Bankruptcy Case Update: A Judges' Panel

Hon. Arthur B. Federman
U.S. Bankruptcy Court (W.D. Mo.); Kansas City

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

Hon. Anita L. Shodeen
U.S. Bankruptcy Court (S.D. Iowa); Des Moines

PLENARY SESSION

2015

2015 SUPREME COURT CASES ON BANKRUPTCY ISSUES

The Honorable Arthur B. Federman
United States Bankruptcy Judge for the Western District of Missouri

And

Erica M. Garrett
Career Law Clerk

Bankruptcy Court Has Constitutional Power to Enter Final Judgment in Noncore and "*Stern*" Matters With Consent of Parties. ***Wellness International Network, Ltd. v. Sharif*, 135 S.Ct. 1932 (2015) (Sotomayor, J.)**

In seeking to collect a District Court judgment against Sharif, Debtor Wellness International sought declaration that a trust established by Sharif was his alter ego, such that the trust's assets should be treated as his own. The Supreme Court granted certiorari to resolve two issues: (1) whether the alter ego claim under state law was core, noncore, or "*Stern*" (*see Stern v. Marshall*, 131 S.Ct. 2594 (2011); and (2) if not core, whether a party could waive its right to final judgment by an Article III judge and, if so, whether such waiver could be implied rather than express.

A majority of six justices held that a bankruptcy court could decide noncore and *Stern* matters with consent of the parties. And, five members of the majority concluded that the right to have such matters decided by an Article III judge could be waived based on "actions rather than words." (*Citing Roell v. Withrow*, 538 U.S. 580, 123 S.Ct. 1696, 155 L.Ed.2d 775 (2003)).

Note that while the majority held that the Constitution allowed for implied consent, the opinion pointed out in footnote 13 that it is "good practice" to seek express statements of consent or nonconsent. Justice Alito was a sixth vote concurring in the holding that *Stern* claims could be decided by bankruptcy judges with consent, but he would not have decided whether consent could be implied, arguing that Sharif had forfeited the issue by not bringing it up below. In so arguing, Alito pointed out that Bankruptcy Rule 7012 provides for final judgment by a bankruptcy judge in noncore matters with the express consent of the parties, and that perhaps *Stern* claims should be treated the same way.

As to whether consent of any sort is sufficient, the Court concluded that the Article III right is personal to a litigant, much like a right to a jury trial, and for that reason may be waived. (*Citing Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833, 106 S.Ct. 3245, 92 L.Ed.2d 675 (1986)). The Court pointed out that a right to an Article III determination would not be waivable if such right served as an inseparable element of the constitutional system of checks and balances, but held here that no such structural difficulties are created by allowing bankruptcy judges to decide matters related to a bankruptcy case with the consent of the parties. That is so, the Court held, because bankruptcy judges hear matters on referral from the District Courts, who have full authority to withdraw such reference in a given case or matter, even *sua sponte*. And, bankruptcy judges are appointed, and subject to removal, by Article III judges. For these and other reasons, the Court held that Congress could not be seen to have created the bankruptcy system in an attempt to emasculate the Article III constitutional courts. In so concluding, the Court relied in part on a Ninth Circuit decision written by now-Justice Kennedy, which validated the consent system used by the magistrate court system, and did so based on the extensive control District Courts have over their magistrate judges. (*Pacemaker Diagnostic Clinic of America, Inc. v. Instromedix, Inc*., 725 F.2d 537 (9th Cir. 1984) (en banc)).

In dissent, Chief Justice Roberts, joined by Justices Scalia and Thomas, would have decided the case on question (1), and would not have reached the consent question.

Supreme Court Rules Chapter 13 Trustee Must Return Undistributed Plan Payments to Debtor Upon Conversion to Chapter 7. *Harris v. Viegelahn*, 135 S.Ct. 1829 (2015) (Ginsburg, J.)

The relevant facts of this case are quite commonplace: A year and a half into his Chapter 13 case, the Debtor converted to Chapter 7, and the Chapter 13 trustee was holding money from the Debtor's regular payments from his wages. Reversing the Fifth Circuit, the Supreme Court held that the Chapter 13 trustee was required to return those funds to the Debtor rather than paying them according to the confirmed plan. First, under § 348(f) of the Bankruptcy Code, a debtor's postpetition wages, including undisbursed funds in the hands of a trustee, ordinarily do not become part of the Chapter 7 estate created by conversion; rather, absent a bad-faith conversion, § 348(f) limits a converted Chapter 7 estate to property belonging to the debtor "as of the date" the original Chapter 13 petition was filed. "Postpetition wages, by definition, do not fit that bill," the Court said. Second, § 348(e) provides that conversion to Chapter 7 terminates the service of the Chapter 13 trustee. Since the "service" of a Chapter 13 trustee is to make payments *to creditors*, and conversion strips the Chapter 13 trustee of that "service," and since a trustee can't just hold on to the money, the trustee must return it to the debtor. Further, since § 1327(a) (which binds the debtor and each creditor to the plan) and § 1326(a)(2) (which requires a trustee to distribute payments in accordance with the plan) are Chapter 13 provisions, they don't apply after the case has been converted. Finally, the Court rejected the trustee's argument that returning the funds to the debtor constituted a windfall.

Note that the opinion deals only with postpetition wages paid to the Chapter 13 trustee; the result might be different if the postpetition funds held by the trustee had come from, e.g., an inheritance.

Note also that, in response to *Harris v. Viegelahn*, the Western District of Missouri is proposing to change two of its Local Rules. Currently, Local Rule 3089-1 provides that funds received prior to dismissal or conversion are to be distributed by the Chapter 13 trustee pursuant to the confirmed plan. The revision eliminates the reference to converted cases. Also, Local Rule 2016-1 now provides that debtors' attorneys may only be paid for services performed prior to dismissal or conversion; once again, the reference to conversion is being eliminated.

Chapter 7 Debtors May Not Strip Off Junior Mortgages, *Bank of America v. Caulkett*, 135 S.Ct. 1995 (2015) (Thomas, J.)

The Eleventh Circuit, alone, had consistently held that Chapter 7 debtors could strip off junior mortgages when the senior mortgage exceeded the value of the property. The other circuits to decide the issue had relied on the holding in *Dewsnup v. Timm*, 502 U.S. 410, 112 S.Ct. 773, 116 L.Ed.2d 903, which had held, as to partially secured junior mortgages, that the lien rides through the Chapter 7 bankruptcy unaffected. The Court unanimously agreed with those other circuits.

The Court here acknowledged that § 506(a)(1) provides that "an allowed claim ...is a secured claim to the extent of the value of such creditor's interest in..." the property, and is otherwise unsecured. And, § 506(d) provides that "[t]o the extent that a lien secures a claim against the debtor that is not an allowed secured claim, such lien is void unless..."(exceptions not applicable here). Logically, the Court seemed to say, if a claim is not a secured one under § 506(a), it should not be an "allowed secured claim" under § 506(d). But in *Dewsnup*, the Court had held that an allowed claim "secured by a lien with recourse to the underlying collateral...does not come within the scope of 506(d)." 502 U.S. at 415, 112 S.Ct. 773.

Here, the Court said, the Debtors were not asking it to overrule *Dewsnup*, but instead to limit it to cases in which the creditor was partially, not completely, unsecured. This the Court declined to do, concluding that *Dewsnup* did not turn on this distinction; if the creditor had recourse to the collateral outside of bankruptcy, and its claim was allowed in the bankruptcy, the debtor could not use § 506(d) to strip it off.

Justices Kennedy, Breyer, and Sotomayor joined the opinion, except as to a footnote in which the majority noted that *Dewsnup* has been long criticized, but perhaps indicated that it was not overruling *Dewsnup* because the debtors had not asked that it be overruled.

Note that the Eighth Circuit BAP previously held that a Chapter 13 debtor need not be eligible for a discharge to strip off a second mortgage, provided the debtor completes payments under a confirmed plan. *Fisette v. Keller* (*In re Fisette*), 455 B.R. 177 (8th Cir. B.A.P. 2011), *appeal dismissed*, 695 F.3d 803 (8th Cir. 2012). Based on that holding, a "Chapter 20" debtor could first discharge any personal liability to the second mortgagee in a Chapter 7 case, and then strip off the mortgage itself in a later Chapter 13 case without owing even an unsecured claim to the mortgagee. *See, e.g., Boukatch v. MidFirst Bank*, 533 B.R. 292 (9th Cir. B.A.P. 2015).

No Fees For Defending Fee Application, *Baker Botts L.L.P. v. ASARCO LLC*, 135 S.Ct. 2158 (2015) (Thomas, J.)

Law firm Baker Botts L.L.P. represented a Chapter 11 debtor, whose case resulted in a 100% payout to creditors. The Debtor nevertheless objected to the fees charged by the firm, and a six day trial was held on the issue. The firm asked for additional fees for the time and expenses incurred in defending its fees. The Supreme Court refused the additional fees, pointing out that the American Rule provides generally that each litigant pays its own attorneys' fees, win or lose, unless a statute or contract provides otherwise. Here, the Court held, the operative provision is § 330(a) of the Code, which allows a bankruptcy court to allow "a reasonable compensation for actual, necessary services rendered by the trustee, . . . or attorney. . . ." That provision does not alter the American Rule, and time spent defending a fee application is not a service which is necessary to protect the interests of the client-debtor; indeed, it is not a service provided to the debtor at all. And, the Court pointed out, when Congress wished to shift fees to a prevailing party in bankruptcy, it did so expressly, such as in § 110(i) concerning petition preparers. (Note that § 523(d) provides another such example.)

Justice Sotomayor concurred, concluding that the case could have been decided based on the text of § 330(a) itself. Justice Breyer dissented for himself and two others, arguing that defense of a fee application should be viewed as part of the "underlying" services provided to a debtor in a bankruptcy proceeding.

No Appeal of Right From Order Denying Confirmation of Chapter 13 Plan, *Bullard v, Blue Hills Bank*, 135 S.Ct. 1686 (2015) (Roberts, J.).

