ABI/UMKC Midwestern Bankruptcy Institute

Case Law Updates

Hon. Brian T. Fenimore, Moderator
U.S. Bankruptcy Court (W.D. Mo.) | Kansas City

Hon. Michael E. Romero
U.S. Bankruptcy Court (D. Colo.) | Denver

Hon. Bianca M. Rucker
U.S. Bankruptcy Court (W.D & E.D. Ark.) | Fayetteville

PLENARY SESSION

2022

MIDWESTERN
BANKRUPTCY INSTITUTE
AMERICAN BANKRUPTCY INSTITUTE
UMKC

Case Law Update

October 2021 through August 2022

Hon. Bianca M. Rucker
U.S. Bankruptcy Court for the
Eastern/Western Districts of Arkansas

Hon. Michael E. Romero
U.S. Bankruptcy Appellate Panel
for the Tenth Circuit and
U.S. Bankruptcy Court for the
District of Colorado

Hon. Brian T. Fenimore, Chief Judge
U.S. Bankruptcy Court for the
Western District of Missouri

Hon. Michael E. Ridgway
U.S. Bankruptcy Appellate Panel
for the Eighth Circuit and
U.S. Bankruptcy Court for the
District of Minnesota

Tenth Circuit Case Law Update

Honorable Michael E. Romero,
United States Bankruptcy Court for the District of Colorado

In re Barrera, 22 F.4th 1217 (10th Cir. 2022).

Debtors filed a chapter 13 case in which they valued their residence at $396,000 and claimed a $75,000 homestead exemption under state law. The Bankruptcy Court confirmed the debtors' chapter 13 plan and the debtors made payments for several years. Before completing plan payments, the debtors sold the residence for $520,000 in April 2018, realizing approximately $140,000 in net proceeds. The debtors converted their chapter 13 to chapter 7 in May 2018.

The chapter 7 trustee filed a motion for turnover of the nonexempt net proceeds from the sale.

Applying § 348(f)(1)(A), the Bankruptcy Court determined the debtors' interest in the appreciation in value of the residence was not property of the converted chapter 7 bankruptcy estate and denied the trustee's motion for turnover.

The BAP affirmed. On appeal to the Circuit, the Circuit affirmed the BAP, analyzing § 348(f)(1)(A) and determining the sale proceeds—a property interest distinct from the physical house from which they were derived—did not enter the converted chapter 7 estate. Thus, the sale proceeds belonged to the debtor.

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

The Bankruptcy Court granted a motion to convert a chapter 11 case to chapter 7 and appointed a chapter 7 trustee. Debtor's attorney appealed the conversion order to the district court. The district court dismissed the appeal, holding only the trustee could appeal the conversion order.

On appeal, the Tenth Circuit agreed, holding *C.W. Mining* controls. *In re C.W. Mining*, 636 F.3d 1257 (10th Cir. 2011) (holding once a chapter 7 trustee was appointed, the debtor's former management could no longer appeal on the debtor's behalf and the chapter 7 trustee was the only person authorized to bring the appeal).

The Tenth Circuit noted it was immaterial whether the debtor's manager objected to the chapter 7 conversion. The Circuit also rejected the argument that Debtor had standing as an aggrieved party to challenge the conversion order because it was solvent. The Circuit reasoned "the determinative question in this case is not whether [the Debtor] has standing as a 'person aggrieved' to appeal, but whether the [the Debtor's former management] has authority to appeal on [the Debtor's] behalf."

In re Chuza Oil Company, 639 B.R. 586 (10th Cir. BAP 2022).

Facts: After chapter 11 plan confirmation, debtor's insiders (one of whom held a subordinated note and two of whom guaranteed the note) lent hundreds of thousands of dollars to the debtor so it could make its plan payments and survive as a going concern. From the borrowed funds, the debtor paid roughly $47,000 on the subordinated note even though general unsecured creditors were not yet paid in full.

The postconfirmation insider loans were not enough to keep the debtor afloat, and the chapter 7 trustee in the debtor's subsequent bankruptcy case sued the insiders to recover the subordinated-note payments as preferential transfers, actual fraudulent transfers, and constructive fraudulent transfers.

The bankruptcy court held a bench trial on the merits. Relying on the earmarking doctrine, the Bankruptcy Court ruled for the insiders on all three counts because there was no transfer of an interest of the debtor in property, a required element under §§ 547(b) and 548(a).

The Bankruptcy Court also held (alternatively) (i) the insiders satisfied the contemporaneous-exchange-for-new-value defense to the preference, (ii) the debtor did not intend to hinder, delay, or defraud creditors, and (iii) the debtor received reasonably equivalent value in exchange for the transfers. The chapter 7 trustee appealed.

In re Chuza Oil Company, 639 B.R. 586 (10th Cir. BAP 2022).

The BAP reversed, holding:

1. Each subordinated-note payment was a transfer of an interest of the debtor in property under both §§ 547(b) and 548(a).

2. Such note payments were not intended to be, and were not actually, a reasonably equivalent or roughly equivalent exchange for new or other value given to the debtor.

In re Bloom, 634 B.R. 559 (10th Cir. BAP 2021).

Debtor is an airplane sales broker who agreed to help a wealthy couple locate and purchase an airplane. The Debtor found a desirable airplane and convinced the couple to make an offer. When the seller's counteroffer came back lower than expected, Debtor—without disclosing the seller's identity—lied to the couple about the amount of the counteroffer and told them he was negotiating hard to get the purchase price down.

Instead, through his shell company, Debtor secretly purchased the airplane for a good price and then sold the airplane to the couple's wholly owned company for $250,000 more than his shell company paid and charged a $120,000 commission for his services. Debtor never disclosed the secret back-to-back transaction, his relationship to the shell company, the $250,000 upcharge, or the seller's refusal to perform aircraft maintenance items the Debtor said the seller would fix.

In Debtor's bankruptcy case, the couple filed a proof of claim and a nondischargeability complaint. The Bankruptcy Court entered judgment allowing the claim in the amount of $458,470 and determining the debt to be nondischargeable under § 523(a)(2)(A) and (a)(6). Debtor appealed.

In re Bloom, 634 B.R. 559 (10th Cir. BAP 2021).

The BAP affirmed. First, the BAP agreed the couple proved fraud and fraudulent concealment under Colorado law, including reasonable reliance on Debtor's misrepresentations and the damages were proximately caused by Debtor's misconduct.

The BAP also rejected Debtor's argument that he should be free from liability for his fraud and fraudulent concealment due to Colorado's economic-loss rule, under which a party suffering only economic loss from breach of an express or implied contract may not assert certain tort claims related to the breach.

Next, the BAP concluded the couple proved false representation, false pretenses, and actual fraud under § 523(a)(2)(A). The BAP rejected Debtor's argument that he should be free from liability for his fraud because he did not directly obtain any benefit from the fruits of his fraud, which instead were distributed to Debtor's wholly owned company.

The BAP concluded Debtor's debt to the couple was "obtained" by Debtor's fraud and a debtor need not receive specific money, property, services, or credit before a debt on account of the fraud can be found nondischargeable under § 523(a)(2)(A). Finally, the BAP concluded the couple proved willful and malicious injury under § 523(a)(6).

Glencove Holdings, LLC v. Bloom (In re Bloom), 2022 WL 2679049, at *1 (10th Cir. July 12, 2022).

On appeal to the Circuit, the Circuit affirmed the BAP, concluding the economic loss rule did not apply because the fraud and fraudulent concealment claims were common law intentional torts that arose from duties independent of a contract.

The Circuit also analyzed § 523(a)(2)(A) and § 523(a)(6) to conclude the Bankruptcy Court did not err in determining the debt was nondischargeable because: (1) the elements of § 523(a)(2)(A) were met, including Debtor receiving a benefit from the fraud, and (2) the finding willful and malicious injury under § 523(a)(6) was based on record evidence Debtor deceived the couple to benefit himself and his colleagues.

In re Frank, 638 B.R. 463 (Bankr. D. Colo. 2022).

Analyzing §§ 1307(c), 1329, 1330(a) and 1328(a), the Bankruptcy Court concluded these provisions "leave[] a pretty wide loophole for the dishonest debtor" and "[w]hether or not this gap was intentional, these two statutes signal Congress has determined, after a certain period of time, the principle of finality must outweigh the policy of rooting out abusers of the bankruptcy system."

Under § 1307(c), failure to disclose an asset can be "cause" for dismissal and § 1307 has no time limit for filing a motion to dismiss.

Section 1330 allows revocation of confirmation but requires such motion be filed within 180 days of confirmation.

Section 1329(a) prohibits plan modification after the last payment has been made and there is no exception for fraud or bad faith conduct.

Finally, § 1328(a) requires entry of a discharge upon completion of plan payments and § 1328(e) permits revocation of discharge, but only if fraud was discovered within the one-year period beginning with the entry of discharge.

In re Richard D. Van Lunen Charitable Trust, 2022 WL 1261453 (D. Colo. 2022).

Chapter 11 debtor obtained court approval to employ special counsel. The chapter 11 plan provided all professionals must file final fee applications not more than 60 days after the plan became effective. In bold letters, the plan also provided for disallowance of administrative claims not filed by the bar date. Additionally, the confirmation order provided all professional fees incurred pre-confirmation shall be subject to final court approval but did not specify a deadline for seeking such approval.

Special counsel did not file a fee application by the administrative bar date. Subsequently, the debtor and the trustee filed a motion for special counsel to disgorge fees paid. Special counsel objected to the disgorgement motion and filed a final fee application at the same time as well as a motion to permit the tardy filing of the fee application, arguing they had not received the plan documents with its deadlines.

On summary judgment, the Bankruptcy Court granted the motion for disgorgement concluding: (1) merely denying receipt of the plan and the attorneys' document retention policy did not rebut the presumption a properly addressed piece of mail is considered properly served and delivered; (2) the information contained in the plan was clear and reasonably conveyed the required information for purposes of due process; and (3) special counsel failed to establish the excusable neglect necessary to justify an enlargement of time to file its final fee application.

The district court affirmed, concluding denial of receipt, even assuming it was true, was not sufficient evidence to rebut the presumption of receipt. There must be "objective evidence," such as showing other intended recipients did not receive the mailing or mail was returned undelivered.

Byrnes v. Byrnes (In re Byrnes), 638 B.R. 821 (Bankr. D.N.M. 2022).

As a matter of apparent first impression, the Bankruptcy Court adopted the narrow view of the term personal injury tort, which requires trauma, bodily injury or psychiatric impairment beyond shame or humiliation – as opposed to the broad view, which encompasses an invasion of personal rights, including libel, slander and mental suffering.

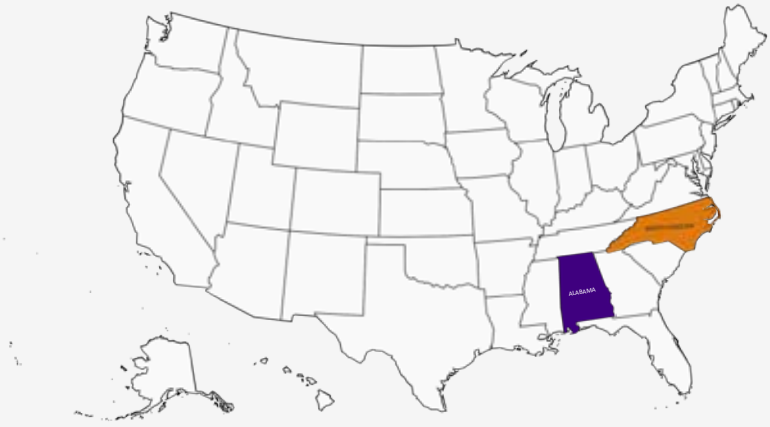
Thus, the Bankruptcy Court concluded, under the narrow interpretation, defamation claims are not personal injury torts.

Other Noteworthy Cases

Honorable Bianca M. Rucker,
United States Bankruptcy Court for the Eastern District of Missouri

***Siegel v. Fitzgerald (In re Circuit City Stores)*, 142 S. Ct. 1770 (2022).**

2017 Increase to Chapter 11 Quarterly United States Trustee Fees Violated Uniformity Requirement of the Bankruptcy Clause



Buckley v. Bartenwerfer (In re Bartenwerfer), 860 Fed. Appx. 544 (9th Cir. 2021), *cert. granted*, 2022 WL 1295707, 142 S.Ct. 2675 (May 2, 2022).

Supreme Court to Determine Whether Fraudulent Intent Imputed from Non-Debtor Partner Satisfies § 523(a)(2)(A)'s Scienter Requirement

In re Boy Scouts of Am., 35 F.4th 149 (3d Cir. 2022) (Ambro, J.).

Alleged Violations of the Rules of Professional Conduct Did Not Require Disqualification Under § 327(a)

Cantwell-Cleary Co., Inc. v Cleary Packaging, LLC (In re Cleary Packaging, LLC), 36 F.4th 509 (4th Cir. 2022) (Niemeyer, J.).

