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October 2022 through August 2023

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U.S. Bankruptcy Appellate Panel
for the Eighth Circuit, Chief Judge, and
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Supreme Court Cases

Honorable Bianca M. Rucker
Judge, United States Bankruptcy Court for the Eastern and
Western Districts of Arkansas

*Bartenwerfer
v. Buckley,*
143 S. Ct. 665
(2023) (Barrett, J.).



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*Bartenwerfer
v. Buckley,*
143 S. Ct. 665
(2023).



Debts arising from a partner's fraud are nondischargeable, even against an innocent partner who did not know of the other partner's fraud



*MOAC Mall Holdings LLC v.
Transform Holdco LLC*, 598 U.S. 288 (2023).

- 363(m) protects good faith purchasers from reversal on appeal unless the sale order is stayed pending appeal
- 363(m) is NOT jurisdictional



Tyler v. Hennepin County,
598 U.S. 631 (2023) (Roberts, C.J.).

Hennepin County Governm
300 South 6th Street

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Tyler v. Hennepin County,
598 U.S. 631 (2023) (Roberts, C.J.).

“A taxpayer who loses her \$40,000 house to the State to fulfill a \$15,000 tax debt has made a far greater contribution to the public fisc than she owed. The taxpayer must render unto Caesar what is Caesar’s, but no more.”

300 South 6th Street

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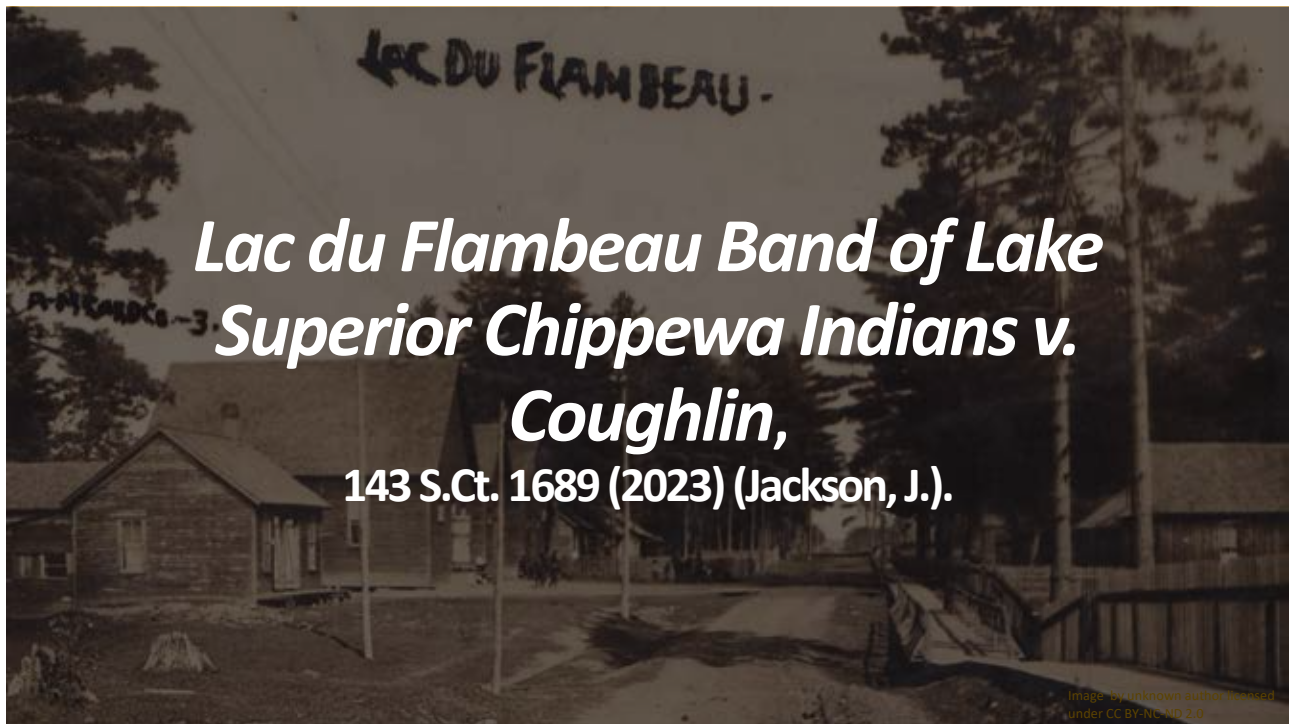
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Financial Oversight and Management Board of Puerto Rico v. Centro De Periodismo Investigativo, Inc.,
143 S.Ct. 1176 (2023) (Roberts, C.J.).

*Financial Oversight and Management Board of Puerto Rico v.
Centro De Periodismo Investigativo, Inc.*, 143 S.Ct. 1176 (2023).

- PROMESA does not abrogate sovereign immunity
- Even though PROMESA incorporates 106(a), this was not a Title III case in which sovereign immunity is stripped under 106(a)
- Language abrogating sovereign immunity must be clear and unequivocal



Lac du Flambeau Band of Lake Superior Chippewa Indians v. Coughlin, 143 S.Ct. 1689 (2023).

- Section 106(a) abrogates the sovereign immunity of tribes
- Section 362(a) applying the automatic stay to “governmental units” applies to tribes as a “foreign or domestic government” as defined under section 101(27).
- Congress’s intent to abrogate tribal sovereign immunity is unmistakably clear despite no mention of tribes specifically

Purdue Pharma, L.P. v. City of Grande Prairie,

(In re Purdue Pharma, L.P.), 69 F.4th 45 (2d Cir. 2023), cert granted, 23-124 (Aug. 10, 2023).

- Third party release decision forthcoming



Eighth Circuit Cases

Honorable Dennis R. Dow
Chief Judge, United States Bankruptcy Appellate Panel for the Eighth
Circuit
Judge, United States Bankruptcy Court for the Western District of
Missouri

PIRS Capital LLC v. Williams, 54 F.4th 1050 (8th Cir. 2022).



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PIRS Capital LLC v. Williams, 54 F.4th 1050 (8th Cir. 2022).

(60)(b)(4): judgment void in “rare instance[s]” and “exceptional cases” when:

- “jurisdictional error” or “violation of due process that deprives a party of notice or the opportunity to be heard”
- “the court that rendered judgment lacked even an ‘arguable basis’ for jurisdiction”
- movant lacked “full and fair opportunity”

Strict Compliance with Rule 7004(b)(3) not required

Pitman Farms v. ARKK Food Co., LLC (In re Simply Essentials, LLC),
78 F.4th 1006 (8th Cir. 2023).



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Pitman Farms v. ARKK Food Co., LLC (In re Simply Essentials, LLC),
78 F.4th 1006 (8th Cir. 2023).

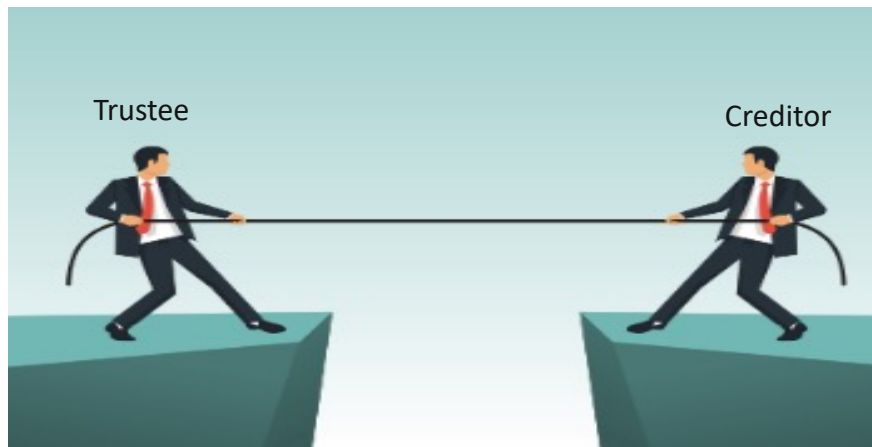


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Avoidance actions are property of the estate and thus saleable.

- § 541(a)(1): inchoate or contingent pre-petition interests
- § 541(a)(7): interests the estate acquires post-petition

United States v. Kelley, 70 F.4th 482 (8th Cir. 2023).



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United States v. Kelley, 70 F.4th 482 (8th Cir. 2023).

District Court did not err in approving final accounting and barring creditors from asserting claims belonging to bankruptcy trustees

In re Topp,
75 F.4th 959 (8th Cir. 2023).



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In re Topp,
75 F.4th 959 (8th Cir. 2023).

“We see no legal significance to whether a court starts with a risk-free rate and adds *full* risk or starts with a *some*-risk rate and adds some more. If the court properly follows the formula approach, the ultimate discount rate, not the starting point, is what matters.”



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Cornice & Rose, LLC v. Four Keys, LLC,
74 F.4th 1116 (8th Cir. 2023).

- District Court properly dismissed and granted summary judgment against an architectural firm on its copyright infringement claims against a building’s purchaser who purchased the building in a 363 sale



Riechel v. Jensen-Carter

(In re Riechel), 645 B.R. 620 (B.A.P. 8th Cir. 2022).

Riechel v. Jensen-Carter

(In re Riechel), 645 B.R. 620 (B.A.P. 8th Cir. 2022).

- Relief from a criminal conviction is not proper grounds to reopen bankruptcy case
- Bankruptcy court has discretion to craft relief when creditors do not file documentation in support of their proof of claim

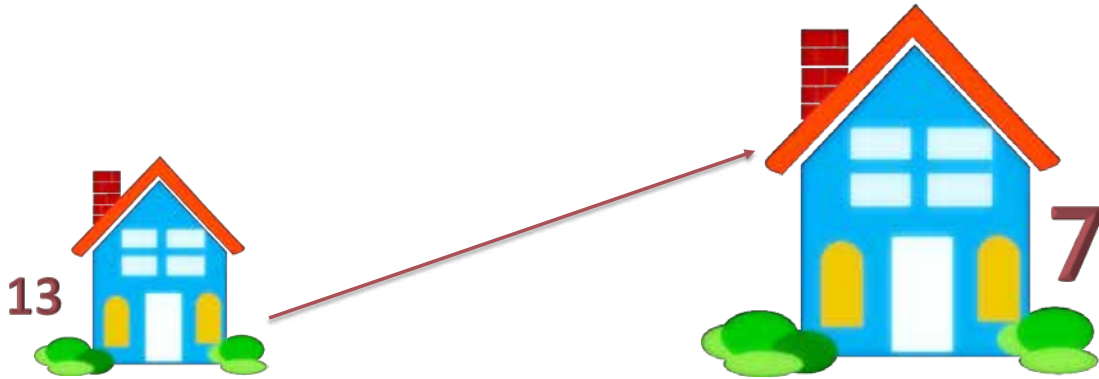


In re Swackhammer, 650 B.R. 914 (B.A.P. 8th Cir. 2023).

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In re Swackhammer,
650 B.R. 914 (B.A.P. 8th Cir. 2023).

- The plain language of § 1229 does not require a “unanticipated, substantial change in circumstances”
- Prior authority required that the change be substantial
- Court did not take a position about whether the change must also be unanticipated



In re Goetz, 651 B.R. 292 (B.A.P. 8th Cir. 2023).

“property of the estate in the converted case shall consist of property of the estate, as of the date of filing of the petition, that remains in the possession of or is under the control of the debtor on the date of conversion.”

11 U.S.C. § 348(f)

- Residence is property of the estate
- Appreciation is inseparable from the residence

In re Goetz, 651 B.R. 292 (B.A.P. 8th Cir. 2023).



Tenth Circuit Cases

Honorable Dale L. Somers
Judge, United States Bankruptcy Appellate Panel for the Tenth Circuit
Chief Judge, United States Bankruptcy Court for the District of Kansas



*Goodman v.
Doll (In re Doll),*
57 F.4th 1129 (10th Cir. 2023).



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*Goodman v.
Doll (In re Doll),*
57 F.4th 1129 (10th Cir. 2023).

When no plan is confirmed, Chapter 13 trustee may not deduct fee from payments received

*State Bank of S. Utah
v. Beal (In re Beal),* No.
21-4124, 2022 WL 17661140 (10th
Cir. Dec. 14, 2022) (unpublished).

Alleged CM/ECF Technical
Failures Did Not Excuse
Tardily Filed Dischargeability
Complaint



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Swan Pediatric Dental, LLC v. Hulse (In re Hulse), No. UT-22-001, 2022 WL 16826561 (B.A.P. 10th Cir. Nov. 8, 2022) (unpublished).



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Swan Pediatric Dental, LLC v. Hulse (In re Hulse), No. UT-22-001, 2022 WL 16826561 (B.A.P. 10th Cir. Nov. 8, 2022) (unpublished).

- Disputes regarding intent and motivation for defamatory statements prevented summary judgment in favor of purchaser
- Arbitration award did not adequately assess defamation-specific liability





*Vitamins Online, Inc.
v. Heartwise, Inc.,
71 F.4th 1222 (10th Cir. 2023).*

A man with a beard and a black shirt is pointing towards a five-star rating. The rating consists of five stars: the first is yellow, the second is half yellow and half white, and the remaining three are white.



*Vitamins Online, Inc.
v. Heartwise, Inc.,
71 F.4th 1222 (10th Cir. 2023).*

- Cross appeal was the “commencement or continuation” of a judicial action under § 362(a)(1)
- § 108(c) tolled the deadline to file the cross-appeal

A man with a beard and a black shirt is pointing towards a five-star rating. The rating consists of five stars: the first is yellow, the second is half yellow and half white, and the remaining three are white.



Byrnes v. Byrnes (In re Byrnes), No. 22-2049, 2022
WL 19693003 (10th Cir. Dec. 21, 2022) (unpublished) (per curiam).

Order denying withdrawal of reference:

- “merely involve[d] the selection or designation of the forum in which final decisions will be ultimately reached”
 - did not finally end the litigation, so was not a final appealable order
- Tenth Circuit lacked jurisdiction



Klein v. Roe,
76 F.4th 1020 (10th Cir. 2023).

- A receiver on behalf of the receivership entities has standing to pursue fraudulent transfer claims
- The receiver did not have to prove the transferees were aware of the fraud
- Court rejected good faith and reasonably equivalent value defense



*Montoya v.
Goldstein*

(In re Chuza Oil Co.), 639
B.R. 586 (B.A.P. 10th Cir.
2022).

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Montoya v. Goldstein
(In re Chuza Oil Co.), 639 B.R. 586 (B.A.P. 10th Cir. 2022).

- Debtor's payments on subordinated notes to insiders, when a Chapter 11 plan required the debtor to pay all general unsecured creditors in full first were preferential transfers
- Court emphasized that diminution of the estate caused by the replacement of subordinated debt with unsubordinated unsecured debt prevented application of earmarking doctrine



Georgelas v. Desert Hill Ventures, Inc.,

45 F.4th 1193 (10th Cir. 2022).

Georgelas v. Desert Hill Ventures, Inc., 45 F.4th 1193
(10th Cir. 2022).

- Even if the employee indirectly assisted with debtor's Ponzi Scheme, unless there is bad faith, the trustee cannot succeed in an avoidance action for the employee's wages
- Court remanded on the issue of bad faith

In re Drakewyck,

No. CO-23-004, 2023 WL 4312153
(B.A.P. 10th Cir. June 23, 2023).



In re Drakewyck,

No. CO-23-004, 2023 WL 4312153 (B.A.P. 10th Cir. June 23, 2023).

- When an action involves the U.S. government, you must timely serve the U.S. Attorney where the action was filed and the U.S. Attorney general
- Failure to do so may result in dismissal

*Bear Creek Trail,
LLC v. BOKF, N.A.,*

*(In re Bear Creek Trail, LLC), 35
F.4th 1277 (10th Cir. 2022).*



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Bear Creek Trail, LLC v. BOKF, N.A.

(In re Bear Creek Trail, LLC), 35 F.4th 1277 (10th Cir. 2022).

- When a case is converted from a Chapter 11 to a Chapter 7, the former management does not have standing to appeal conversion on behalf of the debtor
- However, the former management may be able to appeal conversion on behalf of their own personal interests as managers
- Because the management failed to allege a personal injury, they lacked standing to appeal

Miller v. United States, 71 F.4th 1247 (10th Cir. 2023).



Miller v. United States, 71 F.4th 1247 (10th Cir. 2023).

- Section 106(a)(1) abrogates sovereign immunity of states in avoidance actions brought under Section 544(b)
- The text of Section 106(a)(1) clearly manifests Congress's intent to abrogate sovereign immunity with respect to states and the federal government



Other Noteworthy Cases

Honorable Bianca M. Rucker
Judge, United States Bankruptcy Court for the Eastern and
Western Districts of Arkansas

***In re Off-Spec
Solutions, LLC,***
651 B.R. 862 (B.A.P. 9th
Cir. 2023).



In re Off-Spec Solutions, LLC,
651 B.R. 862 (B.A.P. 9th Cir. 2023).

- Section 523(a) 's nondischargeability provisions only applies to individual debtors
- There is nothing in Section 1192 indicating an intention to broaden the scope of Section 523(a) beyond individuals in Subchapter V cases



*Kirkland v. U.S.
Bankruptcy Court
for the Central
District of California
(In re Kirkland),
75 F.4th 1030 (9th Cir. 2023).*

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Kirkland v. U.S. Bankruptcy Court for the Central District of California (In re Kirkland), 75 F.4th 1030 (9th Cir. 2023).

- Courts may not circumvent Rule 45(c)(1)'s 100-Mile subpoena radius by requiring virtual testimony
- Rule 43(a) permitting remote testimony for compelling circumstances does not negate Rule 45(c)(1)

Blesdoe v. Cook

(In re Blesdoe), 70 F.4th 746
(4th Cir. 2023).



