Consumer Workshop I

Chapter 13 Hot Topics

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CHAPTER 13 HOT TOPICS

ROCKY MOUNTAIN ABI CONFERENCE

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CHAPTER 3

I. Employment of Professionals

***In re U.S. Bentonite, Inc.*, No. 13–20211, 2015 WL 5179425 (Bankr. D. Wyo. Sept. 3, 2015)**

Facts: In 2013, the bankruptcy court approved an application to employ the Winship law firm as counsel for three chapter 11 debtors-in-possession pursuant to 11 U.S.C. § 327(a). The three cases were jointly administered. During the pendency of these cases, substantially all assets were sold under a court-approved sale process. The only remaining assets were the net sale proceeds, $75,000 cash from an adversary proceeding settlement, and minimal funds in debtors' respective DIP accounts. The cases were administratively insolvent, and by January 2015, all that remained was allocating the remaining assets among various administrative claimants and two secured creditors.

Throughout the jointly administered cases, an associate attorney with Winship represented the debtors. On January 22, 2015, that associate met with counsel for one of the two largest secured creditors to discuss potential employment with that firm. Following formal interviews, on March 11, 2015, creditors' firm made an employment offer to the associate, and the associate accepted the position on the same day. The associate did not inform Winship he was resigning his position until April 20, 2015. Between March 11, 2015 and June 5, 2015, the attorney continued to sign and file all pleadings on behalf of debtors. On June 5, 2015, almost three months after accepting a position with creditors' firm, the attorney filed a motion to withdraw, informing the court he would no longer be employed by Winship effective June 5, 2015. The attorney did not disclose he had accepted a position with creditors' firm in the motion to withdraw, which was subsequently granted by the court. After the Trustee discovered the conflict, on June 16, 2015, Winship filed a supplement to application for employment of attorneys, for the first time informing the court of the attorney's acceptance of the employment offer.

Meanwhile, debtors, the four administrative claimants (including Winship), and the two secured creditors reached a settlement allocating all remaining assets and stipulating to the dismissal of the chapter 11 cases. The Trustee objected to the motion to approve the settlement agreement, asserting the agreement was tainted by the undisclosed connection between the associate and creditors' firm. The Trustee also filed a motion to disqualify Winship as counsel and to disgorge all compensation received during the jointly administered cases.

Issues: Whether accepting a position with a creditors' firm during settlement negotiations creates a connection that must be disclosed; whether total or partial denial of compensation is warranted for the non-disclosure; and whether the settlement agreement reached in this case was fair and equitable and in the best interests of the estate.

Holdings: Counsel for a debtor-in-possession has an ongoing fiduciary duty to supplement initial employment disclosures with any connections that arise that create potential conflicts. In its discretion, the court may deny and/or disgorge all compensation in a case for the failure to supplement disclosures under FED. R. BANKR. P.2014(a). In this case, counsel for debtors' failure to disclose an associate's acceptance of a position with counsel for a creditor of debtors warranted partial denial of compensation. However, the settlement agreement which addressed the allocation of remaining assets was fair, equitable, and in the best interests of the estates.

Analysis: The bankruptcy court examined the employment standards of § 327(a). In furtherance of the disinterestedness prong of § 327(a) and the fiduciary duties counsel for the debtor owes the estate, FED. R. BANKR. P. 2014(a) requires counsel for debtors to disclose any connections that have the potential of creating a conflict of interest. The parties acknowledged these disclosure requirements under Rule 2014(a) continue after the initial application to employ is approved. The bankruptcy court agreed with the broad construction of Rule 2014(a), and the conclusion that Rule 2014(a) creates a continuing obligation for counsel to advise the court when such a connection arises during the representation of a debtor-in-possession. The required supplemental disclosure allows the court, not counsel, to determine whether a conflict exists and counsel remains disinterested under § 327(a). Failing to make a supplemental disclosure robs the court the power to make such a determination. Here, the court determined the attorney's acceptance of a position with creditors' counsel in the midst of settlement negotiations involving the same creditors should have been disclosed and Winship failed to do so.

Next, the court turned to the available remedies for such a non-disclosure. In the Tenth Circuit, the failure to supplement initial disclosures when a connection with the potential to create a conflict arises warrants total denial and/or disgorgement of compensation. However, the bankruptcy court has the discretion to determine whether total or partial denial of fees is appropriate based on the facts of a case. Here, the court determined only partial denial of fees from the date the connection arose was proper. As a result of the non-disclosure, fees and costs incurred between March 11, 2015 and August 20, 2015, were denied and Winship was barred from seeking payment of those fees and costs from any source. The court did not disqualify Winship as counsel, and permitted Winship to complete representation of debtors in the cases.

Finally, with respect to the settlement agreement, the bankruptcy court found the agreement was not tainted. Based largely on the evidence from the other creditors, the court determined the settlement agreement resulted in a fair and equitable allocation of the remaining assets, and debtors had no real stake in the outcome. Thus, the court concluded the settlement agreement was in the best interests of the estates under the Rule 9019 standard, with one amendment. The court reduced Winship's administrative claim under the settlement agreement consistent with the denial of part of the firm's fees.

II. Allowance of Professional Fees

Baker Botts L.L.P. v. ASARCO LLC, 135 S. Ct. 2158 (2015)

Facts: Respondent-debtor filed for chapter 11 relief. Respondent operated as a debtor in possession and hired two law firms (petitioners) to represent it in bankruptcy. Petitioners, inter alia, successfully prosecuted a fraudulent-transfer action against respondent's parent valued between $7 to $10 billion, and respondent successfully emerged from bankruptcy four years after initially filing. Petitioners submitted fee applications seeking compensation under § 330(a)(1). Respondent objected. After extensive discovery and a six-day trial, the bankruptcy court awarded petitioners' fees of approximately $129.1 million, including over $5 million for petitioners' defense of their fee application. Respondent appealed various aspects of the bankruptcy court's order to the district court, and the district court held that petitioners could recover fees expended in defense of their fee application. The Fifth Circuit reversed, concluding the American Rule controlled absent explicit statutory authority to the contrary.

Issue: Whether § 330(a)(1) permits a bankruptcy court to award attorneys' fees for work performed in defending a fee application in court.

Holding: Section 330(a)(1) does not permit bankruptcy courts to award attorneys' fees for work performed in defending a fee application in court.

Analysis: Writing for a six-Justice majority, Justice Thomas began with the "bedrock" principle that in the United States each litigant must pay his own attorneys' fees—i.e., the American Rule—unless a statute or contract provides otherwise. The Court will not deviate from the general rule "absent explicit statutory authority." The express language in § 330(a)(1) provides "reasonable compensation" only for "actual, necessary *services* rendered." The plain meaning of "services" is "labor performed for another." Time dedicated to defending a fee application cannot be fairly described as labor performed for the administrator of the estate. Had Congress intended to depart from the American Rule in § 330(a)(1) it could have done so.

The Court also rejected petitioners' and the Government's (as amicus curiae) alternative interpretations. Petitioners argued that defending a fee application qualified as "services rendered" because the estate has an interest in determining the amount owed for professional compensation. The Court dismissed this reading as untenable. Next, the Government argued that compensation for defending a fee application is properly viewed as compensation for the underlying services in the bankruptcy proceeding. Pursuant to § 330(a)(1), however, "reasonable compensation" must be tied to "actual, necessary services rendered by [the professional]." Litigation in defense of a fee application is not a "service" within the meaning of § 330(a)(1).

Finally, a five-Justice majority rejected the Government's policy concern that fee-defense litigation will dilute attorneys' fees, decreasing bankruptcy attorneys' compensation, thereby undermining the congressional aim of ensuring that talented attorneys work in bankruptcy. The Court explained that is was bound by the text of the statute and it lacked "roving authority" to permit fees whenever it deem warranted.

Dissent: The dissent adopted the Government's alternative interpretation. That is, fee-defense work is part of the compensation for the underlying services in a bankruptcy proceeding. As such, when a bankruptcy court determines "reasonable compensation," it may take into account fees for defending a fee application. "[T]o ensure that each professional is paid *reasonably* for compensable services, a court must have the discretion to authorize pay reflecting fee-defense work."

***Adam v. Weinman (In re Adam Aircraft Indus., Inc.)*, 532 B.R. 814 (D. Colo. 2015)**

Facts: Plaintiff appealed the bankruptcy court's award of a partial contingency fee to trustee's special counsel. Special counsel investigated and pursued claims against the estate's largest creditor on a blended hourly and contingency fee basis—namely, 75% of the normal hourly rate plus 15% of the "gross amount recovered." The case settled before commencement of discovery. The creditor agreed to assign trustee its secured claim and agreed to subordinate its unsecured claim to all other claims. In his motion to approve the settlement, trustee opined that the value of the settlement was approximately $3 million. Special counsel submitted a fee application for just over $538,000 in fees—hourly fee component ($73,086) and contingent fee component ($464,996). Plaintiff objected to the contingency fee component on various grounds. The bankruptcy court approved special counsel's fees over plaintiff's objection and he appealed. The district court reversed and remanded in light of the Tenth Circuit's recent decision *In re Market Center East Retail Property, Inc.*, 730 F.3d 1239 (10th Cir. 2013), requiring consideration of both the § 330(a)(3) and the *Johnson* factors when evaluating the reasonableness of fees.

On remand, the bankruptcy court examined the § 330(a)(3) factors and the *Johnson* factors and again awarded special counsel's fees in whole. Plaintiff again appealed the contingent fee component of the award, arguing (1) there was no "recovery" on which a contingency fee could be based; (2) a contingency fee cannot be based on the amount of cash in the client's bank account; and (3) Colorado law requires a recovery of funds in order to receive a contingent fee.

Issue: Whether the bankruptcy court erred in awarding trustee's special counsel a blended fee—the majority of which consisted of a contingent fee component—for pursuing and settling claims against the estate's largest creditor, where the creditor agreed to assign trustee its secured claim and agreed to subordinate its unsecured claim to all other claims.

Holding: The district court affirmed the bankruptcy court's order awarding trustee's special counsel approximately $538,000 in fees.

Analysis: Rejecting each of plaintiff's three arguments, the district court affirmed the bankruptcy court's fee award. First, a contingent fee must not be necessarily based on an "influx of cash to the client." In the appropriate circumstances, it may include a "reduction to the client's liability, so long as the reduction of 'savings' can be reasonable determined." Second, the fee was not calculated on the amount in the estate's bank account, but on the amount the creditor would have taken out of the account had its claims been enforced. Although basing a fee on savings may at times create issues in bankruptcy—i.e., where claims are challenged and abandoned or reduced—the court confirmed that the ultimate authority for an award of fees, both in structure and in amount, lies with the bankruptcy court. And plaintiff provided no reason to disturb the bankruptcy court's findings. Third and finally, the award was consistent with Colorado law, including the Contingent Fee Rules and Rules of Professional Conduct. Whether state rules on fees even applied to a federal court administering fees under a federal statutory regime is questionable. Even if applicable, however, the Contingent Fee Rules do not prohibit a contingency fee based upon reduction in the client's potential liability to a third person. In addition, Rule 1.5 of the Rules of Professional Conduct largely parallels the § 330(a)(3) and *Johnson* factors. The bankruptcy court determined that the amount was reasonable after applying the relevant factors and the trustee was fully informed and was supportive of the requested fee.

***In re Tollefson*, No. 13–24681, 2015 WL 3897533 (Bankr. D. Colo. May 13, 2015)**

Facts: The bankruptcy court dismissed debtor's individual chapter 11 case and debtor's attorneys applied for fees and costs. A major creditor in the bankruptcy objected to the fees as unreasonable. Debtor's attorneys subsequently requested discovery from the objecting creditor, including creditor's counsels' billing statements for the chapter 11 case, billing statements for related bankruptcy cases, and limited communications. Creditor objected to the discovery on the basis of privilege, relevance, and other general objections. Debtor's attorneys moved to compel discovery and for sanctions.

Issue: Whether a professional seeking an award of attorneys' fees under 11 U.S.C. § 330 and FED. R. BANKR. P. 2016 may seek discovery of billing records from the party objecting to the fee application.

Holding: Opposition billing records are generally not relevant to a professional's request for fees and, therefore, are not subject to discovery under FED. R. CIV. P. 26 and 34 and FED. R. BANKR. P. 7026, 7034 and 9014.

Analysis: The bankruptcy court denied debtor's attorneys' motion to compel discovery of creditor's counsels' billing statements, but ordered the production of limited communications. The court first explained document production discovery is generally available in fee disputes. The documents sought, however, must be relevant to the dispute. Billing statements of an objecting party are generally not probative of the objective reasonableness of an applicant's fees. In particular, it would be near impossible to conduct an "apples-to-apples" comparison, not to mention, opposition billing records are irrelevant to the § 330(a)(3) and *Johnson* factors. Even if somehow relevant, the court explained that discovery of the billing records was still inappropriate. Debtor's attorneys would not be seriously prejudiced and the production raised attorney-client privilege issues. In addition, the court expressed concern that permitting discovery of opposition billing might quell otherwise valid objections. The court did order discovery of limited communications relevant to creditor's objections.

