AMERICAN BANKRUPTCY INSTITUTE

2017 Winter Leadership Conference

Judges' Round-and-Round

Douglas L. Lutz, Moderator
Frost Brown Todd LLC; Cincinnati

Hon. Martin R. Barash
U.S. Bankruptcy Court (C.D. Cal.); Woodland Hills

Hon. Kevin J. Carey
U.S. Bankruptcy Court (D. Del.); Wilmington

Hon. Scott C. Clarkson
U.S. Bankruptcy Court (C.D. Cal.); Santa Ana

Hon. Daniel P. Collins
U.S. Bankruptcy Court (D. Ariz.); Phoenix

Hon. Mary Grace Diehl
U.S. Bankruptcy Court (N.D. Ga.); Atlanta

Hon. Dennis R. Dow
U.S. Bankruptcy Court (W.D. Mo.); Kansas City

Hon. Robert D. Drain
U.S. Bankruptcy Court (S.D.N.Y.); White Plains

Hon. Michael A. Fagone
U.S. Bankruptcy Court (D. Maine); Bangor

Hon. Bruce A. Harwood
U.S. Bankruptcy Court (D. N.H.); Manchester

Hon. Barbara J. Houser
U.S. Bankruptcy Court (N.D. Tex.); Dallas

Hon. Laurel M. Isicoff
U.S. Bankruptcy Court (S.D. Fla.); Miami

Hon. Deborah J. Saltzman
U.S. Bankruptcy Court (C.D. Cal.); Los Angeles

Hon. Deborah L. Thorne
U.S. Bankruptcy Court (N.D. Ill.); Chicago

Hon. Eugene R. Wedoff (ret.)
Oak Park, Ill.

Consumer Commission Retired Judges

Hon. William H. Brown (ret.)
Carbondale, Colo.

Hon. Randall L. Dunn (ret.)
Portland, Ore.

Hon. David W. Houston, III (ret.)
Mitchell, McNutt & Sams; Aberdeen, Miss.

Hon. Elizabeth L. Perris (ret.)
Portland, Ore.

2017 ABI WLC Judges Round and Round Program Topics

Table #	JUDGE	TOPICS
1.	Hon. Martin Barash	Mortgage Modification Mediation – Are you doing it? Does it work? Have you tried it
2.	Hon. William Brown, (Ret.)	"No-look" or "presumed reasonable" fees in Chapter 13: Do they help or hurt? Does the fact that lawyers can get a certain fee paid through the plan without the court or trustee scrutinizing it make lawyers more likely to file 13s--even when the debtor really needs a 7? Or does it encourage good lawyers to represent Ch. 13 debtors?
3.	Hon. Kevin Carey	Can the owners of a business entity provide in the company's charter documents that the decision to file a bankruptcy proceeding must be unanimous?
4.	Hon. Daniel Collins	Consumer--Scope of representation: Retainer agreements vs. Court expectations.
5.	Hon. Mary Grace Diehl	Third party releases - are they ever permissible in a plan? Outside of a plan?
6.	Hon. Dennis Dow	Supreme Court decision in Midland and its implications.
7.	Hon. Robert Drain	1124 and (a) feasibility and (b) default interest.
8.	Hon. Randall Dunn	Secret (or not so secret) judicial strategies of administering a chapter 11. How active a role should the court play in chapter 11 cases: chambers conferences; acting as settlement judge; suggesting avenues for settlement?
9.	Hon. Michael Fagone	Avoidance of payments to colleges and universities when an adult debtor is paying a child's tuition and related expenses.
10.	Hon. Bruce Harwood	Administering marijuana assets in bankruptcy cases: the intersection of state law, federal law, and the US Trustee program.
11.	Hon. Barbara Houser	New 2nd Circuit decision in MPM Silicones; contrasted with Ambro's decision in Energy Futures.
12.	Hon. Laurel Isicoff	Successful ways to deal with discovery disputes before going to court?
13.	Hon. Elizabeth Perris	Student loans - advising debtors and litigating adversary proceedings.

2017 ABI WLC Judges Round and Round Program Topics

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14.	Hon. Deborah Saltzman	Discussion of the balance between national uniformity and local independence in bankruptcy practice and procedure, inspired by the new chapter 13 rules and plans effective December 1. The new rules and national plan were an attempt at uniformity, but the widespread adoption of opt out plans suggests that local interests won out. Why did this happen? Is uniformity still a worthwhile goal?
15.	Hon. Deborah Thorne	What is a transfer? Circuit split between the 4th and the 9th and 10th Circuits. Is the deposit into someone's own bank account a transfer within the meaning of section 101(54)? Supreme Court just rejected the Cert. Petition but the circuit split remains.