Blesdoe v. Cook

(In re Blesdoe), 70 F.4th 746 (4th Cir. 2023).

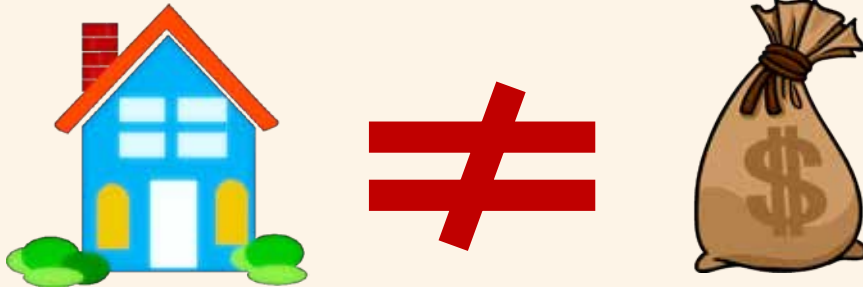
- When calculating disposable income, the debtor may deduct their monthly mortgage payment
- The plain language of Section 707(b)(2)(A)(i) allows for the deduction of amounts spent on account of secured debt

In re Marsh, 647 B.R. 725 (Bankr. W.D. Mo. 2023).



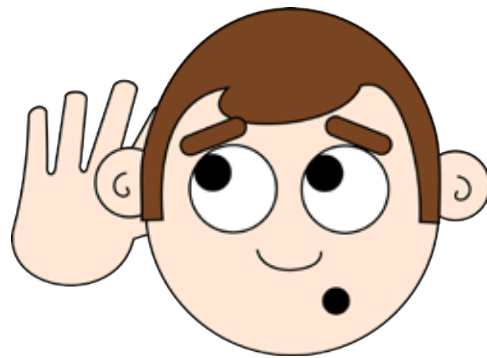
In re Marsh, 647 B.R. 725 (Bankr. W.D. Mo. 2023).

proceeds from post-confirmation sale are new property that replenish the chapter 13 estate



In re Shoults,

649 B.R. 885 (Bankr. E.D. Mo. 2023).



*In re
Shoults,*

649 B.R. 885 (Bankr.
E.D. Mo. 2023).

- No Missouri statute (including § 513.427) creates an exemption in contingent unliquidated claims
- claim was subject to attachment

In re Joseffy, No. 21-19419, 2023 WL 5842000
(Bankr.S.D. Fla. Sept. 8, 2023).



- The absolute priority rule applies in individual Chapter 11 cases
- The absolute priority rule does not preclude individual debtors from retaining exempt property, but it does preclude retention of nonexempt property other than post-petition property or earnings



Questions?

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With contribution by

Hon. Cynthia A. Norton

U.S. Bankruptcy Appellate Panel
for the Eighth Circuit
and U.S. Bankruptcy Court for the
Western District of Missouri

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I. Supreme Court

A. Section 363(m) Is Not Jurisdictional. *MOAC Mall Holdings LLC v. Transform Holdco LLC*, 598 U.S. 288 (2023) (Jackson, J.).

In the Sears Holding chapter 11 bankruptcy case, the debtors' former insiders formed a new company called Transform to purchase substantially all the assets of the debtors, consisting primarily of Sears store leases. The § 363 sale order provided that the leases would be assumed and assigned to designated entities at a later date, subject to court approval. One of the leases was a 100-year sweetheart lease of a three-story building with the Mall of America ("MOAC"), entered into in 1991 to induce Sears to be one of the original anchor tenants—a lease that is now well below the current market. When Transform created a new subsidiary and designated the subsidiary as the assignee, MOAC objected. The issue before the bankruptcy court turned on the requirements of § 365(b)(3), governing adequate assurance of future performance required to be given in connection with a lease of real property in a shopping center. Specifically, § 365(b)(3)(A) requires that the "financial condition and operating performance of the proposed assignee and its guarantors, if any, shall be similar to the financial condition and operation performance of the debtor and its guarantors, if any, as of the time the debtor became the lessee under the lease." Acknowledging that it was a first impression issue, and that Transform could never show it had a similar financial condition and operation as Sears did in 1991, the court nonetheless approved the assumption and assignment, and MOAC appealed.

The District Court initially vacated the assumption and assignment and reversed, finding that the bankruptcy court erred in finding that Transform met § 365(b)(3)(A). Transform then moved for rehearing, on the grounds § 363(m) deprived the District Court of jurisdiction to hear the appeal. Section 363(m) provides that the reversal or modification on appeal of a sale or lease under § 363(b) or (c) does not affect the validity of the sale or lease to an entity that purchased or leased such property in good faith, unless the sale or lease was stayed pending appeal. MOAC strenuously objected, pointing out that it had moved for a stay pending appeal, but the bankruptcy judge had denied it in part based upon Transform's assurances that § 363(m) did not apply and that it would not rely on § 363(m). The District Court judge, saying she was "appalled," vacated her order and dismissed the appeal for lack of jurisdiction based on binding Second Circuit precedent. MOAC then moved to rehear the rehearing, on the grounds of Transform's alleged bad faith. Again, noting her displeasure, the judge refused to hear the untimely bad faith argument and denied MOAC's motion. The parties appealed and cross-appealed to the Second Circuit, which affirmed the dismissal. The Supreme Court accepted cert to resolve a circuit split.

Writing for a unanimous court, Justice Jackson reversed, holding that a provision is treated as jurisdictional only if Congress clearly states as much. Nothing in § 363(m) indicates such a clear Congressional intent and the context of the statute backs that up: § 363(m) is not located with the other jurisdictional provisions in title 28, e.g., §§ 157 and 1334(a), (b), and (e). Section 363(m) is a “mere restriction on the effects of a valid exercise of [appellate] power when a party successfully appeals a covered authorization.” The Supreme Court also rejected Transform’s argument that the appeal was moot under a § 549 theory, noting that a case remains live so long as the parties have a concrete interest, however small, in the outcome of the litigation. Justice Jackson wrote: “[W]e decline to act as a court of ‘first view,’ plumbing the Code’s complex depths in ‘the first instance’ to assure ourselves that [the buyer] is correct about its contention that no relief remains legally available.”

B. The Government May Not Retain Proceeds from Real Estate Tax Foreclosures. *Tyler v. Hennepin Cty.*, 598 U.S. 631 (2023) (Roberts, C.J.).

In Minnesota, state law provides that when owner of real estate fails to pay property taxes or redeem the property during a three year redemption period, the owner forfeits his or her interest in the property. The county may sell the property in a tax foreclosure sale, and if the owner does not timely redeem the property by satisfying the outstanding tax debt, title to the property vests in the state. As the property’s new owner, the state may then sell the property and keep any proceeds. In this case, Hennepin County took an owner’s condo in satisfaction of a \$15,000 tax debt, sold the condo for \$40,000, and kept the \$25,000 proceeds.

The Supreme Court determined the county’s retention of the proceeds violated the Fifth Amendment as an unconstitutional taking of property without just compensation. The county’s practice unconstitutionally “use[d] the toehold of the tax debt to confiscate more property than was due.” “The principle that a government may not take more from a taxpayer than she owes” has been a facet of law since the Magna Carta and has long been recognized under the American statutory system and Supreme Court precedent. Minnesota recognized an owner’s right to a surplus in other circumstances and could not make an exception only for itself. Nonpayment of taxes alone did not sufficiently demonstrate abandonment, which requires indication that the owner lacks a present intention to retain the interest and a failure to make use of the property. Thus, the taking of the surplus was unconstitutional.

Justice Gorsuch wrote a concurring opinion to explain that the state’s action also violated the Excessive Fines Clause. The clause applies to all laws except those with solely remedial purposes, so the lower court erred applying the exception based on a conclusion that the law’s purpose was *primarily* remedial. The taking was also

punitive in nature, and “[e]conomic penalties imposed to deter willful noncompliance with the law are fines by another name,” that may not be excessive under the Constitution.

C. PROMESA Does Not Abrogate Sovereign Immunity. *Fin. Oversight and Mgmt. Bd. for P.R. v. Centro De Periodismo Investigativo, Inc.*, 143 S.Ct. 1176 (2023) (Roberts, C.J.).

A nonprofit media organization sued the governmental board overseeing Puerto Rico’s debt restructuring proceedings, seeking to compel the board to release various documents relating to the board’s work. The board defended on grounds of sovereign immunity. The district court determined that § 2126(a) of the Puerto Rico Oversight Management, and Economic Stability Act (PROMESA) abrogated the board’s sovereign immunity.

Assuming without deciding that the board enjoys sovereign immunity in the first instance, the Supreme Court granted certiorari to determine whether PROMESA abrogates that immunity. Explaining that abrogation must be unmistakable and unequivocal, the Court determined that PROMESA does not effect an abrogation. Abrogation occurs when a statute either (1) “says in so many words that it is stripping immunity from a sovereign entity,” or (2) “creates a cause of action and authorizes suit against a government against that claim.” Though PROMESA explicitly stripped sovereign immunity by incorporating Bankruptcy Code § 106(a) in so-called Title III cases, this was not a Title III case and PROMESA’s immunity stripping provision did not explicitly extend to the kinds of litigation involved in this case. PROMESA likewise did not abrogate sovereign immunity by creating a cause of action against the board or Puerto Rico. Section 2126(a)’s mandate that actions from PROMESA “shall be brought” in district court and its provision for specific litigation protections did not entirely abrogate immunity—suits could be brought under non-PROMESA statutes that abrogate immunity for other purposes (for example, Title VII of the Civil Rights Act), and could be brought if the board waived its immunity. Thus, nothing in PROMESA abrogated the board’s sovereign immunity.

Justice Thomas dissented, explaining that he would have concluded that sovereign immunity applies only to states—not to territories like Puerto Rico. Justice Thomas would have held that Puerto Rico lacks sovereign immunity in the first instance, making any purported abrogation irrelevant.

D. Debts for Partner’s Fraud Are Nondischargeable. *Bartenwerfer v. Buckley*, 143 S. Ct. 665 (2023) (Barrett, J.).

The Bartenwerfers, as partners under applicable California law (a fact never disputed during the lengthy litigation), purchased real estate for the purpose of renovating and flipping it. Mr. Bartenwerfer, who had no construction experience, handled the improvements himself. In the disclosures made to the buyer, Buckley (himself a general contractor), the Bartenwerfers did not disclose numerous problems with the building, including leaky windows, open permits, etc. Buckley sued both Bartenwerfers for damages for fraud and after a 19-day state court jury trial, won a \$200,000+ verdict. The Bartenwerfers filed chapter 7 bankruptcy petition and Buckley filed a complaint seeking to except the debt from discharge for fraud under § 523(a)(2)(A). The bankruptcy court, after trial, initially imputed Mr. Bartenwerfer’s fraud to Mrs. Bartenwerfer and found the debt nondischargeable. The Bartenwerfers appealed. The Ninth Circuit BAP reversed and remanded, finding that the bankruptcy court erred in not applying a *Walker*-type standard (that to be nondischargeable, Mrs. Bartenwerfer knew or should have known of her husband’s fraud). On remand, the bankruptcy court found Mrs. Bartenwerfer did not know and had no reason to know of her husband’s fraud and found the debt dischargeable. Buckley appealed again. The BAP affirmed, but the Ninth Circuit reversed, holding that no culpability standard was required to find the debt nondischargeable.

Resolving a split among the circuits, the Supreme Court unanimously held that debts created by a partner’s fraud are nondischargeable against the innocent partner, even if the innocent partner did not know or have reason to know of the other partner’s fraud. In so holding, the Supreme Court rejected the standard established by the Eighth Circuit in *In re Walker*, 726 F.2d 452 (8th Cir. 1984). The Court found the result justified by the use of the passive voice in § 523(a)(2)(A) (a debt is nondischargeable “to the extent obtained by . . . actual fraud”) and the Court’s holding in *Strang v. Bradner*, 114 U.S. 555 (1885).

In a concurrence, which Justice Jackson joined, Justice Sotomayor emphasized that the Supreme Court had long ago confirmed that fraudulent debts obtained by partners are not dischargeable, noting that the Court was not confronting a situation involving fraud by a person bearing no agency or partnership relationship to the debtor. Justice Sotomayor joined the Court’s opinion with the “understanding” that it concerns fraud only by “agents” and “partners within the scope of the partnership.”

E. Section 106(a) Waives Native Tribes’ Sovereign Immunity. *Lac du Flambeau Band of Lake Superior Chippewa Indians v. Coughlin*, 143 S. Ct. 1689 (2023) (Jackson, J.).

Debtor took out a payday loan from a business owned by the Chippewa, a federally recognized tribe. After the debtor filed a chapter 13 case, the payday loan business continued to try to collect. The debtor attempted suicide two months after filing bankruptcy, blaming the incessant collection calls. The debtor sued. The bankruptcy court dismissed for lack of jurisdiction. In a direct appeal, the First Circuit reversed.

The Supreme Court affirmed the First Circuit, holding that the Bankruptcy Code unequivocally abrogates the sovereign immunity of any and every government that possesses the power to assert such immunity. Two provisions apply: § 106(a) of the Bankruptcy Code abrogates the sovereign immunity of governmental units with respect to certain Code sections, including the automatic stay in § 362(a); “governmental unit” is in turned defined in § 101(27) to include the United States, a State, District, Territory, “or other foreign or domestic government.” Though § 101(27) does not specifically mention federally recognized tribes, taken together, these two provisions unambiguously abrogate the sovereign immunity of federally recognized tribes. Though Congress must make the intent to waive immunity “unmistakably clear” or “clearly discernible” from the statute, Congress does not need to use “magic words.” Congress expansively defined governmental units, and tribes undoubtedly constitute governmental units.

Justice Thomas, concurring, wrote that to the extent tribes possess sovereign immunity at all, that immunity does not extend to suits arising out of a tribe’s commercial activities conducted beyond their territories. Reading the Code to carve out tribes as a subset of governments risks upending the policy choices that the Bankruptcy Code embodies in terms of offering debtors a fresh start by discharging and restructuring their debts from generally “*all* creditors” in an orderly and centralized fashion.

Justice Gorsuch, the lone and lengthy dissenter, quoted the Sixth Circuit case that the majority’s decision abrogated (*In re Greektown Holdings, LLC*, 917 F.3d 451, 460 (6th Cir. 2019)) noting that there is “not one example in all of history whether [the Supreme Court] has found that Congress intended to abrogate tribal sovereign immunity *without* expressly mentioning Indian tribes somewhere in the statute.”

F. Second Circuit Reinstates Sackler Family’s Nonconsensual Third-Party Releases. *Purdue Pharma, L.P. v. City of Grande Prairie (In re Purdue Pharma, L.P.)*, 69 F.4th 45 (2d Cir. 2023) (Lee, J.), cert. granted, 23-124 (Aug. 10, 2023).

In the case below, debtor Purdue Pharma proposed a chapter 11 plan giving nonconsensual third-party releases to members of the Sackler family—the individuals who operated Purdue Pharma during the period that it falsely marketed OxyContin as nonaddictive (contributing to the opioid crisis), and who subsequently drained the company of approximately 75% of its assets. The family members agreed to contribute approximately \$6 billion (as revised) to fund the chapter 11 plan in exchange for the third-party releases, though claims against the Purdue and the Sacklers were much higher—“estimated at more than \$40 trillion.” The bankruptcy court confirmed the plan but limited the third-party releases “to only claims that directly affected [Purdue Pharma’s bankruptcy] estate and for which Purdue’s conduct was a legal cause, or a legally relevant factor, of any released cause of action against the Sacklers.” The district court determined the bankruptcy court lacked constitutional authority to finally adjudicate the third-party releases, consequently treated the bankruptcy court’s decision as a report and recommendation, and ultimately vacated the confirmation order, “ruling that the Bankruptcy Code did not permit such releases.”

Though the Second Circuit agreed with the district court that the bankruptcy court had statutory jurisdiction but lacked constitutional authority to finally adjudicate the third-party releases, it otherwise disagreed with the district court. The court focused on two questions: “*First*, does the Bankruptcy Code permit nonconsensual third-party releases of direct claims against non-debtors, and, *Second*, if so, were such releases proper here in light of all equitable considerations and the facts of this case.” As to the first question, the Second Circuit determined that the bankruptcy court’s equitable powers under § 105(a) (which gives the court “broad” equitable authority to issue any order appropriate to carry out the provisions of the Bankruptcy Code) and § 1123 (which authorizes the court to include “appropriate” provisions in a chapter 11 plan that are “not inconsistent” other Code provisions) gave the court statutory authority to approve the releases. Section 524(e) (which provides that a debtor’s discharge does extend to co-debtors) does not explicitly bar third party releases, so the court declined to infer a limitation from the statutory text. Second Circuit precedents also permitted third-party releases. As to the second question, the court set forth seven factors courts should analyze to determine whether to impose nonconsensual third-party releases: (1) “whether there is an identity of interests between the debtors and released third parties, including indemnification relationships, ‘such that a suit against the non-debtor is, in essence, a suit against

the debtor or will deplete the assets of the estate” (2); “whether claims against the debtor and nondebtor are factually and legally intertwined, including whether the debtors and the released parties share common defenses, insurance coverage, or levels of culpability”; (3) “whether the scope of the releases is appropriate”; (4) “whether the releases are essential to the reorganization”; (5) “whether the nondebtor contributed substantial assets to the reorganization”; (6) “whether the impacted class of creditors ‘overwhelmingly’ voted in support of the plan with the releases”; and (7) “whether the plan provides for the fair payment of enjoined claims.”¹ Applying these factors, the Second Circuit determined the bankruptcy court’s findings supported approval of the releases. Finally, the court rejected the trustee’s arguments that the released creditors did not receive adequate notice and rejected a foreign creditors’ arguments concerning foreign sovereign immunity and the treatment of certain foreign creditors’ claims. Accordingly, the Second Circuit affirmed the bankruptcy court’s approval of the plan.

