

JENNER & BLOCK

Recent Developments in Bankruptcy Law, October 2024

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1. AUTOMATIC STAY

1.1 Covered Activities

- 1.1.a **State court rent abatement order violates the automatic stay.** The debtor owned and operated an apartment complex, which was subject to multiple violation orders from the local jurisdiction and its housing authority. In the local proceeding, the debtor agreed to remedy the violations but failed to do so. The court held the debtor in contempt of court and imposed rent abatement, in increasing percentages over time as violations remained uncured, as a sanction to compel compliance. The debtor filed a chapter 11 case. Section 362 stays any action against the debtor but excepts an action to enforce a governmental unit's police or regulatory power other than proceedings to enforce a money judgment against the debtor or seizure of the debtor's property. Rent from the debtor's tenants is property of the estate. Therefore, rent abatement takes property of the estate for the tenants' benefit and amounts to enforcement of a money judgment against the debtor. Therefore, rent abatement is outside the police or regulatory power exception to the automatic stay. In addition, although a criminal contempt sanction is excepted from the automatic stay as necessary to uphold the dignity of the issuing court, a civil contempt penalty, which is either compensatory or coercive, is subject to the stay. Here, rent abatement was imposed to coerce compliance with the remedial order and is therefore stayed. *MP PPH LLC v. Dist. Of Col. (In re MP PPH LLC)*, 660 B.R. 410 (Bankr. D.D.C. 2024).
- 1.1.b **Automatic stay does not apply during appeal from dismissal of petition.** The creditor obtained a judgment against a Monaco defendant and sought enforcement against its principals as the defendant's alter egos. During enforcement proceedings, the defendant filed a bankruptcy case in Monaco, and its Monaco trustee filed a chapter 15 petition for recognition in the United States. The bankruptcy court dismissed the petition as filed in bad faith. Without obtaining a stay, the debtor appealed. While the appeal was pending, the creditor continued its enforcement proceedings and obtained a judgment against the principals under an alter ego theory. The BAP then reversed the denial of recognition and ordered recognition. Under section 1520, the automatic stay applies as to any of the debtor's property in the United States, but only upon the granting of the recognition order. Because the court had not recognized the petition during the appeal and the court's order denying recognition was not stayed, the automatic stay did not apply, and the creditor was free to pursue enforcement against the debtor and its principals. *Int'l Petro. Prods. And Additives Co., Inc. v. Black Gold S.A.R.L.*, 115 F. 4th 1202 (9th Cir. 2024).

1.2 Effect of Stay

1.3 Remedies

2. AVOIDING POWERS

2.1 Fraudulent Transfers

- 2.1.a **A trustee has Article III standing to bring a fraudulent transfer claim, regardless of actual harm to creditors.** The debtor transferred real estate worth over \$2.5 million to a trust to delay a foreclosure by a second lien holder. She later filed bankruptcy. The second lien holder's claim of \$1.5 million was disallowed, because the debtor did not owe him any money. The total claimed

unsecured claims was under \$50,000. The trustee sued to avoid the transfer as a fraudulent transfer. Under Article III, to establish standing to bring the action, the trustee had to show the estate suffered a concrete, particularized injury that was likely caused by the defendant and could be redressed by the court. As representative of the estate, the trustee may bring the action on its behalf, regardless of whether there are creditors who would benefit or whether a creditor was or could have been harmed by the transfer. Actual harm to creditors is not an element of a fraudulent transfer claim. Thus, it did not matter that the creditor whose foreclosure the debtor sought to hinder or delay was not actually entitled to foreclose and therefore was not harmed. The trustee may still pursue the fraudulent transfer claim. *Hoffman v. The Lovering Tubbs Trust (In re O’Gorman)*, 115 F. 4th 1047 (9th Cir. 2024).

2.1.b **Ninth Circuit affirms Ponzi scheme presumption of fraudulent intent.** The debtor operated a Ponzi scheme. The trustee sued under the fraudulent transfer laws to avoid and recover transfers to an investor. Those laws require showing that the transfer was made with actual intent to hinder, delay, or defraud the debtor’s creditors. A Ponzi scheme involves using new investors’ money to repay old investors, whether the debtor is also conducting a legitimate business or not. By its nature, a Ponzi scheme is insolvent from its inception and is doomed to fail, and the operator is presumed to know that. From that, the court may infer fraudulent intent. “In fact, ‘no other reasonable inference is possible.’” Therefore, fraudulent transfer avoidance in a Ponzi scheme bankruptcy does not require an independent proof of fraudulent intent. A dissent argues otherwise. *Kirkland v. Rund (In re EPD Inv. Co., LLC)*, 114 F. 4th 1148 (9th Cir. 2024).

