



AMERICAN
BANKRUPTCY
INSTITUTE

2018 Central States Bankruptcy Workshop

Consumer Track

Chapter 7 Debtor and Trustee Interactions

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U.S. Bankruptcy Court (D. Minn.); Minneapolis

ABI 25th Annual Central States Bankruptcy Workshop

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THE TRUSTEE'S ROLE

I. OBLIGATIONS TO DEBTORS AND CREDITORS

Section 323(a) provides that the chapter 7 trustee is the representative of the estate. The trustee is a fiduciary charged with protecting the interests of all estate beneficiaries, e.g., the creditors. The trustee should administer the estate so as to maximize the distribution to the beneficiaries. To represent the estate, the trustee must secure for the estate all assets properly obtainable under applicable provisions of the Bankruptcy Code, object to the debtor's discharge where appropriate, defend the estate against improper claims or other adverse interests, and must liquidate the estate as expeditiously as possible for distribution to creditors. In connection with the trustee's obligations to the debtor, the trustee should make sure to conclude the 341 meeting of creditors, so the debtor will receive his/her discharge within 90 days after the conclusion of the meeting of creditors. If the trustee is not going to administer a non-exempt asset and if the case is to remain open in order to administer other assets or causes of action, the trustee should file a notice of abandonment, so the assets are abandoned back to the debtor.

The specific statutory duties of a trustee are set forth at 11 U.S.C. § 704. The trustee shall:

- i. collect and reduce to money the property of the estate and close the estate as expeditiously as is compatible with the best interests of parties in interest;
- ii. be accountable for all property received;
- iii. ensure that the debtor performs his intentions as to the retention or surrender of property of the estate that secures consumer debts;
- iv. investigate the financial affairs of the debtor;

- v. if a purpose would be served, examine proofs of claim and object to the allowance of any claim that is improper;
- vi. if advisable, oppose the discharge of the debtor (but not the discharge of a particular debt since only the creditor to whom it is owed may do so);
- vii. unless the court orders otherwise, furnish such information concerning the estate and the estate's administration as is requested by a party in interest.
- viii. if the business of the debtor is authorized to be operated, file with the court and with any governmental unit charged with the responsibility for collection or determination of any tax arising out of such operations, periodic reports and summaries of the operation of such business, including a statement of receipts and disbursements, and such other information as the court or the United States Trustee requires; and
- ix. make a final report (TFR) and file a final account (TDR) of the administration of the estate with the United States Trustee and the court.

This listing is not an exclusive enumeration of all the responsibilities that any fiduciary has to an estate and its beneficiaries.

II. WHAT TRUSTEES ARE LOOKING FOR IN FILINGS

The trustee is looking for non-exempt, unencumbered assets or causes of action which will bring money into the estate to pay creditors. In addition, the trustee will review the debtor's claim of exemptions to determine if the exemptions are proper. If not, the trustee will object to the claim of exemptions. In so doing, those assets now will become an asset that the trustee will administer for the benefit of creditors.

In addition, if there are material misstatements or misrepresentations in the petition and in schedules or in testimony at the 341 meeting of creditors, the trustee (or the United States Trustee) will object to or revoke the debtor's discharge. Depending upon the egregiousness of the misstatement, the matter may be referred to the U.S. Attorney's office for criminal prosecution.

Tips and Tricks for Chapter 7 Debtor and Trustee Interactions

A View from the Bench

Hon. Michael E. Ridgway

I. Conduct yourself in the direction of the four Ps: (1) punctuality; (2) politeness; (3) professionalism; and (4) preparedness.

1. Punctuality: Always arrive at a hearing either on time, or beforehand.
2. Politeness: Treat opposing counsel with respect, and politeness.
3. Professionalism: Always act like the consummate professional to all, including the Court. In that sense, never be argumentative with the Court.
4. Preparedness: Be prepared by knowing your case, and the law. In doing so, you set yourself up to be persuasive.

II. Be intimately familiar with the Court's local norms, and local rules.

- Know the local rules **cold**.
- Find out if a judge imposes any other requirements. See The Hon. Robert J. Kressel, *Order Preparation Guidelines for Judge Kressel*, <http://www.mnb.uscourts.gov/content/judge-robert-j-kressel>, (last visited Apr. 17, 2018).
- Learn and write the proper spelling of the judge's name.
- Have a strong grasp on the logistics involving the electronic presentation of evidence.

III. Understand the Federal Rules of Evidence.

- Rule 615 of FED. R. EVID. deals with the sequestration of witnesses. That rules states:

At a party's request, the court must order witnesses excluded so that they cannot hear other witnesses' testimony. Or the court may do so on its own. But this rule does not authorize excluding:

- (a) a party who is a natural person;
- (b) an officer or employee of a party that is not a natural person, after being designated as the party's representative by its attorney;
- (c) a person whose presence a party shows to be essential to presenting the party's claim or defense; or
- (d) a person authorized by statute to be present.

FED. R. EVID. 615.

- Object precisely and concisely.
 - o To do so, state the objection, and pinpoint the grounds, without making any argument. An example of a proper form of an objection is "Objection, leading."

IV. Witnesses

- Treat a witness with dignity, and respect. Anything less is unnecessary.
- Similarly, no need exists to be argumentative with a witness.

V. Familiarize yourself with the nuances of bankruptcy appeals, and with appeals in general.

- Part VIII of the FED. R. BANKR. P. sets the procedure for appeals to the bankruptcy appellate panel, district court, and, at times, directly to the court of appeals.
- Many attorneys miss the deadline to file a notice of appeal. Don't be one of those attorneys. Rule 8002, with certain exceptions, requires that a notice "be filed with the bankruptcy clerk within 14 days after entry of the judgment, order, or decree being appealed." FED. R. BANKR. P. 8002(a)(1).

- An appellant must not only file and serve a designation of items to be included in the record on appeal, and a statement of the issues to be presented, FED. R. BANKR. P. 8009(a)(1)(A), but must also:

(A) order in writing from the reporter, as defined in Rule 8010(a)(1), a transcript of such parts of the proceedings not already on file as the appellant considers necessary for the appeal, and file a copy of the order with the bankruptcy clerk; or

(B) file with the bankruptcy clerk a certificate stating that the appellant is not ordering a transcript.

FED. R. BANKR. P. 8009(b).

- Understand what an offer of proof is. See FED. R. EVID. 103(a)(2). If an objection is sustained, and as a result, evidence is excluded, then the proponent must make an offer of proof to preserve the evidentiary ruling for appellate review.
- Rule 8005 requires a party to elect to have an appeal heard by the district court, rather than the bankruptcy appellate panel, within the timeframe set by 28 U.S.C. § 158(c)(1). FED. R. BANKR. P. 8005(a). In turn section § 158(c)(1) requires the appellant to make an election when the notice of appeal is filed. 28 U.S.C. § 158(c)(1). Any other party must make an election “not later than 30 days after service of notice of the appeal” Id.