***In re Sun River Energy, Inc.*, No. 15–15610, 2015 WL 4899627 (Bankr. D. Colo. Aug. 13, 2015)**

Facts: Following the entry of the order for relief in this involuntary chapter 7 case, the chapter 7 trustee filed an application to employ his own firm as counsel to represent the trustee in a contested matter regarding venue, preferential and fraudulent conveyance recovery actions, and on an immediate basis in a pending foreclosure action in New Mexico. After an independent review the bankruptcy court approved the application. Thereafter, the creditor filed an objection to the application. Noting that the application was not required to be sent out on notice by FED. R. BANKR. P. 2014(a) and LBR 2014-1, the court treated the objection as a motion to alter or amend under FED. R. CIV. P. 59(e) as incorporated by FED. R. BANKR. P. 9023.

Issue: Whether a chapter 7 trustee may hire his or her own firm to represent the trustee.

Holding: A chapter 7 trustee may hire his or her own firm if the trustee establishes the required elements of 11 U.S.C. §§ 327(a) and 327(d).

Analysis: After addressing the general requirements for employment under § 327(a), the court held the trustee's firm did not hold or represent an interest adverse to the estate and was a disinterested person. However, when a trustee seeks to hire his or her own law firm, the trustee must also satisfy § 327(d), which authorizes such employment "if such authorization is the in the best interest of the estate." The Court examined several approaches to determine this issue. Recognizing determinations under § 327(d) turn on the particular circumstances of each case, the court ultimately adopted the flexible approach articulated in *In re SONICblue, Inc.*, No. C-07-03483, 2007 WL 3342662, at *6 (N.D. Cal. Nov. 9, 2007) ("[A]bsent a showing of substantial savings and/or efficiencies, appointment of a trustee's own law firm as counsel is not in the estate's best interest."). Thus, in order for a trustee to hire his or her own firm, the trustee must prove hiring the firm will result in substantial savings and or efficiencies for the estate, in addition to the usual elements of § 327(a).

Here, the trustee demonstrated that hiring his own firm was in the best interests of the estate based on the trustee's immediate need for representation in multiple forums, the lack of a retainer, the contingent nature of payment to his firm and his firm's willingness to provide the representation despite the risk of nonpayment inherent in the type of litigation at issue. Lastly, the court concluded the creditor failed to demonstrate how approving the trustee's own firm would result in any manifest injustice warranting reconsideration of its order approving the application. Therefore, the court's order approving the application stood as originally entered.

III. Sales of Estate Assets

***Allen v. Absher (In re Allen)*, 607 Fed. App'x 840 (10th Cir. 2015)**

Facts: Appellant-debtor was the owner of two companies that operated oil and gas leases. The companies were placed into receivership in 2012 and filed for chapter 11 protection three months later. Appellant obtained a new loan to pay off the companies' primary creditor, securing it with his stock in the companies along with other business and personal assets. Appellant defaulted and filed for chapter 7 relief. The trustee moved to sell appellant's stock in the companies—appellant's largest asset—to the creditor who provided the new loan. Appellant objected and the bankruptcy court held a two-day hearing. The bankruptcy court approved the sale and appellant appealed to the district court, arguing that the bankruptcy court failed to find that the purchaser was a good faith purchaser under 11 U.S.C. § 363(m). The district court affirmed, finding that a good faith inquiry was not necessary under § 363(b) to approve the sale.

<u>Issue</u>: Whether the bankruptcy court erred in approving the trustee's motion to sell appellant's stock.

<u>Holding</u>: The bankruptcy court did not err in approving the stock sale.

<u>Analysis</u>: Examining the trustee's decision to sell under the "business judgment" test, the Tenth Circuit concluded that the bankruptcy court did not err in approving the stock sale. The court rejected appellant's argument that the bankruptcy court overlooked evidence of bad faith. Appellant failed to present any evidence of bad faith at the hearing before the bankruptcy court. Moreover, the record supported the finding that the sale was within the trustee's sound business judgment.

***Banning Lewis Ranch Co. v. City of Colo. Springs (In re Banning Lewis Ranch Co.)*, 532 B.R. 335 (Bankr. D. Colo. 2015)**

<u>Facts</u>: Several parties purchased tracts of real estate constituting a collection of approximately 24,000 acres of undeveloped land in El Paso County, Colorado, known as the Banning Lewis Ranch. The parcel of property at issue included approximately 17,760 acres of property located in Banning Lewis Ranch (the "Property") eventually purchased by plaintiffs in this adversary proceeding. In 1988, several parties owning property in Banning Lewis Ranch, including plaintiffs' predecessor-in-interest (together, the "Annexors"), entered into an annexation agreement with Colorado Springs. The annexation agreement was meant to shift the costs of the anticipated public improvements and infrastructure for development of Banning Lewis Ranch to the Annexors and their successors-in-interest. Eventually, it was agreed that each Annexor would bear its proportionate share of the infrastructure costs. In 2010, the owner of the Property filed for chapter 11 relief in Delaware bankruptcy court and sought to sell the Property free and clear of the obligations of the annexation agreement. After an objection was filed by Colorado Springs, an agreement was reached whereby the dispute regarding the applicability of 11 U.S.C. §§ 363(f), (f)(5), and 365 would be severed from the sale hearing. After the Delaware bankruptcy court entered an order approving the sale of the Property, an adversary case was initiated by the debtor and the buyer. The Delaware bankruptcy court promptly transferred venue of the proceeding to the Colorado bankruptcy court and several parties sought declaratory relief through dispositive motions.

<u>Issues</u>: (1) Whether the annexation agreement and other agreements flowing therefrom are "executory contracts" within the scope of § 365, subject to rejection; and (2) whether the

annexation agreement and other agreements flowing therefrom are the types of rights or interests that may be stripped away from property sold by a debtor under the "free and clear" sale provisions of § 363(f).

Holding: The annexation agreement and other agreements are not executory contracts and cannot be stripped away under § 363.

Analysis: (1) The annexation agreements and other agreements flowing therefrom are neither "contracts" nor "executory" as required for application of § 365; (2) Section 365 cannot afford plaintiffs any relief since § 365 does not provide for termination or rescission of an agreement and plaintiffs obligations under the agreements would persist; (3) Restrictive covenants that run with the land are not "interests" that fall within § 363; (4) Even if restrictive covenants were subject to free and clear sales under § 363(f), the annexation agreement is not a restrictive covenant between or among neighboring property owners—it is a legislative proceeding over which a court's authority is limited; (5) The agreements are not an unreasonable restraint on alienation and changed circumstances do not render the agreements unenforceable under § 363(f)(1); and (6) The agreements do not require or compel Colorado Springs to accept money damages as required by § 363(f)(5).

IV. Relief from Stay

Alta Vista, LLC v. Juarez (In re Juarez), 533 B.R. 818 (Bankr. D. Colo. 2015)

Facts: Debtor filed for chapter 13 protection in July 2013. Creditor was the holder of promissory notes secured by three properties owned by debtor (both residential and commercial). Debtor filed a proposed plan and creditor did not object. The plan was confirmed and debtor started making payments. Creditor subsequently filed two proofs of claim and debtor moved to modify the plan to allow for the correct amounts to be paid to creditor. Creditor objected and moved to dismiss on the basis that debtor had failed to pay the correct amounts to creditor and that debtor had failed to disclose interest in an apartment building. The parties reached a stipulation and the case was dismissed.

In January 2015, creditor moved to foreclose on debtor's real property. Debtor again filed for chapter 13 protection. Debtor's new plan provided a one-time cure payment and regular monthly payments to creditor. Creditor filed a motion seeking an order that the automatic stay had terminated pursuant to § 362(c)(3) because debtor had filed bankruptcy within the prior year. The same day, debtor filed a motion seeking an extension of the stay under § 362(c)(3)(B), which was denied as untimely. The bankruptcy court entered an order confirming the termination of the automatic stay under § 362(c)(3)(A). Creditor filed a motion to reconsider, arguing that the stay should terminate with respect *to property of the estate*, not just *as to property of debtor*. Creditor's motion was denied, and a month later creditor filed a motion for relief from stay under §362(d)(1). Particularly, creditor argued that cause existed because of debtor's "bad faith" filing—that is, the dismissal of debtor's previous case and debtor's failure to make complete plan payments evidenced bad faith. Debtor responded that both filings were in good faith.

Issue: Whether relief from stay under § 362(d)(1) is proper where the "cause" offered by creditor is debtor's bad faith filing, which is predicated on the presumption of bad faith found in § 362(c)(3)(C).

Holding: The provisions of § 362(c)(3) do not provide presumptive grounds for granting relief from stay under § 362(d)(1).

Analysis: The bankruptcy court began by acknowledging that where a case has been filed in bad faith, such finding is sufficient "cause" to grant relief from stay under § 362(d)(1). The bad faith presumption in § 362(c)(3)(C), however, is not the applicable legal standard for cause under § 362(d)(1). The court explained that the wording of § 362(c)(3)(C) limits its application to motions for extension filed under § 362(c)(3)(B). Further, § 362(d)(4)(B) specifically addresses repeat filings that affect real property. Accordingly, creditor's argument that § 362(c)(3)(C)'s bad faith presumption equates to cause under § 362(d)(1) must fail. The court did note that under certain circumstances there may be some overlap between § 362(c)(3)(C) and § 362(d)(1). For instance, a court's finding of good faith under § 362(c)(3)(B) may be persuasive in other context such as relief from stay under § 362(d)(1). The court also rejected creditor's argument that the facts giving rise to the statutory presumptions in § 362(c)(3) establish a lack of good faith, which codified prior bankruptcy law. However, the Tenth Circuit held in a pre-BAPCPA case that the fact of successive filings does not, by itself, constitute bad faith in a chapter 13 filing. The court went on to conclude that debtor had filed his chapter 13 petition in good faith and, accordingly, denied creditor's motion for relief from stay under § 362(d)(1).

CHAPTER 5

I. Exemptions

***Gordon v. Wadsworh (In re Gordon)*, 791 F.3d 1182 (10th Cir. 2015)**

Facts: Debtors filed for chapter 7 relief and sought to exempt $2,051 held in a savings account under C.R.S. § 13-54-102(1)(s). The $2,051 was part of a lump-sum distribution from a retirement plan for debtors' living expenses. The chapter 7 trustee objected, arguing that the § 102(1)(s) does not apply to funds paid out of a retirement plan. The bankruptcy court sustained the objection and the district court affirmed.

Issue: Whether Colorado's exemption for qualifying retirement plans applied to funds that had been distributed from the plan.

Holding: Distributions from qualifying retirement plans were not exempt under C.R.S. § 13-54-102(1)(s)—even if not comingled.

Analysis: The Tenth Circuit observed that Colorado courts have not addressed whether § 102(1)(s) protects distributions from a retirement plan. Conducting its own analysis, the court concluded that the provision does not protect distributions. The straightforward meaning of the provision is that it exempts property *held in or payable from* a debtor's retirement plan. The court also rejected debtors' argument that § 102(1)(s) protects the "use" of plan assets. In practice, the Colorado legislature is explicit when exempting certain proceeds, if the legislature had intended to exempt distributions from retirement plans, it could have. The court finally confirmed that its interpretation is consistent with Colorado's exemption scheme.

***In re Romero*, 533 B.R. 807 (Bankr. D. Colo. 2015) (appeal pending)**

Facts: A long-haul truck driver claimed a portion of a semi-trailer truck (the tractor and its living quarters) as exempt under the Colorado homestead statute, C.R.S. § 38-41-201(a), on Schedule C of his chapter 7 bankruptcy filing. The chapter 7 trustee filed an objection to debtor's claim of exemption.

Issue: Does the tractor unit of a semi-trailer truck qualify as a homestead under Colorado law?

Holding: A tractor unit with living quarters used for long-haul trucking is not an exempt homestead under Colorado law.

Analysis: The bankruptcy court noted that it was clear that debtor's tractor truck, upon which debtor's long-haul trucking business relied, was debtor's only home. The court also commented, "equity suggests that the debtor be allowed to keep his source of shelter and income." However, after a careful analysis of the meaning and history of the word "homestead," and after finding that debtor's tractor unit did not qualify for the special homestead status the Colorado legislature granted other personal property—mobile homes and manufactured homes—the tractor unit's lack of association with land ultimately led the court to determine that debtor's tractor unit could not be a homestead.