The Debtor proposed a plan which stripped a real estate loan to value, but treated the secured portion of the claim as a long-term debt which would not be paid off in the five-year plan period. The Massachusetts bankruptcy court denied confirmation, holding that if a claim is bifurcated under § 1322(b)(2), then the modified secured claim is "provided for by the plan", and must be paid to present value over the course of the plan under § 1325(a)(5)(B)(ii). In so holding, the bankruptcy court acknowledged that courts in the First Circuit were split as to the confirmability of such plans. The Debtor appealed the order denying confirmation to the Bankruptcy Appellate Panel, which held first that that order was not final, but that it would exercise its discretion to hear it as an interlocutory appeal under 28 U.S.C. § 158(a)(3). The BAP then affirmed the denial of confirmation, and the Debtor appealed to the Circuit Court. Absent certification from a lower court under § 158(d)(1) that there is no controlling law on a question in the case, and that immediate appeal would materially advance the case, the Circuit Courts have no jurisdiction except from "final judgments, orders and decrees ....in cases and proceedings." 28 U.S.C. § 158(a). The First Circuit dismissed the appeal, holding that the order denying confirmation was not a final order.

In a unanimous opinion, the Supreme Court agreed, rejecting the Debtor's argument that each plan proposed constitutes a separate "proceeding." Instead, the Court held that only plan confirmation or dismissal alters the status quo and fixes the rights and obligations of the parties. Therefore, it is the entire process leading up to confirmation or dismissal that constitutes the relevant proceeding.

Here, since the bankruptcy court gave the Debtor the opportunity to propose an amended plan, albeit one the Debtor did not want, the proceeding was still pending in the bankruptcy court. While perhaps a stretch, the Court pointed out that among the list of "core proceedings" statutorily entrusted to bankruptcy judges are "confirmations of plans," 28 U.S.C. § 157(b)(2)(L), but not "denials," somehow indicating that Congress viewed the larger confirmation process as the proceeding, not the ruling on each specific plan.

The Court did, however, also point out that appeals are time-consuming, and that debtors could use the prospect of an appeal as leverage in negotiations with creditors. The Debtor also argued that as a practical matter its only choices were to accept dismissal, with the attendant loss of the automatic stay, or to propose a plan as to which the Debtor was unlikely to be able to make the payments. The Court said that while either of these options may be "unappealing" (pun intended), the Court said that this prospect is made tolerable "in part by our confidence that bankruptcy courts, like trial courts in ordinary litigation, rule correctly most of the time."

This result is consistent with *Zahn v. Fink*, 526 F.3d 1140 (8th Cir. 2008) (holding that an order denying confirmation of a Chapter 13 plan, without dismissal of the case, is not an appealable final order); *In re Civic Partners Sioux City, LLC*, 779 F.3d 572 (8th Cir. 2015) (same result in Chapter 11 case where confirmation was denied, but case not dismissed; Eighth Circuit held order was not a final order from which appeal would lie); and *In re Simons*, 908 F.2d 643 (10th Cir. 1990) ("[W]e hold that the lower courts' denial of confirmation of debtors' proposed reorganization plan is not final for purposes of appeal under [28 U.S.C. § 158(d).").

In any event, the Court noted that in unusual circumstances, a debtor may be able to appeal plan denial as an interlocutory order under 28 U.S.C. § 158(a)(3), or be able to obtain certification for a direct appeal to the Circuit under 28 U.S.C. § 158(d)(2).

Certiorari Denied in Case Holding that Filing of Stale Claim Could Violate FDCPA. *Crawford v. LVNV Funding, LLC,* 758 F.3d 1254 (11th Cir.2014), *cert. denied*, 135 S.Ct. 1844 (2015).

The Supreme Court has denied certiorari in an Eleventh Circuit case which had held not only that the filing of a stale claim was an action to collect a debt, but also that in doing so the creditors engaged in conduct that was deceptive, misleading, unconscionable, or unfair under the FDCPA, and that the Bankruptcy Code does not preclude suits for violations of the FDCPA.

Contra, *In re Dunaway*, 531 B.R. 267 (Bankr. W.D. Mo. 2015) (Dow, J.) (holding that filing a Proof of Claim subject to limitations defense does not violate the FDCPA); *Torres v. Cavalry SPV I, LLC*, 530 B.R. 268 (E.D. Pa. 2015) (holding that filing a time-barred proof of claim cannot form the basis for an FDCPA claim). *But see In re Avalos*, 531 B.R. 748 (Bankr. N.D. Ill. 2015) (holding that filing a claim subject to a limitations defense could be deceptive or misleading to unsophisticated debtors in violation of the FDCPA: What is the point of filing such a claim if there is no intent to deceive or mislead some debtors?).

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Tenth Circuit and Tenth Circuit BAP Case Law Update

The Honorable Robert E. Nugent
United States Bankruptcy Court for the District of Kansas
Wichita, Kansas[1]

1. *Loveridge v. Hall, et al (In re Renewable Energy Development Corp.)* ___ F. 3d ___, 2015 WL 4153631 (10th Cir. July 10, 2015) (Gorsuch, J.)

The district court certified this interlocutory appeal from an order denying withdrawal of the reference after it determined that the plaintiffs' federal court lawsuit against the chapter 7 trustee for legal malpractice and breach of fiduciary duty arising out of his conflict of interest with his "other" client Summit Wind Power (a stranger to and outside the bankruptcy case) could be referred to the bankruptcy court for final decision without the defendants' consent instead of being transferred to the district court.

A series of legal and ethical issues arose from the chapter 7 trustee's representation of the bankruptcy estate while also representing his client Summit who sought to top lease certain properties upon which the debtor had taken windmill leases for solar power but failed to pay delay rentals. The trouble started when the trustee asked his client Summit to forego its new leases in favor of the debtor's old ones. When Summit refused, the trustee sued it and, after Summit raised the rather obvious conflict issues, was removed.

Relying on the Supreme Court's decision in *Stern v. Marshall,* —— U.S. ——, 131 S.Ct. 2594, 2609, 180 L.Ed.2d 475 (2011), the Tenth Circuit held that, because the plaintiff's state law claims were not amenable to resolution in the bankruptcy claims allowance process nor implicated public rights, the claims could not be finally decided by the bankruptcy court without the parties consent. The Tenth Circuit remanded the case to the district court where, consistent with the opinion, it could refer the case to the bankruptcy court for a report and recommendation under § 157(c)(1), the bankruptcy court could finally decide the case with the parties' consent, or the district court could retain and finally adjudicate the case itself.

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[1] Many thanks to Jana D. Abbott, my career law clerk, and Samantha H. Seang, law clerk to the Bankruptcy Appellate Panel for the Tenth Circuit, for their preparation and editing of these materials. R.E.N.

In a particularly well-crafted and succinct discussion of *Stern*, the Tenth Circuit rejected the defendants' suggestion that *Stern* stated a "factually intertwined test" for determining whether the bankruptcy court could finally decide the case and disagreed that claims that are merely *factually* intertwined with the bankruptcy proceedings belong in bankruptcy court. The Circuit concluded that it is the intertwining of legal issues that matters. The Court also noted that even if the constitutional line were drawn by the historical distinction in bankruptcy between summary and plenary jurisdiction, this lawsuit "fit[s] pretty neatly on the plenary side." Equally important for the functioning of the system as a whole, the Court held that while the plaintiff was entitled to have an Article III judge determine its claims, nothing prevented the district court from referring the matter to the bankruptcy court for a report and recommendation.

2. *Gordon v. Wadsworth (In re Gordon)*
___ F. 3d ___, 2015 WL 3916597 (10th Cir. June 26, 2015) (Hartz, J.)

> Debtors appealed from the bankruptcy court's order sustaining the chapter 7 trustee's objection to their claimed exemption of a savings account that held a lump-sum distribution from debtors' retirement account. The Tenth Circuit, predicting Colorado law, affirmed and denied debtors' motion to certify questions of law to the Colorado Supreme Court.

Colorado is an opt-out exemption state meaning that Colorado bankruptcy debtors are entitled to invoke only those exemptions permitted by Colorado law. By statute, Colorado exempts property, including funds, held in or payable from any pension or retirement plan or deferred compensation plan, including those in which the debtor has received benefits or payments, has the present right to receive benefits or payments, or has the right to receive benefits or payments in the future. [Colo. Rev. Stat. § 13-54-102(1)(s)]. When debtors filed their bankruptcy they sought to treat $2,051 in a savings account as an exempt asset under this statute. The funds in the savings account were the remaining balance of a lump-sum distribution from their retirement account. The funds were not commingled with other sources and were used by debtors to pay living expenses. The trustee objected to the exemption claim on the ground that the exemption does not apply to funds once they are paid out from a retirement plan.

Applying the "straightforward meaning" of the statute, the Circuit Court concluded that the exemption statute did not protect funds distributed from a retirement plan. The statute's references to "benefits or payments" did not independently exempt distributions from a retirement plan. That language describes the types of retirement plans that qualify for the exemption. The Circuit Court also rejected the debtors' argument that "proceeds" of a retirement account are exempt, noting that the Colorado legislature has been explicit when exempting proceeds, citing the treatment of military pensions in § 13-54-102(1)(h) where distributions in the possession of the recipient *are* exempt.

3. *Redmond v. Jenkins, et al (In re Alternate Fuels, Inc.)*
___ F. 3d ___, 2015 WL 3635366 (10th Cir. June 12, 2015) (Kelly, J.) (Phillips, J., dissenting)

This is an appeal from the bankruptcy court's entry of judgment in favor of the chapter 11 trustee ordering recharacterization of advances made by debtor's insiders as equity interests, or alternatively, subordinating the insiders' putatively secured claim to an unsecured claim. The Tenth Circuit reversed.

