



AMERICAN
BANKRUPTCY
INSTITUTE

2021 Midwestern Bankruptcy Institute

Case Law Update

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Hon. Brian T. Fenimore, Moderator

U.S. Bankruptcy Court (W.D. Mo.) | Kansas City

Hon. Bonnie L. Clair

U.S. Bankruptcy Court (E.D. Mo.) | St. Louis

Hon. Terrence L. Michael

U.S. Bankruptcy Court (N.D. Okla.) | Tulsa

Hon. Charles L. Nail

U.S. Bankruptcy Court (D. S.D.) | Sioux Falls

Case Law Update

Hon. Bonnie L. Clair

U.S. Bankruptcy Court for the Eastern District of Missouri

Hon. Brian T. Fenimore, Chief Judge

U.S. Bankruptcy Court for the Western District of Missouri

Hon. Terrence L. Michael

U.S. Bankruptcy Appellate Panel for the Tenth Circuit and U.S. Bankruptcy Court for the Northern District of Oklahoma

Hon. Charles L. Nail, Jr., Chief Judge

U.S. Bankruptcy Appellate Panel for the Eighth Circuit and U.S. Bankruptcy Court for the District of South Dakota

Eighth Circuit

Charles L. Nail, Jr.

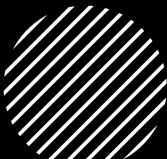
*Chief United States Bankruptcy Judge
U.S. Bankruptcy Appellate Panel
for the Eighth Circuit*

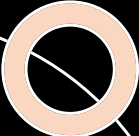

*U.S. Bankruptcy Court
for the District of South Dakota*



Ridings v. Casamatta (In re Allen),

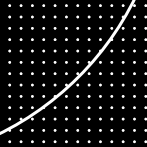
628 B.R. 641 (B.A.P. 8th Cir. 2021).

- \$1,500 pre-petition OR \$2,000 post-petition
 - agreed to provide same services either way
 - **not** a bifurcated fee agreement
 - if same services were worth \$1,500, could not also be worth \$2,000
 - no appeal to Eighth Circuit
- 



Waltrip v. Sawyers
(In re Sawyers),

2 F.4th 1133 (8th Cir. 2021).

- 2 F. . . . 4th???
 - chronology: fire, judgment lien, insurance proceeds (\$132,392.99), chapter 7 petition, discharge and case closed, repairs, sheriff's sale scheduled, case re-opened, judgment lien avoided under § 522(f)(1)(A)
 - bankruptcy court used pre-restoration value (\$3,000 to \$6,000); BAP agreed
- 



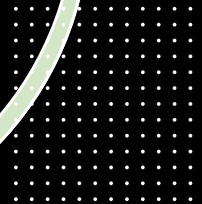
- Eighth Circuit agreed with bankruptcy court and BAP: value determined on petition date
- math: judicial lien **PLUS** all other liens **PLUS** debtor's homestead exemption (not counting liens) **MINUS** debtor's interest in the property (not counting liens) **EQUALS** impairment
- what about insurance proceeds?

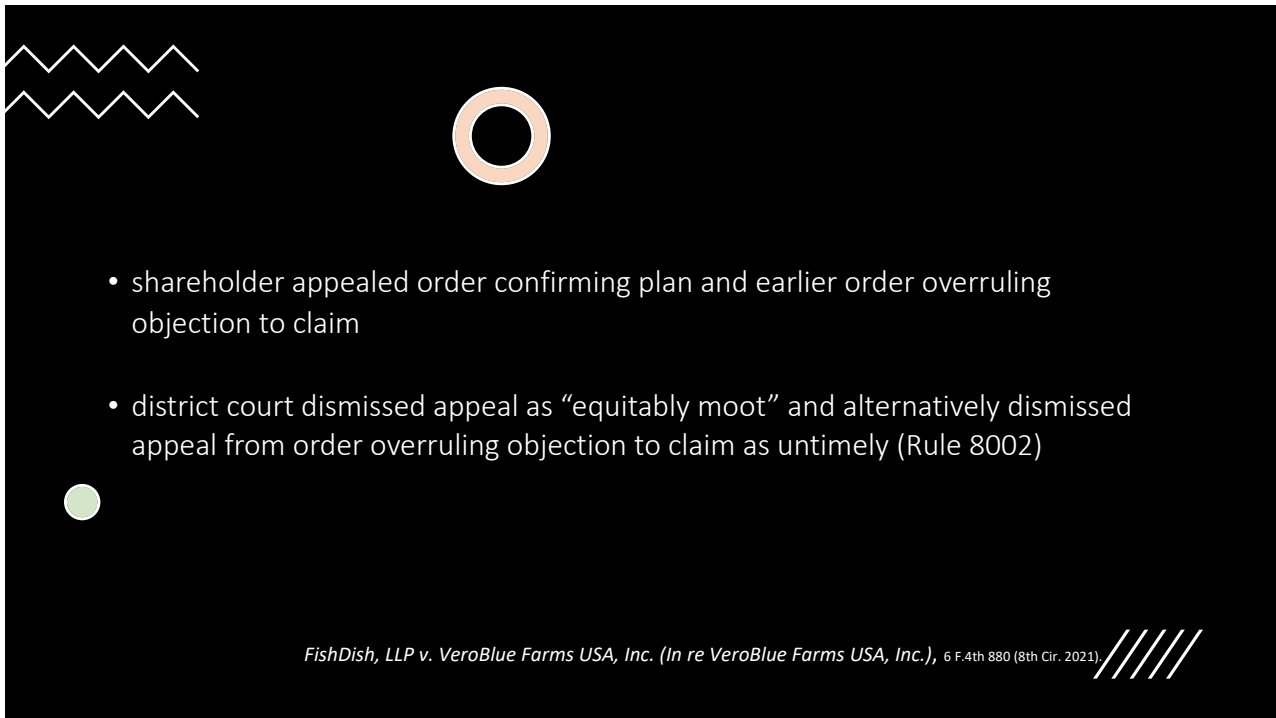
Waltrip v. Sawyers (In re Sawyers), 2 F.4th 1133 (8th Cir. 2021).




*FishDish, LLP v.
VeroBlue Farms USA, Inc.
(In re VeroBlue Farms USA, Inc.),
6 F.4th 880 (8th Cir. 2021).*

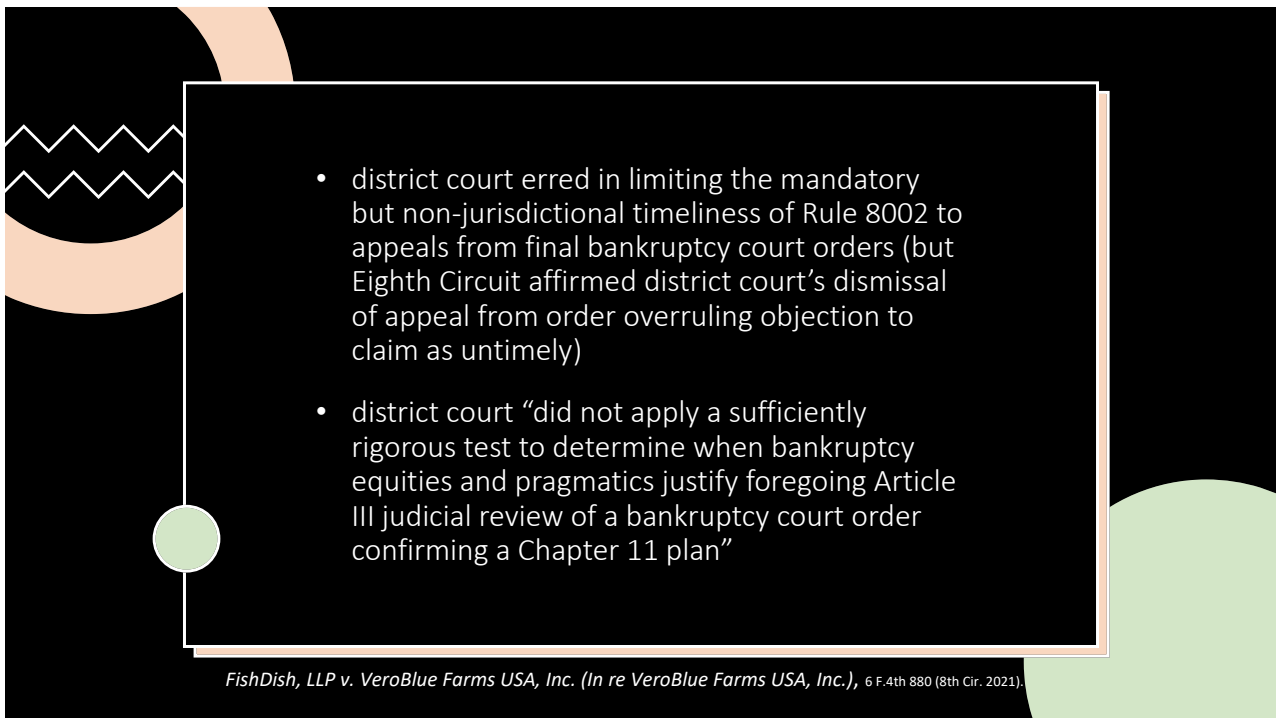
"real mootness" (inability to alter the outcome) vs. "equitable mootness" (unwillingness to alter the outcome)





- shareholder appealed order confirming plan and earlier order overruling objection to claim
- district court dismissed appeal as “equitably moot” and alternatively dismissed appeal from order overruling objection to claim as untimely (Rule 8002)

FishDish, LLP v. VeroBlue Farms USA, Inc. (In re VeroBlue Farms USA, Inc.), 6 F.4th 880 (8th Cir. 2021). 



- district court erred in limiting the mandatory but non-jurisdictional timeliness of Rule 8002 to appeals from final bankruptcy court orders (but Eighth Circuit affirmed district court’s dismissal of appeal from order overruling objection to claim as untimely)
- district court “did not apply a sufficiently rigorous test to determine when bankruptcy equities and pragmatics justify foregoing Article III judicial review of a bankruptcy court order confirming a Chapter 11 plan”

FishDish, LLP v. VeroBlue Farms USA, Inc. (In re VeroBlue Farms USA, Inc.), 6 F.4th 880 (8th Cir. 2021).

*Luebbert v.
Global Control
Sys. (In re
Luebbert),
987 F.3d 771 (8th
Cir. 2021).*

- “willful” and “malicious” under § 523(a)(6)
- “willful”: debtor desired to cause the injury or was substantially certain his/her conduct would result in the injury that occurred
- “malicious”: debtor’s conduct must be “aggravated” or “socially reprehensible”



QUICK HITS

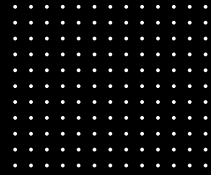




Reichel v. Snyder (In re Reichel),

626 B.R. 34 (B.A.P. 8th Cir. 2021).

lack of notice of entry of order does not affect time for filing notice of appeal



Iowa Dep't of Rev. v. DeVries (In re DeVries),

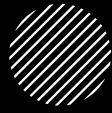
621 B.R. 445 (B.A.P. 8th Cir. 2020).

§ 1232(a) is simply a priority-stripping provision





*Citizens State
Bank Norwood
Young Am. v. Schiller
(In re Schiller),
629 B.R. 54 (B.A.P. 8th Cir. 2021).*



bankruptcy court cannot determine
disputed fact without holding
evidentiary hearing

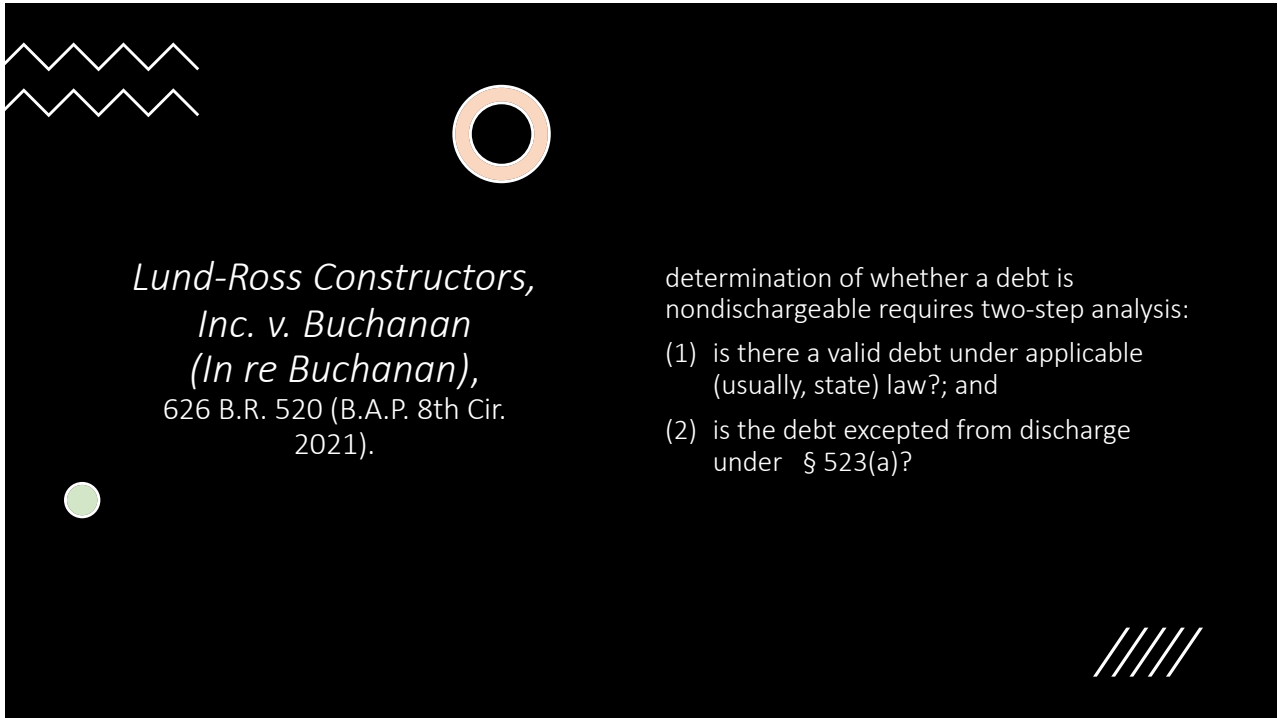


*Amos v. Carpenter
(In re Amos),*

624 B.R. 657 (B.A.P. 8th Cir. 2021).

attorney fees related to enforcing or
defending child support, visitation, or
custody qualify as DSOs

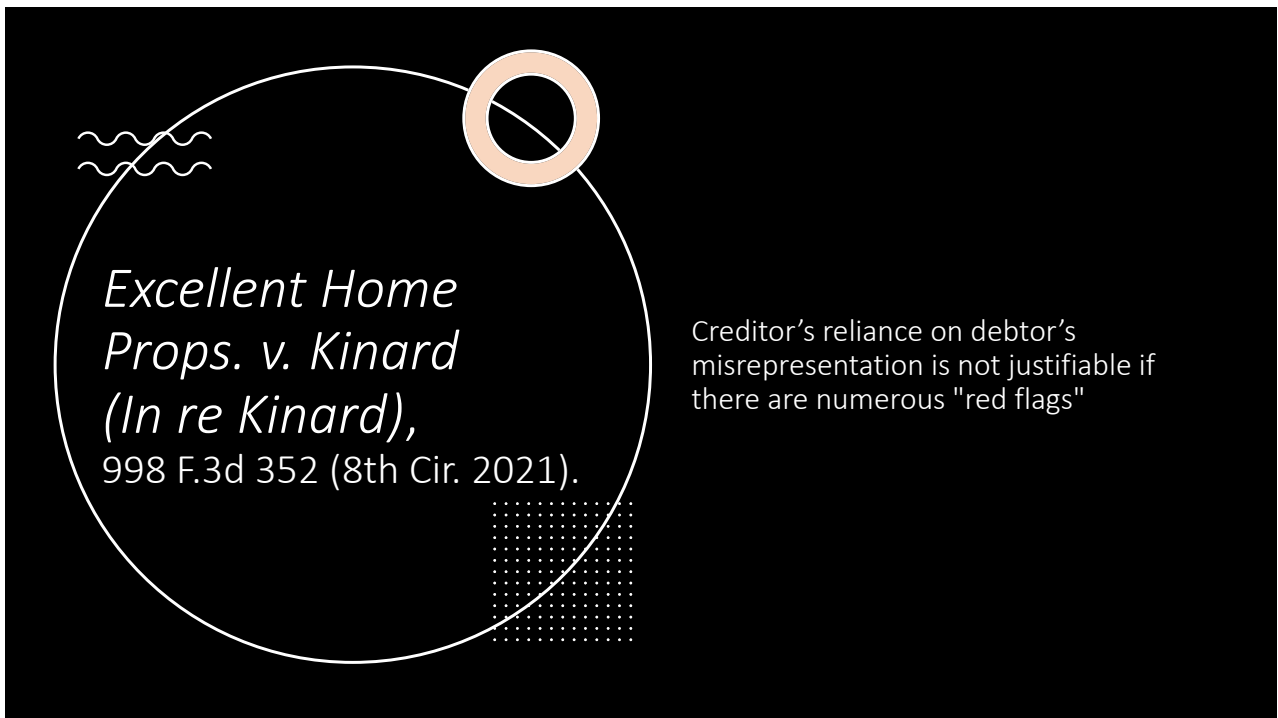




*Lund-Ross Constructors,
Inc. v. Buchanan
(In re Buchanan),
626 B.R. 520 (B.A.P. 8th Cir.
2021).*

determination of whether a debt is
nondischargeable requires two-step analysis:

- (1) is there a valid debt under applicable
(usually, state) law?; and
- (2) is the debt excepted from discharge
under § 523(a)?



