AMERICAN BANKRUPTCY INSTITUTE

2023 Annual Spring Meeting

"Been There, Done That": Preclusion Issues in Bankruptcy

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CONCURRENT SESSION

2023

"BEEN THERE, DONE THAT – HOW PRECLUSION WORKS IN BANKRUPTCY"

Res Judicata (Claim Preclusion)

1) What is Res Judicata?

Background. *Res judicata* prevents litigation of all grounds for, or defenses to, recovery that were previously available to the parties, regardless of whether they were asserted or determined in the prior proceeding. Under *res judicata*, a final judgment on the merits of an action precludes the parties or their privies from relitigating issues that were or could have been raised in that action. By definition, res judicata only applies to new suits and is inapplicable in a continuation of the same suit; the technical rules of preclusion are not strictly applicable in the context of a single ongoing original action. 50 C.J.S. Judgments § 912.

The *res judicata* bar rests on the theory that the party to be precluded has had the incentive and opportunity to litigate the matter fully in the first lawsuit, and that the party to be affected, or some other in privity, has litigated, or had an opportunity to litigate the same matter in a former action in a court of competent jurisdiction, and should not be permitted to litigate it again to the harassment and vexation of the opponent. 50 C.J.S. Judgments § 916.

Policy behind the doctrine. Res judicata serves three fundamental purposes: "(1) it preserves the acceptability of judicial dispute resolution against the corrosive disrespect that would follow if the same matter were twice litigated to inconsistent results; (2) it serves the public interest in protecting the courts against the burdens of repetitious litigation; and (3) it advances the private interest in repose from the harassment of repetitive claims." 50 C.J.S. Judgments § 912. The policies behind res judicata reflect the need to bring litigation to an end, prevent vexatious litigation, maintain the stability of court decisions, promote judicial economy, and prevent double recovery. *Id.*

2) The elements of Res Judicata?

The elements of res judicata are: "(1) the parties are identical or at least in privity; (2) the judgment in the prior action was rendered by a court of competent jurisdiction; (3) the prior action was concluded by a final judgment on the merits; and (4) the same claim or cause of action was involved in both suits." *Comer v. Murphy Oil USA, Inc.*, 718 F.3d 460, 466 (5th Cir. 2013).

Collateral Estoppel (Issue Preclusion)

1) What is Collateral Estoppel?

Background. The doctrine of collateral estoppel, or issue preclusion, "bars a party from relitigating in a second proceeding an issue of fact or law that was litigated and actually decided in a prior proceeding, if that party had a full and fair opportunity to litigate the issue in the prior proceeding and the decision of the issue was necessary to support a valid and final judgment on the merits." *Metromedia Co. v. Fugazy*, 983 F.2d 350, 365 (2d Cir. 1992). Collateral estoppel is available whether or not the second action involves a new claim or cause of action. 18 Fed. Prac. & Proc. Juris. § 4416 (3d ed.).

Collateral estoppel or issue preclusion bars the relitigation of an issue of fact or law that was previously litigated. Stated differently, the "doctrine of collateral estoppel provides that when an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot again be litigated between the same parties in any future lawsuit." 50 C.J.S. Judgments § 998

Collateral estoppel is a common law, judicially created, equitable doctrine. The decision of whether to apply collateral estoppel is within the discretion of the court, and application of the doctrine is determined on a case-by-case basis. The doctrine of collateral estoppel is to be realistically and practically applied to the facts of any given case. The doctrine is flexible, and elastic; it should "not be applied mechanically or hypertechnically, but with realism and rationality." 50 C.J.S. Judgments § 998.

Policy behind the doctrine. The collateral estoppel doctrine is based on the principle that later courts should honor the first actual decision of a matter that has been actually litigated. 18 Fed. Prac. & Proc. Juris. § 4416 (3d ed.). Its purpose is to avoid repeated litigation of matters that were previously judicially determined. Collateral estoppel "preserves the intrinsic purpose of civil courts: conclusive and final resolution of civil disputes." 50 C.J.S. Judgments § 999.

Collateral estoppel, or issue preclusion, is intended to protect litigants from multiple lawsuits and to promote judicial economy and efficiency. It is also meant to encourage reliance on adjudication, promote confidence in judgments, avoid inconsistent results that may undermine the integrity of the judicial system, protect litigants from unnecessary costs and harassment by vexatious litigation, forward the policy of establishing certainty in legal relations, maintain stability of court decisions, and promote comity between state and federal courts. 50 C.J.S. Judgments § 999.

2) The elements of Collateral Estoppel?

The elements of collateral estoppel have been determined by various courts to include the following: (1) that the issue to be precluded is the same as or identical to that disputed in a prior proceeding, (2) that the party against whom the judgment is asserted was a party or in privity with a party to the prior litigation, (3) that the issue was actually litigated in the earlier proceeding, (4) that there was a full and fair opportunity for litigation, (5) that the judgment was on the merits and final, and (6) that the determination of the issue in the prior proceeding was essential or necessary to the final judgment or order. *See, e.g.*, *N.L.R.B. v. Thalbo Corp.*, 171 F.3d 102, 109 (2d Cir. 1999).

Collateral estoppel requires for its application that there be two separate proceedings;[11] it does not apply to decisions in the same case. 50 C.J.S. Judgments § 1000. Further, "it is well settled that a finding made on an issue not necessary to the judgment rendered cannot be used for collateral estoppel purposes in a subsequent action." *Albanese v. Emerson Electric Co.*, 552 F. Supp. 694, 700 (D. Del. 1982). Unlike *res judicata*, collateral estoppel can be invoked in cases that are unrelated to the prior action except for the common issue regarding which preclusion is sought.

3) Examples of Res Judicata and Collateral Estoppel in the Bankruptcy Context?

In re Highland Cap. Mgmt., L.P., 643 B.R. 162 (N.D. Tex. 2022). This case addressed whether the bankruptcy court properly found that principles of collateral estoppel barred a lawsuit brought by DAF and CLO Holdco disputing a settlement reached during the bankruptcy proceedings, when the plaintiffs had voluntarily withdrew their objections during the evidentiary hearing concerning the settlement.

At issue was a settlement reached between Highland Capital and HarbourVest during Highland's bankruptcy case. HarbourVest was a disputed creditor, who asserted a $300 million proof of claim against Highland, and owned an 49.98% equity interest in HCLOF, a Highland-managed investment fund. After Highland Capital and HarbourVest reached a settlement, CLO Holdco (the owner of a 49.02% equity interest in HCLOF) objected to the settlement premised on an alleged right of first refusal. However, CLO Holdco withdrew its objection during the hearing on the settlement, and the bankruptcy court eventually approved the settlement in January 2021.

Prior to the plan effective date, DAF and CLO Holdco Ltd. commenced a lawsuit related to the HarbourVest settlement in the District Court for the Northern District of Texas, naming the debtor and HCLOF as defendants. The complaint alleged several claims relating to the settlement.

Initially, the bankruptcy court found that res judicata did not preclude the clams asserted by plaintiffs in the complaint, because although the claims being brought in the Adversary Proceeding arose from the same "transaction or series of transactions" and are based on the "same nucleus of operative facts" as those that were adjudicated in connection with the settlement, Bankruptcy Rule 9019(a) did not provide the procedural mechanisms to bring the causes of actions asserted in the complaint during the pendency of the HarbourVest Settlement. Unlike in the context of claim objections, where counterclaims can allow the claim objection to be converted through Bankruptcy Rule 3007 to an adversary proceeding, a Bankruptcy Rule 9019 motion does not provide a similar mechanism. Additionally, in considering a settlement, the bankruptcy court is limited to granting or denying a proposed settlement as relief in ruling on a Bankruptcy Rule 9019 motion, regardless of its findings on issues that may also serve for the foundation of the causes of action asserted in the subsequent hearing. By contrast, the bankruptcy court found that collateral estoppel did apply because issues of valuation and a "Right of First Refusal" were the same as those articulated in the Complaint and were "actually litigated" in connection with the HarbourVest Settlement, because those issues were raised in objections and subject to witness testimony settlement hearing.

On appeal, the district court reversed the bankruptcy court's conclusion that collateral estoppel barred plaintiffs' claims but remanded on the judicial estoppel determination. Specifically, the district court credited the bankruptcy court's findings that the issues were identical because CLO HoldCo's objection and DAF's later complaint alleged causes of action involving either the valuation of HCLOF or a right of first refusal. However, the district court did not find that the issues were actually litigated. While the issues of the right of first refusal and the valuation of HCLOF were raised in the Rule 9019 Settlement Hearing, the parties did not fully litigate the

issues as one would at trial during the settlement hearing, and the bankruptcy court did not resolve the issues according to a preponderance of the evidence standard.

The district court determined that the bankruptcy court had erred in its ruling that judicial estoppel barred the claims in the lawsuit and had committed reversable legal error by failing to examine the inadvertence of DAF in asserting inconsistent legal opinions in its determination of whether judicial estoppel applied. DAF had taken inconsistent legal positions in separate proceedings by withdrawing its objections during the settlement hearing in the interpretation of the right of first refusal, but then raising claims raising the opposite argument in their complaint.

In re AMC Investors, LLC, 637 B.R. 43 (Bankr. D. Del. 2022). This case related to claims brought by a pre-petition lender for breach of fiduciary duty and aiding and abetting breaches of fiduciary duty, where the lender had previously sued the debtors and their operating subsidiary in New York state and federal court. The bankruptcy court ultimately found that certain claims were time barred because there was no basis to toll the statute of limitations under Delaware law. However, in so finding, the bankruptcy court also considered issues of res judicata and collateral estoppel, and concluded that each doctrine would bar the adversary proceeding.