The chapter 11 corporate debtor formerly engaged in surface coal mining operation, including briefly under its confirmed plan of reorganization until 1996, when it ceased all operations and abandoned its assets to various creditors. John Warmack acquired 100% of the stock and assumed control of the debtor. He formed an LLC to handle mining operations for which the debtor still held permits and provided reclamation bonds to the State of Missouri assuring that debtor would restore permitted mining sites to their original condition. He pledged $1.4 million worth of CDs to secure the reclamation bonds. By 1999, the mining efforts were complete but debtor was still obligated on the reclamation bonds. At that point, defendant Jenkins purchased Warmack's interest in debtor and the LLC and procured an assignment of the CDs, not intending to resume mining operations, but to fulfill debtor's reclamation obligations and obtain the proceeds of the released CDs. Jenkins placed the stock in the name of a straw man due to his past violations of mining laws, but remained the assignee of the CDs. Debtor executed promissory notes payable to Green Acres Farms, a fictitious business name Jenkins registered with Missouri. Jenkins advanced funds to debtor on checks drawn on Green Acres accounts and debtor in turn endorsed the checks for payment to the LLC for mining operations.

In 2002, debtor filed a suit against certain state officers and employees alleging tortious interference with completion of the reclamation process. In exchange for Jenkins continuing to fund debtor and as security for the loans, debtor assigned $3 million of the potential recovery to Jenkins. Debtor prevailed in the suit and was awarded $5 million damages in 2006. It filed a second bankruptcy in 2009 to obtain a determination of the priority of payment of the judgment to its creditors. Jenkins filed a claim against the estate for $3.8 million attributable to the notes and secured by the assignment of the lawsuit recovery.

The Tenth Circuit concluded that the bankruptcy court erred in recharacterizing Jenkins' claim for the debt as equity. The Tenth Circuit recognized a bankruptcy court's power to recharacterize putative debt under § 105's general equitable powers and held that its recharacterization analysis and 13-factor test in *In re Hedged-Investments Assocs., Inc.,* 380 F.3d 1292 (10th Cir. 2004) remains good law. The Tenth Circuit found that several findings on the *Hedged-Investments* factors were unsupported. The documents titled promissory notes were in fact instruments of indebtedness because they reflected an unconditional promise to pay a fixed amount of money, with interest, at a definite time. There was sufficient consideration for the notes because the note amounts were roughly the sum of funds Jenkins transferred to debtor; sufficient consideration does not require an equivalent value to the benefit received. With respect to the 8th factor – undercapitalization, the Circuit concluded that the bankruptcy court placed too much emphasis on this factor, noting that refusing to treat cash infusions as loans when the business fails could have the unhealthy effect of deterring business owners from making an effort to rescue their struggling enterprises. The Tenth Circuit concluded that the 9th factor – identity of interest between the creditor and stockholder suggests capital contributions – does not necessarily apply when a single shareholder owns all of a company's stock and the advances went toward operations rather than acquisition of capital assets, resulting in no additional equity for the "investment." In short, the majority of the panel cautioned that owners should not be discouraged from trying to salvage a business by requiring all contributions to be made in the form of equity capital, particularly where the owners may be the only party willing to make a loan to a struggling business. On balance, the factors did not warrant recharacterization.

The Tenth Circuit also reversed the bankruptcy court on its alternative ruling that Jenkins' claim should be equitably subordinated under § 510(c). Noting that equitable subordination is an extraordinary remedy, it concluded that whether or not Jenkins held insider status, he did not engage in fraudulent or illegal conduct by obtaining the notes or taking the assignment of the lawsuit judgment. The debtor did not become Jenkins' alter ego merely because he funded the reclamation project and if completed would ultimately benefit him. Nor is undercapitalization in itself inequitable conduct. The Circuit Court found a complete lack of evidence of any inequitable conduct by Jenkins and "probable" unfair conduct could not serve as basis for equitable subordination.

The dissenting judge took issue with the majority's conclusions that the bankruptcy judge and the BAP had incorrectly recharacterized the debt, stating that the panel's giving Jenkins the "benefit of the doubt" "skews" the analysis by creating a sort of presumption in favor of business owners who lend to their businesses that should not apply in a situation like this one where Jenkins' actions were calculated to benefit himself (by facilitating the return of his CDs), not his company or its creditors. The dissenter also criticized the majority's determination that the "loans" were "secured" in a legal sense.

4. *Eastom v. City of Tulsa*
783 F.3d 1181 (10th Cir. Apr. 20, 2015) (Matheson, J.)

The automatic stay tolled running of statute of limitations for plaintiff's § 1983 malicious prosecution claim against ATF agent; district court's summary judgment order granting judgment to other defendants was not final appealable order after plaintiff voluntarily dismissed claim against ATF agent without prejudice. The Tenth Circuit dismissed appeal for lack of jurisdiction.

After ATF agent was sued by plaintiff for malicious prosecution under 42 U.S.C. § 1983, he filed a chapter 7 bankruptcy thereby staying the action. The district court subsequently granted summary judgment to the other defendants, the City and police officer. Plaintiff then voluntarily dismissed his claim against the ATF agent without prejudice (the only remaining claim) and sought to appeal the summary judgment ruling. The Tenth Circuit applied the rule that a party cannot confer appellate jurisdiction by obtaining a voluntary dismissal without prejudice of some claims so that others may be appealed. The district court's summary judgment did not ripen into a final judgment by virtue of the voluntary dismissal of the ATF agent because the bankruptcy stay continued to toll the running of Oklahoma's savings statute as to the ATF agent dismissed without prejudice until the stay is lifted. Because the re-filing period has not begun to run, the claim against the ATF agent is not time-barred; the summary judgment order remains non-final and the appellate court lacks jurisdiction.

5. *Davis v. Pham, et al (In re Tung Thanh Nguyen)*
783 F.3d 769 (10th Cir. Apr. 13, 2015) (Briscoe, C.J.)

This is an appeal from the bankruptcy court's decision that a chapter 7 trustee could not avoid the debtor's quitclaim of property that he held for his mother in a resulting trust as a fraudulent transfer because his interest was limited to bare legal title. The conveyance of his bare interest did not destroy the joint tenancy among the debtor, the mother and the sister because Kansas law permits joint tenancy property to be held in an equitable trust. The Tenth Circuit affirmed.

Ms. Pham is debtor Tung's mother. Pham and Esplund bought land in Reno County in joint tenancy. She contributed 2/3 of the purchase price and Esplund the other 1/3. Two days later, Pham and Esplund conveyed the land to Esplund, Tung, and his sister, Dang, again as joint tenants with rights of survivorship. The parties intended that Tung would hold the property in trust for Pham, resulting in Pham retaining an equitable interest in the property and Tung holding bare legal title. Approximately 8 months later, Tung quitclaimed his interest in the land to his sister and Esplund, again as joint tenants. Not quite one year later, debtor and his wife filed a chapter 7 petition. The trustee seeks to avoid the debtor's transfer of his interest in the land as a fraudulent transfer for which he received less than reasonably equivalent value under § 548(a)(1)(B).

The trustee's avoidance action turned on whether a resulting trust was created in the land and the nature of the interest transferred by debtor. The 10th Circuit held that in order to prove the existence of a resulting trust as to Pham's interest, it was unnecessary to have one's name as a joint tenant on the deed (Pham) or have all parties to the trust arrangement testify as to their intent in the transaction. K.S.A. § 58-2408 provides that a resulting trust is formed when one party (here Pham) provides the consideration to purchase the property, but enters into an agreement with another party (here, debtor) by which the non-paying party holds the property in trust for the party who paid for the land.

In his fraudulent transfer complaint, the trustee claimed that the creation of the resulting trust destroyed one of the four unities of time, title, interest, and possession that are required to be present for a joint tenancy to be shown. This, he said, meant that the parties were no longer joint tenants; instead they were cotenants with one-third legal and equitable interests in the property and the trustee could recover what Tung had transferred as a constructively fraudulent transfer. The 10th Circuit instead concluded a resulting trust and joint tenancy can co-exist because Kansas case law doesn't block the creation of a resulting trust in land held in joint tenancy, even though it appears that the joint tenants lack the unity of interest. The Court followed the Kansas Supreme Court's decision in *University State Bank v. Blevins,* 227 Kan. 40, 605 P.2d 91 (1980) that holds as much. Moreover, the debtor's bare legal title was not an interest that could be recovered as an avoided transfer under § 548(a)(1)(B) because bare legal title is not "an interest in property" to which § 548 applies.

6. *Vehicle Market Research, Inc. v. Mitchell Intern., Inc.*
767 F.3d 987 (10th Cir. 2014) (Ebel, J.)

This is an appeal from a district court's grant of summary judgment on the basis of judicial estoppel in favor of defendant licensee sued for misappropriation of intellectual property under a licensing agreement with a software developer solely owned by debtor who had earlier filed personal bankruptcy. The Tenth Circuit reversed and remanded finding no clearly inconsistent statements between the developer's statements made in the licensee litigation and the representations its sole owner made previously in his personal bankruptcy as required for application of judicial estoppel.

The debtor was the sole owner and alter ego of a software company. Although he had historically earned some royalties from his company through payments from a single licensee, those payments had terminated by September 2005. In October 2005, the debtor filed for Chapter 7 bankruptcy. He disclosed his ownership of the shares of the software company, but asserted that the shares were worthless, even though the company still owned the intellectual property that had been earning license fees. He did not amend that statement, but he did agree with the bankruptcy trustee's 2009 valuing the shares as "unknown." The debtor received a discharge.

A few years later, as his bankruptcy case was winding down, the debtor's company sued its sole licensee, seeking up to $4.5 million in damages for the alleged misappropriation of the company's intellectual property. In response, the licensee argued that the debtor and his company were judicially estopped from proceeding with the litigation because the debtor had listed the value of the stock as $0.00 when he filed bankruptcy in 2005.