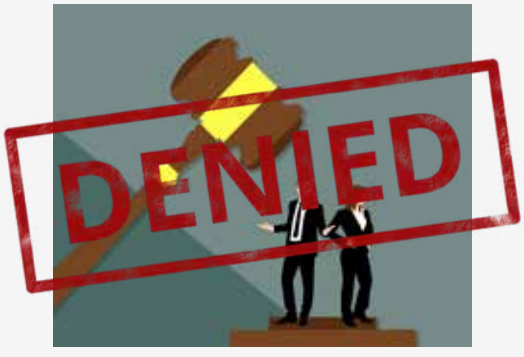
§ 523 Nondischargeability Applies to Entities Filing Under Subchapter V

Archer-Daniels-Midland Co. v. Country Visions Coop., 29 F.4th 956 (7th Cir. 2022).

Buyer Who Withheld Information from Bankruptcy Court Was Not Purchaser in Good Faith Under § 363(m)

Harrington v. Mayer (In re Mayer), 28 F.4th 67 (9th Cir. 2022).

Order Denying Motion for Relief from Stay Without Prejudice Is Final, Immediately Appealable Order



Eighth Circuit Case Law Update

Honorable Brian T. Fenimore,
United States Bankruptcy Court for the Western District of Missouri

***Lariat Cos., Inc. v. Wigley (In re Wigley)*, 15 F.4th 1208 (8th Cir. 2021) (Wollman, J.).**

- Judgment debt arising from fraudulent transfer to the debtor may be excepted from discharge under § 523(a)(2)(A). See *Huskey Int'l Elecs., Inc. v. Ritz*, 578 U.S. 356 (2016)
- Though landlord's claim against debtor's bankruptcy estate may be limited by § 502(b)(6), the landlord cap does not preclude the landlord from pursuing its nondischargeability action for the entire unpaid amount.

Finstad v. Gord (In re Finstad), 4 F.4th 693 (8th Cir. 2021) (Loken, J.).

- Res judicata explained as a broad term used to describe the more modern terms claim preclusion and issue preclusion
- State Court Judgments:
  - Full Faith and Credit Clause – U.S. Constitution Art. IV, § 1
  - Full Faith and Credit Statute – 28 U.S.C. § 1738
- Federal Court Judgments:
  - If diversity suit, apply state claim and issue preclusion
  - If non-diversity suit, federal courts apply their own rule of *res judicata*

Finstad v. Gord (In re Finstad), 4 F.4th 693 (8th Cir. 2021) (Loken, J.).

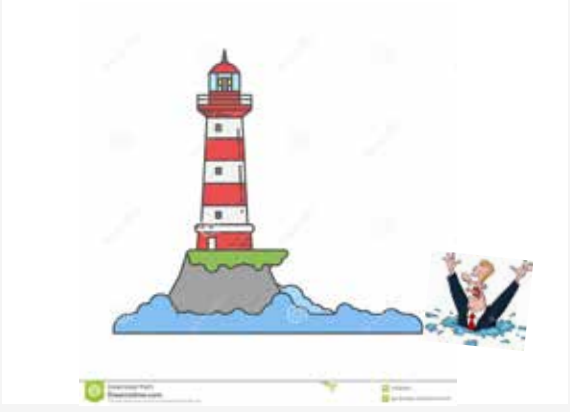
- North Dakota four-part test for collateral estoppel:
  1. Was the issue decided in the prior adjudication identical to the one presented in the action in question?
  2. Was there a final judgment on the merits?
  3. Was the party against whom the plea is asserted a party or privity with a party to the prior adjudication?
  4. Was the party against whom the plea is asserted given a fair opportunity to be heard on the issue?

Excellent Home Props. v. Kinard (In re Kinard), 998 F.3d 352 (8th Cir. 2021) (Benton, J.).

- Refresher on the five elements of a § 523(a)(2)(A) nondischargeability complaint: the debtor
    1. made a representation,
    2. with knowledge of its falsity,
    3. deliberately for the purpose of deceiving a creditor,
    4. who justifiably relied on the representation, and which
    5. proximately caused the creditor damage
- Lenders, particularly sophisticated lenders, may need to conduct appropriate due diligence when making the loan and when foreclosing in order to satisfy the justifiable reliance element of § 523(a)(2)(A)

Kelley v. Safe Harbor Managed Acct. 101, Ltd., 31 F.4th 1058 (8th Cir. 2022) (Shepherd, J.).

- A customer of a financial institution may itself qualify as a financial institution under the § 546(e) "safe harbor" provision

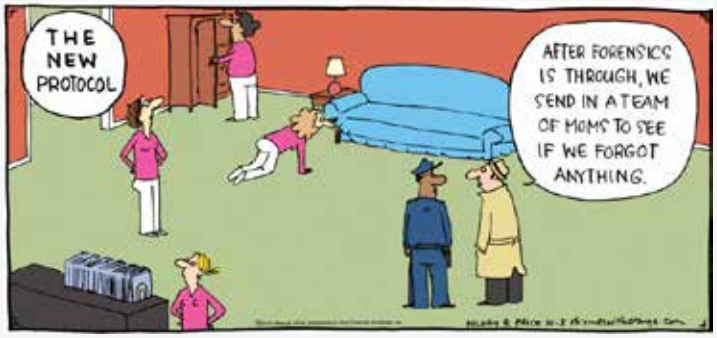


Ritchie Special Credit Invests., Ltd v. JPMorgan Chase & Co., No 21-2707, 2022 WL 4138420 (8th Cir. Sept. 13, 2022).

- claims that are general to the estate (e.g., fraudulent transfer actions) belong to the trustee/estate, and individual creditors may not assert them
- creditor may assert a claim that is "personal" to that creditor
- Rule of Thumb: If the debtor could have asserted the claim the moment before it entered bankruptcy, the trustee—not the creditor—gets to bring it now.

Kelly v. BMO Harris Bank N.A., Case No. 19-cv-1756, Case No. 19-cv-1869, 2022 WL 2801180 (D. Minn. July 18, 2022) (Wright, J.).

- Court may infer intentional spoliation from circumstantial evidence
- Spoliating party bears the burden to prove lack of prejudice to opposing party



In re Mixson, Ch. 7 Case No. 22-20077, 2022 WL 3570371 (Bankr. W.D. Mo. Aug. 18, 2022) (Dow, J.).

- Debtor's retaliatory discharge claim is not exempt as "compensation payable under [the Missouri workers' compensation] chapter."

Questions?

Case Law Update
October 2021 through August 2022

Midwestern Bankruptcy Institute
presented by the
American Bankruptcy Institute
and the
University of Missouri-Kansas City

Hon. Bianca M. Rucker
U.S. Bankruptcy Court for the
Eastern/Western Districts of Arkansas

Hon. Brian T. Fenimore, Chief Judge
U.S. Bankruptcy Court for the
Western District of Missouri

Hon. Michael E. Romero
U.S. Bankruptcy Appellate Panel
for the Tenth Circuit and
U.S. Bankruptcy Court for the
District of Colorado

Hon. Michael E. Ridgway
U.S. Bankruptcy Appellate Panel
for the Eighth Circuit and
U.S. Bankruptcy Court for the
District of Minnesota

Anne Zoltani
Staff Attorney
U.S. Bankruptcy Appellate Panel
for the Tenth Circuit

Kari Beaudry
Law Clerk
To the Honorable Michael E. Ridgway

Hannah S. Politte
Career Law Clerk
to the Honorable Brian T. Fenimore

TABLE OF CONTENTS

I. Eighth Circuit

A. Bankruptcy Court Properly Entered Nondischargeability Judgment Against Recipient of Fraudulent Transfers. *Lariat Cos., Inc. v. Wigley (In re Wigley)*, 15 F.4th 1208 (8th Cir. 2021) (Wollman, J.).

In the case below, the bankruptcy court determined Wigley had engaged in "actual fraud" under 11 U.S.C. § 523(a)(2)(A) by receiving fraudulent transfers from her husband with the requisite intent. Though the bankruptcy court had applied the "landlord cap" under § 503(b)(6) to cap Lariat's claim against the bankruptcy estate, it excepted the entire amount of Wigley's debt to the landlord—not the capped amount—from discharge. The BAP affirmed.

The Eighth Circuit also affirmed. The bankruptcy court's decision did not cause § 523(a)(2)(A) to conflict with § 502(b)(6)'s landlord cap or render the cap superfluous. Section 502(b)(6) "established the amount allowed to be paid from the bankruptcy estate" but "did not preclude Lariat from seeking to except its claim from discharge." Moreover, the evidence supported the bankruptcy court's finding that Wigley received a fraudulent transfer from her husband, and that she "participated in the scheme with the requisite wrongful intent" (i.e. that her fraud involved an "intentional wrong"). Because the full amount of the fraudulent transfer judgment was a debt obtained by actual fraud, the bankruptcy court did not err in determining Lariat's entire claim was excepted from discharge.

B. Eighth Circuit Summarily Affirms Bankruptcy Court Order Denying Debtor's Motion to Reopen Case. *Pennington-Thurman v. Fed. Home Loan Mortg. Co. (In re Pennington-Thurman)*, 835 Fed. Appx. 896 (8th Cir. 2021) (per curiam).

In the latest installment of the long-running *Pennington-Thurman* litigation from the Eastern District of Missouri, the Eighth Circuit affirmed the bankruptcy court's decision to deny the debtor's motion to reopen her bankruptcy case. In the case below, the district court determined that the bankruptcy court used the proper standard to evaluate whether to reopen a bankruptcy case under § 350(b) and upheld the bankruptcy court's determination that the appellant's request was "futile since the relief [the Appellant] seeks is completely lacking in merit." The Eighth Circuit agreed, stating, "[t]he adversary case that Pennington-Thurman sought to pursue addressed previously litigated issues or otherwise lacked merit, so reopening would have been futile." Accordingly, the Eighth Circuit summarily affirmed the bankruptcy court's decision.

C. State Collateral Estoppel Law Barred Debtors from Relitigating Federal Court's Prior Determination of Ownership. *Finstad v. Gord (In re Finstad)*, 4 F.4th 693 (8th Cir. 2021) (Loken, J.).

To avoid a foreclosure on their farmland, the debtors filed a chapter 12 case. As part of a settlement to remove the land from the bankruptcy proceeding, the debtors quit

claimed their interest in the land to a secured creditor but were permitted to remain on the land as tenants with an option to purchase at a price equal to their debt to the secured creditor, plus interest. The secured creditor recorded the deed in January 2006. That spring, a couple, the Gords, loaned the debtors $525,000.00 and took a second mortgage on the same land, allegedly not knowing about the quitclaim deed to the secured creditor. The bankruptcy court approved the debtors' settlement with the secured creditor and confirmed their plan. The debtors later received a discharge.

In July 2008, the secured creditor notified the debtors they were in default on the settlement and said it intended to sell the farmland. The secured creditor sold the farmland to the Gords and gave them a quitclaim deed. The Gords then initiated eviction proceedings against the debtors as tenants under the debtors' settlement agreement. In January 2012, the debtors asked the state court to declare their quitclaim deed to the secured creditor was an equitable mortgage and to further declare the debtors still owned the land despite the quitclaim deed to the secured creditor and the second mortgage to the Gords. The trial court ruled against the debtors, and the Supreme Court of North Dakota affirmed. The debtors then filed a diversity action in federal district court, alleging various torts against the secured creditor and the Gords. The district court dismissed all claims, and the court of appeals affirmed.

In 2018, the debtors successfully moved to reopen their chapter 12 bankruptcy case. They then filed an adversary proceeding wherein they made a variety of claims premised on their primary contention that they held the legal and equitable title to the farmland. They asked the bankruptcy court to utilize 11 U.S.C. § 105 to reform the deed to the secured creditor into an equitable mortgage. The bankruptcy court rejected the debtors' efforts and dismissed their complaint. The BAP affirmed the trial court.

The court of appeals considered only *res judicata* and affirmed. Under federal common law, when a debtor in bankruptcy unsuccessfully litigates an issue before a federal non-bankruptcy court, the non-bankruptcy court's decision binds the bankruptcy court. And if "the debtor relied on substantive state law for its claim in the subsequent bankruptcy case, [the Eighth Circuit looks] to the claim and issue preclusion law of that State to determine the preclusive effect of a prior adverse *state* court judgment." Accordingly, the appellate court applied "North Dakota preclusion law to determine the preclusive effect of the prior *federal* court decision." Under that law, the prior federal court holding that the debtors did not have an interest in the property was "actually litigated" and bound the parties.

D. "Sophisticated" Lender Did Not Justifiably Rely When Multiple Red Flags Should Have Warned Lender of Need to Investigate Before Credit Bidding at Foreclosure. *Excellent Home Props. v. Kinard (In re Kinard)*, 998 F.3d 352 (8th Cir. 2021) (Benton, J.).

A corporate creditor made a short-term loan to a business owned by the debtor's mother and partially managed by the debtor. The parties agreed the business would use the loan proceeds to purchase a house and renovate it and then the business would repay the loan with interest. The business acquired the house and made a few interest payments but never renovated the house. The debtor and her mother repeatedly assured the creditor the renovations were complete, a sale was imminent, and the creditor would be repaid at the closing. The debtor and her mother then ceased all communication with the creditor. The creditor foreclosed on the house and was the successful bidder at the foreclosure sale, sight unseen, with a full credit bid.