*Excellent Home
Props. v. Kinard
(In re Kinard),
998 F.3d 352 (8th Cir. 2021).*

Creditor's reliance on debtor's
misrepresentation is not justifiable if
there are numerous "red flags"

Lincoln v. Snyder
(In re Lincoln),
Case No. 21-6002,
2021 WL 3179692
(B.A.P. 8th Cir. July 28, 2021).

appellate panel
does not have
jurisdiction to
hear matter that
is moot

The slide features a black background with a white rectangular frame. A light green circle is positioned at the bottom-left corner of the frame, and a light orange circle is at the top-right corner. To the right of the frame, there is a large light orange semi-circle containing four white diagonal slashes. A small light green circle is also located on the left side of the slide.

Tenth Circuit
(and a Bonus Surprise!)

Terrence L. Michael
United States Bankruptcy Judge
Northern District of Oklahoma

The slide features a black background with a white rectangular frame. A light orange circle is positioned at the top-right corner of the frame, and a light green circle is at the bottom-left corner. To the left of the frame, there is a light green semi-circle containing two white zigzag lines. To the right of the frame, there is a large light orange semi-circle containing four white diagonal slashes.

*Kinney v. HSBC
Bank USA, N.A.
(In re Kinney),
5 F.4th 1136
(10th Cir. 2021).*



*McDaniel v.
Navient Sols., LLC
(In re McDaniel),
973 F.3d 1083
(10th Cir. 2020).*



Perry v. Judge
(*In re Judge*),
630 B.R. 338
(B.A.P. 10th Cir. 2021).



Trigger
Stimulus

elicits

Extreme
Emotion
and
Fight or
Flight

Rodriguez v. Barrera
(*In re Barrera*),
BAP No. CO-20-003,
2020 WL 5869458
(B.A.P. 10th Cir. Oct. 2, 2020).





Standish v. Navient (In re Standish), 628 B.R. 692
(Bankr. D. Kan. 2020).



*Kearney v. Unsecured
Creditors Comm.
(In re Kearney)*,
625 B.R. 83
(B.A.P. 10th Cir. 2021).



Fill in this information to identify the case:

Debtor 1	<input type="text"/>
Debtor 2	<input type="text"/>
United States Bankruptcy Court for the	District of <input type="text"/>
Case number	<input type="text"/>

Official Form 410S1
Notice of Mortgage Payment Change

If the debtor's plan provides for payment of postpetition contractual installments on your claim secured by a security debtor's principal residence, you must use this form to give notice of any changes in the installment payment amount as a supplement to your proof of claim at least 21 days before the new payment amount is due. See Bankruptcy Rule 1

Name of creditor:	<input type="text"/>	Court claim no. (if known):	<input type="text"/>
Last 4 digits of any number you use to identify the debtor's account:	<input type="text"/>	Date of payment change:	<input type="text"/>
		New total payment:	<input type="text"/>

BONUS CASE:
PHH Mortgage Corp. v. Sensenich
(*In re Gravel*), 6 F.4th 503 (2d Cir. 2021).

Supreme Court and Other Noteworthy Cases

Bonnie L. Clair

*United States Bankruptcy Judge
Eastern District of Missouri*

City of Chicago v. Fulton, 592 U.S. ---, 141 S.Ct. 585 (2021).

- A unanimous 8-0 Supreme Court reversed the Seventh Circuit and held that 11 U.S.C. § 362(a)(3) does not create an affirmative obligation for creditors automatically to release property to a debtor or trustee upon the filing of a bankruptcy petition.
- The Supreme Court found that ruling otherwise would render 11 U.S.C. § 542(a)'s language requiring parties to "deliver to the trustee ... [estate] property" superfluous.
- Justice Sotomayor's concurrence addressed some of the policy and related issues requiring attention by Congress or other actors.

SO NOW WHAT?

- On remand, the Seventh Circuit noted that two of the four consolidated cases — In re Peake and In re Howard — only addressed questions related to § 362(a)(3). Therefore, the Seventh Circuit remanded those cases with directions to vacate their respective judgments.
- The other two cases — In re Fulton and In re Shannon — argued that the City violated the Bankruptcy Code under provisions other than § 362(a)(3). The Seventh Circuit remanded these cases back to the bankruptcy courts for further proceedings.

City of Chicago v. Fulton, 592 U.S. —, 141 S.Ct. 585 (2021).

- In In re Shannon, the Debtor completed all plan payments in mid-2021 and the bankruptcy court determined no grounds existed to vacate the order directing the City to return the Debtor's vehicle to him. Nothing further has occurred in the case at this point.
- The Chapter 13 case of in In re Fulton was dismissed shortly before the Supreme Court ruled. At status before the bankruptcy court, both the Debtor and the City advised that they did not intend to litigate further.

City of Chicago v. Fulton, 592 U.S. —, 141 S.Ct. 585 (2021).




*City of Chicago
v. Howard,*
625 B.R. 384
(N.D. Ill. 2021).


- Debtors' vehicles, worth \$575 and \$3,000 respectively, get impounded over \$8,000 and \$12,000 of unpaid parking tickets.
- The Debtors file bankruptcy and file motions to avoid lien under 11 U.S.C. § 522(f)(1)(A).

- The Debtors argue that the impound rights arise under municipal statutes that condition the ability to impound upon quasi-judicial proceedings, making the impound liens judicial liens subject to avoidance.
- The City argues that the liens arise automatically when vehicles get immobilized, so the liens comprise unavoidable statutory liens.



City of Chicago v. Howard, 625 B.R. 384 (N.D. Ill. 2021).

- 
- Section 101(36) of the Bankruptcy Code defines judicial liens as liens “obtained by” judgment or other legal process or proceeding.
 - Section 101(54) of the Bankruptcy Code defines statutory liens as liens arising solely by force of a statute under specific circumstances or conditions.
 - Judicial liens arise after adjudication; statutory liens arise automatically.


City of Chicago v. Howard, 625 B.R. 384 (N.D. Ill. 2021).




- The Bankruptcy Court held in favor of the Debtors.
- On appeal, the Northern District of Illinois affirmed the ruling below.



City of Chicago v. Howard, 625 B.R. 384 (N.D. Ill. 2021).



- The Northern District of Illinois looked at the applicable municipal statutes and found that they required an “administrative adjudication” to determine liability for vehicular, parking, and traffic violations as part of system, followed by a separate administrative process where a vehicle owner can request a hearing to present evidence to disprove liability – and only then could a vehicle be immobilized to create a possessory lien.
- “[B]ecause the lien is based on the combined effect of a certain number of judgments, it is obtained by those judgments.”



City of Chicago v. Howard, 625 B.R. 384 (N.D. Ill. 2021).

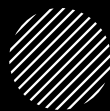
Appeal to the Seventh Circuit followed;
argument should occur on October 29, 2021.



City of Chicago v. Howard, 625 B.R. 384 (N.D. Ill. 2021).



FishDish, LLP v. VeroBlue Farms USA, Inc. (In re VeroBlue Farms USA, Inc.),
6 F.4th 880 (8th Cir. 2021).

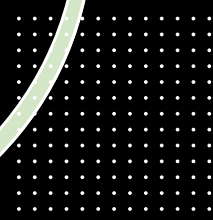


- We've heard Judge Nail speak on *FishDish* in the Eighth Circuit, but the key takeaway is that the Circuits take different approaches to equitable mootness.
- This is problematic in terms of certainty and consistency between jurisdictions, but terrific for CLE presentations!
- Now let's look at two cases trying to get this issue in front of the Supreme Court, *GLM DFW, Inc. v. Windstream Holdings, Inc. (In re Windstream Holdings, Inc.)* from the Second Circuit and *Heckman Corp. v. Hargreaves (In re Nuverra Env't Sols, Inc.)* from the Third Circuit.

GLM DFW, Inc. v. Windstream Holdings, Inc. (In re Windstream Holdings, Inc.),

838 Fed. App'x 634 (2d Cir. 2021),
cert. filed (U.S. July 21, 2021).

Does equitable mootness apply if a creditor appeals an order in a Chapter 11 case and then allows the case to move forward through confirmation without pursuing other available remedies?



- The bankruptcy court entered an order that allowed the debtor, Windstream Holdings, Inc., to pay pre-petition amounts to critical vendors in the bankruptcy case over creditor GLM DFW's objection that the bankruptcy court should have analyzed each creditor's treatment as a critical vendor, instead of approving a list of creditors and not requiring the debtor to disclose each of the critical vendors.
- GLM appealed.
- Meanwhile, Windstream obtained an order confirming its plan and substantially consummated that plan.



GLM DFW, Inc. v. Windstream Holdings, Inc. (In re Windstream Holdings, Inc.), 838 Fed. App'x 634 (2d Cir. 2021).

- The Second Circuit noted that when a Chapter 11 plan already has been substantially consummated, a presumption arises that an appeal is equitably moot.
- Moreover, equitable mootness can be applied “in a range of contexts,” including appeals involving a variety of bankruptcy court orders, not just orders confirming a Chapter 11 plan.

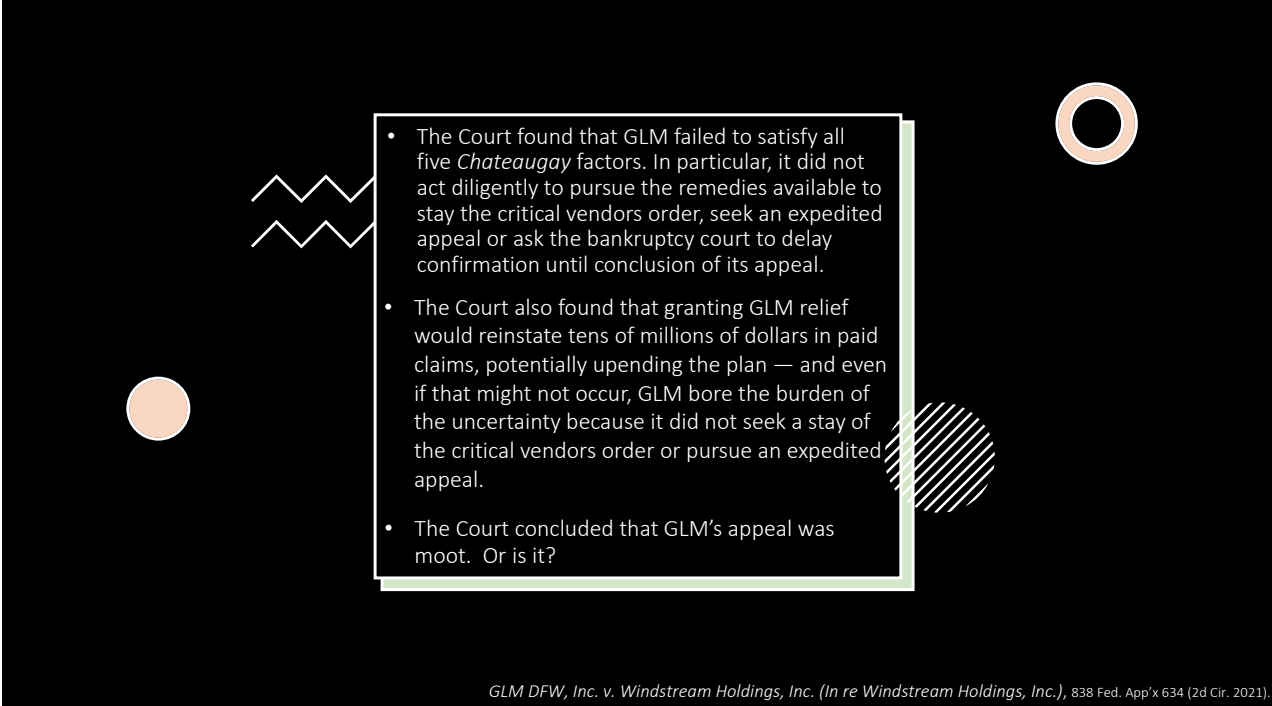
GLM DFW, Inc. v. Windstream Holdings, Inc. (In re Windstream Holdings, Inc.), 838 Fed. App'x 634 (2d Cir. 2021).



- Overcoming that presumption requires an appealing party to carry its burden to demonstrate satisfaction of all five of the so-called *Chateaugay* factors:
 - (1) “the court can still order some effective relief;”
 - (2) “relief will not affect the re-emergence of the debtor as a revitalized corporate entity;”
 - (3) “relief will not unravel intricate transactions so as to knock the props out from under the authorization for every transaction that has taken place and create an unmanageable, uncontrollable situation for the [b]ankruptcy [c]ourt;”
 - (4) “the parties who would be adversely affected by the modification have notice of the appeal and an opportunity to participate in the proceedings;” and
 - (5) “the appellant pursued with diligence all available remedies to obtain a stay of execution of the objectionable order if the failure to do so creates a situation rendering it inequitable to reverse the orders appealed from.”



GLM DFW, Inc. v. Windstream Holdings, Inc. (In re Windstream Holdings, Inc.), 838 Fed. App'x 634 (2d Cir. 2021).



- The Court found that GLM failed to satisfy all five *Chateaugay* factors. In particular, it did not act diligently to pursue the remedies available to stay the critical vendors order, seek an expedited appeal or ask the bankruptcy court to delay confirmation until conclusion of its appeal.
- The Court also found that granting GLM relief would reinstate tens of millions of dollars in paid claims, potentially upending the plan — and even if that might not occur, GLM bore the burden of the uncertainty because it did not seek a stay of the critical vendors order or pursue an expedited appeal.
- The Court concluded that GLM’s appeal was moot. Or is it?

GLM DFW, Inc. v. Windstream Holdings, Inc. (In re Windstream Holdings, Inc.), 838 Fed. App’x 634 (2d Cir. 2021).



*Heckman Corp.
v. Hargreaves
(In re Nuverra Env’t Sols., Inc.),
834 Fed. App’x 729 (3d Cir. 2021),
cert. filed (U.S. July 6, 2021).*

- Does equitable mootness apply where a Chapter 11 plan was confirmed over a creditor’s objection, the creditor filed an appeal requesting individualized treatment and an emergency motion to stay the confirmation order, the bankruptcy court denied the motion to stay, and the confirmed plan became substantially consummated?
- The Third Circuit held that it does.

- In this case, an individual creditor objected to plan confirmation based on allegedly unfair discrimination in a gifting plan.
- The bankruptcy court overruled the objection and confirmed the plan.

Heckman Corp. v. Hargreaves (In re Nuverra Env't Sols., Inc.), 834 Fed. App'x 729 (3d Cir. 2021).

- The creditor appealed to the District Court on the same day as confirmation and, one day later, sought an emergency stay of the confirmation order. Within days, the district court denied the stay request and the Debtors consummated the plan.
- The Debtors subsequently moved to dismiss the appeal due to equitable mootness. The District Court agreed and dismissed the appeal.

Heckman Corp. v. Hargreaves (In re Nuverra Env't Sols., Inc.), 834 Fed. App'x 729 (3d Cir. 2021).





- The Third Circuit stated that there is a “strong presumption that appeals from confirmation orders of reorganization plans ... need to be decided” and that courts can fashion practical relief in those situations, “instead of declining review simply because full relief is not available.”
- Relying on *Tribune 1* from 2015, the Third Circuit provided a test for examining the equitable mootness of a creditor’s appeal:
 - (1) Whether the confirmed plan reached substantial consummation; and
 - (2) If so, whether granting the relief requested in the appeal will
 - (a) fatally upend the plan and/or
 - (b) significantly harm third parties who justifiably relied on the confirmed plan.

Heckman Corp. v. Hargreaves (In re Nuverra Env’t Sols., Inc.), 834 Fed. App’x 729 (3d Cir. 2021).

- The Court found that granting the objecting creditor full payment only of his claim would treat him more favorably than—and unfairly compared to—other members of his class. Moreover, paying all the members of his class in full would “scramble” the plan and harm other creditors.
- As a result, the Third Circuit affirmed the District Court’s ruling below dismissing the appeal.

Heckman Corp. v. Hargreaves (In re Nuverra Env’t Sols., Inc.), 834 Fed. App’x 729 (3d Cir. 2021).

- Judge Krause, dissenting, wanted a word with his colleagues about their ruling.
- Certiorari pends, with the petitioner’s question framed as “Whether the doctrine of equitable mootness is inconsistent with the federal courts’ ‘virtually unflagging obligation’ to hear and decide cases within their jurisdiction.”
- Will the Supreme Court agree to review any or all of these rulings on equitable mootness?

Heckman Corp. v. Hargreaves (In re Nuverra Env’t Sols., Inc.), 834 Fed. App’x 729 (3d Cir. 2021).

Case Law Update

October 2020 through August 2021

Midwestern Virtual Bankruptcy Institute

presented by the

American Bankruptcy Institute

and the

University of Missouri-Kansas City
September 30 and October 1, 2021

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I. SUPREME COURT

A. Mere Retention of Estate Property Is Not an Act “to Exercise Control over Property of the Estate” in Violation of the Automatic Stay. *City of Chi. v. Fulton*, 141 S.Ct. 585 (2021) (Alito, J.).

After enacting an ordinance that subjected impounded vehicles to possessory liens, the City of Chicago began refusing to release impounded vehicles to chapter 13 debtors. In four cases consolidated on appeal, the bankruptcy court sanctioned the City for violating the automatic stay and ordered it to return the debtors’ vehicles. The Seventh Circuit affirmed, holding that by retaining the vehicles post-petition, the City engaged in an act “to exercise control over property of the estate” under § 362(a)(3). Vacating and remanding, the Supreme Court held that “§ 362(a)(3) prohibits affirmative acts that would disturb the status quo of estate property as of the time when the bankruptcy petition was filed.” Consequently, “mere retention of property does not violate § 362(a)(3).” The Court reasoned that § 362’s plain language “stays” any “act” to “exercise” power over a thing, not “merely ‘having’ that power.” And the term “stay” “is commonly used to describe an order that ‘suspend[s] judicial alteration of the status quo.’” Moreover, reading § 362(a)(3) to prohibit mere retention would “make that section a blanket turnover provision” in conflict with the exceptions to turnover in § 542 and render “largely superfluous” § 542(a)’s central command that an entity “shall deliver to the trustee” property of the estate. The history of §§ 362(a)(3) and 542(a) confirmed the Court’s reading. Consequently, the Court held that mere retention does not violate the automatic stay.

