Case Law Update: Business and Consumer Cases

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Hon. Robert E. Nugent | U.S. Bankruptcy Court (D. Kan.); Wichita

Hon. Thomas L. Saladino | U.S. Bankruptcy Court (D. Ne.); Lincoln

2010 Educational Materials

A Review of Eighth Circuit Bankruptcy Decisions (2010 Broadcast)

A BROADCAST FROM THE FEDERAL JUDICIAL CENTER

Faculty

Hon. Arthur B. Federman
U.S. Bankruptcy Judge for the Western District of Missouri

Hon. Robert J. Kressel
U.S. Bankruptcy Judge for the District of Minnesota

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I. BAPCPA

1. **Ford Motor Credit v. Mierkowski (In re Mierkowski),** 580 F.3d 740 (8th Cir. 2009) (Benton, J.)

   Bankruptcy Judge: Barry Schermer

   The hanging paragraph (following § 1325(a)(9)) prohibits bifurcation of a secured claim as to vehicles if "the creditor has a purchase-money security interest securing the debt that is the subject of the claim," the debt was incurred within the 910 days preceding the filing of the petition, and the collateral is a motor vehicle for the debtor's personal use. Here, in addition to the price of the new vehicle, Ford had loaned the debtors the funds sufficient to pay off their lien on the vehicle that was being traded in. The issue was whether Ford's PMSI secured its entire claim, including such negative equity in the trade-in vehicle. Interpreting § 9-103 of the Missouri Uniform Commercial Code (Mo. Rev. Stat. § 400.9-103), which provides that a purchase-money obligation is one incurred as "all or part of the price of the collateral or for value given to enable the debtor to acquire rights in or the use of the collateral," the court found that the term "price" should be broadly interpreted. Since the parties agreed to include the negative equity as part of the total sale price of the new vehicle, the negative equity that was financed was an integral part of and inextricably intertwined with the entire transaction. Therefore, such negative equity was found to be part of the price of the new car, and therefore a purchase-money obligation. All other circuits that have considered this question have come to the same conclusion. *See Ford v. Ford Motor Credit Corp. (In re Ford)*, 574 F.3d 1279 (10th Cir. 2009); *In re Price*, 562 F.3d 618 (4th Cir. 2009); *Graupner v. Nuvell Credit Corp. (In re Graupner)*, 537 F.3d 1295 (11th Cir. 2008).

2. **Nuvell Credit Company v. Callicott (In re Callicott),** 580 F.3d 753 (8th Cir. 2009) (Benton, J.)

   Bankruptcy Judge: Kathy Surratt-States

   The court held that the existence of a PMSI does not depend on whether negative equity financing was essential to the purchase but rather on whether it was part of the price of the collateral; therefore, the creditor need not offer evidence as to whether the debtor would have been able to purchase the vehicle without the negative equity financing. *Compare In re Weiser*, 381 B.R. 263 (Bankr. W.D. Mo. 2007).

II. JURISDICTION

3. **GAF Holdings, LLC, v. Rinaldi (In re Farmland Industries, Inc.),** 567 F.3d 1010 (8th Cir. 2009) (Shepherd, J.)

Bankruptcy Judge: Jerry Venters

Chapter 11 debtor held an auction for its refinery and fertilizer plant and determined that one of the entities bidding was not qualified to bid for many reasons. The *disqualified* entity brought proceedings against the winner of the auction, asserting claims for civil conspiracy and tortious interference. The defendants appealed a BAP decision which found that the bankruptcy court's decision to dismiss the complaint was not a final order and that the bankruptcy court lacked subject-matter jurisdiction to rule on a tort claim against the defendants. The Eight Circuit, however, found that the decision was final because a remand order for only ministerial duties is a final order, and it also held that the bankruptcy court did have subject-matter jurisdiction under 28 U.S.C. § 157(c)(1). In so doing, the circuit reiterated that a claim is related to the bankruptcy if the result could have some *conceivable effect* on the estate. *Specialty Mills, Inc. v. Citizens State Bank,* 51 F.3d 770 (8th Cir. 1995). Here, there was a conceivable effect because the debtor was obligated to indemnify two of the defendants, who were former officers. The BAP then held that Judge Venters correctly dismissed the complaint as facially deficient since the plaintiff was not a qualified bidder, and as a collateral attack on prior orders. *GAF Holdings LLC v. Rinaldi,* 378 B.R. 829 (B.A.P. 8th Cir. 2009).

4. **Robinson v. Rothwell (In re Robinson),** 342 Fed. Appx. 235 (8th Cir. 2009) (per curiam)

Bankruptcy Judge: Jim Mixon

The bankruptcy court had enjoined a Chapter 7 debtor from taking "any actions to interfere in any way with the administration of these jointly administered bankruptcies." Criminal contempt in this circuit requires proof beyond a reasonable doubt that the defendant knowingly and willfully violated a court order. *See Wright v. Nichols,* 80 F.3d 1248 (8th Cir. 1996). Here, the debtor had filed suit in state court, and placed a lis pendens on real estate which his bankruptcy trustee was preparing to sell at auction, resulting in cancellation of the sale. In reversing the district court's judgment for contempt, the Eighth Circuit held that the bankruptcy court's order was neither sufficiently specific to be enforceable nor clear and unambiguous, and therefore violated due process. *Compare Ingalls v. Thompson (In re Bradley),* 588 F.3d 254 (5th Cir. 2009) (bankruptcy court had authority to impose sanctions for civil contempt for violation of oral order, prior to order being reduced to writing). Nevertheless, the Eighth Circuit did affirm the award of damages against the debtor—in the nature of civil contempt—for auction expenses, attorney's fees, and

cost incurred as a result of the filing of the state court action. *But see In re Englund,* 401 B.R. 377 (B.A.P. 8th Cir. 2009) (adversary proceeding not required for motions seeking damages for contempt). And, in a separate matter, the Eighth Circuit affirmed the denial of debtor's discharge for knowingly and fraudulently providing inaccurate information on the bankruptcy schedules pursuant to § 727(a)(4). *See Lewellen v. Wildlife Farms II, LLC,* 557 F.3d 593 (8th Cir. 2009) (affirming award of Rule 9011 sanctions arising out of same facts).

III. DISCHARGEABILITY

5. **Educational Credit Mgmt. v. Jesperson,** 571 F.3d 775 (8th Cir. 2009) (Loken, C.J.)

Bankruptcy Judge: Dennis O'Brien

Debtor was an unmarried lawyer with two children and with $350,000 in student loan debt. He had no physical or mental disabilities preventing him from working but, according to the trial court, had a lack of ambition to do so. The bankruptcy court had held that requiring him to pay his loans was an undue hardship because of the sheer magnitude of such loans. In response to the creditor's argument that the debtor should enroll in the ICRP, the bankruptcy court had held that even if he made payments under that program, based on his income the amount of debt would not be reduced. In a fractured opinion, Judge Loken for the court applied the totality-of-the-circumstances test, with particular emphasis on the ICRP as a factor. After holding that the bankruptcy court was clearly erroneous in determining that the debtor did not have available funds with which to make ICRP payments, Judge Loken indicated that when a debtor is eligible for the ICRP, undue hardship is difficult to prove unless such debtor is able to demonstrate some handicap preventing him from being employed. In concurring, Judge Smith stated that while ICRP is a factor to consider when applying the totality-of-the-circumstances test, it is not the only factor, and that here the debtor's young age, good health, number of degrees, marketable skills, and lack of substantial obligations to dependants or mental or physical impairment all serve to establish that the debt should not be discharged. In dissent, Judge Bye argued that at least four circuits (including the Tenth) have specifically rejected a per se rule with respect to ICRP participation. *Compare Booth v. Dep't of Educ. (In re Booth),* 410 B.R. 672 (Bankr. E.D. Wash. 2009) (under *Brunner* test, debtor can establish undue hardship despite $0 ICRP payment).

6. **Sallie Mae Servicing Corp. v. Walker (In re Walker)**, Case No. 09-6022, — B.R. — (B.A.P. 8th Cir. April 9, 2010)

Bankruptcy Judge: Gregory F. Kishel

The debtor was married with five young children, two of which were diagnosed with autism. Because of the family situation and the debtor's husband's work schedule as a police officer, the debtor was unable to work outside the home, and that situation was likely to continue at least until the children reached the age of majority. She filed a Chapter 7 bankruptcy case, and received a general discharge, in 2004. Three years later, in 2007, she filed an adversary proceeding seeking to discharge her student loans. The bankruptcy court held that, under the circumstances, requiring the debtor to repay the student loans would impose an undue hardship on her, and held them to be dischargeable under § 523(a)(8). In affirming, the BAP first rejected ECMC's argument that the bankruptcy court lacked subject-matter jurisdiction to discharge the student loans after the general discharge was entered. Rule 4007 expressly provides ongoing authority for bankruptcy courts to hear student loan cases after the main bankruptcy case is closed, and hence Rules 59 and 60 are not the exclusive sources of authority for courts to hear student loan cases after the general discharge order is entered. In addition, the adversary proceeding was not a collateral attack on the general discharge order because, while such orders are final as stated in *Travelers Indemnity Company v. Bailey*, 129 S. Ct. 2195 (2009), they are not "final orders" on the issue of dischargeability of student loans. Indeed, a debtor may bring a student loan dischargeability case based on changed circumstances occurring after the general discharge order was entered. And because a student loan discharge can be based on changed circumstances, the BAP rejected ECMC's assertion that the court was limited to analyzing the debtor's situation as it existed when the general discharge was entered; rather, it was appropriate for the court to consider the circumstances existing at the time of trial. On that factual determination, ECMC had pointed out that, during the time after the debtor's general discharge in 2004 and the adversary proceeding in 2007, the debtor's husband had purchased an expensive vehicle and put an addition on their house. In affirming the discharge of the loans, the BAP acknowledged that these expenses, when viewed in isolation, might not be reasonable under the totality of the circumstances test. However, the BAP held, the uncontroverted evidence was that the family's expenses exceeded the income notwithstanding those expenses and, therefore, the debtor was unable to make any payments on her student loans, including under the ICRP, and still maintain a minimal standard of living for herself and her family.

7. **Shotkoski v. Fokkena (In re Shotkoski),** 420 B.R. 479 (B.A.P. 8th Cir. 2009) (Saladino, J.)

Bankruptcy Judge: Chuck Nail

The debtors, a married couple who had filed a joint Chapter 11 petition, appealed from an order of the bankruptcy court denying their motion for the entry of a final decree in their case. They had commenced plan payments, there were no required deposits to be distributed, they had assumed management of the property, and substantial consummation of the plan had taken place. The bankruptcy court reasoned that 11 U.S.C. § 1141(d)(5), 28 U.S.C. § 1930(a)(5), and Fed. R. Bankr. P. 3020, 3021, and 3022 do not contemplate the closing of an individual Chapter 11 case until the administration is complete.

The BAP applied an abuse of discretion standard in its review of the bankruptcy court's order denying entry of a final decree, because the bankruptcy court had made a determination of whether the estate was "fully administered" for purposes of entering a final decree. Citing *Spierer v. Federated Dep't Stores, Inc. (In re Federated Dep't Stores), Inc.*, 43 Fed. Appx. 820, 822 (6th Cir. 2002), and *In re Union Home & Indus., Inc.*, 375 B.R. 912 (B.A.P. 10th Cir. 2007), the court reasoned that bankruptcy courts must review requests for entry of a final decree on a case-by-case basis to determine whether an estate has been fully administered. Although the Advisory Committee Note (1991) to Fed. R. Bankr. P. 3022 provides six factors to consider, those factors are not exclusive.

The BAP stated that it was not holding "that every individual Chapter 11 case must remain open until such time as all long-term plan payments have been completed and a discharge is entered," but that it was a case-by-case determination best left to the discretion of the bankruptcy judge, who might choose to close individual cases prior to the entry of discharge for purposes of convenience and efficiency.

IV. ADMINISTRATIVE EXPENSES

8. **Burival v. Creditor Committee (In re Burival),** 406 B.R. 548 (B.A.P. 8th Cir. 2009) (Schermer, J.)