In January 2003, AMC Computer entered into a credit agreement with lender Eugenia VI Venture Holdings, Ltd. ("Eugenia") to finance AMC Computer's operations (the "Credit Agreement"), which provided Eugenia with an unconditional guarantee of AMC Computer's obligations under the Credit Agreement. In May 2005, after the revelation of potential accounting misstatements, Eugenia declared a default under the Credit Agreement, putting AMC Computer out of business.

Eugenia filed lawsuits in New York state and federal courts against various individuals and entities involved with AMC Computer, including the Debtors. These lawsuits included a lawsuit in New York state court in 2005, where Eugenia received a $10.7 million judgment, and later, seven related suits in New York federal court in 2006. In September 2008, while the debtors' appeal of the New York state court ruling was pending, Eugenia filed involuntary petitions against the Debtors in the Delaware bankruptcy court. Eugenia thereafter obtained derivative standing from the bankruptcy court to sue derivatively on the Debtors' behalf.

In June 2011, Eugenia filed an adversary proceeding on the Debtors' behalf (the "Plaintiffs") for breach of fiduciary duty and aiding and abetting fiduciary duty against certain defendants that were officers, directors, and/or shareholders of AMC Computer and controlled both the Debtors and AMC Computer (the "Defendants"). The Defendants raised the affirmative defenses of statute of limitations, res judicata, and collateral estoppel. The Plaintiffs then filed a motion seeking summary judgment on Defendants' affirmative defenses. The bankruptcy court issued an opinion denying Plaintiffs summary judgment, finding that certain facts supported the Defendants' affirmative defenses and genuine issues of material fact on other issues.

On appeal, the Delaware district court reversed and remanded on "extremely limited" grounds relating to the statute of limitations defense. The Defendants then filed a summary judgment motion in the bankruptcy court on their threshold affirmative defenses.

On remand, the bankruptcy court found that *res judicata* barred the claims. In doing so, the bankruptcy court applied New York law (because New York is the state where the court that rendered the first judgment sat). Specifically, the court found that the elements of *res judicata* were satisfied:

- Earlier decision was a final judgment on the merits and the claims raised were the same: In a 2015 decision, the bankruptcy court had previously found that two elements of the *res judicata* test were satisfied, because the Second Circuit's affirmance of the federal court's grant of summary judgment in the prepetition AMC Computer litigation constituted a final judgment on the merits. In addition, the 2015 decision had found that "the prior and present actions clearly arise out of the same transaction." These findings were now "law of the case," thus satisfying the third prong.

- Privity: The only remaining issue with respect to *res judicata* was whether the element of privity was met. Privity was at issue because the actual plaintiffs in the adversary proceeding were the Debtors, even though Eugenia brought the action derivatively on their behalf. The plaintiffs in the prior lawsuits were Eugenia directly and AMC Computer derivatively through Eugenia. The bankruptcy court used the "alternative test" for privity under New York law, which centers on whether a party, though not formally involved, nevertheless exercised control over the earlier litigation, and found that it was clear that Eugenia controlled both the previous and current litigation, thus satisfying the alternative test of privity.

Separately, the bankruptcy court held that the doctrine of collateral estoppel barred plaintiffs from relitigating the issue of the timing of AMC Computer's insolvency, which was fatal to the breach of fiduciary duty claims. If AMC Computer was already insolvent when it entered into the Credit Agreement, Eugenia would be unable to demonstrate that the Defendants' mismanagement rendered the company insolvent or caused Eugenia's damages. As to the first element of collateral estoppel, the bankruptcy court noted that the New York district court made a factual finding that AMC Computer was insolvent at the relevant time and that this finding was "actually determined" and "necessary" to the court's dismissal of Eugenia's breach of fiduciary duty claims. The court also found that the Plaintiffs had a full and fair opportunity to litigate the issue of AMC Computer's insolvency, relying on discovery revealing that the same party and counsel that controlled the adversary proceeding also controlled the prior litigation, as well as the court's findings that the significant amount of money involved in the New York action ensured there was a "vigorous fight on the issue of liability" and that the same factual allegations in this proceeding were at the center of previous litigation. The court also found that there was privity, following the same analysis as under the res judicata analysis.

In re RTI Holding Company, LLC, Case 20-12456-JTD (Bankr. D. Del. Oct. 27, 2021), Dkt. No. 1798. This case related to a complaint filed in Tennessee by BNA Associates, LLC ("BNA Associates") against Goldman Sachs Specialty Lending Group, L.P. ("GS"), a prepetition and DIP lender, of debtor Ruby Tuesday Inc. ("RTI"), asserting claims arising out of the sale of one of RTI's leasehold interests that was negotiated prepetition and never consummated.

RTI had owned a leasehold interest in a former residence, restaurant, and corporate retreat and the surrounding 7.25-acre property located in Tennessee. BNA Associates and RTI negotiated

and executed an asset purchase and sale agreement (the "PSA") where BNA Associates would acquire RTI's Leasehold Interest in the property through December 31, 2070, for $5.25 million, subject to the consent of the property owner and RTI's secured lender, GS. The closing of the transaction under the PSA was delayed due to the COVID-19 pandemic. While the property owner consented to the transaction, GS's consent was still needed.

RTI filed for bankruptcy before GS gave their consent. After the filing, RTI sent a letter to BNA Associates officially advising them that GS had not consented to the Proposed BNA Sale. RTI told BNA Associates that the Proposed BNA Sale could no longer take place, and BNA Associates could only acquire the property through the auction to be conducted in the bankruptcy. During the auction process, BNA Associates submitted a binding bid of $5.3 million for the property. However, the Debtors determined that the BNA Bid was not a qualified bid pursuant to the terms of their bidding procedures. The Debtors then filed a notice of cancellation of the auction.

The Debtors pursued reorganization and filed their amended disclosure statement and plan on December 21, 2020. BNA Associates then filed an objection to the plan alleging impropriety in the auction process and claiming that the plan was not proposed in good faith. After discovery, BNA Associates withdrew their objection prior to the confirmation hearing. The bankruptcy court then entered the confirmation order. The plan went effective on February 2021. GS received 100% equity in the property and retained the property through its subsidiary, Reorganized RTI.

A few months after the plan effective date, BNA Associates filed an action in Tennessee seeking damages from GS based on GS's alleged intentional interference with business relationships prior to the commencement of the Chapter 11 cases. BNA Associates claimed that GS was not acting in good faith and that GS "improperly used its position as [RTI's] lender to refuse to consent to [RTI's] sale of its leasehold interest to BNA Associates." In response, GS argued that the complaint was an impermissible collateral attack on the court's confirmation order, and the confirmation order barred BNA Associates' claims under the doctrines of res judicata and collateral estoppel. GS argued that the bankruptcy court's determination that all parties negotiated the plan in good faith negated any finding that they acted in bad faith. GS filed a motion for entry of an order to enforce the Order Confirming the Debtors' Second Amended Chapter 11 Plan, to which BNA Associates objected.

The bankruptcy court found that the Tennessee action was not an impermissible collateral attack on the plan because the plan objection was about the conduct of the Debtors regarding the auction, while BNA Associates' complaint related to the debtors' prepetition conduct. The bankruptcy court rejected GS's argument that the transfer of the property pursuant to the plan should be afforded the same protections as a § 363 sale and also noted that BNA Associates was not a releasing party under the plan or confirmation order. The Tennessee Action was a suit between a third party and non-debtor of the original bankruptcy case and did not involve a fight over any of the assets of the bankruptcy estate.

The bankruptcy court then found that res judicata principles did not bar BNA Associates' Tennessee action. The court found that BNA Associates' objection to the plan did not deal with the prepetition conduct that was the subject of the Tennessee action, and did not relate to any of

the actions taken in the bankruptcy case. Additionally, the Tennessee action would not affect the administration of the bankruptcy estate, would not alter any of the terms of the Plan, and would not modify the confirmation order in any way. The bankruptcy court also found that claims arising from the prepetition conduct of two non-debtors did not fall within the bankruptcy court's jurisdiction, so that BNA Associates did not have any obligation to bring their state law claim against GS in the bankruptcy proceedings.

The bankruptcy court also found that collateral estoppel was not a bar to the Tennessee action. The court found that BNA Associates' Tennessee action raised different issues that the plan objection never raised (prepetition conduct vs impropriety in the auction process). Additionally, that issue was never actually litigated and determined by a final and valid judgment, because the bankruptcy court never decided whether GS's prepetition conduct was proper. Even if there was a final and valid judgment about GS's prepetition conduct, the court found that this determination would not be essential to the prior judgment because it would not affect the bankruptcy estate or modify the confirmation order.

Judicial Estoppel

1) What is Judicial Estoppel?

Background. Judicial estoppel is a common law doctrine that prevents an individual from taking a position contrary to a position the party took in an earlier legal proceeding. "As a general matter, the doctrine of judicial estoppel prevents a litigant from pressing a claim that is inconsistent with a position taken by that litigant either in a prior legal proceeding or in an earlier phase of the same legal proceeding." *See Alt. Sys. Concepts, Inc. v. Synopsys, Inc.*, 374 F.3d 23, 33 (1st Cir. 2004).

