of affiliated debtor with debts greater than $7.5 million. Subparagraphs (A) and (B) must be construed together and applied as of the petition date. Bankruptcy Rule 1020(a) requires the debtor to state with the petition if it elects to proceed under subchapter V and allows creditors 30 days to contest the election. It does not allow a later challenge based on a later change in circumstances. Such a limitation helps expedite the case, consistent with subchapter V's streamlined process. Moreover, neither the statute nor the Rules provide a standard for revoking a subchapter V designation. Therefore, the postpetition events do not vitiate the debtor's subchapter V eligibility. *In re Free Speech Sys., LLC*, ___ B.R. ___, 2023 Bankr. LEXIS 892 (Bankr. S.D. Tex. Mar. 31, 2023).

4.1.c **Court denies motion to dismiss case of debtor formerly engaged in marijuana business.** The debtor operated a marijuana business. It sold the business in exchange for 10% of the equity in a Canadian company that operated a similar business. It then filed a chapter 11 case with the goal of confirming a plan that provided for the sale of the stock and the distribution of the proceeds to creditors. Section 1112 permits the court to dismiss a case for cause. Violations of nonbankruptcy law can be cause for dismissal. Although the debtor's prepetition activities violated federal law, its ownership of stock in a Canadian cannabis company likely did not. Moreover,

even if there were a violation, section 1112 does not require dismissal of any case in which the debtor violated nonbankruptcy law, as many debtors wind up in bankruptcy precisely because of their prepetition illegal activities. Therefore, the court denies the U.S. trustee's motion to dismiss the case. *In re The Hacienda Co., LLC*, ___ B.R. ___ (Bankr. C.D. Cal. Jan. 20, 2023).

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5.5.a **Insurer does not have standing to object to a plan that is "insurance neutral."** The debtor proposed a plan in an asbestos chapter 11 case that provided for the debtor's insurance policies to be assigned to the 524(g) trust. To prevent fraudulent claims, a claimant with an uninsured claim had to provide information to the trust about other asbestos trust claims and provide a certification. A claimant with an insured claim was not required to provide the certification. Under the insurance policy, the debtor was required to assist in the investigation and defense of claims. The insurer claimed that the different treatment of insured and uninsured claims under the plan was not "insurance neutral," that is, that it effected a change in the debtor's or the insurer's obligations under the insurance policies. The bankruptcy court found otherwise and recommended plan confirmation to the district court. The district court agreed that the plan was insurance neutral and therefore that the insurer was not a party in interest who had standing to object to confirmation. The insurer appealed the confirmation order. Only a person aggrieved may appeal a bankruptcy court decision. An appellant has standing to appeal from a decision denying standing, whether or not it has standing to appeal from the substance of the adverse decision, though the two concepts are related. If the plan was not insurance neutral, the insurer would have had standing to object to confirmation and appeal, because it would be a person aggrieved. If not, then it would not have had standing to object to confirmation and would have had standing to appeal only the decision denying it standing. The court of appeals agreed that the plan is insurance neutral and therefore affirms the district court's ruling that the insurer was not a party in interest with standing to object to confirmation. *Hanson Permanente Cement, Inc. v. Kaiser Gypsum Co, Inc. (In re Kaiser Gypsum Co., Inc.)*, 60 F.4th 73 (4th Cir. 2023).

6. CLAIMS AND PRIORITIES

6.1 Claims

6.1.a **Court allows postpetition interest on oversecured claim at default rate.** The loan agreement provided for an increase in the interest rate by 3% upon the debtor's filing a bankruptcy petition. In the chapter 11 case, the debtor in possession sold the lender's collateral for a price that exceeded the amount of the loan. Section 506(a) provides for allowance of postpetition interest on an oversecured claim but does not state the applicable rate. Decisions addressing the allowance of postpetition interest focus on the balance of equities between creditor and creditor and between creditors and the debtor. Where a debtor is solvent, equity does not permit the debtor to escape its bargain. Most courts have adopted a presumption in favor of applying the contractual default rate, subject to equitable considerations, which include the creditor's misconduct, harm to unsecured creditors, and whether the rate constitutes a penalty. None of those factors are present here, so the court allows postpetition interest to the secured lender at

claim over for trial. The creditor appealed. The district court affirmed, and the creditor appealed to the court of appeals, A court of appeals has jurisdiction only over final decisions, judgments, orders, or decrees. In bankruptcy, the courts treat the final judgment rule with greater flexibility, permitting appeals of final judgments in discrete disputes within the larger bankruptcy case. However, that flexibility does not extend to termination by final order in some but not all of the claims in a single adversary proceeding. Therefore, unless the court certifies the order for immediate appeal under Bankruptcy Rule 7054, the court of appeals does not have jurisdiction of an appeal from an order determining some but not all the claims. *Esteva v. UBS Fin. Servs. Inc. (In re Esteva)*, 60 F.4th 664 (11th Cir. Feb. 16, 2023).

11.4 Sovereign Immunity

12. PROPERTY OF THE ESTATE

12.1 Property of the Estate

12.2 Turnover

12.3 Sales

12.3.a **Section 363(m) is not jurisdictional.** The debtor sold its assets, including the right to designate assignees of its real property leases. The buyer exercised the designation right, the landlord objected on adequate assurance grounds, the court overruled the objection and approved the assignment, and the landlord appealed. Relying on section 363(m), the district court dismissed the appeal. Section 363(m) provides that a reversal or modification on appeal of a sale order may not affect the validity of the sale to a good faith purchaser. First, an appeal is moot if the appellate court cannot grant effective relief. However, a dispute over whether the court can grant relief goes to the merits—the extent and applicability—of the statutory limitation on the court's authority. The mootness doctrine does not limit the appellate court's determination of that issue. Second, a statutory precondition to relief is jurisdictional only if it is clearly stated as such. Section 363(m) does not speak in jurisdictional terms but only as a limitation on the remedy that an appellate court may apply on reversal or modification of a sale authorization order. Therefore, it does not deprive the appellate court of jurisdiction to hear an appeal of such an order. *MOAC Mall Holdings LLC v. Transform Holdco LLC*, 598 U.S. ___, 143 S. Ct. ____, 2023 U.S. LEXIS 1666 (2023).

12.3.b **Adverse claim to defeat good faith sale requires title dispute.** After the hotel developer debtor defaulted during construction, it provided the secured lender's affiliate a deed (in lieu of foreclosure) in exchange for a release and a 50% profit participation in future development. The construction contractor asserted a mechanics lien in state court litigation. The lender and its affiliate arranged for a sale of the property through a chapter 11 case. They transferred the property to a financial advisory firm. With that firm's cooperation, they hired an experienced hotel broker to sell the property. The lender agreed to provide debtor in possession financing. The court approved the financing, and the advisory firm filed a motion to approve bidding procedures and a stalking horse bidder. No outside bids were received, so the lender, with the court's permission, credit bid an amount greater than the stalking horse bid. The court determined the lender bought the property in good faith and approved the sale. The contractor appealed. Section 363(m) provides that absent a stay pending appeal, an appeal may not affect the validity of a sale to a good faith buyer. A good faith purchaser is one who purchases for value, in good faith, and without notice of adverse claims and does not engage in misconduct, including fraud, collusion, or an attempt to take grossly unfair advantage of other bidders. An adverse claim does not include a lien claim or an objection to the sale, only an adverse claim to title, that is, an ownership dispute. Because the contractor asserted only a lien, its claim did not prevent the lender from purchasing in good faith. In addition, because the lender disclosed all aspects of the planning and the transaction and the court approved each step, the lender was not guilty of any misconduct. Therefore, the court of appeals dismisses the appeal. *SR Construction, Inc. v. Hall Palm Springs,*

the contractual default rate. *Official Comm. v. Entrepreneur Growth Cap. (In re Latex Foam Int'l, LLC)*, ___ B.R. ___, 2023 U.S. Dist. LEXIS 38488 (D. Conn. Mar. 8, 2023).

6.2 Priorities

7. CRIMES

8. DISCHARGE

8.1 General

8.2 Third-Party Releases

8.2.a **Opt-out third-party release is permitted.** The debtor proposed a plan that contained a third-party release and proposed that it would apply to creditors who did not opt out, by checking a box on a ballot, from the release. In the Third Circuit, a bankruptcy court may confirm a plan that contains a non-consensual third-party release if certain conditions are met or a consensual third-party release in any case. If a creditor objects to the release, the plan proponent may exclude the creditor from the release or may attempt to satisfy the conditions for a non-consensual release. If a creditor does not object, then the creditor has effectively forfeited the issue and will be bound by the order confirming the plan, just as would be the case for any other plan provision that might not comply with the Code's confirmation requirements. Therefore, permitting the release to become effective as to creditors who do not opt out is consistent with the treatment of all other plan issues (such as a contract cure amount or the best interest test), and the court need not satisfy itself in the absence of an objection that the requirements are met. However, in this case, an order earlier in the case might have prevented creditors from becoming aware in a timely manner of potential third-party claims, so the court requires opt-in for the release. *In re Arsenal Intermediate Holdings, LLC*, ___ B.R. ___, 2023 Bankr. LEXIS 752 (Bankr. D. Del. Mar. 27, 2023).

8.2.b **Equity receivership court may not bar third-party claims.** An unsecured creditor placed the debtor into an equity receivership. The receiver asserted claims against the directors and officers arising from the debtor's failure and settled with proceeds of directors and officers insurance. A settlement condition was the court's issuance of a bar order protecting the directors and officers from other claims related to the debtor. The debtor's customers who had sued the directors and officers for fraud objected to the bar order as beyond the receivership court's authority. An equity receivership court is limited to the traditional powers in equity exercised by the English chancery courts in 1789. The court has *in rem* jurisdiction over the debtor's property, may issue injunctions to protect the receivership property and the receiver, and may hear and determine claims against the debtor, but it does not have jurisdiction over property of nondebtors and may not enjoin conduct that does not affect the court's control of the debtor's property or of *in personam* actions. Here, the customers owned their claims against the directors and officers because they were injured directly by the fraud; they are not asserting injury based on the directors' and officers' injury to the debtor. Therefore, the bar order exceeds the receivership court's power. *Digital Media Solutions, LLC. v. Dunagan*, ___ F.4th ___ (6th Cir. Feb. 7, 2023).

8.3 Environmental and Mass Tort Liabilities

9. EXECUTORY CONTRACTS

9.1.a **Preliminary injunction requiring debtor's contract performance does not prevent rejection.** The debtor was a franchisee under a hotel management agreement. Disputes arose. The debtor sent a termination notice and sued in state court for damages and for a declaration that the license was terminated. The franchisor also sued, seeking a declaration that the license was not terminated, an injunction prohibiting termination, and damages if the debtor had successfully

terminated the agreement. The state court issued a preliminary injunction that barred termination to preserve the status quo pending trials on the merits. The debtor later filed bankruptcy, blaming its financial distress on the franchise agreement and the franchisor's performance, and sought to reject the agreement. A debtor in possession may reject an executory contract, which is one that remains so far unperformed that failure of either party to perform would constitute a material breach entitling the other party to terminate the contract. Here, the parties had substantial, material continuing obligations. A final order from a nonbankruptcy court requiring performance under a contract renders the contract nonexecutory, as the court has effectively prohibited the debtor's breach. However, a preliminary injunction to preserve the status quo does not determine rights under the contract and so does not prevent rejection of the contract. *In re Times Square JV LLC*, 648 B.R. 277 (Bankr. S.D.N.Y. Feb. 4, 2023).

9.1.b **Section 365(b) cure requirement applies only to contract counterparty.** The debtor entered into a ground lease for property that it intended to develop. The lease required it to pay any contractor in full. The debtor separately contracted with a construction company to build the development. Disputes over the construction led to a halt in construction and, ultimately, the debtor's chapter 11 filing. During the case, the debtor assumed the ground lease but not the construction contract. The contractor sought payment of amounts claimed under its contract based on the provision in the ground lease requiring payment of contractors. Section 365 permits assumption of an unexpired lease, conditioned on cure of any default under the lease. In effect, the lessor gains administrative expense priority for what would otherwise be a general unsecured claim. Priorities are to be strictly construed. Here, the cure requirement is designed to make the counterparty whole, so that the counterparty need not continue performance without the full benefit of the bargain. That purpose does not apply to a stranger to the contract or lease. The absence in section 365 of a direction that only the counterparty is entitled to cure does not override this consideration. Therefore, the debtor in possession need not cure any defaults under the construction contract to assume the ground lease. *Tutor Perini Bldg. Corp. v. N.Y. City Regional Center George Washington Bridge Bus Station and Infrastructure Development Fund, LLC (In re George Washington Bridge Bus Station Development Venture LLC)*, ___ F. 4th ___, 2023 U.S. App. LEXIS 8428 (2d Cir. Apr. 10, 2023).

9.1.c **A limited partnership agreement is not an executory contract.** The chapter 7 debtor held an interest in a limited partnership. The trustee did not seek to assume or reject the limited partnership agreement. Section 365(d)(1) provides for automatic rejection of an executory contract that is not assumed within 60 days after the order for relief. An executory contract is one under which performance is due from each party and nonperformance by either would result in a material breach, excusing the other party from further performance. The limited partner has few if any obligations under the partnership agreement. The partnership must provide distributions to cover the partner's taxes, but only if the partner requests the distribution, which is an option agreement. An option is not an executory contract, because performance is not due from the optionee. Therefore, the limited partnership agreement is not an executory contract. *Rainsdon v. Duncan Ltd. P'shp (In re Duncan)*, ___ B.R. ___, 2023 Bankr. LEXIS 493 (Bankr. D. Ida. Feb. 24, 2023).

10. INDIVIDUAL DEBTORS

10.1 Chapter 13

10.2 Dischargeability

10.2.a **Debt for fraud incurred by debtor's partner or agent is nondischargeable.** The debtor and her boyfriend purchased a house to repair and sell. The boyfriend did nearly all the work; the debtor was largely uninvolved. Their buyer later obtained a judgment against them for defects the boyfriend had knowingly concealed or misrepresented. Section 523(a)(2)(A) excepts from discharge a debt for money, property, or services to the extent obtained by false pretenses, a false representation, or actual fraud. The bankruptcy court determined that the boyfriend's debt to

the buyer was nondischargeable under this provision. The provision is written in the passive voice—a debt for money or property obtained by fraud—without regard to the actor who perpetrated the fraud—such as a debt obtained by the fraud of the debtor. Where, under applicable nonbankruptcy law, a person is liable for a debt of another, such as in a partnership or agency relationship, and the debt is nondischargeable in the fraudster's case, the debt is similarly nondischargeable in the second person's case. *Bartenwerfer v. Buckley*, 598 U.S. ___, 143 S. Ct 665 (2023).

10.2.b

10.3 Exemptions

10.4 Reaffirmations and Redemption

11. JURISDICTION AND POWERS OF THE COURT

11.1 Jurisdiction

11.1.a **Debtor may not remove district court action to the district court for the same district.** The government brought an action in district court to reduce to judgment amounts the debtors owed for nondischargeable taxes. The debtors filed in the district court a notice of removal of the action to the bankruptcy court. Section 1452(a) of title 28 permits removal to the district court of a civil action arising under title 11 or arising in or related to a case under title 11. The statute's language does not support removal of an action from the district court to the district court, and permitting removal to obtain the benefit of the standing orders of reference to the bankruptcy court of all cases and proceedings arising under or related to title 11 would thwart the district court's power to refer matters to the bankruptcy courts. This district court's local rule providing for referral of bankruptcy matters to the bankruptcy court does not apply, because the government's action to obtain a judgment on a tax claim arises under title 26 (the Internal Revenue Code), not title 11. Therefore, the matter proceeds in the district court. *U.S. v. Mikhov*, 645 B.R. 609 (S.D. Ind. 2022).

11.2 Sanctions

11.3 Appeals

11.3.a **District court decision to abstain is unreviewable, even if state court might lack jurisdiction under *Barton*.** After the conversion of its chapter 11 case to chapter 7 and the closing of the chapter 7 case, the corporate debtor sued its counsel in state court for malpractice arising out of his representation of the chapter 7 trustee in specific recovery actions and simultaneous representation of the corporate debtor. Counsel moved to enjoin the action under the *Barton* doctrine, which deprives a state court of jurisdiction over an action against an officer of a bankruptcy estate without leave of the bankruptcy court. The bankruptcy court issued a report and recommendation to the district court, which rejected the recommendation and determined to abstain in favor of the state court action to permit it to develop the record on whether *Barton* applied. Section 1334(c)(1) permits a district court to abstain from any proceeding in the interest of comity or respect for state law. Section 1334(d) provides that a decision to abstain or not abstain is not reviewable on appeal or otherwise. Some courts permit review if the abstention decision is outside the district court's authority. However, here, even if under *Barton* the state court might lack jurisdiction over the action, that determination could not be made until the development of the record in the state court. Therefore, the abstention decision is unreviewable. *Conway v. Smith Devel., Inc.*, ___ F.4th ___, 2023 U.S. App. LEXIS 7988 (4th Cir. Apr. 4, 2023).

11.3.b **Court of appeals does not have jurisdiction of order determining only some adversary proceeding claims.** The debtor in possession sued a creditor who had seized the debtor's property on four claims: declaratory relief that the property was exempt and that the creditor did not hold a security interest in the property, for turnover of the property, and for unjust enrichment. The bankruptcy court granted summary judgment on the first three claims and held the fourth

L.L.C. (In re RE Palm Springs II, L.L.C.), ___ F. 4th ___, 2023 U.S. App. LEXIS 9101 (5th Cir. Apr. 17, 2023).

13. TRUSTEES, COMMITTEES, AND PROFESSIONALS

13.1 Trustees

13.2 Attorneys

13.2.a **Court allows fees for representing affiliated debtors with conflicting interests.** Two affiliated debtors filed chapter 11 petitions. The cases were jointly administered. One of the debtors perpetrated a major fraud, resulting in significant claims against it; the other debtor was arguably solvent but in default on a credit line that it jointly signed with the fraudulent debtor. The U.S. trustee appointed separate creditors' committees. The court permitted representation of both debtors in possession by the same counsel. Counsel filed three separate plans in the course of negotiating a fourth plan incorporating a settlement to which all parties consented. Two of the three plans heavily favored the fraudulent debtor's creditors at the expense of the other debtor's creditors. Section 328(c) permits, but does not require, the court to deny compensation if at any time a professional represented or held an interest adverse to the estate on the matter on which the professional was employed. A chapter 11 professional has a fiduciary duty to pursue a strategy reasonably designed to maximize the estate after accounting for attendant costs, risks, and time. Filing a plan may, among other legitimate purposes, memorialize an agreement, make a proposal, make a threat, or comply with a deadline. Here, the debtors' filing of the three plans properly performed several of these functions and therefore appeared to facilitate the fourth plan that reflected a global resolution. As such, the prior three plans were proper, did not reflect a conflict of interest or representation of an interest adverse to the estate, and did not warrant denial of compensation under section 328(c). In the alternative, sanctions were not warranted because the application of section 328(c) here was a close call, and such a sanction is draconian and should not be applied absent injury or prejudice to the estate. *In re Easterday Ranches, Inc.*, 647 B.R. 236 (E.D. Wash. 2022).

13.3 Committees

13.4 Other Professionals

13.5 United States Trustee

14. TAXES

15. CHAPTER 15—CROSS-BORDER INSOLVENCIES

15.1.a **Court may continue recognition of foreign main proceeding that changes from rescue to liquidation.** The debtor commenced a business rescue proceeding in South Africa. The High Court there appointed Business Rescue Professionals (BRPs). They sought and obtained recognition in the U.S. under chapter 15. After it became apparent that the debtor could not be rescued, the BRPs petitioned the High Court to terminate the rescue proceeding and initiate a provisional liquidation. The two proceedings are coterminous—the provisional liquidation commences upon the termination of the rescue proceeding. The High Court granted the petition and appointed provisional liquidators and authorized them to seek recognition of the liquidation as a foreign proceeding, which they did. Section 1517(d) permits the court to modify a recognition order if the grounds for granting it have ceased to exist. Although the rescue proceeding terminated, the initiation of the liquidation continued the foreign proceeding in a different form but without change of identity, and the provisional liquidators are appropriate substitutes for the BRPs. Therefore, the court modifies the recognition order to recognize the provisional liquidators as the foreign representatives and otherwise leaves in place all relief previously granted in the

chapter 15 case. *In re Comair Ltd.*, ___ B.R. ___, 2023 Bankr. LEXIS 363 (Bankr. S.D.N.Y. Feb. 12, 2023).

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Recent Developments in Bankruptcy Law, January 2023

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1. AUTOMATIC STAY

1.1 Covered Activities

1.1.a **Court declines to enjoin third party claims against the debtor's jointly liable parent corporation.** The debtor manufactured earplugs for many years. A major multinational corporation acquired it. Two years later, it transferred its earplug manufacturing operation to its parent. Although the parent continued to manufacture and sell the earplugs, 80% of the sales occurred before the transfer. The earplugs were ineffective, resulting in hundreds of thousands of product liability actions against the debtor and the parent in both state and federal court, with the federal actions consolidated under an MDL procedure. The debtor and the parent entered into a funding agreement, which provided that the parent would fund up to $1 billion to a plaintiffs' recovery trust and up to $240 million for the debtor's chapter 11 fees and expenses, and the debtor would indemnify the parent for any claims against the parent but could draw funding from the parent to pay any indemnification claims, with no repayment obligation (in effect, a circular transaction). In addition, the debtor and parent shared insurance policies that would cover a substantial amount of claims. Upon filing its petition, the debtor sought to apply the automatic stay to, or to affirmatively enjoin, the prosecution of the product liability actions against the parent. Section 362(a)(1) enjoins only litigation against the debtor, not third parties, unless (in some circuits) there is such an identity of interest that a judgment against the third party would amount to a judgment against the debtor or would cause the debtor irreparable harm. Circuit authority here does not extend the (a)(1) stay, so the court declines to apply it. Section 362(a)(3) stays acts to obtain possession of or exercise control over property of the debtor. Here, because the parent, under the funding agreement, will ultimately fund any liability imposed on the debtor, the tort litigation will not affect the debtor's property or its ability to pay claims. Section 105(a) permits the court to issue any order necessary to carry out the provisions of title 11, but the court must first have jurisdiction. A court has jurisdiction over an action if it is related to the title 11 case, that is, if the outcome could have any conceivable effect on the case, the debtor's assets, or claims. Because of the debtor's ability to access funds under the funding agreement, the tort litigation would not have any such effect. Therefore, the court denies any order staying the tort litigation. *3M Occupational Safety LLC v. Those Parties Listed on Appendix A to the Complaint (In re Aearo Techs. LLC)*, 642 B.R. 891 (Bankr. S.D. Ind. 2022).

1.2 Effect of Stay

1.3 Remedies

2. AVOIDING POWERS

2.1 Fraudulent Transfers

2.1.a **Failure to exercise option is not a transfer.** The debtor had an option to purchase real property within a specified period. The optionor gave notice of the commencement of the period. The debtor did not timely exercise the option. The debtor filed a bankruptcy petition a few months later and sought to avoid the option lapse as a fraudulent transfer. A transfer is any mode, direct or indirect, or parting with an interest in property. The debtor's rights under the option were a future contingent interest, more akin to a business opportunity, not an actual interest in property. Therefore, there was no transfer. *Berley Assocs. Ltd. v. 62-74 Speedwell Ave. LLC (In re Pazzo Pazzo Inc.)*, ___ Fed. App'x ___, 2022 U.S. App. LEXIS 34619 (3d Cir. Dec. 15, 2022).

2.1.b **State court-approved settlement only partially binds a subsequent bankruptcy trustee.** The debtor entered into a settlement of a shareholder derivative class action in which the plaintiffs alleged that a payment to the debtor's parent was a breach of fiduciary duty. The settlement provided for the director defendants to pay the shareholder class and the debtor and for a full

released of the directors. After a thorough fairness hearing, the state court approved the settlement. A few months later, and within four years after the payment to the parent, the debtor filed chapter 11. The plan provided for the appointment of a liquidating trustee, who then sued the former director defendants and the parent for fraudulent transfers. The trustee may avoid as a constructive fraudulent transfer one that is made for less than reasonably equivalent value while the debtor is insolvent. A release of claims is a transfer. However, the state court's fairness approval determined that the releases were made for reasonably equivalent value and may not be attacked in a later bankruptcy. A bankruptcy trustee may bring fraudulent transfer claims for the benefit of creditors. The settlement of the breach of fiduciary duty claim for the payment to the parent was for the benefit of the corporation and its shareholders. For the prior settlement to bind the trustee, the parties must be in privity with the parties to the trustee's action. Here, the creditors for whom the trustee acts were not parties to or in privity with the shareholder derivative plaintiffs or the corporation, so the settlement does not preclude the trustee from seeking to avoid and recover the payment. *Ogle v. Morgan (In re Evergreen Helicopters Int'l Inc.)*, 50 F.4th 547 (5th Cir. 2022).

2.2 Preferences

2.2.a **Transfer under a wage garnishment order is made when money is paid.** The creditor obtained a wage garnishment order more than 90 days before the debtor's bankruptcy and received payments within the 90-day period. The trustee may avoid a transfer of the debtor's property made within 90 days before bankruptcy if certain other conditions are met. Under prior circuit precedent, state law determined when a transfer was made, and a garnishment effected a transfer, even before money was paid. *Barnhill v. Johnson*, 503 U.S. 393 (1992), held that federal law governs and that a transfer by a check, which is an order to pay money, is made only when the money is paid. It effectively overrules prior circuit precedent. Therefore, the transfer under the garnishment was made only when the employer paid the creditor. *Warsco v. Creditmax Collection Agency, Inc.*, ___ F.4th ___, 2023 U.S. App. LEXIS 447 (7th Cir. Jan. 9, 2023). 0

2.3 Postpetition Transfers

2.4 Setoff

2.5 Statutory Liens

2.6 Strong-arm Power

2.6.a **State registry's use of nonstandard search logic makes abbreviated debtor's name in financing statement seriously misleading.** The creditor filed its financing statement with an abbreviation of one word in the debtor's proper name. Under Florida's financing statement search procedures, a search returns a list of 20 names, starting with the name that most closely resembles the searched name, which permits the searcher to navigate forward and backward through all names indexed. UCC section 9-506.provides "a financing statement that fails sufficiently to provide the name of the debtor is seriously misleading" unless a search using "standard search logic" would disclose a financing statement for the debtor with an error in the debtor's name. Standard search logic produces an unambiguous list of hits. Florida's search method does not. Therefore, it is not standard search logic, and the exception in section 9-506 does not apply. The financing statement with the abbreviation in the debtor's name is seriously misleading and is ineffective to perfect the security interest. *1944 Beach Blvd., LLC v. Live Oak Banking Co. (In re NRP Lease Holdings, LLC)*, 50 F.4th 979 (11th Cir. 2022).

2.7 Recovery

2.7.a **DIP may not use turnover order to collect judgment.** The debtor in possession obtained a judgment against a third party and sought a turnover order under section 542(b) against the judgment debtor to turnover its property to pay the judgment. Section 542(b) requires an entity that owes a matured debt to the debtor that is property of the estate to pay the debt to the trustee. Although the judgment is property of the estate, the judgment debtor's property is not. The proper way to enforce a bankruptcy court judgment is through a writ of execution and, if necessary,

supplemental proceedings, as provided under Bankruptcy Rule 7069. Therefore, the court denies the motion. *In re J and M Supply of the Carolinas, LLC*, ___ B.R. ___, 2022 Bankr. LEXIS 3469 (Bankr. E.D.N.C. Dec. 8, 2022).

3. BANKRUPTCY RULES

4. CASE COMMENCEMENT AND ELIGIBILITY

4.1 Eligibility

4.2 Involuntary Petitions

4.2.a **Section 303(i) permits attorneys' fee award for all consequences of a dismissed involuntary petition.** After dismissal of the involuntary petition, the debtor brought litigation against the petitioning creditors under section 303(i)(1) for attorneys' fees and under section 303(i)(2) for compensatory and punitive damages for the creditors' bad faith filing. Before the court finally denied the compensatory and punitive damages claim, the creditor sought to attach and execute on its claim in state court. The debtor unsuccessfully defended that action, then filed a chapter 11 petition to obtain the automatic stay against execution of the attachment. Returning to the bankruptcy court, the debtor sought fees for its prosecution of the punitive damages claim, the defense of the attachment and execution proceeding, and the subsequent chapter 11 case. Section 303(i)(1) permits an award of costs and attorney's fees against a creditor who unsuccessfully files an involuntary petition. Section 303(i)(2) permits an award of compensatory and punitive damages if the creditor filed the petition in bad faith. The authorization to award attorneys' fees includes fees for pursuing the attorneys' fees award, including the compensatory and punitive damage award. Where that claim is unsuccessful, the court may still award fees to the extent that they overlapped with the litigation under section 303(i)(1), for example, where the creditor defends that action on the ground that it filed the petition in good faith. To give full effect to the right to attorneys' fees, the creditor may not offset the award against its claim, and the fees to be awarded may include the fees to collect or protect the award, including litigation in another court. The fees for determining whether to file a chapter 11 case to preserve the claim as an asset are also compensable, as are fees to prevent relief from the automatic stay, but not the fees for other aspects of the chapter 11 case. *Nat'l Med. Imaging, Holding Co., LLC v. United States Bank, N.A. (In re Nat'l Med. Imaging, LLC)*, 644 B.R. 94 (Bankr. E.D. Pa. 2022).

4.3 Dismissal

5. CHAPTER 11

5.1 Officers and Administration

5.1.a **Court permits redactions of individual creditors' home and email addresses.** The Irish debtor and multiple international subsidiaries filed chapter 11 in New York. Its creditors included opioid claimants, medical device injury claimants, employees, and suppliers, all of whom were individuals. Section 521 requires the debtor to file a list of creditors. Rule 1007 and the Official Forms require the list to include creditors' names, physical addresses, and email addresses. Section 107(c) permits the court to protect an individual with respect to personally identifiable information whose disclosure "would create undue risk of identity theft of other unlawful injury." Disclosure of home addresses and email addresses and, in some cases, names creates a risk of identity theft, stalking, and intimate partner violence, especially when the information might reveal certain medical conditions that can cause embarrassment or opprobrium. Therefore, the court permits the redaction of home and email addresses of the individual creditors. *In re Endo Int'l plc*, __ B.R. ___, 2022 Bankr. LEXIS 3093 (Bankr. S.D.N.Y. Nov. 2, 2022).

5.1.b **Court orders appointment of subchapter V trustee upon debtor's refusal to be bound by the law.** After an adverse decision by a district court that exposed the debtor to substantial liability, the debtor filed a chapter 11 case and elected to proceed under subchapter V. Defying the district court's order, the debtor's principal sent numerous harassing emails to the creditor, including one that denied any intention to be bound by the law. The creditor moved to de-designate the case as a subchapter V case so that it would proceed under ordinary chapter 11; the U.S. trustee moved to remove the debtor from possession under section 1185 or to dismiss. Under section 103(i), a case proceeds under subchapter V based only on the debtor's election in the petition. Rule 1020(a) requires a small business debtor to state whether it is proceeding under subchapter V and permits an objection to the statement but does not contemplate de-designation. Rule 1009(a) permits the debtor to amend a petition and the court, on motion of a party in interest, to order the amendment of the petition. However, the structure of subchapter V, under which only the debtor may file a plan, suggests that the court may not override the debtor's decision and force the case into ordinary chapter 11, where any party in interest may file a plan. In this case, the court adopts an alternative remedy. Under subchapter V, the debtor, while remaining in possession, has all the rights and duties of a trustee, who is a fiduciary. Because the debtor's principal has shown himself to be unable to act as a fiduciary, the court may, under section 1185(a), remove the debtor from possession and grant the trustee control over the debtor's business, which the court does. *In re Comedymx, LLC*, ___ B.R. ___, 2022 Bankr. LEXIS 3551 (Bankr. D. Del. Dec. 16, 2022).