Reading the debtor's representations very narrowly, the Court concluded the debtor and his company were not judicially estopped from pursuing the litigation because the value of the intellectual property did not necessarily directly correlate to the value of the company's stock. Moreover, the Court concluded that even if the debtor thought that his company had a valuable claim against the licensee, it was entirely possible that he thought litigation expenses would preclude any significant recovery on the claim, which would support the zero valuation in 2005 when he declared bankruptcy and again in 2009 when he agreed that the stock's value was unknown.

Because the Court reviewed the district court's summary judgment de novo, it could draw all factual inferences in favor of the nonmoving party, and it noted that the Tenth Circuit applies the doctrine of judicial estoppel "both narrowly and cautiously."

Finally, the circuit noted that to find judicial estoppel, the debtor would have to have a duty to amend his bankruptcy pleadings to report the potential of increased value for his stock as of the time his company filed its suit in 2009. When the debtor's company commenced that action, it and he must have believed that the lawsuit had merit. But the Tenth Circuit said that its precedent did not clearly establish that a debtor has a continuing duty to amend his schedules when the bankruptcy estate's assets change in value. Based on the circuit's reluctance to invoke judicial estoppel, it concluded the licensee had not met its burden to show any clearly inconsistent statements that would warrant such relief.

7. *Vaughn v. Internal Revenue Service (In re Vaughn)*
765 F.3d 1174 (10th Cir. 2014) (McKay, J.), *cert. denied* __ S. Ct. __, 2015 WL 2473482 (June 29, 2015)

> This is an appeal from the bankruptcy court determination that excepted chapter 11 debtor's 1999 and 2000 tax debts from discharge for willful evasion of taxes under 11 U.S.C. § 523(a)(1)(C). The Tenth Circuit affirmed, holding that the mental state element of the evasion discharge exception was met.

The debtor made two arguments on appeal: (1) the district court impermissibly employed a "holistic" review of the evidence to support affirming the bankruptcy court's willful evasion determination, as opposed to an element-by-element review of whether the evidence before the bankruptcy court satisfied the two discrete elements of willful evasion – conduct and mental state; and (2) his attempts to evade the tax obligations were merely negligent, not willful.

The circuit court rejected the debtor's first argument because the bankruptcy court had correctly reviewed the elements of willful evasion on an element-by-element basis. The circuit noted that it was reviewing the bankruptcy court's decision, not the district court's decision, and so it did not need to consider the district court's application of a holistic review of the evidence. Under a clear error standard of review, the circuit also rejected the debtor's second argument. Based on evidence of unusual spending, asset transfers that took place after the IRS notified the debtor of a potential review of his tax returns and tax shelter program, and other evidence suggesting an effort to avoid paying his tax debts, the circuit found no error in the bankruptcy court's determination that the debtor knew he "had a duty under the law," which he had "voluntarily and intentionally violated," thus satisfying § 523(a)(1)(C)'s mental state requirement, notwithstanding his claimed reliance on the advice of his accounting firm/tax advisors who recommended the tax shelter. Actions taken with knowledge of an anticipated tax obligation (as opposed to an actual tax assessment) can be considered willful, rather than negligent.

8. *Mallo v. Internal Revenue Service (In re Mallo)*
774 F.3d 1313 (10th Cir. 2014) (McHugh, J.), *cert. denied* __ S. Ct. ___, 2015 WL 935447, 83 USLW 3730 (June 20, 2015)

> This is an appeal from the district court's determination that a late tax return not filed until after the IRS has assessed the tax liability, is not a "return" for purposes of the § 523(a)(1)(B)(i) discharge exception and therefore, the corresponding tax debt is nondischargeable. The Tenth Circuit affirmed.

In two cases, the Chapter 7 debtors had filed untimely Form 1040 tax returns after the IRS had assessed their tax liability for the relevant years, and the question arose whether the untimely returns qualified as "returns" under § 523(a)(1)(B)(i) so that provision would not apply to except from discharge their tax debts for those years. In one of the cases, the bankruptcy judge ruled against the debtors, and in the other, a different judge ruled in the debtor's favor. In consolidated appeals, a district judge ruled against the debtors in both cases. The Tenth Circuit affirmed the district court's ruling. Section 523(a)(1)(B)(i) provides that a discharge "does not discharge an individual debtor from any debt . . . for a tax . . . with respect to which a return . . . was not filed," and an unnumbered paragraph added at the end of § 523(a) in 2005 defines "return" to mean "a return that satisfies the requirements of applicable nonbankruptcy law (including applicable filing requirements)." The circuit concluded the phrase "applicable filing requirements" included the filing deadline, so the debtors' late Form 1040s did not qualify as returns under § 523(a)(1)(B)(i), and that provision excepted their tax debts from discharge.

9. *Jubber v. Bank of Utah (In re C.W. Mining Co.)* 749 F.3d 895 (10th Cir. 2014) (Murphy, J.)

> This is an appeal from the bankruptcy court's denial of the chapter 7 trustee's action to avoid a fully secured creditor's offset against its claim as an unauthorized post-petition transfer under § 549. The Tenth Circuit affirmed.

After this involuntary chapter 11 case was converted to chapter 7, a fully secured bank exercised its common-law right of offset and applied debtor's certificate of deposit against part of its claims without informing the chapter 7 trustee. When the trustee learned of the offset, this suit was brought against the bank seeking to recover the value of the CD under § 549, or alternatively, turnover of the value of the CD under § 542 on the basis that the bank's offset violated the automatic stay and was void. The bankruptcy court denied the trustee all relief sought.

The Tenth Circuit concluded that because the bank's lien would be revived under § 502(h) and the estate would have to pay the full amount of the bank's claim, avoiding the offset would be futile and would result in no benefit to the estate. Likewise, although the offset violated the automatic stay and was void, returning the bank to the status quo meant that the bank returned to its secured creditor status. Because no damages to the estate were shown by the stay violation, the trustee was not entitled to relief. Nor was the trustee entitled to turnover of the CD's value under § 542(a) because the trustee would be obligated to pay the bank the same amount, resulting in an inconsequential value or benefit to the state.

10. ***United States v. Hale***
762 F.3d 1214 (10th Cir. 2014) (Lucero, J.)

This is a criminal case where a bankruptcy debtor was convicted of knowingly and fraudulently making a false oath or account in a bankruptcy case under 18 U.S.C. § 152(2) by falsely testifying at the § 341 meeting, concealing property of the bankruptcy estate under § 152(1), concealing a post-petition real estate purchase agreement, and perpetrating a hoax involving a biological weapons under § 152(a). The Tenth Circuit affirmed in part, reversed in part, and remanded, finding that the questions whose answers the Government claimed were false, were fundamentally ambiguous to support a finding of falsehood. Only the bankruptcy crimes are addressed below.

This was a criminal case that grew out of a bankruptcy gone awry. In October 2005, the debtor filed a voluntary Chapter 13 petition, listing three pieces of real property in his schedules. He significantly undervalued the only one of the three properties that was worth more than the claim it secured. In July 2006, the debtor converted his case from Chapter 13 to Chapter 7. When the Chapter 7 trustee questioned the debtor at the first meeting of creditors, the debtor stated that the information in his schedules was true, complete, and accurate and that he did not know of any changes or amendments that needed to be made. The debtor did not divulge that he was then attempting to sell the undervalued property for far more than he had reported in his schedules. The debtor found a buyer for the property and had signed a contract when the trustee learned about the pending sale from the title company. The trustee canceled the sale and then sold the property herself for the benefit of the bankruptcy estate. Based on these facts, the debtor was convicted in federal court of making a materially false statement under oath in the bankruptcy case and of concealing the contract from the bankruptcy trustee.

The indictment alleged that the debtor had falsely testified under oath at the meeting of creditors with his responses to the following two questions:

> Question: To your best knowledge and belief, is the information contained in your petition, statements, schedules and related bankruptcy documents true, complete and accurate?
>
> Answer: Yes, Mam [sic].
>
> Question: Are you aware of any changes or amendments that need to be made?
>
> Answer: No, Mam [sic].

On appeal, the debtor argued that the questions were "fundamentally ambiguous" and thus could not support the conviction for making a materially false statement. Under a plain error standard, the circuit agreed, based largely on the general requirement for "near absolute clarity from the questioner in order to support a perjury charge." The circuit held that it was unclear whether the trustee's questions referred to the truth, completeness, and accuracy of the debtor's documents at the time they were executed or at the time the questioning occurred. The circuit found there was nothing in the record that would have allowed the jury to determine how the debtor understood the questions. The circuit also found no evidence in the record about the value of the property on the date the debtor filed the schedules. Based on these shortcomings, the circuit concluded it was possible the debtor understood the questions to refer to the truth, completeness, and accuracy of the schedules at the time they were filed, and the government had not established his responses were false if that was how he interpreted them.

The debtor also asked the circuit to reverse his conviction for concealing his contract to sell the property because the agreement was void or, alternatively, because the contract did not meet the statutory definition of property belonging to the estate of a debtor. The debtor argued that his contract to sell property he could not legally sell was void ab initio, so it was not a contract at all, and thus was not property. But the circuit determined the contract was voidable rather than void, because the trustee had the option to either void or ratify the agreement. Further, the circuit found that, under Utah law, the debtor had obtained an interest in the money promised in exchange for the property when the contract was executed. And because the trustee could have elected to ratify the purchase agreement, the contract necessarily created a right in the estate to those same funds, contingent upon ratification. Thus, the circuit concluded the purchase agreement created an interest in proceeds from property of the estate and affirmed the debtor's conviction on the concealment count.

11. *Borges v. AG New Mexico (In re Borges),* 510 B.R. 306 (10th Cir. BAP Apr. 8, 2014) (Somers, J.)

Debtors' lender brought a state court action to foreclose debtors' dairy operation encompassing over 500 acres in New Mexico to which debtors filed numerous lender liability-type counterclaims. The foreclosure was removed to the bankruptcy court by debtors after they filed bankruptcy.

