AMERICAN BANKRUPTCY INSTITUTE

Bankruptcy 2024:
Views from the Bench

Avoidance Actions Update

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Hon. Elisabetta G. M. Gasparini
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U.S. Bankruptcy Court (D. Del.) | Wilmington

2024

purposes of 18 U.S.C. § 3624(e). *See id.* The court noted that, in the period during which Vallejo was released on bail, he was not subject to many of the conditions the district court had imposed upon him when it sentenced him to a period of supervised release. *See id.* Accordingly, Vallejo had not actually become "subject to the conditions of his supervised release" until the day he was sentenced to time served plus one year of supervised release—June 7, 1993. *See id.*

Likewise, Malandrini was not subject to the terms and conditions of her supervised release in the period during which she was free on bail. Malandrini did not actually become subject to the terms and conditions of her supervised release until the date on which she was released from prison—August 13, 1993. Following the dictates of 18 U.S.C. § 3624(e) we hold that the district court had jurisdiction to revoke Malandrini's supervised release because the period of supervised release did not begin running until after she was released from prison.

AFFIRMED.

In re P.R.T.C., INC., Debtor.

Duckor Spradling & Metzger, Appellant,

v.

Baum Trust, Appellee.

No. 97–56772.

United States Court of Appeals, Ninth Circuit.

Argued and Submitted March 3, 1999.

Filed May 19, 1999.

Trustees for Chapter 7 debtor-corporations assigned to estates' largest creditor their powers to sue various parties, including debtors' lawyers, and rights to avoid certain transactions. Lawyers objected. The Bankruptcy Court approved assignment. Lawyers appealed. The United States District Court for the Southern District of California, Jeffrey T. Miller, J., affirmed. Lawyers appealed. The Court of Appeals, Graber, Circuit Judge, held that: (1) lawyers had standing to appeal order approving assignment; (2) order approving assignment was final, appealable order; (3) trustees could transfer their avoidance powers; and (4) bankruptcy court properly permitted transfer of trustees' powers to sue various individuals and to avoid transactions.

Affirmed.

1. Bankruptcy ⚿3787

Decision as to whether party has standing to appeal is reviewed for clear error.

2. Bankruptcy ⚿3771

To prove an injury in fact under Article III, for purposes of constitutional standing, appellant need only allege an injury fairly traceable to the wrongful conduct; that injury need not be financial. U.S.C.A. Const. Art. 3, § 2, cl. 1.

3. Bankruptcy ⚿3771

Under additional prudential standing requirement applicable in bankruptcy cases, an appellant must be a person aggrieved by the bankruptcy court's order.

4. Bankruptcy ⚿3771

An appellant is "person aggrieved" by bankruptcy court's order, for purposes of prudential standing requirement for appeals in bankruptcy cases, if directly and adversely affected pecuniarily by an order of the bankruptcy court; in other words, the order must diminish the appellant's

property, increase its burdens, or detrimentally affect its rights.

See publication Words and Phrases for other judicial constructions and definitions.

5. Bankruptcy ⚿3771

Lawyers for Chapter 7 debtor-corporations were aggrieved by, and thus had standing to appeal, bankruptcy court order approving trustees' assignment, to estates' largest creditor, of trustees' powers to sue various parties, including lawyers, and rights to avoid certain transactions, given that lawyers were creditors of estates, transfer of rights and claims left estates without any significant assets, transferred rights had value if transferred to third party with ability to pursue them, and transfers led to authorization to abandon estates' claims against assignee creditor.

6. Bankruptcy ⚿3771

For purposes of standing to appeal bankruptcy court order, creditor has a direct pecuniary interest in a bankruptcy court's order transferring assets of the estate.

7. Bankruptcy ⚿3771

Ordinarily, a debtor cannot challenge a bankruptcy court's order unless there is likely to be a surplus after bankruptcy.

8. Bankruptcy ⚿3782

District court's decision that bankruptcy court order was an appealable, final judgment is reviewed de novo.

9. Bankruptcy ⚿3767

Bankruptcy court order that approved assignment of Chapter 7 trustees' powers to sue various parties and to avoid certain transactions was final, appealable decision, even though bankruptcy court retained control over certain monetary matters if assignee prevailed in litigation or avoided transaction. 28 U.S.C.A. § 158(a)(1).

10. Bankruptcy ⚿3767

Ordinarily, a final judgment is one that ends the litigation on the merits and leaves nothing for the court to do but execute the judgment.

11. Bankruptcy ⚿3767

In bankruptcy cases, a judgment is "final" for purposes of appeal if it (1) finally determines the discrete issue to which it is addressed, and (2) resolves and seriously affects substantive rights.

See publication Words and Phrases for other judicial constructions and definitions.

12. Bankruptcy ⚿3782

Bankruptcy court's legal conclusion that Chapter 7 trustees could transfer their avoidance powers would be reviewed de novo.

13. Bankruptcy ⚿2154.1

Under the Bankruptcy Code, and pursuant to bankruptcy court's authorization, Chapter 7 trustees could transfer their avoidance powers to estates' largest creditor as assignee. Bankr.Code, 11 U.S.C.A. § 544.

14. Courts ⚿90(2)

A three-judge panel of Court of Appeals lacks authority to overrule the decision of another panel.

15. Bankruptcy ⚿3782, 3787

On review of bankruptcy court's decision to allow Chapter 7 trustees to transfer their powers to sue various individuals and to avoid various transactions to creditor, Court of Appeals would review the bankruptcy court's factual findings for clear error and its legal conclusions de novo.

16. Bankruptcy ⚿2154.1, 3009

Statute governing appointment of Chapter 7 trustee did not prohibit bankruptcy court from authorizing Chapter 7 trustees to transfer to creditor their powers to sue various individuals and to avoid various transactions, in that order allowed creditor to exercise certain of trustees' powers but did not appoint creditor as trustee. Bankr.Code, 11 U.S.C.A. § 701(a)(1).

17. Bankruptcy ⚿2154.1, 3009, 3067.1

In light of other options available to bankruptcy court, court properly permitted Chapter 7 trustees to transfer to estates' largest creditor their rights to sue various individuals and to avoid transactions, even though assignment resulted in abandonment of claims against assignee; although, under assignment agreement, creditor could pursue both its individual claims and estates' collective claims, remaining creditors would receive 50 percent of net proceeds, and therefore creditor was not pursuing only its own interests, and assignment presented greatest potential for recovery that would benefit remaining creditors.

18. Bankruptcy ⚿2154.1

The bankruptcy court can authorize a creditor to exercise trustee's powers to sue and to avoid transactions if (1) the creditor is pursuing interests common to all creditors, and (2) allowing the creditor to exercise those powers will benefit the remaining creditors.

19. Bankruptcy ⚿2154.1

When determining whether an assignment to creditor of trustee's powers to sue and to avoid transactions benefits the remaining creditors, Court of Appeals considers the assignment in light of the other options before the court.

Pamela LaBruyere and Gregory P. Olson, Duckor Spradling & Metzger, San Diego, California, for the appellant.

Kevin J. Hoyt, Estes & Hoyt, San Diego, California, for the appellee.

Appeal from the United States District Court for the Southern District of California; Jeffrey T. Miller, District Judge, Presiding. D.C. No. CV 97–00180–JTM.

Before: BROWNING, WIGGINS, and GRABER, Circuit Judges.

GRABER, Circuit Judge:

In January 1995, P.R.T.C., Inc. (PRTC), and Braunstein Int'l Corp. (BIC) filed Chapter 7 bankruptcy petitions, which the bankruptcy court later consolidated. Gregory A. Akers was appointed as the trustee of PRTC, and Harold S. Taxel was appointed as the trustee of BIC.

The trustees determined that the only significant assets were the right to avoid various transactions and the right to sue various individuals, including Baum Trust (Baum) and the lawyers for the debtors, Duckor Spradling & Metzger (Duckor). The estates, however, had outstanding creditor claims totaling over $2 million. The estates owed Baum about $1 million of that total.

The trustees concluded that the estates lacked sufficient funds to pursue those claims or rights, even though they believed that the claims and rights had "significant value." Thus, they agreed to assign the claims and rights to Baum, the estates' largest creditor.[1]

1. The agreement identifies the rights assigned:

> Based upon the foregoing, the parties believe that one or both of the bankruptcy estates and/or their respective trustees, pursuant to Bankruptcy Codes sections 541 through 552 have claims and rights against or with respect to one or more of the following persons or entities: Braunstein, Christina Braunstein, Braunstein de Mexico, BIC Tech, Inc., Solution Technologies, the employees, agents, attorneys and other professionals, or any representatives of the foregoing, and any affiliates, assigns, other successors in interest and any other persons or entities acting in concert with any of the foregoing, which claims or rights relate to or arise out of pre-petition or post-petition transfers of property of BIC and/or PRTC or their estates, the misappropriation of assets of BIC and/or PRTC or their estates, and/or the usurpation of corporate opportunities of BIC and/or PRTC or their estates. Such claims or rights include, but are not limited to claims for monies owed by Braunstein to BIC stated on BIC's financial statements as an asset due from its shareholders in the principal amount of $140,000. Such claims and rights also include but are not limited to such claims or rights arising un-

Under the assignment, Baum "shall have the right at its sole discretion to pursue, not pursue, settle, compromise or collect upon such Collective Claims or Rights." If Baum does collect or receive any money from the claims, the estates are entitled to 50 percent of the net proceeds (that is, gross proceeds minus Baum's attorney fees and costs).

Duckor objected to the assignment, arguing that the trustees cannot transfer to a creditor their rights to sue various defendants and to avoid various transactions. The bankruptcy court disagreed and approved the assignment.

Duckor appealed that decision to the district court. Baum argued that the district court lacked jurisdiction over the appeal, because (1) Duckor did not have standing to challenge the bankruptcy court's order, and (2) the bankruptcy court's order was not an appealable, final judgment. The district court held that it had jurisdiction and upheld the bankruptcy court's decision on the merits. This timely appeal ensued. For the reasons that follow, we affirm.

STANDING

A. *Standard of Review*

[1] The district court held that Duckor has standing to appeal. This court reviews that decision for clear error. *See McClellan Fed. Credit Union v. Parker (In re Parker),* 139 F.3d 668, 670 (9th Cir.) ("Whether an appellant is a person aggrieved is a question of fact, which this court reviews for clear error."), *cert. denied,* —— U.S. ——, 119 S.Ct. 592, 142 L.Ed.2d 535 (1998).

B. *Applicable Principles*

[2–4] To prove an injury in fact under Article III (constitutional standing), the appellant need only allege an injury "fairly traceable" to the wrongful conduct; that injury need not be financial. *See Kane v. Johns–Manville Corp. (In re Johns–Manville Corp.),* 843 F.2d 636, 642 n. 2 (2d Cir.1988). Bankruptcy cases, however, generally affect the rights of many. *See Tilley v. Vucurevich (In re Pecan Groves of Ariz.),* 951 F.2d 242, 245 (9th Cir.1991) ("[B]ankruptcy litigation[ ] . . . almost always implicates the interests of persons who are not formally parties to the litigation."). To prevent unreasonable delay, courts have created an additional prudential standing requirement in bankruptcy cases: The appellant must be a "person aggrieved" by the bankruptcy court's order. *See Brady v. Andrew (In re Commercial W. Fin. Corp.),* 761 F.2d 1329, 1334 (9th Cir.1985) ("[W]e have adopted the 'person aggrieved' test as the appropriate standard for determining standing to appeal under the Code."); *In the Matter of Andreuccetti,* 975 F.2d 413, 416–17 (7th Cir.1992) ("Its purpose is to insure that bankruptcy proceedings are not unreasonably delayed by protracted litigation by allowing only those persons whose interests are directly affected by a bankruptcy order to appeal.") (citation and internal quotation marks omitted). An appellant is aggrieved if "directly and adversely affected pecuniarily by an order of the bankruptcy court"; in other words, the order must diminish the appellant's property, increase its burdens, or detrimentally affect its rights. *Fondiller v. Robertson (In Matter of Fondiller),* 707 F.2d 441, 442 (9th Cir.1983).

C. *Analysis of Duckor's Standing*

[5] Baum first argues that *Fondiller* requires us to reverse the district court's decision. In *Fondiller,* the wife of a debtor appealed an order appointing a law firm as special counsel to the bankruptcy trustee. *See id.* at 441. This court held that

der either non-bankruptcy law and bankruptcy law. All of the foregoing claims and rights described in this paragraph are herein referred to as the "Collective Claims and Rights." The parties further believe the Collective Claims and Rights to be of significant value.

the wife was not "aggrieved," because her "only demonstrable interest in the order is as a potential party defendant in an adversary proceeding." *Id.* at 443.

As is evident, the only interest of the wife in *Fondiller* was her desire to prevent future litigation. Here, Duckor has a similar interest—the bankruptcy court's order, in fact, led Baum to sue Duckor. But Duckor also has alleged that it is a creditor of the estates and, thus, that it has the type of direct pecuniary interest that was lacking in *Fondiller*. *See Johns–Manville,* 843 F.2d at 642 n. 3 (distinguishing *Fondiller,* because "the creditor opposing a plan of reorganization is distinguishable from marginal parties in the bankruptcy proceedings who face potential harm incident to the bankruptcy court's orders").

Courts have been reluctant to afford broad standing to creditors:

> It might be said that all creditors and the debtor are parties to every order entered in a bankruptcy proceeding. However, that does not help in determining which parties have standing to take an appeal. If such reasoning were employed, the result would be a rule that any party who is involved either directly, indirectly or tangentially in the bankruptcy proceeding has the power to appeal from almost any order entered by the bankruptcy judge.

10 *Collier on Bankruptcy* § 8001.05, p. 8001–11 (Lawrence P. King ed., 15th ed. 998). Thus, for example, "a creditor has no independent standing to appeal an adverse decision regarding a violation of the automatic stay." *Pecan Groves,* 951 F.2d at 245.

[6] A creditor does, however, have a direct pecuniary interest in a bankruptcy court's order transferring assets of the estate. *See Salomon v. Logan (In re International Envtl. Dynamics, Inc.),* 718 F.2d 322, 326 (9th Cir.1983) ("[I]n a case involving competing claims to a limited fund, a claimant has standing to appeal an order disposing of assets from which the claimant seeks to be paid."). *See also Commercial W. Fin.,* 761 F.2d at 1335 (holding that the creditors had standing, because "[t]he plan eliminated their interests in the borrower notes and deeds of trust and disposed of the assets in the estate from which they seek to be paid"); *Johns–Manville,* 843 F.2d at 642 ("As a general rule, creditors have standing to appeal orders of the bankruptcy court disposing of property of the estate because such orders directly affect the creditors' ability to receive payment of their claims."). The bankruptcy court's order transferred to Baum the right to sue various defendants, including Duckor and Baum, and the right to avoid various transactions (thereby returning property to the estates). The transfer of those rights and claims left the estates without any other significant asset. Moreover, the transfer led the bankruptcy court to authorize the abandonment of the claims against Baum—obviously, Baum cannot sue itself and will not avoid any transactions involving itself. In the circumstances, Duckor appears to have standing.

[7] Baum nevertheless suggests three reasons why the principles from the foregoing cases do not apply here. First, this case involves the transfer of intangible assets rather than money or other tangible property. However, the reasoning of the cited cases applies equally to intangible assets. *Cf. Andreuccetti,* 975 F.2d at 417 (holding that the debtors had standing to challenge the settlement of the estate's right to sue various entities, because "[t]he outcome of this litigation could potentially have a huge effect on the liabilities of the [debtors] and could give them a substantial surplus upon emerging from bankruptcy").[2]

2. Ordinarily, a debtor cannot challenge a bankruptcy court's order unless there is likely to be a surplus after bankruptcy. *See, e.g., Fondiller,* 707 F.2d at 442 ("[A] hopelessly insolvent debtor does not have standing to appeal orders affecting the size of the estate.").

Second, Baum suggests that, unlike the money in *International Envtl. Dynamics* and *Commercial W. Fin.*, the assets here have no value. Baum is correct that the assets have no value *if left in the estates,* because the estates do not have sufficient funds to pursue the claims. Baum incorrectly concludes from this fact that the assets themselves are worthless.

As Baum acknowledged in the assignment agreement, the assets have "significant value" if assigned to a third party.[3] In particular, the assignment agreement gives the estates 50 percent of any recovery. Moreover, David J. Braunstein (Braunstein) offered the estates $50,000 for the same assets. The trustees rejected the proposal, because the right to sue various defendants and the right to avoid various transactions are rights that would be asserted primarily against Braunstein and his affiliates. Nevertheless, the offer demonstrates that the assets have value.

Third, Baum argues that Duckor is not actually a creditor of the estates. The record, however, shows that Duckor has claims against the estates of at least $9,859.38, and Duckor appeared before the bankruptcy court, in part, as a creditor.

Baum contends that the trustees later rejected Duckor's claims against the estates, but it provides no support in the record for that argument. Baum presented that same unsupported argument to the district court. Although the district court did not make an express factual finding that Duckor is a creditor of the estates, that finding is implicit in its holding; Duckor always has argued that it has standing only as a creditor. The district court's implicit finding is not clearly erroneous.

D. *Conclusion*

Duckor has demonstrated that the bankruptcy court's order—transferring the estates' only significant assets—will aggrieve it. That being so, the district court did not clearly err by holding that Duckor has standing.

APPEALABLE FINAL JUDGMENT

A. *Standard of Review*

[8] The district court held that the bankruptcy court's order was an appealable, final judgment. This court reviews that decision *de novo. See Ernst & Young v. Matsumoto (In re United Ins. Management, Inc.),* 14 F.3d 1380, 1383 (9th Cir. 1994).

B. *Analysis*

[9] A district court has jurisdiction over a bankruptcy appeal from: (1) final judgments, orders, or decrees, and (2) interlocutory orders with leave from the bankruptcy court. *See* 28 U.S.C. § 158(a)(1) & (3).[4] Duckor did not seek or obtain leave from the bankruptcy court to appeal. Thus, the district court had jurisdiction over the appeal, if at all, as a final judgment.

[10, 11] Ordinarily, a final judgment is one that "ends the litigation on the merits and leaves nothing for the court to do but execute the judgment." *Elliott v. Four Seasons Properties (In re Frontier Prop-*

3. For example, if the likelihood of prevailing in the litigation or avoiding the transfers is 10 percent, and the amount that the estates are likely to collect is $2 million, a reasonable investor would conclude that assets are worth $200,000 (before discounting to present value).

4. Title 28 U.S.C. § 158(a)(1) and (3) provide:

> (a) The district courts of the United States shall have jurisdiction to hear appeals
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> (1) from final judgments, orders and decrees;
>
> . . . .
>
> (3) with leave of the court, from other interlocutory orders and decrees;
>
> and, with leave of the court, from interlocutory orders and decrees, of bankruptcy judges entered in cases and proceedings referred to the bankruptcy judges under section 157 of this title. An appeal under this subsection shall be taken only to the district court for the judicial district in which the bankruptcy judge is serving.

erties, Inc.), 979 F.2d 1358, 1362 (9th Cir. 1992) (citation and internal quotation marks omitted). However, this court has adopted a "pragmatic approach" to finality in bankruptcy cases. *See id.* at 1363. *See also La Grand Steel Prods. Co. v. Goldberg (In Matter of Poole, McGonigle & Dick, Inc.),* 796 F.2d 318, 321 (9th Cir.) ("The issue of finality must follow a pragmatic approach.") (citation and internal quotation marks omitted), *amended by* 804 F.2d 576 (9th Cir.1986). In bankruptcy cases, a judgment is "final" if it: (1) "finally determines the discrete issue to which it is addressed," and (2) "resolves and seriously affects substantive rights." *Frontier Properties,* 979 F.2d at 1363.