5.2 Exclusivity

5.3 Classification

5.4 Disclosure Statement and Voting

5.4.a **Plan modification requires resolicitation, even of rejecting creditors.** The debtor proposed a plan that allocated new equity to existing shareholders based solely on new capital contributions. A day before confirmation, the controlling shareholder moved to modify the plan to eliminate the contributions of the other three shareholders, without notifying them of the motion. The court confirmed the plan, reasoning that the shareholders were to receive or retain nothing under the plan on account of their old equity interests and were therefore deemed to reject the plan. Accordingly, it concluded that neither a new disclosure statement nor new solicitation was required. The three shareholders moved for reconsideration. Section 1126(g) provides that a class whose member receives or retains nothing under the plan on account of the interests is deemed to reject. However, the plan gave the three shareholders the right to invest to acquire new equity based on their existing interests and therefore did not provide for them to receive or retain nothing on account of their old interests. In addition, Bankruptcy Rule 3019(a) requires new disclosure and resolicitation when a modification materially and adversely affects the treatment of any creditor or equity holder who has not accepted the modification in writing. It is not limited to holders who had previously accepted the plan. Therefore, the court must require a new disclosure statement and solicitation before confirmation. *Braun v. America-CV Station Group, Inc.(In re America-CV Station Group, Inc.)*, ___ F.4th ___, 2023 U.S. App. LEXIS 230 (11th Cir. Jan. 5, 2023).

5.5 Confirmation, Absolute Priority

6. CLAIMS AND PRIORITIES

6.1 Claims

6.1.a **Code's disallowance of postpetition interest, not the plan, alters a creditor's right to postpetition interest and permits non-impairment without payment of interest.** Although the debtor claimed that it was insolvent, the debtor's plan proposed payment in cash in full of a class of unsecured claims, without postpetition interest. Section 502(b)(2) disallows unmatured interest as of the petition date. Section 1124(1) provides that a class of claims is unimpaired under the

plan if the plan does not alter any of the holders' legal, contractual, or equitable rights. The Code, not the plan, disallowed postpetition interest on the claims. Therefore, the plan left unaltered the claims' legal and contractual rights, so the class was not impaired, as that terms is used in section 1124. However, the solvent debtor exception allows postpetition interest if the debtor is solvent, and the right to postpetition interest might be an equitable right under the solvent debtor exception. In this case, the debtor was not solvent, so the exception did not apply, although the court confusingly uses language that suggests the solvent debtor exception might not apply in any case. *TLA Claimholders Group v. LATAM Airlines Group S.A.*, 55 F.4th 377 (2d Cir. 2022).

6.1.b **Account debtor's payment to debtor does not satisfy obligation to secured lender.** The debtor granted a security interest in its accounts receivable to its lender. The lender notified an account debtor of the security interest and directed it to pay the lender on any obligations owing to the debtor. UCC § 9-607(a)(3) permits a secured party to enforce the debtor's obligations, including an account debtor's payment obligation to the debtor, if so agreed with the debtor or, in any event, after a default. Section 9-406(a) permits an account debtor to pay an assignor until (but not after) it receives a notice from the assignor or assignee that the amount due has been assigned. A security interest is an assignment. Although section 9-406(a) would have permitted the account debtor here to pay the debtor before notice, the account debtor paid the debtor after notice. Therefore, the payment did not satisfy the obligation to the secured party. *Worthy Lending LLC v. New Style Contractors, Inc.*, ___ N.Y. ___, 2022 N.Y. LEXIS 2384 (Nov. 22, 2022).

6.2 Priorities

7. CRIMES

8. DISCHARGE

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8.3 Environmental and Mass Tort Liabilities

9. EXECUTORY CONTRACTS

9.1.a **A deferred payment settlement agreement is not an executory contract.** The debtor settled a large claim by agreeing to make installment payments over time. After the debtor completed payments, the creditor would release the claim, but it maintained the claim until the payments were made. Section 365 permits the debtor to assume an executory contract. An executory contract is one under which performance remains due to some extent on both sides, such that a material breach by one party would excuse performance by the other. Under this settlement agreement, the creditor had no obligations it could breach. Therefore, the contract was not executory under section 365, and the debtor in possession may not assume it. *In re Svenhard's Swedish Bakery*, ___ B.R. ___, 2022 Bankr. LEXIS 3583 (Bankr. E.D. Cal. Dec. 19, 2022).

10. INDIVIDUAL DEBTORS

10.1 Chapter 13

10.2 Dischargeability

10.2.a **A discharge does not release future liability on a guarantee.** The individual debtor personally guaranteed debts to a supplier of the debtor's corporate restaurant business. Years later, the debtor filed a chapter 7 bankruptcy and received a discharge, but the restaurant continued to

operate and purchase from the supplier, and the debtor did not terminate the guarantee. Later, the restaurant closed with an outstanding balance owing to the supplier. The supplier sought payment from the debtor under the guarantee. A chapter 7 discharge releases any claim that arose before the discharge. A "claim" means right to payment, including contingent and unmatured rights. Under applicable state law, a claim under a guarantee arises only when a debt subject to the guarantee is incurred. Therefore, the supplier's claim for the postpetition future advances was not contingent, and did not arise, prepetition. As such, the debtor's discharge did not release liability for guaranteed postpetition advances. *Reinhart Foodservice LLC v. Schlundt*, 646 B.R. 478 (E.D. Wis. 2022).

10.3 Exemptions

10.4 Reaffirmations and Redemption

11. JURISDICTION AND POWERS OF THE COURT

11.1 Jurisdiction

11.1.a **The "close nexus" test for post-confirmation related-to jurisdiction does not apply to core proceedings.** The plan discharged all claims that arose before the effective date. Shortly before the effective date, the plan sponsor and the not-yet-existing successor to the debtor agreed to pay the sponsor's financial advisor a contingent fee based on future financings. After the effective date, the financings occurred, but the debtor and sponsor did not pay the fee. The advisor sued, and the reorganized debtor asked the bankruptcy court to enjoin the action as violating the discharge order. The bankruptcy court's jurisdiction extends to proceedings arising under title 11 or arising in a title 11 case (core proceedings) or related to a title 11 case. After confirmation, jurisdiction narrows, so that related to jurisdiction continues only if the proceeding has a close nexus to the underlying bankruptcy case. However, the close nexus test does not apply to a core proceeding. The bankruptcy court's core proceeding jurisdiction continues after confirmation unabated. Interpreting and enforcing a discharge order is a core proceeding, because it is based on rights under title 11. Moreover, the bankruptcy court always has jurisdiction to interpret and enforce its orders. Therefore, the court has jurisdiction to enjoin the litigation. *Mesabi Metallics Co., LLC v. B. Riley FBR, Inc. (In re Essar Steel Minn., LLC)*, 47 F.4th 193 (3d Cir. 2022).

11.2 Sanctions

11.3 Appeals

11.4 Sovereign Immunity

12. PROPERTY OF THE ESTATE

12.1 Property of the Estate

12.1.a **Cryptocurrency deposits are property of the estate.** The cryptocurrency debtor operated an "earn" program, under which customers would "loan" stablecoin to the debtor, who could then hypothecate it as part of its business model, and the customer would earn crypto assets based on the amount and duration of the deposits. To participate in this program, the customer had to agree, on the debtor's website, to the clickwrap terms of service. The terms of service provided that the customer grants the debtor all right and title to the digital assets, including ownership rights. A clickwrap contract is effective to bind the parties if there is assent, consideration, and intent to be bound and if the terms are conspicuous on the website. The contract here met those terms and so was valid and enforceable. Because the terms transferred title and ownership to the debtor, the stablecoin became property of the estate when the debtor filed its chapter 11 petition. The characterization of the transaction as a loan of stablecoin does not change the result. A loan of money or property to another creates a debtor-creditor relationship. And perfection of a security interest in the loaned assets requires filing a financing statement under the U.C.C., which

was not done here. Therefore, the assets are property of the estate. *In re Celsius Network LLC*, ___ B.R. ___ (Bankr. S.D.N.Y. Jan. 4, 2023).

12.1.b **A claim for aiding and abetting a principal's fraud against the debtor is property of the estate.** A defrauded Ponzi scheme creditor sued one of the scheme's major lenders for aiding and abetting the fraud. The trustee had already settled with the lender, asserting, among others, the same kind of claims. A claim that the debtor could have brought becomes property of the estate. The aiding and abetting claim asserts that the lender helped the principal steal from the debtor. The debtor could have brought that claim before bankruptcy. Therefore, it is property of the estate, and the defrauded creditor may not bring it against the lender. Only the trustee may do so. *Ritchie Special Credit Invs., Ltd. v. JPMorgan Chase & Co.*, 48 F4th 896 (8th Cir. 2022).

12.2 Turnover

12.3 Sales

13. TRUSTEES, COMMITTEES, AND PROFESSIONALS

13.1 Trustees

13.2 Attorneys

13.2.a **Attorney-client relationship does not transfer from debtor to liquidating trust.** Creditors proposed and confirmed a plan that provided for the creation of a liquidating trust, transfer of all the debtor's assets (including the debtor's attorney-client privilege) to the trust, and the liquidation of the debtor. The liquidating trustee objected to a tax claim. The debtor's former attorney appeared for the tax creditor, and the trustee moved to disqualify him. An attorney who has formerly represented a client in a matter may not, without consent, later represent another client in the same or a substantially related matter in which the later client's interest are materially adverse to the former client's interests. The transfer of the debtor's assets to the liquidating trust under a creditor plan does not create an attorney-client relationship between debtor's counsel and the trust, despite the transfer of the attorney-client privilege to the trust, because the trustee does not substitute for the debtor's management. Instead, the trustee oversees the liquidation, free from the debtor's corporate structure, so the attorney-client relationship does not transfer. However, the attorney may not disclose to the new client confidential information that was obtained in the prior representation. *In re Las Uvas Valley Dairies*, ___ B.R. ___, 2022 Bankr. LEXIS 3407 (Bankr. D.N.M. Dec. 2, 2022).

13.3 Committees

13.4 Other Professionals

13.5 United States Trustee

13.5.a **Liquidating trust must pay U.S. trustee fees.** The debtor's plan provided for the creation of a liquidating trust and transfer to the trust of all its assets, with the trust to be the successor to the debtor for all purposes. It also provided for the trust to pay quarterly fees imposed under 28 U.S.C. § 1930(a)(6) until the issuance of a final decree or the case is closed or dismissed. Section 1930(a)(6) requires payments of a fee calculated based on "all disbursements." Although the statute does not specifically say who shall pay, context suggests it is the debtor. The liquidating trust succeeded to that obligation. Disbursements include payments to the debtor's creditors, even though they became trust beneficiaries and therefore equitable owners of the trust's assets upon the plan's effective date. The payments are still disbursements and subject to the fees. *In re Health Diagnostics Lab., Inc.*, ___ B.R. ___ (Bankr. E.D. Va. Jan. 4, 2023).

14. TAXES

14.1.a **State's strict property tax foreclosure law is unconstitutional.** Under state law, a county could conduct strict foreclosure—that is, take title without a foreclosure sale process—to real property on which there were delinquent real property taxes. The Fifth Amendment's Takings Clause prohibits the government from taking private property for a public use without just compensation. A land owner retains equitable title, that is, the equity in the property's value over and above the amount of any liens, including tax liens, on the property. The courts protect that equity by requiring a foreclosure sale to determine the property's value and to provide the portion of the sale price in excess of the lien to the land owner. The state's failure to do so under its real property tax foreclosure statute amounts to a taking of the land owner's property without just compensation and so is unconstitutional. *Hall v. Meisner*, 51 F.4th 185 (6th Cir. 2022).

14.1.b **Liquidating trustee may not make refund determination request under section 505.** The debtor confirmed a liquidation plan, which provided for creation of a liquidation trust and appointment of a liquidation trustee. The liquidation trustee filed a request with the IRS for a refund based on prior year losses. The IRS issued a tentative refund, but it had about two years in which to initiate deficiency proceedings to recover the refund. The trustee requested a court determination of the trust's liability for return of the refunds. Section 505(a)(1) permits the court to determine the amount or legality of any tax, but section 505(a)(2)(B)(i) prohibits the court from determining a right to a refund for 120 days after the trustee properly requests the refund. Section 505 is a jurisdictional statute and must be narrowly construed. A liquidating trustee, as a representative of the estate under section 1123(b)(3), is not a "trustee" as that term is used in the Bankruptcy Code. Therefore, section 505(a)(1) does not permit the liquidating trustee to make the refund determination request. *In re GUE Liquidation Cos.*, 642 B.R. 683 (Bankr. D. Del. 2022).

14.1.c **Section 505 gives the bankruptcy court jurisdiction to determine a state or local property tax.** The county imposed a prepetition *ad valorem* property tax on the debtor's property. The debtor paid the tax and sued for a refund in state court. After plan confirmation, the reorganized debtor brought an adversary proceeding under section 505 to determine the amount or legality of the tax. Section 505(a)(1) gives the bankruptcy court jurisdiction to determine the amount or legality of any tax, whether or not paid and whether or not contested. However, the Tax Injunction Act deprives the court of jurisdiction to "enjoin, suspend or restrain the assessment, levy or collection of any tax under State law." Because the TIA has been interpreted to prohibit determination of refunds, the two statutes conflict. Section 505's predecessor statute was enacted 29 years after the TIA. Generally, the later enacted statute controls. Section 505 is more specific than the TIA, and the more specific statute generally controls the more general one. Section 505(a)(2)(C) prohibits the court from determining the amount or legality of an *ad valorem* property tax if the period under applicable nonbankruptcy law to challenge the tax has expired, and section 505(b)(1)(A) requires the clerk to maintain a list of federal, state, and local taxing authorities addresses for service of requests under section 505. Both provisions evidence Congressional intent that section 505 applies to state and local property taxes. Therefore, the court denies the county's motion to dismiss for lack of jurisdiction. *WPG Northtown Venture, LLC v. Cnty. of Anoka (In re Wash. Prime Grp., Inc.)*, 642 B.R. 771 (Bankr. S.D. Tex. 2022).

15. CHAPTER 15—CROSS-BORDER INSOLVENCIES

15.1.a **Corporate governance and fraud remediation proceeding that does not address creditors' claims is not a foreign proceeding.** The Cayman company entered into questionable transactions, which some of the shareholders challenged. Upon their petition, the Cayman High Court appointed provisional joint liquidators to take steps to protect and preserve and prevent dissipation of the company's assets and to commence any winding up proceedings or insolvency process in Cayman or elsewhere. The liquidators had not commenced winding up proceedings or insolvency process in Cayman. The company's creditors had not received formal notice of the proceeding, and the proceeding had not involved any attempt to identify or classify creditors or determine how and whether to satisfy their claims. The liquidators sought recognition of the proceeding under chapter 15 as a foreign main proceeding. A bankruptcy court may grant

recognition to a "foreign proceeding," which is defined in section 101(23) of the Code as a collective judicial or administrative proceeding in a foreign country under a law relating to insolvency of adjustment of debt for the purpose of reorganization or liquidation. Although the definition is to be broadly construed, it is not limitless. The proceeding must involve the treatment of and potential benefit to creditors as a whole. Here, the proceeding involved primarily a corporate governance and fraud remediation effort, not one to reorganize or liquidate the company or deal with its creditors. Therefore, it does not meet the definition of "foreign proceeding," and the chapter 15 petition must be denied. *In re Global Cord Blood Corp.*, ___ B.R. ___, 2022 Bankr. LEXIS 3426 (Bankr. S.D.N.Y. Dec. 5, 2022).

15.1.b **Bankruptcy court issues anti-suit injunction against the trustee pursuing Singapore avoiding power actions in a cross-border case in Singapore.** A U.S. debtor and its Singapore affiliate filed bankruptcy cases in the U.S. The U.S. trustee obtained recognition in Singapore of the U.S. proceedings as foreign main proceedings. The trustee brought U.S. preference and fraudulent transfer actions against several defendants. The U.S. bankruptcy court granted motions to dismiss on the ground that the avoiding powers did not apply extraterritorially. The trustee filed an amended complaint without the preference claims. The court granted motions to dismiss those claims as well. The trustee appealed. While the appeal was pending, the trustee brought actions in the Singapore court under Singapore avoiding power law to avoid and recover the same transfers from the same defendants involved in the U.S. action. The defendants brought an action in the U.S. bankruptcy court for an anti-suit injunction against the trustee. Although the Singapore recognition action permitted the trustee to bring those actions in the Singapore court, it did not require him to do so. The Code does not expressly grant the trustee rights to bring foreign avoiding power actions, but here, the trustee's powers as a foreign representative in Singapore on behalf of the U.S. estates made the Singapore avoiding power actions property of the U.S. estates. U.S. law, not an order of a Singapore court, determines whether the U.S. court has jurisdiction to hear an action, even an action under Singapore law. Because those claims are related to the bankruptcy cases in the U.S., the court had jurisdiction to hear them. The court may issue an anti-suit injunction if the parties and the issues are the same in both jurisdictions, at least one *Unterweser* factor applies, and the injunction's effect on international comity is tolerable. The parties here are the same. Whether the issues are the same may be analyzed under principles of res judicata, as a court may issue an anti-suit injunction if res judicata would bar a later foreign action. Res judicata applies when the parties are identical, the first action involved the same cause of action as the second, and the first action was resolved by a final judgment. Although the second action here is based on Singapore law, rather than U.S. law, the underlying facts, transactions, and transfers are all the same. Therefore, res judicata applies. The *Unterweser* factors are whether the foreign action would frustrate the local forum's policy, would be vexatious, or oppressive, or prejudice other equitable considerations. Here, the Singapore action would frustrate the bankruptcy court's judgment in the first action, would be vexatious or oppressive because it is a second action for the same claims against the same parties, and would prejudice equitable considerations, because the trustee's choice of forum in Singapore strongly suggests forum shopping. Finally, because there are no government litigants, issues of foreign relations, or concerns involving international law, any effect on comity of an anti-suit injunction would be tolerable. Therefore, the court grants the injunction. *King v. Exp. Dev. Can. (In re Zetta Jet USA, Inc.)*, 644 B.R. 12 (Bankr. C.D. Cal. 2022).

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Recent Developments in Bankruptcy Law, October 2022

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1. AUTOMATIC STAY

1.1 Covered Activities

1.1.a **Automatic stay is not enforceable in the U.S. against a foreign creditor.** The debtor borrowed money in Ireland, securing the loan by various Irish assets. When he defaulted, his Irish creditors pursued and obtained remedies in the Irish courts. The debtor filed a chapter 11 petition to attempt to stay any further foreclosure actions and sued the Irish creditors in the bankruptcy court for contempt for violating the stay. The automatic stay prohibits any act to exercise control over property of the debtor or property of the estate. Property of the estate includes any interest of the debtor in property, wherever located. Therefore, the automatic stay applies to protect the debtor's Irish property. However, a court may not enforce violations of the stay against creditors or other defendants over whom the court does not have personal jurisdiction. Here, the Irish creditors and other actors had no U.S. contacts and so were not subject to an enforcement action in the U.S. courts. *Sheehan v. Breccia Unltd. Co. (In re Sheehan)*, 48 F.4th 513 (7th Cir. 2022).

1.1.b **Authorizing issuance of additional shares in the debtor's corporation does not violate the stay.** The individual debtor, who had embezzled substantial sums from a corporation while he was an officer, owned a 23% interest in the corporation. That interest became property of the estate. The majority shareholder adopted a resolution increasing the number of authorized shares in the corporation but took no action to issue any additional shares. The automatic stay prohibits any act to obtain possession of or exercise control over property of the debtor or of the estate. Merely authorizing the issuance of additional shares does not dilute the estate's interest in the corporation and therefore does not violate the stay. Because the corporate action did not contemplate issuance of new shares, the court did not need to address the issue of whether such an action would have violated the stay. *In re Harrison*, 643 B.R. 399 (Bankr. E.D. N. Car. 2022).

1.1.c **False advertising to the debtor's customers does not violate the stay.** The debtor provided telecommunications services to its customers. After its bankruptcy, its competitor sent advertisements to the debtor's customers implying that the debtor would be going out of business and would not be able to provide services. The automatic stay prohibits any act to obtain possession or control of property of the estate, including any act or proceeding that might dissipate the estate's assets. It protects both executory contracts and goodwill. However, a competitor's competitive efforts to attract customers, standing alone, does not interfere with the debtor's contracts with its customers, and its general advertising questioning the debtor's future longevity does not attempt to obtain possession of or exercise control over the debtor's goodwill. Not every illegal act violates the stay: nothing in the stay suggests that improper advertisements are attempts to obtain control but legitimate ones are not. Therefore, the competitor did not violate the stay. *Windstream Holdings, Inc. v. Charter Commc'ns Inc. (In re Windstream Holdings, Inc.)*, 2022 U.S. Dist. LEXIS 183574 (S.D.N.Y. Oct. 6, 2022).

1.2 Effect of Stay

1.3 Remedies

2. AVOIDING POWERS

2.1 Fraudulent Transfers

2.1.a **Providing administrative services to a Ponzi scheme may constitute "value."** The debtor conducted a Ponzi scheme. He employed and paid a reasonable price to an administrator to keep records, maintain his website, and handle withdrawal requests and questions from investors. The SEC instituted a receivership proceeding against the debtor. Under the UFTA, a receiver may avoid and recover a transfer made with actual intent to defraud creditors, but not to the extent a transferee gave reasonably equivalent value to the debtor in good faith. Under the Ponzi scheme

presumption, the debtor's transfers are all presumed to be made with actual intent to defraud creditors. A transferee gives value if the debtor's net worth is preserved. Here, the services provided value to the debtor, the debtor incurred a debt for the price of the services, and the payments preserved the debtor's net worth by discharging the debt. Enabling the Ponzi scheme to continue does not negate the value the administrator provided. The administrator's knowledge, if any, of the Ponzi scheme goes to his good faith, not to whether he provided value. *Georgelas v. Desert Hill Ventures, Inc.*, 45 F.4th 1193 (10th Cir. 2022).

2.1.b **Trustee may not rely on FDCPA reach-back based on allowed PBGC claim.** More than four years but within six years before bankruptcy, the debtor paid consultants in connection with an illegal scheme to reduce the apparent underfunding of a private, single-employer defined benefit pension plan. The Pension Benefit Guaranty Corporation, which is a corporation that is 100% owned by the United States, had an allowed claim against the debtor for the benefit of the plan, whose benefits the PBGC guaranteed. Section 544(b) permits the trustee to avoid a transfer avoidable by a creditor holding an allowed unsecured claim. The Federal Debt Collection Procedures Act governs collection of debts owed to the United States, but not debts the United States seeks to collect on behalf of private parties or acquires by assignment. The FDCPA has a six-year reach-back period for the United States to avoid fraudulent transfers. Because the debt to the PBGC is not a debt to the United States, the PBGC could not use the six-year reach-back period here to avoid the transfers to the consultants. Therefore, the trustee may not rely on the PBGC as a triggering creditor under section 544(b) to avoid the transfers. *Shuford v. Kearns (In re JTR1, LLC)*, 643 B.R. 403 (Bankr. W.D. N. Car. 2022).

2.1.c **Safe harbor does not protect refinancing loan for purchase of the debtor's stock.** The debtor was the subject of an LBO. The private equity firm created a holding company that acquired the debtor's stock using the proceeds of a bank loan to the holding company. A month later, the bank loan was refinanced with a loan to the debtor that was guaranteed by the holding company. A chapter 7 case ensued a year later. Section 544(b) permits a trustee to avoid a transfer that is voidable by a creditor holding an allowable unsecured claim. The UVTA permits a creditor to avoid a transfer of an interest of the debtor in property that is made for less than a reasonably equivalent value while the debtor was insolvent and to recover the value of the transfer from the transferee or the entity for whose benefit the transfer was made. If a transfer is avoidable by an unsecured creditor, the trustee need not separately avoid the transfer to recover from the transfer's beneficiary. Section 546(e) prohibits the trustee from avoiding under section 544 a settlement payment in connection with a securities contract to or for the benefit of a financial institution. Section 546(e) does not prohibit a creditor from avoiding such a transfer. The court need not determine whether the trustee may actually avoid the transfer, because "avoidability," not "avoidance," is the element of the trustee's claim. Therefore, the trustee may step into the creditor's shoes and assert the claim for recovery without first avoiding the transfer and without triggering the section 546(e) prohibition. In addition, section 546(e) applies only if the settlement payment is made "in connection with" a securities contract. "In connection with" implies a meaningful connection, consistent with the statute's purpose to protect the securities markets, with the transfer. Because the transfer here was made a month after the holding company's purchase of the debtor's equity securities, it was not made in connection with the purchase. *Petr v. BMO Harris Bank, N.A. ((in re BWGS, LLC)*, 2022 Bankr. LEXIS 2313 (Bankr. S.D. Ind. Aug. 18, 2022).

2.1.d **Termination of ownership interest before transfer precludes fraudulent transfer liability.** The debtor provided retail electric service to its customers. When it failed to pay the wholesaler, the regulator terminated its right to service retail customers. Upon the termination, the regulator transferred the customers to a new provider. The trustee may avoid a transfer of an interest of the debtor in property if made within two years before bankruptcy for less than reasonably equivalent value while the debtor was insolvent. In this case, because the termination of the debtor's right to service its customers terminated before the customers were transferred to the new provider, the new provider did not receive an interest of the debtor in property and is not liable for a fraudulent

transfer. *Nelms v. TXU Retail Energy Co. LLC (In re Gritty Energy LLC)*, 2022 Bankr. LEXIS 2888 (Bankr. S.D. Tex. Oct. 6, 2022).

2.2 Preferences

2.2.a **Postpetition claim payment under section 503(b)(9) does not defeat subsequent new value preference defense.** The debtor purchased and, within 90 days before the petition date, paid for goods from a supplier. At the petition date, some of the supplier's invoices remained unpaid, including for shipments the debtor received within 20 days before the petition date. The supplier filed an administrative expense claim under section 503(b)(9) for those invoices. Section 547(b) allows the trustee to avoid payments made within 90 days before the petition date as a preference if various other conditions are met, but section 547(c)(4) gives a preference defendant a defense to the extent the defendant, after the preference, provided new value to the debtor "not secured by an otherwise unavoidable security interest" and for which the debtor "did not make an otherwise unavoidable transfer to or for the benefit" of the creditor. First, in this context, "otherwise unavoidable" means unavoidable under a provision other than section 547(c)(4), not generally under section 547. Thus, if a transfer to the creditor is avoidable for any reason, including as a preference, the creditor may rely on the subsequent new value defense with respect to the new value for which the debtor made the transfer. Second, the subsequent new value defense does not specify whether the "otherwise unavoidable transfer" must have been made pre- or postpetition. The first two uses of the word "transfer" in section 547(b) and 547(c)(4) apply only to prepetition transfers. The third use, in section 547(c)(4)(B), should similarly be read to apply only to prepetition transfers. The section's title, "Preferences," suggests that it applies only in the 90-day prepetition period. If only prepetition "new value" provides a defense, then (B) should similarly be read to apply only to prepetition transfers. Therefore, the unavoidable postpetition claim payment under section 503(b)(9) is not an "otherwise unavoidable transfer" that defeats the supplier's subsequent new value defense. *Auriga Polymers Inc. v. PMCM2, LLC*, 40 F.4th 1273 (11th Cir. 2022).

2.3 Postpetition Transfers

2.3.a **Filing a C corporation tax return is a transfer of property of the estate.** After the chapter 11 C corporation case was converted to chapter 7, the shareholders caused the corporation to file, without the chapter 7 trustee's approval, tax returns for the chapter 11 years. Section 549 permits a trustee to avoid a postpetition transfer of property of the estate that was not authorized. The filing of a corporate tax return has a significant effect of the estate's net assets and therefore fits within the broad definition of estate property and therefore is a transfer because it disposes of an estate asset or results in the disposing of or parting with an interest in property. Accordingly, the court denies the shareholders' motion to dismiss the trustee's complaint under section 549 to avoid the filing of the returns as unauthorized postpetition transfers. *Harker v. GYPC, Inc. (In re GYPC, Inc.)*, 639 B.R. 739 (Bankr. S.D. Ohio 2022).

2.4 Setoff

2.5 Statutory Liens

2.6 Strong-arm Power

2.7 Recovery

3. BANKRUPTCY RULES

3.1

3.1.a **A claims agent may not adjudge the validity of a claim transfer.** The court ordered the allowance of a rejection damages claim and required the claimant to file a proof of claim within 30 days. The claimant did not do so. Shortly before the order, the claimant transferred the claim to a

claim dealer. The dealer filed evidence of transfer under Rule 3001(e)(1), which addresses transfers of claims before a proof of claim is filed. Because no proof of claim had been filed, the claims agent, in accordance with Rule 3001(a)(1), did not send notice of the transfer, but because no proof of claim had been filed, it paused processing the transfer on the claims register. Later, when reconciling the claims register, the claims agent sent a Notice of Defective Transfer to the transferor and transferee. The claimant then filed a proof of claim, but naming its affiliate. It later withdrew that claim and filed on behalf of the proper entity. After that, the claims agent sent notice of transfer to the transferor and transferee. Neither objected to the transfer, and the claims agent updated the register accordingly, When the transferee's subsequent transferee objected to the claims agent's notice of subsequent transfer, the claims agent reversed both transfers. The claims agent is appointed under 28 U.S.C. § 156(c), which authorizes the clerk to contract claims processing, and has only the authority the clerk would have. The clerk does not have the authority to adjudge the validity of the claim transfer; nor does a claims agent. Therefore, the court orders the claims agent to record the claim transfer. *In re LATAM Airlines Grp. S.A.*, 2022 Bankr. LEXIS 2528 (Bankr. S.D.N.Y. Sept. 13, 2022).

4. CASE COMMENCEMENT AND ELIGIBILITY

4.1 Eligibility

4.2 Involuntary Petitions

4.3 Dismissal

4.3.a **District court reverses dismissal of chapter 7 asbestos case.** The debtor had been out of business for 20 years but was still the defendant in 27,000 asbestos personal injury actions in state courts. It had some cash from a settlement with its insurers and claims against other insurers that could be used to fund the administrative expenses of a case and provide a distribution to claimants. It filed a chapter 7 case to allow a trustee to pursue the claims and provide a distribution to claimants who could establish their claims. Section 707(b) requires a court to dismiss a case filed in bad faith. 28 U.S.C. § 157(b)(5) requires that personal injury tort claims be heard in the district court, not the bankruptcy court. Those requirements do not divest the bankruptcy court of jurisdiction over the underlying bankruptcy case or make the bankruptcy proceeding useless. Chapter 7 provides a collective mechanism to address the claims of numerous creditors and to provide for equitable distribution, thus preventing and substituting for the creditors' race to dismember the debtor or grab its assets first. Therefore, the district court reverses the bankruptcy court's dismissal of the chapter 7 case for bad faith. *In re Nash Engineering Co.*, 2022 U.S Dist. LEXIS 139985 (D. Conn. Aug. 5, 2022).

