JENNER&BLOCK

Recent Developments in Bankruptcy Law, April 2020

(Covering cases reported through 609 B.R. 383 and 949 F.3d 1039)

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2.6.b **Section 544(b) does not require that a triggering creditor hold the same claim at the time of the transfer and at the petition date.** The debtor purchased assets nearly four years before the petition date. The trustee claimed the purchase price was inflated and sued under state fraudulent transfer law to avoid the purchase as a fraudulent transfer. Section 544(b) permits the trustee to avoid a transfer that is avoidable under applicable nonbankruptcy law by a creditor holding an allowable unsecured claim. The applicable nonbankruptcy law permits a creditor who was a creditor at the time of the transfer or within a reasonable time thereafter to avoid a

fraudulent transfer. Although the trustee has the burden to allege and prove the existence of such a creditor who could avoid the transfer and that the creditor was also a creditor at the petition date, the creditor's claim need not be the same at both times. *Katchadurian v. NGPO Energy Cap. Mgmt., LLC (In re Northstar Offshore Group, LLC)*, ___ B.R. ___ (Bankr. S.D. Tex. Apr. 20, 2020).

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5.1 Officers and Administration

5.1.a **Rule 1009 governs amendment to a petition to elect application of subchapter V, which applies to pending cases.** The small business debtor filed a chapter 11 case before the effective date of the Small Business Reorganization Act of 2019, which added subchapter V to chapter 11. Subchapter V applies only in a case in which the debtor has elected its application. The debtor filed a motion seeking to amend its petition to elect subchapter V application. Bankruptcy Rule 1009 permits a debtor to amend a petition as a matter of course before the case is closed and requires notice of the amendment to the trustee (if any) and any affected party in interest. Therefore, the debtor's motion for leave to amend is procedurally improper and is denied without prejudice. If the debtor files an amendment, parties in interest may oppose, and the court will consider such issues then. *In re Progressive Solutions, Inc.*, ___ B.R. ___, 2020 Bankr. LEXIS 467 (Bankr. C.D. Cal. Feb. 21, 2020).

5.1.b **Rule 1009 governs amendment to a petition to elect application of subchapter V, which applies to pending cases.** The debtor's sole business was owning and leasing out three real estate parcels. It filed its chapter 11 petition before the effective date of the Small Business Reorganization Act of 2019. In its petition, it designated itself as a small business debtor. After the SBRA effective date, the debtor amended its petition to elect treatment under subchapter V. Where a statute does not affect contractual rights or property interests, it applies as of its effective date, even in pending cases. With exceptions not relevant in this case, SBRA's provisions do not materially change the treatment of secured and unsecured creditors in subchapter V. Therefore, it applies to this case. SBRA amended the definition of "small business debtor" to exclude only "single asset real estate," not any debtor "whose primary activity is the business of owning or operating real property." The debtor did not qualify as a small business debtor under the prior definition, but did qualify under the SBRA definition, which applies to this case after its effective date. Accordingly, the debtor is eligible for subchapter V. Bankruptcy Rule 1009 permits a debtor to amend its petition. Therefore, the amendment electing subchapter V was effective, and the

case will proceed under subchapter V. *In re Moore Props. Of Person County, LLC*, ___ B.R. ___, 2020 Bankr. LEXIS 550 (Bankr. M.D.N.C. Feb. 28, 2020).

