Consumer Workshop I: Ventilating: Fresh Air for Miners, Fresh Start for Debtors: How Fresh Is Fresh?

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Lien Stripping in the 10th Circuit

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Lien stripping in the 10th Circuit - § 506(d) is out, is § 1322(b)(2) still in?

In *In re Woolsey*, 696 F. 3d 1266 (10th Cir. 2012), the 10th Circuit held, consistent with all other circuit courts that have addressed the issue, that § 506(d) does not authorize lien stripping in a chapter 13 case. However, the 10th Circuit did not address whether a chapter 13 debtor may use § 1322(b)(2) to strip a lien that is wholly unsupported by value in collateral. Although the Court invited briefing on the § 1322(b)(2) issue, the debtor "made plain that they wanted no part of the argument," *Id.* at 1279, and the Court declined to opine on the availability of § 1322(b)(2).

May a debtor use § 1322(b)(2) to strip a lien that is wholly unsupported by value in collateral? Bankruptcy courts, including those in the 10th Circuit, are consistently confirming chapter 13 plans that purport to strip liens that are wholly unsecured. All of the Circuits that have addressed the issue have held that chapter 13 debtor's may strip liens that are wholly unsecured. What is the mechanism that permits this result?

Chapter 13 plans that purport to strip liens typically treat the creditor's claim as an unsecured claim. The debtor, either by motion or by adversary proceeding, seeks a determination under § 506(a) that the claim is unsecured because there is no value in the collateral to support the creditor's lien. Once the claim is determined to be unsecured it is not subject to § 1322(b)(2) and is treated as an unsecured claim in the chapter 13 plan. Upon completion of the chapter 13 plan, the debt is discharged and the lien stripped.

Does this really make sense and is this permitted under the Bankruptcy Code? The Chapter13 Trustee's brief in the *Woolsey* case make a strong argument that § 1322(b)(2) prohibits lien stripping.

> A trust deed creditor holds an array of rights colloquially referred to as a "bundle of sticks" to symbolize both their discrete powers and that the removal of one does not necessarily vitiate the power of the others. United States v. Craft, 535 U.S. 274, 278 (2002). The sticks in the bundle include: (1) the contractual right to repayment of the debt (in personam); and (2) the property right of recourse against the collateral (in rem). In re Nichols, 440 F.3d 850, 854 (6th Cir. 2006) (citing United States v. Security Indus. Bank, 459 U.S. 70, 74 (1982). In personam and in rem rights in bankruptcy are determined by state law. Nobelman, 508 U.S. at 329. Bankruptcy law honors the distinction between these rights because the "[Supreme Court] cases recognize, as did the common law, that [in bankruptcy] the contractual right of a secured creditor to obtain repayment of his debt may be quite different in legal contemplation from the property right of the same creditor in the collateral." United States v. Security Indus. Bank, 459 U.S. 70, 74 (1982). The difference between in personam and in rem rights has created a "long-recognized tension between permitting the impairment of contractual obligations [in bankruptcy] while maintaining the integrity of the property rights." In re Nichols, 440 F.3d 850, 854 (6th Cir. 2006) (citing Security Indus. Bank, 459 U.S. at 75).)

> The contractual in personam rights of a residential mortgagee may be limited in bankruptcy, such as by the automatic stay of § 362 or by the cure of a prepetition mortgage arrearage under § 1322(b)(5), but these "limitations on the lender's rights . . . are independent of the debtor's plan or otherwise outside § 1322(b)(2)'s prohibition." Nobelman, 508 U.S. at 330. However, a creditor's in rem rights generally survive the effects of bankruptcy. Dewsnup, 502 U.S. at 419 ("Subsection (d) [of § 506] permits liens to pass through the bankruptcy unaffected."). Nonetheless, if the bankruptcy modification of a creditor's in rem a right "goes so far as to constitute 'total destruction' of the value in the property held by a creditor, it violates the Fifth Amendment and may not stand." Nichols, 440 F.3d at 854 (citing Armstrong v. United States, 364 U.S. 40, 48 (1960)); see also Louisville Joint Stock Land Bank v. Radford, 295 U.S. 555, 590 (1935) (using its bankruptcy powers, Congress may impair contractual obligations, but the taking of a mortgagee's rights in real property is subject to Takings Clause).

There are some questions about lien stripping. When is the lien stripped? Is a discharge required to effect the lien strip? Is the lien stripped before a chapter 13 discharge or after a chapter 13 discharge? If before a chapter 13 discharge, may the debtor sell the property during the pendency of the case? What is the effect of conversion or dismissal? If after the discharge, how is the lien strip enforced? What if title insurance companies will not insure title unless there the creditor provides a reconveyance or release of lien? Is further court involvement required?

On a broader level, a chapter 13 debtor is not permitted to strip down a lien so what is the justification for requiring a debtor to pay the full claim of a lien supported by a collateral value of $100 but allowing a debtor to discharge a lien that barely misses that threshold? What about the creditor's property right of recourse? Did congress really intend to permit debtors to strip liens on there residences? If so, why was the 2009 proposed legislation that would have given bankruptcy judges the ability to modify mortgages unsuccessful?

FILED
United States Court of Appeals
Tenth Circuit

September 4, 2012

Elisabeth A. Shumaker
Clerk of Court

PUBLISH

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

In re: KENNETH WOOLSEY; STEPHANIE WOOLSEY,

Debtors.

KENNETH WOOLSEY; STEPHANIE WOOLSEY,

Appellants,

v.

CITIBANK, N.A.,

Appellee,

KEVIN R. ANDERSON, Chapter 13 Trustee,

Trustee - Appellee,

NATIONAL ASSOCIATION OF CONSUMER BANKRUPTCY ATTORNEYS,

Amicus Curiae.

No. 11-4014

Appeal from the United States District Court
for the District of Utah
(D.C. No. 2:10-CV-01097-BSJ)

David M. Cook, Salt Lake City, Utah, for Debtors-Appellants.

Mariah E. Murphy (Anthony C. Kaye and Steven D. Burt with her on the briefs), Ballard Spahr LLP, Salt Lake City, Utah, for Appellee Citibank.

Kevin R. Anderson, Salt Lake City, Utah, for Trustee-Appellee.

Tara Twomey, San Jose, California, for Amicus Curiae National Association of Consumer Bankruptcy Attorneys.

Before **GORSUCH, HOLMES,** and **MATHESON**, Circuit Judges.

GORSUCH, Circuit Judge.

Like so many these days, Stephanie and Kenneth Woolsey owe more money on their home than it's worth. In fact, the value of their home doesn't come close to covering the balance due on their first mortgage, much less the amount they owe on a second. And it's that second mortgage, held by Citibank, at the center of our case. After the Woolseys sought shelter in bankruptcy, they prepared a Chapter 13 repayment plan. In their plan, they took the position that the bankruptcy code voids Citibank's lien because it is unsupported by any current value in the home. Naturally, Citibank didn't take well to the Woolseys' intentions. The bank objected to the Woolseys' plan and eventually persuaded the bankruptcy court to reject it. Later the district court, too, sided with Citibank and now the question has found its way to us.

Before us, though, the Woolseys don't just shrink from, they repudiate the only possible winning argument they may have had. They choose to pursue instead and exclusively a line of attack long foreclosed by Supreme Court precedent. To be sure, the Woolseys argue vigorously and with some support that the Supreme Court has it wrong. But, as Justice Jackson reminds us, whether or not the Supreme Court is infallible, it *is* final. *See Brown v. Allen*, 344 U.S. 443, 540 (1953) (Jackson, J., concurring in the result). And it belongs to that Court, not this one, to decide whether to revisit its precedent. For now, and like the other judges to have passed on this case so far, we are obliged to apply the Court's current case law and that leads us, inexorably, to affirm.

* * *

But before we can get to all that, there's a jurisdictional snarl we have to untangle first. After Citibank successfully objected to the Woolseys' initial repayment plan, the bankruptcy court issued an order rejecting it. That order, of course, was hardly an appealable final decision spelling the end to things in bankruptcy court: it promised only more litigation until an amended repayment plan could win the bankruptcy court's approval. *See Simons v. FDIC (In re Simons)*, 908 F.2d 643, 645 (10th Cir. 1990). All the same, the Woolseys appealed the bankruptcy court's order to the district court. And this they could do because 28 U.S.C. § 158(a)(3) permits interlocutory appeals in these particular circumstances. For its part, however, the district court soon issued a summary

order affirming the bankruptcy court's rejection of the Woolseys' initial plan, and it is that decision the Woolseys now seek to appeal to our court.

And that raises this question: Do we have the power to hear an interlocutory appeal of an interlocutory appeal? By what authority might we entertain an appeal from the district court of an interlocutory order regarding a matter pending in bankruptcy court? To be sure, the Woolseys could have sought permission to proceed to this court under the general interlocutory appeal statute, 28 U.S.C. § 1292(b). *See Conn. Nat'l Bank v. Germain*, 503 U.S. 249, 254 (1992). But they didn't. Instead and at their behest, the district court purported to certify its interlocutory appeal for a further interlocutory appeal to this court under 28 U.S.C. § 158(d)(2)(A). Can a district court *do* that?

When a case is properly certified by the bankruptcy court, district court or bankruptcy appellate panel, Congress through § 158(d)(2)(A) has clearly given this court the power to hear "appeals described in the first sentence of [§ 158(a)]." The difficulty is that the "appeals described" in the first sentence of § 158(a) are not appeals from the district court, but appeals directly from the bankruptcy court. So it's evident enough that § 158(d)(2)(A) gives us the authority to hear appeals straight from the bankruptcy court, leapfrogging over the district court or bankruptcy appellate panel in order to speed up the resolution of dispositive legal questions. *See Weber v. U.S. Tr.*, 484 F.3d 154, 157-58 (2d Cir. 2007). What's less certain is whether the statute *also* permits us to hear

interlocutory appeals from the *district court's* disposition of an interlocutory appeal of a bankruptcy court order, in this respect covering much the same ground as § 1292(b).