5. CHAPTER 11

5.1 Officers and Administration

5.1.a **Cryptocurrency debtor may not redact customer names.** The debtor operated a cryptocurrency brokerage and exchange, with over 300,000 customers, including foreign customers, having account balances of over $100. The debtor argued that disclosure of names and physical and email addresses would give competitors an undue advantage in soliciting the debtor's customers. Section 521 requires the debtor to file a list of creditors and a schedule of liabilities, with creditors' names and addresses. Public policy strongly presumes public access to court records. Section 107(b) permits the court to order redaction of confidential commercial information. Section 107(c) permits the court to protect an individual with respect to information whose disclosure would create undue risk of identity theft or other unlawful injury to the individual. Rule 1007(j) permits the court to protect information from disclosure to competitors or others who might make inappropriate or unfair use of the information. These exceptions to the public policy of public access are construed narrowly. Foreign data protection laws prohibit the debtor from disclosing any personal information, including names. Here, disclosure of physical and email

addresses of individual customers could risk identity theft, and they may be filed under seal. However, disclosure of names, without more, does not pose the same risk, and foreign law does not trump U.S. law to prevent public access to records. Therefore, the debtor may redact physical and email addresses, but not customer names or account balances or non-individuals' information in filing its creditor lists and schedules of liabilities. The court notes that other bankruptcy courts hearing cryptocurrency cases have concluded otherwise. *In re Celsius Network LLC*, 2022 Bankr. LEXIS 2672 (Bankr. S.D.N.Y. Sept. 28, 2022).

5.2 Exclusivity

5.3 Classification

5.4 Disclosure Statement and Voting

5.5 Confirmation, Absolute Priority

5.5.a **In a solvent case, an unimpaired class of unsecured claims is entitled to postpetition interest at the contract rate.** The solvent debtor's plan left unsecured trade claims unimpaired. Section 1124(1) provides that a class of claims is unimpaired only if the plan leaves unaltered the legal, equitable, and contractual rights of the holders of claims in the class. The common law and the Bankruptcy Act recognized a solvent debtor exception to the general rule that unsecured claims do not accrue postpetition interest. The solvent debtor exception is an equitable right of creditors. Therefore, a plan that does not alter a claim's equitable rights preserves the claim's entitlement to postpetition interest in a solvent case. The Code did not abrogate the exception. For an impaired class in a solvent debtor case, the best interest test of section 1129(a)(7) incorporates indirectly the postpetition interest requirement of section 726(a)(5), which provides for interest at the "legal rate," which is the federal judgment rate. Those sections do not apply to an unimpaired class. Therefore, the interest to which claims in an unimpaired class are entitled is interest at the contractual or default (nonbankruptcy statutory) rate, unless compelling equitable considerations require a different rate. *Ad Hoc Committee of Holders of Trade Claims v. Pac. Gas & Elec. Co. (In re Pac. Gas & Elec. Co.)*, 46 F.4th 1047 (9th Cir. 2022).

5.5.b **In a solvent case, an unimpaired class of unsecured claims is entitled to postpetition interest at the contract rate.** The debtor became solvent during the case. It proposed a plan to leave the class of bond claims unimpaired but to pay the claims only principal, interest accrued at the contract rate to the date of the petition, and postpetition interest at the federal judgment rate. Under section 1124(1), a class of claims is impaired unless the plan leaves unaltered the legal, contractual, and equitable rights of the holders of the claims in the class. Although section 502(b)(2) disallows claims for unmatured postpetition interest, in the absence of a clear Congressional mandate to the contrary, historical precedent imposes a solvent debtor exception to the disallowance of postpetition interest. Here, section 502(b)(2) tracks closely with pre-Code law, section 63 of the Bankruptcy Act, under which the courts enforced a solvent debtor exception. Therefore, it survived the Code's enactment. Because unimpairment requires leaving legal and contractual right unaltered, creditors are entitled to postpetition interest at their contract rate. *Ultra Petro. Corp. v. Ad Hoc Comm. (In re Ultra Petro. Corp.)*, ___ F. 4th ___, 2022 U.S. App. LEXIS 28604 (5th Cir. Oct. 14, 2022).

5.5.c **Recovery for junior class contingent on post-consummation payment in full of senior class does not violate the fair and equitable rule.** The debtor confirmed a cram-down plan that provided for immediate partial distributions to a class of unsecured claims, with contingent later distributions based on litigation recoveries. It provided for distribution to a junior class from litigation recoveries only if the later distributions on the unsecured claims were sufficient to satisfy those claims in full. The unsecured class and the junior class did not accept the plan. Section 1129(b)(2) permits confirmation over a class's nonacceptance of a plan if the plan is fair and equitable to that class by providing that a junior class may not receive or retain any consideration unless the senior class is paid in full. Even though the junior class's contingent recovery right might have some "option" value, the plan's provision that the junior class not receive any recovery

until the unsecured class has been paid in full satisfies that requirement. *NexPoint Advisors, L.P. v. Highland Cap. Mgmt., L.P. (In re Highland Cap. Mgmt., L.P.)*, ___ F.4th ___, 2022 U.S. App. LEXIS 23237 (5th Cir. Aug. 19, 2022).

5.5.d **Backstop commitment fees and plan treatment were reasonable.** The debtor searched for financing from multiple sources. Ultimately, it engaged in a mediation with some of its largest unsecured creditors and reached agreement on their financing of a plan. The "Commitment Creditors" agreed to backstop a notes offering in exchange for the right to buy up to 50% of the notes in exchange for discharge of 50% of the amount of their unsecured claims as well as a contribution of approximately 20% of the face value of the notes in cash and for a backstop fee of 20% of the face amount of the notes. The effect was to give them the ability to purchase a disproportionately greater share of the notes than other creditors in the same class. The bankruptcy court determined that the Commitment Creditors were subject to substantial risk in their commitment and that the payments to them were reasonable based on the risk, the value, and backstop fees in other cases. Section 1123(a)(4) requires that holders of claims in the same class receive equal treatment under the plan on account of their claims. Here, any advantage to the Commitment Creditors did not violate the equal treatment requirement because it was in compensation for their commitment and the accompanying risk, not in payment of their claims, and the result of a reasonable search for financing, not an inside deal to favored creditors. *Ad Hoc Group of Unsecured Claimants v. LATAM Airlines Group, S.A. (In re LATAM Airlines Group., S.A.)*, 2022 U.S. Dist. LEXIS 157534 (S.D.N.Y. Aug. 31, 2022).

6. CLAIMS AND PRIORITIES

6.1 Claims

6.1.a **A make-whole is unmatured postpetition interest.** The debtor's bonds contained a make-whole provision that required the debtor to pay the bondholders an additional payment if the bonds' maturity was accelerated and interest rates had dropped. Roughly speaking, the payment was calculated as the discounted present value of all future payments due on the bonds, including interest payments, minus the accelerated principal. Section 502(a) allows claims as of the petition date. Section 502(b)(2) disallows any claim for unmatured interest. The disallowance applies equally to the economic equivalent of interest. Make-whole payments are designed to compensate a lender for a loss of future interest if reinvestment rates have declined. As such, they are the economic equivalent of unmatured postpetition interest. *Ultra Petro. Corp. v. Ad Hoc Comm. (In re Ultra Petro. Corp.)*, ___ F. 4th ___. 2022 U.S. App. LEXIS 28604 (5th Cir. Oct. 14, 2022).

6.1.b **Lenders must return mistaken payment.** By failing to check a proper box on a computer screen that provided for payments on a syndicated loan, the agent bank mistakenly paid the lenders the full amount outstanding on the loan several years before it was due, rather than paying just the current interest amount. The agent requested the lenders to return the mistakenly disbursed funds the next day. Many refused. Generally, a payor may recover a mistaken payment. However, under the discharge-for-value rule, the payee need not return the payment that was in discharge of a debt if the payee had no knowledge the payment was mistaken. In this context, "knowledge" includes inquiry notice—whether the facts were sufficiently troublesome that a reasonably prudent investor would have made reasonable inquiry that would have revealed the error. Here, the facts that the payment was not due, that the lenders received no notice (as ordinarily required) that the payment would be made, and that the debtor was in severe distress, with the notes trading at 20% of their face amount, all raised questions about whether the payment was intended or mistaken. As a result, the lenders must return the mistaken payment to the agent. *Citibank, N.A. v. Brigade Cap. Mgmt, LP*, 49 F.4th 42 (2d Cir. 2022).

6.2 Priorities

6.2.a **Failed adequate protection priority amount is based on proposed disposition or use as of the petition date.** On the petition date, it appeared that the debtor would sell its assets, not reorganize as a going concern, although it was unclear whether the sale would be an orderly liquidation/going concern sale or a forced liquidation. Ultimately, the sale was a going concern liquidation. Section 507(b) gives priority to the claims of a secured creditor to the extent that adequate protection of the value of its collateral provided to the creditor turned out to be inadequate and the collateral value decreased during the case. Section 506(a) requires valuation in light of the purpose of the valuation, the proposed use or disposition of collateral, and in conjunction with any hearing of the disposition or use affecting the creditor's interest. When the creditor sought a priority claim under section 507(b), the bankruptcy court valued the collateral as of the petition date using a "net orderly liquidation value" basis. Because an orderly liquidation sale was a possibility at the petition date, that valuation method was proper, without regard to how the collateral was ultimately used or disposed of. *ESL Invs., Inc. v. Sears Holdings Corp. (In re Sears Holdings Corp.)*, ___ F.4th ___, 2022 U.S. App. LEXIS 28584 (2d Cir. Oct. 14, 2022).

6.2.b **DIP's postpetition breach of prepetition contract may entitle counterparty to administrative expense claim.** Prepetition, the debtor entered into a service contract. The contract permitted the counterparty to extend the term unilaterally, which it did, both pre- and postpetition. The debtor's plan rejected the contract. The counterparty claimed the debtor in possession breached the contract during the chapter 11 case, before rejection, and filed an administrative expense claim for breach damages. Section 503(b)(1) allows the actual and necessary costs and expenses of preserving the estate as administrative expenses. It must arise from a transaction between the counterparty and the debtor in possession, not the debtor, and is allowable only to the extent the consideration was both supplied to and beneficial to the estate. However, to the extent that the damage claim was within the parties' fair contemplation at the time of contracting, the claim could be a contingent prepetition claim. But "fair contemplation" does not end the inquiry. For if the counterparty provided value to the estate at the debtor in possession's request, the counterparty is entitled to an administrative expense claim to the extent of the benefit to the estate. Although the parties argued the state law question of whether the postpetition extensions constituted new, postpetition contracts entitling the counterparty to allowance of an administrative expense or were part of the prepetition executory contracts, the questions whether a contract is an executory contract under section 365 and whether a claim is entitled to administrative expense priority is a bankruptcy law question. Here, the counterparty continued postpetition to provide services to the estate, so the district court remands for determination of the reasonable value of those services. *Fin. Of Am. LLC v. Mortgage Winddown LLC (In re Ditech Holding Corp.)*, 2022 U.S. Dist. LEXIS 172793 (S.D.N.Y. Sept. 23, 2022).

6.2.c **Postpetition attorneys' fee award against the estate is denied administrative expense priority.** The debtor's insurer denied coverage on a prepetition claim. The trustee sued the insurer for damages arising from its bad faith denial of coverage and lost. A state statute awards attorneys' fees to the prevailing party in such litigation. A claim arises based on the timing of the debtor's or trustee's conduct. Here, the claim could not arise until the trustee sued, because the state statute awarding attorneys' fees applied only upon commencement of the litigation. Therefore, the claim is a postpetition claim. The definition of "creditor" includes only the holder of a prepetition claim. Therefore, the insurer was not a creditor. A claim is entitled to administrative expense priority only if it arises from a transaction with the estate that directly and substantially benefits the estate. Defending against the trustee's lawsuit does not meet those criteria. However, *Reading v. Brown*, 391 U.S. 471 (1968), grants administrative expense priority to a claim arising from the wrongful conduct of a receiver or trustee in operating the debtor's estate. Under circuit precedent, only a claim arising from operation of the debtor's business involving tortious or otherwise wrongful conduct qualifies under the *Reading* test. Here, the claim does not meet those criteria and is disallowed. *In re Greenway Park, LLC*, 2022 Bankr. LEXIS 2734 (Bankr. W.D. Okla. Sept. 29, 2022).

6.2.d **Court subordinates to general unsecured claims an unauthorized postpetition loan.** During its chapter 11 case, without court approval under section 364, the debtor in possession borrowed from an insider to acquire real property. The lender asserted an administrative claim for the loan amount. Section 503(b) allows claims for actual amounts necessary to the preservation of the estate and grants them priority over prepetition claims. Section 364 permits the court to authorize nonordinary course postpetition loans with administrative expense priority. Failure to obtain prior approval defeats a claim for administrative expense priority. The nature of the transaction here was not in the debtor's ordinary course of business. A court may grant administrative expense priority to an unauthorized postpetition loan on equitable principles. To do so, the court must find that the court would have approved the loan before it was made, the loan would not impair creditor interests, and the property acquired with the loan proceeds would provide a substantial distribution to creditors, all measured as of the time the loan was made. None of those factors were present here. Section 503(b)(3) allows an administrative expense claim of a creditor and certain other specified entities for making a substantial contribution to the case. An insider lender is not among the specified entities and so may not rely on the substantial contribution provision. Therefore, the court denies administrative expense priority to the loan. The court may disallow the claim in its entirety, but here, the court allowed it and subordinated it to the claims of general unsecured creditors based on the insider's inequitable conduct. *Norcross Hospitality, LLC v. Jones (In re Nilhan Devs., LLC),* 2022 U.S. App. LEXIS 22291 (11th Cir. Aug. 11, 2022).

7. CRIMES

8. DISCHARGE

8.1 General

8.1.a **Chapter 11 discharges a reorganized debtor who continues in business for only a limited time.** The debtor confirmed a plan that provided for continuation of its business for a limited period, ending in a wind-down and liquidation of its then-remaining assets. Section 1141(d) denies a discharge to a corporate debtor that does not engage in business after plan consummation if the plan provides for liquidation of all or substantially all property of the estate. Even a temporary continuation of business after consummation suffices to permit a discharge, Because the plan here provides for continuation of the business, albeit for a limited time, discharge is proper. *NexPoint Advisors, L.P. v. Highland Cap. Mgmt., L.P. (In re Highland Cap. Mgmt., L.P.)*, ___ F.4th ___, 2022 U.S. App. LEXIS 23237 (5th Cir. Aug. 19, 2022).

8.2 Third-Party Releases

8.2.a **Fifth Circuit reaffirms limitation on plan exculpation but permits a bankruptcy court gate-keeping function for post-confirmation litigation,** The debtor's principal was particularly litigious. Shortly after the petition date, the court replaced him with an independent board, which effectively acted as a trustee, and a CEO. The debtor confirmed a plan that provided for continuation of the debtor's business through a managing general partner and the creation of a liquidating trust to pursue litigation recoveries for unpaid creditors. It provided for exculpation of the board, the CEO, the reorganized debtor, the trust, and the creditors committee members, except for acts constituting gross negligence or willful misconduct, and imposed an injunction against litigation against any of them without prior bankruptcy court approval that the litigation stated a colorable claim. Section 524(e) provides that a discharge does not release a nondebtor from any claims. However, chapter 11 permits exculpation of only the debtor, a trustee, and the committee for conduct during the chapter 11 case and in implementing the plan. The independent directors acted effectively as a chapter 11 trustee and are therefore entitled to limited qualified immunity and exculpation. Exculpation of any other parties violates section 524(e). Therefore, the exculpation of the reorganized debtor and the post-consummation trust are impermissible. Under the *Barton* doctrine, a bankruptcy court may perform a gatekeeping function by requiring leave of court before litigation against estate fiduciaries. Therefore, the gatekeeping injunction in this case

is permissible, even for parties who are not exculpated. *NexPoint Advisors, L.P. v. Highland Cap. Mgmt., L.P. (In re Highland Cap. Mgmt., L.P.)*, ___ F.4th ___,2022 U.S. App. LEXIS 23237 (5th Cir. Aug. 19, 2022).

8.3 Environmental and Mass Tort Liabilities

9. EXECUTORY CONTRACTS

9.1.a **Section 365(b)'s "cure, compensate, and assure" provision applies to nonmaterial defaults.** The debtor's landlord complained to the debtor of several nonfinancial defaults relating to the debtor's use of the premises. When the landlord threatened enforcement action, the debtor filed a chapter 11 petition. During the case, it paid rent into an escrow account. When the court ruled that it was not entitled to do so, the debtor paid the rent to the landlord and later, upon becoming aware of the requirement, paid the landlord a late payment penalty. The debtor then moved for approval of assumption of the lease. If there has been a default under a lease, section 365(b) conditions approval of assumption of a lease on cure of the default, compensation for any loss occasioned by the default, and adequate assurance of future performance. Because section 365(b) speaks only of a "default," it is not limited to material defaults or defaults that have already been cured. However, where the default is nonfinancial and the only form of adequate assurance is the debtor's reaffirmation of its obligations under the lease, the assumption process adequately provides such assurance. *Smart Cap. Invs. I v. Hawkeye Entert., LLC (In re Hawkeye Entert., LLC)*, 49 F.4th 1232 (9th Cir. Sept. 23, 2022).

9.1.b **A surety bond is not an executory contract.** Before bankruptcy, the debtor obtained surety bonds to guarantee performance of its obligations to mineral rights lessors. The surety's obligations to the lessors were irrevocable, but once it issued the bonds, it had no further obligations to the debtor, only to the guaranteed lessors. In connection with obtaining the bonds, the debtor entered into indemnification agreements with the surety, obligating the debtor to pay the surety or provide collateral under certain circumstances. Under its chapter 11 plan, the debtor assumed all contracts not rejected. The surety bonds were not among the contracts listed for rejection. After the effective date, the reorganized debtor defaulted on some of the leases, the lessors demanded payment from the surety, and the surety demanded the reorganized debtor reimburse it or post collateral. An executory contract is one under which "performance remains due to some extent on both sides and … the failure of either party to complete performance would constitute a material breach" that would excuse the other party's further performance. Here, whether or not the surety had remaining performance obligation to the debtor, the bonds are irrevocable, so the debtor's failure to perform under the indemnity agreement would not constitute a breach excusing the surety's performance to the lessors. Therefore, the contract is not executory, it was not assumed under the plan, and the surety may not enforce any obligations under the indemnity agreement against the reorganized debtor. *Argonaut Ins. Co. v. Falcon V, L.L.C. (In re Falcon V, L.L.C.)*, 44 F.4th 348 (5th Cir. 2022).

9.1.c **Assumption is not a ratification**, The debtor in possession assumed an executory contract that it alleged was procured by fraud and subject to rescission. Under applicable nonbankruptcy law, ratification waives any right to void or rescind a contract for fraud, but the ratification must be an unequivocal expression of intent to forego any ability to void the contract. Section 365 permits assumption of an executory contract. Although court approval is required, the approval process is a summary proceeding that addresses only the debtor in possession's business judgment and cure of any defaults. Assumption is *cum onere*—with all burdens and benefits. Therefore, by assumption, the debtor in possession does not lose its right to challenge the validity of the contract. *Astria Health v. Cerner Corp. (In re Astria Health)*, 640 B.R. 758 (Bankr. E.D. Wash. 2022).

10. INDIVIDUAL DEBTORS

10.1 Chapter 13

10.2 Dischargeability

10.2.a **Takings Clause claims are not dischargeable in a municipal bankruptcy case.**. The debtor confirmed a plan under PROMSEA Title III, which parallels chapter 9. Numerous creditors asserted claims under the Fifth Amendment for takings of their property before the bankruptcy. Section 944(b) provides for a general discharge. However, the Constitution's Bankruptcy Clause is subject to the Fifth Amendment's Takings Clause, and a bankruptcy case may not effect a taking without compliance with the Fifth Amendment. The Takings Clause provides a specific remedy for a taking—just compensation. Therefore, it is not dischargeable in a bankruptcy case. *Fin. Oversight & Mgmt. Bd. v. Cooperativa de Ahorro (In re Fin. Oversight & Mgmt. Bd.)*, 41 F4th 29 (1st Cit. 2022).

10.2.b **A PACA claim is dischargeable.** The debtor purchased produce from a supplier who was registered under the Perishable Agricultural Commodities Act but did not pay for the produce. PACA provides that produce received by a buyer and all proceeds "shall be held … in trust for the benefit of all unpaid suppliers … until full payment of the sums owing." The PACA regulations provide that trust assets "are to be preserved as a nonsegregated 'floating' trust" and that "[c]ommingling of trust assets is contemplated." Section 523(a)(4) excepts from discharge any debt for "fraud or defalcation while acting in a fiduciary capacity." This discharge exception applies only to a technical trust, where there is a trustee who holds an identifiable *res* for the benefit of an identifiable beneficiary. In addition, the trust relationship must impose sufficient trust-like duties on the trustee, including the duty to segregate trust assets and not use them for non-trust purposes, and the trust relationship must have been created before the act or fraud or defalcation creating the debt. PACA establishes the trustee, the *res*, and the beneficiary, but because it permits commingling and use of trust assets for non-trust purposes, it does not sufficiently impose trust-like duties on the trustee to qualify as a technical trust. As a result, any trust results only from the act or fraud or defalcation and does not exist before hand. Therefore, a PACA trust is not a technical trust who breach gives rise to a discharge exception under section 523(a)(4). *Spring Valley Produce, Inc. v. Forrest (In re Forrest)*, 47 F.4th 1229(11th Cir. Aug. 31, 2022).

10.2.c **State bar client security fund reimbursement obligation is dischargeable.** An attorney was disbarred after he embezzled money from his clients. The state bar has a client security fund that reimburses clients for any such losses and then subrogates to the clients' claims against the attorney. Section 523(a)(7) makes nondischargeable any debt for a fine or penalty payable to or for the benefit of a governmental unit that is not in compensation for actual pecuniary loss. Here, the fact that the client security fund steps in to pay the client victim does not make its claim, through subrogation, against the attorney not in compensation for actual pecuniary loss. To the contrary, the claim is precisely to compensate for the loss. Therefore, it is dischargeable. *Kassas v. State Bar of Calif.*, 49 F.4th 1158 (9th Cir. 2022).

10.3 Exemptions

10.4 Reaffirmations and Redemption

11. JURISDICTION AND POWERS OF THE COURT

11.1 Jurisdiction

11.1.a **Arbitration agreement does not apply to avoidance actions.** The debtor contracted with a professional adviser for prebankruptcy workout services. They were unsuccessful, at least in part because of the adviser, and the debtor filed a chapter 7 case. The agreement contained a broad arbitration agreement. The trustee brought an action against the adviser asserting state law claims for breach of fiduciary duty aiding and abetting breach of fiduciary duty, negligence/

professional malpractice, fraud, civil conspiracy, unjust enrichment, and breach of contract and Bankruptcy Code claims to avoid and recover fraudulent transfers and preferences under sections 547 and 548(a)(1) and for recovery of all transfers under § 550. The Federal Arbitration Act favors enforcement of arbitration agreements. The trustee's state law claims that arise under the agreement between the debtor and the adviser are governed by the agreement, including the arbitration provision. However, the trustee's avoiding power claims are brought on creditors' behalf under claims created by the Bankruptcy Code, independent of any contract. As such, the agreement's arbitration provision does not bind the trustee, and he may bring the claims in the bankruptcy court. *Fort v. Kibbey (In re Oaktree Med. Centre, P.C.)*, 640 B.R 649 (Bankr. S. Car. 2022).

11.2 Sanctions

11.3 Appeals

11.3.a **Appeal from cram-down distribution and plan exculpation provisions is not equitably moot.** The debtor confirmed and consummated a cram-down plan that included broad exculpation provisions for the debtor, its directors, the creditors committee, the reorganized debtor and its management, and a liquidating trust. Creditors with claims in the nonaccepting class appealed. Analysis of whether an appeal from a confirmation order for a substantially consummated plan is equitably moot proceeds on an issue-by-issue basis. A court must consider whether appellants obtained a stay, whether the plan was substantially consummated, and whether the relief requested would affect the plan's success or non-parties' rights. Although section 1127 does not permit post-consummation plan modification, it does not limit appeals, and reversal of a plan provision on appeal does not violate the anti-modification provision. Moreover, "equity strongly supports appellate review of issues consequential to the integrity and transparency of the Chapter 11 process." Therefore, the court of appeals denies the motion to dismiss the appeal for equitable mootness. *NexPoint Advisors, L.P. v. Highland Cap. Mgmt., L.P. (In re Highland Cap. Mgmt., L.P.)*, ___ F.4th ___, 2022 U.S. App. LEXIS 23237 (5th Cir. Aug. 19, 2022).

11.3.b **A magistrate judge may not hear a bankruptcy appeal.** The losing party in the bankruptcy court appealed the order, and the parties consented to the district court's reassignment of the appeal to a magistrate judge, who affirmed the bankruptcy court's ruling. Section 158 of title 28 permits bankruptcy appeals to the district court or to a bankruptcy appellate panel. Despite the broad language in section 636(c) of title 28 governing referral to magistrate judges of matters pending in the district courts, the express language of section 158 governs and prohibits referral of bankruptcy appeals, even with consent of the parties, to a magistrate judge. *S. Cent. Houston Action Council v. Oak Baptist Church*, 38 F.4th 471 (5th Cir. 2022).

11.4 Sovereign Immunity

12. PROPERTY OF THE ESTATE

12.1 Property of the Estate

12.2 Turnover

12.3 Sales

12.3.a **Trustee cannot sell water rights free and clear of a forfeiture action.** The debtor owned disputed water rights. Under applicable state law, water rights constituted only a right to use a certain amount of water, not ownership of the water itself. The public owned all water. Failure to use the rights for a certain period forfeited the rights. Nearby landowners claimed the debtor had forfeited the rights and brought a forfeiture action in state court before the debtor's bankruptcy. Success in the forfeiture action results only in the water rights being returned to the state's water pool, not in an injunction or money judgment. In the bankruptcy, the trustee moved to sell the

water rights free and clear of any adverse interest. Section 363(f) permits a sale of property of the estate free and clear of disputed interests. Because the forfeiture action would not result in a money judgment or injunction, the plaintiffs do not hold claims against the estate or any interest in the debtor's water rights. Therefore, section 363(f) does not permit sale free and clear of the forfeiture action. *In re Sugarloaf Holdings, LLC*, 640 B.R. 270 (Bankr. D. Utah. 2022).

13. TRUSTEES, COMMITTEES, AND PROFESSIONALS

13.1 Trustees

13.2 Attorneys

13.2.a **Court may reduce fees based on results obtained.** Trustee's counsel investigated and drafted a complaint to pursue a claim that could have recovered $1.6 million for the estate. After presenting the draft complaint to the defendant, the trustee was able to settle for only $38,000. Counsel applied for fees of $37,000. The bankruptcy court awarded only 50%. Section 330(a)(3) permits, but does not require, a bankruptcy court to award fees based on the nature, the extent, and the value of the services, taking into account all relevant factors. Section 330(a)(4) prohibits the court from allowing fees for, among other things, services that were not reasonably likely to benefit the estate. By listing "all relevant factors" in a non-exclusive list, section 330(a)(3) does not prohibit the court from considering the results obtained. Section 330(a)(4)'s provision requiring a court to consider whether services were likely beneficial at the time rendered, without hindsight, does not suggest otherwise. It permits but does not require a court to award fees for services that were likely to benefit the estate, even if the services did not do so, and bars the court from disallowing fees in every case where the services were unsuccessful. In this case, because the fees almost equaled the recovery, the bankruptcy court did not abuse its discretion in considering the results obtained and reducing the fee award to 50% of the amount requested. *In re Village Apothecary, Inc.*, 45 F.4th 940 (6th Cir. 2022).

13.2.b **Approval of employment of named attorney includes the attorney's law firm.** The trustee employed an individual as special counsel and obtained court approval of employment of just the individual lawyer. While employed by the trustee, the lawyer changed law firms twice, submitted fee applications that included time spent by other lawyers at his firms, and did not file disclosures under Rule 2014(a) for any of the three law firms. Section 327(a) permits the trustee to employ a professional who is disinterested and does not have an interest adverse to the estate. Rule 2014(a) requires a professional to disclose all connections with parties in interest to assist the court and creditors in evaluating whether the professional qualifies under section 327(a). Rule 2014(b) permits partners or associates of a named attorney whose employment the court has approved to be employed without further court order. Therefore, the use of attorneys at the lawyer's first firm was permissible, although not a best practice. A literal reading of that Rule also permits use of the later firms as well. However, Rule 2014(a) disclosures are still required for the new firms. *In re Final Analysis, Inc.* 640 B.R. 633 (Bankr. D. Md. 2022).

13.2.c **Model Rule compliance protects against disqualification.** A liquidating trust under a plan sued the debtor's shareholder. A lawyer at a big firm successfully pitched to represent the shareholder and spent a fair amount of time on the matter. In the middle of the litigation, the lawyer joined the plaintiff's law firm, where her fiancé (and later, husband) practiced, which immediately screened her from the new firm's work on the matter, obtained her agreement to comply with the screen, advised the shareholder in writing of the screen, and offered the shareholder periodic updates on compliance with the screen. The shareholder moved to disqualify the new firm in the litigation. Model Rule of Professional Conduct 1.10(a) prohibits a firm from representing a client when any lawyer at the firm would be prohibited, unless the disqualified lawyer is timely screened and written notice of the screen and certification of compliance is given promptly to the former client. The bankruptcy court's local rules incorporated the Model Rules. Compliance with the Model Rules, which do not include any "exceptional

circumstances" additional requirements, is adequate. Therefore, the court denies the shareholder's disqualification motion. *The Maxus Liq. Trust v. YPF S.A. (In re Maxus Energy Corp.)*, 49 F.4th 223 (3d Cir. 2022).

13.3 Committees

13.3.a **A creditor has neither a right to serve nor a pecuniary interest in serving on a committee.** The bankruptcy court removed four committee members because their counsel disclosed confidential information. They appealed. Standing to appeal in a bankruptcy case requires the appellant to be a "person aggrieved," that is, to have a pecuniary interest adversely affected by the order. Removal from a committee does not affect a creditor's pecuniary interest. In some circumstances, a creditor who has been sanctioned may appeal from the sanction order. Removal from the committee is not a sanction, because the creditor has no right to serve on a committee. Therefore, the court dismisses the appeal for lack of standing. *In re Roman Catholic Church of the Archdiocese of New Orleans*, 2022 U.S. Dist. LEXIS 151083 (E.D. La. Aug. 11, 2022).

13.4 Other Professionals

13.4.a **Claims agent may not charge fee for private arrangement with claims trading platform.** The debtor in possession employed a claims agent to receive and record filed proofs of claim and to maintain the claims register for the clerk of court. The claims agent had contracted with a company that runs a claims trading marketplace website to provide the claims register data in special electronic format for the website and to receive a portion of the fee that the company receives for each claim trade. 28 U.S.C. § 156(c) permits the court to use facilities to manage claim processing where paid for by the estate, which includes an estate-hired claims agent. The claims agent is an agent of the clerk. As such, it may not do anything the clerk may not do. Under sections 156 and 1930, the clerk may collect specified fees for specified services and for no others and may not take a fee for assisting a for-profit business. Therefore, the claims agent's agreement with the claims trading website provider violates section 156(c) and may not be approved. *In re Madison Sq. Boys & Girls Club, Inc.*, 642 B.R. 487 (Bankr. S.D.N.Y. 2022).

13.4.b **Court denies financial advisor's request to increase fee cap under section 328(a).** Three months after the COVID-19 pandemic began, the debtor in possession employed a financial advisor to arrange DIP and exit financing and to negotiate a reorganization plan. The engagement letter provided for a monthly fee, a financing fee (a percentage of each financing that the advisor arranged), and a restructuring fee, as well as a fee cap. The case took much longer than expected and required more financing than originally anticipated, primarily because of the length of the COVID-19 pandemic. As a result, the debtor in possession and the advisor requested an increase in the fee cap. The court approved the employment and the fee under section 328(a), which permits approval of employment on any reasonable terms and conditions and permits the court to allow compensation different from the approved amount only if the terms and conditions "provided to have been improvident in light of developments not capable of being anticipated" at the beginning. Showing a need for modification faces a high hurdle. Here, the services actually provided were all covered by the engagement letter; no additional kinds of services were rendered. The financial advisor provided no evidence of the scope and amount of services initially contemplated nor of how the additional time required could not have been anticipated. Therefore, the court denies the supplemental application to modify the terms and conditions of employment, *In re LATAM Airlines Group S.A.*, 2022 Bankr. LEXIS 2553 (Bankr. S.D.N.Y. Sept. 17, 2022).