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Avoidability of College Tuition Payments
Made by Parents who are Debtors in Bankruptcy

A. There are multiple cases holding or suggesting that such tuition payments are, or may be, avoidable. *See, e.g.,* Boscarino v. Bd. of Trustees of Conn. State Univ. Sys. (In re Knight), Adv. No. 15-02064, 2017 WL 4410455 (Bankr. D. Conn. Sept. 29, 2017) (denying University's request for summary judgment that tuition payments made by parent were not avoidable, based on determination that parent had no legal obligation to make the payments and did not receive "value" in exchange); Roach v. Skidmore College (In re Dunston), 566 B.R. 624, 637 (Bankr. S.D. Ga. 2017) (recognizing that parent "may have felt a moral obligation to pay for [child's] college education," but finding that the satisfaction of such obligation did not provide an "economic" benefit to parent because it did not discharge a legal obligation or increase parent's assets); Gold v. Marquette Univ. (In re Leonard), 454 B.R. 444, 457-59 (Bankr. E.D. Mich. 2011) (concluding that parents did not receive reasonably equivalent value in exchange for payment of child's college tuition because parents had no legal obligation to make the payments, and any benefits received in exchange were intangible, and neither concrete nor quantifiable); *see also* Banner v. Lindsay (In re Lindsay), Adv. No. 08-9091 (CGM), 2010 WL 1780065, at **9-10 (Bankr. S.D.N.Y. May 4, 2010) (holding parent's transfer in payment of son's college tuition was fraudulent under state law in the absence of evidence or authority establishing parent had anything more than a "moral obligation" to make the payment).

B. There are also numerous cases that declare or suggest that such tuition payments are not avoidable under section 548. *See, e.g.,* Eisenberg v. Penn. State Univ. (In re Lewis), 574 B.R. 536 (Bankr. E.D. Pa. 2017) (concluding that trustee failed to state claim for fraudulent transfer of tuition payments, based on conclusions that (a) parent's payment of a child's undergraduate expenses is a necessary family expense, and parent "therefore receives reasonably equivalent value in exchange"; and (b) loan proceeds do not become property of parent's bankruptcy estate when government disburses proceeds of loan in parent's name directly to university); DeGiacamo v. Sacred Heart Univ. (In re Palladino), 556 B.R. 10, 15-16 (Bankr. D. Mass. 2016) (finding that parents paid for child's college tuition "because they believed that a financially self-sufficient daughter offered them an economic benefit," and concluding that motivation was "concrete" and "quantifiable" enough to constitute "reasonably equivalent value" under 11 U.S.C. § 548(a)(1)(B). *See also* Shearer v. Oberdick (In re Oberdick), 490 B.R. 687, 712 (Bankr. W.D. Pa. 2013) (concluding that trustee could not recover parents' payments of child's college tuition expenses based on recognition that payments were "made out of a reasonable sense of parental obligation"); Sikirica v. Cohen (In re Cohen), Adv. No. 07-02517-JAD, 2012 WL 5360956, at *10 (Bankr. W.D. Pa. Oct. 31, 2012) (holding that parents' payments for their children's undergraduate education "are reasonable and necessary for the maintenance of the . . . family for purposes of the fraudulent transfer statutes), *overruled on other grounds by* Cohen v. Sikirica, 487 B.R. 615 (W.D. Pa. 2013).

Compare Geltzer v. Xaverian High School (In re Akanmu), 502 B.R. 124, 135-37 (Bankr. E.D.N.Y. 2013) (distinguishing fraudulent transfer cases involving parent payment of college tuition, and holding that parents "received reasonably equivalent value" for payments for their

minor children's education because parents "satisfied their legal obligation to educate their children" and because parents "and their minor children must be viewed as a single economic unit . . . for purposes of constructive fraudulent conveyance analysis"); McClarty v. Univ. Liggett School (In re Karolak), Adv. No. 13-04394-PJS, 2013 WL 4786861, at *3 (Bankr. E.D. Mich. Sept. 6, 2013) (concluding that parent received reasonably equivalent value in exchange for tuition payments for education of her three minor children because the education discharged her legal obligation to provide her children with an education).