Fortunately, it turns out we don't have to decide that question in this case. We don't because, while this appeal was wending its way to us, the bankruptcy court confirmed an amended repayment plan the Woolseys submitted after their initial plan voiding Citibank's lien was rejected. The confirmation of an amended plan brought the bankruptcy proceedings to a close, surely constituting a final order subject to appeal. *See* 28 U.S.C. § 158(d)(1). Indeed, in the world of bankruptcy proceedings — a world where cases continue on in many ways for many years and lack the usual final judgment of a criminal or traditional civil matter — confirmation of an amended plan "is as close to *the* final order as any the bankruptcy judge enters." *See Interwest Bus. Equip., Inc. v. U.S. Tr. (In re Interwest Bus. Equip., Inc.)*, 23 F.3d 311, 315 (10th Cir. 1994) (internal quotation marks omitted).

Neither does the fact the Woolseys filed their notice of appeal in this court prematurely — after the district court decided its appeal but before the bankruptcy court confirmed the Woolseys' amended plan — deny them the right to appeal. In the multi-layered appellate world of bankruptcy practice this problem recurs not infrequently. And this circuit has responded by holding that, at least absent any indication of potential prejudice, a premature notice of appeal

involving a bankruptcy matter, even one (like this one) with an interstitial stop in the district court, ripens and becomes effective once "a final order approving [a] plan[] of reorganization" is entered. *Interwest*, 23 F.3d at 315; *see also Adelman v. Fourth Nat'l Bank & Tr. Co. (In re Durability, Inc.)*, 893 F.2d 264, 265-66 (10th Cir. 1990). This court's precedent, moreover, finds analogies of various sorts in most other circuits. *See, e.g., Community Bank, N.A. v. Riffle*, 617 F.3d 171, 173-74 (2d Cir. 2010) (*per curiam*); *Rains v. Flinn (In re Rains)*, 428 F.3d 893, 900-01 (9th Cir. 2005); *Watson v. Boyajian (In re Watson)*, 403 F.3d 1, 5 (1st Cir. 2005); *Official Comm. of Unsecured Creditors v. Farmland Indus., Inc. (In re Farmland Indus., Inc.)*, 397 F.3d 647, 649-50 (8th Cir. 2005); *In re Rimsat, Ltd.*, 212 F.3d 1039, 1044 (7th Cir. 2000); *In re Emerson Radio Corp.*, 52 F.3d 50, 53 (3d Cir. 1995); 16 Charles Alan Wright, Arthur R. Miller & Edward H. Cooper, Federal Practice and Procedure § 3926.2 at 290 (2d ed. 1996). After all, the bankruptcy court's refusal to confirm the Woolseys' initial plan has now become a final and irrevocable decision, no longer subject to reconsideration there: the bankruptcy proceeding is closed. The district court has likewise finished its work and can't revise any decision we render. Neither have the parties identified any prejudice anyone would suffer by taking up the appeal now. Cumulatively, it's clear everything that could be done below has been done.

But even this analysis, we must acknowledge, isn't without its wrinkles. The notion that proceedings in a district court cumulatively might give rise to a

final judgment was touched upon in *FirsTier Mortgage Co. v. Investors Mortgage Insurance Co.*, 498 U.S. 269 (1991). There, the Court interpreted Fed. R. App. P. 4(a)(2)'s instruction that a "notice of appeal filed after the announcement of a decision or order but before the entry of the judgment or order shall be treated as filed after such entry and on the day thereof." 498 U.S. at 272-73. While holding that the Rule allowed the appeal at issue, the Court proceeded, in a statement that may or may not have been essential to its holding, to say the Rule does not permit a premature notice of appeal from a "clearly interlocutory decision — such as a discovery ruling or a sanction order under Rule 11" because a "belief that such a decision is a final judgment would *not* be reasonable." *Id.* at 276 (emphasis in original); *see Gonzales v. Texaco Inc.*, 344 F. App'x 304, 307 (9th Cir. 2009) (unpublished) (suggesting all this language is dicta). Instead, the Court said, the Rule permits a premature notice of appeal only from decisions that themselves "*would be* appealable if immediately followed by the entry of judgment" because "[i]n these instances, a litigant's confusion" about the finality of the case is "understandable, and permitting the notice of appeal to become effective when judgment is entered does not catch the appellee by surprise." *FirsTier Mortg. Co.*, 498 U.S. at 276 (emphasis in original).

Whether and to what degree this discussion, even if controlling, pertains to bankruptcy practice is an open question. In the first place, it is a matter of some debate whether Rule 4(a)(2) — and so *FirsTier*'s gloss on it — supplies the sole

means for a court of appeals to secure jurisdiction over a prematurely filed appeal. The Rule, some argue, is but a rule of practice, not a limit on our statutory jurisdiction, and it might be supplemented by Fed. R. App. P. 2 when necessary to allow courts to hear prematurely filed appeals that may not satisfy its particular terms but involve sufficiently final decisions that we are statutorily entitled to hear them. *Compare Khan v. Attorney Gen.*, No. 11-1789, 2012 WL 3290155, at *3 n.2 (3d Cir. Aug. 14, 2012) (citing *Lazy Oil Co. v. Witco Corp.*, 166 F.3d 581, 587 (3d Cir 1999) so arguing), *with Outlaw v. Airtech Air Conditioning & Heating*, 412 F.3d 156, 160 n.2 (D.C. Cir. 2005) (disagreeing).

One might debate, as well, whether and to what degree the Rule needs to be supplemented, by means of Rule 2 or otherwise, to fit the peculiarities of bankruptcy practice. The Rule seems to assume the court "announc[ing] a decision or order" is the same one that later enters "the judgment or order" embodying that previous announcement. Yet here of course we have an appeal from a decision announced by a district court concerning a final judgment (as it were) later entered by the bankruptcy court, no unusual situation in bankruptcy practice but surely not typical in the criminal or traditional civil practice to which the Rule seems to speak. And one might wonder whether compliance with Rule 4(a)(2) can be forfeited or waived if it does not describe the outer limits of our statutory jurisdiction. What it might say about any of this is surely a point for debate, but it is a curiosity all the same that *Interwest* and most related cases in

other circuits make no mention of the Rule (one way or the other) when discussing appeals involving premature notices of appeal in the bankruptcy context. And, perhaps like litigants in those cases, the litigants in ours have not suggested the Rule or *FirsTier* imposes any impediment to entertaining this appeal.

Beyond even all this, however, *FirsTier*'s relevance in bankruptcy practice is an open question for still a different reason: it isn't clear whether a circuit entertaining an appeal from a district court even needs to resort to the cumulative finality doctrine — or for that matter § 1292 or § 158(d)(2)(A), two other possibilities we've already discussed. When it comes to bankruptcy matters, Congress in § 158(d)(1) gives circuit courts jurisdiction to hear "final decisions" as well as final judgments, orders and decrees "entered under subsection[] (a)." Turning to § 158(a), Congress there gives district courts authority to entertain appeals from final judgments, orders and decrees, *and* certain interlocutory orders and decrees from the bankruptcy court. Meanwhile, though, no mention is made of "final decisions." Given this arrangement, one might wonder whether this court possesses jurisdiction under § 158(d)(1) to review a "final decision" of the district court "entered under subsection[] (a)," with respect to a bankruptcy court's interlocutory order — all without the necessity of any final bankruptcy court order. On this theory, the phrase "decision . . . entered under subsection[] (a)" as it appears in § 158(d)(1) permits us to review a district court's decision on

a purely interlocutory issue. As applied to this case, the district court's "final decision" rejecting the Woolseys' initial plan is enough to afford us jurisdiction: the finality of the bankruptcy court's proceedings is immaterial. *See* Wright, Miller, & Cooper, *supra*, § 3926.2 at 279-80 (discussing merits and demerits of this interpretation).

The layering of appeal on appeal in the bankruptcy context, where our usual ideas of finality are already put to the test, surely invites many and interesting questions. But while we cannot ignore them, neither must we decide them today. We don't have to do so because, even assuming a final bankruptcy proceeding is required to trigger our own jurisdiction under § 158(d)(1), and even assuming that Rule 4(a)(2) is the only means by which we may entertain cases involving a prematurely filed notice of appeal, this case satisfies the test this court has set forth for satisfying the Rule.

Though *FirsTier*'s cryptic and arguably tangential discussion about the limits of Rule 4(a)(2) is open to many different understandings, in *Hinton v. City of Elwood*, 997 F.2d 774 (10th Cir. 1993), this court explained its understanding that, under the Rule, "a premature notice of appeal retains its validity only when the order appealed from is likely to remain unchanged in both its form and its content." *Id.* at 778. Admittedly, *Hinton* did not discuss *FirsTier* but it does post-date *FirsTier* and so controls our analysis of the Rule. While a panel of this court may sometimes recognize that a prior panel decision has been clearly

overruled by an intervening Supreme Court decision, *see, e.g., Currier v. Doran*, 242 F.3d 905, 912 (10th Cir. 2001), we are aware of no existing Tenth Circuit authority that might allow this panel to overrule another panel simply because the earlier panel didn't mention a still earlier and (possibly) relevant Supreme Court decision.

Hinton's test, moreover, is clearly satisfied where, as here, the appealed order from the district court (or Bankruptcy Appellate Panel) resolves the only outstanding issue in what has, by the time it reaches us, become an otherwise completed bankruptcy proceeding. In these circumstances, the challenged order not only amounts to the order of a superior authority the bankruptcy court could not undo later, it resolves the only appealed issue to arise out of the now concluded bankruptcy proceedings and so could not be changed in any event. In this situation, no one can claim serious surprise that the appealed order is amenable to appellate review. Indeed, to hold otherwise might require the appealing party to undertake the useless gesture of appealing again to the district court the very same order it just issued, all so it could get the matter back to this court, surely a paper pushing process no one would reasonably expect the law to require. Because of the layering effect of review in bankruptcy, our situation is very different from an attempt to appeal a district court's discovery or Rule 11 sanctions order discussed in *FirsTier* that no party could reasonably think ended

the case. No similar injustice or circumvention of traditional concepts of finality are in play here.

Neither, in any event, could we hold otherwise. As we've already explained, *Interwest*, like so many similar decisions in other circuits, expressly authorizes bankruptcy appeal in the circumstances we face. And we are of course bound by that precedent, as well. To be sure, and as we've already indicated, *Interwest* (like *Hinton*) does not discuss *FirsTier*. But (again like *Hinton*) *Interwest* post-dates *FirsTier* and we see no fair way by which we might avoid its teachings.

