AMERICAN BANKRUPTCY INSTITUTE

Central States Bankruptcy Workshop

*Consumer Track*

# Property of the Estate, Constructive Trusts and Nonfiling Spouses

**Hon. Beth E. Hanan, Moderator**
U.S. Bankruptcy Court (E.D. Wis.) | Milwaukee

**A. Todd Almassian**
Keller & Almassian | Grand Rapids, Mich.

**Tracy M. Clark**
Steinberg Shapiro Clark | Southfield, Mich.

**Hon. Margaret Dee McGarity (ret.)**
U.S. Bankruptcy Court (E.D. Wis.) | Milwaukee

CONCURRENT SESSION

2022

# Property of the Estate, Constructive Trusts (Unjust Enrichment), and Non-Filing Spouses

**Hon. Beth E. Hanan**
**Hon. Margaret Dee McGarity**
**A. Todd Almassian**
**Tracy M. Clark**

## Introduction

We are all familiar with fraudulent conveyance litigation. Fraudulent conveyances are "intentional" or "constructive." But is there more? Have creative trustees and their attorneys discovered means by which to reach more property of the estate under Bankruptcy Code § 541? What about the theory of unjust enrichment?

The Bankruptcy Code offers a trustee two mechanisms for attacking intentional fraudulent conveyances. First, Bankruptcy Code § 548(a)(l)(A) provides a trustee with the power to avoid intentional fraudulent conveyances. Second, Bankruptcy Code § 544(b)(1) vests the trustee with avoidance rights otherwise exclusively reserved for unsecured creditors under non-bankruptcy law. In order to assert a claim under § 544(b)(1), the trustee must identify at least one unsecured creditor that has standing to pursue such claim. The trustee then "steps into the shoes" of that unsecured creditor and may assert the claim. Bankruptcy Code § 544(b)(1) is used primarily to enable the bankruptcy estate's prosecution of fraudulent conveyance claims under state law with longer statutes of limitations. Most states have enacted one of two model fraudulent conveyance statutes to govern such claims. The Uniform Fraudulent Transfer Act (UFTA) has been adopted with some variations by the majority of states.

Under the Bankruptcy Code, the mechanism for attacking a constructively fraudulent conveyance is Bankruptcy Code § 548(a)(1)(B), which provides that a pre-petition transfer made or obligation incurred by the debtor may be avoided if (1) the debtor did not receive "reasonably equivalent value" in exchange for the transfer or obligation, and (2) the debtor (a) was insolvent on the date of the transfer or became insolvent as a result of the transfer or obligation, or (b) was engaged or was about to engage in a business or transaction for which any property remaining with the debtor was unreasonably small, or (c) intended to incur, or believed it would incur, debts beyond its ability to pay as such debts matured. Section 548(a)(1)(B)(ii)(IV) provides an additional cause of action for constructive fraudulent conveyance if the debtor "made such transfer to or for the benefit of an insider, or incurred such obligation to or for the benefit of an insider, under an employment contract and not in the ordinary course of business." A claim based on constructive fraudulent conveyance is largely a commercial theory of action, and generally, the intent of the parties does not determine liability. The crux of the complaint is that the debtor's counterparty to a pre-petition exchange received more than its fair value and that it essentially fleeced the debtor. By comparison, the UFTA requires the following elements to establish a constructively fraudulent conveyance claim:

> a claim for avoidance of a constructive fraudulent conveyance is based... on a debtor's (1) transfer of an interest in property or incurrence of an obligation; (2) receipt of less than a reasonably equivalent value in exchange therefor; and (3) at the time the debtor (a) was insolvent or became insolvent as a result, (b) was engaged or about to engage in business or a transaction for which any remaining property was an unreasonably small capital, or (c) intended to incur or believed that it would incur debts that would be beyond its ability to pay as such debts matured.

Under the UFTA, a debtor is insolvent if the sum of the debtor's debts is greater than all of the debtor's assets at a fair valuation, and a debtor who is generally not paying his debts as they become due is presumed to be insolvent. With regard to reasonably equivalent value, a person gives a reasonably equivalent value if the person acquires an interest of the debtor in an asset pursuant to a regularly conducted, non-collusive foreclosure sale, or execution of a power of sale for the acquisition or disposition of the interest of the debtor upon default under a mortgage, deed of trust, or security agreement.

What happens when a transfer does not fit squarely in the actual fraud category or the constructive fraud category? Are there transfers that should be examined based on "equity" alone? One of these avenues that has recently been more actively pursued by trustees is unjust enrichment.

## Overview

"No one ought to be enriched at the expense of another."[1]

Unjust enrichment has developed and been effectively deployed throughout history, including ancient civil legal traditions in Rome, Germany, Scotland, and other parts of Europe. There, legal systems recognized interpersonal obligations, such as unjust enrichment, that did not flow solely from the consent of the parties or from any wrongdoing.[2]

---

[1] This phrase can be traced to a twelfth-century case as documented by Jenkins's *Eight Centuries of Reports*. JENKINS, EIGHT CENTURIES OF REPORTS 4 (1777).
[2] *The Intellectual History of Unjust Enrichment*, 133 Harv. L. Rev. 2077, 2078 (2020).

Unjust enrichment is a source of personal obligation separate from contract or tort. The idea of unjust enrichment includes any treatment of an unjust transfer of value that operates as a source of obligation separate from obligations arising from consent or wrongdoing. Unjust enrichment is unavailable when terms of an express contract control. Unjust enrichment seems to suggest a supplement to the rule of law. Can such claims belong to the debtors as property of the estate?

## I. PROPERTY OF THE ESTATE – Anything and Everything?

**The Ever-Expanding Concept of Property of the Estate**

11 USC § 541(a)1-7

**(a)** The commencement of a case under section 301, 302, or 303 of this title [*11 USCS § 301*, *302*, or *303*] creates an estate. Such estate is comprised of all the following property, wherever located and by whomever held:

**(1)** Except as provided in subsections (b) and (c)(2) of this section, all legal or equitable interests of the debtor in property as of the commencement of the case.

**(2)** All interests of the debtor and the debtor's spouse in community property as of the commencement of the case that is—

**(A)** under the sole, equal, or joint management and control of the debtor; or

**(B)** liable for an allowable claim against the debtor, or for both an allowable claim against the debtor and an allowable claim against the debtor's spouse, to the extent that such interest is so liable.

**(3)** Any interest in property that the trustee recovers under section 329(b), 363(n), 543, 550, 553, or 723 of this title [*11 USCS § 329(b)*, *363(n)*, *543*, *550*, *553*, or *723*].