The district court correctly held that the bankruptcy court's order satisfied those requirements. As noted above, the bankruptcy court's order assigned to Baum the estates' right to sue various individuals and to avoid various transactions. On its face, that order "finally determine[d] the discrete issue to which it is addressed." *See, e.g., Frontier Properties,* 979 F.2d at 1363. Baum nevertheless argues that the decision is not "final," because the bankruptcy court retains some control over the assigned assets. We are not persuaded.

The bankruptcy court retains control only over monetary matters if Baum prevails in litigation or avoids a transaction. For example, the bankruptcy court can determine the appropriate amount of attorney fees and costs, if disputed. The bankruptcy court lacks discretion, however, to alter the scope of the assignment. That being so, the bankruptcy court's order finally assigned the assets to Baum. *See, e.g., Poole,* 796 F.2d at 321 (stating that a bankruptcy court's order is final if "further bankruptcy court proceedings would not affect the scope of the order").

Turning to the second criterion, the assignment transferred the only significant assets from the estates. Therefore, the assignment seriously affected the rights of all creditors, including Duckor, to receive payment for their claims.

We conclude that the district court did not err by holding that the order was "final" for the purposes of appellate review. *Cf. Law Offices of Nicholas A. Franke v. Tiffany (In re Lewis),* 113 F.3d 1040, 1044 (9th Cir.1997) (holding that an order to disgorge funds was "final," even though the order did not distribute the funds); *United States v. Stone (In re Stone),* 6 F.3d 581, 583 n. 1 (9th Cir.1993) (holding that a "judgment resolv[ing] the question of the priority of the federal tax lien[ ] . . . constitutes a final and appealable order over which we have jurisdiction").

AVOIDANCE POWERS

A. *Standard of Review*

[12] The bankruptcy court held that the trustees could transfer their avoidance powers. This court reviews that legal conclusion *de novo. See Siriani v. Northwestern Nat'l Ins. Co. (In re Siriani),* 967 F.2d 302, 303 (9th Cir.1992).

B. *Analysis*

[13] The bankruptcy code expressly authorizes trustees and, in some circumstances, debtors to avoid various transactions. *See* 11 U.S.C. § 544 (trustee);[5] 11 U.S.C. § 522(f) & (h).[6] Although no provi-

5. Title 11 U.S.C. § 544 provides in part:

> (a) The trustee shall have, as of the commencement of the case, and without regard to any knowledge of the trustee or of any creditor, the rights and powers of, or may avoid any transfer of property of the debtor or any obligation incurred by the debtor. . . .

6. Title 11 U.S.C. § 522(f) and (h) provides in part:

> (f)(1) Notwithstanding any waiver of exemptions but subject to paragraph (3), the debtor may avoid the fixing of a lien on an interest of the debtor in property to the extent that such lien impairs an exemption to which the debtor would have been entitled under subsection (b) of this section. . . .
>
> . . . .
>
> (h) The debtor may avoid a transfer of property of the debtor or recover a setoff to

sion of the bankruptcy code similarly authorizes others to exercise those powers, "[i]t is a well-settled principle that avoidance powers may be assigned to someone other than the debtor or trustee pursuant to a plan of reorganization" under 11 U.S.C. § 1123(b)(3)(B).[7] *Winston & Strawn v. Kelly (In re Churchfield Mgmt. & Inv. Corp.),* 122 B.R. 76, 81 (Bankr. N.D.Ill.1990). *See also McFarland v. Leyh (In the Matter of Texas Gen. Petroleum Corp.),* 52 F.3d 1330, 1335 (5th Cir. 1995) ("Section 1123(b)(3)(B) allows a plan to transfer avoidance powers to a party other than the debtor or the trustee."); *Citicorp Acceptance Co. v. Robison (In re Sweetwater),* 884 F.2d 1323, 1327 (10th Cir.1989) ("[T]he plan provision naming Robison as a representative of the estate for the purpose of enforcing these avoidance claims is consistent with § 1123(b)(3)(B).").

Duckor argues that the cited principle does not apply to this case, because the trustees did not transfer their avoidance powers pursuant to a Chapter 11 reorganization plan. This court, however, has held to the contrary.

In *Briggs v. Kent (In re Professional Inv. Properties of Am.),* 955 F.2d 623, 625 (9th Cir.1992), the trustee sold its avoidance powers to a creditor. Unlike in the cases cited above, in *Professional Inv.* the transfer did not occur as part of a Chapter 11 reorganization plan. *See id.* at 626 ("[W]hile it was not argued by Miller, nor was he specifically identified for this purpose, he could best be identified as a representative appointed to enforce the debt *in line with* section 1123(b)(3)(B).") (emphasis added). Nevertheless, this court held that a trustee can transfer its avoidance powers: (1) pursuant to a Chapter 11 reorganization plan, *or* (2) outside a Chapter 11 reorganization plan, when a creditor is pursuing interests common to all creditors. *See id.* ("If a creditor is pursuing interests common to all creditors or is appointed for the purpose of enforcement of the plan, he may exercise the trustee's avoidance powers."). *See also Howard v. Fidelity & Deposit Co. of Maryland (In Matter of Royale Airlines, Inc.),* 98 F.3d 852, 856 n. 4 (5th Cir.1996) (noting that *Professional Inv.* "permit[ted] assignment of a trustee's avoidance powers under particular circumstances outside [a] reorganization plan"); *Fleet Nat'l Bank v. Doorcrafters (In re North Atl. Millwork Corp.),* 155 B.R. 271, 281 (Bankr.D.Mass.1993) (noting that *Professional Inv.* "permitted the assignment of a trustee's avoiding powers outside a Chapter 11 plan").

Duckor argues that *Professional Inv.* is distinguishable, because *Professional Inv.* was a Chapter 11 case, whereas this is a Chapter 7 case. We disagree. Nothing in this court's opinion in *Professional Inv.* states whether it was a Chapter 7 or Chapter 11 case. The bankruptcy court's decision on remand suggests that, like this case, *Professional Inv.* was a Chapter 7 case. *See Briggs v. Kent (In re Professional Inv. Properties of Am., Inc.*), 157 B.R. 166, 170–71 (Bankr.W.D.Wash.1993) ("A transfer to or for the benefit of the creditor made while the debtor was insolvent within the preference period on account of an antecedent debt is preferential to the extent it enables creditors to receive more than they would in a case under *Chapter 7* had the transfer not been made, and the creditors received payment in accordance with the Bankruptcy Code.") (emphasis added) (footnote omitted). *See also Met–Al, Inc. v. Gabor (In re Metal*

the extent that the debtor could have exempted such property under subsection (g)(1) of this section if the trustee had avoided such transfer. . . .

7. Title 11 U.S.C. § 1123(b)(3)(B) provides:
(b) Subject to subsection (a) of this section, a plan may—
. . . .
(3) provide for—
(B) the retention and enforcement by the debtor, by the trustee, or by a representative of the estate appointed for such purpose, of any such claim or interest[.]

Brokers Int'l, Inc.), 225 B.R. 920, 921 (Bankr.E.D.Wis.1998) ("Met–Al places reliance upon [*Professional Inv.*], which, like the instant case, was a chapter 7 case.").

Even if *Professional Inv.* did arise under Chapter 11, one thing is clear: the transfer did not occur in a plan of reorganization pursuant to § 1123(b)(3)(B). Duckor has not presented, nor have we found, any reason why a Chapter 11 trustee can transfer its avoidance powers outside a reorganization plan, but a Chapter 7 trustee cannot. We therefore hold that the principles in *Professional Inv.* apply to both Chapter 7 and Chapter 11 cases.

Finally, Duckor argues that *Professional Inv.* applies only to cases in which the trustee actually asserts its avoidance powers before the transfer. The court in *Professional Inv.* did state that the trustee had asserted its avoidance powers. *See Professional Inv.,* 955 F.2d at 626 ("[T]he trustee originally asserted the avoidance powers in the bankruptcy and district court."). The court emphasized that fact simply because it demonstrated that both the trustee and the bankruptcy court had authorized the creditor to use the trustee's avoidance powers. *See id.* (distinguishing *Texas Gen. Petroleum Corp. v. Evans (In re Texas Gen. Petroleum Corp.),* 58 B.R. 357 (Bankr.S.D.Tex.1986), where "there was no such involvement by the trustee or the bankruptcy court. The creditor was acting independently and for his sole benefit"). Similarly, here, both the trustees and the bankruptcy court authorized Baum to use the trustees' avoidance powers.

[14] In summary, we see no principled way to distinguish this case from *Professional Inv.*[8] Therefore, the bankruptcy court did not err by holding that the trustees could transfer their avoidance powers.

DISINTERESTED PARTY

A. *Standard of Review*

[15] The bankruptcy court allowed the trustees to transfer the right to sue various individuals and to avoid various transactions to an interested party, *i.e.,* a creditor. This court reviews the bankruptcy court's factual findings underlying that decision for clear error, and its legal conclusions *de novo. See Siriani,* 967 F.2d at 303–04.

B. *Analysis*

[16–18] Duckor argues that 11 U.S.C. § 701(a)(1) prohibits the bankruptcy court from authorizing the trustees to transfer to Baum the right to sue various individuals and to avoid various transactions.[9] The bankruptcy court's order allowed Baum to exercise certain of the trustees' powers, but it did not appoint Baum as a trustee pursuant to 11 U.S.C. § 701(a)(1). The bankruptcy court can authorize a creditor to exercise those powers if: (1) the creditor is pursuing interests common to all creditors, *see Professional Inv.,* 955 F.2d at 626 ("If a creditor is pursuing interests common to all creditors . . ., he may exercise the trustee's avoidance powers."); and (2) allowing the creditor to exercise those powers will benefit the remaining creditors, *see Sweetwater,* 884 F.2d at 1327 ("The primary concern is whether a successful recovery by the appointed representative would benefit the debtor's estate and particularly, the debtor's unsecured creditors.") (citation and in-

8. Duckor's real argument seems to be that *Professional Inv.* was wrongly decided. A three-judge panel, however, lacks authority to overrule the decision of another panel. *See United States v. Gay,* 967 F.2d 322, 327 (9th Cir.1992) ("As a general rule, one three-judge panel of this court cannot reconsider or overrule the decision of a prior panel."). We therefore do not address Duckor's implicit argument.

9. Title 11 U.S.C. § 701(a)(1) provides:

> Promptly after the order for relief under this chapter, the United States trustee shall appoint one disinterested person that is a member of the panel of private trustees established under section 586(a)(1) of title 28 or that is serving as trustee in the case immediately before the order for relief under this chapter to serve as interim trustee in the case.

ternal quotation marks omitted); *Official Comm. of Unsecured Creditors of Maxwell Newspapers, Inc. v. MacMillan, Inc. (In re Maxwell Newspapers, Inc.),* 189 B.R. 282, 287 (Bankr.S.D.N.Y.1995) ("The primary consideration ... is the benefit bestowed upon the estate as a result of the transfer, in particular the benefit to the unsecured creditors."). The assignment at issue here satisfied both requirements.

Under the assignment agreement, Baum can pursue both its individual claims and the estates' collective claims. However, if Baum prevails on any of the claims, even its individual claims, the remaining creditors receive 50 percent of the net proceeds. Thus, Baum is not pursuing solely its own interest but, instead, the interest of all creditors. *Cf. Texas Gen. Petroleum,* 58 B.R. at 358 (holding that the creditor did not satisfy the foregoing requirement, because it was "trying to exercise the avoidance power for itself as a sole creditor, not for the benefit of the debtor's estate or the creditors as a whole").

Duckor argues that the assignment will not benefit the remaining creditors, because the assignment led the bankruptcy court to abandon the estates' claims against Baum. However, the trustees informed the bankruptcy court that the claims against Baum were dubious, at best. Thus, abandonment of those claims likely cost the estates little, if anything.

[19] Moreover, when determining whether an assignment benefits the remaining creditors, we consider the assignment in light of the other options before the court. The bankruptcy court could have ordered the claims and rights to remain a part of the estates. Under that option, the creditors would receive no benefit, because the estates had insufficient funds to pursue those claims and rights.

Similarly, the bankruptcy court could have ordered the trustees to abandon the assets. Again, the creditors would receive no benefit.

The bankruptcy court could have approved the sale of the claims and rights to Braunstein for $50,000. However, the right to sue various individuals and the right to avoid various transactions are rights that the estates would assert primarily against Braunstein and his affiliates. In the circumstances, transferring the claims to Braunstein would have prevented the estates from recovering any more than $50,000. The trustees already had spent about $50,000 on bankruptcy administrative costs. Had the court approved the transfer to Braunstein, the creditors likely would receive no benefit.[10]

Finally, the bankruptcy court could have approved the transfer of the assets to Baum. That option had the potential to recover between $70,000 and $1 million for the remaining creditors, which would be sufficient to satisfy at least some of the creditors' claims. In the process, the transfer would require the abandonment of claims against Baum. But, as noted above, the claims against Baum were unlikely to recover any money for the estates.

Faced with these four options, the bankruptcy court properly approved the transfer to Baum. Only that option had the potential to provide the remaining creditors with any benefit.

AFFIRMED.

10. In a motion to reconsider the approval of the assignment, Braunstein increased his offer to more than $163,000. However, Duckor has not argued that the bankruptcy court abused its discretion by denying that motion. We therefore do not consider the effect of Braunstein's increased offer. *See Sanchez v. Pacific Powder Co.,* 147 F.3d 1097, 1100 (9th Cir.1998) ("Ordinarily, a party's failure to raise an issue ... constitutes a waiver of that issue.").

as well as the 5–4 Supreme Court decision in *Pioneer,* bespeak the need for the exercise of sound judgment.

For those who analogize judges to baseball umpires, I submit that the differences between the Appellate and Bankruptcy Rules require the bankruptcy judge to use a bigger strike zone for Bankruptcy Rule 8002(c) "excusable neglect" than the district judge, who also has the latitude of "good cause," needs for Appellate Rule 4(a)(5)(A)(ii) [or 4(b)(4)] "excusable neglect."

Under the facts of this appeal, the notice of entry of judgment was sent to appellant at a different address than all of the other notices that had been sent to her. The appellant had filed her objection to the form of the trustee's order on May 4, 2001, yet the bankruptcy judge inexplicably did not act on the disputed form of the order until July 10, 2001. The bank's assertion of prejudice—that the passage of time has made some receivables more difficult to collect—is vulnerable to the counter-argument that the bank knew of the pendency of this appeal from the outset, at a time that it could have better protected its interest with respect to the receivables. The case trustee has not even participated in this appeal.

These factors are enough to be in the vicinity of the Bankruptcy Rule 8002(c) "excusable neglect" strike zone, warranting a closer look by the bankruptcy judge. Accordingly, I DISSENT.

In re MAXIMUS COMPUTERS, INC., Debtor.

COM–1 Info, Inc.; Djit Ong; Henry Salim; Celina Lieu, Appellants,

v.

Edward Wolkowitz, Chapter 7 Trustee; Gibbs, Giden, Locher & Turner, LLP, Appellees.

BAP Nos. CC–00–1657–KMOB, CC–00–1658–KMOB, CC–01–1183–KMOB. Bankruptcy No. LA 00–11124 ER. Adversary No. LA 00–02301 ER.

United States Bankruptcy Appellate Panel of the Ninth Circuit.

Argued and Submitted Sept. 19, 2001.

Filed May 8, 2002.

Special litigation counsel was appointed by trustee and approved by court to prosecute fraudulent transfer action. The United States Bankruptcy Court for the Central District of California, Ernest M. Robles, J., denied motion to disqualify counsel. The Bankruptcy Appellate Panel, Klein, J., held that: (1) actual conflict analysis conducted by court was inadequate, and (2) special litigation counsel had "connections" with creditor.

Reversed, vacated, and remanded.

Montali, J., filed opinion concurring and dissenting.

1. Bankruptcy ⚿2154.1, 3030

A creditor authorized by the court to recover counsel fees as administrative expenses in the recovery of property for the estate has standing to sue in the trustee's name without counsel being employed under the provision providing for the employment of professional persons. Bankr. Code, 11 U.S.C.A. §§ 327, 503(b)(3)(B).

2. Bankruptcy ⚿3030

A decision affirming the employment of a creditor's lawyer as special litigation counsel permits, but does not require, such employment when payment of counsel fees as an administrative expense would suffice. Bankr.Code, 11 U.S.C.A. §§ 327, 503(b)(3)(B).

3. Bankruptcy ⚿3782

Interpretations of statutes are questions of law reviewed de novo.

4. Bankruptcy ⚿3784

Orders on employment and disqualification of professionals are reviewed for abuse of discretion.

5. Bankruptcy ⚿3784

It is an abuse of discretion to apply the wrong legal rule.

6. Attorney and Client ⚿21.5(6)

Bankruptcy court's actual conflict analysis, necessary under safe harbor rule to approve special litigation counsel, was inadequate, where only minimal recital relating to material matter was made to court without supporting explanation; court did not consider continuing representation of creditor by counsel, or that creditor was paying fees of special counsel in prosecution of fraudulent transfer action, and there was no indication of how creditor's payment of counsel's fees would impact fee applications that counsel indicated it would make. Bankr.Code, 11 U.S.C.A. § 327; Fed.Rules Bankr.Proc.Rule 2014(a), 11 U.S.C.A.

7. Bankruptcy ⚿3179

Facts that creditor was paying fees of special litigation counsel while counsel was representing trustee in prosecution of fraudulent transfer action, and that special counsel continued to represent creditor, were "connections" with creditor, within meaning of rule relating to employment of professional persons, that were required to be disclosed in employment application and in verified statement that accompanied application. Fed.Rules Bankr.Proc.Rule 2014(a), 11 U.S.C.A.

See publication Words and Phrases for other judicial constructions and definitions.

8. Attorney and Client ⚿21.5(6)

Creditor's payment of fees of special litigation counsel, and special litigation counsel's continuing representation of creditor, were material to both employment and analysis of safe harbor rule relating to the employment of professional persons, since such situations raised issues relating to lawyer's ethical duty of loyalty and identity of client and they potentially affected eventual fee awards that counsel said it would seek. Bankr.Code, 11 U.S.C.A. § 327(c).

9. Attorney and Client ⚿21.5(6)
Bankruptcy ⚿2154.1

A creditor authorized by the court to recover property for the estate may sue in the trustee's name without counsel being employed under the statute relating to the employment of professional persons, and without counsel being disinterested. Bankr.Code, 11 U.S.C.A. §§ 327, 503(b)(3)(B).

10. Bankruptcy ⚿3779

The Bankruptcy Appellate Panel may affirm a bankruptcy court's refusal to disqualify counsel for any reason supported by the record.

11. Bankruptcy ⚿2154.1, 2871

Creditors may sue in the name of the trustee to recover property for the benefit of the estate and their efforts may be compensated as administrative expenses. Bankr.Code, 11 U.S.C.A. §§ 327, 503(b)(3)(B).