Judicial Administration of Chapter 11 Cases

1. Case Management Conferences -- Initial and Periodic; a matter of routine or local rules, or ad hoc?

    A. Why the debtor is in chapter 11, and how will it emerge?

    B. Plan and Disclosure Statement deadlines
        --In re Airadigm Communications, Inc., 519 F. 3d 640 (7th Cir. 2008)
        --In re Seaside Engineering & Surveying, Inc. 780 F. 3d 1070 (11th Cir. 2015)

2. First Day Orders -- Scheduling hearings; guidelines for cash collateral use motions and orders; omnibus hearings for First Day Orders and other motions; due process concerns.

3. Disclosure Statement Hearings -- How "hands on" is it appropriate for the judge to get?

4. How activist or supine should the judge be in administering chapter 11 cases? Pet peeves from the lawyers' perspectives?

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Midland Funding LLC v. Johnson, 137 S. Ct. 1407 (2017)

Filing of an obviously time-barred claim in a Chapter 13 case is not false, deceptive, misleading, unfair, or unconscionable debt collection practice within the meaning of the Fair Debt Collection Practices Act

Facts: Debt collector Midland Funding filed a proof of claim in Aleida Johnson's Chapter 13 case. It was clear on the face of the claim that it was based on a credit card debt that was incurred more than 10 years before Johnson filed for bankruptcy. Johnson objected to the claim, asserting the applicable six-year statute of limitations. Midland did not respond. The bankruptcy court in the Southern District of Alabama disallowed the claim.

Johnson then initiated a lawsuit in district court against Midland for violation of the FDCPA, seeking actual damages, statutory damages, and attorney's fees and costs. The FDCPA prohibits a debt collector from asserting any "false, deceptive, or misleading representation," or using any "unfair or unconscionable means" to collect, or attempt to collect, a debt. 15 U.S.C. §§1692e, 1692f. The district court dismissed the action, holding that a creditor's right to file a time-barred claim under the Code precluded the debtors from challenging that practice as a violation of the FDCPA. The 11th Circuit reversed, holding that the FDCPA was not precluded by the Bankruptcy Code and that the two statutes could be construed to coexist. The Supreme Court granted certiorari to resolve a circuit split on the issue.

Holding: Reversed. The filing of a proof of claim that is obviously time-barred does not fall within the scope of the FDCPA in that it is not "false," "deceptive," "misleading," "unconscionable" or "unfair." (Justices Breyer, Roberts, Kennedy and Alito)

Analysis: With respect to the words "false," "deceptive," or "misleading," **t**he Supreme Court began with the Bankruptcy Code's definition of "claim" as a "right to payment" under §101(5)(A), and noted that the word "enforceable" does not appear in that definition.

The Court also relied on the relevant Alabama law providing that a creditor has the right to the payment of a debt even after the limitations period has expired. (The passage of time extinguishes the remedy but the right remains.)

The Supreme Court rejected Johnson's argument that other provisions (*e.g.,* §502(a) and Rule 3001(f)) support the interpretation of "claim" as "*enforceable* claim." The Court observed that Congress' intent was to adopt the broadest available definition of "claim," and that the Code makes clear that limitations constitutes an affirmative defense that a debtor can assert after a creditor makes a claim.

The Court also noted that the determination of whether a statement is misleading normally requires consideration of the legal sophistication of its audience. In a Chapter 13 case, the audience includes a trustee who is likely to understand that a proof of claim is subject to disallowance based on several grounds, including untimeliness.

With respect to the words "unfair" or "unconscionable," Johnson argued that, in the context of an ordinary civil action, several lower courts had found that a debt collector's assertion of a claim known to be time-barred was "unfair." The Supreme Court distinguished those cases on the basis that the lower courts were concerned that a consumer might unwittingly repay a time-barred debt. Those concerns are diminished in a bankruptcy context where the consumer initiates the proceeding, where procedural rules guide the evaluation of claims, and where the claims resolution process is generally more streamlined and less unnerving for the debtor.

The Court also found unpersuasive Johnson's argument that the practice of filing time-barred claims risks harm to the debtor. It observed that the bankruptcy system treats untimeliness as an affirmative defense and the assertion of that defense can even benefit the debtor on occasion.