Bankruptcy Judge: Tom Saladino

The debtors and their landlord entered into a three-year lease of crop land, commencing March 2007. Payments were to be made twice each year: $75,329.78 on April 1 and $90,799.22 on December 1. On November 29, 2007, the debtors filed chapter 11 and the landlord sought the full payment of $90,799.22 based on § 365(d)(3), which requires Chapter 11 debtors to perform fully all obligations un-

der an unexpired lease until the lease is rejected. The BAP agreed, rejecting the argument that § 365(d)(3) only required a proration of the rent due post-petition.

Judge Kressel dissented, arguing that obligating the debtor to pay rent that comes due postpetition does not mean that unpaid rent is entitled to an administrative expense. Instead, he contended, the landlord should only be entitled to an administrative expense to the extent it can show benefit to the estate within the meaning of § 503(b). *Compare In re ContinentalAFA Dispensing Co.*, 403 B.R. 653 (Bankr. E.D. Mo. 2009) (Surratt-States, J.) (laid-off employees' claim for damages under WARN Act not entitled to administrative expense status because no benefit to the estate).

V. EMPLOYMENT OF PROFESSIONALS

9. **Blumenthal v. Myers (In re M & M Marketing, LLC)**, — B.R. —, 2010 WL 1253777 (B.A.P. 8th Cir. 2010) (Venters, J.)

Bankruptcy Judge: Tim Mahoney

The trustee, Myers, filed an application to employ Skalka (a lawyer) and his law firm as special counsel to represent the trustee in connection with actions against one particular creditor, Blumenthal. The bankruptcy court approved Skalka's employment, without ruling on whether he or his law firm represented an adverse interest. The creditor, Blumenthal, then filed a motion to remove Skalka and his firm because (1) Skalka represented a group of petitioning creditors with interests adverse to the estate; (2) Skalka was not disinterested as required by 11 U.S.C. § 327(a) due to his representation of the debtor's principal; and (3) Myers and Skalka failed to disclose that Skalka represented relatives of a manager of the debtor. The bankruptcy court found no basis for disqualification and denied the motion. Blumenthal appealed both orders.

The BAP reviewed the bankruptcy court's order approving the employment of a professional under the abuse of discretion standard. The BAP agreed with the bankruptcy court that Skalka and his law firm were not disqualified under § 101(14), because whether an attorney is disinterested is solely a function of the attorney's relationship to the debtor, not other creditors. However, the BAP reversed because Skalka and his law firm represented petitioning creditors whose interests were adverse to the estate. 11 U.S.C. § 327(a). Skalka had actual and potential conflicts because (1) the petitioning creditors received transfers from the debtor prior to the bankruptcy filing which were arguably subject to avoidance and Skalka and his firm might be required to investigate those transfers, notwithstanding the limited scope of the trustee's employment of Skalka and his firm as "special counsel"; and (2) Blumenthal might possess state-law claims against the petitioning creditors,

which could lead to a genuine conflict of interests or in other ways interfere with Skalka's unbiased representation of the estate.

The court noted that § 327(e) allows a court to consider conflicts solely with regard to the matter for which the attorney is to be employed, but only where the attorney has previously represented the debtor. Because Skalka and his firm had not previously represented the debtor, it was inapplicable. The BAP also noted that the trustee did not properly limit the scope of Skalka's representation (although the BAP did not rule on whether limiting the scope of representation was ever proper). It was only as a last-minute, oral modification that the trustee stated that Skalka's employment would be limited to pursing actions against Blumenthal.

SUMMARIES OF PUBLISHED BANKRUPTCY OPINIONS BY THE EIGHTH CIRCUIT COURT OF APPEALS AND BANKRUPTCY APPELLATE PANEL JAN.-JULY 2010

1. **Wells Fargo Home Mortgage, Inc. v. Lindquist (In re Westlund)**, 592 F.3d 838 (8th Cir. 2010).
Bankruptcy Court: Minnesota
Route to Court of Appeals: District Court
Ruling: Affirmed

The borrower obtained a loan from Wells Fargo in 2003 and granted a mortgage on his home. Wells Fargo did not record the mortgage. The borrower, unaware of this, listed Wells Fargo as a secured creditor in his bankruptcy schedules when he filed a Chapter 7 petition in 2005. During the pendency of the bankruptcy case, Wells Fargo sold a bundle of mortgage loans, including the debtor's, to EMC Mortgage Corporation. After the debtor was discharged and the case was closed, EMC recorded the mortgage. The Chapter 7 trustee then moved to reopen the case and avoid the transfer of the mortgage to Wells Fargo as a preference. The bankruptcy court granted the trustee's motion for summary judgment, ruling that the relevant transfer was the pre-petition transfer of the mortgage from the debtor to Wells Fargo. Because the transfer occurred immediately before the petition date by operation of § 547(e)(2)(C), it was a preference under § 547(b) and Wells Fargo owed the estate the value of the mortgage pursuant to § 550(a). The district court affirmed.

On appeal, the three statutory preference elements at issue were (1) whether the transfer was "to or for the benefit of a creditor," (2) whether it was "for or on account of an antecedent debt owed by the debtor before such transfer was made," and (3) whether Wells Fargo received more than it would have in a hypothetical liquidation. The Court of Appeals ruled that because the debt was incurred in 2003 and the transfer was deemed to have occurred in 2005, Wells Fargo was indeed a creditor and the transfer was in fact for an antecedent debt. On the issue of whether Wells Fargo received more than it otherwise would have in a Chapter 7 case, the court said:

> We do not necessarily disagree with Wells Fargo's position that, in this context, a creditor holding an unsecured note would not normally benefit from obtaining an unrecorded mortgage from the debtor on the eve of the debtor's bankruptcy filing because its claim would remain unsecured and its recovery would not change.

However, the court noted, the debtor listed Wells Fargo as a secured creditor, which allowed Wells Fargo to hold onto the mortgage and then benefit by selling it to EMC. " But for the transfer of the mortgage to Wells Fargo, the bankruptcy estate would have included an interest in the house equal to the value of the mortgage, which the trustee would have been able to liquidate." The result would have been that unsecured creditors such as Wells Fargo would have received a pro rata distribution. Because Wells Fargo received the full value of its claim as a result of the transfer, it received more than it would have in a liquidation and the transfer was a preference. It received and sold a property interest that should have remained with the estate.

With regard to the appropriate damages, the evidence indicated the amount the debtor owed to Wells Fargo on the petition date. While the price EMC subsequently paid for the mortgage would have been a more accurate representation of its value, there was no admissible evidence of that amount.

2. **American Prairie Construction Co. v. Hoich (In re Tri-State Ethanol)**, 594 F.3d 1015 (8th Cir. 2010)
Bankruptcy Court: South Dakota
Route to Court of Appeals: District Court
Ruling: Affirmed in part, reversed in part

American Prairie built an ethanol plant in South Dakota in 2001 for the debtor. The debtor did not pay American Prairie, so American Prairie initiated foreclosure proceedings. The debtor filed a Chapter 11 petition in May 2003. A group of investors then formed Tri-State Financial, LLC, to fund the debtor and get the plant back into operation. The debtor filed a plan of reorganization in March 2004, to which American Prairie objected. Tri-State Financial negotiated with American Prairie to see if it could buy American Prairie's claims, but no agreement was reached at that time. Hoich, on behalf of Tri-State Financial, offered American Prairie $2.5 million for its claims. American Prairie accepted the offer on June 21, 2004, the morning of the confirmation hearing. Tri-State Financial representatives then met with American Prairie's attorney and discussed the terms of the settlement. Hoich was not involved in these conversations. American Prairie's attorney took notes of the discussions and read them into the record at the confirmation hearing, representing them to be the terms of the parties' settlement agreement. The bankruptcy court ordered an amended plan to be filed by June 25, 2004, and set a confirmation hearing on that amended plan for approximately 30 days thereafter. When the parties attempted to commit the settlement agreement to writing, disputes arose over its terms. Chief among the disputes was whether the settlement agreement was subject to confirmation of the amended plan. While the parties tried to work out the terms, Tri-State Financial investors raised the $2.5 million and deposited it into their attorney's trust account. The parties failed to reach agreement on the terms, and asked the bankruptcy court to enforce the June 21st agreement. Before the matter was heard, American Prairie attempted to perform its obligations under the purported settlement agreement by tendering an assignment of its claims to Tri-State Financial. Tri-State Financial declined the tender and refused to pay American Prairie. At the hearing, confirmation was abandoned and the debtor and Tri-State Financial joined the U.S. Trustee's motion to dismiss the case. The bankruptcy court denied that motion, but converted the Chapter 11 to a Chapter 7. The court also denied American Prairie's motion to approve the settlement agreement, finding that the agreement was not conditional in any manner. The court concluded that it did not have the jurisdiction to force Tri-State Financial, a third party, to go forward with the arrangement. Tri-State returned the $2.5 million to the investors who provided it.

American Prairie then filed a lawsuit in district court to enforce the alleged settlement agreement against Tri-State Financial and Hoich, while continuing to negotiate a new settlement in the bankruptcy case. In 2006, American Prairie and the bankruptcy trustee settled American Prairie's

claim for construction costs. However, the bankruptcy court was unable to enforce that settlement because the district court contract litigation was going forward. The district court ruled that the June 21, 2004, settlement agreement as read into the record at the confirmation hearing was binding and enforceable, that the agreement bound both Tri-State Financial and Hoich, that both Tri-State Financial and Hoich breached the agreement by failing to perform, and that both were jointly and severally liable for the $2.5 million plus interest. Tri-State Financial and Hoich appealed. Tri-State Financial then filed bankruptcy, so its appeal was stayed. In 2009, the Eighth Circuit reversed the district court's finding that Hoich had guaranteed or was a party to the June 21st settlement agreement. Thereafter, the bankruptcy court lifted the stay in Tri-State Financial's case and allowed it to pursue its claims in the appeal of the contract litigation.

One of the issues on appeal was whether the district court judge should have recused himself from hearing the contract case because he had ruled on various appeals in the underlying bankruptcy case and Tri-State Financial believed he was biased against its position. The Court of Appeals found that Tri-State Financial did not meet the burden of demonstrating that the district judge held "a deep-seated favoritism or antagonism" or "had a disposition so extreme as to display a clear inability to render a fair judgment."

Before reaching the merits of the contract claim, the Court of Appeals ruled that Tri-State Financial could not rely on the argument that plan confirmation was a condition precedent to the formation of a binding agreement regarding the settlement because Tri-State Financial prevented that condition precedent from occurring when it joined the U.S. Trustee's motion to dismiss the case. The Court of Appeals then ruled that no agreement was reached because Hoich, never having agreed to be personally bound to the agreement with Tri-State Financial and American Prairie, was not a party to the settlement agreement under South Dakota law; the parties' assumption that he was a party meant that no "meeting of the minds" existed on the essential contractual term of the identity of the parties to the agreement, so no contract was ever formed. The Court of Appeals went on to explain that even if an agreement had been reached, it would not be enforceable because it had not been approved by the bankruptcy court. The Court of Appeals stated, "Quite simply, a settlement reached between a debtor in bankruptcy and a creditor is not effective under Fed. R. Bank. P. 9019 absent bankruptcy court approval." Moreover, the court said, even if the agreement did not require bankruptcy court approval, it was nevertheless unenforceable because the ethanol plant had been sold while the contract litigation was pending and that "drastic change in circumstances" frustrated the purpose of the contract and prevented its enforcement.