In a concurring opinion, Justice Sotomayor “wr[ote] separately to emphasize that the Court has not decided whether and when § 362(a)’s other ‘provisions may require a creditor to return a debtor’s property,” or “how bankruptcy courts should go about enforcing creditors’ separate obligation to ‘deliver’ estate property to the trustee or debtor under § 542(a).”

II. 8th Circuit and 8th Circuit BAP

A. Insurance Proceeds for Damage to Residence Not Included in Value of Residence for Lien Avoidance Purposes. *Waltrip v. Sawyers (In re Sawyers)*, 2 F.4th 1133 (8th Cir. 2021) (Grasz, J.).

Summary: The court of appeals affirmed the bankruptcy court’s decision avoiding a judgment creditor’s judicial lien against a chapter 7 debtor’s homestead.

The debtor’s home was badly damaged in a fire. Two months or so after the fire, the judgment creditor’s judicial lien attached to the debtor’s home (or what remained of it), and a month or so after that, the debtor filed a chapter 7 petition. Before she filed her petition, the debtor’s homeowner’s insurance provider paid her \$132,392.99 for

repairs, but the debtor did not make the necessary repairs until after she received her discharge and her bankruptcy case was closed. When the judgment creditor subsequently scheduled a sheriff's sale, the debtor moved to reopen her case and to avoid the judgment creditor's judicial lien. On the parties' cross-motions for summary judgment, the bankruptcy court held the value of the debtor's homestead was fixed on the petition date, the pre-restoration value of the debtor's homestead (between \$3,000.00 and \$6,000.00) was thus the appropriate value to use in determining whether the judgment creditor's judicial lien could be avoided, and there was no authority for adding the insurance proceeds to the pre-restoration value of the debtor's homestead in making that determination. The judgment creditor appealed. The bankruptcy appellate panel affirmed. The judgment creditor again appealed.

On appeal, the Eighth Circuit agreed with the bankruptcy court and the bankruptcy appellate panel and declined to include the amount of the insurance payout when calculating the fair market value of the debtor's home on the petition date. Adding the amount of the judicial lien (\$234,123.31), the amount of all other liens on the property (\$29,376.96), and the amount of the debtor's homestead exemption absent any liens on the property (\$15,000.00), and subtracting the value of the debtor's interest in the property absent any liens (\$3,000.00 to \$6,000.00), the Eighth Circuit calculated the impairment to be between \$275,500.27 and \$272,500.27 and affirmed the bankruptcy court's decision to avoid the entirety of the judgment creditor's judicial lien.

B. In a Subsequent Bankruptcy Adversary Proceeding, North Dakota Collateral Estoppel Law Barred Debtors from Relitigating Federal Court's Prior Determination of Ownership. *Finstad v. Gord (In re Finstad)*, 4 F.4th 693 (8th Cir. 2021) (Loken, J.).

Summary: When considering *res judicata* from an earlier federal decision, state preclusion law may still apply.

To avoid a foreclosure on their farmland, the debtors filed chapter 12. As part of a settlement to remove the land from the bankruptcy proceeding, the debtors quit claimed their interest in the land to the secured creditor but were permitted to remain on the land as tenants with an option to purchase at a price equal to their debt to the secured creditor, plus interest. The secured creditor recorded the deed in January 2006. That spring, a couple—the Gordes—loaned the debtors \$525,000.00 and took a second mortgage on the same land, allegedly not knowing about the quitclaim deed to the secured creditor. The bankruptcy court approved the debtors' settlement with the secured creditor and confirmed their plan. The debtors later received a discharge.

In July 2008, the secured creditor notified the debtors they were in default on the settlement and said it intended to sell the farmland. The secured creditor sold the farmland to the Gords and gave them a quitclaim deed. The Gords then initiated eviction proceedings against the debtors as tenants under the debtors' settlement agreement. In January 2012, the debtors asked the state court to declare their quitclaim deed to the secured creditor was an equitable mortgage and to further declare the debtors still owned the land despite the quitclaim deed to the secured creditor and the second mortgage to the Gords. The trial court ruled against the debtors, and the Supreme Court of North Dakota affirmed. The debtors then filed a diversity action in federal district court, alleging various torts against the secured creditor and the Gords. The district court dismissed all claims, and the court of appeals affirmed.

In 2018, the debtors successfully moved to reopen their chapter 12 bankruptcy case. They then filed an adversary proceeding wherein they made a variety of claims premised on their primary contention that they hold the legal and equitable title to the farmland. They asked the bankruptcy court to utilize 11 U.S.C. § 105 to reform the deed to the secured creditor into an equitable mortgage. The bankruptcy court rejected the debtors' efforts and dismissed their complaint. The bankruptcy appellate panel affirmed the trial court.

The court of appeals considered only *res judicata*:

We need consider only one to decide this appeal -- looking to North Dakota preclusion law for the federal common law principles of issue preclusion applicable in this case, we conclude that our decision in *Finstad II* that the [debtors] "do not have any interest in the property" was an issue actually litigated in a prior suit between the parties that is binding on the [debtors] in this lawsuit. Accordingly, we affirm.

Res judicata is a broad term often used to describe the more modern terms claim preclusion and issue preclusion. The Full Faith and Credit Clause, U.S. Const. Art. IV, § 1, and the full faith and credit statute, 28 U.S.C. § 1738, govern the *res judicata* effects to be given *state* court judgments. But "no federal textual provision addresses the claim-preclusive effect of a federal-court judgment in a federal-question case," so that is an issue of federal common law. *Semtek Int'l, Inc. v. Lockheed Martin Corp.*, 531 U.S. 497, 507 (2001); see *Rick v. Wyeth, Inc.*, 662 F.3d 1067, 1069 (8th Cir. 2011), *cert. denied*, 566 U.S. 906 (2012). Likewise, "federal common law governs the claim-preclusive effect of a dismissal by a federal court sitting in diversity." *Semtek*, 531 U.S. at 508. Thus,

federal common law governs the preclusive effect of *Finstad II*, a federal diversity action.

In *Heiser v. Woodruff*, the Supreme Court held that "in non-diversity cases . . . the federal courts will apply their own rule of *res judicata*." 327 U.S. 726, 733 (1946). Recognizing "the salutary principle of *res judicata*," the Court held that where the debtor or the trustee in a federal bankruptcy case had unsuccessfully litigated an issue in *federal* court outside the bankruptcy proceeding, "the decision against him is binding in the bankruptcy court." *Id.* at 731, 733-34. In applying that principle, when the trustee or the debtor relied on substantive state law for its claim in the subsequent bankruptcy case, we looked to the claim and issue preclusion law of that State to determine the preclusive effect of a prior adverse *state* court judgment in *In re Athens/Alpha Gas Corp.*, 715 F.3d 230, 238 (8th Cir. 2013), and in *In re Marlar*, 267 F.3d 749, 753-54 (8th Cir. 2001). *Accord In re Bair Hugger Forced Air Warming Devices Prods. Liab. Litig.*, 999 F.3d 534, 537-38 (8th Cir. 2021). We see no reason not to look to North Dakota preclusion law to determine the preclusive effect of the prior *federal* court decision in *Finstad II*. *See Semtek*, 531 U.S. at 508 (choosing state law as the federal rule of decision).

C. Breach of Contract Debt was Nondischargeable Under § 523(a)(6) Without Accompanying Judgment for an Intentional Tort Because the Debtor’s Conduct Amounted to an Intentional Tort Against the Creditor. *Luebbert v. Global Control Sys. (In re Luebbert)*, 987 F.3d 771 (8th Cir. 2021) (Kobes, J.).

Summary: A federal district court’s breach of contract judgment sounding in tort was found to be a nondischargeable willful and malicious injury under 11 U.S.C. § 523(a)(6).

An employer sued the debtor, a former employee, for breach of a settlement agreement arising out of the debtor’s earlier alleged violation of a covenant not to compete in his employment contract. The employer prevailed and obtained a judgment against the debtor. The debtor sought bankruptcy relief under chapter 7. The employer sought a determination its claim was nondischargeable under 11 U.S.C. § 523(a)(6) as a willful and malicious injury. The bankruptcy court applied collateral estoppel solely to the question of whether the debtor had injured the employer. The bankruptcy court then independently determined the injury was willful and malicious because the debtor’s failure to turn over profits that should have been paid to his former employer was substantially certain to harm his former employer, was clandestine in nature, and essentially constituted a conversion. The

debtor appealed. The district court affirmed. The debtor appealed again.

The court of appeals also affirmed. It agreed the jury verdict and judgment in the trial court provided the necessary record to conclude the debtor had injured his former employer and held the bankruptcy court's application of collateral estoppel to find there was an injury was proper.

The court of appeals noted "willful" and "malicious" are two different characteristics that must each be found by a preponderance of the evidence. For an injury to be willful, the court said there must be proof the debtor desired to cause the injury or was substantially certain his conduct would result in the injury that occurred, that is, there must be by the debtor a deliberate or intentional invasion of the legal rights of another. For the injury to be malicious, the court noted the debtor must have more than just knowledge that another's legal rights are being violated. Instead, the debtor's conduct must be "aggravated" or "socially reprehensible" for malice to be imputed.

The court of appeals then considered dischargeability in the context of a contract action and opined "a judgment for an intentional tort is not necessary to find [a] judgment debt for a breach of contract nondischargeable. The willfulness requirement is met when the bankruptcy court finds facts showing that the debtor's conduct accompanying the breach of contract amounted to an intentional tort against the creditor." The appellate court then analyzed whether the debtor's conduct amounted to an intentional tort under the applicable state law (Missouri) and determined the debtor's conduct accompanying his breach of contract satisfied the elements of conversion under that state law sufficient for a finding of willfulness. As for maliciousness, the court of appeals was satisfied the debtor's knowing and surreptitious retention of the full value of funds he was obligated to share with his former employer constituted conduct that was more culpable than just a reckless disregard for his former employer's economic interests and expectancies.

D. "Sophisticated" Lender Did Not Justifiably Rely When Multiple Red Flags Should Have Warned Lender of Need to Investigate Before Credit Bidding at Foreclosure. *Excellent Home Props. v. Kinard (In re Kinard)*, 998 F.3d 352 (8th Cir. 2021) (Benton, J).

Summary: In a nondischargeability action under 11 U.S.C. § 523(a)(2)(A), an experienced corporate creditor's reliance on the debtor's misrepresentations in making a full credit bid at the foreclosure sale was not justifiable.

A corporate creditor made a short-term loan to a business owned by the debtor's

mother and partially managed by the debtor. The parties agreed the business would use the loan proceeds to purchase a house and renovate it and then the business would repay the loan with interest. The business acquired the house and made a few interest payments but never renovated the house. The debtor and her mother repeatedly assured the creditor the renovations were complete, a sale was imminent, and the creditor would be paid back at the closing. The debtor and her mother then ceased all communication with the creditor. The creditor foreclosed on the house and was the successful bidder at the foreclosure sale, sight unseen, with a full credit bid.

When the debtor and her mother later filed separate bankruptcy petitions, the creditor filed complaints seeking a determination its claim for the loss it incurred when it later resold the unrenovated home was nondischargeable under 11 U.S.C. § 523(a)(2)(A). Following a trial in the adversary proceeding against the debtor, the bankruptcy court found the creditor had failed to prove it had justifiably relied on the debtor's and her mother's misrepresentations. The bankruptcy court also held the creditor's full credit bid extinguished the debt and it dismissed the creditor's state law claims for fraud, negligent misrepresentation, and civil conspiracy. The creditor appealed to the district court, which affirmed, and then appealed to the court of appeals.

The court of appeals also affirmed, finding the creditor did not have a claim against the debtor and "[e]ven if it did, it is not excepted from discharge." Citing *Field v. Mans*, 516 U.S. 59, 71 (1995), it held "[j]ustification is a matter of the qualities and characteristics of the particular plaintiff, and the circumstances of the particular case, rather than of the application of a community standard of conduct to all cases. . . . [A] victim of fraud is not justified in relying on a representation, and a duty to investigate arises, where 'the facts should be apparent to one of his knowledge and intelligence from a cursory glance, or [where] he has discovered something which should serve as a warning that he is being deceived.'" The court of appeals agreed with the lower courts that numerous red flags warned the creditor, which the court described as a "non-novice, sufficiently sophisticated investor," not to rely on the debtor's representations.

E. Eighth Circuit Raises Concerns with the Doctrine of Equitable Mootness. *FishDish, LLP v. VeroBlue Farms USA, Inc. (In re VeroBlue Farms USA, Inc.)*, 6 F.4th 880 (8th Cir. 2021) (Loken, J.).

Summary: The court of appeals provided a primer on constitutional and equitable mootness.

A shareholder appealed some pre-confirmation orders, including a claim objection

order, and the order confirming a chapter 11 plan over the shareholder's objection. A senior secured creditor moved to dismiss the shareholder's appeal of the claim objection order. The plan proponent moved to dismiss the appeal in total because it was equitably moot. The district court granted the motions and dismissed the appeal as equitably moot. The shareholder appealed and the creditor cross-appealed. The court of appeals affirmed in part, reversed in part, and remanded.

The court of appeals held the 14-day time to appeal in Fed. R. Bankr. P. 8002 is mandatory but not jurisdictional and applies to both final and interlocutory orders. It said the district court appropriately dismissed the claim objection appeal as untimely.

As to the appeal on the confirmation order, the court of appeals reversed and remanded, holding the district court had not applied a sufficiently rigorous test in determining whether the appeal should go forward.

[O]n remand, the district court must make at least a preliminary review of the merits of FishDish's appeal to determine the strength of FishDish's claims, the amount of time that would likely be required to resolve the merits of those claims on an expedited basis, and the equitable remedies available -- including possible dismissal -- to avoid undermining the plan and thereby harming *third parties*.

....

In resolving a different but somewhat analogous issue, the Supreme Court recently held that "allowing Article I adjudicators to decide claims submitted to them by consent does not offend the separation of powers *so long as Article III courts retain supervisory authority over the process.*" *Wellness Int'l Network, Ltd. v. Sharif*, 575 U.S. 665, 135 S. Ct. 1932, 1944, 191 L.Ed.2d 911 (2015) (emphasis added). When a district court (or a court of appeals reviewing a BAP decision) is asked to invoke equitable mootness to preclude a party whose rights have been impaired by a Chapter 11 confirmation order from obtaining supervisory review of the merits of the plan by an Article III court that has an "unflagging obligation" to exercise its appellate jurisdiction, the request should be granted only in extremely rare circumstances. "The presumptive position remains that federal courts should hear and decide on the merits cases properly before them." *Semcrude*, 728 F.3d at 326. If equitable mootness instead becomes the rule of appellate bankruptcy jurisprudence, rather than an exception to the Article III-based rule that jurisdiction should be exercised, we predict the Supreme Court, having up to now denied petitions for

certiorari to review the doctrine, will step in and severely curtail -- perhaps even abolish -- its use, just as the Court curtailed lower courts' excessive use of the "Rooker-Feldman doctrine" to avoid difficult claim and issue preclusion analysis in *Exxon Mobil Corp. v. Saudi Basic Indus., Corp.*, 544 U.S. 280, 283–84, 125 S. Ct. 1517, 161 L.Ed.2d 454 (2005).

F. Eighth Circuit Affirms Bankruptcy Court's Determination that Debtor Was Not Unjustly Enriched by Retention of Returned Tax Overpayments and Gambler-Creditors Had no Contractual Entitlement to the Returned Taxes. *PW Enterprises, Inc. v. Bala (In re Racing Services, Inc.)*, 617 B.R. 641 (D.N.D. 2020), *aff'd*, 854 Fed. Appx. 777 (8th Cir. 2021) (per curiam).

Summary: Two creditors appealed the district court's order affirming the bankruptcy court's denial of the claims of the creditors for certain authorized taxes assessed against their wagering accounts with the debtor. The court of appeals found no basis for reversal of the district court's "well-reasoned and thorough opinion" and affirmed.

Beginning in 1993, the debtor possessed the sole license to engage in North Dakota's pari-mutuel horse wagering industry as a service provider. The creditors are professional gamblers who used the debtor's services to bet on horse races. After the debtor filed bankruptcy, one of its creditors challenged whether the state had the authority to tax account wagering, sought the return to the bankruptcy estate of all money collected as taxes, and the denial of the state's claim for all taxes it believed the debtor still owed. In 2015, the Eighth Circuit Court of Appeals ultimately determined that North Dakota law did not authorize taxes on account wagering and remanded to the bankruptcy court to calculate the amount of unauthorized taxes the state had to return to the bankruptcy estate. Millions of dollars were returned to the bankruptcy estate.

Prior to the Eighth Circuit's ruling in 2015, the debtor paid money to the State of North Dakota for pari-mutuel taxes the debtor believed it owed at the time. The debtor deducted a percentage of the money paid by each customer--called the takeout--and the remainder would go into a pool to be distributed to winning bettors. The debtor used the takeout to pay a variety of fees and expenses, including taxes.

In 1997, the debtor entered into its first rebating agreement, in which it agreed to pay a portion of its takeout to a player as a bonus incentive on the player's betting volume. The debtor entered into rebate agreements with its high-volume customers.

Both creditors argued they were entitled to the money returned to the bankruptcy estate on contractual and equitable grounds. The bankruptcy court determined, and the appellate courts agreed, that the pari-mutuel taxes collected by North Dakota and ultimately returned to the bankruptcy estate were distinguishable from sales taxes and that the debtor, not the creditors, should be considered the taxpayer. The bankruptcy court also held the creditors failed to show it was unjust for the debtor to retain the returned tax money since the taxes were paid from the debtor's takeout, to which the creditors were not entitled in the absence of any rebating agreement stating otherwise. The bankruptcy court also held the creditors' claims failed on contractual grounds since no contract terms addressed the specific issue of the unexpected return of tax money years after the taxes were collected.

G. Bankruptcy Court Did Not Err in Relying on Deemed Admissions as Evidence of Damages Under § 523(a)(2)(A). *Madison Resource Funding Corp. v. Marsh (In re Marsh)*, 629 B.R. 473 (B.A.P. 8th Cir. 2021) (Schermer, J.).

Summary: Requests for admission can be a very useful legal tool; ignore them at your client's peril.