The Supreme Court also pointed out that the FDCPA and the Bankruptcy Code have different purposes and structural features: the Act seeks to help consumers by preventing consumer bankruptcies,

while the Code creates and maintains the "delicate balance of a debtor's protections and obligations." Carving out an exception for a limitations affirmative defense would upset that balance, add complexity to the claims process, and shift the obligation to investigate the staleness of a claim from the debtor to the creditor.

Finally, the Court dismissed the argument that Bankruptcy Rule 9011 settled the issue, finding it noteworthy that the Advisory Committee specifically rejected a proposal that would have required a creditor to certify that there was no valid limitations defense. The Court also noted that only one bankruptcy court has held that sanctions were warranted under Rule 9011 for filing a time-barred claim without a pre-filing investigation, but that many courts have held to the contrary.

Dissent (Justices Sotomayor, Ginsburg and Kagan)**:** The dissent is primarily policy-oriented, focusing on the sheer size of the debt-buying industry and its widespread practice of filing objectionable claims in the hopes that the bankruptcy system will fail. The dissent also cited the similarities between civil lawsuits and the bankruptcy process, stating that there was no sound reason to depart from the civil courts' conclusion that the practice of collecting debts that are knowingly time-barred violates the FDCPA.

Additionally, the dissent disagreed with the majority's reliance on the presence of a bankruptcy trustee and the bankruptcy system to weed out meritless claims. Citing the government which oversees trustees and the trustees themselves, the dissent contends trustees are struggling under a deluge of stale debt and cannot realistically be expected to identify every time-barred claim filed in every case.

The dissent concluded with these words:

"It does not take a sophisticated attorney to understand why the practice I have described in this opinion is unfair. It takes only [sic] common sense to conclude that one should not be able to profit on the inadvertent inattention of others. It is said that the law should not be a trap for the unwary. Today's decision sets just such a trap."

Aftermath: While the case resolved one question, others remain.

First, does preclusion apply to bar an FDCPA action in bankruptcy? Given that the determination was made that the FDCPA was not violated, it seems unlikely. Second, does the holding extend to Chapter 7 cases? Lastly, what, if any, effect will the holding have on the U.S. Trustee's position on filing claims for out-of-statute debt?

Only a few courts have cited *Midland Funding* for its holding on the filing of time-barred claims, most of which construe the holding narrowly. *See Casamatta v. Resurgent Capital Services, L.P.*, *et al.*, 2017 WL 3841739 (Bankr. W.D. Mo. Sept. 1, 2017)(holding that the filing of time-barred claims is not sanctionable conduct); (*Kaiser v. Cascade Capital LLC,* 2017 WL 2332856 (D. Or. May 25, 2017)(limiting *Midland Funding's* holding to bankruptcy cases, and concluding that it did not alter the persuasive weight of the civil cases discussed in the opinion); *Arias v. Gutman, Baker & Sonnenfeldt LLP*, 2017 WL 5330081 (2nd Cir. November 14, 2017)(*Midland's* rationale not extended to this case because the proceeding was in state court and consumer did not have the benefit of counsel or a bankruptcy trustee); *In re Demarais v. Gurstel Chargo, P.A.*, 869 F.3d 685 (8th Cir. 2017)(*Midland* holding not applicable here because this was an attempt to collect an extinguished debt in a civil suit).

No-look Attorney Fees in Chapter 13

● Do no-look (presumed reasonable) attorney fees for a debtor's attorney in Chapter 13 encourage good attorneys to file Chapter 13?

● Is lack of scrutiny by the court or trustee a good thing for the bankruptcy system?

● Do such fees result in holding down the costs for debtors or does this practice increase costs?

● What is the relationship between no-look fees in Chapter 13 and the choice for debtors between Chapter 7 and 13?

● If the debtor would be better served by filing Chapter 7 but lacks the ability to pay front-end Chapter 7 attorney fees, are there ethical issues for the attorney filing Chapter 13 because it is the way to recover attorney fees in a no-money down or attorney-fee-only plan?

● Should the Chapter 7 debtor's attorney fees be nondischargeable as a means of permitting attorneys to be paid in Chapter 7 cases, or would that result in conflicts of interests for the attorney.

● Are there other ways to permit payment of Chapter 7 attorney fees, other than requiring full payment before filing?