13.5 United States Trustee

14. TAXES

15. CHAPTER 15—CROSS-BORDER INSOLVENCIES

15.1

15.1.a **Court grants recognition as foreign main proceeding for debtor incorporated in Cayman and conducting business in China.** The debtor was incorporated in the Cayman Islands and owned numerous subsidiaries incorporated there, managed holding company corporate business there, and worked with legal counsel there, but conducted all its business operations in China. It issued several series of notes, all governed by New York law. When it encountered financial stress, it convened the holders of a substantial majority of one series of notes to negotiate a scheme of arrangement under Cayman law. The negotiations were successful, resulting in a restructuring support agreement that provided for and resulted in the initiation in Cayman of a scheme proceeding, but not a provisional liquidation with the appointment of a provisional liquidator. The Cayman court convened the scheme and ordered a creditors' meeting, voting on the scheme, and the appointment of a foreign representative. All but two creditors (out of 370) holding nearly 95% in amount of the debt approved the scheme. The Cayman court ultimately sanctioned the scheme, which provided for a discharge of the note series in exchange for cash and new notes. The foreign representative sought recognition of the scheme under chapter 15 in New York. Chapter 15 provides for recognition of a foreign proceeding as a foreign main proceeding if the foreign proceeding is in the debtor's center of main interest (COMI) and as a foreign nonmain proceeding if the debtor merely has an establishment in the jurisdiction conducting the foreign proceeding. The Code has a rebuttable presumption that a debtor's place of incorporation is its COMI. In addition, the courts consider whether the debtor's COMI would be ascertainable by third parties based on factors available in the public domain, whether the debtor (including any liquidators or provisional liquidators) conducted business at its putative COMI, and the law that governs the debtor's operations. An establishment sufficient to support recognition as a foreign nonmain proceeding requires nontransitory economic activity in the forum jurisdiction. Neither existence of debts in the forum nor conduct of the foreign proceeding qualifies; rather, there must be assets to administer and some effect on the local marketplace. Here, the creditors expected the scheme to proceed in Cayman, the debtor maintained some corporate activities in Cayman, and Cayman law governed the debtor's corporate operations. Accordingly, the court grants the scheme recognition as a foreign main proceeding. The absence of a provisional liquidation and of a provisional liquidator does not prevent recognition, because where the debtor is able to effect a consensual restructuring without the need for a liquidation proceeding, the court should not burden the process by requiring such a proceeding. The court denies recognition as a foreign nonmain proceeding. *In re Modern Land (China) Co, Ltd.*, 641 B.R. 768 (Bankr. S.D.N.Y. July 18, 2022).

15.1.b **Court denies recognition to proceeding in "letter-box" debtor's place of incorporation.** The debtor incorporated in the Isle of Man. Its directors were located there, but they were employees of a corporate service company, and there was no evidence they independently managed or exercised control of the debtor. The debtor had no creditors, assets, or operations there. After a dispute arose over a sale of an aircraft, resulting in claims against the debtor, it commenced a voluntary winding up proceeding in the Isle of Man. The Isle of Man liquidator sought recognition of the proceeding in the United States under chapter 15. A court may grant recognition of a foreign proceeding as a foreign main proceeding if the debtor's center of main interests is in the jurisdiction where the proceeding is pending. Chapter 15 presumes that a debtor's COMI is where it is incorporated, but the presumption is rebuttable. The court must consider the location of the debtor's headquarters, where the debtor is actually managed, where its assets and creditors are located, and the jurisdiction whose law would apply to most disputes. Here, headquarters, management, operations, assets, creditors, and applicable law were not in the Isle of Man. Therefore, the Isle of Man was not the debtor's COMI. A court may grant recognition as a foreign nonmain proceeding if the debtor has an establishment in the jurisdiction where the proceeding is pending. An establishment requires some presence in the jurisdiction, an economic impact on the local market, maintenance of a minimum level of organization for a period, and the objective appearance to creditors of a local presence. Here, the debtor had none of these on the Isle of

Man, so the court denies recognition as a foreign nonmain proceeding. *In re Petition of Shimmin, as Liquidator of Comfort Jet Aviation, Ltd.*, 2022 Bankr. LEXIS 2932 (Bankr. W.D. Okla. Oct. 14, 2022).

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Recent Developments in Bankruptcy Law, July 2022

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1. AUTOMATIC STAY

1.1 Covered Activities

1.1.a **Order granting counterclaim declaring validity of mortgage on the debtor's property does not violate the stay.** The debtor acquired property subject to a disputed mortgage. The debtor brought a quiet title action against the mortgagee. The mortgagee counterclaimed to declare the mortgage valid. While summary judgment motions were pending, the debtor filed a chapter 11 case. The nonbankruptcy court granted summary judgment to the mortgagee after the debtor's petition date. The automatic stay prohibits continuation of any action against the debtor that was or could have been commenced before the petition date, any act to obtain possession or exercise control of property of the estate, and any act to create, perfect, or enforce a lien against property of the debtor. Because the mortgagee's counterclaim was simply the mirror image of the debtor's complaint, did not seek additional relief, and was only a defense to the complaint, the mortgagee's counterclaim was not an action against the debtor. The counterclaim also sought only to maintain the status quo and as such, did not constitute an act to obtain possession or control of property of the debtor or the estate. It simply affirmed the validity of an existing lien. Finally, the judgment on the counterclaim did not create, perfect, or enforce a lien on the debtor's property. It only declared existing rights. Therefore, the nonbankruptcy court's summary judgment order did not violate the stay. *Censo, LLC v. Newrez, LLC (In re Censo, LLC)*, 638 B.R. 416 (9th Cir. B.A.P. 2022).

1.2 Effect of Stay

1.3 Remedies

2. AVOIDING POWERS

2.1 Fraudulent Transfers

2.1.a **A bank's customer is a financial institution for purposes of section 546(e)'s safe harbor.** The debtor's special purpose entity, which issued notes under note purchase agreements to facilitate the debtor's Ponzi scheme, transferred payments on the notes, as provided in the agreement, to the note holder at the holder's custodial account at a bank. Section 546(e) prohibits a trustee from avoiding a transfer that is a settlement payment or made in connection with a securities contract and that is by or to (or for the benefit of) a financial institution. The Code defines "financial Institution" to include a customer of a bank when the bank is acting as agent or custodian for the customer. The bank was an agent or custodian for the note holder, because it received the note payments into a custodial account for the note holder. Therefore, the note holder was a financial institution. The note is a security. But the court below did not adequately examine whether the transfer was made in connection with a securities contract. Therefore, the court remands for that determination. *Kelley v. Safe Harbor Managed Account 101, Ltd.*, 31 F.4th 1058 (8th Cir. 2022).

2.2 Preferences

2.2.a **Pleading the due diligence prerequisite for a preference complaint.** The debtor in possession analyzed transfers to a creditor, including days-to-pay information for each transfer and for pre-avoidance period transfers and any unusual collection activity, and included that information in a preference avoidance and recovery demand letter to the creditor. When the creditor did not respond, the DIP sued to avoid and recover the preferences. In the complaint, the DIP recited that it had conducted an analysis of the transfers and whether they were protected from avoidance by any applicable defense. The complaint also referred to, but did not attach, the

demand letter. Section 547(b) permits a trustee or DIP to avoid a preference, "based on reasonable due diligence in the circumstances of the case and taking into account a party's known or reasonably knowable affirmative defenses." On a motion to dismiss, the court may consider a document the complaint references. Combined with the complaint's allegation that the DIP conducted an analysis, the letter satisfied the statutory prerequisite for bringing the complaint, whether or not the prerequisite is an element of the preference claim. *Center City Healthcare, LLC v. McKesson Plasma & Biologics LLC (In re Center City Healthcare, LLC)*, 2022 Bankr. LEXIS 1638 (Bankr. D. Del. June 13, 2022).

2.2.b **Ear-marking doctrine requires satisfaction of the dominion/control and diminution of the estate tests.** The closely held debtor owed money to an insider on a note that was to receive no payments until a separate series of notes was paid in full. The debtor's principal loaned money to the debtor specifically to make payments on the insider note and the other notes. Upon the debtor's bankruptcy, the trustee sued to avoid and recover the payments on the insider notes as preferences. A preference is a transfer of property of the debtor that meets certain additional conditions. If a new creditor loans money to a debtor to pay an old creditor, the payment might be protected by the ear-marking doctrine, which deems the money not to have been property of the debtor. To satisfy the ear-marking doctrine, the new money must not be subject to the dominion or control of the debtor—that is, the debtor must be under a binding agreement to use the new money to pay the old creditor and not for any other purpose—and the transaction must not result in the diminution of the estate—that is, the reduction in the amount of assets available to pay creditors. The doctrine's application is clearer when the new creditor pays the money directly to the old creditor and the money does not pass through the debtor's account, but that is not required. Here, the new lender (the principal) required the debtor (controlled by the principal) to use the new loan to pay the insider note, so the debtor did not have dominion and control over the funds. However, the insider note payments resulted in the diminution of the estate, because it replaced subordinated debt with general unsecured debt. Therefore, the court concludes, the transfer was of property of the debtor and avoidable. *Montoya v. Goldstein (In re Chuza Oil Co.)*, 639 B.R. 586 (10th Cir. B.A.P. 2022).

2.2.c **PPP loan rescission and return is not a preference.** The debtor applied for a Payroll Protection Program loan on April 24, 2020. It signed the note on May 5 and received the funds on May 8. It held the funds aside, pending a decision whether to revoke the loan and return the funds, which it did on May 13, under a "safe harbor," no-questions-asked provision in the PPP program policy, which permitted return of the funds and cancellation of the loan by May 14. The debtor filed a bankruptcy case on May 27. The trustee sued the lender to avoid the funds' return as a preference. A preference is a transfer of an interest of the debtor in property for or on account of an antecedent debt. Upon rescission of a contract, the contract become void *ab initio*, and the rescinding party must restore anything of value received. The court may impose a resulting trust to effectuate that result. Therefore, under the circumstances, the funds the debtor had held aside were subject to a resulting trust and were not property of the debtor. Moreover, because of the rescission, the transaction was cancelled, and there was no antecedent debt. Therefore, there was no avoidable preference. *Brady v. United States, SBA (In re Specialty's Café & Bakery, Inc.)*, 639 B.R. 548 (Bankr. N.D. Cal. 2022).

2.3 Postpetition Transfers

2.4 Setoff

2.5 Statutory Liens

2.6 Strong-arm Power

2.7 Recovery

3. BANKRUPTCY RULES

4. CASE COMMENCEMENT AND ELIGIBILITY

4.1 Eligibility

4.1.a **Debtor may not elect subchapter V during a pending chapter 11 case if it prejudices creditors.** The individual debtor purchased an historic home, which she used for her residence and as a bed and breakfast under a local ordinance that permitted short-stay rentals only if the owner also resided in the property. In October 2018, on the eve of foreclosure by the mortgage lender, the debtor filed a chapter 11 case, listing her debts as primarily consumer debts, and did not designate her case as a small business. Her debts included about $1.6 million on the mortgage and about $65,000 of general unsecured debts. After numerous cash collateral and preliminary plan proceedings, the court set deadlines for filing plans. The lender filed a plan that provided for foreclosure on the property. On the eve of the confirmation hearing for the creditor's plan, the debtor moved to amend her petition to designate her case as a small business case and to elect to proceed under then-new subchapter V, added by the Small Business Reorganization Act (SBRA), which became effective a week before the scheduled confirmation hearing. A small business debtor is "a person engaged in commercial or business activities" with total debt less than $2,725,625 (later amended effective March 27, 2020 to $7,500,000 for two years and then, under section 104 adjustment, to $3,024,725, and then again in June 2022 to $7,500,000), "not less than 50 percent of which arose from the commercial or business activities of the debtor." Bankruptcy Rule 1009(a) permits a debtor to amend a voluntary petition "as a matter of course," though the amendment is not necessarily controlling, and the original petition, signed under penalty of perjury, still retains evidentiary effect. However, the court should disallow an amendment where it would prejudice creditors. Prejudice is measured not by creditors' potential recoveries, but by whether the creditor detrimentally relied on the debtor's prior position. Here, the court and the creditor had spent considerable time and resources to get to the point where the creditor was ready to confirm its plan. Changing the rules, including imposing debtor plan exclusivity under subchapter V, after all the prior proceedings, prejudices the creditor, so the amendment is disallowed. *In re Ventura*, ___ B.R. ___ (E.D.N.Y. Apr. 21, 2022).

4.1.b **A non-operating non-profit business can be eligible for subchapter V.** The debtor was formed to acquire and sell interests in private aircraft, provide private air transportation, and provide depreciation tax benefits to its sole member and manager. It did not have a profit motive. A dispute with its fractional interests provider, which was the debtor's largest creditor, led to cessation of operations and related litigation. As of the petition date, it was engaging in litigation, paying its aircraft registry fees, remaining in good standing as a Delaware LLC, and filed tax returns and paying taxes. A person engaged in commercial or business activities at least 50 percent of whose debts arose from its commercial or business activities is eligible to proceed under subchapter V. The Code does not define "engaged in commercial or business activities." Commercial or business activities do not require historical operations. The present tense of "engaged" means the test applies as of the petition date. The activities in which the debtor was engaged as of the petition date qualify as commercial or business activities. And nothing in subchapter V requires that the debtor be a profit-motivated business; otherwise, churches and other nonprofits would be excluded, contrary to Congress' intent. *NetJets Aviation, Inc. v. RS Air, LLC (In re RS Air, LLC)*, 638 B.R. 403 (9th Cir. B.A.P. 2022).

4.2 Involuntary Petitions

4.3 Dismissal

5. CHAPTER 11

5.1 Officers and Administration

5.1.a **Court may order revocation of subchapter V election.** The debtor filed its chapter 11 petition and elected to proceed under subchapter V. It did not go well. After the court denied confirmation

of the debtor's fifth amended plan, it determined the debtor could not successfully proceed under subchapter V. Because a subchapter V case is under chapter 11, the case may not be converted to an ordinary chapter 11 case. However, a debtor accesses subchapter V by an election on the petition, and a debtor may amend a petition filed under chapter 11 to elect to proceed under subchapter V. By the same token, the court, exercising its power under section 105 to carry out the provision of the Code, should be able to order the amendment of a petition to revoke the subchapter V election. Because the debtor has a viable business, that is the appropriate remedy here. But because of the debtor's inability to manage the subchapter V case, the court orders the appointment of a chapter 11 trustee upon the revocation of the election. *In re Nat'l Small Bus. Alliance, Inc.*, 2022 Bankr. LEXIS 1811 (Bankr. D.D.C. June 29, 2022).

5.1.b **Court does not consider prepetition decisions in evaluating the debtor in possession's business judgment.** The debtor vacated the premises on the lease expiration date, although the landlord claimed the debtor had exercised a lease extension option. The debtor filed a chapter 11 petition six days later. Because of the landlord's extension claim, the debtor in possession filed a motion the day after the petition date for approval of the rejection of the lease, effective as of the petition date or the motion date, arguing in part that its prepetition vacating of the premises supported its postpetition decision to reject the lease. Lease rejection requires court approval under a business judgment standard. The court should evaluate the debtor in possession's business judgment. Whether the prepetition debtor properly exercised sound business judgment is not before the court, which must address the situation as it exists as of the petition date or when the motion is filed. *In re Player's Poker Club, Inc.*, 636 B.R. 811 (Bankr. C.D. Cal. 2022).

5.2 Exclusivity

5.3 Classification

5.4 Disclosure Statement and Voting

5.5 Confirmation, Absolute Priority

5.5.a **Mortgagee's failure to participate in chapter 11 case results in plan divesting it of its mortgage.** The debtor mortgaged real property and later took out a second loan, which purported to pay off the earlier loan. But the title company erred, and the prior loan was not paid off. The debtor continued to make payments on both loans. Some years later, the debtor filed a chapter 13 case. During the chapter 13 case, the earlier mortgage holder appeared, filed a proof of claim, and ultimately obtained stay relief. The debtor converted the case to chapter 11. During the chapter 11 case, the title company paid the earlier mortgagee, took an assignment of the mortgage, and subordinated it to the later mortgage. The title company did not file a notice of the transfer of the claim. The debtor confirmed a plan that said the earlier mortgage had been satisfied by the later mortgage and that the earlier mortgage would receive nothing under the plan and the mortgage would be released. Although the debtor continued to send notices to the earlier mortgagee, neither the title company nor the earlier mortgagee appeared in connection with plan confirmation. After the debtor received his discharge, the title company sought to enforce the earlier mortgage. Under section 1141(c), property "dealt with" by a plan is free and clear of any claim or lien except as provided in the plan. A court may revoke a confirmation order obtained by fraud only if revocation is requested within 180 days after confirmation. Whether or not the debtor's treatment of the earlier mortgage in the plan was fraudulent, the title company's request to avoid the plan's treatment of its mortgage was too late and was therefore barred. Lack of notice may be a ground for avoiding treatment under the plan, but here, the debtor continued to send notice to the earlier mortgagee, and the title company failed to receive notice only because it did not file a notice of transfer of claim or arrange with the earlier mortgagee for forwarded notices. Accordingly, the title company is deemed to have participated in the case. Stay relief does not remove the property from the estate, so the creditor is not relieved of having to appear and protect its rights. Therefore, the property revested in the debtor free and clear of the earlier mortgage. *Beyha v. Conestoga Title Ins. Co. (In re Beyha)*, 2022 Bankr. LEXIS 635 (Bankr. E.D. Pa. 2022).

5.5.b **Effective date payment may satisfy subchapter V cramdown requirement.** The debtor proposed a plan under subchapter V that would make a large payment on the effective date in an amount materially in excess of the debtor's projected disposable income for the three years after the effective date and would make additional payments from actual disposable income received during the three years after the effective date. The debtor's major creditor did not accept the plan and objected to confirmation. Section 1191(c)(2) permits nonconsensual plan confirmation if the value of property to be distributed under the plan in the three years after the effective date is not less than the debtors' projected disposable income over the three-year period. Because the effective date payment is greater than the present value of the debtor's post-effective date projected disposable income, the plan satisfies section 1191(c)(2) and is properly confirmed. *Legal Service Bureau, Inc. v. Orange County Bail Bonds, Inc. (In re Orange County Bail Bonds, Inc.)*, 638 B.R. 137 (9th Cir. B.A.P. Apr. 27, 2022)

6. CLAIMS AND PRIORITIES

6.1 Claims

6.1.a **COVID-19 pandemic excuses the debtor from WARN Act compliance.** The debtor suffered financial losses, leading to a chapter 11 filing on March 8, 2020. It entered chapter 11 with a wind-down budget and plan to operate one line of stores pending a going-concern sale and to liquidate the remainder of its inventory. The COVID-19 emergency was declared on March 13, 2020, after which the debtor in possession concluded it could no longer operate or continue the liquidation sales. It terminated all employees about a week later. The WARN Act requires an employer to provide 60 days' notice of a mass layoff but permits exceptions for a liquidating fiduciary, an unforeseen business circumstance, and a natural disaster. A liquidating fiduciary is one whose sole operation is the liquidation of the business. Here, because the debtor continued some operations in aid of liquidating, the liquidating fiduciary exception does not apply. An unforeseen business circumstance involves a sudden, dramatic, and unexpected action or condition outside the employer's control that is the cause of the layoff. It need not be the sole cause, but it will suffice if it is the straw that broke the camel's back. Here, the sudden onset of the COVID-19 pandemic, which the employer could not predict or control, pushed the debtor over the edge, resulting in the closing of the business and the mass layoffs. The natural disaster exception applies in the case of "any form of natural disaster, such as flood, earthquake, or drought and similar effects of nature." Similar to the unforeseen business circumstances, the pandemic was a natural disaster that contributed substantially to the business closure and resulting layoffs. Therefore, the employer was excused from WARN Act compliance. *Steward v. Art Van Furniture, LLC (In re Art Van Furniture, LLC)*, 638 B.R. 523 (Bankr. D. Del. 2022).

6.1.b **Debt to a trustee for avoidance and recovery is incurred on the petition date, not at the time of the transfer.** The SIPA trustee sued a partnership and its former general partner to avoid and recover fraudulent transfers. The partner disassociated himself from the partnership nine months before the filing of the SIPA proceeding. The court found the partnership liable for the fraudulent transfers. A general partner is liable for the partnership's debts incurred while a general partner, or, under the state statute in effect, within two years after disassociation, unless the creditor knew of the disassociation. The debtor's transfers to the partnership were proper transactions when made and became voidable only upon the filing of the SIPA petition. Because the partnership became liable to the trustee within two years after the partner's disassociation from the partnership, the partner was also liable to the trustee. *Sec. Investor Prot. Corp. v. Bernard L. Madoff Inv. Secs. LLC (In re Madoff)*, 638 B.R. 41 (Bankr. S.D.N.Y. 2022).

6.2 Priorities

6.2.a **Goods supplied in connection with a service contract are entitled to section 503(b)(9) administrative priority.** In the 20-day period before bankruptcy, a supplier provided "acidizing services" to the debtor, which necessitated the use of certain chemicals. The supplier sought administrative expense priority for the cost of the chemicals. Section 503(b)(9) grants

administrative expense priority to goods sold to the debtor within the 20 days before the petition date. Generally, courts look to U.C.C. Article 2 to determine what constitutes goods. Although chemicals are goods, they were supplied here as part of a service. The U.C.C. uses the "predominate purpose" test to determine whether a transaction that includes both goods and services should be subject to Article 2, which governs the sale of goods. Section 503(b)(9) addresses only priority for the sale of goods, not an entire body of law to govern transactions involving goods. Therefore, the predominate purpose test does not apply in determining section 503(b)(9)'s applicability. Nor does the apparent link between Article 2 and section 546 reclamation rights on the one hand and section 503(b)(9) on the other suggest that the latter should apply only where a reclamation right might otherwise exist, because nothing in the statute or the legislative history supports such a reading. Therefore, the supplier is entitled to administrative expense priority for the chemicals used in the service. *In re Sklar Exploration Co., LLC*, 638 B.R. 627 (Bankr. D. Colo. 2022).

7. CRIMES

8. DISCHARGE

8.1 General

8.1.a ***Taggart v. Lorenzen* applies to chapter 11 confirmation order.** The debtor confirmed a chapter 11 plan, which provided for reinstating a home mortgage. The reorganized debtor paid according to the plan's terms, but the lender, based on faulty records, continued to send notices claiming the loan was in default and later began foreclosure. The debtor moved in the bankruptcy court for civil contempt penalties against the lender for violating the plan confirmation order. *Taggart v. Lorenzen*, 139 S. Ct. 1739 (2019), held that violations of the stay included in a discharge order must be evaluated under the general process for evaluating a civil contempt citation. Because a chapter 11 confirmation order serves the same purpose as a chapter 7 discharge order, the same standard should apply—whether there is a fair ground of doubt about whether the conduct violates the order. The standard is an objective one; advice of counsel is not a defense. *Beckhart v. Newrez LLC*, 31 F.4th 274 (4th Cir. 2022)

8.1.b **Section 523(a) exceptions to discharge apply to a nonconsensual subchapter V plan.** The creditor obtained a prepetition judgment for willful and malicious injury against the corporate subchapter V debtor, which the creditor sought to except from discharge. Section 1192(2) excepts from discharge under a nonconsensual subchapter V plan any debt "of the kind specified in section 523(a)." Section 523(a) excepts certain debts of an individual debtor, including a debt for willful and malicious injury, from a discharge granted under section 1192. Section 1192(2) refers to kinds of debts, without regard to the kind of debtor, and not to kinds of debtors, and so should be construed to apply equally to corporate and individual debtors. In addition, the structure of chapter 11's general discharge provision, which distinguishes between individual and corporate debtors, contrasts with section 1192(2), which does not distinguish. Identical language in chapter 12 has been construed to apply to corporate debtors. Finally, Congress reasonably traded off dischargeability for the elimination of the absolute priority rule in a nonconsensual subchapter V plan. Therefore, the debt is not dischargeable. *Cantwell-Cleary Co. v. Cleary Packaging LLC (In re Cleary Packaging LLC)*, 36 F.4th 509 (4th Cir. 2022).

8.1.c **Court may award debtor attorneys' fees for appeal from order granting sanctions for discharge injunction violation.** The creditor violated the discharge injunction. The debtor sought contempt sanctions, which the court awarded, along with attorneys' fees. The creditor appealed. The district court affirmed but remanded for clarification of one aspect of the ruling. The bankruptcy court clarified, and the debtor sought an additional award of attorneys' fees for the appeal, which the bankruptcy court and the district court both denied. Section 524 operates as an injunction. For violation of an injunction, a court who issued the injunction may award sanctions, including attorneys' fees incurred in enforcing the injunction and including fees incurred on an

appeal. The debtor need not seek appellate fees from the appellate court, because the fees are incurred only because of the initial stay violation and are awardable even if the contemnor's appeal is not frivolous. *Law Offices of Francis J. O'Reilly, Esq. v. Selene Fin., L.P. (In re DiBattista)*, 33 F.4th 698 (2d Cir. 2022).

8.1.d **1992 Coal Act obligations are claims that are discharged.** The Coal Industry Retiree Health Benefit Act of 1992 imposed retiree health benefit obligations on coal companies and their affiliates. Companies who had signed wage agreements with the United Mine Workers of America before then were required to continue to provide health benefits to employees by paying premiums to the Combined Benefit Fund in an annual amount determined by the Commissioner of Social Security to provide benefits directly through individual employer plans. Those companies that did not provide benefits directly were required to pay premiums to the 1992 UMWA Benefit Plan. The Act gave the plan trustees the right to enforce these obligations. A group of related companies, including a coal company, confirmed a chapter 11 plan in 1995, discharging all claims that arose before the plan effective date and not provided for in the plan. In 2015, the reorganized coal company again filed a chapter 11 case, and the bankruptcy court terminated obligations to provide retiree benefits under the Coal Act. The plan trustees sought to require related companies, who were debtors in the 1995 chapter 11 cases, to provide health benefits to the coal company's employees and retirees or to pay premiums to the 1992 Plan. A claim includes a right to payment, even if contingent, unliquidated, unmatured, or unenforceable, and a right to an equitable remedy for breach of performance where such breach gives rise to a right to payment, even if contingent, unliquidated, unmatured, or unenforceable. A claim arises when a debtor's liability is based on past conduct and there is an established relationship between an identifiable claimant and the past conduct. The debtors' liability for Combined Plan premiums arose before the 1995 effective date from the debtors' past conduct of conducting coal mining operations, even though the future premiums were not yet due (unmatured) and their amounts were not yet determined (unliquidated). Therefore, they were discharged. So too the obligations to provide health benefits or pay premiums to the 1992 Plan. The plan trustees held a right in 1995 to an equitable remedy for breach of the companies' obligations to provide health benefits, and breach of that obligation gave rise to a right to payment, even though the right was unmatured, presently unenforceable, and unliquidated. It too was discharged. *U.S. Pipe and Foundry Co., LLC v. Holland (In re U.S. Pipe & Foundry Co.)*, 32 F. 4th 1324 (11th Cir. 2022).

8.2 Third-Party Releases

8.3 Environmental and Mass Tort Liabilities

9. EXECUTORY CONTRACTS

9.1.a **Bankruptcy court may authorize rejection of FERC-regulated filed-rate contract.** The debtor natural gas producer had contracted with a pipeline company to transport its gas. They filed the contract with the Federal Energy Regulatory Commission. Under the filed rate doctrine, the contract became legally binding as though FERC had specifically approved it, and it could not be modified or abrogated without FERC's approval. Fearing the debtor might file bankruptcy, the pipeline company sought, and FERC granted, orders determining that it had exclusive jurisdiction over the contract and that the contract could not be rejected in the debtor's bankruptcy case without FERC approval, which would be based on the public interest under its regulatory authority. The next day, the debtor filed a chapter 11 case, and its plan proposed rejection of the contract. The bankruptcy court has exclusive jurisdiction over the debtor's and the estate's property, including contracts. Rejection amounts to a breach, for which damages will lie, nothing more. It does not change or rescind the contract. As such, rejection does not violate the filed rate doctrine, as the counterparty's damage claim is determined based on the filed rate. Therefore, FERC does not have exclusive jurisdiction over rejection of filed rate contracts, and the bankruptcy court may approve rejection. *Gulfport Energy Corp. v. F.E.R.C.*, 2022 U.S. App. LEXIS 19986 (5th Cir. July 19, 2022).

9.1.b **Court approves retroactive approval of lease rejection.** The debtor vacated the premises on the lease expiration date, although the landlord claimed the debtor had exercised a lease extension option. The debtor filed a chapter 11 petition six days later. Because of the landlord's extension claim, the debtor in possession filed a motion the day after the petition date for approval of the rejection of the lease, effective as of the petition date or the motion date. The Court of Appeals has approved retroactive approval of lease rejection under section 105(a) on the ground that such an order may be necessary and appropriate to carry out the provisions of section 365(d)(3) and (4) to encourage prompt surrender of premises and lease rejection. In *Roman Catholic Diocese v. Acevedo Feliciano*, 140 S. Ct. 696 (2020), in a *per curiam* opinion that followed prior decisions, the Supreme Court rejected the use of *nunc pro tunc* orders except to correct the record to reflect what actually happened on an earlier date. However, in other precedents, the Court had also permitted such orders where the delay in issuing an order was due to the court's delay, not the parties', so that neither party would be prejudiced by the courts' delay. The Ninth Circuit was presumably aware of these precedents when it approved retroactive rejection approval. Moreover, retroactive approval is rooted in the Bankruptcy Code because of a court's power under section 105(a), does not "revise" history by a later order, and is necessitated only by the court approval process, not by the parties. Accordingly, the court approves rejection retroactive to the motion date, which is the date on which the debtor in possession unequivocally expressed its decision to reject. *In re Player's Poker Club, Inc.*, 636 B.R. 811 (Bankr. C.D. Cal. 2022).

10. INDIVIDUAL DEBTORS

10.1 Chapter 13

10.2 Dischargeability

10.2.a **Takings Clause claims are not dischargeable in a municipal bankruptcy.** The municipal debtor condemned properties. The owners asserted claims for the value of the properties. The debtor proposed a plan that treated the claims as general unsecured claims that were subject to adjustment under the plan. The Fifth Amendment provides that private property may not "be taken for public use, without just compensation." It imposes a condition on condemnation and a specific remedy, unlike other constitutional provisions that do not state a remedy for their violation. Bankruptcy laws are subordinate to the Fifth Amendment; Congress' bankruptcy power does not permit taking a creditor's interest in property during or as a result of a bankruptcy without just compensation. But impairment of a claim arising from a prepetition taking would effect the same result and is therefore equally prohibited. Therefore, discharge of a takings claim would violate the constitution and is not permitted. *Fin. Oversight & Mgmt Bd. v. Cooperativa de Ahorro Y Credito Abraham Rosa (In re Fin. Oversight & Mgmt Bd.)*, 2022 U.S. App. LEXIS 19736 (1st Cir. July 18, 2022).

10.3 Exemptions

10.4 Reaffirmations and Redemption

11. JURISDICTION AND POWERS OF THE COURT

11.1 Jurisdiction

11.1.a **Bankruptcy court has constitutional authority to order attorneys' fee disgorgement.** Debtor's counsel did not disclose fees received from the debtor's principal and was evasive and contradictory when the bankruptcy court asked him about it. The bankruptcy court denied his fee application and ordered disgorgement of fees already paid. The bankruptcy court has constitutional and statutory authority to issue final orders in title 11 proceedings in matters that arise in the title 11 case. Payment of legal fees is strictly governed by Bankruptcy Code provisions, not on common law or other nonbankruptcy law sources, even though some of the

fees were paid by the nondebtor principal. Therefore, the bankruptcy court acted within its authority in ordering disgorgement. *In re Greenville Ave LLC*, 2022 U.S. App. LEXIS 10468 (3d Cir. Apr. 19, 2022).