In a nutshell, two brothers formed a temporary staffing company. One brother then formed another temporary staffing agency. A creditor, who provided payroll and billing services to the one brother's agency and also purchased existing and future accounts, entered into a lending agreement with the one brother's agency. The one brother guaranteed the debt. The brothers and their companies eventually became crosswise with the creditor, and the one brother and his agency incurred a large debt. Both brothers filed bankruptcy.

The creditor filed a nondischargeability action against each brother. The bankruptcy court ruled in favor of the creditor, finding the one brother owed the debt based on his guaranty and finding it was nondischargeable for fraud. As to the other brother, the bankruptcy court found he, too, owed a debt to the creditor that was nondischargeable because he was a willing participant in his brother's fraud, that is, there was "vicarious liability due to conspiracy." The brothers appealed only as to the issue of damages.

The bankruptcy appellate panel found the bankruptcy court had correctly determined the existence of a debt to the creditor under nonbankruptcy law and had correctly determined the debt was nondischargeable under federal bankruptcy law. Most notable, the panel found the bankruptcy court had not committed any reversible

evidentiary errors in determining damages. The panel did not question the bankruptcy court's discernment of a witness's testimony and supporting exhibit and noted the debtors had not provided contrary evidence. The bankruptcy appellate panel also said the bankruptcy court had properly relied on some requests for admission the bankruptcy court had deemed admitted after the debtors did not respond to them.

H. Lack of Notice Regarding Entry of an Order Does Not Affect the Deadline to Appeal. *Reichel v. Snyder (In re Reichel)*, 626 B.R. 34 (B.A.P. 8th Cir. 2021) (Shodeen, J.).

Summary: Under Fed. R. Bankr. P. 9022(a), the lack of notice regarding the entry of an order does not affect the time for an appeal from that order.

The bankruptcy court denied a pro se debtor's motion for relief from an earlier order. The debtor appealed but did so after the appeal time had run. In his notice of appeal, the debtor acknowledged his appeal was untimely but said while the bankruptcy court had denied his motion on February 26, 2021, the order was not served on him at his New Jersey address until about three weeks later. The bankruptcy court had promptly served the order on the debtor through the Bankruptcy Noticing Center at an address in Ohio but did not serve the order on the debtor at his newer New Jersey address at the same time.

Quoting Fed. R. Bankr. P. 9022(a), which provides the "[l]ack of notice of the entry [of an order] does not affect the time to appeal or relieve or authorize the court to relieve a party for failure to appeal within the time allowed, except as permitted in [Fed. R. Bankr. P.] 8002[.]" the bankruptcy appellate panel dismissed the appeal. To the extent the debtor was raising an issue under Fed. R. Bankr. P. 8002(d) involving the bankruptcy court's service of the order and any attendant impact that may have on the time to appeal, the appellate panel said those issues needed to be addressed first by the bankruptcy court.

I. Law Firm's Claims for Attorney's Fees Were "Domestic Support Obligations." *Amos v. Carpenter (In re Amos)*, 624 B.R. 657 (B.A.P. 8th Cir. 2021) (Shodeen, J.).

Summary: The bankruptcy court properly granted summary judgment in favor of the debtor's former wife's divorce counsel that attorney fees the state court had ordered debtor to pay constituted domestic support obligations that were nondischargeable under 11 U.S.C. § 523(a)(5).

During lengthy and contentious state court proceedings involving support and custody issues following a divorce, the state court entered several orders requiring the debtor to pay certain attorney fees and sanctions. The debtor then filed a chapter 13 bankruptcy case and treated the attorney fees and sanctions as unsecured claims in his plan. The former wife's law firm filed three proofs of claim for the attorney fees the state court had awarded and denominated them as domestic support obligations under 11 U.S.C. § 101(14A) that were entitled to priority under 11 U.S.C. § 507(a)(1)(A). The firm also commenced an adversary proceeding seeking a determination the claims were nondischargeable under 11 U.S.C. § 523(a)(5). On cross-motions for summary judgment, the bankruptcy court held the undisputed material facts established, as a matter of law, the attorney fees constituted domestic support obligations and the bankruptcy court ordered the debtor to file a modified plan that treated the fees accordingly. After objecting to the modified plan he was required to file, the debtor appealed from the confirmation order.

On *de novo* review, the bankruptcy appellate panel affirmed. It noted "[a] liberal construction governs the analysis of what constitutes support to fulfill the legislative purpose of § 523(a)(5)." The appellate court further noted the determination of whether a debt is a domestic support obligation is strictly a question of federal law and that labels assigned by the state court are not binding on the bankruptcy court. The appellate court affirmed "the crucial question is the function the award was intended to serve" and noted the majority of courts recognize that attorney fee awards related to enforcing or defending issues involving child support, visitation, or custody that affect the welfare of the children qualify as domestic support obligations. The bankruptcy appellate panel rejected the debtor's argument that the bankruptcy court had failed to examine the function the award was intended to serve, noting the bankruptcy court had considered the function of the various awards of fees and had agreed with the debtor that one specific award of attorney fees was to punish the debtor for his litigation conduct and therefore did not constitute domestic support. The appellate court also rejected the debtor's contention that a "needs test" is necessary to determine whether a debt is a domestic support obligation, noting that has been rejected in the Eighth Circuit.

J. Mailing Amount Listed in Notice of Foreclosure, Rather Than Full Delinquency Amount, Did Not Provide Adequate Basis to Dispute the Foreclosure. *Courtney v. KeyBank N.A. (In re Courtney)*, 623 B.R. 549 (B.A.P. 8th Cir. 2021) (Dow, J.).

After Vanessa Courtney defaulted under the terms of her second mortgage, KeyBank mailed her the amount required to cure her default and told her to contact its foreclosure counsel to obtain a complete and correct written payoff statement. KeyBank's foreclosure department later mailed Courtney a letter providing a

reinstatement amount significantly higher than the amount it had previously told her was necessary to cure the default. Courtney mailed the lower of the two amounts, but the bank rejected the payment as insufficient and foreclosed on the property. After Courtney subsequently filed a bankruptcy case and received a chapter 7 discharge, she filed an adversary complaint alleging, among other things, wrongful foreclosure in equity, breach of good faith and fair dealing, and violation of the Missouri Merchandising Practices Act (“MMPA”).

The Eighth Circuit Bankruptcy Appellate Panel affirmed the bankruptcy court’s judgment in favor of KeyBank. KeyBank did not wrongfully foreclose on the property or violate its duties of good faith and fair dealing because it did not “lull [Courtney] into a sense of security then foreclose[] . . . without giving actual notice.” KeyBank also did not violate the MMPA because its conduct did not cause Courtney’s loss, as the MMPA requires. Finally, the bankruptcy court correctly determined applicable statutes of limitations barred Courtney’s counts under TILA and RESPA. Consequently, the bankruptcy court did not err in entering judgment in favor of KeyBank.

K. Lodestar Analysis Not Required to Reduce Attorneys’ Fees When Attorney Charged More If Debtors Paid Fees Post-Petition Rather Than Pre-Petition. *Ridings v. Casamatta (In re Allen)*, 628 B.R. 641 (B.A.P. 8th Cir. 2021) (Ridgway, J).

Summary: The bankruptcy court did not abuse its discretion in reducing the debtors’ attorney’s fees by \$500.00 in two separate chapter 7 cases.

The attorney offered the debtors the choice of either paying him \$1,500.00 pre-petition or paying him \$2,000.00 post-petition. Either way, the attorney agreed to provide both “pre-filing services” (meeting with the debtor; analyzing the debtor’s financial information; providing legal analysis and advice; and preparing and filing the chapter 7 petition, credit counseling certificate, and list of creditors) and “post-filing services” (preparing and filing the schedules, statement of financial affairs, means test calculations, and disclosures; attending the meeting of creditors; monitoring the case and communicating with the debtor; responding to inquiries from the chapter 7 trustee; reviewing and advising the debtor regarding any reaffirmation agreements, redemptions, and motions for stay relief; and any other legal services required by the local rules). Both debtors chose the latter option. Because the attorney would have provided the same services, regardless of whether his fees were paid pre- or post-petition, the bankruptcy court found the “extra \$500.00” to be paid under the latter option exceeded the value of those services. The attorney appealed.

On appeal, the bankruptcy appellate panel limited its review to the narrow issue of the reasonableness of the attorney’s fees, expressly declining to opine on the validity

of “bifurcated fee agreements” or the “unbundling” of legal services. Rejecting the attorney’s argument that the bankruptcy court should have applied the lodestar analysis to determine the reasonableness of his fee (both because bankruptcy courts are not required to do so in every case and because the attorney did not produce any evidence that would have enabled the bankruptcy court to do so), the bankruptcy appellate panel found no abuse of discretion in the bankruptcy court’s decision to reduce the attorney’s fees and affirmed the bankruptcy court’s decision. The attorney did not appeal the bankruptcy appellate panel’s decision.

L. Even Minor Factual Dispute Requires Evidentiary Hearing; Unsecured Creditors Should File Proofs of Claim in Chapter 12. *Citizens State Bank Norwood Young Am. v. Schiller (In re Schiller)*, 629 B.R. 54 (B.A.P. 8th Cir. 2021) (Nail, J.).

Summary: The bankruptcy court erred in determining the value of a bank’s collateral without holding an evidentiary hearing but did not err in disallowing the bank’s unsecured claim.

The bank did not file a proof of claim but objected to confirmation of the debtor’s chapter 12 plan, alleging the plan failed to provide for the full amount of its secured claim, failed to provide for any amount of its unsecured claim, and failed to commit the debtor’s disposable income. At a telephonic hearing, the bankruptcy court overruled the bank’s objection and confirmed the debtor’s plan. Without receiving evidence, the bankruptcy court accepted the debtor’s valuation of the bank’s collateral and thus the amount of the bank’s secured claim as set forth in the debtor’s plan, reasoning the difference between the bank’s valuation and the debtor’s valuation was minor and did not warrant an evidentiary hearing. The bank appealed.

On appeal, the bankruptcy appellate panel held because the value of the bank’s collateral was disputed, the bank was entitled to an evidentiary hearing on the issue. However, it agreed with the bankruptcy court proof of the bank’s unsecured claim was not deemed filed under 11 U.S.C. § 1111(a), which has no applicability in a chapter 12 case. It also agreed the bank’s limited objection to the debtor’s earlier motion to obtain secured credit did not qualify as an informal proof of the bank’s unsecured claim. Pending the outcome of the evidentiary hearing to determine the value of the bank’s collateral, the bankruptcy appellate panel could not say whether the bank would be paid less than the allowed amount of the bank’s secured claim under the debtor’s plan. And it found no clear error in the bankruptcy court’s finding that the debtor’s plan satisfied chapter 12’s disposable income requirement. The bankruptcy appellate panel remanded the matter for an evidentiary hearing to determine the value of the bank’s collateral.

M. BAP Sanctions Debtors \$3,000 for Frivolous Appeal. *Scott v. Anderson (In re Scott)*, 627 B.R. 134 (B.A.P. 8th Cir. 2021) (Schermer, J.) (appeal pending).

Summary: *Pro se* cases can be difficult and tedious; use your legal tools to get through them.

A creditor obtained possession of the debtors' home on the eve of the debtors' chapter 13 bankruptcy. This was followed by a dispute over the automatic stay. Two years later, a state court appellate decision rendered, according to the debtors, "the [pre-petition] unlawful detainer judgment a nullity and void," thus presumably forming the basis for attacking some of the statements made by the creditor's attorney during the earlier stay litigation. The debtors sought sanctions against the creditor's attorney under Fed. R. Bankr. P. 9011.

Applying an objectively reasonable standard, the bankruptcy court found no Rule 9011 violation. The debtors then asked for reconsideration. In the absence of any cited authority, the bankruptcy court applied Fed. R. Bankr. P. 9014, 9023, and 7052 and found no basis for reconsidering its prior order, particularly when the debtors' only real basis for relief was that they did not like the result. The bankruptcy judge also denied the debtors' request, their fifth, to recuse himself. The debtors appealed.

The bankruptcy appellate panel affirmed. It found no error in the bankruptcy court's denial of the debtors' request for sanctions against the creditor's attorney, noting the bankruptcy court had "listened patiently to [the debtors'] arguments, read methodically through the [sanctions motion], and addressed in detail why nothing in the [creditor's relief from stay motion] violated Rule 9011."

Regarding the debtors' challenge to the bankruptcy court's failure to take judicial notice of a state appeals court decision, the appellate panel saw no error were the debtors "did not provide a complete copy of the [state court] decision to the court and failed to otherwise provide 'necessary information' to give meaning to the excerpts they cited."

Regarding the debtors' appeal of the denial of their motion for recusal, the bankruptcy appellate panel said the debtors' complaint about an alleged *ex parte* contact between the bankruptcy judge and the creditor's attorney's assistant lacked merit. The appellate court found no impropriety in the judge's communication where: The judge innocently answered the telephone while his office was not staffed during the COVID-19 pandemic. He gave the assistant the publicly available dial-in information so the

creditor's attorney could appear by telephone. The judge also immediately informed everyone about the contact. At the hearing, the debtors objected to the creditor's attorney appearing by telephone, so the judge rescheduled the hearing.

As the bankruptcy court recognized, Canon [sic] 3 of the Code of Conduct for United States Judges, which generally prohibits substantive *ex parte* communications, permits *ex parte* communications when required under the circumstances if the communication is “for scheduling, administrative, or emergency purposes, but only if the *ex parte* communication does not address substantive matters and the judge reasonably believes that no party will gain a procedural, substantive, or tactical advantage as a result of the *ex parte* communication.” Code of Conduct for United States Judges, Canon 3(A)(4)(b).

Under Fed. R. Bankr. P. 8020(a), the bankruptcy appellate panel, reciting the debtors' protracted and legally meritless contentions, granted the creditor \$3,000.00 in sanctions against the *pro se* debtors for filing a frivolous appeal.

N. Record on Summary Judgment Showed Debtors Were Not Personally Liable for Alleged Fraudulent Corporate Debt. *Lund-Ross Constructors, Inc. v. Buchanan (In re Buchanan)*, 626 B.R. 520 (B.A.P. 8th Cir. 2021) (Nail, J.) (Shodeen, J., dissenting) (appeal pending).

Summary: Creditor failed to first establish it had a personal claim against the debtors. The issue of nondischargeability was not reached.

The debtors were the sole members of a limited liability company (LLC) that had subcontracted some electrical work from a general contractor. The debtors' LLC signed lien waivers falsely stating its own subcontractors and suppliers had been paid. After those unpaid subcontractors and suppliers filed liens against the general contractor's projects and the general contractor paid to clear them, the general contractor sued the debtors' LLC in state court and obtained a large default judgment. The debtors filed chapter 7 bankruptcy, scheduling the general contractor as holding a contingent, unliquidated, and disputed claim, labeling it a “Corporate Debt” for “Notice Purpose Only[.]”

The general contractor sought a determination its claim against the debtors was nondischargeable under § 523(a)(2)(A). The debtors sought summary judgment, arguing they were not personally liable for their LLC's debt and arguing there was insufficient evidence to pierce the corporate veil or treat the LLC as their alter ego.

The bankruptcy court agreed, finding the general contractor had not sought a piercing of the corporate veil in its complaint and had otherwise failed to establish how the debtors were personally liable to the general contractor. The general contractor appealed the summary judgment the bankruptcy court entered in the debtors' favor.

After it commenced its adversary proceeding against the debtors, the general contractor filed a proof of claim for the judgment amount. While the adversary was being litigated, the chapter 7 trustee objected to several proofs of claim filed by creditors of the debtors' LLC, including the general contractor. The trustee objected to the claims because the claimholders had not supported their claims with evidence the debtors had personally guaranteed the LLC's debts. The general contractor did not respond to the trustee's objection, and the bankruptcy court disallowed the general contractor's claim. The general contractor did not appeal. Another similarly situated creditor did respond to the trustee's objection. At the hearing on that contested matter, the bankruptcy court sustained the trustee's objection, noting *inter alia* the other creditor's proof of claim was supported only by invoices addressed to the debtors' LLC.

In its appeal from the summary judgment in the nondischargeability adversary proceeding, the general contractor argued it did not need to pierce the corporate veil for the debtors to be held personally liable for its claims, citing for the first time case law authority for bringing a tort action against individual officers or directors of a legal entity. The debtors argued, also for the first time, the bankruptcy court's disallowance of the general contractor's claim was *res judicata* as to whether they were personally liable for the general contractor's debt.

The majority affirmed. "Like the bankruptcy court, we cannot see where in the record [the general contractor] identified for the bankruptcy court the nonbankruptcy law that would make [the debtors] personally liable to [the general contractor]." The majority pointed out the general contractor had not pled or argued before the bankruptcy court that the corporate veil should be pierced and had not alleged specific facts demonstrating the debtors had used their LLC to commit fraud, to violate a legal duty, or to perpetrate a dishonest or unjust act. The majority held the case law on which the general contractor was relying was distinguishable or had been cited for the first time on appeal. Finding the record did not establish the general contractor had a personal claim against the debtors, the majority did not reach the issue of whether that debt was excepted from discharge under § 523(a)(2)(A).

One panelist respectfully dissented and would have reversed. Differentiating the claims allowance process from a determination of the dischargeability of a debt, the judge stated a dischargeability action requires a two-step analysis: first, is the debt

valid under applicable law; and second, is the debt excepted from discharge under § 523(a). The judge further stated § 523(a)(2)(A)'s use of the term "any debt" indicates "debt" as used in § 523(a)(2)(A) is not restricted to a debt established under any particular theory of recovery. Under § 523(a)(2)(A), the judge stated the claimant must establish "the debtor is liable on an enforceable obligation under applicable law, nothing more nor less." Pointing to the fact the debtors had scheduled the general contractor as a creditor and that the general contractor had filed a claim, the dissenting panelist concluded a debt existed—the first step—and the allegation the debtors committed actual fraud to obtain payments from the general contractor on behalf of the debtors' LLC or for the LLC's benefit—the second step—needed to be tried by the bankruptcy court.