2.1.c **Court may approve trustee’s settlement of creditor’s prepetition secured fraudulent transfer claim.** The individual debtor defrauded numerous investors. One investor sued in state court to recover a claim against the debtor and to avoid and recover fraudulent transfers the debtor made to related corporations. The investor obtained a prejudgment attachment on the transferred properties to secure any fraudulent transfer judgment. More than 90 days later, the debtor filed bankruptcy. The investor filed a proof of secured claim but agreed that his liens were subject to dispute. The trustee asserted claims against the state court defendants and reached settlement under which they would pay the estate for a full settlement of all estate claims against them. The trustee succeeds to claims creditors have against the debtor if they are general claims that are common to all creditors (that is, could be brought by any creditor) and arise from harm done to the estate, such as fraudulent transfer, alter ego, and reverse veil piercing claims. Such a claim becomes property of the estate under section 541(a). Similarly, a creditor’s claim against a third party is property of the estate if the claim’s outcome might have any conceivable effect on the estate. Section 363(f)(5) permits a trustee to sell property of the estate free and clear of a lien that is in bona fide dispute. The liens were in bona fide dispute (although the court is unclear whether the liens were on the fraudulent transfer claims or on the underlying property), and therefore, the trustee could settle the actions free and clear of the investor’s liens. Although the investor claimed secured status, its claim was not secured until the dispute was resolved, and therefore the creditor was entitled to nothing on account of the lien at the time of settlement. Because the trustee showed that the settlement met the conditions for approval of a settlement, the court approved. *Stadtmauer v. Tulis (In re Nordlicht)*, 115 F.4th 90 (2d Cir. 2024).

2.2 Preferences

2.3 Postpetition Transfers

2.4 Setoff

2.5 Statutory Liens

2.6 Strong-arm Power

2.7 Recovery

2.7.a **For section 550(b)(1) purposes, a subsequent transferee has the same knowledge that his agent has.** The debtor transferred proceeds from the sale of a major asset to its affiliated preferred shareholders, who then bought the debtor’s bonds from another affiliate. The affiliate used the proceeds to pay outside investors. The investors had designated the debtor’s principal as agent with full authority to act for them in connection with the investment. After bankruptcy, the trustee sued the outside investors to avoid and recover the transfers to them. A trustee may avoid a fraudulent transfer under section 548 and, under section 550, may recover the transferred assets from an initial transferee or from a subsequent transferee, but not from a subsequent transferee who takes for value, in good faith, and without knowledge of the voidability of the initial transfer. The debtor’s principal had actual knowledge of the voidability of the transfers, since he had masterminded the whole scheme. Under standard agency principles, the agent’s knowledge is fully imputed to the principals, the investors. Section 550 does not change the application of agency principles in this context. Therefore, the investors are charged with actual knowledge of the avoidability of the transfers. *Schmidt v. Rechnitz (In re Black Elk Energy Offshore Ops., LLC)*,

2.7.b **Court may use any reasonable tracing method to identify fraudulent transfer proceeds.** The debtor transferred proceeds from the sale of a major asset to its affiliated preferred shareholders, who then bought the debtor’s bonds from another affiliate. The affiliate used the proceeds to pay outside investors. The investors had designated the debtor’s principal as agent with full authority to act for them in connection with the investment. During the sale and repayment process, the sale proceeds were commingled with untainted funds. After bankruptcy, the trustee sued the outside investors to avoid and recover the transfers to them. A trustee may avoid a fraudulent transfer under section 548 and, under section 550, may recover the transferred assets from an initial transferee or from a subsequent transferee. A court may use any reasonable tracing method to identify and segregate commingled property and to determine whether the investor received the transferred property. The method must reflect reality, based on the precise circumstances of the particular case. Here, the court used the “proceeds in-first out” method, under which the court assumes the tainted funds in the account are used first. Because the account had enough untainted funds remaining after the transfer, the court properly concluded that the payments came from the tainted funds and were therefore proceeds of the fraudulent transfer. *Schmidt v. Rechnitz (In re Black Elk Energy Offshore Ops., LLC)*, 114 F. 4th 343 (5th Cir. 2024).

3. BANKRUPTCY RULES

4. CASE COMMENCEMENT AND ELIGIBILITY

4.1 Eligibility

4.1.a **Third Circuit reiterates financial condition chapter 11 filing requirement.** The debtor was exposed to significant mass tort liabilities, but it had a guarantee from a solvent parent for the liabilities, and its forced liquidation value slightly exceeded a worst-case mass tort liability scenario. A court may dismiss a chapter 11 case that is not filed in good faith. The debtor bears the burden of proof. “Good faith” depends not on subjective intent but whether the filing serves a valid bankruptcy purpose, which assumes a debtor in financial distress. Because the debtor was not at risk of short term or long-term financial distress, the court found no valid bankruptcy purpose in the filing and dismissed the case. *In re LTL Mgmt LLC*, 2024 U.S. App. LEXIS 18437 (3d Cir. July 25, 2024).