**(4)** Any interest in property preserved for the benefit of or ordered transferred to the estate under section 510(c) or 551 of this title [*11 USCS § 510(c)* or *551*].

**(5)** Any interest in property that would have been property of the estate if such interest had been an interest of the debtor on the date of the filing of the petition, and that the debtor acquires or becomes entitled to acquire within 180 days after such date—

**(A)** by bequest, devise, or inheritance;

**(B)** as a result of a property settlement agreement with the debtor's spouse, or of an interlocutory or final divorce decree; or

**(C)** as a beneficiary of a life insurance policy or of a death benefit plan.

**(6)** Proceeds, product, offspring, rents, or profits of or from property of the estate, except such as are earnings from services performed by an individual debtor after the commencement of the case.

**(7)** Any interest in property that the estate acquires after the commencement of the case.

## II. CHOICE OF LAW RULES

Relevant caselaw regarding the applicable choice of law generally looks to the situs of the property transferred or the law of the state having the most significant relationship to the occurrence and the parties. For instance, under Michigan's conflict of law rules, rights and interests in real property are determined by the law of the *situs* of the property (i.e., where the property is situated).

## III. STATUTE OF LIMITATIONS

Transfers outside of two years from the petition date must be analyzed under state law. Consider the statute of limitations for such transfer, as it may fluctuate from state to state. Michigan's Borrowing Statute states:

> An action based upon a cause of action accruing without this state shall not be commenced after the expiration of the statute of limitations of either this state or the place without this state where the cause of action accrued, except that where the cause of action accrued in favor of a resident of this state the statute of limitations of this state shall apply.

Mich. Comp. Laws § 600.5861.

Michigan generally looks to the state of injury under its borrowing statute to determine where the claim accrued. *Parish v B F Goodrich Co*, 395 Mich. 271, 284, 235 N.W.2d 570 (1975). Where the injury occurs outside of the state of Michigan, the cause of action is barred if either Michigan or the foreign state's statute of limitation bars the claim. *See e.g.*, *Muni High Income Fund, Inc. v. Goldman, Sachs & Co*, No. 264224, 2006 Mich. App. LEXIS 425, at *22, 2006 WL 361149, at *7 (Mich. Ct. App. Feb. 16, 2006) ("Because plaintiffs' claim accrued outside of Michigan, it is barred if either Michigan or New York's statute of limitations bars the claim.").

## IV. UNJUST ENRICHMENT AND ENTIRETIES

Trustees pursuing claims for unjust enrichment often look to "big ticket" items such as real estate. Many of the cases that are emerging wherein the trustee is pursuing claims of unjust enrichment deal with the home in which the debtor lives. This often overlaps with the concepts of entireties property. It is important to understand how these concepts work in conjunction when dealing with a potential trustee claim.

The issue in these cases often focuses on why one party—either the debtor or non-filing spouse—is on the deed or not on the deed. In order to understand the basis of such claims for unjust enrichment we need to first consider the creation of a Tenancy by the Entireties, and how the concepts of unjust enrichment work within each jurisdiction.

### A. TYPES OF ENTIRETIES PROPERTY - MICHIGAN[3]

A tenancy by the entirety is a type of concurrent ownership that is unique to married persons. It has been consistently held in Michigan that entireties ownership protects property from collection by creditors of only one of the married spouses.

There are now three general categories of property that are carved out by statute in Michigan as constituting protected entireties property: (i) real property, (ii) membership interests in limited liability companies, and (iii) certain evidences of indebtedness.

i. Real Property - Under Michigan law, real property owned jointly by a husband and wife is entireties property, and, thus, a judgment lien does not attach to such property unless the judgment is entered against both the husband and wife. *See* Mich. Comp. Laws § 600.2807(1) ("A judgment lien does not attach to an interest in real property owned as tenants by the entirety unless the underlying judgment is entered against both the husband and wife.").

ii. Personal Property - Historically, Michigan courts rejected any argument that personal property fell within the scope of common law entireties protections.

- Evidences of Indebtedness - Nevertheless, the Michigan legislature enacted MCL 557.151 in 1927, which protects as entireties property certain so-called evidences of indebtedness. The current version of that statute provides:

> All bonds, certificates of stock, mortgages, promissory notes, debentures, or other evidences of indebtedness hereafter made payable to persons who are husband and wife, or made payable to them as endorsees or assignees, or otherwise, shall be held by such husband and wife in joint tenancy unless other-wise therein expressly provided, in the same manner and subject to the same restrictions, consequences and conditions as are incident to the ownership of real estate held jointly by husband and wife under the laws of this state, with full right of ownership by survivorship in case of the death of either.

[3] The Panel wishes to thank and recognize Paul Hage and his article *You Never Give Me Your Money: Tenancy By The Entireties In Michigan* for the Entireties Property research.

There is a substantial amount of caselaw interpreting MCL 557.151. Published opinions usually focus on whether a particular asset falls within the scope of the statute.

- Brokerage Accounts - Although there was initially some uncertainty with respect to the issue of whether brokerage accounts owned by spouses fall within the scope of "evidences of indebtedness," it appears that the caselaw is now clear that brokerage accounts are, in fact, protected. *See e.g.*, *Oster v Clarkson State Bank* (*In re Oster*), 474 Fed App'x 422, 426 (6th Cir. 2012) (noting that Michigan made it "explicitly clear that brokerage accounts . . . were within § 557.151's ambit") (referencing *Zavradinos v JTRB, Inc*, No. 268570, 2007 WL 2404612 (Mich. Ct. App. Aug 23, 2007)).

  Interestingly, in *Shapiro v. Nicoloff* (*In re Nicoloff*), No 01-CV-71591-DT (E.D. Mich. Sept 25, 2001) (unpublished), the court held that a brokerage account fell within the scope of MCL 557.151. The court reasoned that the account was protected because any distribution was expressly required to be payable to both husband and wife. It is unclear whether the court would have reached a different conclusion if distributions from the account were not so limited.

iii. <u>LLC Membership Interests</u> - Finally, in 2002 the Michigan legislature enacted MCL 450.4504(1), which provides entireties protection for membership interests in limited liability companies:

> A membership interest is personal property and may be held in any manner in which personal property may be held. A husband and wife may hold a membership interest in joint tenancy in the same manner and subject to the same restrictions, consequences, and conditions that apply to the ownership of real estate held jointly by a husband and wife under the laws of this state, with full right of ownership by survivorship in case of the death of either.

Mich. Comp. Laws § 450.4504(1). To date, there is no published caselaw analyzing the entireties protection afforded to membership interests owned by husband and wife by MCL 450.4504(1).