O. Subsequent Dismissal of Incarcerated Defendant's Bankruptcy Case Mooted Appeal of Order Denying Waiver of Credit Counseling Requirement. *Lincoln v. Snyder (In re Lincoln)*, Case No. 21-6002, 2021 WL 3179692 (B.A.P. 8th Cir. July 28, 2021) (Saladino, J.).

Summary: An appellate panel does not have jurisdiction to hear a matter that is moot.

The debtor, a prisoner, sought a waiver of the credit counseling requirement under 11 U.S.C. § 109(h). Before the bankruptcy court, he contended no credit counselor is "reasonably able to provide adequate services" under 11 U.S.C. § 109(h)(2)(A) and that due to "incapacity" he has described exigent circumstances that merit a waiver under § 109(h)(3). The United States Trustee objected, arguing exigent circumstances only permit the court to grant a temporary extension. He also argued the only way the debtor could avoid the credit counseling requirement is if the debtor could demonstrate mental incapacity or physical disability or show he was on active duty in a combat zone, which the United States Trustee argued the debtor had not done. The bankruptcy court denied the debtor's motion.

The debtor sought a reconsideration of this denial. He noted two other prisoners in the same facility had obtained a waiver from another bankruptcy judge in the district. He also argued the COVID-19 pandemic and his status as a prisoner prevented access to credit counseling. He further argued he had successfully established his indigency, through an earlier motion for a waiver of the filing fee that had been granted, and that his indigency should be an exigent circumstance. The bankruptcy court denied his motion to reconsider on February 5, 2021, citing *Bourgeois v. Bank of America (In re Bourgeois)*, 488 B.R. 622, 627 (B.A.P. 8th Cir. 2013), for the proposition that incarceration does not warrant a waiver of the credit counseling requirement. The bankruptcy court also said the debtor's original application was denied because the

debtor had not presented evidence that he could not take the course by telephone or the internet. Finally, the bankruptcy court noted indigency is not a valid statutory exception to the credit counseling requirement. The court further explained that proving an exigent circumstance would only grant him a temporary reprieve, not a waiver. The case was dismissed four days later under 11 U.S.C. § 521(i)(1) due to the debtor's failure to file the documents required by § 521(a)(1).

The debtor appealed from “the decision of February 5th, 2021 dismissing the Bankruptcy petition and all other adverse order[s] therefrom.” The dismissal order, however, was not entered on February 5, 2021. Further, the debtor did not address the dismissal order in his appellate brief, so that argument was not considered. Accordingly, the bankruptcy appellate panel addressed only the order denying the debtor relief from the denial of his request for a waiver of the credit counseling requirement. In doing so, the appellate panel dismissed the appeal as moot due to the dismissal of the case.

P. The Plain Language of § 1232 Does Not Permit a Chapter 12 Plan to Compel a Taxing Authority to Disgorge Pre-Petition Withholdings. *Iowa Dep't of Rev. v. DeVries (In re DeVries)*, 621 B.R. 445 (B.A.P. 8th Cir. 2020) (Schermer, J.).

Summary: The plain language of 11 U.S.C. § 1232(a) cannot be expanded to compel taxing authorities to refund tax withholdings to chapter 12 debtors as part of the debtors' plan.

The joint debtors sold farmland and equipment in 2017. When they filed their chapter 12 bankruptcy in 2019, the debtors owed significant capital gains taxes to the Internal Revenue Service (“IRS”) and the Iowa Department of Revenue (“IDR”). Their liability to each taxing authority for the 2017 tax year had been reduced by withholdings from the wife's earnings. In conjunction with seeking confirmation of their plan, the debtors filed *pro forma* tax returns showing that, but for the sales, they would not have owed any income taxes for 2017. Debtors' proposed chapter 12 plan required the taxing authorities to refund the withheld taxes to the debtors. The IRS and the IDR objected, arguing 11 U.S.C. § 1232, which governs the treatment of government claims based on the disposition of farm property, does not authorize forced refunds of the taxes withheld. Finding § 1232(a) was ambiguous and focusing on the statute's policy and legislative history, the bankruptcy court confirmed the plan over the taxing authorities' objections. The bankruptcy court held the specific provisions in § 1232(a) controlled over the general setoff provisions of 11 U.S.C. § 553(a). The IDR appealed.

The bankruptcy appellate panel reversed. It held § 1232(a) was not ambiguous, observing § 1232(a) “is simply a priority-stripping provision.” Section 1232(a), the appellate court said, does not change the way a governmental unit’s claim is calculated; it only addresses the priority of the claim. It went on to find nothing in § 1232 authorizes a chapter 12 plan to require a taxing authority to disgorge, refund, or turn over pre-petition withholdings for the benefit of the estate. “Simply put, disgorgement is foreign to § 1232.”

Q. Court Did Not Abuse Its Discretion in Granting Stay Relief When the Debtor Failed to Comply with a Drop-Dead Provision. *Brooks v. First Cent. Bank McCook (In re Brooks)*, 621 B.R. 442 (B.A.P. 8th Cir. 2020) (Nail, J.).

Summary: The bankruptcy court did not abuse its discretion in interpreting the debtor’s confirmed chapter 12 plan and in granting relief from the automatic stay where the debtor had defaulted on payments due under the dropdead provisions of the confirmed plan.

The debtor’s confirmed chapter 12 plan provided that if the debtor failed to make a plan payment to a certain secured creditor within ten days of when the payment was due, the creditor could file an affidavit of default and obtain an order granting it relief from the automatic stay, without further notice or hearing. After the debtor defaulted, the secured creditor moved for relief from the stay (rather than filing an affidavit of default) and the debtor objected. The bankruptcy court granted the secured creditor relief from the automatic stay. The debtor appealed.

On appeal, the bankruptcy appellate panel held that the bankruptcy court had not abused its discretion in finding the dropdead default provision in the confirmed plan was dispositive. Like the bankruptcy court, the bankruptcy appellate panel rejected the debtor’s argument that he was not in fact in default. Although another provision of the plan provided for a later possible renegotiation of terms with the creditor, that provision did not condition the plan payments on the status of any negotiations.

R. Constructive Notice That Credit Reporting Agency Erroneously Included Discharged Debt in Credit Report Could Satisfy Fair Credit Reporting Act Notice Requirement. *Gibson v. Experian Info. Sols., Inc.*, 494 F. Supp. 3d 613 (E.D. Mo. 2020) (Fleissig, J.).

Gibson filed a complaint in the Eastern District of Missouri, alleging Experian Information Services violated § 1681 of the Fair Credit Reporting Act by listing a discharged debt on her credit report. Experian moved to dismiss the complaint,

arguing Gibson’s complaint failed to state a claim because her complaint did not include sufficient facts and because Gibson did not notify Experian or otherwise give it an opportunity to amend the credit report before filing the complaint.

The FCRA requires credit reporting agencies to “follow reasonable procedures to assure maximum possible accuracy of the information concerning the individual about whom the [consumer] report relates.” 15 U.S.C. § 1681e(b). A plaintiff who does not notify a credit reporting agency of an inaccuracy may recover under § 1681e(b) if the credit reporting agency received constructive notice of systemic problems with its procedures, even if the agency relied on a source it reasonably believed to be reputable. The court determined Gibson’s complaint was plausible because the report was inaccurate, Experian knew about the chapter 7 discharge and must have known of its effect based on a recent class-action settlement agreement. Consequently, the court denied Experian’s motion to dismiss.

S. With Third-Party Defendant’s Bankruptcy Filing, Plaintiffs’ State Law Claims Severed from Defendant/Third-Party Plaintiffs’ Contribution Claim Against Third-Party Defendant. *Tamia Banks v. Cotter Corp.* No. 4:20-cv-01227-JAR, 2020 WL 7625088 (E.D. Mo. Dec. 22, 2020) (Ross, J.).

In April 2018, the plaintiffs filed an amended class action petition relating to the Coldwater Creek radioactive waste litigation alleging state law claims. The defendants removed the case to federal court asserting jurisdiction was proper under the Price-Anderson Act (“PAA”). The federal court remanded the matter to the state court in March 2019. The plaintiffs filed a second amended class action petition, and in June 2020, defendant Cotter filed a Third-Party Petition asserting a claim for contribution against the Third-Party Defendants, including Mallinckrodt. Mallinckrodt filed a Notice of Removal under the PAA. In October 2020, Mallinckrodt filed bankruptcy and the automatic stay went into effect.

The plaintiffs filed a motion for severance indicating that they seek no relief from Mallinckrodt and asked the federal court to decline supplemental jurisdiction over the state law claims. The federal court found that the plaintiffs’ state law claims dominated the matter making severance appropriate and, after a review of the *Gibbs* factors, the federal court ordered the contribution action severed and remanded all of the plaintiffs’ state law claims back to state court.

T. A Trustee Should Not Request Joinder in an Action as a Co-Plaintiff but Instead a Trustee Should Seek to be Substituted as the Real Party in Interest When Pursuing Pending Litigation on Behalf of the Estate. *Jordan v. Bi-State Dev. Agency of the Mo.-Ill. Metro. Dist.*, No. 20-cv-00366, 2020 WL 6196117 (E.D. Mo. Oct. 22, 2020) (Schelp, J.).

The debtor filed for bankruptcy, received her discharge, and the bankruptcy closed, but she failed to list a cause of action. She then filed an employment lawsuit for damages, but the bankruptcy trustee had not yet abandoned this asset because it had been previously undisclosed. The debtor reopened her bankruptcy, amended her schedules, and the trustee moved to intervene as a co-plaintiff. The defendants however sought for the entire suit to be dismissed under a theory of judicial estoppel.

The district court declined to apply judicial estoppel, but the district court also declined to allow the trustee to intervene as a co-plaintiff. The district court noted that the proper party-in-interest to assert the claim was the bankruptcy trustee, and therefore, the proper procedural request was for the bankruptcy trustee to be substituted as the plaintiff. The district court ordered relief consistent with this procedure and granted leave for the trustee to amend the complaint.

U. District Court Reviews Fee Request and Reduces Amount Requested for Work on Bankruptcy Case by Half Due to Excessive Billing in a Three-Month Long Bankruptcy. *Jet Midwest Int’l Co., Ltd. v. Jet Midwest Grp., LLC*, No. 17-CV-06005-FJG, 2020 WL 6441116 (W.D. Mo. Oct. 2, 2020) (Gaitan, J.).

Plaintiff sought attorneys’ fees under its Term Loan Agreement with Defendants. The parties declined mediation and other forms of alternative dispute resolution. The district court reviewed the request for reasonableness looking at the time entries, lists of legal professionals, attorneys, billing rates, and average hourly rates in the Kansas City area. The entire request amounted to over 1.2 million dollars. The district court determined that a reduction in some of the fees was warranted including in the category for the efforts of the Plaintiff in the Defendants’ bankruptcy action which accounted for over half of the total request—even though the bankruptcy only last approximately three months. Noting the bankruptcy was only “tangentially related” to the Term Loan, the district court reduced the fees for work in the bankruptcy by half. The district court also reduced fees in several other categories by smaller amounts and percentages for a total fee award of just over \$800,000.

This matter is on appeal to the Eighth Circuit 20-3297, 20-3334

V. Debtor Not Entitled to Exemption in an Annuity that Was Not Intended to Replace Lost Wages. *In re Taylor*, 620 B.R. 911 (Bankr. W.D. Mo. 2020) (Norton, J.).

More than ten years before she filed her bankruptcy petition, the debtor purchased an annuity that contained a death benefit. Postpetition, she claimed an exemption in the annuity under Mo. Rev. Stat. § 513.430.1(10)(e), as a “similar plan or contract” that pays “on account of . . . death.” Sustaining the trustee’s objection, the bankruptcy court first held that the annuity was not a “similar plan or contract” under (10)(e).

Under binding precedent, § 513.430.1(10)(e) protects annuities that resemble retirement accounts—annuities “intended to replace lost wages,” that “provide benefits in lieu of earnings after retirement,” and make payments “akin to future earnings.” In determining whether an annuity constitutes a “similar plan or contract,” courts analyze the circumstances surrounding the purchase of the contract, nature of contents of the contract, and other factors, including whether the annuity was intended to replace lost wages and was a prebankruptcy planning measure. Though the annuity in this case was not a prebankruptcy planning measure, because the debtor stipulated that “[t]he Annuity is not a replacement for lost wages,” the court determined that the annuity was not a “similar plan or contract” under § 513.430.1(10)(e). The court also determined that, though the annuity contained a death benefit, the periodic payments the debtor would receive under the annuity during her lifetime—the benefits at issue in this case—were not “on account of . . . death.” Consequently, the debtor’s annuity was not exempt under § 513.430.1(10)(e).

W. The Bankruptcy Court Did Not Require, and the Code Does Not Require, that a Debtor, in Order to Establish Undue Hardship, Prove that Even After Working Seventy-Five Hours a Week She is Unable to Pay Her Student Loans. *Mudd v. United States (In re Mudd)*, 624 B.R. 676 (Bankr. D. Neb. 2020) (Hastings, J).

The bankruptcy court applied the Eighth Circuit’s totality-of-the-circumstances test to determine whether the debtor satisfied the undue hardship test under 523(a)(8). The court considered (1) the debtor’s past, present, and reasonably reliable future financial resources; (2) a calculation of the reasonable living expenses of the debtor and her dependents; and (3) any other relevant facts and circumstances surrounding the particular bankruptcy case. The debtor obtained twenty-six loans, two from the Department of Education. The debtor entered an Income Based Repayment plan and was approved for a repayment of Zero Dollars (\$0) a month. The debtor failed to recertify her annual income and family size the following year and her loans lapsed into delinquency. Despite working seventy hours a week at two jobs, the debtor had an income that equated to roughly half of the median income for a household of one in Nebraska. The debtor lived in a modest one-bedroom apartment and was the sole caretaker of her grandson with special needs. Citing to *Piccinnino v. U.S. Dep’t of Educ (In re Piccinnino)*, 577 B.R. 560, 565 (B.A.P. 8th Cir. 2017), the bankruptcy court found the debtor’s loans to be an undue hardship on the debtor and her dependent because the debtor was entitled to sufficient financial resources to satisfy her needs for food, shelter, clothing, and medical treatment to maintain her minimal standard of living.

X. A Debtor Who Once Engaged in Commercial or Business Activities But is Otherwise Not Active or Involved in Any Commercial or Business Activities at the Time of the Petition Does Not Qualify as a Subchapter V Debtor. *In re Thurmon*, 625 B.R. 417 (Bankr. W.D. Mo. 2020) (Norton, J.).

The debtors operated Dowel LLC, which consisted of two pharmacies in Higginsville, Missouri. Several months before filing for bankruptcy, the debtors closed Dowel LLC, sold the assets, and had no intentions of resuming business operations. Although Dowel LLC was not in operation, it was still an entity in good standing under Missouri law. The debtors then filed for chapter 11 protection under subchapter V. The United States Trustee (“UST”) objected to the debtors’ designation as subchapter V small business debtor, asserting the debtors failed to meet the definition of a person “engaged in commercial or business activities.” The bankruptcy court ruled in favor of the UST finding that the plain meaning of “engaged in” means to be actively and currently involved. The bankruptcy court looked to how other provisions of the Bankruptcy Code, specifically Chapter 12 use similar “engaged in” language. The bankruptcy court analyzed the Eighth Circuit’s definition of what qualifies as a “family farmer.” The current precedent requires that to conduct farming, some member of the family had to play “an active role in the farming operation taking place on the land.” The bankruptcy court compared the active role required to “conduct” a farming operation with being “engaged in” a commercial or business operation. The bankruptcy concluded the currency of the involvement or activeness is inherent in the idea of being “engaged in” something, and for Congress to have added the word “currently” before the phrase “engaged in commercial or business activities” would be redundant.

Y. Disbarred Attorney Denied Discharge for Omitting Information Concerning His Criminal Past. *United States Tr. v. Thompson (In re Thompson)*, 624 B.R. 663 (Bankr. W.D. Mo. 2020) (Fenimore, C.J.).

Thompson was a former foreclosure attorney who stole client funds, pleaded guilty to theft by taking by a fiduciary, and then filed a chapter 7 voluntary petition. Under the terms of his criminal plea agreement, he owed a criminal restitution debt that would partially reimburse his victims. After Thompson omitted almost all information about his criminal past on his bankruptcy filings and failed to notify his victims of his bankruptcy case, the United States Trustee asked the court to deny Thompson’s discharge under 11 U.S.C. § 727(a)(4)(A). Thompson argued the UST did not satisfy its burden of proving that he made false statements, that he acted with fraudulent intent, or that the omitted information was material. The court determined Thompson’s statements on his bankruptcy filings were false, rejecting (among other “untenable” arguments) Thompson’s arguments that the victims did not have “claims” under 11 U.S.C. § 101(5). Thompson’s pattern of omissions and baseless legal arguments purportedly justifying his nondisclosure demonstrated that

he acted with fraudulent intent. Finally, though omitting his creditors did not affect the distribution of assets in his bankruptcy estate, the court determined his omissions were material because they “deprived his victims of the opportunity to participate meaningfully in his bankruptcy—a result that materially affected his case.” The court entered judgment in favor of the United States Trustee and denied Thompson’s discharge.

Z. Despite Post-Petition Operating Losses, “Special Circumstances” Prevented Conversion from Subchapter V to Chapter 7. *In re Neosho Concrete Prods. Co.*, Case No. 20-30314, 2021 WL 1821444 (Bankr. W.D. Mo. May 6, 2021) (Fenimore, C.J.).

The UST moved to convert this Subchapter V case to Chapter 7 or remove debtor Neosho Concrete Products company as debtor in possession. The UST argued that cause existed to convert the case for “substantial or continuing loss to or diminution of the estate and the absence of a reasonable likelihood of rehabilitation” under 11 U.S.C. § 1124(b)(4) because Neosho incurred ongoing administrative expenses but had ceased operations. The UST argued cause existed to remove Neosho as debtor in possession because the debtor made preferential transfers to an insider during the preference period.