11.2 Sanctions

11.3 Appeals

11.3.a **District court may not refer a bankruptcy appeal to a magistrate judge.** After the defendant won summary judgment in the bankruptcy court, the debtor appealed to the district court. With the parties' consent, the district court referred the appeal to a magistrate judge under 28 U.S.C. § 636(c). The debtor lost and appealed to the court of appeals, which first examined its own jurisdiction. 28 U.S.C, § 158 allows an appeal from a bankruptcy court order to be taken to a district court or a bankruptcy appellate panel. Because section 157 does not authorize referral to a magistrate judge, the district court improperly referred the appeal to the magistrate judge. The court of appeal remands to the district court to hear the appeal. *S. Central Houston Action Coun. v. Oak Baptist Church (In re S. Central Houston Action Coun.)*, 35 F.4th 1277 (5th Cir. 2022).

11.3.b **Only trustee, not debtor, may appeal chapter 7 conversion order.** The bankruptcy court converted the corporate chapter 11 case to chapter 7, resulting in the appointment of a trustee. The debtor appealed. When a chapter 7 trustee is appointed, the trustee takes over all the debtor's management functions and authority. Therefore, only the trustee may appeal the conversion order on the debtor's behalf. However, the debtor's former management may appeal in their own name if they have a sufficient pecuniary interest to satisfy the "person aggrieved" standing standard. *Bear Creek Trail, LLC v. BOKF, N.A. (In re Bear Creek Trail, LLC)*, ___ F.4th ___ (10th Cir. June 7, 2022).

11.4 Sovereign Immunity

11.4.a **Section 106 abrogates tribal immunity.** An instrumentality of an Indian tribe violated the automatic stay in an individual debtor's case. The individual sued, seeking stay enforcement, prohibiting further collection actions, and damages, attorneys' fees, and expenses. Congress may abrogate a tribe's sovereign immunity only if it does so clearly and unequivocally. Section 106(a) abrogates sovereign immunity with respect to a governmental unit in the application of Bankruptcy Code sections listed in section 106(a). Section 101(27) defines "governmental unit" capaciously to include "other foreign or domestic government." Neither section 106(a) nor section 101(27) refers to Indian tribes. Because they act as governing authorities of their members and have sovereignty over the members and territories, they are governments. Because they operate within the territorial boundaries of the United States, they are domestic governments. The application of the two sections is a clear and unequivocal expression of Congress' intent to abrogate the tribes' sovereign immunity. *Coughlin v. Lac Du Flambeau Band of Lake Superior Chippewa Indians (In re Coughlin)*, 33 F.4th 600 (1st Cir. 2022).

12. PROPERTY OF THE ESTATE

12.1 Property of the Estate

12.1.a **Trustee's claim against investment banker is barred by *in pari delicto*.** The debtor used an investment banker to help it raise capital based on some dodgy accounting practices. When the debtor ultimately failed, its chapter 7 trustee sued the banker for fraud, breach of fiduciary duty, and aiding and abetting breach of fiduciary duty. Section 544(a) gives the trustee the rights of a hypothetical judicial lien creditor. A judicial lien creditor could execute on all the debtor's assets, including claims it might have against third parties. However, a debtor's claim for fraud or breach of fiduciary duty is subject to the *in pari delicto* defense, under which a debtor may not recover against a wrong-doer when the debtor itself was part of the wrong-doing, that is, in equal (or greater) fault. A judicial lien creditor suing the third party would be subject to all defenses the third party would have against the debtor, including the *in pari delicto* defense. The trustee is similarly

subject to the defense. *Anderson v. Morgan Keegan & Co., Inc. (In re Infinity Bus. Group, Inc.)*, 31 F.4th 294 (4th Cir. 2022).

12.2 Turnover

12.3 Sales

12.3.a **Court authorizes sale free and clear of successor multi-employer pension plan liability.** The debtor operated a grocery store. After it filed chapter 11, the debtor in possession proposed to sell the estate's assts to another grocery store operator. The debtor had been a signatory to a collective bargaining agreement that required the debtor to contribute to a multi-employer pension plan. It had accrued a large liability to the plan when the closure of its other stores resulted in withdrawal liability. It sought to sell the remaining store free and clear of any successor liability to the pension fund, which the buyer refused to assume. Section 363(f) permits a sale to be free and clear of any interests in property of the estate if one of five conditions is met, including if the interest holder could be compelled to accept a money satisfaction of the interest. As a claimant, the fund could be compelled to accept money to satisfy its claim. "Interest" is broader than lien and includes any claim or interest arising out of the operation of the debtor's property. Here, the claim arose only by reason of the debtor's operation of the assets that are being sold, and the buyer would be liable only because it intended also to operate a grocery store. Therefore, the fund's claim is an interest in the estate's property, and the court may order the sale to be free and clear of that interest, thereby obviating successor liability. *In re Norrenberns Foods, Inc.*, 2022 Bankr. LEXIS 1896 (Bankr. S.D. Ind. July 8, 2022).

12.3.b **Credit bid may be subject to auctioneer's buyer's premium.** The debtor in possession proposed an auction sale of assets that were subject to a lender's lien. The auction procedures provided for the payment of a "buyer's premium," essentially a commission to the auctioneer payable by the buyer, rather than the seller, in cash to the auctioneer. Section 506(c) permits the trustee to recover from collateral the reasonable, necessary costs and expenses of preserving or disposing of the collateral to the extent of any benefit to the creditor. To the extent the trustee can show that the buyer's premium meets these requirements, neither section 506(c) nor any other Code provision prohibits the imposition of the charge. *In re Dalton Crane, LC.*, ___ B.R. ___ (Bankr. S.D. Tex. June 29, 2022).

12.3.c **Settlement of an estate's claim is not necessarily a sale.** A business divorce situation resulted in a chapter 7 for the business and a chapter 11 for its former principal. The business' creditors, who had forced out the principal, asserted claims against the business and the principal. The principal asserted claims against the creditors. The chapter 7 trustee asserted claims against both the principal and the creditors. The trustee agreed to compromise with the principal, transferring the claims against the creditors to an affiliate of the principal, accepting a cash payment and a percentage of the affiliate's recovery on the claims against the creditors, and allowing as subordinated claims the principal's claims against the chapter 7 estate. Bankruptcy Rule 9019 governs approval of a compromise of claims, and section 363 governs approval of a sale of assets. A compromise of an estate's claims against a third party may be evaluated as a sale of the claim, but it need not be. Evaluation as a sale is more appropriate where the defendant does not assert claims against the estate. Where the transaction involves a complex exchange of consideration and mutual release of claims, sale analysis is not required. *Spark Factor Design, Inc. v. Hjelmeset (In re Open Medicine Inst., Inc.)*, 639 B.R. 169 (9th Cir. B.A.P. 2022).

13. TRUSTEES, COMMITTEES, AND PROFESSIONALS

13.1 Trustees

13.1.a ***Barton* doctrine does not apply after a case is closed.** After the closing of a chapter 7 case, the debtor and his affiliates sued the chapter 7 trustee in a distant federal district court. Under

Barton v. Barbour, 104 U.S. 126 (1881), a court other than the appointing court does not have subject matter jurisdiction over an action against a receiver or trustee. The rule's purpose is to prevent another court from interfering with the *in rem* jurisdiction of the appointing court. Otherwise, the other court could issue orders that would require expenditure or other use of property that is *in custodia legis* of the appointing court. Once a case is closed and the appointing court no longer has *in rem* jurisdiction over property, an action in another court does not interfere with the appointing court's jurisdiction. Accordingly, the *Barton* doctrine does not apply after the case is closed. The trustee's remedy is to rely on judicial immunity. *In re Keitel*, 636 B.R. 845 (Bankr. S.D. Fla. 2022).

13.2 Attorneys

13.2.a **Section 327 protects the estate from conflicts but does not otherwise incorporate the rules of professional conduct.** Before bankruptcy, the debtor's general reorganization attorney represented the debtor's insurer on reinsurance matters related to the debtor's chapter 11 case. It ceased the representation around the petition date. The debtor had already retained separate insurance counsel to pursue its claims against the insurer, and the reorganization counsel had no involvement in those claims. Section 327(a) permits the debtor in possession to retain counsel who is disinterested and does not hold or represent an interest adverse to the estate. The focus is on protection of the estate, and the requirement does not incorporate the applicable rules of professional conduct except insofar as they implicate the interest of the estate. Here, counsel's prior representation of the insurer on matters related solely to reinsurance, and not to matters pending in the case, was not the representation of an interest adverse to the estate and therefore did not require denial of the application to approve the employment. *In re Boy Scouts of America*, 35 F.4th 149 (3d Cir. 2022).

13.3 Committees

13.3.a **Court has authority to disband a committee.** The debtor filed its chapter 11 case in a Bankruptcy Administrator district. The Administrator recommended a committee to the court, who appointed an eleven-member committee. The court then transferred venue to a United States trustee district. The U.S. trustee reconstituted the existing committee and appointed a new committee, with some of the members of the existing committee. The existing committee and the debtor in possession sought to void the U.S. trustee's appointment. Although the U.S. trustee ordinarily has authority to appoint and reconstitute committees, that authority does not extend to overruling an order in the case, which is law of the case. Because section 1102(a) permits a court to order appointment of an additional committee or order a change in committee membership, the court may review the U.S. trustee's action, including actions regarding committees. In addition, Bankruptcy Rule 2020 permits the court to review any act by the U.S. trustee. Under section 105(a), that review includes the power to disband a committee the U.S. trustee has appointed. Here, because the U.S. trustee asserted absolute authority over committee appointments, it did not provide a record to justify its actions. Without such a record, the court strikes the U.S. trustee's notice of appointment, with the effect of disbanding the additional committee and reconstituting the original committee. *In re LTL Mgmt., LLC*, 636 B.R. 610 (Bankr. D.N.J. 2022).

13.4 Other Professionals

13.4.a **Future Claims representative need not be disinterested.** The debtor moved for the appointment of a future claims representative who had served in that role prepetition. The FCR's law firm represented him and also represented several insurance companies in coverage litigation on asbestos issues. The law firm had obtained an advance conflicts waiver from the insurers, making explicit that the firm might serve as counsel to an asbestos FCR. Section 524(g) requires the bankruptcy court to "appoint a legal representative for the purposes of protecting the rights" of future claimants but does not specify the representative's necessary qualifications. A legal representative is by nature one who owes fiduciary duties to an absent, represented constituent. Therefore, an FCR is, and must meet the standards applicable to, a fiduciary. The FCR need not be disinterested, as defined in the Code. That definition applies to a professional

who owes duties to the estate, not to creditors and other parties in interest as an FCR does. To the extent any ethical conflict might have disqualified the FCR, the advance waiver cured it. Prospective waivers do not require a second round of consent once the conflict arises. Moreover, the conflict is not direct, because the coverage litigation and the claimants the FCR represents do not involve substantially related matters. They do not involve the same transactions or legal disputes, nor was there any substantial risk that the FCR would use any confidential information from the insurers in representing the future claimants. *In re Imerys Talc Amer. Inc.*, 38 F.4th 361 (3d Cir. 2022).

13.5 United States Trustee

13.5.a **2018 U.S. trustee fee increase violates Constitution's Uniformity Clause.** Effective January 1, 2018, Congress enacted U.S. trustee fee increases for all pending and future chapter 11 cases. The Judicial Conference is authorized to impose fees on chapter 11 cases in Bankruptcy Administrator districts and had done so since 2001, mirroring the same rates as the U.S. trustee fees. However, it did not implement the 2018 increase until October 1, 2018 and applied it only to newly-filed cases. The Constitution requires that laws on the subject of bankruptcies be uniform throughout the United States. "Laws on the subject of bankruptcies" is broad and encompasses both substantive and procedural laws. This law, which addresses bankruptcy fees, is therefore a law on the subject of bankruptcies. Although the uniformity requirement permits Congress some flexibility to address regional or geographic differences, it does not permit arbitrary geographically disparate treatment of debtors. The fee difference here resulted from a budgetary shortfall in the U.S. trustee districts that did not occur in the Bankruptcy Administrator districts. But that difference resulted only from Congress' arbitrary separation of the districts into two separate systems with two separate funding mechanisms. Congress may not treat debtors differently based on an artificial funding distinction that Congress itself created. Therefore, the fee disparity violates the uniformity requirement. *Siegel v. Fitzgerald*, 596 U.S. ___, 142 S. Ct 1770 (2022).

14. TAXES

15. CHAPTER 15—CROSS-BORDER INSOLVENCIES

CONSUMER LAW UPDATE

Selected Cases reported
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Automatic Stay

Bankruptcy Code abrogated sovereign immunity of federally recognized Indian tribes. The issue arose in a Chapter 13 case in which debtor moved to recover damages for alleged violations of the automatic stay by a lender owned by an Indian tribe. The tribe asserted sovereign immunity, but the Supreme Court held that § 106(a) unambiguously abrogated sovereign immunity of all governments, including federally recognized Indian tribes, which fell within the definition of "governmental unit," in § 101(27). Lac Du Flambeau Band of Lake Superior Chippewa Indians v. Coughlin, 143 S.Ct. 1689 (2023).

Failure to prove damages for stay violation. In unpublished decision, the Fourth Circuit affirmed debtor's failure to establish emotional distress and attorney fee damages. Emotional distress damages require proof that debtor suffered demonstrable emotional distress, "which must be sufficiently articulated, neither conclusory statements that the plaintiff suffered emotional distress nor the mere fact that a violation occurred." The panel also agreed with the Bankruptcy Court that the debtor's attorney caused most of the damages and "ratcheted up the amount of costs and fees." Brittner v. Beach Anesthesia, LLC, 2023 WL 4146240 (4th Cir. June 23, 2023). See also In re Minawi, 651 B.R. 72 (Bankr. M.D. Fla. 2023), Judge McEwen (Although landlord's stay violation was willful, under Eleventh Circuit authority, *Lodge v. Kondaur Capital Corp.,* 750 F.3d 1263 (11th Cir. 2014), Chapter 13 debtor did not carry burden of proof for emotional distress damages.). Compare In re Davis, 651 B.R. 192 (Bankr. D. S.C. 2023), Judge Duncan (Repossession of vehicle was willful stay violation, justifying $6,000 actual damages, $3,500 attorney fees, $12,000 punitive damages, and extinguishing creditor's claim.).

Mortgagee failed to show lack of adequate protection for stay relief. Discussing the need to show cause for stay relief based on alleged lack of adequate protection, the mortgage creditor must establish the fair market value of the property at time of confirmation. That showing is required in order to establish the debtor's lack of equity and lack of adequate protection. The creditor failed to carry its burden of proof. In re Hamilton, ___ B.R. ___, 2023 WL 3721290 (Bankr. D. S.C. May 5, 2023), Judge Gasparini.

Foreclosure not completed before Chapter 13 filing violated stay. The Chapter 13 debtor filed after conclusion of a non-judicial foreclosure of her home and purchase by a third-party investor. Interpreting California's amended foreclosure law, the purchaser was not a prospective owner-occupant, resulting in 15-day period for overbid from the date of the foreclosure sale. Several notices of intent to bid were submitted, which opened a further 45-day window for bids that could exceed the original purchase bid, and when that bid became final, the debtor had already filed Chapter 13. Thus, finalizing the sale after bankruptcy commencement violated the automatic stay. Under the facts presented, there was not cause to annul the stay. In re Hager, 2023 WL 4174065 (Bankr. E.D. Cal. June 26, 2023), Judge Lastreto. Compare In re Ferris, 650 B.R. 552 (Bankr. W.D. Pa. 2023) (Cause found for annulling the stay when foreclosure was completed before Chapter 13 filed, but debtor attempted to "slip" language into state court scheduling order that could restore title to property.).

Attorney sanctioned for filing motion for stay relief and abeyance. Finding that an attorney should have known that a motion for relief from the stay and to hold the Chapter 7 trustee's adversary proceeding in abeyance was frivolous, the motion resulted in sanctionable conduct. The motion alleged a "probate exception" to federal court jurisdiction, but the motion "unreasonably and vexatiously" multiplied the proceedings in violation of 28 U.S.C. § 1927, and the motion made legal arguments that were not warranted by existing law or by a nonfrivolous argument for extension of existing law, in violation of Fed. R. Bankr. P. 9011(b)(2). Sanction was payable to Chapter 7 trustee. In re Williams, 2023 WL 4038583 (Bankr. E.D. Mich. June 15, 2023), Judge Tucker.

Appeal of denial of motion to impose stay became constitutionally moot upon subsequent case dismissal. The Chapter 13 debtor had moved for imposition of the automatic stay under § 362(c)(4)(B), and the Bankruptcy Court denied the motion. The debtor timely appealed, but the appeal became constitutionally moot when the case was dismissed while appeal was pending. In re Davies, 2023 WL 3876685 (B.A.P. 8th Cir. June 8, 2023).

Attempts to collect domestic support obligation from non-estate property protected by § 362(b)(2)(B). In Chapter 7 case, collection attempts from property that

was not property of the bankruptcy estate, including collection from a trust, were not violations of the stay, because of § 362(b)(2)(B)'s exception. Judicial estoppel prevented the debtor from now arguing that the trust assets were property of the bankruptcy estate. In re Foufas, 650 B.R. 732 (Bankr. S.D. Fla. 2023), Judge Kimball.

Avoidance

Effect of *Bartenwerfer* and *Huskey* on nondischargeable liability of transferee of fraudulent conveyance. The former wife of debtor sued ex-husband and his current wife for alleged fraudulent transfer, resulting from debtor's transfer of $400,000 to current spouse before they were married. State court found current wife, Victoria Vulaj, shared husband's fraudulent intent regarding the transfer and awarded judgment. Ms Vulaj then filed Chapter 7 and the issue was whether the judgment was nondischargeable under § 523(a)(2)(A), and the Court considered the effects of *Bartenwerfer v. Buckley*, 143 S.Ct. 665 (2023), and *Husky Int'l Elecs., Inc. v. Ritz,* 578 U.S. 356 (2016), in motion for summary judgment. *Huskey* examined the "actual fraud" element of § 523(a)(2)(A), and in an unpublished decision applying *Huskey*, the Ninth Circuit held, in *Bonnett v. Miirbia Scottsdale, LLC*, 860 F. App'x 473 (9th Cir. 2021), that the recipient of a fraudulent transfer must individually possess the fraudulent intent. *Bartenwerfer* held that if underlying law on fraud makes a partner liable for the fraud of another partner, § 523(a)(2)(A) does not require that the debtor/partner be the one who committed or knew of the fraud to establish an exception from discharge. The Bankruptcy Court limited *Bartenwerfer* to partnership or agency cases for purposes of the pending summary judgment motion and found disputed issues of fact as to whether the debtor had the fraudulent intent to make her transferee liability nondischargeable. In re Vulaj, 651 B.R. 319 (Bankr. S.D. Cal. 2023), Judge Mann.

Debtor's withdrawal of prior motions to avoid judicial lien did not prevent granting subsequent motion. The Chapter 7 debtor had withdrawn two prior motions to avoid judicial lien, and the creditor asserted that the third motion was barred by laches and Rule Fed. R. Civ. P. 41(a), arguing that the second withdrawal amounted to a dismissal with prejudice. Examining that Rule in the context of contested matters, the BAP agreed with the Bankruptcy Court that the two-dismissal rule did not apply because the creditor had

responded to the first motion preventing the withdrawal from being an effective dismissal under the Rule. In addition, there was no error including contractual interest on a note for purposes of calculating impairment. The judicial lien creditor asserted that the interest was usurious, but that creditor lacked standing to assert usury, which could only be raised as an affirmative defense by the borrower or borrower's representative. In re Alfahel, 2023 WL 3749493 (B.A.P. 9th Cir. June 1, 2023).

Property of Estate and Exemptions

Post-chapter 13 but pre-conversion increase in home value accrued to estate's benefit. Noting the split of authority, the Bankruptcy Appellate Panel agreed with the Bankruptcy Court that postpetition appreciation is not a distinct asset but rather a characteristic or attribute of property. There was no evidence of bad faith conversion, but § 348(f) supported the Bankruptcy Court's conclusion that postpetition pre-conversion nonexempt equity accrues for the benefit of the converted Chapter 7 estate. Confirmation did not remove the home from bankruptcy estate, although it vested the home in the debtor, and the home was not removed from the estate when the debtor claimed homestead exemption. The vesting effect of confirmation had no effect in the converted Chapter 7 case. The homestead exemption would be paid from the Chapter 7 trustee's sale of the property, along with the remaining mortgage lien. To the extent the property value over the mortgage lien exceeded the allowed $15,000 homestead under Missouri's statute, the value was not exempt. In re Goetz, 651 B.R. 292 (B.A.P. 8th Cir. 2023).

Debtors claim of exemption under Missouri common law was disallowed. Attempting to claim exemption in unliquidated personal injury damages related to earplug litigation, the Chapter 7 debtors asserted that Missouri's opt out of Federal bankruptcy exemptions allowed exemption in any property exempt from attachment and execution under Missouri law and that the State's common law exempted unliquidated causes of action from attachment and execution. Prior decisions from the Eighth Circuit rejected similar arguments. Moreover, Missouri statutory law and rules of civil procedure permit attachment and execution on a wide range of property, including unliquidated contingent causes of action. In re Shoults, 649 B.R. 885 (Bankr. E.D. Mo. 2023), Judge Clair.

Discharge

Student loan discharged. Beginning the opinion with the comment that "it is time to demythologize unwarranted and fallacious dogmas and propaganda" that have contributed to misconception about impossibility of proving undue hardship, the Court analyzed the preponderance of evidence establishing that the *Brunner* test was satisfied. Mixed questions of fact and law were involved in the decision. In re Love, 649 B.R. 556 (Bankr. E.D. Cal. 2023), Judge Klein.

Debtors denied discharge under § 727(a)(2)(B). Chapter 7 debtors made a prepetition "transfer" by applying their 2018 tax refund to 2019 taxes which were due in 2020, the year they filed bankruptcy, and they made false statement on Schedules A/B when they said the amount of the refund was "unknown;" however, the false statement was not made with fraudulent intent. The trustee did not establish fraudulent intent as to the prepetition transfer for purposes of § 727(a)(2)(A), but the debtors then made unauthorized transfer postpetition by electing to apply 2019 refund to 2020 tax liability, and that transfer was made with intent to hinder trustee for purposes of § 727(a)(2)(B) denial of discharge. In re Wylie, 649 B.R. 852 (Bankr. E.D. Mich. 2023), Judge Tucker.

Revocation of discharge. Disputed issue of material fact prevented summary judgment on U.S. Trustee's complaint seeking revocation of discharge, with Court holding that "refused" to obey an order of the court in § 727(d)(3) and (6) requires showing that the debtor acted willfully and intentionally. In re Tahseen, 650 B.R. 883 (Bankr. N.D. Ill. 2023), Judge Cleary.

Collection agency violated discharge injunction. Applying *Taggart*'s standard for contempt, there was no fair ground for doubt under Ninth Circuit authority that claims arising from prepetition employment contracts were subject to discharge, and the collection agency violated discharge injunction by commencing state-court collection action. Sanction included requiring dismissal of the state-court action and payment of Chapter 7 debtor's reasonable attorney fees and costs. In re Blanco, 649 B.R. 571 (Bankr. E.D. Wash. 2023), Judge Holt.

Chapter 7 Issues

Equitable mootness did not prevent appeal of creditor's objection to Chapter 7 trustee's final report and fee application. In non-consumer case begun as Chapter 11 and then liquidated in Chapter 7, the appeal involved a creditor's objections to the Chapter 7 trustee's final report and fees, and the district court had determined that the objections were constitutionally and equitably moot. The Sixth Circuit disagreed and discussed the equitable mootness doctrine, with the majority panel questioning whether the doctrine is compatible with Chapter 7 liquidation. The panel reversed and remanded for determination whether the Chapter 7 trustee fees were too high for the work performed as trustee. In re Kramer, 2023 WL 4044112 (6th Cir. June 16, 2023).

Fees as attorney for trustee denied because services fell within scope of trustee work. The Chapter 7 trustee engaged herself as attorney for trustee and filed application for attorney fees related to work hiring auctioneer to sell a vehicle and getting approval for the sale. Finding that this work fell within the scope of § 704 trustee duties, the application for separate attorney fees was denied. The trustee was entitled to trustee's commission under § 326 but no legal fees on top of that commission. In re Craig, 2023 WL 3984291 (Bankr. S.D. Ala. June 12, 2023), Judge Callaway.

Bifurcated fee denied. Affirming the Bankruptcy Court's determination that Chapter 7 bifurcated fees were excessive and that disclosures contained in the fee structure were inadequate, the District Court held that the attorneys failed to show error in the finding that the fees were excessive for postpetition services. Moreover, the fee agreements did not satisfy disclosure requirements in §§ 526 and 528. Pre-filing and post-filing agreements were illusory, because they were contained in a unitary agreement, making the proposed post-filing fee a dischargeable obligation. The Court declined to adopt the policy argument in favor of bifurcated fess. In re Rosenschein, 2023 WL 3301219 (D. S.C. May 8, 2023), District Judge Anderson.

Chapter 13 Issues

Trustee

Ninth Circuit agrees with Tenth—Trustees must return fees in cases dismissed before confirmation. Holding that if a plan is not confirmed, §§ 1326(a) and (b) require the trustee to return payments to the debtor, including fees that would otherwise be paid to the trustee, the Ninth Circuit agreed with *In re Doll,* 57 F.4th 1129 (10th Cir. 2023). The Tenth Circuit has denied a motion for en banc rehearing, and the same issue is pending before the Second Circuit. The Ninth Circuit opinion noted that Chapters 12 and Subchapter V have Code provisions specifically authorizing trustee fee payments regardless of plan confirmation. In re Evans, 69 F.4th 1101 (9th Cir. 2023). See also In re Johnson, 650 B.R. 904 (Bankr. N.D. Ill. 2023), Judge Barnes (Agreeing with *Doll* and authorizing direct appeal but with no stay pending appeal.). Contrast In re Baum, 650 B.R. 852 (Bankr. E.D. Mich. 2023), Judge Tucker, disagreeing with *Doll* and holding that Chapter 13 trustee was entitled to retain § 586(e)(2) percentage fee "even though the case was dismissed without a plan being confirmed."

Eligibility

Calculation of interest on pre-bankruptcy judgment. In contest over whether debt exceeded $2,750,000, post-judgment interest was added to judgment but creditor incorrectly calculated interest. Applying 28 U.S.C. § 1961(a), the interest calculation did not result in total debt exceeding statutory limit, and ineligibility motion was denied. In re Cogswell, 2023 WL 3964086 (Bankr. E.D. Mich. June 12, 2023), Judge Tucker.

Co-debtor Stay

Chapter 13 debtor was not protected by codebtor stay in his ex-wife's separate bankruptcy. Foreclosure had been conducted after the ex-wife filed her Chapter 13 bankruptcy, but the debtor/former husband was not protected by the codebtor stay in her case, because he had not signed the mortgage note on the home that former wife had purchased, and he was not obligated on the debt. The former husband was not a debtor in bankruptcy at the time of foreclosure and his attempt to set aside the foreclosure was

denied as a violation of the codebtor stay. In re Prather, 2023 WL 3028991 (Bankr. N.D. Miss. Apr. 20, 2023), Judge Woodard.

Disposable Income

Means test permits above-median debtors to deduct actual mortgage costs. On direct appeal, the Fourth Circuit agreed with the Sixth and Ninth Circuits that above-median debtors could deduct the actual costs of mortgages in calculating their disposable income. The trustee objected to the calculation, arguing that the debtors should have used the Local Standards for mortgage payments. The Panel held that the mortgage was a secured claim that the means test required to be paid as contractually due; therefore, the debtors properly deducted their actual mortgage payments in the Form 122C-2 calculation. Bledsoe v. Cook, ___ F.4th ___, 2023 WL 3985167 (4th Cir. June 14, 2023).

Postpetition 401(k) payments are disposable income. Affirming trustee's objection to confirmation, the District Court reviewed the split of authority on whether a debtor's postpetition contributions to 401(k) retirement plans are disposable income. In the current case, the debtor proposed to make 401(k) contributions in the same amounts she had made prepetition, but the Court found most persuasive interpretations of the statutes that "voluntary retirement contributions are always disposable income." Only voluntary contributions made before the petition date are excluded under § 541(b)(7). In re Saldana, 2023 WL 3483241 (N.D. Cal. May 15, 2023), District Judge Freeman, appeal filed to Ninth Circuit.

Confirmation

Attorney modified local plan form to hold in escrow debtors' postpetition mortgage payments. Debtors' counsel provided in multiple plans that she would act as escrow agent for clients' postpetition mortgage payments, rather than make payments to trustee or to secured creditors. The stated reason was that the debtors challenged validity of the mortgages, but the attorney violated state disciplinary rules regarding IOLTA accounts, commingling escrow funds and failing to timely reconcile account funds. After hearings on show cause, the Court found inaccuracies in the attorney's representations in numerous plans about escrowing. The attorney created tensions between her purported

role as escrow agent and counsel for debtors. Sanction included reference to district court's grievance committee. In re Reyes, et al., 651 B.R. 99 (Bankr. S.D. N.Y. 2023), Judge Lane.

Domestic relations exception to federal jurisdiction and impact on confirmation. A creditor who did not receive notice of the Chapter 13 filing or confirmation moved to vacate confirmation, and the motion triggered consideration of the domestic relations exception to federal court jurisdiction. The Bankruptcy Court abstained from dispute between parties who had pre-bankruptcy relationship, to allow state court litigation over creditor's unliquidated claim to proceed. Factors favoring abstention were discussed. In re Malmborg, 650 B.R. 707 (Bankr. N.D. Ill. 2023), Judge Cox.

Modification of reverse mortgage. Applying § 1322(c)(2)'s exception for the anti-modification of home mortgages, the non-recourse reverse mortgage at issue was subject to modification of value on the home inherited by debtor from his deceased mother. Upon the mother's death, the mortgage automatically accelerated, making the last payment due pre-bankruptcy and subjecting the mortgage to modification. The Court determined value under § 506 and the proposed plan provided for payment of the value in full. In re Godwyn, 2023 WL 3358577 (Bankr. E.D. N.C. May 10, 2023), Judge Callaway.

Plan could propose cure of monetary default when there was also non-monetary default. The debtor's home had been acquired by transfer from his father in violation of "due-on-sale" clause prohibiting transfer without creditor's consent, and the mortgage was now in monetary default. The plan proposed to cure the monetary default, and the Court discussed the split of view, concluding that the debtor who is not in privity with the mortgagee may nevertheless cure the monetary default, because the claim is against the property. Moreover, curing the monetary default was distinguished from modification of the mortgage, and confirmation did not dilute the mortgagee's remedies for the non-monetary default. In re Lazaro, 650 B.R. 651 (Bankr. E.D. Pa. 2023), Judge Mayer.

Plan Modification

Proposed modification failed good faith requirement. Confirmed plan provided for 100% to unsecured creditor, but six months later debtor moved to modify to reduce

biweekly payroll deduction, amending Schedules I and J to reflect increased expenses. The modification would reduce distribution to unsecured creditors to 51%. Finding that the debtor did not show by preponderance of evidence that most of her expenses had increased between petition date and filing of amended schedules, the modification did not satisfy good faith requirements to allow reduction in monthly payments. In re Deroo, 650 B.R. 561 (Bankr. N.D. Ill. 2023), Judge Cleary.