### B. UNJUST ENRICHMENT - MICHIGAN

Under Michigan law, the trustee must demonstrate "(1) the receipt of a benefit by the defendant from the plaintiff; and (2) an inequity resulting to the plaintiff because of the retention of the benefit by the defendant." *Dumas v. Auto Club Ins. Ass'n*, 437 Mich. 521, 473 N.W.2d 652, 663 (Mich. 1991). Further, Michigan law finds that a party may not recover for unjust enrichment pursuant to a gift relationship. *See Buell v Orion State Bank*, 327 Mich 43, 56, 41 N.W.2d 472 (Mich. 1950) ("On[e] is not unjustly enriched, however, by retaining benefits involuntarily acquired which law and equity give him absolutely without any obligation on his part to make restitution.") (internal quotation marks omitted).

### C. ENTIRETIES AND UNJUST ENRICHMENT – ILLINOIS

Tenancy by the entireties is an estate in real property provided for by the Illinois Joint Tenancy Act, 765 ILCS 1005/1c (2018). *Premier Property Management, Inc. v. Chavez*, 191 Ill. 2d 101, 105, 728 N.E.2d 476, 245 Ill. Dec. 394 (Ill. 2000). Only spouses may hold property in this estate. *Id.*; 765 ILCS 1005/1c. Additionally, the estate is limited to homestead property. *Id.* This type of ownership operates under the fictional assumption that a husband and wife are one for legal purposes and it conveys the property to them as one person; they each own 100% of the property. *Marquette Bank v. Heartland Bank and Trust Co.*, 2015 IL App (1st) 142627, ¶ 11, 397 Ill. Dec. 356, 41 N.E.3d 1007.

According to the tenancy by the entirety provision of the Illinois Code of Civil Procedure (Code) (735 ILCS 5/12-112 (West 2018)), holding property in tenancy by the entirety protects spouses in that the property cannot be sold to satisfy the debt of only one spouse. The exemption protects an innocent spouse from losing the marital home because of the individual debts of his or her spouse.

To state a claim for unjust enrichment under Illinois law, "a plaintiff must allege that the defendant has unjustly retained a benefit to the plaintiff's detriment, and that defendant's retention of the benefit violates the fundamental principles of justice, equity, and good conscience." *Siegel v. Shell Oil Co.*, 612 F.3d 932, 937 (7th Cir. 2010) (citing *HPI Health Care Serv., Inc. v. Mt. Vernon Hosp., Inc.*, 131 Ill. 2d 145, 545 N.E.2d 672, 679, 137 Ill. Dec. 19 (Ill. 1989)).

In Illinois, "where property is taken in the joint names of the husband and wife, and the consideration is furnished by one of them, there is a presumption of a gift from the one furnishing the consideration to the other. That presumption can be overcome only by clear, convincing and unmistakable evidence that no gift was intended." *Kratzer v Krazter*, 130 Ill. App. 2d 762, 767, 266 N.E.2d 419 (Ill. Ct. App.1971). More importantly, "[t]he mere circumstance that a husband purchased the property placed in joint tenancy with his wife does not make him the equitable owner of her interest. Property voluntarily conveyed by a husband to his wife, without fraud or coercion is presumed to be a gift, notwithstanding the fact the husband purchased the property with his own money, and the wife may hold the property against him." *Baker v Baker*, 412 Ill. 511, 514, 107 N.E.2d 711 (Ill. 1952). This concept is equally applied to improvements that one spouse may make to the real property. *Kratzer*, 130 Ill. App. 2d at 767 ("The same principle has been applied to improvements placed by the husband on property held in joint tenancy with his wife."). Illinois courts have found that "a party may not recover damages for unjust enrichment pursuant to a gift relationship." *See Liautaud v Liautaud*, 221 F.3d 981, 988–89 (7th Cir. 2000) (citing *Hartman v. Townsend,* 169 Ill. App. 3d 111, 523 N.E.2d 199, 202–03, 119 Ill. Dec. 731 (Ill. Ct. App.1988)); *Buell*, 327 Mich. at 56 ("One is not unjustly enriched, however, by retaining benefits involuntarily acquired which law and equity give him absolutely without any obligation on his part to make restitution.").

### D. ENTIRETIES AND UNJUST ENRICHMENT - INDIANA

Indiana is among the states following the majority pattern. Tenancies by the entirety are provided for in Indiana by statute. Ind. Code. § 32-4-2-1 (1982). Each co-tenant is seized of the whole, which is taken by one upon the death of the other. *Id.; Anuszkiewicz v. Anuszkiewicz*, 172 Ind. App. 279, 360 N.E.2d 230, 232 (Ind. Ct. App. 1977). Generally, neither has an interest severable without the consent of the other, *Thornburg v. Wiggins*, 135 Ind. 178, 34 N.E. 999, 1000 (Ind. 1893), and property held by a tenancy in the entirety is exempt from execution upon it by the creditors of one spouse alone, *Baker v. Cailor*, 206 Ind. 440, 186 N.E. 769, 770 (Ind. 1933). This is true also of the proceeds from the sale of a property so held, as long as they are left intact and are not divided and distributed between the spouses, although normally there can be no tenancy by the entirety in personalty. *See Whitlock v. Public Service Co. of Indiana, Inc.*, 239 Ind. 680, 159 N.E.2d 280, 285 (Ind. 1959); *Anuszkiewicz*, 360 N.E.2d at 233. The estate (in the realty or the proceeds from the sale of realty formerly held in the entirety) is terminated by the death of one or both spouses, by divorce, by conveyance to a third party by both spouses, or by the conveyance or release by one person of his or her interest to the other. *See National City Bank of Evansville v. Bledsoe*, 237 Ind. 130, 144 N.E.2d 710, 713–14 (Ind. 1957); *Fuston v. National Mutual Insurance*

*Co.*, 440 N.E.2d 751, 753 (Ind. Ct. App.1982); *Anuszkiewicz*, 360 N.E.2d at 230; Ind. Code § 29-2-14-3 (1982); Ind. Code § 32-4-2-1 (1982); Ind. Code § 2-4-2-2 (1982). It is worth noting that a conveyance of one spouse's interest in a tenancy by the entirety to the other spouse is "technically a "'release.'" *In re Agnew*, 818 F.2d 1284, 1289 (7th Cir. 1987) (quoting Roger A. Cunningham, William B. Stoebuck & Dale A. Whitman, *The Law of Property* § 5.5, at 210–11 (1984) (citing *Thornburg v. Wiggins*, 135 Ind. 178, 34 N.E. 999 (Ind. 1893))).