II. Lien Avoidance

***Bank of Am., N.A. v. Caulkett*, 135 S. Ct. 1995 (2015)**

Facts: This consolidated appeal involved chapter 7 debtors' (respondents) attempt to void junior mortgage liens on their personal residences. In each case, the amount owed on the senior mortgage exceeded the fair market value of respondents' residences. Respondents moved to strip away the junior mortgage liens under 11 U.S.C. § 506(d). The bankruptcy court granted the motions, which were affirmed by the district court and the Eleventh Circuit. The junior mortgage creditor (petitioner) petitioned and was granted certiorari.

Issue: Whether a chapter 7 debtor may void a junior mortgage lien under § 506(d) when the debt owed on a senior mortgage exceeds the fair market value of the property.

Holding: A chapter 7 debtor may not void a junior mortgage lien under § 506(d) when the debt owed on a senior mortgage exceeds the current value of the collateral if the creditor's claim is both secured by a lien and allowed under § 502.

Analysis: The Supreme Court began with the text of § 506(d), which permits a debtor to void a lien so long as it is not an allowed *secured* claim. A "straightforward" reading of the Code suggests that petitioner's claims are not secured. Specifically, § 506(a)(1) provides a claim is secured "to the extent of the value of such creditor's interest in . . . such property." That is, if the value of the creditor's interest in the property is zero, its claims cannot be secured. However, the Court in *Dewsnup v. Timm*, 502 U.S. 410 (1992), construed the term "secured claim" in § 506(d) to mean a claim supported by a security interest in property, regardless of whether the value of that property would be sufficient to cover the claim. Because petitioner's claims were secured by liens and allowed under § 502, and because respondents did not ask the Court to overturn *Dewsnup*, the junior mortgage liens cannot be voided under the definition previously given to the term "secured claim."

III. Recharacterization of Claims and Equitable Subordination

In re Alternate Fuels, Inc., 789 F.3d 1139 (10th Cir. 2015)

Facts: For, $549,250, Jenkins and his wife purchased all of the stock in Alternate Fuels, Inc. ("AFI"); 99% of the stock in AFI's operating company, Cimarron Energy Co.; Cimarron's mining equipment; and 24 certificates of deposit. The certificates had been previously pledged to secure reclamation bonds guaranteeing AFI's obligations to the State of Missouri to restore certain mining sites. The release of the certificates in the amount of $1.4 million was contingent upon AFI's satisfactory completion of its reclamation work. Jenkins was betting that the amounts of the certificates that would be released upon completion of reclamation would be less than his costs to complete the work. AFI had no income other than the advances provided by Jenkins through checks drawn on accounts of Green Acre Farms, a fictitious business name Jenkins registered in Missouri. These checks were signed over immediately by AFI to Cimarron, the operating company. AFI executed several promissory notes payable to Green Acres Farms. Jenkins was aware that AFI had no present ability to repay the notes and that his only chance of recovery were the proceeds of the release of the certificates upon completion of reclamation. AFI eventually obtained a significant judgment in a lawsuit against certain state officers and employees for tortious interference with completion of AFI's reclamation process. Jenkins had previously been granted a security interest in potential recovery from the lawsuit. As news of the judgment spread, AFI's creditors began making claims and AFI filed bankruptcy for assistance in determining the priority of claims. Jenkins filed a proof of claim in the AFI bankruptcy case. The bankruptcy court exercised authority under 11 U.S.C. § 105(a) and recharacterized the promissory notes underlying Jenkins's claim as equity and, in the alternative, ruled that Jenkins had not adequately proved the amount of his claim and equitable subordination under § 510(c) would be appropriate. On appeal, the BAP affirmed.

Issue: Whether the Supreme Court cases, *Travelers Casualty & Surety Co. of America v. Pacific Gas & Electric Co.*, 549 U.S. 443 (2007) and *Law v. Siegel*, 134 S. Ct. 1188 (2014), limit a bankruptcy court's authority to recharacterize claims.

Holding: *Travelers* and *Law* do not limit a court's authority to recharacterize claims and the Tenth Circuit case *In re Hedged-Investments Associates, Inc.*, 380 F.3d 1292 (10th Cir. 2004) remains good law. The court also reversed the BAP and bankruptcy court and held that Jenkins had sufficiently proven his claim and neither recharacterization nor equitable subordination was appropriate under the circumstances of this case.

Analysis: The Tenth Circuit agreed with the BAP that neither *Travelers* nor *Law* abrogated a bankruptcy court's ability to recharacterize a claim. Neither case dealt with recharacterization or even mentioned *Hedged-Investments*. Unlike the situation in *Law*, no explicit mandate in another section of the Bankruptcy Code was being overridden through the bankruptcy court's equitable powers in 11 U.S.C. § 105. The Tenth Circuit then applied the 13-point recharacterization test from *Hedged-Investments* and determined that the bankruptcy court had erred in recharacterizing Jenkins's debt as equity. Noting that the amounts forwarded by Jenkins to AFI did not need to match up exactly with the amounts of the promissory notes to constitute consideration and that the undercapitalization factor had been given too much weight by the bankruptcy court, the Tenth Circuit noted that caution should be exercised in this arena so that individuals would not be discouraged from trying to salvage their struggling businesses. The Tenth Circuit went on to explain that because his debt would not be recharacterized, Jenkins had met his burden of proof regarding the validity of his secured claim. Despite a dissenting opinion by Judge Phillips regarding, among other things, his view that the case should be remanded so that the bankruptcy court could make findings regarding whether Jenkins's claim was secured, the majority stated that the issue was not raised by the parties and unrequested relief would not be provided. The Tenth Circuit also concluded that equitable subordination is an extraordinary remedy that was not justified under the three-part equitable subordination test from *Hedged-Investments* because there had been no inequitable conduct by Jenkins.

IV. Property of the Estate

Brumfiel v. U.S. Bank, No. 14–1421, 2015 WL 4496197 (10th Cir. July 24, 2015)

Facts: U.S. Bank filed a public trustee foreclosure action against Brumfiel based on non-payment of a mortgage loan. Brumfield opposed the foreclosure action and filed for chapter 7 relief. The foreclosure action was stayed but remained pending during administration of Brumfiel's bankruptcy case. Brumfiel did not list her claims against U.S. Bank in her bankruptcy schedules. She received a discharge and her case was closed. Brumfield then filed a federal lawsuit against U.S. Bank, seeking, among other things, monetary damages for alleged violations of her constitutional and state law rights in connection with the foreclosure action. The district court dismissed Brumfiel's complaint and she appealed.

Issue: Whether a debtor who failed to list legal claims that accrued pre-petition was permitted to pursue such claims after debtor's bankruptcy case closed.

Holding: Because Brumfield did not list the claims, the trustee neither administered nor abandoned them at the close of the bankruptcy case and they remained property of the bankruptcy estate. Brumfield lost the authority to pursue the claims.

Analysis: The Tenth Circuit reasoned that Brumfiel's claims against U.S. Bank remained property of the bankruptcy estate and that the bankruptcy trustee, and not the former debtor, was the only proper party in interest to pursue those claims.

V. Fraudulent Transfers

***Expert South Tulsa, LLC v. Cornerstone Creek Partners, LLC (In re Expert South Tulsa, LLC)*, 534 B.R. 400 (B.A.P. 10th Cir. 2015) (appeal pending)**

Facts: Before commencement of bankruptcy proceedings, plaintiff-debtor sold real property to defendant for $3 million as a part of a complex debt resolution transaction. Approximately ten days later, defendant resold the same real property for $4.42 million. Subsequently, an involuntary chapter 7 petition was filed against debtor, which was later converted to a chapter 11 case. Debtor brought an adversary proceeding against the defendant to avoid the sale pursuant to 11 U.S.C. § 548(a)(1)(B) (the "§ 548 Claim") and § 544(b), asserting a claim under Oklahoma's Uniform Fraudulent Transfer Act (the "UFTA Claim") on the grounds that debtor was insolvent at the time of the transfer and that defendant had not provided "reasonably equivalent value" for the property. The bankruptcy court granted summary judgment in favor of defendant.

Issue: Whether the bankruptcy court erred in granting summary judgment in a fraudulent transfer proceeding based on failure to exchange reasonably equivalent value for the property.

Holding: Sale of property that was subject to a mortgage exceeding its value was not an avoidable sale of an asset.

Analysis: The BAP affirmed the decision of the bankruptcy court granting summary judgment in favor of defendant on the grounds that the property was not an "asset" subject to UFTA because it was fully encumbered at the time of the sale and that § 548 similarly failed because debtor received reasonably equivalent value for the sale. On appeal, the BAP affirmed the finding that at the time of the transfer the security interest held by the lender had not been compromised and was in excess of the value of the collateral. The BAP found debtor's argument that the value of the property actually exceeded the liens (by claiming the lien had been compromised prior to the transfer leaving some equity) unpersuasive. Accordingly, the property could not be considered an "asset" subject to avoidance under UFTA. The BAP agreed that debtor's claim pursuant to § 548 failed because the debtor had in fact received reasonably equivalent value for the sale. In so finding, the BAP confirmed that "reasonably equivalent value" is not synonymous with a simple calculation of purchase price compared to appraised value. Reasonably equivalent value is measured by all the benefits received by the seller, both direct and indirect. This requires consideration of whether or not the transferor's unsecured creditors were better off before or after the transfer. Here, the bankruptcy court reviewed the purchase price, the satisfaction of debt, and the release of liens. The BAP affirmed the bankruptcy court's analysis of reasonably equivalent value and found that the sale to defendant could not be avoided under either UFTA or § 548.

CHAPTER 11

I. Confirmation

***In re Experient Corp.*, No. 13–30169, 2015 WL 4868783 (Bankr. D. Colo. Aug. 12, 2015)**

Facts: In a contentious small business chapter 11 case, the Colorado bankruptcy court analyzed the requirements for confirmation.

Issue: Whether debtor's plan complied with the requirements of 11 U.S.C. § 1129(a).

Holding: The debtor's plan was confirmed.

Analysis: The bankruptcy court's opinion contained a detailed evaluation of the evidence in the context of contested confirmation proceedings. Among other things, the court held that the objecting creditors' claims subject to dispute (in a pending adversary and four pending objections to claims) were not "allowed" claims for the purposes of voting on debtor's plan of reorganization. Neither would the court allow the claims to be estimated for the limited purpose of voting to accept or reject the plan under FED. R. BANKR. P. 3018(a) because the creditors never filed a separate motion to request an estimation of their claims or an objection to the treatment of their votes in the debtor's ballot summary. Accordingly, the court found that the class of general unsecured creditors had voted in favor of accepting debtor's plan.

II. Effect of Confirmation on Non-Dischargeability Claims

***Bank of Commerce & Tr. Co. v. Schupbach (In re Schupbach)*, 607 Fed. App'x 831 (10th Cir. 2015)**

Facts: Debtors-appellees were members of an LLC buying, renovating, and renting/reselling real estate. The LLC obtained financing from creditor-appellant to renovate over 40 properties. Appellees signed personal guarantees. The LLC filed for chapter 11 relief and appellant filed a proof of claim for approximately $749,000. Appellees subsequently filed for chapter 13 relief (which was later converted to a chapter 11 case) and appellant filed a proof of claim that was substantially identical to its claim in the LLC case. In addition, appellant initiated an adversary proceeding against appellees under 11 U.S.C. §§ 523(a)(2) and (a)(6) for six of the 40-plus loans. The bankruptcy court dismissed the (a)(2) claim as untimely and, after a trial on the merits, entered judgment in favor of debtor-appellees on the (a)(6) claim. In between the dismissal of the (a)(2) claim and the (a)(6) trial, the LLC was liquidated, which resulted in appellant taking the LLC's properties free and clear—appellant valued the properties at $1.3 million in its claim.

Appellant subsequently appealed the bankruptcy court's dismissal of the (a)(2) claim. While the appeal was pending before the BAP, appellees proposed an individual-chapter 11 plan that purported to treat appellant's claim as fully satisfied based on the LLC's liquidation. Appellant received notice of the plan and did not object. After the court confirmed the plan, appellees filed a motion to dismiss the appeal on the basis that appellant's nondischargeability claim was moot.

The BAP granted the motion and appellant appealed to the Tenth Circuit.

Issue: Whether the BAP erred in dismissing appellant's appeal because its nondischargeability claim was mooted by appellees-debtors' confirmed individual-chapter 11 plan.

Holding: In affirming the BAP, the Tenth Circuit held that appellant's nondischargeability claim was mooted by the confirmation of the individual-chapter 11 plan.