Judge Wesley “reluctantly” concurred in the judgment, reasoning that Second Circuit precedent required a decision in favor of third-party releases until reversed by the Supreme Court or Second Circuit sitting en banc, and inviting the Supreme Court to weigh in.

II. Eighth Circuit

A. Strict Compliance with Rule 7004(b)(3) Not Required. *PIRS Cap. LLC v. Williams*, 54 F.4th 1050 (8th Cir. 2022) (Loken, J.).

The chapter 7 trustee sued PIRS Capital to recover a preference and to disallow its claim until PIRS paid the preference amount under § 502(d). The trustee searched the secretary of state’s website for registered agent information and found that the PIRS’s street address and suite number were exactly the same as what PIRS disclosed on its filed proof of claim. But the secretary of state did not have the name of an authorized agent. The trustee served the summons and complaint by certified mail, return receipt requested, to that address, to the attention of the person who had signed the claim as a “Managing Agent.” Unbeknownst to the trustee, PIRS had since moved to a different suite number and the “Managing Agent” had left PIRS but PIRS had not updated its information on the proof of claim or on the secretary of state’s website. The summons and complaint were delivered to PIRS’s new address, however, and an employee who was not authorized to accept service signed for the delivery. PIRS did not answer and the trustee, following proper procedures with notice now to both the old and new suite numbers, took a default judgment. None of the mail was

¹ This list is remarkably similar to the five factors that Judge Frank W. Koger synthesized from existing case law in 1994 in *In re Master Mortg. Inv. Fund, Inc.*, 168 B.R. 930, 934–35 (Bankr. W.D. Mo. 1994).

returned undeliverable. Almost three years later, the trustee objected to PIRS's claim and PIRS did not respond. Not until after it received the order sustaining the trustee's objection did PIRS file a motion to vacate the default judgment, arguing it was void under Rule 60(b)(4) or should be set aside under (b)(6) as made applicable by Fed. R. Bankr. Proc. 9024. The bankruptcy court denied the motion to vacate and the District Court affirmed, as did the Eighth Circuit.

The Eighth Circuit rejected PIRS's argument that Rule 7004(b)(3) governing service of process on an entity requires strict compliance. Rather, the issue was governed by *United Student Aid Funds, Inc. v. Espinosa*, 559 U.S. 260 (2010), addressing whether an order confirming a chapter 13 plan was void (and holding it was not). Under *Espinosa*, bankruptcy rules are only procedural rules adopted for the orderly transaction of court business and are not jurisdictional. Rule 60(b)(4) only renders an order or judgment void "in the rare instance where a judgment is premised either on a certain type of jurisdictional error or on a violation of due process that deprives a party of notice or the opportunity to be heard." Federal courts considering Rule 60(b)(4) motions generally only find a judgment is void for exceptional circumstances in which the court lacked even an "arguable basis" for jurisdiction. There was an arguable basis for jurisdiction over PIRS for three reasons: (1) the trustee "arguably complied" with Rule 7004(b)(3) by serving to the proof of claim address; (2) PIRS received actual notice of the complaint and summons at its correct address; and (3) PIRS had not updated its own records and should not therefore benefit from its own inaccurate or dated records when others attempted in good faith to determine the appropriate agent for service. The court also rejected PIRS's reliance on the catch-all provision of Rule 60(b)(6), noting it only applies when other subsections of Rule 60 do not apply, expressly pointing out that PIRS had not sought to vacate the judgment for excusable neglect under Rule 60(b)(1).

B. Avoidance Actions Are Property of the Estate and Thus Saleable.
***Pitman Farms v. ARKK Food Co., LLC (In re Simply Essentials, LLC)*,**
78 F.4th 1006 (8th Cir. 2023) (Melloy, J.).

The creditor in this case submitted a bid to purchase the debtor's chapter 5 avoidance actions (interestingly, the creditor was also the defendant in the avoidance actions and made the bid as an attempt to "buy peace"), but the trustee selected another bidder. The creditor appealed the bankruptcy court order approving the sale, arguing the trustee was not entitled to sell the avoidance actions because they were not property of the estate.

The Eighth Circuit affirmed, determining the trustee was entitled to sell the actions because avoidance actions are property of the estate. First, the avoidance actions are property of the estate under § 541(a)(1) as a "legal or equitable interest[] of the debtor

in property as of the commencement of the case.” Such legal interests of the debtor as of the petition date include “inchoate or contingent interests held by the debtor prior to the filing of the bankruptcy.” And “[b]ecause debtors have the right to file for bankruptcy and the debtor in possession or the Trustee may file avoidance actions to recover property, the debtor has an inchoate interest in the avoidance actions prior to the commencement of the bankruptcy proceedings” that is property of the estate under § 541(a)(1). Second, even if the debtor did not have an inchoate interest in avoidance actions that would be property of the estate under § 541(a)(1), “the avoidance actions clearly qualify as property of the estate under subsection (7) which includes ‘[a]ny interest in property that the estate acquires after the commencement of the case.’” The court rejected the argument that the property was created during a third period of time, the moment the bankruptcy proceeding commences, because determining that such a period existed would contradict the broad inclusion of property in the estate. The possibility that the court’s reading would create surplusage was tolerable, due to a drafting history characterized by alterations over time to improve specificity and the complex nature of the Code. Finally, permitting the trustee to sell avoidance actions was consistent with the trustee’s fiduciary duties and congressional intent to maximize property of the estate.

C. District Court Did Not Err in Approving Final Accounting and Barring Creditors from Asserting Related Claims. *United States v. Kelley*, 70 F.4th 482 (8th Cir. 2023) (Benton, J.).

The receiver for a principal who had perpetrated a Ponzi scheme and had sought bankruptcy relief requested approval to close the receivership. The district court approved the receiver’s final accounting and, in a separate order, barred creditors from asserting claims that belonged to the bankruptcy trustees in related cases. A creditor who had continued to assert the barred claims appealed the orders approving the final accounting and barring creditors from asserting claims.

The Eighth Circuit affirmed. First, the creditor waived its ability to challenge the court’s approval of the final accounting by agreeing in a settlement not to take any action in the receivership. On the merits, the Eighth Circuit determined the bankruptcy court did not abuse its discretion when it approved the receiver’s final accounting because the accounting complied with a prior order requiring the accounting and the creditor cited no authority imposing a heightened standard for the approval of a final accounting. The court also determined circumstances justified the receiver’s policy to charge parties for accessing its records. Next, the order barring the creditor from asserting claims belonging to the trustees did not violate the creditor’s due process rights because the order did not deprive the creditor of a protected right and because the creditor could still pursue other claims that were not derivative of claims belonging to the estate. Consequently, the district did not err.

D. Bankruptcy Court Did Not Clearly Err in Determining Repayment of Oversecured Creditor’s Claim Over 20 Years at 4% Interest in a Chapter 12 Case Provided Creditor with Present Value of Claim. *In re Topp*, 75 F.4th 959 (8th Cir. 2023) (Gruender, J.).

Chapter 12 debtor’s proposed plan provided for repayment of Farm Credit Service’s secured claim over 20 years at 3.87% interest, arrived at under the formula approach by adding a 2% risk factor to the 20-year treasury rate of 1.87%. FCS’s \$595,000 claim was secured by real estate valued at \$1.45 million and the underlying loan agreements provided for interest rates from 3.5% to 7.6%. FCS argued that the court should start with the national prime rate of 3.25% before adding the 2% risk factor. After a hearing and consideration of the arguments submitted on briefs, the bankruptcy court (Shodeen, J.), confirmed the plan at 4%, using the treasury rate of plus risk factor and rounding up to 4%. The District Court affirmed the bankruptcy court on appeal, as did the Eighth Circuit.

The Eighth Circuit rejected FCS’s argument that the Supreme Court’s decision in *Till v. SCS Credit Corp.*, 541 U.S. 465 (2004) (plurality opinion) effectively overrode the Eighth Circuit’s earlier opinion in *United States v. Doud*, 869 F.2d 1144 (8th Cir. 1989). In *Doud*, another chapter 12 case, the Eighth Circuit upheld the bankruptcy court’s use of a formula-based rate that had added risk factors to the base treasury rate as not clearly erroneous. By comparison, *Till* was a chapter 13 case in which the Supreme Court took review to resolve a circuit split in which some courts used non-formula approaches to determine interest rates. The plurality in *Till* adopted the formula approach, which it characterized as beginning with the national prime rate and adjusting upward for the typically greater risk of nonpayment that bankrupt borrowers pose, noting that courts had generally approved adjustments of 1 to 3%. According to the *Till* plurality, the prime rate “reflects the financial market’s estimate of the amount a commercial bank should charge a creditworthy commercial borrower to compensate for the opportunity costs of the loan, the risk of inflation, and the relatively slight risk of default.”

But neither *Doud* nor *Till* were about the proper starting point; they “are about the proper approach to satisfying the plan-confirmation requirement that secured creditors receive at least ‘the value, as of the effective date of the plan,’” of their claims. That approach begins with risk-free or low-risk lending practices then accounts for case-specific risk factors. Calling FCS’s approach as a red herring, the Court said that FCS was attempting to pitch the starting-rate choice as a purely legal question calling for *de novo* review rather than what it is: a factual finding about the appropriate discount rate in this particular case reviewed for clear error. Given that the bankruptcy court had studied the *Till/Doud* relationship and noted that the

longer term treasury rate was appropriate for how real estate transactions were generally financed, including that the bank was oversecured, the Circuit said the bankruptcy court had not clearly erred.

E. Bankruptcy Court Had Discretion to Craft Relief When Creditors Did Not File Documentation in Support of Proof of Claim. *Reichel v. Jensen-Carter (In re Reichel)*, 645 B.R. 620 (B.A.P. 8th Cir. 2022) (Dow, J.), *aff'd*, No. 23-1002, 2023 WL 4145910 (8th Cir. June 23, 2023).

The debtor voluntarily waived his discharge in 2012, and the court closed his chapter 7 case without a discharge in 2017. In 2016, a jury convicted the debtor of bankruptcy fraud. The debtor had filed a “host” of motions, seeking “to reopen his case to obtain relief from his conviction,” among other relief.

In the appeal below, the BAP determined that the debtor’s former counsel—who worked simultaneously as debtor’s counsel and a chapter 13 staff attorney at the bankruptcy court—did not have an actual conflict of interest because it was not likely that the attorney would be placed in a position permitting the attorney to favor one interest over an impermissibly conflicting interest. Next, nothing required the case trustee to “vet” allegedly false proofs of claims. The debtor failed to timely object to the claims allowance and did not address in his brief on appeal the lower court’s conclusions that laches, equity, and waiver prevented him from raising objections so late. The lack of documentation supporting the challenged proofs of claim was not fatal: “Bankruptcy Rule 3001(c)(2)(D) gives the court discretion to craft the relief when failure to file documentation is asserted” and the debtor bore the burden to prevent allowance by establishing an exception under § 502(b). The bankruptcy court also did not err in refusing to provide the debtor free copies of transcripts—something the Bankruptcy Code and Rules do not require even if the debtor is proceeding *in forma pauperis*. Finally, the debtor’s allegations that he and his family members entered into settlement agreements with the trustee under duress were “disingenuous at best,” mischaracterized the facts of his case, and did not provide grounds for reversal on appeal.

In June 2023, Eighth Circuit summarily affirmed the BAP’s decision with little comment.

F. District Court Properly Dismissed and Granted Summary Judgment Against Architectural Firm on Copyright Infringement Claims Against Third Party Purchaser. *Cornice & Rose Int'l, LLC v. Four Keys, LLC*, 76 F.4th 1116 (8th Cir. Aug. 11, 2023) (per curiam).

An owner retained an architectural firm to design a building. No one disputed that the architects obtained copyright protection under the Architectural Works Copyright Protection Act of 1990 (“AWCPA”), 17 U.S.C. § 101 et seq., for the technical drawings and for the building itself as the tangible embodiment of the design work product. When the building was 90% complete, the owner filed bankruptcy. After the case later converted to chapter 7, the trustee moved to sell the building in a § 363 sale free and clear of liens and interests, including the copyright interest of the architects in the plans and drawings. The architects objected, arguing that the building could not be sold, completed, or used unless the architects were paid in full. The bankruptcy court rejected the architects’ argument and approved the sale. The sale order provided that, so long as the purchaser did not use the architects’ plans or drawings, the purchaser could develop, complete, use, and occupy the building free and clear of any existing or future claims of the architects for copyright infringement or otherwise. The trustee then sold the building to the lender as a good faith purchaser. The architects appealed and their motion for stay pending appeal was denied. The U.S. District Court dismissed the appeal as moot under § 363(m); the architects’ appeal to the Eighth Circuit was likewise dismissed as statutorily moot.

In the meantime, the architects sued the lender and its officer in U.S. District Court for copyright infringement and a declaratory judgment that use of the building would also be a copyright infringement. The district court dismissed two counts and granted summary judgment on the other, determining that *res judicata* barred the suit. On appeal, the Eighth Circuit affirmed. The Eighth Circuit agreed with the lender that the architects’ copyright claims were litigated before the bankruptcy court and were the subject of a final order. The Circuit rejected the architects’ argument that the bankruptcy court’s order was not final because the appeal of the order was dismissed. Denying sale orders full preclusive effect would negate the purpose of § 363(m), under *In re Veg Liquidation*, 931 F.3d 730 (8th Cir. 2019), *cert. denied*, 140 S. Ct. 904 (2020).

Loken, J., concurred, adding that he would affirm the district court’s ruling that the building owner’s right to alter or destroy the building granted in the AWCPA includes a bona fide purchaser’s right to complete the unfinished building, and that completion of the building did not “copy” the building by creating an unauthorized derivative work.

G. At a Minimum, Plan Modification Under § 1229 Requires Substantial Change in Circumstances. *In re Swackhammer*, 650 B.R. 914 (B.A.P. 8th Cir. 2023) (Norton, J.).

Chapter 12 debtors moved to modify their confirmed plan to extend the time to make payments to creditors. A secured creditor objected, arguing that debtors had failed to show an “unanticipated, substantial change in circumstances” and that, in any event, the proposed plan was not feasible. The court confirmed the modified plan, finding that the plain language of § 1229 did not require any such requirement but that, even if it did, the debtors had met their burden of establishing it and that the modified plan was feasible. The secured creditor appealed. Norton, J., writing for the panel consisting of Judges Dow and Surratt-States, affirmed, relying on *dicta* from the Eighth Circuit in *Educ. Assistance Corp. v. Zellner*, 827 F.2d 1222 (8th Cir. 1987), a case construing nearly identical language in § 1329 involving chapter 13 plan modifications, and the B.A.P.’s decision in *In re Johnson*, 458 B.R. 745 (B.A.P. 8th Cir. 2011). Both cases suggested that the standard in the Eighth Circuit is that a party moving to modify show a substantial change of circumstances – but not an “unanticipated one.” *But see In re Witkowski*, 16 F.3d 739 (7th Cir. 1994) (plain language of § 1329 does not require showing of a change in circumstances). *Accord Whaley v. Guillen (In re Guillen)*, 972 F.3d 1221 (11th Cir. 2020); *In re Meza*, 467 F.3d 874 (5th Cir. 2006); *Barbosa v. Solomon*, 235 F.3d 31 (1st Cir. 2000); *In re Brown*, 219 B.R. 191 (B.A.P. 6th Cir. 1998); *In re Powers*, 202 B.R. 618 (B.A.P. 9th Cir. 1996). The court also determined the bankruptcy court did not clearly err in finding that the modified plan was feasible, noting the broad discretion afforded to bankruptcy courts. *Contra Murphy v. O’Donnell (In re Murphy)*, 474 F.3d 143, 149 (4th Cir. 2007).

H. Eighth Circuit BAP Dismisses Appeal as Equitably Moot. *Davies v. Daugherty (In re Davies)*, 651 B.R. 445 (B.A.P. 8th Cir. 2023) (Ridgway, J.)

The debtor filed a motion to impose the stay in the chapter 13 case in which the stay did not go into effect due to debtor’s recent history of prior bankruptcy filings. The bankruptcy court denied the motion. The debtor appealed, but the case was dismissed while the appeal was pending. The BAP explained that an appeal is constitutionally moot when there is no longer a case or controversy, such that the appellate court could not give effective relief. The court determined that the dismissal of the bankruptcy case rendered the appeal constitutionally moot and dismissed the appeal for lack of jurisdiction.

I. Post-petition, Pre-Conversion Appreciation Is Inseparable from Underlying Property and, Therefore, Inures to Converted Chapter 7 Estate. *In re Goetz*, 647 B.R. 412 (Bankr. W.D. Mo. 2022) (Fenimore, C.J.), *aff'd* 651 B.R. 292 (B.A.P. 8th Cir. 2023) (appeal pending).

In *Goetz*, the debtor converted her chapter 13 case to a chapter 7. Between the time she filed the chapter 13 in August 2020 and when she converted in April 2023, her home value had increased by approximately \$75,000. Though there was insufficient equity to justify liquidation in August 2020, by April 2023 based on the increase in value a liquidation would have netted \$62,000 for the benefit of the estate after deduction of the secured lien and the \$15,000 applicable Missouri homestead exemption. The debtor moved to compel the chapter 7 trustee to abandon under § 554, arguing that, as of the date of the filing, the property was of inconsequential value and benefit to the estate. Although noting a split of authority, Chief Judge Fenimore said the analysis was simple: the debtor owned the home on the chapter 13 petition date and retained it on the date of conversion, meaning the home was clearly property of the estate under the plain language of § 348(f)(2). And because the post-petition appreciation was inseparable from the home itself, the post-petition equity was also property of the estate. He thus denied the debtor’s motion to compel abandonment, meaning the chapter 7 trustee would likely net \$62,000 for the benefit of the estate.