4.2 Involuntary Petitions

- 4.2.a **Bankruptcy court may dismiss an involuntary petition on state court receiver's motion, based on totality of circumstances.** A state court appointed a general receiver of the debtor and gave him full managerial authority over the debtor. After the receiver ran out of financing to continue operations, it closed the business and began a sale process. The debtor's owners filed a voluntary bankruptcy petition for the debtor, which the court dismissed based on the owners' lack of authority to file the petition. Shortly later, they joined in an involuntary petition against the debtor, which the receiver moved to dismiss. Section 543(b) requires a receiver to turnover to the estate and account for all property, but that section applies only after the order for relief. Therefore, the receiver did not violate section 543(b) by moving to dismiss the petition and, with full management authority over the debtor, had standing to move to dismiss. Under section 303, a court may dismiss an involuntary petition that is not filed in good faith and may consider the best interest of the alleged debtor and its creditors under the totality of the circumstances. The court need not rely on authority to dismiss under section 305 based on the interests of the creditors and the debtor, although that section gives the court additional authority. In this case, the conduct of the petitioning creditors and the work of the receiver in managing the debtor before the involuntary petition justified the court in dismissing the case. *Goldberg Healthcare Partners, LLC v. MorrisAnderson & Assocs. (In re SA Hosp. Acquisition Grp.)*, 660 B.R. 97 (D. Del. 2024).
- 4.2.b **Section 303(i) allows damages for dismissal under section 305 but preempts state law damage claims.** The creditor filed an abusive involuntary petition against the alleged debtor, who moved to dismiss under section 305(a)'s "interests of creditors and the debtor" standard, so as to avoid the "notice to all creditors" requirement of dismissal under section 303. Section 303(i)(1) grants a claim for costs and attorneys' fees, and section 303(i)(2) grants a claim for damages proximately caused by the petition and punitive damages, to an alleged debtor if "the court dismisses a petition under this section." The alleged debtor brought a state law tort claim against the petitioner for damages arising from the petition. "Under this section" modifies "petition," under the last antecedent rule, not "dismisses." Therefore, a dismissal under section 305 of an involuntary petition gives rise to a section 303(i) damages claim. However, the bankruptcy court has exclusive jurisdiction to enforce debtor remedies for an improper petition. Therefore, the district court properly dismissed the state law tort claims. *Stursberg v. Morrison Sund PLLC*, 112 F. 4th 556 (8th Cir. 2024).
- 4.2.c **Bankruptcy court automatically retains jurisdiction over section 303(i) fees after dismissal.** The bankruptcy court dismissed an involuntary petition because only two creditors joined the petition. The court of appeals affirmed. After the court of appeals issued its mandate, the bankruptcy court closed the case. The dismissal order did not retain jurisdiction in the bankruptcy court to determine a claim for fees or damages under section 303(i). The debtor later filed a motion for an award of attorneys' fees under section 303(i)(1). Under 28 U.S.C. § 1334(b), the bankruptcy court's jurisdiction encompasses a proceeding that arises under title 11, that is, a proceeding for which title 11 provides the rule of decision. Section 303(i) expressly contemplates a claim for fees or damages only after dismissal. Therefore, the court necessarily retains jurisdiction to hear such a claim without need to specify in the dismissal order that it retains jurisdiction. *Reyes-Colón v. Banco Popular de Puerto Rico*, 110 F. 4th 54 (1st Cir. 2024).
- 4.2.d **Section 303(i)(1) is a fee shifting statute whose application is subject to time limits on seeking fees.** The bankruptcy court dismissed an involuntary petition because only two creditors joined the petition. The court of appeals affirmed. The debtor later filed a motion for an award of attorneys' fees under section 303(i)(1). The local bankruptcy rules provided that for any matter

not governed by those rules, the local district court rules applied. A local district court rule required that a post-appeal motion for attorney's fees be filed within 14 days after issuance of the mandate. Section 303(i)(1), considered separately from section 303(i)(2), which authorizes damages for a bad faith filing, is a stand-alone fee-shifting statute, to which the local rule applies, not an independent cause of action. Similarly, Civil Rule 54(d)(2), which provides a 14-day deadline for a fee request and which is made applicable by Bankruptcy Rule 7054, applies when there is no appeal. *Reyes-Colón v. Banco Popular de Puerto Rico*, 110 F. 4th 54 (1st Cir. 2024).