Analysis: The Tenth Circuit concluded that a confirmed plan functions as a judgment and binds the debtor and the creditors who are parties to the plan. In the nondischargeability case, appellant sought a ruling that a portion of its claim was nondischargeable. But according to the confirmed individual-chapter 11 plan, appellant's claim was fully satisfied by the property transfer and liquidation related to the LLC case. Accordingly, once the plan was confirmed and the confirmation order went unchallenged, there was no remaining case or controversy as to the nondischargeability case. The court explained that, even if appellant were to prevail in reversing the bankruptcy court's dismissal of its (a)(2) claim as untimely, and even if the bankruptcy court held on remand that a portion of appellant's claim was nondischargeable, it was impossible for that court to grant relief because appellant's claim had been satisfied in full.

III. Conversion for Cause

***Morreale v. 2011-SIP-1 CRE/CADC Venture, LLC*, 533 B.R. 320 (D. Colo. 2015)**

Facts: The U.S. Trustee moved to convert debtor's chapter 11 case to chapter 7 for cause. The Trustee argued three forms of "cause" justified conversion: (a) substantial or continuing loss to or diminution of the estate and the absence of a reasonable likelihood of rehabilitation; (b) gross mismanagement of the estate; and (c) failure to timely pay taxes owed after the date of the order for relief or to file tax returns due after the date of the order for relief. The bankruptcy court concluded that no "gross mismanagement of the estate" existed and refused to convert on that ground. However, the court sustained the motion on the two remaining grounds.

Issue: Whether the bankruptcy court erred in holding that accrual of attorney fees by debtor-in-possession was enough, by itself, to constitute "continuing loss to or diminution of the estate" and that debtor's proposed liquidation plan indicated the "absence of a reasonable likelihood of rehabilitation."

Holding: The bankruptcy court's decision was upheld by the district court.

Analysis: Debtor claimed that the bankruptcy court erred by relying on the attorneys' fees he had incurred (but not paid) to find continuing loss to or diminution of the estate and that accrual of liabilities was not the same as actual out-of-pocket losses. Debtor further argued that his attorneys' fees were subject to dispute by certain creditors and that other courts had not relied on that fact alone to find loss or diminution. The district court agreed with the bankruptcy court that accruing attorney fees, even if the exact amount of such liabilities were yet to be determined, could constitute a continuing loss to or diminution of the estate.

Debtor also argued that his plan was more than just a simple liquidation plan. The district court was not persuaded and found adequate evidentiary support for the bankruptcy court's determination that the plan was a liquidation plan. Accordingly, the district court affirmed because a debtor cannot show "a reasonable likelihood of rehabilitation" through a liquidation plan. The district court also noted the "failure to file tax returns" element was subject to the "unusual circumstances" exception and the "substantial or continuing loss to or diminution of the estate and the absence of a reasonable likelihood of rehabilitation" element was not. Because the district court affirmed on latter, there was no need to reach debtor's argument regarding the "unusual circumstances" exception.

CHAPTER 13

I. Debtor's Obligations Under Confirmed Plan

***In re Formaneck*, 534 B.R. 29 (Bankr. D. Colo. 2015)**

Facts: The bankruptcy court confirmed debtors' sixty-month chapter 13 plan ("Confirmed Plan"), which included provisions to cure a prepetition mortgage default through payments to the chapter 13 trustee (the "Trustee"), and to make post-petition mortgage payments directly to the mortgage creditor outside the Confirmed Plan. Debtors completed all payments to the Trustee, and cured the prepetition arrears. However, the notice process under FED. R. BANKR. P. 3002.1 revealed debtors' failure to make over thirty mortgage payments directly to the mortgage creditor. Debtors never sought any modification of their Confirmed Plan, and the Trustee filed a motion to dismiss the case under 11 U.S.C. § 1307(c).

Issue: Whether debtors' failure to make post-petition payments directly to the mortgage creditor was a "material default" by debtors with respect to a term in their Confirmed Plan, and if so, whether dismissal or conversion was in the best interests of creditors and the estate.

Holding: Debtors failed to make all payments under the terms of the Confirmed Plan resulting in a material default. The bankruptcy court concluded that dismissal (rather than conversion) was in the best interests of the creditors and the estate because debtors failed to account for the missing payments of $109,022 that were not made directly to the mortgage creditor.

Analysis: The bankruptcy court noted the provisions of the Confirmed Plan were binding on debtors under 11 U.S.C. § 1327(a), and two other divisions of the court had recently addressed similar issues. *See In re Daggs*, No. 10–16518 (Bankr. D. Colo. Jan. 6, 2014) (Docket No. 49); *In re Furuiye*, No. 10–15854 (Bankr. D. Colo. Apr. 7, 2014) (Docket No.

85). Although debtors made their required payments to the Trustee, it was undisputed that debtors failed to make all payments required by the plan to their mortgage creditor. A discharge pursuant to § 1328(a) requires completion of all "payments under the plan" and that language plainly embraces payments that are required to be made directly to a creditor.

Ultimately, the court concluded the debtors' failure to make over thirty post-petition payments directly to the mortgage creditor established a "material default" with respect to terms of the Confirmed Plan, which harms both creditors and the estate. Although debtors made all required payments to the Trustee and the mortgage creditor failed to seek relief from stay to enforce its state law rights with respect to the residence, debtors failed to pay post-petition payments of $109,022 in violation of their Confirmed Plan and provided no evidence, or even allegations, as to where and how all of the income earmarked for these payments was used. Debtors could not obtain a discharge of their debts in chapter 13, and rewarding debtors with a discharge in chapter 7 for their failure to comply with the Confirmed Plan and the Code was inappropriate. In its discretion, the court held debtors' material default warranted dismissal pursuant to § 1307(c)(6).

***In re Gonzales*, 532 B.R. 828 (Bankr. D. Colo. 2015)**

Facts: Following chapter 13 debtors' final plan payment, the trustee filed a notice of final cure payment and debtors filed their certification to obtain discharge. Debtors' mortgage creditor timely filed a statement in response to the notice of final cure, noting that nearly $50,000 in post-petition payments remained unpaid. Notwithstanding, the trustee docketed an entry informing the bankruptcy court that debtors had completed their plan and requested entry of debtors' discharge. The court entered the discharge the next day. The court subsequently issued an order to show cause because its review of the docket revealed contradictory filings that called into question the propriety of the debtors' discharge in the case.

Issue: Whether the court properly granted debtors' discharge under 11 U.S.C. § 1328(a) based upon their certification that they completed all plan payments and obligations, and upon the trustee's statement of completion with request for discharge.

Holding: Debtors were not entitled to entry of a discharge because they failed to make all payments under the plan.

Analysis: The bankruptcy court vacated debtors' discharge because debtors failed to make all plan payments. Although debtors made their required payments to the trustee, it was undisputed that debtors failed to make all payments required by the plan to debtors' mortgage creditor—in fact, those payments were part of a second bankruptcy filed by debtors in 2015. A discharge pursuant to § 1328(a) requires completion of all "payments under the plan" and that language plainly embraces payments that are required to be made directly to a creditor. The court found particularly troubling the trustee's request for discharge despite debtors' mortgage creditor's indication that debtors failed to make all plan payments. The court observed that a trustee need not investigate the status of all non-direct plan payments, however, where the trustee has received information that a creditor alleges a substantial default under the plan, the trustee has a duty to inform the court of the alleged default.

II. Plan Provisions Relating to Changes in Circumstances

In re Trobiano, 532 B.R. 355 (Bankr. D. Colo. 2015)

Facts: Debtors filed for chapter 13 relief. Between filing the petition and proposing the plan at issue, debtor-husband lost his job as a pipefitter. Debtors filed a plan along with amended schedules I and J. Debtors included a provision in their plan that would have required debtors to amend schedule I and modify the plan within 30 days of debtor-husband obtaining employment. The trustee objected and requested that debtors include provisions requiring: (1) debtors to disclose their tax returns and year-end pay advices during the duration of the plan; and (2) debtors to turn over 33% of their gross income in excess of the income listed in schedule I. Debtors rejected the trustee's provisions and argued the plan should be confirmed.

Issue: Whether debtors' plan was confirmable, absent the trustee's proposed reporting and income turnover provisions.

Holding: Debtors were not required to include the trustee's proposed provision requiring debtors to turn over 33% of gross income in excess of certain threshold during the duration of the plan.

Analysis: The court rejected the trustee's income turnover provision, but agreed that the reporting provision was appropriate. Although *Lanning* endorses a forward-looking approach factoring in future adjustments to projected disposable income, the changes in a debtor's income or expenses must be known or virtually certain. There was no evidence that debtor-husband's employment prospects were known or virtually certain. Moreover, the trustee's mechanical approach—requiring payment of a fixed portion of future income above a certain amount—would not have taken into account the changed circumstances resulting from debtor-husband's future employment. Debtors' proffered provision to amend schedule I and modify the plan within 30 days of employment was reasonable and all that was required by the Code. To ensure that debtors' complied with the provision, however, the court mandated that the trustee's reporting provision be included in the plan.

III. Treatment of Accumulated Post-Petition Wages After Conversion

Harris v. Viegelahn, 135 S. Ct. 1829 (2015)

Facts: Debtor filed for chapter 13 bankruptcy relief. His court-confirmed plan provided that the chapter 13 trustee would collect part of debtor's post-petition wages for distribution to creditors, including debtor's home mortgage lender. After debtor once again fell behind on his mortgage payments, the bank foreclosed on debtor's home during the pendency of the bankruptcy. The trustee continued to collect money from debtor's post-petition wages but stopped distributing the portion of those funds previously earmarked for the bank. As a result, over $5,000 in funds formerly reserved for the bank accumulated in the trustee's possession. A few days after the case was converted, the trustee distributed the accumulated wages to debtor's creditors. Debtor sought an order from the bankruptcy court directing a refund of the accumulated wages. The court granted debtor's motion and the district court affirmed. The Fifth Circuit reversed, concluding that a trustee must distribute a debtor's accumulated post-petition wages to creditors.

Issue: What should a chapter 13 trustee do with accumulated wages upon conversion of a case from chapter 13 to chapter 7?

Holding: Post-petition wages held by a chapter 13 trustee at the time the case is converted to chapter 7 must be returned to debtor.

Analysis: Conversion does not commence a new bankruptcy case but conversion does terminate the service of the Chapter 13 trustee. Thus, the provisions of the bankruptcy code relating to the duties of a Chapter 13 trustee are not helpful. Section 348(f) clarifies that a debtor's post-petition wages, including undisbursed funds in the hands of a trustee, ordinarily do not become part of the Chapter 7 estate created by conversion. 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 and post-petition wages don't fit that bill. The Supreme Court noted that even though § 348(f) "does not say, expressly: On conversion, accumulated wages go to the debtor" that is the most sensible reading of what Congress did provide.

OTHER ISSUES

I. Article III Jurisdiction

***Wellness Int'l Network, Ltd. v. Sharif*, 135 S. Ct. 1932 (2015)**

Facts: Respondent-debtor filed a federal suit against petitioner-creditor concerning a distribution agreement between the parties. Petitioner eventually obtained a default judgment in the case and was awarded fees in excess of $650,000. Respondent filed for chapter 7 relief in part due to petitioner's collection efforts. During the bankruptcy process, petitioner learned of unreported assets that respondent was purportedly holding in trust for the benefit of his sister. Petitioner initiated an adversary proceeding (1) objecting to respondent's discharge, and (2) seeking a declaration that the trust was respondent's alter ego and that its assets should be part of the bankruptcy estate. After repeated discovery violations, the bankruptcy court denied respondent's discharge and entered a default judgment against him in the adversary proceeding.

Respondent appealed to the district court. Before respondent filed his opening brief, the U.S. Supreme Court decided *Stern v. Marshall*, holding that Article III prevents a bankruptcy court from entering final judgment on claims that seek to augment the estate and could exist outside of bankruptcy. Importantly, respondent did not cite *Stern* in his briefing, and the district court affirmed the bankruptcy court. On appeal to the Seventh Circuit, the court determined that respondent's *Stern* objection implicated structural interests, and based on separation-of-powers considerations, respondent could not have waived any *Stern* objection. The court went on to hold that the bankruptcy court lacked constitutional authority to enter final judgment on petitioner's claim for declaratory judgment because it involved a *Stern* claim.

Issue: Whether Article III allows bankruptcy courts to adjudicate a *Stern* claim with the consent of the parties.

Holding: Article III permits bankruptcy courts to decide *Stern* claims when the parties knowingly and voluntarily consent to the bankruptcy court's adjudication.