The Eighth Circuit BAP affirmed. It rejected the debtor’s first argument that § 348(f) was ambiguous such that the court should have looked to legislative history. Rather, § 348(f) is plain: prepetition property owned as of the chapter 13 petition date remains property of the bankruptcy estate upon conversion; new property the debtor acquires postpetition is not property of the converted estate unless the debtor converts in bad faith. The court also rejected the debtor’s second argument that because of vesting upon confirmation or exemption the home was “removed” from the estate: § 1327 regarding vesting does not apply in chapter 7 and the debtor in claiming the \$15,000 exemption only removed \$15,000 from the estate, not the entire residence. In addition, since the issue arose under the context of abandonment, the BAP explained that § 554 speaks in terms of current value in determining whether property should be abandoned, not past value (i.e., the court may order the trustee to abandon property “that *is* of inconsequential value and benefit to the estate.”).

The debtor’s appeal to the Eighth Circuit is pending, Case No. 23-2491.

J. Post-Petition, Post-Confirmation Sale Proceeds Are New Property that Replenish and Inure to the Chapter 13 Estate. *In re Marsh*, 647 B.R. 725 (Bankr. W.D. Mo. 2023) (Fenimore, C.J.).

More than three years after the court confirmed the debtors’ plan, they sold their home (with court approval), netting substantial equity of around \$73,000. The debtors filed a motion to retain the proceeds and the chapter 13 trustee objected, asserting

that because the proceeds were property of the estate, the debtors should remit to the trustee an amount sufficient to pay 100% of the filed and allowed nonpriority claims. The debtors argued that proceeds were not property of the estate because the applicable commitment period had expired before they sold their home.

Noting a significant split of authority, Chief Judge Fenimore observed that the dispute arose from the conflict between § 1306 (governing property of a chapter 13 estate) and § 1327 (the vesting provision). Courts have adopted five distinct approaches to reconciling these two provisions:

1. The Estate Termination Approach (§ 1327 vesting provisions terminate the chapter 13 estate upon confirmation);
2. The Estate Preservation Approach (the chapter 13 estate includes all property, both pre- and post-petition, until the case is closed, because § 1327 does not control the scope of what is property of the estate);
3. The Conditional Vesting Approach (property is simultaneously property of the estate and of the debtor);
4. The Estate Transformation Approach (the estate consists of the property and future earnings of the debtor dedicated to fulfillment of the chapter 13 plan, regardless of when debtor acquires the property); and
5. The Estate Replenishment Approach (pre-confirmation property of the estate becomes property of the debtor at confirmation, but post-confirmation property become property of (i.e., “replenishes”) the estate absent contrary provisions in the plan confirmation order.

Upon determining that the Estate Replenishment Approach best reconciled §§ 1306 and 1327 the court adopted that approach, then turned to analyzing whether in the debtors’ particular case the sale proceeds were vested in the debtor or constituted property of the chapter 13 estate. The court determined that the proceeds were distinct from the property sold to produce them, that proceeds are property of a kind specified in § 541, and that the debtors acquired the property after the confirmation date such that they constitute property of the estate. The court distinguished between “appreciation” and “proceeds,” noting that, unlike appreciation, proceeds are entirely separate from the underlying property once it is sold, with attributes and uses distinct from the property sold. Because debtors didn’t acquire the proceeds until post-confirmation, the proceeds could not have vested at confirmation. Finally, the court also rejected the debtors’ argument that because they were past the applicable commitment period under § 1325(b)(1), the proceeds were not property of the estate.

But because the debtors’ confirmed plan required them to make ongoing payments on their mortgage, the motion to retain was in essence a proposed plan modification that did not adequately specify the terms of the proposed modification. Noting that the court’s ruling did not necessarily prevent the debtors from retaining at least a portion

of the proceeds, the court set the matter for another hearing to determine whether the proposed modification satisfied the requirements of § 1329 governing modification.

NOTE: The debtors settled with the trustee. The trustee received \$10,278.59 from the sale proceeds, and plan was amended from a 0% dividend to a 22.134% dividend. Debtors thereafter completed the plan and received their discharge.

**K. No Missouri Exemption for Unliquidated Contingent Causes of Action.
In re Shoults, 649 B.R. 885 (Bankr. E.D. Mo. 2023) (Clair, C.J.).**

The co-debtors scheduled an interest in a potential personal injury claim against earplug manufacturer 3M for faulty earplugs one of the debtors used while in the military. The debtors claimed an exemption in the personal injury claim under Mo. Rev. Stat. Ann. § 513.427. The trustee objected, arguing that § 513.427 was Missouri's opt out statute, that it does not create any substantive personal injury exemption, and that no exemption in Missouri law would shelter the debtors' interest in the contingent unliquidated claim.

Relying on the Eighth Circuit's holdings in *Benn v. Cole (In re Benn)*, 491 F.3d 811 (8th Cir. 2007), and *Abdul-Rahim v. LaBarge (In re Abdul-Rahim)*, 720 F.3d 710 (8th Cir. 2013), the bankruptcy court determined that because exemptions are created by statute and because there is no Missouri statute (including § 513.427) creating an exemption in contingent unliquidated claims, the 3M claim was subject to attachment.

Further, the court rejected the debtors' argument that *Rodriguez v. FDIC*, 140 S. Ct. 713 (2020), overturned *Benn* and *Abdul-Rahim*. The debtors claimed that *Benn* and *Abdul-Rahim* were examples of the Eighth Circuit creating federal common law, which, according to *Rodriguez*, is only permitted in limited circumstances, and such circumstances were not implemented in this case. The court disagreed with the debtors' interpretation of the Eighth Circuit precedent and determined that both *Benn* and *Abdul-Rahim* only involved statutory interpretation, not the creation of federal common law.

III. Tenth Circuit

A. Chapter 13 Trustee Not Entitled to Fees After Dismissal of Pre-Confirmation Case. *Goodman v. Doll (In re Doll)*, 57 F.4th 1129 (10th Cir. 2023) (Ebel, J.).

The chapter 13 debtor filed multiple proposed plans of reorganization in the bankruptcy court, but no plan was ever confirmed, and the debtor's case was

dismissed. Prior to dismissal, the debtor made pre-confirmation payments to the chapter 13 trustee. With the debtor’s consent, the trustee disbursed portions of the money to the debtor’s attorney and to a state tax creditor but retained a portion of the funds as the trustee’s fee. The debtor filed a motion seeking return of the funds kept by the chapter 13 trustee for his fee.

Under § 1326(a)(2), a trustee retains preconfirmation payments until the confirmation hearing and then “[i]f a plan is confirmed, the trustee shall distribute any such payment in accordance with the plan” but “[i]f a plan is not confirmed, the trustee shall return any such payments . . . to the debtor.” Under 28 U.S.C. § 586(e)(2), the trustee is directed to collect a fee “from all payments received . . . under” chapter 13 reorganization plans for which the trustee serves.

The Tenth Circuit concluded that when read together, § 1326(a)(2) and 28 U.S.C. § 586(e)(2) require a chapter 13 trustee to return preconfirmation payments to the debtor without deducting a trustee fee when no plan is confirmed. The Tenth Circuit also contrasted chapter 13 trustee fees with chapter 12 and subchapter V cases and noted that Congress “expressly directed” the standing trustees in those chapters to deduct fees before returning preconfirmation payments to a debtor when a proposed plan is not confirmed, which would make those express directions surplusage if an implied direction was read into chapter 13’s similar provisions.

See also, Evans v. McCallister (In re Evans), 69 F. 4th 1101 (9th Cir. 2023) (determining chapter 13 trustee may not keep percentage fee when case dismissed prior to confirmation); *Soussis v. Macco*, No. 20-CV-05673, 2022 WL 203751 (E.D.N.Y. Jan 24, 2022), *appeal filed*, No. 22-155 (2d Cir.), *argued* February 15, 2023.

B. Alleged CM/ECF Technical Failures Did Not Excuse Tardily Filed Dischargeability Complaint. *State Bank of S. Utah v. Beal (In re Beal)*, No. 21-4124, 2022 WL 17661140 (10th Cir. Dec. 14, 2022) (unpublished) (Hartz, J.).

The debtor filed a chapter 7 bankruptcy petition, and the deadline to file a complaint objecting to entry of discharge and the dischargeability of debts was set by Federal Rules of Bankruptcy Procedure 4004(a) and 4007(c) as April 22, 2019, sixty days after the first meeting of creditors. At 11:40 p.m. on April 22, 2019, the attorney for the creditor logged into the bankruptcy court’s case management/electronic filing system. Ultimately, the complaint was not successfully filed until 12:16 a.m. on April 23, 2019.

The creditor argued its complaint had been timely filed because counsel’s efforts to file were delayed by alleged technical failures within the court’s electronic filing system. The bankruptcy court held a two-day evidentiary hearing and rejected those arguments, crediting the testimony of court staff regarding how the system worked. The creditor appealed.

The Tenth Circuit affirmed the judgment of the bankruptcy court, refusing to disturb the bankruptcy court’s factual findings regarding how the electronic filing system worked. The Tenth Circuit also refused to consider the creditor’s request for equitable relief, because the request was predicated on an argument that something was amiss with the electronic filing system, which the bankruptcy court “properly rejected.”

C. Bankruptcy Court Erred by Not Specifying Portion of Damages Claim Stemming from Willful and Malicious Injury and by Entering Summary Judgment Despite Factual Disputes. *Swan Pediatric Dental, LLC v. Hulse (In re Hulse)*, No. UT-22-001, 2022 WL 16826561 (B.A.P. 10th Cir. Nov. 8, 2022) (unpublished) (Somers, J.).

After selling his dental practice in Utah, a chapter 7 debtor asserted prepetition claims against the purchaser in state court related to the transaction. The purchaser filed a demand for arbitration pursuant to the parties’ asset purchase agreement. The state court stayed the proceeding, and the parties were ordered to arbitration. The arbitration then proceeded on dueling claims for breaches of the asset purchase agreement and a claim of defamation brought by the purchaser against the debtor. The arbitrator entered a final award awarding the purchaser, among other things, \$345,000 against the debtor for “breach of contract and defamation.” The state court confirmed the arbitrator’s final award and judgment was entered against the debtor.

Shortly after the state court proceedings, the debtor filed a petition for chapter 7 relief. The purchaser filed a proof of claim and initiated a nondischargeability complaint under § 523(a)(4) and (a)(6). The purchaser then filed a motion for summary judgment on the § 523(a)(6) claim, alleging the debtor defamed him. The debtor then filed his own motion for summary judgment. At the hearing, the debtor argued his conduct did not rise to the level of willful and malicious intent and that the damages in the final award were not based on the defamation finding. The bankruptcy court granted the purchaser’s motion for summary judgment and denied the debtor’s motion, concluding the debtor’s conduct amounted to willful and malicious intent under § 523(a)(6). The bankruptcy court then awarded damages in the full amount of \$345,000. The debtor appealed the bankruptcy court’s summary judgment order.

The BAP reversed, concluding genuine issues of material fact remained on the § 523(a)(6) willful and malicious intent issue, and the bankruptcy court erred in awarding the full amount of the final award on the § 523(a)(6) claim. The BAP found the record contained disputes concerning the debtor’s intent at the time he made the defamatory statement and surrounding his motives at the time the defamatory statement was made. Regarding damages, the figure was set in the arbitration as the amount the debtor damaged the goodwill of the purchaser’s dental practice through

breaches of the asset purchase agreement. No separate amount was computed for the defamation claim because the arbitrator concluded the damages for defamation were “sufficiently compensated” by the breach of contract figure. The BAP concluded the bankruptcy court erred by not assessing what portion of the purchaser’s claim stemmed from willful and malicious injury under § 523(a)(6).

D. Bankruptcy Court Did Not Err in Applying *Kopexa* Factors and Approving Settlement. *Ruiz v. Rupp (In re Ruiz)*, No. 23-006, 2023 WL 5201671 (B.A.P. 10th Cir. Aug. 14, 2023) (unpublished) (Hall, J.).

The debtor and her estranged husband, while married, owned three vehicles. The debtor commenced divorce proceedings, but no divorce decree or property division was entered prior to the debtor filing a chapter 7 bankruptcy petition. The bankruptcy estate had a community property interest in the three vehicles, two of which were in the husband’s possession and one of which was in the debtor’s possession.

The chapter 7 trustee sought approval of a settlement with the husband. The settlement provided the husband would convey to the bankruptcy estate any community property interest in, and any claims related to, one of the vehicles, and the trustee would convey to the husband the bankruptcy estate’s interest, if any, in the remaining two vehicles, subject to any community debt and claims. The debtor objected to the settlement, contending the community property interests in the two vehicles in her husband’s possession should be available to distribute to creditors of her bankruptcy estate—specifically to pay her nondischargeable student loan debt. Analyzing the settlement agreement under the *Kopexa* factors (“[1] the probable success of the underlying litigation on the merits, [2] the possible difficulty in collection of a judgment, [3] the complexity and expense of the litigation, and [4] the interests of creditors in deference to their reasonable views”), the bankruptcy court approved the settlement agreement over the debtor’s objection, and the debtor appealed.

On appeal, the BAP held the bankruptcy court did not abuse its discretion in approving the settlement agreement and affirmed. The BAP concluded the bankruptcy court analyzed each of the *Kopexa* factors, and the settlement did not “fall below the lowest point in the range of reasonableness.” Regarding the debtor’s argument that the settlement relied on mistakes of fact and misrepresentations, the BAP pointed to the bankruptcy court’s recognition that the dispute over establishing those facts would be “a contested issue potentially requiring costly litigation,” and concluded the bankruptcy court was correct to focus on the cost of the litigation to resolve the dispute and the relatively small return likely available to the estate, which would be diminished though litigation expenses and sale costs that could be avoided through approval of the settlement.

E. Automatic Stay Tolled Deadline to File Cross-Appeal. *Vitamins Online, Inc. v. Heartwise, Inc.*, 71 F.4th 1222 (10th Cir. 2023) (Ebel, J.).

The plaintiff sued the defendant under the Lanham Act and Utah’s Unfair Competition Law, alleging false advertising. After a bench trial, the district court found for the plaintiff and awarded damages, but denied enhanced damages, punitive damages, and injunctive relief. The defendant filed a timely notice of appeal, challenging the district court’s judgment and then filed a chapter 11 bankruptcy petition. The plaintiff filed a cross-appeal over a year later, after the automatic stay had expired.

The Tenth Circuit concluded in relevant part that the cross-appeal was timely. Under 11 U.S.C. § 108(c), if there is a pending, non-bankruptcy deadline when the automatic stay takes effect, then the deadline is tolled until the later of the end of the period or “30 days after notice of the termination or expiration of the stay.” The Tenth Circuit concluded the filing of a cross appeal constituted the “commencement or continuation” of a judicial action under § 362(a)(1), and so the deadline to file the cross-appeal was tolled by § 108(c) during the bankruptcy proceeding. As a result, the filing of a bankruptcy petition tolls the time for both the debtor and a creditor to file a notice of appeal or a cross-appeal in a suit that was pending at the time of filing.

F. Bankruptcy Courts May Not Extend the Deadline to File Motion for Reconsideration and Erroneous Extension of the Reconsideration Deadline Does Not Toll Deadline to File Notice of Appeal. *Lane v. Witt (In re Witt)*, No. CO-22-007, 2023 WL 384210 (B.A.P. 10th Cir. Jan. 25, 2023) (unpublished) (Lloyd, J.), *appeal pending*, No. 23-1035 (10th Cir.).

For many years, creditor Noel Lane sought to prove that the debtor and the debtor’s former mortgage company committed mortgage fraud against him. In 2017, the debtor filed a bankruptcy petition. Lane got involved in the bankruptcy proceeding only after another creditor filed an adversary proceeding seeking information from certain boxes of documents in Lane’s possession. Lane filed a motion to intervene to prevent losing the boxes. The bankruptcy court denied the motion and warned that the bankruptcy court was not the proper forum to resolve disputes seeking to adjudicate ownership of the boxes or any other non-party disputes related to the documents.

Lane then filed an adversary proceeding asserting nine claims and naming fifteen defendants. The bankruptcy court dismissed the adversary proceeding. Two parties thereafter filed motions for sanctions against Lane, which the bankruptcy court granted. Lane then filed a motion to extend the time to file a motion for reconsideration of the sanctions order but did not request an extension of the time to appeal. The bankruptcy court granted the motion to extend time to request reconsideration and Lane filed his motion for reconsideration before the extended

deadline. The bankruptcy court then denied the motion for reconsideration. Lane filed a notice of appeal, seeking reversal of the bankruptcy court’s orders dismissing his adversary proceeding, imposing sanctions, and denying his motion for reconsideration.

As pertinent here, the BAP concluded Lane did not properly preserve appellate review of the dismissal order and sanctions order. Regarding the dismissal order, under Federal Rule of Bankruptcy Procedure 8002, a notice of appeal must be filed within 14 days after entry of an order or judgment. Lane did not file his notice of appeal until well after the Rule 8002 deadline. Regarding the sanctions order, though a motion for reconsideration under Rule 9023 can toll the time to file a notice of appeal, the deadline for filing a motion for reconsideration cannot be enlarged per Rule 9006(b)(2). Moreover, “an untimely Rule 9023 motion is ineffective to toll the time to file a notice of appeal.” As a result, the bankruptcy court erred in granting Lane an extension to file his motion for reconsideration, and Lane did not timely appeal the sanctions order.