12. Bankruptcy ⚿2154.1

A creditor acting under statutory authority, to sue in the name of the trustee to recover property for the benefit of the estate, and to be compensated as administrative expenses with the court's prior permission, has statutory standing, not some form of non-statutory standing. Bankr. Code, 11 U.S.C.A. §503(b)(3)(B).

13. Attorney and Client ⚿21.5(6)

Professionals acting under statutory authority, to sue in the name of the trustee to recover property for the benefit of the estate and to be compensated as administrative expenses with the court's prior permission, have the authorized creditor as a client and may be paid by that client, with the client bearing the risk of not being reimbursed, and need not be "disinterested." Bankr.Code, 11 U.S.C.A. §§ 327(a), 503(b)(3)(B), (b)(4).

14. Bankruptcy ⚿2124.1, 3033

A court acts as gatekeeper, polices any dysfunction that arises as between authorized creditor and the trustee, and retains the power to scrutinize compromises. Fed.Rules Bankr.Proc.Rule 9019(a), 11 U.S.C.A.

15. Bankruptcy ⚿3771

Appellate standing is a discretionary, rather than a jurisdictional, doctrine.

J. Randy Dorcy, Law Offices of J. Randy Dorcy, Van Nuys, CA, for COM–1 Info, Inc.; Djit Ong.

Rocky W. Dorcy, Law Offices of Rocky W. Dorcy, Encino, CA, for Henry Salim and Celina Lieu.

Robert P. Judge, Gibbs, Giden, Locher & Turner, LLP, Los Angeles, CA, for Edward Wolkowitz, Chapter 7 Trustee.

Before: KLEIN, MONTALI and BRANDT, Bankruptcy Judges.

OPINION

KLEIN, Bankruptcy Judge.

These interlocutory appeals constitute an attempt by defendants in a fraudulent transfer action that is being prosecuted for the benefit of the estate to disqualify opposing counsel because a creditor is paying the counsel's fees.

In an effort to derail state court fraud litigation against them, defendant corporate insiders had their defunct corporation file a chapter 7 bankruptcy in which there can be no discharge. The plaintiff's state court counsel was then engaged to prosecute a bankruptcy fraudulent transfer action. The defendants appeal two orders parrying attempts to rid themselves of their nemesis.

The appealed orders ratified employment as special counsel under 11 U.S.C. § 327 and, twice, refused to disqualify the firm for having its fees paid by the creditor client that it still represents and that opposed a nuisance-value settlement that the defense attempted to negotiate directly with the trustee behind the back of opposing counsel.

Although we REVERSE the employment under § 327 as procedurally defective, we merely VACATE the orders refusing to disqualify counsel and REMAND for clarification of whether the orders reflect authorization under 11 U.S.C. § 503(b)(3)(B) for a creditor to sue in the name of the trustee, using its own lawyer, to recover property for the benefit of the estate.

[1, 2] We publish to clarify that § 503(b)(3)(B) retains vitality: first, a creditor authorized by the court per § 503(b)(3)(B) to recover property for the

estate may sue in the trustee's name without counsel being employed under § 327 and without counsel being "disinterested"; second, such a creditor has standing; and, third, since §§ 327 and 503(b)(3)(B) are not mutually exclusive, decisions affirming § 327 employment of a creditor's lawyer should be understood as permitting, but not requiring, § 327 employment when § 503(b)(3)(B) permission would suffice.

FACTS

The procedural context of these consolidated and related appeals requires that we accept the plaintiff's allegations as true. When we do so, this appeal smacks of a "strategic" effort by defendants to divert attention from the merits of allegations that they stole about $7 million by looting a corporation.

A number of wholesale electronics suppliers, including Arrow Electronics, Inc. ("Arrow"), were bilked out of about $7 million in computer microchips sold to Maximus Computers, Inc. ("Maximus"), in a fraud perpetrated by Maximus' owners (Henry Salim and his spouse, Celina Lieu), working in league with Salim's brother (Djit Ong) and a corporation owned by Ong.

The structure of the fraud, which occurred in a period of about four weeks in 1999, was simple. Maximus and Salim had preexisting trade credit agreements with vendors who were induced to ship microchips to Maximus on various credit terms in September and October 1999, including tendering of checks to be issued upon delivery. Maximus received the microchips, issued the checks, immediately stopped payment on the checks, and transferred the microchips to entities controlled by Salim family members before the vendors could reclaim the goods.

For example, Arrow shipped microchips to Maximus on October 1, 1999, on the promise by Salim and Maximus that postdated checks for payment would be delivered upon receipt. On October 19, Maximus issued and delivered two checks signed by Lieu totaling $1,225,000 postdated to November 1, 1999. On October 25, Arrow learned from two other suppliers that Maximus had stopped payment on checks to them. On October 27, Arrow presented the checks to the drawee bank, which notified Arrow that Maximus had stopped payment. Arrow sued in state court on November 2, 1999, alleging multiple counts including fraud and conversion. *Arrow Elec., Inc. v. Maximus Computers, et al.,* Los Angeles County Super. Ct. (No. KC031873, filed 11/2/99).

Arrow was represented in the state court action by the law firm of Gibbs, Giden, Locher & Turner, LLP ("GGL & T").

By the time that Maximus filed a voluntary chapter 7 case in January 2000, all Maximus assets had been transferred to various entities and individuals related to Salim.

Arrow offered the services of GGL & T to the chapter 7 trustee, Edward Wolkowitz, to prosecute the bankruptcy version of the fraudulent transfer action with the promise that fees would be due from the estate only if the action was successful.

The trustee applied for an order approving employment of GGL & T as special counsel to recover the microchips or their value, presenting employment application papers noting that GGL & T represented Arrow in the state court action, which familiarity was said to make GGL & T the logical litigation counsel for the estate, that GGL & T would be compensated by the estate only if successful, and that any compensation would be based upon the services rendered to the estate and submitted for court approval.

The application disclosed neither the fact that Arrow was paying GGL & T's fees, nor the terms of that compensation, nor that GGL & T would continue to represent Arrow simultaneously with the trustee. The court approved the application on May 11, 2000.

GGL & T filed an adversary proceeding in the name of the trustee in July 2000, against Salim, Lieu, Ong, and Ong's corporation, Com–1 Info, Inc., alleging causes of action for, among others, fraud, breach of contract, conversion and conspiracy and requesting that the court avoid the allegedly fraudulent transfers, avoid preferences, and marshal assets.

In September 2000, a proposed amended employment order was tendered to the court without an accompanying application. The amendment's substance was: "By this Amended Order, the Court acknowledges that the fees of [GGL & T] are currently being paid by ARROW ELECTRONICS, INC., a creditor." There was no disclosure of what those fees were and no verified statement from GGL & T articulating the precise continuing relationship with Arrow.

Salim, Lieu, Com–1, and Ong objected to the amended employment order and made a motion to disqualify GGL & T.

The court overruled the objection, signed the amended order, and refused to disqualify GGL & T by memorandum decision dated November 7, 2000.

Our first two appeals were filed by Salim and Lieu (No. CC–00–1657) and Com–1 and Ong (No. CC–00–1658) from the November 7 order, with motions for leave to appeal, which we granted.

Our third appeal, No. CC–01–1183, is from an order entered April 11, 2001, again refusing to disqualify GGL & T after it allegedly interfered with a potential settlement that Salim and Lieu had negotiated with the trustee without GGL & T's knowledge.

The trustee, who is a partner in a law firm ("RD & W"), employed RD & W as his "general counsel." Rocky Dorcy, counsel for Salim and Lieu, negotiated with the trustee through RD & W without telling GGL & T and, Dorcy says, reached a $137,000 settlement.

GGL & T learned of the putative settlement when Dorcy refused to appear at a deposition. The fraud victims, including Arrow, expressed dismay to the trustee. This creditor opposition led the trustee to forsake the settlement.

The frustrated appellants reacted by filing two motions. The first (not involved in this appeal) was a motion to enforce the putative $137,000 settlement. The other was a second motion to disqualify GGL & T, on the premise that GGL & T had an actual conflict with the estate because it continued to represent Arrow, which opposed the trustee's putative settlement of the adversary proceeding in which GGL & T was representing the trustee.

The trustee opposed both motions, denying he had agreed to settle and adding that he had since learned of another $2.27 million in potentially avoidable transfers to a Salim relative.

The bankruptcy court denied the second motion to disqualify by order entered April 11, 2001. We granted leave to appeal.

JURISDICTION

The bankruptcy court had jurisdiction via 28 U.S.C. §§ 1334 and 157(b)(1). We have jurisdiction under 28 U.S.C. § 158(a)(3).

ISSUES

Although the appellants' joint brief specifies twenty-four questions, they boil down to three issues.

1. Whether GGL & T was correctly employed by the trustee as special litigation counsel under 11 U.S.C. § 327 while concurrently representing a creditor.

2. Whether GGL & T's creditor client is eligible and has standing to prosecute a fraudulent transfer action in the name of the trustee under 11 U.S.C. § 503(b)(3)(B).

3. Whether GGL & T's representation of plaintiff is affected by a disqualifying conflict of interest.

STANDARD OF REVIEW

[3–5] Interpretations of statute are questions of law reviewed de novo. *Tighe v. Celebrity Home Entm't, Inc. (In re Celebrity Home Entm't, Inc.),* 210 F.3d 995, 997 (9th Cir.2000). Orders on employment and disqualification of professionals are reviewed for abuse of discretion. *First Interstate Bank v. CIC Inv. Corp. (In re CIC Inv. Corp.),* 175 B.R. 52, 53 (9th Cir. BAP 1994). It is an abuse of discretion to apply the wrong legal rule. *Gschwend v. Markus (In re Markus),* 268 B.R. 556, 559 (9th Cir. BAP 2001).

We do not reverse for errors not affecting substantial rights of the parties and may affirm for any reason supported by the record. 28 U.S.C. § 2111; Fed. R.Civ.P. 61, *incorporated by* Fed. R. Bankr.P. 9005; *Dittman v. California,* 191 F.3d 1020, 1027 n. 3 (9th Cir.1999); *Polo Bldg. Group, Inc. v. Rakita (In re Shubov),* 253 B.R. 540, 547 (9th Cir. BAP 2000).

DISCUSSION

We begin with the procedural error in the employment of GGL & T that necessitates vacating the employment order. Then we turn to the question whether the employment error was harmless with respect to the refusal to disqualify counsel. While the facts fit the pattern that would permit GGL & T, regardless of whether it is "disinterested," to act under § 503(b)(3)(B) as counsel for a creditor authorized by the court to sue in the trustee's name to recover property transferred by the debtor, the trial court must clarify GGL & T's status before we would affirm.

I

[6] There is a fundamental procedural defect in the employment of GGL & T as special litigation counsel under § 327.

Concurrent representation of trustee and creditor can be permitted if, and only if, it is within the § 327(c) safe harbor, which requires that other creditors and the U.S. trustee have the opportunity to object. If there is objection, then the court must determine whether an actual conflict of interest exists.

The statutory opportunity to object prescribed by § 327(c) necessitates disclosure of appropriate information be available to those who are entitled to object. To this end, employment application papers must include full disclosure of, among other things, "all of the person's connections with" creditors and that the application be accompanied by a verified statement of the person to be employed setting forth the connections with, among others, creditors. Fed. R. Bankr.P. 2014(a).

GGL & T has never made the requisite disclosure in the requisite form. The initial application refers to GGL & T's representation of Arrow in the pre-bankruptcy litigation and represents that GGL & T's compensation will be based on the nature, extent, and value of services rendered to the estate, will be determined by the court as an ordinary fee application, and that there would be no fee liability in excess of

actual recovery.[1] The accompanying declaration represents that GGL & T's sole connection with Arrow is representation in the stayed state court action, that GGL & T has not received a monetary retainer, and that any fee award will not exceed any recovery.[2]

There is no reference to any continuing representation of Arrow by GGL & T or to Arrow as paying GGL & T's fees for prosecuting the bankruptcy fraudulent transfer action. Nor is there any indication of how Arrow's payment of GGL & T's fees will impact fee applications that GGL & T says it will make.

On September 20, 2000, more than four months after the initial May 11 employment order, GGL & T lodged a proposed amended order, bearing the caption of the fraudulent transfer adversary proceeding, which is identical to the May 11 order entered in the parent bankruptcy case except for the following language: "By this Amended Order, the Court acknowledges that the fees of [GGL & T] are currently being paid by ARROW ELECTRONICS, INC., a creditor." No supporting application or declaration accompanied the proposed amended order.

This triggered the appellants' unsuccessful objection to employment and first motion to disqualify GGL & T.

[7] The facts that Arrow is paying GGL & T's fees for purportedly representing the trustee and that GGL & T continues to represent Arrow are "connections" with a creditor within the meaning of Rule 2014(a) that must be disclosed in the em-

1. The pertinent portions of the employment application are:

> 2. . . .The Firm [GGL & T], prior to the filing of the petition in this matter filed a state court action against the Debtor on behalf of ARROW ELECTRONICS, INC. (''ARROW''). Mr. Griffin is uniquely familiar with the issues in this case and[,] therefore, is in the best position to litigate issues concerning the transfer of the Debtor's assets. . . .
> 5. The Firm's compensation will be based upon the nature, extent, and value of the services it renders to the estate. All fees will be submitted to the Court for approval in accordance with the Bankruptcy Code and Rules, and the requirements of the office of the United States Trustee. *The parties understand and agree that the Chapter 7 Estate shall not be liable to the proposed Special Counsel unless there is a recovery of the Estate's assets in an amount at least equal to the fees and costs requested.*
> 7. To the best of the Debtor's [sic] knowledge, neither [GGL & T] nor any of its attorneys has a connection with any party in interest, its attorneys or accountants, other than as set forth herein and in the accompanying declarations. Except as may be set forth in this Application and [accompanying Declaration], to the best of Applicant's knowledge, neither [Declarant] nor any of the Firm's attorneys represent any interest adverse to the Estate, and [GGL & T] and its attorneys are disinterested persons under § 101(14) of the Bankruptcy Code.

Application to Employ [GGL & T] as Special Litigation Counsel (emphasis supplied).

2. GGL & T's declaration represents, in pertinent parts:

> 4. . . . To the best of my knowledge [GGL & T] has no affiliation with the Debtor, creditors, or any other party in interest, the United States Trustee or any person employed by the office of the United States Trustee, *except for my representation of ARROW in the above-referenced Superior Court litigation*. . . .
> 7. I have not received a monetary retainer in this case. I understand and [have] agreed that my Firm's fees in connection with this matter will be submitted to the Court for approval in accordance with the Bankruptcy Code and Rules, and the requirements of the office of the United States Trustee. Further, *unless there is a recovery of the Estate's assets which I believe were fraudulently conveyed away in an amount at least equal to my fees and costs, the Chapter 7 Estate shall not be liable to the Firm.*

Declaration of Gerald A. Griffin (emphasis supplied).

ployment application and in the verified statement that accompanies the application. Fed. R. Bankr.P. 2014(a); *Neben & Starrett, Inc. v. Chartwell Fin. Corp. (In re Park–Helena Corp.),* 63 F.3d 877, 880–82 (9th Cir.1995); *In re B.E.S. Concrete Prods., Inc.,* 93 B.R. 228, 237 (Bankr. E.D.Cal.1988); *United States v. Azevedo (In re Azevedo),* 92 B.R. 910, 910–11 (Bankr.E.D.Cal.1988).

[8] Moreover, creditor payment of fees and the continuing representation are material to both the employment and the analysis of the § 327(c) safe harbor. Such situations typically raise issues relating to the lawyer's ethical duty of loyalty and the identity of the client. They also potentially affect the eventual fee awards that counsel says it will seek. *In re Park–Helena Corp.,* 63 F.3d at 882.

These are matters that might matter to entities entitled to object and trigger the § 327(c) actual conflict analysis.

While there are established solutions for such problems, they must be dealt with explicitly in advance of the employment and be fully disclosed. They cannot be swept under the carpet.

There is no declaration or application that addresses the "connections" with Arrow relating to payment of GGL & T fees and continuing representation.

The minimal recital relating to a material matter that was made in an "amended" order tendered to the court without supporting explanation does not satisfy Rule 2014(a). Nor does it comport with the statutory notice requirement of § 327(c). Hence, the court acted prematurely when it did the "actual conflict" analysis necessary to the § 327(c) safe harbor.

The present § 327 employment order must be REVERSED. If, in further proceedings in the trial court, the United States trustee or a creditor with standing objects after GGL & T has presented the requisite application papers, then it will become appropriate to assess the question of "actual conflict of interest" within the meaning of the § 327(c) safe harbor.

II

[9] In attacking the court's refusal to disqualify GGL & T, appellants ask us to hold that the firm must be disqualified because it is not "disinterested" under § 327.

While we agree that § 327 imposes the "disinterested" requirement on all general and special counsel employed under that section (except debtor's counsel employed under the § 327(e) exception [3]), it does not follow that GGL & T must be disqualified if it is not "disinterested."

[10] We may affirm the court's refusal to disqualify counsel for any reason supported by the record. *Dittman v. California,* 191 F.3d at 1027 n. 3; *In re Shubov,* 253 B.R. at 547.

Moreover, we have an independent duty to disregard error that does not affect the substantial rights of the parties. 28 U.S.C. § 2111; Fed.R.Civ.P. 61, *incorporated by* Fed. R. Bankr.P. 9005; 11 CHARLES ALAN WRIGHT, ARTHUR R. MILLER & MARY KAY KANE, FEDERAL PRACTICE & PROCEDURE: CIVIL 2D § 2888 (1995). In

3. That exception provides:

> (e) The trustee, with the court's approval, may employ, for a specified special purpose, other than to represent the trustee in conducting the case, an attorney that has represented the debtor, if in the best interest of the estate, and if such attorney does not represent or hold any interest adverse to the debtor or to the estate with respect to the matter on which such attorney is to be employed.

11 U.S.C. § 327(e).

other words, we must explore the possibility that any error is harmless.

Here, the record presents the pattern of § 503(b)(3)(B)'s authorization for creditors to sue in the trustee's name to recover, for the estate's benefit, property that the debtor transferred or concealed.

A

[11] Section 503(b)(3)(B) carries forward the long-settled authority under former Bankruptcy Act § 64a(1) for creditors to sue in the name of the trustee to recover property for the benefit of the estate and to be compensated as administrative expenses. *In re Godon, Inc.*, 275 B.R. 555, 561–63 (Bankr.E.D.Cal.2002).

[12] A creditor acting under that authority with the court's prior permission has statutory standing, not some form of non-statutory standing. *Id.*, 275 B.R. at 563–66.

[13] Sections 503(b)(3)(B) and 327 are not necessarily mutually exclusive, but the theories of compensation are different. Professionals acting under § 503(b)(3)(B) have the authorized creditor as a client, may be paid by that client (with the client bearing the risk of not being reimbursed under § 503(b)(4)) and need not be "disinterested" as required by § 327(a). *Id.*, 275 B.R. at 566–68; 4 L. KING, ET AL., COLLIER ON BANKRUPTCY § 503.11[4] (15th ed. rev. 2000).

[14] The court acts as gatekeeper, polices any dysfunction that arises as between authorized creditor and the trustee, and retains the power to scrutinize compromises. Fed. R. Bankr.P. 9019(a); *Godon*, 275 B.R. at 569–70.