The lending relationship began in 2006 with three cross-collateralized notes secured by the dairy herd, milk and milk proceeds, crops, farm equipment, accounts receivable and a line of credit mortgage on the dairy facility that described the real estate as 337.33 acres and included water rights associated with the dairy farm property. The 2006 mortgage was acknowledged and properly recorded in the county records. The lender submitted change of ownership of water right forms to the state for filing noting it as the mortgagee, but the recorded forms lacked any attachments. Debtors serviced the debt with proceeds from milk production until 2008 when the dairy began losing money due to a decline in milk demand and rising feed costs. After a 6-month loan renewal and dairy prospects not improving, debtors looked to sell their dairy operation. The lender continued to make a series of advances to continue to fund the dairy operation while debtors attempted to sell their cow herd. In late 2008, the lender sent debtors a letter giving them 45 days to restructure their loans and threatening foreclosure. Debtors ultimately signed a contract for the sale of their herd but the deal never closed. They then liquidated their herd through a national herd retirement program but a dispute ensued with the lender on whether it had a lien on the proceeds and how they should be disbursed. At this point, the lender discovered that the legal description on the 2006 mortgage omitted 220 acres of farmland attached to the dairy facility that the parties had intended to include. The lender unilaterally corrected the mortgage and filed the mortgage without obtaining the debtors' signatures. Thereafter, the lender retroactively increased the interest on the note secured by the dairy herd which debtor signed to continue receiving advances for operations. In August the cow note was placed on nonaccrual status and the lender commenced foreclosure. Debtors filed counterclaims against the lender. Several months later they filed a chapter 11 petition and removed the foreclosure case to bankruptcy court. The debtors filed an adversary proceeding against the lender to avoid its lien on the 220 acres added to the corrected mortgage and the water rights and another adversary proceeding against the lender and the milk producers cooperative, CWT, for turnover of the herd retirement sale proceeds. The foreclosure and avoidance proceedings were consolidated and tried to the bankruptcy court. The bankruptcy court determined that the lender did not have a valid lien on the additional 220 acres under the corrected mortgage nor on the water rights under the change of ownership documents recorded with the state. It avoided those liens.

The BAP affirmed the bankruptcy court's judgment 1) avoiding the creditor's claimed lien on the additional 220 acres; 2) avoiding the creditor's claimed lien on water rights; 3) allowing the creditor's proofs of claim on three notes subject to some offsets; 4) denying the debtors' counterclaims for breach of the obligation of good faith and fair dealing, interference with contracts, violation of New Mexico's Unfair Practices Act, and prima facie tort; 5) rejecting the debtors' affirmative defense of unclean hands; and 6) calculating postpetition interest. The panel concluded that the bankruptcy court correctly ruled that a corrected mortgage that was not signed by the debtors did not provide constructive notice under New Mexico law of the creditor's interest in the additional 220 acre parcel and that the debtors-in-possession may avoid the claimed lien under 11 U.S.C. § 544(a). As to the lien on the water rights, the panel concluded that the creditor raised a new theory of perfection for the water rights on appeal (perfection by filing mortgage with county records), and because the creditor had not argued or shown plain error, this Court would not consider this new theory of perfection. As to the theory of perfection presented to the bankruptcy court (perfection by filing change of ownership forms with the state engineer), the panel concluded that the bankruptcy court correctly ruled that these forms failed to comply with New Mexico's filing requirements and did not perfect creditor's interest in the water rights. As to the bankruptcy court's interest calculation, the panel concluded that it was a part of the court's § 502 analysis to determine the amount of the claim as of the petition date and whether the claim was allowable, and was not a premature calculation of postpetition interest under § 506(b). Finally, because the record supports the bankruptcy court's finding that the creditor's actions were reasonable in providing a payoff figure for all debts owed to it rather than a payoff figure for a single debt, the panel concluded that the bankruptcy court properly denied the debtors' counterclaims and affirmative defenses.

12. *Weinman v. Walker (In re Adam Aircraft Indus. Inc.),* 510 B.R. 342 (10th Cir. BAP May 15, 2014) (Jacobvitz, J.)

The chapter 7 trustee sued debtor's former president and board member to avoid as preferences or fraudulent transfers, payments that the corporate debtor made to him after his resignation. The defendant was president and a member of the board from 2003 or 2004 until his resignation in 2007. The outside board members had decided to oust defendant and had a replacement lined up, but so as not to disrupt the company's negotiations for debt financing from Morgan Stanley, they gave the former president an opportunity to resign. In his resignation e-mail sent at 12:04 a.m. on February 2, 2007, the defendant proposed severance terms and stated that if his severance terms were met, he would abstain from working with a competitor, would strongly support the company, and attribute his departure to a personal situation. He removed his personal effects from the office prior to sending the e-mail. The president's successor was named 8 hours after the e-mail was sent and a meeting was held to introduce the successor and a replacement board member to the employees. The former president did not return to the premises nor participate in corporate governance or management after February 1. On February 5 the Board accepted defendant's resignation, effective February 2. The defendant and company executed a memorandum of understanding on February 13 outlining the severance terms and a separation agreement and release in which the former president's employment was terminated effective March 1, 2007. Around the time the Morgan Stanley $80 million financing transaction closed in May 2007, the former president and company executed another separation agreement changing from a "separation date" to a "change of position date" to "field sales liaison," although the parties never intended the defendant to perform any services as the field sales liaison. Debtor made the following severance payments to defendant in the year before the bankruptcy petition: a $105,704 refund of defendant's deposit on an airplane purchase, $100,002 to repurchase defendant's company stock, and $250,000 in severance salary payments, of which $62,600 was paid within the 90-day period prior to the company's bankruptcy filing. The bankruptcy court concluded that at the time of the payments, the former president was not a statutory or non-statutory insider, having made a clean break on February 1, prior to the commencement of severance payments. The bankruptcy court avoided as a preference, the $62,500 severance payment made to the former president within 90 days before the corporation's bankruptcy petition, but denied the remaining claims.

The BAP affirmed. Trustee claimed the payments, including continued salary, stock repurchase, and a refunded purchase deposit, were preferential under 11

U.S.C. § 547(b)(4)(B) (the 1-year look back period), and constructively fraudulent under 11 U.S.C. § 548(a)(1)(B)(i) and (ii)(I) or § 548(a)(1)(B)(i) and (ii)(IV). The BAP concluded that the bankruptcy court's findings that defendant's insider status ended on February 1, 2007 were not clearly erroneous; thus, the trustee's insider preference claim failed because defendant was neither a statutory ("per se") insider, nor a non-statutory insider, when the severance payments were made, as is required by § 547(b)(4)(B). Trustee's § 548(a)(1)(B)(ii)(IV) constructive fraud claim also failed due to defendant's lack of insider status. Finally, trustee's § 548(a)(1)(B)(ii)(I) constructive fraud claim failed because the only evidence presented at trial indicated that the debtor was balance-sheet solvent when debtor incurred its severance obligations to defendant, and debtor's subsequent insolvency when some of the payments were made still did not satisfy the statute because any payment made pursuant to the severance agreements was supported by reasonably equivalent value, and both insolvency and lack of reasonably equivalent value are required by § 548(a)(1)(B)(ii)(I).

The trustee has appealed the case to the Tenth Circuit.

13. *In re Miller,* 519 B.R. 819 (10th Cir. BAP Oct. 8, 2014) (Karlin, J.)

The bankruptcy court dismissed debtor's chapter 7 petition under § 707(b)(2)'s presumed abuse provisions, after determining that debtor's current monthly income (CMI) exceeded the median income for a family of 4 and disqualified him from proceeding under chapter 7 and debtor declined to convert his case to chapter 13. The BAP affirmed.

Debtor, asserting that the calculation of CMI in § 101(10A) only requires inclusion of income that is both received and "earned" in the six month look-back period, omitted one of his bi-weekly salary payments from that calculation because, although received in the relevant period, the payment was for work debtor performed just outside of that period. The decision holds that § 101(10A) is not ambiguous and that the terms receive and derive, as used in the statute, are synonymous. Thus, the statute requires inclusion of all income received in the 6-month look-back period in the CMI calculation, without regard to when it was earned. To the extent that consideration of legislative history is appropriate, that history strongly supports this reading of the statute as well. When the omitted bi-weekly payment was included in the CMI calculation, debtor was above median income and triggered the presumption of abuse.

14. *LTF Real Estate Co., Inc. v. Expert South Tulsa, LLC (In re Expert South Tulsa, LLC),* 522 B.R. 634 (10th Cir. BAP Dec. 4, 2014) (Jacobvitz, J.)

This adversary proceeding arises out of a dispute between the chapter 11 debtor and the plaintiff real estate developer on a commercial real estate project. Developer purchased real estate from Debtor and under the purchase agreement, Debtor was to construct certain improvements on the property at its sole expense and to escrow an amount equal to 120% of the estimated cost of those improvements – some $1.2 million. Debtor, Developer and the title company escrow agent entered into an escrow agreement and Debtor deposited the funds into the escrow account with the title company. The escrow fund guaranteed Debtor's completion of the contemplated site improvements; if the Debtor failed to timely complete the improvements, the Developer had the option to complete the improvements itself and obtain reimbursement from the escrow account. Under the escrow agreement, Debtor was to receive 3 disbursements from the escrow account according to completion of each of 3 phases of site work. Debtor hired Key Construction for the site improvements and it began work thereon, but no phase of the improvements was completed when Key sued debtor for the amount owing to it -- $440,699, alleging breach of contract and foreclosure of mechanic's and materialman's liens. Those claims were settled but no funds were disbursed from the escrow account. An involuntary chapter 7 was then commenced against debtor, but it voluntarily converted the case to chapter 11. The Developer then filed this adversary proceeding against Debtor seeking a declaration of the rights and interests the parties had to the escrow account. The Developer claimed that Debtor nor the estate had any interest in the escrowed funds, and that it was entitled to the escrowed funds. The Debtor counterclaimed that the escrowed funds were property of the estate and that the escrow agreement was void and unenforceable. The Developer moved for summary judgment on the declaratory action. The bankruptcy court granted partial summary judgment in favor of the Developer and over Debtor's objection that the motion was premature because discovery had not commenced. It concluded that Debtor only had a contingent interest in the escrow funds and they were not property of the estate. Neither the Developer nor Debtor were entitled to disbursement of the escrow funds but that the Developer could exercise its rights under the escrow agreement to complete the improvements and obtain reimbursement. After the bankruptcy court denied Debtor's motion to alter or amend the partial summary judgment ruling, it amended its counterclaims to add avoidance claims and sought to avoid the original sale of the realty to the Developer under § 544(b) and § 548. When the Developer defaulted on the amended counterclaims, Debtor moved for summary judgment. That motion was denied due to Debtor's failure to obtain leave to file the post-judgment avoidance counterclaims as required by Fed. R. Bankr. P. 7015. Debtor appealed to the BAP but the appeal was dismissed as interlocutory because Debtor's original counterclaim remained against the Developer. After the appeal was dismissed, the bankruptcy court reinstated the debtor's avoidance counterclaims. The bankruptcy court subsequently granted the Developer's motion to dismiss the remaining claims and *sua sponte* dismissed the avoidance counterclaims under Fed. R. Civ. P. 12(b)(6). The Debtor appealed all of the adverse rulings.