When the debtor and her mother later filed separate bankruptcy petitions, the creditor filed complaints seeking a nondischargeability determination under 11 U.S.C. § 523(a)(2)(A) for its claim for the loss it incurred when it later resold the unrenovated home. Following a trial in the adversary proceeding against the debtor, the bankruptcy court determined the creditor had failed to prove it had justifiably relied on the debtor's and her mother's misrepresentations. The bankruptcy court also held the creditor's full credit bid extinguished the debt, and the court dismissed the creditor's state law claims for fraud, negligent misrepresentation, and civil conspiracy. On appeal, the district court affirmed.

The court of appeals also affirmed, holding the creditor did not have a claim against the debtor and "[e]ven if it did, it is not excepted from discharge." Citing *Field v. Mans*, 516 U.S. 59, 71 (1995), it held "[j]ustification is a matter of the qualities and characteristics of the particular plaintiff, and the circumstances of the particular case, rather than of the application of a community standard of conduct to all cases. . . . [A] victim of fraud is not justified in relying on a representation, and a duty to investigate arises, where 'the facts should be apparent to one of his knowledge and intelligence from a cursory glance, or [where] he has discovered something which should serve as a warning that he is being deceived.'" The court of appeals agreed with the lower courts that numerous red flags warned the creditor, which the court described as a "non-novice, sufficiently sophisticated investor," not to rely on the debtor's representations.

E. Eighth Circuit Upholds Frivolous-Appeal Sanction Against *Pro Se* Litigants. *Scott v. Anderson* (*In re Scott*), No. 21-2102, 2022 WL 792094 (8th Cir. Mar. 16, 2022) (per curiam).

The bankruptcy court denied the *pro se* chapter 13 debtors' motions for sanctions, motions to disqualify the bankruptcy judge, and motion seeking sanctions against a former attorney for the party who purchased their residence in a foreclosure sale. The debtors appealed and filed three more motions before the bankruptcy appellate panel.

The BAP affirmed the bankruptcy court and awarded the attorney sanctions of $3,000.00 for the debtors' frivolous appeal. The debtors appealed again. The Eightd Circuit affirmed, determining the debtors failed to identify how any of the claimed technical errors prejudiced them and that any error was harmless.

F. The Customer of a Financial Institution May Itself Qualify as a Financial Institution Under § 546(e)'s "Safe Harbor" Provision. *Kelley v. Safe Harbor Managed Acct. 101, Ltd.*, 31 F.4th 1058 (8th Cir. 2022) (Shepherd, J.).

Following the collapse of a multi-billion-dollar Ponzi scheme, the liquidating trustee of the chapter 11 debtor–one of the entities through which the scam was operated–filed an adversary complaint against an investor, seeking to recover funds transferred to the investor by a feeder fund the liquidating trustee had obtained a judgment against for transfers made to the feeder fund by a subsidiary of the debtor. The investor filed a motion to dismiss, which the bankruptcy court denied. The case was subsequently transferred to the district court because the investor requested a jury trial. The district court granted the investor's motion for summary judgment, concluding that 11 U.S.C. § 546(e) shielded the investor from the trustee's avoiding powers. The trustee appealed.

The court of appeals affirmed in part, reversed in part, and remanded. The court of appeals ruled the customer of a financial institution may itself qualify as a financial institution under the Bankruptcy Code's § 546(e) "safe harbor" provision. The court of appeals also found the note purchase agreement from the feeder fund and the special purpose entity it formed to transfer funds to the debtor qualified as a "securities contract" for the purposes of the Code's "safe harbor" provision. Finally, the court of appeals remanded, holding a genuine dispute of material fact existed concerning whether the transfers from the debtor's subsidiary to the feeder fund were made "in connection with" a securities contract.

G. Disallowance of Claim Did Not Prevent Nondischargeability Action. *Lund-Ross Constructors, Inc. v. Buchanan* (*In re Buchanan*), 31 F.4th 1091 (8th Cir. 2022) (Gruender, J.).

A general contractor hired an LLC as a subcontractor on some pre-petition projects. After the LLC failed to pay its suppliers, the general contractor had to indemnify the property owner and clear the suppliers' liens. The general contractor then obtained a state court judgment against the LLC (but not the LLC's principals) for the damages the general contractor incurred. After the LLC's principals filed chapter 7, the general contractor commenced an adversary proceeding against them, seeking to except from the principals' discharge the general contractor's state court judgment against the LLC. The general contractor argued the principals obtained periodic payments from the general contractor by knowingly and falsely representing in lien waivers the suppliers had been paid. Before the adversary proceeding was resolved, the case trustee filed a notice of assets, and the general contractor filed a proof of claim. The

trustee objected to the proof of claim because the general contractor did not have a claim against the principals personally. The general contractor did not resist the trustee's objection to its claim, and the bankruptcy court disallowed the general contractor's claim. In the adversary proceeding, the bankruptcy court granted summary judgment in favor of the principals, determining the general contractor did not have a valid claim owed by the principals personally. The general contractor appealed, the BAP affirmed, and the general contractor appealed again.

The court of appeals reversed and remanded. It acknowledged the general contractor had to show it had a valid claim before the bankruptcy court could determine if the debt was nondischargeable. The court ruled the principals did not argue at the summary judgment stage there were no material facts in dispute regarding whether the general contractor could establish a separate tort claim against the principals personally (they had only addressed piercing the corporate veil during the summary judgment proceeding). Thus, the court of appeals determined the bankruptcy court improperly granted summary judgment on the grounds the creditor did not have a valid claim against the principals personally. The court of appeals declined to affirm the lower courts on the alternative ground of claim preclusion because the issue of whether the principals could be treated as a party to the trustee's prior proof of claim proceeding, in which the principals did not personally appear, was difficult and the lower courts did not address it.

H. Creditors May Not Assert Claims that Are "General" to the Estate. *Ritchie Special Credit Invests., Ltd v. JPMorgan Chase & Co.*, No 21-2707, 2022 WL 4138420 (8th Cir. Sept. 13, 2022).

Plaintiff Ritchie Special Credit Investments was a victim of the Petters Ponzi Scheme. After the Petters companies commenced bankruptcy cases, Ritchie sued JPMorgan Chase and Richter Consulting, Inc., alleging (1) JPMorgan received fraudulent transfers from Petters, and (2) JPMorgan and Richter aided and abetted Petters' fraud. The district court dismissed the complaint.

The Eighth Circuit affirmed. The court of appeals first determined Ritchie lacked standing to assert the fraudulent transfer causes of action against JPMorgan. Causes of action that the debtor could have brought on the petition date are property of the estate, and only the trustee has standing to assert them. Thus, creditors of the estate may not assert causes of action that are "general to the [bankruptcy] estate," but may assert causes of action that are "personal to a specific creditor." In this case, because the debtors would have had "the same causes of action against JP Morgan for helping *Petters himself* perpetuate the fraud," the aiding and abetting and fraudulent transfer claims against JPMorgan "now belong[] to the trustees." Next, the Eighth Circuit determined the aiding and abetting claim against Richter also failed. Though the court of appeals assumed the claim against Richter was "'personal' to Ritchie, rather than "general" to the estate, Ritchie did not sufficiently allege that Richter had

"actual knowledge" of Petters' fraud. Thus, the district court did not err in dismissing the case.

I. Attorney's Missed Deadline Not "Excusable Neglect" Due to Plain Text of Rule 8018(a)(1) and Docket Entry. *Lennartson v. Cristofono,* No. 21-1979, 2022 WL 245527 (8th Cir. Jan. 27, 2022) (per curiam).

The plaintiffs–an attorney and her law firm–commenced an adversary proceeding against a chapter 7 debtor seeking a determination the firm's claim was excepted from discharge for fraud. The plaintiffs alleged *inter alia* the attorney performed divorce-related services for the debtor on credit based on the debtor's false promise to pay the legal fees after the marital assets were divided. Eventually, the bankruptcy court granted the debtor summary judgment, and the plaintiffs appealed.

The district court dismissed the appeal because the plaintiffs failed to file an opening brief. In dismissing the plaintiffs' appeal, the district court attributed the plaintiffs' failure to file a timely brief to their attorney's failure to review the docket and apply the plain language of Fed. R. Bankr. P. 8018(a)(1) to the plain text of a docket entry and determined the failure did not constitute "excusable neglect." Rule 8018(a)(1) made the plaintiff's brief due within 30 days after the docketing of notice that the record is available electronically. The relevant docket entry clearly gave notice that the record was available electronically. Thus, "[a] minimal level of diligence would have sufficed for counsel to determine the due date." Moreover, the briefing schedule and date of oral argument should have alerted the plaintiffs to the due date. The court explained, "'excusable neglect' is an equitable determination" that requires the court to consider all relevant circumstances including "the danger of prejudice to the nonmoving party; the length of the delay and its potential impact on judicial proceedings; the reason for the delay, including whether it was within the reasonable control of the moving party; and whether the moving party acted in good faith." Applying those factors, the court determined the missed deadline was not attributable to "excusable neglect," but "to their counsel's failure to review the docket and apply the plain language of Rule 8018(a)(1)." Moreover, "granting appellants' request for an extension at this point would delay the resolution of this appeal for many months." The plaintiffs again appealed.

The court of appeals summarily affirmed, concluding the district court did not abuse its discretion in denying the plaintiffs an extension of time to file their brief and dismissing their appeal.

J. Chapter 7 Debtors Lacked Standing to Appeal Bankruptcy Court's Denial of Motion to Remove Trustee and Court's Partial Approval of Trustee's Fee Application. *Levitt v. Jacoway (In re Levitt)*, 632 B.R. 527 (B.A.P. 8th Cir. 2021) (Ridgway, J.).

The bankruptcy court orders granted in part and denied in part the trustee's application to pay the trustee's law firm and denied the debtors' motion to remove the trustee. Without discussing the merits of the debtors' appeal, the Eighth Circuit Bankruptcy Appellate Panel decided the matter entirely on the "threshold question" of the debtors' standing.

The BAP explained that appellate standing is a more restrictive standard than the standard governing permissible parties to an action. To have standing on appeal, an appellant must be a "person aggrieved" by the order the appellant wishes to appeal. A person aggrieved is one who suffers a "direct[]" and "pecuniary" injury from the relevant order. The order must either diminish the appellant's property, impair his or her rights, or increase his or her burdens. Chapter 7 debtors lack appellate standing unless: "(1) there is a reasonable possibility–not just a theoretical chance–that a successful appeal would entitle the debtor to the distribution of a surplus under 11 U.S.C. § 726(a)(6); or (2) the appealed order impacts the terms of the debtor's bankruptcy discharge."

Because the bankruptcy case divested the chapter 7 debtors of all their interests in the nonexempt property of their estate and because the estate lacked sufficient property to pay all claims in full, the chapter 7 debtors lacked any pecuniary interest in the trustee's disposition of the relevant property. Consequently, the chapter 7 debtors were not "persons aggrieved" and they lacked appellate standing.

K. Bankruptcy Court Had Discretion to Preclude State from Filing Last-Minute Breach of Contract Claim and Related Evidence. *State of North Dakota ex rel. Stenehjem v. Bala (In re Racing Servs., Inc.)*, 635 B.R. 498 (B.A.P. 8th Cir. 2022) (Dow, J.).

The state of North Dakota had previously paid $15 million to Racing Services' bankruptcy estate to settle a claim for overpaid taxes. As part of the settlement, the state agreed not to assert a claim against Racing Services' estate. After the state paid the settlement proceeds to the estate and more than 14 years after the petition date, the state filed a proof of claim on behalf of a charitable organization that had assigned its claim to the state, effectively seeking to circumvent the settlement agreement and receive distributions from the estate. The state argued that, as an as assignee of a claim originally belonging to a charitable organization, it was entitled to any excess settlement proceeds because a North Dakota statute and its constitution required net gambling proceeds to go to charitable purposes. The bankruptcy court disallowed the claim, holding the claim was barred by laches. The BAP reversed and remanded, directing the bankruptcy court to determine the validity of the state's claim. On

remand, the state asserted a new basis for its post-settlement claim: that Racing Services owed the state money for breach of contract. Racing Services' sole equity holder and the chapter 7 trustee each objected to the state's post-settlement claim. The bankruptcy court disallowed the claim. The state appealed again.

The BAP affirmed. It first determined that the state could not collect on the claim the charitable organization had assigned it. Neither the North Dakota statute nor its constitution required the category of net gambling proceeds at issue in this case to go to charitable and similar purposes. The debtor was otherwise entitled to all estate funds that remained after the filed and allowed claims had been paid in full. The constitution and statute, therefore, did not entitle the state to the net proceeds.