Analysis: The Supreme Court began its analysis of the issue with *Commodity Futures Trading Commission v. Schor*. That case stands for the proposition that the right to an Article III adjudicator is a "personal" right subject to waiver. Whether a claimant has waived that right is not always dispositive, however. Article III also serves structural interests in the organization of our government—i.e., preserving separation of powers. Where structural concerns are implicated, litigants cannot cure such constitutional deficiencies by consent. The Court (citing two magistrate judge cases) explained that structural issues are not present when the non-Article III adjudicator is under the supervision and control of Article III courts. Here, the bankruptcy process takes place under the control and jurisdiction of the district court. Even more, bankruptcy judges serve as officers of the district court and are subject to removal by Article III judges. Therefore, no structural concerns are implicated. Lastly, the Court addressed the type of consent required to activate a bankruptcy court's authority to decide a *Stern* claim. Nothing in the Constitution or 28 U.S.C. § 157 mandates that consent be express. Looking again to the magistrate judge system, the Court held that the implied consent standard supplied the appropriate rule. Notwithstanding, "the key inquiry is whether 'the litigant or counsel was made aware of the need for consent and the right to refuse it, and still voluntarily appeared to try the case' before the non-Article III adjudicator"—that is, the consent must be knowing and voluntary.

Dissent (Roberts, C.J.): Chief Justice Roberts argued that the majority should have decided the case on narrower grounds. That is, based on the fact that a bankruptcy court had the authority to adjudicate petitioner's claim *because* it dealt with whether the trust assets were part of the bankruptcy estate. As to the broader issue addressed by the majority, he argued that because the case presented separation of powers concerns, respondent had no authority to consent to the bankruptcy court's adjudication. Despite the practicality of allowing more issues to be adjudicated outside of Article III courts, the constitutional protections of the power of the judiciary must be respected and protected against legislative usurpation.

Dissent (Thomas, J.): Justice Thomas argued that, while an individual can waive certain constitutional rights, an individual cannot consent to a violation of the Constitution. Therefore, a party can waive the right to have a claim decided by an Article III court only if the claim is within the jurisdiction of a non-Article III court. Because petitioner's claim did not fall within the jurisdiction of the bankruptcy court, respondent could not have consented to have it adjudicated by a non-Article III court.

***Loveridge v. Hall (In re Renewable Energy Dev. Corp.)*, 792 F.3d 1274 (10th Cir. 2015)**

Facts: A company that leased real property from private property owners to operate wind farms filed for chapter 7 relief. The chapter 7 trustee consulted with one of his clients who also operated wind farms (Summit Wind Power) to determine whether debtor's leases had any value. With the help of Summit, the trustee determined leases were worthless because debtor had failed to properly pay the property owners. The trustee encouraged Summit to pursue its own leases with the same property owners. Later, however, the trustee took the position that debtor's leases still had value because debtor was entitled to a chance to cure its defaults under the leases. By this time, Summit had entered into new leases with the property owners. The trustee then filed an adversary action against Summit on behalf of the bankruptcy estate. Summit counterclaimed for, among other things, legal malpractice and breach of fiduciary duty. As a result of the conflict of interest, the trustee was removed from the bankruptcy case. Summit then sued the trustee in district court, alleging diversity jurisdiction and the right to have the case resolved in an Article III court. The trustee argued that the dispute belonged in bankruptcy court. The district court (with some uncertainty, it seems) agreed with the trustee and referred the case to the bankruptcy court, concluding that the bankruptcy court had jurisdiction to enter a final judgment on the claims, notwithstanding *Stern*. However, the district court judge also certified its decision to the Tenth Circuit for immediate appeal. Summit then appealed.

Issue: Whether state law claims that were "factually intertwined" with a bankruptcy proceeding belonged in bankruptcy court.

Holding: Under *Stern*, Summit's claims against the trustee and his firm arose under state law, were properly heard in federal court under the diversity statute, and would not have been resolved in the process of allowing or disallowing claims against the estate. Summit was entitled to have an Article III district court resolve its claims and the district court may refer the case to an Article I bankruptcy court for a report and recommendation.

Analysis: The opinion includes a lengthy discussion of *Stern* and the "public rights" exception in which persons otherwise entitled to a federal forum may wind up having their dispute resolved by someone other than an Article III judge. The Tenth Circuit commented that the Supreme Court has not helped much in deciding which aspects of typical bankruptcy proceedings do and don't implicate public rights; however, the opinion does recognize that *Stern* did make one thing clear: "cases properly in federal court but arising under state law and not necessarily resolvable in the claims allowance process trigger Article III's protections." While recognizing that at least the last part of this test from *Stern* could be read to invoke the "plenary" and "summary" distinction of old, it expressly rejected the trustee's theory that the "public rights doctrine" should be extended to cases "factually intertwined" with bankruptcy. The Tenth Circuit commented that the only "intertwining" that *Stern* cares about "concerns the law, not the facts." The Tenth Circuit agreed with Summit that ultimately only an Article III court could finally determine the dispute, but also held that the district court could refer the matter to the bankruptcy court for proposed findings and conclusions pursuant to 28 U.S.C. § 157(c)(1). Summit argued that the dispute was so tangential to the bankruptcy case that it did not even satisfy "related to" jurisdiction, but the Tenth Circuit declined to address this argument as it was not raised in the lower court and was therefore waived on appeal.

II. Appeal of a Denial of Motion to Dismiss

Florado Partners, LLC v. Gollehon (In re Gollehon), No. 14–031, 2015 WL 1746496 (B.A.P. 10th Cir. Apr. 17, 2015)

Facts: Defendant-debtor appealed the bankruptcy court's denial of his discharge. Plaintiff was an LLC formed by defendant and other investors to hold and develop real estate. Prior to bankruptcy, plaintiff obtained an arbitration award against defendant, which was confirmed by state court order. Plaintiff objected to defendant's discharge under multiple grounds and defendant filed a motion to dismiss on the basis of authority to sue. Defendant contended that plaintiff's operating agreement required unanimous consent by plaintiff's members. The bankruptcy court denied the motion and, ultimately, denied defendant's discharge after a trial on the merits. Defendant appealed, arguing that the bankruptcy court erred in failing to grant his motion to dismiss on capacity to sue.

Issue: Whether the bankruptcy court erred in not granting defendant's motion to dismiss on the basis that plaintiff lacked the authority to commence the adversary proceeding objecting to defendant's discharge.

Holding: Under Tenth Circuit law, no grounds existed to permit defendant to successfully appeal the bankruptcy court's ruling on plaintiff's capacity or authority to sue.

Analysis: The BAP rejected defendant's appeal on procedural grounds. The general rule in the Tenth Circuit is that a defendant may not appeal the *denial* of a Rule 12(b)(6) motion after a plaintiff has prevailed at trial. Instead, defendant must first challenge the sufficiency of the claim through a motion for judgment as a matter of law and then appeal the denial of that motion. Although the Tenth Circuit has recognized a limited exception for the denial of summary judgment where the decision is purely a legal question, no such exception exists for 12(b)(6) motions. Because defendant failed to raise the authority to sue at trial or in any post-trial motion, no grounds existed to permit defendant's appeal.

Interestingly, a two-judge majority, in dictum, went on to address the applicability of res judicata. Relying on the Restatement (Second) of Judgments § 18, the BAP opined that the adversary proceeding was akin to "an action upon the judgment," and defendant was precluded from availing himself of defenses he *might have asserted* in the first action. Because the adversary proceeding involved the same transaction, evidence, and factual issues as the underlying arbitration, and concerned the future enforceability of the confirmed arbitration award, defendant was barred from raising his capacity to sue defense.

III. Clerk's Failure to Give Notice and Appellate Rights

Onyeabor v. Centennial Pointe Prop. Owners' Ass'n (In re Onyeabor), No. 14–047, 2015 WL 1726692 (B.A.P. 10th Cir. Apr. 15, 2015)

Facts: A *pro se* debtor's chapter 13 case was converted to a case under chapter 7. Two and a half years later, the debtor filed a FED. R. CIV. P. 60(b) motion to reconsider the conversion order based on new evidence (the "Motion to Reconsider"). The bankruptcy court denied the Motion to Reconsider in open court at the end of a hearing on the matter. Two days later, the court entered a written order. Inexplicably, neither a copy of the order nor notice of its entry was sent to the debtor until 18 days later. Twenty-one days after entry of the order denying the Motion to Reconsider, the debtor then filed a motion to set the date she actually received notice as the determinative date when time began to run for her to file a motion under FED. R. BANKR. P. 9023 (the "Motion to Set Deadline") and another motion to set aside the order on the Motion to Reconsider based on the clerk's failure to send her notice of the order's entry (the "Motion to Set Aside"). The bankruptcy court: (a) denied the Motion to Set Deadline concluding that Rule 9006 prohibited the court from enlarging the time to file a motion under FED. R. CIV. P. 59; and (b) denied the Motion to Set Aside concluding that the Motion to Set Aside simply revisited arguments previously heard and rejected. Debtor appealed the order denying the Motion to Reconsider and the order denying the Motion to Set Deadline and the Motion to Set Aside.

Issue: Whether the bankruptcy court denied debtor her due process when it treated the Motion to Set Aside as an untimely Rule 59 motion.

Holding: The bankruptcy court's orders were affirmed. Debtor's appeal of the bankruptcy court's order denying the Motion to Reconsider was dismissed for lack of appellate jurisdiction.

Analysis: Ordinarily, if a motion to reconsider is filed within FED. R. BANKR. P. 9023's time limitation, it is treated as a FED. R. CIV. P. 59(e) motion; if it is filed more than 14 days after entry of judgment, it is treated as a motion under Rule 60(b). A motion for reconsideration under Rule 59 tolls the time to file an appeal and a motion under Rule 60 generally does not. The BAP found the clerk's failure to give the notice required by FED. R. BANKR. P. 9022 did not violate debtor's right to due process. The BAP found that entitlement to notice under Rule 9022 was not an interest protected by the Due Process Clause and this result comports with Rule 9022's warning that notice of entry of a judgment does not affect the time to appeal. The BAP also felt that debtor was given a meaningful opportunity to be heard under FED. R. CIV. P. 60 such that there was no due process violation. The BAP did not consider the debtor's *pro se* status to be a "unique circumstance" justifying the extension of time to file a Rule 59 motion. Because the Motion to Set Aside was filed more than 14 days after entry of the order denying the Motion to Reconsider, the BAP concluded that the bankruptcy court properly treated it as a motion filed under Rule 60. Thus, the deadline to appeal the order denying the Motion to Reconsider was not tolled and the appeal of the order granting the Motion to Reconsider was dismissed for lack of appellate jurisdiction.

IV. Recusal

In re Ottman, 534 B.R. 18 (Bankr. D. Colo. 2015)

Facts: Debtors filed for chapter 13 relief in 2011. Debtors moved to modify their plan in 2013 and amended schedules I and J. The trustee objected and the court denied the motion. Debtors filed a new modified plan and the trustee again objected, asserting that debtor-husband's pay advices showed more monthly income and certain expenses were not reasonably necessary. The court held an evidentiary hearing, which was continued for a later date. In the interim, debtors filed a motion to recuse the bankruptcy judge because of perceived criticism of debtors' counsel during the hearing. In particular, debtors claimed that the judge was over critical of counsel and described the courts tone as "one of condescension, a profound lack of respect, and a manner that borders on scorn."

Issue: Whether a bankruptcy judge should recuse himself because of perceived criticism of debtors' counsel during an evidentiary hearing on debtors' motion to modify their chapter 13 plan.

Holding: No grounds existed to justify recusal of the bankruptcy judge.

Analysis: The court rejected debtors' motion for recusal. Citing 28 U.S.C. § 455, the court observed that recusal is appropriate where impartiality might be reasonably questioned or where a judge has personal bias or prejudice concerning a party. However, perceived bias that emanates from events originating in the current proceeding is not grounds for recusal—even if the remarks are considered hostile or critical of a party or counsel. The bias alleged by debtors was primarily related to a dialogue between the judge and debtors' counsel during the course of the hearing. The discussion related to debtors' amended schedules I and J and the absence of a summary of debtors' schedules. In particular, there was confusion during the hearing as to the proper date of the amended schedules. The court concluded that these complaints are not grounds for recusal. As for debtors' complaint regarding the judge's history with their counsel, debtors provided no factual support for that assertion.

V. Finality of Order Denying Confirmation of Chapter Plan

Bullard v. Blue Hills Bank, 135 S. Ct. 1686 (2015)

Facts: Petitioner-debtor filed for chapter 13 relief and proposed a plan that would have bifurcated respondent-creditor's mortgage debt into secured and unsecured claims. Through the plan, petitioner would have paid less than 5% of the unsecured claim. Upon objection from respondent, the bankruptcy court denied confirmation, concluding that petitioner's plan failed unless he paid the entire secured portion during the plan period. Petitioner appealed to the First Circuit BAP, who concluded that the order denying confirmation was not a final order. The BAP elected to hear the appeal under 28 U.S.C. § 158(a)(3). On the merits, the BAP agreed with the bankruptcy court. Petitioner appealed to the First Circuit, and the court dismissed the appeal for lack of jurisdiction. The court acknowledged the circuit split as to whether an order denying confirmation is a final appealable order and sided with the majority view—that is, as long as the debtor is free to propose another plan, an order denying confirmation is not final.