VI. Know how to use the different types of “reconsideration” motions.

- Rule 3008 holds the only reference in the Fed. R. Bankr. P. to the term, “reconsideration.” FED. R. BANKR. P. 3008. That rule states, “A party in interest may move for reconsideration of an order allowing or disallowing a claim against the estate. The court after a hearing on notice shall enter an appropriate order.” Id.
- Rule 9023 of the Fed. R. Bankr. P. incorporates FED. R. CIV. P. 59 by reference, with certain modifications. Rule 59 of the FED. R. CIV. P. deals with new trials, and motions to alter or amend a judgment.

- Rule 9024 of the FED. R. BANKR. P. applies, with some modification, Fed. R. Civ. P. 60 to bankruptcy cases. Rule 60 of the FED. R. CIV. P. provides a procedural mechanism for relief from a judgment or order.

VII. Keep a few things in mind when dealing with the clerk's office, law clerks, or the Court.

- Professionalism extends to all, including personnel in the clerk's office, law clerks, and the Court.
- Never be condescending. Acting that way is unnecessary, and casts lawyers in a bad light.
- Remember! When you deal with the clerk's office or law clerks, you are dealing with an extension of the Court.
- If you make a mistake, never blame your support staff; fall on your sword. Remember: It's your name on the pleading.

Tips and Tricks for Chapter 7 Debtor and Trustee Interactions

Views from the Trustees

I. Tips, Tricks and Suggestions For Debtor's Counsel

A. Before the Meeting of Creditors

1. Try and identify 1 or possibly 2 trustees in your jurisdiction that you can call and ask to "run this by you". You will gain insight as to what a trustee is looking for, you may receive some valuable advice and the trustee will learn that you are someone trying to do a good job. This does not have to be limited to your Case Trustee.
2. Contact the trustee in advance of your 341 meeting if something odd or embarrassing may be disclosed so that the trustee does not inadvertently ask an embarrassing question.
3. Give your client instructions regarding what to do before and what to do after the meeting of creditors. Written instructions are preferred in the event that there is a question as to whether or not you gave your client the correct advice. A standard document given to all of your clients will be valuable.
4. Be the first "trustee" to examine your client. Ask your client the same questions that they will probably hear from the Trustee.
5. Follow your instincts. If you don't believe your "client" why should the trustee. Your questions to your client should be just as probing as the Trustee's.
6. Consider asking that sensitive information and data be considered confidential or that it be filed under seal prior to the 341 meeting or after the 341 meeting in response to a request for documents request if the documents will include sensitive or confidential information.

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7. If the trustee requests information prior to the meeting of creditors, do your best to provide all information requested to the trustee prior to the meeting. This may alleviate the need for a continued meeting and the debtor having to return. (Nauni)
8. If your spider sense is tingling when you meet the debtor, ask if he or she has been to see other attorneys and, if so, how many. Sometimes a debtor seeking to avoid disclosing certain assets will see multiple attorneys and “edit” their disclosures accordingly.
9. The trustee has a duty to safeguard and preserve collateral. If you file a case with an uninsured, non-exempt asset or there is personal property that may in jeopardy, it would be greatly appreciated if you call the trustee and let the trustee know of the situation when the case is filed. Otherwise, the trustee may not know about it until the meeting of creditors. Time is of the essence in these types of cases. (Nauni)
10. Adequately describe the debtor’s assets in the petition and schedules. If you describe your assets as a “boat”, “jewelry”, “artwork”, “guns”, “collectibles”, the trustee will ask questions at the meeting of creditors in order to ascertain its value. A better description: “1985 16’ Lund Fishing Boat, with 35 hp motor with trailer value determined per XYZ Boat dealer”. The better description will save time and testimony from the debtor. The meeting will be much easier on the debtor. (Nauni).
11. Trustees are audited every three years by the United States Trustee. Do not exempt assets that the debtor is not entitled to exempt. If they are de minimis in value the trustee will not administer it. If you exempt it, the trustee may be forced to object to the exemption. (Nauni)
12. Exempting an asset in an unknown amount will raise an objection to the exemption. *See Taylor v. Freeland & Kronz*, 503 U.S. 638 (1992). (Nauni)

13. In a pre-bankruptcy planning situation, leave something on the table for the bankruptcy estate. Remember the old adage: "Pigs are safe, but hogs are slaughtered." *In re Bronk*, 444 B.R. 902, 908 (Bankr. W.D. Wisc. 2011) (citing *In re Zouhar*, 10 B.R. 154, 157 (Bankr. D. N.M. 1981) (citing *Dolese v. United States*, 605 F.2d 1146, 1154 (10th Cir. 1979) and *In re Johnson*, B.R. 953 (Bankr. D. Minn. 1987)). (Nauni)
14. If the debtor has valuable assets, are they insured? Have they been appraised? Has the debtor tried to sell them? The trustee will ask those questions. If the assets are scheduled for significantly less, there may be trouble on the horizon for the debtor. (Nauni)
15. Provide Tax Returns in a Timely Manner, as some Trustees may not hold the meeting if returns are not provided on-time. 11 U.S.C. § 521(e)(2)(A) (Jim).

(2)(A) The debtor shall provide--

(i) not later than 7 days before the date first set for the first meeting of creditors, to the trustee a copy of the Federal income tax return required under applicable law (or at the election of the debtor, a transcript of such return) for the most recent tax year ending immediately before the commencement of the case and for which a Federal income tax return was filed; and

(B) If the debtor fails to comply with clause (i) or (ii) of subparagraph (A), the court shall dismiss the case unless the debtor demonstrates that the failure to so comply is due to circumstances beyond the control of the debtor.

B. At the Meeting of Creditors

1. Make sure your client as an identification card or driver's license and social security card or W-2. 11 U.S.C. § 521(h) (Jim)

(h) If requested by the United States trustee or by the trustee, the debtor shall provide--

(1) a document that establishes the identity of the debtor, including a driver's license, passport, or other document that contains a photograph of the debtor; or

(2) such other personal identifying information relating to the debtor that establishes the identity of the debtor.

2. Don't answer the question for your client – it may look like you are coaching the debtor or trying to hide something.

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3. Don't rephrase the trustee's question before the debtor has a chance to try and answer.

C. After the Meeting of Creditors

1. If a no-asset case (or no distribution report case) is reopened because of an inheritance or unscheduled non-exempt or partially exempt asset, request that the trustee set a claims filing deadline to determine the universe of claims. It is often difficult to find creditors who will file claims in older cases. As such, the debtor may receive more than originally anticipated. (Nauni)
2. Let's make a deal. When there are several non-exempt assets, do not cherry pick a few of those assets to purchase from the estate. Make the trustee a reasonable offer that encompasses all non-exempt assets. A lump-sum offer for all of the assets is preferred. However, if there are non-exempt cash assets, e.g., bank accounts, refunds, the trustee will not make a deal on those assets. Spending the cash or refunds may result in a denial or revocation of discharge. (Nauni)
3. If you want an asset abandoned when the case is closed, make sure it is scheduled. If it is not listed, informing the trustee about it may not be enough. Amending the schedules is the safest route to take. *See* Abandonment section.