The BAP affirmed the bankruptcy court's summary judgment order determining that funds placed in escrow by the Debtor to ensure the completion of improvements on property it sold are not property of the estate, but reversed its *sua sponte* dismissal of the fraudulent transfer avoidance counterclaims for failure to state a claim. The BAP first concluded that there is no waiting period before a motion for summary judgment may be filed and that the Debtor failed to comply with Fed. R. Civ. P. 56(d) to gain additional time to conduct discovery before summary judgment could be considered. On the merits of the appeal, the Debtor argued that because it supplied the escrowed funds and performed some improvements prepetition, it held title, as well as a vested or present interest in the funds, making them property of the estate. The panel concluded that under both Oklahoma and federal escrow law, the estate includes any claim, contingency or chose in action against the trust fund, but not the funds itself. Under the escrow agreement, the Debtor only had a right to receive payment upon its completion of a segment of the improvements but only if the Developer had not exercised its self-help rights under the agreement. Because the Debtor did not complete any of the phased improvements prior to the petition date, it did not have a present, vested interest in the escrowed funds. Thus, the bankruptcy court correctly concluded that the escrowed funds were not property of the estate. The Debtor's additional argument that the Developer was stayed from exercising the self-help rights post-petition was rejected because it did not adequately raise the automatic stay issue in the bankruptcy court and therefore did not preserve that issue for appeal. The bankruptcy court, however, erred when it dismissed *sua sponte* the Debtor's counterclaims based on 11 U.S.C. §§ 544 and 548, under Rule 12(b)(6) for failure to state a claim without granting leave to amend, because the Debtor adequately pled lack of reasonably equivalent value and previous filings in the record established the insolvency element of a constructive fraud claim.

This case is currently on appeal to the Tenth Circuit.

15. *Wieland v. Gordon (In re Gordon),* 526 B.R. 376 (10th Cir. BAP Mar. 9, 2015) (Somers, J.)

The United States Trustee brought this adversary proceeding against debtor, a practicing securities attorney and CPA who was convicted of securities fraud, for denial of his general discharge under § 727. The bankruptcy court entered judgment against debtor on the Trustee's fraudulent concealment claim, § 727(a)(2)(A), and false oath claim, § 727(a)(4)(A).

In 2010 debtor was convicted of multiple counts of securities fraud, wire fraud, and money laundering from a "pump-and-dump" scheme where he and others in the scheme bought inexpensive stocks, artificially inflated and manipulated their value, and then sold them to other investors. Based on the conviction, the district court entered criminal forfeiture orders on debtor's assets, including his residence, brokerage accounts, interests in corporations, and other real property.

In 2000, prior to his conviction, debtor and his wife purchased real estate using the equity in the couple's previous jointly-owned home. They instructed that the property be titled in Mrs. Gordon's name only. Two years later the Gordons obtained a $5.4 million construction loan and granted a mortgage to build a new home. In 2005, they paid off the construction loan with a final payment of $1.7 million using funds obtained from the securities scheme under the pretense of a sale of stock by debtor to one of his co-conspirators in the scheme. Although the property remained titled solely in his wife's name, Debtor lived in the residence and never transferred or disclaimed any interest in the property. He exercised ownership rights in the residence and treated it as his own, using marital funds from the couple's $20 million in capital gains reported on their 2000 tax return to pay property taxes on the property between 2003-2010 and paying utility accounts that were opened and maintained in his name. Debtor also listed the residence as his asset on personal financial statements submitted to obtain credit in his name. All of the family vehicles were titled in Mrs. Gordon's name but were treated as joint property and each member of the family had a vehicle that was primarily used only by that family member. At no time during the 10-year period prior to Debtor's conviction was Mrs. Gordon employed, but she accumulated significant assets from transfers of stock and money by Debtor.

Seven months after his criminal conviction and while incarcerated, debtor filed a chapter 7 bankruptcy *pro se*. The schedules and statement of financial affairs contained numerous misstatements and omissions despite subsequently amending his filings three times. Debtor claimed he had no interest in the residence or family vehicles and attributed ownership to his wife. The Trustee filed this proceeding to deny debtor's discharge and following a trial, the bankruptcy court entered judgment against Debtor under § 727(a)(2)(A), based on debtor's placement of assets solely in his wife's name and his continuing concealment of an equitable interest in those assets, and under § 727(a)(4)(A), based on numerous misstatements and omissions in debtor's bankruptcy filings, including his denial of any interest in real property, failures to list business interests and/or appropriate values for those businesses, and failures to list in his SOFA both businesses in which he had management status and financial accounts in which he had signatory authority, within six years of the petition date.

The BAP affirmed concluding that the bankruptcy court's findings in support of its conclusions were not clearly erroneous. The BAP held that even though Debtor's initial transfers of assets in his wife's name occurred outside the one year period prior to bankruptcy in § 727(a)(2), his "continuing concealment" of his beneficial interest in the property carried over into the one year period, is within the reach of § 727(a)(2), and sufficed for denial of discharge. Section 727(a)(2)(A) does not require as an element of proof that Debtor's creditors suffered harm as a result of the fraudulent transfer or concealment. The BAP also upheld the denial of discharge under § 727(a)(4)(A) noting the "overwhelming" number of false statements made by Debtor in his schedules, apart from the omission of his beneficial interest in the couple's residence, and the Debtor's sophistication.

EIGHTH CIRCUIT BANKRUPTCY CASE LAW UPDATE[1]

The Honorable Anita L. Shodeen
U.S. Bankruptcy Court Southern District of Iowa

Midwest Bankruptcy Institute and Professional Development Workshop
ABI/UMKC

October 15-16, 2015

1. Automatic Stay, Discharge Injunction, FDCPA and Violations

Venture Bank v. Lapides, ___ F.3d. ____, Case No. 14-3085 2015 WL 5011704 (8th Cir. August 25, 2015)

After debtor was discharged the bank initiated a declaratory judgment action in state court for enforcement of various post-discharge agreements and foreclosure of its third mortgage. [R]eaffirmation agreements are enforceable only if they are enforceable under state law *and* meet the requirements of federal law in §524(c)." (emphasis original) The Agreements entered into between Lapides and the bank were unenforceable as reaffirmation agreements because they did not meet the requirements of 11 USC §524. This conclusion renders the application of state law or other legal issues involving contracts unnecessary. Under the bankruptcy code, a debtor may elect to voluntarily repay a debt after its discharge. The decision affirmed the conclusion that the actions of the bank provided "ample evidence of pressure and inducement" to conclude that Lapides' were not voluntary.

Carter v. First Nat'l Bank of Crossett (In re Carter), 583 F. App'x. 560 (8th Cir. Nov. 17, 2014), aff'g 502 B.R. 333 (B.A.P. 8th Cir. 2013).

The debtor transferred assets from his business to himself, personally. The assets were subject to a bank lien, but the debtor did not inform the bank of the transfer. The debtor

[1] The outline contains selected cases and information of a general nature related to current bankruptcy issues from the Eight Circuit Court of Appeals and Bankruptcy Appellate Panel (BAP). The outline does not include all decisions rendered by these judicial bodies. Practitioners should independently research any specific legal issue to obtain all relevant opinions. My thanks and acknowledgement to Judge Michael Melloy and my law clerk, Laura Carrington, for their contributions to this outline.

then filed for personal bankruptcy but also did not inform the bank of this fact. After a default on the underlying debt, the bank provided notice to the business, pursued replevin under state law, and obtained a judgment. The debtor received notices of the state court action but did not respond to the suit or file objections. After the bank obtained the state court judgment, the debtor informed the bank of his bankruptcy filing, the assignment and moved in state court to prevent delivery of the equipment to the bank. The state court directed the sheriff to repossess the equipment and hold it pending further order rather than deliver it to the bank.

Carter filed for sanctions in bankruptcy court alleging a violation of the automatic stay. The bankruptcy court denied sanctions, holding the notice from the bank served to advise the debtor of his rights under the UCC and, although it violated the automatic stay, it was merely a technical violation and not willful. To be a "willful" violation, a creditor must take deliberate action "with the knowledge" that a bankruptcy petition has been filed. The replevin action filed by the Bank did not name the debtor individually and sought only to repossess equipment originally owned by the LLC in which the lender held a properly perfected security interest. The bankruptcy court held the bank did not have notice of the asset transfer and bankruptcy filing until after it had obtained the state court judgment.

The BAP and the Eighth Circuit affirmed, finding no abuse of discretion in the denial of sanctions. The Eighth Circuit characterized the knowledge issue as relating to knowledge of both the asset transfer and the bankruptcy. The court held the bank did not have knowledge of these facts, and absent such knowledge, the violation of the stay was not willful.