The doctrine of judicial estoppel is designed to prevent parties from obtaining unfair advantage on opposing parties in subsequent proceedings. Essentially, "[t]he doctrine's primary utility is to safeguard the integrity of the courts by preventing parties from improperly manipulating the machinery of the judicial system." *Alt. Sys. Concepts, Inc.*, 374 F.3d at 33. The doctrine is often invoked when a court previously accepted a party's earlier position and the later position clearly contradicts it. This doctrine has been referred to as the "doctrine of preclusion of inconsistent positions." *In re Hoopai*, 581 F.3d 1090, 1097 (9th Cir. 2009) (internal citations omitted).

Policy behind the doctrine. The policy arguments in applying the doctrine can include preventing internal inconsistency, precluding litigants from playing "fast and loose" with the courts, preventing and precluding parties from concealing assets, and preventing parties from intentionally changing positions.

Equitable doctrine. The Supreme Court has explained that "judicial estoppel is an equitable doctrine invoked by a court at its discretion." *New Hampshire v. Maine*, 532 U.S. 742, 750, 121 S. Ct. 1808, 149 L.Ed.2d 968 (2001) (internal citations omitted); *see also Browning Mfg. v. Mims (In re Coastal Plains, Inc*.), 179 F.3d 197 (5th Cir. 1999) (discussing that judicial estoppel is an equitable doctrine within the court's discretion). The doctrine is fact specific by nature and there

is no "mechanical test." In addition, the doctrine is sometimes described as having "hazy" counters. *Alt. Sys. Concepts, Inc.,* 374 F.3d at 33.

2) The elements of Judicial Estoppel?

There is no mechanical test for determining the applicability of judicial estoppel and the application turns on the facts, but its generally agreed two conditions must be satisfied for the doctrine to apply: (i) the position of the party to be estopped is *clearly inconsistent* with its prior position; *and* (ii) such party must have *convinced a court* to accept its prior position. *Alt. Sys. Concepts, Inc.*, 374 F.3d at 33 (emphasis added).

Although these two core factors are widely agreed by the courts as being necessary for satisfying judicial estoppel, if the core requirements are satisfied, "additional considerations" can also inform the doctrine's application. The additional considerations include things like, "[a]bsent an estoppel, would the party asserting the inconsistent position derive an unfair advantage from it?" And, "[r]elatedly, courts often inquire as to whether judicial acceptance of a party's initial position conferred a benefit on that party." *Id.*

A critical aspect is that the doctrine is a discretional doctrine. The Supreme Court has held that there is no "inflexible prerequisites… or exhaustive formula[s] for determining the applicability of judicial estoppel." *New Hampshire*, 532 U.S. at 751; s*ee also Brooks v. Beatty*, No. 93-1891, at *2, 25 F.3d 1037 (1st Cir. May 27, 1994) ("Judicial estoppel is an equitable device which does not lend itself to reflexive application.").

3) Examples in the bankruptcy context?

In re Mary E Buscone, 61 F. 4th 10 (1st Cir. 2023).

> *"A tale as old as commerce: Two friends, next door neighbors in fact, enter, and exit, business together, leaving behind unmet expectations and financial acrimony. Sprinkle in a default judgment or two, alongside a tortured discovery dispute, and we reach today's appeal." Id. at*1.*

The debtor and creditor conducted business together – both ended up in bankruptcy, but in different years. The creditor (the "judgment creditor") experienced her own chapter 7 bankruptcy filing years before the debtor but failed to list any claims against the debtor. The judgment creditor received a chapter 7 discharge. After the judgment creditor's bankruptcy case concluded, the judgment creditor sued the debtor in state court, but for reasons unknown the debtor failed to respond and that resulted in a default judgment of $91,673.45. Soon thereafter, the debtor then filed her own chapter 7 case and in that case the debtor listed on her schedules the default judgment. In the debtor's bankruptcy, the judgment creditor filed an adversary proceeding seeking a declaration that the default judgment was non-dischargeable.

The debtor then filed a motion for summary judgment ("MSJ") and claimed that the judgment creditor's failure to schedule the claim on her own prior bankruptcy schedules in her previous chapter 7 case prevented the judgment creditor from pursuing the judgment claim and asserting non-dischargeability. The bankruptcy court denied the MSJ. The judgment creditor filed a

motion to compel discovery and the bankruptcy court authorized the judgment creditor to serve discovery requests. The debtor failed to timely respond to these discovery requests and the bankruptcy court thus deemed any objections to the requests waived. The bankruptcy court ultimately entered a default judgment against the debtor. The debtor first sought reconsideration (denied) and then appealed. The First Circuit BAP affirmed the bankruptcy court. The debtor appealed again.

The First Circuit denied the debtor's appeal. Although declining to espouse a bright line rule whether a court is obliged to create an "exception" to judicial estoppel, the First Circuit held that the bankruptcy court did not abuse its discretion in denying the MSJ. The First Circuit emphasized that judicial estoppel is an inherently fact specific inquiry that isn't subject to a bright line test, rather "factual circumstances drive the [judicial] estoppel analysis, and [] declining to apply judicial estoppel might be reasonable in those instances where further factual development will better inform the ultimate decisions, and where it is not immediately clear that estoppel would advance the doctrine's primary purpose of safeguarding the integrity of the courts." *Id.* at 26.

The First Court noted that, although the debtor demonstrated the minimum requirements for judicial estoppel, she did not demonstrate how, as a matter of law, the circumstances favored the court exercising its discretion to apply judicial estoppel to the judgment creditor's claims.

The First Court cited the *Brooks v. Beatty* case as a comparable judicial estoppel case in the bankruptcy context where the bankruptcy court declined to apply judicial estoppel at the summary judgment stage. The court in *Brooks v. Beatty* held that:

> [a]n examination of the evidence adduced on summary judgment below indicates that [the defendant] established a genuine issue of material fact concerning her bona fides in failing to schedule . . . an asset in her chapter 7 case . . . . [B]ecause the issue arose on summary judgment we must credit the . . . affidavit as a plausible basis for . . . a possible defense against a finding of bad faith. The conflicting evidentiary signals simply illustrate that the judicial estoppel issue was inappropriate for summary disposition under Rule 56.[1]

"Like in *Brooks*, here we affirm that the bankruptcy court was not required to resolve the estoppel issue -- which, as the bankruptcy court put it, 'involv[es] considerable judicial discretion'-- at summary judgment on the facts that were presented below." *In re Mary E Buscone,* 61 F. 4th, at 26-27.

In re 78-80 St. Marks Place LLC, 648 B.R. 505 (Bankr. S.D.N.Y. 2023). Chapter 7 trustee brought an adversary proceeding against sole member and owner of the debtor and some other parties, seeking, among other things, turnover of estate property. One of the issues in the case was "whether the defendants should be judicially estopped from asserting the existence of any leases for the Property." *Id.* at 520. The bankruptcy court noted that there was an inconsistency

[1] *Brooks v. Beatt*y, No. 93-1891, 1994 WL 224160, at *2 (1st Cir. May 27, 1994) ("Judicial estoppel is an equitable device which does not lend itself to reflexive application.").

in positions: "[i]n this proceeding, the Defendants claim that there are multiple leases in existence, and that those leases are rent-controlled. The Trustee claims that this is entirely inconsistent with the representations Defendants agreed to in the Forbearance Agreement and the Consent Order." *Id.* The bankruptcy court held that judicial estoppel applied with respect to the defendants' assertions regarding the existence of the leases, having failed to list leases on the schedules and failed to previously disclose leases. The bankruptcy court in applying judicial estoppel held that the defendants "plainly seek an unfair advantage here and cannot seriously argue that the equities tip in their favor." *Id.* at 523. The bankruptcy court also noted that "refusing estoppel here would provide Defendants 'an opportunity to 'play [ ] fast and loose' with the requirements of the bankruptcy process and inject an unacceptable level of uncertainty into its results—exactly the result that the doctrine of judicial estoppel is intended to avoid.'" *Id.*

In re Raza, No. 21-12075, 2022 WL 2348789 (Bankr. E.D. Va. June 29, 2022). The debtor did not initially disclose a certain bank account on his schedules. The chapter 7 trustee learned of the bank account and filed a turnover motion. The debtor maintained that the funds were not property of his bankruptcy estate. The bankruptcy court rejected the debtor's position and ordered the funds to be turned over to the trustee. The debtor then later claimed the funds were exempt. The trustee argued that the debtor was judicially estopped from changing his position. The bankruptcy court found that because the court had not adopted the debtor's position that the funds were not property of the estate, judicial estoppel did not apply.

Smith v. Haynes & Haynes P.C., 940 F.3d 635 (11th Cir. 2019). Chapter 13 bankruptcy plaintiff Jenny Smith sued former employer (law firm) alleging claims for unpaid overtime / retaliation under the Fair Labor Standards Act. Smith began employment at the firm after she filed a chapter 13 petition. On her bankruptcy filings, Smith claimed she had no claims that might prompt a lawsuit. While the disclosure was true when she filed for bankruptcy (*i.e*. prior to her employment), she failed to correct her bankruptcy filings when she realized she had a claim against the firm. The district court granted summary judgment for the employer on the overtime claim relying on the judicial estoppel defense. The Eleventh Circuit reversed summary judgment on judicial estoppel grounds and cited a seminal case, *Slater v. U.S. Steel Corp.*, 871 F. 3d 1173 (11th Cir. 2017) (Slater II), for the proposition that courts must apply "all the facts and circumstances" standard to determine the plaintiff's intent when she omitted her claims in the bankruptcy petition as opposed to relying on the pre-Slater II allowed presumption that failing to disclose the claim on the bankruptcy schedules implied a motive to deceive (*i.e.* establishing a basis for judicial estoppel). In *Smith*, the Eleventh Circuit claimed it was "far from clear" that Smith failed to amend the petitions in bad faith since she denied any motive to deceive the court and could potentially have been unaware of the requirement to update bankruptcy filings when learning of the post-petition claims. The *Smith* case also held that the district court erred in granting judicial estoppel due to inconsistencies between Smith's initial and amended complaint, noting that the inconsistent statements regarding when Smith learned of her claims against the employer were not illustrative of an intent to deceive.