3. **Bremer Bank v. John Hancock Life Ins. Co.**, 601 F.3d 824 (8th Cir. 2010)
Not really a bankruptcy case
Bankruptcy Court: Southern District of New York
Route to Court of Appeals: Litigation originating in District Court in Minnesota
Ruling: Affirmed

Bremer Bank owned, through a trust, a Boeing 757-251 airplane leased to Northwest Airlines. U.S. Bank managed the trust. John Hancock represented the majority interest in the loan which paid for 80% of the plane's purchase price. The lenders' interest in the ownership trust was represented by an indenture trustee. The airplane lease was assigned to U.S. Bank, which held a first priority security interest in the plane and the lease. John Hancock's interest was secured by the plane and the lease. U.S. Bank collected the lease payments and distributed them first to John Hancock and the other lenders, with any remainder going to itself. Northwest filed a Chapter 11 bankruptcy proceeding in September 2005, which was an event of default under the lease and under the indenture agreement. Section 1110 of the Bankruptcy Code requires a debtor to cure an airplane lease default or turn the plane over to the lessors within 60 days after the petition date. Northwest rejected the airplane lease and obtained court authorization to negotiate more favorable lease terms. Bremer Bank did not seem interested in negotiating with Northwest, so John Hancock took steps to restructure the lease and protect its investment. The parties stipulated several times to extend that § 1110 stay. In March 2006, Northwest moved for approval of a new lease which included reduced monthly payments and would give U.S. Bank an unsecured claim for $15 million for lease rejection damages. Bremer objected. The bankruptcy court continued the hearing to give John Hancock and U.S. Bank time to foreclose on Bremer Bank's interest to remove it from the transaction. U.S. Bank, as indenture trustee, set in motion a foreclosure action. Bremer Bank unsuccessfully attempted to stop the sale. A third party purchased the indenture estate for cash above the credit bid, and the bankruptcy court approved Northwest's new lease. Bremer Bank then sued for breach of contract, and the district court granted summary judgment to John Hancock and U.S. Bank. The Court of Appeals affirmed, ruling that U.S. Bank properly declared a default under the indenture and that §§ 362 and 1110 did not prohibit U.S. Bank from declaring a default.

4. **R & R Ready Mix v. Freier (In re Freier)**, 604 F.3d 583 (8th Cir. 2010)
Bankruptcy Court: Minnesota
Route to Court of Appeals: B.A.P.
Ruling: Reversed the B.A.P., affirmed the trial court

Freier was the sole shareholder, officer, and director of T.F., which was a contractor that performed concrete and masonry work. R & R Ready Mix supplied materials to T.F. on credit. When T.F. fell behind on payments and R & R threatened to stop extending credit, Freier promised that T.F. would pay the debt and worked out a payment schedule with R & R. T.F. again failed to make payments, and R & R filed a collection action in state court. Freier pursued settlement discussions with R & R and represented his ability to pay certain dollar amounts on the debt for a certain period of months. He also provided a corporate financial statement for T.F. which was inaccurate as it did not include the R & R debt, among others. Freier also told R & R that he was not taking any funds from T.F. for himself. The parties signed a settlement agreement, but T.F. failed to make some monthly payments while it also incurred new debt with R & R, so the overall debt increased. R & R pursued legal action against T.F., Freier, and another corporation owned by Freier. Freier then filed a Chapter 7 case.

R & R filed an adversary proceeding against Freier alleging non-dischargeability. The bankruptcy court pierced the veil, holding that T.F.'s debt to R & R was Frier's debt and it was not dischargeable under §§ 523(a)(2)(A), (a)(2)(B), and (a)(4).

On appeal, the B.A.P. reversed on the basis of the trial court's findings of fact regarding § 523(a)(2) and its conclusions of law regarding § 523(a)(4).

The Court of Appeals reversed the B.A.P.'s ruling on § 523(a)(2)(A), finding that Freier committed fraud by misrepresenting that he was not taking any funds from T.F. for himself when in fact he was. R & R justifiably relied on those representations by foregoing collection efforts and continuing to provide materials to T.F. on credit.

5. **Asset Based Resource Group, LLC v. U.S. Trustee (In re Polaroid Corp.)**, ___ F.3d ___ 2010 WL 2696748 (July 9, 2010) (per curiam)
Bankruptcy Court: Minnesota
Route to Court of Appeals: District Court
Ruling: Dismissed as moot

A creditor moved to stay the § 363(f) sale of the debtor's assets pending appeal, but the bankruptcy court denied the motion. The creditor renewed its motion in district court, which also denied it. The sale closed. The creditor appealed, attacking the sale.

The Court of Appeals ruled the appeal was moot under § 363(m) because the sale was not stayed. The creditor argued that § 363(m) applies only to sales authorized under § 363(b) and (c), but not sales under § 363(f). The appellate court dispensed with that argument on the plain language of § 363(f), which incorporates § 363(b).

The creditor also tried to get around the mootness argument by taking the position that it was not seeking the reversal or modification of the sale order, but was challenging only the "free and clear" provision in an attempt to obtain a ruling that its liens were preserved in the assets. Because a ruling in the creditor's favor would necessitate unwinding the sale and would adversely affect the case because the buyer would no longer be willing to go forward with the sale, the court said the appeal was statutorily moot.

6. **Burival v. Roehrich (In re Burival),** ___ F.3d ___, 2010 WL 2882222 (8th Cir. July 23, 2010).
Bankruptcy Court: Nebraska
Route to Court of Appeals: B.A.P.
Ruling: Affirmed the B.A.P., reversed the trial court

The debtors were farmers who leased crop land. The lease at issue here called for semi-annual payments: April 1st and December 1st. The debtors filed their Chapter 11 petition on

November 29 – two days before the second rent payment was due. They rejected the lease on the following March 19. The landlord filed an administrative expense claim for the full amount of the second payment under § 365(d)(3). The bankruptcy court prorated the rent, allowing an administrative expense for the post-petition, pre-rejection usage of the premises. On appeal, the B.A.P. reversed, allowing the full amount of the second rent payment as an administrative claim.

The Court of Appeals affirmed the B.A.P., finding that § 365(d)(3) unambiguously provides that a debtor must perform a rent obligation on an unexpired lease of non-residential real property in full until the lease is rejected, regardless of whether it preserved the estate.

7. **Carpenter v. Ries (In re Carpenter),** ___ F.3d ___, 2010 WL 2977388 (8th Cir. July 30, 2010).
Bankruptcy Court: Minnesota
Route to Court of Appeals: B.A.P.
Ruling: Affirmed the B.A.P., reversed the trial court

Pre-petition, the debtor received a lump-sum payment for retroactive Social Security disability benefits. He deposited the funds in a bank account and subsequently withdrew them via cashier's check approximately two months before filing his Chapter 7 bankruptcy petition. He claimed the benefits as exempt under the federal exemptions scheme at § 522(d)(10)(A). The debtor also argued that § 541(c)(2) excluded the benefits from property of the estate as a beneficial interest of the debtor in a trust that is enforceable under applicable non-bankruptcy law. He further asserted that 42 U.S.C. § 407, an anti-assignment provision of the Social Security Act, protected the proceeds because it safeguards them from execution, levy, attachment, garnishment, or the operation of any bankruptcy law unless that law expressly references § 407.

The bankruptcy court ruled against the debtor, holding that § 541(c)(2) was inapplicable because the debtor held "a fully realized present interest in cash" rather than a beneficial interest in a trust res. The bankruptcy court also said 42 U.S.C. § 407 did not apply. On appeal, the B.A.P. agreed that § 522(d)(10)(A) did not exempt the proceeds because the cashier's check represented actual funds rather than "the right to receive" a Social Security benefit. The B.A.P. said the real question was whether 42 U.S.C. § 407 excluded the benefits from the estate altogether, and if so, then the exemption question need not be reached. The B.A.P. ruled that, under the terms of § 407, the benefits were free from the operation of any bankruptcy law, so the bankruptcy trustee had authority to administer those funds as property of the estate.

The Court of Appeals examined the conflict between the Bankruptcy Code and the Social Security Act with respect to the treatment of Social Security benefits as property of the estate, particularly in light of Congress's amendment of Chapter 13 to expand relief to Social Security recipients. It concluded that § 407's protection is not limited by the Bankruptcy Code, so it "operates as a complete bar to the forced inclusion of past and future social security proceeds in the bankruptcy estate." Section 407 is an exclusion provision, not an exemption provision.

8. **Bank Northwest v. Potts (In re Potts)**, 421 B.R. 518 (B.A.P. 8th Cir. 2010)
Bankruptcy Court: Western District of Missouri
Ruling: Affirmed

The debtors filed a Chapter 12 case, and converted it to a Chapter 13 a month later. The debtors' plan proposed to pay their Bank Northwest debt directly with annual payments and a balloon payment in 2015. The Bank Northwest debt was secured by deeds of trust on three tracts of real estate, the value of which exceeded the total amount due on the note. When Bank Northwest objected to confirmation, the debtors filed an amended plan proposing to pay the claim with interest in annual payments amortized over 20 years with a balloon payment after five years. The bank maintained a feasibility objection, which the court overruled in confirming the amended plan. On appeal, the bank argued that the debtors' projected income from cattle sales was speculative, but the B.A.P. said "[s]imple disagreement [with the debtors' projections] is not sufficient to establish clear error by the court." As to the bank's argument that the plan impedes the bank's remedies upon default by conditioning relief from the stay upon the sale of the larger tract of land first, with the debtors having an opportunity to propose an amended plan to deal with the balance of the debt, the B.A.P. ruled that § 1322(b)(2) allows a plan to modify the rights of holders of secured claims. Because there is no Code provision prohibiting the modification of a secured creditor's default remedies and the Code expressly permits the modification of a secured creditor's rights, the bankruptcy court was correct in overruling that objection.

9. **Treadwell v. Glenstone Lodge, Inc. (In re Treadwell)**, 423 B.R. 309 (B.A.P. 8th Cir. 2010)
Bankruptcy Court: Western District of Missouri
Ruling: Affirmed in part, reversed in part

The Treadwells owned and Mrs. Treadwell operated a travel agency. In 2005, she signed a contract with the Glenstone Lodge in Gatlinburg, TN, to host an event (accommodations and activities) for a national women's group in April 2006. Mrs. Treadwell made a deposit to hold the facilities, and the parties agreed that Mrs. Treadwell could make a partial payment in March 2006 and the final payment in April 2006 after she collected from the attendees. In October 2005, Mrs. Treadwell realized she had underestimated the costs of the event and had under-charged the participants, with the result that she would not be able to satisfy the Glenstone bill. She used a portion of the attendees' deposits for other expenses related to the event, and for her mother's funeral. However, she continued to represent to Glenstone that she would make the payments due in the spring. The event was held, and the Treadwells left the Glenstone without paying outstanding charges of more than $60,000. Thereafter, Mrs. Treadwell stalled and made false promises when Glenstone asked her to pay the bill. Glenstone obtained a default judgment for treble damages of $153,611.44 plus costs from a Tennessee court and registered it in Missouri to create a lien against the Treadwells' house. The Treadwells subsequently filed a Chapter 7 petition and initiated an adversary proceeding to avoid Glenstone's judicial lien. Glenstone counterclaimed with a request to except the debt from discharge. The bankruptcy court found in the Treadwells' favor, avoiding

the lien and permitting the debt to be discharged. The bankruptcy court found that Glenstone had not justifiably relied on Mrs. Treadwell's representations, so the debt was not excepted under § 523(a)(2)(A). The B.A.P. reversed this ruling, stating that justifiable reliance is a minimal standard which does not require the creditor to investigate the veracity of the representation, and finding that Glenstone justifiably relied on Mrs. Treadwell's statements regarding her intention to pay. There were no "obvious warning signs of falsity," as "[r]epeated requests to postpone payment, without more, do not rise to the level of obvious warning signs of falsity." While Glenstone did not run a credit check on the Treadwells or the travel agency, there was no evidence that such a check would have alerted it to the Treadwells' inability to pay. Because Glenstone established all of the elements of § 523(a)(2)(A), the debt should have been excepted from discharge as to Mrs. Treadwell. The B.A.P. affirmed the bankruptcy court's ruling that the debt was dischargeable as to Mr. Treadwell because he was not a business partner in the travel agency, so there was no basis for imputing liability for Mrs. Treadwell's fraud to him. The B.A.P. also affirmed the avoidance of the judicial lien on the residence, clarifying that dischargeability is irrelevant to lien avoidance and § 522(f)(2)(A) provides "a congressionally mandated bright line formula" for determining whether a lien impairs an exemption.

10. **Asbury v. Alliant Bank (In re Asbury)**, 423 B.R. 525 (B.A.P. 8th Cir. 2010)
Bankruptcy Court: Western District of Missouri
Ruling: Affirmed

Facing numerous adversary proceedings under § 523 and § 727, the debtor opted to waive discharge under § 727(a)(10) instead. Creditors objected, arguing that the debtor was attempting to escape judgment in the adversary proceedings and likely forcing the creditors to pursue him in his home state of Florida. The bankruptcy court denied the waiver, finding (1) that the debtor did not fully understand the legal consequences of a waiver of discharge and (2) such a waiver would prejudice creditors. On appeal, the B.A.P. ruled that the bankruptcy court is obligated to assess whether the waiver is an intentional relinquishment of the debtor's known rights, and it properly considered the creditors' interests as part of that analysis.

