JENNER&BLOCK

Recent Developments in Bankruptcy Law, January 2021

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TABLE OF CONTENTS

1. AUTOMATIC STAY

1.1 Covered Activities

1.1.a **Section 362(a)(3) does not require turnover of property of the estate.** The city impounded the debtor's vehicle for nonpayment of traffic fines. The debtor filed a chapter 13 petition and demanded turnover of the car. Section 362(a)(3) stays any act to "exercise control over property of the estate." Section 542(a) requires one in possession of property of the estate to deliver it to the trustee. The most natural reading of section 362(a)(3) is that it prohibits affirmative acts that alter the status quo and does not impose an affirmative obligation on a party holding property of the estate to turn it over. Section 542(a) performs that function. Therefore, the city may retain the vehicle without violating the automatic stay. *City of Chicago v. Fulton*, 592 U.S. ___140 S. Ct. 2017 (2021).

1.1.b **Automatic stay applies to state court litigation between equity holders over control of the debtor and its property.** A faction in control of the debtor church brought litigation in state court against another faction for a determination that the debtor faction had control of the church and its property to the exclusion of the other faction. Section 362(a)(3) stays any act to obtain control over property of the debtor or of the estate. Although the faction currently in control of the debtor was the plaintiff, the litigation involved control over the debtor and its property and was therefore subject to the automatic stay. The litigation differed from other corporate control litigation, such as whether to hold a shareholder meeting or whether to permit the voting of pledged shares, to which the automatic stay does not apply. *In re Korean W. Presbyterian Church of L.A.*, 619 B.R. 282 (Bankr. C.D. Cal. 2020).

1.2 Effect of Stay

1.3 Remedies

2. AVOIDING POWERS

2.1 Fraudulent Transfers

2.1.a **Leveraged recapitalization through a financial institution agent is safe harbored from state law intentional and constructive fraudulent transfer claims.** The debtor engaged in a leveraged recapitalization, borrowing from three groups of lenders to redeem equity interests and make distributions to equity holders. The funds flowed from the lenders to the subsidiary's and the parent's bank accounts to a bank disbursing agent's account to the equity holders. The debtor retained control over the disbursing agent, who operated and made disbursements only according to the debtor's instructions. After bankruptcy, the lenders assigned their state fraudulent conveyance claims to the chapter 11 plan's liquidating trustee, who brought an action under the Bankruptcy Code avoiding powers and on the creditors' claims against the equity holders. Applicable state fraudulent conveyance law permits a creditor to avoid and recover a transfer made with actual intent to hinder, delay, or defraud creditors (an intentional fraudulent transfer) or made for less than fair consideration while the debtor was insolvent (constructively fraudulent transfer). Section 546(e) prohibits a trustee from avoiding a transfer that is a settlement payment or is made under securities contract by or to or for the benefit of a financial institution except under section 548(a)(1)(A) (Bankruptcy Code intentional fraudulent transfer). A financial institution includes a bank's customer when the bank is acting as agent for the customer. Section 546(e) applies not only to the Code's avoiding powers (other than section 548(a)(1)(A)) but also to state fraudulent transfer laws, whether the trustee is suing under the trustee's own Code avoiding powers or as assignee of the creditors' state law avoiding powers and whether the action is to avoid a constructive or an intentional fraudulent transfer. Here, the disbursing agent acted as an agent of the debtor, which was its customer; the equity interests were securities, which were transferred under a securities contract between the debtor and the holders upon a settlement payment for the purchase of the securities. As a result, the transfers to the equity holders were protected by the safe harbor. *Holliday v. K Road Power Mgmt., LLC (In re Boston Generating LLC)*, 617 B.R. 442 (Bankr. S.D.N.Y. 2020).

2.1.b **Trustee may not sue intermediate transferee to evade the safe harbor.** The debtor owned securities of a subsidiary. In step one, it transferred the securities to an SPV. In step two, the SPV pledged the securities to an indenture trustee to secure notes the SPV issued to purchase another company. The liquidating trustee sued to avoid the step one transfer as a constructive fraudulent transfer. Section 546(e) safe harbors a transfer that is a settlement payment or a transfer made in connection with a securities contract by, to, or for the benefit of a financial institution. In determining whether the safe harbor applies, the court must identify the relevant transfer, which is the "overarching transfer the trustee seeks to avoid under one of the substantive avoidance powers." The trustee may not escape that requirement by seeking to avoid an intermediate transfer and suing institutions protected by the safe harbor as subsequent transferees under section 550(a), to which the safe harbor does not apply. The step one and step two transfers here were part of a single integrated transaction, which was the transfer through the SPV to the indenture trustee to secure the notes. The underlying transaction involved the purchase of the target company's securities, and the indenture trustee is a financial institution. Therefore, the safe harbor applies, and the trustee may not avoid the transfer. *SunEdison Litig. Trust v. Seller Note, LLC (In re SunEdison, Inc.)*, 620 B.R. 505 (Bankr. S.D.N.Y. 2020).

2.1.c **Payments to a Ponzi schemer's administrative services provider are recoverable fraudulent transfers.** The defendant provided administrative services to a Ponzi schemer. The services included preparing spreadsheets, circulating spreadsheets and statements to investors, receiving and maintaining investor agreements, coordinating withdrawal requests, and serving as the conduit for investor questions. The services helped ensure the smoother operation of the scheme, which helped entice new investors. All transfers by a Ponzi schemer are presumptively fraudulent transfers, but a defendant who gave reasonably equivalent value in good faith is not liable. Here, the defendant's involvement in maintaining the scheme, despite the lack of knowledge that the business was a Ponzi scheme, negated any claim of reasonably equivalent value. *Georgelas v. Desert Hill Ventures, Inc.*, 2021 U.S. Dist. LEXIS 564 (D. Utah. Jan. 4, 2021).