Oneida Motor Freight, Inc. v. United Jersey Bank, 848 F.2d 414 (3d. Cir. 1988). Judicial estoppel barred a former chapter 11 debtor from prosecuting bank claims not disclosed during the bankruptcy proceedings. The excuse for nondisclosure was *not* lack of knowledge; instead, the debtor asserted that the bankruptcy case was never in a procedural posture for the claims to be properly asserted. Although the court stopped short of holding that the nondisclosure was

equivalent to taking a position that the claims did not exist, it concluded that the debtor's acknowledgment of its debt to the bank on the schedules, without any indication that the debt was disputed or subject to setoff (as is the situation here), constituted a position inconsistent with its later action against the bank.

Payless Wholesale Distribs., Inc. v. Alberto Culver (P.R.) Inc., 989 F.2d 570 (1st Cir. 1993). In the bankruptcy, the debtor did not disclose any claims. After the bankruptcy discharge, the debtor brought a racketeering, antitrust and fraud suit. The court held that the debtor obtained its bankruptcy relief on the representation it had no monetary claims and that a debtor who obtained judicial relief "on the representation that no claims existed, cannot now resurrect them and obtain relief on the opposite basis." As the court stated: [t]he basic principle of bankruptcy is to obtain a discharge from one's creditors in return for all one's assets, except those exempt, as a result of which creditors release their own claims and the bankrupt can start fresh. Assuming there is validity in Payless's present suit, it has a better plan. Conceal your claims; get rid of your creditors on the cheap, and start over with a bundle of rights. This is a palpable fraud that the court will not tolerate, even passively." *Id. at* 571.

The role of good-faith/presumption of bad-faith. Judicial estoppel is not always "automatic" and "good faith" may (but does not always) "excuse" a party from the application of judicial estoppel. *See, e.g., In re Buscone*, 634 B.R. 152, 169-70 (1st Cir. BAP 2021) (discussing the "good faith defense"). In discussing the "good faith defense," the First Circuit BAP noted that "several circuits have recognized a good faith defense to judicial estoppel." *Id.* at 170 (discussing Fifth, Sixth and Eleventh Circuit cases) (internal citations omitted). The "good faith defense" is an exception or defense to judicial estoppel whereby individuals who "fail to identify a legal claim in bankruptcy schedules may escape the application of judicial estoppel if they can show that they 'either lack[ed] knowledge' of the undisclosed claims or ha[d] no motive for their concealment." *See Guay v. Burack*, 677 F.3d 10, 20 n.7 (1st Cir. 2012). In *Guay,* the Court noted that the "[w]e [the First Circuit] have never recognized such an exception and have noted that deliberate dishonesty is not a prerequisite to application of judicial estoppel." *Id.*

Scienter / intentionality requirements in the application of the judicial estoppel vary among the courts. *See, e.g., Bankruptcy: Splits of Authority Among Circuit, District, and Bankruptcy Courts Tracker, Practical Law Practice Note Overview* (discussing that the 5th and 10th Circuits "adopt the view that that there is a presumption of bad faith regardless of the party's intent, "but also discussing that the 4th, 9th and 11th Circuits "reject the presumption of bad faith to assert judicial estoppel"); *see also Browning Mfg. v. Mims (In re Coastal Plains, Inc.)*, 179 F.3d 197, 210 (5th Cir. 1999) (finding that "[o]ur review of the jurisprudence convinces us that, in considering judicial estoppel for *bankruptcy cases*, the debtor's failure to satisfy its statutory disclosure duty is 'inadvertent' only when, in general, the debtor either lacks knowledge of the undisclosed claims *or* has no motive for their concealment"), cert. denied, 528 U.S. 1117 (2000); *see also Eastman v. Union Pac. R.R. Co.,* 493 F.3d 1151, 1157-60 (10th Cir. 2007) (finding the debtor had "a motive to sweep his personal injury action 'under the rug'" and that "[a] discharge in bankruptcy is sufficient to establish a basis for judicial estoppel"); *see also Slater v. U.S. Steel Corp.*, 871 F.3d 1174, 1189 (11th Cir. 2017) (en banc) (discussing that the district court should consider all the facts and circumstances in determining whether the omission of a claim in a bankruptcy filing was intended to "make a mockery of the judicial system" and holding that "district courts should consider all the facts and circumstances of the case to determine whether

the debtor had the requisite intent"); *White v. Wyndham Vacation Ownership, Inc.*, 617 F.3d 472, 481 (6th Cir. 2010) (finding that the evidence did not show an absence of bad faith or that the "omission resulted from mistake or inadvertence").

For some courts one of the critical factors in analyzing bad faith is an examination of the debtor's intentions underlying the prior omission. Examples include considering an omission inadvertent only if the debtor neither knew about the claim nor had motive to conceal it, or attaching a presumption of bad faith if the debtor had such knowledge or motive. *See, e.g., Krystal Cadillac-Oldsmobile GMC Truck, Inc. v. Gen. Motors Corp.*, 337 F.3d 314, 321 (3d Cir. 2003) ("a rebuttable inference of bad faith arises when averments in the pleadings demonstrate both knowledge of a claim and a motive to conceal that claim in the face of an affirmative duty to disclose"); *see also In re Coastal Plains, Inc.*, 179 F.3d 197, 210 (5th Cir. 1999) (discussed above); *compare Martineau v. Wier,* 934 F.3d 385, 393 (4th Cir. 2019) (finding that "[t]he inquiry into bad faith is central to the judicial estoppel question, but it is not the only consideration").

However, the ability to escape judicial estoppel under an objective approach may be somewhat illusory, as a debtor generally is viewed as having a motive to conceal a claim from the bankruptcy court in order to shield it from creditors. *See Ah Quin v. Cnty. of Kauai Dep't of Transp.*, 733 F.3d 267, 271 (9th Cir. 2013) (noting that the common "interpretation of 'inadvertence' is narrow in part because the motive to conceal claims from the bankruptcy court is, as several courts have explained, nearly always present"); *see also Payless Wholesale Distribs., Inc. v. Alberto Culver (P.R.) Inc.,* 989 F.2d 570, 571 (1st Cir.1993) ("Conceal your claims; get rid of your creditors on the cheap, and start over with a bundle of rights. This is a palpable fraud that the court will not tolerate, even passively.").

The Rooker-Feldman Doctrine

1) What is the Rooker-Feldman doctrine?

Background. The *Rooker-Feldman* doctrine is one of several doctrines which enforces comity between state and federal courts. The doctrine takes it name from two Supreme Court cases: *District of Columba Court Appeals v. Feldman*, 460 U.S. 462 (1983) and *Rooker v. Fidelity Tr. Co.*, 263 U.S. 413 (1923). "Together, those cases stand for the proposition that lower federal courts lack subject matter jurisdiction to sit in appellate review of state court judgments." *See In re Lindsay*, No. 20-10339, 2021 WL 278317, at *4 (Bankr. S.D.N.Y. Jan. 27, 2021).

"R*ooker–Feldman* is not a constitutional doctrine, but arises out of negative inferences drawn from two statutes: 28 U.S.C. § 1331, which establishes the district court's 'original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States,' and 28 U.S.C. § 1257, which allows Supreme Court review of '[f]inal judgments or decrees rendered by the highest court of a State in which a decision could be had.'" *In re Rinegard-Guirma*, No. 22-03057, 2023 WL 2314696, at *1 (Bankr. D. Or. Mar. 1, 2023) (internal citations omitted).

Policy behind the doctrine. Under the *Rooker-Feldman* doctrine, "district courts are courts of original, not appellate, jurisdiction," and they "have 'no authority to review the final

determinations of a state court in judicial proceedings." *See Gruntz v. County of Los Angeles (In re Gruntz)*, 202 F.3d 1074, 1078 (2000), quoting *Worldwide Church of God v. McNair*, 805 F.2d 888, 890 (9th Cir. 1986); *see also* 28 U.S.C. §1331 (providing that federal district courts are courts of original jurisdiction); 28 U.S.C. §1257 (1999)*; see also In re Glass*, 240 B.R. 782, 785 (Bankr. M.D. Fla. 1999).

In sum, the *Rooker-Feldman* doctrine bars "cases brought by state-court losers complaining of injuries caused by state court judgments rendered before the district court proceedings commenced and inviting district court review and objection to those judgments." *Exon Mobil Corp. v. Saudi Basic Indus. Corp*., 544 U.S 280, 28 (2002).

Jurisdictional doctrine. The Supreme Court has cautioned against applying the *Rooker-Feldman* doctrine too broadly. *In re Lowry*, No. 20-1712, 2021 WL 6112972, at *3 (6th Cir. Mar. 2021) (citing *Lance v. Dennis*, 546 U.S. 459, 464 (2006) (describing that "[n]either *Rooker* nor *Feldman* elaborated a rationale for a wide-reaching bar on the jurisdiction of lower federal courts, and our cases since *Feldman* have emphasized the narrowness of the *Rooker-Feldman* rule.")). The *Rooker-Feldman* doctrine is a "narrow jurisdictional doctrine" that "simply establishes that a party who loses a case in state court cannot appeal that loss in a federal district court." *Behr v. Campbell,* 8 F.4th 1206, at *1 (11th Cir. 2021).