The BAP also determined the bankruptcy court did not err in refusing to reopen the record to admit exhibits related to the newly filed contract claim and did not err in refusing to permit the state to amend its claim. Because the appellate court had not expressly directed the bankruptcy court to reopen the record, the bankruptcy court had discretion in determining whether "to reopen the evidentiary record on remand to receive probative evidence that would be logically responsive to the appellate court's analysis," in light of "the probative value of the evidence proffered, the proponent's explanation for failing to offer such evidence earlier, and the likelihood of undue prejudice to the proponent's adversary." Despite "multiple opportunities throughout th[e] case to assert its claims," the state did not amend its claim until "more than 14 years after the bankruptcy filing." The state also waited "years and years" to submit the evidence in support of its claim. Allowing such a late amendment would cause undue prejudice to the debtor. The bankruptcy court, therefore, had discretion to disallow the state's claim under Rule 15 and the court's inherent authority to control the cases before it. The BAP's prior ruling that laches did not apply to bar the claim in light of section 726(a) did not deprive the bankruptcy court of discretion to disallow the claim on other grounds. Moreover, the state did not satisfy its burden to assert a viable breach of contract claim.

Though the BAP affirmed the bankruptcy court's decision, it denied the equity holder's motion for appellate sanctions. "The arguments presented in the State's reply brief, though unpersuasive, [were] not frivolous within the meaning of Bankruptcy Rule 8020."

L. Lack of Notice Regarding Entry of Order Does Not Affect Deadline to Appeal. *Reichel v. Snyder (In re Reichel)*, 626 B.R. 34 (B.A.P. 8th Cir.) (Shodeen, J.), *aff'd*, No. 21-6004, 2021 WL 5711092 (8th Cir. Dec. 2, 2021) (per curiam).

The bankruptcy court denied a *pro se* debtor's motion for relief from an earlier order. The debtor appealed but did so after the appeal time had expired. In his notice of appeal, the debtor acknowledged his appeal was untimely but said that, though the bankruptcy court had denied his motion on February 26, 2021, the order was not

served on him at his New Jersey address until about three weeks later. The bankruptcy court had promptly served the order on the debtor through the Bankruptcy Noticing Center at an address in Ohio but did not serve the order on the debtor at his newer New Jersey address at the same time.

Quoting Fed. R. Bankr. P. 9022(a), which provides that "[l]ack of notice of the entry [of an order] does not affect the time to appeal or relieve or authorize the court to relieve a party for failure to appeal within the time allowed, except as permitted in [Fed. R. Bankr. P.] 8002," the BAP dismissed the appeal. To the extent the debtor was raising an issue under Fed. R. Bankr. P. 8002(d) involving the bankruptcy court's service of the order and any attendant impact that may have on the time to appeal, the appellate panel said those issues needed to be addressed first by the bankruptcy court. The Eighth Circuit affirmed without further comment.

M. Court May Infer Intentional Spoliation from Circumstantial Evidence; Spoliating Party Bears the Burden to Prove Lack of Prejudice. *Kelly v. BMO Harris Bank N.A.*, Case No. 19-cv-1756, Case No. 19-cv-1869, 2022 WL 2801180 (D. Minn. July 18, 2022) (Wright, J.).

The defendant in this case was a successor to the lending institution that handled a financial account of Petters Company, Inc. while that company was actively orchestrating a Ponzi scheme. The chapter 11 trustee in the Petters Company's bankruptcy case filed an adversary proceeding against the defendant lending institution, alleging the defendant "legitimized and facilitated the Ponzi scheme." In discovery, the trustee learned that the defendant permitted destruction of backup tapes containing thousands of potentially relevant email records—in violation of a 2008 district court injunction requiring the defendant to preserve documents—without attempting to assess the contents of the backup tapes and despite the defendant's knowledge of the injunction and litigation holds prohibiting such destruction. The defendant also withheld evidence relating to the spoliation and witnesses for the defendant made several inconsistent statements and half-truths in an apparent attempt to mislead the bankruptcy court and cover up the spoliation. The bankruptcy court imposed sanctions, explaining circumstantial evidence established the defendant acted with the intent to deprive the trustee of the use of the destroyed evidence and that the trustee suffered prejudice.

The district court affirmed. The bankruptcy court did not err in relying on circumstantial evidence in determining the defendant intended to deprive the trustee of the backup tapes. For example, the bankruptcy court had discretion to infer bad faith intent from evidence of "willful ignorance of a duty to preserve evidence," including evidence that the employees who supervised the destruction knew about the injunction and associated litigation holds but made no effort to review the contents of the destroyed backup tapes or solicit advice of counsel. The bankruptcy court also reasonably inferred that the defendant "obfuscated facts and lacked candor

and credibility" from evidence that the defendant "repeatedly made vague or inconsistent statements" about its post-destruction rediscovery of spoliated evidence and subsequent misplacement of records containing some of the rediscovered information. Finally, "It was not unreasonable for the bankruptcy court to infer that [the defendant's] repeated delays in disclosing important information to its own counsel and to the Trustee, together with all of the other circumstantial evidence . . . reflect[ed] bad faith and an intent to hide information." That some of the misleading statements of the defendants' witnesses were "technically accurate" was not evidence of "good faith lapses in memory by witnesses" but "a continuation of bad faith behavior and intent to keep the information on the Minnesota backup tapes away from [the Trustee] and others." The bankruptcy court did not err in considering the financial stakes of the litigation as evidence of the defendant's motive, which was also relevant to the bankruptcy court's determination that the defendant's "conduct was carefully calculated."

The bankruptcy court also did not err in determining the trustee suffered prejudice from the spoliation and did not err in placing the burden of proving prejudice on the party that lost the information. "[P]rejudice may be established if the only source of a particular category of relevant information has been lost or destroyed," or if there is a "reasonable probability" that the "destroyed information could have materially benefitted the party that has been deprived of that information." "[T]he bankruptcy court reasonably relied on circumstantial evidence in the record to infer that the destroyed information likely contained unique and relevant evidence," including circumstantial evidence of the large quantity of spoliated evidence. And "[e]ven if the spoliated evidence is cumulative to some extent, the availability of the same or similar evidence from third parties or other sources does not necessarily demonstrate a lack of prejudice," because "it is unlikely that those alternative sources are of the same quality or scope as the spoliated evidence." Moreover, it was fair to place the burden of proving lack of prejudice on the party who responsible for the destruction of evidence. Thus, the bankruptcy court did not abuse its discretion in imposing spoliation sanctions.

N. Workers' Compensation Exemption Statute Did Not Apply to Retaliation Claim. *In re Mixson*, Ch. 7 Case No. 22-20077, 2022 WL 3570371 (Bankr. W.D. Mo. Aug. 18, 2022) (Dow, J.).

Pre-petition, the debtor filed a state-court lawsuit against her former employer alleging retaliatory discharge in violation of Missouri workers' compensation law. In bankruptcy, the debtor claimed an exemption in any recovery under the workers' compensation exemption statute. The trustee objected, arguing the workers' compensation exemption statute did not apply to the damages awarded in the retaliation lawsuit.

The bankruptcy court agreed with the trustee and disallowed the exemption. The worker's compensation exemption statute, Mo. Rev. Stat. § 287.260, makes exempt

"compensation payable under [the workers' compensation] chapter." Though courts construe exemption statutes liberally in favor of the debtor, the Missouri legislature superseded that rule of construction when it amended the statute to specifically require strict construction. Accordingly, the court analyzed the "ordinary meaning" of the term "compensation" in the context of Missouri's workers' compensation laws, construing the term "consistently and harmoniously to give effect to the entire [workers' compensation] statute." Because the Missouri legislature consistently used the term "compensation" in conjunction with provisions governing injuries arising from employment, the Missouri legislature must have intended the workers' compensation exemption statute to apply exclusively to "payments for physical injuries and fatalities attributable to the workplace, not for retaliatory discharge payments." The court distinguished Eighth Circuit authority determining a claim "ar[ose] under" worker's compensation laws for removal purposes because the Eighth Circuit decided the case under the Federal Rules of Civil Procedure rather than worker's compensation law and the relevant statutory language governed matters "arising under"—not "payable under"—workers' compensation law. Finally, because the administrative procedures that applied to claims for at-work injuries did not apply to retaliatory discharge claims, the Missouri legislature must have intended the workers' compensation exemption to apply only to claims determined under the ordinary administrative procedures.

II. Tenth Circuit

A. Debtors Entitled to Retain Sale Proceeds Earned Post-Petition, Pre-Conversion from Chapter 13 to Chapter 7. *Rodriguez v. Barrera (In re Barrera)*, 22 F.4th 1217 (10th Cir. 2022) (Tymkovich, J.).

The debtors filed a chapter 13 case in which they valued their residence at $396,000 and claimed a $75,000 homestead exemption under state law. The bankruptcy court confirmed the debtors' chapter 13 plan and the debtors made payments for several years. Before completing plan payments, the debtors sold the residence for $520,000 in April 2018, realizing approximately $140,000 in net proceeds. The debtors converted their chapter 13 to chapter 7 in May 2018. The chapter 7 trustee filed a motion for turnover of the nonexempt net proceeds from the residence's sale. Applying § 348(f)(1)(A), the bankruptcy court determined the debtors' interest in the appreciation in value of the residence was not property of the converted chapter 7 bankruptcy estate and denied the trustee's motion for turnover. The BAP affirmed the bankruptcy court's denial of the motion for turnover. On appeal to the Circuit, the Circuit affirmed the BAP, analyzing § 348(f)(1)(A) and determining the sale proceeds—a property interest distinct from the physical house from which they were derived—did not enter the converted chapter 7 estate. Thus, the sale proceeds belonged to the debtor.

B. Debtor's Former Manager Lacked Standing to Appeal Order Converting Case to Chapter 7. *Bear Creek Trail, LLC v. BOKF, N.A. (In re Bear Creek Trail, LLC)*, 35 F.4th 1277 (10th Cir. 2022) (Matheson, J.).

Debtor filed for chapter 11 reorganization. The bankruptcy court granted a motion to convert the proceeding to a chapter 7 liquidation and appointed a chapter 7 trustee. Debtor's attorney in the bankruptcy proceedings appealed the conversion order to the district court. The district court dismissed the debtor's appeal, holding only the trustee could appeal the conversion order. The Tenth Circuit agreed, holding *C.W. Mining* controls. *In re C.W. Mining*, 636 F.3d 1257 (10th Cir. 2011) (holding once a chapter 7 trustee was appointed, the debtor's former management could no longer appeal on the debtor's behalf and the chapter 7 trustee was the only person authorized to bring the appeal). Thus, the district court correctly dismissed the appeal. The Tenth Circuit noted it was immaterial whether the debtor's manager objected to the chapter 7 conversion. The Circuit also rejected appellant's argument that since the Debtor was solvent, it had standing as an aggrieved party to challenge the conversion order and appeal. The Circuit reasoned "the determinative question in this case is not whether [the Debtor] has standing as a 'person aggrieved' to appeal, but whether the [the Debtor's former management] has authority to appeal on [the Debtor's] behalf."

C. Debtor Need Not Personally Obtain Money, Property, Services, or Credit Under § 523(a)(2)(A). *Glencove Holdings v. Bloom (In re Bloom)*, 634 B.R. 559 (B.A.P. 10th Cir. 2021), *aff'd*, No. 22-1005, 2022 WL 2679049 (10th Cir. July 12, 2022) (McHugh, J.).

The Debtor was an airplane sales broker who agreed to help a wealthy couple locate and purchase an airplane. The Debtor found a desirable airplane and convinced the couple to make an offer. When the seller's counteroffer came back lower than expected, the Debtor—without disclosing the seller's identity—lied to the couple about the amount of the counteroffer and told them he was negotiating hard to get the purchase price down. Instead, through his shell company, the Debtor secretly purchased the airplane for a good price and then sold the airplane to the couple's wholly owned company for $250,000 more than his shell company paid and charged a $120,000 commission for his services. The Debtor never disclosed the secret back-to-back transaction, his relationship to the shell company, the $250,000 upcharge, or the seller's refusal to perform aircraft maintenance items the Debtor said the seller would fix. In the Debtor's bankruptcy case, on behalf of their company, the couple filed a proof of claim and a non-dischargeability complaint. The Debtor appealed the bankruptcy court's judgment allowing the claim in the amount of $458,470 and determining the debt to be non-dischargeable under § 523(a)(2)(A) and (a)(6).

The BAP affirmed, concluding the bankruptcy court did not err in any of its findings and conclusions. First, the BAP agreed the creditor proved fraud and fraudulent concealment under Colorado law, including reasonable reliance on the Debtor's misrepresentations and the damages were proximately caused by the Debtor's misconduct. The BAP also rejected the Debtor's argument that he is free from liability for his fraud and fraudulent concealment due to Colorado's economic-loss rule, under which a party suffering only economic loss from the breach of an express or implied contract may not assert certain tort claims related to the breach. The BAP concluded the economic-loss rule does not bar the creditor's claim because (a) there is no contract governing the Debtor's duties, so the economic-loss rule does not apply, and (b) after the 2019 Colorado Supreme Court *Bermel* opinion, the economic-loss rule does not bar intentional tort claims such as fraud and fraudulent concealment. Next, the BAP concluded the creditor proved false representation, false pretenses, and actual fraud under § 523(a)(2)(A). The BAP rejected the Debtor's argument that he is free from liability for his fraud because he did not directly obtain any benefit from the fruits of his fraud, which instead were distributed to the Debtor's wholly owned company. The BAP concluded the Debtor's debt to the creditor was "obtained" by the Debtor's fraud and a debtor need not receive specific money, property, services, or credit before a debt on account of the fraud can be found non-dischargeable under § 523(a)(2)(A). Finally, the BAP concluded the creditor proved willful and malicious injury under § 523(a)(6), rejecting the Debtor's various arguments his conduct was not willful and malicious and the creditor was not injured by such conduct.