Though we are able, ultimately and after the application of some elbow grease, to untie the jurisdictional knot and reach the merits of this case, we have paused to describe along the way a number of unresolved and beguiling questions so future litigants and district courts are not left unwarned or unwary — about the questions surrounding § 158(d)(2)(A)'s reach, the curious discrepancies of §§ 158(a) and (d), the anomalies of Rule 4(a)(2), and the still not entirely explored frontiers of *FirsTier*.

* * *

Now to the merits. May Chapter 13 debtors like the Woolseys void a state law lien secured by no remaining value in the collateral? By all appearances, the path to answering that question would seem to begin and end with the language of 11 U.S.C. § 506(d), a provision of the bankruptcy code allowing any debtor in

bankruptcy, regardless under which specific Chapter the debtor proceeds, to remove (or "strip off") certain liens. Section 506(d) explains that, "[t]o the extent that a lien secures a claim against the debtor that is not an allowed secured claim, such lien is void." Or, put differently, if Citibank's claim *isn't* an "allowed secured claim," the statute appears to allow the Woolseys to void the lien just as they originally proposed.

We are convinced Citibank's claim is an "allowed" one. Section 502 provides that a claim filed by a creditor is "allowed" if nobody objects — and even if there is an objection, a claim is *still* allowed unless stated otherwise in § 502. 11 U.S.C. § 502(a)–(b). The parties avidly dispute whether the Woolseys ever properly objected to Citibank's claim, but nothing turns on their fight. It doesn't because, even assuming the Woolseys did object, no provision in § 502 "disallows" the bank's claim. Seeking to suggest otherwise, the Woolseys point to § 502(b)(1). That provision "disallows" claims that are "unenforceable against the debtor and property of the debtor, under any agreement or applicable law for a reason other than because such claim is contingent or unmatured." But it's beyond question that Citibank's claim is a valid mortgage enforceable under Utah law — and that leaves § 502(b)(1) without any bite here. Alternatively, the Woolseys say Citibank's claim is disallowed by § 506(a), if not by § 502. Flipping forward a few pages to § 506(a), however, reveals that it has precisely nothing to say about whether a claim is allowed or disallowed. By its terms

§ 506(a) applies only to claims that are already "allowed," making abundantly clear it doesn't "disallow" anything.

Even accepting that Citibank's claim is "allowed," though, there remains the question whether it is "secured." And on that question § 506(a)(1) turns out to have quite a lot to say:

> An allowed claim of a creditor secured by a lien on property in which the estate has an interest . . . is a secured claim to the extent of the value of such creditor's interest in the estate's interest in such property . . . and is an unsecured claim to the extent that the value of such creditor's interest . . . is less than the amount of such allowed claim.

The thrust of § 506(a) is to classify allowed claims (or portions of allowed claims) as either secured or unsecured, which in turn affects how the bankruptcy code treats them. The statute explains that for purposes of federal bankruptcy law a "secured claim" requires something more than a security interest recognized by state law. A claim, even if secured by a valid state law lien on property, qualifies as "secured" for purposes § 506(a) and federal bankruptcy law only to the extent it is supported by *value* in the collateral. *United States v. Ron Pair Enters., Inc.*, 489 U.S. 235, 239 (1989). To the extent that the lien is supported by some but not enough value to cover the whole debt, § 506(a) splits the claim in two, creating a secured claim and an unsecured claim. *Id.* at 239 n.3. So even if a lien qualifies as a valid security interest under state law, it gives rise to a "secured claim" for purposes of federal bankruptcy law only if and to the extent it is supported by value in the underlying property.

All this would seem to bring us within a simple syllogism from the end of this case. The code allows debtors to void liens that aren't "allowed" and "secured" claims. *See* 11 U.S.C. § 506(d). The code defines "allowed" claims. *See id*. § 502. It also defines "secured" claims. *See id*. § 506(a). And so one might be forgiven for thinking any lien either "disallowed" under § 502 or "unsecured" under § 506(a) would be void under § 506(d). Because Citibank's junior lien isn't backed by any value in the home, Citibank holds only an allowed *unsecured* claim and so its lien would appear to be voidable, just as the Woolseys argue.

But the law in this corner of bankruptcy practice doesn't follow such a straight path. It doesn't because of *Dewsnup*. *See Dewsnup v. Timm*, 502 U.S. 410 (1992). There, the Supreme Court considered § 506(d) in the context of a Chapter 7 bankruptcy proceeding and concluded that the term "allowed secured claim" means a claim "allowed" under § 502 and "secured" by a lien enforceable under state law. So it is, the Court held, value in the collateral has no bearing on the lien-voiding language of § 506(d): *any* lien secured under state law must be respected and protected from removal. *Id*. at 417. And it is precisely because of *Dewsnup*'s holding that the bankruptcy court and district court refused the Woolseys' effort to remove Citibank's lien using § 506(d).

Now, one might well ask: How can it be that to qualify as "secured claim" in § 506(a) some value is needed but a mere three subsections later in § 506(d),

value is irrelevant to whether a claim is "secured"? It's surely a topsy-turvy result to give these two related provisions in the same statutory section entirely different (even opposing) meanings. After all, it defies the Supreme Court's own "normal rule of statutory construction that identical words used in different parts of the same act are [presumed] to have the same meaning." *Sullivan v. Stroop*, 496 U.S. 478, 484 (1990) (internal quotation marks omitted).

Even so, the Supreme Court found § 506(d)'s use of the term "secured" sufficiently "ambiguous" that it felt at liberty to overlook these problems. And the Court took the distinctly unusual step of finding the liberating ambiguity based on no more than the fact the litigants before it happened to disagree over the statute's meaning — an ailment surely afflicting most every statutory interpretation question in our adversarial legal system. *Dewsnup*, 502 U.S. at 416; *see also id*. at 422-23 (Scalia, J., dissenting) (criticizing the idea that a statutory ambiguity might be "achieved by being the subject of disagreement between self-interested litigants"). Still, in light of the ambiguity so generated, the Court felt free to strike out to interpret § 506(d) on its own, unchained by § 506(a)'s plain language.

Turning to historical practice for guidance, the Court said that state law liens in Chapter 7 cases, at least before the enactment of the current bankruptcy code, "pass[ed] through the bankruptcy case unaffected," retaining their force whether backed by value or not. *Id*. at 418. Without some indication in the

legislative history that Congress intended to alter this practice, the Court decided to interpret § 506(d) the same way in order to avoid "effect[ing] a major change in pre-[c]ode practice." *Id*. at 418. The Court also worried that any other result would bestow upon the debtor the "windfall" of any increase in value during the pendency of the bankruptcy, value more appropriately belonging to the lienholder. *Id*. at 417.

Even on their own terms these rationales are open to question. Whatever pre-code practice looked like, it would seem to have (at best) limited interpretive significance today, given that Chapter 7 indubitably permits liens to be removed in many situations. *See Harmon v. United States*, 101 F.3d 574, 581 (8th Cir. 1996) (collecting examples); *In re Penrod*, 50 F.3d 459, 461-62 (7th Cir. 1995). And it's far from clear how much we have to worry about the debtor winning a windfall: in most Chapter 7 cases it will be the remaining unsecured creditors rather than the debtor who will reap any appreciation in the property's value. *See Dewsnup*, 502 U.S. at 422 n.1 (Scalia, J., dissenting); *see also* David Gray Carlson, *Bifurcation of Undersecured Claims in Bankruptcy*, 70 Am. Bankr. L.J. 1, 10-11 (1996). Even more fundamentally still, when it comes to interpreting statutes the Court itself has repeatedly instructed that pre-enactment practice is relevant only "to the interpretation of an ambiguous text" and holds no sway when the statutory language is clear. *RadLAX Gateway Hotel, LLC v.*

Amalgamated Bank, 132 S. Ct. 2065, 2073 (2012). And the language of § 506(a) and (d) does seem pretty plain.

All this has led Justice Thomas to observe that *Dewsnup* has created more than a little "methodological confusion," confusion "enshroud[ing] both the Courts of Appeals and, even more tellingly, Bankruptcy Courts, which must interpret the Code on a daily basis." *Bank of Am. Nat'l Trust & Sav. Ass'n v. 203 North LaSalle Street P'ship*, 526 U.S. 434, 463 (1999) (Thomas, J., concurring in the judgment). In fact, both *Dewsnup*'s decision to depart from the plain language of § 506(a) and the rationales it supplied for doing so have engendered many critics.[1]

But this much still is clear. Right or wrong, the Dewsnuppian departure from the statute's plain language is the law. It may have warped the bankruptcy code's seemingly straight path into a crooked one. It may not be infallible. But until and unless the Court chooses to revisit it, it *is* final.

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[1] For a sampling of these criticisms, and beyond those found in the powerful dissent in *Dewsnup* itself, *see, e.g.*, *Bank of Am. Nat'l Trust*, 526 U.S. at 462-63 (Thomas, J., concurring in the judgment); *Cunningham v. Homecomings Fin. Network (In re Cunningham)*, 246 B.R. 241, 245-46 (Bankr. D. Md. 2000); *Dever v. IRS (In re Dever)*, 164 B.R. 132, 138 (Bankr. C.D. Cal. 1994); Lawrence Ponoroff & F. Stephen Knippenberg, *The Immovable Object Versus the Irresistible Force: Rethinking the Relationship Between Secured Credit and Bankruptcy Policy*, 95 Mich. L. Rev. 2234 (1997); Carlson, *supra*, at 12-20; Barry E. Adler, *Creditor Rights After* Johnson *and* Dewsnup, 10 Bankr. Dev. J. 1, 10-12 (1993); Mary Josephine Newborn, *Undersecured Creditors in Bankruptcy:* Dewsnup*,* Nobelman*, and the Decline of Priority*, 25 Ariz. St. L.J. 547 (1993); Margaret Howard, *Dewsnupping the Bankruptcy Code*, 1 J. Bankr. L. & Prac. 513 (1992).