2) The elements of the Rooker-Feldman doctrine?

The *Rooker-Feldman* doctrine involves cases brought by state-court litigants complaining of injuries caused by state-court judgments rendered before district court proceedings commenced and inviting district court review and rejection of those judgments. *In re Lowry*, No. 20-1712, 2021 WL 6112972, at *8-9 (6th Cir., Dec. 27, 2021).

Four-part test. Applicative involves a four-part test: (i) federal Plaintiff lost in state court; (ii) Plaintiff complains of injuries caused by state court judgment; (iii) Judgment was rendered before federal suit was filed; and (iv) Plaintiff invites the federal court to review and reject the state court judgment. *Exxon Mobil Corp. v. Saudi Basic Indus. Corp.*, 544 U.S. 280, 287 (2005); *see also In re: NLG, LLC*, No. 21-11269, 14-15 (Bankr. D. Del. 2022) [ECF 147] (citing *Cardillo v. Neary*, 756 F. App'x 150, 154 (3d Cir. 2018)); *see also In re Pearson,* No. 18-10502, 2023 WL 234579, at *3 (Bankr. D. Del., Jan. 17, 2023).

The main inquiry is whether the "source of the plaintiff's injury is the state-court judgment itself." *In re West,* No. 21-31047, 2022 WL 1309939, at *4 (Bankr. E.D. Mich., May 2, 2022) (citing *VanderKodde v. Mary Jane M. Elliott, P.C.*, 951 F. 3d 397, 400, 402 (6th Cir. 2020)); *see also See Washington v. Wilmore*, 407 F.3d 274, 285 n.3 (4th Cir. 2005); *Hoblock v. Albany Cnty. Bd. of Elections*, 422 F.3d 77 (2d Cir. N.Y. 2005); *Reusser v. Wachovia Bank, N.A.*, 525 F.3d 855, 858 (9th Cir. 2008).

At its core, the *"Rooker–Feldman* doctrine asks: is the federal plaintiff seeking to set aside a state judgment, or does he present some independent claim, albeit one that denies a legal conclusion that a state court has reached in a case to which he was a party? If the former, then the district court lacks jurisdiction; if the latter, then there is jurisdiction and state law determines whether the defendant prevails under principles of preclusion." *GASH Associates v. Village of Rosemont, Ill.*, 995 F.2d 726, 727 (7th Cir. 1993).

3) Examples in the bankruptcy context?

In re Lowry, No. 20-1712, 2021 WL 6112972 (6th Cir. Dec. 27, 2021). In 2017, the state court entered a tax foreclosure judgment against Lowry's home. The home was sold at auction to the city for $14,496, which was the amount of the unpaid property taxes. Lowry filed a chapter 13 bankruptcy petition in 2018. He then filed an adversary complaint to avoid the tax foreclosure sale of his home as a constructive fraudulent conveyance under section 548 of the Bankruptcy Code. According to the complaint, Lowry's home was worth $152,000 at the time of the foreclosure.

The bankruptcy court, among other things, found that Lowry was attempting to relitigate the foreclosure proceedings which mandated dismissal based on the *Rooker-Feldman* doctrine. The court also concluded that *BFP v. Resolution Trust Corp.*, 511 U.S. 531 (1994) applied (that is, that the price received in a mortgage foreclosure establishes a "reasonably equivalent value" of the property for purposes of section 548).

The district court on appeal agreed that *Rooker-Feldman* applied and affirmed the judgment of the bankruptcy court on that basis. The Sixth Circuit reversed and remanded, holding that the *Rooker-Feldman* doctrine did not apply because "this appeal does not involve a review of the merits" of the court judgment. *See In re Lowry,* 2021 WL 6112972, at *3-4. The Court found that: "Lowry's alleged injury in this case is not the state court foreclosure judgment, but instead is the fact that he could not use § 548 to avoid the foreclosure as a fraudulent transfer. Although the § 548 issue is closely related to the state foreclosure judgment, that by itself does not mean that *Rooker-Feldman* applies." *Id.* In addition, the Court noted that: "We can assume that the state court reached a proper foreclosure judgment, and then independently decide whether the foreclosure could be avoided as a fraudulent transfer under § 548." *Id.*

Philadelphia. Entm't & Dev. Partners LP v. Commonwealth of Pa. Dept. of Rev. (In re Phila. Entm't & Dev. Partners LP), 879 F.3d 492 (3d Cir. 2018). The debtor (gaming business owner) operated slot machines and obtained slot machine state license. Before commencing a chapter 11 case, state gaming entity rescinded license due to debtor's failure to meet certain requirements. Debtor appealed revocation order in state court but lost the appeal. After debtor's chapter 11 plan was confirmed, and a liquidation trust was established, the liquidation trustee initiated an adversary proceeding to avoid the revocation of the slot machine license as a constructively fraudulent transfer. The bankruptcy court relied on the *Rooker-Feldman* doctrine to dismiss trustee's lawsuit, finding that it lacked subject matter jurisdiction.

On appeal, the Third Circuit reversed the lower courts' rulings and remanded. Relying on *Exxon Mobile*, the Third Circuit held that if a federal court lawsuit doesn't pertain to "the bona fides of the prior judgment" the federal court "is not conducting appellate review, regardless of whether compliance with the second judgment would make it impossible to comply with the first judgment." *Id.* at 500. Third Circuit also held that the bankruptcy court applied *Rooker-Feldman* too extensively in holding fraudulent transfer claims necessitated federal court to void state court orders. The Third Circuit noted that the liquidation trustee was not complaining of an injury caused by state court judgment, thereby not seeking review of said state court judgment. The trustee's fraudulent transfer claims did not oblige the bankruptcy court to undergo appellate review of the state court order that rescinded gaming license. Accordingly, the Third Circuit held "a federal court can address the same issue 'and reach[] a conclusion contrary to a judgment by the first court,' as long as the federal court does not reconsider the legal conclusion reached by the state court." *Id.* 501-02.

NLG, LLC v. Horizon Hospitality Group, LLC (In re Hazan), 10 F.4th 1244 (11th Cir. 2021).

Background. The facts in this case are convoluted and a bit obscure but the following is some of the essentials. In 2006, NLG sold a Florida home to the Hazan ("the debtor") for $5.1 million, taking back a note and mortgage to secure the purchase price. NLG sued the debtor on the note in 2007 in Florida state court (the "2007 Action"). The result was a default money judgment for NLG against the debtor for about $1.6 million (the "2007 Money Judgment"). In 2011, NLG sued the debtor again in Florida to foreclose on the mortgage, but in 2014 the Florida court found that by seeking a money judgment in the earlier action NLG had elected its monetary remedy instead of foreclosure and therefore was limited to enforcing the 2007 Money Judgment. NLG appealed this ruling (the "Election Judgment") to a Florida appellate court. In the meantime, in 2012 a third party obtained an unrelated $5 million judgment in New York state court against NLG (the "Third Party Judgment"). Selective, also a stranger to the situation, acquired the Third Party Judgment and recorded it against NLG in a Florida state court action (the "Selective Action"). That Florida court issued an order (the "Assignment Order") assigning the 2007 Judgment and all of NLG's rights against the debtor to Selective in partial satisfaction of the Third Party Judgment. Subsequently, in the Selective Action against NLG, Selective recorded a satisfaction of NLG's 2007 Money Judgment against the debtor as partial satisfaction of the $5 million Third Party Judgment against NLG it had acquired from the third party in New York.

The Florida appeal's court granted the NLG's appeal of the Florida Election Judgment. On remand, the Florida court entered a foreclosure judgment (the "Foreclosure Judgment") for NLG against the debtor even though NLG's rights against the debtor had been assigned by the other Florida court to Selective by the Assignment Order in the Selective Action. The Foreclosure Judgment also found that NLG had a remaining claim against the debtor for $4.8 million, setting the underlying property for foreclosure sale on January 12, 2016 to satisfy the residual $4.8 million debt. Selective tried unsuccessfully to intervene in these proceedings.

The bankruptcy filing. On January 11, 2016, the day before the scheduled foreclosure sale, the debtor filed a chapter 11 case in the bankruptcy court in Florida. After NLG filed a proof of claim (the "NLG Claim") based on its 2007 Money Judgment and subsequent Foreclosure Judgment, Selective filed an adversary proceeding against NLG in the bankruptcy case

contesting the NLG Claim based upon the Assignment Order in the second Florida case. In its ruling in the adversary proceeding (the "Bankruptcy Judgment") the bankruptcy court found the debtor had in effect exercised her right to redeem the property from foreclosure and that, as a result of the rulings in the Selective Action, Selective had applied NLG's claims from the 2007 Action and the Foreclosure Action to the Third Party Judgment it had bought in New York, at one and the same satisfying NLG's claims against the debtor, stripping NLG of any rights against the debtor. The debtor then proceeded to confirm a plan of reorganization without objection by NLG. NLG chose instead to appeal the Bankruptcy Judgment to the district court on the grounds, *inter alia*, that the bankruptcy court's decision violated the *Rooker-Feldman* doctrine.

The appeal. The district court affirmed the bankruptcy court, and NLG appealed to the Eleventh Circuit. The Court of Appeals for the Eleventh Circuit affirmed the district court dismissing the appeal. As it relates to the *Rooker-Feldman* doctrine, first, the Court of Appeals noted that the parties in the state court foreclosure action and the bankruptcy case were not the same (Selective was not a party to the state court proceedings). Second, the Court of Appeals found that bankruptcy court did not purport to review the Florida Foreclosure Judgment. Neither of the two plaintiffs in the adversary proceeding, the debtor and Selective, asked the bankruptcy court to overturn the various state court decisions. Rather, the bankruptcy court sought to apply and harmonize those decisions, not reverse them. In short, the bankruptcy court's judgment on its face did not implicate a *Rooker-Feldman* issue.