● Should the bankruptcy court address in any way public perceptions about no-look and no-money-down Chapter 13 attorney fees? See, e.g.,
Paul Kiel & Hannah Fresques, How the Bankruptcy System Is Failing Black Americans, PROPUBLICA (Sept. 27, 2017), https://features.propublica.org/bankruptcy-inequality/bankruptcy-failing-black-americans-debt-chapter-13/; Paul Kiel & Hannah Fresques, Chicago's Bankruptcy Boom, PROPUBLICA (Sept. 28, 2017), https://www.propublica.org/article/chicagos-bankruptcyboom. And see Pamela Foohey et al., "No Money Down" Bankruptcy, 90 S. CAL. L. REV. 1055, 1099–1103 (2017).

Is a deposit into an unrestricted checking account in the ordinary course of business, withdrawable at will, a *transfer*?

New York Cty. Nat'l Bank v. Massey, 192 U.S. 138 (1904).

- At least for purposes of the preference statute, a deposit into a general checking account is not a "transfer": a deposit does not deplete the assets of the debtor available to general creditors. It creates a corresponding claim against the bank that is capable of being liquidated on demand, whether by withdrawal or by drawing on the account. There is no disposing of or parting with property as a "payment, pledge, gift, or security." It is not clear whether the Court relies on the diminution-of-assets/estate rationale or the idea that there is no parting with property under old § 1(25) (now the broader § 101(54)).

Ivey v. First Citizens Bank & Tr. Co. (In re Whitley), 848 F.3d 205 (4th Cir. 2017), *cert. denied.*, No. 16-1330, 2017 WL 1807072 (U.S. Oct. 10, 2017).

- The court held that a deposit into one's own general checking account is not a transfer at all within the meaning of § 101(54), not relying on any depletion-of-estate rationale. The Debtor maintained "possession, custody, and control" of the funds at all times, since the Debtor merely *substituted* the same kind of property (funds) for the same kind of property (funds). The deposit created a credit against the bank redeemable/withdrawable at will. Free access to the funds means there has been no "disposing of" or "parting with" property under § 101(54).[1]

Matter of Prescott, 805 F.2d 719 (7th Cir. 1986).[2]

- While a deposit into a bank account *can* be a transfer under § 101(54), it is not avoidable by the trustee to the extent the deposit was made in the ordinary course of business, was to an unrestricted checking account, and was withdrawable at will. In those circumstances, there is no diminution of the debtor's estate.

Schoenmann v. Bank of the West (In re Tenderloin Health), 849 F.3d 1231 (9th Cir. 2017).

- A deposit is a transfer under § 101(54). *Massey* no longer applies because the Bankruptcy Code constituted a fundamental restructuring of bankruptcy law. It expanded the definition of transfer, and the Senate Report[3] confirms this. A deposit is an exchange of money for debt, and therefore constitutes a transfer. Such a transfer *also*, on the facts of this case, depleted the assets of the debtor when it was made, thus satisfying the diminution test.[4]

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[1] *Ivey* also states that the Senate Report indicating that deposits into bank accounts were intended to be considered "transfers" when the Code was passed does not apply to regular deposits made into an unrestricted checking account.

[2] *Prescott* says largely the same thing as *Ivey* about the Senate Report.

[3] *See supra* note 1.

[4] The court reasoned that the bank had a security interest in the account and also obtained a right of setoff independent of that security interest. The concurrence notes that the bank already had a security interest of the same breadth in the funds before they were deposited, so its position was not improved. The potential security interest / setoff rationale in *Tenderloin* is *contra* to *Massey*, since in *Massey*, the bank acquired a potential right of setoff upon the deposit. As long as the bank has not exercised its rights, the debtor can still withdraw/use the funds at will.

Redmond v. Tuttle, 698 F.2d 414 (10th Cir. 1983).[5]

Some Lower Court Decisions:

Not a transfer, under either of the rationales:[6]

In re Tonyan Const. Co., Inc., 28 B.R. 714, 729 (Bankr. N.D. Ill. 1983).

Perkins v. Lehman Bros., No. 1:11-CV-1806-CAP, 2012 WL 11946959, at *9 (N.D. Ga. Mar. 30, 2012).

In re Rollaguard Sec., LLC, 570 B.R. 859, 871–74 (Bankr. S.D. Fla. 2017).

In re Ford, 98 B.R. 669, 680 n.13 (Bankr. D. Vt. 1989).

Pioneer Liquidating Corp., 211 B.R. 704, 714–15 (S.D. Cal. 1997).