G. Order Denying Motion to Withdraw Reference Is an Interlocutory, Non-Appealable Order. *Byrnes v. Byrnes (In re Byrnes)*, No. 22-2049, 2022 WL 19693003 (10th Cir. Dec. 21, 2022) (unpublished) (per curiam).

The debtor filed a chapter 7 bankruptcy petition and her ex-husband filed two nondischargeability proceedings (one for nondischargeability of damages for defamation and intentional infliction of emotional distress and one for a declaratory judgment that the debtor’s contract and domestic support obligations were nondischargeable). The ex-husband demanded a jury trial on his jury triable claims and did not consent to bankruptcy court jurisdiction over those claims. The ex-husband then filed a motion to withdraw reference. Ultimately, the district court denied the motion to withdraw reference and a motion seeking reconsideration of that order. The ex-husband appealed.

The Tenth Circuit dismissed the appeal as an interlocutory, non-appealable order over which it lacked appellate jurisdiction. Withdrawal of the reference is an issue about the selection or designation of the forum for hearing a case—it does not finally end the litigation. The fact that the district court opened a separate proceeding to address the motion to withdraw reference issue and entered an order that terminated that proceeding did not change the analysis.

H. Receiver of Defrauded Entities Has Standing to Assert Fraudulent Transfer Action; Reasonably Equivalent Value Defense Determined from Perspective of Debtor. *Klein v. Roe*, 76 F.4th 1020 (10th Cir. 2023) (Holmes, J.).

A receiver was appointed to control the assets and business operations of multiple related entities, and the receiver thereafter filed lawsuits against several individuals

and entities stating claims for, as pertinent here, avoidance of fraudulent transfers under the Uniform Voidable Transactions Act (formerly the Uniform Fraudulent Transfer Act). On appeal of a grant of summary judgment to the receiver on those claims, the Tenth Circuit considered several issues related to bankruptcy practice.

First, the Tenth Circuit considered whether a receiver, standing in the shoes of the receivership entities, is a “defrauded creditor” with standing to bring a fraudulent transfer claim. The Tenth Circuit explained “a business entity abused by a fraudulent scheme qualifies as a defrauded creditor” and “the receiver of such defrauded entities has standing to recover fraudulent transfers.”

Second, the Tenth Circuit rejected the argument that the transferees of the transfers could avoid liability because they had no knowledge of the fraudulent scheme or the wrongdoing. The Tenth Circuit noted that precedent was clear that the receiver did not have to prove that the transferees were aware of the fraud, but rather, the “focus is on the intent of the transferor.”

Finally, the Tenth Circuit rejected the transferees’ good faith and reasonably equivalent value defenses. Again, the Tenth Circuit concluded the transferees had focused incorrectly: to determine if reasonably equivalent value is given, the focus is on whether the transferor received reasonably equivalent value from the transfer, not on whether the transferee gave reasonably equivalent value.

I. Diminution-of-the-Estate Thwarted Earmarking Defense to Fraudulent Transfer Action. *Montoya v. Goldstein (In re Chuza Oil Co.)*, 639 B.R. 586 (B.A.P. 10th Cir. 2022) (Rosania, J.), appeal pending, No. 22-2073 (10th Cir.) (argued March 22, 2023).

The chapter 7 trustee sued defendants/insiders under § 547(b) and § 548(a)(1)(B) to avoid and recover preferential and constructively fraudulent payments made to them by the debtor on a subordinated note. The debtor was an unprofitable petroleum production company that twice landed in bankruptcy. The defendants were insiders of the debtor: one held a subordinated note, and the other two guaranteed the note. In the debtor’s first bankruptcy case, a chapter 11 case filed in 2014, the debtor’s confirmed chapter 11 plan separately classified general unsecured creditors from the insider subordinated note creditors and required payment in full of all general unsecured creditors before paying the insider subordinated note. Due to the debtor’s continued unprofitability after confirmation, the defendants loaned hundreds of thousands of dollars to the debtor post-confirmation so the debtor could make its plan payments and continue operating. From the loaned funds, the debtor made a payment on the subordinated note even though general unsecured creditors had not been paid in full. The post-confirmation insider loans were not enough to keep the debtor afloat. In 2018, an involuntary chapter 7 petition was filed and an order for relief was

entered commencing the debtor's second bankruptcy case. The chapter 7 trustee sued the insiders to recover the subordinated-note payments as preferential transfers, actually fraudulent transfers, and constructively fraudulent transfers.

Relying on the earmarking doctrine, the bankruptcy court ruled for the defendants on all three counts, concluding the debtor did not have an interest in the funds used to make the payments and thus there was no transfer of an interest of the debtor in property, a required element under §§ 547(b) and 548(a). The bankruptcy court also held in the alternative that the defendants satisfied the contemporaneous-exchange-for-new-value defense to the preference, § 547(c); that the debtor did not intend to hinder, delay, or defraud creditors, § 548(a)(1)(A); and that the debtor received reasonably equivalent value in exchange for the transfers, § 548(a)(1)(B). The chapter 7 trustee appealed the preferential transfer and constructively fraudulent transfer rulings to the BAP.

The BAP discussed the viability of the earmarking doctrine under Tenth Circuit law to determine whether the debtor transferred an interest in the property and ultimately applied the dominion/control and diminution-of-the-estate tests. Based on the evidence presented at the bankruptcy court, the debtor did not have control of the funds because the insider loans were conditioned upon their distribution to the subordinate note holder. But the debtor's transfer of the funds to the subordinate note holder resulted in the diminution of the estate because the subordinated debt was replaced with regular unsubordinated unsecured debt, lessening the chance other unsecured creditors would be paid in full because the unsecured creditors would share the available funds equally with the new insider lenders rather than sharing the available funds ahead of the subordinated debt. In short, the BAP concluded each subordinated-note payment was a transfer of an interest of the debtor in property that diminished the debtor's estate by the subordinated-for-unsecured debt exchange and satisfied the transfer element under both §§ 547(b) and 548(a). The BAP also rejected the defendants' new value defense to the preference claim under § 547(c) because the bankruptcy court erred in considering payments outside the preference period, and such were not contemporaneous exchanges with the payments made to the subordinated note holder within the insider preference period. Finally, with respect to the constructively fraudulent transfers under § 548(a)(1)(B), the BAP concluded the debtor did not receive reasonably equivalent value for each subordinated note payment because the transfers replaced lower priority subordinated debt with higher priority unsubordinated debt. The BAP, therefore, reversed the bankruptcy court's judgment in favor of the insider defendants on the preference and constructively fraudulent transfer claims.

J. Trustee Could Avoid and Recover Wage Payments Where Employee’s Services to Ponzi Scheme Operator Were Reasonably Equivalent Value to Wages Paid. *Georgelas v. Desert Hill Ventures, Inc.*, 45 F.4th 1193 (10th Cir. 2022) (Ebel, J.).

A man ran a Ponzi scheme for eight years, and for the last four years had an employee providing him administrative services. The employee received about \$350,000 in salary during the course of his employment, and the employer/Ponzi-schemer paid about \$115,000 for renovations to the employee’s house after the employee’s wife was diagnosed with a medical condition. The district court considered on summary judgment whether the \$350,000 and the \$115,000 should be recovered as constructively fraudulent transfers under the Utah Fraudulent Transfer statute, similar to § 548(c) of the Bankruptcy Code. The district court granted summary judgment to a receiver on both the \$350,000 salary and the \$115,000 renovations.

On appeal, the Tenth Circuit assessed whether the recipient received the transfer in good faith and for reasonably equivalent value. To determine whether the debtor received value the Tenth Circuit asked if “property is transferred or an antecedent debt is secured or satisfied.” To determine if the employee’s services were reasonably equivalent value, the Tenth Circuit noted the employee provided administrative services pursuant to an employment agreement. The fact that the services indirectly helped the employer run his Ponzi scheme did not negate those facts. The grant of summary judgment as to the \$350,000 was reversed and the matter remanded for the district court to determine if the employee acted in good faith. Regarding the \$115,000 renovation payments, the matter was remanded due to genuine issues of material fact.

K. Failure to Timely and Properly Serve Student Loan Dischargeability Complaint on Home District U.S. Attorney and Attorney General Warrants Dismissal. *In re Drakewyck*, No. CO-23-004, 2023 WL 4312153 (B.A.P. 10th Cir. June 23, 2023) (unpublished) (Thurman, J.), *appeal pending*, No. 23-1236 (10th Cir.).

The chapter 7 debtor filed a pro se adversary proceeding to discharge her student loan debt naming the United States Department of Education as the defendant. The bankruptcy court issued a summons, and the debtor filed an affidavit of service asserting she served the Department of Education. The Department of Education never answered, and the debtor filed a motion for entry of default judgment. The bankruptcy court denied the motion for failure to properly effectuate service and set forth the steps the debtor needed to take to effectuate proper service. The debtor attempted to cure but failed once again, and then filed a second motion for entry of default judgment. The bankruptcy court denied the second motion for failure to properly effectuate service and dismissed the adversary proceeding without prejudice. The debtor appealed.

The BAP affirmed the bankruptcy court's order. Under Federal Rule of Bankruptcy Procedure 7004(b)(4) and (5), when serving a United States agency, a party must also serve the United States. To properly serve the United States, the debtor was required to mail a copy of the summons and complaint to the Department of Education, the United States Attorney for the district in which the action was brought, and the Attorney General of the United States in Washington, D.C. In addition, under Federal Rule of Civil Procedure 4(m), failure to effectuate proper service within ninety days after a complaint is filed, without a showing of good cause for the failure, will result in dismissal without prejudice. The BAP concluded dismissal was not an abuse of discretion because the debtor failed to comply with the order requiring her to file a motion for alias summons and then properly serve the alias summons on the Department of Education and the United States, and the debtor failed to effectuate service within ninety days.

L. After Conversion to 7, Ousted Chapter 11 Debtor in Possession Lacks Standing to Appeal Conversion Order. *Bear Creek Trail, LLC v. BOKF, N.A. (In re Bear Creek Trail, LLC)*, 35 F.4th 1277 (10th Cir. 2022) (Matheson, J.).

The corporate debtor filed a chapter 11 bankruptcy petition, and creditors moved to convert the proceeding to chapter 7. The bankruptcy court permitted conversion and appointed a chapter 7 trustee. The corporate entity's attorney appealed the conversion order. The district court dismissed the appeal, concluding only the chapter 7 trustee had standing to appeal the conversion order.

Applying *In re C.W. Mining Co.*, 636 F.3d 1257 (10th Cir. 2011), the Tenth Circuit agreed that the debtor lacked standing to appeal. The Tenth Circuit noted that after a corporate bankruptcy is converted from chapter 11 to chapter 7, the former management's role is simply to turn over corporate property and provide information. All authority to make legal decisions and business decisions passes to the chapter 7 trustee alone. As a result, the appeal in the corporate debtor's name had to be dismissed. The Tenth Circuit noted that former management may appeal a bankruptcy court order in its own right, if the managers themselves are persons aggrieved because their individual rights or interests are directly and adversely affected pecuniarily.

M. Erroneous Determination of Lack of Subject Matter Jurisdiction was Harmless Due to Permissive Abstention. *McIntyre v. Active Energies Solar, LLC (In re McIntyre)*, No. CO-22-004, 2022 WL 17999539 (B.A.P. 10th Cir. Dec. 30, 2022) (unpublished) (Hall, J.), appeal pending to Tenth Circuit (No. 23-1052); *McIntyre v. Fangman (In re McIntyre)*, No. CO-22-003, 2022 WL 18000098 (B.A.P. 10th Cir. Dec. 30, 2022) (unpublished) (Hall), *appeal pending*, No. 23-1048 (10th Cir.).

These appeals each involve disputes between a single debtor, McIntyre, and creditors who asserted claims against McIntyre stemming from state court litigation. McIntyre filed adversary proceedings against both creditors asserting essentially the same state law claims McIntyre had asserted against the creditors in state court and objecting to the creditors' proofs of claim. Appeals relating to portions of the state court litigation remained pending at the time the bankruptcy court considered the defendants' motions to abstain from hearing the adversary proceedings.

The bankruptcy court concluded in relevant part that (1) it did not have subject matter jurisdiction over the state law claims and (2) permissive abstention under 28 U.S.C. § 1334(c) was appropriate because claims remained pending in state court. The bankruptcy court dismissed the adversary complaints. McIntyre appealed.

As pertinent here, the BAP determined the bankruptcy court erred in concluding that it did not have subject matter jurisdiction, but the error was harmless because the bankruptcy court had discretion to permissively abstain from hearing the state law claims. The state law claims were related to McIntyre's bankruptcy case within the meaning of 28 U.S.C. § 1334(b). A "related to" proceeding is one whose outcome could conceivably have an impact on the estate being administered in bankruptcy. If McIntyre prevailed on the state law claims on appeal or on reconsideration, then his bankruptcy estate could be impacted. The court next rejected McIntyre's argument that 28 U.S.C. § 1334(e)(1) (which gives the bankruptcy court exclusive jurisdiction over a debtor's property) required the bankruptcy court to hear the state law claims, which McIntyre argued either were themselves property of the estate or would determine the disposition of property of the estate. Section 1334(e)(1) did not require the bankruptcy court to serve as the forum to adjudicate the state law claims. Next, the BAP concluded the bankruptcy court did not abuse its discretion in abstaining under § 1334(c)(1) under the circumstances. Finally, the bankruptcy court's core jurisdiction to determine McIntyre's objections to the creditors' claims did not prevent the court from dismissing the claim objections because the claim objections were merely a reassertion of the state law claims.

N. Section 106(a)(1) Abrogates Sovereign Immunity in Avoidance Actions Brought Under § 544(b). *Miller v. United States*, 71 F.4th 1247 (10th Cir. 2023) (Baldock, J.).

The chapter 7 trustee bought an avoidance action under § 544(b), seeking to avoid personal tax debt payments the debtor made to the IRS. The Utah cause of action the trustee invoked under § 544(b) required that an “actual creditor” have an unsecured claim arising before the transfers. The IRS argued the trustee could not succeed because, outside of bankruptcy, an actual creditor’s suit against the IRS would be barred by sovereign immunity. The chapter 7 trustee argued that the waiver of sovereign immunity in § 106(a) abrogated sovereign immunity not only as to the trustee’s § 544(b)(1) adversary proceeding against the IRS, but also as to the underlying Utah state law cause of action he invoked to avoid the transfers.

The Tenth Circuit affirmed the decision of the bankruptcy court that § 106(a) waives sovereign immunity as to state law avoidance actions a trustee asserts under § 544(b)(1). The Tenth Circuit reviewed the text of § 106(a) and concluded “the critical phrase ‘with respect to’ in § 106(a)(1) clearly expresses Congress’s intent to abolish the Government’s sovereign immunity in an avoidance proceeding arising under § 544(b)(1), regardless of the context in which the defense arises.” The Tenth Circuit also examined § 106(a)(2) and determined “the authority which subsection (a)(2) plainly confers would be substantially curtailed if Congress had intended an assertion of sovereign immunity to preclude a bankruptcy court from considering whether a trustee has satisfied the substantive elements of an underlying state law cause of action invoked pursuant to § 544(b)(1).” The Tenth Circuit concluded § 106(a) waived the IRS’s sovereign immunity both as to the chapter 7 trustee’s proceeding under § 544(b)(1) and the underlying Utah state law.

IV. Other

A. Bankruptcy Courts May Not Permit Nondischargeability Complaint After the Rule 4007(c) Deadline Expires. *In re Dellosa*, 72 F.4th 532 (3d Cir. 2023) (Rendell, J.).

More than five years after the court closed the debtor’s chapter 7 case, a creditor discovered the debtor allegedly fraudulently transferred assets that should have been part of the estate. The creditor filed a motion to reopen the case, intending to file a nondischargeability complaint or complaint to revoke the debtor’s discharge. The bankruptcy court denied the creditor’s motion, concluding that (1) reopening the case would be futile because the deadline to file such complaints had expired, and the court lacked authority to apply equitable tolling to extend the relevant deadlines; and (2) other legal avenues existed to redress the creditor’s grievances.

The Third Circuit affirmed. Rule 4007(c) provides that a dischargeability complaint “shall be filed no later than 60 days after the first date set for the meeting of creditors,” and that a court may extend the deadline only if a motion to extend is filed before the original 60-day deadline expires. Rule 9006(b) permits extension of Rule 4007(c)’s deadline “only to the extent and under the conditions stated in [that] rule[.]” As the Supreme Court determined in *Nutraceutical Corp. v. Lambert*, 139 S.Ct. 710 (2019), clear Congressional intent to prohibit extensions prevents equitable tolling even if the Rule imposing a deadline is nonjurisdictional. Here, the relevant rules demonstrated a clear congressional intent to prevent equitable tolling and left no room for flexibility. Thus, the bankruptcy court lacked authority to equitably toll the relevant deadlines despite the nonjurisdictional character of the Rules imposing them. Section 105(a) did not give the court authority to root out fraud in a manner inconsistent with the Bankruptcy Code and Rules. Finally, the bankruptcy court did not abuse its discretion in concluding the other legal avenues available to address the creditor’s grievances weighed in favor of declining to reopen the case.

B. Debtors May Deduct Actual Costs of Mortgage Payments When Calculating Disposable Income for Means Testing. *Blesdoe v. Cook* (*In re Blesdoe*), 70 F.4th 746 (4th Cir. 2023) (Heytens, J.).