A transfer may be found to be a fraudulent conveyance only if it reduces the assets that are actually available to a creditor. *In re MacDonald*, 50 Bankr. 255, 258 (Bankr. D. Mass. 1985) (husband's transfer of interest in entireties property to wife held not fraudulent as to husband's creditors). *See also Donvito v. Criswell*, 1 Ohio App. 3d 53, 439 N.E.2d 467, 473 (Ohio Ct. App. 1982) (husband's quitclaim deed to wife conveying his interest in an estate by the entireties worked to terminate the estate by the entireties, vesting the grantee-spouse with an unqualified fee simple estate, to be held by her free and clear of any claims by creditors of her husband). It is also consistent with *Stamper v. Stamper*, 227 Ind. 15, 83 N.E.2d 184 (Ind. 1949). The court in that case reviewed Indiana law and concluded that property that is exempt from execution may be transferred by the owner free from a creditor's claims, and in making the transfer the owner cannot be charged with defrauding his creditors or with intending to do so. "'It is impossible to conceive any logical ground upon which [the conveyance of] property not subject to the claims of creditors can be held to have been fraudulent[] . . . .'" 83 N.E.2d at 186 (quoting *Blair v. Smith*, 114 Ind. 114, 15 N.E. 817, 823 (Ind. 1888)).

In Indiana, "to prevail on a claim of unjust enrichment, a plaintiff must establish that a measurable benefit has been conferred on the defendant under such circumstances that the defendant's retention of the benefit without payment would be unjust." *Pond v McNellis*, 845 N.E.2d 1043, 1056–57 (Ind. Ct. App. 2006) (citing *Bayh v. Sonnenburg,* 573 N.E.2d 398, 408 (Ind. 1991), *reh'g denied, cert. denied*, 502 U.S. 1094 (1992)).

### E. COMMUNITY PROPERTY AND UNJUST ENRICHMENT - WISCONSIN

Wisconsin is a community property state. *See* Wis. Stat. § 766.001. In Wisconsin, all property is presumed to be marital property in which each spouse has a present undivided one-half interest. Wis. Stat. §§ 766.31(2) and (3).

Under Wisconsin law, "the imposition of a constructive trust requires the following elements:

(1) A trust is needed to avoid unjust enrichment, (2) the part obtained title to a specific res via fraud, duress, abuse of a confidential relationship, mistake, commission of a wrong, or any form of unconscionable conduct." *In re LaLonde,* 431 B.R. 199, 207 (Bankr. W.D. Wis. 2010)(citing *Wilharms v. Wilharms,* 93 Wis. 2d 671, 678); *Mumm v. Adametz (In re Adametz),* 53 B.R. 299, 305-06 (Bankr. W.D. Wis. 1985). A constructive trust arises "[w]here a person holding title to property is subject to an equitable duty to convey it to another on the ground that he would be unjustly enriched if he were permitted to retain it. *Tikalsky v. Friedman*, 2019 WI 56, ¶ 20, 386 Wis 2d 757, 777, reconsideration denied, 388 Wis. 2d 656 (quoting *Schmalz v. McKenna*, 58 Wis. 2d 220, 228 (1973). It exists as a remedy for the defendant's failure to perform an antecedent duty, which is the cause of the action.

A resulting trust, unlike a constructive trust, seeks to carry out a donative intent rather than to thwart an unjust scheme. *Am. Nat. Bank & Tr. Co. of Rockford, Ill. v. United States*, 832 F.2d 1032, 1035 (7th Cir. 1987). The general rule is that "where a transfer of property is made to one person and the purchase price is paid by another, a resulting trust arises in favor of the person by whom the purchase price is paid." *Restatement (Second) of Trusts* § 440 (1959). *See Hanus v. Jankowski*, 256 Wis. 187, 40 N.W.2d 573, 574 (Wis. 1949) (citing the *Restatement*). The reasoning behind the imposition of a resulting trust in favor of the payor is that persons usually don't give up something for nothing. This presumption has less force in dealings within a family where legal and moral duties of support, love and affection, rather than economic gain, motivate transactions. *See Am. Nat. Bank*, 832 F.2d at 1036. The common law recognizes this and reverses the presumption in cases involving certain close relationships, including spouses.

The rebuttable presumption of a gift, rather than a resulting trust, arises when the transferee is, by virtue of the relationship, a natural object of the transferor's bounty. *Restatement* § 442. The common law considered the wife, but not her husband, the natural object of the bounty. The exception, quoted with approval by the Supreme Court of Wisconsin, is that a conveyance "'from a husband, parent, or other person, where title is taken in the name of the wife, child or other natural object of the purchaser's bounty, generally does not raise, and, on the contrary, rebuts, a resulting trust, and raises a presumption of a gratuitous settlement on the wife, child, or other object of the bounty.'" *Hanus*, 256 Wis. 187, 40 N.W.2d at 573 (quoting 54 Am. Jur. Trusts § 205).

In Wisconsin, there must be some wrongful conduct in addition to the benefit/detriment requirements before a court will impose a constructive trust. There are also presumptions that a transfer to a wife, child, or close family member is a gift and no unjust enrichment results. Both of these issues would prevent a trustee from pursuing an unjust enrichment count against a non-filing spouse, unless the trustee could demonstrate fraud or some other wrongdoing on behalf of the non-filing spouse.

## V. TENANCY BY THE ENTIRETIES IN BANKRUPTCY

Although there has been some uncertainty over the years, it appears that bankruptcy courts have now arrived at a general consensus as to the basic principles for treating entireties property in bankruptcy. Those basic principles include the following.

- Entireties Property is Property of the Estate that a Debtor Can Exempt
- Entireties Exemption is Determined on the Petition Date
- Exemptions Must Be Timely Objected To
- A Trustee Can Administer Entireties Property to Satisfy Joint Claims

In today's real estate market, homes are appreciating and trustees are looking to these assets as possible opportunities for recovery for creditors.