5.1.c **Debtor operating a bed and breakfast where she resides may elect subchapter V during a pending chapter 11 case.** The individual debtor purchased a historic home, which she used for her residence and as a bed and breakfast under a local ordinance that permitted short-stay rentals only if the owner also resided in the property. In October 2018, on the eve of foreclosure by the mortgage lender, the debtor filed a chapter 11 case, listing her debts as primarily consumer debts, and did not designate her case as a small business. Her debts included about $1.6 million on the mortgage and about $65,000 of general unsecured debts. After numerous cash collateral and preliminary plan proceedings, the court set deadlines for filing plans. The lender filed a plan that provided for foreclosure on the property. On the eve of the confirmation hearing, the debtor moved to amend her petition to designate her case as a small business case and to elect to proceed under new subchapter V, added by the Small Business Reorganization Act (SBRA), which became effective a week before the scheduled confirmation hearing. A small business debtor is "a person engaged in commercial or business activities" with total debt less than $2,725,625 (later amended effective March 27, 2020 to $7,500,000), "not less than 50 percent of which arose from the commercial or business activities of the debtor." Bankruptcy Rule 1009(a) permits a debtor to amend a voluntary petition "as a matter of course," though the amendment is not necessarily controlling, and the original petition, signed under penalty of perjury, still retains evidentiary effect. Therefore, the debtor could amend the petition to take advantage of a statute that did not become effective until 15 months after the filing of her case. Whether a debt is a business or personal debt depends on whether the debtor incurred it with an eye toward profit. Because the debtor incurred the mortgage to purchase the property for a bed and breakfast business, the debt was a business debt, and she qualified as a small business debtor, even though she also occupied the property as her residence. It was within the court's discretion to reset deadlines running from the order for relief that subchapter V imposes to allow the debtor to proceed when the law was not available at the time of the order for relief in her case. *In re Ventura*, ___ B.R. ___, 2020 Bankr. LEXIS 985 (Bankr. E.D.N.Y. Apr. 10, 2020).

5.1.d **Debtor with business debts who is out of business may be eligible for subchapter V.** The debtor owned a company that filed bankruptcy and ceased operations. In that case, the estate's assets were sold and some creditors were paid. However, substantial debts remained for which the debtor was personally liable. Those debts comprised 56% of the debtor's scheduled debts. The Small Business Reorganization Act of 2019 permits a small business debtor to attempt reorganization under subchapter V of chapter 11. A small business debtor is "a person engaged in commercial or business activities … that has aggregate noncontingent liquidated secured and unsecured debts as of the date of the filing of the petition or the date of the order for relief in an amount not more than $2,725,625 … not less than 50 percent of which arose from the commercial or business activities of the debtor." The debtor is engaged in commercial or business activities by addressing residual business debt and therefore meets the eligibility requirements for subchapter V. *In re Wright*, ___ B.R. ___, case no. 20-01035-HB *Bankr. D. S. Car. Apr. 27, 2020).

5.2 Exclusivity

5.3 Classification

5.4 Disclosure Statement and Voting

5.5 Confirmation, Absolute Priority

5.5.a **Dirt-for-debt plan requires valuation to account for time to sell and for risk.** The debtor's plan proposed to transfer unencumbered real estate to a secured creditor in satisfaction of a portion of the creditor's claim. The creditor did not accept the plan. Section 1129(b)(2)(A) requires as a condition to cram down that the creditor receive cash payments, sale proceeds (with a right to credit bid), or the indubitable equivalent of the creditor's claim. When valuing real estate to

determine the extent to which it constitutes the indubitable equivalent, the court must take into account the time to sell the property and any associated costs of sale. Here, the court did not do so. Moreover, because the plan deems the creditor's claim satisfied to the extent of the court-determined value, the creditor assumes the risk of receiving less on sale of the property than the court determines and is then unable to look to remaining collateral to make up any difference. Therefore, the plan does not provide the indubitable equivalent of the creditor's claim. *Havasu Lakeshore Invs. V. Fleming (In re Fleming)*, ___ B.R. ___, 2020 Bankr. LEXIS 670 (9th Cir. B.A.P. Mar. 10, 2020).