4.3 Dismissal

5. CHAPTER 11

5.1 Officers and Administration

5.2 Exclusivity

5.3 Classification

5.4 Disclosure Statement and Voting

5.5 Confirmation, Absolute Priority

5.5.a **A class of unsecured claims against a solvent debtor is impaired unless postpetition interest is paid in full.** The debtor became hopelessly solvent during its chapter 11 case. Its bonds contained a make-whole provision (an "Applicable Premium"), requiring the debtor, upon early redemption, to pay a sum calculated by reference to how early the prepayment occurred and current market interest rates. The debtor proposed a plan to pay its bondholders in cash in full, plus postpetition interest at the legal rate, claimed that the class of bondholder claims was not impaired, and claimed therefore that the Code did not require payment of the make-whole. Under section 1124, a class of claims is impaired if the plan alters any of the legal, contractual, or equitable rights of claims in the class. A change in rights required by the Code, such as disallowance of unmatured postpetition interest, does not impair a class. Section 502(b)(2) disallows any claim for unmatured postpetition interest. The make-whole is interest, because it compensates the holders for the use of the bond proceeds, and it is based on a time component. However, the Code carries over from pre-Code law a "solvent debtor exception," required by the Code's underlying absolute priority rule, under which a plan must provide for payment of claims in full, including contractual interest, before shareholders may share in any distribution under the plan, unless the creditors consent. Despite the specific definition of "impaired" in section 1124, a class is impaired if its treatment violates the absolute priority rule, because every creditor has a right to treatment consistent with that principle. Therefore, for a plan that provides a recovery for shareholders to leave the class of bondholder claims not impaired, it must provide for the payment of postpetition interest, including any make-whole, on the bonds. *Wells Fargo Bank, N.A. v. The Hertz Corp. (In re The Hertz Corp.)*, 117 F. 4th 109 (3d Cir. 2024).

5.5.b **Absolute priority rule includes requirements in addition to those in section 1129(b)(2).** The debtor had no value as a stand-alone business. It had potential value to an acquiror, but during the year the case had been pending, no non-insider offers were received. The 70% owner of the debtor's holding company proposed a plan that provided for a major equity investment in the debtor, paid all general unsecured creditors in cash in full on the effective date, and paid nothing to the debtor's existing equity. The general unsecured claims class was unimpaired and deemed to accept the plan; the equity class was deemed to reject. Accordingly, no disclosure statement was required. But the plan had to meet the requirements of section 1129(b), since the equity class was deemed not to accept. Section 1129(b)(1) requires that a plan be fair and equitable

with respect to any class that does not accept the plan. Section 1129(b)(2) provides that the fair-and-equitable standard as applied to equity interests includes the requirement either that equity receive the value of its interest or that no junior class receive or retain any value under the plan. Because the statute uses “includes,” the standard may include requirements in addition to those stated explicitly. Thus, even though no class junior to the equity was receiving or retaining any value under the plan, thus satisfying the second requirement and obviating the express need to satisfy the first requirement, if the equity had value and was receiving nothing, then that value was being diverted to senior classes or the acquiror, and the plan was not fair and equitable. However, to relieve a plan proponent of having to present valuation evidence on every cramdown plan, the court imposes the burden on the equity to present evidence showing value. *In re Global Fertility & Genetics, New York, LLC*, 2024 Bankr. LEXIS 2080 (Bankr. S.D.N.Y. Sept. 7, 2024).

6. CLAIMS AND PRIORITIES

6.1 Claims

- 6.1.a **A make-whole due after payment of bonds in a chapter 11 case is postpetition interest.** The debtor became hopelessly solvent during its chapter 11 case. Its bonds contained a make-whole provision (an “Applicable Premium”), requiring the debtor, upon early redemption, to pay a sum calculated by reference to how early the prepayment occurred and current market interest rates. Section 502(b)(2) disallows any claim for unmatured postpetition interest. Whether a claim represents interest that would be disallowed under section 502(b)(2) can be determined by the definition of interest—compensation for the use or forbearance of money—or by its economic substance—a payment based on the time value of money. Under either approach, the make-whole is interest. It compensates the holders for the use of the bond proceeds, and it is based on a time component. Therefore, the make-whole is disallowed under section 502(b)(2). *Wells Fargo Bank, N.A. v. The Hertz Corp. (In re The Hertz Corp.)*, 117 F. 4th 109 (3d Cir. 2024).
- 6.1.b **Prepetition secured creditor may not take lien on avoiding power actions.** The lender took a security interest in the debtor’s general intangibles, including after-acquired property. In an earlier case, the court of appeals ruled that avoiding power actions are property of the estate under section 541(a) that a trustee may sell because the debtor has an inchoate interest in the actions before bankruptcy. The bankruptcy court rejects application of that reasoning to the lender’s claim. The avoiding power actions arise only upon the filing of the petition. The inchoate interest the court of appeals recognized arises only because the debtor may file a bankruptcy petition that then creates those actions. The debtor itself has no ownership interest in those actions; it never could have brought them before bankruptcy, and only the trustee (or the debtor, acting as a DIP on the estate’s behalf) may bring them after bankruptcy. Moreover, allowing the lender to have a lien on the avoiding power actions would allow the debtor to direct the proceeds of those actions to a single creditor, contrary to the fundamental bankruptcy policy that the avoiding powers are for the benefit of all creditors. Therefore, the lender does not have a security interest in the estate’s avoiding power actions. *In re BDC Group, Inc.*, 2024 Bankr. LEXIS 2105 (N.D. Iowa Sept. 10, 2024).
- 6.1.c **Court refuses enforcement of arbitration clause in claim objection and preference recovery proceeding.** The debtor’s prepetition loan agreement provided for arbitration of claims. After the debtor’s case was converted to chapter 7, the lender filed a proof of claim. The trustee filed an adversary proceeding seeking recovery of preferences and disallowance of the claim. A bankruptcy court may enforce an arbitration agreement when the claim or right to be adjudicated is derivative of the debtor’s claim or right. Here, however, the trustee did not succeed to the loan