Gatewood v. CP Medical, LLC, 533 B.R. 905 (B.A.P. 8th Cir. 2015)

The operative facts in this case arose in the debtors' chapter 13 case. A collection agent filed a timely proof of claim on behalf of CP Medical, LLC. The bankruptcy court confirmed a plan that called for payments over 36 months with a pro-rata distribution to unsecured creditors. After confirmation the debtors filed an adversary proceeding against CP Medical alleging it had violated the FDCPA in filing a proof of claim on a debt that was time barred under Arkansas state law. The bankruptcy court entered summary judgment in favor of CP Medical and the BAP affirmed.

In its ruling the BAP stated that filing a proof of claim is an action to collect a debt and that such an action, at least arguably, constitutes litigation for purposes of application of the FDCPA. However, the ultimate issue in this appeal is whether CP Medical engaged in false, misleading, deceptive, unfair or unconscionable conduct by filing a proof of claim on a stale debt. On this issue, the BAP stated that a statute of limitations merely limits the ability to judicially enforce the debt, but it does not eliminate the obligation.

The debtors did not object to CP Medical's proof of claim under 11 USC §502(b)(1) as an unenforceable obligation. The BAP stated that "[t]o then sue CP Medical under the FDCPA for doing that which it was invited to do – file an accurate proof of claim – offends the senses." In conclusion, the BAP held that: "The FDCPA does not prohibit *all* debt collection practices. Instead, it simply prohibits false, misleading, deceptive, unfair, or unconscionable debt collection practices. Filing in a bankruptcy case an accurate proof of claim containing all the required information, including the timing of the debt, standing alone, is not a prohibited debt collection practice."

Bugg v. Gray (In re Gray), 519 B.R. 767 (B.A.P. 8th Cir. 2014).

This case involves the application of 11 U.S.C. §362(e) and termination of the automatic stay. This provision requires that final resolution of stay relief be completed within 60 days of the date a motion is filed. The facts reflect that the landlord had filed a motion to terminate the stay. Before 60 days expired the debtor filed for a continuance of a hearing on the motion and the landlord later filed for its own continuance. At a hearing, the parties informed the court a settlement had been reached. The landlord later evicted the debtor, damaging personal property, including a vehicle, in the process. The bankruptcy court eventually imposed sanctions against the landlord, and landlord appealed, arguing the stay had automatically terminated such that no sanctions were warranted.

The BAP concluded that a creditor can explicitly or implicitly waive the 60 day time period. If a creditor's actions are inconsistent with the 60 day time constraint the deadline is deemed waived. Here, the moving creditor did not file objections and requested a continuance which prevents application of the 60 day deadline.

2. Chapter 11

Heritage Bank v. Woodward, 2015 WL 4923520 (B.A.P. 8th Cir. August 13, 2015)

Debtor filed an individual chapter 11 petition and obtained confirmation of her Fifth Amended Plan over the objection of Heritage Bank, her largest creditor. One of the three issues raised on appeal: whether the absolute priority rule required the debtor to pay all of her unsecured creditors in full. The BAP held that: "the absolute priority rule still applies in individual Chapter 11 cases to prevent debtors from retaining prepetition property. Our holding is supported by: (1) the language and context of § 1129(b)(2)(B)(ii) and 1115; (2) the absence of a clear indication by Congress of an intent to abrogate; and (3) the weight of existing authority."

3. Exemptions and Lien Avoidance

Hardy v. Fink (In re Hardy) (In re Hardy), 787 F.3d 1189, (8th Cir. 2015)

The Additional Child Tax Credit, the refundable portion of the Child Tax Credit, is exempt as a public assistance benefit. The debtor, who filed in Missouri, identified a tax refund on her Schedule B and claimed the majority of the refund as exempt on Schedule C noting that $2,000 of the refund was attributable to the Additional Child Tax Credit. The trustee objected to Hardy's claim of exemption in the refund as a "Public Assistance Benefit". The bankruptcy court sustained the objection to the exemption. The BAP affirmed.

The Eighth Circuit went through a lengthy analysis of the history of the Child Tax Credit, including the Additional Child Tax Credit which was at issue in this case. It was determined that the Additional Child Tax Credit qualified as public assistance and, therefore, is exempt under Missouri law.

Pierce v. Collections Assocs. (In re Pierce), 779 F.3d 814 (8^{th} Cir. 2015)

This proceeding involved the calculation of the amount of garnished wages that may be the subject of lien avoidance. Both parties agree that the elements of §547(b) are met with regard to the transfers of the garnished wages, but they disagreed on whether the exception under 547(c)(8) applies. That Code provision states that a trustee may not avoid a transfer if the aggregate value of all property that constitutes or is affected by such transfer is less than $600. The bankruptcy court held that §547(c)(8) did apply because the Appellee didn't get the benefit or the value of $600 or more. Debtor appealed from the bankruptcy court's order dismissing the complaint to avoid and recover transfer of wages to the creditor.

The BAP determined that all six wage garnishments, totaling $858.98 constituted preferences. Because the property transferred involved wages the transfer occurs precisely when wages are earned, making each garnishment a preference at the time the Debtor earned his wages. Prior to the Debtor's action to avoid, the garnishee had returned $296.20 to the Debtors. The complaint requested relief in the amount of $562.78, an amount less than $600. Therefore, application of §547(c)(8) was proper. The Eighth Circuit affirmed.

Running v. Miller (In re Miller), 778 F.3d 711 (8th Cir. 2015)

Before filing for bankruptcy, Miller used $267,319.48 from an IRA to purchase a single-premium annuity that was to pay him 8 annual payments of $40,497.95. Miller claimed the annuity as an exempt qualified retirement account. It was undisputed that if he had simply left the funds in the original account, they would have been exempt.

The trustee objected, arguing that the annuity was not exempt because 11 U.S.C. §408(b)(2)(A) requires that "premiums are not fixed," and §408(b)(2)(B) requires that "the annual premium on behalf of any individual . . . not exceed the [annual contribution limit]." In this case the annual contribution limit was $6000. The bankruptcy court overruled the objection, and the BAP affirmed.

The Eighth Circuit also affirmed. As to both arguments, the courts held rollover funds are not premiums such that the fixed premium and annual contribution limit requirements did not apply. "A premium does not include funds, such as Miller's, that are taken from a qualified individual retirement account to pay for an individual retirement annuity." Rather, the term "premium" in this context refers to "retirement contributions being made for the first time."

4. Discharge

Wilson v. Walker (In re Walker), 2015 WL 1527870 (B.A.P. 8th Cir. April 7, 2015)

There must be a debt owed for an action to under 11 U.S.C. §523 to have merit.

Walker v. Sailor Music (In re Walker), 514 B.R. 585 (B.A.P. 8th Cir. 2014)

Artists obtained judgment against the debtor for his infringement of artists' copyrights in musical works performed at saloon that debtor operated. An adversary proceeding was filed to except resulting debt from discharge on willful and malicious injury pursuant to 11 U.S.C. §523(a)(6). The United States Bankruptcy Court for the Eastern District of Missouri, entered judgment in favor of plaintiffs, and debtor appealed.

The BAP held the injury was willful and malicious because debtor failed to respond to 44 communications requesting that debtor obtain a license for performance of these works and allowed these unlicensed performances to continue (while ignoring these communications, none of which was returned as undeliverable and one of which the debtor had accepted by signing).

5. Procedural

Cutcliff v. Reuter, 791 F.3d 875 (8th Cir. 2015)

This ruling is one of many that arise from a bankruptcy proceeding originally filed in 2010. At issue in this appeal is a judgment for actual and punitive damages recommended by the bankruptcy court without an evidentiary hearing. Upon de novo review the district court adopted the proposed findings and conclusions of law and entered final judgment. The debtor's appeal was dismissed because he lacked standing under the person aggrieved doctrine. In addressing the co-trustee's arguments on appeal, the Court of Appeals held that the issue was properly referred to the bankruptcy court for determination as a "related to" matter under 11 U.S.C. §157. It further determined that a hearing prior to the award of punitive damages was subject to an exception and was not required in this case

Boellner v. Dowden, --- F. App'x ---, Case No. 14-2816, 2015 WL 2193045 (8th Cir., May 12, 2015)

A married couple filed separate bankruptcies with one spouse seeking to claim Arkansas exemptions and the other seeking to claim Federal exemptions. The bankruptcy court ordered substantive consolidation, finding that the creditors would suffer greater prejudice in the absence of consolidation than the debtors would suffer due to consolidation. In reaching this conclusion, the bankruptcy court looked at the debtors' assets and found substantial identity. On appeal, the debtors argued their assets were not substantially identical because they claimed separate IRAs, separate interests in businesses, separate annuities, and separate insurance policies. In addition, one spouse lived in an unencumbered $450,000 home whereas the other lived in a home without equity and subject to foreclosure. In ordering consolidation, the bankruptcy court noted that, notwithstanding the debtors' other assertions, the spouse in the equity-free, foreclosure home had claimed household items from the unencumbered home. In addition, the couple had made joint withdrawals from the separate IRAs. The Eighth Circuit affirmed, finding that the bankruptcy court did not abuse its discretion in ordering substantive consolidation

O & S Trucking, Inc. v. Mercedes Benz Financial Services USA (In re O & S Trucking), 529 B.R. 711 (B.A.P. 8th Cir. 2015)

A trucking firm filed for Chapter 11. The parties had challenged values assigned to the trucks and determinations of adequate protection. Later the trucking firm relinquished its fleet to the creditor/truck-lessor/financer. The bankruptcy court eventually confirmed a plan and the debtor appealed. The BAP dismissed the debtor's appeal for three reasons. First, orders entered on valuation and adequate protection were not final orders, and the elements for interlocutory relief had not been established in this case or in a prior dismissed appeal. Second, the debtor lacked standing as a person aggrieved to appeal the order confirming its own plan. As to this issue, the BAP noted that, although the debtor nominally appealed the confirmation order, the debtor really only challenged the valuation and adequate protection determinations. Third, the issue regarding valuation and adequate protection were moot because the trucks had been relinquished.