5.5.b **Subchapter V permits modification of a purchase-money mortgage on a bed and breakfast where the debtor resides.** The individual debtor purchased a historic home, which she used for her residence and as a bed and breakfast under a local ordinance that permitted short-stay rentals only if the owner also resided in the property. In October 2018, on the eve of foreclosure by the mortgage lender, the debtor filed a chapter 11 case, listing her debts as primarily consumer debts, and did not designate her case as a small business. Her debts included about $1.6 million on the mortgage and about $65,000 of general unsecured debts. After numerous cash collateral and preliminary plan proceedings, the court set deadlines for filing plans. The lender filed a plan that provided for foreclosure on the property. On the eve of the confirmation hearing, the debtor moved to amend her petition to designate her case as a small business case and to elect to proceed under new subchapter V, added by the Small Business Reorganization Act (SBRA), which became effective a week before the scheduled confirmation hearing. The debtor could propose a confirmable plan only if she could modify the mortgage. Section 1123(a)(5) prohibits modification of a mortgage secured only by the debtor's principal residence. However, section 1190(3), in subchapter V, permits modification of a mortgage on the debtor's principal residence notwithstanding section 1123(a)(5) if the mortgage proceeds were not used primarily to acquire the property and the property is used primarily in connection with the debtor's business. In determining whether this provision applies, a court should determine whether the mortgage proceeds were used primarily to further the debtor's business interest, the property is an integral part of the business and is necessary to run the business, and customers enter the property to conduct business. Here, the debtor did not purchase a residence in which she used a part as an office but rather bought the property as a business and also resided there. The property's primary purpose is to rent rooms, even though the town requires that she live there as a condition to her permit. Therefore, section 1190(3) applies and permits modification of the mortgage. *In re Ventura*, ___ B.R. ___, 2020 Bankr. LEXIS 985 (Bankr. E.D.N.Y. Apr. 10, 2020).

6. CLAIMS AND PRIORITIES

6.1 Claims

6.1.a **In section 552(b), "proceeds" retains the meaning from the original U.C.C., not Revised Article 9.** A security agreement gave municipal pension fund bondholders a security interest on the pensions system's employer contributions, the right to receive employer contributions, and the proceeds thereof. Section 552 terminates a security interest in after-acquired property as of the petition date, except property that is proceeds of prepetition collateral. When Congress enacted section 552, Article 9 of the U.C.C. contained a definition of "proceeds," which courts used in interpreting section 552. Revised Article 9 expanded the definition. Courts look to a statutory term's definition when Congress used the term, not later amendments to the definition. Therefore, in construing the reach of "proceeds" in section 552, only the narrower original definition of "proceeds" in Article 9 applies. *Fin. Oversight and Mgmt. Bd. v. Andalusian Global Designated Activity Co. (In re Fin. Oversight and Mgmt. Bd.)*, 948 F.3d 457 (1st Cir. 2020).

6.1.b **Postpetition receipts are not proceeds of a "right to receive" a mere expectancy.** A municipal statute defined "employer contributions" as the amounts the statute required municipal employers to pay into the retirement system, which were based on actual payroll. The statute also allowed the legislature to modify or eliminate the contribution rate. A security agreement gave

municipal pension fund bondholders a security interest on employer contributions, the right to receive employer contributions, and the proceeds thereof. Section 552 terminates a security interest in after-acquired property as of the petition date, except property that is proceeds of prepetition collateral. Because postpetition employer contributions based on payroll could not be determined as of the petition date, postpetition contributions, and the "right to receive" future employer contributions, were not property of the debtor as of the petition date, and the postpetition contributions were a mere expectancy interest, not proceeds in which the bondholders could have a security interest. *Fin. Oversight and Mgmt. Bd. v. Andalusian Global Designated Activity Co. (In re Fin. Oversight and Mgmt. Bd.)*, 948 F.3d 457 (1st Cir. 2020).