Judge Kressel dissented on the grounds that the majority's interpretation expanded § 727(a)(10) beyond its intended meaning. He stated that the court "is limited to assuring that the statutory requirement that the waiver be executed after the order for relief is met and the waiver is a true one" and the bankruptcy court in this instance went beyond the scope of its role.

11. **Stephens v. Hedback (In re Stephens)**, 425 B.R. 529 (B.A.P. 8th Cir. 2010)
Bankruptcy Court: Minnesota
Ruling: Affirmed

In 1998, the debtor and her husband filed separate Chapter 7 cases. In 2006, the bankruptcy court ruled that neither spouse could claim an ownership interest or a homestead exemption in certain residential real property, so the fight over the house belonged to the trustees of the respective

bankruptcy estates. That decision was affirmed twice. In 2009, the trustees reached an agreement as to the division of the proceeds of the sale of the house. The debtor objected to that settlement, in contravention of a 2006 district court order prohibiting her and her husband from any further pro se filings without prior court authorization in either bankruptcy case or in the related adversary proceedings. After hearing the debtor's objection but admonishing her for disregarding the order of the court, the bankruptcy court approved the settlement. The appellate court considered the merits of her appeal of the settlement order, but ruled that because she had no interest in the property, she could not continue to claim an exemption in it.

12. **Wallace v. Marble (In re Marble)**, 426 B.R. 316 (B.A.P. 8th Cir. 2010)
Bankruptcy Court: Eastern District of Missouri
Ruling: Affirmed

When the parties dissolved their marriage in 2000, the husband's obligation to pay nearly all the marital debts and hold the wife harmless thereon created a new debt. That debt is what is excepted from discharge under pre-BAPCPA § 523(a)(5) because it was "an obligation that arose in or was made in connection with a separation agreement." While the underlying debt was discharged in the husband's bankruptcy case, the obligation to hold her harmless fell within § 523(a)(5)(B).

13. **Doeling v. Nessa (In re Nessa)**, 426 B.R. 312 (B.A.P. 8th Cir. 2010)
Bankruptcy Court: Minnesota
Ruling: Affirmed

The debtor's claimed exemption in an inherited IRA account was affirmed. Pre-petition, the debtor was named as a beneficiary of her father's IRA. After he passed away, and before she filed bankruptcy, the debtor transferred the IRA into her account via a trustee-to-trustee transfer. This is relevant because by not rolling over the account to her own IRA or making contributions to it, she did not treat the IRA as her own and it remained exempt by virtue of § 522(b)(4)(C). When she filed her Chapter 7 petition, she claimed the IRA as exempt under § 522(d)(12). The bankruptcy court overruled the trustee's objection, ruling that the funds transferred from the father's IRA retained their character as retirement funds. The trustee did not dispute that the funds were retirement funds prior to the father's death, but argued that the funds did not retain that status thereafter. The trustee took the position that to be retirement funds, the funds either would have to be part of the debtor's retirement plan or have been contributed by the debtor. The B.A.P. said such a definition would impermissibly limit the statute; § 522(d)(12) requires only that the account be comprised of retirement funds, not that they must be the debtor's retirement funds.

14. **Marcusen v. Glen (In re Glen)**, 427 B.R. 488 (B.A.P. 8th Cir. 2010)
Bankruptcy Court: Minnesota
Ruling: Reversed

The issue was whether the creditors had established the elements of fraud under § 523(a)(2)(A) to except the debt from discharge on the theory that the debtors concealed the existence of the Marcusens' security interests from other creditors, and vice versa. The bankruptcy court said yes, but the B.A.P. disagreed.

The debtors borrowed money from the Marcusens to finance a residential home development. The promissory notes were secured by mortgages on each lot of real estate. As the houses sold, the promissory note for that lot would be paid and the parties would equally share in the profits. The Marcusens did not record the mortgages. The Marcusens advanced $175,000.00 to the debtor to develop Lot 23; this was memorialized by a promissory note and secured by a mortgage, which the Marcusens did not record. When the financial relationship between the parties deteriorated, the debtors sought additional funding for the Lot 23 project from a bank. As part of their loan application to the bank, they failed to disclose the unrecorded mortgage held by the Marcusens. The bank made the loan and recorded a mortgage on that lot. The debtors did not tell the Marcusens about the bank loan. The debtors used a portion of the bank loan to repay part of the debt to the Marcusens. When Lot 23 sold, the debt to the bank was satisfied, but the Marcusens received nothing. In the meantime, the Marcusens agreed to lend money to develop Lot 6. Once again, they did not record the mortgage to this lot. The debtors subsequently gave a mortgage on Lot 6 to a third-party developer, without disclosing the mortgage held by the Marcusens, nor did they tell the Marcusens of the transaction with the third-party developer. When that developer foreclosed its recorded mortgage on Lot 6, the Marcusens received nothing. The debtors filed a Chapter 7 petition and the Marcusens filed an adversary proceeding to except the debts from discharge under § 523(a)(2)(A) and (B). The bankruptcy court held that the debtors defrauded the Marcusens by destroying their valuable mortgage interest in Lots 6 and 23 by failing to disclose the Marcusens' interest to the bank and the third-party lender and failing to disclose their transactions with those two entities to the Marcusens.

The B.A.P. disagreed, finding no intent by the debtors to deceive the Marcusens and no contemporaneous misrepresentations by the debtors when they obtained the loans. The debtors' concealment of the Marcusens' unrecorded mortgages constituted misrepresentations to the bank and the third-party developer, but not to the Marcusens. The debtors' subsequent encumbrance of Lots 6 and 23 were not misrepresentations to the Marcusens because those debts were incurred after the Marcusens' lien, and if the Marcusens had recorded their mortgages, their liens would have been superior to those held by the bank and the third-party developer. There also was no evidence of intent to deceive because the debtors were trying to "prim[e] the projects" and get a return for all the parties. Finally, the alleged misrepresentations were made after the debtors obtained the loans from the Marcusens, so the funds were not obtained by fraud and therefore did not fall within § 523(a)(2)(A).

15. **McCarty v. Jenkins (In re Jenkins)**, 428 B.R. 845 (B.A.P. 8th Cir. 2010)
Bankruptcy Court: Eastern District of Arkansas
Ruling: Affirmed

The issue was whether the debtor materially defaulted under the terms of his Chapter 13 plan by not making all the payments due within 60 months. The bankruptcy court and the B.A.P. said no. The distinction was the manner in which the debtor and the trustee calculated the amount due under the plan. In this regard, the B.A.P. "urge[s] bankruptcy courts to require every debtor to specify the plan base in his original plan and any modifications to it."

The debtor's plan called for monthly payments beginning in September 2004. There were two pre-confirmation modifications: the first took account of a larger mortgage arrearage than the debtor realized, so he increased his monthly plan payment and the sum of the total plan payments. Subsequently, the debtor missed a plan payment, so the second modification increased the amount of his monthly payment to meet the trustee's "insufficient base" objection, meaning that the plan payments were not sufficient to meet the plan obligations. The plan was confirmed in March 2005. The debtor modified his plan three more times, with no objection. The first post-confirmation modification increased the debtor' monthly payment and was made as a response to the trustee's motion to dismiss the case for failure to make plan payments and a motion for relief from the automatic stay filed by a creditor holding a secured lien on the debtor's automobile. The second modification did not change the amount of the debtor's monthly plan payments. The third modification also increased the amount of monthly payment and occurred, in part, in response to a motion for relief from the automatic stay filed by the debtor's home mortgage lender alleging that the debtor was behind on the mortgage payments being paid through his plan. None of the post-confirmation plans contained language defining the "base" or whether the base should change as a result of the modification. As the plan neared the end of its term, the trustee moved to dismiss under § 1307(c)(6), alleging material default because the plan would not be completed within 60 months. The trustee's position was that each increase in the amount of the monthly payment meant a corresponding increase in the base amount to be paid into the plan. The bankruptcy court found that the debtor had made all the payments required by the plan.

Because the bankruptcy court was in the best position to interpret its own confirmation order, the B.A.P. deferred to its ruling that the modifications were intended to make up missed payments and were not meant "to gratuitously bestow on his creditors additional payments." The B.A.P. considered the trustee's position – that he was required to increase the plan base each time the debtor increased plan payments – to be an irrelevant internal record-keeping matter. Because the plan was ambiguous about the amount of the base, the B.A.P. said the bankruptcy court properly considered the parol evidence of the debtor's testimony about his intent.

16. **Harmon Autoglass Intellectual Property, LLC v. Leiferman (In re Leiferman)**, 428 B.R. 850 (B.A.P. 8th Cir. 2010)
Bankruptcy Court: Minnesota
Ruling: Affirmed

In 2003, the debtor entered into a contract with HAIP to purchase certain assets for the operation of glass repair shops. In 2007, HAIP obtained a $3.7 million judgment in state court

against the debtor. In 2008, the debtor filed a Chapter 7 petition. HAIP then filed an adversary proceeding to except the judgment debt from discharge under § 523(a)(2)(B), alleging that the debtor made a false representation on a financial statement given to HAIP in connection with the asset purchase. The debtor refused to provide discovery in the adversary proceeding, so the bankruptcy court struck his answer and entered default judgment in HAIP's favor. The B.A.P. affirmed, finding ample support in the record that the bankruptcy court entered orders compelling discovery, that the debtor willfully violated those orders, and that HAIP was prejudiced as a result. Because the debtor's conduct in avoiding discovery was in bad faith, the sanction of striking his answer and entering default judgment was appropriate under Federal Rule of Civil Procedure 37(b)(2)(A) /Federal Rule of Bankruptcy Procedure 7037.

17. **Lapke v. Mutual of Omaha Bank (In re Lapke)**, 428 B.R.839 (B.A.P. 8th Cir. 2010)
Bankruptcy Court: Nebraska
Ruling: Affirmed

The debtor and his wife purchased a home in 2004. The house ultimately secured three notes with Wells Fargo. The debtor signed the deed of trust for the first loan, but did not sign the accompanying promissory note. The debtor did not sign either the note or the deed of trust regarding the second loan. The debtor and his wife signed both the third note and deed of trust. The debtor and his wife filed a joint Chapter 7 petition in 2007, in which they treated the debts to Wells Fargo as consumer debt. After that case was dismissed under § 707(b)(3) as an abuse of the Chapter 7 provisions, the debtor filed an individual Chapter 7 petition in 2009 arguing that because he had not signed the first or second promissory notes and the second deed of trust, he was not personally liable on them, so they did not constitute consumer debt. The bankruptcy court granted Mutual of Omaha Bank's § 707(b) motion to dismiss the case, finding that the Wells Fargo debt should be classified as consumer debt and the debtor's bankruptcy filing was an abuse of Chapter 7. The characterization of the debt as consumer debt is what brings the case within the parameters of § 707(b) ("the court . . . may dismiss a case filed by an individual debtor under [Chapter 7] whose debts are primarily consumer debts, . . . if it finds that the granting of relief would be an abuse of the provisions of [Chapter 7]").

The B.A.P. held that the first and second loans were "debts" under the Bankruptcy Code because they were claims against the debtor's property. They were "consumer debts" because they were incurred to finance the family residence. The evidence indicated that the debtor intended to obtain funds from Wells Fargo, even though he did not sign the documentation; the amounts owed under the first and second notes are claims against the debtor because they are claims against his property and the debts were incurred by the debtor or his wife or both for personal, family, or household purposes; and it is illogical for the character of the obligation to Wells Fargo to have changed between the first and second petition dates simply because the debtor discovered that he failed to sign some of the underlying loan documentation. "In sum," the B.A.P. said, "we find that where a debtor's home serves as collateral for a loan and the loan is for personal, family or household purposes, the amount owed to the lender is classified as consumer debt."

In dicta, the B.A.P. expressed the opinion that the appeal by the debtor was frivolous, as it raised the same issues, based on the same facts, that had been decided in his previous Chapter 7 case but sought "a different result based on an inconsequential technicality." However, the court declined to award damages and costs absent additional proceedings.