That doesn't stop the Woolseys from trying to argue otherwise. In their view, *Dewsnup* controls the meaning of the term "secured" under § 506(d) only in Chapter 7 cases. The very same term in § 506(d), they contend, should be given an entirely different meaning when it comes to handling Chapter 13 cases — requiring proof of value to avoid lien removal, just as the plain language of § 506(a) suggests. And we must admit their argument isn't entirely without appeal.

Take *Dewsnup*'s reasoning first. When interpreting § 506(d), *Dewsnup* relied heavily on perceptions about Chapter 7 practice. But, of course, § 506(d) applies equally to bankruptcies like the Woolseys' proceeding under Chapter 13. And as the Woolseys point out, very different considerations are at work in Chapter 7 liquidation bankruptcies than in reorganization bankruptcies under Chapter 13. In a Chapter 7 bankruptcy, the debtor liquidates his non-exempt assets to provide for immediate repayment of as much of his debt as possible, and in exchange receives immediate relief from dischargeable debt. *See Marrama v. Citizens Bank of Mass.*, 549 U.S. 365, 367 (2007). The satisfaction of secured creditors comes primarily from a foreclosure sale of the collateral, and for this reason under pre-code practice there wasn't usually much reason to allow the debtor to void a lien on property he will be forced to surrender in any event. By contrast, in a Chapter 13 case the debtor's obligations are not met primarily through liquidation. Instead of selling his assets to meet his debts, the debtor has

to commit a portion of his *future* income for a period up to five years as part of the bankruptcy repayment plan. In exchange, "[t]he benefit to the debtor of developing a plan of repayment under Chapter 13, rather than opting for liquidation under Chapter 7, is that it permits the debtor to protect his assets." H.R. Rep. No. 95-595, at 118 (1977), *reprinted in* 1978 U.S.C.C.A.N. 5963, 6079.

All this suggests that lien stripping has a very different role to play in Chapter 13 than in Chapter 7. While voiding a lien may afford few benefits in a Chapter 7 proceeding, it may be more integral to achieving Chapter 13's goals. After all, if the law always precluded lien stripping in the Chapter 13 context, a debtor hoping to keep his property would have to provide for full repayment of a lien no matter how large, even if his debt is secured by worthless collateral. Faced with the prospect of paying much more than the property is worth under a Chapter 13 plan, many more debtors would likely throw up their hands and simply opt for liquidation. And this result would run contrary to Congress's preference for individual debtors to use Chapter 13 instead of Chapter 7. *See id*. at 118. It would undercut Congress's aim to allow individual debtors "to retain the pride attendant" on satisfying a repayment plan rather than face the "stigma" of liquidation. *Id*. It would thwart Congress's stated purpose to change "the treatment of secured creditors" in Chapter 13 to focus on "the true value of the goods" secured as collateral rather than simply the lien's "value as leverage" against the debtor. *Id*. at 124. And it would not even obviously help creditors as

a whole: because Chapter 13 debtors commit future income to debt repayment, unsecured creditors' losses are often "significantly less than [when] debtors opt for" liquidation. *Id*. at 118; *see also In re McDonald*, 205 F.3d 606, 614 (3d Cir. 2000). For all these reasons, and as *Dewsnup* itself recognized, pre-code practice in reorganization cases like those under Chapter 13 (unlike pre-code Chapter 7 liquidation practice) often *permitted* liens to be stripped down to the value of the collateral. 502 U.S. at 418-19.[2]

Not only does *Dewsnup*'s reasoning rest on peculiarities of the Chapter 7 context bearing little relevance to Chapter 13 practice, the case expressly instructs us to read its holding narrowly. It tells us that its holding is limited to "the case before us" and that "other facts . . . await their legal resolution on another day." *Id*. at 417. It adds candidly that the Court found it impossible to "interpret[] the statute in a single opinion that would apply to all possible fact situations." *Id*. at 416. And taking up this invitation to give the decision a crabbed reading, every federal court of appeals to consider the question has already refused to extend

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[2] *See also Haberman v. St. John Nat'l Bank (In re Haberman)*, 516 F.3d 1207, 1213 (10th Cir. 2008); *Enewally v. Wash. Mut. Bank (In re Enewally)*, 368 F.3d 1165, 1170 (9th Cir. 2004) ("The rationales advanced in the *Dewsnup* opinion for prohibiting lien stripping in Chapter 7 bankruptcies . . . have little relevance in the context of rehabilitative bankruptcy proceedings under Chapter 11, 12, and 13, where lien stripping is expressly and broadly permitted") (quotation omitted); *Wade v. Bradford*, 39 F.3d 1126, 1128 (10th Cir. 1994); *Harmon*, 101 F.3d at 581-82 & n.4; Margaret Howard, *Secured Claims in Bankruptcy: An Essay on Missing the Point*, 23 Cap. U. L. Rev. 313, 314-16 (1994).

Dewsnup's definition of the term "secured claim" to other statutory provisions using that term in Chapter 13, where the focus is on reorganization rather than liquidation.[3] This same pattern — of circuits distancing themselves from *Dewsnup* — recurs in Chapter 11 and Chapter 12 reorganization cases.[4] Most notably, the Supreme Court itself has declined to extend *Dewsnup*'s understanding of the term "secured claims" when it appears in Chapter 13. *See Nobelman v. Am. Sav. Bank*, 508 U.S. 324, 328 (1993) ("secured claim" in § 1322(b)(2) is defined with reference to § 506(a) and the value of the collateral); *Assocs. Commercial Corp. v. Rash,* 520 U.S. 953, 960 (1997) (same in § 1325(a)(5)(B)). So it is that *Dewsnup* has lost every away game it has played: its definition of "secured claim" has been rejected time after time elsewhere in the code and seems to hold sway only in § 506(d).

Building on all this, the Woolseys invite us to hand *Dewsnup* a loss even on its home court, within § 506(d) itself. *Dewsnup* suggests that the term "secured claim" may mean something different in § 506(d) than it does in the rest of the bankruptcy code, and many circuits and the Supreme Court itself have now

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[3] *See, e.g.*, *Haberman,* 516 F.3d at 1213; *Enewally*, 368 F.3d at 1169-70; *Bartee v. Tara Colony Homeowners Assoc. (In re Bartee)*, 212 F.3d 277, 291 n.21 (5th Cir. 2000).

[4] Chapter 11: *Wade v. Bradford*, 39 F.3d 1126, 1128-30 (10th Cir. 1994); *In re Heritage Highgate, Inc.*, 679 F.3d 132, 144 (3d Cir. 2012). Chapter 12: *Okla. ex rel. Comm'rs of the Land Office v. Crook (In re Crook)*, 966 F.2d 539, 539 n.1 (10th Cir. 1992); *Harmon*, 101 F.3d at 582.

(repeatedly) held as much. All that, of course, is curious enough in light of the "normal rule" that identical words bear identical meaning throughout a statutory structure. *Sullivan*, 496 U.S. at 484. But, the Woolseys say, we should go now a step further and read the term "secured claim" to mean two different things *even within § 506(d) itself*. When a Chapter 7 case comes along, they say, the term should mean what *Dewsnup* says it means: any claim secured under state property law is protected from removal, even if backed by no value. But when a court is faced with a Chapter 13 case, they argue, the term should be read to require proof of value before a lien is protected from removal in accord with § 506(a). They stress that *Dewsnup*'s rationales are limited to Chapter 7 cases and that *Dewsnup* itself seems to suggest the term "secured claims" may be interpreted to mean different things in different "fact situations." 502 U.S. at 416.

Though we must admit the Woolseys' invitation to undo *Dewsnup* in this way has its attractions, it's an especially odd invitation to issue, let alone for this court to accept. After all, it violates yet another and even more elementary rule of statutory interpretation: the rule against "[a]scribing various meanings to a *single* iteration" of a statutory term in different applications. *Ratzlaf v. United States*, 510 U.S. 135, 143 (1994) (emphasis added) (internal quotation marks omitted). Though giving a term different meanings in different but related statutes is one thing and disfavored enough, in recent years the Supreme Court

has suggested that giving a *single* use of a term different meanings is another thing altogether, a ploy not just frowned upon but methodologically incoherent and categorically prohibited: "To give these same words a different meaning for each category [of cases to which they apply] would be to invent a statute rather than interpret one." *Clark v. Martinez*, 543 U.S. 371, 378 (2005); *see also id.* at 386 (rejecting "the dangerous principle that judges can give the same statutory text different meanings in different cases"); *United States v. Santos*, 553 U.S. 507, 522-23 (2008) (opinion of Scalia, J.) (*Clark* "forcefully rejected" the notion that courts could "giv[e] the same word, in the same statutory provision, different meanings in different factual contexts" (emphasis omitted)).

Applying this rule, the Supreme Court has refused to give different meanings to a single statutory term even when the case for doing so is far stronger than the case the Woolseys are able to muster here. In *Clark*, for example, the Supreme Court held that when a statutory provision is given a limiting construction to avoid a serious constitutional question arising from one of its potential applications, that interpretation governs *all* applications of the provision — even those that do not raise the same constitutional concerns. *Clark*, 543 U.S. at 377-78. While noting that "the statutory purpose and the constitutional concerns" motivating the prior limiting construction were not present in the case before it, the Court held this still "cannot justify giving the *same* . . . provision a different meaning" in different factual circumstances. *Id.* at

380 (emphasis in original). Rather, "the lowest common denominator, as it were, must govern." *Id*. Similarly, the Court has held, when a statute possesses both criminal and civil applications a narrowing interpretation in a criminal case driven by the rule of lenity must apply equally to civil litigants to whom lenity would not ordinarily extend. *Id*. at 380 (citing *United States v. Thompson/Center Arms Co*., 504 U.S. 505, 517-518 & n. 10 (1992) (plurality opinion) and *id*. at 519 (Scalia, J., concurring in judgment)). If the rules of lenity and constitutional avoidance — powerful and long-standing interpretive traditions — fail to justify giving multiple meanings to a statutory term, it's difficult to see how anything the Woolseys offer us in this case might.