The debtors filed a voluntary petition under chapter 13. When the debtors calculated their disposable income, they deducted their monthly mortgage payment. The trustee argued that the debtors could only claim the relevant local standards amount for their mortgage deduction, which was less than their monthly payment. Thus, the trustee argued that the debtors’ unsecured creditors were being shortchanged. The bankruptcy court overruled the trustee’s objection, stating that the debtors followed

the plain language of the Bankruptcy Code by deducting the full monthly mortgage payment.

On appeal directly to the Fourth Circuit, the court agreed with the bankruptcy court as well as the Sixth and Ninth Circuits and held that “the Chapter 13 means test permits above-median income debtors to deduct the actual costs of their mortgage payments when calculating their disposable income.” The court relied on the plain language of § 707(b)(2)(A)(i) which states, in relevant part, that the debtor’s monthly income is reduced by the amounts determined under subsections (ii), (iii), and (iv). Turning to subsection (iii), the court noted that the amount under this subsection was calculated using the sum of the amounts owed on account of secured debt. Since the mortgage was clearly a secured debt, the court concluded, rejecting the trustee’s arguments to the contrary, that the mortgage payment, as an amount owed on account of a secured debt, is an expense deducted when calculating disposable income under the means test.

C. After Chapter 11 Confirmation, Bankruptcy Court’s Jurisdiction Is Limited to Plan Implementation. *RDNJ Townbridge v. Chesapeake Energy Corp. (In re Chesapeake Energy Corp.)*, 70 F.4th 273 (5th Cir. 2023) (Jones, J.).

The chapter 11 debtor paid royalties to lessors for rights to explore and extract shale gas on the lessors’ land. The lessors had filed class actions against the debtor in Pennsylvania pre-petition for the debtor’s underpayment of lease royalties but most did not file proofs of claim in the debtor’s case. The debtor’s confirmed plan proposed to pay the lessors who had filed proofs of claim as general unsecured creditors receiving a 0.1% dividend and proposed to pay nothing to the lessors who had not filed proofs of claim. One month after the effective date of the debtor’s plan, the debtor sought the bankruptcy court’s approval of a settlement purporting to resolve all of the debtor’s remaining and future disputes with the lessors. Though the plan categorized the lessors as general unsecured creditors (who would receive at most a 0.1% dividend), the proposed settlement would require the debtor to pay participating creditors more than twenty percent of the amounts negotiated in the pre-petition Pennsylvania litigation. The proposed settlement also altered the formula for payment of future royalties. Overruling some of the lessors’ objections, the bankruptcy court approved the settlement. The district court affirmed.

The Fifth Circuit reversed, concluding that the bankruptcy court lacked jurisdiction to settle the lawsuits after confirmation. After confirmation, the bankruptcy court’s jurisdiction is limited to implementation or execution of the plan. The settlement was not within the ordinary claims estimation process because the settlement conflicted with the debtor’s plan and disclosure statement and proposed to pay the

affected lessors who lost their entitlement to recover because they had not filed proofs of claim in the debtor's case. The proposed settlement would result in a "windfall" to the "class members compared with other general unsecured creditors" and the debtor's "audacious attempt to bootstrap a few objectors' preserved rights into a basis for a 'fundamental reset' between the debtor and nearly 23,000 other Pennsylvania lessors who did not preserve their rights [did] not fly." The settlement principally dealt with post-confirmation relations of the debtor by attempting to resurrect the rights of the lessors whose pre-petition claims were discharged and by purporting to "mandatorily modify the terms of the leases going forward for all of the [lessors]," despite the provision in the plan that future leases claims would ride through the bankruptcy unaffected. The lessors' pre-bankruptcy claims did not survive the reorganization, so any antagonism between the debtor and lessors on the date of reorganization "d[id] not pull the class settlement agreements within the scope of the bankruptcy's 'related-to' jurisdiction." The plan was not necessary to the disposition of the settlement agreements; in fact, the settlements went beyond implementation of the debtor's plan and contradicted the plan. Consequently, the bankruptcy court lacked jurisdiction to approve the settlements.

D. Fifth Circuit Declines to Dismiss Appeal as Equitably Moot, Rules on the Merits. *Texxon Petrochemicals, LLC v. Getty Leasing, Inc. (In re Texxon Petrochemicals, LLC)*, 67 F.4th 259 (5th Cir. 2023) (Higginson, J.).

The debtor in this case filed a motion to assume an executory contract with a leasing company. The leasing company objected, alleging that no contract existed. The court denied the motion to assume, determining no contract existed. The district court affirmed, and the debtor appealed. By the time the appeal got to the Fifth Circuit, the district court had dismissed the debtor's underlying bankruptcy case. The leasing company asked the Fifth Circuit to dismiss the appeal as equitably moot.

The Fifth Circuit declined to dismiss the appeal as equitably moot and affirmed the bankruptcy court's denial of the motion to assume on the merits. The Fifth Circuit first explained that equitable mootness is a form of appellate abstention and declined to abstain. Turning to the merits of the appeal, the Fifth Circuit determined no contract existed because there was no legally valid offer and acceptance. Accordingly, the bankruptcy court did not err in denying the debtor's motion to assume.

E. Trustees May Not Avoid Even Blatantly Fraudulent Transfers from Non-Debtors to Non-Debtors. *Mann v. LSQ Funding Grp., L.C.*, 71 F.4th 640 (7th Cir. 2023) (St. Eve, J.).

Weeks before the petition date, the debtor allegedly tricked a new creditor into paying off the debtor’s debt to a prior creditor—effectively replacing the prior creditor with the new creditor—in furtherance of a Ponzi scheme. The trustee in the debtor’s case subsequently sued the prior creditor to avoid the payoff as preferential and fraudulent and recover the funds the new creditor paid to the prior creditor. The bankruptcy court granted summary judgment in favor of the prior creditor, determining the transfer was not avoidable because it involved funds belonging to the new creditor and “earmarked” for the prior creditor and, therefore, did not involve the transfer of “an interest of the debtor.” The district court affirmed.

The Seventh Circuit also affirmed. A transfer affects an interest of a debtor within the meaning of the preference and fraudulent transfer statutes if (1) the debtor could exercise control over the transferred property, and (2) the transfer diminished the estate. The Seventh Circuit sidestepped the question of control, focusing instead on the requirement that the transfer diminished the estate. The parties agreed that the relevant property would not have been property of the debtor’s estate, and the debtor did not own the property. Thus, the transaction had no effect on other creditors and did not diminish the estate. The court rejected the trustee’s argument that the diminution of the estate requirement applied only to preference causes of action under § 547 and not to fraudulent transfer causes of action under § 548. The identical phrase “an interest of the debtor in property” in § 547 and § 548 supported the conclusion that the diminution of the estate requirement applied to both causes of action. The Seventh Circuit’s decision also fostered equality of distribution among creditors because it prevented creditors from receiving funds that never would have been property of the estate. Finally, the court’s interpretation “align[ed] comfortably with” other circuit court decisions holding that “even in the Ponzi scheme context, outright fraud alone cannot bring a transaction within the avoiding powers of the Bankruptcy Code.” Because “this is not the type of fraud governed by the Bankruptcy Code” the new creditor could seek relief “in a separate fraud suit,” but the bankruptcy court did not err in entering summary judgment in favor of the old creditor.

F. Bankruptcy Court Correctly Applied *Taggart* in Assessing \$9.5 Million Sanction for Surety’s Contempt of Confirmation Order. *Fidelity Deposit Co. of Md. v. TRG Venture Two, LLC (In re Kimball Hill, Inc.)*, 61 F.4th 529 (7th Cir. 2023) (Scudder, J.).

When it was financially healthy, the debtor in this case entered into agreements to develop municipalities’ land. To guarantee the debtor’s performance of the land

development agreements, a surety gave the municipalities the right to draw on the surety bonds to compensate the municipalities if the debtor failed to develop the land as agreed. In turn, the debtor agreed to indemnify the surety for any payments the surety made to the municipalities. After the 2008 financial crisis, the debtor filed a chapter 11 petition. The debtor's confirmed plan, which the surety supported, stated that any purchaser of assets formerly belonging to the debtor would be "expressly contemplated and released from pre-petition creditors' claims against [the debtor's] estate." The debtor later sold the land development agreements to a purchaser free and clear of all claims. The bankruptcy court retained the authority to adjust the surety's claim amount based on future payments the surety made to the municipalities on the surety bonds. Meanwhile, the municipalities sued the surety to enforce their right to draw on the surety bonds in compensation for the debtor's nonperformance. Despite the surety's consent to the plan (which expressly released creditors' pre-petition claims against the debtor), the surety repeatedly interpleaded the purchaser of the debtor's land development agreements in state court. Though the purchaser repeatedly obtained dismissals, the surety engaged in a pattern of "continuing and persistent" efforts to involve the purchaser. Applying the "no objectively reasonable basis" standard the Supreme Court articulated in *Taggart v. Lorenzen*, 139 S.Ct. 1795 (2019), the bankruptcy court held the surety in contempt of the confirmation order and assessed a \$9.5 million sanction. The surety appealed the sanctions order. The district court affirmed.

On appeal from the district court, the Seventh Circuit also affirmed. The court first determined that the bankruptcy court had jurisdiction to issue the sanctions order pursuant to its inherent authority to enforce its own orders. Second, the Seventh Circuit determined that the bankruptcy court correctly applied *Taggart*. The court further explained that the bankruptcy court's rejection of Fidelity's arguments of an objectively reasonable basis did not mean that the bankruptcy court placed the burden on the surety. The Seventh Circuit "agree[d] with the bankruptcy court's conclusion that there is 'no fair ground of doubt' that [the surety's] actions amounted to a flagrant violation of the agreed to terms of [the debtor's] plan confirmation order," which was "clear and precise" that the municipalities could enforce their development agreements against the purchaser. The agreements "were part and parcel of the land sale to [the purchaser]" because they ran with the land, and they did not entitle the surety to sue the purchaser for the debtor's pre-petition indemnity obligations. Consequently, "[t]he bankruptcy court did not err by finding [the surety] in contempt and imposing \$9.5 million in sanctions"—an amount the purchaser justified with "evidence of its costs arising directly from its efforts to fend off [the surety's] indemnity claims."

G. Post-Petition, Pre-Conversion Appreciation Inures to Chapter 7 Estate. *Castleman v. Burman (In re Castleman)*, 75 F.4th 1052 (9th Cir. 2023) (Tallman, J.).

This case required the Ninth Circuit to determine whether post-petition, pre-conversion appreciation in a residence belonged to the estate or to the debtors who converted from chapter 13 to chapter 7 in good faith. The Ninth Circuit determined “the plain language of § 348(f)(1)(A), coupled with th[e Ninth] circuit’s previous interpretation of § 541(a), compel[led] the conclusion that any appreciation in the property value and corresponding increase in equity belong[ed] to the estate upon conversion.” Section 348(f)(1)(A) defines property of the estate in a case converted from chapter 13 to chapter 7 to include “property of the estate, as of the date of the filing of the petition, that remains in the possession of or is under the control of the debtor on the date of conversion.” Section 541(a) further defines property of the estate to include “all legal or equitable interests of the debtor in property as of the commencement of the case” and “[p]roceeds, product, offspring, rents, or profits of or from property of the estate.” The Ninth Circuit agreed with courts holding that appreciation is a part of the pre-petition underlying property (that § 348(f) would capture for the estate) rather than a separate, after-acquired item of property (that § 348(f) would exclude from the converted estate). Moreover, because “[i]t is well settled” that post-petition property does not become property of a chapter 7 estate, “[t]he Ninth Circuit, in finding that appreciation inures to the estate under § 541(a)(6) [in a Chapter 7 case], has necessarily found that increased equity in a pre-petition asset cannot be a separate, after-acquired property interest.” Finding the statutory text unambiguous, the court declined to look to the legislative history for guidance. The court also determined § 1327(b) (which vests property in the debtor at confirmation of a chapter 13 plan) did not apply in a case converted to chapter 7 to exclude the property from the converted estate.

In a vigorous dissent, Judge Tallman attacked the majority’s holding as one that “punishes the [debtors] for filing under Chapter 13” and that “is not the best reading of the Bankruptcy Code or [Ninth Circuit] precedents.” Ninth Circuit precedent dictated that the appreciation was “proceeds.” But because the residence vested in the debtors at confirmation, the appreciation was not proceeds of *property of the estate* under § 541(a)(6), and, therefore, did not inure to the estate under that subsection. Legislative history also supported the inference that Congress intended § 348(f) to exclude post-petition appreciation from the converted estate. Thus, Judge Tallman would have held that the appreciation inured to the debtors, rather than to the estate.

H. Courts May Not Circumvent 100-Mile Trial Subpoena Radius by Requiring Zoom Testimony. *Kirkland v. U.S. Bankruptcy Court for the Central District of California (In re Kirkland)*, 75 F.4th 1030 (9th Cir. 2023) (Forrest, J.).

The trustee in the bankruptcy case of a trust belonging to the Kirklands subpoenaed the Kirklands—who resided out of the forum state and more than 100 miles from the location of a pending bankruptcy adversary proceeding—to testify at trial via contemporaneous remote video transmission. The Kirklands moved under Rule 45(c)(1) to quash the subpoena. The bankruptcy court denied the motion, concluding that Rule 45(c)(1)’s geographical limitation did not apply when the subpoena sought to compel remote testimony because where “good cause and compelling circumstances” existed to take remote testimony under Rule 43(a), the availability of remote testimony negated the purpose of Rule 45(c)(1)’s geographical limitation (to protect the witness against extensive travel). The Kirklands filed a mandamus petition asking the Ninth Circuit to order the bankruptcy court to quash the subpoena.

The Ninth Circuit ordered the bankruptcy court to quash the subpoena. The Ninth Circuit first determined the bankruptcy court’s order was erroneous as a matter of law. Rule 43(a), which permits remote testimony “[f]or good cause in compelling circumstances and with appropriate safeguards,” did not move the Rule 45(c) place of compliance from the courthouse to the witnesses’ remote location—such an interpretation would render the geographical limitation in Rule 45 a nullity and would be contrary to the mandate in Rule 45 that the witness “attend *a trial*” because “*trials* occur in court.” Moreover, “Rule 45(c) governs the court’s power to require a witness to testify at trial, and Rule 43(a) governs the mechanics of how trial testimony is presented” and “determining the limits of the court’s power to compel testimony precedes any determination about the mechanics of how such testimony is presented.” The advisory committee notes reinforced the court’s conclusion that Rule 43(a)’s authorization of remote testimony did not supersede Rule 45(c)’s geographical limitation. So did Rule 32(a)(4), which makes unavailable witnesses more than 100 miles from the place of trial without making an exception for remote testimony. Next, the bankruptcy court’s order raised new and important problems, “given the recent proliferation of videoconference technology in all types of judicial proceedings” and “[a]s evidenced by the diverging views of the district courts.” The Kirklands had no other adequate means to attain their desired relief because the bankruptcy court had denied the Kirkland’s request to certify an interlocutory appeal and requiring the Kirklands to additionally ask the district court for interlocutory review would have been futile. The Kirklands would be damaged in a way not correctable on appeal by suffering “the intrusion” of having to give testimony when the bankruptcy court

lacked authority to compel them to do so. Consequently, mandamus relief was warranted.

I. Discharge Injunction Did Not Enjoin Alter Ego Suit Against Debtor’s Principals. *RS Air, LLC v. NetJets Aviation, Inc.*, 651 B.R. 538 (B.A.P. 9th Cir. 2023) (Faris, J.).

After the chapter 11 debtor received its discharge, creditors sought to collect their discharged debts from the debtor’s alleged alter egos. The debtor filed a motion to hold the creditors in contempt, arguing the creditors’ post-discharge pursuit of the alter ego suit violated the discharge injunction “because the alter ego allegation meant that ‘the Defendants [and the debtor] are all one and the same.’” The bankruptcy court denied the debtor’s contempt motion, concluding that the discharge injunction did not apply, and contempt was not appropriate because the creditors had an objectively reasonable basis to believe the injunction did not apply.

The Ninth Circuit BAP affirmed. By its plain terms, § 524 only protects the debtor from personal liability on a debt. It does not protect any person who is liable with the debtor or discharge the liability of nondebtors. It also does not extinguish the underlying debt. That the alter ego suit required the debtor to participate in discovery and litigation did not violate discharge injunction. The discharge injunction did not apply to prevent litigation whenever a creditor might later seek a judgment against the discharged debtor, and, in any event, “a creditor’s later attempt to add the discharged debtor to a judgment would unquestionably violate the discharge injunction.” Thus, the Bankruptcy Court did not err.

J. Debts of Corporate Subchapter V Debtors Cannot Be Held Nondischargeable under § 523(a). *In re Off-Spec Sols., LLC*, 651 B.R. 862 (B.A.P. 9th 2023) (Gan, J.).

A former employee and creditor filed a nondischargeability complaint against *Off-Spec Solutions*, a subchapter V corporate debtor. The debt at issue stemmed from sexual harassment and discrimination claims against the debtor. The creditor alleged the debt was nondischargeable under § 523(a)(6) as a debt derived from a “willful and malicious injury by the debtor to another.” The court had to determine whether the provisions of § 523(a) apply to debts provided for under subchapter V corporate debtors’ nonconsensual plans. The creditor argued that the Ninth Circuit B.A.P. should follow the Fourth Circuit’s holding in *Cantwell-Cleary Co. v. Cleary Packaging, LLC (In re Cleary Packaging, LLC)*, 36 F.4th 509 (4th Cir. 2022), in which the court held that debts specified in § 523(a) are not dischargeable by any debtor in a subchapter V, corporate or individual.