18. **Hastings State Bank v. Stalnaker (In re EDM Corp.)**, ___ B.R. ___, 2010 WL 1929772 (B.A.P. 8th Cir. May 14, 2010)
Bankruptcy Court: Nebraska
Ruling: Affirmed

The debtor's corporate name was EDM Corporation. It commonly used the name EDM Equipment, although that trade name was not registered with the Secretary of State. Three banks held liens against an item of the debtor's property, and there was a priority dispute. The earliest filed financing statement identified the debtor as "EDM CORPORATION D/B/A EDM EQUIPMENT." Another bank extended a line of credit to the debtor and ran three U.C.C. searches using the standard search logic of the Secretary of State's search engine, but the earlier financing statement did not appear in those search results. The third bank ran a U.C.C. search, using the standard search logic of the Secretary of State's search engine, and discovered the second bank's financing statement. The financing statements filed by the second and third banks identified the debtor as "EDM Corporation." The bankruptcy court held that the first bank's financing statement was seriously misleading with regard to the debtor's name because of the superfluous d/b/a information and was not validly perfected because a U.C.C. search would not reveal its financing statement.

On appeal, the B.A.P. emphasized that the purpose of the U.C.C. filing requirements is to make other creditors aware of the existence of a lien, so complete accuracy in the debtor's name is of paramount importance. While the official comments to U.C.C. § 9-503 might imply that trade names may be included along with the debtor's organizational name, the statutes themselves, read together, make clear that the debtor's legal name is the most important information to include on a financing statement. To that end, trade names may be added as other or additional names on a financing statement, but not in place of, or as part of, the debtor's organizational name. As the B.A.P. explained,

> In sum, we interpret § 9-503 to mean exactly what it says: if the debtor is a registered organization, then a financing statement "provides the name of the debtor" only if it "provides the name of the debtor indicated on the public record of the debtor's jurisdiction of organization" – nothing more and nothing less. Trade names may be added, but not as part of the organizational name itself.

2010 WL 1929772 at *5.

Moreover, the "safe harbor" of § 9-506, which provides that an error in the debtor's name does not render the financing statement seriously misleading if a search of the filing office's records

using the filing office's standard search logic would disclose the financing statement, did not protect the first filer in this case because the statement did not turn up when subsequent lenders searched the records. The Secretary of State's standard search engine was not designed to pick the debtor's legal name out of a string of words in the "debtor's name" field; the filing rules require a corporate debtor's name on a financing statement to be its name as listed in the public records of its jurisdiction of incorporation.

19. **Islamov v. Ungar (In re Ungar)**, 429 B.R. 668 (B.A.P. 8th Cir. 2010)
Bankruptcy Court: Nebraska
Ruling: Affirmed

After the debtor achieved some success in day-trading stocks, she offered to invest on the creditor's behalf. He took her up on that offer and, for four years, regularly delivered funds to her to invest for him and for friends and family members through her trading account. He told the debtor he did not want his principal investment to be at risk and he instructed her to stop investing if the account lost money. The debtor regularly provided reports to the creditor regarding the account's profitability. Most of the time, those reports were greatly exaggerated, unbeknownst to the creditor. The debtor occasionally returned money to the creditor, ostensibly as a return of principal and as repayment of interest on the credit card debt he incurred to invest with her. Eventually, the creditor learned there were no funds in the trading account and the debtor had either lost or spent all of the money he had given her to invest. After the debtor filed her Chapter 7 petition, the creditor moved to except this debt from discharge. After trial, the bankruptcy court ruled that the debt was non-dischargeable pursuant to § 523(a)(2)(A) and entered judgment for $228,791.00.

The B.A.P. affirmed the finding that the creditor justifiably relied on the debtor's initial promise of a profit on the investments and her continuing representations that the account was showing a profit when it in fact was not. The B.A.P. said the parties had established a relationship of trust and the debtor maintained that trust by submitting false statements of the account balance and by delivering money to the creditor as a return on his investment. The debtor's conduct raised no red flags, so the creditor had no duty to investigate whether her representations were true or false. In addition, the B.A.P. held that bankruptcy courts have the authority to enter money judgment in dischargeability actions. The calculation of the amount of damages was proper because the debtor put on no evidence to the contrary.

20. **Overton's, Inc. v. Interstate Fire & Casualty Insurance Co. (In re SportStuff, Inc.)**, 430 B.R. 170 (B.A.P. 8th Cir. 2010)
Bankruptcy Court: Nebraska
Ruling: Reversed

The debtor designed, patented, and sold sports and leisure products, including an inflatable tube intended to be towed behind a motor boat. This particular item gave rise to a large number of personal injury, wrongful death, and property damage claims, which resulted in the company filing

Chapter 11. These claims and lawsuits also involved vendors and others in the product's chain of distribution. The debtor owned liability and excess insurance policies for claims related to the use of its products; vendors of the debtor's products were additional insureds under some of the policies. The debtor and the insurance companies reached settlements whereby the insurers would contribute the amount of the policy limits to the bankruptcy estate in exchange for an injunction essentially discharging the insurers from any further liability or obligations under the policies. The parties to the settlement anticipated that it would become part of the plan of reorganization. The vendors of the debtor's products were not party to these settlements and objected to them, arguing that the insurers had a duty to defend and indemnify the vendors under the policies, that the vendors had a state-law right to challenge the settlements, and that the settlements would short-circuit the normal confirmation procedures. After hearing the objections, the bankruptcy court approved the settlements in proposed orders submitted by the debtor.

On appeal, the B.A.P. reversed the bankruptcy court, finding (1) that the settlements were not fair and equitable because they did not preserve the vendors' rights under state law or the Bankruptcy Code; (2) the settlements were significantly different from the insurance litigation injunction approved in *MacArthur Co. v. Johns-Manville Corp. (In re Johns-Manville Corp.)*, 837 F.2d 89 (2d Cir. 1988), on which the bankruptcy court relied; (3) the record did not reflect that the settlements were in the best interest of the bankruptcy estate; and (4) the approval procedure was improper.

The B.A.P. went on to explain that, unlike the *Johns-Manville* case, the vendors in this case had independent contractual and common law rights, such as the right to defense and the right to pursue bad-faith claims against the insurer, under the policies which the bankruptcy court had no authority to impair. The B.A.P. also found that the case was dissimilar enough from *Johns-Manville* that the bankruptcy court should not have relied on it, particularly since *Johns-Manville* was a reorganization case in which the vendor's rights were protected by the ability to assert claims against the settlement proceeds, whereas the bankruptcy judge knew that SportStuff intended to sell all of its assets. Moreover, the terms of the settlement agreements explicitly reserved the insurance proceeds for the personal injury claimants, leaving the vendors without recourse. Finally, the B.A.P. said, the settlements were not in the best interests of the bankruptcy estate because the only groups to benefit were the insurers and the personal injury claimants, with the burden of administering the settlement proceeds shifted from the insurers to the debtor and the expense borne by the rest of the creditors.

The B.A.P. also found fault with the procedural aspects of the matter, holding that two parties in a multi-party lawsuit cannot bind non-settling parties, so the bankruptcy court should not have approved an agreement that denied the vendors' right to a trial on their claims against the debtor and the insurers.

21. **Mid-City Bank v. Skyline Woods Homeowners Ass'n (In re Skyline Woods Country Club, LLC)**, ___ B.R. ___, 2010 WL 2402880 (B.A.P. 8th Cir. June 17, 2010)

Bankruptcy Court: Nebraska
Ruling: Affirmed

The Chapter 11 debtor sold substantially all of its assets, including a portion of a golf course, in 2005. The sale, free and clear of claims, liens, and encumbrances, was approved by the court, and the case was closed in early 2006. The buyers decided not to reopen the golf course, leading to a state court lawsuit by the homeowners living near the golf course to enforce restrictive covenants requiring the property to be used only as a golf course. The buyer then filed a motion in the bankruptcy case seeking an injunction against the state court lawsuit on the basis that it violated the order approving the sale. The bankruptcy court struck the motion from the record and notified the movant that it would need to file a motion to reopen the bankruptcy case and pay the necessary filing fee. The buyer took no further action in the bankruptcy case.

The state court ruled in favor of the homeowners regarding the enforceability of the restrictive covenants and specifically held that the bankruptcy court's sale confirmation order did not eliminate those covenants. The Nebraska Supreme Court affirmed. Thereafter, the buyer moved to reopen the bankruptcy case to file an adversary proceeding to "enforce" the 2005 sale order, enjoin the homeowners from enforcing the state supreme court's decision, and obtain a declaratory judgment that the state court lacked subject matter jurisdiction to "modify or otherwise alter" the sale order. After a hearing, the bankruptcy court denied the motion to reopen the case.

The reopening of a bankruptcy case is left to the broad discretion of the bankruptcy court, and the movant must demonstrate a compelling reason to reopen a closed case. Here, the issue was the interpretation (not the modification) of the sale order, which the Nebraska Supreme Court had concurrent jurisdiction to do. The availability of relief in an alternate forum – such as the state court – is a permissible basis for denying a motion to reopen. In addition, the doctrine of res judicata precluded the bankruptcy court's review of the Nebraska Supreme Court's judgment, which is what the movants were really seeking.

22. **Bank of Bennington v. Thomas (In re Thomas)**, ___ B.R. ___, 2010 WL 2486006 (B.A.P. 8th Cir. June 22, 2010)
Bankruptcy Court: Nebraska
Ruling: Affirmed

The debtors and their son and his wife owned a number of corporations. The individuals and some of the corporate entities executed various promissory notes to the Bank of Bennington for business lines of credit. The bank required the borrowers to submit monthly borrowing base certificates showing the value of the companies' assets; it relied on those certificates in making its lending decisions. By late 2004, the bank warned the debtor and his son that if the January certificates did not show sufficient assets, the bank would terminate the lending relationship. When attempts to increase sales failed to raise the asset level to the required amount, phantom sales

invoices were created which led the bank to continue the lending relationship. Eventually, however, the companies closed and the bank was left with a significant amount of debt.

The debtors filed a Chapter 7 petition but failed to disclose various tax refunds, settlement payments, business income, and a loan from a family member. The bank filed an adversary proceeding to except its debt from discharge under § 523(a)(2), (4), and (6), and to deny the debtors a discharge under § 727(a)(4)(A). After a trial, the bankruptcy court denied the bank's § 523(a) claims, finding that the activities concerning the fraudulent invoices were done by the debtor's son, not the debtor. However, the bankruptcy court granted the bank's request to deny the debtor a discharge because he was aware of the refunds and payments that were missing from his statements and schedules but chose not to disclose them. The court declined to deny a discharge to the debtor's wife, however, because there was insufficient evidence of her knowledge of the omissions.

On appeal, the B.A.P. found there was sufficient evidence of the "recklessness and magnitude of the omissions" to find intent by the debtor to make a false oath or account, thereby supporting the denial of discharge. The B.A.P. also affirmed the decision regarding the debtor's wife because there was little evidence in the record regarding her intent.

Summary of Supreme Court Bankruptcy Opinions in the 2009-2010 session.

MIDWESTERN BANKRUPTCY INSTITUTE
October 1, 2010
The Honorable Arthur B. Federman

1. Look To The Future To Project Disposable Income (Sometimes). *Hamilton v. Lanning,* 2010 WL 2243704 (U.S.) (Alito, J. affirming Karlin, J., 2007 WL 145199)

Section 1325(d) requires, as a condition of confirmation, that above-median debtors who are not paying all of their claims, must pay, for the benefit of unsecured creditors, all "projected disposable income to be received" in the sixty (60) months after the first payment is due under the Plan. Here, the debtor's disposable income for these purposes did not accurately project such disposable income over the next five years, because her income included a one-time buyout from a former employer. In resolving a circuit split, the Supreme Court held that "when a bankruptcy court calculates a debtor's projected disposable income, the court may account for changes in the debtor's income or expenses that are known or virtually certain at the time of confirmation." In so holding, the Court held that the mechanical approach favored by some courts ignored the statutory requirement that the disposable income indicated that which was "to be received" during the Plan. In addition, the Court reasoned that the ordinary meaning of the word "projected" supports a forward-looking approach. Finally, in cases such as this one, the mechanical approach could lead to absurd results, because a Plan requiring a debtor to make payments based on income she was no longer receiving would not be feasible, and therefore not confirmable. Note that in ***In re Fredrickson,*** 545 F.3d 652 (8th Cir. 2008), the Eighth Circuit had held that disposable income as calculated on the Form 22C is the starting point in determining projected disposable income but the final calculation can take into consideration changes that have occurred in the debtor's financial circumstances as well as the debtor's actual income and expenses as reported on Schedules "I" and "J".