Not only is the rule against multiple interpretations of the same statute well entrenched, it is of special importance. Without it, even a statutory term used but a single time in a single statute risks never settling on a fixed meaning. And this surely would leave citizens at sea, only and always guessing at what the law might be held to mean in the unique "fact situation" of the next case — a result in no little tension with the rule of law itself. *See id*. at 382 (to accept that the same statutory provision could have multiple meanings "would render every statute a chameleon, its meaning subject to change . . . in each individual case").

Given all this, it's perhaps no surprise that of all the circuit courts approving of lien stripping in reorganization cases, not a single one has taken up the Woolseys' invitation to do so using § 506(d). Instead, they have relied

exclusively on other statutory provisions particular to those chapters. *See, e.g.*, *Wade*, 39 F.3d at 1129 (permitting lien stripping in Chapter 11 cases under 11 U.S.C. § 1129(b)(2)); *Harmon*, 101 F.3d at 583 (permitting lien stripping in Chapter 12 cases under 11 U.S.C. § 1225(a)(5)); *In re Lane*, 280 F.3d 663, 665 (6th Cir. 2002) (permitting lien stripping in Chapter 13 cases under 11 U.S.C. § 1322(b)(2)); *see also* 4 *Collier on Bankruptcy*, ¶ 506.06[1] (16th ed. 2011) ("[T]here is no principled way to conclude that, although section 506(d) does not authorize lien stripping in chapter 7 cases, it has a different meaning in chapter 11, 12, and 13 matters.").

In light of recent and unambiguous Supreme Court precedent repudiating the interpretive move the Woolseys invite us to take, and because the Woolseys never even pause to confront this precedent, we decline to follow where they wish to lead. We do not doubt a strong argument can be made that the language and logic of § 506 permit the Woolseys to void not only Citibank's lien but any lien to the extent it is unsupported by value in the collateral. But we fail to see any principled way we might, as lower court judges, get there from here. *Dewsnup* may be a gnarled bramble blocking what should be an open path. But it is one only the Supreme Court and Congress have the power to clear away.

* * *

Having said that much, we candidly acknowledge we thought at first there might possibly be a way around *Dewsnup*, if not a way to plow through it so

directly as the Woolseys urge. As we've already alluded to, many courts seeking to avoid *Dewsnup*'s pinch have invoked provisions specific to the reorganization chapters to permit the removal or stripping down of liens unsupported by value. And when it comes to Chapter 13, many courts have already identified one apparently promising candidate in § 1322(b)(2).

Section 1322 sets forth the provisions a Chapter 13 reorganization plan may contain (as well as some that it must). Relevant for our purposes is § 1322(b)(2), which provides that the plan may

> modify the rights of holders of secured claims, other than a claim secured only by a security interest in real property that is the debtor's principal residence, or of holders of unsecured claims, or leave unaffected the rights of holders of any class of claims[.]

In broad strokes, this provision permits a debtor's plan to modify the rights of secured or unsecured creditors — all as part of Chapter 13's general effort to find a realistically achievable repayment plan. Of course, the power to modify creditors' claims is qualified — qualified both by other parts of § 1322 not at issue here, and by § 1322(b)(2)'s own internal limitation on the modification of secured claims in real property. But those exceptions aside, the first and third clauses of § 1322(b)(2) arm the debtor with considerable power to modify the rights of secured and unsecured creditors alike.

At first we wondered whether this modification power might include the ability to strip off a lien unsupported by value in its collateral. To be sure,

§ 1322(b)(2) itself prohibits modification of the rights of the "holder of a secured claim" supported by a lien on the debtor's home. But the Supreme Court's decision in *Nobelman v. American Savings Bank*, 508 U.S. 324 (1993), can be read to suggest that for a claim to be "secured" and therefore trigger the anti-modification clause in § 1322(b)(2), it must be supported by at least some value in the collateral — just as § 506(a) (but not *Dewsnup*) says. *Nobelman*, 508 U.S. at 328-31. Indeed, no fewer than six circuits have already read *Nobelman* this way and held a debtor may invoke § 1322(b)(2) to remove a wholly unsecured lien, even if that lien is secured against the debtor's principal residence. *See Lane v. W. Interstate Bancorp (In re Lane)*, 280 F.3d at 665; *Zimmer v. PSB Lending Corp. (In re Zimmer)*, 313 F.3d 1220, 1221 (9th Cir. 2002); *Pond v. Farm Specialist Realty (In re Pond)*, 252 F.3d 122, 127 (2d Cir. 2001); *McDonald*, 205 F.3d at 615; *Bartee*, 212 F.3d at 280; *Tanner v. FirstPlus Fin., Inc. (In re Tanner)*, 217 F.3d 1357, 1360 (11th Cir. 2000); *see also* 8 *Collier on Bankruptcy*, *supra*, ¶ 1322.06[1][a][i].

The hitch is, the Woolseys didn't choose to pursue this line of argument before this court in their initial briefs. What's more, they have now expressly repudiated it in a supplemental submission. This even though the bankruptcy court offered a favorable discussion of lien stripping under § 1322(b)(2), uniform circuit precedent endorses it, and an amicus brief in this case from the National Association of Consumer Bankruptcy Attorneys ably argued the point. For their

part, however, the Woolseys only glancingly referred to § 1322(b)(2) in their opening briefs. Wanting to know more about that provision in light of all the authority discussing it as a possible avenue for relief for debtors like the Woolseys, we decided to ask the parties for supplemental briefing on the question whether § 1322(b)(2) permits a Chapter 13 debtor to remove a wholly unsecured lien even if § 506(d) does not. In response, the Woolseys made plain that they wanted no part of the argument. They emphatically announced "[t]here is no Code provision other than 11 U.S.C. §506(d) that declares void a wholly unsecured lien." Appellants' Supp. Br. at 4.

And that leaves us in an awkward place. There's a potentially promising argument for the Woolseys, one suggested by their own amicus, but one they want no part of. Whatever our power to tackle the § 1322(b)(2) question in these circumstances, nothing *requires* us to do so, to foist on litigants arms they so avidly refuse to take up in the adversarial arena. So in deference to their wishes, we opt today against forcing a § 1322(b)(2) argument onto the unwilling Woolseys and leave that statute and its meaning for another day when a bankruptcy petitioner actually wants to pursue the question. In this case, we limit ourselves to the question the Woolseys do want us to address: did the bankruptcy and district courts err in holding that § 506(d) precluded them from removing Citibank's lien? The answer to that narrow question, we have seen, has to be no

so long as *Dewsnup* remains the law. For that reason (and that reason alone) we affirm.[5]

[5] Because this is a sufficient basis to affirm the bankruptcy court's refusal to confirm the plan proposing to remove Citibank's lien, we have no need to consider the bankruptcy court's separate holding that the Woolseys' plan was *also* deficient for failing to include the so-called "lien retention" language in § 1325(a)(5)(B)(i)(II).

Chapter 13 Model Plans

Hon. R. Kimball Mosier
United States Bankruptcy Court , District of Utah

Model Chapter 13 Plans - If you don't have it now, you soon will.

"[T]he Code makes plain that bankruptcy courts have the authority – indeed, the obligation – to direct a debtor to conform his plan" to the requirements of the bankruptcy code. *United Student Aid Funds, Inc. V. Espinosa*, 130 S.Ct. 1367 (2010). A bankruptcy court is required "to address and correct a defect in a debtor's proposed plan even if no creditor raises the issue." *Id.*

In order to insure that chapter 13 plans comply with the provisions of the bankruptcy code, many courts have adopted model plans. A national model chapter 13 plan is under consideration.

In the District of Colorado bankruptcy judges have issued conflicting orders but it appears the model plan is gaining the upper hand. In *In re Gordon*, 417 B.R. 614 (D. Colo. 2012), the chapter 13 trustee and a secured creditor appealed bankruptcy court orders confirming the debtor's chapter 13 plan that did not conform to the model plan adopted by the United States Bankruptcy court for the District of Colorado. The District Court reversed the bankruptcy court concluding that the non-standard plan language proposed by the debtors and approved by the bankruptcy court conflicted with the claims processing procedures and other requirements of the bankruptcy code and rules. "Most important, the non-standard language improperly eliminates the requirement that a Chapter 13 plan remain in compliance with the Code even after the plan has been confirmed." *Id.* at 625. In reversing the bankruptcy court, in district court referred to and adopted the position of Judge Tallman in *In re Butcher*, 459 B.R. 115 (Bankr. D. Colo. 2011). As Judge Tallman stated, requiring debtors to use a model plan is not inconsistent with the bankruptcy code and does not deprive debtors of any rights.

> The narrow issue before the Court is whether the Court may deny confirmation of the Debtor's chapter 13 plan on account of their failure to propose a plan in accordance with the district's Local Rules and Form Plan. The Court concludes that it may deny confirmation of such a plan. The Court rejects the Debtor's argument that Section VII of the Court's Form Plan exceeds the Court's rule-making authority because it is contrary to the Bankruptcy Code. The Court's L.B.R. 3015-1 and L.B. Form 3015-1.1 fall well within the Court's authority to establish rules regulating the practice and procedure before the Court. Use of the prescribed procedures and forms for chapter 13 plans deprive no debtor of rights granted by the Bankruptcy Code nor do the Court's Local Rules or Form Plan alter the substantive rules of decision with respect to the confirmation of plans or the allowance of claims. Indeed, the prescribed procedures and forms assure a balance enforcement of parties' rights and fair application of substantive law respecting plan confirmation and claims allowance.

Id. at 134.

THE *ROOKER-FELDMAN* DOCTRINE AND PRECLUSION LAW

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THE *ROOKER-FELDMAN* DOCTRINE AND PRECLUSION LAW

I. The *Rooker-Feldman* Doctrine

A. History. The *Rooker-Feldman* doctrine derives from two U.S. Supreme Court cases: *Rooker v. Fidelity Trust Co.*, 263 U.S. 413, 68 L. Ed. 362, 44 S. Ct. 149 (1923), and *District of Columbia Court of Appeals v. Feldman,* 460 U.S. 462, 75 L. Ed. 2d 206, 103 S. Ct. 1303 (1983). Prior to the year 2005, the *Rooker-Feldman* doctrine had been applied by the Supreme Court only twice, in *Rooker* and in *Feldman*. In *Rooker,* the plaintiffs sought to have the federal district court declare a state court judgment null and void. In *Feldman,* the plaintiffs commenced an action in federal court against the appellate court that denied their bar applications. In both cases the Supreme Court ruled that the cases were properly dismissed for lack of subject-matter jurisdiction.