The Ninth Circuit B.A.P. rejected the holding of *Cleary*. Looking at the plain language of the relevant Code sections, the court determined that the key provisions were reconcilable. Turning first to § 1192, the court noted that upon confirmation, debts that are nondischargeable under § 523(a) are also nondischargeable for a subchapter V debtor. However, the court went further and noted that the plain language of § 523(a) applied only to the individual receiving a discharge. Though the court admitted that § 1192 and § 523(a) seem inconsistent because § 1192 provides for discharges for individual and corporate debtors while § 523(a) refers only to individual debtors, the court reasoned that the purpose of the relevant language in § 1192 is to reiterate § 523(a)'s application in subchapter V cases, and § 523(a) is limited to individuals. The court further determined that there is nothing in § 1192 that indicates an intention to broaden the scope of § 523(a) to subchapter V corporate debtors. The court also analyzed the legislative history and found no indication of congressional intent to narrow the discharge. Moreover, the court found that the context of subchapter V, as part of chapter 11, suggests that the discharge provisions should be interpreted similarly. Lastly, the court suggested that determining § 523(a) debts were nondischargeable would harm general unsecured creditors the most. Thus, even if there are policy considerations supporting the opposite conclusion, they are unavailing.

K. Eleventh Circuit Requires Refunds for Payment of Unconstitutionally Dis-Uniform Quarterly UST Fees. *United States Tr. v. Bast Amron LLP (In re Mosaic Mgmt. Grp., Inc.)*, 71 F.4th 1341 (11th Cir. 2023) (Anderson, J.).

Before the Supreme Court determined in *Siegel v. Fitzgerald*, 142 S.Ct 1770 (2022), that the 2018 increase to quarterly fees owed in United States Trustee (“UST”) districts but not bankruptcy administrator districts violated the uniformity requirement under the Bankruptcy Clause of the Constitution, the Eleventh Circuit had ruled that the fee increase did not violate the uniformity clause. After *Siegel*, the Supreme Court vacated the Eleventh Circuit’s contrary decision and remanded for further consideration in light of *Siegel*. The issue in this case was whether the trustee of an investment trust managing the debtor’s assets was entitled to a refund for its payment of unconstitutionally disparate fees.

The Eleventh Circuit determined the trustee was entitled to a refund. The Court determined it had two options to remedy the dis-uniform burden of the unconstitutional fees: “1) nullify the burden (the fee increase); or 2) extend the burden (the fee increase) to those excluded (the BA districts).” The UST argued that the court should extend the burden to the BA districts retroactively because “Congress has already chosen the remedy option of extending the burden (the fee increase) to the previously excluded BA districts, thus rejecting the other option which would have

nullified the burden (the fee increase).” The Eleventh Circuit rejected this argument, explaining that it “did not have the authority to ‘claw back’ additional fees from comparable debtors in the BA districts” who were not parties before the Eleventh Circuit and were in some cases located outside the Eleventh Circuit. Moreover, Congress remedied the dis-uniformity by requiring the BA districts to pay fees “only prospectively and did not order such ‘clawbacks.’” The Eleventh Circuit also rejected the UST’s argument that no remedy was required because only prospective relief was appropriate and Congress had already granted prospective relief by increasing the fees in BA districts. Supreme Court precedent supported the court’s conclusion that refunds, rather than prospective-only relief, were the appropriate remedy, and the two other Circuit Courts to have analyzed the issued ordered refunds. *See In re Clinton Nurseries, Inc.*, 53 F.4th 15 (2d Cir. 2022); *In re John Q. Hammons Fall 2006, LLC*, No. 20-3203, 2022 WL 3354682 (10th Cir. 2022). Thus, refunds were appropriate.

Judge Brasher concurred in the judgment but wrote separately to explain that he would have required the refund under due process principles, rather than in reliance on the Supreme Court precedent the majority cited.

L. Bankruptcy Court Erred in Compelling Turnover of Proceeds from Post-Petition Sale. *Willard v. Preuss (In re Willard)*, 72 Bankr. Ct. Dec. 95 (S.D.N.Y. 2023) (Roman, J.).

Before the court confirmed the debtor’s chapter 13 plan, the debtor sold non-residential real property. The debtor sought to retain the sale proceeds. The bankruptcy court ordered that the debtor instead turn the proceeds over to the chapter 13 trustee, reasoning that the debtor’s chapter 13 plan would not be feasible if the debtor retained the proceeds.

On appeal, the district court reversed. In chapter 13 cases, Congress offers a bargain: debtors may retain pre-petition property (and avoid liquidation) if they devote all disposable income to the chapter 13 plan. The Code does not require that chapter 13 debtors turn over property other than disposable income. “Compelling a debtor to submit a pre-petition asset to the Trustee, and thereby exposing such pre-petition asset to the creditors, runs counter to the congressional design evidenced by Chapter 13’s language and structure.” Thus, the bankruptcy court erred in compelling turnover.

M. Southern District of New York Adopts “Time Approach” to Calculating Lease Termination Damages Cap. *In re Cortlandt Liquidating, LLC*, 648 B.R. 137 (Bankr. S.D.N.Y. 2023) (Wiles, J.).

The debtor in this case rejected two commercial leases. The parties disagreed about how to apply § 502(b)(6)’s cap on lease termination damages, which gives rise to a claim for terminated rent calculated at “the greater of one year, or 15 percent, not to exceed three years, of the remaining term of such lease.” The court first analyzed whether the 15% component of the equation in § 502(b)(6) refers to (1) 15% of the total time left on the lease, regardless of any rent escalations that might occur after the first 15% of the remaining lease term (the Time Approach); or (2) 15% of the total dollar amount of the rent that would be payable for the entire remaining term of the lease, including amounts due for any escalations (the Rent Approach). The court determined § 502(b)(6)’s cap is calculated based on the Time Approach. Though cases within the Southern District of New York had previously adopted the Rent Approach, the weight of authority and respected treatises now favor the time approach. The text of § 502(b)(6) also favored the Time Approach because the words “15 percent” in § 502(b)(6) plainly modified the phrase “of the remaining term of such lease,” and “15 percent” was situated parallel to other references to time. If Congress intended “15 percent” to refer to a dollar amount, it would not have phrased § 502(b)(6) in temporal terms. Legislative history also supported the Time Approach, and principles of fairness and equity were not helpful in selecting between the available approaches. The court next determined that store cleanup costs arose from the termination of the lease and, therefore, were subject to the § 502(b)(6) cap. Claims for mechanics liens, however, did not arise from lease termination and were not subject to the cap. The court lacked sufficient information to determine whether certain alleged repair costs were subject to the cap because it lacked evidence concerning whether those costs arose from lease termination. Finally, the court determined that the lease requirements that the debtor pay real estate taxes and operating expenses were “rent reserved” for future periods that should be included within the § 502(b)(6) cap only to the extent proven at a later evidentiary hearing.

N. Oversecured Creditor Entitled to Default Interest Rate When Debtor Defaulted by Commencing Bankruptcy Case. *Off. Comm. of Unsecured Creditors of Latex Foam Int’l, LLC v. Entrepreneur Growth Cap. (In re Latex Foam Int’l, LLC)*, No. 3:21-CV-01311 (VLB), 2023 WL 2403757 (D. Conn. Mar. 8, 2023) (Bryant, J.).

A predecessor to the secured creditor in this case had provided financing to enable the debtor to exit a prior bankruptcy. Under the exit loan, the debtor agreed that the lender could charge a default interest rate that would require the debtor to pay an additional 3% interest if the debtor defaulted. Events of default included a

subsequent bankruptcy filing. So when the debtor filed a subsequent case, the secured lender's successor requested default interest. The unsecured creditors' committee opposed the secured lender's request. The bankruptcy court awarded default interest.

The district court affirmed. Under § 506(b), an oversecured creditor is entitled to postpetition interest at its contractual rate. Though neither § 506(b) nor binding precedent explicitly authorized default interest, courts generally have applied a presumption in favor of awarding default interest but may modify the default rate if the balance of equitable considerations weighs in favor of modification. "Balancing equities requires consideration of all relevant circumstances that allow the court to exercise equitable discretion," including: "(1) whether the secured creditor is guilty of misconduct, (2) whether the application of the contractual interest rate would harm unsecured creditors or impair the debtor's fresh start, and (3) whether the contractual interest rate constitutes a penalty." In this case, neither the secured lender's position as a successor nor its lack of cooperation during bankruptcy made the lender guilty of misconduct. The application of the interest rate would harm unsecured creditors, but the harm was not "undue" under the circumstances. The 3% increase to the interest rate was too low to constitute a penalty. Relevant circumstances otherwise favored the default rate because the predecessor negotiated the default rate while assisting the debtor in exiting a prior bankruptcy case. Finally the court determined that the bankruptcy court did not err in finding that the chapter 11 petition was an event of default warranting default interest in light of the circumstances of the loan formation and the failure of the unsecured creditors' committee to proffer sufficient evidence calling the bankruptcy court's determination into question.

O. Debtors Entitled to Deduct 401(k) Contributions up to IRS Limit. *In re Perkins*, Case No. 22-20025, 2023 WL 2816687 (Bankr. S.D. Tex. April 6, 2023) (Isgur, J.).

The debtors in this case proposed to contribute \$1,700 per month to their 401(k) account but had "made few, if any, 401(k) contributions in the two years before filing the bankruptcy petition." The debtors sought to confirm a plan that would pay a 24% dividend to unsecured creditors. The chapter 13 trustee objected to confirmation, arguing the proposed 401(k) contributions deprived the unsecured creditors of the debtors' disposable income and that the debtors had not proposed the plan in good faith.

The court overruled the trustee's objection. The court first determined that voluntary contributions to a 401(k) account are excluded from the computation of projected disposable income under § 1325(b)(1)(B). The court explained that § 541(b)(7), which states that amounts withheld for qualifying employee benefit plans are not disposable

income and excepts 401(k) contributions from the estate, applies to exclude post-petition 401(k) contributions. Though § 541(b)(7)'s awkward phrasing creates some confusion, its cross reference to § 1325 (which applies only post-petition), and its failure to expressly limit its application to pre-petition property suggest Congress intended to exclude even post-petition 401(k) contributions from the estate. Similarly, that § 1306 incorporates § 541 as a whole (including § 541(b)(7)) suggests that Congress intended both the definition of property of the estate under § 541(a) and the exclusions from property of the estate under § 541(b) to apply in chapter 13 cases. Moreover, applying § 541(b)(7) to debtors' post-petition assets is more consistent with the nature of chapter 13 cases, which require payment of creditors over time from debtors' post-petition earnings rather than from pre-petition assets. Because § 541(b)(7) excludes 401(k) contributions without regard to the amount proposed to be contributed, the court next analyzed whether good faith requirement constrained the amount of the debtors' post-petition contributions. The court determined the debtors proposed the plan in good faith under the totality of the circumstances. Because the Bankruptcy Code provided the mechanisms the debtors relied on to deduct 401(k) contributions and the contributions were lower than the IRS limit, the contributions could not be evidence of bad faith. The debtors' circumstances (including health problems that could jeopardize the debtors' future earning potential) also demonstrated that the debtors' proposal was in good faith. Consequently, the plan was confirmable as filed.

P. Debtor Asserting Fraudulent Transfer Cause of Action Under § 522(h) May Only Recover Exemption Amount. *Wright v. Trystone Cap. Assets, LLC (In re Wright)*, 649 B.R. 625 (Bankr. D.N.J. 2023) (Altenburg, J.).

After the chapter 13 trustee declined to pursue a fraudulent transfer cause of action against Trystone Capital Assets, LLC, the party who had purchased the debtor's former residence in a tax sale, the debtor himself initiated a fraudulent transfer adversary proceeding in the trustee's place under § 522(h). The parties agreed that the circumstances of the case satisfied all elements of a fraudulent transfer but disagreed about the amount the debtor could recover. The court explained that chapter 13 debtors lack standing to assert fraudulent transfer causes of action except under § 522(h). If the trustee declines to assert a viable avoidance action, § 522(h) authorizes a debtor to step in and assert an action to avoid a transfer and recover transferred property "to the extent that the debtor could have exempted such property under subsection (g)(1) of this section." Subsection, (g)(1), in turn, "allows a debtor to exempt property the trustee avoids if the transfer was not a voluntary transfer, and the debtor did not conceal the property." But under the plain language of § 522(h), the debtor's recovery "is limited to the extent of a debtor's exemption in the property avoided." The debtor in this case, "therefore, could only avoid up to his

exemption in the property, here, \$25,150.” And under § 550, the debtor could only recover property “to the extent that [the] transfer [wa]s avoided.” Finally, “[a]s for whether the court [should] order[] return of the property or its value,” the court elected to require the creditor to return the \$25,150 value of the debtor’s exemption, reasoning that “because the property [wa]s worth well more than \$25,150, it would be inequitable to Trystone to have to return the real property.” In so holding, the court determined that a chapter 13 debtor may not recover for the benefit of the estate and creditors under § 522(h).

Q. Section 552(a) Prohibited Extension of Pre-petition Security Interest in After-Acquired Accounts to Post-Petition Sale Proceeds. *In re Burts Constr., Inc.* 648 B.R. 185 (Bankr. S.D. Tex. 2023) (Lopez, J.).

The creditor’s security agreement granted the creditor a security interest on all of the debtor’s assets, including accounts owned at the time of the security interest or acquired later. During the debtor’s chapter 11 case, the court entered an order authorizing the sale of unencumbered real estate and stating that all liens on proceeds would attach to the proceeds of the sale. The issue before the court was whether the creditor’s lien on after-acquired accounts extended to the proceeds from the post-petition sale. The court first determined that the proceeds were an “account” under Article 9 because they arose from a right to payment for sale of property. That the sale was of real estate did not change this conclusion. Next, the court determined that § 552(a) nonetheless prevented the creditor’s lien from attaching to the sale proceeds. Section 552(a) states that property acquired post-petition is not subject to any lien resulting from a pre-petition security interest. The proceeds were “property” that the estate “acquired” post-petition, and the exception under § 552(b) for proceeds from the sale of a lender’s own collateral did not apply. Consequently, § 552(a) prevented the creditor’s lien from extending to the proceeds.

R. Post-Petition Events Do Not Destroy Subchapter V Eligibility. *In re Free Speech Sys., LLC*, 649 B.R. 729 (Bankr. S.D. Tex. 2023) (Lopez, J.).

Debtor Free Speech Systems was eligible to proceed under subchapter V when it filed its voluntary petition and made its subchapter V election. But after the petition date, creditors obtained \$1.5 billion judgment against Free Speech Systems and its owner, Alex Jones, who subsequently filed his own bankruptcy case. Free Speech Systems’ creditors asked the bankruptcy court to revoke Free Speech Systems’ subchapter V election, arguing the judgment against Jones and Jones’ bankruptcy case destroyed Free Speech Systems’ subchapter V eligibility.

The bankruptcy court determined Free Speech Systems remained eligible to proceed under subchapter V. Subparagraph (A) of § 1182(1) provides that a debtor may not proceed under subchapter V if the debtors’ noncontingent liquidated debts as of the petition date exceed \$7.5 million, “subject to subparagraph (B).” Subparagraph (B), in turn, requires the court to include a debtor’s affiliates in its determination of a debtor’s subchapter V eligibility if the affiliates’ aggregate noncontingent liquidated debts exceed \$7.5 million. Subparagraph (B), however, does not state that the court must determine the affiliates’ debts as of the petition date. Free Speech Systems argued that the omission of the phrase “as of the date of the filing of the petition” in subparagraph B imposed a “continuing obligation,” such that a debtor who was eligible to proceed under subchapter V as of the petition date would become ineligible if an affiliate with more than \$7.5 million debts filed a subsequent bankruptcy case. The court disagreed, explaining that both subparagraphs (A) and (B) apply as of the petition date, and Rule 1020 establishes a deadline by which parties must oppose a debtor’s subchapter V election. Thus, the debtor makes the subchapter V election as of the petition date, and the “case proceeds in accordance with the statement of election unless the court finds that the statement is incorrect.” Nothing in the Bankruptcy Code gave the court authority to revoke the debtor’s election against the debtor’s opposition. Preventing tardy eligibility challenges facilitated expeditious and economical resolution and consensual reorganization, and resolution of Free Speech Systems’ case in particular because the court was “ready to address” the many other issues in the case. Thus, the court denied the creditors’ motion to revoke Free Speech Systems’ subchapter V election.

S. Company Created to Resolve Johnson & Johnson’s Liability Denied Chapter 11 Relief a Second Time. *In re LTL Mgmt., LLC*, 652 B.R. 433 (Bankr. D.N.J. July 28, 2023) (Kaplan, J.).

A subsidiary of healthcare giant Johnson & Johnson faced significant liability relating to the sale of allegedly cancer-causing products containing talc. Through a divisional merger, the subsidiary split into two new entities, (1) LTL and (2) another entity, now called HoldCo. At the conclusion of this maneuvering, the subsidiary ceased to exist and LTL held, among other assets, all of the subsidiary’s talc liabilities and a funding agreement under which HoldCo and Johnson & Johnson agreed to pay LTL for talc-related liability. In October 2021, LTL filed a chapter 11 petition. In January 2021, the Third Circuit entered an order directing the bankruptcy court to dismiss LTL’s 2021 case, concluding that LTL did not suffer financial distress and explaining that “a debtor who does not suffer from financial distress cannot demonstrate its Chapter 11 petition serves a valid bankruptcy purpose supporting good faith.” Approximately two hours after the bankruptcy court dismissed LTL’s original case, LTL filed this case pursuant to a mediated agreement with counsel for 60,000 talc claimants and with a new funding agreement. Among other things, the

new funding agreement would create a \$8.9 billion trust for talc liability and would authorize LTL to request funding from HoldCo.