## VI. CONSTRUCTIVE TRUSTS — The Hail Mary[4] for Bankruptcy Trustees?

### A. Unjust Enrichment v. Constructive Trust

The bankruptcy court in *Richardson v. Huntington Nat'l Bank (In re CyberCo Holdings, Inc.)* explained the development of the remedies of unjust enrichment and constructive trust—

> Unjust enrichment, which is the older doctrine, derives generally from the common law and specifically from the action of assumpsit. The common law courts originally used assumpsit to award damages when an actual contract had been broken. However, over time, the common law courts expanded the remedy first to award damages where a contract could be "implied" and then to award damages for virtually any situation where it appeared that the defendant had received an unjust benefit at the plaintiff's expense. The common law courts, though, did not have the ability to actually order the return of specific property that had unfairly enriched a

[4] A *Hail Mary play* is a desperate play in sports that has a very small chance of being successful. The idea is that the team member making the play does so while saying a prayer that it will be successful, alluding to the Catholic prayer the Hail Mary. The term goes back to the 1920s, it was used by the Four Horsemen of Notre Dame, an outstanding group of players on the college football team, to describe a desperate, last-minute forward pass. The term gained wider use in 1975, to describe a 50-yard pass made by Dallas Cowboys quarterback Roger Staubach. The pass was successful, and when asked about it later, Staubach said, "I just closed my eyes and said a Hail Mary." Commentators referred to this play as a *Hail Mary pass*, and an idiom moved into the mainstream. Interestingly, the term is increasingly used to define many types of desperate situations as a *Hail Mary*. - *https://grammarist.com › idiom › hail-mary-play-or-hai...*(last visited June 16, 2022).

party. For example, A could not compel B under common law to return a horse that A had mistakenly given to B. All that A could recover from B under an action for general assumpsit was a money judgment for the horse's value.

> The courts of chancery, on the other hand, were able to order such recoveries because of their equitable powers. Consequently, those courts fashioned actions based upon legal fictions such as constructive trusts and equitable liens. For example, a court of equity could find that the horse B had mistakenly received was held in constructive trust by B for the benefit of A and then order B to return the horse under the terms of that trust.

*Richardson,* 382 B.R. 118, 127–28 (Bankr. W.D. Mich. 2008).

Although the merger of law and equity has blurred the distinction between common law actions for unfair enrichment and equitable actions for constructive trusts, there is at least one important difference: an unjust enrichment claim is a cause of action on its own, whereas a constructive trust is simply a remedy. *See Tikalsky v. Friedman,* 928 N.W.2d 502, 511–12 (Wis. 2019); *Ferguson v. Owens*, 459 N.E.2d 1293 (Ohio 1984); *Kammer Asphalt Paving Co v. East China Twp. Sch.*, 504 N.W.2d 635 (Mich. 1993).

A constructive trust remedy is only available if there is a specific *res* (*i.e.,* identifiable property) in the possession or control of the defendant over which a constructive trust may be imposed. Otherwise, the remedy for unjust enrichment is restitution in the form of money damages. *See, e.g.*, *Kammer*, 504 N.W.2d at 640 ("[U]nder the equitable doctrine of unjust enrichment, '[a] person who has been unjustly enriched at the expense of another is required to make restitution to the other.'") (quoting *Restatement (First) of Restitution* § 1).

The person wishing to impose the constructive trust bears the burden of proof. Michigan requires proof by a preponderance of the evidence. *See Cerling v. Hedstrom*, 214 N.W.2d 904, 905 (Mich. Ct. App. 1974). Other states—such as Ohio, Indiana, and Illinois—require clear and convincing evidence. *See University Hospitals of Cleveland, Inc., et al, v. Lynch, et al*, 772 N.E.2d 105, 116 (Ohio 2002); *Davis v. Combes*, 294 F.3d 931, 936 (7th Cir. 2002) (citing Ohio and Illinois law on the burden of proof).

**B. Expanding estate property with constructive trust claims**

When all else fails, a bankruptcy trustee may seek to recover property based on a constructive trust claim. The claim comes in through 11 U.S.C. § 541. Section 541 of the Bankruptcy Code provides that the commencement of a bankruptcy case creates an estate comprised of "all legal and equitable interests of the debtor in property." 11 U.S.C. § 541.

If the trustee, as successor to the debtor's rights under § 541(a)(1), can show that, but for the bankruptcy, the debtor would have been entitled to constructive trust relief, the trustee is entitled to that same relief. *See Richardson,* 382 B.R. at 130 n.10 (explaining that a trustee's constructive trust claim hinges on whether "a debtor had a claim immediately before the commencement of the case that justified imposing a constructive trust upon the third party").

The determination of whether a constructive trust should be imposed is a question of state law. *See In re Howard's Appliance Corp.*, 874 F.2d 88, 93–94 (2d Cir. 1989) (concluding that the law of the situs of the property governs the determination of whether to impose a constructive trust on property).

The imposition of a constructive trust is commonly used as relief for an unjust enrichment claim. In most states, a constructive trust may be imposed "when a person has obtained [property] to which he is not entitled, under such circumstances that in equity and good conscience he ought not to retain it . . . to avoid unjust enrichment." *Snuthberg v. Ill. Mun. Ret. Fund,* 735 N.E.2d 560, 565 (Ill. 2000); *see also Kammer*, 504 N.W.2d at 641. *But see Tikalsky*, 928 N.W.2d at 512 (requiring unjust enrichment and an "additional showing" such as fraud, duress, abuse of confidence, mistake, commission of a wrong, or unconscionable conduct).

**1. Establishing unjust enrichment**

The elements of a claim for unjust enrichment are "(1) receipt of a benefit by the defendant from the plaintiff, and (2) an inequity resulting to plaintiff from defendant's retention of the benefit." *Bellevue Ventures, Inc. v. Morang-Kelly Inv*., 836 N.W.2d 898, 901 (Mich. Ct. App. 2013) (citing *Dumas v Auto Club Ins Ass'n*, 473 N.W.2d 652, 663 (Mich. 1991)). *Accord Schlosser v. Welk*, 550 N.E.2d 241, 242 (Ill. Ct. App. 1990). Some states also require the defendant's appreciation and knowing acceptance of the benefit. *See Dahl v. R.J. Reynolds Tobacco Co.*, 742 N.W.2d 186, 195–96 (Minn. Ct. App. 2007); *Ludyjan v. Cont'l Cas. Co.*, 747 N.W.2d 745, 748 (Wis. Ct. App. 2008).

If the elements are satisfied, the law operates to imply a contract to prevent unjust enrichment. *See, e.g., Bellevue Ventures*, N.W. 2d at 901; *Schlosser*, 550 N.E.2d at 242.

The unjust enrichment doctrine must be applied with caution "because the mere fact that a benefit has been conveyed does not necessarily indicate that it is unjust for the party to retain that benefit." *Kammer,* 504 N.W.2d at 646.

**2. Tracing the trust property**

A plaintiff seeking a constructive trust must prove its interest in the specific property being held by the defendant. *See, e.g.*, *Richardson*, 382 B.R. at 129 n.9 (citing *Detroit Trust Co. v. Struggles*, 278 N.W. 385, 386 (Mich. 1938), for the proposition that Michigan law "unequivocally limits the imposition of a constructive trust to only those instances where the defendant is in possession or control of either the subject property itself or proceeds traceable to that property"). *See also In re Mississippi Valley Livestock, Inc.*, 745 F.3d 299, 307 (7th Cir. 2014) ("There can be no constructive trust without tracing a claimant's interest to specific property").