The Bankruptcy Code and the Federal Rules of Bankruptcy Procedure are silent about the mechanism for obtaining prior court authorization for creditor recovery actions.

B

Although this case generally fits within the § 503(b)(3)(B) creditor recovery model, neither the trustee nor GGL & T expressly invoked it.[4] If they had done so, we would affirm.

While the bankruptcy court's approval of the amended employment order that explicitly recognized Arrow was paying GGL & T's fees, together with its ensuing refusal to disqualify the firm, could be construed as a § 503(b)(3)(B) authorization on which we could premise a finding of harmless error, the prudent course is to ask the bankruptcy court to be clear about the basis on which GGL & T is proceeding.

The key point about § 503(b)(3)(B) at this juncture is that its mere existence belies appellants' argument that being "not disinterested" or that payment of counsel by a creditor requires disqualification. Since the "disinterested" requirement of § 327 does not apply in § 503(b)(3)(B) creditor suits, it follows that lack of "disinterest" is no reason for disqualification.

Likewise, the fact that § 503(b)(3)(B) authorizes a creditor to use its own lawyer to recover property for the benefit of the estate, once the court has given its permission, compels the conclusion that the authorized creditor's lawyer may be paid by its client without fear of disqualification on that account.

Thus, on the question of disqualification of counsel acting under § 503(b)(3)(B), it would be irrelevant whether GGL & T is

4. In contrast, the counsel and trustee in *Godon* actually agreed to use § 503(b)(3)(B). *Godon*, 275 B.R. at 561.

"disinterested" and irrelevant that Arrow is paying GGL & T's fees.

The apparent congruence of the facts with the § 503(b)(3)(B) creditor recovery model tends to support the court's denial of the motions to disqualify GGL & T, even though GGL & T was not validly employed to represent the trustee. Nevertheless, without an explicit determination by the court invoking § 503(b)(3)(B) and clarifying who is GGL & T's client, we will not actually affirm the denials of the disqualification motions.

In short, no matter how defective the employment of GGL & T may have been under § 327, the court could permit GGL & T to prosecute the adversary proceeding as counsel to Arrow on the basis of § 503(b)(3)(B) permission to recover property for the benefit of the estate. We cannot say that the court abused its discretion in refusing to disqualify GGL & T, nor are we willing to affirm without clarification of GGL & T's precise status. Accordingly, we will VACATE and REMAND.

III

In deciding this appeal, we have treated the appellants' possible lack of standing as a non-jurisdictional issue that has been waived by not having been raised. *Pershing Park Villas Homeowners Ass'n v. United Pac. Ins. Co.,* 219 F.3d 895, 900–01 (9th Cir.2000); *Godon,* 275 B.R. at 564–66 (distinguishing among "prudential standing," "statutory standing," "appellate standing," and "constitutional standing").

[15] Nevertheless, because it may have implications for future attempts to pursue diversionary strategic appeals in this case, we note that appellants have not established that they have "appellate standing," which requires that they be "persons aggrieved" or be "directly and pecuniarily affected" by their adversary's choice of counsel. Without such a demonstration, an appellate court would be justified in refusing to hear them. *Duckor Spradling & Metzger v. Baum Trust (In re P.R.T.C, Inc.),* 177 F.3d 774, 777–78 (9th Cir.1999); *Fondiller v. Robertson (In re Fondiller),* 707 F.2d 441, 442–43 (9th Cir.1983). Since, however, "appellate standing" is a discretionary, rather than a jurisdictional, doctrine, we are not compelled to dismiss.

Appellants are not creditors. Appellants' briefs are barren of authority for the necessary proposition that they have standing to appeal a refusal to disqualify opposing counsel for a conflict of interest that does not involve any ethical duty owed to them. Thus, if the bankruptcy court rules that GGL & T is authorized to proceed under § 503(b)(3)(B), appellants will need to demonstrate standing in order to have any such order reviewed on appeal.

CONCLUSION

The bankruptcy court abused its discretion when it authorized employment under § 327 without GGL & T's prior compliance with the procedure prescribed by § 327(c) and Rule 2014. Accordingly, the employment order under § 327 must be REVERSED. The court may authorize § 327 employment if, and only if, GGL & T fully complies with § 327 and Rule 2014.

This error, however, may be harmless. Without § 327 employment, the court may authorize GGL & T to proceed pursuant to § 503(b)(3)(B), representing Arrow suing in the name of the trustee. We VACATE and REMAND the orders refusing to disqualify GGL & T, so that the bankruptcy court may clarify the capacity in which this adversary proceeding is being prosecuted.

If the court determines that the action is proceeding under § 503(b)(3)(B), the terms of employment, including payment terms and who bears the risk of non-payment by the bankruptcy estate, are between GGL

& T and Arrow. While compensation from the estate is governed by § 503(b)(4), Arrow and GGL & T may allocate among themselves the risk of non-payment by the estate. Those private contractual arrangements are none of the appellants' business.

MONTALI, Bankruptcy Judge, concurring and dissenting.

I

I agree with the majority's conclusion in Part I that the amended order approving the employment of GGL & T must be reversed. As pointed out in the discussion, the amended application lacked all of the supporting papers necessary to determine whether GGL & T was eligible for employment under Bankruptcy Code section 327(a), the section relied upon by appellee. There has *never* been a proper employment of GGL & T under that section and Rule 2014(a). In my view this defect is fatal to appellees' case.

GGL & T has steadfastly refused without justification to disclose the details of its arrangements with Arrow, even up to the time of oral argument on this appeal. It should not be rewarded for such arrogance, nor should it be given anything else other than its outright termination as counsel to the trustee. If Arrow wants to pay for GGL & T's work, so be it. The estate should not. *See Neben & Starrett, Inc. v. Chartwell Financial Corp. (In re Park–Helena Corp.),* 63 F.3d 877 (9th Cir. 1995) (court must ensure attorneys representing estate do not have adverse interests; forfeiture of all fees for non-disclosure not inappropriate); *Atkins v. Wain, Samuel & Co. (In re Atkins),* 69 F.3d 970, 974 (9th Cir.1995) (factors to show exceptional circumstances for retroactive approval of employment include satisfactory explanation for failure to obtain proper approval).

Reversal of the amended employment order should make reversal of the bankruptcy court's two refusals to disqualify GGL & T follow as a matter of course.

II

Where I depart from the majority's analysis is in Part II, where it proceeds to give the trustee and his now-disqualified special counsel a road map to follow a trail they never considered in an attempt to salvage their attempt to pursue appellants. The majority begins with a false assumption to reach the conclusion that GGL & T's employment constituted an authorization for Arrow to seek to recover assets for the benefit of the estate as permitted by Bankruptcy Code section 503(b)(3)(B).

It suggests that "... the record presents the pattern of § 503(b)(3)(B)'s authorization for creditors to sue in the trustee's name ...." We look to the record for facts, not patterns. As a matter of fact, Arrow did nothing. It asked for nothing. No one other than the majority ever thought of § 503(b) as a solution to the dilemma presented. No party contemplated the availability of § 503(b) or requested relief under it. In *Godon,* the trustee and the creditor entered into a compromise, governed by Rule 9019. That agreement did not mention §§ 503(b)(3) or (b)(4). *Godon,* 275 B.R. at 561. At the hearing someone raised the possibility of reaching the same result under § 503(b). I can only guess who was that creative. Thus, the statement by the majority that "...the court could permit GGL & T to prosecute the adversary proceeding as counsel to Arrow on the basis of § 503(b)(3)(B) permission to recover property for the benefit of the estate" is wholly unsupported in the record and is wholly speculative.

Our duty on the Bankruptcy Appellate Panel is to correct error; it is not to draft trial briefs for parties who fail to achieve

what they attempt. We should not be outlining alternatives for unsuccessful litigants. GGL & T failed miserably in its efforts to act as the trustee's counsel. If and when Arrow seeks permission for its attorneys to sue in the trustee's name, the bankruptcy court should consider all relevant factors. It is impermissible, indeed unseemly, for this court to outline Arrow's legal approach to a matter never presented to the bankruptcy court. We are neither qualified to act as a party's advocate, nor authorized to issue advisory opinions.

In sum, while it is true that we can affirm for any reason, and perhaps even for reasons not even raised by the parties at the bankruptcy court or on appeal, we cannot change the underlying events in order to get to a result we wish to reach. Here the majority imports a section of the Bankruptcy Code that allows fees to be paid to a creditor who first obtains authority to recover an asset transferred or concealed by the debtor, and then actually recovers it. In fact, the trustee applied (for the reasons stated above, in a sloppy manner) to employ GGL & T as his special counsel. There has been no authorization for Arrow to do anything. Nor has there been any recovery of property transferred or concealed. The action brought by GGL & T against appellants seeks far more than the recovery of property within the purview of § 503(b)(3)(B); it includes counts based upon fraud, breach of contract and conspiracy. Since there has been no recovery at all, GGL & T's willingness to be paid only out of any recovery makes any stretching of section 503(b)(3) to cover these facts premature as well as inappropriate. Finally, there has been no request for compensation.

We should simply reverse the orders on appeal and let the chips fall where they may.

III

I also reject the majority's intimation at Part III that appellants lack appellate standing. Appellees failed to raise standing as an issue at the bankruptcy court, and the majority correctly states that the issue has been waived. There is no suggestion in the majority's discussion that our jurisdiction is implicated. If it were, this appeal would have to be dismissed. The record reflects that appellees have never raised the issue of appellants' standing, and in my opinion the defense, if valid at all, has been waived twice.

IV

The majority does not treat with the issue of whether GGL & T's representation of appellee has been tainted by a disqualifying conflict of interest. The majority has declined to elaborate on the issue; I would simply resolve the matter by observing that the trustee was pressured by the bankruptcy court to go forward with a settlement that he thought was opposed by creditors, and that he no longer supported himself. Thus it would be difficult, if not impossible, to accuse GGL & T, his counsel, of a disqualifying conflict when it was acting in a manner consistent with the wishes not only of Arrow, but of the trustee, its putative client, as well. That being said, the issue of disqualification based upon a conflict is moot in my mind, as set forth above, because there has never been (and never should be) a proper authorization of GGL & T's employment.

that Defendant is to pay to Plaintiff the amount of $3,250.34 as and for judgment in this matter.

In re Kaveh LAHIJANI, Debtor.

Kamiar Simantob; Nasser Lahijani, Appellants,

v.

Claims Prosecutor, LLC; Bryan Mashian; Peter C. Anderson, Chapter 7 Trustee, Appellees.

BAP No. CC–04–1350–KMOSN. Bankruptcy No. SV 98–15561–AG.

United States Bankruptcy Appellate Panel of the Ninth Circuit.

Argued and Submitted Jan. 20, 2005.

Filed April 21, 2005.

Background: Order was entered by the United States Bankruptcy Court for the Central District of California, Arthur M. Greenwald, J., authorizing sale of estate's avoidance claims to one of the transferees from whom recovery might be sought, over objection of creditors that sought to pursue these claims against transferees. Creditors appealed.

Holding: The Bankruptcy Appellate Panel, Klein, J., held that decision to approve proposed sale of estate's avoidance claims to one of the transferees from whom recovery might be sought, upon ground that monetary payment of $175,000 offered by transferee was in excess of the $160,000 offered by creditors who wished to pursue such claims, constituted abuse of bankruptcy court's discretion.

Reversed and remanded.

1. Bankruptcy ⚿3784

Bankruptcy court orders authorizing sales outside ordinary course of business are reviewed for abuse of discretion. Bankr.Code, 11 U.S.C.A. § 363(b).

2. Bankruptcy ⚿3784

It is "abuse of discretion" for bankruptcy court to apply an incorrect legal rule.

See publication Words and Phrases for other judicial constructions and definitions.

3. Bankruptcy ⚿3067.1

Trustee's sale of avoiding-power cause of action need not necessarily be to one who will exercise those powers for benefit of all creditors.

4. Bankruptcy ⚿3069, 3072(2)

Bankruptcy court's obligation, in connection with sale of estate assets other than in ordinary course of business, is to ensure that optimal value is realized by the estate under the circumstances. Bankr. Code, 11 U.S.C.A. § 363(b).

5. Bankruptcy ⚿3070

Ordinarily, in determining whether to authorize sale of estate assets other than in ordinary course of business, bankruptcy court should defer to position of trustee, particularly where business judgment is entailed in sales decision, or where there is no objection. Bankr.Code, 11 U.S.C.A. § 363(b).

6. Bankruptcy ⚿3070

While bankruptcy court will ordinarily defer to trustee on matters involving his proposed sale of estate assets other than in ordinary course of business, decision whether to approve proposed sale is ultimately the responsibility of court, particu-

larly in face of opposition to sale by creditors. Bankr.Code, 11 U.S.C.A. § 363(b).

7. Bankruptcy ⚿3072(2)

Decision to approve proposed sale of estate's avoidance claims to one of the transferees from whom recovery might be sought, upon ground that monetary payment of $175,000 offered by transferee was in excess of the $160,000 offered by creditors who wished to pursue such claims, constituted abuse of bankruptcy court's discretion, where creditors had also sought to offer percentage of their recovery on these avoidance claims, but this offer had been refused out-of-hand by trustee, on ground that he had no way of evaluating possibility of success on claims; absent any assessment of value of the other, noncash component of creditors' offer, court could not determine whether transferee's offer was actually the highest bid. Bankr.Code, 11 U.S.C.A. § 363(b).

8. Bankruptcy ⚿3072(1)

In deciding whether to approve proposed sale of estate assets other than in ordinary course of business, bankruptcy court should examine proposed purchase price more carefully when there are only a limited number of bidders, such as where only bidders for avoidance claim are prospective defendant and creditors seeking to pursue claim against defendant. Bankr. Code, 11 U.S.C.A. § 363(b).

9. Bankruptcy ⚿3033, 3069, 3070

When cause of action is being sold to present/potential defendant over creditors' objection, bankruptcy court, in addition to evaluating it as sale outside ordinary course of business, must independently assess transaction as settlement under the prevailing "fair and equitable" test, and consider possibility of authorizing the objecting creditors to prosecute cause of action for benefit of estate. Bankr.Code, 11 U.S.C.A. §§ 363(b), 503(b)(3)(B); Fed. Rules Bankr.Proc.Rule 9019, 11 U.S.C.A.

10. Bankruptcy ⚿3033

In deciding whether proposed settlement is fair and equitable, bankruptcy court must consider the following: (1) probability of success in litigation; (2) collectibility of judgment; (3) complexity, expense, inconvenience and delay which will be attendant to any continued litigation; and (4) paramount interests of creditors. Fed.Rules Bankr.Proc.Rule 9019, 11 U.S.C.A.

11. Bankruptcy ⚿3033, 3070

Decision to approve proposed sale of estate's avoidance claims to one of the transferees from whom recovery might be sought, over objection of creditors that sought to pursue these claims against transferees, constituted abuse of bankruptcy court's discretion, where court, in approving sale, considered only that transferee had offered to make greater cash payment up front and never evaluated proposed sale under "fair and equitable" standard applicable to proposed settlements. Bankr.Code, 11 U.S.C.A. § 363(b); Fed. Rules Bankr.Proc.Rule 9019, 11 U.S.C.A.

12. Bankruptcy ⚿2021.1

Crucial rule of construction regarding transition from the Bankruptcy Act to the Bankruptcy Code is that judge-made doctrines are presumed to be carried forward, except to extent that Congress indicated a contrary intent.

13. Bankruptcy ⚿2154.1

Creditor acting under statutory creditor-recovery authority is permitted to sue in name of trustee to recover estate property, and creditor, upon obtaining permission to act, has statutory standing to sue. Bankr.Code, 11 U.S.C.A. § 503(b)(3)(B).

14. Bankruptcy ⚿3033

Creditor's willingness to bear risk and expense on behalf of estate of litigating to recover property that would be property of estate and that would not otherwise deleteriously affect administration of estate is matter that bankruptcy court is obliged to consider when weighing compromise that would eliminate this recovery action. Fed. Rules Bankr.Proc.Rule 9019, 11 U.S.C.A.

Herbert N. Niermann, Irvine, CA, for debtor.

Peter C. Anderson, Los Angeles, CA, trustee.

Before: KLEIN, MONTALI, and SNYDER,* Bankruptcy Judges.

OPINION

KLEIN, Bankruptcy Judge.

What is in a name? Sometimes a lot—of misinformation. If ever there was a misnomer, it is the name of appellee, "Claims Prosecutor, LLC," which should have called itself "Claims Defender" or "Claims Extinguisher" when purchasing the trustee's causes of action to retrieve property allegedly transferred by the debtor. Its owner, who is both a defendant and the debtor's brother-in-law, concedes that the causes of action will not be prosecuted and elected in open court not to attempt to establish that the purchase was in "good faith" for purposes of the 11 U.S.C. § 363(m) statutory safe harbor from appellate remedies.

This appeal ties together a number of our recent decisions. We have held that the question whether a purchaser at a court-approved sale acted in § 363(m) "good faith" is to be determined by the trial court with findings based on evidence and that the safe harbor can be waived by omission to present such evidence.[1] We have held that sale of avoiding actions may simultaneously implicate § 363 "sale" analysis and "compromise" analysis under Federal Rule of Bankruptcy Procedure 9019(a).[2] We have also explained that 11 U.S.C. § 503(b)(3)(B) recognizes that courts may authorize a creditor to sue in the name of the trustee, at its own expense (but subject to reimbursement under § 503(b)), to recover property transferred by a debtor.[3]

We now conclude that, when a cause of action is being sold to a present or potential defendant over the objection of creditors, a bankruptcy court must, in addition to treating it as a sale, independently evaluate the transaction as a settlement under the prevailing "fair and equitable" test, and consider the possibility of authorizing the objecting creditors to prosecute the cause of action for the benefit of the estate, as permitted by § 503(b)(3)(B). Accordingly, we REVERSE the order approving the sale of the estate's causes of action under § 363.

* Hon. Paul B. Snyder, Bankruptcy Judge for the Western District of Washington, sitting by designation.

1. *T.C. Investors v. Joseph (In re M Capital Corp.),* 290 B.R. 743, 745 (9th Cir. BAP 2003); *Thomas v. Namba (In re Thomas),* 287 B.R. 782 (9th Cir. BAP 2002).

2. *Goodwin v. Mickey Thompson Entm't Group, Inc. (In re Mickey Thompson Entm't Group, Inc.),* 292 B.R. 415, 421 (9th Cir. BAP 2003) (*"Mickey Thompson"*).

3. *Com–1 Info, Inc. v. Wolkowitz (In re Maximus Computers, Inc.),* 278 B.R. 189, 197–98 (9th Cir. BAP 2002) (*"Maximus Computers"*); *accord, In re Godon, Inc.,* 275 B.R. 555, 561–63 (Bankr.E.D.Cal.2002) (*"Godon"*).

FACTS

Kaveh Lahijani filed a chapter 7 bankruptcy case in April 1998. Discharge was entered in August 1998. The case was closed as a no-asset case in August 1999.

Nine months after the bankruptcy case was closed, the appellants Kamiar Simantob and Nasser Lahijani (joined by one other person), who had not been scheduled as creditors and did not otherwise know of Kaveh Lahijani's bankruptcy, sued him and others in state court in an effort to recover about $10 million that they alleged was embezzled before the bankruptcy.