<u>Issue</u>: Whether an order denying confirmation of a chapter 13 plan is a final order that the debtor can immediately appeal.

<u>Holding</u>: A bankruptcy court's order denying confirmation of a debtor's proposed repayment plan is not a final order that the debtor can immediately appeal.

<u>Analysis</u>: The Supreme Court began by acknowledging that the general rules of finality do not necessarily comport with the bankruptcy process. Congress recognized this caveat in enacting § 158(a), which authorizes appeals not only from final judgments, but from "final judgments, orders, and decrees . . . in cases and proceedings." The question then becomes how to define the immediately appealable "proceeding" in the context of chapter 13 plans. The Court concluded that the relevant proceeding is the process of arriving at an *approved* plan that would allow the bankruptcy to move forward. An approved plan alters the status quo and reforms parties' legal rights; it is also preclusive on the parties. By contrast, denial of confirmation with leave to amend changes little. The stay persists, the parties' rights and obligations remain unsettled, and the possibility of discharge lives on.

The Court rejected the Solicitor General's argument that, because an objection to a plan is considered a contested matter, denying confirmation "resolves" that matter making it final. The list of contested matters is "endless." The mere resolution of such matter cannot be the predicate for gauging finality. Instead, the appropriate test is whether a decision resolves the entire plan process. Lastly, the Court was sympathetic to petitioner's claim that debtors could be put in the precarious position of seeking dismissal of their bankruptcy or accepting an amended plan and appealing the confirmation. The litigation system has, however, accepted that certain rulings may be only imperfectly reparable by the appellate process. Even more, questions deserving immediate review can be appealed through interlocutory appeal process.

Morreale Hotels, LLC v. 2011–SIP–CRE/CADC Venture, LLC (In re Morreale Hotels, LLC), No. 14–cv–1537, 2015 WL 1726764 (D. Colo. Apr. 13, 2015)

<u>Facts</u>: Appellant-debtor filed for chapter 11 protection, and appellee-creditor filed a motion for relief from stay. The bankruptcy court denied appellee's motion, but conditioned the continuation of the stay on the confirmation of appellant's reorganization plan pending before the court. Later the court denied confirmation of appellant's plan and lifted the stay. Appellant appealed to the district court. After appellant filed its opening brief, the U.S. Trustee (also an appellee) filed a motion to dismiss the appeal for lack of jurisdiction.

<u>Issue</u>: Whether a district court has appellate jurisdiction to review an order denying confirmation of debtor's chapter 11 plan when it is inextricably related to the grant of relief from stay.

<u>Holding</u>: The district court's jurisdiction was proper because of the unique relationship between the order denying confirmation and the order granting relief from stay.

Analysis: The district court first noted that the order denying confirmation and the order granting relief from stay were "inextricably bound" in appellant's appeal. The grant of relief from stay was expressly conditioned on the denial of confirmation of the chapter 11 plan. The Tenth Circuit has held that the denial of confirmation in both a chapter 13 and chapter 12 context is not a final order. There is nothing to suggest a chapter 11 plan should be treated differently. The grant of relief from stay, however, is an appealable order. And because of the unique relationship between the order denying confirmation and the order granting relief from stay, the court held that it had jurisdiction to hear the entire appeal. The court did, however, strike appellant's opening brief due to deficiencies in form and content of the brief.

VI. Failure to Seek Stay Pending Appeal and Mootness

***Anderson v. West (In re Anderson)*, 604 Fed. App'x 735 (10th Cir. 2015)**

Facts: Appellant-debtor obtained several loans secured by real property from appellee-creditor. Appellant defaulted on the loans and appellee initiated state foreclosure proceedings. On the eve of the foreclosure sale appellant filed for chapter 11 relief—which was later converted to a chapter 7 case. A trustee was appointed, and he elected to abandon the subject property because it was underwater. Appellant objected. The bankruptcy court allowed the abandonment and appellant *did not* seek a stay pending appeal. Because the property was no longer subject to the stay, the appellee continued with the foreclosure sale. After the foreclosure sale, appellant filed an emergency motion with the bankruptcy court seeking to extend/impose the automatic stay and to invalidate the sale. The court denied the motion and dismissed a related adversary proceeding, finding that the matter was moot. Appellant appealed to the district court. The district court considered the merits of appellant's appeal, including taking evidence, but ultimately affirmed the bankruptcy court's allowance of the abandonment. On appeal to the Tenth Circuit, appellees asserted the court lacked jurisdiction because of mootness issues.

Issue: Whether the issues appellant raised on appeal regarding the subject property were moot because appellant failed to seek a stay of the bankruptcy court's allowance of the abandonment before the foreclosure sale.

Holding: The appellate court lacked jurisdiction over the appeal because it was moot.

Analysis: The Tenth Circuit explained that mootness is a threshold jurisdictional issue. A case is moot where it would be impossible for a court to grant relief to the prevailing party—that is, if the court were to reverse the allowance of the abandonment, can the court grant effective relief. The court cited the established rule that if a party fails to seek a stay pending appeal of an order granting relief from stay, and the property is subsequently sold through a foreclosure sale, then an appeal of that order is moot. The same logic applies to the bankruptcy court allowing the abandonment of property. In each case the decision is immediately operative, and the property is no longer under the control of the bankruptcy court.

VII. Abstention

***Platte River Bottom, LLC v. Advantage Bank (In re Platte River Bottom, LLC)*, No. 13–13098, 2015 WL 3897453 (Bankr. D. Colo. Jun. 23, 2015) (appeal pending).**

Facts: Debtor filed for chapter 11 relief. Debtor's business involved the ownership and leasing of certain real property and it owned certain water rights. The water rights are unique to the City of Evans and were referred to as Equivalent Residential Units (EQRs). Defendant-creditors claimed a security interest in certain EQRs. Prior to debtor's bankruptcy, defendants had filed lawsuits in state court to recover their collateral. These lawsuits precipitated the filing of debtor's bankruptcy case and other related bankruptcy cases.

Debtor filed an adversary proceeding against defendants and the City of Evans (among others) seeking a declaration from the bankruptcy court as to the parties' respective interest in the EQRs. Debtor also sought the court's determination regarding a prepetition foreclosure sale by one of the defendants of certain EQRs. Thereafter, the adversary complaint was amended to seek the court's declaration regarding the validity of the transaction with Evans where certain ditch shares were exchanged for EQRs. Debtor also sought the court's determination as to the validity and enforceability of a settlement agreement. One of the defendant-creditors filed a motion in the adversary proceeding whereby it requested that the bankruptcy court abstain from adjudicating the adversary proceeding.

Issue: Whether the bankruptcy court must abstain under 28 U.S.C. § 1334(c)(2) (mandatory abstention) or should abstain under 28 U.S.C. § 1334(c)(1) (discretionary abstention) from adjudicating the adversary proceeding.

Holding: The bankruptcy court, under theories of both mandatory and discretionary abstention, granted the motion to abstain.

Analysis: Under § 1334(c)(2) and the analysis set forth in *In re Taub*, 413 B.R. 81, 88 (Bankr. E.D.N.Y. 2009), the Court analyzed six factors. The court concluded that any determination regarding the validity of the transactions with Evans and any interest in the EQRs were state law issues. While the court concluded that the issue of the validity of the settlement agreement was a close question because the bankruptcy court had entered the settlement agreement, the court concluded that the underlying subject matter of the settlement agreement was more closely related to the litigation taking place in state court. Moreover, the court did not believe that the adversary proceeding was an action arising under title 11 or arising in a case under title 11 simply because the settlement agreement was entered into during the course of the bankruptcy case. The court decided that, because state court litigation was pending at the time of filing, the dispute should be decided in state court as all of the parties present and all of the claims present in the adversary proceeding were the subject of the prior state court litigation.

The court also considered 12 factors from the case of *Matter of Chicago, Milwaukee, St. Paul & Pacific R. Co.,* 6 F.3d 1184, 1189 (7th Cir. 1993) and further decided to exercise discretionary abstention under § 1334(c)(1). The Court went on to explain the philosophy behind discretionary abstention:

> The gravamen of any discretionary abstention determination is the extent to which abstention from exercising federal bankruptcy jurisdiction over a case serves "the interest of comity with State courts or respect for State law." 28 U.S.C. § 13334(c)(1). The . . . list of factors has been developed over the years by the federal courts as an aid to highlighting how the interests of comity and respect for state law are served by a decision to abstain. However, in the end, the decision to abstain is always made on the basis of the totality of circumstances and the . . . recognized factors do not serve to limit the circumstances that a court may consider relative to a given case or the weight a court chooses to give to particular factors.

VIII. Revocation of Technical Abandonment

In re Ghaemi, No. 12-29295 (Bankr. D. Colo. Aug. 5, 2015)

Facts: Nine months before debtor filed for bankruptcy relief, he met with an attorney to access the viability of a malpractice claim with an attorney. Debtor filed bankruptcy and did not list a potential malpractice claim. He attended his 341 meeting of creditors and made no mention of a potential malpractice claim. About eight months after his meeting of creditors and just prior to the closing of his bankruptcy case, debtor amended his bankruptcy schedules to list the malpractice claim. The chapter 7 trustee filed his report of no distribution and discharge entered on July 5, 2013. Believing his case was over the debtor met with the attorney with whom he met with nine month prior to the bankruptcy filing to engage him to pursue the malpractice claim. While the malpractice case was pending, debtor's bankruptcy case was closed. Thereafter, the trustee was informed about the malpractice claim. The trustee moved to reopen the case to administer the malpractice claim. Debtor objected asserting that he disclosed the claim on his amended schedules and the trustee, notwithstanding, had abandoned the claim

Issue: May a trustee revoke the "technical abandonment" of property of a bankruptcy estate under the circumstances of the case?

Holding: Under the facts and circumstances of the case, the trustee could not revoke his technical abandonment.

Analysis: Pursuant to 11 U.S.C. § 544(c), any property that was listed on debtor's schedules and was not "otherwise administered" by the trustee at the time of the closing of the case is "abandoned to the debtor," unless the court orders otherwise. The Tenth Circuit has held that a trustee seeking to revoke a technical abandonment must do so pursuant to FED. R. CIV. P. 60(b). The court held that "[w]hen it comes to scheduling legal claims, courts have held that listing an unknown value along with a general description of the claim is sufficient." The court declined the trustee's argument that the information provided to him did not disclose enough to lead him to believe the malpractice claim was worth anything. The court held that once the claim was disclosed on the amended schedule, the trustee could have placed a phone call to debtor's bankruptcy counsel. Instead, the trustee chose not to investigate the asset and allowed it to be abandoned. The court held that just because the trustee regrets his decision, it is not a "mistake" or "inadvertence" sufficient to warrant revocation of technical abandonment under Rule 60(b).

IX. Debtor's Standing to Object to Trustee's Administration of Bankruptcy Estate

In re Morreale, No. 13–27310, 2015 WL 3897796 (Bankr. D. Colo. Jun. 22, 2015)

Facts: In an individual debtor case converted from chapter 11 to chapter 7, debtor objected to the chapter 7 trustee's motion to sell certain assets of the bankruptcy estate. Contending that the bankruptcy estate was insolvent and that debtor lacked standing to object to the sale, the trustee filed a motion to strike debtor's objection. Apparently wishing to bolster his standing argument, debtor obtained an assignment of a purported creditor claim from a law firm against himself and filed a proof of claim. The trustee then objected to debtor's proof of claim which was contested by debtor. Prior to the dispute surrounding the motion to sell and motion to strike, he debtor repeatedly confirmed the insolvency of his personal bankruptcy estate. Debtor's wholly owned company had filed its own chapter 11 case almost a year prior to debtor's individual filing. Prior to obtaining an assignment of the creditor claim, debtor listed the creditor claim as a contingent, unliquidated, and disputed business debt in his personal case and as a trade debt with no codebtor in the business case.

Issue: Whether standing for an individual debtor to object to a trustee's motion to sell estate assets could be established through the (1) reasonable possibility of a surplus where the debtor had previously alleged insolvency, and (2) assignment by a creditor of its claim against the debtor—to the debtor.

Holding: (1) Debtor failed to meet his burden to prove a reasonable possibility of surplus in the case; (2) debtor failed to meet his burden to establish the validity and amount of the creditor claim; and (3) a debtor cannot obtain standing by asserting a claim against his personal bankruptcy estate.