II. Tips, Tricks and suggestions for Trustees

A. Before the Meeting of Creditors

1. Consider using a handout of instructions for the 341 meeting or to be mailed to debtor's counsel before the 341 meeting regarding things that have happened or may happen in the future. This can be especially important if unknown pre-petition causes of action are discovered post-petition. This helps establish that later discovered cause of action should not be considered constructively abandoned and this type of paperwork is a good practice in the event of a field audit.

2. Try to identify in your jurisdiction 3 or 4 “good” debtor attorneys (clean and clever) that you can refer a debtor to if asked.
3. Consider conducting a pre-341 meeting in a complex case between yourself, the debtor and debtor’s counsel (invite the U.S. Trustee) then state the fact that you conducted the pre-341 meeting on the record at the public 341 meeting.

B. At the Meeting of Creditors

1. Put on the record what has already been done in the way of conversations or meetings with Debtors and Counsel.
2. Do your own audio recordings of 2004 examinations.
3. Be sensitive to privacy issues. Don’t put everything on tape, know that what you say when the recorder is on is publicly available unless you specify that it cannot be available to the public.
4. In certain cases, conclude the 341 meeting and then proceed with a consensual 2004 examination. You may then do this with the room cleared.
5. Don’t be afraid to call a break. Also the debtor’s attorney shouldn’t be afraid to ask for a break between cases.
6. Consider rescheduling a complicated case to the end of the docket both as a courtesy to other debtors and their counsel and for increased privacy.
7. Don’t be afraid to be human. You may be surprised how what you say and how you say it is remembered by the debtors.

C. After the Meeting of Creditors

1. Where appropriate, get audio copies of 341 meetings.

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ABANDONMENT OF ESTATE PROPERTY

Nauni Manty

There are three ways an asset may be abandoned: (1) the trustee may file a notice/motion of the abandonment with the court; (2) a party in interest may request that the asset be abandoned by motion; or (3) the scheduled asset may be abandoned when the case is closed.

11 U.S.C. § 554 provides:

(a) After notice and a hearing, the trustee may abandon any property of the estate that is burdensome to the estate or that is of inconsequential value and benefit to the estate.

(b) On request of a party in interest and after notice and a hearing, the court may order the trustee to abandon any property of the estate that is burdensome to the estate or that is of inconsequential value and benefit to the estate.

(c) Unless the court orders otherwise, any property scheduled under section 521(a)(1) of this title not otherwise administered at the time of the closing of a case is abandoned to the debtor and administered for purposes of section 350 of this title.

(d) Unless the court orders otherwise, property of the estate that is not abandoned under this section and that is not administered in the case remains property of the estate.

Sections 554 (a) and 544(b) are commonly referred to as “specific or intentional abandonment.”

In re DeGroot, 484 B.R. 311, 318 (BAP 6th Cir. 2012). Procedurally, under subsection (a), the trustee will file a notice of abandonment (or motion) with the bankruptcy court that will be served on all creditors. If a party in interest requires a more immediate abandonment, it can

file a motion requesting abandonment pursuant to §554(b). If a party in interest does not object by the date listed in the notice/motion, the asset will be abandoned back to the debtor.

The trustee considers various factors in officially abandoning an asset. In subsection 554(a) the trustee is permitted to “relinquish assets that would be a financial drain on the estate, or relieve the trustee of the financial burden of administering inconsequential assets that would cost more than they are worth to the estate.” *In re Schultz*, 509 B.R. 190 (Bankr. N.D. Ind. 2014). Types of assets that may be abandoned by the trustee include, but are not limited to: property that contains hazardous waste; assets that are encumbered in excess of their value; property that may expose the estate to a large tax liability; any property that will cost more to administer than will benefit the estate; any asset that may expose the estate to liability. *See generally Tiffany v. Norwest Bank of Des Moines, NA*, 972 F.2d 355 (8th Cir.1992) (trustee may abandon property back to the debtor so the bankruptcy estate will not bear any tax liability arising from a subsequent foreclosure sale)(citing *Samore v. Olson (In re Olson)*, 930 F.2d 6, 8 (8th Cir.1991)(an abandonment of chapter 7 property by the trustee is not a “sale or exchange” for tax purposes); and *In re Wiczek*, 452 B.R. 762, 767 (Bankr. D. Minn.2011) (recognizing difference between a trustee's liquidation of an asset through a sale and a trustee's abandonment); *In re Haber*, 547 B.R. 252 (Bankr. S.D. Ohio 2016). *But see Midlantic Nat'l Bank v. New Jersey Dept. of Environmental Protection*, 474 U.S. 494 (1986)(a bankruptcy trustee may not abandon property in contravention of state statute or regulation that is reasonably designed to protect the public health or safety from identified hazards; rather,

before authorizing abandonment, the court must formulate conditions that will adequately protect the public's health and safety).

In order to undo an abandonment, courts require the trustee to file a motion. Courts typically require the trustee to seek relief under Fed. R. Civ. P. 60(b), incorporated by Fed. R. Bankr. P. 9024 to resurrect the asset. *In re Reiman*, 41 B.R. 901 (Bankr. E.D. Mich. 2010).

The other two provisions dealing with abandonment are §§ 554(c) and (d). Abandonment under these provisions is often referred to as “technical abandonment” or “abandonment by operation of law”. *In re Morris*, 2018 WL 132343 (Bankr. N.D. Ohio 2018), citing *DeGroot*, 484 B.R. at 319. Once the case is closed, the unadministered asset is automatically abandoned and cannot be resurrected. *In re Wright*, 566 B.R. 547 (BAP 6th Cir. 2017). However, if the “debtor gives a trustee false or incomplete information about the asset, the abandonment is revocable.” *In re Wick*, 276 F.3d 412, 414 (8th Cir. 2002); *Stoebner v. Wick (In re Wick)*, 249 B.R. 900 (Bankr. D. Minn. 2000). Also, unscheduled or concealed assets are not abandoned. It is the rule that “property not scheduled remains property of the estate in perpetuity.” *In re Darrah*, 337 B.R. 313 (Bankr. N.D. Ohio 2005); see also *Cundiff v. Cundiff (In re Cundiff)*, 227 B.R. 476, 478 (BAP 6th Cir. 1998); *In re Shultz*, 509 B.R. 190, 198 (Bankr. N.D. Ind. 2014) citing *In re Sutton*, 10 B.R. 737 (Bankr. E.D. Va. 1081) (Tax refund that was not scheduled was not abandoned by the closing of the case and the refund remains an unadministered asset for the trustee to administer.) In *Sutton*, even though the trustee had knowledge, the asset was

not abandoned because it was unscheduled. The court found that only scheduled assets can be abandoned. Moreover, it is not enough if the trustee learns of the property through other means. The asset must be scheduled to be abandoned. *Vreugdenhill v. Navistar International Transportation Corporation*, 950 F.2d 524, 526 (8th Cir.1991)(unscheduled claim against another party, not abandoned even though the trustee had knowledge of the claim); *see also In re McCoy*, 139 B.R. 430 (Bankr. S.D. Ohio 1991). The trustee must also have made an “intelligent decision” with respect to the abandonment and “§ 554(c) should not be interpreted to inadvertently deny creditors the benefit of a substantial asset.” *In re Schmid*, 54 B.R. 78, 80 (Bankr. D.Ore.1985). *See also, In re Lintz West Side Lumber*, 655 F.2d 786 (7th Cir.1981)(holding that the Court could revoke an express abandonment if that abandonment was the result of an inadvertent error and the parties were not unduly prejudiced by the revocation); *Mele v. First Colony Life Ins. Co., (In re Mele)*, 127 B.R. 82, 85–86 (D.D.C.1991)(holding that to prove abandonment under § 554(c), it must be shown “at a minimum that the trustee made a reasonable inquiry consistent with his statutory duties” under 11 U.S.C. § 704).