The action, *Simantob, et al. v. Lahijani, et al.*, sounding in fraud, was filed in a state court in May 2000.[4] It alleged misrepresentation, concealment, rescission, conspiracy, breach of fiduciary duty, constructive trust, and conversion.

While the state court action was pending, the bankruptcy case was reopened and appellee Peter C. Anderson was appointed chapter 7 trustee. The appellants filed a $9,786,000 proof of claim (all claims total about $13 million) and commenced an adversary proceeding to have the debtor's discharge revoked or have the debt excepted from discharge.

The net result of three years of convoluted state and federal litigation was that, by October 2003, the appellants had lost in state court on all substantive claims for relief and had not succeeded in having the discharge revoked or the debt excepted from discharge.

Left with a simple debt that was subject to a valid discharge, the appellants' only remaining avenue for recovery was to maximize the value of the bankruptcy estate available for distribution to creditors. This they proposed to accomplish through the exercise of the trustee's powers to avoid and recover property that the appellants believed Kaveh Lahijani had fraudulently transferred.

Since the trustee (who says he is unable to evaluate the underlying merits and, in any event, lacks the funds necessary to wage war) was unwilling to pursue the fraudulent transfer and turnover causes of action, the appellants offered to purchase them for a price of one-half of net recoveries.

The appellants' proposal operated to put the avoiding power causes of action into play as assets that could be auctioned.

Kaveh Lahijani's brother-in-law and co-defendant, Bashan "Bryan" Mashian, formed appellee, Claims Prosecutor, LLC (" 'Claims Prosecutor' "), in order to acquire the avoiding power causes of action, offering $30,000.

The chapter 7 trustee evaluated the appellants' 50 percent offer as more beneficial to the estate than $30,000 and filed a motion for permission to assign his trustee avoiding powers to the appellants, subject to overbid.

When "Claims Prosecutor" raised its offer to $100,000, the trustee switched positions and proposed to accept that offer, subject to overbid and court approval.

The trustee subsequently issued a supplemental notice of a contested sale hearing at which the estate property would be auctioned. Pursuant to the notice, which purported to detail overbid procedures, both initial and subsequent overbids had to be in cash or cash equivalent.[5]

4. Kamiar Simantob, *Kamran Simantob & Nasser Lahijani v. Kaveh Lahijani, Micha Mottale, Venice & Vermont, Inc.*, Bahman ["Bryan"] Mashian, Buchalter, Nemer, Fields & Younger & Does 1—100, No. BC231307, Los Angeles County Super. Ct., filed 5/22/00.

5. The property being sold was described as:

At the sale hearing on June 2, 2004, the trustee insisted that only cash or cash equivalent offers were acceptable to him. He did not explain why percentage offers were unacceptable.

During the bidding, the appellants offered a number of overbids that included additional percentage recoveries for the estate ($101,000 + 10 percent; $110,000 + 25 percent; and $130,000 + 25 percent). The trustee objected to the percentages because he wanted a sum certain so the case could be closed.[6] When the appellants persisted, they were effectively forced to state their bids without adding percentages of recoveries, even though they made a record that they wanted to do so.[7] Their final bid was for $160,000.[8]

> any and all assets of the Estate whether real, personal or otherwise including, but not limited to, the following: any and all known or unknown claims, suits, contracts, judgments, demands, damages, debts, obligations, lawsuits, causes of action, losses, penalties, fines, liabilities (including strict liability), encumbrances, liens, costs or expenses, whether or not ultimately defeated, of whatever kind, nature or description, contingent or otherwise, matured or unmatured, foreseeable or unforeseeable, including [fees and expenses].
>
> Supplemental Notice of Trustee's Motion to Assign Avoiding Powers to Simantob, Subject to Overbid, filed 5/25/04, at 4.

6. The relevant colloquy was:

> [APPELLANTS' COUNSEL]: We'll bid $110,000 plus a 25 percent interest in the recovery.
>
> COURT: Well, is the Trustee going to object? There may not be a recovery, but they're offering to give a 25 percent recovery.
>
> [TRUSTEE'S COUNSEL]: . . . [B]ecause of the nature of facilitating overbids in this case, we do not want a percentage of the recovery included in the items. We want the sale over with, the Trustee's involvement with that portion of the case over with. . . .
>
> COURT: Well, what does the Trustee deem to be the value of this recovery at this time?
>
> [TRUSTEE'S COUNSEL]: Your Honor, other than the offers that are made, the Trustee has no way of determining the value of those claims. He has no resources to pursue those claims. So to the estate as it stands right now without any bids, the claims are not of any value to the estate.
>
> Tr. 6/2/04 hearing, at 33.

7. For example, when appellants offered $130,000, plus 25 percent of the recovery, the following colloquy occurred:

> [APPELLANTS' COUNSEL]: We bid $130,000, again, plus 25 percent of any recovery. . . .
>
> [TRUSTEE'S COUNSEL]: The Trustee will not accept the portion that is a percentage of the recovery.
>
> COURT: . . . [are] you going to withdraw your bid?
>
> [APPELLANTS' COUNSEL]: No, your honor.
>
> COURT: Or are you going to modify it to limit it to the $130,000?
>
> [APPELLANTS' COUNSEL]: Well, we're offering that in addition to the $130,000 cash. It's not contingent.
>
> COURT: I understand, and the Trustee is not accepting that. So then the question is what do we do with your bid. . . . Are you going to reject the bid or are you going to ask that the bid be limited to the $130,000?
>
> [APPELLANTS' COUNSEL]: Well, if I'm forced to do so, the bid will be limited to the $130,000. . . .
>
> [TRUSTEE'S COUNSEL]: The only portion that we would accept, your Honor, is the $130,000 bid. If that bid is made at $130,000 without any percentages, we would accept. . .
>
> COURT: Your bid. You want to modify your bid?
>
> [APPELLANTS' COUNSEL]: Yes, we do, your Honor, but *I want to make it clear for the record that we're offering a percentage of the recovery* . . .
>
> COURT: I think the record is clear as to how the trustee wants to deal with that.
>
> Tr. 6/2/04 hearing at 38–43 (overlapping speech corrected) (emphasis supplied).

8. Appellants did not add a percentage to their $160,000 bid. At oral argument, counsel explained to us that he believed he had already made his record on the point and was reluctant to risk annoying the trial judge. Under the circumstances, we do not believe appel-

The court authorized the trustee to sell the causes of action to "Claims Prosecutor", for its high bid of $175,000 and, as a back-up, to appellants for $160,000.

When the court was asked to find that the purchaser was acting in "good faith" within the meaning of § 363(m) so that the sale could not be upset on appeal,[9] it (correctly) noted that our § 363(m) decisions in *Thomas* and *Mickey Thompson* emphasize the need for evidence to support such a finding and then declined to make a finding unsupported by evidence.

"Claims Prosecutor" declined the court's offer to take testimony directed to the question of § 363(m) "good faith" and represented that the transaction would proceed without the benefit of a finding of "good faith."

This timely appeal ensued.

JURISDICTION

The bankruptcy court had jurisdiction via 28 U.S.C. §§ 1334 and 157(b)(1). We have jurisdiction under 28 U.S.C. § 158(a)(1).

ISSUES

1. Whether the court applied the correct legal standard when approving a § 363 sale of causes of action to a defendant for a sum certain over objection by the main creditor in the case, who wanted to pursue the causes of action.

2. Whether the sale of causes of action to defendants in this instance meets the requirements for approving a compromise as "fair and equitable."

STANDARD OF REVIEW

[1, 2] Sales under § 363 are reviewed for abuse of discretion. *Moldo v. Clark (In re Clark),* 266 B.R. 163, 168 (9th Cir. BAP 2001). It is an abuse of discretion to apply an incorrect legal rule. *Maximus Computers,* 278 B.R. at 194.

DISCUSSION

This appeal involves the sale of causes of action to a defendant over the opposition of creditors. The rules governing sales are implicated, as are the rules governing compromises.

I

Bankruptcy trustees are permitted to sell property of the estate not in the ordinary course of business after notice and a hearing. 11 U.S.C. § 363(b)(1).

Objections to sale that are based on inadequacy of price are often resolved by the court ordering an auction, which may occur in open court. Fed. R. Bankr.P. 6004(f).

Causes of action owned by the trustee are intangible items of property of the estate that may be sold. These include causes of action owned by the debtor as of the filing of the case. 11 U.S.C. § 541(a)(1). In addition, property recovered by the trustee pursuant to, inter alia, turnover and avoiding powers, is property of the estate. 11 U.S.C. § 541(a)(3).

lants waived their right to urge on appeal that their fixed amount "plus percentage" bid be considered.

9. That safe harbor section provides:

> (m) The reversal or modification on appeal of an authorization under subsection (b) or (c) of this section of a sale or lease of property does not affect the validity of a sale or lease under such authorization to an entity *that purchased or leased such property in good faith,* whether or not such entity knew of the pendency of the appeal, unless such authorization and such sale or lease were stayed pending appeal.

11 U.S.C. § 363(m) (emphasis supplied).

Causes of action that exist independent of bankruptcy are commonly sold by bankruptcy trustees under § 363(b).

While there is some disagreement among courts about the exercise by others of the trustee's bankruptcy-specific avoiding power causes of action, the Ninth Circuit permits such actions to be sold or transferred. *Duckor Spradling & Metzger v. Baum Trust (In re P.R.T.C., Inc.),* 177 F.3d 774, 781 (9th Cir.1999) ("*P.R.T.C.*"); *Briggs v. Kent (In re Prof'l Inv. Props. of Am.),* 955 F.2d 623, 625–26 (9th Cir. 1992).[10] Thus, we focus first on the transaction under ordinary sale rules.

A

[3] We reject appellants' argument that the avoiding power causes of action should not have been sold to one who would not exercise the powers for the benefit of all creditors.

The difficulty with this argument is that, under the law of the circuit, trustee avoiding powers may be transferred for a sum certain. *P.R.T.C.,* 177 F.3d at 781–82; *Briggs,* 955 F.2d at 625–26. The benefit to the estate in such circumstances is the sale price, which might or might not include a portion of future recoveries for the estate. Thus, *P.R.T.C.* and *Briggs* do not mandate, as appellants contend, that the avoidance powers can only be sold to a creditor who agrees to pursue those avoidance powers for the benefit of all creditors.

To be sure, the common-sense of appellants' argument is captured by the statutory authorization under §§ 503(b)(3) & (4) that permits a creditor, with the permission of the court, to sue in the name of the trustee to recover, for the benefit of the estate, transfers made by the debtor. *Maximus Computers,* 278 B.R. at 197–98; *Godon,* 275 B.R. at 561–69.

While one may wonder whether the analysis in *P.R.T.C.* and *Briggs* would have been the same if the Ninth Circuit had had the benefit of the subsequently-articulated *Maximus Computers–Godon* analysis of §§ 503(b)(3) & (4), *P.R.T.C.* and *Briggs* stand for a broader proposition that extends beyond creditors and that extends beyond the recovery of property transferred by the debtor. Moreover, it is law of the circuit that we must follow.

Viewed as a sale, the question, thus, boils down to whether the sale price to "Claims Prosecutor" created a greater benefit to the estate than the best offer of appellants.

B

[4–6] The court's obligation in § 363(b) sales is to assure that optimal value is realized by the estate under the circumstances. The requirement of a notice and hearing operates to provide both a means

10. Most decisions that wrestle with this problem overlook a key statutory analysis that resolves the issue with respect to recovery of property transferred or concealed by the debtor and that, to that extent, makes the *P.R.T.C.–Briggs* analysis unnecessary. The Bankruptcy Code recognizes, albeit obliquely, that a court may authorize a creditor to prosecute an action to recover property transferred or concealed by the debtor, suing in the name of the trustee but at the creditor's risk and expense, and authorizes reimbursement under 11 U.S.C. §§ 503(b)(3) & (4) in the event of success. *Maximus Computers,* 278 B.R. at 197–98; *Godon,* 275 B.R. at 561–69. Thus, it is neither necessary for the trustee to transfer a cause of action to recover property transferred or concealed by the debtor, nor to employ a creditor's attorney as "special" counsel, in order to permit a creditor to prosecute such an action. Note, however, that *P.R.T.C.–Briggs* sweeps broader than § 503(b)(3)(B) because it applies to all causes of action owned by the trustee and does not purport to be limited to recovery of property transferred or concealed by the debtor.

of objecting and a method for attracting interest by potential purchasers. Ordinarily, the position of the trustee is afforded deference, particularly where business judgment is entailed in the analysis or where there is no objection. Nevertheless, particularly in the face of opposition by creditors, the requirement of court approval means that the responsibility ultimately is the court's.

[7] The trustee in this instance refused to entertain bids that included a fixed percentage of net proceeds in addition to a sum certain. In effect, he valued the fixed percentage at zero, which he purported to justify on the basis that he had no way to value the merits of the causes of action being sold. The court deferred to the trustee, accepted the trustee's zero valuation of net litigation proceeds, and essentially required the appellants to stop adding a percentage to their offers. They acquiesced after making a record that they wished to continue to add percentages. After bidding $160,000, they let "Claims Prosecutor's" $175,000 bid stand.

Two facets bear on the analysis of the question whether the $175,000 is an appropriate price for the sale. First, there is the problem of thin competition. Second, there is the question whether $175,000 was actually the higher bid in the face of the additional percentage offered by appellants.

[8] The price achieved by an auction is ordinarily assumed to approximate market value when there is competition by an appropriate number of bidders. When competition is constrained, however, the price is less likely to be reliable and should be examined more carefully. The sale of a cause of action to a defendant in circumstances in which the plaintiff is the only competitor is an example of constrained competition that warrants more scrutiny.

When the facades are stripped away in this case, the only bidders were a defendant (who apparently was acting in the interest of all fellow defendants) and the plaintiffs (creditors who held about 70 percent of the debt). While the plaintiffs (our appellant) did not bid more than $160,000, they were willing to add, even though the trustee did not want to hear it, a portion of the net return. The trustee's zero valuation does not inspire confidence in his business judgment.

In addition, it is debatable that $175,000 was actually the high bid in light of the standing offer of a percentage of the net litigation proceeds.[11] An economist would place an "expected value" on such a proposition and discount it to "present value," based on a calculation that, in its simplest form, is the product of the possible result, multiplied by the probability of achieving the result, discounted to present value.[12]

11. We are mindful that the final bid by appellants did not state that a percentage of litigation proceeds was also being offered. Under the circumstances, appellants had made a record that amply establishes the percentage additive. In view of the high proportion of appellants' claim in relation to total claims that would cycle a majority of those funds back to appellants, there is no rational reason appellants would have voluntarily ceased including the percentage sweetener.

12. Present value analysis is a well-understood proposition of elementary economics. Paul A. Samuelson & William D. Nordhaus, Economics 201–02, 271–73 (14th ed.1992); Eugene F. Fama & Merton H. Miller, The Theory of Finance 27–29, 209–211 (1972). As applicable, here, for example, a probability of .05 (one chance in twenty) of recovering $1 million in three years with a discount rate of 10 percent would be valued as follows. First, ascertain the expected value in the future period: .05 × $1,000,000 = $50,000. Second, compute the present value by dividing by 1.1 (i.e., 1 + 10 percent) to the third power (because the period is three years): $50,000 ÷ (1.1 × 1.1 × 1.1) = $50,000 ÷ 1.331 =

The crucial point for purposes of the present analysis is that, so long as the pertinent probability is not zero, the expected and present value calculation will yield some value. Any such value should be taken into account.

The consequence is that there is good reason to think that "Claims Prosecutor" was not actually the high bidder. Since it elected to proceed without a determination that it was a "good faith" purchaser within the meaning of § 363(m), there is no impediment to reversing and remanding so that the trial court can evaluate the sale in a manner that gives appropriate value to the appellants' bid.

II

[9] There is, moreover, a problem more fundamental than the sale price.

Since the transaction amounted to acquisition of causes of action by a defendant for $175,000, *Mickey Thompson* teaches that it must also be analyzed as a compromise as to which the court has an independent duty to determine whether it is "fair and equitable." *Mickey Thompson,* 292 B.R. at 420–21.[13]

A

[10] The fair and equitable settlement standard, originally established by the Supreme Court in *TMT Trailer Ferry,* requires consideration of: (a) probability of success in the litigation; (b) collectability; (c) complexity, expense, inconvenience, and delay attendant to continued litigation; and (d) the interests of creditors, which are said to be "paramount." *Protective Comm. for Indep. Stockholders of TMT Trailer Ferry, Inc. v. Anderson,* 390 U.S. 414, 424–25, 88 S.Ct. 1157, 20 L.Ed.2d 1 (1968) (Bankruptcy Act); *Woodson v. Fireman's Fund Ins. Co. (In re Woodson),* 839 F.2d 610, 620 (9th Cir.1988); *Martin v. Kane (In re A & C Props.),* 784 F.2d 1377, 1380–81 (9th Cir.1986); *Mickey Thompson,* 292 B.R. at 420.

[11] None of this analysis, which is inherently fact-intensive, relative, and contextual, was undertaken by the bankruptcy court.

Some of these issues appear to cut in favor of appellants. Since the interest of creditors is said to be of "paramount" importance and entitled to deference, and since appellants hold the majority of the debt in the case, their position on the amount of the settlement deserves more credence than it received.

Correlatively, while keeping the case open during the life of the anticipated litigation would entail delay, there would be little or no cost to the estate. If, as here, the creditors holding the majority of the claims filed in the case desire to forego the quick payment of what they see as a small dividend and are willing to bear the expenses, their position on this factor is likewise entitled to deference.

Appellants' suggestion that the other creditor that appeared was an LLC that was controlled by the owners of "Claims Prosecutor" has some intuitive appeal. Yet, that possibility is a factual matter that

$37,565.74. *Id.* Hence, the present value of one chance in twenty of recovering $1 million after three years is $37,565.74.

13. This is also a corollary of the appellate standing rule that, in the context of a sale or other disposition of estate assets, creditors have standing to appeal, but disappointed prospective bidders who are not creditors usually do not have standing to appeal. *Calpine Corp. v. O'Brien Envtl. Energy, Inc. (In re O'Brien Envtl. Energy, Inc.),* 181 F.3d 527, 531 (3rd Cir.1999); *accord, Licensing by Paolo, Inc. v. Sinatra (In re Gucci),* 126 F.3d 380, 388 (2d Cir.1997).

would have to be developed in proceedings in the bankruptcy court.

On balance, the record before us is not adequately developed so as to enable an informed determination.

By not addressing the fair and equitable settlement standard, the bankruptcy court applied an incorrect legal standard and thereby abused its discretion.

Accordingly, the matter needs to return to the bankruptcy court for appropriate proceedings.

B

On remand, the bankruptcy court should consider the alternative of permitting the objecting creditors to sue in the name of the trustee, but at their own risk and expense, to recover the property allegedly transferred by the debtor.

As explained in *Maximus Computers* and in *Godon*, this alternative is recognized by §§ 503(b)(3)(B) and (4) and carries forward a provision from former Bankruptcy Act § 64a(1).[14]

[12] A crucial rule of construction regarding the transition from the Bankruptcy Act to the Bankruptcy Code was that judge-made doctrines were presumed to be carried forward except to the extent Congress indicated a contrary intent. *See, e.g., Kelly v. Robinson*, 479 U.S. 36, 47, 107 S.Ct. 353, 93 L.Ed.2d 216 (1986).