2. Supreme Court Upholds Debt Relief Provisions of BAPCPA, *Milavetz, Gallop & Milavetz, P.A. v. United States*, 130 S.Ct. 1324 (U.S.)(Sotomayor,J.)

BAPCPA defines "debt relief agencies" as, with limited exceptions, "any person who provides any bankruptcy assistance to an assisted person...for...payment..., or who is a bankruptcy petition preparer." 11 U.S.C. 101(12A). DRA's are prohibited from "advising an assisted

person...to incur more debt in contemplation of" filing for bankruptcy 11 U.S. C. 526(a)(4). In their advertisements, they are required to disclose that certain services offered are with respect to or may involve bankruptcy relief, and to identify themselves as debt relief agencies. 11 U.S.C. Section 528. The Court easily rejected plaintiff's argument that law firms were not intended to be included within the definition of debt relief agencies, and affirmed the Eighth Circuit on that ground. Plaintiff also challenged these provisions on constitutional grounds. As to Section 526(a)(4), the Circuit had found that prohibiting DRA's from advising debtors to incur more debt in contemplation of bankruptcy was a content-based restriction on attorney-client communications that was not adequately tailored to constrain only speech the government has a legitimate interest in restricting, and therefore violated the First Amendment. Reversing, the Supreme Court interpreted this provision narrowly to only prohibit that conduct intended to manipulate the protections of the bankruptcy system, rather than for a valid purpose. Specifically, the Court said that the prohibited advice "will generally consist of advice to "load up" on debt with the expectation of obtaining its discharge, *i.e.*, conduct that is abusive *per se.*" (130 S.Ct. at 1336). Finally, as to the disclosure requirements under Section 528, the Court affirmed the Circuit's determination that these requirements serve the legitimate governmental interest of regulating misleading commercial speech--specifically, the promise of debt relief without any reference to the possibility of needing to file for bankruptcy to obtain such relief.

3. If Value Of Property Is In Excess of Allowed Exemption, Trustee Need Not Object to Exemption To Preserve Right To Sell. *Schwab v. Reilly,* 2010 WL 2400094 (U.S.) (Thomas, J.)

Rule 4003(b) requires interested parties to object to a debtor's claimed exemption within 30 days after the conclusion of the Section 341 Meeting of Creditors. If an interested party fails to object in that period of time, the exemption is allowed as claimed even if the value of the property exceeds the exemption permitted under applicable law. In ***Taylor v. Freeland & Kronz,*** 503 U.S. 638, 112 S. Ct. 1644, 118 L.Ed. 2d 280 (1992), a debtor had claimed an exemption in a lawsuit in an unknown amount. After the debtor recovered a significant amount of damages in that lawsuit, the Trustee, who had not timely objected to the exemption, asked the bankruptcy court to

limit the exemption to the amount allowable under applicable law. The Supreme Court held that, since Schedule "C" had made clear that the debtor intended to exempt the entire value of the asset, the Trustee was should have objected, and so was out-of-luck. Here, Reilly claimed an exemption of approximately $10,000.00 for tools of the trade, which was within the statutory amount, and valued such equipment the same. The Trustee did not object, but later asked to sell the property for $17,000, pay the debtor the $10,000 exemption allowed under state law, and keep the rest for the bankruptcy estate. Section 522(l) states that a Chapter 7 debtor must "file a list of property that the debtor claims is exempt under subsection (b) of this section," and further states that "[u]nless a party-in-interest objects, the property claimed as exempt on such list is exempt." The "list" to which Section 522(l) is refers is Schedule "C". The debtor here asserted that the "property claimed as exempt" is defined by reference to all the information on Schedule "C", including the estimated market value of the asset. The Court, however, agreed with the Trustee that the Code specifically defines the "property claimed as exempt" as an interest, the value of which may not exceed a certain dollar amount, in a particular asset, not as the asset itself. Therefore, while the property turned out to be worth more than stated in Schedule C, the Trustee did not need to object to the exemption because the stated value of the debtor's interest, and thus of the "property claimed as exempt,", was within the limits the Code allows. In distinguishing ***Taylor,*** the Court stated that the exemption there was objectionable on its face because the exemption concerned an asset that the Code did not permit the debtor to exempt beyond a specific dollar amount. Therefore, the debtor there had listed a "value claimed exempt" that was not plainly within the limits the Code allows. By contrast, the amount Reilly listed in the Schedule "C" column titled "Value of Claimed Exemption" was essentially within the limits the Code prescribes and therefore raised no warning signs. *See also,* ***In re Soost,*** 262 B.R. 68 (BAP, 8th Cir. 2001) [holding that where debtor claimed exemptions of $1.00 in assets which he claimed had no equity, he could only avoid a judgment lien to the extent it impaired his $1.00 exemption].

4. Bankruptcy Court Erred in Confirming Chapter 13 Plan Containing Discharge by Declaration of Student Loans, but Such Error Did Not Render Confirmation Order Void. ***United Student***

***Aid Funds, Inc. v. Espinosa*, ___ U.S. ____, 130 S.Ct. 1367, 176 L.Ed.2d 158 (2010) (Thomas, J.).**

Three years after the Debtor=s Chapter 13 plan was successfully completed and discharge granted, a student loan lender began intercepting Debtor=s income tax refunds in order to satisfy the balance that it concluded remained unpaid. The Debtor=s plan had provided for a Adischarge by declaration@ B a provision that the otherwise-nondischargeable student loans would be discharged upon completion of the plan. The lender had been earlier notified of the amount listed in the plan, yet had made no objection at that time. Therefore, since an order confirming a plan is a final judgment, it would not ordinarily be subject to collateral attack. ***Traveler's Indemnity Co. v. Bailey,*** 557, U.S. ___, ___ _ ___, 129 S.Ct. 2195, 2198-98, 174 L.Ed.2d 99 (2009). Debtor requested an order holding the lender in contempt and violating the discharge injunction under ' 524(a)(2). Lender moved under Rule 60(b)(4) (BR 9004) for an order that the confirmation order was void, since Astudent loans may not be discharged under Chapter 13 unless the debtor can show >undue hardship,= 11 U.S.C. ' 523(a)(8), and such a showing can only be made in an adversary proceeding,@ (BR 7001) which never happened in this case. Therefore, the lender argued, the bankruptcy court lacked jurisdiction to enter the confirmation order, so it was void. The bankruptcy court held the lender violated the discharge injunction and then ordered it to cease all collection activity against the Debtor. The District Court reversed, saying the lender was denied due process because in was not served with a complaint and summons. The Ninth Circuit, however, concluded that the lender had an opportunity to object to the plan and failed to do so, thereby losing all rights and acting willfully in violating the injunction. In affirming the Ninth Circuit's decision, the Supreme Court held that, although a bankruptcy court should not confirm a plan providing for a discharge of student loans without a finding of undue hardship in an adversary proceeding, the bankruptcy court's error in confirming such a plan discharging a portion of the student loan debt without an adversary proceeding was not jurisdictional and, thus, did not render the confirmation void under Rule 60(b)(4).. Further, because the student loan creditor received actual notice of the contents of the plan, there was no due process violation. For another example of a courts refusal

to allow a creditor to use Rule 60(b) to help out a creditor which sat on its rights, ***See, In re Roberts,*** 2010 WL 1725391 (5th Cir., April 26, 2010). There, at a hearing on a claim objection, debtor had offered a note marked paid in full, and creditor had offered nothing in response. When creditor later attempted to reopen under Rule 60(b)(3), based on fraud or misrepresentation, the Court refused, holding that it had not shown that it should be entitled to more than one bite at the apple. ***See also, In re Martin,*** 427 B.R. 573 (Bankr. W.D. Va. 2010) [creditor not entitled to deficiency claim when creditor failed to object to plan providing for surrender in full satisfaction of debt.]

ABI/UMKC MIDWESTERN BANKRUPTCY INSTITUTE
October 1, 2010
Kansas City, Missouri
The Honorable Robert E. Nugent

Tenth Circuit Case Law Update

(Tenth Circuit Court of Appeals and Tenth Circuit Bankruptcy Appellate Panel)

Domestic Support Obligations, § 101(14A)

Wodark v. Wodark (In re Wodark), 425 B.R. 834 (10th Cir. BAP Mar. 22, 2010) (Nugent, J.)

Affirming the bankruptcy court, the BAP held that a debtor's agreement, embodied in a domestic court order, to pay a pre-existing marital debt owed to a third party was a debt "to a former spouse" that was excepted from discharge by § 523(a)(15), as amended by BAPCPA, even though the domestic court order contained no express requirement to hold the debtor's ex-spouse harmless or to indemnify him to the extent he paid the debt. The debtor's direct obligation to the third party was dischargeable in bankruptcy, and the obligation to her ex-spouse was not a domestic support obligation excepted from discharge by § 523(a)(5). However, under Colorado law, her ex-spouse could enforce the agreement in state court as a judgment, making her obligation to him a debt separate from her debt to the third party and one that was covered by § 523(a)(15).

Bankruptcy Appeals: Jurisdiction, Mootness

Montoya v. Garcia (In re Garcia), 2009 WL 3089070, *unpublished disposition* (10th Cir. Sept. 29, 2009)

Under Tenth Circuit precedent, when a federal magistrate issues a report and recommendation to a federal district judge, no objections are timely filed, and the district judge adopts the report and recommendation, the parties have waived any right to appellate review of the district court's ruling. The Circuit calls this a "firm waiver rule," and bases it on Fed. R. Civ. P. 72(a). When a bankruptcy appeal to a district court was referred to a magistrate, and the appellant, the bankruptcy trustee, failed to object to the magistrate's report and recommendation that the bankruptcy court's ruling be affirmed, the Circuit applied this rule to bar the trustee's appeal from the district court's ruling. The Circuit said it had not applied this rule to *pro se* litigants when they were not given explicit notice of the rule, but declined to excuse the trustee, who had counsel, on that ground because counsel are expected to know the rules in their entirety. The Circuit had also recognized an "interests of justice" exception to its firm waiver rule, which required review of the

facts alleged to excuse the failure to timely object to the magistrate's order. The trustee's assertion he read 28 U.S.C. § 636(b)(1), which provides a party "may" object to a magistrate's recommendations, was insufficient, because: (1) Fed. R. Civ. P. 72(a) provides, "A party may not assign as error a defect in the [report and recommendation] not timely objected to," and (2) it was a well-known rule that parties must present their arguments first to the district court and not wait until appeal to the circuit.

In re Paige, 584 F.3d 1327 (10th Cir. Nov. 3, 2009)

Seeking to gain control of a valuable Internet domain name, two creditors, one joined by the Chapter 11 trustee, proposed reorganization plans for the debtor's bankruptcy estate. After a hearing, the bankruptcy court confirmed the plan joined by the trustee, and the losing creditor appealed. Both the bankruptcy court and the district court denied the creditor's motion for a stay pending appeal, but the creditor did not appeal that decision.

The district court later dismissed the appeal of the confirmation order as moot. The Circuit reversed. The appellees claimed the appeal was constitutionally moot because the losing creditor had not shown that it could fund its plan and reversal would require forcing third-party creditors to disgorge payments made to them under the confirmed plan, an action allegedly beyond the court's power. The Circuit rejected this argument on the grounds (1) it tried to shift the burden of proof to the losing creditor, and (2) the losing creditor sought not only confirmation of its plan but also denial of confirmation of the other plan, which could be granted even if the losing creditor's plan could not be confirmed. The Circuit also explicitly adopted the doctrine of equitable mootness of appeals, placing the burden on appellees to prove an appeal should be dismissed on this ground.

The Circuit identified six factors to consider in deciding whether an appeal of a bankruptcy court order confirming a plan has become equitably moot: (1) whether and how diligently the appellant sought a stay pending appeal; (2) whether the plan had been substantially consummated; (3) whether reversal of confirmation would adversely affect innocent third parties; (4) whether reversal would undermine the public-policy need for reliance on the finality of confirmation orders, and of the finality of bankruptcy court orders generally; (5) whether reversal would adversely affect the chances of a successful confirmation; and (6) whether, on a quick look, the appellant's challenge to confirmation was legally meritorious or equitably compelling. In this case, the factors did not point in the same direction, but the Circuit determined the appeal was not equitably moot in large part because it involved allegations that the trustee was operating under serious conflicts of interest, raising questions about whether the losing creditor's proposed plan received an adequate and balanced appraisal. The Circuit held these serious matters would not lightly be swept under the rug unless the other factors strongly suggested the claims should not be considered on the merits.