In re NLG, LLC, No. 21-11269, 2023 WL 2055344 (Bankr..D. Del., Feb. 16, 2023). Involuntary chapter 7 filed against NLG. The dispute relates to the same property addressed in the case above. Creditor was seeking cancellation of debt caused by earlier judgment. The bankruptcy court found it lacked subject matter jurisdiction under the *Rooker-Feldman* doctrine. The bankruptcy court held that "at the heart of [] request is for this Court to reevaluate, cancel, or change the [prior] Judgment, which this Court cannot do. There is a final, non-appealable judgment from the New York state court that this Court cannot simply 'cancel' or 'undo.' *Id*. at 9.

In re Beardslee, 209 B.R. 1004 (Bankr. D. Kan. 1997). As part of a divorce, the (ex) husband was awarded marital residence and was assigned a number of joint unsecured debts for payment. Ex-husband then filed a chapter 7 case, exempted his residence and received a discharge. The ex-wife then obtained a state court judgment ordering the debtor to sell the residence and pay the unsecured debts from the proceeds. The ex-husband appealed, claiming the ruling was akin to colleting a discharged debt as personal liability, and lost. While pursuing the appeal, the ex-husband initiated the adversary proceeding in the bankruptcy court for contempt and to enjoin the ex-wife. The bankruptcy court held that permanently enjoining the ex-wife "now would, in effect, nullify the state court judgment," and that under the *Rooker Feldman* doctrine, the court had no subject matter jurisdiction to review the state court decision. *But see In re DiGeronimo,* 354 B.R. 625, 640 (Bankr. E.D.N.Y. 2006) (also addressing a divorce decree but declining to apply *Rooker-Feldman*).

In re Singleton, 230 B.R. 533 (6th Cir. BAP 1999). The state court determined that debtor's chapter 13 case did not stay the foreclosure of property owned by his corporation. The debtor

did not appeal state court's determination, but rather initiated an adversary proceeding in his chapter 13 case. The Sixth Circuit BAP held the bankruptcy court lacked subject matter jurisdiction and could not adjudicate the adversary proceeding. The Court noted:

> The *Rooker-Feldman* doctrine bars a lower federal court from conducting a virtual "review" of a state court judgment for errors in construing federal law or constitutional claims "inextricably linked" with the state court judgment. The state and federal claims need not be identical for the doctrine to apply. In order to determine whether a claim is "inextricably intertwined" with a state court claim, the federal court must analyze whether the relief requested in the federal action would effectively reverse the state court decision or void its ruling. In other words, "the federal claim is inextricably intertwined with the state-court judgment if the federal claim succeeds only to the extent that the state court wrongly decided the issues before it" (citations omitted).

The "Debtor's federal claim was 'inextricably intertwined with the state-court judgment [because] the federal claim [would] succeed...only to the extent that the state court wrongly decided the issues before it." *Id.* at 536-38; *but see In re Mid-City Parking, Inc.*, 332 B.R. 798 (Bankr. N.D. Ill. 2005) ("collateral challenge to state appellate court's automatic-stay determination was not barred by *Rooker–Feldman* doctrine").

Reliance Ins. Co. v. Six Star, Inc., No. 2165, 2002 WL 342623 (S.D.N.Y. Mar. 5, 2002). Insurance company sued defendants in district court, and insurance company was placed in receivership, and the state court issued an order enjoining further prosecution of lawsuits. The district court denied defendants' request to permit the lawsuit to proceed, citing *McCarran Ferguso*n and *Rooker-Feldman;* holding it had "no jurisdiction to review or overturn" the "two outstanding state court orders that specifically purported to enjoin defendants and all other claimants from pursuing claims against [company] other than through the state liquidation process." *Id.* at 3.

Value Manufactured Homes, LLC v. Key Bank, N.A., 919 F. Supp. 2d 303 (W.D.N.Y. 2013). Plaintiffs allege that they owned mobile homes, all of which were sold on installment loan contracts or lease-option contracts. Seventy-nine of the homes were sold to LVOA and the loan advanced by the bank to LVOA was in arrears and so bank moved to foreclose and for appointment of a receiver. The receiver was appointed by the Michigan state court. The court found to the extent the plaintiffs were seeking to challenge the state court order appointing a receiver, the action was barred by *Rooker-Feldman*. *But see In re Smith,* No. 15-35436, 2016 WL 3582209, at *3 (Bankr. S.D. Tex. June 23, 2016) (Applying section 543 to require turnover of property and holding that *Rooker-Feldman* did not apply because "[t]his Court is not reviewing the correctness of any state court decision … [t]he Court assumes the correctness of the receivership appointment.")

The Barton Doctrine

1) What is the Barton doctrine?

Background. The *Barton* rule or *Barton* doctrine derives from the U.S. Supreme Court decision *Barton v. Barbour*, 104 U.S. 126 (1881). It provides that "before a lawsuit is brought against a receiver[,] leave of the court by which he was appointed must be obtained." *Id.* at 128. It has universally been extended to apply to trustees in bankruptcy. *Satterfield v. Malloy*, 700 F.3d 1231, 1234 (10th Cir. 2012) (gathering cases).

"Pursuant to the *Barton* doctrine, actions against trustees in any forum other than the court that appointed them require leave of the court." Creditors' Rights in Bankruptcy § 4:5 (2d ed.) Stated otherwise, "the *Barton* rule does not prevent a party from suing a trustee for actions taken in the trustee's official capacity; it simply requires the party to first obtain leave of the court that appointed the trustee—generally, the bankruptcy court—before suing the trustee in another court." Collier on Bankruptcy ¶ 10.01 (Richard Levin & Henry J. Sommer eds., 16th ed.).

The *Barton* doctrine has been expanded to apply to trustees, members of creditors' committees, and fiduciaries appointed under chapter 11 plans. *In re Swan Transportation Co.*, 596 B.R. 127 (Bankr. D. Del. 2018) (*Barton* doctrine applied to actions against future claims trustee and is intended to protect liquidating trustees and other court appointees); *In re MF Global Holdings Ltd.*, 562 B.R. 866 (Bankr. S.D.N.Y. 2017) (enjoining action commenced by insurers against foreign provisional liquidator in chapter 15 proceeding); *In re Circuit City Stores, Inc.*, 557 B.R. 443 (Bankr. E.D. Va. 2016) (*Barton* doctrine applied to enjoin compliance with subpoena by liquidating trustee).

Jurisdictional nature. "[T]he *Barton* doctrine is jurisdictional in nature." *Satterfield*, 700 F.3d at 1234 (quoting *Barton*, 104 U.S. at 131). As explained by the U.S. Bankruptcy Court for the Western District of Pennsylvania: "Simply stated, the Barton doctrine does not shield trustees from lawsuits. Rather, the doctrine requires the bankruptcy court to determine where the suit may be brought, not whether the trustee may be sued." *In re J & S Properties, LLC*, 545 B.R. 91, 98 (Bankr. W.D. Pa. 2015).

Congressional limitation. Congress has provided a limited exception to the *Barton* rule in 28 U.S.C. § 959(a). That "exception provides that a trustee, receiver, or manager may be sued without leave of the court in which the appointment has been made in an action regarding the acts or transactions of the aforesaid party in carrying on the business connected with the property of the bankruptcy estate." *In re Kashani*, 190 B.R. 875, 884 (B.A.P. 9th Cir. 1995).

2) The elements of the Barton doctrine?

The *Barton* doctrine applies when a party attempts to [1] "initiate[] an action in another forum [2] against a bankruptcy trustee or other officer appointed by the bankruptcy court [3] for acts done in the officer's official capacity." *In re Crown Vantage, Inc.*, 421 F.3d 963, 970 (9th Cir. 2005); *see also In re CDC Corp.*, 610 F. App'x 918, 921 (11th Cir. 2015) ("[A] plaintiff must obtain leave of the bankruptcy court before initiating an action in district court when that action

is against a bankruptcy-court-approved officer.")[2]; *In re VistaCare Grp., LLC*, 678 F.3d 218, 224 (3d Cir. 2012); *Matter of Foster*, 2023 WL 20872, at *5 (5th Cir. Jan. 3, 2023) (noting that "the *Barton* doctrine does not apply to ultra vires acts"); *In re MF Glob. Holdings Ltd.*, 562 B.R. 866, 873 (Bankr. S.D.N.Y. 2017) (same).

Granting leave.

Second Circuit. "To obtain leave of court to sue a trustee, the requesting party must establish a *prima facie* case on the merits against the trustee. However, 'even if the party seeking leave has established a prima facie case against the trustee, the bankruptcy court may still conclude that it is in a better position to adjudicate the claim based on a 'balancing of the interests of all parties involved.'" *In re Biebel*, 2009 WL 1451637, at *4 (Bankr. D. Conn. May 20, 2009).

Third and Fifth Circuits. "A party seeking leave of court to sue a trustee must make a prima facie case against the trustee, showing that its claim is not without foundation. Although . . . the 'not without foundation' standard is similar to the standard courts employ when evaluating a motion to dismiss under Federal Rule of Civil Procedure 12(b)(6), [the not without foundation standard] involves a greater degree of flexibility." *In re VistaCare Grp., LLC*, 678 F.3d 218, 232 (3d Cir. 2012) (citations omitted); *In re Provider Meds, LP*, 514 B.R. 473, 477 (Bankr. N.D. Tex. 2014) (relying on *VistaCare*).