6.1.c **Employer contributions to a pension system trust fund are not special revenues.** A security agreement gave municipal pension fund bondholders a security interest on the employer contributions, the right to receive employer contributions, and the proceeds thereof of the debtor's pension system, which is a separate legal entity from the debtor. The system does not charge fees for its services in handling employer and employee contributions and paying pensions from its trust fund and does not generate any revenues. Section 552 terminates a security interest in after-acquired property as of the petition date, except property that is proceeds of prepetition collateral and, in a municipal case under section 928, special revenues. Section 902(2) defines special revenues to include "(A) receipts derived from the ownership, operation, or disposition of projects or systems of the debtor that are primarily used or intended to be used primarily to provide transportation, utility, or other services" and "(D) other revenues or receipts derived from particular functions of the debtor." Because the employer contributions do not originate in either the system's ownership or operation of the pension system or trust assets, they do not qualify as special revenues under section 902(2)(A). And because they do not originate in the system's management, investment, and distribution of its trust fund, they are not special revenues under section 902(2)(D). *Fin. Oversight and Mgmt. Bd. v. Andalusian Global Designated Activity Co. (In re Fin. Oversight and Mgmt. Bd.)*, 948 F.3d 457 (1st Cir. 2020).

6.1.d **Court may not disallow default interest on a secured claim as an unenforceable penalty or on equitable grounds.** After a successful auction, the senior lien creditor's claim became oversecured. The creditor sought allowance of postpetition interest at the 18% default rate under the loan agreements, which was about 10% to 14% higher than the contract rate on the creditor's loans. Section 502(b)(2) disallows postpetition interest, but section 506(b) authorizes allowance on an oversecured claim. Section 506(b) does not specify the interest rate, but courts have held that the contract rate is the presumptive rate, as long as the rate is enforceable under applicable nonbankruptcy law. Applicable nonbankruptcy law here permits a lender to charge any rate and disallows any contract term that imposes a penalty, rather than liquidated damages, upon a default. However, a default interest rate is not a liquidated damages provision, which provides a specific sum for breach, and may not be analyzed as liquidated damages. Although the bankruptcy court may apply equitable considerations in some circumstances, its power does not extend to determination of an allowable interest rate under section 506(b). For these reasons, the court allows the default rate. *Bank of Mo. v. Family Pharmacy, Inc. (In re Family Pharmacy, Inc.)*, ___ B.R. ___, 2020 Bankr. LEXIS 716 (8th Cir. B.A.P. Mar. 19, 2020).

6.2 Priorities

6.2.a **Creditor's reclamation claim is subordinate to a postpetition secured lender's lien.** The debtor received goods from a supplier shortly before bankruptcy. The debtor's prepetition lender had a security interest in all the debtor's assets. Within one day after bankruptcy, the court approved the lender's "creeping roll-up" debtor in possession financing, which also provided a security interest in all the debtor's assets, including inventory. Two days later, the supplier delivered to the debtor in possession a reclamation demand for the goods. Section 546(c)(1), "subject to the prior rights of a holder of a security interest in such goods," protects the reclamation rights of a seller of goods who makes a reclamation demand sooner than the earlier of 45 days after delivery of the goods and 20 days after the petition date. Unlike prior law, the

statute makes explicit that the reclamation right is subject to a valid security interest, without regard to state law concepts of whether the security interest holder is a good faith purchaser under U.C.C. section 9-207(3). A reclamation right arises only upon delivery of a reclamation demand. Here, the demand came only after the debtor in possession granted a lien to the postpetition lender, and there was no break between the prepetition and postpetition lien. Accordingly, the supplier's reclamation right did not spring into first position when the lender's prepetition lien was extinguished by the postpetition lien. Therefore, the supplier's reclamation claim is subordinate to the lender's security interest. *Whirlpool Corp. v. Wells Fargo Bank, N.A. (In re hhgregg, Inc.)*, 949 F.3d 1039 (7th Cir. 2020).