agreement and its arbitration clause but is bringing an action that is unique to the trustee. Therefore, the court refuses enforcement of the arbitration agreement. *Samson v. The LCF Group, Inc. (In re Bridger Steel, Inc.)*, 2024 Bankr. LEXIS 2386 (Bankr. D. Mont. Sept. 30, 2024).

- 6.1.d **Equity holders who may be liable to the estate for a deficiency have standing to object to claims.** The trustee sued the debtor's equity holders to avoid and recover fraudulent transfers. While the action was pending, the holders objected to a creditor's proof of claim and sought discovery. The creditor moved to quash the holders' subpoena. Under section 502(a), a party in interest may object to a claim. Under *Truck Ins. Exch. v. Kaiser Gypsum Co., Inc.*, 602 U.S. 268 (2024), "party in interest" should be interpreted broadly to include any party who is "potentially concerned with, or affected by, a proceeding." Therefore, if the holders are liable to the estate for more than the allowed amount of all claims, they have an interest in whether the creditor's claim is allowed, and they have standing to object. The court defers ruling on the motion to quash pending the outcome of the fraudulent transfer litigation. *In re Team Sys. Int'l, LLC*, 2024 Bankr. LEXIS 2573 (Bankr. D. Del. Oct. 21, 2024).

6.2 Priorities

7. CRIMES

8. DISCHARGE

8.1 General

8.2 Third-Party Releases

- 8.2.a **Court rejects opt-out third-party releases for non-voting creditors.** The subchapter V debtor proposed a plan that provided for third-party releases. The ballots for the general unsecured class provided that a vote for or against the plan would constitute a consent to the third-party release. But the ballot also contained an opt-out checkbox, which the creditor could check whether voting for or against the plan. Under *Harrington v. Purdue Pharma L.P.*, 144 S. Ct. 2017 (2024), the Code does not permit a plan to include a nonconsensual third-party release, but the Court did not express a view on whether a consensual release was permitted or what constitutes consent. Consent requires either an affirmative act or a failure to object to a court demand that the Code authorizes, for example, failure to object to a cure amount for an assumed executory contract. Because the Code does not authorize the release without consent, the failure to object cannot result in a "default" against the non-objecting creditor. But where the creditor takes an affirmative action that the debtor advises will be construed as consent, the creditor may be bound. Thus, a creditor who fails to opt out of the consent is deemed to consent. At the same time, a creditor who does not vote at all is not deemed to consent, because the creditor has given no indication of consent. *In re Smallhold, Inc.*, 2024 Bankr. LEXIS 2332 (Bankr. D. Del. Sept. 25, 2024).
- 8.2.b **Opt-out third-party release is ineffective.** The debtor proposed a plan with an opt-out third-party release. The plan provided no additional consideration for creditors who did not opt out. Under *Harrington v. Purdue Pharma L.P.*, 144 S. Ct. 2017 (2024), the Code does not permit a plan to contain a nonconsensual third-party release. The Court did not express a view on what constitutes consent but noted that the Code does not contemplate, much less specifically authorize, a consensual release. Therefore, a consensual release must be based on applicable nonbankruptcy contract law. Under New York law, which applies to this debtor, a release without consideration is effective only if in writing. Therefore, a failure to opt out does not suffice to bind a

creditor, and the court may not confirm the plan. *In re Tonawanda Coke Corp.*, 662 B.R. 220 (Bankr. W.D.N.Y. 2024).

- 8.2.c **Opt-out third-party release is effective.** The debtor proposed a plan with an opt-out third-party release. The disclosure statement provided detailed, specific notice about the plan, the objection and voting deadlines, the opportunity to opt out of the release, and the types of claims and parties being released. The releases were narrowly tailored to the case, covering only matters relating to the debtors and the estates, and carved out claims unrelated to the debtors. The release was integral to the plan and a condition of the plan settlements. More than 100 creditors opted out of the release. Under *Harrington v. Purdue Pharma L.P.*, 144 S. Ct. 2017 (2024), the Code does not permit a plan to contain a nonconsensual third-party release, but the Court did not express a view on whether a consensual release was permitted or what constitutes consent. Because opt-out releases of the kind the plan contemplated have been common in this judicial district, the Supreme Court did not address them, and notice was clear and adequate (as evidenced by the number of creditors who opted out), the court finds no reason to change the district's practice and overrules an objection to the inclusion of opt-out third-party releases in the plan. *In re Robertshaw US Holding Corp.*, 662 B.R. 300 (Bankr. S.D. Tex. 2024).