The Tenth Circuit affirmed the BAP, concluding the economic loss rule did not apply because the fraud and fraudulent concealment claims were common law intentional torts that arose from duties independent of a contract. The Circuit also analyzed 11 U.S.C. § 523(a)(2)(A) and § 523(a)(6) to conclude the debt was non-dischargeable because the Debtor met the elements of § 523(a)(2)(A), including that the debtor need not receive the specific money, property, or services at issue. The Tenth Circuit sidestepped the question of whether the debtor must have received some benefit from the fraud, explaining, "even if we apply the receipt-of-benefits requirement, the bankruptcy court's findings support the nondischargeability" determination. Moreover, the Bankruptcy Court did not commit clear error in finding willful and malicious injury under § 523(a)(6) based on record evidence that the Debtor deceived the couple to benefit himself and his colleagues.

D. Tenth Circuit BAP Applies the "Dominion/Control" the "Diminution-Of-The-Estate" Earmarking Tests to Determine Whether a Debtor's Interest in Funds Transferred During the Preference Period. *Montoya v. Goldstein (In re Chuza Oil Company*), 639 B.R. 586 (B.A.P. 10th Cir. 2022) (Rosania, J.).

A confirmed chapter 11 plan in a debtor's first case required the debtor to pay all general unsecured creditors in full before paying an insider note obligation. After plan confirmation, the Defendants (debtor's insiders, one of whom holds the subordinated note and two of whom guaranteed the note) lent hundreds of thousands of dollars to the debtor so it could make its plan payments and survive as a going concern. From the borrowed funds, the debtor paid roughly $47,000 on the subordinated note even though general unsecured creditors were not yet paid in full. The post-confirmation insider loans were not enough to keep the debtor afloat, and the chapter 7 trustee in the debtor's subsequent bankruptcy case sued the insiders to recover the subordinated-note payments as preferential transfers, actual fraudulent transfers, and constructive fraudulent transfers. The bankruptcy court held a bench trial on the merits.

Relying on the earmarking doctrine (which permits repayment to a creditor—typically a guarantor—who provided the debtor funds "earmarked" for payment to another creditor), the bankruptcy court ruled for the Defendants on all three counts because there was no transfer of an interest *of the debtor* in property, a required element under §§ 547(b) and 548(a). The bankruptcy court also held (alternatively) (i) the Defendants satisfied the contemporaneous-exchange-for-new-value defense to the preference, (ii) the debtor did not intend to hinder, delay, or defraud creditors, and (iii) the debtor received reasonably equivalent value in exchange for the transfers. The chapter 7 trustee appealed the bankruptcy court's rulings on the preferential-transfer and constructive-fraudulent-transfer count.

The BAP reversed the bankruptcy court's decisions in favor of the defendants under the counts for preferential and constructively fraudulent transfers. The BAP first

concluded each subordinated-note payment was a transfer of an interest of the debtor in property under both §§ 547(b) and 548(a). The BAP applied the "dominion/control" and the "diminution-of-the-estate" earmarking tests to determine whether there had been a transfer of an interest of the Debtor in property. The transfers did not satisfy the dominion/control test because "the Debtor did not have control over the conditionally lent funds because the Debtor could not direct their distribution." But the transfers did satisfy the diminution-of-the-estate test because the purportedly "earmarked funds" left the debtor's bank account and "diminished the estate by leaving the Debtor saddled with new, unsecured debt rather than with old, subordinated debt." The BAP also determined that the note payments were not intended to be, and were not actually, a reasonably equivalent or roughly equivalent exchange for new or other value given to the debtor.

E. Special Counsel Required to Disgorge Fees Due to Failure to File Fee Application by Deadline in Chapter 11 Plan. ***McLeod Brock, PLLC v. Cohen (In re Richard D. Van Lunen Charitable Tr.*****), No. 21-cv-1727-LTB, 2022 WL 1261453 (D. Colo. Apr. 18, 2022) (Babcock, J.).**

Chapter 11 debtor obtained court approval to employ special counsel. The chapter 11 plan provided all professionals must file final fee applications not more than 60 days after the plan became effective. In bold letters, the plan also provided for disallowance of administrative claims not filed by the bar date. Additionally, the confirmation order provided all professional fees incurred pre-confirmation would be subject to final court approval but did not specify a deadline for seeking such approval. Special counsel did not file a fee application by the administrative bar date. Subsequently, the debtor and the trustee filed a motion for special counsel to disgorge fees it had been paid. Special counsel objected to the disgorgement motion and filed a final fee application at the same time as well as a motion to permit the tardy filing of the fee application, arguing they had not received the plan documents with its deadlines. On summary judgment, the bankruptcy court granted the motion for disgorgement concluding: (1) merely denying receipt of the plan and the attorneys' document retention policy did not rebut the presumption a properly addressed piece of mail is considered properly served and delivered; (2) the information contained in the plan was clear and reasonably conveyed the required information for purposes of due process; and (3) special counsel failed to establish the excusable neglect necessary to justify an enlargement of time to file its final fee application. The district court affirmed, concluding denial of receipt, even assuming it was true, was not sufficient evidence to rebut the presumption of receipt. There must be "objective evidence," such as showing other intended recipients did not receive the mailing or mail was returned undelivered.

F. Requirement that District Courts Hear "Personal Injury Torts" Applies Only to Torts Involving Trauma, Bodily Injury, or Psychiatric Impairment Beyond Mere Shame or Humiliation. *Byrnes v. Byrnes (In re Byrnes*), 638 B.R. 821 (Bankr. D.N.M. 2022) (Thuma, J.).

A husband sued his wife in state court on claims of defamation and intentional infliction of emotional distress. The wife filed a chapter 7 bankruptcy, and the husband removed the lawsuit to bankruptcy court. Later, the husband filed a motion to withdraw the reference. While the motion to withdraw the reference was pending, the bankruptcy court ruled the husband was not entitled to a jury trial, and, with the tort claims ready for trial, reviewed whether it could hold the trial or must send the case to district court for trial under 28 U.S.C. § 157(b)(5), which provides, "The district court shall order that personal injury tort and wrongful death claims shall be tried in the district court[.]" As a matter of apparent first impression, the bankruptcy court adopted the narrow view of the term "personal injury tort," which requires trauma, bodily injury or psychiatric impairment beyond shame or humiliation – as opposed to the broad view, which encompasses an invasion of personal rights, including libel, slander and mental suffering. Thus, the bankruptcy court concluded under the narrow interpretation, defamation claims are not personal injury torts. It, therefore, could hear the husband's defamation claim. The bankruptcy court also could hear the intentional infliction of emotional distress claim because the gravamen of that claim was defamation.

G. Allegedly Bad Faith Failure to Disclose Settlement Proceeds Did Not Justify Dismissal After Chapter 13 Plan Completion. *In re Frank*, 638 B.R. 463 (Bankr. D. Colo. 2022) (Brown, J.).

Before bankruptcy, the debtors were in an auto accident. The debtors filed a chapter 13 bankruptcy case and confirmed a 39-month plan. About one year after confirmation, the debtors settled their personal injury claim and received $67,000. In their bankruptcy papers, the debtors disclosed neither the claim nor the proceeds. About one month before their final plan payment, the debtors disclosed the $67,000 payment to the trustee. A few days after the debtors made their last plan payment, the trustee filed a motion to dismiss the chapter 13 case for nondisclosure of the $67,000. Nonetheless, the bankruptcy court granted the debtors their discharges and denied the motion to dismiss. In doing so, the bankruptcy court analyzed §§ 1307(c), 1329, 1330(a) and 1328(a). Under § 1307(c), failure to disclose an asset can be "cause" for dismissal and § 1307 has no time limit for filing a motion to dismiss. Additionally, § 1330 allows revocation of confirmation but requires such motion be filed within 180 days of confirmation. Section 1329(a) prohibits plan modification after the last payment has been made and there is no exception for fraud or bad faith conduct. Finally, § 1328(a) requires entry of a discharge upon completion of plan payments and § 1328(e) permits revocation of discharge, but only if fraud was discovered within the one-year period beginning with the entry of discharge. Thus, the bankruptcy court concluded these provisions "leave[] a pretty wide loophole for the dishonest debtor" and "[w]hether or not this gap was intentional, these two statutes signal Congress

has determined, after a certain period of time, the principle of finality must outweigh the policy of rooting out abusers of the bankruptcy system."

III. Other

A. 2017 Increase to Chapter 11 Quarterly United States Trustee Fees Violated Uniformity Requirement of the Bankruptcy Clause. *Siegel v. Fitzgerald (In re Circuit City Stores, Inc.)*, 142 S.Ct. 1770 (2023) (Sotomayor, J.).

In 2017, Congress increased chapter 11 fees in United States Trustee districts. The increase became effective in the first quarter of 2018, but the six districts and two states participating in the Administrator Program did not adopt a commensurate Administrator Program fee increase until September 2018, which became effective in October 2018. The fee increases in United States Trustee districts and Administrator Program districts had two key differences: (1) the fee increase in the Administrator Program districts took effect ten months after the increase in United States Trustee districts, and (2) the fee increase in Administrator Program districts applied only to new cases, but the fee increase in United States Trustee districts applied to all pending cases. Debtors with cases pending in United States Trustee districts during the period of unequal fee assessments sued, arguing the 2017 fee increase violated the uniformity requirement of the bankruptcy clause. The bankruptcy court held the 2017 fee increase unconstitutional due to a lack of uniformity. The Fourth Circuit reversed, concluding any lack of uniformity was a permissible exercise of Congress' power to implement legislation to resolve a geographically isolated problem: the funding shortfall that existed in U.S. Trustee states.

The Supreme Court disagreed with the Fourth Circuit. The Court first determined the 2017 fee increase was subject to the uniformity requirement, which broadly applies to all laws "on the subject of bankruptcies," whether administrative or substantive in nature. The fee increase was on the subject of bankruptcies: the amendment was to a statute entitled "Bankruptcy fees," applied to fees paid from a debtor's bankruptcy estate, affected debtor and creditor relations by decreasing funds that would be otherwise available to creditors, and had no other subject. The court next held that the 2017 amendment was not a permissible exercise of Congress' authority to enact uniform laws on the subject of bankruptcy. Though the uniformity requirement permits Congress to enact regional laws based on regional differences, it does not permit Congress to enact laws causing "arbitrary, disparate treatment of similarly situated debtors based on geography," or to "treat identical debtors differently based on an artificial funding distinction that Congress itself created" by creating a dual bankruptcy system. Thus, the Court held, "the uniformity requirement of the Bankruptcy Clause prohibits Congress from arbitrarily burdening only one set of debtors with a more onerous funding mechanism than that which applies to debtors in other States." In so holding, the court noted that its decision did not "address the constitutionality of the dual scheme of the bankruptcy system itself" or "impair Congress' authority to structure relief differently for different classes of debtors or to respond to geographically isolated problems."

B. Supreme Court to Determine Whether Fraudulent Intent Imputed from Non-Debtor Partner Satisfies § 523(a)(2)(A)'s Scienter Requirement. *Buckley v. Bartenwerfer (In re Bartenwerfer)*, 860 Fed. Appx. 544 (9th Cir. 2021), *cert. granted*, 2022 WL 1295707, 142 S.Ct. 2675 (May 2, 2022).

The debtors, husband and wife, renovated a house as partners and sold it to the creditor in this case. The creditor later discovered several undisclosed defects. After the creditor obtained a judgment against the debtors in state court for breach of contract, negligence, and nondisclosure, the debtors sought protection under the Bankruptcy Code. The creditor initiated an adversary proceeding under § 523(a)(2)(A), alleging the debt was obtained by fraud. The bankruptcy court determined that the husband debtor had actual knowledge of the false representations made to the creditor, and the wife debtor's knowledge could be imputed from the husband's knowledge under partnership law. The district court reversed in part, holding that the wife's imputed knowledge did not suffice, and adopting the test the Eighth Circuit articulated in *Walker v. Citizens State Bank*, 726 F.2d 452 (8th Cir. 1984), which requires the court to determine a debtor "knew or should have known" of another's fraud. On remand, the bankruptcy court determined wife did not have the requisite scienter. The creditor appealed to the Bankruptcy Appellate Panel for the Ninth Circuit, which determined the bankruptcy court erred by failing to analyze whether the wife was directly liable for fraud, but nonetheless affirmed because it determined the error was harmless. The creditor appealed again.