In the instance of § 503(b)(3)(B), Congress demonstrated an intent to keep the creditor-recovery rule of former § 64a(1) in force and, in addition, codified the judge-made rule that the creditor obtain prior permission.[15] *Godon*, 275 B.R. at 562–63.

14. The House and Senate Reports to the 1978 Bankruptcy Code each state, in identical language, that § 503(b) "is derived mainly from section 64a(1) of the Bankruptcy Act, with some changes" and refer to including "a creditor that recovers property for the benefit of the estate." S. REP. No. 95–989, at 66 (1978), *reprinted in* 1978 U.S.C.C.A.N. 5787, 5852; H.R. REP. No. 95–595, at 355 (1977), *reprinted in* 1978 U.S.C.C.A.N. 5963, 6311.

Former Bankruptcy Act § 64a(1) provided, in relevant part:

> a. The debts to have priority, in advance of the payment of dividends to creditors, and to be paid in full out of bankrupt estates . . .:(1) . . .; where property of the bankrupt, transferred or concealed by him either before or after the filing of the petition, is recovered for the benefit of the estate of the bankrupt by the efforts and at the cost and expense of one or more creditors, the reasonable costs and expenses of such recovery;

Bankruptcy Act § 64a(1), 11 U.S.C. § 104(a)(1) (redesignated from § 64b(2) in 1938) (repealed 1978).

The change made in 1978 was to codify the judge-made rule that the creditor obtain permission before recovering property for the benefit of the estate. 11 U.S.C. § 503(b)(3)(B), *codifying In re Eureka Upholstering Co.*, 48 F.2d 95, 96 (2d Cir.1931) (L. Hand, J.); *Godon*, 275 B.R. at 562.

Creditor recovery was authorized by a 1903 amendment to the Bankruptcy Act, making explicit what had already been recognized as implicit by judge-made law. *Chatfield v. O'Dwyer*, 101 F. 797, 799–800 (8th Cir.1900); *Godon*, 275 B.R. at 561; 3A JAMES WM. MOORE ET AL., COLLIER ON BANKRUPTCY ¶ 64.104 n. 6 (14th ed. rev.1975).

15. Judge Learned Hand made the classic statement of the prior-permission requirement for the creditor-recovery rule:

> While [§ 64a(1)] does indeed justify such an award after [a] motion to compel the receiver or trustee to undertake a litigation, this is a condition upon the right, at least after a receiver [trustee] has been appointed. The receiver [trustee] is responsible for the collection of the assets, and he alone can authorize any charges against them. If any creditor, petitioning or other, learns facts which lead him to suppose that property has been concealed, he may, and indeed he should, advise the receiver [trustee], and if the receiver [trustee] prove slack, he may apply to the referee [bankruptcy judge] to stir him to action. The referee [bankruptcy judge] or the [district]

[13] Under that practice, a creditor acting under the statutory creditor-recovery authority was, and remains, permitted to sue in the name of the trustee to recover the subject property. *Id.* The creditor, upon obtaining permission to act, has statutory standing to sue. *Id.* at 562–66.

The litigation is conducted at the creditor's risk and expense. Counsel is employed by, and ordinarily paid by, the creditor. *Maximus Computers,* 278 B.R. at 197–98. Moreover, a lawyer hired by a creditor acting pursuant to § 503(b)(3)(B) is not required to be employed by the trustee under 11 U.S.C. § 327, even though the creditor is suing in the name of the trustee. *Id.* Unless the lawyer contracts with the creditor to accept only what compensation may ultimately be awarded after the fact under § 503(b)(4), the creditor is responsible for paying counsel according to their agreed-upon terms and bears the risk of not being reimbursed.

[14] A creditor's willingness to bear the risk and expense on behalf of the estate for litigating to recover property that would be property of the estate and that would not otherwise deleteriously affect the administration of the estate is a matter that the bankruptcy court is obliged to consider when weighing a compromise that would eliminate the recovery action.

CONCLUSION

The bankruptcy court abused its discretion when it approved the sale of estate assets, including the avoiding power causes of action, to "Claims Prosecutor" without appropriately evaluating appellants' bid and without analyzing the situation through the matrix of the fair and equitable settlement standard. REVERSED and REMANDED for further proceedings consistent with this opinion.

> judge may then authorize the creditor to proceed, and he will be entitled to his reward under [§ 64a(1)], but not otherwise. *Eureka Upholstering Co.,* 48 F.2d at 96 (L. Hand, J.) (citations omitted).

In re Michael Muldoon ELDER, Debtor.

Michael Muldoon Elder, Appellant,

v.

Susan Uecker & Official Unsecured Creditors' Committee, Appellees.

Nos. C–043845 MHP, 02–30677.

United States District Court, N.D. California.

May 31, 2005.

Background: Chapter 11 trustee and unsecured creditors committee sought confirmation of jointly proposed plan of reorganization. Debtor objected, based on the powers and fees granted to plan administrator, who was the former Chapter 11 trustee. The bankruptcy court confirmed the plan, and debtor appealed.

Holdings: The District Court, Marilyn Hall Patel, J., held that:

(1) appeal was not moot, despite debtor's failure to seek a stay pending appeal and the alleged "substantial consummation" of the plan;

(2) alternatively, in light of allegations of self-dealing on the part of plan administrator, the appeal was not moot on equitable grounds;

discharge injunction be by motion for contempt. *See* Rule 9020. The determinations Harlestons seek in their adversary proceeding are the factual predicates for such a motion. Arguably those determinations could be made without a separate adversary proceeding, as the substantive question is whether the debt is within the discharge already granted, rather than whether it is dischargeable per se. Suffice it to say that we need not here delineate the precise boundary between Rules 7001 and 9020.

Walls also makes clear that Harlestons' prayer for an award of attorneys' fees in their adversary proceeding cannot succeed; we therefore need not address the possibility that that request would require a different Eleventh Amendment analysis (but do not mean to suggest attorneys' fees may not be available as a compensatory sanction).

VI. CONCLUSION

The Board's proof of claim waived its sovereign immunity in Harlestons' bankruptcy case, and the bankruptcy court retained jurisdiction over matters ancillary to the discharge order in that case. The Harlestons' adversary proceeding to determine whether their debt to the Board was discharged is such a matter. Alternatively, the Harlestons' adversary proceeding is logically related to the adjudication of the Board's claim. Under either analysis, the Board's waiver extends to the Harlestons' adversary proceeding. We AFFIRM.

In re GODON, INC., Debtor.

No. 01–24209–C–7.

United States Bankruptcy Court, E.D. California.

March 15, 2002.

Chapter 7 trustee and creditor-bank sought court approval of agreement whereby creditor would prosecute actions in trustee's name to recover, for the benefit of the estate, property allegedly transferred or concealed by debtor, and the parties resolved any dispute about the secured status of creditor's claim. The Bankruptcy Court, Christopher M. Klein, J., held that: (1) authorized creditors have "statutory standing" to prosecute actions for the recovery of property in the name of the trustee; (2) parties' proposed agreement fit within the administrative expense statute's creditor recovery model; and (3) the agreement was "fair and equitable."

Agreement approved.

1. Bankruptcy ⚿2871, 2877

Under the Bankruptcy Code's administrative expense provisions, authorized creditor that recovers property for the benefit of the estate is reimbursed, as are its attorneys and accountants. Bankr. Code, 11 U.S.C.A. § 503(b)(3)(B), (b)(4).

2. Bankruptcy ⚿2021.1

One key rule of construction for the Bankruptcy Code is that judge-made doctrines developed under the former Bankruptcy Act are presumed to be carried forward except to the extent Congress indicated a contrary intent.

3. Bankruptcy ⚿2702.1

In the instance of creditor recovery of property for the benefit of the estate, Con-

gress expressly incorporated the judge-made requirement of prior permission, developed under the former Bankruptcy Act, into the Bankruptcy Code and made it apply in all cases. Bankr.Code, 11 U.S.C.A. § 503(b)(3)(B).

4. Bankruptcy ⚿2154.1

Since action brought by creditor to recover property is maintained for the benefit of the estate, it must be brought in the name of the bankruptcy trustee as the real party in interest. Bankr.Code, 11 U.S.C.A. § 503(b)(3)(B).

5. Bankruptcy ⚿2877, 3192

Congress contemplated that a creditor bringing an action to recover property for the benefit of the estate may pay its counsel, taking the risk that those fees might not all be reimbursed under the statutory "reasonable compensation" standard. Bankr.Code, 11 U.S.C.A. § 503(b)(3)(B), (b)(4).

6. Federal Civil Procedure ⚿103.2
Federal Courts ⚿12.1

Term "standing" is ambiguous, as it signifies both the "injury in fact" that is the irreducible minimum of the case-or-controversy requirement of Article III and also a higher degree of relation to a matter in litigation that courts or Congress demand as a prudential matter before permitting a party to be heard. U.S.C.A. Const. Art. 3, § 2, cl. 1.

See publication Words and Phrases for other judicial constructions and definitions.

7. Federal Civil Procedure ⚿103.2

Same person may be "injured in fact," for purposes of the constitutional minimum, and nevertheless lack standing for prudential reasons because it is possible to have one form of standing but not the other, thus leading to the linguistic paradox that a person with standing may lack standing. U.S.C.A. Const. Art. 3, § 2, cl. 1.

8. Federal Civil Procedure ⚿103.2

Irreducible minimum "injury in fact," for purposes of federal jurisdiction under Article III, is termed "constitutional standing." U.S.C.A. Const. Art. 3, § 2, cl. 1.

See publication Words and Phrases for other judicial constructions and definitions.

9. Federal Civil Procedure ⚿103.2

Every litigant in federal court must have "constitutional standing." U.S.C.A. Const. Art. 3, § 2, cl. 1.

10. Federal Civil Procedure ⚿103.2

Second branch of standing, other than constitutional standing, is "prudential standing," which subdivides into multiple categories of circumstances in which courts limit the exercise of federal jurisdiction for reasons related to such considerations as orderly management of the judicial system.

See publication Words and Phrases for other judicial constructions and definitions.

11. Federal Civil Procedure ⚿103.2

One subcategory of prudential standing is "statutory standing," in which Congress has explicitly made the prudential standing determination by designating persons who are entitled to enforce a particular right created by statute.

See publication Words and Phrases for other judicial constructions and definitions.

12. Federal Civil Procedure ⚿103.2

Where rights or duties are statutory in origin, Congress has broad power to define the classes of persons who may be entitled to enforce them.

13. Federal Civil Procedure ⚿103.2

Implicit in the congressional power to create rights and duties is the power to

define the classes of persons who may enforce them.

14. Federal Civil Procedure ⚿103.2

Subcategory of prudential standing known as "non-statutory standing" consists of persons that either have not been named by Congress in a statute or who want to enforce some right not created by statute.

See publication Words and Phrases for other judicial constructions and definitions.

15. Federal Civil Procedure ⚿103.2

"Constitutional standing" is a jurisdictional limit on the power of federal courts and can never be waived. U.S.C.A. Const. Art. 3, § 2, cl. 1.

16. Federal Civil Procedure ⚿103.2

"Prudential standing" is not a jurisdictional limit ordained by the Constitution and may be waived in appropriate circumstances.

17. Bankruptcy ⚿3770

When a matter of "prudential standing" is raised for the first time on appeal, the appellate court has discretion to entertain it as a "purely legal issue" if the record is adequate.

18. Federal Civil Procedure ⚿103.2

Matters of "statutory standing" reflect Congress making pertinent policy determinations in connection with enactment, whereas other matters of "prudential standing" reflect policy determinations relating to orderly management of the judicial system as to which it is appropriate to expect the trial courts to serve as gatekeepers.

19. Bankruptcy ⚿2159.1

All creditors are "injured in fact," for purposes of constitutional standing, because they are able to allege injury that is fairly traceable to the bankruptcy; at a minimum, they face the automatic stay and the risk that debts owed to them will be discharged. U.S.C.A. Const. Art. 3, § 2, cl. 1.

20. Bankruptcy ⚿2154.1

Some creditors acquire "statutory standing" by virtue of Bankruptcy Code provisions authorizing them to perform specific trustee tasks, as in the case of the court's power to grant permission for a creditor to recover property for the benefit of the estate. Bankr.Code, 11 U.S.C.A. §§ 503(b)(3)(B), 1123(b)(3)(B).

21. Bankruptcy ⚿2702.1

Debtors have express statutory authority to exercise trustee avoiding powers in particular situations. Bankr.Code, 11 U.S.C.A. § 522(h).

22. Bankruptcy ⚿2159.1

In the absence of "statutory standing," creditors participate in bankruptcy litigation only if they have "non-statutory standing," which normally entails an analysis of the nature of the harm suffered in connection with the dynamics of the particular case.

23. Bankruptcy ⚿2161

When a creditor would enforce rights that belong to others, a form of third-party standing analysis is applied that focuses upon what is to be gained for the estate.

24. Federal Civil Procedure ⚿103.4

General third-party standing analysis looks for three features: Congress has undertaken to regulate a particular relationship, the third party is better prepared to be an effective advocate than the nonparty, and there is little danger of a divergence between the interests of the third party and the nonparty.

25. Bankruptcy ⚿3771

In the area of appellate standing, creditors are subject to a prudential, nonstatutory requirement that, in order to appeal, one must be a "person aggrieved," which normally means a person directly and adversely affected pecuniarily by the order in question.

See publication Words and Phrases for other judicial constructions and definitions.

26. Bankruptcy ⚿2154.1

Creditor that obtains permission from the court to recover property for the benefit of the estate and to sue in the name of the bankruptcy trustee has the same "statutory standing" as the trustee. Bankr. Code, 11 U.S.C.A. § 503(b)(3)(B).

27. Bankruptcy ⚿2154.1

Decision whether to grant permission for creditors to recover property for the benefit of the estate is within the sound discretion of the bankruptcy judge. Bankr.Code, 11 U.S.C.A. § 503(b)(3)(B).

28. Bankruptcy ⚿2154.1

Proposed agreement between Chapter 7 trustee and creditor, whereby creditor would prosecute actions in trustee's name to recover, for the benefit of the estate, property allegedly transferred or concealed by debtor, and the parties resolved any dispute about the secured status of creditor's claim, fit within the administrative expense statute's creditor recovery model; trustee lacked resources to pursue the property and had not proposed to engage counsel on a contingent fee basis, creditor, which had largest economic interest in the outcome, was willing to undertake the task with its own counsel, all recoveries would benefit the estate, court retained power to approve compromises, trustee would remain at arm's length from creditor, with ability to exercise independent judgment, reimbursement of creditor in the event of recovery would be on the basis of "actual, necessary expenses," and creditor's counsel would be eligible for "reasonable compensation." Bankr.Code, 11 U.S.C.A. § 503(b)(3)(B), (b)(4).

29. Bankruptcy ⚿2154.1

Even though an action by a creditor to recover property for the benefit of the estate is prosecuted in the name of the trustee, the client of plaintiff's counsel in such an action is the creditor, not the trustee. Bankr.Code, 11 U.S.C.A. § 503(b)(3)(B).

30. Attorney and Client ⚿21.5(6)

Bankruptcy ⚿2877

Key difference between section of administrative expense statute governing creditor's recovery of property for the benefit of the estate and section of the Bankruptcy Code governing the employment of professional persons is that the former affords a free pass from the "disinterestedness" requirement of the latter. Bankr. Code, 11 U.S.C.A. §§ 327(a), 503(b)(3)(B).

31. Bankruptcy ⚿2877

In addition to prior judicial permission, successful recovery is an essential element to creditor's eligibility for reimbursement under section of administrative expense statute governing creditor's recovery of property for the benefit of the estate. Bankr.Code, 11 U.S.C.A. § 503(b)(3)(B).

32. Bankruptcy ⚿2877

When a creditor has brought an action to recover property for the benefit of the estate, creditor eligibility, that is, actual recovery plus prior judicial permission, is a prerequisite to compensation for a professional employed by the creditor. Bankr. Code, 11 U.S.C.A. § 503(b)(3)(B), (b)(4).

33. Bankruptcy ⚿2877

When a creditor has brought an action to recover property for the benefit of the estate, in order for a professional employed by the creditor to receive reasonable compensation under the Bankruptcy Code, it is not essential that the eligible creditor have actually incurred an expense. Bankr.Code, 11 U.S.C.A. § 503(b)(3)(B), (b)(4).

34. Bankruptcy ⚿2877

When a creditor has brought an action to recover property for the benefit of the estate, in order for a professional employed by the creditor to receive reasonable compensation under the Bankruptcy Code, the professional's services and expenses need to be linked to a recovery of "any property transferred or concealed by the debtor." Bankr.Code, 11 U.S.C.A. § 503(b)(3)(B), (b)(4).

35. Bankruptcy ⚿3160, 3197

Success is merely relevant, albeit powerfully relevant, to fee awards for counsel employed under section of the Bankruptcy Code governing employment of professional persons. Bankr.Code, 11 U.S.C.A. §§ 327, 330.

36. Bankruptcy ⚿3183

In awarding fees to counsel employed under section of the Bankruptcy Code governing employment of professional persons, focus is on subjective factors such as the "value" of the services, taking into account such factors as whether the services were beneficial at the time rendered and subject to a limitation that they must have been reasonably likely to benefit the estate. Bankr.Code, 11 U.S.C.A. §§ 327, 330.

37. Bankruptcy ⚿2154.1

Under section of administrative expense statute governing creditor's recovery of property for the benefit of the estate, the bankruptcy court acts as gatekeeper for creditors who want to prosecute actions to recover property transferred or concealed by debtor; whether the court chooses to open the gate is a matter of judicial discretion. Bankr. Code, 11 U.S.C.A. § 503(b)(3)(B).

38. Bankruptcy ⚿3033

When assessing a compromise, bankruptcy court is required to make an "informed, independent judgment" about whether the compromise is "fair and equitable."

39. Bankruptcy ⚿3033

Bankruptcy court's determination of whether a proposed compromise is fair and equitable entails comparing the terms of the compromise with likely rewards of litigation and all other factors relevant to a full and fair assessment of the wisdom of the proposed compromise, including the following: (1) probability of success in litigation, (2) likely difficulties in collection, (3) complexity of the litigation, (4) expense, inconvenience, and delay necessarily attending continued litigation, and (5) the paramount interest of creditors and proper deference to any reasonable views they may express.

40. Bankruptcy ⚿3033

Compromise between Chapter 7 trustee and creditor, which resolved any dispute about secured status of creditor's claim and, in exchange, the estate and creditors received the benefit of agreed surcharges of collateral and a distribution scheme that amounted to creditor voluntarily subordinating its rights to other unsecured creditors so that they would be paid sooner, was "fair and equitable"; there was no indication that meritorious challenge could be mounted to creditor's secured status or that amount of creditor's claim was materially overstated, likely re-

wards of litigating creditor's secured status were less than the benefits of compromise, any challenge to secured status would have been complex and expensive, and other creditors would receive payments at accelerated rate and in higher amounts than required by the Bankruptcy Code.

Robert S. Bardwil, Sacramento, CA, for Debtor.

J. Russell Cunningham, Sacramento, CA, for trustee.

Thomas A. Aceituno, Folsom, CA, trustee.

OPINION RE AUTHORIZATION PER 11 U.S.C. § 503(b)(3)(B) FOR CREDITOR TO RECOVER FOR BENEFIT OF ESTATE PROPERTY TRANSFERRED OR CONCEALED BY DEBTOR

CHRISTOPHER M. KLEIN, Bankruptcy Judge.