**3. The applicable statute of limitation**

As previously noted, constructive trust is an equitable remedy and not a cause of action. Accordingly, the Ohio courts have held that the statute of limitation applicable to the underlying cause of action also applies to the constructive trust remedy. *See, e.g., Cundall v. U.S. Bank,* 909 N.E.2d 1244, 1252 (Ohio 2009) ("[i]f the cause of action in which imposition of a constructive trust is sought as a remedy is barred by a statute of limitation, the imposition of a constructive trust is likewise barred.").

In Michigan, when an equitable claim would provide relief that is analogous to the relief available under a similar legal claim, courts typically apply the legal claim's statute of limitations to the equitable claim as well. *See Lothian v. Detroit,* 324 N.W.2d 9, 14 (Mich. 1982) ("[If] [a claim is held] barred at law, it must be held barred in equity also."). *See also Lorimer v. Berrelez,* 331 F. Supp. 2d 585, 587 (E.D. Mich. 2004) (claims for the rescission of a deed and the imposition of a constructive trust in real property were deemed to be governed by the fifteen-year statute of limitations of M.C.L. § 600.5801(4)).

In Illinois, a five-year statute applies to an action for constructive trusts. *E.g., Hagney v. Lopeman*, 590 N.E.2d 466, 468 (Ill. 1992); 735 ILCS. 5/13-205. Actions for unjust enrichment are also governed by the five-year statute of limitation. However, the statute is tolled if a party can prove that some fraud prevented the discovery of the cause of action. *Hagney*, 590 N.E.2d at 468; 735 ILCS 5/13-215.

#### 4. *Omegas* is inapplicable

The Sixth Circuit in *Omegas Group*[5] declared constructive trusts to be "anathema to the equities of bankruptcy," and it barred bankruptcy courts from using them "[u]nless a court has already impressed a constructive trust upon certain assets or a legislature has created a specific statutory right to have particular kinds of funds held as if in trust." 16 F.3d at 1449.[6] However, as explained by the bankruptcy court in *Miller v. Short*,[7] the Sixth Circuit's prohibition on constructive trusts was adopted in response to a creditor seeking to impose a constructive trust on certain funds, so that those funds would not be part of the bankruptcy estate under § 541(d). *Short,* 625 B.R. 678 (citing *Omegas Group* at 1446). The circumstances are different when it is a *trustee* seeking to bring property *into* the bankruptcy estate. *Id.* at 693 ("where, as here, it is the bankruptcy trustee who seeks to impose a constructive trust, in an effort to increase the funds available for distribution to all creditors, the concerns expressed by the court in *Omegas Group* do not apply").

### C. The case law

Recently, the issues of unjust enrichment/constructive trust claims have been brought in bankruptcy cases where a home is titled in the name of the nonfiling spouse, and the debtor regularly contributes to the expenses associated with the home. *Short, supra; Nathan v. DeBruin (In re DeBruin),* Case No. 20-48962, Adv. No. 21-04156, 2022 Bankr. LEXIS 699, 2022 WL 828299 (Bankr. E.D. Mich. Mar. 18, 2022).

#### *Miller v. Short*—E.D. Mich.

In *Short*, the Chapter 7 trustee filed a complaint against the debtor and his wife seeking a constructive trust over the family home alleging fraud and unjust enrichment. The home had been purchased approximately 9 years pre-petition for $18,000 with a personal loan obtained by the debtor, his wife, and his wife's parents. The home was titled solely in the wife's name. The Shorts explained that this was done because the debtor was working at the time of the closing and could not attend. Otherwise, the debtor's name would have been on the deed.

The trustee alleged that the Shorts intentionally omitted the debtor's name from the deed to defraud his creditors. The Shorts paid off the loan used to purchase the home with funds from

[5] *XL/Datacomp, Inc. v. Wilson (In re Omegas Group, Inc.)*, 16 F.3d 1443 (6th Cir. 1994).
[6] The 7th Circuit has rejected *Omegas's* strict prohibition on constructive trusts, preferring to apply state law on a case-by-case basis. *In re Mississippi Valley Livestock,* 745 F.3d at 305–06.
[7] *Miller v. Short (In re Short)*, 625 B.R. 678 (Bankr. E.D. Mich. 2021).

their joint bank account. They also paid for significant repairs and improvements to the property from their paychecks. The debtor, being the primary wage-earner in the family, contributed the greater portion. In his complaint, the trustee alleged that because the debtor provided most of the funds to purchase and improve the home (which was now worth $170,000), a constructive trust should be imposed on at least one-half of the equity in the home. The bankruptcy court denied the Shorts' motions to dismiss and for summary judgment concluding, among other things, that a trustee, as successor to the debtor's interests, can assert a claim for the imposition of a constructive trust on real property titled in the name of a non-debtor if the state law requirements for a constructive trust are met. The bankruptcy court further concluded that fraud is not a required element of a constructive trust claim in Michigan and unjust enrichment alone will suffice. Finally, the court found that the trustee had pled sufficient alleged facts to state a claim for fraud as well as a claim for unjust enrichment, but there were genuine issues of material fact which prevented the Court from reaching a decision on these claims.

***Nathan v. DeBruin*—E.D. Mich.**

Not long after the *Short* decision, the same trustee filed a similar complaint in the *DeBruin* case. In *DeBruin*, the family home was purchased for $219,000 by the debtor's wife and her mother just over six years before the debtor filed bankruptcy, with a mortgage for $192,307. Because of his poor credit, the debtor could not be on the mortgage note or the deed. Nor could the debtor's wife qualify for the mortgage loan on her own, so her mother agreed to co-sign the note and mortgage. Her mother also provided the $30,000 down payment for the home. Subsequently, the mortgage payments and other household expenses were paid from the joint bank account of the debtor and his wife (where their paychecks were direct deposited). The two grossed almost the same income. As of the petition date, the home was worth $300,000 and the mortgage balance was approximately $170,000.

The trustee filed a complaint against the debtor, his wife, and the wife's mother alleging, *inter alia,* that the defendants fraudulently left the debtor off the deed to evade his creditors and that because the debtor's income paid at least 50% of the mortgage payments and other expenses associated with home ownership, the wife and mother had been unjustly enriched, and a constructive trust should be imposed on the home in favor of the trustee for at least half of the home's equity. The debtor's wife and her mother filed a motion for summary judgment on the unjust enrichment/constructive trust count of the complaint.