If the trustee wishes to close the case and wants to preserve the asset for the benefit of creditors, the trustee may file a motion or application with the court requesting that the asset not be abandoned under § 554(d). For example, under a divorce decree, the debtor may have a marital lien in the former homestead. The decree may not require sale of the home for several years due to the fact that minor child reside there. The trustee may file a motion to close the case with an unadministered asset. The court may enter an order that the asset is not

abandoned. It is not enough for a trustee to file a no-asset report with the modifying language that the asset is not abandoned. *In re Wright*, 566 B.R. 457 (BAP 6th Cir. 2017); *see also In re Bloxsom*, 389 B.R. 52 (Bankr. W.D. Mich. 2008). “The statement in the NDR alone does not suffice to preserve the trustee’s right to pursue the claim on the bankruptcy estate’s behalf.” *Wright*, 566 B.R. at 463.

In summary, the safest route for the debtor is to schedule the asset or amend the schedules to make sure the asset is listed prior to closing. It may not be enough to simply notify the trustee of the unscheduled asset. The trustee, on the other hand, must request and obtain an order from the court preserving the asset as an unadministered asset for a future date. Also, if this is the only asset to be administered, the trustee may wish to obtain a claim filing deadline, so when the asset matures, there are actual claims to be paid.



Domestics and Foreign Asset Protection Trusts:

An Overview on Their Creation and How to Break Them Down

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Domestic Asset Protection Trusts (DAPTs) - Overview

- What is a DAPT?
 - an irrevocable trust with an independent trustee with absolute discretion to make distributions to a class of beneficiaries which include the settlor
- How many states have a DAPT statute?
 - 17 of the 50 states allow DAPTs (as of Fall 2017)
 - 39% of geographical area of U.S.
 - 29% of the population
- The first state to enact a DAPT statute - Alaska in 1997
- The more recent DAPT statutes:
 - Ohio in 2013
 - Mississippi in 2014
 - West Virginia in 2016
 - Michigan in 2017
- What about the states that don't have a DAPT statute?
 - 14 of the 50 states allow asset protection through self-settled techniques
- Sketchy authority exists interpreting these statutes.
 - 5 known cases currently:
 - 2 regarding Alaska statute - creditors' prevailed in fraudulent transfers cases
 - 1 regarding Delaware statute - SOL barred the creditors
 - 2 regarding Nevada's statute
 - (1) holding that DAPT assets could not be reached for satisfaction of future spousal support claims & child support claims

- (2) applying Utah law to the Nevada DAPT statute for a divorce action.
- Public policy behind DAPTs - all about equity and “right” to keep money safe
- Key component in many statutes is the limited SOL
- Exceptions; creditors (depending on the state)
 - Child support obligations
 - Fraudulent conveyances
 - Spousal claims
 - Tort claims - arising from injuries on or before the date of the transfer of the trust
- Many issues hover around DAPTS
 - Whether nonresidents of DAPT states may form a DAPT under one of the DAPT state’s laws and obtain the desired asset protection and tax benefits.
 - *Conflict of laws*; the choice of law rules most frequently discussed in this area are two sections of the Restatement (Second) of the Law, Conflict of Laws. **Section 273** discusses when the creditors of a beneficiary can reach the assets of a trust, and directs that this issue is governed by the law of the state chosen by the settlor in the trust instrument.

However, cases in the foreign trust area, and the one DAPT case dealing with this subject, refer to **section 270(a)**, which deals with the validity of an inter vivos trust.

This section’s test is whether the nonresident’s state of residence has a “strong public policy” against DAPT asset protection. Since several cases have applied the section 270 rule, it will be important to explore just what is a “strong public policy.”

- Are there fraudulent transfer statutes that apply to DAPTs?
 - Yes, the **Uniform Fraudulent Transfer Act** and **Uniform Voidable Transfer Act (2014)**; though amendments being made state-to-state to support DAPTs
 - Some states require an Affidavit verifying that the DAPT isn’t being used to shield assets.

B. Various States DAPTs

- **Alaska:** Alaska Trust Act - 1997
 - Allows protection for irrevocable spendthrift trusts
 - *Requirements:*
 - 1) must be irrevocable
 - 2) must expressly state Alaska law governs validity, construction, and administration of the trust
 - 3) must contain spendthrift trust clause
 - It cannot be used for “asset protection” (really???)
 - *Benefits:*
 - Alaska does not recognize exception creditors

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- settlor can retain certain powers while continuing to have protection
 - *Exceptions*: courts have avoided transfers where:
 - the bankruptcy trustee proved actual intent to defraud; and
 - Washington public policy warranted voiding a transfer in Alaska where the debtor had no ties
 - *SOL*: 4 years or 1 year
 - *Existing creditors*:
 - 4 years after the transfer or 1 year after the transfer was or could reasonably have been discovered
 - To qualify for the discovery exception: the existing creditor must: (i) demonstrate that the creditor asserted a specific claim against the settlor before the transfer; or (ii) within 4 years after the transfer file another action against the settlor that asserts a claim based on an act or omission of the settlor that occurred before the transfer
 - *Future Creditors*:
 - 4 years after the transfer
 - Must prove transfers made with intent to defraud
 - Alaska has not adopted the UFTA
 - Burden of proof - **clear and convincing evidence**
- **Delaware**: Delaware Qualified Disposition Act - 1997
 - allows protection for irrevocable spendthrift trusts
 - *Requirements*:
 - 1) must be irrevocable
 - 2) must expressly state that DE law governs validity, construction, and administration of trust (unless trust is being transferred to DE trustee from non-DE trustee)
 - 3) must contain spendthrift clause
 - *Benefits*:
 - Settlor can retain certain powers while continuing to have protection
 - *Exceptions*: Exception creditors are permitted to go after the trust for:
 - alimony
 - child support
 - tort claimants for claims
 - *SOL*: 4 years or 1 year
 - *Existing creditors*:
 - 4 years after transfer, or 1 year after transfer was or could reasonably have been discovered if claim based upon intentional fraud
 - 4 years after transfer if claim based upon constructive fraud.
 - *Future creditors*: 4 years after transfer
 - Burden of proof - **clear and convincing evidence**
 - UFTA applies to creditors whose claims exist at time of qualified disposition
- **South Dakota**: Qualified Disposition in Trust Act of 2005