Ninth Circuit. When leave is properly requested, bankruptcy courts typically consider five factors in determining whether to grant leave: "(1) whether the acts complained of 'relate to the carrying on of the business connected with the property of the bankruptcy estate,' (2) whether the claims concern the actions of the officer while administering the estate, (3) whether the officer is entitled to quasi-judicial or derived judicial immunity, (4) whether the plaintiff seeks a personal judgment against the officer and (5) whether the claims seek relief for breach of fiduciary duty, through either negligent or willful conduct." *In re Yellowstone Mountain Club, LLC*, 841 F.3d 1090, 1096 (9th Cir. 2016). "Even satisfying one factor may be a basis for the bankruptcy court to retain jurisdiction." *Id.* (modifications omitted).

3) Examples in the bankruptcy context?

In re Yellowstone Mountain Club, LLC, 841 F.3d 1090 (9th Cir. 2016). In the late 1990s, Timothy Blixseth ("Blixseth") and his wife developed the Yellowstone Mountain Club, an exclusive ski and golf resort in Montana that catered to the "ultra-wealthy." As part of his business-development efforts, Blixseth borrowed millions on behalf of the Yellowstone Mountain Club, LLC and certain related entities (the "Debtors") and used some of the proceeds to pay off personal debts. Blixseth contended that he relied on the advice of his attorney, Stephen Brown, who assured him that his actions were lawful.

[2] The Eleventh Circuit has an arguably more developed test. "*Barton* applies whenever the plaintiff's suit is 'related to' the bankruptcy proceeding using the 'conceivable effect' test." *In re CDC Corp.*, 610 F. App'x 918, 922 (11th Cir. 2015). "[A] a suit could conceivably affect the bankrupt estate 'if the outcome could alter the debtor's rights, liabilities, options, or freedom of action (either positively or negatively)' or if it could 'in any way impact[ ] the handling and administration of the bankrupt estate.'" *Id.* at 921.

Later, the Debtors filed chapter 11 and the U.S. Trustee appointed an official committee of unsecured creditors. Stephen Brown, Blixseth's former attorney, served as chairman of the committee.

Blixseth challenged the propriety of Brown's service, alleging, among other things, that he improperly used confidential information in his committee role. Blixseth initially brought suit in the District Court, without first obtaining leave. The District Court dismissed this action finding that the *Barton* doctrine protected members of official committees of unsecured creditors like Brown.

Blixseth then moved the Bankruptcy Court for leave to sue Brown. In his motion for leave, Blixseth contended that his claims against Brown were based on prepetition conduct that arose before the bankruptcy and, as such, could not relate to Brown's service on the committee. The Bankruptcy Court rejected these claims and found it "impossible . . . to isolate Blixseth's so-called 'pre-petition malpractice and malfeasance' claims from Brown's activities as a member of the [c]ommittee." The Bankruptcy Court denied Blixseth's motion. Blixseth appealed, the District Court affirmed, and the Ninth Circuit reviewed.

In a detailed opinion, the Ninth Circuit found that members of a committee are entitled to the protections of the *Barton* doctrine: "Because creditors [on an official committee] have interests that are closely aligned with those of a bankruptcy trustee, there's good reason to treat the two the same for purposes of the *Barton* doctrine." Moreover, given the statutory investigative and fiduciary mandate of committee members, the Ninth Circuit held that "*Barton* applies to UCC members like Brown who are sued for acts performed in their official capacities."

The Ninth Circuit next addressed Blixseth's contention that the Bankruptcy Court should have granted leave to sue Brown. Because Blixseth sought a personal judgment against Brown (the fourth factor in deciding whether to grant leave, as listed above), the Ninth Circuit found that denial of leave was not an abuse of discretion.

Ultimately, the Panel remanded for limited further proceedings related the Bankruptcy Court's rulings on qualified immunity and whether Brown was entitled to derived judicial immunity.

Matter of Foster, 2023 WL 20872 (5th Cir. Jan. 3, 2023). After the close of her bankruptcy case,[3] a former chapter 7 debtor (the "Debtor") sued, among others, the bankruptcy trustee (the "Trustee") and its counsel in state court related to their sale of certain properties during the bankruptcy case.

Shortly after filing for bankruptcy, the Debtor commenced divorce proceedings in which the Debtor's husband argued that certain properties were his separate property. The Trustee

[3] Note that there is a potential circuit split on the applicability of the *Barton* doctrine post-case closure. *Chua v. Ekonomou*, 1 F.4th 948, 953 (11th Cir. 2021) ("Although . . . we created no categorical rule that the *Barton* doctrine can never apply once a bankruptcy case ends, we concluded that where any decision by a district court would have no conceivable effect on a bankruptcy estate, the *Barton* doctrine does not deprive the district court of subject-matter jurisdiction." (modifications omitted). In the Fifth, Seventh, Ninth, and Tenth Circuits, "the Barton doctrine applies even after a bankruptcy trusteeship has ended because it protects the court-appointed trustee from suit." *Id.* (listing cases).

intervened in the divorce proceedings and commenced an action in the bankruptcy case to determine whether those properties are property of the bankruptcy estate. The Bankruptcy Court found that the properties were property of the estate and authorized the Trustee to sell them. The bankruptcy case was later closed.

The Debtor attempted to attack the sale orders in several ways. Following the case closure, she filed a motion to reopen the bankruptcy case so that she could sue the Trustee and seek to vacate the sale order for lack of subject matter jurisdiction. The Bankruptcy Court denied the motion.

With her efforts in the Bankruptcy Court unsuccessful, the Debtor commenced a lawsuit in state court against the Trustee and its counsel (among others), without leave. The defendants removed the action to the Bankruptcy Court. The Debtor moved to remand and the trustee and counsel moved to dismiss on the grounds that the state court action violated the *Barton* doctrine.

The Bankruptcy Court dismissed the action and the Debtor appealed. The District Court affirmed.

At the Fifth Circuit, the Panel recognized the underpinnings of the *Barton* doctrine: "before a plaintiff can sue a bankruptcy trustee, or a court-approved professional employed by a bankruptcy trustee such as counsel for the trustee, in a forum other than the appointing court, leave of the appointing court must be obtained." The Court also recognized that the *Barton* doctrine does not apply to ultra vires acts, *i.e.* acts "outside the scope of the person's official duties." *Id.* (modifications omitted). The Fifth Circuit concluded that, because the properties had been listed in the Debtor's schedules and the Trustee sold the properties with authority of the Bankruptcy Court, their administration was within the Trustee's official duties and suit against the Trustee required leave of the Bankruptcy Court under *Barton*.

Other Examples.

- *Barton* may apply to officers and directors of a debtor. *E.g.*, *In re CDC Corp.*, 610 F. App'x 918, 922 (11th Cir. 2015) (applying the *Barton* doctrine to general counsel of the debtor in possession).

- *Barton* applies to international suits against a covered party. *E.g.*, *In re MF Glob. Holdings Ltd.*, 562 B.R. 866, 874 (Bankr. S.D.N.Y. 2017) ("[T]he Barton Doctrine is not restricted to legal actions brought within the United States, and requires that a party who seeks to file suit in an international forum obtain leave of the appointing court." (citations omitted)).

- Leave is not required under *Barton* to sue a trustee in the appointing court. *In re Provider Meds, LP*, 514 B.R. 473, 477 (Bankr. N.D. Tex. 2014).

Law of the Case

1) What is law of the case?

The law of the case doctrine is a preclusion doctrine. It provides that "[w]hen a court decides upon a rule of law, that decision should continue to govern the same issues in subsequent stages in the same case." *Arizona v. California*, 460 U.S. 605, 618 (1983). Courts generally apply the law of the case doctrine where prior decisions in an ongoing case have already resolved an issue either expressly or implicitly. *Aramony v. United Way of Am.*, 254 F.3d 403, 410 (2d Cir. 2001).

The law of the case doctrine is a rule of practice, "based upon longstanding policy that once an issue is litigated and decided, that should be the end of the matter." *United States v. U. S. Smelting Ref. & Min. Co.*, 339 U.S. 186, 198 (1950). In the bankruptcy context, most courts hold that adversary proceedings or separate contested matters are the same "case" as the main bankruptcy proceeding. *In re 447 West 142nd St. Housing Dev. Fund Corp.*, 2020 WL 3067733 at * 12 (Bankr. S.D.N.Y. June 8, 2020) (for purposes of the law of the case doctrine, adversary proceeding was part of same "case" as main chapter 11 case); *In re Moise*, 575 B.R. 191, 205 (Bankr. E.D.N.Y. 2017) (separate contested events or adversary proceedings tied to a single main bankruptcy case are all part of the same case).

"[T]he doctrine does not 'act as an absolute bar on re-litigation (in contrast to the doctrines of claim and issue preclusion). Rather, the law of the case doctrine merely directs the court's discretion not to rehear matters ad nauseam.'" *In re AMC Invs., LLC*, 637 B.R. 43, 67 (Bankr. D. Del. 2022).

2) The elements of the law of the case doctrine?

Second Circuit. In order for the law of the case doctrine to apply, there must be an "identity of parties between the prior and subsequent matters" and the earlier decision on the asserted identical issue must be final. *In re Brizinova*, 588 B.R. 311, 323 (Bankr. E.D.N.Y. 2018).