The question is whether vitality remains in the provision for reimbursement of a creditor's expenses and professional fees incurred in recovering property with the court's permission under 11 U.S.C. § 503(b)(3)(B) and (b)(4). Concluding that the Bankruptcy Code carries forward from the former Bankruptcy Act the authority for creditors to sue in the name of the trustee to recover property for the benefit of the estate without needing to have their counsel employed by the trustee, the court will approve an agreement between creditor and trustee to have the creditor prosecute avoiding actions in the trustee's name.

Jurisdiction

Federal jurisdiction is founded upon 28 U.S.C. § 1334(a). Arrangements for the exercise of avoiding powers concern estate administration and are core proceedings that a bankruptcy judge may hear and determine. 28 U.S.C. § 157(b)(2)(A).

Facts

Godon, Inc., filed its voluntary chapter 7 case soon after creditor Bank of the West commenced fraudulent transfer litigation in state court, alleging that Godon, Inc., had been looted of millions of dollars by insiders and affiliates, including the sole shareholder.

Total debt is about $3.97 million, of which $3.77 million is owed to Bank of the West based on loans backed by a security interest in virtually all personal property assets of debtor and a filed UCC–1 financing statement.

The trustee has about $210,000, most of which remains from the sale of equipment in which the bank claims a security interest. The rest of the estate's assets consist of causes of action against the debtor's insiders and affiliates to recover property allegedly transferred by the corporation, together with a proof of claim in another bankruptcy case.

The bank removed its state court action to bankruptcy court under 28 U.S.C. § 1452, where it is now pending.

The bank and the trustee have agreed to cooperate in attempting to recover assets for the benefit of the estate, with the bank, as the creditor holding 95 percent of the debt, taking the lead, incurring the expense of counsel, and bearing the risk of not recovering enough to have its attorney's fees reimbursed.

The basic terms of the agreement call for the trustee and the bank to fix the amount of the bank's claim ($3,769,899.37), settle the status of its security interest, divide the proceeds of the sale of the equipment covered by the security inter-

est, and "jointly prosecute" litigation to recover assets for the benefit of the estate.

The bank further agrees to various surcharges of its collateral that will enable the trustee to have resources with which to fund litigation and agrees to subordinate, in part, its own payment rights as a secured and an unsecured creditor to those of the other unsecured creditors, who would receive 10 percent of all recoveries until such time as they are paid in full even though they only represent 5 percent of the total debt.

It is agreed that the bank has discretion over which recovery actions to pursue and that it is not obliged to take instructions from the trustee. The bank's counsel, Crosby, Heafey, Roach & May, has the bank, not the trustee, as its client.

Correlatively, it is agreed that the trustee may appear on his own account, represented by his own counsel, Desmond, Nolan, Livaich & Cunningham, in any action being prosecuted by the bank and that the trustee may file and prosecute any other action.

The trustee agrees not to settle, over the objection of the bank, any action filed by the bank. For its part, the bank agrees not to settle any action without giving the trustee an opportunity to object. All settlements are subject to court approval as "fair and equitable."

The bank and trustee mutually reserve the right to object to each other's fees and expenses.

Although the agreement did not mention §§ 503(b)(3)(B) and (b)(4), the parties clarified in open court that those provisions supply the model for what they are attempting to do and that they are content to be governed by those subsections.

Discussion

The arrangement is simultaneously a request to permit a creditor to prosecute actions in the name of the trustee to recover property for the benefit of the estate and a compromise that must be scrutinized as "fair and equitable."

I

Sections 503(b)(3)(B) and (b)(4) have faded into such obscurity that it is necessary to begin by reviewing their origin before turning to their application in this case.

A

It has been a settled feature of bankruptcy law since 1898 that creditors may recover property for the benefit of the estate and have their attorneys' fees reimbursed by the estate.

1

Under the former Bankruptcy Act, the reimbursable creditor recovery doctrine started as judge-made law. *See, e.g., Chatfield v. O'Dwyer,* 101 F. 797, 799–800 (8th Cir.1900); 3A JAMES WM. MOORE ET AL., COLLIER ON BANKRUPTCY ¶ 64.104 n. 6 (14th ed. rev.1975) ("COLLIER 14th ed.").

Then, in 1903, Bankruptcy Act § 64 was amended to make explicit what had already been determined to be implicit:

> (a) The debts to have priority, in advance of the payment of dividends to creditors, and to be paid in full out of bankrupt estates, and the order of payment, shall be: (1) . . .; where property of the bankrupt, transferred or concealed by him either before or after the filing of the petition, is recovered for the benefit of the estate of the bankrupt by the efforts and at the cost and expense of one or more creditors, the reasonable costs and expenses of such recovery; . . .

Bankruptcy Act § 64(a)(1), 11 U.S.C. § 104(a)(1) (redesignated from § 64b(2) in 1938) (repealed 1978).

Creditors acting for the benefit of the estate were allowed to use the name of the bankruptcy trustee. *In re Kenny,* 269 F. 54, 57 (W.D.Pa.1920) ([c]reditors "Gamble & Co. were the prosecutors of the suit; the trustee's name being used simply as a legal necessity"); *cf. A.C. James Co. v. Reconstr. Fin. Corp. (In re W. Pac. R. Co.),* 122 F.2d 807, 808 (9th Cir.1941)(appeal); *Australia v. MacDonald (In re Patterson–MacDonald Shipbldg. Co.),* 288 F. 546, 548 (9th Cir.1923)(petition for revision & appeal); *Ohio Valley Bank v. Mack,* 163 F. 155, 156 (6th Cir.1906) (appeal); COLLIER 14th ed. ¶ 62.29[2.4].

A limitation imposed by case law was that once a trustee was appointed, a creditor usually needed permission from the trustee or the court before acting. COLLIER 14th ed. ¶ 62.29[2.4].[1]

The necessity of such prior permission was an issue in the leading case explaining Bankruptcy Act § 64(a)(1):

> While that section does indeed justify such an award after a motion to compel the receiver or trustee to undertake a litigation, this is a condition upon the right, at least after a receiver has been appointed. The receiver is responsible for the collection of the assets, and he alone can authorize any charges against them. If any creditor, petitioning or other, learns facts which lead him to suppose that property has been concealed, he may, and indeed he should, advise the receiver, and if the receiver prove slack, he may apply to the referee [bankruptcy judge] to stir him to action. The referee or the [district] judge may then authorize the creditor to proceed, and he will be entitled to his reward under section 64b(2) [64a(1)], but not otherwise.

In re Eureka Upholstering Co., 48 F.2d 95, 96 (2d Cir.1931) (L.Hand, J.) (citations omitted).

It had been established before *Eureka Upholstering* that the trustee could also give sufficient permission to a creditor. *In re Stearns Salt & Lumber Co.,* 225 F. 1, 3 (6th Cir.1915).

2

[1] When the authorization for creditors to sue on behalf of the estate to recover property transferred or concealed by the debtor was carried forward into the 1978 Bankruptcy Code as §§ 503(b)(3)(B) and (4), Congress resolved the former ambiguity by making mandatory the judge-made requirement of prior permission as part of the continuing authorization for administrative expenses:

> (b)(3) the actual, necessary expenses, other than compensation and reimbursement specified in paragraph (4) of this subsection, incurred by—
>
> . . .
>
> (B) a creditor that recovers, *after the court's approval,* for the benefit of the estate any property transferred or concealed by the debtor[.]

11 U.S.C. § 503(b)(3)(B) (emphasis added).

Under this administrative expense provision, the authorized creditor is reim-

1. The COLLIER treatise describes the practice under former Bankruptcy Act § 64(a)(1):

> Yet orderly administrative practice calls for a qualification. It is primarily for the trustee to decide whether the estate should embark on an attempt to recover concealed or transferred assets. The right to attorney's fees is, therefore, limited to cases in which the services are rendered either before a trustee has been appointed or in which a trustee has been given an opportunity to intervene and has refused to do so, even though the creditor is allowed to proceed in the trustee's name.

COLLIER 14th ed. ¶ 62.29[2.4], at p. 1578 (footnotes omitted).

bursed under § 503(b)(3)(B), while its attorneys and accountants are compensated under § 503(b)(4):

> (4) reasonable compensation for professional services rendered by an attorney or an accountant of an entity whose expense is allowable under paragraph (3) of this subsection, based on the time, the nature, the extent, and the value of such services, and the cost of comparable services other than in a case under this title, and reimbursement for actual, necessary expenses incurred by such attorney or accountant[.]

11 U.S.C. § 503(b)(4).

An alternative form of advance approval occurs in chapter 11 cases by virtue of the statutory authorization for a plan of reorganization to provide for "the retention and enforcement by the debtor, by the trustee, or by a representative of the estate appointed for such purpose" of any claim belonging to the debtor or the estate. 11 U.S.C. § 1123(b)(3)(B).

[2, 3] A key rule of construction for the Bankruptcy Code is that judge-made doctrines developed under the former Bankruptcy Act are presumed to be carried forward except to the extent Congress indicated a contrary intent. *See, e.g., Kelly v. Robinson,* 479 U.S. 36, 47, 107 S.Ct. 353, 93 L.Ed.2d 216 (1986). In the instance of creditor recovery, Congress expressly incorporated the judge-made requirement of prior permission into the statute and made it apply in all cases. *In re Romano,* 52 B.R. 590, 593 (Bankr.M.D.Fla.1985); *In re Spencer,* 35 B.R. 280, 281–82 (Bankr. N.D.Ga.1983); *Lazar v. Casale (In re Casale),* 27 B.R. 69, 70 (Bankr.E.D.N.Y.1983).

[4] Since the action is maintained for the benefit of the estate, it must be brought in the name of the bankruptcy trustee as the real party in interest. *Hansen v. Finn (In re Curry & Sorensen, Inc.),* 57 B.R. 824, 828–29 (9th Cir. BAP 1986).

[5] Thus, a creditor acting with judicial permission under § 503(b)(3)(B) may sue in the name of the trustee in the same manner as was permitted under former law. Moreover, Congress contemplated that a creditor may pay its counsel, taking the risk that those fees might not all be reimbursed under the § 503(b)(4) statutory "reasonable compensation" standard.

3

Nor does the requirement of standing present an obstacle to a creditor the court authorizes to act under § 503(b)(3)(B). The bewildering variety of decisions discussing creditor standing in bankruptcy, however, warrants that one explain why an authorized creditor has standing.

a

The basic difficulty with all discussions of standing is that they are vulnerable to the fallacy of ambiguity.

[6, 7] The term "standing" is ambiguous. It signifies both the "injury in fact" that is the irreducible minimum of the case-or-controversy requirement of Article III and also a higher degree of relation to a matter in litigation that courts or Congress demand as a prudential matter before permitting a party to be heard. The same person may be "injured in fact" for purposes of the constitutional minimum and nevertheless lack standing for prudential reasons because it is possible to have one form of standing but not the other. This leads to the linguistic paradox that a person with standing may lack standing.

[8] Precision requires that one assign separate terms to various concepts subsumed by the term "standing." The irreducible minimum "injury in fact" for pur-

poses of federal jurisdiction under Article III is termed "constitutional standing."

[9] It is now an article of faith that every litigant in federal court must have "constitutional standing." *UF & CW Union Local 751 v. Brown Group, Inc.,* 517 U.S. 544, 551, 116 S.Ct. 1529, 134 L.Ed.2d 758 (1996); *Lujan v. Defenders of Wildlife,* 504 U.S. 555, 560, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992); *Pershing Park Villas Homeowners Ass'n v. United Pac. Ins. Co.,* 219 F.3d 895, 899 (9th Cir.2000).

[10] The second branch of standing is "prudential standing," which subdivides into multiple categories of circumstances in which courts limit the exercise of federal jurisdiction for reasons related to such considerations as orderly management of the judicial system. *Pershing Park,* 219 F.3d at 900–01.

[11] One subcategory of "prudential standing" is "statutory standing" in which Congress has explicitly made the prudential standing determination by designating persons who are entitled to enforce a particular right created by statute.

[12, 13] Where rights or duties are statutory in origin, Congress has broad power to define the classes of persons who may be entitled to enforce them. Implicit in the congressional power to create rights and duties is the power to define the classes of persons who may enforce them. Wm. A. Fletcher, *The Structure of Standing,* 98 YALE L.J. 221, 223–24 (1988). The fact that a legislative grant of standing is usually straightforward leads to few disputes, which explains why there are few reported decisions addressing "statutory standing."

[14] Another subcategory is "non-statutory standing," which consists of persons that either have not been named by Congress in a statute or who want to enforce some right not created by statute. This is where much ink is spilled in case reporters, particularly over the question of third-party enforcement, in which some party that does not have "statutory standing" nevertheless wants to enforce rights without needing to rely on someone that has "statutory standing."

[15] "Constitutional standing" is a jurisdictional limit on the power of federal courts and can never be waived. *Bender v. Williamsport Area Sch. Dist.,* 475 U.S. 534, 541–42, 106 S.Ct. 1326, 89 L.Ed.2d 501 (1986); *Pershing Park,* 219 F.3d at 899; *Ripplinger v. Collins,* 868 F.2d 1043, 1046–47 (9th Cir.1989).

[16, 17] "Prudential standing," in contrast, is not a jurisdictional limit ordained by the Constitution and may be waived in appropriate circumstances. *Pershing Park,* 219 F.3d at 899–900; *Sycuan Band of Mission Indians v. Roache,* 54 F.3d 535, 538 (9th Cir.1995). Likewise, when a matter of "prudential standing" is raised for the first time on appeal, the appellate court has discretion to entertain it as a "purely legal issue" if the record is adequate. *Pershing Park,* 219 F.3d at 901 n. 3; *Sierra Switchboard Co. v. Westinghouse Elec. Corp.,* 789 F.2d 705, 708 n. 1 (9th Cir.1986).

[18] In this vein, it has been cogently argued that the sensible approach is to treat matters of "statutory standing" as elements of the particular legal relief being requested. Fletcher, 98 YALE L.J., at 223–24 & 264–65. Matters of "statutory standing" reflect Congress making pertinent policy determinations in connection with enactment. Other matters of "prudential standing" reflect policy determinations relating to orderly management of the judicial system as to which it is appropriate to expect the trial courts to serve as gatekeepers.

b

[19] The standing of creditors in bankruptcy fits within this construct. All creditors are "injured in fact" for purposes of "constitutional standing" because they are able to allege injury that is "fairly traceable" to the bankruptcy; at a minimum, they face the automatic stay and the risk that debts owed to them will be discharged. *Duckor Spradling & Metzger v. Baum Trust (In re P.R.T.C., Inc.),* 177 F.3d 774, 778 (9th Cir.1999).

[20, 21] Some creditors acquire "statutory standing" by virtue of Bankruptcy Code provisions authorizing them to perform specific trustee tasks, as in the case of the court's power to grant permission for a creditor to recover property for the benefit of the estate under either § 503(b)(3)(B) or § 1123(b)(3)(B). *Id.,* at 780–81 (§ 1123(b)(3)(B)); *McFarland v. Leyh (In re Tex. Gen. Petroleum Corp.),* 52 F.3d 1330, 1335 (5th Cir.1995)(same); *Citicorp Acceptance Co. v. Robison (In re Sweetwater),* 884 F.2d 1323, 1327 (10th Cir.1989)(same). Similarly, debtors have express statutory authority to exercise trustee avoiding powers in particular situations. 11 U.S.C. § 522(h).

[22, 23] In the absence of "statutory standing," creditors participate in bankruptcy litigation only if they have "non-statutory standing," which normally entails an analysis of the nature of the harm suffered in connection with the dynamics of the particular case. Where the creditor would enforce rights that belong to others, a form of third-party standing analysis is applied that focuses upon what is to be gained for the estate. *P.R.T.C.,* 177 F.3d at 781; *Briggs v. Kent (In re Prof'l Inv. Props.),* 955 F.2d 623, 625 (9th Cir.1992).

[24] This is consistent with general third-party standing analysis that looks for three features: Congress has undertaken to regulate a particular relationship; the third party is better prepared to be an effective advocate than the nonparty; and there is little danger of a divergence between the interests of the third party and the nonparty. 13 CHARLES. A. WRIGHT, ARTHUR R. MILLER & EDWARD H. COOPER, FED. PRAC. & PROC. 2d § 3531.9.

[25] In the related area of appellate standing, creditors are subject to a prudential, non-statutory requirement that in order to appeal one must be a "person aggrieved," which normally means a person "directly and adversely affected pecuniarily by" the order in question. *P.R.T.C.,* 177 F.3d at 777–78; *Fondiller v. Robertson (In re Fondiller),* 707 F.2d 441, 442 (9th Cir.1983).

c

It is against this background that our circuit's bankruptcy appellate panel has consistently held that a creditor obtains "derivative standing" to exercise powers that are otherwise reserved to the trustee—i.e., some form of "prudential standing"—when the court authorizes a creditor to do so for the benefit of the estate. *E.g., Curry & Sorensen,* 57 B.R. at 828. But the reasoning has not always been explicit.

The courts of appeals have agreed with the conclusion, likewise without searching explication. *E.g., Avalanche Mar., Ltd. v. Parekh (In re Parmetex, Inc.),* 199 F.3d 1029, 1031 (9th Cir.1999) (citing *Curry & Sorensen); City of Farmers Branch v. Pointer (In re Pointer),* 952 F.2d 82, 88 (5th Cir.1992) (citing *Curry & Sorensen*); *Neb. State Bank v. Jones,* 846 F.2d 477, 478 (8th Cir.1988) (citing *Curry & Sorensen*).

The decisions also apply the non-statutory species of "prudential standing" when the court either grants such permission to a creditors' committee, rather than to a

creditor, without a provision to that effect in a confirmed plan of reorganization under § 1123(b)(3)(B), or grants permission to do something that reaches beyond § 503(b)(3)(B). *Liberty Mut. Ins. Co. v. Off'l Unsecured Creditor's Comm. (In re Spaulding Composites Co.),* 207 B.R. 899, 903–05 (9th Cir. BAP 1997); *accord, Commodore Int'l Ltd. v. Gould (In re Commodore Int'l Ltd.),* 262 F.3d 96, 99–100 (2d Cir.2001) (citing *Spaulding Composites*); *La. World Expo. v. Federal Ins. Co.,* 858 F.2d 233, 247–48 (5th Cir.1988) (citing *Curry & Sorensen*).

Another recognition of non-statutory "prudential standing" underlies decisions authorizing the trustee to transfer or assign avoiding powers without reference to § 503(b)(3)(B). *P.R.T.C.,* 177 F.3d at 781–82; *Prof'l Inv. Props.,* 955 F.2d at 625.

The salient fact about all of these decisions is that they involve "prudential standing" issues, not "statutory standing." First, there are the problems that ensue when the prudential gatekeeper—i.e. the court—either refuses to open the gate or is not asked. Second, there are the problems in which circumstances make it prudent to open the gate for purposes that extend beyond the matters (such as § 503(b)(3)(B) property recovery) for which Congress has explicitly told the court it can open the gate to creditor action on behalf of the trustee. Third, there are the problems that arise when the trustee or debtor in possession performing the duties of the trustee is not interested in pursuing an avoiding action.