Though the bankruptcy court lamented that “a ‘wait and see’ approach [to seeking bankruptcy relief] often gives rise to serious risks and increased costs that may threaten the viability of the business,” the Third Circuit’s direction that the court balance the need for bankruptcy relief against the risks of premature filing and “the Circuit’s focus on immediacy and certainty” of the financial distress requirement required the bankruptcy court to dismiss the new case. Analyzing LTL’s substantial assets, HoldCo’s financial wherewithal, the status of the asbestos litigation, and other factors, the court concluded that it was “presented with nearly the same record with respect to verdicts and costs” as LTL’s 2021 case. Because the Third Circuit had just concluded that those circumstances did not give rise to financial distress and required the bankruptcy court to dismiss the prior case as not filed in good faith, circumstances likewise required dismissal of this case.

Next, the court determined § 1112(b)(2) did not excuse dismissal. When cause for dismissal exists, § 1112(b)(2) may nonetheless excuse dismissal in “unusual circumstances.” But Third Circuit authority established that the § 1112(b)(2) unusual circumstances exception is only available when a debtor demonstrates a reasonable justification or a possible timely cure of the cause for dismissal and “where the debtor otherwise properly belongs in bankruptcy.” “Thus, lack of financial distress is not the type of ‘bad faith’ that could be subject to the § 1112(b)(2) exception to prevent dismissal or conversion.” The exception, therefore, did not save LTL from dismissal in this case.

Finally, the court declined to appoint a trustee or examiner as an alternative to dismissal. Under § 1104(a)(1), courts may appoint a trustee or examiner if appointment is in the best interests of creditors. But in this case, “the appointment of either a trustee or an examiner [was] likely to result in little more headway than [the parties and court] ha[d] seen to date” and would likely result in significant expense without significant benefit. Accordingly, the court dismissed the case.

T. Debtor’s Entitlement to Retain Post-Confirmation Inheritance Boils Down to Good Faith. *In re Madrid*, Case No. 19-42260-MJH, 2023 WL 3563019 (Bankr. W.D. Wash. May 18, 2023) (Heston, J.).

The debtor received an inheritance during month 31 of her confirmed 36-month plan, but she did not disclose the inheritance until the plan period had expired. In month 37, the trustee moved to modify the plan to require a 100% dividend to unsecured creditors. The trustee’s motion raised two distinct issues: (1) “whether the postconfirmation inheritance [wa]s property of the estate”; and (2) “whether the

Trustee [wa]s entitled to modify the plan in light of the inheritance under the provisions of § 1329.”

The court first determined the inheritance was property of the estate. Though § 541(a)(5) only captures for the estate inheritances received within 180 days after the petition date—and the debtor here received the inheritance after that 180-day period expired, § 1306 extends the 180-day period in chapter 13 cases by adding to the estate property of the kind described in § 541(a) (including all of the debtor’s legal and equitable interests) that the debtor acquires during a chapter 13 case.

Next, the trustee was entitled to seek modification of the debtor’s plan. Though the trustee sought modification after the debtor had made the final payment under her original 36-month plan, the debtor’s failure to timely disclose the inheritance equitably estopped the debtor from arguing that the conclusion the plan period precluded modification. The court next analyzed the amount that would be distributed in a hypothetical chapter 7 liquidation to determine how § 1325(a)(4)’s best interests of creditors test applied to the trustee’s proposed modification. Disagreeing with the minority of courts (including the Eighth Circuit) that apply the best interests of creditors test as of the petition date or original confirmation date, the court in this case applied the test as of the date of modification. Because a hypothetical liquidation as of the date of modification would require conversion to chapter 7, § 348(f) (which governs property of the estate at conversion)—not § 1306 (which governs property of the estate during a chapter 13 case)—determined the value of the property that would be distributed under in a hypothetical liquidation. Because § 348(f) excludes new property from the converted estate (absent a conversion in bad faith), under the circumstances of this case, the court did not include the value of the inheritance in the liquidation analysis. Nonetheless, the inheritance was a substantial unanticipated change in circumstances that required modification. Accordingly, the court required that the debtor propose an amended plan increasing the distribution to unsecured creditors in amount sufficient to demonstrate good faith under § 1325(a)(3).

U. Court Had Discretion to Modify Plan to Exclude Post-Petition Personal Injury Claims from the Estate. *In re Hill*, 652 B.R. 212 (Bankr. S.D. Ala. 2023) (Callaway, J).

The debtors in these cases had each received post-petition settlements for personal injury claims. The question before the court was “whether the settlement proceeds should be applied to the cases at the confirmed percentage to unsecured creditors or at a higher percentage, that is, on top of the debtors’ payments under the confirmed plan.” The court first explained that the settlement proceeds became property of the estate under § 1306(a). But because the proceeds were not income, the disposable

income test under § 1325(b) did not apply to require that the debtors devote them to their plan payments. The best interest of creditor’s test under § 1325(a)(4) likewise did not require the debtors to pay the proceeds to unsecured creditors because, absent bad faith, the proceeds would not have been property of the estate if the case had been converted to chapter 7 on the date of modification under § 348(f). Though the statutory tests did not require the debtors to devote the settlement proceeds to plan payments, governing precedent additionally required the court to determine whether the Eleventh Circuit’s common law “ability to pay” standard imposed such a requirement. The court determined the ability to pay standard required payment equal to the amount of the proceeds but left the court to determine “whether the nonexempt personal injury settlement proceeds should be applied to the debtors’ cases at the confirmed percentages or, instead, on top of the debtors’ confirmed plan payments to increase the percentage paid to unsecured creditors.” Increasing the dividend is appropriate when an asset would produce a windfall to a debtor absent the increase. In this case, the personal injury settlements did not produce a windfall to the debtors because the settlements were for compensatory damages and did not increase the debtors’ ability to pay creditors. Consequently, the court denied the trustee’s motions to modify the confirmed plans.

V. Two Condominiums Owned and Operated by Same Debtor and Subject to Single Mortgage Were Not a “Single Property or Project” Under Single Asset Real Estate Test. *In re Nuovo Ciao-Di, LLC*, 650 B.R. 785 (Bankr. S.D.N.Y. 2023) (Mastando, J.).

The question in this case was “whether two contiguous commercial condominiums . . . [that] have the same owner and are subject to the same mortgage, but have different tenants, different commercial uses, different plans for future sale and development and are listed as separate lots by the NYC Department of Finance—satisfy the definition of ‘single asset real estate’ under 11 U.S.C. § 101(51B) of the Bankruptcy Code.” The court determined the condominiums did not satisfy the definition because they were neither a single property nor a single project. Though the condominiums were subject to a common mortgage and deed, they were not a single property because they had separate lot numbers, could be valued and used separately, and possessed unique characteristics. The condominiums also were not a single project because they were not linked together in a common plan or scheme involving their use. The debtor had historically leased the properties to separate entities at separate times and “ha[d] not demonstrated any plans to combine the properties or use them for a single purpose.” The properties had separate values and were subject to separate uses. Because the debtor was not using the properties under a common scheme, the other factors courts consider in determining whether an asset satisfies the definition of a single asset real estate were irrelevant. Accordingly, the court denied the creditor’s motion to designate the debtor as a “single asset real estate debtor” under § 101(51B).

W. *Bartenwerfer* Nondischargeability of Debt Arising from Imputed Fraud Does Not Apply to Good Faith Recipient of Fraudulent Transfer. *Turney v. Vulaj (In re Vulaj)*, 651 B.R. 310 (Bankr. S.D. Cal. 2023) (Mann, J.).

The creditor in this case had obtained a pre-petition state court judgment against the debtor for the debtor's receipt of fraudulent transfers. "Absent from the [state court] [d]ecision, however, were specific findings that [the debtor] shared [the transferor's] fraudulent intent regarding the transfers." After the debtor filed a chapter 7 voluntary petition, the creditor asked the court to declare the fraudulent transfer judgment against the debtor nondischargeable and sought summary judgment. Rather than establish the debtor-transferee's fraudulent intent, the creditor premised her nondischargeability complaint exclusively on the imputation of the transferor's fraudulent intent. The creditor relied on *Bartenwerfer v. Buckley*, 143 S.Ct. 665 (2023), in which the Supreme Court held nondischargeable the debt of a partner who herself lacked fraudulent intent because the debt arose from another partner's fraud, which the Supreme Court imputed to the debtor under partnership law. In opposition, the debtor relied primarily on *Husky International Electronics Inc. v. Ritz*, 578 U.S. 355 (2016), in which the Supreme Court implied in dicta that actual fraud requires wrongful intent and stated that a recipient's debt may be nondischargeable under § 523(a)(2)(A) only if the recipient participated in the fraud. As the bankruptcy court explained, "[c]ases following *Husky* have . . . focused on the intent of the fraudulent transferee debtor to determine whether the debt could be discharged," including in *Bonett v. Moirbia Scottsdale, LLC*, 860 F. App'x 473 (9th Cir. 2021), in which the Ninth Circuit determined that a recipient's liability for receipt of a fraudulent transfer is nondischargeable only if the recipient herself acted with fraudulent intent. Siding with the debtor, the bankruptcy court determined that a nondischargeability plaintiff must establish a fraudulent transfer recipient's fraudulent intent to succeed under § 523(a)(2)(A). The court determined *Bartenwerfer* does not conflict with *Husky* because *Bartenwerfer's* imputation of fraud only applies in circumstances involving a partnership or an agency relationship. Imputation of fraud under partnership law is the exception to the longstanding general rule "that culpable intent of the debtor [i]s necessary to except debts from discharge." The court's interpretation was consistent with the language of § 523(a)(2)(A), which requires that the relevant debt be obtained by "actual fraud." Because the debtor's liability as a fraudulent transfer recipient was independent of any liability of the transferor, the debtor's debt was not obtained by actual fraud. Accordingly, the court determined that the creditor would have had to prove the debtor's independent fraudulent intent to establish nondischargeability and denied the creditor's motion for summary judgment.

X. Post-Confirmation Sale Proceeds Cannot Be Untethered from Underlying Property, and, Consequently, Do Not Replenish the Chapter 13 Estate under § 1306. *In re Elassal*, Case No. 21-42801, 2023 WL 5537061 (Bankr. E.D. Mich. Aug. 28, 2023).

When the court confirmed the debtor’s chapter 13 plan—which required the debtor to pay very little to unsecured creditors—the debtor had no non-exempt equity in her residence. But less than two years later, after the value of her residence had significantly increased, the debtor sold her residence and received more than \$175,000 in net sale proceeds. The debtor filed a motion to retain the sale proceeds. The trustee objected to the debtor’s motion and moved to amend the plan to require the debtor to pay 100% of her general unsecured creditors.

The issues in this case required the bankruptcy court to reconcile § 1306 (which captures for the chapter 13 estate property the debtor acquires post-petition) and § 1327 (which provides that property of the estate “vests” in the debtor at confirmation). The court analyzed five different approaches to reconciling those sections and ultimately selected the “estate replenishment approach.” Under the estate replenishment approach, property of the estate becomes property of the debtor at confirmation under the vesting language of § 1327, but then § 1306 operates to replenish the estate with any property the debtor acquires after confirmation. The court next determined the sale proceeds in this case were not post-confirmation property that became property of the estate under § 1306 because the proceeds could not be untethered from the underlying, pre-petition residence, which vested in the debtor at confirmation. Finally, the court determined the proceeds were not disposable income under § 1325 for several reasons: (1) the Sixth Circuit cases the trustee cited were distinguishable; (2) the proceeds were not an anticipated stream of payments in the nature of income; and (3) because the debtor proposed to use the proceeds in their entirety to purchase a new residence, the proceeds were not disposable income to the debtor.

Y. The Absolute Priority Rule Applies in Individual Chapter 11 Cases.

***In re Joseffy*, No. 21-19419, 2023 WL 5842000 (Bankr. S.D. Fla. Sept. 8, 2023) (Russin, J.).**

The individual chapter 11 debtor in this case sought to retain exempt and nonexempt property acquired prepetition despite that his plan of reorganization impaired unsecured claims. The unsecured creditors voted against the plan, and the debtor sought a cramdown, arguing that the plan was confirmable because the unsecured creditors would receive more than they would under a chapter 7. The UST objected, however, arguing that the plan violated the absolute priority rule because the debtor sought to retain the exempt and nonexempt property acquired prepetition.

The absolute priority rule generally provides that a dissenting class of creditors must be paid in full before any junior class, including the debtor, can receive or retain estate property. Congress amended § 1129 in 2005 to state that even if a plan did not pay unsecured creditors in full, an individual debtor may still retain property of the estate “included under” § 1115, which captures post-petition property and earnings for the estate. This new language created a split in authority with a “broad” interpretation and a “narrow” interpretation. Applying the broad interpretation of § 1129, some courts have determined that property of the estate “included under § 1115” includes all property under § 541 *and* post-petition property and earnings.

In contrast, this court joined all circuit courts that have addressed this issue and applied the narrow interpretation. The court held that a debtor may only retain post-petition property and earnings and cannot retain nonexempt property that is acquired prepetition. The court focused on the word “include” in § 1129(b)(2)(B) and reasoned that because § 541 property is already included in the estate, § 1129 only allows retention of post-petition property and earnings which are additionally brought in through § 1115. The court, though stating the language of § 1129(b) is unambiguous, further reasoned that even if the text were ambiguous, there was no reason to believe Congress ever intended to abrogate the absolute priority rule in individual chapter 11 cases.

Lastly, the court determined that the debtor may still retain exempt property, even if it was acquired prepetition because the debtor would not be retaining property “under the plan” according to § 1129(b)(2)(B)(ii). The court reasoned that the language of § 1129(b)(2)(B)(ii) limited the absolute priority rule’s application to property of the estate which does not include exempt property.

Faculty

Hon. Dennis R. Dow is a U.S. Bankruptcy Judge for the Western District of Missouri in Kansas City, appointed on Nov. 10, 2003, by the Eighth Circuit Court of Appeals. Prior to taking the bench, he was a partner with the firm of Shook, Hardy & Bacon LLP, where he represented trustees in chapter 7 cases involving significant assets, individual and corporate debtors in proceedings under chapters 7 and 11, and secured, unsecured and priority creditors and lessors in chapter 7, 11, 12 and 13 cases, and had been listed in *The Best Lawyers in America* in the area of bankruptcy law every year since 1995. He also tried numerous adversary proceedings and contested matters, including preference actions, objections to discharge, dischargeability complaints and objections to confirmation of chapter 11 plans. Judge Dow is a member of ABI, the Missouri Bar and the Kansas City Metropolitan Bar Association. He is a Fellow of the American College of Bankruptcy, inducted in March 2013, and was selected in November 2014 to become a conferee of the National Bankruptcy Conference. He also is a member of the National Conference of Bankruptcy Judges. Judge Dow is Chief Judge of the Bankruptcy Appellate Panel. He also served a term as chair of the Judicial Conference Advisory Committee on Bankruptcy Rules. Judge Dow has authored and co-authored several articles, including “ERISA-Related Claims in Bankruptcy,” *Journal of Bankruptcy Law and Practice*, Vol. 3, No. 1 (Nov/Dec 1993), “Rent to Own Agreements in Bankruptcy: Sales or Leases?,” *ABI Law Review*, Vol. 2, No. 1 (Spring 1994), and “Gramm-Leach-Bliley and the Bankruptcy/Collection Attorney,” *Norton Bankruptcy Law Advisor* (Feb 2002). He received his B.A. with honors from the University of Wyoming and his J.D. from Washburn University School of Law, where he was notes editor of the *Washburn Law Journal*.

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. Bianca M. Rucker is a U.S. Bankruptcy Judge for the Eastern and Western Districts of Arkansas in Fayetteville, appointed on April 26, 2021. Prior to her judicial appointment, she was a chapter 7 panel bankruptcy trustee and attorney representing creditors and debtors in consumer and business bankruptcy matters at Rucker Law PLLC, in Fayetteville. Before working as a trustee, Judge Rucker was a partner at Wright, Lindsey & Jennings, LLP (WLJ), where her practice focused on bankruptcy, commercial litigation and insurance defense. She also served as a staff attorney to Hon. Richard D. Taylor (2006-07) and Hon. Ben T. Barry (2007-11) of the U.S. Bankruptcy Court for the Eastern

and Western Districts of Arkansas. Judge Rucker has served as president of the Northwest Arkansas Debtor and Creditor Bar Association, and she is an adjunct professor at the University of Arkansas School of Law, where she teaches alcohol beverage law. She received her B.A. in political science in 2003 from the University of Arkansas at Little Rock and her J.D. with honors in 2006 from the William H. Bowen School of Law.

Hon. Dale L. Somers is Chief U.S. Bankruptcy Judge for the District of Kansas in Topeka, initially appointed in September 2003. He hears cases in Topeka, Kansas City and Wichita. Previously, he was in private practice for 32 years and a partner in the law firms of Eidson, Lewis, Porter & Haynes and Wright, Henson, Somers, Sebelius, Clark & Baker. Judge Somers was appointed to the Bankruptcy Appellate Panel for the U.S. Court of Appeals for the Tenth Circuit in March 2010. He served as a member of the Judicial Resources Committee of the Judicial Conference of the United States. Judge Somers served on the Board of Governors for the Kansas Bar Association from 1988-98 and as president from 1995-96. He is a Fellow of the of the American College of Bankruptcy and of the American Bar Association. Judge Somers received his undergraduate degree from Kansas State University in 1968 and his J.D. from the University of Kansas School of Law in 1971.