The Ninth Circuit reversed. Partnership law makes all partners responsible for fraud one partner commits in the conduct of the partnership, regardless of whether the partner "knew or should have known" of the other partner's fraud. In this case, because the debtors were also partners, the husband's fraudulent intent imputed to the wife. Thus, the district court erred in adopting the Eighth Circuit's "knew or should have known" scienter standard rather than the imputation of fraud standard it should have applied under partnership law. The Ninth Circuit remanded to the bankruptcy court with instructions to enter judgment against the debtors. The Supreme Court has granted certiorari to resolve the circuit split.

C. Alleged Violations of the Rules of Professional Conduct Did Not Require Disqualification Under § 327(a). *In re Boy Scouts of Am.*, 35 F.4th 149 (3d Cir. 2022) (Ambro, J.).

The debtor, Boy Scouts of America, had made insurance coverage claims relating to its liability for molestation of boy scouts. The law firm representing the debtor in bankruptcy had previously represented an affiliate of the debtor's insurer in connection with reinsurance disputes that did not determine whether the insurer would pay the debtor's direct insurance claims. The insurer objected to the debtor's motion to retain the firm, arguing (1) there was an "actual conflict of interest" that precluded representation under § 327, and (2) the court should disqualify the firm for violating Rules of Professional Conduct 1.7 and 1.9. The bankruptcy court overruled

the objection, concluding that the firm's representation of the insurer "did not render it unable to represent [the debtor] effectively" and noting that "disqualification was unnecessary because [the debtor] had special insurance counsel and [the law firm] had put an ethics screen into place." The district court affirmed.

The Third Circuit also affirmed. Section 327 of the Bankruptcy Code authorizes employment of attorneys who "(1) 'do not hold or represent an interest adverse to the estate' and are (2) 'disinterested persons.'" Because § 327 focuses on the estate, the relevant issue was "whether a possible conflict implicates the economic interests of the estate and might lessen its value." The insurer did "not meaningfully challenge the Bankruptcy Court's factual finding that [the firm] did not have an interest adverse to the estate," and did not explain why the alleged violation of the professional rules of conduct "impeded [the firm's] representation of [the debtor] for purposes of § 327(a)." Thus, the bankruptcy court did not abuse its discretion in finding no actual conflict under § 327, "even if [the insurer] had legitimate concerns about [the firm's]' compliance with the applicable Rules of Professional Conduct." Moreover, though violations of the Rules of Professional Conduct may inform a trial court's determinations of a motion to disqualify under § 327(a), violations of those rules do not *require* disqualification. The court had discretion to determine whether disqualification was an appropriate remedy for a Rules violation, and "[s]ometimes disqualification is more disruptive than helpful even though an attorney may not have satisfied his or her professional obligations." Thus, the bankruptcy court did not abuse its discretion in declining to disqualify the firm.

D. Counsel Denied Fees and Ordered to Disgorge Previously Received Payments. *In re 38-36 Greenville Ave LLC*, No. 21-2164, 2022 WL 1153123 (3d Cir. Apr. 14, 2022) (Jordan, J.).

The debtor's bankruptcy counsel filed a retention application disclosing that it had received $3,000 in compensation and seeking permission to hire an outside firm that had represented the debtor in state court litigation. One year later, after failing to obtain stay relief to continue to litigate in state court, the debtor still had not filed a chapter 11 plan or disclosure statement. The court later converted the debtor's case from chapter 11 to chapter 7. "It was not until after the Chapter 7 conversion, and over a year and a half after the debtor declared bankruptcy, that [counsel] filed its first and only fee application" seeking $31,819 in fees and expenses and disclosing prior receipt of almost $20,000 from the debtor's sole shareholder without court approval. Debtor's counsel admitted that the debtor intentionally omitted the undisclosed payments to prevent the debtor's monthly operating reports from revealing a negative net income. Throughout several show cause hearings, the debtor's counsel was evasive, defensive, and his answers to the court's questions were contradictory. The bankruptcy court denied the fee application, required disgorgement of previously received payments it had previously received, and referred the case for possible disciplinary action. The district court affirmed.

The Third Circuit also affirmed. The bankruptcy court had constitutional authority to order disgorgement because this action was not a so-called *Stern* claim involving legal rights grounded in state law but was instead a "core" matter involving property of the estate under § 541(a)(7). The bankruptcy court did not abuse its discretion in ordering disgorgement and denying the fee application; counsel's "repeated violations of the bankruptcy Rules and Code, along with counsel's lack of candor, more than justified entry of the Fee Order." That the bankruptcy judge appeared in a photograph with counsel for the chapter 7 trustee at a New Jersey Bankruptcy Lawyers Foundation Event was not evidence of judicial bias. Consequently, the bankruptcy court's order was a "well-justified response" to counsel's "flout[ing]" of the obligations of disclosure and candor.

E. Debtor's Misconduct Barred Trustee's Tort Claims Against Corporate Debtor's Financial Services Company Under *In Pari Delicto* Defense. *Anderson v. Morgan Keegan & Co., Inc. (In re Infinity Bus. Grp., Inc.)*, 31 F.4th 294 (4th Cir. 2022) (Heytens, J.).

The debtor in this case "used a dodgy accounting practice that inflated its accounts receivable and therefore its revenues." The debtor hired a financial services company initially to raise capital through a private placement of its stock, and later to obtain mezzanine debt. Both efforts were unsuccessful. The financial services company helped prepare documents for potential investors that incorporated the falsely inflated revenues from falsified financial statements the debtor furnished. The trustee sued the debtor's financial services company and one of its employees for common law fraud and breach of fiduciary duty, aiding and abetting breach of fiduciary duty, and securities fraud. The bankruptcy court determined that the debtor bore greater fault than the defendants and concluded that the *in pari delicto* defense barred the trustee's recovery.

The Fourth Circuit affirmed. The *in pari delicto* defense bars recovery by a plaintiff who "bears equal or greater fault" than the defendant. The Fourth Circuit disagreed with the trustee's argument that he was immune to the *in pari delicto* doctrine because he represented not just the debtor but also its creditors. When a trustee exercises his or her power to assert a cause of action on behalf of a debtor, the trustee "'stands in the shoes of the debtor' and is 'subject to the same defenses as could have been asserted against the debtor.'" The trustee could not assert the action as a hypothetical judgment creditor under § 544 because no authority suggested that the relevant state law would have permitted a judgment creditor to assert the trustee's causes of action. Moreover, the "*in pari delicto* would be available as a defense" in a hypothetical action a judgment creditor could assert as belonging to a judgment debtor because "the underlying shoes would still be the debtor's," so "the creditor would *also* be subject to the same defenses as the debtor." Next, agency law did not apply to prevent the defendants from asserting the *in pari delicto* defense because the record established the defendants did not "collude with corporate insiders," but instead did not "even have *knowledge* of [the debtor's] wrongdoing." And the adverse

interest exception to the *in pari delicto* defense, under which a party may not assert the defense against an entity whose agents were acting in a manner adverse to the corporation, did not apply because the debtor derived "all sorts of benefits" from its agents' use of the dodgy accounting practice at issue. Finally, the applicable states had not adopted an approach that would prohibit the *in pari delicto* defense in a corporation's suits against its fiduciaries for breach of their fiduciary duties, and the available authority suggested the relevant states would not adopt such an approach. Thus, the bankruptcy court did not err in determining that the *in pari delicto* defense defeated the trustee's suit.

F. *Taggart* "No Fair Ground of Doubt" Standard Applies to Contempt of Chapter 11 Confirmation Order. *Beckhart v. NewRez, LLC (In re Beckhart)*, 31 F.4th 274 (4th Cir. 2022) (Heytens, J.).

The debtors' chapter 11 plan entitled them to keep a piece of real property so long as they made ongoing mortgage payments. The debtors made all post-confirmation mortgage payments on time. Later, due to an internal error, the mortgage servicer mistakenly failed to adjust the loan to eliminate the pre-petition delinquency and commenced foreclosure proceedings. The debtors filed a motion to hold the servicer in civil contempt of the confirmation order. The bankruptcy court held the servicer in contempt but did not apply the test the Supreme Court articulated in *Taggart v. Lorenzen*, 139 S.Ct. 1795 (2019), which prevents courts from holding a defendant in civil contempt if "a fair ground of doubt" existed as to the wrongfulness of the defendant's conduct. The district court reversed, determining a "fair ground of doubt" existed and protected the servicer from contempt liability.

The Fourth Circuit vacated and remanded. Under *Taggart*, the Supreme Court determined in the context of a violation of a chapter 7 discharge order, "the standard for civil contempt 'is generally an *objective* one' and [] such orders are inappropriate 'where there is a *fair ground of doubt* as to the wrongfulness of the defendant's conduct." "Nothing about the Supreme Court's analysis in Taggart suggests it is limited to violations of discharge orders." Thus, the bankruptcy court erred by failing to analyze whether the there was a fair ground of doubt about the wrongfulness of the servicer's conduct. The district court also erred, however, by concluding that a fair ground of doubt existed merely because the servicer relied on advice of counsel. The Seventh Circuit remanded to the bankruptcy court with instructions "to reconsider the contempt motion under the correct legal standard."

G. Fourth Circuit Determines § 523 Nondischargeability Applies to Entities Filing Under Subchapter V. *Cantwell-Cleary Co., Inc. v Cleary Packaging, LLC (In re Cleary Packaging, LLC)*, 36 F.4th 509 (4th Cir. 2022) (Niemeyer, J.).

The creditor in this case had a pre-petition judgment against the subchapter V debtor, an LLC. The parties agreed that the judgment was a debt "for willful and malicious injury" under § 523(a). The debtor argued the judgment was nonetheless

dischargeable because § 523(a) applies only to individual debtors, not entities. The bankruptcy court agreed with the debtor, held that § 523 excepts debts from discharge only in cases of individual debtors, and determined the judgment was, therefore, dischargeable.

On direct appeal to the Fourth Circuit, the appellate court reversed and remanded. The appellate court started its analysis with § 1192(2), which "is the provision specifically governing discharges in a subchapter V proceeding," and, therefore, "should govern over the more general" provision, § 523. Section 1192(2) states, "If the plan of the debtor is confirmed . . . the court shall grant the debtor a discharge of all debts . . . except any debt . . . *of the kind* specified in section 523(a) of this title." Section 523, in contrast, states that a discharge under certain chapters of the Bankruptcy Code, "does not discharge *an individual debtor* from" the listed categories of debts. The Fourth Circuit explained that by its plain language, § 1192(2) grants all debtors a discharge of debts, regardless of the debtor's status as an entity or individual, subject to certain exceptions. "The section's use of the word 'debt' is, . . . decisive, as it does not lend itself to encompass the 'kind of *debtors* discussed in the language of § 523(a)." "By referring to the *kind of debt* listed in § 523(a), Congress used a shorthand to avoid listing all 21 types of debts . . . Thus, . . . *the debtors* covered by the discharge language of § 1192(2) — i.e., both individual and corporate debtors — remain subject to the 21 *kinds of debt* listed in § 523(a)." Other courts have analyzed nearly identical language in §§ 1141(d)(6) and 1228 (making nondischargeable certain debts "of a kind" specified in § 523) and determined those sections apply to entities. Moreover, interpreting § 1192 to treat individuals and corporations differently would frustrate an important purpose of subchapter V by eliminating a distinction between § 1141(d) (which applies to non-subchapter V cases and distinguishes between individuals and entities in excepting certain debts from discharge) and § 1192 (which applies to subchapter V and makes no such distinction). Interpreting § 1192 to apply to debts of both corporations and individuals also advances fairness and equity by balancing against the elimination of the absolute priority rule. Thus, "*all Subchapter V debtors* are textually subject to the discharge limitations described in § 523(a), not just *individual* Subchapter V debtors."

H. Fifth Circuit Holds to Narrow Application of Equitable Mootness, Limits Use of Third-Party Releases, and Approves Bankruptcy Court as Gatekeeper for Post-Confirmation Actions that Interfere with the Implementation or Consummation of the Plan. *NexPoint Advisors, L.P. v. Highland Cap. Mgmt., L.P. (In re Highland Cap. Mgmt., L.P.)*, No. 21-10449, 2022 WL 3571094 (5th Cir. Aug. 19, 2022) (Duncan, J.).

In this long and contentious chapter 11 case, the creditors' committee—through a governance settlement agreement—forced the debtor's prior CEO (Dondero) out and installed three independent directors to act as a quasitrustee and to govern the debtor in possession. The orders approving the agreement and the later appointment of one

of the independent directors as CEO, CRO, and Foreign Representative, protected those individuals from claims arising from their performance of their roles unless it involved willful misconduct or gross negligence. After much litigation, the committee and independent directors proposed, and obtained confirmation of, a cramdown plan that included exculpation of a number of protected parties, including the debtor, its employees and CEO, the independent directors, the committee, professionals retained in the case, and a broad group of "related persons." The confirmed plan also enjoined bankruptcy participants "from taking any actions to interfere with the implementation or consummation of the plan" and required any party seeking to pursue a claim against a protected party to first go to the bankruptcy court to determine whether the claim is a colorable claim of any kind—referred to as the "gatekeeping" function.