The court found no evidence of fraud, rejected the trustee's unjust enrichment claim, and granted the motion for summary judgment.

As to the trustee's claim that the mother was unjustly enriched, the court concluded—

> There is nothing inequitable about [the mother's] entitlement to one-half of the equity—derived mostly from property appreciation—in the [] home as a legal co-owner; she is not unjustly enriched at [the debtor's] expense. But for her willingness to use her credit to obtain the home; her consent to be co-obligated on the mortgage debt; and her gratuitous contributions, [the deBruin family] would not enjoy the stability of living in the [] home.

*DeBruin*, 2022 Bankr. LEXIS 699, at *8; 2022 WL 828299, at *3.

As to the wife, the court noted that it was she who obtained the $30,000 down payment through her mother, and she, not the debtor, who was liable on the mortgage debt. 2022 Bankr. LEXIS 699, at *9. Accordingly, the court found that the wife was not unjustly enriched by her home ownership. *Id.*

Finally, with respect to the alleged detriment suffered by the debtor, the court concluded: "the fact that [the debtor] made contributions to the household and mortgage payments for a home—he could never have qualified to purchase—does not make a constructive trust appropriate." And his expenditures were not out of proportion to the use of the home by the debtor and his children. *Id.* at *9.

***Moyer v. Slotman*—W.D. Mich. 2013**

A trustee argued for the imposition of a constructive trust on a business in a Western District of Michigan case in *Moyer v. Slotman (In re Slotman)*, Case No. No. GG 11-11037, Adv. No. 12-80232, 2013 Bankr. LEXIS 5560, 2013 WL 7823003 (Bankr. W.D. Mich. Dec. 5. 2013). The business was acquired during the debtor's marriage to Richard Slotman. The debtor contributed to the operation of the business and shared in the profits with Richard. Richard transferred the business to his father, Eugene Slotman. Four months later, Richard filed for divorce. Approximately five months later, Richard's wife filed her Chapter 7 bankruptcy.

The trustee asserted that the debtor had a one-half interest in the business as of the date of its transfer because the business was part of her marital estate and that the transfer to Eugene was avoidable as a fraudulent transfer. The complaint further alleged that Richard and Eugene were unjustly enriched by the transfer and that Eugene should be compelled to turn over the debtor's interest in the business to the trustee under § 542. To prevail on any of the counts in the complaint, the trustee had to prove that the debtor had an interest in the business when it was transferred.

The court observed that Michigan law provides for certain property rights during marriage. "During a marriage, either spouse may own property individually and may use or dispose of that property without interference from the other spouse." *Slotman*, 2013 Bankr. LEXIS 5560, at *17 (citing *Canjar v. Cole*, 770 N.W.2d 449, 453 (Mich. Ct. App. 2009)). Married persons have the "power to protect, control and dispose of property in their own name, free from their spouse's interference." *Id*. The court further noted that "Michigan is not a 'community property' state." *Id*. (citing *In re Harajli*, 469 B.R. 274, 279–80 (Bankr. E.D. Mich. 2009)).

Following the court's recitation of the laws in Michigan governing property rights during marriage the court concluded that "*nothing in the law today functions to prevent one spouse from acquiring property in an individual capacity without the consent of the other*." *Slotman*, 2013 Bankr. LEXIS 5560, at *18–19 (citing *Canjar*, 770 N.W.2d at 453) (emphasis in *Slotman*). Each spouse "has the power and authority to independently exercise his or her [property] rights free of the other spouse's interference." *Id.* at *19. (citing *Canjar*, 770 N.W.2d at 453; Mich. Comp. Laws § 557.21 (other citations omitted)).

Because the business was in Richard's name, he owned it and had every right to transfer it before the divorce was filed. Accordingly, the business was not included among the marital assets which became property of the estate. For that reason, the court dismissed the fraudulent conveyance counts of the complaint.

On the same basis, the court dismissed the unjust enrichment and turnover counts, stating, "[t]he Trustee has failed to establish that the Defendants received a benefit from the Debtor, because the Debtor had, at most, an inchoate interest in the business when it was transferred from Richard to Eugene Slotman." *Id.* at *32.

### ***CadleRock v. Beaudoin*—D. Conn.**

In *CadleRock Joint Venture II, L.P. v. Beaudoin (In re Beaudoin),* 388 B.R. 6, 11 (D. Conn. 2008), the debtor's parents transferred title to their home where they lived on Corbin Avenue in New Britain, Connecticut ("Corbin property") to the debtor in 1986. In 1990, the debtor married Loretta. Shortly after their marriage, Loretta added the debtor to the title to her home on Ridgewood Street ("Ridgewood property"), and they obtained a loan secured by the Ridgewood property.

They lived in the Ridgewood property until 1995. In 1995, they sold the Ridgewood property and moved into the Corbin property. At that time, the debtor quitclaimed his interest in the Corbin property to Loretta because she was in a "better position than the debtor to obtain a mortgage loan on the Corbin property." The mortgage loan was needed to provide funds to cover a deficiency owed on the Ridgewood property. Approximately 17% of the mortgage loan proceeds were used to pay the deficiency on the Ridgewood property. The balance of the funds were used to pay: two mortgages on the Corbin property; the debtor's parents for vacating the Corbin property and moving to senior housing; and miscellaneous costs.

After moving into the Corbin property, the debtor and Loretta contributed "roughly equal amounts towards the family's living expenses." The debtor generally paid the mortgage payments, taxes, and utilities on the Corbin property. Loretta paid expenses for health insurance, food, daycare, transportation, and home repairs.

In 1997, the debtor defaulted on a mortgage secured by a rental property owned by the debtor, and the mortgagee (CadleRock) foreclosed, resulting in a large deficiency claim. The debtor filed a Chapter 7 bankruptcy in 2002. CadleRock and the Chapter 7 trustee filed a complaint against the debtor and Loretta, seeking a constructive trust on the Corbin property, a judgment against Loretta based on unjust enrichment, and denial of the debtor's discharge. (The four-year statute of limitations had long expired.)