B. The Doctrine. In the case of *Exxon Mobil Corp. v. Saudi Basic Indus. Corp.*, 544 U.S. 280, 125 S. Ct. 1517, 161 L. Ed. 2d 454 (2005), after recognizing that lower courts had construed the *Rooker-Feldman* doctrine beyond the contours of the *Rooker* and *Feldman* cases—thereby superseding the ordinary application of preclusion law—the Court defined the *Rooker-Feldman* doctrine as follows:

> The *Rooker-Feldman* doctrine, we hold today, is confined to cases of the kind from which the doctrine acquired its name: cases brought by state court losers complaining of injuries caused by state-court judgments rendered before the district court proceedings commenced and inviting district court review and rejection of those judgments. *Rooker-Feldman* does not otherwise override or supplant preclusion doctrine or augment the

> circumscribed doctrines that allow federal courts to stay or dismiss proceedings in deference to state-court actions.

In so holding, the Court distinguished between a suit seeking to overturn or invalidate a state court judgment, and a suit attempting to litigate a matter previously litigated in state court. In the former instance, the *Rooker-Feldman* doctrine applies and the federal court lacks subject-matter jurisdiction; in the latter, the federal court has subject-matter jurisdiction and applies the principles of preclusion.

II. Preclusion. The Full Faith and Credit Act, 28 U.S.C. § 1738, requires federal courts to "give the same preclusive effect to a state-court judgment as another court of that State would give." *Exxon*, 544 U.S. at 293 (citations omitted). Unlike the *Rooker-Feldman* doctrine, preclusion is not a jurisdictional matter. The most common preclusion grounds are collateral estoppel (issue preclusion) and res judicata (claim preclusion).

A. Collateral Estoppel (Issue Preclusion). While the elements of collateral estoppel may vary slightly by state, the typical elements are as follows: (1) the issue decided in the prior adjudication must be identical to the one presented in the action in question; (2) there must be a final judgment on the merits; (3) the party against whom the plea is asserted must be a party in privity with a party to the prior adjudication; and (4) the issue in the first action must be completely, fully, and fairly litigated. *See In re Johnson (Newman v. Johnson),* 473 B.R. 447, 455 (Bankr. D. Utah 2012) (collateral estoppel elements under Utah law).[1]

[1] The four elements required for issue preclusion under Colorado law are: (1) the issue sought to be precluded must be identical to an issue actually and necessarily decided at a prior proceeding; (2) there must have been a final judgment on the merits at the first proceeding; (3) there must be identity of parties or privity between the parties against whom the doctrine is asserted; and (4) the party against whom collateral estoppel is asserted must have had a full and fair opportunity to litigate the issue in the prior proceeding. *See In re Glaser,* 2012 Bankr. Lexis 1889, *29 (Bankr. D. Colo. April 30, 2012).

B. Res Judicata (Claim Preclusion). The typical elements of res judicata are: (1) the prior suit must have ended with a judgment on the merits; (2) the parties must be identical or in privity; (3) the suit must be based on the same cause of action; and (4) the party must have had a full and fair opportunity to litigate the claim in the prior suit. *Nwosun v. General Mills Restaurants, Inc.*, 124 F.3d 1255, 1257 (10th Cir. 1997).

III. Recent Cases Applying the *Rooker-Feldman* Doctrine and/or Preclusion Principles.

A. *In re Miller*, 666 F.3d 1255 (10th Cir. February 1, 2012). *Miller* involved an appeal of the bankruptcy court's order granting a secured creditor's motion for relief from the automatic stay, and the debtor's defense that the alleged creditor lacked standing because it did not have possession of the promissory note. The BAP relied on the *Rooker-Feldman* doctrine and held that the Colorado state court's prior order that the creditor was an "interested person" entitled to an order authorizing sale, under Colorado law, prohibited the bankruptcy court from ruling on the debtor's standing defense.

The Tenth Circuit reversed, holding that the standing issue raised by the debtor should have been analyzed under collateral estoppel rather than the *Rooker-Feldman* doctrine. The Tenth Circuit relied on *Exxon's* definition of the *Rooker-Feldman* doctrine, noted that the party seeking affirmative relief in the bankruptcy case (the creditor) was not the "losing" party in state court, and stated that "attempts merely to relitigate an issue determined in a state case are properly analyzed under issue or claim preclusion principles rather than *Rooker-Feldman*." 666 F.3d at 1261.

Then, applying Colorado issue preclusion principles, the Tenth Circuit held that the bankruptcy court was not precluded from determining whether the alleged creditor had standing because the state court order was not a final order. *See id*. at 1262 ("proceedings pursuant to C.R.C.P. 120 are not adversarial in nature, are not final, and generally no appeal may be taken to review the resulting orders.").

B. *In re Campbell*, 682 F.3d 1278 (10th Cir. June 22, 2012). The Court in *Campbell* stated that, in the Tenth Circuit, "[w]hen a state court judgment is not itself at issue, the [*Rooker-Feldman*] doctrine does not prohibit federal suits regarding the same subject matter, or even the same claims, as those presented in the state-court action." 682 F.3d at 1281.

The Tenth Circuit focused on the *Feldman* court's use of the term "inextricably intertwined," which has caused confusion in subsequent lower court decisions. Referring to the U.S. Supreme Court, and specifically the Court's decision in *Exxon*, the Tenth Circuit stated: "The Court certainly did not mean that a claim is inextricably intertwined with a judgment just because the issues raised by the claim had been (or could have been) resolved in the proceedings leading to the judgment." *Id*.

Thus, rather than try to "untangle the meaning of *inextricably intertwined*[,] [t]he essential point is that barred claims are those 'complaining of injuries caused by the state-court judgments.' In other words, an element of the claim must be that the state court wrongfully entered its judgment." *Id*. at 1283.

One example used by the Tenth Circuit was that a plaintiff who lost a civil-rights claim in state court would not be barred by *Rooker-Feldman* from bringing an identical civil-rights claim in federal court. Instead, the defendant to the federal suit would have to rely on preclusion doctrine.

C. *In re Kline*, 472 B.R. 98 (10th Cir. BAP June 1, 2012). *Kline* involved a debtor's appeal of the bankruptcy court's order granting summary judgment dismissing debtor's claims for willful violations of the automatic stay. The creditor had previously obtained a foreclosure judgment in state court, and the debtor later filed an adversary proceeding alleging willful violations of the automatic stay based on the creditor's conduct in the state court foreclosure action.

Even though the debtor did not directly seek reversal of the state court foreclosure judgment, the BAP held that the *Rooker-Feldman* doctrine applied because "the relief [the debtor] seeks and the arguments [the debtor] presents would necessarily require the bankruptcy court to reject the Foreclosure Judgment." 472 B.R. at 106.

D. *In re Johnson (Newman v. Johnson)*, 473 B.R. 447 (Bankr. D. Utah May 25, 2012). *Johnson* involved cross-motions for summary judgment to determine the dischargeability of a debt pursuant to 11 U.S.C. §§ 523(a)(5) & 523(a)(15). The main issue was whether the creditor was a "former spouse" under Section 523(a)(15), and whether the *Rooker-Feldman* doctrine or issue preclusion prevented the debtor from claiming that he was never married to the creditor.

The bankruptcy court found that the *Rooker-Feldman* doctrine barred it from determining whether the creditor was the "former spouse" of the debtor.

The state court divorce decree, and related findings of fact and conclusions of law, found that the parties had been married. The bankruptcy court held that the issue of whether the parties were married was "inextricably intertwined" with the divorce decree because it would "create an absurdity of Utah law" to determine that one could have a divorce decree without being legal spouses. 473 B.R. at 455.

In the alternative, the bankruptcy court also held that collateral estoppel, equitable estoppel, and judicial estoppel barred the debtor from claiming the creditor was not his former spouse, based on the divorce decree's finding that the parties had been married. *Id*. at 455-57.

E. *In re Glaser,* 2012 Bankr. Lexis 1889 (Bankr. D. Colo. April 30, 2012). *Glaser* involved an adversary proceeding brought by a creditor under 11 U.S.C. §§ 523 (a)(2), 523(a)(4), and 523(a)(6). Holding that the *Rooker-Feldman* doctrine did not apply, the bankruptcy court found that the state court judgment did not involve the question of dischargeability and therefore the nondischargeability action presented an independent claim from the state court judgment.

The bankruptcy court did find, however, that collateral estoppel warranted the finding of nondischargeability based on the state court judgment.

RECENT UPDATES AND TRENDS WITH FEES IN CHAPTER 7, 11, AND 13

N. APRIL NORTON

INTRODUCTION

Attorney fees in bankruptcy cases continue to be an area of high scrutiny, not only by the case Trustees and Judges, but also by consumer colleagues and clients. As time marches on, the notion of a "fresh start" is becoming increasingly soiled in light of the attractive lures of petition preparers, through which debtors may find themselves misguided, misinformed, and misrepresented; Chapter 7 post filing attorney fee reaffirmation agreements that leave debtor's financial liability slate deceptively clean; and myriad attorney fee issues, concerns, and objections that may conjure a feeling of betrayal and abuse. Nonetheless, an abundant recovery of fees is absolutely necessary to encourage skilled, competent counsel to continue to represent debtors through the process. When all is said and done- how fresh is fresh?

PETITION PREPARERS

Wieland vs. Assaf (In re Briones-Coroy), 2012 Bankr. LEXIS 5160 (Bankr. D. Colo. October 23, 2012)- In an 88 page opinion, the Court ordered injunctive relief barring the petition preparer Mr. Emmanuel M. Assaf d/b/a/ Emmanuel Assaf Debt Relief Agency ("defendant") from providing services, directly or indirectly, for a period of ten (10) years in both the state of Colorado and the United States from operating as a debt relief agency and/or bankruptcy petition preparer pursuant to 11 U.S.C. §110(j)(2)(A). Additionally, damages, including the forfeiture of fees paid amounting to a sum not less than $603,060.00, were ordered.