Hatch Jacobs, LLC, v. Kingsley Capital, Inc. (In re Kingsley Capital, Inc.), 423 B.R. 344 (10th Cir. BAP Jan. 20, 2010) (Thurman, J.)

A law firm sued two clients in state court to collect unpaid fees. One of the clients then filed bankruptcy and removed the suit to the bankruptcy court. The parties gave consent for the bankruptcy court to enter final orders in the suit. After trial, however, the law firm attempted to withdraw its consent to final resolution of its claim against the non-debtor defendant. The

bankruptcy court granted judgment for the law firm ("merits order"), declared the firm's effort to withdraw its consent to be moot, and gave the firm 20 days to submit a bill of costs and statement of attorney fees incurred in the collection action. The non-debtor defendant did not appeal that judgment within the time fixed by Fed. R. Bankr. P. 8002(a), and incorporated into 28 U.S.C. § 158(c)(2), but did timely appeal the bankruptcy court's later order ("fees order") awarding costs and fees incurred in the collection action. The BAP reviewed several recent Supreme Court decisions about the jurisdictional nature of time limits fixed by rules and statutes, and determined it did not have jurisdiction to review the merits order because § 158(c)(2)'s incorporation of the time limit set by Rule 8002(a), coupled with its historical treatment as a jurisdictional requirement, made the time limit jurisdictional. The appeal was timely for the fees order, however, and the BAP held the bankruptcy court did not abuse its discretion by refusing to recognize the law firm's withdrawal of its consent to the court's issuing final orders on the firm's claims against the non-debtor defendant

In re Latture, 605 F.3d 830 (10th Cir. May 20, 2010)

Applying the oft-stated legal principle that the failure to file a timely notice of appeal is a jurisdictional defect barring appellate review, the Court affirmed the BAP's dismissal of debtor's appeal of a non-dischargeability determination for lack of jurisdiction. The appeal time starts to run the day after a judgment is entered or noted on the docket, not the day the judge signs the order or judgment. The Court explicitly considered the implication of *Kontrick v. Ryan*, 540 U.S. 443 (2004) (holding that the time limit in Fed. R. Bankr. P. 4004(a) for objecting to a debtor's discharge is not jurisdictional) and concluded that the time limit for filing a notice of appeal under Fed. R. Bankr. P. 8002 is jurisdictional. In addition, Fed. R. App. P. 6 (making Fed. R. App. P. 26(a)(2) applicable in computing time) does not apply to an appeal taken from bankruptcy court to a bankruptcy appellate panel. Finally, the Court rejected debtor's claim of excusable neglect in failing to request an extension of time to file a notice of appeal under Rule 8002(c)(2).

Property of the Estate, §541, Turnover, §§ 521 & 542, Sales § 363, and Abandonment §§ 554 & 725

In re Graves, 609 F.3d 1153 (10th Cir. June 29, 2010)

Pre-petition chapter 7 debtors irrevocably elected to apply their 2006 tax refund of $3,000 to their 2007 income tax liability. The trustee sought turnover of debtors' 2006 tax refund. Citing 26 U.S.C. § 6513(d), the Tenth Circuit concluded that debtors had no right to any cash from the refund applied as a prepayment of their 2007 taxes until after the 2007 tax liability is determined, and then only if debtors are entitled to a further refund. The debtors held a contingent reversionary interest in the pre-payment attributable to pre-petition earnings and is included in debtors' estate. The trustee's interest was similarly limited because the trustee takes property subject to the same restrictions that existed at the commencement of the case and succeeds only to the title and rights in property that debtor has at the time of filing the bankruptcy petition. Because debtors were never in "possession, custody, or control" of the contingent reversionary interest in the prepayment during the case, turnover was inappropriate. Turnover under § 542 cannot be used to broaden the trustee's

interest in the refund. Thus, only that part of the refund that is attributable to pre-petition earnings and reverts to debtors after application of the refund to their 2007 tax liability is subject to turnover.

Miller v. Bill and Carolyn Limited Partnership (In re Baldwin), 593 F.3d 1155 (10th Cir. Jan. 26, 2010)

When a married couple filed a Chapter 7 bankruptcy, one of them owned a 99% interest as a limited partner in a limited partnership, while her parents were trustees of a trust that owned the other 1% as the general partner. Agreeing with the Tenth Circuit BAP, the Circuit held that although the partnership had been established as a family estate-planning device, it could still operate its business for the purposes expressly stated in the partnership agreement, and the trustee could not force its judicial dissolution under Oklahoma law. In a separate appeal from a district court decision affirming the bankruptcy court, however, the Circuit agreed with the lower courts that the trustee's notice of withdrawal and offer to buy the general partner's interest for $3,000, or sell the bankruptcy estate's 99% interest for $297,000, was valid and binding under the withdrawal provisions of the partnership agreement. The agreement's requirement that the offer to buy must be "on identical terms" as the offer to sell did not mean the total prices must be identical, but was satisfied by a proposal to buy or sell each percentage point of ownership interest for the same amount. The fact the provision did not account for the management and control differences between the general and limited partner interests did not make it unenforceable under Oklahoma law, even if it might be inequitable.

In re Hall, ___ B.R. ___, 2009 WL 4456542 (10th Cir. BAP Dec. 4, 2009) (Romero, J.)

Affirming the bankruptcy court, the BAP held that although the debtor-wife's father died less than 180 days after she filed bankruptcy, § 541(a)(5) did not bring into the bankruptcy estate property that passed to her as a result of (1) a transfer on death deed, (2) a payable on death beneficiary designation for certificates of deposit and U.S. bonds, and (3) a beneficiary designation under an individual retirement account. These transfers were not made by "bequest, devise, or inheritance," as required for § 541(a)(5) to make them property of the estate. The BAP also agreed that, under Kansas law, the debtor-wife had no legal or equitable interest in these assets when she filed bankruptcy, as required for them to constitute property of the estate under § 541(a)(1).

Automatic Stay, §362, and Other Injunctions

Johnson v. Smith (In re Johnson), 575 F.3d 1079 (10th Cir. Aug. 5, 2009)

Despite dismissal of the debtors' Chapter 13 case, the bankruptcy court retained jurisdiction of their stay violation proceeding under § 362(k)(1). The purpose of that proceeding was not negated by dismissal because it would still serve to compensate for losses that were not extinguished by the termination of the bankruptcy case and to vindicate the authority of the statutory stay. The Circuit also concluded the bankruptcy court did not abuse its discretion by basing a fee award on

the attorney's verification without an evidentiary hearing since the stay violator had raised its objection to that procedure for the first time on appeal.

In re Rafter Seven Ranches L.P., 414 B.R. 722 (10th Cir. BAP Sept. 17, 2009) (Brown, J.)

Affirming the bankruptcy court, the BAP held a general partnership was not an "individual" entitled to seek damages under § 362(h) (now found at § 362(k)) for alleged violations of the automatic stay. The BAP affirmed the bankruptcy court's discretionary refusal to award damages under § 105(a) for the alleged stay violations. Alternatively, the BAP concluded the bankruptcy court correctly construed a settlement agreement between the parties under Kansas law, and therefore correctly determined that no stay violation occurred. Finally, the BAP (1) dismissed as moot the debtor's appeal of a bankruptcy court order that enforced a particular provision of the settlement agreement, and (2) declined to vacate the underlying order because the debtor had voluntarily taken action that caused the appeal to become moot.

Bryner v. LeBaron (In re Bryner), 425 B.R. 601 (10th Cir. BAP Mar. 15, 2010) (Michael, J.)

Before filing bankruptcy, the debtor obtained a default judgment in state court against a married couple. After a garnishment, the couple moved to set aside the judgment. Before that motion was heard, the debtor filed a Chapter 13 petition. At the subsequent hearing on the motion, the state court declined to take action until it was satisfied its proceeding would not violate the automatic stay. The debtor then obtained another writ of garnishment in the state court, and in bankruptcy court, sued the couple and their attorney for alleged stay violations. The couple answered the garnishment, but at a hearing, the state court declined to proceed on their motion to set aside the default or on the writ of garnishment. The couple and their attorney moved for summary judgment before the bankruptcy court, which granted their motion. On the debtor's appeal, the BAP affirmed, holding the couple's defensive actions before the state court did not violate § 362(a)(1) because they were not actions "against the debtor," and did not violate § 362(a)(3) because they were not acts "to obtain possession" or "exercise control over" property of the estate. In light of the debtor's post-bankruptcy-petition efforts to proceed with litigation against them in both courts, equity required that the couple and their attorney be allowed to defend themselves.

Executory Contracts, Leases, and Administrative Rent, §365

In re C.W. Mining Co., 422 B.R. 746 (10th Cir. BAP Feb. 3, 2010) (Brown, J.)

Affirming the bankruptcy court, the BAP held the debtor's lease of a coal mine did not terminate prepetition because the debtor still had a right to cure its defaults under the lease when an involuntary bankruptcy petition was filed against it, so the lease became property of the estate. The automatic stay imposed by § 362(a) then applied to give the trustee, who was appointed when an order for relief was entered, time to decide whether to assume or reject the lease under § 365. The

lease did not cease to be property of the estate under § 541(b)(2) by the expiration of its stated term because the lease did not expire automatically at the end of the cure period, but instead gave the landlord the option to terminate it then, an action the landlord could not take because of the stay. The BAP held the bankruptcy court's finding that the debtor did not actually terminate the lease during the gap period between the involuntary petition filing and the order for relief was not clearly erroneous. Finally, the BAP affirmed, as not clearly erroneous, the bankruptcy court's finding that the lease was not covered by § 365(c)(1) because Utah law did not make it an unassignable personal services contract. A provision in the lease indicated it could be assigned, and when the lease was signed, the debtor's president was a different person than the one the landlord now claimed was the only person it had intended to agree could direct performance under the lease.

Trustee as Lien Creditor or Bona Fide Purchaser, §544

Hamilton v. Washington Mutual Bank (In re Colon), 563 F.3d 1171 (10th Cir. May 4, 2009)

Reversing the lower courts, the Circuit, applying Kansas law, held that a bank's recorded mortgage on the debtors' home, which contained the correct street address and parcel identification number but an incorrect lot number ("29" instead of "79"), would give sufficient notice to a prospective purchaser of the home to require the purchaser to investigate further and therefore learn the mortgage was in fact on the debtors' home, despite the incorrect lot number. Therefore, the Chapter 13 trustee could not avoid the mortgage under § 544(a)(3). The Circuit concluded Kansas law required a prospective purchaser to examine the complete contents of all recorded documents in the prospective grantor's chain of title (many of which contained the same street address and parcel ID number as the bank's mortgage), as well as the contents of all recorded documents indexed under the grantor's name in the grantor and grantee indexes, which would have raised at least the possibility the mortgage was on the debtors' home. In addition, a subordination agreement that also used the wrong lot number unambiguously referred by recording book and page number to (1) a second mortgage that used the correct lot number and (2) the bank's mortgage, thus alerting a prospective purchaser that the bank's mortgage was on the debtors' home.

In re Kasparek, 426 B.R. 332 (10th Cir. BAP Apr. 5, 2010) (Rasure, J.)