- allows protection for irrevocable spendthrift trusts
 - *Requirements:*
 - 1) must be irrevocable
 - 2) must expressly state that SD law governs validity, construction, and administration of trust (unless trust is being transferred to SD trustee from non-SD trustee);
 - 3) must contain spendthrift clause
 - 4) must have a “qualified person” as a trustee
 - *Benefits:*
 - There is no rule against perpetuities
 - settlors can retain certain powers while continuing to have protection
 - *Exceptions:*
 - the settlor must be a discretionary beneficiary
 - at least part of the trust property must be in South Dakota
 - all or some of the trust administration should be performed in South Dakota
 - At least 1 trustee must be a resident or institution in South Dakota
 - exception creditors are protected for:
 - alimony
 - child support
 - marital property transferred to the trust during the marriage
 - tort claimants - for claims that arose before the transfer
 - *SOL:* 2 years or 6 months
 - UFTA applies and sets aside transfers with intent to defraud a specific creditor
 - Burden of proof - **clear and convincing evidence**
 - *Existing creditors:* 2 years after transfer, or 6 months after transfer was or could reasonably have been discovered if creditor (1) asserted specific claim before transfer; or (2) if creditor files another action within 2 years that asserts claim before transfer.
 - *Future creditors:* 2 years after transfer.
- **Oklahoma:**
 - *Requirements:*
 - 1) must expressly state that OK law governs
 - 2) must have a trustee or co-trustee as a OK based bank that maintains a trust dept. or an OK-based trust company at all times
 - 3) must have only qualified beneficiaries [ancestors or lineal descendants of grantor (including adopted lineal descendants if they were under age 18 when adopted), spouse of the grantor, charities, or trusts for such beneficiaries];
 - 4) must recite that income is subjected to income tax laws of OK
 - *Benefits:*
 - can be a revocable or irrevocable trust
 - can be used for asset protection
 - *Exceptions:*

- *SOL*: 4 years or 1 year
 - *Existing* and *future creditors* are treated the same:
 - 4 years after transfer, or 1 year after transfer was or could reasonably have been discovered if claim based intentional fraud
 - 4 years after transfer if claim based upon constructive fraud.
 - UFTA applies and sets aside transfers with intentionally or constructive fraud
 - Burden of proof - clear and convincing evidence

C. Nevada – “What Goes in a Nevada DAPT STAYS in a Nevada DAPT!”

- **Nevada:** Spendthrift Trust Act of Nevada - amended in 1999
 - allows protection for irrevocable spendthrift trusts
- 3 Trust Instrument Requirements:
 - 1) must be irrevocable
 - 2) all or part of corpus of trust must be located in Nevada, settlor’s domicile must be in Nevada, OR trust instrument must appoint a Nevada trustee; and
 - 3) distributions to settlor must be approved by someone other than the settlor
- *Benefits*: Does not recognize exception creditors and settlor can retain certain powers while continuing to have protection
- Restrictions:
 - A revocable trust cannot be used for “asset protection” (again, really???)
- Restrictions on creditors:
 - Exception creditors do not apply
 - There is no exception for a child support claim, alimony claim, for property division upon divorce, or tort claims.
 - A charging order is the only remedy for a creditor of an owner as to LLCs, partnerships, and limited partnerships
- Supported by the state legislature through continued amendments in 2007, 2009, 2011, and 2015
- A Nevada DAPT:
 - can last up to 365 years
 - can have distribution advisor, investment advisor, or a trust protector
 - there is no statutory authority to support a trust’s non-contestability clause even if probable cause exists for contest
 - due diligence is NOT required
- Requirements to establish “situs”:
 - 1) all or part of assets are in a state
 - 2) Nevada trustee’s powers include
 - maintaining records, and
 - preparing income tax returns
 - 3) all or part of the administration must be in state
- Nevada law allows the settlor to:
 - have a lead interest in a CRT
 - the right to minimum required distribution under a retirement or deferred - compensation plan
 - the lead interest in a GRAT

- the lead interest in a QPRT
- the right to receive distributions in the discretion of another person
- the right to use real or personal property owned by the trust
- have a veto power over distributions
- a limited lifetime or testamentary power of appointment
- the power to remove and replace a trustee
- direct trust investments
- and other management powers (but NOT the power to make distributions without the consent of another person)
- Who can be a trustee?
 - The trustee must be a resident individual or a trust company or bank that has an office in Nevada
 - There are no restrictions on co-trustees
- What is a trustee's **distribution authority**:
 - it can be absolute discretion or limited discretion by an ascertainable standard, **and it may be subject to approval or veto powers retained by the settlor or given to the trust protector or other advisor**
 - A trustee can pay income or principal directly to a third party, for the benefit of a beneficiary, even if the beneficiary has an outstanding creditor
 - A trustee is not given a lien against the trust assets for costs & fees incurred to defend the trust
 - However, a trustee or an advisor of the settlor or trustee is liable only if it is established by **clear and convincing evidence** that damages directly resulted from the advisor's violation of the law knowingly and in bad faith
 - The trustee is given "decanting" authority to modify the trust
- **Fraudulent transfers**
 - Nevada law sets aside fraudulent transfers under *intentional* or *constructive* fraud
 - The burden of proof: **clear and convincing evidence**
 - **SOL:**
 - *future creditors* - 2 years after transfer
 - *existing creditors* - 2 years after transfer, or if longer, 6 months after transfer was or could've reasonably been discovered if the claim was based on intentional fraud rather than constructive fraud
 - **A transfer is discovered when it is reflected in a public record**
 - Nevada has NOT adopted the 2014 amendment to the Uniform Fraudulent Transfer Act (now the Uniform Voidable Transactions Act)
- Can a trust outside of Nevada later get moved to Nevada and be subject to NV DAPT statute?
 - Yes
- What's the right of a beneficiary?
 - A beneficiary can use or occupy real property or tangible personal property owned by the trust if it's in accordance with the trustee's discretion
- A non-settlor beneficiary's interest is protected from property division at divorce if:
 - The property is retained in a spendthrift trust for the beneficiary. Even if it's not retained in the trust, property received by gift or inheritance is the beneficiary's

separate property. However, trust income and assets can be considered a resource for purposes of determining alimony and child support.