The action was initiated by the United States Trustee's adversary proceeding concerning 241 similar cases requesting that the Court assess appropriate sanctions, under 11 U.S.C. §110, for alleged wrong doing and that the defendant be barred from acting as a petition preparer or engaging in bankruptcy related services.

During the course of a three (3) day trial, the United States Trustee produced evidence demonstrating that defendant had previously been subject to Court action in both California and Colorado for violations of 11 U.S.C. §110, extending into the unauthorized practice of law, and that defendant failed to disclose his entire fee to his customers and violated 11 U.S.C. §110(h)(2) by filing disclosures of compensation with the Court that also failed to reveal the total fee

charged. Defendant also violated 11 U.S.C. §110(g) by collecting and paying Court filing fees from customers. He additionally neglected to properly disclose his identity and signed forms he prepared that included credit counseling and financial management course documents. Exceptionally disturbing evidence also established that defendant had given legal advice, though not a licensed attorney, to customers including whether a bankruptcy should be filed, what chapter for relief should be pursued, and whether the debtors were entitled to a bankruptcy discharge in violation of 11 U.S.C. §110(e)(2). The summation was that defendants continuing conduct was fraudulent, unfair and deceptive under 11 U.S.C. §110(i)(1) and required injunctive relief pursuant to 11 U.S.C. §110(j)(2)(A).

CHAPTER 7

In re Bernhardt (Bankr. Colo. 2012)- Fees awarded in the subject case were vacated and Attorney was ordered to disgorge fees previously collected; Attorney was also sanctioned $500 in nine (9) cases totaling $4,500.

United States Trustee pursued Motion to Determine Reasonableness of Fees Charged by Attorney seeking a denial of fees for numerous concerns including billing time for appearances he did not make (a substitute attorney filled in), no disclosure to the Court of a fee arrangement, if any, for substitute attorney, and charging flat fees for "average" amounts of time instead of actual amounts of time spent.

Attorney represented to the Court specific amounts of time and travel expenses that were used to appear at a hearing. However, the Minutes of Proceeding revealed that the attorney actually appeared telephonically. The false representation created cause for the complete denial of compensation in the particular case pursuant to 11 USC §328(c). Representations were also made, in the itemizations of time spent, that Attorney spent time to "download read and review Trustee's minutes from §341 meeting" in Colorado cases, yet the Colorado Chapter 13 Trustee does not file copies of the §341 minutes with the Court.

Fees were requested in numerous cases that exceeded the amount disclosed in the Rule 2016 Disclosure of Compensation.

Attorney's Rule 2016 disclosure in all subject cases stated that the fee would be charged based on actual time spent. Despite this, Attorney admitted using a "template" for creating time entries on his fee applications that contained average amounts of time, or a "flat rate," for common services instead of actual time spent.

Rule 2016(b) requires that every attorney for a debtor, whether or not the attorney is applying for compensation, must file a statement pursuant to 11 USC §329 through which an indication must

be made as to whether the attorney has agreed to share compensation with any other entity. If an attorney seeks the assistance of a substitute attorney to cover a hearing, the attorney must disclose the substitute attorney and any compensation to the client, obtain client's consent, and disclose the arrangement through a Rule 2016 statement. See Colo. R. Prof. Con. 1.5(d)(2) and (4).

In re Martin, 197 B.R. 120 (Bankr. D. Colo. 1996)- United States Trustee filed an Application for Examination of Attorney's Fees and Fee Agreement Pursuant to 11 U.S.C. §329 in response to the fee arrangement providing debtor would pay attorney fees after the petition for Chapter 7 relief was filed. Court concluded that a conflict of interest arose on the date of filing warranting a determination that post-petition fees were excessive and unreasonable. The flat fee arrangement left the Court unable to determine the amount of fees incurred prior to the conflict and therefore canceled the entire fee.

Attorney presented two (2) options for payments of Chapter 7 attorney fees to debtor prior to case filing. Debtor chose the option that allowed him to pay the Court filing fee upfront followed by monthly installment payments for the attorney fees after the case was filed.

The attorney did not discuss the dischargeability of the pre-petition fees which remained unpaid at the time the case was filed. Attorney did not believe the fee was subject to discharge and therefore did not believe an advisement was necessary.

Attorney filed a Rule 2016 disclosure which reflected the agreed upon fee, that none of the fee had been paid prior to filing, and that the entirety of the fee would be collected from Debtor.

Concerning the agreement itself, the Court noted a public policy concern in affording debtors access to bankruptcy counsel but agreed with the reasoning presented in *Hessinger & Assoc. v. U.S. Trustee (In re Bigger),* 185 B.R. 825 at 829 (N.D. Cal. 1995): "Public policy concerns cannot trump the plain language of the Bankruptcy Code. Moreover, the public policy concerns are not one-sided. On the other side is the public interest in providing an honest debtor with a fresh start unhindered by debt. If Congress wishes to amend the code to provide an exception for the debt owed to an attorney who has prepared and filed a bankruptcy petition it may, but it is not the Court's role to create such an exception."

The Court also analyzed the issue of whether a conflict of interest was created by the agreement since the agreement essentially created a creditor in Attorney whose self-interest was to except the pre-petition attorney fee arrangement from debtor's discharge. The Court found guidance in the comment to Rule 1.7 of the Colorado Rules of Professional Conduct: "The lawyer's own interest should not be permitted to have adverse effect on the representation of the client."

Specific conflicts of interest were spelled out in the fee agreement itself by including remedies to Attorney should debtor default including a provision authorizing attorney to withhold post-petition representation if the pre-petition debt was not paid as required.

In re Perez, 177 B.R. 319 (Bankr. Neb., 1995)- The Court found that it is a necessary right of debtors' counsel to obtain a reaffirmation of attorney fees in order to provide indigent debtors, or other debtors who cannot pay the fees upfront, representation during their Chapter 7 case. The agreement must comply with 11 U.S.C. §524(c) and (d). Unless the debtor is advised by independent counsel on whether to enter into the reaffirmation agreement, Attorney must request a hearing on the agreement and the debtor must participate (in person, telephonically, or otherwise) so that the Court can become satisfied that debtors are fully informed of their rights.

Attorney agreed to represent debtors in exchange for a promissory note for attorney fees. The note spelled out debtor's obligation to make installment payments to Attorney for Chapter 7 representation. Debtors also granted Attorney a security interest in a 1976 Chevrolet Blazer to secure the note. After the Chapter 7 case was filed, debtors and Attorney signed and filed a reaffirmation agreement for the attorney fees with the Court.

The United States Trustee stepped in and requested that the Court examine the fee agreement pursuant to Federal Bankruptcy Rule 2017. The Trustee's specific concerns were: (1) that the agreement constituted an undue hardship on debtors since debtors' budget reflected negative disposable income, (2) that portions of the reaffirmation agreement did not comply with 11 U.S.C. §524(c), and (3) that the conflict of interest created by the agreement necessitated independent counsel to properly represent debtors in negotiating the agreement.

In response, the Court directed Attorney to request a hearing on the reaffirmation agreement. The Court encouraged to United States Trustee to present the issues of undue hardship and compliance with 11 U.S.C. §524(c) at a hearing on the agreement.

In re Laberge, 380 B.R. 277 (Bankr. D. Mass. 2008)- Using the Lodestar method, the Court determined that $6,000 for simple, no asset, Chapter 7 was excessive.

CHAPTER 11-

In re Xavier PS, Inc., 2012 Bankr. LEXIS 721 *(*Bankr. D. Colo. Feb. 27, 2012*)*- Law Firm was required to disgorge all fees, to the tune of $36,000, received both pre and post-petition. The Order entered due to failure to disclose a second retainer received after the case was filed and

also the application of pre and post-petition retainers to fees, without first filing a fee application and obtaining Court approval, thereby failing to comply with the disclosure requirements of 11 U.S.C. § 329 and Bankruptcy Rule 2016(b).

2016(b) requires that the statement required under 11 U.S.C. §329 be provided to the United States Trustee within fourteen (14) days from the Order for relief and also "a supplemental statement shall be filed and transmitted to the United States Trustee within fourteen (14) days after any payment or agreement not previously disclosed"

Action was presented on prior Chapter 11 debtors' Motion to Require Disgorgement of All Fee Payment Taken without Court Approval and Disclosure in the Chapter 11 Proceeding after the Chapter 11 was dismissed. Court noted that despite the case dismissal, jurisdiction was retained to hear the matter pursuant to 11 U.S.C. § 330 to review and approve attorney fees.

Attorney never requested an interim payment procedure to allow periodic payment of fees and costs citing extenuating circumstances and a mistaken belief that separate Court approval was not necessary based on the language contained within the order authorizing use of cash collateral.

Waldron v. Adams & Reese, L.L.P. (In re American Int'l Refinery, Inc.), 56 Bankr.Ct.Dec. 67, 82 Fed.R.Serv.3d 109, 676 F.3d 455 (5th Cir., 2012)- The Fifth Circuit, addressing an issue of apparent first impression, determined that the totality of circumstance was the better test, as opposed to a per se approach, to determine whether the payment of a retainer by a third party created a disqualifying interest. While both the actual retainer payment by a creditor, and law firm's prior representation of the debtors, did not constitute a disqualifying interest, law firm's failure to properly disclose the relationship to the Court lead to sanctions of $135,000.

CHAPTER 13-

In re Wesseldine, 434 B.R. 31, 63 Collier Bankr.Cas.2d 1649 (Bankr. N.D.N.Y., 2010)- The Court trusts that attorneys will exercise their best business judgment and choose the hourly fee option, if and when appropriate, as counsel should be justly compensated for services rendered and should not be limited to a flat fee for exceptionally complex and complicated cases. The process should afford debtors a level of certainty, after they file for bankruptcy, in future financial obligations, including attorney fees.

The Chapter 13 Trustee objected to Attorney's fee application because Attorney charged a fee of $3,500.00 for representation from the initial consultation through plan confirmation thereby

removing certain services from representation. Attorney intended to file an adversary proceeding to avoid a mortgage on the debtors' property and charge the debtors a separate fee for the service. Part of Attorney's argument was that the flat fee, or presumptively reasonable fee, most bankruptcy attorneys work for creates an incentive for them to do as little work as possible.