Trustee appealed bankruptcy court's order denying trustee's complaint to sell jointly held real property under § 363(h). The real property was held by debtor, his brother James, and his father Wayne. Wayne purchased the property in 2005 and had the seller execute a deed to the three of them as joint tenants with the right of survivorship. The deed was prepared in this fashion to insure that upon Wayne's death, the property would vest in his sons outside of probate. Wayne leased the farmground to a third party on a crop-share basis, collected the landlord's share of income and paid the landlord's share of expenses. Debtor filed his chapter 7 bankruptcy in 2007 and disclosed his undivided 1/3 interest in the property. When the trustee sought to sell the jointly owned property, Wayne asserted that he was the 100% equitable owner of the property and that it was not part of debtor's bankruptcy estate under § 541, because debtor held bare legal title. Under Kansas law, the recorded deed established equal undivided interests of the property among the joint tenants as a matter of law. In order for Wayne to claim that his sons held their interests in trust for his benefit,

it was incumbent upon Wayne to establish the elements of an implied trust under K.S.A. 58-2408. The Court went on to hold that even if Wayne owned the entire equitable interest under an implied trust theory, that unrecorded interest is subordinate to a bona fide purchaser under K.S.A. 58-2402. The trustee qualified as a bona fide purchaser of debtor's interest because he had no constructive or implied notice that debtor held his 1/3 interest in trust for the benefit of his father. A hypothetical purchaser's inquiry of the farming tenant would not have put a purchaser on notice that the joint tenants were not all equitable owners and since the tenant did not claim an interest adverse to any of the joint tenants, a hypothetical purchaser has no further duty of inquiry. Since the trustee in bankruptcy stands in the shoes of a hypothetical bona fide purchaser of debtor's interest in real property, the trustee's rights are superior to and free of Wayne's interest. Under § 544(a)(3), the trustee is granted all rights and powers of a bona fide purchaser, including the right to obtain title to property free of unrecorded interests, and is not limited to avoiding transfers. The BAP reversed the bankruptcy court order denying the trustee's complaint to sell jointly owned property and remanded for further findings of the § 363(h) elements.

Trustee Recoveries on Avoided Transfers, §§ 550 & 551

Rodriguez v. Daimlerchrysler Financial Services Americas LLC (In re Bremer) and *Rodriguez v. Drive Financial Services, L.P. (In re Trout),* 609 F.3d 1106 (10th Cir. June 23, 2010)

The Tenth Circuit affirmed the bankruptcy court (392 B.R. 869 and 392 B.R. 873) and the BAP (408 B.R. 355) in denying a Chapter 7 trustee's claims under § 550(a) for money judgments for the value of motor vehicle liens he avoided as preferences under § 547(b), which were automatically preserved for the benefit of the bankruptcy estates under § 551. The bankruptcy estate was sufficiently returned to its pre-transfer status by avoiding the preferential lien and stepping into the lien priority of the avoided creditor under § 551. With respect to the availability of § 550(a) value relief, the Tenth Circuit agreed that recovery under § 550 was permissive and discretionary with the bankruptcy court, not mandatory. Section 550 relief may be applicable to possessory property interests as well as nonpossessory liens. Recovery of value under § 550 may be appropriate in cases where the collateral securing the lien is gone or the lien itself has been paid in full. In these instances, avoidance and preservation of the lien may not be sufficient to restore the estate to a pre-transfer status. If avoidance and preservation of the lien restores the estate to its pre-transfer status, the bankruptcy court does not abuse its discretion in declining to award the trustee recovery for the value of the avoided lien under § 550.

Exemptions

In re Hall, ___ B.R. ___, 2009 WL 4456542 (10th Cir. BAP Dec. 4, 2009) (Romero, J.)

Affirming the bankruptcy court, the BAP determined that a Kansas debtor could claim as his homestead either a one-half interest in a house occupied by his family, even though he lived in a separate mobile home, or a one-half interest in the mobile home, but not both. Similarly, his joint-debtor wife could claim as her homestead a one-half interest in the house or in the mobile home

occupied by her husband, but not both. The Chapter 7 trustee's appeal failed.

Discharge, §§ 727, 1141(d), 1228, & 1328, Protection of the Discharge, § 524, Reaffirmation Agreements, § 524(c), and Protection Against Discrimination, § 525

. *Beaumont v. Department of Veteran Affairs*, 586 F.3d 776 (10th Cir. Oct. 15, 2009)

In 1993, the debtor qualified for a non-service-connected disability pension from the VA based on his having no countable income. In 2001, he received a substantial inheritance but did not advise the VA of this fact. When the VA learned of the inheritance, it determined it had overpaid him about $18,000, and informed him it would recoup that amount by reducing future payments to him. The debtor filed bankruptcy in 2005 and received a discharge, then sued the VA for violating the automatic stay, § 362, and the discharge injunction, § 524, by continuing to recoup the overpayment. The bankruptcy court held the VA was entitled to recover the money from the debtor under the doctrine of equitable recoupment because its obligation to pay benefits to the debtor, and the debtor's obligation to repay the overpayment, arose from a single integrated transaction. The court held it would be inequitable for the debtor to receive the inheritance, fail to satisfy his obligation to inform the VA of the inheritance, continue to receive benefits as if he had no income, and then be able to discharge the overpayment in bankruptcy once it was determined he had been overpaid. The Circuit affirmed, adopting the bankruptcy court's opinion as its own.

Dischargeability, §523

Melnor, Inc., v. Corey (In re Corey), 583 F.3d 1249 (10th Cir. Sept. 30, 2009)

In a pre-bankruptcy fraud lawsuit in federal district court, the debtor engaged in litigation misconduct that led the court to strike his defenses to the fraud claim. When he later failed to appear at the trial on damages, the court dismissed the jury and assessed damages based on the plaintiff's evidence. The debtor then filed bankruptcy, and the plaintiff sought to except the judgment from discharge under § 523(a)(2)(A) as a debt based on fraud. Affirming the BAP's decision that affirmed the bankruptcy court, the Circuit held that issue preclusion barred the debtor from relitigating whether he defrauded the plaintiff because the default in the district court was not based on his failure to contest the fraud issue, but on his abusive efforts to contest the issue.

In re Riebesell, 586 F.3d 782 (10th Cir. Oct. 28, 2009)

A debtor-attorney's debt to a former client, which was based on loans the client made to him, was excepted from discharge by § 523(a)(2)(A). The attorney obtained the loans while the attorney-client relationship existed but without making disclosures required by the Colorado Rules of Professional Conduct, thus constituting a false representation covered by § 523(a)(2)(A). The loans were not excepted from the disclosure requirements as "standard commercial transactions" because the client had never made any personal loans other than those he made to the attorney. The bankruptcy court's finding, based on all the circumstances, that the attorney intended to deceive his

client was not clearly erroneous. The court's finding that the client justifiably relied on his long-time friend and attorney in making the initial loan and some later loans was not clearly erroneous; the court also found the client's reliance eventually became unjustifiable because he was told of the attorney's deteriorating financial condition before making a final loan to him. Agreeing with the Second, Sixth, Seventh, and Ninth Circuits, the Tenth Circuit held that bankruptcy courts have jurisdiction not only to determine the dischargeability of a debt but also to liquidate the amount of the debt and enter a money judgment against the debtor. However, the Circuit reversed the lower courts' decision that the creditor was entitled to post-judgment interest at the rate provided by the parties' promissory note, instead of the federal judgment interest rated provided by 28 U.S.C. § 1961, because they did not specifically contract around the general rule that a cause of action reduced to judgment merges into the judgment and the contractual interest rate therefore disappears for post-judgment purposes.

Copper v. Lemke (In re Lemke), 423 B.R. 917 (10th Cir. BAP Feb. 24, 2010) (Bohanon, J.)

Two creditors who loaned the debtors money to build their dream home sued to have their debt excepted from discharge under § 523(a)(2)(A) based on false pretenses, false representations, or actual fraud. The BAP affirmed, as not clearly erroneous, the bankruptcy court's finding that the lenders failed to prove the debtor-wife made any representations to them or otherwise committed any act that violated § 523(a)(2)(A). The BAP affirmed, as not clearly erroneous, the bankruptcy court's findings that the debtor-husband made no false representations and had no intent to deceive the lenders because (1) substantial construction on the home had been completed, (2) the debtor-husband testified he had purchased various items that were later found to be missing from the home, (3) testimony of one of the lenders that he discovered vandalism at the home indicated theft was as likely an explanation for the missing items as the lenders' claim that the debtor-husband's assertions he had bought them were false, and (4) the debtor-husband's offer to sign a new note for the full amount borrowed indicated he intended to pay the creditors.

The BAP also affirmed, as not clearly erroneous, the bankruptcy court's finding that the lenders did not justifiably rely on the debtor-husband's construction draw requests because (1) the lenders had no prior experience with him but did not investigate his construction ability or financial worth, (2) they did not require any supporting documentation for the draws, (3) they continued to lend money after "red flags" appeared, such as when the debtor-husband included substantial unrelated items in one draw request, and when the draw requests exceeded his total pre-construction estimate, and (4) they did not visit the home to view its progress until after the debtors defaulted on the loan, even though one of the creditors lived nearby.

Miscellaneous Chapter 11 Rulings

Torrington Livestock Cattle Company v. Berg (In re Berg), 423 B.R. 671 (10th Cir. BAP Feb. 16, 2010) (Rasure, J.)

The BAP held the bankruptcy court's order denying a Chapter 11 debtor a discharge because he had violated § 727(a)(3) was a final order because the court had made clear it considered moot

all other grounds the creditor had asserted for excepting its debt from discharge or denying the debtor a discharge. The BAP then reversed the bankruptcy court's decision because a Chapter 11 debtor's discharge cannot be denied under § 727(a) alone. Instead, under § 1141(d)(3), a discharge can be denied if the debtor would be denied a discharge under § 727(a) in a Chapter 7 case only if two other factors exist: (1) the debtor's confirmed plan provides for the liquidation of all or substantially all the property of the estate, and (2) the debtor does not engage in business after consummation of the plan.

Chapter 13 Anti-Modification, § 1322(b)(2) and Lien Retention, § 1325(a)(5)(B)(i)

In re Picht, 428 B.R. 885 (10th Cir. BAP May 4, 2010) (Rasure, J.)

Following debtors receiving a chapter 7 discharge, creditor Bank foreclosed its second mortgage on their residence and obtained an in rem judgment of $127,000. Debtors then promptly filed a chapter 13 case and plan which proposed to pay the Bank a total of $15,000 on its secured claim over the plan term after which the Bank was to file a satisfaction of its mortgage. The bankruptcy court confirmed debtors' plan over the Bank's objections that it impermissibly modified the Bank's secured claim in violation of § 1322(b)(2) and required the Bank to release its lien in violation of § 1325(a)(5)(B)(i)(I)(aa) - requiring that the Bank retain its lien until payment of the underlying debt determined under nonbankruptcy law. The BAP held that the debtors' plan did not comply with the lien retention provision and reversed the bankruptcy court. The BAP reiterated that under *Dewsnup* a lien survive a chapter 7 discharge and the debt secured by the lien is enforceable against the property securing the debt. Thus, the Bank's debt (determined under nonbankruptcy law, *i.e.* the foreclosure) was enforceable against the debtors' residence up to $127,000. Debtors' plan which required the Bank to release its mortgage after less than full payment of the *in rem* judgment was unconfirmable.

Chapter 12 Postpetition Sales of Farm Assets and Tax Claims, § 1222(a)(2)(A)

In re Ficken, 430 B.R. 663 (10th Cir. BAP May 7, 2010) (Nugent, J.)

Debtors sought determination that their debt for capital gains taxes arising from the postpetition sale of cattle would be treated as an unsecured claim for distribution and discharge purposes pursuant to priority stripping provision, § 1222(a)(2)(A), added by BAPCPA. The 2006 sale of all of debtors' cattle (calf inventory and breeding livestock) resulted in a gain of nearly $140,000. The BAP affirmed the bankruptcy court's determination that § 1222(a)(2)(A) applies to tax liabilities arising from postpetition sales of farm assets and affirmed the determination that debtors' calf inventory were farm assets "used in" debtors' farming operation. It concluded that postpetition income taxes are administrative expenses incurred by the estate and rejected the IRS argument that the taxes were not incurred by the estate (since there is no separate taxable entity in

a chapter 12 case) and therefore did not qualify as administrative expenses. As for the calf inventory as a farm asset "used" in debtors' farming operation, the BAP rejected the argument that the calf inventory was not used in the farming operation in the sense of capital assets in the federal tax code but was the end product of the farming operation. Because the calf inventory was sold in the ordinary course of the farming operation, the IRS reasons the unsecured claim treatment is not available. The BAP also held that the proper method to calculate the amount of tax that is afforded unsecured claim treatment under § 1222(a)(2)(A) is the marginal tax allocation method, rather than the proportional tax allocation method. The marginal tax allocation method, which results in a greater amount of taxes receiving § 1222(a)(2) treatment, is consistent with the relief Congress intended for farmers.