Plans not modified to increase percentage to unsecured creditors from settlement of postpetition injuries. The Chapter 13 trustee moved to modify confirmed plans following settlement of postpetition injury claims, seeking to add those settlement proceeds on top of the confirmed percentage to unsecured creditors, increasing percentage payments. The nonexempt settlement proceeds were property of the bankruptcy estates under §§ 541 and 1306, and the district's local plan provided vesting in the debtors did not occur until dismissal or discharge. However, the Code does not require plan modification to account for postpetition personal injury claim proceeds. These settlement proceeds were assets, and not income for purposes of the disposable income test of § 1325(b). Moreover, the settlement proceeds were not included in § 1325(a)(4)'s liquidation test when the Court is considering plan modification under § 1329(a), because these postpetition settlement funds would not be included in Chapter 7 analysis if the cases had been filed as, or converted to Chapter 7, absent bad faith. In *In re Waldron,* 536 F.3d 1239 (11th Cir. 2008), the Eleventh Circuit adopted an "ability to pay" standard for proposed plan modifications based on postpetition assets. The Court disagreed with the concept that all postpetition personal injury recoveries are windfalls to debtors, making a potential distinction between recovery for personal injuries and punitive damages. In re Hill, 2023 WL 3966386 (Bankr. S.D. Ala. May 30, 2023), Judge Callaway.

Attorney and Fees

Attorney violated Rule 9011. Declining to approve proposed settlement between U.S. Trustee, Chapter 13 trustee and debtor's attorney, after hearing the Court found that the attorney had violated Rule 9011(b) in multiple ways: misrepresenting that he had debtor's "wet signatures" when he didn't; knowingly filing inaccurate schedules; proposing unconfirmable plans; proposing infeasible plan modifications; and filing serial cases for

improper purposes. Sanctions included public censure, disgorgement of fees and remedial requirements in future cases. In re Kelly, 649 B.R. 448 (Bankr. W.D. Pa. 2023), Judge Taddonio.

Rule 3002.1

Creditor violated rule by failure to provide timely notice under Rule. Reviewing the background of Rule 3002.1's adoption, the Court had previously determined that the mortgage creditor violated the Rule by failure to timely provide notice of tax payments, and the current opinion discusses available remedies under the Rule. Remedies included barring creditor from presenting evidence in any proceeding of information that should have been noticed under the Rule and awarding of attorney fees and costs to the debtor. The Rule does not authorize compensatory damages for emotional or mental distress, but Rule 3002.1(i)(2) does authorize punitive damages, disagreeing with the majority opinion in *PHH Mortg. Corp. v. Gravel,* 6 F.4th 503 (2d Cir. 2021). In re Dewitt, 651 B.R. 215 (Bankr. S.D. Ohio 2023), Judge Humphrey.

Claims

Debtor's payment on mortgage note restarted statute of limitations. The Chapter 13 debtor objected to mortgage creditor's proof of claim on basis that statute of limitations had expired before foreclosure started, but the Court found that the debtor's payment after expiration of the original limitations period had the effect of restarting the statute of limitations. In re Gonzalez, ___ B.R. ___, 2023 WL 3075946 (Bankr. N.D. Ill. Apr. 20, 2023), Judge Cleary.

No jurisdiction to award "innocent spouse" relief on tax claims. The issue was whether the Bankruptcy Court had subject matter jurisdiction to grant the debtor "innocent spouse relief" under section 6015(f) of the Internal Revenue Code by virtue of § 505 of the Bankruptcy Code, and the Court determined that § 505 did not support jurisdiction, concluding that equitable relief from IRS's determination of the amount of tax owed was outside the scope of Bankruptcy Court's jurisdiction. In re Geary, 650 B.R. 486 (Bankr. W.D. Pa. 2023), Judge Taddonio.

CONSUMER LAW UPDATE

Selected Cases reported
January 1 to March 31, 2023

Prepared for Federal Judicial Center

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Automatic Stay

Transferee servicer did not violate stay by sending mortgage statements. The District Court found no stay violation by the transferee servicer sending Chapter 13 debtors mortgage statements, even though they had payment coupons attached, when the statements included language that they were not attempts to collect a debt and that they were intended for informational and compliance purposes. The Court noted that it did not defer to CFPB's interpretation of the automatic stay, and Congress had not given CFPB authority to enforce the Bankruptcy Code. Freedom Mortgage Corp. v. Dean, 647 B.R. 780 (M.D. Fla. 2023).

Lack of adequate protection by serial filer. Secured automobile lender established cause for stay relief based on lack adequate protection when debtor had filed multiple unsuccessful cases that were dismissed without confirmation after unreasonable delay and failure to make plan payments. In re Conway, 648 B.R. 318 (Bankr. N.D. Ill. 2023), Judge Cleary.

IRS obtained stay relief to pursue setoff against Social Security benefits. Determining that IRS had "colorable claim" to set off its tax lien against Chapter 13 debtor's Social Security benefits, under 26 U.S.C. § 6321, IRS was given stay relief to pursue enforcement of tax lien. Social Security benefits were excluded from the bankruptcy estate; therefore, the debtor's argument about exemption was not relevant—nothing in § 522(c) prevented the benefits from remaining liable for the tax lien. In re Rios, ___ B.R. ___, 2023 WL 2358825 (Bankr. E.D. Wisc. Mar. 3, 2023), Judge Perhach.

Debtor violated stay by filing Chapter 13 when prior Chapter 7 was still open. The Chapter 7 case filed jointly with her now-deceased husband had been reopened to permit the trustee to administer an asset, but the debtor filed a Chapter 13 attempting to exempt the tort claim being administered in the Chapter 7. That action violated the automatic stay in the Chapter 7 case, and the Chapter 13 was dismissed. In re Wood, ___ B.R. ___, 2023 WL 2435682 (Bankr. E.D. Mich. Mar. 9, 2023), Judge Tucker.

Avoidance

Transfer for preference avoidance occurs when garnished funds change hands. Reversing its 1984 precedent, the Seventh Circuit held that *Barnhill v. Johnson,* 503 U.S.

383 (1992) required that federal rather than state law define the meaning of "transfer" under § 547. Transfer in garnishment occurs when the money changes hands, not when the garnishment order was signed. Warsco v. Creditmax Collection Agency, Inc., 56 F.4th 1134 (7th Cir. 2023).

Exemptions

Section 522(d)(11)(D)'s exemption. The Chapter 7 debtor claimed exemption under § 522(d)(11)(D) related to a prepetition automobile accident, and the trustee did not object, but the trustee hired counsel to pursue litigation on behalf of the estate. The issue on appeal was whether the bankruptcy court properly allowed fees to trustee's attorney for resisting the debtor's efforts to obtain more recovery than the statutory limit of § 522(d)(11)(D), and the Circuit held that the attorney's efforts were for benefit of the estate, because the trustee had reasonable arguments that two settlements reached in the litigation fell outside the scope of the statutory exemption as recovery for pain and suffering or actual pecuniary loss that are excluded from the exemption. The trustee had not waived those arguments by failing to object to the claimed exemption because the debtor did not specifically claim exemption beyond the statutory scope. The trustee's attorney fees were reasonably likely to benefit the estate and were properly allowed. In re Biondo, 59 F.4th 811 (6th Cir. 2023).

Debtors could not amend schedules and exemptions after case was closed except upon showing of excusable neglect. The Chapter 7 debtors moved to reopen closed cases to amend schedules and exempt settlement proceeds of unscheduled prepetition personal injury claim, and the United States Trustee objected. The Court held that the debtors did not have a right to amend schedules as a matter of course after the case had been closed, applying Rule 1009(a). Further evidence was required on whether the debtors could show excusable neglect for their failure to amend within the pre-closing time provided by Rule 1009(a). In re Gerstner, ___ B.R. ___, 2023 WL 2359019 (Bankr. E.D. Wisc. Mar. 3, 2023), Judge Halfenger. See also In re Wantz, 647 B.R. 541 (Bankr. W.D. Mich. 2023), Judge Gregg (Agreeing that debtor lost right to amend schedules upon case closing, here the debtor demonstrated excusable neglect and was permitted in reopened case to amend and schedule proceeds of personal injury claim.).

Exemption cap on homestead applied in opt out states. Section 522(p) and (q) caps

on homestead exemptions apply in opt out states, such as California, with the Court adopting the majority view that every "election" of an exemption under § 522(b)(1) leads to the application of the caps. Rule 4003(b)(3) permits an objection to an exemption based on § 522(q) at any time prior to closing of the case. In re Oliver, ___ B.R. ___, 2023 WL 2620032 (Bankr. E.D. Cal. Mar. 23, 2023), Judge Klein.

Chapter 7 trustee could not sell home that was subject to homestead exemption. Trustee negotiated with IRS and State Department of Revenue for compromise of their claims and objected to debtor's homestead, while moving to sell the property subject to tax liens, but under *Law v. Siegel,* 571 U.S. 415 (2014), an exemption may only be denied on basis found in Bankruptcy Code or state law. No authority was provided for disregarding the homestead exemption to benefit the trustee's administrative expense or carve out for tax liens from sale proceeds. Summerlin v. Turnage, ___ B.R. ___, 2023 WL 2496181 (Bankr. W.D. N.C. Mar. 14, 2023), Judge Bell.

Discharge Issues

Fraud imputed to partner under § 523(a)(2)(A). The Supreme Court held that if underlying law on fraud (in this case California law) makes a partner liable for the fraud of another partner, § 523(a)(2)(A) does not require that the debtor/partner be the one who committed or knew of the fraud to establish an exception from discharge. Pointing to its earlier authority in *Strang v. Bradner*, 114 U.S. 555 (1885), which held that the fraud of one partner was the fraud of all partners, the Court noted that after its *Strang* decision, Congress amended the predecessor Code to § 523(a)(2)(A), eliminating "of the bankrupt" from that fraud exception to discharge. The current subsection (A) does not specify that the debtor be the fraud actor. In contrast, section 523(a)(2)(B) refers to the debtor "causing" a false financial statement to be made or published, and section 523(a)(2)(C) refers to debts "obtained" by the individual debtor. *Bartenwerfer* clarifies that if relevant non-bankruptcy law imposes fraud liability on a debtor in an agency or partnership context, the debt arising from that fraud may be nondischargeable even if the debtor was not aware of the fraud committed by another partner. In this case, the now spouses were partners in a real estate remodel project, and one partner fraudulently misrepresented facts to the buyer, with the other partner unaware of the fraud. Nevertheless, the

"innocent" partner was liable under applicable state law and the debt was nondischargeable. Bartenwerfer v. Buckley, 598 U.S. _____, 143 S.Ct. 665 (Feb. 22, 2023).

Debtor's failure to remit insurance reimbursement checks to medical provider of elective procedures was nondischargeable under §§ 523(a)(2), (4) and (6). Finding that the debtor obtained medical services with false representations and obtained services by actual fraud, the failure to remit insurance reimbursement to the provider was also embezzlement and a willful and malicious injury. The full debt was nondischargeable, notwithstanding that insurance proceeds were significantly less. In re Orslini, ___ B.R. ___, 2023 WL 1428578 (Bankr. E.D. N.Y. Jan. 30, 2023), Judge Grossman.

Property settlement was domestic support in nature under § 523(a)(5). Although a property settlement agreement may be dischargeable in Chapter 13 cases under § 523(a)(15), here the agreement was incorporated by divorce decree and was structured to provide support for the former spouse. Labeling did not control over the intention that payment to a trust was for support. There was significant disparity between income of former spouse and debtor at time of agreement. In re Ventrone, 648 B.R. 30 (Bankr. E.D. Pa. 2023), Judge Chan.

Preclusive effect of state court judgment under section 523(a)(6). The state court judgment was given preclusive effect under Ohio law in the subsequent § 523(a)(6) adversary proceeding. The Court determined that the judgment for sanctions against the Chapter 7 debtor/attorney included finding that attorney's actions met the standards for willful and malicious injury. In re Anthony, ___ B.R. ___, 2023 WL 2058902 (Bankr. S.D. Ohio Feb. 17, 2023), Judge Hoffman.

Private student loan to attend medical school fell under § 523(a)(8)(B) exception from discharge. Although the private student loan to attend medical school was not part of a "program" funded by a governmental unit and would be dischargeable under § 523(a)(8)(A)(i), the language of subsection 523(a)(8)(B) required the Court to look to the initial purpose of the loan rather than the debtor's actual use of the loan proceeds in determining whether the loan was a "qualified educational loan." The loan was intended to fund the debtor's attendance at a Title IV school qualified under § 523(a)(8)(B), and the

debtor was bound by her loan agreement's designation of that school. The fact that she attended another school, not Title IV qualified, did not prevent application of the initial purpose test. In re Mazloom, 648 B.R. 1 (Bankr. N.D. N.Y. 2023), Judge Davis.

Debtor attorney made false oath by omission of law practice income. Affirming, the First Circuit held that the Chapter 7 debtor attorney made false oath for purposes of § 727(a)(4)(A) by omitting law practice income from statement of financial affairs and interests in real estate in Schedules A/B. In re Kupperstein, 61 F.4th 1 (1st Cir. 2023).

Chapter 7 Issues

Bifurcated Fees

Bifurcated Chapter 7 fee structure rejected. The District Court affirmed the rejection of bifurcated fee agreements, finding them to contain misrepresentations in violation of §§ 526 and 528. The Colorado attorney was also a "partner" in Ovation Law, which was based in Arizona, and Ovation utilized a bifurcated fee structure that provided for a skeletal Chapter 7 petition with no prepetition fee but a subsequent postpetition fee paid over twelve months. Under that structure, the total fee was higher than if a debtor paid in advance. There were financing costs included in the bifurcated fee, charged by Fresh Start Funding. The District Court agreed that the bifurcated fee structure and its resulting unbundled services were "illusory" and misleading to debtors. In re Suazo, ___ F.Supp.3d ___, 2023 WL 1961198 (D. Colo. Feb. 13, 2023).

Dismissal

Dismissal by debtor would be prejudicial to creditors. The District Court vacated dismissal of the Chapter 7, which had been granted on debtor's motion. Court must balance equities, weighing benefits and prejudices that would result from dismissal, and if estate assets would be unavailable to creditors after dismissal, that would be prejudicial to creditors. Leavers v. McLaughlin, ___ F.Supp.3d ___, 2023 WL 114068 (D. Maryland Jan. 4, 2023).

Chapter 13 Issues

Eligibility

Plan was not filed in good faith by manager of cannabis business. Debtor's employment at cannabis business violated Federal criminal statutes, and case was not filed in good faith nor plan proposed in good faith. Case was dismissed. In re Blumsack, 647 B.R. 584 (Bankr. D. Mass. 2023), Judge Katz.

Confirmation

Section 1322(b)(2) primed finality of confirmation. Although the "full payment" plan had been confirmed without objection from the mortgagee, the creditor only filed a claim for the arrearage. The debtor paid the claim and then moved for release of the mortgage lien, contending that payment of the claim amount satisfied the mortgage obligation. The Eleventh Circuit held that § 1322(b)(2)'s anti-modification provision prevented modification of the creditor's rights, relying on *Nobelman v. American Savings Bank,* 508 U.S. 324 (1993). That concept prevailed over argument that the confirmed plan bound the creditor, and the Court distinguished *United Student Loan Aid Funds, Inc. v. Espinosa,* 559 U.S. 360 (2010), holding that it had not abrogated prior Eleventh Circuit authority under § 1322(b)(2). Under applicable Alabama law and the terms of the mortgage, the mortgagee had the right to full payment of its balance and to retention of its lien, and the confirmed plan did not modify those rights. In re Bozeman, 57 F.4th 895 (11th Cir. 2023).

Lack of default did not prevent payment of long-term debt in plan. Affirming confirmation, the First Circuit Bankruptcy Appellate Panel examined the authority on treatment of long-term debt in a plan, agreeing that §1322(b)(5) does not require that the debt be in default. The section permits alternative to maintain contractual payments. In re Nieves, 647 B.R. 809 (B.A.P. 1st Cir. 2023).

Good faith under §§ 1325(a)(3) and (a)(7). Analyzing whether the petition was filed in good faith and the separate issue of whether the plan was proposed in good faith, the Court noted that the percentage of repayment of unsecured creditors' claims was not an appropriate factor. Applying ten factors identified in *In re Colston,* 539 B.R. 738 (Bankr. W.D. Va. 2015), the Court found that the debtor's petition was filed in good faith and that the plan was proposed in good faith, overruling a creditor's objection to confirmation. In

re Attariwala, 648 B.R. 335 (Bankr. D. Columbia 2023), Judge Gunn. See also for examination of two prongs of good faith, In re Roby, et al., ___ B.R. ___, 2023 WL 2542365 (Bankr. M.D. Ala. Mar. 16, 2023), Judge Cresswell.

Mortgage on inherited property could be paid under §1322(c)(2). Under applicable state law, the debtor had sufficient interest in property inherited from deceased mother to pay the non-recourse mortgage in plan, and the mortgage was subject to modification to pay its value under § 1322(c)(2). In re Berry, ___ B.R. ___, 2023 WL 2482645 (Bankr. E.D. Wisc. Mar. 13, 2023), Judge Halfenger.

Postpetition Property

Estate replenishment approach to postpetition appreciation. Addressing the split of authority, the Bankruptcy Court analyzed approaches to whether postpetition proceeds of the debtor's home were property of the bankruptcy estate. At the time of commencement of the case the home was valued at $140,000, with a mortgage of $125,000 and $15,000 claimed as exempt. The confirmed plan vested property in the debtors at confirmation, and three years later the debtors moved to sell the home for $210,000, which generated net proceeds of $75,000. Considering the estate-termination, estate-preservation, conditional vesting, and estate-transformation approaches to property of the estate, the Court found the estate-replenishment approach to reconcile section 1327 and 1306. The appreciated value did not exist at the time of confirmation; therefore, it did not revest in the debtors under section 1327(b). Under section 1306(a), the appreciation was acquired post-confirmation, and the post-confirmation sale proceeds were property interest distinguished from the home that revested in the debtors at confirmation. In re Marsh, 647 B.R. 725 (Bankr. W.D. Mo. Jan. 17, 2023), Judge Fenimore.

Debtor required to disclose post-confirmation cause of action under Circuit authority. The debtor incurred a post-confirmation personal injury claim but did not amend her schedules to disclose it until the defendant in the action asserted judicial estoppel in the state court. At that point the debtor moved to reopen the closed Chapter 13 case to amend schedules. Discussing the differences in property of the estate in Chapter 7 and 13 cases, the Court cited Eleventh Circuit authority requiring that debtors

have a "continuing duty" to amend schedules to disclose post-confirmation litigation claims, citing *Robinson v. Tyson Foods, Inc.,* 595 F.3d 1269 (11th Cir. 2010), and other Circuit authority. The issue of when and how a debtor fulfills that amendment duty is then discussed, with Circuit authority indicating that Rule 1009 was an appropriate vehicle for amendment of schedules, citing *In re Waldron,* 536 F.3d 1239 (11th Cir. 2008). In this case, the amendment to add the cause of action would not affect the bankruptcy estate or creditors, because the confirmed plan had paid unsecured creditors 100%. Nevertheless, reopening the case and allowing the amendment will benefit the debtor, fulfilling her duty under Circuit authority, and the cause of action did become property of the estate under § 1306(a)(1). The case was reopened to permit amendment of schedules, notwithstanding the plan being completed and discharge having been granted. In re Calixto, 648 B.R. 119 (Bankr. S.D. Fla. 2023), Judge Grossman.

Dismissal

In case dismissed prior to confirmation, trustee must return pre-confirmation payments to debtor without deducting trustee's fee. The Tenth Circuit held that § 1326(a)(2) requires that the trustee may not retain fee on pre-confirmation payments when the case is dismissed prior to confirmation. In contrast, under Chapter 11 subchapter V and Chapter 12, the statutes provide for the trustee's fee to be paid before returning pre-confirmation payments to the debtor. In re Doll, 57 F.4th 1129 (10th Cir. 2023).

Section 109(g)(2) dismissal not mandatory. The Chapter 13 debtor had filed prior cases, with the last one voluntarily dismissed after motions for stay relief had been filed. Dismissal was intended to take advantage of increase in debt limits and elimination of distinction between secured and unsecured debt in the Bankruptcy Adjustment and Corrections Act of 2022. Prior to voluntary dismissal, the debtor had resolved the two stay relief motions filed in that case. In the next case the same creditors moved to dismiss based on § 109(g)(2), and the Court analyzed the meaning of the term "following" in that Code section, discussing the split of judicial authority on whether the term required a temporal or causal interpretation. The Court found prior authority in the state to be persuasive. *In re Swigert,* 601 B.R. 913 (Bankr. M.D. Pa. 2019), had adopted the causal

approach, requiring that a debtor's voluntary dismissal not merely "follow" in time or be "subsequent to" the prior filing of a motion for stay relief but that it have a causal connection to that motion. This debtor did not dismiss the case because of the prior stay-relief motions but to take advantage of the statutory change in monetary debt limits. In re Higgins, ___ B.R. ___, 2023 WL 2357740 (Bankr. E.D. Pa. Mar. 3, 2023), Judge Coleman.

Debtor did not have absolute dismissal right after conversion. When debtor did not seek dismissal prior to conversion of the case from 13 to 7, the debtor did not have absolute right to dismiss. In re Skandis, ___ B.R. ___, 2023 WL 2520521 (B.A.P. 6th Cir. Mar. 15, 2023).

Serial filing not necessarily dismissed with prejudice. Analyzing whether serial filing was in bad faith and subject to dismissal with prejudice under § 109(g)(1), the Court found the facts and circumstances in current case did not compel dismissal with prejudice. The Code does not specifically prohibit serial filings and not all serial filers act in bad faith. In re Bryant, ___ B.R. ___, 2023 WL 2705943 (Bankr. S.D. Ga. Mar. 29, 2023), Judge Coleman.

Priority

Shared responsibility payment is tax rather than penalty for priority purposes. The Fourth Circuit, with a dissent, held that the Affordable Care Act's shared responsibility payment obligation was a tax rather than a penalty for purposes of section 507(a)(8)'s priority treatment in a Chapter 13 plan. United States v. Alicea, 58 F.4th 155 (4th Cir. 2023).

Attorney Fees and Sanctions

Disgorgement upheld for attorney's failure to timely disclose fees. The Seventh Circuit affirmed the bankruptcy court's granting of U.S. Trustee's motion for disgorgement when the Chapter 7 debtor's attorney failed to comply with fee disclosure requirements of § 329 and Bankruptcy Rule 2016. The attorney had only disclosed $5,000 of the $21,500 paid by the debtor. It was irrelevant whether the estate suffered any harm, with the fee disclosure requirement mandatory. In re Dordevic, 62 F.4th 340 (7th Cir. 2023).

Attorney had sufficient due process notice of potential sanctions. The Fourth Circuit affirmed sanction of $5,000 against an attorney and suspension from practice for one year, finding that the complaint filed by the United States Trustee provided adequate notice to the attorney of the alleged misconduct and of the sanction that was sought. The attorney was given opportunity to prepare and present a defense. The Circuit's 1971 precedent on due process notice to an attorney, *Nell v. United States,* 450 F.2d 1090 (4th Cir. 1971), remained "good law." U.S. Trustee v. Delafield, et al., 57 F.4th 414 (4th Cir. 2023).

Non-bankruptcy work that reduced student loan debt did not justify additional Chapter 13 fee. Denying the debtor's attorney's motion to reconsider prior denial of additional fees, the Court found that under the applicable local rule for Chapter 13 fees, the attorney's services outside of the bankruptcy court in obtaining reduction or forgiveness of student loan debt did not qualify for supplemental fee in addition to no-look fee already paid. In re Welch, 647 B.R. 673 (Bankr. D. S.C. 2023).

Attorney sanctioned for Rule 9011 violations. In analysis of patterns demonstrated in multiple filings by experienced attorney, Court found various Rule 9011 violations, including failure to have wet signatures of debtors when attorney represented they existed, filing so called "adequate protection plans" that did not propose satisfaction of secured claims, failure to perform good faith objectively reasonable inquiry into claims against debtors, filing proposed plan modifications that were not feasible, and filing serial Chapter 13 cases for improper purpose. Sanctions addressed the Rule 9011 issues. In re Kelly, ___ B.R. ___, 2023 WL 2724350 (Bankr. E.D. Pa. Mar. 31, 2023), Judge Taddonio. See also in re Frantz, 648 B.R. 91 (Bankr. C.D. Cal. 2023), Judge Houle ($5,000 sanction against Chapter 13 debtor's attorney for improperly representing to Court that plan had been completed when direct payments on mortgage were delinquent.).

CONSUMER LAW UPDATE

Selected Cases reported
September 15 to December 31, 2022

Prepared for Federal Judicial Center

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Appeals

Motion denied staying preliminary injunction pending appeal. Considering the factors for stay pending appeal, including public interest, the Court denied Navient's motion to stay the preliminary injunction pending its appeal. The Court had granted the injunction against Navient's continued collection of Tuition Answer Loans to the extent the loans exceeded the costs of attendance, in *In re Homaidan*, 640 B.R. 810 (Bankr. E.D. N.Y. 2022). In re Homaidan, ___ B.R. ___, 2022 WL 16641075 (Bankr. E.D. N.Y. Nov. 1, 2022), Judge Stong.

Abstention

Personal injury tort was not core, with permissive abstention appropriate. Dischargeability complaint alleging sexual assault under California law constituted personal injury tort that was not core proceeding, with permissive abstention and stay relief appropriate to allow liquidation of claim in pending Federal court litigation. In re Gordon, ___ B.R. ___, 2022 WL 16857098 (Bankr. D. Idaho, Nov. 10, 2022), Judge Hillen.

Automatic Stay

Mortgage creditor violated stay. The Chapter 13 debtor was beneficiary under her deceased father's spendthrift trust, having acquired her interest in residence prior to Chapter 13 filing. Mortgage creditor's servicer was aware of filing and willfully violated stay by foreclosure. District Court affirmed. In re Hoover, 645 B.R. 656 (W.D. Wash. 2022), District Judge Lasnik. See also In re Giles-Flores, ___ B.R. ___, 2022 WL 12025689 (Bankr. S.D. Tex. Oct. 20, 2022), Judge Isgur. Homeowners' association willfully violated stay by foreclosure of property that was arguably property of Chapter 13 estate. Fifth Circuit authority only required arguably property of estate. See also In re Hamby, ___ B.R. ___, 2022 WL 17428947 (Bankr. N.D. Ga. Nov. 29, 2022), Judge Bonapfel. Car creditor violated stay by postpetition repossession of vehicle, retention and collection attempt.

Mortgage creditor did not violate stay by postponing foreclosure. Citing other judicial holdings, mortgage creditor's postponement of sheriff's sale and its property inspections did not violate automatic stay. The inspections were not for purpose of

harassment or coercion to pay. In re Nyamusevya, 644 B.R. 375 (Bankr. S.D. Ohio 2022), Judge Hoffman. Compare In re Tavera, 645 B.R. 299 (Bankr. M.D. Fla. 2022), Judge Vaughan. Landlord violated stay by posting notice that demanded payment and by offering to drop criminal charges in return for possession.

Stay relief granted to allow probate litigation. Considering factors for granting stay relief and abstention, the Court granted stay relief in Chapter 13 case to allow pending state-court probate action to continue but did not grant relief for purposes of collection of any judgment against debtor that may result. In re Cattron, ___ B.R. ___, 2022 WL 17861742 (Bankr. E.D. Mich. Dec. 22, 2022), Judge Tucker.

Section 362(b)(2). In reopened Chapter 7, debtor objected to claim filed by former spouse, and no stay was in effect under § 362(b)(2) as to collection of domestic support obligations from property that is not property of bankruptcy estate, but there were some debts omitted from divorce decree on which determination was required by state court. Stay relief was granted to allow parties to return to state court. Opinion also discusses ability of bankruptcy court to reconsider a claim that was deemed allowed before the case had been closed and reopened, citing Rule 3008; however, because no order had been entered allowing claim before closing, Court did not need to rely on that Rule. In re Jardins, ___ B.R.___, 2022 WL 16579457 (Bankr. D. Idaho Nov. 1, 2022), Judge Meier.

Sheriff violated stay but no actual damages shown. The sheriff's office violated the automatic stay by enforcing writ of possession after having notice of the Chapter 13 filing, and the sheriff was not entitled to quasi-judicial immunity or protection of sovereign immunity; however, § 362(k) requires proof of "injury," and the debtor did not establish any legally cognizable injury to allow recovery of attorney fees. In re Toppin, ___ B.R. ___, 2022 WL 16696068 (E.D. Pa. Nov. 3, 2022). See also In re Schneorson, 645 B.R. 146 (Bankr. E.D. N.Y. 2022), Judge Mazer-Marino. Chapter 7 debtor did not establish damages against spouse and her attorneys for actions in divorce court, and those actions were excepted from stay by § 362(b)(2).

In rem relief. In Chapter 7 case, the mortgage servicer moved for in rem relief under § 362(d)(4), and the trustee moved to dismiss the case. The debtor's multiple filings on the eve of foreclosure sale presented rebuttable presumption of scheme to hinder, delay, or defraud the creditor, supporting in rem relief, and the Court had jurisdiction to grant such

relief, even though the case may be subject to dismissal under § 521(i). Automatic dismissal under that section is not "absolute," because § 349 permits that court to "order otherwise" and retain jurisdiction to grant in rem relief. In re Merlo, ___ B.R. ___, 2022 WL 16857102 (Bankr. E.D. N.Y. Nov. 10, 2022), Judge Grossman.

Avoidance

Real estate tax sales—Avoidable? Without deciding the direct question of whether a tax sale was avoidable as a fraudulent transfer, when the homes were more valuable than the taxes, county's refusal to compensate homeowners for their equity amounted to an unconstitutional taking of properties in violation of the Fifth Amendment. The first plaintiff's home was worth $300,000 and was sold for $22,000 tax debt, with no refund to the plaintiff of her substantial equity. Hall v. Meisner, 51 4th 185 (6th Cir. 2022). See also In re Riendeau, 645 B.R. 321 (Bankr. D. Maine, 2022), Judge Cary. Real property tax lien foreclosure did not, as matter of law, establish reasonable equivalent value, but successful bidder was immediate transferee who took for value, in good faith and without knowledge of voidability.

Chapter 7 trustee may not avoid tax penalty lien on exempt property. Deciding matter of first impression, the Ninth Circuit held, with a dissent, that the Chapter 7 trustee could not use §§ 724(a) and 551 to avoid a tax penalty lien on the debtor's exempt homestead or preserve that lien for the benefit of the bankruptcy estate. The debtor could claim the homestead exemption, but it would be subject to the lien. Although the Arizona homestead exemption did not provide a reduction of the exemption for tax liens, § 552(c)(2)(B) provides an exception from allowed exemptions for filed tax liens. Once the debtor's claimed exemption was allowed, the property was no longer property of the estate; therefore, § 724(a) would no longer apply. In re Tillman, 53 F.4th 1160 (9th Cir. 2022).

Judgment lien avoidance determined based on homestead exemption in effect on bankruptcy filing date, not date of judgment lien. The Ninth Circuit held that for purposes of lien avoidance under § 522, the amount of the exemption to which the debtor would be entitled in absence of the judgment lien is determined by the exemption amount as of the bankruptcy petition filing date, rather than the earlier date the judgment lien was recorded. In re Barclay, 52 F.4th 1172 (9th Cir. 2022).