6.2.b **Affordable Care Act individual mandate "tax" is not entitled to priority as an excise tax.** The Affordable Care Act imposes a tax on anyone who does not purchase qualifying health insurance. The debtor incurred such a tax but did not provide for its payment as a tax priority claim in his chapter 13 plan. Section 507(a)(8)(E) grants priority to an "excise tax on a transaction occurring before the petition date." The failure to purchase qualifying health insurance is not a transaction. Therefore, the charge under the ACA is not entitled to priority under section 507(a)(8)(E). *U.S. v. Chesteen (In re Chesteen)*, 799 Fed. Appx. 236 (5th Cir. Feb. 20, 2020).

7. CRIMES

8. DISCHARGE

8.1 General

8.1.a **Bankruptcy court should determine whether discharge bars postdischarge litigation.** After the debtor's bankruptcy, a dispute between a creditor and the individual debtor's LLC, which the debtor's trustee had abandoned, proceeded in state court. The creditor obtained a judgment against the LLC and then sought to prosecute an alter ego claim against the debtor. The creditor filed an adversary proceeding in the bankruptcy court for a determination that pursuing the action would not violate the discharge injunction. Courts advise creditors to seek the court's guidance when an action might be construed to violate the automatic stay or the discharge injunction. More generally, courts provide guidance on whether the conduct of a party subject to an injunction would violate the injunction. Accordingly, the bankruptcy court should rule on whether the action would violate the discharge injunction. *Sterling-Pacific Lending, Inc. v. Moser (In re Moser)*, ___ B.R. ___, 2020 Bankr. LEXIS 1037 (9th Cir. B.A.P. Apr. 15, 2020).

8.2 Third-Party Releases

8.3 Environmental and Mass Tort Liabilities

8.3.a **Noncompensable environmental penalties resulting from fraudulent reports are dischargeable.** The debtor filed false reports with the air quality regulator, who filed a proof of claim for fines for air quality violations and false reports and filed an action in state court for the same amounts. The plan provided for limited distributions to unsecured creditors and a discharge for the reorganized debtor. Section 1141(d)(6) makes nondischargable a debt "of a kind specified in paragraph (2)(A) or (2)(B) of section 523(a) that is owed to a domestic governmental unit." Those paragraphs except from discharge debts "for money, property, services, or an extension of credit, to the extent obtained by … false pretenses, a false representation, or actual fraud." A debt is nondischargeable under this section only for loss or damage the creditor sustained as a result of the false pretenses or fraud. The penalties here are noncompensable and so are dischargeable. *S. Coast Air Qual, Mgmt. Dist. v. Exide Techs. (In re Exide Techs.)*, ___ B.R. ___, 2020 U.S. Dist. LEXIS 50662 (D. Del. Mar. 24, 2020).

9. EXECUTORY CONTRACTS

9.1.a **Shopping center lease assignment financial condition requirements are independent of the lease's assignment terms.** The debtor in possession proposed to assign a shopping center anchor tenant lease to a newly-formed entity. The lease gave the tenant broad latitude in assigning or subletting the premises, not requiring the assignee to use the premises for anything similar to the tenant's business and not containing any tenant mix restriction. But the lease imposed a financial restriction—the landlord would release the tenant from liability after an assignment only if the assignee had a minimum net worth. Section 365(f) permits a debtor in possession to assign a real property lease but requires, among other things, that the assignee provide adequate assurance of future performance. Section 365(b)(3) imposes additional requirements on assignment of a shopping center lease—(A) that the assignee's financial condition and operating performance be similar to the debtor's when the lease was signed, and (D) that assignment will not disrupt any tenant mix or balance in the shopping center. The statute does not define the phrase "tenant mix and balance." Therefore, because the tenancy contemplated by the lease is part of the center's tenant mix, the court may construe the phrase by reference to any tenant mix or balance requirements in the lease, regardless of the debtor's particular use of the premises. The assignee here met that requirement. However, subparagraph (A) requires a specific financial condition of the assignee as a condition to assignment—similarity to the debtor's financial condition and operating performance at the time of the original lease. Lease provisions relating to future assignment do not override subparagraph (A)'s specific requirements. Those provisions are independent requirements for assignment. Even though the assignee appeared to meet the lease conditions for release of liability upon assignment, the assignee did not meet the independent statutory requirements. Therefore, the court denies the motion to assign. *MOAC Mall Holdings LLC v. Transform Holdco LLC (In re Sears Holdings Corp.)*, ___ B.R. ___, 2020 U.S. Dist. LEXIS 34717 (S.D.N.Y. Feb. 27, 2020).