CadleRock argued that Loretta held the Corbin property under a constructive trust and had been unjustly enriched by the amount of any principal repaid on the Corbin mortgage by the debtor. The bankruptcy court initially found that Loretta was not unjustly enriched because she had paid fair consideration by using the majority of the mortgage proceeds to pay debts of the debtor. On appeal, the district court remanded for "further findings regarding the nature of the arrangement between Mr. and Ms. Beaudoin for the payment of the mortgage on the Corbin Avenue property and the amount of that debt paid off by Mr. Beaudoin." On remand, the bankruptcy court concluded:

> With regard to the debtor's making post-transfer mortgage payments for the Corbin property, the court has found that the defendants, who had never had a joint checking account, shared the family expenses by writing checks from their individual accounts to pay various bills. Although a portion of the debtor's checks was applied toward principal repayment (at most $ 10,000 in total) on the Corbin mortgage, the court finds that the debtor received reasonably equivalent value in return from Loretta's payment of other expenses. The evidence indicated that each of the defendants contributed about the same amount toward the family's living

> expenses and that Loretta occasionally gave the debtor additional money from her own earnings from time to time as needed. *See, e.g. United States v. Goforth*, 465 F.3d 730, 736 (6th Cir. 2006) ("[A] debtor does indeed receive 'reasonably equivalent value' when he/she makes payments to his/her spouse (or co-habitant) that are used for household expenses.").

Case No. 02-22859, Adv. No. 03-20182008, Bankr. LEXIS 2526, at *10–11 (Bankr. D. Conn. Feb. 4, 2008), *aff'd Cadlerock Joint Venture II LP v. Beaudoin*, 321 F. App'x 26 (2d Cir. 2009).

## Conclusion

As bankruptcy courts begin to hear cases and make decisions, not based on actual fraud or constructive fraud, but rather on theories of unjust enrichment, it seems a deeper understanding of the sources of obligations beyond consent and wrongdoing must really be understood based on the history of the development of unjust enrichment. Is the fusion of law and equity appropriate within the context of a bankruptcy proceeding? Is unjust enrichment within the context of a bankruptcy proceeding simply an attempt made in a desperate situation to shake out something for the unsecured creditors? Or rather, given the complexities of transfers and relationships based on marriage or cohabitation is unjust enrichment exactly where trustees should be looking to return property back to the debtor's estate?

Whether these claims are here to stay or flameout quickly, bankruptcy practitioners need to be asking the right questions of their clients at the initial intake, understand the nature of the risks associated with certain transfers, and advise their clients according.

# Faculty

**A. Todd Almassian** is a partner with Keller & Almassian, PLC in Grand Rapids, Mich., and focuses his practice in the areas of bankruptcy, reorganization and liquidation law. He represents debtors, creditors and trustees. Mr. Almassian has served as an expert witness for plaintiffs and defendants in various insolvency matters and bankruptcy cases, and he is a frequent lecturer regarding the Bankruptcy Code. He also serves as a qualified mediator for the U.S. Bankruptcy Court for the Western District of Michigan and was recently inducted into the American College of Bankruptcy as a Fellow. Mr. Almassian is Board Certified in Consumer Bankruptcy Law by the American Board of Certification. He is listed in the 2011-15 editions of *The Best Lawyers in America* for Bankruptcy and Creditor-Debtor Rights Law and as its 2016 Grand Rapids Bankruptcy and Creditor Debtor Rights/Insolvency and Reorganization Law "Lawyer of the Year." Mr. Almassian received his B.A from Michigan State University in 1993 and his J.D. from the University of Detroit Mercy School of Law in 1996.

**Tracy M. Clark** is a partner with Steinberg, Shapiro & Clark in Southfield, Mich., where she represents creditors, chapter 7 and 11 debtors, and chapter 7 and 13 trustees. She is admitted to the State Bar of Michigan, the U.S. District Courts for the Eastern and Western Districts of Michigan, the Sixth Circuit Court of Appeals and the U.S. Supreme Court. Ms. Clark is a member of the Federal Bar Association, ABI, the National Association of Bankruptcy Trustees and the Consumer Bankruptcy Association (Eastern District of Michigan). She is listed in *Super Lawyers* and *The Best Lawyers in America*, and she has written and lectured on the topics of bankruptcy and insolvency. Ms. Clark received her B.A. with distinction from Walsh College and her J.D. *cum laude* from Wayne State University Law School.

**Hon. Beth E. Hanan** is a U.S. Bankruptcy Judge for the Eastern District of Wisconsin in Milwaukee and Green Bay, appointed in May 2015. Previously, she was an appellate lawyer and litigator in Wisconsin, and served several terms as managing member of a trial practice boutique, Gass Weber Mullins. Judge Hanan was chair of the Wisconsin Judicial Council and president of the Milwaukee Bar Association, and she remains a Fellow in the American Academy of Appellate Lawyers. Since joining the bench, she has been the judicial co-chair of ABI's annual Wedoff Consumer Conference (in 2020 renamed the Consumer Summit) and has served as the bankruptcy representative to the Seventh Circuit Judicial Council (2019-21). She also chairs the Public Outreach committee of the National Conference of Bankruptcy Judges (NCBJ) and is a member of NCBJ's Ethics and International Judicial Relations committees. Judge Hanan received her undergraduate degree from Marquette University and her J.D. in 1996 from the University of Wisconsin Law School.

**Hon. Margaret Dee McGarity** is a retired U.S. Bankruptcy Judge for the Eastern District of Wisconsin in Milwaukee, appointed in 1987, reappointed in 2001 and retired in 2016. She served as Chief Judge from 2003-10. Prior to her appointment, she was in private practice, concentrating primarily in the areas of bankruptcy, family law and marital property, and she served on the panel of chapter 7 trustees. Judge McGarity has been a frequent lecturer on various marital property and bankruptcy-related topics, especially on the interrelationships between family law and the Bankruptcy Code, having participated in seminars sponsored by the Federal Judicial Center, National Conference of Bankruptcy Judges, National Association of Bankruptcy Trustees, National Association of Chapter 13 Trustees, ABI, State Bar of Wisconsin, Supreme Court of Wisconsin (Judicial Education Division), National Child Support Enforcement Association, National Judicial College, National Association of Consumer Bankruptcy Attorneys, National Association of Juvenile and Family Court Judges, and various bar associations, among others. She is a co-author of *Marital Property Law in Wisconsin*, published by the State Bar of Wisconsin; a co-author of *Collier Family Law and the Bankruptcy Code*, published by Matthew Bender/LexisNexis; and a contributing author of *Collier on Bankruptcy*, also published by Matthew Bender/LexisNexis. She has also authored numerous articles dealing with the practical aspects of bankruptcy practice. Judge McGarity is a Fellow of the American College of Bankruptcy and a member of the National Conference of Bankruptcy Judges, ABI, the National Association of Women Judges and the Thomas E. Fairchild Inn, AIC. She received her undergraduate degree Phi Beta Kappa from Emory University and her J.D. in 1974 from the University of Wisconsin Law School.