The Court sustained the Chapter 13 Trustee's Objection and ordered that Attorney amend her Rule 2016 disclosure to reflect that the flat fee included all required Chapter 13 services and did not specifically carve out exceptions to representation.

In re: Nicholas Moukazis, (Bankr. E.D.N.Y., October 11, 2012)- The Court concluded that counsel for the debtor failed to exercise reasonable billing judgment and thereby reduced the requested fee by $2,500 (from $7,500 to $5,000) pursuant to 11 U.S.C. §330(a)(4)(B).

Utilizing the rationale presented in *In re Dabney*, 417 B.R. 826, at 829 (Bankr. N.D. Ga., 2009), the Court stated that a reasonable fee must accomplish many goals- it must be generous enough to encourage counsel to render exacting and necessary services while also protecting the debtor, the estate, and creditors who effectively pay the fee in cases proposing less than one hundred percent (100%) repayment since they will receive a reduced pro rata distribution.

The matter was presented to the Court on the Chapter 13 Trustee's Objection to counsel's flat fee charged in excess of the customary rate for the District in a routine case. Applicant argued that the actual billable time spent on the case exceeded the request; that high quality standards warrant additional time on files; that the high fee was further warranted based on the expertise of the attorney; and that his high overhead for providing a "Class A" office building and a large amount of staff also justified the fee.

In addition to reducing the fee requested, the Court rationalized that awarding such a high fee would create bad precedent and could consequently render representation in Chapter 13 cases unaffordable to persons most in need.

McMullen v. Schultz, 443 B.R. 236 (D. Mass., 2011)- The Court granted Attorney's Motion for Rehearing pursuant to Federal Rules of Bankruptcy Procedure 8015 after entering an Order reducing the requested Attorney's fees by $60,000 as a sanction for failing to file updated Rule 2016 disclosures with the Court. After determining that the Court had not previously considered an important aspect of the case, reconsideration was warranted pursuant to Federal Rules of Appellate Procedure 40(a)(2).

The case originally was initiated by a pro se Chapter 7 filer, in January, 2000, who subsequently retained counsel to convert the matter to Chapter 13. The case was very complicated partially

due to debtor's various real estate transactions, as a real estate agent, fueling extensive claims litigation.

Three (3) fee applications were pursued; the first resulted in an award, which discounted the request by fifty five percent (55%), the second was granted in the full amount requested, the final fee application was also awarded at an amount below the request by approximately fifteen percent (15%). By the time the final fee application was submitted, Attorney and debtor had become acrimonious. Through a very complicated and drawn out process, the debtor, then appearing pro se, filed a letter with the Court requesting an investigation of the case in light of the substantial fees and "underwhelming" results achieved.

Debtor made numerous claims against Attorney to the Court including general dissatisfaction with the results obtained in the case, and that Attorney had double-billed, charged excessive fees, fabricated charges, and repeatedly lied to the Court. Over the allegations, the Court found that the debtor was substantially better positioned after the case for reasons including the total award of cash settlements of $257,500, $20,000 in realizable value from other disallowed claims, the receipt of a discharge of a mortgage on a rental property, and a release of a deficiency judgment on a residence. See *In re McMullen*, 2009 WL 530296 (Bankr.D.Mass. Feb. 18, 2009).

At the rehearing, Attorney produced evidence that he, on numerous occasions, encouraged Debtor to settle the claims litigation issues since pursuing them with little proof had a small likelihood of recovery, would substantially increase attorney's fees, and could potentially anger the Court and that Debtor's expectations were unrealistic. Despite this, Debtor insisted on pursuing her claims to trial and ultimately recovered a large award that was largely consumed by the attorney fees.

Upon reconsideration of the appellate record, and the supplemental evidence presented, the Court increased the attorney's fees awarded by $30,000 (thereby cutting the amount previously discounted in half), finding that the debtor was adequately advised about the risks in pursuing her claims and that doing so would result in a substantial increase in attorney fees; that, despite Attorney's failure to supplement/amend his Rule 2016(b) statement warranting sanctions, Debtor was aware of the fee arrangement; that the debtor was aware of the difficulty in pursuing the claims without sufficient proof of damages; and that the debtor was also aware of the fact that Attorney was compelled to continue to represent her in light of their deteriorating relationship.

Ultimately, Attorney was awarded a total of $285,347 in attorney fees reflecting a reduction of $30,000 for his failure to properly comply with Rule 2016, but also taking into account the many hardships he faced in representing Debtor.

In re Maldonado, 2012 Bankr. LEXIS 5206 (Bankr. N.D. III. October 29, 2012)- The Court ordered debtor's counsel to disgorge attorney fees of $2,768.77 to fund debtor's Chapter 13 Plan,

pursuant to 11 U.S.C. §329, reasoning that Attorney knew the instant case was Debtor's fourth (4th) attempt and therefore, the funds should have gone towards plan payments; Attorney should have taken the risk of non-payment through the Plan. Attorney was allowed to keep $933.97 received prior to case filing as Debtor intended to be applied to attorney fees for representation in previous cases.

This case represents the fourth (4th) petition for Chapter 13 relief for which Counsel represented the same Debtor. All three (3) of the previous cases were ultimately dismissed for Debtor's failure to make plan payments. Attorney had previously received approximately $10,000.00 in compensation for the dismissed cases. Prior to filing the fourth (4th) case, Attorney received a total of $3,702.64 and applied $933.87 to balances from the prior cases. The issues presented were whether the application of the pre-petition fees to prior cases was a conflict of interest requiring consent and a waiver from Debtor and whether it was proper under 11 U.S.C. § 329 for Attorney to receive all sums previously owed, plus a substantial portion of fees for the current case, pre-petition.

At a hearing on the requested fees, the Chapter 13 Trustee argued that the receipt of the prior fee balance pre-petition constituted a preference payment under 11 U.S.C. §547 and thereby created a conflict of interest between Attorney and Debtor. Attorney's response was that pursuant to 11 U.S.C. §547(c)(4), the agreement to represent Debtor in the fourth (4th) case constituted "new value." The Court rejected Attorney's "new value" argument as Attorney would have been required to disclose the agreement in a Rule 2016(b) statement and submit an Application for Compensation- which he did not. However, the Court ultimately allowed retention of these fees based on Debtor's testimony that he knew the payment would be applied to his prior unpaid fee balance.

Additionally, the Trustee argued that Attorney breached his fiduciary duty to Debtor by putting his personal interest above his client's (following the reasoning of *In re Winthrop*, 84,8 N.E.2d 961(2006): "the attorney-client relationship constitutes a fiduciary relationship as a matter of law."). The main purpose of Debtor's Chapter 13 was to save his home and because Attorney charged so much prior to filing, Debtor was unable to make another mortgage payment putting him further behind. Court found that Attorney should have made sure he was presenting a viable case that had a decent chance of obtaining confirmation through which Debtor could complete the Plan.

In re Ezell, 2012 Bankr. LEXIS 5205 (Bankr. N.D. III. October 29, 2012)- Ruling on the United States Trustee's Motion to compel debtor's counsel to disgorge fees and request for sanctions, the Court ordered debtor's counsel to disgorge $1,663.41 received, payable to debtor, for the concealment of his status as a creditor by assigning claim.

Attorney represented Debtor in a Chapter 13 case that was dismissed pre-confirmation and prior to entry of order on Attorney's fee application which was pending at the time of dismissal. Attorney subsequently filed a new Chapter 13 bankruptcy on behalf of Debtor through which he listed a pre-petition debt on Schedule F for another attorney, "Kohler," and as consideration stated "assignee to breach of contract." Attorney did not reflect a debt owed to himself on Schedule F for unpaid attorney fees from the prior Chapter 13.

The Court entered an Order granting Attorney's fee application in the second Chapter 13. After the award, Attorney filed a Proof of Claim on behalf of Kohler for $2,626.26 as "assignee to contract." Upon case completion, the Trustee's final reported reflected $1,663.41 paid on the "Kohler" claim. Attorney admitted that he actually received the funds on the claim.

Although Attorney presented evidence that Debtor waived the conflict, the Court entered an Order for sanctions pursuant to 11 U.S.C. §105(5) for Attorney's failure to disclose his status as a creditor and hiding that status by filing a fake claim resulting in intentional abuse of the judicial process.

In re Irons, 379 B.R. 680 (Bankr. S.D. Tex. 2007)- The Court was compelled to act after witnessing the possible abuse of the debtor by his Attorney.

Debtor's case was dismissed pursuant to 11 U.S.C. §521 for failure to timely file all required documents with the Court including schedules A-J, the Statement of Financial Affairs, Form B22, and payment advises. In response, Debtor's counsel requested that the dismissal be vacated alleging that the failure to file the pertinent documents was actually his own fault and not the debtor's.

The Court declined to vacate the dismissal Order and instead set a new hearing to determine the appropriate remedies for Attorney's conduct under 11 U.S.C.§526.

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FREEING DEBTORS THROUGH THE BANKRUPTCY PROCESS: AN ETHNOGRAPHIC INQUIRY

Approximately one million individuals file for Chapter 7 bankruptcy relief each year. To deal with their financial woes, the Bankruptcy Code affords debtors a "discharge" of their pre-existing indebtedness. It has been repeatedly stated that this discharge of debt provides consumer debtors with a "fresh start" in life, unhampered by pre-existing debt. The social utility of providing individual debtors with a fresh start is deeply rooted in American bankruptcy law. To date, very few studies have examined whether individual debtors actually receive a "fresh start" in life, or whether the conditions of modern society cause debtors to re-experience financial misery in the years immediately following their discharges.

Consequently, the purpose of this project is to conduct an ethnographic study of debtors who have filed for bankruptcy relief in the past in an effort to determine whether they actually realized a financial rebirth as a result of having submitted themselves to the bankruptcy process. The study is limited to former debtors who have filed for bankruptcy in the State of Colorado. Nevertheless, the results of the study will allow for a restricted generalization about the efficacy of the federal bankruptcy process. Thus, by extrapolation, this study will enhance our understanding of whether the consumer bankruptcy system successfully functions as intended by Congress.