8.3 Environmental and Mass Tort Liabilities

- 8.3.a **Section 524(g) is not the exclusive means to discharge asbestos future claims.** The debtor suspected some creditors might assert asbestos-related injuries from use of the debtor's talc products. The bar date order expressly applied to a personal injury claim arising from exposure to talc products. The bar date publication notice referred to claims "no matter how remote or contingent ... including claims for potential unmatured injuries" but did not mention talc products. The debtor confirmed a plan with a broad discharge of all claims and an injunction against pursuit of any discharged claims. Several talc claimants, asserting asbestos-related injuries based on prepetition use of the debtor's talc products but that were first diagnosed after plan confirmation, sued the reorganized debtor in district court. The debtor moved to enforce the plan injunction. A claim is any right to payment, whether or not liquidated, fixed, matured, or disputed. A chapter 11 discharge applies to any claim that arose before plan confirmation. The claims arose when the claimants were exposed to the debtor's products and thus are subject to discharge, regardless of when the injuries were diagnosed, as long as the debtor gave adequate notice of the bar date. Because these claimants were unknown at the time of the bar date, publication notice satisfies due process. The notice need not specify the nature of the potential claims to which it applies. Therefore, the absence of a talc reference in the published notice did not deprive the claimants of due process. Section 524(g) permits a court to issue a broad discharge of and injunction against future asbestos claims. It is permissive, not mandatory, and only supplements the general injunction provision. In addition, section 1141(d), which provides the chapter 11 discharge, does not carve out an exception for asbestos claims or refer to section 524(g). Therefore, section 524(g) is not the exclusive means for dealing with asbestos claims in a chapter 11 case. *In re RML, LLC*, ___ B.R. ___, Case No. 22-10784-dsj (Bankr. S.D.N.Y. Aug. 12, 2024).

9. EXECUTORY CONTRACTS

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 **Bankruptcy court's exclusive jurisdiction over claims related to actions in a bankruptcy case preempts state court jurisdiction over such claims.** The creditor's attorney filed a dischargeability action in the debtor's Nevada bankruptcy case alleging willful and malicious injury. The parties stipulated to dismissal. The debtor brought a malicious prosecution action against the attorney in Arizona state court. The attorney challenged the state court's jurisdiction to hear the action, but the court overruled the objection. The attorney then brought an action in the Nevada district court collaterally challenging the Arizona court's ruling as *void ab initio* for lack of subject matter jurisdiction. The *Rooker-Feldman* doctrine prohibits a federal court challenge to a final state court judgment. However, a state court judgment on a matter that is within the federal courts' exclusive jurisdiction is subject to collateral attack. Actions for events taking place in a bankruptcy case are within the exclusive jurisdiction of the bankruptcy courts and are governed only by federal law. The preemption applies even to a state court's determination that it has jurisdiction to proceed, which itself may be challenged in the bankruptcy court. Therefore, *Rooker-Feldman* did not apply, and the district court had jurisdiction to proceed to the merits of the action. *Cogan v. Trabucco*, 114 F. 4th 1054 (9th Cir. 2024).

11.1.b **Bankruptcy court does not have jurisdiction over abandoned property.** After the trustee abandoned real property to the debtor, the debtor brought an action against state agencies for their activities that the debtor claimed injured her interest in the property. Section 1334(e)(1) grants the bankruptcy court exclusive *in rem* jurisdiction of "all the property, wherever located, of the debtor as of the commencement of such case, and of property of the estate." Once property is abandoned, it is no longer property of the estate, and abandonment removes the property from the bankruptcy court's exclusive *in rem* jurisdiction, because the jurisdiction is then no longer necessary to facilitate the administration of the bankruptcy estate. Section 1334(b) grants the bankruptcy court original but not exclusive jurisdiction over all proceedings arising in or related to a title 11 case or arising under title 11. The jurisdiction extends to any matter that could conceivably have an effect on the debtor or the estate, but the provision's reach is not limitless. Here, once the property has been abandoned, any litigation over it would not have any effect on the estate. Therefore, the court dismisses the case. *Porretto v. The City of Galveston Park Board of Trustees*, 113 F. 4th 469 (5th Cir. 2024).