The court denied the UST’s motion. The court determined that any ongoing losses attributable to the administrative expenses were not “substantial” (i.e. “sufficiently large . . . to materially negatively impact the bankruptcy estate and interest[s] of creditors”) because “the administrative expense claimants b[ore] the primary risk of nonpayment.” The court also declined to characterize the post-petition losses as “continuing,” reasoning that because “Neosho incurred the relevant losses only recently and only after an abrupt change in the circumstances of its case” (when the former buyer ended the manufacturing relationship), “the court c[ould] not yet determine whether Neosho’s losses [we]re likely to persist in the future.” And lacking evidence of the Neosho’s future business prospects, the court also determined that the UST did not prove “the absence of a reasonable likelihood of reorganization.” Accordingly, the court denied the UST’s motion to convert. The court also denied the motion to remove Neosho as debtor in possession, determining that the debtor remediated the court’s concerns about the preferential transfers because the insider had retained separate counsel, demonstrated an intent to reimburse the bankruptcy estate for the transfers, and subordinated his personal interests to Neosho’s interests.

AA. Debt Obtained with Intent to Deceive Not Excepted from Discharge. *Bank Northwest v. Clevenger (In re Clevenger)*, Case No. 19-42680, Adv. No. 20-4019, 2020 WL 7753313 (Bankr. W.D. Mo. Dec. 29, 2020) (Fenimore, C.J.).

Bank Northwest asked the court to except from discharge under 11 U.S.C. §§ 523(a)(2)(A), (a)(2)(B), and (a)(6) the debt David Clevenger owed it, alleging Clevenger fraudulently listed his father's tractor on a balance sheet he completed as part of a loan application. Explaining that §§ 523(a)(2)(A) and (a)(2)(B) are mutually exclusive, the court first determined § (a)(2)(A) did not apply. Consequently, the court analyzed the case under §§ 523(a)(2)(B) and (a)(6) alone. Though Clevenger's statement on the balance sheet about his father's tractor was a written, false statement that Clevenger made with the intent to deceive the bank, the bank did not satisfy its burden of proof under § (a)(2)(B). The also court determined the bank did not satisfy its burden of proving the "materiality" and "reliance" elements of § 523(a)(2)(B). Because the tractor comprised only a small portion of the total equipment value and net worth at the time of the loan, the bank failed to prove the statement was materially false. Additionally, the bank officer testified that the bank would have made the loan even if Clevenger had not listed the tractor on the balance sheet. Thus, the bank did not prove it actually relied on Clevenger's statement. The bank also did not satisfy its burden of proof under § 523(a)(6) because it did not prove Clevenger committed an intentional tort or acted willfully or maliciously. Thus, despite his fraudulent intent, the court determined Clevenger was entitled to discharge with respect to his debt to the bank.

III. 10th Circuit and 10th Circuit BAP

A. A Chapter 13 Debtor May Not Cure Defaults After the Plan Term Ends. *Kinney v. HSBC Bank (In re Kinney)*, 5 F. 4th 1136 (10th Cir. 2021) (Bacharach, J.).

May a Chapter 13 debtor cure defaults on a plan after the plan term has ended? Not in the Tenth Circuit. In this case, the debtor confirmed a Chapter 13 plan which provided for ongoing payments on her home mortgage. The plan term was for five years, as allowed under § 1322(d)(2). Near the end of the term plan, debtor was involved in an automobile accident and missed two plan payments as a result. She eventually recovered and tendered the late payments to the Chapter 13 Trustee *after* the expiration of the five-year period. The trustee refused the payments and moved to dismiss the case. The bankruptcy court granted the motion, holding that the tender of late payments was the equivalent of an impermissible modification of the plan effectively extending the plan term beyond five years.

The case went to the Tenth Circuit on direct appeal. Recognizing that cases were split on the issue, and noting a potential ambiguity in the statute, the Tenth Circuit held that all payments under a Chapter 13 plan had to be made within the term of the plan in order for a debtor to receive a Chapter 13 discharge. Failure to make the plan payments within the term of the plan was cause for dismissal under § 1307. The

Tenth Circuit offered no opinion as to whether the case was ripe for conversion to Chapter 7.

In a concurring opinion, Judge Alison Eid agreed with the result, but found no ambiguity in the statute.

NOTE: Chapter 12 contains the same language limiting plan terms, so a strong argument may be made that this decision applies in Chapter 12 cases as well.

B. Private Student Loans Are Not Obligations to Repay Funds Received as an Educational Benefit, Scholarship, or Stipend under § 523(a)(8)(A)(ii). *McDaniel v. Navient Sols., LLC (In re McDaniel)*, 973 F.3d 1083 (10th Cir. 2020) (Holmes, J.).

This case represents another attempt at creative lawyering doomed to failure. The McDaniels filed a Chapter 13 case, completed their plan payments, and received a discharge. Navient was the holder of student loans that were not “made, insured, or guaranteed by a governmental unit, or made under any program funded in whole or in part by a governmental unit or nonprofit institution,” and thus they did not qualify as non-dischargeable under § 523(a)(8)(A)(i). When it came to student loans, the confirmed plan said nothing about dischargeability, and simply deferred these loans to the end of the plan. During the term of the plan, Navient was paid approximately 27% of its principal debt.

After the McDaniels received their discharge, Navient began collection actions. The McDaniels reopened their bankruptcy case and filed an adversary proceeding against Navient for violation of the discharge injunction. Navient moved to dismiss the adversary proceeding on two separate grounds: (1) the Chapter 13 plan was *res judicata* on the issue of the dischargeability of Navient’s loans, because it placed them in the same class with other loans that fell within the scope of § 523(a)(8)(A)(i); and (2) the loans held by Navient qualified as “an obligation to repay funds received as an educational benefit, scholarship, or stipend,” and were thus non-dischargeable under § 523(a)(8)(A)(ii).

The bankruptcy court rejected both arguments and denied the motion to dismiss. With respect to the effect of the confirmed plan, the bankruptcy court noted that no issues of dischargeability were determined at plan confirmation, and that the classification of Navient’s claim in a class that included non-dischargeable student loans did not constitute a finding or an order holding Navient’s claims non-dischargeable. The bankruptcy court also found nothing in § 523(a)(8)(A)(ii) to indicate that it applied to student loans outside the scope of § 523(a)(8)(A)(i). Given

the fact that Congress used the word “loan” in § 523(a)(8)(A)(i) and (B) and chose not to include the word “loan” in § 523(a)(8)(A)(ii), the bankruptcy court ruled that Congress did not intend to include claims like Navient’s in that section. The bankruptcy court also determined that the reading of § 523(a)(8)(A)(ii) advanced by Navient would render § 523(a)(8)(A)(i) and (B) superfluous. Navient appealed, and the bankruptcy court certified the appeal directly to the Tenth Circuit.

On appeal, the Tenth Circuit affirmed the bankruptcy court decision in all respects (don’t you just love that? Come on, you know you do.). The Tenth Circuit found that the confirmed plan was silent on the issue of dischargeability of Navient’s loans, and thus had no preclusive effect on the issue. The Tenth Circuit went on to rule that “the statutory terms ‘obligation to repay funds received as an educational benefit’ and ‘educational loan’ mean separate things.” Put another (more eloquent) way by the circuit, “Moreover, it is pellucid to us that no ‘normal speaker of English ... in the circumstances’ here would say that student loans are obligations to repay funds received as an educational benefit.” If that sent you to dictionary.com to look up “pellucid,” don’t feel bad. You are in excellent company.

C. Debtor Not Entitled to Convert from Chapter 11 to Chapter 7 Due to Bad Faith. *Kearney v. Unsecured Creditors Comm. (In re Kearney)*, 625 B.R. 83 (B.A.P. 10th Cir. 2021) (Somers, J.).

A good friend of mine was known to say, “everything in moderation, including moderation.” This case could be described as a case where certain rights under the Bankruptcy Code are absolute, except when they are not. Here’s the blurb from last year, when this was just a lowly bankruptcy court opinion (Judge Thuma, if you’re reading this, I’m only kidding):

This case raises the fascinating question of whether a Chapter 11 debtor, displaced as the debtor-in-possession as the result of confirmation of a liquidating plan proposed by the unsecured creditors’ committee, may effectively vacate the order of confirmation by seeking to convert the case from Chapter 11 to Chapter 7. The debtor argued that the right to convert under § 1112(a) was absolute, and that any inquiry as to his motives or bad faith in seeking conversion was not permitted as a matter of law.

The bankruptcy court disagreed and denied conversion, relying heavily on *Marrama v. Citizens Bank of Massachusetts*, 549 U.S. 365 (2007). As noted in *Marrama*, a debtor may convert from Chapter 7 to Chapter 13 only if the debtor is eligible to be a debtor under the chapter to which he seeks to convert. The court found that the debtor: (1) acted in bad faith

throughout the Chapter 11 proceedings; (2) the bad faith exhibited by debtor would be cause for immediate dismissal of any Chapter 7 case; (3) debtor was not eligible to be a debtor under Chapter 7; and (4) therefore could not convert his case. The court also noted that § 1112(a)(1) did not give an absolute right to convert to a debtor who was not a debtor-in-possession. Finally, the court rejected the notion that failure to grant conversion would deny him the effective assistance of counsel in a criminal action pending against him.

So now we are at the BAP level (and yes, maybe next year we will talk about the circuit court decision). The BAP affirmed the decision to deny the motion to convert. The key point in both rulings is that the right to convert a Chapter 11 case is limited by § 1112(f), which states “[n]otwithstanding any other provision of this section, a case may not be converted to a case under another chapter of this title unless the debtor may be a debtor under this chapter.” The bankruptcy court and the BAP both held that § 1112(f) allows a court to make an inquiry as to the good faith of the debtor in seeking conversion and that, if a case once converted to Chapter 7 would be subject to immediate dismissal or reconversion back to the prior chapter, the court need not engage in a futile exercise and may simply deny the motion to convert.

You guessed it. The decision is on appeal to the Tenth Circuit. See you next year.

D. Judgement for Injuries Plaintiff Incurred Retaliating Against Defendant’s Battery Was Nondischargeable Under § 523(a)(6). *Perry v. Judge (In re Judge)*, 630 B.R. 338 (B.A.P. 10th Cir. 2021) (Hall, J.).

A bar fight. That’s right, a bar fight. And a hellaciously creative (or brash, or desperate) defense. In this case, Judge (his name, not his title) got in a bar fight with Perry and hit Perry with a glass coffee mug (the record is silent as to whether it was just coffee in the mug, but we all know better, don’t we?). In response, Perry hit Judge over the head while holding his glass beer mug. The mug shattered, damaging Perry’s hand in the process. Perry obtained a \$150,000 judgment against Judge, who then filed bankruptcy in an attempt to discharge the debt.

Perry brought an action against Judge based on § 523(a)(6), which denies the discharge of debts “for willful and malicious injury by the debtor to another entity or to the property of another entity.” Judge argued that Perry’s injuries were not caused by Judge’s coffee mug, but by the fact that Perry retaliated with his beer mug (kind of a twist on a child’s “BUT HE HIT ME FIRST!”). The bankruptcy court rejected the argument and, on appeal, the Bankruptcy Appellate Panel was equally unpersuaded, finding that it was foreseeable that Perry would react to being hit over the head with

a coffee mug, and would defend himself in response. All of Perry's injuries were proximately caused by the willful and malicious act of using a coffee mug as a weapon. Play stupid games, win stupid prizes. The BAP affirmed the decision in its entirety.

E. Amount a Residence Appreciates During a Chapter 13 Case Does Not Become Property of the Estate at Conversion to Chapter 7. *Rodriguez v. Barrera (In re Barrera)*, BAP No. CO-20-003, 2020 WL 5869458 (B.A.P. 10th Cir. Oct 2, 2020) (Michael, J.).

Things I know, and things I think I know:¹

Most people file Chapter 13 cases to save a house, or a car, or both.
A lot of Chapter 13 cases fail.

There are two ways to increase the owner's equity in a house (or any asset, for that matter): the house can appreciate in value, and the amount of debt secured by the house can be paid down.

This case deals with a simple question: if a debtor files a Chapter 13 case and later converts to Chapter 7, who gets any appreciation in value of the house that occurred while the case was in Chapter 13? The facts were simple: the parties stipulated that the house appreciated by some \$140,000 while the Chapter 13 was pending, and that all the appreciation was the result of a strengthening house market. Moreover, the house had been sold, so the \$140,000 wasn't theoretical value that existed only on paper: it was cold hard cash (by the time the Trustee sued, some of the money had been spent, and there was "only" \$100,000 left). The bankruptcy court ruled in favor of the debtor, looking at § 348(f) and the legislative history indicating that Congress wished to encourage the filing of Chapter 13 cases. The bankruptcy court reasoned that if a debtor who attempts a Chapter 13 and fails stands to lose all of the increased equity in her home, she would be less likely to consider Chapter 13 as a viable option.

The BAP affirmed, relying upon the legislative history and the fact that § 348(f)(2) only adds after-acquired property to a bankruptcy estate when a debtor converts his Chapter 13 in bad faith. The BAP reasoned that the Trustee's argument would "all but write § 348(f)(2) out of the Bankruptcy Code."

¹ I took this line from sports columnist Steve Sipple of the Lincoln (Neb.) Journal-Star. Steve is from my home town and I played a heck of a lot of basketball in my younger days with his kid brother, Marty, who was much better than Steve. Sorry, Sip, gotta call them as I see them.

The Trustee argued that he was not seeking to punish the debtors, and that had there been equity generated as the result of the debtors' "pay down" of debt, they would be entitled to keep it. The author of the BAP opinion is a brutal pragmatist, as can be seen from the rejection of this argument:

The Trustee argues paydown cases are distinguishable from the case where debtors obtain equity through appreciation in value because debtors are not deprived of equity created by their own efforts. In turn, the Trustee argues including the proceeds derived from the sale of estate property does not penalize debtors for giving chapter 13 a try. The Trustee's argument ignores the primary disincentive in a case such as this: the potential that the debtor's residence is liquidated to distribute nonexempt equity. Had the Debtors not already sold their Residence before converting the case, the Trustee would likely attempt to sell the home based on the nonexempt equity. It is safe to say few debtors would appreciate the prospect of having their home sold out from under them if a chapter 13 does not pan out. Second, for many debtors, a residence is the only investment asset in their portfolios. The prospect of losing that investment is what drives many debtors to seek bankruptcy protection and would serve as a disincentive to attempting a chapter 13.

There is a pragmatic aspect to this case that the Bankruptcy Court recognized and that should not be ignored. The parties have served this case up neatly wrapped and tied in a bow: they have stipulated that the Residence was worth \$396,606 on the petition date, sold for \$520,000 some two years later, and that the difference in price was entirely attributable to market forces. The Trustee uses the clean nature of these facts to argue that he only seeks appreciation due to market value. The next case, and, indeed, the vast majority of cases, are unlikely to be so pristine. What is the next court to do when a debtor has remodeled a home? Or repainted? Or did any of the myriad of things real estate agents advise to make a house more attractive? In those cases, how is the bankruptcy court to determine what amount of increased value is due to the effort of the debtor, and how much is due to market forces? As a trial court judge, I do not relish the prospect of making such determinations and believe they will be largely unworkable and highly subjective. (footnote omitted)

Yeah, that was me. The case is now on appeal to the Tenth Circuit. Get ready for more next year.

F. Subchapter V Debtor Was “Engaged in Commercial or Business Activities” While Winding Down its Business. *In re Offer Space, LLC*, 629 B.R. 299 (Bankr. D. Utah 2021) (Thurman, J).

On its petition date, the debtor employed no one, no longer conducted business as it previously did, held no intentions to reorganize, and intended to merely liquidate its main operational asset and any remaining assets. The bankruptcy court held that under a totality of the circumstances analysis, the debtor actively engaged in commercial or business activities because the debtor held active bank accounts, held accounts receivable, participated in a lawsuit, managed its main operational asset, and remained in the process of winding down its business and took reasonable steps to pay its creditors and realize value for its assets. The bankruptcy court found that the terms “activities” and “operations” are not interchangeable, and a small business debtor may engage in a very inclusive range of commercial or business activities to qualify under subchapter V.

G. The Term “Commercial or Business Activities” in § 1182(1)(A) Encompasses Any Earning Activity Related to Buying, Selling, Financing, or Using Goods, Property, or Services. *In re Ikalowych*, 629 B.R. 261 (Bankr. D. Colo. 2021) (McNamara, J).

The debtor filed for chapter 11 relief and elected to proceed under subchapter V. The debtor wholly owned a limited liability company (pass-through company), and the pass-through company, in turn, owned a thirty percent interest in a second limited liability company (the shutdown company). The debtor worked for and managed the shutdown company. Shortly before filing for bankruptcy, the debtor began a new job selling commercial insurance products for a company he held no ownership or management interest in. Simultaneous with his commercial insurance products job, the debtor performed a modest amount of winding down work for the shutdown company that had ceased business operations and surrendered all of its assets. The U.S. Trustee and the debtor’s largest creditor objected to the debtor’s subchapter V election on the grounds that the debtor failed to qualify as a person engaged in commercial or business activities within the meaning of § 1182(1)(A) of the Bankruptcy Code.

The bankruptcy court held that the term “commercial or business activities” is an exceedingly broad phrase that encompassed any private sector actions related to buying, selling, financing, or using goods, property or services undertaken for the purpose of earning income. The bankruptcy court employed the totality of the circumstances test to determine that the debtor engaged in commercial or business activities through his non-passive ownership of the pass-through company, his non-passive, indirect ownership of the shutdown company, which included steps the debtor took to wind down the business and being a wage earner at and employee of the company the debtor sold commercial insurance products. The bankruptcy court

found that a nexus must exist between at least fifty percent of the debtor's debt and the commercial or business activities of the debtor, and the debtor's execution of a personal guaranty for the shutdown company in which the debtor held an indirect equity interest qualified the debtor as holding debts of which more than fifty percent arose from the debtor's commercial or business activities.

H. Debtor's Use of Inheritance to Pay for Daughter's Education Prevented Discharge of Debtor's Own Student Loans Under the Brunner Test. *Standish v. Navient (In re Standish)*, 628 B.R. 692 (Bankr. D. Kansas 2020) (Berger, J.).