- Nevada cannot get income tax against DAPTs formed by non-resident settlor

D. Breaking Down DAPTs

- Under Local Law for Domestic Asset Protection Trusts
 - **Child support obligations**
 - Delaware & Rhode Island: trust assets are not protected against child support claims period
 - Alaska & Utah: trust assets aren't protected from child support claims if at the time of the transfer the settlor was in default by 30 days or more in making those payments.
 - Nevada: no spendthrift trust exception for child support
 - **Fraudulent conveyances statutes**
 - Asset protection trust statutes do NOT override the state's fraudulent conveyance statutes, but differs on how the fraudulent conveyance statute is applied and some are being modified to support the spirit of DAPTs.
 - Delaware & Wyoming – the burden of proof for fraudulent conveyance regarding an asset protection trust is clear and convincing evidence
 - Nevada – only a 2 year SOL period from the time of the transfer or 6 months after the transfer reasonably should've been discovered
 - **Spousal claims**
 - Delaware, Rhode Island, & Utah: **exempts** marital property divisions or distributions from protection
 - **Tort claims from injuries occurring on or before the date of transfer of the trust**
 - Delaware: doesn't insulate trust property from a person who suffers tort injuries (death, personal injury, or property damage) on or before the date of the transfer to the trust – in cases where the injury or damage is caused in whole or in part by an act or omission of the transferor or by someone from whom the transferor is or was vicariously liable
 - Alaska: doesn't have this provision at all.
 - **Sham or alter-ego transaction**
 - **Applicability:** when the settlor has retained excessive control in the trust document or through inappropriate trust administration and a failure to adhere to trust formalities
 - **Result:** trust assets are subject to levy
 - **The transfer is against public policy**
 - **Applicability:** applies to states where self-settled trusts are not recognized – the trust can be disregarded for public policy reasons. State public policy provides an exception to the choice of law language in the trust instrument to prevent the other court from having jurisdiction
 - **Process:**
 - 1) establish that the court has jurisdiction

- 2) determine whether the law designated in the trust or the law of the court with jurisdiction should govern
 - **Factors:** Settlor residency, trust asset location, creditor residency, operation of business, trust administration, and location of legal professionals

E. Foreign Asset Protection Trusts

- **Substantially similar to DAPTs though have been around much, much longer – that’s where we got the idea!**
- **Cook Islands:**
 - *Benefits:*
 - Does NOT recognize treaties or statutes to enforce foreign judgments against settlors, donors, trustees, protectors, or beneficiaries.
 - The creditor **MUST** bring an action in the Cook Islands to set aside the trust
 - If unsuccessful, the creditor may have to pay the legal costs of the trusts if the court mandates it
 - The settlor can also be a beneficiary of the trust – as well as the sole beneficiary
 - It’s an offense for a person to disclose any information re the establishment, constitution, or business undertaking or affairs of the trust – fine: \$10,000 or prison up to a year
 - UNLESS authorized to by the High Court of Cook Islands or for administrative purposes when the trustee needs to seek advice of legal counsel
 - Trust owners:
 - Those convicted of Medicaid Fraud
 - Ponzi Schemes
 - Bilking employee pension funds
 - Doctors worried of getting sued for malpractice
 - *Drawbacks:*
 - The trust must be registered with the Registrar of International Trusts within 45 days of it being created
 - *SOL:*
 - 2 years
 - *Burden of proof: beyond a reasonable doubt*
 - the creditor must prove that the settlor did it with an intent to defraud him and that the transfer rendered the settlor insolvent or without assets that the creditor’s claim could have satisfied
 - **Interesting Tidbit: Most settlors don’t even know where to find the Cook Islands.**
- **Bahamas:**
 - *Benefits:*
 - The trust cannot be void, voidable, or liable to be set aside under foreign law

- No settlor or trustee or any beneficiary can be subject to liability based on laws of any foreign jurisdiction that doesn't recognize the trust, the trust avoids rights from someone with a personal relationship with the settlor or by heirship rights, or if the trust contravenes a rule of foreign law, judicial, or administrative order or action
- The settlor retains various powers
- Settlor can be a beneficiary of the trust
 - BUT the settlor cannot benefit from a spendthrift provision in the trust
- Non-Bahamian trust beneficiaries are exempt from taxes – income tax, capital gains tax, estate tax, or inheritance tax
- Trusts or other deeds executed by the trustees, settlors, beneficiaries, or protectors are exempt from registration under Bahamian law
- *Drawbacks:*
 - Trust – does NOT include duties incident to property subject to a mortgage, but it does extend to implied, constructive, and resulting trusts
 - The Rule of Perpetuities applies, or in the alternative, the trust cannot exceed 150 years
- *SOL:* 2 years
 - The creditor must prove fraudulent intent
- **Nevis:**
 - *Benefits:*
 - Does NOT recognize foreign judgments
 - The settlor or the trustee of the trust can also be a beneficiary – and settlor can be the only beneficiary
 - Settlor retains various powers
 - Creditor must prove the fraudulent transfer **beyond a reasonable doubt** by proving actual fraud against this credit & the settlor's insolvency (same as Cook Islands)
 - The creditor must post a bond to pursue any action against the trust property
 - It provides secrecy laws to protect the confidentiality of the info related to a trust registered under the act
 - *Drawbacks:*
 - Must be registered under Nevis' laws within 45 days
 - Settlor and beneficiaries must be a nonresident
 - The trust cannot own any land in Nevis and St. Kitts
 - *SOL:* 2 years
 - *Burden of proof:* beyond a reasonable doubt
- **Belize (not offshore, though neither is the U.S., home to some of the best DAPTs):**
 - *Benefits:*
 - The court will NOT recognize any claim against the assets of the trust, or the order of a court of another jurisdiction respecting the trust, with regard

- to marriage, divorce, forced heirship, and creditor claims in the event of a settlor's insolvency
- Settlor can also be a beneficiary
- Rule against Perpetuities does not apply
- The trust is exempt from taxes and duties of Belizean laws
- Trusts are NOT open for public inspection
 - Except the trustee or trust agent may authorize, in writing, a person to inspect the entry of that trust on the register
- *Drawbacks:*
 - Non-charitable trusts can only last for 120 years from the date of its creation
 - It has its own fraudulent transfers law that applies if actual intent is proven & its own law for invalidating international trusts
- **Bermuda:**
 - *Benefits:*
 - Does NOT recognize foreign judgments
 - Does NOT recognize actions based on law from a jurisdiction that prohibits the trust;
 - Actions that the trust avoids rights, claims, or interests brought by a personal with a personal relationship to the settlor or any beneficiary or by way of heirship rights; or
 - Actions that the trust avoids rights, claims, or interests brought by a creditor in matters of insolvency
 - Trustee can be a beneficiary
 - *Drawbacks:*
 - The trust must be created for a certain purpose either non-charitable purpose or purses provided that:
 - sufficiently certain to allow the trust to be carried out;
 - lawful; and
 - not contrary to public policy.
 - The Rule Against Perpetuities applies – but ONLY to the extent that the property is land in Bermuda

F. Breaking Down FAPTs

- **U.S. Treaties/Acts with Foreign Jurisdictions:**
 - **FATCA – Foreign Account Tax Compliance Act**
 - **Purpose:** to target non-compliance by U.S. taxpayers using foreign accounts
 - **Applicability:** requires foreign financial institutions (FFIs) to report to the IRS information about financial accounts held by U.S. taxpayers, or by foreign entities in which U.S. taxpayers hold a substantial ownership interest. FFIs are encouraged to either directly register with the IRS to comply with the FATCA regulations (and FFI agreement, if applicable) or