The ousted CEO and others aligned with him appealed confirmation of the plan directly to the Fifth Circuit. The court of appeals first addressed whether it should abstain from appellate review under the equitable mootness doctrine. Prior Fifth Circuit precedent, *In re Pacific Lumber*, 584 F.3d 229 (5th Cir. 2009) and *In re Manges*, 29 F.3d 1034 (5th Cir. 1994), provided the narrow ("scalpel rather than an axe") claim-by-claim analysis for equitable mootness. Here, the court referred to the equitable mootness doctrine as an "atextual balancing act" (footnote 8) and placed the court's "duty to protect the integrity of the process" ahead of the doctrine's "goal of finality." (at *7). Not surprisingly, then, the court declined to abstain under the equitable mootness doctrine.

After addressing some more routine confirmation issues, the court of appeals turned to whether the exculpation provisions went too far in releasing non-debtor parties from potential liability. It first recognized a circuit split—with the Fifth and Tenth Circuits barring third-party releases absent express authority in the Bankruptcy Code on one side, and the Second, Third, Fourth, Sixth, Seventh, Ninth, and Eleventh Circuits "allow[ing] varying degrees of limited third-party exculpations." Again, its prior decision in *Pacific Lumber* provided much of the framework for the analysis. In a nutshell, the court determined that the bankruptcy court clearly had the power to exculpate (release) the debtor in possession, the committee members, and a trustee from actions related to the performance of their duties in the case. Under the facts of this case, the independent directors were vested with the rights and powers of a trustee, and they too were entitled to "limited qualified immunity for any actions short of gross negligence." So the court struck the exculpations for all non-debtors except the committee members and the independent directors.

Finally, the Fifth Circuit determined that the injunction and gatekeeper functions are "perfectly lawful." The court reminds us that under the *Barton* doctrine (*Barton v. Barbour*, 104 U.S. 126 (1881)), "[c]ourts have long recognized bankruptcy courts can perform a gatekeeping function."

I. Buyer Who Withheld Information from Bankruptcy Court Was Not Purchaser in Good Faith Under § 363(m). *Archer-Daniels-Midland Co. v. Country Visions Coop.*, 29 F.4th 956 (7th Cir. 2022) (Easterbrook, J.).

Pre-petition, the debtors acquired real property subject to a third party's preexisting right of first refusal, entitling the third party to buy the property by matching any other prospective buyer's offer. The debtors later commenced a Chapter 11 bankruptcy case but did not notify the third party about the bankruptcy filing, list the third party as a creditor, otherwise attempt to make the third party a party to the bankruptcy case, or tell the bankruptcy court about the right of first refusal. Pursuant to their confirmed plan and without offering the third party a right of first refusal, the debtors sold the property to the buyer, purportedly free and clear of all other interests. When the buyer subsequently arranged to sell the property again without offering the third party the right of first refusal, the third party sued in state court, asserting it was entitled to compensation for the violation of its right of first refusal. In response, the buyer asked the bankruptcy court to determine that the sale was free and clear of the right of first refusal because the buyer was "an entity that purchased . . . property in good faith" under 11 U.S.C. § 363(m). The bankruptcy court dismissed the action, determining the buyer "had not acquired the parcel in good faith, because it knew of the Right yet failed to alert the bankruptcy judge." The district court affirmed.

The Seventh Circuit also affirmed, explaining, "it is impossible to disagree with the bankruptcy and district judges that someone who has both actual and constructive knowledge of a competing interest, yet permits the sale to proceed without seeking the judge's assurance that the competing interest-holder may be excluded from the proceedings, is not acting in good faith." Though the parties "devoted a lot of time and space to the question of whether [the third party] knew enough, before the 2011 sale, to supply it with the notice and opportunity for a hearing required by the Due Process Clause of the Fifth Amendment," the notice to the third party was irrelevant to the question of the buyer's good faith under § 363(m). Consequently, § 363(m) did not shield the buyer.

J. Post-*Fulton*, Impoundment Liens Are Avoidable Judicial Liens. *City of Chicago v. Mance (In re Mance)*, 31 F.4th 1014 (7th Cir. 2022) (Hamilton, J.).

After the Supreme Court determined in *City of Chicago v. Fulton*, 141 S.Ct. 585 (2021), that the city did not violate the automatic stay by passively retaining vehicles it had impounded prepetition, the debtor in this case sought to avoid the city of Chicago's possessory lien on an impounded vehicle under § 522(f) as a judicial lien impairing an exemption, rather than a statutory lien that is not avoidable. The lower courts determined that the lien was judicial because it was "inextricably tied to the

prior adjudication of [the debtor's] parking and other infractions, so it did not arise solely by statute, as the Bankruptcy Code requires."

The Seventh Circuit agreed. "When a vehicle owner files for bankruptcy through Chapter 7, she can avoid a lien under § 522(f) if the lien qualifies as judicial and its value exceeds the value of her exempt property (in this case, her car). Conversely, if the lien is statutory, it is not avoidable under the same provision." Because § 101(53) defines a "statutory lien" as a "lien arising solely by force of a statute," "prior legal proceedings leading to a lien would exclude the lien from the category of statutory liens." In contrast, the term "judicial lien," which must be "obtained by" a judicial process, "applies when the lien is caused by or results from the broad categories of process identified" in § 101(36). Thus, "classification of a lien depends on the events, if any, that must occur before the lien attaches." In Chicago, the city may only impound a car after multiple determinations of liability, an administrative process involving delivery of notice and an opportunity for the citation recipient to contest the charged violation, a determination of liability, an opportunity to appeal, further notice of impending impoundment and opportunity for a hearing following imposition of the fine, and a period of immobilization of a vehicle. Only "the very last step of the lien attachment" arises automatically by operation of statute. But "without the judicial or quasi-judicial procedures needed for final determinations for each traffic violation and without the quasi-judicial impoundment procedures, the City could not impose a lien on the indebted driver's vehicle." Because "the City's possessory lien does not arise 'solely' by statute," it is a judicial, rather than statutory lien.

K. Mutual Settlement Does Not Require Evaluation as § 363 Sale. *Spark Factor Design, Inc. v. Hjelmeset (In re Open Med. Inst., Inc.)*, 639 B.R. 169 (B.A.P. 9th Cir. 2022) (Faris, J.).

The chapter 11 trustee filed a motion to approve a compromise with the debtor corporation's former principal, who had filed a concurrent chapter 11 case. Under the terms of the compromise, the trustee sold causes of action to a different company belonging to the former principal, settled breach of fiduciary duty claims against the former principal, and withdrew the trustee's proof of claim in the former principal's bankruptcy case. In exchange, the former principal and the company that purchased the causes of action paid the trustee $200,000, agreed to fund the litigation of the purchased causes of action, and agreed to deliver to the trustee fifty-five percent of the recovery in the purchased causes of action. The bankruptcy court determined (1) the compromise satisfied the Ninth Circuit test for approving settlement agreements, and (2) the sale of the causes of action was proper under § 363.

The Bankruptcy Appellate Panel of the Ninth Circuit affirmed. The BAP first determined the bankruptcy court correctly applied the Ninth Circuit test for approving settlement agreements. Second, the court wrote further "to clarify that bankruptcy courts do not always need to examine a compromise as a sale under § 363." Bankruptcy courts have "the discretion to apply § 363 procedures to a sale of

claims pursuant to a settlement approved under Rule 9019" and must evaluate a settlement of claims under § 363 when "the claims r[un] in only one direction," such that the settlement amounts to "a one-way sale." But "it is not always necessary for a bankruptcy court to treat a compromise of claims as a sale under § 363." When the trustee and the other party to the settlement have claims against each other and the settlement resolves those mutual claims, the "requirement that the bankruptcy court examine a compromise as a sale or conduct an auction is inapplicable." Because the settlement in this case resolved mutual claims, "the bankruptcy court did not need to analyze whether the compromise transaction comported with § 363."

L. Order on Quiet Title Counterclaim Did Not Violate the Automatic Stay. *Censo, LLC v. NewRez, LLC (In re Censo, LLC)*, 638 B.R. 416 (B.A.P. 9th Cir. 2022) (Lafferty, J.).

In non-bankruptcy pre-petition litigation among non-debtor parties, multiple parties sought to quiet title to property one of the parties later transferred to the debtor. During that litigation, the defendant mortgage servicer filed a motion for summary judgment on its counterclaim against one of the property's former owners seeking to quiet title and a declaratory judgment that its lien was valid. While the servicer's motion for summary judgment was pending, the debtor filed a chapter 11 bankruptcy petition. Post-petition, the non-bankruptcy court entered summary judgment in favor of the mortgage servicer. The debtor filed an adversary proceeding seeking disallowance of the mortgage servicer's proof of claim based on errors in the deed of trust. The servicer moved to dismiss the adversary proceeding, arguing the errors in the deed of trust were not fatal and that claim preclusion barred the proceeding due to the non-bankruptcy court's order entering summary judgment in favor of the servicer. The bankruptcy court granted the servicer's motion to dismiss and denied the debtor's motion for leave to amend the complaint. The debtor appealed, arguing for the first time on appeal that the non-bankruptcy court's order entering summary judgment in favor of the servicer was void because the non-bankruptcy court entered it post-petition—in violation of the automatic stay.

The appellate panel determined the non-bankruptcy court's summary judgment order was not void because it did not violate § 362(a)(1), (3), (4), or (5). The summary judgment order did not violate § 362(a)(1) as the "continuation . . . of a judicial . . . proceeding against the debtor" because the servicer's counterclaim was "in substance, a defense" to the other party's claims seeking to quiet title and other relief, and summary judgment "did not diminish the estate, nor did it unfairly benefit one creditor over another." The summary judgment order did not violate § 362(a)(3) as an "act to obtain possession of property of the estate or of property from the estate or to exercise control over property of the estate," because the servicer's counterclaim merely sought to preserve the pre-bankruptcy status quo: that the servicer had an interest of record. Finally, the summary judgment order did not violate § 362(a)(4) or (5) because it was not an act to create, perfect, or enforce a lien securing a pre-bankruptcy claim. "[N]ot every post-petition act or omission that could conceivably

affect property of the debtor or the estate is a stay violation," and the debtor had "utterly failed" to offer any factual or legal basis to support its allegation that the order violated § 362(a)(4) and (5). Thus, the order was not void in violation of the automatic stay. The appellate panel next determined that, on the merits, the debtor waived its arguments against claim preclusion. Consequently, the bankruptcy court did not err in granting the servicer's motion to dismiss and denying the debtor's motion for leave to amend.

M. Debtor has Burden to Prove Subchapter V Eligibility; Profit Motive Not Required. *NetJets Aviation, Inc. v. RS Air, LLC (In re RS Air, LLC)*, 638 B.R. 403 (B.A.P 9th Cir. 2022) (Brand, J.).

The subchapter V debtor in this case was formed "for the purpose of using and providing aircraft transportation services, acquiring and selling interests in aircraft, and providing depreciation tax benefits to [its sole member and manager]." Pre-bankruptcy, the debtor leased fractional interests in aircraft from creditor NetJets Aviation, Inc., until a noninjury crash caused the debtor's relationship with NetJets to deteriorate. On the petition date, the debtor was not engaged in its normal flight operations, was not earning income, did not anticipate future income, and had no employees. NetJets objected to the debtor's subchapter V election and objected to confirmation based on the purported ineligibility, arguing the debtor was not eligible to proceed under subchapter V because it "had never been a revenue generating business" and was not "engaged in" business activities on the petition date. The debtor responded that subchapter V eligibility does not require income-generation. The debtor argued it was engaged in business activities because it intended to resume operations (albeit, not profit-generating operations) and "it was currently engaged in business activities by (1) litigating with NetJets, (2) negotiating with NetJets to sell its fractional jet interests back to NetJets, (3) paying its aircraft registry fees, (4) remaining in good standing as a Delaware LLC, and (5) keeping its tax obligations current with the state of California and the federal government." The bankruptcy court determined NetJets had the burden to establish ineligibility and overruled NetJets' objections.

The Ninth Circuit BAP determined the bankruptcy court erred in assigning NetJets the burden of proof, but nonetheless affirmed. As to the burden of proof, the BAP held that the debtor who elected to proceed under subchapter V has the burden of establishing eligibility, relying on authority holding that the debtor bears the burden to prove eligibility under Chapter 9 and Chapter 12 when a party objects. Thus, "the burden to prove eligibility for subchapter V should be placed on the debtor, especially considering the many advantages subchapter V offers debtors over a 'traditional' chapter 11: total plan exclusivity (including modifications) and no disclosure statement requirement; the ability to obtain a discharge on the effective date; and the inapplicability of the absolute priority rule. It also makes sense to place the burden on the debtor because debtors are in the best position to prove that they are qualified to be in subchapter V." But because the debtor had proffered sufficient

evidence in this case, the bankruptcy court's erroneous determination that NetJets bore the burden was harmless. As to eligibility, the issue was "whether [the debtor] was 'engaged in commercial or business activities' within the meaning of § 1182(1)(A)." Agreeing with the majority of courts to consider the issue, the BAP first explained that the debtor must be actively engaged in commercial or business activities on the petition date. But "the scope of commercial activities is very broad" and courts apply a "totality of the circumstances" standard to determine whether a business activity satisfies § 1182(1)(A). Moreover, "the plain and ordinary meaning" of the key phrase "engaged in business or commercial activities" does not require that a subchapter V debtor intend to pursue profit in the future. "Congress chose not to exclude nonprofits or other persons who lack a profit motive from qualifying for subchapter V. And that makes sense, because churches, hospitals, and other nonprofit businesses are allowed to file for chapter 11 (or 7) relief." Thus, in this case, the bankruptcy court did not err in determining the debtor's ongoing activities satisfied § 1182(1)(A).