In this student loan dischargeability case, the debtor was a 63-year-old woman on a very limited income with very modest expenses. Applying the *Brunner* test (as it was bound to do under Tenth Circuit precedent), the bankruptcy court found that the debtor could not maintain a minimal standard of living if she were required to repay her student loans, and that her inability to repay would persist for the term of the loans. The bankruptcy court found that the debtor lived minimally and spent her income in a reasonable manner to provide for the basic needs of her and her daughter. However, the bankruptcy court found that, during the term of the loans, debtor received a \$45,000 inheritance to pay for her only daughter's education. The court noted that had the debtor applied every cent of this inheritance toward her student loans, she could have almost eliminated the student loan debt at issue. Due to the use of the inheritance to provide for her daughter rather than to pay her student loan debt, the bankruptcy court found that the debtor had not acted in good faith, and thus failed the third prong of the *Brunner* test. A harsh result to be sure, but one that says far more about the severity of the *Brunner* test than anything else.

I. The Automatic Stay Did Not Terminate as to Property of the Estate on the Thirtieth Day After a Debtor's Second Bankruptcy Filing Within Twelve Months. *In re McGrath*, 621 B.R. 260 (Bankr. D.N.M. 2020) (Thuma, J.).

Section 362(c)(3) of the Bankruptcy Code provides that, when an individual debtor files a second bankruptcy case within the 12-month period after dismissal of a prior case, the automatic stay under § 362(a) "shall terminate with respect to the debtor on the 30th day after the filing of the later case," unless the court orders otherwise within the 30-day period. In this case, no one disputed that the stay terminated under § 362(c)(3). The question dealt with the effect of such termination: did it apply only to the debtor, or was the stay also terminated with respect to property of the bankruptcy estate? Debtor, relying on a prior decision of the Tenth Circuit Bankruptcy Appellate Panel which ruled on the issue in his favor, argued that the stay remained in place with respect to property of the estate, and that the bankruptcy

court was bound to follow the BAP decision. The creditor argued that § 362(c)(3) was ambiguous and poorly written, and that the only reasonable interpretation of the section was that the stay was also terminated with respect to property of the estate; i.e., the creditor's collateral.

The bankruptcy court decision can essentially be divided into two halves. In one half, the bankruptcy court found § 362(c)(3) to be plain on its face and limited to terminating the automatic stay with respect to actions taken against the debtor, leaving the stay in place with respect to property of the estate. As it did so, the bankruptcy court agreed with the analysis contained in the prior BAP decision, going so far as to say it would in this follow the BAP decision, and refused the creditor's request to use legislative history in an attempt to rewrite the statute.

The other half of the opinion was an essay in why BAP and district court decisions were not binding precedent upon any bankruptcy court. An interesting (and perhaps unnecessary) foray into the area, given that the bankruptcy court agreed with the BAP analysis.

IV. Other Noteworthy Cases

A. The Second Circuit Expanded the Contempt Standard from *Taggart v. Lorenzen* to Apply to Scenarios Outside of Discharge Injunctions, Including in Situations Implicating the Automatic Stay. *PHH Mortgage Corp. v. Sensenich (In re Gravel)*, 6 F.4th 503 (2d Cir. 2021) (Jacobs, J.).

In three separate chapter 13 cases, the chapter 13 trustee filed a motion for contempt, sought a disallowance of postpetition fees, and moved for sanctions against a mortgage servicer due to inaccurate monthly mortgage statements, and the chapter 13 trustee asserted the authority for the relief extended from the mortgage servicer's violation of Federal Rule of Bankruptcy Procedure 3002.1 and for violations of the bankruptcy court's orders. Rule 3002.1 operates to inform debtors of new post-petition fees, charges, and other amounts due and requires creditors to send formal notice to specific parties while assuring creditors that a violation of the automatic stay will not occur for sending the notices.

The mortgage servicer objected in each case, and the bankruptcy court held a consolidated hearing. The bankruptcy court granted the motions for contempt and ordered sanctions against the mortgage servicer totaling \$375,000. The mortgage servicer appealed to the district court, which vacated and remanded the matter. The bankruptcy court then granted the motions and ordered sanctions against the mortgage servicer totaling \$300,000. The mortgage servicer appealed to the district court again, and the trustee requested direct certification to the Second Circuit, which was granted.

The Second Circuit vacated and reversed the matter. The Second Circuit applied the standard from *Taggart*, which stated that no sanctions for civil contempt could apply in the context of a discharge injunction action if the creditor held an “objectively reasonable basis for concluding that the creditor’s conduct might be lawful under the discharge order.” *Id.* at 1801. The Second Circuit expanded *Taggart* to apply to situations beyond discharge injunctions, and in the specific instance, unless the bankruptcy court issued “an express injunction” preventing a mortgage servicer from sending out inaccurate statements contrary to the bankruptcy court’s orders, a fair ground of doubt arose as to whether the order barred the creditor’s conduct, preventing contempt findings. The Second Circuit also held that Rule 3002.1(i) does not authorize bankruptcy courts to impose punitive sanctions.

The Second Circuit also indicated that the bankruptcy court failed to adequately assess whether monetary sanctions were permitted under the bankruptcy court’s inherent powers for violations of Rule 3002.1.

One judge opted to write a concurrence in part and a dissent in part, where the judge agreed with the application of *Taggart* to contempt proceedings beyond discharge injunction scenarios but disagreed with the vacating of the monetary sanctions for the violations of Rule 3002.1. The dissent viewed the Rule’s language as its own basis to permit punitive sanctions when a creditor repeatedly violated the Rule.

But see Sosne v. Reinert & Duree, P.C. et al. (In re Just Brakes Corporate Systems, Inc.), 108 F.3d 881 (8th Cir. 1997) (holding the bankruptcy court’s authority to compensate an individual harmed by willful violations of the automatic stay and the authority to punish for willful violations of the automatic stay granted by statutory authority not under equitable authority or through inherent contempt powers).

B. Not All Private Student Loans are Excepted from Discharge. *Homaidan v. Sallie Mae, Inc. et al. (In re Homaidan)*, 3 F.4th 595 (2d Cir. 2021) (Jacobs, J.).

The debtor reopened his bankruptcy case to commence a class action suit against the lender. The lender moved to dismiss, and the bankruptcy court denied the motion. The lender appealed and received a direct appeal to the Second Circuit.

The lender only argued that its loan qualified for exception to discharge under § 523(a)(8)(A)(ii). The Second Circuit rejected the lender’s broad reading of the language under this subsection that would make any loan used for education non-dischargeable. The Second Circuit, instead, in focusing on the statutory language, determined the lender’s loans did not qualify as student loans sufficient to be excepted from discharge under Section 523(a)(8)(A)(ii), because they did not qualify as scholarships, stipends, or conditional education grants.

By making such a determination, the Second Circuit joined two other circuits in holding that not all private student loans are excepted from discharge.

The Second Circuit affirmed the denial of the lender's motion to dismiss, and this matter now continues to progress in the bankruptcy court on the merits.

C. Prior Version of the Statute Setting Forth Quarterly Fees in Chapter 11 Cases Violated the Uniformity Requirement of the Constitution's Bankruptcy Clause. *Clinton Nurseries, Inc. et al. v. Harrington (In re Clinton Nurseries, Inc.)*, 998 F.3d 56 (2d Cir. 2021) (Nardini, J).

The Second Circuit held that the 2017 Amendment to the bankruptcy fees of chapter 11 debtors violated the uniformity requirement of the Bankruptcy Clause. The debtors—plant nursery operators—filed a chapter 11 petition on December 18, 2017, in a district that utilizes the U.S. Trustee program. After the enactment of the 2017 Amendment, the debtor paid the increased quarterly fees.

The debtors filed a motion with the bankruptcy court seeking relief from the increased quarterly fees. The bankruptcy court found that the 2017 Amendment constituted a bankruptcy law subject to the uniformity requirement of the Bankruptcy Clause. However, the bankruptcy court held the 2017 Amendment implicated no uniformity problem. The debtors appealed the decision of the bankruptcy court.

The Second Circuit reversed the bankruptcy court and issued two rulings: (1) the 2017 Amendment governed debtor-creditor relations and impacted the relief available, and thus, it qualified as a bankruptcy law subject to the Bankruptcy Clause and qualified as constitutional only if applied uniformly; (2) prior to a 2020 amendment that equalized fees in U.S. Trustee and Bankruptcy Administrator districts, the 2017 Amendment stood unconstitutional on its face because it charged higher fees to debtors in U.S. Trustee districts than to debtors in Bankruptcy Administrator districts.

D. Creditors Failed to Overcome Presumption that Substantial Consummation of Chapter 11 Plan Rendered Appeal Equitably Moot.

***GLM DFW, Inc. v. Windstream Holdings, Inc. (In re Windstream Holdings, Inc.)*, 838 Fed. Appx. 634 (2d. Cir. 2021), petition for cert. filed, U.S. (U.S. Jul. 21, 2021) (No. 21-78).**

GLM appealed an order of the district court that granted the debtor-in-possession the authority to pay various prepetition debts held by certain creditors. While the appeal pended, the bankruptcy court confirmed the debtor's plan of reorganization. The Second Circuit dismissed the appeal after applying equitable mootness, finding that appellant failed to exhaust its available remedies by seeking to stay the bankruptcy court's initial order permitting the debtor-in-possession to pay various prepetition debts, nor did the appellant seek an expedited appeal or ask the bankruptcy court to hold off on plan confirmation. The Second Circuit reasoned it would be inequitable to grant appellant's relief because such relief would require the bankruptcy court to reopen the reorganization plan to address the tens of millions of dollars of previously satisfied claims.

E. Third Circuit Dismisses Appeal as Equitably Moot. *Heckman Corp. v. Hargreaves (In re Nuverra Env't Sols, Inc.)*, 834 Fed. Appx. 729 (3d Cir. 2021) (Jordan, J), petition for cert. filed, sub nom., *Hargreaves v. Nuverra Env't Sols., Inc. et al.*, 2021 WL 2890270 (U.S. July 6, 2021) (No. 21-17).

Over the creditor's objection on the grounds of unfair discrimination, the bankruptcy court confirmed a plan of reorganization that treated equally ranked claims differently. The same day the bankruptcy court confirmed the plan, the creditor filed a notice of appeal to the district court, requesting individualized payment. The day following plan confirmation, the creditor filed an emergency motion for stay of the bankruptcy court's confirmation order. The district court denied the creditor's stay request, allowing implementation of the confirmed plan. After substantial consummation of the plan, the debtors moved to dismiss the creditor's appeal. The district court ruled the appeal equitably moot on the grounds that the plan could not practically be unwound. The creditor appealed the district court ruling.

The Third Circuit dismissed the appeal as moot. In doing so, the Third Circuit employed two analytical steps in examining the creditor's appeal of equitable mootness: (1) whether the confirmed plan reached substantial consummation; and (2) if so, whether granting the relief requested in the appeal will (a) fatally upend the plan and/or (b) significantly harm third parties who justifiably relied on the confirmed plan. First, the Third Circuit found that the confirmed plan reached substantially consummation. Second, the Third Circuit found that the creditor's request for individualized payment contravened section 1129(b) of the Bankruptcy Code, which mandated the same treatment for each claim or interest of a particular class. The Third Circuit reasoned that because section 1129(b) applied to classes of creditors and not individual creditors that comprised a class, the only relief available to the

creditor would constitute class-wide relief and such relief would fatally scramble and upend the plan.

F. Fourth Circuit Holds Increase to Quarterly UST Fees Due in Chapter 11 Cases Did Not Create Constitutional Uniformity or Retroactivity Problems. *Siegel v. Fitzgerald (In re Circuit City Stores, Inc.)*, 996 F.3d 156 (4th Cir. 2021) (King, J).

Congressional enactment of the 2017 Amendment temporarily increased chapter 11 debtors' quarterly fees, leading to chapter 11 debtors in districts that utilized the U.S. Trustee program to pay more in fees than chapter 11 debtors in districts that utilized the Bankruptcy Administrator program. The debtor, with a chapter 11 case pending in a U.S. Trustee district at the inception of the 2017 Amendment, filed a motion asserting the 2017 Amendment impermissibly created nonuniform bankruptcy laws that were unconstitutionally retroactive.

The bankruptcy court held the 2017 Amendment unconstitutional due to a lack of uniformity. The U.S. Trustee appealed the bankruptcy court's decision to the district court and the debtor cross-appealed. The Fourth Circuit held that there exists no constitutional uniformity problem posed by the 2017 Amendment because the Bankruptcy Clause does not forbid Congress to distinguish among classes of debtors. The Fourth Circuit found that the 2017 Amendment need only be geographically uniform, and Congress may consider differences that exist between different parts of the country and implement legislation that resolve geographically isolated problems. The Fourth Circuit reasoned the application of the 2017 Amendment resulted in different quarterly fees between U.S. Trustee regions and Administrator regions because Congress reasonably resolved the funding shortfall that existed in Trustee states and such distinction was not arbitrary.

The Fourth Circuit also held that the 2017 Amendment did not qualify as unconstitutionally retroactive because Congress clearly intended for the 2017 Amendment to apply to all disbursements made after its effective date, including the cases that were filed before the 2017 Amendment but pending during the 2017 Amendment's enactment. The Fourth Circuit found that applying the 2017 Amendment to cases filed before its effective date did not increase a debtor's liability for past conduct or impose new duties with respect to transactions already completed.

G. A Debtor May Not Select Different Treatments Under § 1325(a)(5) for Different Pieces of Collateral Securing the Same Loan. *Evolve Fed. Credit Union v. Barragan-Flores (In re Barragan-Flores)*, 984 F.3d 471 (5th Cir. 2021) (Owen, C.J).

The debtor in this case purchased two vehicles, financing both with secured loans

from the same lender. The security agreements cross-collateralized the loans. The debtor filed a chapter 13 petition and plan. In the plan, he proposed to “cram down” the first vehicle and surrender the second. The creditor filed an objection, arguing the cross-collateralization provisions of the loan prevented the debtor from partially surrendering the collateral. The bankruptcy court confirmed the plan. The district court reversed, and the circuit court affirmed, concluding the language in § 1325(a)(5) requires the debtor to either cramdown *or* surrender all the collateral securing the loan. The language of the code does allow debtors to select different options for each allowed secured claim. But here, the debtor is asking to select a different option for different collateral securing the same claim, something the plain meaning of the code does not permit. Thus, a debtor cannot select different treatment for each vehicle, but rather must either cramdown or surrender both.

H. Court Had Equitable Authority to Grant Tardily Filed Motion to Extend Discharge Objection Deadline Due to Prior Order Setting Incorrect Deadline. *Yaquinto v. Ward (In re Ward)*, 978 F.3d 298 (5th Cir. 2020) (Owen, C.J.).

After the original bankruptcy court scheduled Ward’s first § 341 meeting, it transferred his chapter 7 case to a different district. The recipient court set a new, later discharge-objection deadline that erroneously permitted parties-in-interest to object to Ward’s discharge more than sixty days after the first date set for the original § 341 meeting (in violation of Rule 4004(a)’s sixty-day deadline). More than sixty days after the first date set for the original § 341 meeting but before the recipient court’s later, erroneous discharge-objection deadline, creditors and the trustee filed a motion to extend the deadline to object to Ward’s discharge under §§ 727(a)(4)(A) and (a)(5). The court granted the extension and ultimately denied Ward’s discharge. On appeal, Ward argued the court lacked authority to extend the discharge objection deadline beyond the strict 60-day deadline set forth in Rule 4004(a). The Fifth Circuit disagreed, holding that courts have authority under § 105(a) to correct their own errors. Because the only way the lower court in this case could correct its own error was to “deem[] the Objectors’ motion timely” and because the lower court correctly analyzed §§ 727(a)(4) and (5), the Fifth Circuit determined the lower court did not err in denying Ward’s discharge.

I. Eleventh Circuit Considers Only Due Process Challenge and Debtor’s Failure to Establish Second *Brunner* Factor in Affirming Student Loan Nondischargeability Judgment. *Graddy v. Educational Credit Mgmt. Corp. (In re Graddy)*, 852 Fed. Appx. 509 (11th Cir. 2021) (per curiam).

Utilizing the *Brunner* test, the bankruptcy court determined that the debtor failed to carry her burden that she would be unable to make future payments on student loans. The bankruptcy court excepted the student loans from discharge and the debtor

appealed to the district court, which affirmed the bankruptcy court. The debtor appealed to the Eleventh Circuit.

The Eleventh Circuit reasoned that because the debtor failed to cite to controlling case law or content with the standard that required a certainty of hopelessness regarding the debtor's ability to pay, the debtor presented no reversible error on the second *Brunner* factor. Therefore, the Eleventh Circuit affirmed the lower courts in finding that the student loans were excepted from discharge without considering any of the other *Brunner* factors.

J. After *Fulton*, Debtors Win Right to Avoid City of Chicago's Possessory Liens on Vehicles Under § 522(f)(1)(A). *City of Chicago v. Howard*, 625 B.R. 384 (N.D. Ill. 2021) (Wood, J).

Two debtors filed separate chapter 7 petitions. Within their bankruptcies, each moved to avoid a possessory lien that the City of Chicago ("City") asserted attached to their cars. The bankruptcy court in both bankruptcies granted the motions and avoided the City's possessory liens as judicial liens under § 522(f)(1)(A) of the Bankruptcy Code. The City appealed, arguing the liens arose from a statute. The district court affirmed the bankruptcy court. The district court reasoned that the right for the City to impound vehicles and attach its possessory liens arose after the City received a certain number of money judgments—a determination that required administrative adjudication. A statutory lien conversely does not require any additional adjudication, relying solely on specific circumstances set forth in the statute. Therefore, the liens the City held were judicial liens subject to avoidance under § 522(f)(1)(A).

K. Bankruptcy Court Had Authority to Enjoin Pro Se Litigant from Making New Filings Without Prior Court Approval. *Simon v. Bank of America, NA*, No. 19-CV-3498 JMA, 2021 WL 148650 (E.D.N.Y. Jan. 15, 2021) (Azrack, J).