Analysis: The court followed well-established precedent that to have standing to object to a bankruptcy court order, a person must have a pecuniary interest in the outcome of the proceeding. In the context of a motion to sell estate property by a trustee, the court explained that the "reasonable possibility of a surplus" rule has been universally endorsed and is the law in the Tenth Circuit. In other words, a chapter 7 individual debtor will not have a pecuniary interest in the trustee's administration of the bankruptcy estate unless there is a reasonable possibility that the trustee's administration of the bankruptcy estate will result in a surplus and a financial return to the debtor. After an evidentiary hearing, the court decided that debtor's new optimism regarding the potential for a surplus was not supported by the evidence. The court noted that without outside valuation testimony or evidence of a change in circumstances since the previous allegations of insolvency, debtor's bare assertions that his estate was now solvent were unpersuasive. Turning to whether the creditor's assignment of a claim against debtor—*to debtor*—would endow debtor with standing by giving him a pecuniary interest in the trustee's administration of the estate, the court first found that debtor failed to prove the validity and amount of the claim itself. The evidence submitted by debtor was insufficient to overcome his prior representations about the unenforceability of the very claim he had been assigned. Furthermore, the court reasoned, even had the claim been a valid obligation owed personally by debtor, the assignment itself was impermissible as a matter of law. The court explained that a debtor may not be a creditor in his own bankruptcy case. A debtor simply cannot owe himself money or sue himself.

X. Dismissal for Engaging in the Marijuana Trade

***Arenas v. U.S. Trustee (In re Arenas)*, No. 14–046, 2015 WL 5008718 (B.A.P. 10th Cir. Aug. 21, 2015)**

Facts: Debtors jointly own a commercial building in Denver that consisted of two units. The husband grew and wholesaled marijuana in one unit. Debtors leased the other unit to a marijuana dispensary. After an eviction proceeding against the dispensary resulted in a $40,000 attorney fee award against debtors, they filed their chapter 7 bankruptcy petition. The U.S. Trustee filed a motion to dismiss the case for cause under 11 U.S.C. § 707(a). In response, debtors moved to convert their case to chapter 13 and objected to the motion to dismiss. The Colorado bankruptcy court denied the motion to convert and granted the Trustee's motion to dismiss debtors' case.

Issue: Whether engaging in the marijuana trade, which is legal under Colorado law but prohibited under federal law, amounts to "cause" including a "lack of good faith" that effectively disqualifies otherwise eligible debtors from bankruptcy relief.

Holding: The bankruptcy court's decision was affirmed.

Analysis: The BAP noted that bankruptcy relief is a privilege and not a right. The BAP also agreed with the bankruptcy court's reasoning that under the facts of this case, it would be impossible for a chapter 13 trustee to administer and distribute funds or for a chapter 7 trustee to administer the estate without violating the Controlled Substances Act.

XI. *Rooker-Feldman*, Issue Preclusion, and Judicial Estoppel

***Flanders v. Lawrence (In re Flanders)*, No. 13–01456, 2015 WL 4641697 (B.A.P. 10th Cir. Aug. 5, 2015).**

Facts: An individual debtor's bankruptcy and divorce proceedings were pending at the same time. Debtor's wife did not join in his bankruptcy petition. Both proceedings were complex and involved interrelated property issues. After the bankruptcy case was closed, the divorce court issued final orders dividing marital property and marital debt and entered a large judgment against debtor. Debtor unsuccessfully appealed the divorce court's orders in the state court. Undaunted, debtor initiated an adversary proceeding in bankruptcy court asking the bankruptcy court to hold the divorce court and his ex-wife in contempt for allegedly violating the discharge injunction of 11 U.S.C. § 524. The bankruptcy court granted the ex-wife's motion for summary judgment concluding that although it could not revisit factual issues decided by the divorce court to the extent that an exercise of such jurisdiction would constitute an appeal of state court orders, the ex-wife's alleged willful violation of the discharge injunction is an independent claim which it was not barred from adjudicating by virtue of the *Rooker-Feldman* doctrine. However, the bankruptcy court also held that to the extent success on debtor's contempt claims required relitigation of issues decided by the divorce court, the result was governed by principles of issue preclusion. This is because debtor's claims for violation of the discharge injunction depended on reversal of factual adjudications regarding marital property and marital property debt by the divorce court.

Issue: Did the bankruptcy court erroneously grant the ex-wife's summary judgment motion based upon the *Rooker-Feldman* doctrine and issue preclusion?

Holding: The bankruptcy court's order granting summary judgment in favor of the defendants in the adversary proceeding on the debtor's claims against them for violation of the discharge injunction was affirmed.

Analysis: Debtor's causes of action, which related to a state court's divorce orders regarding marital property and marital debt, were not barred by the *Rooker-Feldman* doctrine because debtor's claims for violation of the discharge injunction were independent federal claims. Instead, defendants were entitled to summary judgment based on the principles of issue preclusion because the facts essential to debtor's claims had all been litigated and adjudicated against him by the divorce court.

***Horizon Womens Care Prof'l LLC v. Baack (In re Horizon Womens Care Prof'l LLC)*, No. 13–28436, 2015 WL 2147970 (Bankr. D. Colo. Apr. 17, 2015)**

Facts: Debtor filed an adversary complaint against defendant alleging claims under 11 U.S.C. §§ 547 and 548 (preferential and fraudulent transfer) as well as §§ 502 and 510 (disallowance and equitable subordination). Defendant moved for summary judgment, arguing debtor's claims were barred by collateral estoppel, judicial estoppel, and the *Rooker- Feldman* doctrine.

Issue: Whether the defendant was entitled to summary judgment.

Holding: Summary judgment was not proper.

Analysis: The bankruptcy court denied summary judgment, holding collateral estoppel did not bar the debtor's claims because there was no final judgment in the state court, citing *Rantz v. Kaufman*, 109 P.3d 132, 141 (Colo. 2005) ("a judgment is not final for purposes of issue preclusion while an appeal is pending"). The court also noted the elements of judicial estoppel differ slightly under Colorado and federal law because an "intentional effort to mislead the court" is an element of judicial estoppel under Colorado law, but the Tenth Circuit only requires "an appearance that either the federal or state court was misled." *Eastman v. Union Pacific*, 493 F.3d 1151, 1156 (10th Cir. 2007). The court declined to apply judicial estoppel against debtor because there was no appearance that either court had been misled, and debtor would not gain an unfair advantage over the opposing party if it were not estopped. Finally, the court determined the *Rooker-Feldman* doctrine did not apply, observing it is unclear in the Tenth Circuit whether application of the doctrine requires a state court judgment to be final, citing *Lambeth v. Miller*, 363 Fed. App'x 565, 567 (10th Cir. 2010) ("This court held in *Guttman*, 446 F.3d at 1031, that *Rooker- Feldman* only applies where there is a final judgment. *But see Tal v. Hogan*, 453 F.3d 1244 (10th Cir. 2006) . . . holding that the state court judgment need not be final for *Rooker- Feldman* to apply")).

Utah cases:

Withers v. Utah Sheet Metal Worker's Trust Funds (In re Withers), 2015 Bankr. LEXIS 1014 (Bankr.D. Utah Mar. 31,2015) Unlisted creditor had no formal notice of the bankruptcy filing but was given information by phone. Held: creditor had inquiry notice of the case sufficient to file a timely proof of claim.

Zion's First National Bank v. Taylor 528 B.R. 826, (Bankr.D.Utah 2015) Bank filed adversary complaint under §523(a)(2)(A). Loan application purchase of automobiles was for Debtor's personal use. Debtor's defense was that seller represented that lenders knew of Debtor's intent to lease the vehicles. The Court held that the seller's fraud upon the Debtor did not absolve him of his fraud on the Bank.

Kansas cases:

In re Wark, Case No. **15-40558** (Bankr. D. Kan. December 17, 2015). The U.S. Trustee moved to convert numerous Chapter 13 cases on the basis that they were not filed in good faith because their only visible purpose was to pay, through the Chapter 13 plan, the attorney fees required for the filing of those cases. The U.S. Trustee sought a rule requiring "special circumstances" or requiring debtors sustain a "heavy burden" when filing a "fee only" case, since in each of these cases, the debtors were eligible for Chapter 7 relief, and thus could receive a discharge much more quickly and cheaply if they could afford the lesser fee to file a Chapter 7. Judge Karlin declined the invitation to require some additional factor, finding that the application of the totality of the circumstances test set forth in *Flygare*, as modified by *In re Cramner* post BAPCPA, should be left to bankruptcy judges to thoughtfully apply, without the requested threshold limitation.

In re Williams, Case 14-20159 (Bankr.D.Kan. December 2, 2015) Plan containing provision for surrender of property and vesting of title cannot be confirmed over creditor's objection. 11 U.S.C. 1322(b)(9) and 1325(a)(5).

Colorado cases:

In re Tabert, Case No. 15-13805 EEB (October 29, 2015) Case converted from 7 to 13 was dismissed for failure to file Plan within 14 days. Dismissal vacated to reconvert to 7.

In re Vinger, 2015 WL 6821277 (Bankr. D. Colo. 2015) Case No. 15-12069 SBB (September 30, 2015). Non-filing spouse's expenses for benefit of household are not deducted on Form 22C-1 to bring household income below median.

In re Burgher, 2015 WL 6560608 (Bankr.D.Colo. September 30, 2015) Case No. 12-14410 SBB. 707(b) applies in case converted from Chapter 13 to Chapter 7.

In re Smith (Walters v. Farmers Korner, Inc.) Adversary Proceeding No. 14-01065 SBB, August 17, 2015. Non statutory insider and 11 U.S.C. §547(b).

In re Sniff, Case No. 15-18086 TBM, October 6, 2015. Power of Attorney, FRBP 1004.1 and FRBP 1016.

In re Dominguez Juarez, Case No. 15-10030 HRT, July 2, 2015. Relief from stay; 11 U.S.C. §362(c)(3) and 362 (d)(1).

In re Miller, 526 B.R. 857 (D. Colo. 2014). Debtor passed away during the course of the Chapter 13 case and the non-filing spouse filed a motion requesting a hardship discharge on behalf of the deceased Debtor. Upon appeal, the District Court determined that the Bankruptcy Court's finding that a hardship discharge was not in the best interest of the parties and that further administration was not possible was well within the Court's discretion under B.R. 1016. Here, Debtor made no showing that a hardship discharge was warranted for any reasons other than the death of the Debtor.

In re Fogel, 14-CV-1851 (D. Colo. 8/25/2015). Debtor died within months after Chapter 13 case was filed, however Court was not notified of this fact until the Debtor's non-filing spouse had continued to make all of the payments required under the plan and then filed a motion to excuse the final financial management class and allow her (as Personal Representative) to file the final Certificate to Obtain Discharge. Bankruptcy Court denied the motion and *sua sponte* dismissed the case preventing the two previously approved motions to strip a 2nd and 3rd mortgage on the Debtor's home from being finalized. On Appeal, the District Court reversed the Bankruptcy Court's ruling that the dismissal was mandatory and that the spouse as personal representative could not act on behalf of the Debtor. The District Court further indicated that B.R. 1016 allows for situations where the plan can be administered and the payments made despite the death of a debtor. The Court distinguished the Miller case (above) since the Court in the Miller case balanced the factors required in B.R. 1016, but failed to do so in the Fogel case by dismissing the case *sua sponte*. The case was remanded directing the Court to reinstate the case, waive the financial management class due to "incapacity," and for further proceedings consistent with the opinion. The personal representative signed the Certificate to Obtain Discharge on behalf of the Debtor's estate and the Discharge was granted.

Excerpts of Recent Cases from the 10th Circuit Controlling Case Law - Bankruptcy Compendium by M. John Straley

§ 548

Bare legal title, when transferred for no consideration, is not an interest in property that may be avoided under § 548(a)(1)(B). Davis v. Hoa Thi Pham (In re Nguyen), 783 F.3d 769 (10th Cir. 2015).

Although a resulting trust may prevail over a joint tenancy and potentially destroy the unity of interest resulting in a tenancy in common, state law may hold that joint tenancies are compatible with resulting trusts (interpreting Kansas law). Bare legal title is not an interest that may be avoided under § 548(a)(1)(B). Davis v. Hoa Thi Pham (In re Nguyen), 783 F.3d 769 (10th Cir. 2015).

§ 327 Employment of Professional Persons

Our statement concerning the need to show extraordinary circumstances to justify nunc

pro tunc appointment of an attorney in *In re Land*, 943 F.2d 1265 (10th Cir 1991) was not dicta.

The requirement to show extraordinary circumstances is the appropriate standard and represents

the prevailing approach in the circuits. Lazzo, P.A. v. Rose Hill Bank (In re Schupbach Investments, L.L.C.), F.3d (10th Cir. Nov 3, 2015).