N. Order Denying Motion for Relief from Stay Without Prejudice Is Final, Immediately Appealable Order. *Harrington v. Mayer (In re Mayer)*, 28 F.4th 67 (9th Cir. 2022) (Tashima, J.).

A creditor filed a motion for relief from the automatic stay, seeking to continue state court litigation. The bankruptcy court denied the motion without prejudice. The creditor then filed a motion for leave to appeal in district court. The district court determined that the creditor could not appeal because the bankruptcy court's decision denying the stay relief motion was without prejudice and, therefore, was not a final, appealable order.

The Ninth Circuit determined that the denial without prejudice was a final, appealable order. Bankruptcy court orders become final "when they definitively dispose of discrete disputes within the overarching bankruptcy case." In *Ritzen Grp., Inc. v. Jackson Masonry, LLC*, 140 S.Ct. 582 (2020), the Supreme Court determined the finality of an order denying stay relief order made a creditor's delayed appeal untimely. There, the Supreme Court held that "adjudication of a motion for relief from the automatic stay forms a discrete procedural unit" that "yields a final, appealable order when the bankruptcy court unreservedly grants or denies stay relief." In this case, though the order denying the stay relief motion was without prejudice, the order was sufficiently final. "The bankruptcy court's statement that the denial of stay relief was without prejudice indicates that the court was willing to consider stay relief if sought for a different purpose, but not for the purpose of resolving [the creditor's] state claims." By determining that it would adjudicate the state law claims as part of the claims allowance process, the bankruptcy court "resolve[d] and seriously affect[ed] substantive rights": "the discrete issue of whether [the creditor] could obtain relief from the stay to proceed against [the debtor] in state court." The court's determination, therefore, was final and immediately appealable.

O. Postpetition Transfers Do Not Offset New Value Defense. *Auriga Polymers, Inc. v. PMCM2, LLC*, 40 F.4th 1273 (11th Cir. 2022) (Lagoa, J.).

The issue in this case was "whether a creditor may reduce its [preference] liability by new value provided to a debtor within the 20 days prior to the bankruptcy filing if the creditor also files a § 503(b)(9) administrative claim seeking payment for that new value." Or, stated differently, "whether a creditor can use the same value to recover under § 503(b)(9) and offset its preference liability under § 547(c)(4)."

The debtor manufactured and distributed carpeting and flooring materials. The creditor sold the debtor on credit materials used in the debtor's manufacturing operations. The debtor paid the creditor more than $2.2 million for materials during the 90-day preference period. During that same period, the creditor delivered more than $3.5 million in materials—nearly $700,000 worth of those materials within 20 days of the petition date, entitling the creditor to an almost $700,000 administrative expense claim against the debtor's estate under § 503(b)(9). The liquidating trustee in the debtor's case filed an action to avoid and recover prepetition preferential transfers the debtor made to the creditor, and the creditor asserted a new value defense to the preference action. The bankruptcy court determined the creditor could not assert a new value defense to preference liability for new value that would be paid as an administrative expense claim.

The Eleventh Circuit reversed and remanded. Under § 547(c)(4), the new value defense does not apply if the debtor made an "otherwise unavoidable transfer to or for the benefit of [the] creditor" on account of the new value. Under § 503(b), a claim for goods received by the debtor within 20 days of the petition date is entitled to administrative priority. Though § 547(c)(4) does not explicitly require that an "otherwise unavoidable transfer" occur prepetition, the use of the term "transfer" in "otherwise unavoidable transfer" should have the same meaning as it has in all other uses of that term in § 547(c). Because all other uses of the term "transfer" necessarily referred to preferential transfers, the court construed the phrase "otherwise unavoidable transfers" to likewise refer to otherwise avoidable *preferential* transfers—which must occur pre-petition. Thus, post-petition transfers in satisfaction of an administrative expense claim could not fall within the "otherwise unavoidable transfers" limitation to the new value defense. The title of § 547, "Preferences," supported the conclusion that § 547 refers exclusively to transfers that occur during the preference period. Moreover, because § 547(c)(4)(B) "does not allow post-petition extensions of new value to become part of a creditor's new value defense, then logically it does not allow post-petition payments to affect the preference analysis." Finally, bankruptcy policy in favor of encouraging creditors to continue to do business with debtors also favored the Eleventh Circuit's conclusion. Thus, only pre-petition preferential transfers may reduce a creditor's new value defense, and a creditor may assert an administrate expense claim for new value that is the subject of a new value defense to a preference action.

P. Post-*Acevedo*, Courts May Continue to Use Nunc Pro Tunc Power to Achieve Justice in Appropriate Circumstances. *In re Player's Poker Club, Inc.*, 636 B.R. 811 (C.D. Cal. 2022) (Barash, J.).

Chapter 11 debtor-in-possession Player's Poker Club, Inc. filed a motion to reject a commercial lease and licensing agreement with lessor Hofer Properties, LLC and asked the court to make rejection apply retroactively. The lessor opposed the motion on the merits but did not oppose the debtor's request for retroactive application. The bankruptcy court first determined that the debtor was entitled to reject the lease under § 365(a) because the rejection was not "so manifestly unreasonable that it could not be based on sound business judgment, but only on bad faith, or whim or caprice." The bankruptcy court then *sua sponte* analyzed its authority to make the rejection retroactive and determined it could award retroactive rejection despite the Supreme Court's invalidation of a *nunc pro tunc* order (an equitable tool to make orders retroactive) in *Roman Catholic Archdiocese of San Juan v. Acevedo Feliciano*,140 S. Ct. 696, 206 (2020).

In determining it had the authority to award retroactive rejection, the bankruptcy court explained, "the Acevedo Feliciano decision does not change existing law or introduce a new limitation on the nunc pro tunc powers of courts. To the contrary, this per curiam (unsigned) opinion simply applies a longstanding limitation on that power: i.e., that it may not be used to create jurisdiction retroactively," or, stated otherwise, "may not be used to pretend that a jurisdictional fact existed at a time when it did not actually exist." But "the nunc pro tunc approval of a lease rejection under Bankruptcy Code section 365(a) does not involve the issue at the heart of *Acevedo Feliciano*: the retroactive creation of jurisdiction at a time when none existed." Retroactive rejection also does not involve the circumstance *Acevedo* explicitly prohibits: "'revisionist history' or the 'creat[ion of] facts that never occurred in fact.'" Instead, retroactive rejection fell within courts' long-recognized power—including recognition by the Supreme Court in *Mitchell v. Overman*, 103 U.S. 62 (1880)—to issue nunc pro tunc orders "to remedy delays resulting from the judicial process that are not attributable to the unreasonable delay of the parties. "Thus, post-*Acevedo*, courts may continue to use nunc pro tunc power "to achieve justice under appropriate circumstances," including the circumstance of retroactive lease rejection under binding Ninth Circuit precedent. Moreover, the bankruptcy court had the authority to award retroactive rejection because that authority derives from "the legislatively granted powers of the bankruptcy court to grant orders that are 'necessary and appropriate to carry out' provisions of the Bankruptcy Code" under § 105(a). "Based on the totality of the circumstances, the court [found] that it would be equitable and appropriate to approve Debtor's rejection of the [] Lease and License *nunc pro tunc.*"

Q. Assignment of Burden of Proof in Rule 4003(c) Remains Valid Despite Supreme Court Authority Arguably Suggesting Bankruptcy Rules Cannot Preempt Conflicting Burden of Proof Under State Law. *In re Hammond*, 638 B.R. 427 (C.D. Cal. 2022) (Houle, J.).

California law entitles debtors with disabilities to claim a higher homestead exemption than those without disabilities. The debtor in this case claimed the higher homestead exemption amount based on her non-filing spouse's disability. The trustee objected to the debtor's disability-based increase in her homestead exemption. The parties disagreed about whether the debtor or trustee had the burden of proof on the objection to exemption.

The court determined the trustee had the burden of proof. Though Rule 4003(c) of the Federal Rules of Bankruptcy Procedure assigns the burden of proof to the party objecting to an exemption, California law provides that the party claiming an exemption has the burden of proof. In *Raleigh v. Ill. Dep't of Revenue*, 120 S.Ct. 1951 (2000), the Supreme Court held that state law determined the burden of proof in the context of an objection to claim. Though the Supreme Court also made clear in *Raleigh* that Congress may preempt state law substantive rights under the *Bankruptcy Code*, "28 U.S.C. § 2072 provides that federal rules of procedure 'shall not abridge, enlarge or modify any substantive right.'" Because "burden of proof is substantive," and Congress did not enact a *Code* provision assigning the burden of proof, arguably "the Federal Rules of Bankruptcy Procedure could not alter the applicable burden of proof absent a Code provision providing for such alteration." If so, Rule 4003(c) would be an invalid attempt to alter a substantive right created under state law. Nonetheless, the court concluded that Rule 4003(c) remains valid because: (1) The Supreme Court, which must validate all Bankruptcy Rules, validated Rule 4003(c) after it decided *Raleigh* and, therefore, must have understood that Rule 4003(c) could designate burden of proof; and (2) the Supreme Court has not explicitly overruled authority from any jurisdiction assigning the burden of proof to the objecting party under Rule 4003(c). Having determined that the trustee had the burden of proof under Rule 4003(c), the bankruptcy court determined that the debtor was entitled to claim the exemption.

Faculty

Hon. Brian T. Fenimore is a U.S. Bankruptcy Judge for the Western District of Missouri in Kansas City, appointed on Aug. 31, 2017. Previously, he was a partner in the Kansas City, Mo., office of Lathrop & Gage LLP for more than 25 years and co-chaired its Banking & Creditors' Rights practice area, representing debtors, creditors and many other parties in interest. He also represented borrowers and lenders in problem loan matters, including loan enforcement, guarantor liability, workouts, reorganizations and bankruptcies throughout the U.S. Judge Fenimore is admitted to practice in Kansas and Missouri, and before the U.S. Bankruptcy Courts for the Eastern and Western Districts of Missouri and the District of Kansas, as well as the U.S. District Courts for the District of Kansas and the Eastern and Western Districts of Missouri. He is AV-rated by Martindale-Hubbell and has been listed in *The Best Lawyers in America* every year since 2003, among other listings. He is also a frequent speaker and ABI member. Judge Fenimore received his B.S. *magna cum laude* in 1988 in agricultural economics from the University of Missouri-Columbia and his J.D. in 1990 from the University of Michigan Law School, after which he clerked for Hon. Arthur B. Federman.

Hon. Michael E. Romero is a U.S. Bankruptcy Judge in the District of Colorado in Denver, initially appointed in 2003 and appointed Chief Judge from July 2014-June 2021. He is also Chief Judge of the Tenth Circuit Bankruptcy Appellate Panel. Since becoming a judge, Judge Romero has served on numerous committees and advisory groups for the Administrative Office of the U.S. Courts, is the past chair of the Bankruptcy Judges Advisory Group and has served as the sole bankruptcy court representative/observer to the Judicial Conference of the United States, the governing body for the federal judiciary. He is a past president of the National Conference of Bankruptcy Judges and actively participates in several of its committees. He also serves on the Executive Board of Our Courts, a joint activity between the Colorado Judicial Institute and the Colorado Bar Association that provides programs to further public understanding of the federal and state court systems. Judge Romero is a member of the Colorado Bar Association, ABI, the Historical Society of the Tenth Circuit and the Colorado Hispanic Bar Association. He received his undergraduate degree in economics and political science from Denver University in 1977 and his J.D. from the University of Michigan in 1980.

Hon. Bianca M. Rucker was appointed U.S. Bankruptcy Judge for the Eastern and Western Districts of Arkansas in Fayetteville on April 26, 2021. Prior to her judicial appointment, she was a chapter 7 panel bankruptcy trustee and attorney representing creditors and debtors in consumer and business bankruptcy matters at Rucker Law PLLC, in Fayetteville. Before working as a trustee, Judge Rucker was a partner at Wright, Lindsey & Jennings, LLP (WLJ), where her practice focused on bankruptcy, commercial litigation and insurance defense. She also served as a staff attorney to Hon. Richard D. Taylor (2006-07) and Hon. Ben T. Barry (2007-11) of the U.S. Bankruptcy Court for the Eastern and Western Districts of Arkansas. Judge Rucker has served as president of the Northwest Arkansas Debtor and Creditor Bar Association, and she is an adjunct professor at the University of Arkansas School of Law, where she teaches alcohol beverage law. She received her B.A. in political science in 2003 from the University of Arkansas at Little Rock and her J.D. with honors in 2006 from the William H. Bowen School of Law.