11.2 Sanctions

11.3 Appeals

11.3.a **Order denying motion to dismiss a chapter 7 case is not final and appealable.** The bankruptcy court denied the debtor's motion to dismiss his chapter 7 case. The debtor appealed. The district court affirmed. A court of appeals has jurisdiction only over final orders of a bankruptcy court. An order is final when it disposes of the matter and does not contemplate further proceedings. Here, the order denying the motion to dismiss leaves the bankruptcy court to continue to administer the case and contemplates further proceedings. Therefore, it is not a final order, and the court of appeals does not have jurisdiction to hear an appeal from the order. *Delaney v. Messer (In re Delaney)*, 110 F. 4th 565 (2d Cir. 2024).

11.3.b **Denial of a sovereign immunity claim is appealable under the collateral order doctrine.** The state filed an involuntary petition against an individual, basing its claim on unpaid taxes. After the court dismissed the petition, the debtor brought an action against the state under section 303(i) for damages. The court denied the state's motion to dismiss on sovereign immunity grounds. Although bankruptcy appellate jurisdiction generally requires a final order, under the collateral order doctrine, an interlocutory order may be appealed if it determines a claim "too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred." Denial of a sovereign immunity claim is immediately appealable under this doctrine. *State of Montana Dept. of Rev. v. Blixseth (In re Blixseth)*, 112 F. 4th 837 (9th Cir. 2024).

11.4 Sovereign Immunity

11.4.a **Section 106 does not abrogate state sovereign immunity for section 303(i) claims.** The state filed an involuntary petition against an individual, basing its claim on unpaid taxes. During a colloquy with the court, the state's counsel stated that by bringing the involuntary petition, the state submitted itself to the court's jurisdiction and waived sovereign immunity for damage claims arising from the action. After the court dismissed the petition, the debtor brought an action against the state under section 303(i) for damages. A state waives sovereign immunity for any claim that arises out of the same operative or aggregate core of facts as the state's claim. A section 303(i) claim is more like a malicious prosecution claim or a claim under a fee shifting statute: it arises from the litigation, not from the facts supporting the state's involuntary petition. A state may waive sovereign immunity only by statute, not by its counsel's statement in court. Under *Central Va. Cmty. Coll. v. Katz*, 546 U.S. 356 (2006), as a constitutional matter, states are deemed to have waived sovereign immunity for matters that are core to the bankruptcy functions, which are the court's exclusive jurisdiction over property, the equitable distribution of the estate, and the debtor's discharge and fresh start. Section 106(a) abrogates a state's sovereign immunity for claims under specified sections, including section 303. A section 303(i) claim implicates none of those functions and therefore is not encompassed by the constitutional abrogation. Therefore, the court dismisses the section 303(i) on sovereign immunity grounds. *State of Montana Dept. of Rev. v. Blixseth (In re Blixseth)*, 112 F. 4th 837 (9th Cir. 2024).

12. PROPERTY OF THE ESTATE

12.1 Property of the Estate

12.1.a **Chapter 11 trustee remains subject to *in pari delicto* defense, despite prior receivership.** The debtor ran a Ponzi scheme. The bank aided and abetted the scheme. A federal court appointed a receiver for the debtor. The receiver filed a chapter 11 petition five days later and was appointed as chapter 11 trustee. Under the doctrine of *in pari delicto*, a wrongdoer may not assert a claim against one who is at equal or lesser fault. Under applicable nonbankruptcy law in this case, a receiver represents both the debtor and creditors and, as a creditor representative, is not subject to the *in pari delicto* defense of an aider and abettor. However, when the receiver filed a chapter 11 petition for the debtor, all of the debtor's claims, including those that are subject to the *in pari delicto* defense, become property of the estate. The trustee steps into the debtor's shoes and is bound by any defenses applicable to the debtor's claims. The chapter 11 case superseded the receivership, and the chapter 11 trustee was subject to any defense to which the debtor was subject. Therefore, the court dismisses the trustee's claims against the bank. *Kelley v. BMO Harris Bank N.A.*, 115 F. 4th 901 (8th Cir. 2024).

- 12.1.1.b **Veil piercing is a claim, not merely a remedy.** The individual debtor defrauded numerous investors. One investor sued in state court to recover a claim against the debtor, asserting, among other things, reverse veil piercing to get at the assets of the debtor's corporation that were used to perpetrate the fraud. Under New York law, a veil-piercing or reverse-veil-piercing assertion claims that predicate facts exist that would impose liability on the corporate entity. Once those predicate facts are established, the creditor has a direct claim against the corporate entity if liability can be established. Therefore, a veil-piercing assertion is a claim, not just a remedy for a claim against the individual. *Stadtmauer v. Tulis (In re Nordlicht)*, 115 F.4th 90 (2d Cir. 2024).
- 12.1.1.c **Insured v. Insured exception does not apply to action by the debtor in possession.** The debtor's directors' and officers' liability insurance policy defined "Company" to include the debtor and debtor in possession and defined "Insured" to include the Company and any Executive. It excluded coverage for any claim by an Insured against another Insured but excepted any claim by a bankruptcy or insolvency trustee for the Company. During the debtor's chapter 11 case, the debtor in possession and the creditors' committee sued the former CEO, who asserted coverage under the policy. Under section 1107, a debtor in possession has all the rights and powers of a trustee. And the policy contains a possible ambiguity in that the definition of the Company to include a debtor in possession conflicts with the Code's grant to a debtor in possession of all the rights and powers of a trustee, so that an action by the Company would be excepted from the exclusion. Under governing nonbankruptcy law, a policy must be construed against the insurer. Therefore, the court resolves the ambiguity in favor of the former CEO and orders coverage. *Walker County Hosp. Corp. v. Brown (In re Walker County Hosp. Corp.)*, 2024 Bankr. LEXIS 2440 (Bankr. S.D. Tex. Oct. 3, 2024).