Approval under § 327(a) must precede an attorney's engagement. Nunc pro tunc approval is appropriate only in the most extraordinary circumstances. Simple neglect will not justify nunc pro tunc approval. Lazzo v. Rose Hill Bank (In re Schupbach Investments, L.L.C.), F.3d (10th Cir. Nov 3, 2015).

§ 1101

Debtor-in-possession status terminates not only upon appointment of a qualified trustee, but also upon confirmation of a Chapter 11 plan. . Lazzo v. Rose Hill Bank (In re Schupbach Investments, L.L.C.), F.3d (10th Cir. Nov 3, 2015).

When a debtor's status as debtor-in-possession terminates, this also terminates an attorney's authorization under § 327 to provide service as an attorney for the debtor-in-possession. Lazzo v. Rose Hill Bank (In re Schupbach Investments, L.L.C.), F.3d (10th Cir. Nov 3, 2015).

A debtor's obligation to cooperate with the trustee and the bankruptcy court to carry out the terms of a creditors' plan does not allow the debtor to retain its status as debtor-in-possession. Lazzo v. Rose Hill Bank (In re Schupbach Investments, L.L.C.), F.3d (10th Cir. Nov 3, 2015).

§547 and Ordinary Course of Business

Jubber v. SMC Electrical Products, 798 F.3d 983 (10th Cir. 2015).

Basic facts of the case:

C.W. Mining Company, a coal-mining company, was forced into bankruptcy after creditors filed a petition for involuntary bankruptcy on January 8, 2008. Several months before the petition was filed, C.W. Mining had entered into its first contract with SMC Electrical Products, Inc.—an agreement to purchase equipment with a view toward greatly increasing coal production by converting its mining method from continuous mining to a longwall system. One payment for the equipment was a $200,000 wire transfer from C.W. Mining on October 16, 2007. Because this transfer was less than 90 days before the petition was filed, the bankruptcy trustee (the Trustee) sought to recoup the $200,000 for the bankruptcy estate by initiating an adversary proceeding to avoid the transfer under 11 U.S.C. § 547(b). Granting SMC summary judgment, the bankruptcy court rejected the Trustee's claim on the ground that the debt was incurred and the payment made in the ordinary course of business. This circuit's bankruptcy appellate panel (BAP) affirmed. We do the same. Jubber v. SMC Electrical Products, 798 F.3d 983 (10th Cir. 2015).

Because summary judgment may only be granted where there is no genuine issue of material fact, any purported "factual findings" are conclusions as a matter of law that no genuine issue of material facts exists. Jubber v. SMC Electrical Products, 798 F.3d 983 (10th Cir. 2015).

Bankruptcy court summary judgments are subject to de novo review on appeal. Jubber v. SMC Electrical Products, 798 F.3d 983 (10th Cir. 2015). In footnote 2, the Court noted that "on two occasions this court apparently reviewed a bankruptcy-court ruling on summary judgment for clear error rather than de novo…. Those two precedents should not be followed." The court said further, "[t]o avoid any future uncertainty, this opinion has been circulated to all unrecused active members of this court and all agree that bankruptcy-court summary judgments are subject to de novo review on appeal."

Under § 547(c)(2), a trustee may not avoid a transfer "to the extent that such transfer was in payment of a debt incurred by the debtor in the ordinary course of business or financial affairs of the debtor and the transferee" when "such transfer was . . .(A) made in the ordinary course of business or financial affairs of the debtor and the transferee; or (B) made according to ordinary business terms." . Jubber v. SMC Electrical Products, 798 F.3d 983 (10th Cir. 2015).

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Four factors to determine whether a payment was made in the ordinary course of business of the debtor and the transferee: 1) length of time the parties were engaged in the type of dealing at issue; 2) whether the amount or form of tender differed from the past practices; 3) whether the debtor or creditor engaged in any unusual collection of payment activities; and 4) the circumstances under which the payment was made. Jubber v. SMC Electrical Products, 798 F.3d 983 (10th Cir. 2015).

This circuit construes the § 547(c)(2) exception narrowly. The transferee bears the burden of establishing the exception by a preponderance of the evidence. Jubber v. SMC Electrical Products, 798 F.3d 983 (10th Cir. 2015).

Even if payments were "not common," they may be in the ordinary course if they did not favor certain creditors or encourage a race to dismember the debtor. Jubber v. SMC Electrical Products, 798 F.3d 983 (10th Cir. 2015).

We have defined ordinary business terms to mean those used in normal financing relations: the kinds of terms that creditors and debtors use in ordinary circumstances, when debtors are healthy. This definition contemplates an examination of what is ordinary in the relevant industry, not what is ordinary in each party's respective practices. Jubber v. SMC Electrical Products, 798 F.3d 983 (10th Cir. 2015).

Courts should be deferential to a company's business decisions. A debt incurred for an unduly risky project that can be justified only because the risk is borne solely by the company's creditors is not a debt incurred in the ordinary course of business. Jubber v. SMC Electrical Products, 798 F.3d 983 (10th Cir. 2015).

A first time transaction can qualify for the exception under § 547(c)(2). For first-time transactions the court may refer solely to the written terms of the transaction to define the ordinary course of business between the parties. Absent other peculiar circumstances, a payment made shortly before or at the due date will satisfy the statutory requirement. Jubber v. SMC Electrical Products, 798 F.3d 983 (10th Cir. 2015).

From footnote 3: We generally assume that a term carries the same meaning throughout a statute. But the purposes of § 547(c) and § 364(a) differ, we should be cautious about applying the same definition to both. The aim of the ordinary-course standard under § 364(a) is to determine whether a postpetition transaction is so "ordinary" that creditors, to whom the debtor owes fiduciary duties, *see Wolf v. Weinstein*, 371 U.S. 633, 649 (1963), need not receive notice of its existence. *See In re Husting Land & Dev., Inc.*, 255 B.R. 772, 777 (Bankr. D. Utah 2000). This is quite a different inquiry from the § 547(c)(2) inquiry into whether the transaction would have been entered into absent the debtor's slide into bankruptcy. The § 364(a) notion of *ordinary* should be, and is, more restrictive that the notion of the same term under § 547(c)(2). Jubber v. SMC Electrical Products, 798 F.3d 983 (10th Cir. 2015).

Section 547(c)(2) refers to the "ordinary course of business or financial affairs *of* the debtor and the transferee," not *between* the debtor and the transferee. Jubber v. SMC Electrical Products, 798 F.3d 983 (10th Cir. 2015).

Ponzi Schemes

A business entity abused by a Ponzi scheme qualifies as a defrauded creditor. Klein v. Cornelius, 786 F.3d 1310 (10th Cir. 2015).

Core and Noncore Proceedings

The general grant of federal question jurisdiction under CEA brings with it the power to hear all other claims that are so related to the original claim as to form part of the same case or controversy. 28 U.S.C. § 1367(a). Under this provision and 28 U.S.C. § 754, a receiver may bring ancillary state-law claims against entities alleged to have received unlawful payments. Klein v. Cornelius, 786 F.3d 1310 (10th Cir. 2015).

A Ponzi corporation is under the principal's improper control when the principal fraudulently transfers its funds, and it is injured in its own right. Klein v. Cornelius, 786 F.3d 1310 (10th Cir. 2015).

Jurisdiction: Minimum Contacts

The minimum contacts test described under *International Shoe v. Washington*, 326 U.S, 310 (1946) does not apply where jurisdiction is invoked based on nationwide service of process. To defeat federal jurisdiction invoked under nationwide service of process, a defendant must establish that the chosen forum will make litigation gravely difficult and inconvenient or, in other words, the forum district burdens the defendant with constitutionally significant inconvenience. Klein v. Cornelius, 786 F.3d 1310 (10th Cir. 2015).

To consider a defendant's argument that jurisdiction in a chosen forum will make litigation gravely difficult and inconvenient, the court must consider: 1) the extent of contact with the forum state, 2) the inconvenience of having to litigate in a foreign jurisdiction, 3) judicial economy, 4) the probable situs of the discovery proceedings, and 5) the nature of the defendant's activities and it impact beyond his state's borders. Klein v. Cornelius, 786 F.3d 1310 (10th Cir. 2015).

Where a court exercises personal jurisdiction over a defendant for a federal question claim, it may exercise personal jurisdiction over that same defendant for a supplemental state-law claim. Klein v. Cornelius, 786 F.3d 1310 (10th Cir. 2015).

Section 548

Because Ponzi schemes are insolvent by definition, we presume that transfers from such entities involve actual intent to defraud. Klein v. Cornelius, 786 F.3d 1310 (10th Cir. 2015).

Nothing in the UFTA requires that a transferee be aware of the fraud. Klein v. Cornelius, 786 F.3d 1310 (10th Cir. 2015).

A payment made *solely* for the benefit of a third party, such as a payment to satisfy a third party's debt, does not furnish reasonable-equivalent value to the debtor. Klein v. Cornelius, 786 F.3d 1310 (10th Cir. 2015).

The statute of limitation is tolled under the UFTA for as long as an entity is controlled or dominated by the wrongdoers. Klein v. Cornelius, 786 F.3d 1310 (10th Cir. 2015).

727(a)(2) Fraudulent Concealment

Under the continuous concealment doctrine, a concealment will be found to exist during the year before bankruptcy even if the initial act of concealment took place before this one year period as long as the debtor allowed the property to remain concealed into the critical year. Weiland v. Gordon (In re Gordon), 526 B.R. 376 (B.A.P. 6th Cir., 2015).

Maintenance of a ruse that occurred more than one year prior and was intended to shield assets from creditors which continued up to, and even after, the filing of the petition constitutes a "continuing concealment" subject to the reach of § 727(a)(2). Weiland v. Gordon (In re Gordon), 526 B.R. 376 (B.A.P. 6th Cir., 2015).

Rule 11 Sanctions

Rule 11 requires that a pleading be, to the best of the signor's knowledge, well grounded in fact, warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and not interposed for any improper purpose. Predator International v. Gamo Outdoor, 793 F.3d 1177 (10th Cir. 2015).

To determine whether a motion was unwarranted under the facts or law, the court must evaluate the conduct under a standard of objective reasonableness–whether a reasonable attorney admitted to practice before the court would file such a document. This standard is a tough one to satisfy; an attorney can be rather aggressive and still be reasonable. Predator International v. Gamo Outdoor, 793 F.3d 1177 (10th Cir. 2015).

Even if a legal position in a pleading is clearly contrary to current law, it is not sanctionable if the position is warranted by a nonfrivolous argument for extending, modifying, or reversing existing law or for establishing new law. Predator International v. Gamo Outdoor, 793 F.3d 1177 (10th Cir. 2015).

Even if counsel obnoxiously tries a court's patience with unfounded or silly arguments, the sanction must be based solely on those violations of Rule 11, not on other rejected arguments that were in fact objectively warranted. Predator International v. Gamo Outdoor, 793 F.3d 1177 (10th Cir. 2015).

Leave to supplement a complaint with post-complaint transactions, occurrences or events should be liberally granted unless good reason exists for denying leave, such as prejudice to the defendants. Predator International v. Gamo Outdoor, 793 F.3d 1177 (10th Cir. 2015).

Justifiable Reliance

Embezzlement is the fraudulent appropriation of property by a person to whom such property has been entrusted or into whose hands it has lawfully come. Larceny is the fraudulent and wrongful taking and carrying away of the property of another with intent to convert the property to the taker's use without the consent of the owner. The difference between these two types of misconduct is that, with embezzlement, the debtor initially acquires the property lawfully whereas, with larceny, the property is unlawfully obtained. Wonjoong Kim v. Hyungkeun Sun, 535 B.R. 358 (10th Cir. BAP 2015).

In Korea, transactions of this type typically have one attorney representing both parties. And between Korean friends and family, asking questions is a sign of distrust, and truth is the expectation, so justifiable reliance was found. Wonjoong Kim v. Hyungkeun Sun, 535 B.R. 358 (10th Cir. BAP 2015).

In the absence of an applicable federal statute, a federal court is free to choose any prejudgment interest rate which will fairly compensate a plaintiff for the delay in the receipt of payment. Wonjoong Kim v. Hyungkeun Sun, 535 B.R. 358 (10th Cir. BAP 2015).

Fiduciary Fraud

Under ERISA, a breach of fiduciary duty complaint is timely if filed no more than 6 years after the date of the last breach or violation or in the case of an omission, the latest date on which the fiduciary could have cured the breach or violation. 29 U.S.C. § 1113. The trustee has a continuing duty– separate and apart from the duty to exercise prudence in selecting investments at the outset– to monitor, and remove imprudent trust investments. A fiduciary must discharge his responsibilities with the care, skill, prudence, and diligence that a prudent person acting in a like capacity and familiar with such matters would use. § 1104(a)(1). Tibble v. Edison Int'l, 135 S.Ct. 1823 (2015).