- **11 U.S.C. § 548(e)** - In addition to any transfer that the trustee may otherwise avoid, the trustee may avoid any transfer of an interest of the debtor in property that was made on or within 10 years before the date of the filing of the petition, if -
 - (A) such transfer was made to a self-settled trust or similar device;
 - (B) such transfer was by the debtor;
 - (C) the debtor is a beneficiary of such trust or similar device; and
 - (D) the debtor made such transfer with actual intent to hinder, delay, or defraud any entity to which the debtor was or became, on or after the date that such transfer was made, indebted
- U.S. Bankruptcy courts don't have jurisdiction to avoid transfers in foreign asset protection trusts
 - Ways to get around this obstacle:
 - *Nastro v. D'Onfrio*, 263 F. Supp 2d 446, 455 (D. Conn. 2003) - the court granted that judgment creditor injunctive relief under UFTA regarding transfers of LLC interests to a foreign trusts.
 - The court also indicated that although the certificates may be outside the jurisdiction of the court, "the court could order the corporations to delete the trustee as the owner of the stock in the corporate ledger and issue new certificates in favor of [debtor]." Thus, the creditor could seize the certificates.
 - The court held that under the UFTA the court had broad powers to remedy the fraud, including issuing new certificates that would be subject to seizure by the creditors.
 - The court found that the foreign trustee would be bound by its decision even if the court didn't have jurisdiction over the trustee because "the trust beneficiaries, who are also named as defendants to this action and whose interest in this litigation is identical to the trustee, could protect the trustee's interest.

Additional Authority:

- In *In re Mortensen*, an Alaska court considered whether a debtor can use the Alaska DAPT statute as a shield against creditors in bankruptcy. The court refused to allow the debtor to use his trust to shield his creditors.
 - *Facts*: In 2005 debtor put his property in Alaska, worth \$60,000 at the time, into a self-settled trust. The purpose of the trust was to "to maximize the protection of the trust estate or estates from creditors' claims of the Grantor or any beneficiary and to minimize all wealth transfer taxes." His beneficiaries were himself and his descendants. His brother and wife were co-trustees and his mother was trust protected. Pursuant to the Alaska DAPT statute, the debtor had to submit an affidavit that, among other things, he had no intent to defraud creditors by creating the trust. Then in 2009, he filed for bankruptcy under Chapter 7.
 - *Issue*: did the debtor create the trusts with actual intent to hinder, delay, or defraud his creditors
 - *Rule*: The court applied 548(e) because "[i]t would be a very odd result for a court interpreting a federal statute aimed at closing a loophole to apply the state law that permits it. . . [A] settlor's expressed intention to protect assets placed into a self-settled trust from a beneficiary's potential future creditors *can* be evidence of an

- intent to defraud (ex: substantial credit card debt which he did not attempt to pay off with \$100,000 he just received from his mother, but instead put that money in the trust) showed evidence of intentional fraud.
- *Held*: From looking at the debtor's financial condition leading up to his creation of the trust, the debtor created the trust to defraud present and future creditors.
 - *In re Mortensen*, 2011 WL 5025249 (Bankr. D. Alaska 2011).
- **Burden on trustee**: the trustee must prove § 548(e) by a **preponderance of the evidence** even though the burden of proof under state DAPT statutes is clear and convincing evidence. *In re Pollack*, 2016 WL 270012, *4 (Bankr. D.N.H. 2016)

Avoidance Powers

James V. Block

Trustees may use trustee avoiding powers in sections 544 - 553 as tools to be used to avoid unequal treatment among creditors.

I. Constructively Fraudulent Transfer

A. Exemptions are not deducted from value of transferred property in determining whether transferee received reasonably equivalent value

In *In re Laura A. Wierzbicki*, 830 F.3d 683 (7th Cir 2016), the Seventh Circuit affirmed the district court's affirmation of the bankruptcy court order avoiding a transfer of a 40-acre farm to, Griswold, the father of the debtor's children on the basis that the debtor did not receive reasonably equivalent value. Under 11 U.S.C. § 548(a)(1)(B), the trustee brought an adversary complaint alleging that the transfer of the farm was constructively fraudulent and thus avoidable because

- (a) it had occurred within two years of the bankruptcy filing,
- (b) Wierzbicki was insolvent at the time of the transfer, and
- (c) she did not receive "a reasonably equivalent value in exchange for" the property.

The Seventh Circuit noted that the bankruptcy "court found that, at the time of the transfer, the fair market value of the farm was \$300,000. The property was encumbered by three mortgages, two judgment liens, and outstanding real estate taxes,

but the court found that Wierzbicki still had equity of approximately \$151,000 at the time of the transfer to Griswold.”

On appeal, Griswold argued the following:

1. the bankruptcy court erred by overvaluing the real estate by not reducing the value of the real estate since a *lis pendens* was filed against it,
2. The bankruptcy court should have deducted two separate Wisconsin homestead exemptions of \$75,000, and
3. That the bankruptcy court undervalued the transferee’s promise to drop his appeals in state court against the debtor and assume liability for the mortgages on the real estate.

The Seventh Circuit found that Griswold’s arguments failed because the *lis pendens* is only a notice to third parties and does not reduce the value of the real estate, Griswold was not entitled to a homestead exemption since he was not the debtor and the debtor’s exemption has nothing to do with the value of the real estate, and finally the promise to drop the appeals was worthless since two out of three of Griswold’s appeals were already dismissed.

II. Avoidance of Prepetition Transfers:

A. *Transferee only has a defense to the extent of new value proved*

In *In re Dearborn Bancorp, Inc.*, 2018 WL 1913768 (E.D. Mich. 2018), Bankruptcy Judge Thomas J. Tucker ruled in favor of the chapter 7 trustee avoiding pre-petition transfers totaling \$358,766 that the debtor bank paid under consulting agreements to

the debtor's president and treasurer for winding up the bank's business affairs.

The defendants argued that they had a complete defense under § 547(c)(1), because they provided some new value. Judge Tucker rejected that argument and noted that the majority of circuits "have held that the defense is limited to the amount of new value given to the debtor in exchange for a transfer." *Id.* at *17. "The Court agrees with what now appears to be the unanimous view, as shown by the cases cited above, that a defendant asserting the contemporaneous new value defense under § 547(c)(1) **must prove the amount of the value of any "new value" provided to the Debtor**, and has no § 547(c)(1) defense beyond the amount of such value." *Id.* (emphasis added).

The defendants argued that the Consulting Agreement provides a presumption of the value of the services provided. The Court also rejected that argument, noting that the Consulting Agreement is just one piece of relevant evidence that needs to be weighed with all other available evidence, especially since the defendants are insiders: "Transactions between debtors and insiders are different than arms-length transactions, and must be viewed with closer scrutiny." *Id.* at *22.