Is a transfer, under either of the rationales:

In re Huff, 2014 WL 904537, at *6 (B.A.P. 9th Cir. Mar. 10, 2014).

In re Schafer, 294 B.R. 126, 132 (N.D. Cal. 2003).

In re Pineview Care Ctr., Inc., 152 B.R. 703, 708 (D.N.J. 1993).[7]

Meoli v. Huntington Nat'l Bank (In re Teleservices Group, Inc.), 469 B.R. 713, 744–46 (Bankr. W.D. Mich. 2012).

Congress Talcott Corp. v. Sicari (In re Sicari), 187 B.R. 861, 871 n.8 (Bankr. S.D.N.Y. 1994).[8]

Ward v. Jenkins (In re Jenkins), 2012 Bankr. LEXIS 5722, at *11-13 (Bankr. W.D.N.C. Dec. 12, 2012).

Practice Tips:

- Most, if not all, courts outside of the Fourth Circuit seem to generally agree that there is or can be a transfer under § 101(54). The real question is whether it depleted the assets of the debtor available to creditors. The Ninth Circuit seems to think that that test is satisfied where the bank is also a creditor of the debtor, because in that situation the bank will at least have a potential right to setoff, and that is enough to deplete the estate available at the time of the deposit.
- Where the bank is a not a creditor of the debtor, therefore, counsel for a bank should simply raise the above cases and say that there has been no avoidable transfer.
- Where the bank is a creditor of the debtor, counsel should, if not in the Ninth Circuit, still argue that there has been no avoidable transfer because there has been no depletion of the estate at the time of the transfer. Up to the point where the bank actually acts to exercise its setoff rights,[9] the debtor is free to withdraw/use the funds at will, and that freedom of use with an unrestricted

[5] The court here notes in passing in a footnote that the new Code transfer definition encompasses deposits into bank accounts. It cites the Senate Report.
[6] *I.e.*, not a transfer at all under § 101(54) (*Ivey*), or not a transfer subject to avoidance (*Prescott*).
[7] Citing *Matter of Prescott*, 805 F.2d 719 (7th Cir. 1986). *Prescott* held that deposits into an unrestricted checking account in the ordinary course of business, withdrawable at will, are not avoidable transfers.
[8] Stated generally for purposes of § 727.
[9] This logic would also seem to apply if the bank has a security interest in the account, as long as it has not exercised or is not exercising its rights under the security agreement.

checking account is the touchstone for diminution/depletion. If the court finds a *potential* diminution to be enough, however, then the existence of potential setoff or security agreement rights will likely mean that an avoidable transfer has occurred.

Permissibility of Third Party Releases

1. Arguments In Favor
    A. Section 524(e) does not prohibit third party releases
        --In re Airadigm Communications, Inc., 519 F. 3d 640 (7th Cir. 2008)
        --In re Seaside Engineering & Surveying, Inc. 780 F. 3d 1070 (11th Cir. 2015)

    B. Sections 1123(b)(3)(A) and 1123 (b)(6)provide for settlements within a POR and for the inclusion of provisions not inconsistent with the Code.
        --In re Hercules Offshore, Inc., 565 BR 732 (Bankr D.Del. 2016)
        --In re Dow Corning Corp., 280 F. 3d 648 (6th Cir. 2002)

    C. Court adopted tests* limit use of releases to specific facts where they are necessary to the reorganization process
        --Retention of individual insiders vital to going concern
        --Financial support from corporate insiders
        --Lenders providing exit financing
        --Insurers --524(g)parallels

2. Arguments Against

    A. Bankruptcy Courts lack inherent power to order the discharge of a claim against a non-debtor. A court's authority is limited to the resolution of the case before it.
        --U.S. v. Ward Baking Co., 376 U.S. 327 (1964)
        --Callaway v. Benton, 336 U.S. 132 (1949)

    B. Bankruptcy Courts lack subject matter jurisdiction over claims against non-debtors by third parties. This is not even "related to" jurisdiction.

    C. Releases of non-debtors in a plan do not comport with procedural due process because they represent the taking of the property of a third party without any formal service of process and procedural protections.

*Test used by most courts is modelled on the Dow Corning test and includes the following elements: (1)an identity of interest between the debtor and the third party being released; (2) whether the third party made a substantial contribution to the reorganization process; (3) whether the release/injunction is essential to the reorganization; (4) whether a substantial majority of the creditors agree to the release with particular focus on the creditors in the impacted class and (5) whether the plan provides for payment of substantially all of the claims affected by the release.