Judgment lien for overpayment of workers' compensation benefits was avoidable judicial lien. Discussing the distinction between statutory and judicial liens, the "focus is on the manner in which the lien arose, not the manner by which it is enforced." With no controlling law in the Ninth Circuit, the Court examined case authority from other Circuits, including *Matter of Mance,* 31 F.th 1014 (7th Cir. 2022), which concluded that a judicial or administrative process was a prerequisite of a judicial lien. In the current case, under Washington law a process occurs before a lien arises, and that process included the opportunity to appeal to an industrial appeal judge and the opportunity to present evidence at such appeals hearing, as well as an opportunity to seek judicial review. The Court determined that this lien was judicial in nature and impaired the debtors' homestead exemption; therefore, the lien was avoidable. In re Shippy, 2022 WL 14146881 (Bankr. W.D. Wash. Oct. 24, 2022), Judge Heston.

Exemptions

100% of Fair Market Value Exemption. The Ninth Circuit Bankruptcy Appellate Panel held that the debtors' claim of homestead exemption, 100% of FMV [fair market value], in the Chapter 11 phase of the case became incontestable after the case was converted to Chapter 7, because there had been no timely objection to the exemption claim. Applying the holding of *Taylor v. Freeland & Krontz,* 503 U.S. 638 (1992), an exemption becomes allowed in the absence of timely objection, and under *Schwab v. Reilly,* 560 U.S. 770 (2010), an exemption claim of 100% of FMV puts parties in interest on notice that the debtor is claiming full value of the property as exempt, even if the resulting exemption exceeds a statutory limit. Here, the debtors claimed Washington homestead, under § 522(d)(1), which at the time was limited to $45,950, but the claim to 100% FMV was a claim to the entire market value of the home. The snapshot rule did not prevent the exemption from reaching the appreciated value of the home, because there had been no objections to the claim. The Panel notes that it did not condone the conduct of the debtors or their attorneys, observing that improperly claiming exemptions risks sanctions or other appropriate penalties. In re Masingale, 644 B.R. 530 (B.A.P. 9th Cir. 2022).

Under snapshot rule, debtors not entitled to homestead exemption increased by post-filing amendment. Under Colorado law, Chapter 7 debtors' homestead exemption

was limited to amount in effect when petition filed, and the Legislature did not expressly or impliedly intend to make an increase in homestead retroactive. The statutory exemption had been increased from $75,000 to $250,000 a week after the Chapter 7 filing, but debtors were limited to the exemption amount in effect when they filed. In re Gomez, ___ B.R. ___, 2022 WL 17097228 (Bankr. D. Colo. Nov. 17, 2022), Judge McNamara.

Section 522(p) applied to homestead claimed under opt-out state law. Affirming, the District Court held that § 522(p) applied to state exemptions when the state had opted out of the federal exemptions, and the debtor had acquired the homestead from an LLC a day before filing Chapter 7. The homestead was capped at $170,350. Kane v. Zions Bancorporation, N.A., ___ F.Supp.3d ___, 2022 WL 4591787 (N.D. Cal. Sept. 29, 2022).

Investment property did not qualify for Florida homestead exemption. The Chapter 7 trustee objected to debtors' claim of homestead exemption in realty that served as investment property, and the Court determined that the property did not meet requisite subjective and objective tests for homestead and that debtors were residing in other long-term Florida homestead property on date of Chapter 7 filing. The opinion reviews the appropriate factors under Florida law. In re Coats, 643 B.R. 634 (Bankr. M.D. Fla. 2022), Judge Brown.

Debtor did not have ownership in property at petition filing for purposes of homestead exemption. The Chapter 7 debtor did not claim homestead exemption when she filed, but soon thereafter her mother passed away, leaving will that bequeathed property to debtor and a brother equally, but at commencement of case debtor did not have a fee ownership interest in property to claim as homestead under applicable Idaho law. In re Zent, ___ B.R. ___, 2022 WL 17085003 (Bankr. D. Idaho Nov. 18, 2022), Judge Meier.

Property of Estate

Joint tenancy property. Under Illinois law and agreeing with the Tenth Circuit's *In re Chernushin,* 911 F.3d 1265 (10th Cir. 2018), when a joint tenant dies after one tenant files bankruptcy, the joint tenancy operates as it would in the absence of bankruptcy—the surviving joint tenant becomes sole owner of the property with the deceased debtor's

interest no longer property of the bankruptcy estate. "The rationale behind this rule is that the trustee cannot assert greater rights than the debtor." The opinion cites other courts considering the same issue, concluding that the right of survivorship operates as it would absent bankruptcy. The Chapter 7 trustee had no right to sell the deceased debtor's interest in the joint tenancy property. In re Nakhshin, 644 B.R. 402 (Bankr. N.D. Ill. 2022), Judge Thorne.

Discharge Issues

1040 forms filed years after due were not "returns" under applicable nonbankruptcy law. The Chapter 13 debtor had filed 1040 forms for two tax years but long after they were due under the IRS Code, and the First Circuit held that those late-filed forms were not "returns" that would satisfy nonbankruptcy law, under either the BAPCPA definition of "returns" or under the *Beard* test. In re Kriss, 53 F.4th 726 (1st Cir. 2022).

Collateral estoppel not applied to state court judgment for § 523(a)(2). When a state court judgment was based on breach of contract, there had been no finding of debtor's intent to deceive, and such intent is required for purposes of § 523(a)(2). Therefore, the judgment was not entitled to preclusive effect, and the creditor filed to show that the judgment was nondischargeable. In re Piazza, ___ B.R. ___, 2022 WL 16726739 (Bankr. M.D. Pa. Nov. 4, 2022), Judge Van Eck. Compare In re Sangha, 644 B.R. 843 (Bankr. C.D. Cal. 2022), Judge Houle. Collateral estoppel applied to state court's finding of the malicious element of § 523(a)(6), but the willfulness element remained for trial in the bankruptcy court.

Student loan discharge under totality of circumstances test. Applying Eighth Circuit's totality of circumstances test, the Chapter 7 debtor established that payment of a student loan she co-signed for her mother's college education would be an undue hardship, warranting discharge. In re Haugen, 645 B.R. 635 (Bankr. D. N.D. 2022), Judge Hastings.

Section 523(a)(7) debts. Amounts owed by a disbarred attorney to reimburse a state fund for payments made by the fund to victims of the attorney's misconduct are dischargeable in bankruptcy under § 523(a)(7). To be nondischargeable under §

523(a)(7), the debt "must (1) be a fine, penalty, or forfeiture; (2) be payable to and for the benefit of a governmental unit; and (3) not constitute compensation for actual pecuniary costs." The Ninth Circuit found that the requirement to reimburse the state fund constituted compensation for actual pecuniary costs, and therefore, it did not need to address whether it was a fine, penalty, or forfeiture. The amounts owed by the attorney to the state fund were dischargeable. However, the court also held that amounts owed by the attorney on account of the costs of conducting the administrative proceedings surrounding the fund, as allowed by state statute, were nondischargeable under Ninth Circuit precedent. Kassas v. State Bar of Cal., 49 F.4th 1158 (9th Cir. 2022).

Material omission from schedules was not knowingly done with fraudulent intent. Although Chapter 7 debtor admitted inadvertent omission of snowmobile and livestock from schedules and omission was "material," debtor did not act "knowingly" or with fraudulent intent. Creditor failed to establish required § 727(a)(4)(A) elements. In re Heinle, ___ B.R. ___, 2022 WL 16841384 (Bankr. D. Mont. Nov. 9, 2022), Judge Hursh.

"Special circumstances" under § 523(d). The District Court reversed award of $30,000 attorney fees to the Chapter 7 debtor, finding that "special circumstances" existed for purposes of § 523(d)'s attorney fee provision. The court noted that "special circumstances" is not a defined term. "Section 523(d)'s goal of curbing abusive practices by institutional creditors would not be furthered by requiring" law firm creditor to pay substantial fees. Moreover, the adversary proceeding was not confined to § 523(a)(2), also alleging § 523(a)(6) grounds for exception from discharge. Aboud and Aboud PC v. Cary, ___ F.Supp.3d ___, 2022 WL 17261415 (D. Ariz. Nov. 29, 2022).

Chapter 7 Issues

Bifurcated Attorney Fees

Finance charges and failure to disclose bifurcated fee agreements. Reviewing the Court's Chapter 7 bifurcated fee standards, the attorney had duty to disclose third-party factoring payments and failure to disclose the bifurcated fee agreements required fee disgorgement of $150 to each debtor. In four cases financed by third party the finance fee must be returned to debtors. In re Shepherd, 644 B.R. 130 (Bankr. W.D. Pa. 2022), Judge Agresti.

Chapter 13 Issues

Eligibility

Son's filing on behalf of incompetent father. Bankruptcy Rule 1004.1 permits filing by representative, next friend or guardian, provided the debtor is incompetent, and under South Carolina law, mental incompetence is established by evidence of mental impairment that makes the person incapable of managing own affairs. The father was incompetent at time of petition filing so that son was qualified as "next friend' to file on his behalf, and son could be appointed as guardian ad litem for purposes of pursuing the case. In re Brown, 645 B.R. 524 (Bankr. D. S.C. 2022), Judge Gasparini.

Household Size

Economic unit approach adopted for measuring household size. Rejecting "heads on beds" and "income tax dependent" approaches to determination of the debtors' household size, the Court adopted an "economic unit" approach as being most consistent with congressional intent behind BAPCPA's disposable income and means tests. In re Poole, ___ B.R. ___, 2022 WL 5224087 (Bankr. N.D. Tex. Sept. 30, 2022), Judge Larson

Confirmation

Terms of confirmed plan controlled over proof of claim. Citing authority in the Seventh Circuit, when the confirmed plan provided mortgage arrearage cure amount, creditor with adequate notice of the plan was bound by that provision, which controlled over proof of claim asserting different amount. In re Mastro-Edelstein, 645 B.R. 603 (Bankr. N.D. Ill. 2022), Judge Baer.

Lack of due process notice of plan. Analyzing prior Eleventh Circuit authority, the Chapter 13 debtor's former divorce attorney did not have adequate due process notice of the plan to provide opportunity to present objections to confirmation. The debtor had not scheduled the attorney and had only sent notice of the filing of the case, and the attorney did not receive the notices required by Rules 2002 and 3015. As a result, the attorney was not bound by terms of the confirmed plan. The Court considered merits of creditor attorney's claim to priority status, finding that the fee owed by the debtor to her former divorce attorney was not a domestic support obligation because it was not in the nature

of support. The fee was a contractual obligation that was not entitled to priority status. In re Collins, ___ B.R. ___, 2022 WL 17842158 (Bankr. M.D. Ga. Dec. 21, 2022), Judge Laney.

Valuation

Manufactured home retail value determined under comparable sales. In disputed valuation of manufactured home, debtor asserted value based on website questionnaire and creditor's expert used depreciated cost, but Court determined that comparable sales appraisal was more appropriate measure of retail value, without including hypothetical cost to move the home. In re Lay, 645 B.R. 661 (Bankr. D. Kan. 2022), Judge Somers.

Plan Modification

Debtors in plans extended by former § 1329(d) could not modify those plans to maintain extension beyond five years. Debtors who had extended their plans to 76 and 84 months under now expired § 1329(d) sought to modify those plans, retaining the extended time periods, but the Court held that § 1329(c) limited the modified plans to five years. The opinion discusses congressional intent, concluding that the Court could not correct any oversight by Congress when § 1329(d) expired. In re Nelson, ___ B.R. ___, 2022 WL 6795096 (Bankr. E.D. Wisc. Oct. 11, 2022), Judge Hanan.

Dismissal

Ineligibility for Chapter 13 does not prevent voluntary dismissal. A creditor had asserted that the debtor exceeded the debt limit for Chapter 13 relief, and the debtor sought to dismiss the case under § 1307(b), but the creditor responded that the debtor's ineligibility prevented voluntary dismissal. The Bankruptcy Appellate Panel found no eligibility restriction in the Code on a debtor's right to dismiss. In re Powell, 644 B.R. 181 (B.A.P. 9th Cir. 2022).

Conversion

***Harris* prevents payment of debtors' Chapter 13 attorney's fees after conversion to 7.** The Chapter 13 plan had not been confirmed prior to the debtors' conversion to

Chapter 7, and the attorneys representing the debtors in both phases of the case sought payment of Chapter 13 fees from funds held by the trustee at the time of conversion. The Court held that *Harris v. Viegelahn,* 575 U.S. 510 (2015), was controlling in its application of § 348(f). Absent a bad-faith conversion, the funds held by the Chapter 13 trustee do not become part of the Chapter 7 estate and must be returned to the debtors. The fact that the debtors' attorneys were seeking payment from the funds did not distinguish *Harris,* which had rejected an argument that § 1326(a)(2) authorized the Chapter 13 trustee to make payments after conversion. The Court held that *Harris* applied to every converted case, requiring trustees to return postpetition funds to the debtors without making administrative expense disbursements to Chapter 13 attorneys. In re Montilla, ___ B.R. ___, 2022 WL 12165276 (Bankr. N.D. Ill. October 12, 2022), Judge Hunt.

Attorney Fees

Chapter 13 debtor's attorney not entitled to retroactive approval of employment. Although there is no express requirement that a professional's retention be approved prior to rendering services, timely request for approval serves important functions, including evaluation of need for retention, conflicts of interest, control over administrative expenses and transparency. Under Third Circuit authority, retroactive retention requires showing of extraordinary circumstances, and none were shown here when the request was two years after representation began in personal injury action, and the attorney had notice of the client's bankruptcy filing. In re Young, ___ B.R. ___, 2022 WL 17730742 (Bankr. W.D. Pa. Nov. 15, 2022), Judge Taddonio.

CONSUMER LAW UPDATE

Selected Cases reported
July 1 to September 15, 2022

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Automatic Stay

Foreclosure sale violated stay as to debtor's possessory interest. The Chapter 7 debtor filed her petition four days before the foreclosure sale of her residence, which was owned by an LLC, of which the debtor held 99% interest. In the foreclosure suit, the LLC and debtor had been named as defendants. The lender received notice of the individual debtor's Chapter 7 filing but proceeded with sale, taking the position that the LLC was owner and that it had not filed bankruptcy. The Second Circuit adopted a "bright line rule: If the debtor is a named party in a proceeding or action, then the automatic stay imposed by [sections 362(a)(1) and 362(a)(2)] applies to the continuation of such proceeding or action." It was undisputed that the debtor held a possessory interest in the residence at time of her Chapter 7 filing, and that interest was part of her bankruptcy estate protected by the automatic stay. The lender willfully violated the stay by proceeding with foreclosure sale while knowing that a named defendant in the foreclosure action had filed bankruptcy. The lender should have sought stay relief. In re Fogarty, 39 F.4th 62 (2d Cir. 2022).

Stay not violated by state court action against former spouse's interest in property. The Chapter 13 debtor and her husband had divorced pre-bankruptcy, becoming tenants in common in former marital residence, and the terms of property settlement agreement had not been consummated to remove former husband from mortgage. The mortgage lender and its attorney did not violate stay in Chapter 13 by proceeding against former spouse's interest in the property. The lender and its attorney were not aware of the debtor's Chapter 13 filing, and demand against the former husband for payment of the mortgage was not an attempt to collect from the debtor or from the estate's interest in the property. There also was no violation of the discharge injunction, applying the *Taggart* standard. In re Busby, ___ B.R. ___, 2022 WL 3030971 (Bankr. E.D. Pa. Aug. 1, 2022), Judge Chan.

Absence of automatic stay when debtor did not have equitable or legal interest at filing. The Chapter 13 debtor did not own any legal or equitable interest under applicable Michigan law in the real property foreclosed by homeowners' association; therefore, there was no automatic stay in effect upon debtor's filing. The property was titled only in the debtor's husband's name, and debtor did not acquire interest in marital property because the parties had not filed divorce action that could create such interest. Debtor's

contributions to mortgage payments had not created constructive trust interest in the property. The opinion also notes that the debtor unreasonably withheld notice of her Chapter 13 filing from the homeowners' association, and the association would be prejudiced by imposing a stay, citing *Easley v. Pettibone Michigan Corp.,* 990 F.2d 905 (6th Cir. 1993). In re Wright, 642 B.R. 172 (Bankr. E.D. Mich. 2022), Judge Tucker.

Avoidance

In avoidance of judicial lien, debtor's lay opinion on value was allowed. The Chapter 7 debtor moved to avoid judicial lien impairing exemption, and the Court allowed the debtor's lay opinion. Under Fed. R. Evidence 701, a property owner may testify about value of her property, with the basis of the opinion affecting weight but not admissibility, when the opinion is based upon personal knowledge or experience. The debtor had personal knowledge of sale amounts for similar properties in neighborhood. In re Liss, 641 B.R. 384 (Bankr. N.D. Ill. 2022), Judge Cox. *Compare* In re Badolato*,* 641 B.R. 806 (Bankr. E.D. Pa. 2022), Judge Chan (Chapter 13 debtor was not qualified to give expert testimony about condition of foundation of property but could testify about existence of cracks.).

Fraudulent transfer between former spouses. The Chapter 7 debtor transferred three properties to his ex-wife, after he had consulted with bankruptcy attorney and was advised that the properties were at risk. The debtor told the ex-wife that he needed to put the properties in her name to protect them during the bankruptcy case, establishing evidence of direct intent under § 548(a)(1)(A). Avoidance and turnover were ordered, subject to the trustee obtaining relief from the automatic stay in the case now filed by the ex-wife. In re Taylor, ___B.R. ___, 2022 WL 3363683 (Bankr. W.D. Ark. Aug. 15, 2022), Judge Rucker.

Property of Estate and Exemptions

Increase in equity of residence was property of estate upon conversion from 13 to 7. The debtors' home increased in value during the Chapter 13 case, $200,000, and the Court concluded that upon conversion to Chapter 7, the equity increase above the claimed homestead was property of the Chapter 7 estate. Affirming, the Court construed

§ 348(f)(1)(A), holding that the residence was property of the estate upon Chapter 13 filing, and the increased equity was "proceeds, product, offspring, or profits" under § 541(a)(6). The increased equity in the prepetition asset was not a separate, after-acquired property interest, under the holding of *Wilson v. Rigby,* 909 F.3d 306 (9th Cir. 2018). In re Castleman, 2022 WL 2392058 (W.D. Wash. July 1, 2022), appeal filed to 9th Cir. Aug. 2, 2022.

Trustee's futile attempt to reach retirement funds covered by § 541(c)(2). The Chapter 7 debtor had significant retirement funds in 401(a) and 401(k) accounts, and the trustee's adversary proceeding argued that the funds were not excluded from the bankruptcy estate under § 541(c)(2) or were not exempt under § 522. The Court discussed the controlling authority on exclusion of retirement funds, holding that it did not need to reach the exemption issues because the funds were excluded from the bankruptcy estate under § 541(c)(2). Citing *Law v. Siegel,* the Court observed that any changes in § 541(c)(2) must be made by Congress, not by the Courts. In re Gilbert, ___ B.R. ___, 2022 WL 3637569 (Bankr. D. N.J. Aug. 23, 2022), Judge Ferguson.

Proceeds from prepetition sale of residence did not qualify for § 522(d)(1) exemption. The debtor claimed homestead exemption under § 522(d)(1) in proceeds from the prepetition sale of her residence, but those proceeds did not satisfy the statute's residence-use requirement. Affirming, the attempted exemption runs afoul of *Law v. Siegel,* and Congress had provided through § 522(d)(5) an exemption in any property to the extent the debtor did not use the exemption provided in § 522(d)(1). In re Richards, ___ B.R. ___, 2022 WL 3654827 (B.A.P. 6th Cir. Aug. 25, 2022).

Discharge Issues

Attorney's debt owed to client and to State Bar's Client Security Fund was dischargeable under § 523(a)(7). On direct appeal, the Ninth Circuit held that a disbarred attorney's obligation to pay clients either directly or to the California Bar's Client Security Fund was not excepted from discharge under § 523(a)(7). That section requires the debt be for a fine, penalty or forfeiture; be payable to and for the benefit of a governmental unit; and not constitute compensation for actual pecuniary costs, and the Client Security Fund's purpose was to mitigate pecuniary loss by clients of dishonest

attorneys, giving the Fund "hallmarks of a secondary, public insurance program overseen by an administrative agency." Once the Fund has made payment to a client victim, the attorney's obligation is to reimburse the Fund. The opinion notes that the disciplinary costs were excepted from discharge under § 523(a)(7), citing *In re Findley,* 593 F.3d 1048 (9th Cir. 2010). Kassas v. State Bar of California, 42 F.4th 1123 (9th Cir. 2022).

Income and potential increase in earning prevented student loan discharge. Affirming, the Bankruptcy Appellate Panel found no error in the Bankruptcy Court's determination that the pro se Chapter 7 debtor's current income level and potential for increased income did not demonstrate undue hardship. Also, the debtor's eligibility to participate in income-based repayment program weighed against determination of undue hardship. In re Parvizi, 641 B.R. 729 (B.A.P. 1st Cir. 2022).

Temporary restraining order against further collection of discharged student loan debts. In a sequel to the Second Circuit's decision in *Homaidan v. Sallie Mae, Inc.,* 3 F.4th 595 (2d Cir. 2021), that private loans did not fall within § 523(a)(8)(A)(ii)'s exception from discharge, because those loans were not "an obligation to repay funds as an educational benefit," the former Chapter 7 debtor sought injunctive relief on behalf of a class of debtors who had received discharge but were subject to continuing collection of private loans like those addressed in the Second Circuit decision. In an extensive discussion, the Bankruptcy Court concluded that it had jurisdiction and authority to issue injunctive relief on behalf of a nationwide putative class. The opinion discusses the views on whether a Bankruptcy Court may enforce the § 524(a) discharge injunction for debtors in other judicial districts, concluding that it may do so. Navient was enjoined from taking any collection action on "Tuition Answer Loans held by the Plaintiffs and the Putative Class Members…that exceed the cost of attendance as defined by Internal Revenue Code § 221(d), and that have an outstanding balance subject to collection." In re Homaidan, 640 B.R. 810 (Bankr. E.D. N.Y. 2022), Judge Stong.

Chapter 7 Issues

Bifurcated Chapter 7 Fees

Examination of bifurcated fees, financing and settlement with U.S. Trustee. In an extensive examination of issues underlying "nontraditional methods" of attorney payment

for Chapter 7 cases, the Court considered whether to approve settlement between debtors' attorneys, the U.S. Trustee and intervening interested parties. The opinion discusses financing and bifurcated fee structures, unbundled legal services, requirements for full disclosure, the district's requirement for execution of a Rights and Responsibilities Agreement between attorneys and bankruptcy clients, as well as factors for consideration in evaluating whether to approve a settlement that would provide guidance to attorneys before entering into "nontraditional methods to get paid." The proposed settlement included disgorgement and self-reporting to disciplinary authorities, as well as other admissions and representations going forward. In re Rosema, 641 B.R. 896 (Bankr. W.D. Mo. 2022), Judge Norton.

Dismissal

Upon dismissal of Chapter 7 case for cause, pending adversary proceeding also dismissed. Finding cause on creditor's motion to dismiss the Chapter 7 case, the Court also dismissed the creditor's pending dischargeability adversary proceeding. Section 349 permits the Court to find cause to retain a pending proceeding, but dismissal of the case eliminates the creditor's standing to seek § 523(a) determinations because case dismissal meant that the debt was not discharged. In re Le Fande, 641 B.R. 430 (Bankr. S.D. Fla. 2022), Judge Russin.

Chapter 13 Issues

Eligibility

Filing on behalf of deceased person to delay foreclosure was for improper purpose, with debtor's attorney properly sanctioned. Two chapter 13 cases were filed for a deceased person at request of that person's daughter/administratrix, with three more cases filed by the daughter pro se, and the Chapter 13 trustee moved to dismiss the cases and for sanctions against the pro se daughter. The Court then noticed the attorney who filed the first two cases for show cause why he was not subject to sanctions. Affirming the attorney's sanction under Rule 9011, the Sixth Circuit noted that only individuals were eligible for Chapter 13 relief, and a probate estate was not eligible under § 109(e). Under Rule 9011, an objective standard is applied in evaluating whether to

sanction, and the bankruptcy court was not required to find that the attorney acted in bad faith; rather, it was appropriate to find that the attorney's conduct in filing Chapter 13 on behalf of a deceased person was unreasonable. The Circuit opinion comments that filing petitions on behalf of the deceased person were for the sole purpose of delaying foreclosure proceedings, which was an "improper purpose." The attorney admitted that he did not conduct a pre-filing reasonable inquiry into whether the deceased person's estate was eligible. The sanctions against the attorney were appropriate under Rule 9011. In re Bagsby, 40 F.4th 740 (6th Cir. 2022).

Filling second case while first case pending violated "single estate rule." The debtor filed a second Chapter 13 while a case was still pending, and then moved to extend the automatic stay in the second case, but § 362(c)(3) did not apply to terminate stay in second case because the first case had not been dismissed. Generally, filing second case while prior case is still pending violates "single estate rule," because two cases involving same debtor cannot be open simultaneously if they involve same property of estate. Debtor was given notice to show cause why the second case should not be dismissed. In re Giles, 641 B.R. 255 (Bankr. S.D. Fla. 2022), Judge Russin.

Venue incorrect and case dismissed. Noting that the debtor and her husband had filed thirteen bankruptcy cases in seven districts, the debtor in current case failed to show venue was proper in Connecticut. Because the case was filed in the wrong venue and in bad faith, it was dismissed, and any future cases filed by these parties in this district would be met with show cause why they should not be dismissed with twenty-four month bar. In re Emiabata, ___ B.R. ___, 2022 WL 2914361 (Bankr. D. Conn. July 22, 2022), Judge Nevins.

Confirmation

Claimant had sufficient due process notice of case. Former attorney for debtor in divorce proceedings alleged that his claim for attorney fees was domestic support obligation and that he had not received notice of the plan; however, the attorney received actual notice of the bankruptcy case in time to permit inquiry into what plan provided. The motion to amend judgment confirming plan was denied as improper attempt to revoke confirmation, with revocation requiring adversary proceeding. Attorney failed to establish

that he had a domestic support claim against the debtor for fees in the prior divorce. In re Collins, 641 B.R. 296 (Bankr. M.D. Ga. 2022), Judge Laney.

Curing Defaults

After seller had judgment for possession, home not property of estate and default could not be cured. The debtor had purchased home by installment contract, and seller had obtained prepetition judgment for possession. Noting that "§ 1322 does not fit installment contracts well," there is never a foreclosure upon default and title stays with the seller until full payment of the contract. "For installment contracts, the best analogue to a foreclosure sale is a judgment for possession—and that moment passed for [the debtor] before he filed for bankruptcy, even though he stayed in the house." Although the Bankruptcy Code does not define "foreclosure sale" for purposes of § 1322(c)(1), the Circuit had adopted the gavel rule to decide when property is sold at foreclosure. For an installment sale under Pennsylvania law, default removes the buyer's equitable title when a judgment for possession is entered against the homeowner. The opinion notes that the buyer could have cured default in Chapter 13 if the case had been filed before entry of the judgment for possession. In re Peralta, ___ F.4th ___, 2022 WL 4090304 (3d Cir. Sept. 7, 2022).

Plan Modification

Modification of plan untimely under Rule 60(b). The confirmed plan provided for the State of Wisconsin Department of Children and Families to be treated as priority domestic support creditor under § 507(a)(1)(B). The plan was confirmed in February 2019, but subsequently the Seventh Circuit held in *In re Dennis,* 927 F.3d 1015 (7th Cir. 2019), that excess public-assistance payments were not subject to priority status under § 507(a)(1)(B). As a result of *Dennis*, the potential was for the State's claim to be treated as unsecured non-priority, with reduction in plan term and total payments. The debtors did not seek to modify their plan to take advantage of *Dennis* until December 2020, and the Circuit held that under *Kemp v. United States,* 142 S.Ct. 1856 (2022), Rule 60(b)(1) governs "all kinds of mistakes," legal and factual, or a mixture of them. Rule 60(c) sets a one-year time limit on relief under Rule 60(b)(1). "The Terrells could have sought timely

relief [to modify their confirmed plan] under Rule 60(b)(1)—when *Dennis* was decided, that year had more than seven months left to go—but they did not. They took almost two years from the plan's confirmation." Attempted modification was too late under that Rule. Matter of Terrell, 39 F.4th 488 (7th Cir. 2022).

Sale of Property

Short sale was not sale free and clear of liens. Interpreting prior judge's order that had authorized the Chapter 13 debtor's sale of real property for less that the total liens on the property, that order had provided for closing upon approval of lienholders. One lienholder agreed to the short sale but the second lienholder did not. The order for sale was not the equivalent of approval of a sale free and clear of liens, and the original motion did not seek approval of a sale under § 363(f). Although the debtors had closed on a sale and the first lienholder was paid what it agreed to accept, the second lien was never released. The District Court affirmed the Bankruptcy Court's determination that the order for short sale of the property was not an order authorizing sale free and clear of all liens, and modifying that order would be impermissible substantive correction of the order, which was not an order with consent of the second lienholder. In re Munn, ___ B.R. ___, 2022 WL 2790714 (N.D. Tex. July 15, 2022). See also In re Stark, ___ B.R. ___, 2022 WL 2316176 (E.D. N.Y. June 28, 2022) (Carve-out sales by Chapter 7 trustee, in which property with no equity value is sold under agreement with lienholders to provide bankruptcy estate some value, are disfavored but not necessarily impermissible, but the District Court held that such sales could not be approved without some payment for the debtor's claimed homestead exemption. The value of the property included the debtor's homestead property right; therefore, the carve-out sale with consent of the lienholders was subject to the debtor's claimed homestead.).

Chapter 13 Attorney Fees

No-look fee was not supported by actual and necessary work, with reduced fee allowed. In an examination of whether the Chapter 13 attorney's actual work justified allowance of $4,350 no-look fee in the district, the Bankruptcy Court evaluated the circumstances in the particular case to determine that a small reduction in the no-look fee

was required. The opinion examines no-look fee structures and amounts in several other judicial districts, concluding that a no-look fee cannot automatically be assumed allowable; rather, the facts and circumstances of a case must be considered. The fee in a particular case must be "reasonable and tied to actual and necessary work for the benefit of the estate or the debtor." The opinion reviews authority in the Sixth Circuit on the lodestar method, with a major factor being the rate charged by comparable attorneys in the area. The attorney in this case maintained time records, and the Court found that the case "presented fewer complexities and required less work than many Chapter 13 cases. The evidence did not support an award of the maximum no-look fee." The opinion alerts attorneys that they should "assess each case on its own to determine whether the maximum flat fee of $4,350 or a different fee within that allowed range is appropriate." In re Spurlock, ___ B.R. ___, 2022 WL 3041256 (Bankr. S.D. Ohio Aug. 1, 2022), Judge Humphrey. Also, for reduction of debtor's attorney fees, see In re Metts, ___ B.R. ___, 2022 WL 3648420 (Bankr. D. S.C. June 30, 2022), Judge Burris. In *Metts*, the debtor's attorney was inexperienced in bankruptcy, and time spent on tasks were excessive, with inadequate billing records.

Creditor's motion to disgorge debtor's attorney fees denied. A judgment creditor moved to require disgorgement of debtor's attorney fees and for sanctions related to the filing of two Chapter 13 cases, but the District Court affirmed denial of that motion, holding that the statutory predicate for disgorgement is § 329(b)'s evaluation of whether the fee exceeded reasonable value of the legal services. The Bankruptcy Court was familiar with the facts and circumstances underlying the two bankruptcy filings, and that Court had noted that the fee was within the presumptively reasonable fee in the district and that the debtor's attorney had not received full payment for the second case. In re Lang, 642 B.R. 76 (M.D. Fla. 2022).

Dismissal

Payment of creditors ordered for cause upon case dismissal. After winning lottery during Chapter 13 case, debtor agreed to payment of creditors' claims and to dismissal of case. Debtor subsequently moved to compel trustee to recover and return funds paid to creditors, but Court found cause under § 349(b) for the distribution to creditors. The

trustee made those payments in compliance with the debtor's consent and with the terms of Court's order for payment. In re Mammay, 641 B.R. 569 (Bankr. W.D. Pa. 2022), Judge Deller.