After Simon filed with the bankruptcy court, district court, and state court numerous baseless pleadings, discovery requests, and challenges to his mortgage lender's standing, the bankruptcy court enjoined him from making new filings without first obtaining the bankruptcy court's permission. Simon appealed the filing injunction, among other bankruptcy court orders. The district court affirmed, holding in relevant part that the bankruptcy court did not abuse its discretion in issuing the filing injunction under its inherent authority to sanction improper litigation conduct. Courts must weigh five factors when considering whether to restrict a litigant's access to the courts:

- (1) the litigant's history of litigation and in particular whether it

entailed vexatious, harassing or duplicative lawsuits; (2) the litigant's motive in pursuing the litigation, e.g., does the litigant have an objective good faith expectation of prevailing?; (3) whether the litigant is represented by counsel; (4) whether the litigant has caused needless expense to other parties or has posed an unnecessary burden on the courts and their personnel; and (5) whether other sanctions would be adequate to protect the courts and other parties.

Though Simon was a pro se litigant, which weighed against the filing injunction, his history of vexatious and duplicative litigation tactics and the financial and administrative burden he caused the courts and other litigants persuaded the district court that the filing injunction was necessary to protect the courts and other parties. For that reason, and because the bankruptcy court did not otherwise err, the district court denied Simon's appeal.

L. Section 1182(1)(A) Does Not Require a Debtor to Maintain its Core or Historical Business Operations on the Petition Date If the Debtor Otherwise Is Engaged in Some Type of Commercial or Business Activities. *In re Port Arthur Steam Energy, L.P.*, 629 B.R. 233 (Bankr. S.D. Tex. 2021) (Lopez, J.).

The debtor, who operated a waste heat facility, filed for chapter 11 relief under the Bankruptcy Code and elected to proceed under subchapter V. On the petition date, the debtor had ceased its core business operation—selling steam and electricity. However, the debtor continued to engage in other activities that related to its business such as pursuing litigation against a third party, pursuing collection remedies on an outstanding account receivable, selling an asset, and having managers oversee the company while an independent contractor maintained the debtor's facility. The bankruptcy court found that all those activities constituted commercial and business activities. The bankruptcy court held that § 1182(1)(A) does not require a debtor to maintain its core or historical business operations on the petition date, rather it required that the debtor be engaged in some type of commercial or business activities.

M. Neither Prior Ownership and Operation of Now-Defunct Businesses nor Employment as an Officer at a Presently Operating Business Rendered Debtors Eligible Elect Subchapter V. *In re Johnson*, Case No. 19-42063-ELM, 2021 WL 825156 (Bankr. N.D. Tex. Mar. 1, 2021) (Morris, J).

The bankruptcy court examined two issues: (1) whether an individual who previously owned and managed certain now-defunct businesses and holds mostly business-

related debts qualified as a debtor engaged in commercial or business activities for purposes of subchapter V election, and (2) whether an employed officer of a non-debtor business entity, having no ownership in or ultimate control over the non-debtor business entity qualified as a person engaged in commercial or business activities.

First, the bankruptcy court found that the meaning of “engaged in” required an inherently contemporary assessment of the debtor’s state of affairs as of the petition date rather than a retroactive application. Applying a contemporary focus to the meaning of engaged in, the bankruptcy court held that the debtor failed to be engaged in commercial or business activities because the debtor’s defunct companies had ceased all commercial and business activities as of the petition date with no intention to resume operations. Second, the bankruptcy court held that a person who is merely an employee of a non-debtor business entity with no ownership interest in the non-debtor entity does not qualify as a person engaged in commercial or business activities because such person does not engage in the exchange or buying and selling of economic goods or services for profit.

N. Bankruptcy Court Relies on § 105(a) to Discharge the Portion Debtor’s Student Loans that Remains After Debtor Completes Income Based Repayment Plan. *Parvizi v. U.S. Dept. of Educ. et al. (In re Parvizi)*, Case No. 18-30578-EDK, 2021 WL 1921121 (Bankr. D. Mass. May 13, 2021) (Katz, J).

A pro se debtor brought an adversary complaint to determine the dischargeability of her student loans. The 51-year-old woman had a high level of education, with multiple degrees, fluent in multiple languages, and had no known physical or mental impairments preventing her ability to work.

The debtor attended medical school on a couple of occasions, the last time, entering a residency program that she failed to complete. The debtor asserted to the bankruptcy court that her inability to pay her student loans stemmed from her termination from the residency program. However, the bankruptcy court noted that in the near-decade since the incident, the debtor did not make efforts to maximize her income and did not attempt to make payments through the income-based repayment (“IBR”) programs even though the debtor had discretionary income in excess of the minimum payment every month.

The bankruptcy court held that the totality of the circumstances did not support a finding that the student loans imposed an undue hardship on the debtor. However, utilizing Section 105(a), the bankruptcy court discharged the portion of the debt that remains after twenty-five years of continuous participation in an IBR program. The bankruptcy court also left open the possibility for the debtor to return to the bankruptcy court and renew the request for discharge if the debtor ever were ruled

ineligible for participation in IBR.

O. Debtor’s Consulting Activities as an Independent Contractor Rendered her “Engaged in Business or Commercial Activities” for Purposes of Subchapter V Eligibility. *In re Blue*, 21-80059, 630 B.R. 179 (Bankr. M.D.N.C. 2021) (Kahn, J).

The debtor served as president of her solely owned IT consulting business. The debtor’s business ceased operations in May 2019, and the debtor became a full-time employee of a non-debtor entity and an independent contractor providing IT services. The bankruptcy administrator and the subchapter V trustee (Objecting Parties) objected to the debtor’s election to proceed under subchapter V on three grounds. First, the Objecting Parties provided the debtor did not qualify for subchapter V reorganization because neither her former ownership of her defunct IT consulting business nor her current consulting activities qualified her as a person engaged in commercial or business activities. Second, the Objecting Parties contended that less than fifty percent of the debtor’s aggregate noncontingent, liquidated secured and unsecured debts arose from the debtor’s commercial or business activities. Third, the Objecting Parties provided there must be a nexus between the business or commercial activities in which the debtor is presently engaged and the business and commercial activities from which not less than fifty percent of her debts arose under § 1182 of the Bankruptcy Code.

The bankruptcy court held the term “engaged in” requires debtors to be presently participating in business or commercial activities as of the petition date, and the debtor’s consulting activities as an independent contractor qualified her as engaged in commercial or business activities. The bankruptcy court also held that the plain language of section 1182(1)(A) of the Bankruptcy Code does not mandate that the debtor’s scheduled business debts be related to her current business activities, and thus the debtor met the debt threshold even though a significant portion of the debtor’s debts arose from her defunct IT consulting business.

P. Distinguishing *Acevedo*, Bankruptcy Court Approves Employment of Professionals Retroactive to a Date Preceding the Approval Order. *In re Hunanyan*, 21-10079-MT, 2021 WL 2389273 (Bankr. C.D. Cal. Jun. 10, 2021) (Tighe, J).

The chapter 7 trustee filed an application to employ accountants and requested an effective date of the employment approximately three weeks prior to the docketing of the motion. The UST held no objection to the employment, but the UST argued that the employment’s effective date should be the hearing date or the date of the entry of the order if no hearing occurred. The UST based its objections on the theory that any retroactive relief would run afoul of the Supreme Court’s decision in *Roman Catholic Archdiocese of San Juan, Puerto Rico v. Acevedo Feliciano*, 140 S.Ct. 696 (2020).

Acevedo prohibited the issuance of nunc pro tunc orders that relied on facts not in existence. The bankruptcy court did not view *Acevedo* to include a prohibition on approving employment that began prior to the docketing of a motion. The bankruptcy court also noted that § 327 of the Bankruptcy Code authorized the approval of the employment application without the use of equitable considerations or nunc pro tunc orders.

Therefore, the bankruptcy court overruled the UST’s motion and granted the employment of the accountants effective to the date the work commenced.

Q. Case Illustrates Why Individual Chapter 11 and Subchapter V Debtors Must Carefully Define and Document Disposable Income. *In re Patel*, 621 B.R. 245 (Bankr. E.D. Cal. 2020) (Klein, J.).

The individual chapter 11 debtors’ confirmed plan required the debtors to pay their unsecured class all of their “disposable income as defined in 11 U.S.C. § 1129(a)(15)(B).” The court determined the debtors did not comply with that provision of their proposed plan because, among other reasons, the debtors could not produce record proving their income and expenses, and their plan did not adequately define the term “disposable income.” The case serves as a cautionary tale for attorneys working on individual chapter 11 and subchapter V cases. It highlights the importance of (1) carefully defining disposable, and (2) ensuring debtors keep detailed records of income and expenses during the life of their plans.

R. Courts Decline to Impose a Non-Statutory Requirement that Debtors Be Current in Their Plan Payments to Amend Under the CARES Act. *In re Gilbert*, 622 B.R. 859 (Bankr. E.D. La. 2020) (Grabill, J.); *In re Fowler*, Nos. 19-32243-WRS, 19-32243-WRS, 2020 WL 6701366 (Bankr. M.D. Ala. Nov. 13, 2020) (Sawyer, J.).

The debtors in *Gilbert* all filed their chapter 13 cases prior to March 27, 2020. In each case, the debtors had fallen behind on payments before Congress enacted the CARES Act and sought to modify their plans under 11 U.S.C. § 1329(d). The trustee objected, arguing that to modify under the CARES Act, the debtors must have fallen behind *after* March 27, 2020, and the pandemic must be the sole reasons for the debtors’ arrearages. The court disagreed. The language of the CARES Act allows a debtor to modify his or her chapter 13 plan if he or she meets two requirements: (1) the court confirmed the debtor’s plan by March 27, 2020; and (2) the debtor “[is] ‘experiencing or has experienced a material financial hardship due, directly or indirectly to’ COVID-19.” 11 U.S.C. § 1329(d). The trustee in this case appeared to ask the court to impose a non-statutory requirement that debtors be current in their plan payments prior to March 27, 2020, to qualify to amend under the CARES Act. But nothing suggested Congress intended to impose this requirement. Thus, if the court confirmed the

debtor's plan prior to March 27, 2020, and if the debtor's financial hardship was due to COVID-19, then the debtor was eligible to modify his or her plan under the CARES Act.

In *Fowler*, the court relied on *Gilbert* to arrive at the same conclusion respecting two separate debtors who had previously confirmed chapter 13 plans. Both debtors had poor payment histories and payment delinquencies. Each sought to amend his or her case under the CARES Act, but the trustee objected due to the pre-CARES Act delinquency. Just as in *Gilbert*, the court here declined to require that the debtors be current in their plan payments on March 27, 2020, to be eligible to modify their plans under the CARES Act. Because the debtors' plans were confirmed prior to March 27, 2020, and their hardship stemmed from the COVID-19 pandemic, the court determined both debtors could modify their plans under the CARES Act, despite the delinquencies.

S. Subchapter V Trustees are Entitled to 'Reasonable' Compensation Without a "Cap." *In re Tri-State Roofing*, No. 20-40188-JMM, 2020 WL 7345741 (Bankr. D. Idaho Dec. 7, 2020) (Meier, J.).

The court dismissed this subchapter V case prior to confirmation. The trustee, who had been appointed as a disinterested person, filed an application for about \$2000. To determine whether the court can grant the award of compensation under § 330(a)(1), the court had to consider § 326, which places limits on certain trustees' compensation. Section 326(b) states a court may not allow compensation for services or reimbursement of expenses of the United States Trustee or a standing trustee in subchapter V, chapter 12, or chapter 13 cases. It also states courts "may allow reasonable compensation under § 330 of a trustee appointed under §§ 1202(a) or 1302(a) for the trustee's services. Here, this issue is whether § 326(b) prevents an award of compensation to the subchapter V trustee and whether it places a cap on such compensation. The court concluded the most sensible reading is that "Congress only intended to place a percentage limitation on compensation to trustees who are not standing trustees in chapter 12 and chapter 13 and not to impose that cap on trustees in subchapter V." Thus, subchapter V trustees are entitled to reasonable compensation without a cap.

Faculty

Hon. Bonnie L. Clair is a Bankruptcy Judge in the U.S. Bankruptcy Court for the Eastern District of Missouri in St. Louis. Prior to her appointment in 2020, she spent many years in private practice at Summers Compton Wells LLC representing both creditors and debtors in bankruptcy, commercial, and consumer finance matters; she previously had piloted the field attorney program at Norwest Financial, Inc. (now Wells Fargo Financial, Inc.) and served in the U.S. Attorney General's Honors Program as an attorney with the Office of the U.S. Trustee in St. Louis, Mo., and Little Rock, Ark. She also served as a member of the Region X Committee for the Missouri Office of Chief Disciplinary Counsel and the Missouri Bar's Fee Dispute Resolution Committee panel. Judge Clair appeared on "Jeopardy!" in 2006 and "Who Wants to Be a Millionaire?" in 2002. She received her undergraduate degree from Duke University in 1990 and her J.D. from Washington University School of Law in 1993, where she was an articles editor for the *Journal of Urban and Contemporary Law* (now the *Journal of Law and Policy*), a national competitor in the New York City Bar Moot Court competition and a law clerk for the Civil Division of the U.S. Attorney's Office for the Eastern District of Missouri.

Hon. Brian T. Fenimore is a U.S. Bankruptcy Judge for the Western District of Missouri in Kansas City, appointed on Aug. 31, 2017. Previously, he was a partner in the Kansas City, Mo., office of Lathrop & Gage LLP for more than 25 years and co-chaired its Banking & Creditors' Rights practice area, representing debtors, creditors and many other parties in interest. He also represented borrowers and lenders in problem loan matters, including loan enforcement, guarantor liability, workouts, reorganizations and bankruptcies throughout the U.S. Judge Fenimore is admitted to practice in Kansas and Missouri, and before the U.S. Bankruptcy Courts for the Eastern and Western Districts of Missouri and the District of Kansas, as well as the U.S. District Courts for the District of Kansas and the Eastern and Western Districts of Missouri. He is AV-rated by Martindale-Hubbell and has been listed in *The Best Lawyers in America* every year since 2003, among other listings. He is also a frequent speaker and ABI member. Judge Fenimore received his B.S. *magna cum laude* in 1988 in agricultural economics from the University of Missouri-Columbia and his J.D. in 1990 from the University of Michigan Law School, after which he clerked for Hon. Arthur B. Federman.

Hon. Terrence L. Michael is a U.S. Bankruptcy Judge for the U.S. Bankruptcy Court for the Northern District of Oklahoma in Tulsa and a member of the Bankruptcy Appellate Panel of the Tenth Circuit. He has authored more than 170 published opinions, as well as articles in the *Tulsa Law Review*, *Texas Tech Law Review* and *Creighton Law Review*. Upon graduation from law school, Judge Michael joined the firm of Baird, Holm, McEachen, Pedersen, Hamann & Strasheim in Omaha, Neb., where he was a member of the firm's bankruptcy and creditors' rights practice group. His practice included all types of bankruptcy matters and general civil litigation. While at Baird, Holm, Judge Michael chaired the Bankruptcy Section of the Nebraska State Bar Association and was a member of the local rules committee responsible for drafting local rules in chapter 12 cases. He also authored and presented numerous papers at various continuing legal education seminars. Judge Michael has taught courses for the American Banker's Association School of Agri-Finance and Metro Technical Community College. On June 9, 1997, he began his career as a bankruptcy judge, and on June 7, 2000, he was appointed to the Bankruptcy Appellate Panel of the Tenth Circuit, a position he still

holds. As a member of the BAP, Judge Michael chaired the committee charged with revising the local rules of that court. He has authored more than 170 opinions, is an associate editor of the *American Bankruptcy Law Journal* and an adjunct professor of law at the University of Tulsa, and has served as a speaker at various seminars presented by the Federal Judicial Center, the Eighth Circuit Judicial Conference, the Tenth Circuit Judicial Conference, ABI, the Nebraska State Bar Association, the Oklahoma Bar Association, the Tulsa County Bar Association, the West Texas Bar Association and the Southwest Regional Turnaround Management Association. Judge Michael is a member of the National Conference of Bankruptcy Judges, having served on various committees and the Board of Governors. He received the President's Award for Distinguished Service to the Conference in 2018. Judge Michael is an emeritus member of the Council Oak/Johnson-Sontag American Inn of Court, which awarded him the John A. Athens Leadership Award in 2004, and the Nebraska State Bar Association. He was part of a multi-state select choir, which sang in Carnegie Hall in 1999, and recorded his first studio album in collaboration with Oklahoma Music Hall of Fame member and Grammy winner David Teegarden in 2018. Judge Michael received his B.A. *magna cum laude* in history from Doane College in 1980 and his J.D. from the University of Southern California's Gould School of Law in 1983.

Hon. Charles L. Nail is the Chief U.S. Bankruptcy Judge for the District of South Dakota in Sioux Falls. In January 1984, he left the litigation department of the Minneapolis law firm of Stacker & Ravich to join the bankruptcy department of the Minneapolis law firm of Arnold & McDowell. While there, he also served as a chapter 7 trustee for the District of Minnesota. Judge Nail returned to South Dakota in November 1988 to become an Assistant U.S. Trustee, first for the District of South Dakota and later for both the Districts of North Dakota and South Dakota. In September 1995, he was appointed clerk of the U.S. Bankruptcy Court for the District of South Dakota, a position he held until August 2006, when he was sworn in as bankruptcy judge. In September 2010, Judge Nail was appointed to the Eighth Circuit Bankruptcy Appellate Panel, and in January 2021, he was appointed Chief Judge of the BAP. He has served as an adjunct professor at the University of South Dakota School of Law, and he co-authored "Truth or Consequences: The Dilemma of Asserting the Fifth Amendment Privilege Against Self-Incrimination in Bankruptcy Proceedings," an article appearing in the *Nebraska Law Review*. Judge Nail received his undergraduate degree in 1979 from the University of South Dakota and his J.D. *magna cum laude* in 1982 from the University of Minnesota School of Law.