Third Circuit. "Law-of-the-case rules have developed to maintain consistency and avoid reconsideration of matters once decided during the course of a single continuing lawsuit. As rules that govern within a single action, they do not involve preclusion by final judgment; instead, they regulate judicial affairs before final judgment. It is important to note that law of the case rules come into play only with respect to issues previously determined, and that questions that have not been decided do not become law of the case merely because they could have been decided." *In re Foxmeyer Corp.*, 286 B.R. 546, 556 (Bankr. D. Del. 2002) (citations and modifications omitted).

Fifth Circuit. "The law of the case doctrine, as formulated in this circuit, generally precludes reexamination of issues of law or fact decided on appeal, either by the district court on remand or by the appellate court itself on a subsequent appeal. . . . [T]he 'law of the case; doctrine applies only to issues that were actually decided, rather than all questions in the case that might have been decided, but were not. Even when issues have not been expressly addressed in a prior decision, if those matters were fully briefed to the appellate court and necessary predicates to the

court's ability to address the issue or issues specifically discussed, those issues are deemed to have been decided tacitly or implicitly, and their disposition is 'law of the case.'" *Alpha/Omega Ins. Servs., Inc. v. Prudential Ins. Co. of Am.*, 272 F.3d 276, 279 (5th Cir. 2001) (citations and modifications omitted).

Ninth Circuit. "Under the law of the case doctrine, a court is ordinarily precluded from reexamining an issue previously decided by the same court, or a higher court, in the same case. For the law of the case doctrine to apply, the issue in question must have been decided explicitly or by necessary implication in the previous disposition." *Hydrick v. Hunter*, 500 F.3d 978, 986 (9th Cir. 2007), judgment vacated on other grounds, 556 U.S. 1256 (2009).

3) Examples in the bankruptcy context?

Brizinova.

The *Brizinova* cases are a triad that exemplify law of the case issues in various bankruptcy proceedings. Estella Brizinova and Edward Soshkin (the "Debtors") were chapter 7 debtors in jointly administered cases. The Debtors listed an auto parts supply company, ESNI Consulting, Inc. ("ESNI"), as 100% owned by Ms. Brizinova. Following his appointment, the chapter 7 trustee (the "Trustee") commenced several proceedings seeking, among other things, the turnover of ESNI's postpetition revenues.

In *In re Brizinova* ("Brizinova I"), 554 B.R. 64 (Bankr. E.D.N.Y. 2016), the trustee brought suit against the Debtors seeking to recover post-petition revenues generated by ESNI. The Debtors moved to dismiss. The Bankruptcy Court, in relevant part, upheld the Trustee's claims against the Debtors and found that the trustee had adequately plead that the ESNI proceeds were property of the Debtors' bankruptcy estates, but granted leave to amend as to various other claims.

In *In re Brizinova* ("Soshkin"), 588 B.R. 311 (Bankr. E.D.N.Y. 2018), the Trustee asserted similar claims to those at issue in *Brizinova I* against Zlata Soshkin, the Debtors' daughter in law, and sought to recover from her postpetition ESNI revenues. The Trustee argued that, under the law of the case doctrine, the Bankruptcy Court was required to find that the proceeds were property of the estate because it had so-held in *Brizinova I*. The Bankruptcy Court disagreed. It found that the law of the case doctrine did not apply for two reasons. First, it found that "the identity of the parties" was lacking because Ms. Soshkin was not a party to *Brizinova I*. Second, it found that the order on the motion to dismiss in *Brizinova I* was not sufficiently final because "that decision allowed the case to continue to trial."

In *In re Brizinova* ("Brizinova II"), 592 B.R. 442 (Bankr. E.D.N.Y. 2018), the Debtors, in the same adversary proceeding as in *Brizinova I*, filed a motion for judgment on the pleadings adopting Soshkin's position that post-petition revenues generated by ESNI are not part of the Debtors' bankruptcy estate. The Trustee, again, contended that such arguments are precluded under the law of the case.

The Bankruptcy Court again rejected the Trustee's proffered application of law of the case. While the parties were the same as in *Brizinova I*, the Bankruptcy Court found that the order granting the motion to dismiss in part was not sufficiently final to bar reconsideration of the issues on a motion for judgment on the pleadings.

Other Examples.

- Law of the case applies following a venue transfer. *In re LTL Mgmt., LLC*, 636 B.R. 610, 617 (Bankr. D.N.J. 2022) (rejecting the U.S. Trustee's reconstitution of two tort claim committees as precluded under the law of the case doctrine by the transferor court's order appointing a single tort claim committee).

- Law of the case applies only to legal and not factual conclusions. *In re Bernard L. Madoff Inv. Sec. LLC*, No. 1:21-CV-02334-CM, 2022 WL 493734, at *5 (S.D.N.Y. Feb. 17, 2022) (disagreeing with the bankruptcy court's application of the "law of the case" doctrine to certain findings in other fraudulent transfer adversary proceedings).

Faculty

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Hon. Lisa S. Gretchko is a U.S. Bankruptcy Judge for the Eastern District of Michigan in Detroit, sworn in on April 5, 2021. Prior to her judicial appointment, she spent several decades as a bankruptcy/creditors' rights attorney and represented nearly every constituency in bankruptcy courts around the country, including secured creditors, unsecured creditors' committees, landlords, licensors of intellectual property, customers, suppliers, business debtors and trustees. Judge Gretchko has written and lectured extensively for various organizations on numerous bankruptcy and creditors' rights issues. From April 2018-April 2022, she served as ABI's Vice President-Publications, as a member of ABI's Executive Committee and Board of Directors, and as ABI's Publications Committee chair. Judge Gretchko is a former Executive Editor of the *ABI Journal* and a former co-chair of the ABI's Unsecured Trade Creditors Committee, which named her 2014 Committee Person of the Year. She also has been named in *Michigan Super Lawyers* and *The Best Lawyers in America*, and she was honored as a Woman in the Law by *Michigan Lawyer's Weekly* in 2011. Judge Gretchko received her B.A. with honors in 1976 from the University of Michigan, where she was elected Phi Beta Kappa, and her J.D. with honors in 1978 from the University of Detroit.

James P. Muenker is a partner with DLA Piper in Dallas and has more than 25 years of experience representing publicly and privately held companies, boards of directors, equityholders, lenders, official and ad hoc committees, creditors' trusts and trustees, high-net-worth individuals and major stakeholders in a variety of restructuring matters, commercial disputes and other transactions. He also regularly represents purchasers and sellers in distressed M&A transactions, including § 363 sales. While Mr. Muenker represents clients across all industries, he has significant experience in the health care, energy, hospitality, media and sport industries. He received his B.S. from Oklahoma State University and his J.D. from the University of Oklahoma.

Erica S. Weisgerber is a partner in Debevoise & Plimpton LLP's Litigation Department in New York, where her practice focuses on bankruptcy litigation and antitrust matters. Her experience includes a range of debtor and creditor representations, adversary proceedings and contested matters in cases under chapters 11 and 15 and cross-border insolvency proceedings, including extensive experience litigating clawback claims arising out of domestic and international insolvencies. Ms. Weisgerber has advised clients on restructuring- and litigation-related issues arising in bankruptcy cases, out-of-court restructurings and other distressed situations across a diverse range of industries. She also regularly represents investment banks in their retentions by major constituencies in chapter 11 proceedings. Ms. Weisgerber was recognized in 2020 by *Turnarounds & Workouts* in its annual list of 12 Outstanding Young Restructuring Lawyers in the United States. She also was selected as a member of the 2020 Class of ABI's "40 Under 40" and was awarded The M&A Advisor's 2021 Chapter 11 Reorganization of the Year (over $1B) for her role as counsel to Canada Pension Plan Investment Board as co-sponsor of Neiman Marcus in its chapter 11 restructuring. In addition, she also was recommended in *The Legal 500 US* in 2021 for her bankruptcy litigation work. Ms. Weisgerber's antitrust practice encompasses a wide range of complex civil antitrust litigation, including representing plaintiffs and defendants in civil litigation, as well as representing clients before antitrust agencies in government reviews of proposed transactions, and counseling clients with respect to antitrust issues associated with mergers and acquisitions, joint ventures and competitors' exchange of information. She is ranked as a leading Antitrust lawyer by *Chambers USA* (2021) and *The Legal 500 US* (2021). Ms. Weisgerber also maintains an active *pro bono* practice and is a 2012 and 2013 recipient of The Legal Aid Society's *Pro Bono Publico* Award for outstanding service to The Legal Aid Society and its clients. She is a member of the Bar of New York and is admitted to appear before the U.S. District Courts for the Southern and Eastern Districts of New York; the U.S. Courts of Appeals for the Second, Third and Tenth Circuits; and the U.S. Supreme Court. She also is a member of the New York State Bar Association, for which she serves on the executive committee of its Antitrust Section. Ms. Weisgerber is a member of ABI and the International Women's Insolvency & Restructuring Confederation, for which she serves on the membership and programming committees. She is a speaker and author on issues relating to restructuring and bankruptcy litigation and antitrust, and she is an active member of the American Bar Association's Antitrust Section and Litigation Section. In addition, she serves as an editor of the *Antitrust Law Journal* and is vice chair of the Antitrust Section's Legislation Committee. She also is a member of the National Association of Women Lawyers, for which she has co-chaired its Membership Committee. Ms. Weisgerber serves as editor-in-chief of the *Debevoise Women's Review* and is a co-editor of the ABA Antitrust Section's *State Action Practice Manual*. She received her A.B. *magna cum laude* from Georgetown University in 2005 and her J.D. *magna cum laude* from Georgetown University Law Center in 2008, where she was a member of the Order of the Coif and managing editor of the *Georgetown Law Journal*.