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Scope of Representation
(Retainer Agreements vs Court Expectations)

Retainer Agreements

Limitations on tasks to be accomplished

(e.g., Dischargeability Actions, Tax Work, Etc.).

Pre-Bankruptcy Agreements vs Post-Bankruptcy Agreements.

Does it matter when the agreement is prepared or signed?

What is unbundled representation?

What the Ethical Rules Require

E.R. 1.2(a) "A lawyer may limit the scope of the representation if the limitation is reasonable under the circumstances and the client gives informed consent."

What Case Law Might Require

In re Seare, 515 B.R. 599 (B.A.P. 9th Cir. 2014)

What the Courts Require

Conclude Administrative Work

Examples:

Petition, Schedules, Statements and Other Initial Filings

Attend 1st Meeting of Creditors

Respond to trustee and U.S. Trustee informational requests.

Cooperate with trustee and creditor inspections and examinations.

Respond to stay lift motions.

Respond to turnover motions.

Seek to withdraw if clients are not cooperating. (E.R. 1.6(B) & (C)).

Earned upon receipt retainers – client (or chapter 7 trustee) retains power to terminate and gain a refund based on value of representation (E.R. 1.5(d)(3)).

Reading to Consider

In re Grimmett, 2017 WL 243723, (Bankr. D.Idaho June 5, 2017).

ABI Journal Article by Alexander Laughlin, *Unbundling as a Means of Financing Bankruptcy Fees and Working Without a Wet Signature*, October 2017, p. 30.

Successful Ways to Deal with Discovery Disputes before Going to Court

By Latriece Jones, Law Clerk to the Hon. Laurel M. Isicoff

- **Be familiar with the scope of discovery**
  - Rule 7026 of the Federal Rules of Bankruptcy Procedure which adopts Rule 26 of the Federal Rules of Civil Procedure sets forth the duty to disclose and the scope of discovery.
  - Rule 26 provides that "[p] arties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense and proportional to the needs of the case, considering the importance of the issues at stake in the action, the amount in controversy, the parties' relative access to relevant information, the parties' resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit. Information within this scope of discovery need not be admissible in evidence to be discoverable."
- **Be familiar with local rules of the court pertaining to discovery**
  - Some jurisdictions have adopted local rules that address discovery matters.
- **Review pre-trial orders**
  - Most pretrial orders contain discovery deadlines.
  - Failure to adhere to discovery deadlines can lead to detrimental consequences for both the client and the lawyer.
- **Be familiar with the judge's procedure regarding discovery**
  - Some judges may require a "pre call" related to discovery matters.
- **Know what you want before you ask**
  - Understand your case - "what do I need to prove and how do I need to prove it?"
  - Make sure that what you are requesting is what you need and that you request everything you do need.
- **Be reasonable**
  - Where possible, employ discovery methods that are cost efficient and not burdensome.
- **Be familiar with the "meet and confer" requirements and remember the importance of communication**
  - Counsel for parties to any discovery dispute are required by Rule 37(a)(1) to confer with one another and to make a good faith effort to eliminate or reduce the area of controversy prior to filing a motion to compel.
  - Conferring with opposing counsel allows each party to participate in meaningful discussions to resolve discovery disputes.
  - If you are unable to meet a discovery deadline, request an extension from opposing counsel.
  - Communicate as early as possible with opposing counsel any witness or counsel availability limitations.
- **Be familiar with Objection and Privilege Log Requirements**
  - If you are objecting to discovery, ensure that your objection contains the required information. Rule 26 (a)(3)(B)
  - Make sure privilege logs meet the requirements of Rule 26(b)(5), as well as in any applicable local rules
- **Preparing electronic discovery protocols**
  - Coordinate electronic discovery protocols with opposing counsel as early as possible in the case.
- **Litigation holds**
  - Advise your clients as soon as litigation is threatened or a complaint or contested motion is filed of litigation holds and limitations on the destruction of records.
- **Communicate with potential witnesses to be deposed or testify**
  - Advise any witnesses within your control, as early as possible, of dates for any deposition, scheduled trial, or evidentiary hearing so any conflicts can be addressed in a timely manner, and if necessary *de bene esse* depositions noticed properly.
- **Remember Rule 37 sanctions are NOT discretionary**