"Statutory standing" does not present these problems.

d

[26, 27] Creditor standing to recover property for the benefit of the estate with judicial permission presents a straightforward question of "statutory standing" conferred by § 503(b)(3)(B).

In the context of a creditor being given permission to recover for the benefit of the estate any property transferred or concealed by the debtor, the source of standing is statutory and has been statutory since at least 1903, when the original version of the creditor recovery provision at Bankruptcy Act § 64(a)(1) was enacted. That statutory authority was carried forward into the Bankruptcy Code of 1978 as § 503(b)(3)(B), with the enhancement inherent in the formalization of the requirement that there be prior judicial permission.

What follows from the statutory nature of the authority to grant permission for creditors to recover property for the benefit of the estate is that the decision whether to grant permission is within the sound discretion of the bankruptcy judge. It is that deferential standard that we have in mind when, in cases such as *Curry & Sorensen,* we speak of promoting "fair and orderly administration of the bankruptcy estate by providing judicial supervision over the litigation to be undertaken." *Curry & Sorensen,* 57 B.R. at 828.

In short, a creditor that obtains permission from the court to recover property for the benefit of the estate and to sue in the name of the bankruptcy trustee under § 503(b)(3)(B) has the same "statutory standing" as the trustee.

B

[28] It is apparent that the facts of this case fit comfortably within the § 503(b)(3)-(4) creditor recovery model that includes a grant of "statutory standing" to authorized creditors.

1

The trustee lacks the resources to pursue the property that the debtor allegedly transferred or concealed and has not pro-

posed to engage counsel on a contingent fee basis.

The creditor bank, which has the largest economic interest in the outcome, is willing to undertake the task with its own counsel.

The bank has chosen not to confuse the attorney-client relation by funding the trustee's effort and then letting the trustee attempt to hire the bank's counsel as special counsel under § 327(a) and (c), glossing over the disinterestedness requirement and the attorney's ethical duty of loyalty.

All recoveries will be for the benefit of the estate, with the court retaining power to approve compromises.

The trustee, who does have some resources, will remain at arm's length from the bank with the ability to exercise his independent judgment to participate in all litigation with his own counsel if he concludes that the interests of the estate are not being well served by the bank.

Reimbursement of the bank by the estate will be on the basis of "actual, necessary expenses" and only in the event of actual recovery. 11 U.S.C. § 503(b)(3)(B).

The bank's counsel will be eligible for "reasonable compensation" that is "based on the time, the nature, the extent, and the value of such services and the cost of comparable services" in nonbankruptcy cases. 11 U.S.C. § 503(b)(4). This statutory standard is similar, but not identical, to § 330.

In short, this is the paradigm case for implementing the creditor recovery model embodied in § 503(b)(3)(B).

2

In view of the fact that this is not an authorization of employment as counsel to the trustee under § 327, several points of contrast bear emphasis.

[29] Even though the action is prosecuted in the name of the trustee, the client of plaintiff's counsel under § 503(b)(3)(B) is the creditor, not the trustee. 4 L. KING, COLLIER ON BANKRUPTCY ¶ 503.11[4] (15th ed. rev.2001).

[30] A key difference is that § 503(b)(3)(B) affords a free pass from the "disinterested" requirement of § 327(a). With the exception of debtors' counsel employed under § 327(e), the terms of § 327(a) apply to all special counsel employed by a trustee; but the putative safe harbor of § 327(c) is, by its terms, limited to conflicts of interest, not the statutory "disinterested" requirement. In contrast, § 503(b)(3)(B) finesses all of those issues in favor of having the court act as gatekeeper in order to police any dysfunction.

Another difference is that fees are more likely to be paid from the estate to a professional employed under § 327 than to a professional who must rely on §§ 503(b)(3)(B) and (b)(4) because the latter sections have more limitations.

[31] In addition to prior judicial permission, successful recovery is an essential element to the creditor's § 503(b)(3)(B) eligibility. This follows from the statutory language "a creditor that recovers, after the court's approval" in that section. 11 U.S.C. § 503(b)(3)(B).

[32, 33] In turn, such creditor eligibility, i.e. actual recovery plus prior judicial permission, is prerequisite to § 503(b)(4) compensation for a professional by virtue of the language "attorney . . . of an entity whose expense is allowable under" subparagraph (b)(3). 11 U.S.C. § 503(b)(3)(4). It is not, however, essential that the eligible creditor have actually incurred an expense. *Law Offices of Wake v. Sedona Inst. (In re Sedona Inst.),* 220 B.R. 74, 81 (9th Cir. BAP 1998).

[34] Moreover, services and expenses need to be linked to a recovery of "any

property transferred or concealed by the debtor." 11 U.S.C. § 503(b)(3)(B). Thus, to the extent services are difficult to attribute to a qualifying recovery, the professional bears a greater risk of not being paid.

[35, 36] In contrast, success is merely relevant—albeit powerfully relevant—to § 330 fee awards for counsel employed under § 327. There, the focus is on more subjective factors such as the "value" of the services, taking into account such factors as whether the services were beneficial at the time rendered and subject to a limitation that they must have been reasonably likely to benefit the estate. 11 U.S.C. § 330(a).

Counsel acting pursuant to a § 503(b)(3)(B) grant of permission to a creditor, unlike counsel employed directly by the trustee under § 327, are not required to be "disinterested." To the contrary, the expectation is that counsel is working for the creditor and may well not be "disinterested."

3

Prior decisions that have ignored § 503(b)(3)(B) in favor of hiring counsel under § 327 do not make § 503(b)(3)(B) superfluous. But they warrant explanation.

An important early bankruptcy appellate panel decision was *Fondiller* in which a divided panel affirmed § 327 employment of a creditor's counsel to locate and recover concealed and fraudulently conveyed property. *Fondiller,* 15 B.R. at 891–92. It construed a since-repealed restriction in § 327(c) forbidding concurrent representation of a creditor during employment as special counsel as not applying when there is not a conflict of interest.[2] Although then-Bankruptcy Judge Lloyd George probably had the better of the argument in his dissent urging that the restriction was plainly applicable and could not be judicially construed into a corner, Congress mooted the debate when it enacted the majority's distinction as part of the Bankruptcy Amendments of 1984.[3]

Fondiller, however, did not address § 503(b)(3)(B). In the convoluted facts of that case, which included support of § 327(c) employment by a rare chapter 7 creditors' committee and counter-suits by the debtor, it did not appear that there was a creditor willing to undertake the financial risks inherent in obtaining § 503(b)(3)(B) permission, hiring counsel, and then not recovering. In the absence of such a creditor, the law firm was understandably not willing to work if it could not be paid in its own right under § 330 as special counsel employed by the trustee. Nothing about *Fondiller* suggests that there would have been any difficulty in utilizing the § 503(b)(3)(B) creditor permission strategy had there been a willing creditor.

Next, the Ninth Circuit rejected a defendant's attack on the employment of a creditor's lawyer under § 327 to prosecute an avoiding action that also sought to im-

2. The then-applicable version of § 327(c) was:

> (c) In a case under chapter 7 or 11 of this title, a person is not disqualified for employment under this section solely because of such person's employment by or representation of a creditor, but may not, while employed by the trustee, represent, in connection with the case, a creditor.

11 U.S.C. § 327(c), *repealed,* 1984.

3. The Bankruptcy Amendments of 1984 substituted "unless there is objection by another creditor or the United States trustee, in which case the court shall disapprove such employment if there is an actual conflict of interest" for "but may not, while employed by the trustee, represent, in connection with the case, a creditor." Pub.L. 98–353, § 430(c), 98 Stat. 370 (July 10, 1984).

pose equitable subordination and successor liability on another entity. *Stoumbos v. Kilimnik,* 988 F.2d 949, 964–65 (9th Cir. 1993). Relying on *Fondiller's* analysis of how the interests of the trustee and creditors align with respect to matters that would increase the estate, the court of appeals affirmed the § 327 employment of the creditor's lawyer because there was no actual conflict of interest.

There was no mention in *Stoumbos* of § 503(b)(3)(B), perhaps because the inclusion of equitable subordination and successor liability issues in special counsel's assignment went beyond the recovery-of-property constraint on that section. Nevertheless, nothing about the analysis in *Stoumbos* is inconsistent with potential application of § 503(b)(3)(B) to permit the counsel to prosecute the avoiding actions.

Finally, the Second Circuit applied *Stoumbos* and *Fondiller* to sustain employment of a creditor's counsel under § 327 to prosecute complex negligence and derivative action litigation that was plainly beyond the reach of § 503(b)(3)(B). *Bank Brussels Lambert v. Coan (In re AroChem Corp.),* 176 F.3d 610, 622 (2d Cir.1999). Once again, the presence of issues that extend beyond the limits of recovering property transferred or concealed by the debtor made § 503(b)(3)(B) irrelevant to that case.

Nor does the bankruptcy appellate panel decision in *McCutchen, Doyle, etc. v. Off'l Comm. of Unsecured Creditors (In re Weibel, Inc.),* 176 B.R. 209 (9th Cir. BAP 1994), compel a contrary result. There, a law firm that was *denied* employment under § 327 was correlatively precluded from collecting fees on theories of *quantum meruit,* § 503(b)(1) estate preservation expenses, or § 503(b)(2) payment of § 330 fee awards.

Weibel comports with other decisions requiring either § 327 employment or prior permission as prerequisite to compensation under §§ 503(b)(1)(A), (b)(2), and (b)(3)(D). *In re Albrecht,* 233 F.3d 1258, 1261 (10th Cir.2000) (§ 503(b)(1)(A)); *In re Singson,* 41 F.3d 316, 320 (7th Cir.1994)(no prior authorization); *F/S Airlease II, Inc. v. Simon (In re F/S Airlease II, Inc.),* 844 F.2d 99, 108 (3d Cir.1988) (§ 503(b)(1)(A)); *In re Stoico Rest. Group, Inc.,* 271 B.R. 655, 661–62 (Bankr.D.Kan.2002) (§ 503(b)(3)(D)).

Neither *Weibel,* nor the other consistent decisions, involve creditor recovery of transfers for the benefit of the estate with prior court permission under § 503(b)(3)(B). To the extent that *Weibel* has any applicability to § 503(b)(3)(B), it stands for the unremarkable proposition that no compensation will be awarded if the court refuses to grant prior permission. In short, nothing about *Weibel* undermines the vitality of § 503(b)(3)(B).

While these decisions illustrate that § 327 often is essential for bringing counsel into a bankruptcy case, they do not read § 503(b)(3)(B) out of the Bankruptcy Code. While the two sections often overlap, they present different questions.

[37] Under § 503(b)(3)(B), the bankruptcy court acts as gatekeeper for creditors who want to prosecute actions to recover property transferred or concealed by the debtor. Whether the court chooses to open the gate is a matter of judicial discretion.

II

[38–40] The agreement between the trustee and the bank also includes a compromise that resolves any dispute about the secured status of the bank's claim. In exchange, the estate and creditors receive the benefit of agreed surcharges of collateral and a distribution scheme that amounts to the bank voluntarily subordi-

nating its rights to other unsecured creditors so that they will be paid sooner.

When assessing a compromise, a bankruptcy court is required to make an "informed, independent judgment" about whether the compromise is "fair and equitable." This entails comparing the terms of the compromise with likely rewards of litigation and "all other factors relevant to a full and fair assessment of the wisdom of the proposed compromise," including: (1) probability of success in litigation; (2) likely difficulties in collection; (3) complexity of the litigation; (4) expense, inconvenience, and delay necessarily attending continued litigation; and (5) the paramount interest of creditors and proper deference to any reasonable views they may express. *Protective Comm. of Indep. S'holders of TMT Trailer Ferry, Inc. v. Anderson,* 390 U.S. 414, 424–25, 88 S.Ct. 1157, 20 L.Ed.2d 1 (1968); *Woodson v. Fireman's Fund Insur. Co. (In re Woodson),* 839 F.2d 610, 620 (9th Cir.1988).

In this instance, the compromise is plainly "fair and equitable." There is no indication that a meritorious challenge could be mounted to the bank's secured status. Moreover, there is no indication that the amount of the claim is materially overstated. Thus, defeating the bank's secured status would still leave the bank holding about 95 percent of total debt, which would entitle it to 95 percent of distributions.

Under the compromise, the bank agrees to let the other unsecured creditors have an initial partial distribution from the § 506(c) surcharge it is permitting and to have 10 percent of all subsequent distributions until such time as they have been paid in full. It is also agreeing to permit a substantial surcharge against the secured claim without requiring the trustee to prove all the essential elements of § 506(c), which, under the apparent facts, may be difficult for the trustee to do. Thus, the likely rewards of litigating the details of the bank's secured status and the amount of its claim are less than the benefits of the compromise.

As it is by no means evident that the trustee could make a meritorious challenge to the bank's claim, the probability of success in such litigation is doubtful. Collection issues are irrelevant to this situation as there is no hint that the bank might owe anything to the estate. Similarly, the lack of an apparent meritorious challenge suggests that any such effort would entail complex analysis. It also would be expensive and would delay the time-sensitive recovery litigation that comprises the primary value remaining in the estate. Finally, the other creditors will receive payments on an accelerated rate and in higher amounts than required by the Bankruptcy Code.

Thus, the compromise is "fair and equitable."

An appropriate order will issue.

In re Clyde Eldon STEFFENS, and LaDona Louise Steffens, Debtors.

Bank One, Colorado, N.A., Movant,

v.

Clyde Eldon Steffens and LaDona Louise Steffens, Respondents.

No. 01–25624 SBB.

United States Bankruptcy Court, D. Colorado.

March 22, 2002.

Deed of trust creditor moved for relief from stay based on alleged lack of ade-

Faculty

Hon. Elisabetta G. M. Gasparini is a U.S. Bankruptcy Judge for the District of South Carolina in Charleston, appointed on June 27, 2022, after an extensive career as a trial attorney with the Office of the U.S.Trustee in both Region 4 (2012-22) and Region 2 (2009-12). During her tenure with Region 4 in Columbia, S.C., she served as chapter 11 regional coordinator in complex chapter 11 cases. In 2019, Judge Gasparini received the Director's Award for Excellence in Chapter 11 Complex Issues. While serving as a trial attorney for Region 2 in New York, she worked on numerous high-profile cases, including *American Airlines*, *Blockbuster* and *Lehman Brothers*. Prior to her service with the UST, Judge Gasparini was a member of the corporate restructuring groups for several firms in New York from 2001-09, where she worked on complex chapter 11 cases and mass-tort bankruptcies, and represented various defendants to preference actions. She previously clerked for her predecessor, Hon. John E. Waites, from 1999-2001. Judge Gasparini was born in Milan, Italy, and immigrated to the U.S. with her family in 1987. She received her B.A. in 1996 from Wake Forest University and her J.D. in 1999 from the University of South Carolina School of Law.

Laura Davis Jones is a named partner and management committee member of Pachulski Stang Ziehl & Jones LLP in Wilmington, Del., and is the managing partner of the firm's Delaware office. She gained national recognition as debtor's counsel in the *Continental Airlines* bankruptcy case and has represented numerous debtors, creditors' committees, bank groups, acquirers and other significant constituencies in national chapter 11 cases and workout proceedings. Ms. Jones participates as a speaker at national bankruptcy and litigation seminars, and she has authored numerous articles. She was named "Deal Maker of the Year" by *The American Lawyer* in 2002, which also has profiled her. Ms. Jones has been named continuously by her peers as one of the *The Best Lawyers in America*" and as one of the "Best Lawyers in Delaware," and was selected as one of the top 10 lawyers in Delaware by *Delaware Super Lawyers*. She is a Fellow of the American College of Bankruptcy and a *Chambers USA* "Star Individual," the highest honor a lawyer can receive. Ms. Jones has been recognized in the *K&A Restructuring Register* and the *Lawdragon 500* since their inception, has been named repeatedly to the *International Who's Who of Insolvency and Restructuring Lawyers*, and is AV-rated by Martindale-Hubbell. In 2018, she received the prestigious "Women Leadership" award at Global M&A Network's Turnaround Atlas Awards, which honors the achievement of influential women leaders in the restructuring and turnaround communities. She started her career as a judicial law clerk in the U.S. Bankruptcy Court for the District of Delaware. Ms. Jones is admitted to practice in Delaware and the District of Columbia. She received her undergraduate degree from the University of Delaware and her J.D. from Dickinson School of Law, where she was on the board of editors and business manager for the *Dickinson Law Review* and served on the Appellate Moot Court Board.

Hon. Christopher M. Klein is a U.S. Bankruptcy Judge for the Eastern District of California in Sacramento, appointed in 1988, and he was a member of the Bankruptcy Appellate Panel of the Ninth Circuit from 1998 until August 2008, serving as Chief Judge from 2007-08. He is admitted to the California, District of Columbia, Illinois and Massachusetts Bar Associations. After completing service in the U.S. Marine Corps as an artillery officer in Vietnam and judge advocate, Judge Klein was a trial attorney in the U.S. Department of Justice, in private practice with Cleary, Gottlieb, Steen & Hamilton, and deputy general counsel-litigation of the National Railroad Passenger Corporation.

In 1988, he was appointed a U.S. Bankruptcy Judge for the Eastern District of California. He was appointed to the Bankruptcy Appellate Panel in 1998 and served for 10 years. From 2000-07, Judge Klein was a member of Advisory Committee on Bankruptcy Rules of the Judicial Conference of the United States and the Advisory Committee on the Federal Rules of Evidence. He is a Fellow of the American College of Bankruptcy and a member of the American Law Institute, International Insolvency Institute, ABI and the American Bar Association's Business Bankruptcy Committee. In addition, he serves as NGO delegate to the Cross-Border Insolvency Working Group of UNCITRAL. Judge Klein received his B.A. and M.A. from Brown and his M.B.A. and J.D. from the University of Chicago, where he was executive editor of its law review.

David J. Richardson is a partner with BakerHostetler in Los Angeles and a member of the firm's national Restructuring and Bankruptcy and Litigation teams. He has more than 30 years of experience in restructuring and commercial litigation, with a focus on complex litigation in bankruptcy cases, and representation of committees of unsecured creditors in industries as diverse as energy, telecommunications, art sales, transportation, construction and consumer products. Mr. Richardson is a member of ABI and served on the board of directors of the Los Angeles LGBTQ+ Bar Association from 2020-24, and he has been listed in *The Best Lawyers in America* in California for Bankruptcy and Creditor/Debtor Rights/Insolvency and Reorganization Law from 2022-25. He received his B.A. with honors in 1986 from Queen's University in Ontario, and his J.D. in 1993 from Stanford Law School.

Hon. Laurie Selber Silverstein is a U.S. Bankruptcy Judge for the District of Delaware in Wilmington, initially sworn in on Jan. 7, 2015. She served a term as Chief Judge. Judge Silverstein is a member of the Committee on the Budget of the Judicial Conference of the United States and a Fellow of the American College of Bankruptcy and the American Bar Foundation.She serves on the board of directors of the Delaware Bar Foundation and the executive committee of The Delaware Bankruptcy American Inn of Court. She also is a member of the Legislative Committee of the National Conference of Bankruptcy Judges. Prior to joining the bench, Judge Silverstein was a partner at Potter Anderson & Corroon LLP in Wilmington, Del., where she led the firm's bankruptcy and corporate restructuring practice group. She received her B.S. *cum laude* in economics in 1982 from the University of Delaware and her J.D. with honors from George Washington University's National Law Center in 1985.