9.1.b **A gas gathering and production agreement can be a covenant running with the land.** The debtor had a lease of mineral rights, including an easement to access the minerals. It entered into an agreement with the creditor to construct an oil and gas gathering system. Under the agreement, the debtor granted the creditor an easement over its own easement to build the system and agreed to deliver all minerals extracted from the lease to the creditor at specified prices. The agreements state they are covenants running with the land and are intended to bind successors. The parties recorded the agreements in the land records office. Section 365 permits a debtor in possession to reject an executory contract but not a covenant running with the land, despite on-going performance obligations under such a covenant. A covenant runs with the land under Oklahoma law if the agreement touches and concerns real property, the covenanting parties are in privity, and the parties intend the covenant to bind successors. A covenant touches and concerns real property if there is a logical connection between the benefit to be derived from enforcement and the property, that is, if the covenant affects the value of the owner's interest in the land. In this case, the gathering agreement enhances the debtor's ability to sell extracted minerals and also restricts the debtor's ability to sell the minerals it extracts from its leasehold, which is real property, and therefore affects the value of the leasehold. Therefore, the covenant touches and concerns the leasehold. Because the debtor transferred an easement to the creditor in connection with the agreement, the parties are in horizontal privity. Finally, the agreement provides that the parties intend successors to be bound. Therefore, the gathering agreement is a covenant that runs with the debtor's real property interest and may not be rejected. *Alta Mesa Holdings, LP v. Kingfisher Midstream, LLC (In re Alta Mesa Res., Inc.)*, ___ B.R. ___, 2019 Bankr. LEXIS 3859 (Bankr. S.D. Tex. Dec. 20, 2019).

9.1.c **A gas gathering and production agreement can be a covenant running with the land.** The debtor owned land with mineral rights. It sold a portion of the land. The debtor and buyer entered into a gas gathering and production agreement under which the buyer would gather and process for sale the natural gas the debtor produced from the debtor's land. The agreement stated the parties' intent that it was a covenant running with the debtor's land. After bankruptcy, the debtor in

possession moved to sell the land free and clear of the agreement. Under applicable law (Utah), a covenant runs with the land if it touches and concerns the land, there is privity of estate between the initial covenantor and covenantee, the parties intend the covenant to run with the land, and the covenant is in writing. The agreement itself satisfied the latter three requirements. The touch-and-concern requirement requires the covenant to enhance or burden the land's value or that "its performance or nonperformance will so affect the use, value or enjoyment of the land itself that it must be regarded as an integral part of the property." Because the agreement directly diminishes the debtor's interest in the mineral rights, the covenant touches and concerns the land. Section 363(f) permits sale free and clear of an interest in property if, among other things, the property could be sold under applicable nonbankruptcy law free and clear or the interest holder could be compelled to accept a money satisfaction. A covenant that runs with the land is an integral part of the property, so neither of those conditions apply. Section 365 permits assumption of an executory contract but requires cure of pre-assumption defaults. A covenant that runs with the land is not an executory contract, because it is an integral part of the land. Therefore, the buyer need not cure the debtor's pre-assumption defaults. *Monarch Midstream, LLC v. Badlands Prod. Co. (In re Badlands Prod. Co.)*, 608 B.R. 854 (Bankr. D. Colo. 2019).