REOPENING CASES: Nauni Manty

11 U.S.C. § 350(b) permits a bankruptcy case to be reopened for one of three reasons: “to administer estate assets; to accord relief to the debtor; or for other cause.” *In re Kapsin*, 265 B.R. 778, 780 (Bankr. N.D. Ohio 2001). Fed. R. Bankr. P. 5010 provides that a case may be reopened by motion. Motions are decided on a case by case basis and bankruptcy courts have broad discretion in determining whether to reopen a case based upon the case’s particular circumstances and equities. *Apex Oil Co. v. Sparks*, (*In re Apex Oil Co.*), 406 F.3d 538, 542 (8th Cir. 2005). Its decision to grant or deny the request is binding, absent a clear abuse of discretion. *Kapsin*, 265 B.R. at 780. Section 350(b) does not provide an absolute right to reopen. “Instead, the use of the word ‘may’ exhibits a clear Congressional intent that under certain circumstances bankruptcy cases should remain closed.” *Kapsin*, 265 B.R. 778, citing *In re Jackson*, 144 B.R. 852 (Bankr. W.D. Ark. 1992). And, the longer the period between closing and reopening, the “more cause must be shown to warrant the reopening.” *In re Arboleda*, 224 B.R. 640 (Bankr. N.D. Ill. 1998).

In particular, in considering whether to allow a trustee to reopen a bankruptcy case to undo a “technical abandonment”, the court may consider the following factors:

1. whether the denial will result in an injustice to creditors;
2. whether the trustee was initially afforded the ability to make an informed decision regarding the asset;
3. whether the debtor substantially improved the abandoned asset;
4. whether the failure to administer the property was the trustee’s fault; and

5. whether significant time has passed since the trustee abandoned the property. *Arboleda*, 224 B.R. 640, 645 citing *In re Neville*, 192 B.R. 825 (D.N.J. 1996); *In re Shelton*, 201 B.R. 247 (Bankr. E.D. Va. 1996).

Where the stated purpose of the reopening is the commencement of judicial proceedings, the movant must show “that the proceedings have merit. Where the sought-for relief is not available, there is no cause for reopening”. *In re Canal St. Ltd. Partnership*, 260 B.R. 460, 461 (Bankr. D. Minn. 2001) citing *Arleaux v. Arleaux*, 210 B.R. 148, 149 (BAP 8th Cir. 1997).

The following are illustrative of cases where courts have **denied** the motion to reopen:

- 18 months after the case was closed debtors moved to reopen case to determine dischargeability of student loan obligation based on undue hardship. Needs to be finality. May create a perpetual chapter 7 case and render § 350(a) superfluous. See *In re Kapsin*, 265 B.R. 778, 780 (Bankr. N.D. Ohio 2001).
- 17 months after case was closed, debtor’s case was not reopened to avoid a judgment lien on exempt asset which the debtor knew about two months prior to case closing. *In re Tarkington*, 301 B.R. 502 (Bankr. E.D. Tenn. 2003).
- No clear benefit to creditors in adding a cause of action that was barred by laches five years after the case was filed and six months after the case was closed. *In re Nelson*, 100 B.R. 905 (Bankr. N.D. Ohio 1989).
- Unnecessary for creditor to reopen, as prerequisite to proceeding with post-discharge lawsuit to determine liability against a third party and collecting debt from debtor’s insurer. *In re Patterson*, 297 B.R. 110 (Bankr. E.D. Tenn. 2003).

- Eight years or 16 months after case closed – will not be reopened to file a completion of financial management in order to obtain a discharge. *In re Barrett*, 569 B.R. 687 (Bankr. E.D. Mich. 2017); *In re Lockhart*, 582 B.R. 1 (Bankr. E.D. Mich. 2018).
- Trustee failed to bring a cause of action even though the transfers were listed on the statement of financial affairs. *In re Arboleda*, 224 B.R. 640 (Bankr. N.D. Ill. 1998).
- Finding of fraud, intentional design or reckless disregard by debtor for failing to list creditor precludes the debtor from reopening to list the omitted creditor. *In re Smith*, 68 B.R. 897 (Bankr. N.D. Ill. 1987).
- Debtor waiting three years to reopen the case to add a creditor even though debtor had knowledge of the creditor one year prior to the motion. *In re Brumfield*, 1998 WL 34069413 (Bankr. C.D. Ill. 1998).
- Motion filed too late and was barred by laches. Fourteen months passed between closing and filing of motion. No reason was offered why motion was filed so late. Mere inattention or neglect is not a basis for reopening the case. Judgment by the state court was rendered 18 months prior to the motion and the sale of property, through foreclosure had already occurred. *In re Jackson*, 142 B.R. 325, 327 (Bankr. W.D. Ark. 1992).
- Debtor's default in failing to make payments to bondholders was not cause to reopen case to allow the bondholders to file a motion to convert. *In re Canal St. Ltd. Partnership*, 260 B.R. 460 (Bankr. D. Minn. 2001).

- Case will not be reopened to rescind and reissue the debtor's discharge for the purposes of validating a reaffirmation agreement. *In re Herald*, 1992 WL 12626483 (Bankr. S.D. Iowa 1992).

The following cases are illustrative of **granting** the reopening:

- Creditor to file a motion to vacate an order avoiding its judicial lien. *In re Barrett*, 2006 WL 2587978 (Bankr. N.D. Ind. 2006).
- Case had only been closed 16 days. Court granted the debtor's request to reopen to amend schedules to claim homestead exemption in fire insurance proceeds and bring motion to avoid lien. *In re Cummings*, 172 B.R. 268 (Bankr. W.D. Ark. 1994).
- When trustee failed to distribute monies to secured creditor (SBA) after sale of its collateral, the case was reopened in order to unwind the distribution made by the trustee. *In re Frontier Enterprises*, 70 B.R. 356 (Bankr. C.D. Ill. 1987).
- Debtor may reopen case in order to amend schedules to list inadvertently omitted creditor, absent evidence of fraud, prejudice or intentional design. *In re Hocum*, 119 B.R. 723 (Bankr. D. S.D. 1990); *In re Dodge*, 133 B.R. 654 (Bankr. W.D. Mo. 1991).
- Case may be reopened to determine dischargeability of unsecured debt under 11 U.S.C. § 523(a)(9). *In re Higgins*, 161 B.R. 993 (Bankr. W.D. Mo. 1993). *But see* Reopening a bankruptcy case "is not a prerequisite to filing a dischargeability complaint." *In re Diamond*, 509 B.R. 219, 223 (BAP 8th Cir. 2014); *In re Staffer*, 306 F.3d 967 (9th Cir. 2002). The filing of the complaint does not affect the administration of the underlying bankruptcy case. The adversary proceeding is an

entirely new administrative matter. There is “no reason in principle for the ‘case’ to be open” to file an adversary proceeding. *Id, see also In re Walker*, 427 B.R. 471 (BAP 8th Cir. 2010).