12.2 Turnover

12.3 Sales

13. TRUSTEES, COMMITTEES, AND PROFESSIONALS

13.1 Trustees

13.2 Attorneys

- 13.2.a **Trustee may not seek post-conversion, after-the-fact approval of counsel employment.** The debtor filed a chapter 7 case, and the US trustee appointed a chapter 7 trustee. The trustee obtained approval to employ counsel. The debtor converted the case to chapter 11, and the US trustee appointed the same individual as chapter 11 trustee. The same counsel continued to provide services to the trustee, but the trustee did not obtain an order approving counsel's employment in the chapter 11 case. The debtor converted the case to chapter 13, and the trustee's service terminated. He filed an application to approve his and his counsel's compensation. He later filed an application to approve his employment of counsel during the chapter 11 case. Section 327(a) authorizes the trustee to employ professionals. Section 330 authorizes compensation of professionals employed under section 327. Section 348(e) terminates a trustee's service upon conversion. Because the trustee's service is terminated, so is counsel's, and a new application is required to employ counsel during the chapter 11 case. Section 327(a) authorizes only *the* trustee, that is, the currently serving trustee, to employ counsel. Whether or not an after-the-fact employment approval application is proper (the court suggests but does not hold that it is), a post-service application is not. Therefore, the court may not approve counsel's employment, even for the chapter 11 period, and may not approve compensation for counsel. *David v. King*, 109 F. 4th 653 (4th Cir. 2024).

13.3 Committees

13.3.a **Chapter 11 committee survives dismissal for appeal.** On the motion of an official committee, the bankruptcy court dismissed the chapter 11 case on lack of good faith grounds. In its dismissal order, it authorized the committee to defend the debtor's appeal from the decision and ordered the debtor to continue to pay the committee's expenses. Under section 103(g), section 1102, which authorizes the committee, applies only in a chapter 11 case, so upon conversion to chapter 7, the committee dissolves. However, the case here remained in chapter 11 during the appeal. Therefore, the committee retained authority to defend the appeal. *In re LTL Mgmt. LLC*, 2024 U.S. App. LEXIS 18437 (3d Cir. July 25, 2024).

13.4 Other Professionals

13.5 United States Trustee

14. TAXES

14.1.a **Avoided and preserved lien for tax penalties is subordinated to the lien for taxes.** The IRS had a valid lien on the debtor's property to secure \$46,000 in taxes and \$35,000 in penalties. The trustee sold the property for \$39,000 and avoided the lien under section 724(a) to the extent it secured the penalties. Under section 551, the avoided lien was automatically preserved for the benefit of the estate. Section 726(a)(4) subordinates payment of penalties to the payment of all other claims. Consistent with that principle, the preserved lien to secure penalties should be subordinated to the lien to secure taxes. Otherwise, the lien avoidance would effectively reduce the value of the tax lien by sharing the property's value with the trustee under section 551. Therefore, the sale proceeds must be distributed to the IRS for taxes before any distribution on the preserved lien for the estate. *U.S. v. MacKenzie (In re Leite)*, 112 F. 4th 1246 (9th Cir. 2024).

15. CHAPTER 15—CROSS-BORDER INSOLVENCIES

15.1.a **Chapter 15 creditor may pursue claim only in foreign proceeding.** After the bankruptcy court granted recognition to a Bermuda liquidation proceeding, a creditor filed an adversary proceeding in the chapter 15 case to determine the debtor's liability on a claim. Upon the granting of a recognition petition, section 362's automatic stay applies with respect to the debtor and property of the debtor. Although a creditor's filing of an adversary proceeding in the home court to collect a claim does not violate the stay under the "home court" exception, because the adversary proceeding can be treated as just a proof of claim, the home court rule does not apply in a chapter 15 case. Rather, the creditor must pursue the claim in the foreign proceeding, because the chapter 15 court's role is limited to supporting the foreign proceeding, which must adjudicate all claims against the debtor. Therefore, filing the adversary proceeding violates the stay. *FTI GP I, LLC v. Point Invs., Ltd. (In re Point Invs., Ltd.)*, 2024 U.S. Dist. LEXIS 171066 (D. Del. Sept. 23, 2024).