See also, Peoples v. Radloff (In re Peoples), 764 F.3d 817 (8th Cir. 2014); In re Heyl, Case No. 14-1453, 2014 WL 5354040 (8th Cir. Oct. 22, 2014) (discussion of person aggrieved doctrine).

In re Patriot Coal Corp., 511 B.R. 563 (B.A.P. 8th Cir. 2014)

In 2002 a putative class action was filed against Eastern Associated Coal LLC in West Virginia claiming damages due to chemical exposure in the coal plants. This case, along with a similar action had been working its way through litigation in state court for ten years. Eastern Associated Coal LLC was an affiliate of Patriot Coal that filed bankruptcy on July 9, 2012. Omnibus objections were filed to the claims asserted by the Pettry claimants which were resisted. The bankruptcy court entered an order sustaining the omnibus claim objections on November 8, 2013. This order was not appealed. On December 16, 2013 the Pettry claimants filed a motion to reconsider the order entered on November 8, 2013 based upon 11 U.S.C. §502(j), which provides that a claim that has been allowed or disallowed may be reconsidered for cause. After hearing in January 2014 the Motion was denied and the Pettry claimants appealed.

The BAP found that when a proof of claim has been litigated by the parties, the litigants must seek reconsideration pursuant to the usual Rule 60 standards if they elect not to pursue a timely appeal of the original order. The BAP's review is limited to the bankruptcy court's order denying the motion for reconsideration and it reviews that order for abuse of discretion. The claimants attempt to argue Rule 60(b)(4), but a motion under that Rule is not a substitute for a timely appeal. That Rule applies only in the rare instance where a judgment is premised either on a certain type of jurisdictional error or on a violation of due process. The claimants failed to identify any infirmity that would cause the bankruptcy court's order to be void and only reference arguments that had been rejected by the bankruptcy court by order entered on November 8, 2013. The proper remedy was to file a timely appeal of the order sustaining the omnibus objection, not seeking reconsideration of the order after the time for appeal had expired. No new issues or any other grounds for reconsideration of the bankruptcy court's order were identified and therefore the bankruptcy court properly denied the motion.

6. Miscellaneous

Lariat Companies, Inc. v. Wigley (In re Wigley), 533 B.R. 267 (B.A.P. 8th Cir. 2015)

In 2008 the debtor personally guaranteed a ten year lease of commercial real property for his LLC, Baja Sol Cantina EP, to operate a restaurant. Within 2 years the restaurant was in default and evicted from the premises. Lariat eventually obtained a judgment in excess of $2.2 million against the debtor and the LLC. The landlord filed a proof of claim in the amount of $1.7 million in Wigley's personal bankruptcy case. Wigley objected to the proof of claim on two grounds: 1) that the amount of the proof of claim exceeded the limits prescribed under 11 U.S.C. §502(b)(6) and that the amount was duplicative of the fraudulent transfer judgment entered against his wife. The bankruptcy court capped Lariat's claim at $445,273.

The BAP adopted the following standard to determine what portions of Lariat's claim were subject to the cap: Assuming all other conditions remain constant, would the landlord have the same claim against the tenant if the lease had not been terminated? The bankruptcy court's limitation of damages for rent, CAM, and late fees through the eviction date and the interest on the judgments did not arise from termination of the lease. Future rents were capped under the statutory formula and could not include interest. The case was remanded for further determination of the balance of attorney fees and costs claimed by the landlord. The BAP affirmed the bankruptcy court's decision that the fraudulent transfer judgment included in the proof of claim was duplicative.

Ritchie Capital Management, LLC v. Stoebner, 779 F.3d 857 (8th Cir. 2015)

This case arises from the bankruptcy of Thomas Petters and recovery of fraudulent transfers that were the result of a ponzi scheme he operated that involved a number of his business entities. This case held that the bankruptcy court did not commit error in reaching a conclusion that based upon the facts of the case and applying a badges of fraud analysis under state law that the trustee was entitled to a presumption of actual fraudulent intent in his action to recover under 11 U.S.C. §548.

See also, Finn v. Alliance Bank, 860 N.W.2d 638 (Minn. 2015) (Ponzi scheme presumption is not supported by Minnesota Uniform Transfer Act)

Dietz v. Calandrillo (In re Genmar Holdings, Inc.), 776 F.3d 961 (8th Cir. 2015)

To settle claims with a boat owner alleging that the boat was defective, a manufacturer agreed to accept return of the boat in exchange for a payment of $140,000 to a bank to obtain release of a lien and a payment of $65,000 to the boat's owner. The agreement specifically provided that the manufacturer was to pay the $65,000 "*no sooner than*" 15 days after receiving the lien waiver and title documents.

The manufacturer filed for bankruptcy. The manufacturer's payment to the bank was outside the 90-day preference period of §547(b), but the $65,000 payment to the owner was within the period. The trustee sought to avoid the payment to the owner as preferential, but the owner argued the payment satisfied an exception as a "contemporaneous new value exchange" pursuant to §547(c)(1). The bankruptcy court rejected the argument and avoided the transfer. The BAP affirmed.

The Eighth Circuit also affirmed. The court noted that the owner bore the burden of proving the parties intended the payment to be a contemporaneous exchange for new value. The court then emphasized that a time lag, standing alone, often will not answer the question of the parties' intent because many scenarios exist in which parties intend a contemporaneous exchange for new value, but delays nonetheless occur. The court gave the example of a stock purchase intended as a contemporaneous exchange event though it may not actually settle for seven days. The court stated, "Contemporaneity is a flexible concept which requires a case-by-case inquiry into all relevant circumstances." The court then concluded that a reasonable jury could view the mandatory 15-day delay period contained in the settlement agreement as evidence that the owner and manufacturer intended the transaction to include a 15-day, short-term loan from the owner to the manufacturer. Because the owner bore the burden of proof and failed to present evidence to disprove this reasonable interpretation, the owner failed to prove the transfer was a contemporaneous new value exchange.

Peet v. Checkett (In re Peet), 529 B.R. 718 (B.A.P. 8th Cir. 2015)

Chapter 7 debtors, a husband and wife, owned property in joint tenancy with the wife's relative(s). The BAP held that the filing of the bankruptcy petition did not convert the joint tenancies to tenancies in common. "Under Missouri law, a joint tenant 'hold[s] by the moiety (or half) and by the whole.'" *Poetz v. Klamberg,* 781 S.W.2d 253, 255 (Mo.Ct.App.1989). Further,

> [j]oint tenancy is based on the theory that the tenants share one undivided estate, with the distinctive characteristic of the right of survivorship. Upon the death of any one of the joint tenants, the entire estate goes to the survivors, and so on to the last survivor, who attains sole ownership and exclusive possession. A joint tenancy can be destroyed by conveyance ... by one or more of the joint tenants during the lifetime of the cotenants. A conveyance by a cotenant destroys the unity of title and converts the joint tenancy into a tenancy in common insofar as the interest of the particular joint tenant is concerned.

Remax of Blue Springs v. Vajda & Co., 708 S.W.2d 804, 806 (Mo.Ct.App.1986) (citations omitted).

As such, the question before the court was whether the filing of the petition qualified as this type of joint-tenancy-destroying conveyance. The BAP noted that the language of the Bankruptcy Act of 1998, 30 Stat. 544, 565 at § 70(a) provided that the filing of a petition would have been just such a qualifying "conveyance." The 1978 Act, however, eliminated this language:

Congress eliminated the provisions of the old Bankruptcy Act which vested "title" in the Chapter 7 trustee by operation of law. Thus, the concept of "title" in the Chapter 7 trustee as a basis for determining what property the trustee will administer in a Chapter 7 proceeding ended with the enactment of the Bankruptcy Reform Act of 1978.

6. Sanctions

Young v. Young (In re Young), 789 F.3d 872 (8th Cir. 2015)

The attorney for a Chapter 13 debtor made several representations to the court characterizing post-petition domestic support obligations as pre-petition obligations. Through these representations, the attorney secured for the debtor confirmation of a plan notwithstanding the fact the debtor was not current in his post-petition domestic support obligations. The bankruptcy court issued a show-cause order related to counsel's conduct in the case. Under Rule 9011 or 11 U.S.C. §105 a bankruptcy court may impose sanctions on its own initiative upon providing notice and opportunity to respond to the party that is subject to sanctions. The bankruptcy court ultimately imposed sanctions against the attorney including a six-month suspension.

The BAP and the Eighth Circuit affirmed, stressing the importance of candor in bankruptcy courts due to the volume of fact-finding work in bankruptcy courts and the bankruptcy courts' need to rely on counsel.

Bisges v. Gargula, (In re Clink), 770 F.3d 719 (8th Cir. 2014)

The U.S. Trustee moved for disgorgement of fees and sanction against debtor's attorney who had advised his client that she did not need to list horses she owned on the schedules and counseled her to deny a loan repayment made to her mother within weeks prior to the filing. The attorney responded by asserting that the motions be dismissed because the U.S. Trustee destroyed the tape of the Creditor's Meeting which constitutes spoliation of evidence.

The bankruptcy court determined that bad faith had not been demonstrated and dismissal was not appropriate. It also concluded that a violation under 11 U.S.C. §526(a)(2) had occurred because while acting as a debt relief agency, the attorney "counsel[ed] or advise[ed] a[n] assisted person" to make a fraudulent or misleading statement was correct. Sanctions were also warranted under 11 U.S.C. §707(b)(4) for engaging in conduct that was in violation of Bankruptcy Rule 9011. Finding no clear error or abuse of discretion the bankruptcy court and district court's decisions were affirmed.

Needler v. Casamatta, (In re Miller Automotive Group Inc.), Case No. 14-6047, 2015 WL 4746246 (B.A.P. 8th Cir. Aug. 12, 2015)

A bankruptcy court has the inherent authority to discipline attorneys that appear before it. In this case sufficient notice was provided to counsel and the court acted fairly, reasonably and without bias in its determination that sanctions were warranted.