10. INDIVIDUAL DEBTORS

10.1 Chapter 13

10.2 Dischargeability

10.3 Exemptions

10.4 Reaffirmations and Redemption

11. JURISDICTION AND POWERS OF THE COURT

11.1 Jurisdiction

11.1.a **A nunc pro tunc order is limited to reflecting a prior event, not making an order retroactive.** A defendant in an action removed a case from the state trial court to the district court because of the chapter 11 filing of another defendant. The bankruptcy court dismissed the defendant's chapter 11 case, but the district court did not remand the case to the state court until several months later. When it did, its order stated it "shall be effective as of" the day the bankruptcy court dismissed the chapter 11 case. In between the dismissal and the remand, the state trial court issued orders against several of the defendants, which the defendants appealed. Upon removal, the state court completely loses jurisdiction, which is not restored until the case is remanded. A court may not make an order retroactive, that is, making the remand effective before the court ordered it. A court may issue a *nunc pro tunc* order to reflect what happened earlier, but not to reflect something as happening earlier. Therefore, the state court did not have jurisdiction to issue the challenged orders, and they are vacated. *Roman Catholic Archdiocese of San Juan v. Acevedo Feliciano*, 589 U.S. ___, 140 S. Ct. 696 (2020).

11.2 Sanctions

11.3 Appeals

11.3.a **Filing a notice of appeal only after attorneys' fees award was untimely.** The debtor in possession brought a stay violation action against a state court counter-litigant, seeking damages and attorneys' fees for the stay violation motion. In an opinion and order entered on April 4, the bankruptcy court awarded damages, except for attorneys' fees "incurred in the prosecution of this adversary proceeding." On April 18, 14 days later, the debtor in possession filed a reconsideration motion under Bankruptcy Rules 9023 and 9024. By order entered May 30, the bankruptcy court denied the motion. On November 27, the bankruptcy court awarded the attorneys' fees. The defendant filed a notice of appeal on December 8. A complex combination of the Bankruptcy Rules and Civil Rules govern the time for filing a notice of appeal. Bankruptcy

Rule 8002(a)(1) requires a notice of appeal to be filed "within 14 days after the entry of the judgment, order, or decree being appealed." Civil Rule 58(a), incorporated by Bankruptcy Rule 7058, requires a judgment to "be set out in a separate document," that is, a document separate from an opinion or memorandum of the court, with limited exceptions. Under Civil Rule 58(c)(2), if the clerk does not enter a separate judgment, then judgment is deemed entered 150 days after the court's ruling is entered on the docket. Under Rule 58(e), entry of judgment and time to appeal may not be delayed to tax costs or award fees if the fees are incurred in the course of litigation and cannot be determined until after the case is litigated, unless the court expressly orders the attorneys' fee motion to have the same effect as a reconsideration motion, which extends the time for appeal. In this case, the court's order required a separate judgment, which was not issued and entered on the docket, so the judgment was deemed entered 150 days later, on September 1. The timely reconsideration motion extended the time for appeal to 14 days after its denial on May 30. Because Rule 58(a) does not require a separate judgment for disposition of such a motion, the time to appeal expired fourteen days later, on June 13. Because the defendant did not file its notice of appeal until December 8, it appeal was untimely, except as to the ruling on the attorneys' fees motion on November 27. *PC Puerto Rico v. Emprésas Martinez Valentín Corp. (In re Emprésas Martinez Valentín Corp.)*, 948 F.3d 448 (1st Cir. 2020).

11.4 Sovereign Immunity

12. PROPERTY OF THE ESTATE

12.1 Property of the Estate

12.1.a **State law, not federal common law, determines property rights.** The FDIC took over a failed bank. Its parent corporation filed bankruptcy. The trustee filed a tax refund request with the IRS, which issued the refund. The refund was due to losses the bank, not the parent, suffered, so the FDIC as the bank's receiver claimed the refund, relying on *In re Bob Richards Chrysler-Plymouth Corp*, 473 F.2d 262 (1973), in which the court fashioned a federal common law rule to determine entitlement to a tax refund among corporate group members. However, under *Butner v. U.S.*, 440 U.S. 48 (1979), property rights in bankruptcy are determined by state law, unless a federal interest requires otherwise. More generally, federal courts are not free to fashion federal common law rules except in areas in which a federal interest predominates. There is not such federal interest in determining which member of a corporate group receives a tax refund. Therefore, the court must look to state law, including any applicable tax allocation agreement, to determine entitlement. *Rodriguez v. Fed. Deposit Ins. Corp.*, 589 U.S. ___, 140 S. Ct. 714 (2020).