Material default not defined in Code. The trustee had moved to dismiss the Chapter 13 case for material defaults, and the motion had been granted for debtor's failure to comply with confirmed plan's requirement to provide tax returns to trustee. The debtor's motion for reconsideration was denied, with the Court noting that "material" was not defined in § 1307(c)(6), and nothing in that section required the "default to have a financial impact in order to constitute a 'material default.'" The Court had discretion to determine what constitutes a material default. In re Lee, 2022 WL 4085882 (Bankr. E.D. Mich. Sept. 6, 2022), Judge Gretchko.

Claims

Amendment of claim post-confirmation allowed. Because the Bankruptcy Court provided compelling reasons, the secured vehicle creditor was allowed to amend its proof of claim post-confirmation to add attorney fees. The Chapter 13 was filed shortly after the debtor purchased the vehicle, and the confirmed plan provided for full payment with interest, stating an estimated amount of the claim. Citing *Holstein v. Brill,* 987 F.2d 1268 (7th Cir. 1993), the relation-back principle of Rule 15(c) applies to amended claims. Here, debtor's counsel knew about the creditor's fees prior to confirmation, and the creditor's fees accumulated because of required responses to the debtor's pleadings. In re Laney, 46 F.4th ___, 2022 WL 3500194 (7th Cir. Aug. 18, 2022).

Rule 3002.1 did not apply to bifurcated claim for manufactured home. The Chapter 13 debtor's plan proposed to bifurcate the claim related to manufactured home, and the creditor's objection was resolved by consent. Subsequent to confirmation, the creditor filed notice of postpetition mortgage fees and expenses, pursuant to Rule 3002.1, and the debtor disputed the amounts. The Court held that the Rule only applied to plans under which "contractual installment payments" are made either by the trustee or debtor, and the bifurcation of the debt into secured and unsecured portions under § 506(a) took the secured portion out of that definition. The confirmed plan provided for the secured amount, with interest and monthly terms, replacing the former contractual installments.

Upon plan completion, the creditor could not collect more than the confirmed amount, and compliance with Rule 3002.1 was not required. In re White, 641 B.R. 717 (Bankr. S.D. Ga. 2022), Judge Coleman.

Municipality's claims for water, sewer and other municipal services were not entitled to priority. Discussing the distinctions between taxes and other fees for municipal services, for purposes of priority treatment under § 507(a)(8)(B), the Court concluded that the City failed to prove that its charges added to the property tax bill for storm water, water and sewer were functionally tax in nature. The City had the burden of proof on priority status. In re Peete, ___ B.R. ___, 2022 WL 2387652 (Bankr. E.D. Wisc. June 30, 2022), Judge Hanan.

CONSUMER LAW UPDATE

Selected Cases reported
April 1 to June 30, 2022

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Legislation

Increase in Chapter 13 debt eligibility. The Bankruptcy Threshold Adjustment and Technical Corrections Act became law with the President's signature on June 21, 2022, immediately increasing the Chapter 13 debt eligibility limit to $2,750,000, and eliminating the distinction between secured and unsecured debt. The Act amends section 109(e) to provide:

> (e) Only an individual with regular income that owes, on the date of the filing of the petition, noncontingent, liquidated debts of less than $2,750,000 or an individual with regular income and such individual's spouse, except a stockbroker or a commodity broker, that owe, on the date of the filing of the petition, noncontingent, liquidated debts that aggregate less than $2,750,000 may be a debtor under chapter 13 of this title.

The Act includes a two-year sunset from the date of enactment, restoring the pre-June 21 version of section 109(e), unless Congress subsequently extended or modified the sunset provision.

Automatic Stay

Damages for stay violation against Indian tribe and waiver of sovereign immunity. The First Circuit held on direct appeal that § 106 unequivocally abrogates tribal sovereign immunity, even though the Code section does not mention Indian tribes. The Code's reference to "governmental unit" was sufficient to include tribes within the definition found in § 101(27). The stay violation occurred in a Chapter 13 case, with the debtor having obtained a payday loan from a wholly owned subsidiary of the defendant Band of Lake Superior Chippewa Indians. In re Coughlin, 33 F.4th 600 (1st Cir. 2022).

Section 362(c)(3)(A) stay terminates only as to debtor. The Chapter 13 debtor had one prior case dismissed within the year of commencement of current case, and the Court reviewed case and other authority on the extent to which the automatic stay terminated on the 30th day in the current case. Under the Bankruptcy Code, there can be various property that never becomes property of the estate but remains property of the debtor, and section 362(c)(3)(A) provides for termination of the stay "with respect to the debtor," but does not provide for stay termination as to property of the bankruptcy estate. In re Madsen, ___ B.R. ___, 2022 WL 1272583 (Bankr. E.D. Cal. Apr. 27, 2022), Judge Sargis.

No stay under § 362(c)(4). The debtor was a repeat filer engaged in attempts to prevent foreclosure of property located in Texas, and under § 362(c)(4)(A), no automatic stay went into effect upon this Chapter 13 filing in New York. Based on a finding of the debtor's bad faith, any stay would be annulled nunc pro tunc to the date of filing. In re Thomas, ___ B.R. ___, 2022 WL 1272145 (Bankr. S.D. N.Y. Apr. 28, 2022), Judge Morris.

Avoidance

City of Chicago's lien for unpaid parking tickets was avoidable judicial lien. The City of Chicago had possessory lien on vehicle impounded because of unpaid tickets, and the issue before the Circuit was whether that lien was statutory or judicial in nature. The City's Municipal Code provided for the lien, but the Circuit held that the lien did not arise "solely by force of a statute," as defined in § 101(53). "Classification of a lien depends on the events, if any, that must occur before the lien attaches," and the Circuit found that "quasi-judicial proceedings [were] needed for the City to obtain an impoundment lien." The opinion describes the full process under the City's Code, and "without the judicial or quasi-judicial procedures needed for final determinations of each traffic violation and without the quasi-judicial impoundment procedures, the City could not impose a lien on the indebted driver's vehicle. While the lien is authorized by and defined by statute, the City's possessory lien does not arise 'solely' by statute." For purposes of bankruptcy, the lien was judicial. Matter of Mance, 31 F.4th 1014 (7th Cir. 2022).

Tax lien sale did not provide reasonably equivalent value and debtors had standing to avoid sale. The Second Circuit first held that § 522(c)(2)(B) did not deprive the Chapter 13 debtors of standing to pursue avoidance of the County's tax sale. That section provides that allowance of homestead does not eliminate the tax lien obligation, and the debtors were not seeking to avoid payment of the tax lien. Rather, they were seeking to avoid the sale of their home, while paying the tax lien through the Chapter 13 plan. Distinguishing *BFP v. Resolution Trust Corp.,* 511 U.S. 531 (1994), the Circuit noted that *BFP* only addressed mortgage foreclosure of real estate, and a tax lien sale offered fewer debtor protections than did a mortgage foreclosure. This tax lien sale did not lead to a presumption of reasonably equivalent value under § 548 for a transfer of the debtors'

property. Gunsalus v. County of Ontario, N.Y., ___ F.4th ___, 2022 WL 2296945 (2d Cir. June 27, 2022).

Property of Estate and Exemptions

Debtors judicially and equitably estopped to amend exemptions. Nine years after Chapter 7 debtors received discharge, following California Court of Appeal decision holding that only the Chapter 7 trustee had standing to prosecute action against the mortgage lender, the Chapter 7 case was reopened, and trustee moved to approve compromise and sale of the home. The debtors then moved to amend exemption, and the Court recognized that Rule 1009(a) allowed amendment after case was reopened, but under California law equitable estoppel could be basis for objection to the amended exemption claim, citing *In re Guevarra*, 638 B.R. 120 (B.A.P. 9th Cir. 2022), for five elements of equitable estoppel. The Court sustained the trustee's objection to amended exemption based on equitable and judicial estoppel. In e Stoller, ___ B.R. ___, 2022 WL 1567253 (Bankr. C.D. Cal. May 18, 2022), Judge Tighe.

Abandonment not required for undisclosed real property. The Chapter 13 case had been closed almost twenty years, and the debtor had not scheduled real property (an empty parcel adjacent to a residence that was disclosed), in which she held an interest with her sister. The sister was now deceased, and the former debtor moved to reopen the case and for abandonment so that title could be cleared on the property. The Court could not assume inconsequential value for the unscheduled real property nor was there a basis to order abandonment under § 554(b). The possible resolutions included allowing the current Chapter 13 trustee to administer the asset or the debtor converting to Chapter 7 and allowing that trustee to administer the asset. In re Dinio, ___ B.R. ___, 2022 WL 1549404 (Bankr. W.D. N.Y. May 4, 2022), Judge Bucki.

Chapter 7 Issues

Attorneys

Bifurcated fees disapproved by Bankruptcy Courts. In the First Quarter summary of cases, the District Court had found bifurcated fee agreements did not violate the local bankruptcy rule about continued representation of an attorney. In re Prophet, et al., 2022

WL 766390 (D. S.C. March 14, 2022). The Bankruptcy Court in Colorado took a different direction, first examining the reasonableness of bifurcated fees charged by attorneys for Chapter 7 debtors and then finding the pre-petition and post-petition fee agreements before the Court "both contain misrepresentations and are misleading since, among other things, they did not accurately disclose counsel's obligations under the Bankruptcy Code and Local Rules. Thus, the Pre-petition Agreement and the Post-Petition Agreement are void under Section 526." In re Suazo, 2022 WL 1468083, at *1 (Bankr. D. Colo. 2022). The attorneys had financing and payment management services for their consumer practice through Fresh Start Funding, LLC. The pre-petition agreement "contemplates only an admittedly deficient 'bare-bones' or 'skeletal' submission containing the minimum necessary to start a bankruptcy case," and the Court found that part of the agreement "misleading because it omits explanation of all the numerous additional filings which are required to be made pursuant to Section 521(a)(1)(B) and Fed. R. Bankr. P. 1007(b) and (c) within 14 days after the Petition Date." *Id.,* at * 16.

The Pre-petition Agreement was also defective because it did not offer an option for debtors to continue representation by the attorneys without regard to whether the debtors entered into a post-petition fee contract. The Post-petition Agreement was also defective because it failed to explain that the attorneys had a legal obligation under Code section 526 and Local Bankruptcy Rule 9010-1(c) "to file all documents required by Section 521(a)(1)(B) and Fed. R. Bankr. P. 1007(b) and (c) and perform all the Basic Services." *Id.,* at * 18. In addition, the fee agreements in *Suazo* provided that the attorney would advance the case filing fee, which violated Code section 526(a)(4). *Id.,* citing In re Brown, 631 B.R. 77, 102-03 (Bankr. S.D. Fla. 2021).

Finding the proposed bifurcated fee agreements to be void, all payments made by the debtors must be refunded. The *Suazo* Court declined to decide "whether bifurcated fees agreements are *per se* prohibited in every case and makes no such determination. And, the Court will not endorse a new framework for what types of bifurcated fee agreements might be good policy. That would seem best left to the Legislative Branch." In re Suazo, 2022 WL 1468083, at * 21. The Court only decided that the bifurcated fee agreements before it were void, in violation of the Bankruptcy Code and Local Rules.

The Bankruptcy Court in Minnesota, *In re Siegle,* 2022 WL 1589381 (Bankr. D. Minn. 2022), also disapproved attempts at bifurcation of fees. Under the bifurcated structure, the parties entered into two fee agreements, with the Court finding the agreements violated sections 526(a)(2) – (3) because they contained "untrue and misleading [statements about the attorney's services terminating at filing under the pre-petition agreement,] and they affirmatively misrepresent well-settled law about withdrawal and the scope of services in bankruptcy cases." In re Siegle, 2022 WL 1589381, at * 3. The Court also found misrepresentation in the agreements by omission of the services required by the attorney. The agreements also violated section 528(a)(1), "which requires that the explanation of services be stated 'clearly and conspicuously.'" *Id.,* at * 4. Under § 526(c)(1) agreements were void and unenforceable.

United States Trustee Guidelines for Enforcement Related to Bifurcated Chapter 7 Fee Agreements. On June 10, 2022, the Acting Director of the Executive Office for United States Trustee announced Guidelines for Enforcement Related to Bifurcated Chapter 7 Fee Agreements. The Guidelines acknowledge that final determination of whether such agreements are in compliance with the Bankruptcy Code and Rules is a matter for each Court.

Discharge

Late-filed tax return was honest and reasonable attempt under § 523(a)(1)(B). Under the circumstances, the debtors' late-filed federal income tax return satisfied the four-prong test of *Smith v. United States,* 828 F.3d 1094 (9th Cir. 2016): the return "(1) purports to be a return, (2) is executed under penalty of perjury, (3) contains sufficient data to calculate the tax and (4) is an honest and reasonable attempt to satisfy the law." The return provided accurate information, reducing the debtors' assessed tax obligation, with tax obligations discharged in the Chapter 13 case after plan completion. In re Golden, ___ B.R. ___, 2022 WL 1272570 (Bankr. E.D. Cal. Apr. 27, 2022), Judge Sargis.

Marriage-related debts under §§ 523(a)(2), (4), (6), (5) and (15). In an analysis of whether some debts to the former spouse were nondischargeable on the basis of fraud, defalcation, larceny or willful and malicious injury, after five-day trial, the Court did not find

evidence to support those complaints, but some of the obligations were domestic support in nature, nondischargeable under § 523(a)(5), and others were debts incurred in the course of divorce, making them nondischargeable under § 523(a)(15) in the Chapter 7 case. In re Michelena, ___ B.R. ___, 2022 WL 1815205 (Bankr. S.D. Tex. June 2, 2022), J. Rodriguez.

Arbitration award confirmed by state-court judgment was for willful and malicious injury. Arbitration award for tortious interference with prospective economic advantage was confirmed by state court, and under Illinois law such an award required a showing of intentional and unjustifiable interference, satisfying § 523(a)(6). The state court shall clarify the amount of its judgment applied to the tortious interference claim. In re Ferro, ___ B.R. ___, 2022 WL 1008280 (Bankr. N.D. Ill. Apr. 4, 2022), Judge Cassling. See also In re Sage, ___ B.R. ___, 2022 WL 2155936 (Bankr. E.D. Pa. June 15, 2022), Judge Mayer. (Failure to restrain dangerous dog was wrongful act substantially certain to cause injury, with state court criminal judgment nondischargeable under § 523(a)(6). Judgment was not covered under § 523(a)(7) because payable to individual and not to governmental unit, and debt was for actual pecuniary loss.).

Postpetition consolidated student loan was not subject to discharge. After filing Chapter 7 and eight years after receiving discharge, the debtor moved to reopen and seek discharge of student loan for undue hardship. However, the debtor had entered into a new consolidation loan after filing the Chapter 7 case, which loan had extended new funds and paid off prior loans in full. The consolidated postpetition loan was not subject to discharge, citing *Hiatt v. Indiana State Student Assistance Comm'n,* 36 F.3d 21 (7th Cir. 1994). In re Tolbert, 2022 WL 2125970 (Bankr. N.D. Ill. June 13, 2022), Judge Hunt.

Debtor's failure to keep and preserve records justified denial of discharge under § 727(a)(3). Reviewing the requirements under § 727(a)(3), the debtor failed to keep and preserve adequate records, and that failure was not justified under the circumstances. The debtor had extensive business experience with rental properties, but failed to maintain records of rental income and expenses. In re Shove, 638 B.R. 1 (B.A.P. 1st Cir. 2022).

Denial of discharge under § 727(a)(5). The debtor had been a career banker with significant financial experience but failed to explain loss of assets. Under the burden-

shifting approach to § 727(a)(5), the United States Trustee identified assets that the debtor owned at one time, with burden shifting to debtor to satisfactorily explain loss of those assets. The Sixth Circuit found no error in the bankruptcy court looking back at transactions five years prior to the bankruptcy filing, with § 727(a)(5) containing no specific look-back period. In re McDonald, 29 F.4th 817 (6th Cir. 2022).

Discharge Injunction

Violation of discharge injunction leads to attorney fees for appeal. The Bankruptcy Court has authority to award attorney fees to the debtor for appellate work related to the contempt order for violation of the discharge injunction. The contempt sanction against the mortgage servicer was for attempting to collect the discharged debt, and the servicer appealed to the District Court. The Bankruptcy Court had denied the debtor's attorney's fees for the appellate work, but the Second Circuit concluded that the authority to impose contempt sanctions "includes the authority to award damages and attorneys' fees. This authority carries with it the ability to award appellate attorneys' fees." In re Bi Battista, 33 F.4th 698 (2d Cir. 2022).

Discharge injunction violation and class certification. Following the Second Circuit's decision that enforcement of the discharge injunction was not subject to arbitration, *Anderson v. Credit One Bank, N.A.,* 884 F.3d 382 (2d Cir. 2018), *cert. denied,* 139 S.Ct. 144 (2018), discovery and litigation continued in the Bankruptcy Court. Finding "repeated, lengthy, and willful discovery failure, including its submission of false affidavits and repeated misrepresentations to the Court," the Bankruptcy Court granted sanctions under Rule 7037. The Court also granted in part the plaintiff's motion for class certification by certifying an opt-out class of individuals for whom the defendant did not correctly report discharged debt as discharged rather than charged off. Anderson v. Credit One Bank, N.A., 2022 WL 1926608 (Bankr. S.D. N.Y. June 3, 2021), Judge Drain.

Dismissal

Dismissal under § 707(b)(3). In a case converted from Chapter 11 to 7, involving high income individuals, the Court found cause under totality of circumstances to dismiss the case on creditor's motion for abuse under § 707(b)(3). In looking at the debtors' expenses

for purposes of § 707(b)(2), there were two approaches—"snapshot" and forward-looking, with the Court following snapshot approach and not finding presumption of abuse for that Code section. However, under § 707(b)(3)'s totality of circumstances analysis, the Court found "failure to comport their lifestyle to their financial situation, their suspicious house purchase while considering bankruptcy, and their lack of consideration for creditors" justified dismissal for abuse. In re Lee, ___ B.R. ___, 2022 WL 1499522 (Bankr. M.D. Ga. May 11, 2022), Judge Laney.

Chapter 13 issues

Supreme Court denied certiorari on Second Circuit's interpretation of Rule 3002.1
The Second Circuit Court of Appeals had vacated a bankruptcy court's contempt and sanctions ruling, concluding that, even if PHH Mortgage Corp. improperly disclosed mortgage-related fees, such a violation of Rule 3002.1 could not "form the basis for contempt," in light of *Taggart v. Lorenzen*, 139 S. Ct. 1795 (2019), because "there is fair ground of doubt" as to whether its conduct was expressly barred. The majority panel went on to hold that Rule 3002.1 does not authorize an award of punitive sanctions. PHH Mortgage Corp. v. Sensenich (In re Gravel), 6 F.4th 503 (2d Cir. 2021), *cert. denied*, 2022 WL 2111447 (June 13, 2022).

Eligibility

Increase in Chapter 13 debt eligibility. The Bankruptcy Threshold Adjustment and Technical Corrections Act became law with the President's signature on June 21, 2022, immediately increasing the Chapter 13 debt eligibility limit to $2,750,000, and eliminating the distinction between secured and unsecured debt. The Act amends section 109(e) to provide:

> (e) Only an individual with regular income that owes, on the date of the filing of the petition, noncontingent, liquidated debts of less than $2,750,000 or an individual with regular income and such individual's spouse, except a stockbroker or a commodity broker, that owe, on the date of the filing of the petition, noncontingent, liquidated debts that aggregate less than $2,750,000 may be a debtor under chapter 13 of this title.

The Act includes a two-year sunset from the date of enactment, restoring the pre-June 21 version of section 109(e), unless Congress subsequently extended or modified the sunset provision.

Eligibility based on amount of debt at petition date. Although the debtors' amount of scheduled debt exceeded the § 109(e) limit, they contended that eligibility should be determined based on the amount of filed proofs of claim less potential disallowance of some claims. The Court disagreed, holding that eligibility is "based on debts as of the petition date not on how many creditors chose to file a claim to participate in distribution." Here, the scheduled noncontingent, liquidated, unsecured debts exceeded the statutory cap of $419,275, and potential disallowance of some claims does not change the amount of debt owed on the petition date. The debtors were ineligible. The opinion notes in footnote 7 enactment of the Bankruptcy Threshold Adjustment and Technical Corrections Act on June 21, but that Act was not in effect when this case was filed, and the Act was not retroactive. In re Knott, 2022 WL 2293994 (Bankr. W.D. Va. June 24, 2022), Judge Connelly.

Confirmation

Sale plans. In two cases debtors proposed plans that would sell principal residences during the terms of the plans, and secured creditors objected, resulting in the Court analyzing various issues involved in sale plans. Neither plan indicated current sale prospects, instead proposing future sales during the 60-month plan, with amounts required to cure prepetition arrearages to be paid in full though the future sales. Although the plans provided for secured creditors to retain their liens, the creditors contended that balloon payments did not satisfy § 1325(a)(5)(B) requirements. The Court examined how that section's "equal monthly payments" requirement applied to these prospective sale plans. "If a debtor is providing for payment of a long-term home mortgage loan in a plan, the Code would appear to require a debtor to comply with § 1325(a)(5)(B)(iii) where that plan proposed to maintain monthly contractual payments (or make other periodic payments) and to cure arrearages during the life of the plan." The Court examined the majority and minority interpretations of whether balloon payments are prohibited by § 1325(a)(5)(B)(iii)(I), concluding "that the equal payment provision…is best read to prohibit

confirmation of a sale plan, over the objection of a secured creditor holding a mortgage of a principal residence that contemplates periodic payments followed by a lump-sum payment." Section 1322(b)(2)'s anti-modification provision prohibits delay and uncertainty that would result from sale plans that have no definite sale date for the curing of defaults. However, non-consensual sale plans may be confirmable if they provide "for a secured claim to be paid in full through a sale that is in prospect at the time of or at a reasonable time after confirmation, with or without payments prior to the sale, subject to all other confirmation requirements such as feasibility and good faith." Feasibility would include such factors as identification of the sale terms, timeline for sale, marketing efforts, and default remedy, as well as whether the debtor will be able to make payments contemplated under the plan. In re Materne, ___ B.R. ___, 2022 WL 1102452 (Bankr. D. Mass. Apr. 7, 2022), Judge Panos.

Contempt for violation of confirmed plan. Finding that TitleMax was in violation of the confirmed plan, which provided for satisfaction of TitleMax's lien and release of the lien upon entry of discharge, TitleMax was in civil contempt for failure to comply with confirmed plan. The lien was ordered satisfied, with the title returned to the debtor and with attorney fees awarded to debtor's counsel. In re Seaver, ___ B.R. ___, 2022 WL 2068271 (Bankr. D. S.C. May 13, 2022).

Inheritance is exempt, is not disposable income, but excess over exemption comes into plan under best interests of creditors test. The Debtor Wife claimed wildcard exemption in an inheritance, and trustee objected to confirmation contending inheritance was disposable income. The Court concluded that the inheritance was exempt up to the allowable amount. The issue then became whether any portion of the inheritance was disposable income, with the debtors below-median and with disposable income defined in § 1325(b)(2)(A)(i). The opinion discusses the split of judicial view on whether an exempt asset is included as disposable income, with the Fourth and Eleventh Circuits holding that "an exempt asset is not part of the disposable income calculation." This Court concluded that the inheritance was not disposable income "because it is not income or revenue that Debtor Wife will receive 'on a regular basis;'" however, the "value of the inheritance is implicated, if at all, by the 'best interests of creditors' or 'ability to pay' test found in § 1325(a)(4)." To the extent the Debtor received a sum from the inheritance in

excess of the amount allowed as exempt under § 522(b)(5), it must be remitted to the trustee for distribution to creditors. In re McGuire, 2022 WL _____, Case No. 20-61183-6-DD (Bankr. N.D. N.Y. June 24, 2022), Judge Davis.

Plan Modification

Maximum plan term returned to five years. Noting that the portion of § 1329(d) that could permit extension of plans to seven years had sunset, effective March 27, 2022, the maximum term for a plan is now five years; therefore, the debtor's motion to extend the plan to 67 months was denied. In re Bohinski, ___ B.R. ___, 2022 WL 1435605 (Bankr. E.D. Mich. Apr. 25, 2022), Judge Tucker.

Modification to surrender collateral. The confirmed plan provided treatment of two claims secured by vehicles, and the debtors moved to modify the plan to allow surrender of the collateral. The creditor objected, asserting that modification to surrender collateral was not permitted under § 1329, and the Court reviewed the split of authority on the issue, with no direct authority from the Fifth Circuit. The Court agreed with the majority view that modification may be allowed to surrender collateral if the modification is filed in good faith. Such modification fits within § 1329(a)(3), and the incorporation of §§ 1322 and 1325 into § 1329 supports allowing modification to surrender collateral. The plan modification must be proposed in good faith, which is determined under totality of circumstances. Modification was granted. In re Jenkins, ___ B.R. ___, 2022 WL 1196578 (Bankr. E.D. Tex. Apr. 21, 2022), Judge Searcy.

Plan modification motion was timely when filed before completion of direct payments of ad valorem taxes. Construing § 1329(a)'s time to file a plan modification, the Court noted the split of authority on whether completion of plan payments was triggered by payments to the trustee or by direct payments, concluding that when the confirmed plan provided for direct payments they were "payments under the plan." Therefore, the debtors' motion to modify the confirmed plan was timely even though filed seven months after payments to the trustee had been completed. The plan provided for direct ad valorem tax payments, which had not been completed. The debtors had entered into a mortgage modification, which could not be considered a de facto plan modification because it did not comply with Code and Rule requirements for plan modification. The

plan modification as filed was not confirmable, but opportunity to refile was given. In re Villarreal, ___ B.R. ___, 2022 WL 1102223 (Bankr. S.D. Tex. Apr. 12, 2022), Judge Rodriguez.

Discharge

Deceased debtor's discharge. The probate estate of deceased Chapter 13 debtor moved to waive requirement of financial management course and to grant discharge. The debtor's daughter and probate representative completed final plan payments. Rule 1016 provides for continued administration of the case after a death, and the only administrative task remaining was completion of the financial management course. Waiving that course requirement would not adversely impact creditors, with the confirmed plan providing for 100% of allowed unsecured claims and full payment of secured claims. The debtor's death constituted disability under § 109(h)(4), with financial management course waived and debtor entitled to discharge. In re Ibarra, ___ B.R. ____, 2022 WL 1787637 (Bankr. W.D. Tex. June 1, 2022), Judge Parker.

Dismissal and Conversion

Cause for reconversion to Chapter 7. After the case was filed as Chapter 7, the debtor converted to 13, but the U.S. Trustee moved to reconvert to 7. Under the nonexclusive factors of § 1307(c) and *In re Leavitt,* 171 F.3d 1219 (9th Cir. 1999), bad faith can be ground for cause to dismiss or convert. Bad faith was found in omission or misrepresentation in schedules and statement of financial affairs, and on balance conversion back to Chapter 7 was in the best interest of creditors and the bankruptcy estate. In re Ezell, 2022 WL 2134539 (Bankr. D. Ore. June 14, 2022), Judge Hercher.

Attorney

Chapter 13 debtor's attorney disqualified. The Chapter 13 debtor's attorney was also a prepetition creditor, holding a potentially large but unliquidated and contingent claim for attorney fees from complex state-court litigation. The attorney waived a fee for the Chapter 13 filing and proposed agreement with the debtor to subordinate the prepetition fee claim to claims of other creditors. Michigan's Rules of Professional Conduct conflict of interest Rule 1.7 required disqualification. Representation of the debtor in the Chapter

13 case may be materially limited by the attorney's own interest, and the debtor needed independent, objective advice and representation. The attorney's conflict of interest could not be waived under Rule 1.7. In re Baum, ___ B.R. ____, 2022 WL 1447379 (Bankr. E.D. Mich. May 6, 2022), Judge Tucker.

Claims

Shared responsibility payment under Affordable Care Act is a tax for bankruptcy purposes. The Third Circuit held that the Affordable Care Act's shared responsibility payment required by those who did not maintain health insurance coverage was a tax and not a penalty for bankruptcy purposes. The payment was a tax on or measured by income, entitled to priority under § 507(a)(8). In re Szczyporski, 34 F.4th 179 (3d Cir. 2022).

Faculty

Hon. Denise E. Barnett is a U.S. Bankruptcy Judge for the Western District of Tennessee in Memphis, appointed on Nov. 8, 2021. Prior to her appointment, she was a trial attorney with the U.S. Trustee Program in Tampa, Fla., from 2002-21. Judge Barnett also was an attorney in private practice from 1997-2002 in Jacksonville, Fla., where she represented consumer debtors, chapter 11 debtors, trustees and creditors. From 1995-97, she clerked for Hon. George L. Proctor, Chief Judge Emeritus of the U.S. Bankruptcy Court for the Middle District of Florida in Jacksonville. Judge Barnett taught as an adjunct professor from 1996-2000 in Jacksonville. She is a member of the State Bars of Florida and Minnesota. Prior to her appointment, Judge Barnett served on the board of directors of the Tampa Bay Bankruptcy Bar Association (TBBBA), specifically working with its Judicial Liaison Committee from 2016-21. She also served on the District Wide Steering Committee (MDFL) for several terms from 2013-19, and was a frequent speaker for several continuing legal education seminars. Since 2021, Judge Barnett has been a guest lecturer teaching bankruptcy law at the University of Memphis Cecil C. School of Law. She also has helped prepare law students for the Duberstein Moot Court Competition, and welcomed high school and law students as interns in her judicial chambers. Judge Barnett received her B.S. in legal studies in 1990 from City University of New York John Jay College of Criminal Justice and her J.D. from William Mitchell College of Law (now known as Mitchell Hamline School of Law) in St. Paul, Minn., in 1995, where she was a member and an editor of the *William Mitchell Law Review*.

Prof. Kara J. Bruce is a professor of law at the University of Oklahoma School of Law in Norman, Okla., where she teaches contracts, civil procedure, creditor/debtor law, business bankruptcy, bankruptcy litigation skills, secured transactions and payment systems. Her research focuses on bankruptcy and commercial law, with particular emphasis on how the Bankruptcy Code and procedural rules are enforced. Prof. Bruce is a coauthor of the forthcoming Sixth Edition of the *Law of Bankruptcy* hornbook. She also coauthored the Fifth and Sixth Editions of *Problems and Materials on Secured Transactions*, and she is a contributing author to the *Bankruptcy Law Letter*, a member of the editorial advisory board for the *American Bankruptcy Law Journal*, and a former ABI Robert M. Zinman Scholar in Residence. Previously, Prof. Bruce was a professor of law at the University of Toledo College of Law and an associate in the Bankruptcy and Restructuring Group of Locke Lord Bissell & Liddell LLP in Chicago. She received her undergraduate degree from the University of North Carolina at Chapel Hill and her J.D. from Tulane Law School.

Hon. Pamela W. McAfee is a U.S. Bankruptcy Judge for the Eastern District of North Carolina in Raleigh, appointed on Jan. 7, 2022. Prior to taking the bench, she was a creditors' rights attorney, commercial litigator and mediator for 13 nonconsecutive years and served as a law clerk or career law clerk for four bankruptcy judges over 14 nonconsecutive years. Judge McAfee has spoken and written on a variety of bankruptcy topics, served on the Local Rules Committee for the bankruptcy court and the Local Civil Rules Subcommittee for the district court, and was an adjunct professor of bankruptcy law and a moot court coach at Campbell Law School. In 2016, she was recognized by the North Carolina Bar Association with the Citizen Lawyer Award for her work with HopeLine, a suicide prevention hotline, and for her mentoring activities with law students and young lawyers.

Judge McAfee received her undergraduate degree from the University of Pennsylvania and her J.D. with honors from the University of North Carolina School of Law.