12.1.b **A dishonored cashier's check from the debtor's account remains property of the debtor.** The debtor's president caused the debtor's bank to issue a cashier's check to herself, which she deposited in her own account at another bank. Believing the withdrawal to have been fraudulent, the debtor's majority owner promptly canceled the president's signature authority over the bank account and demanded the bank stop payment on the check. The bank did so, and the president's bank returned the funds represented by the check to the debtor's bank, which held the funds in a suspense account pending resolution of the disputes. The debtor filed bankruptcy years later after the state court ruled in the president's favor. Ordinarily, a check does not transfer funds in a debtor's bank account until the check clears the account. A cashier's check differs, because the account is debited upon issuance of the check. However, where the check is later reversed, and, as in this case the bank does not claim an interest in the funds, the funds remain in the debtor's account and are therefore property of the estate. *Gould v. BOKF, N.A. (in re FDV Artfolio LLC)*, ___ B.R. ___, 2020 Bankr. LEXIS 994 (Bankr. W.D. Okla Apr. 10, 2020).

12.2 Turnover

12.3 Sales

13. TRUSTEES, COMMITTEES, AND PROFESSIONALS

13.1 Trustees

13.2 Attorneys

13.2.a **Court denies nunc pro tunc employment approval but authorizes payment for pre-approval services.** Eleven months after counsel started work, the trustee filed an application for approval of the employment of counsel *nunc pro tunc* to the time counsel started work. Section 327 authorizes the trustee to employ counsel with the court's approval. Section 330(a) authorizes compensation from the estate to counsel whose employment the court approved under section 327. Section 330 does not limit compensation to work performed after the court's approval of employment, although counsel takes a risk that a delayed application and approval might shed light on whether the services rendered before employment were beneficial to the estate and compensable. In *Roman Catholic Archdiocese of San Juan, Puerto Rico v. Acevedo Feliciano*, 140 S. Ct. 696 (2020), the Supreme Court held that *nunc pro tunc* orders are permissible only "to reflect the reality of what has already occurred," not to make orders retroactive. Therefore, the court denies the request for *nunc pro tunc* application of the order, but recognizes the late application and order do not of themselves prevent compensation for services rendered before the approval. In this case, however, the application did not provide sufficient explanation of the reason for the delayed application, so the court denies it without prejudice. *In re Benitez*, ___ B.R. ___ (Bankr. E.D.N.Y. Mar. 13, 2020).

13.2.b **Court denies use of estate assets to pay for debtor's criminal defense counsel.** After bankruptcy, the individual debtor was indicted for prepetition tax fraud. As debtor in possession, he sought court approval of the employment of criminal defense counsel at the expense of the estate. Section 327(a) authorizes employment of counsel at the expense of the estate but only if counsel's employment benefits the estate. Protection of the debtor against a criminal indictment does not benefit the estate. The debtor's Sixth Amendment right to counsel does not supersede section 327(a)'s requirements. Denial of using estate assets to pay counsel does not deprive the debtor of counsel in the criminal case, since the debtor can still use nonestate assets or a public defender in his criminal case. *In re Kearney*, 609 B.R. 383 (Bankr. D.N.M. 2019).

13.3 Committees

13.4 Other Professionals

13.5 United States Trustee

14. TAXES

15. CHAPTER 15—CROSS-BORDER INSOLVENCIES