2.1.d **The UVTA does not require showing of actual injury to avoid actual fraudulent transfer.** The judgment debtor divided his property with his wife under a community property regime. The record was unclear on whether the debtor had sufficient assets to satisfy the judgment without the transferred assets. The creditor sued to avoid the transfer under the Uniform Voidable Transaction Act as a transaction with actual intent to hinder, delay, or defraud creditors. Under the statutory language, the creditor had to prove only the transfer of an asset made with actual intent to hinder, delay, or defraud. He did not have to show that he suffered actual injury from the transfer. *Stadmueller v. Sarkisian (In re Medina)*, 619 B.R. 236 (9th Cir. B.A.P. 2020).

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 **Court permits recovery from subsequent transferees of proceeds of sale of the debtor's fraudulently issued stock.** The debtor issued controlling stock to its 3% shareholder, who was also its CEO, under his scheme to sell the stock as a way of monetizing his investment in the company. He then colluded with some friends, who raised money from investors into a fund, which then purchased the stock from the CEO. The friends received a large commission from the fund. The CEO promptly transferred portions of the cash to his children. The debtor filed bankruptcy soon thereafter, and the trustee sought to recover from the children and the friends as subsequent transferees of a fraudulent transfer from the debtor. Under section 550(a), "to the extent a transfer is avoided … the trustee may recover … the property transferred … from the initial transferee of such transfer … or any immediate or mediate transferee of such initial transferee." Section 550(b) gives a defense to a subsequent transferee who took in good faith, for value, and without knowledge of the voidability of the transfer. The phrase "to the extent a transfer is avoided" does not limit a trustee's recovery to transfers that have actually been avoided, as long as the court finds the transfers are avoidable. The phrase's purpose is to limit the recovery by the limiting provisions in the avoidance sections. Only a transfer of property of the debtor is avoidable. Although the debtor's stock represents an interest in the debtor, rather than an interest of the debtor in property, the stock had value which the debtor could have captured by issuing it directly to buyers, and therefore constitutes property of the debtor. Finally, section 550(a) applies to any transferee of an initial transferee, not only to a transferee of the initially transferred property. Therefore, the cash proceeds the defendants received were recoverable. *Cage v. David (In re Giant Gray, Inc.)*, ___ B.R. ___, 2020 Bankr. LEXIS 2980 (Bankr. S.D. Tex. Oct. 22, 2020).

2.7.b **Federal law governs prejudgment interest on a section 544(b) fraudulent transfer avoiding action.** The trustee sued the transferee under section 544(b), applying state fraudulent transfer law to avoid the debtor's transfers, and under section 550(a) to recover the avoided transfers. Governing law on prejudgment interest follows the law governing the substantive claim. Although state law governed the trustee's avoidance action, federal law, section 550(a), governed recovery. As such, federal law governs prejudgment interest on the recovery. *Kelley v. Boosalis*, 974 F.3d 884 (8th Cir. 2020).

3. BANKRUPTCY RULES

4. CASE COMMENCEMENT AND ELIGIBILITY

4.1 Eligibility

4.1.a **Public company's affiliate's eligibility for subchapter V is based on all voting securities.** A public company owned 21% of the subchapter V debtor's equity securities, but 27% of the debtor's voting securities. The debtor's charter limits the power to vote on an action to reorganize or liquidate the business to a single class of equity securities; the public company owns only 6.5% of that class. Under section 1182(1)(B)(iii), a debtor that is an affiliate of an "issuer, as defined in section 3 of the Securities Exchange Act of 1934" is not eligible for subchapter V. An issuer, among other things, is a company that has publicly-traded securities. Under section 101(2)(A), an affiliate is "an entity that directly or indirectly owns, controls, or holds with power to vote, 20 percent or more of the outstanding voting securities of the debtor." The definition measures ownership against all outstanding voting securities, not just those that have a right to vote on the matter before the court. Therefore, the debtor is an affiliate of the public company and is ineligible for subchapter V. *Hall Los Angeles WTS, LLC v. Serendipity Labs, Inc. (In re Serendipity Labs, Inc.)*, 620 B.R. 679 (Bankr. N.D. Ga. 2020).

4.1.b **A nonprofit community association is eligible for subchapter V.** The debtor is a nonprofit homeowners' community association. It is registered with the state as a corporation and has a board of directors. It collects assessments from homeowners, contracts for goods and services, hires managers, lawyers, landscapers, maintenance personnel, and other professionals, oversees common areas of the project, and files tax returns that list business income. Subchapter V is limited to a person engaged in commercial or business activities. It does not require a profit motive as an eligibility condition. Commercial or business activities are those that are not consumer activities—those intended for personal, family, or household use. The debtor here is not a consumer debtor but engages in business activities and so is eligible for subchapter V. *In re Ellingsworth Res. Cmty. Ass'n.*, 619 B.R. 519 (Bankr. M.D. Fla. 2020).

4.2 Involuntary Petitions

4.3 Dismissal

5. CHAPTER 11

5.1 Officers and Administration

5.1.a **Eleventh Circuit enforces SBA anti-bankruptcy PPP rule.** The debtor in possession applied to a traditional lender for a Payroll Protection Program (PPP) loan. The PPP program permits a borrower to obtain a loan guaranteed by the Small Business Administration (SBA); to the extent the borrower uses the loan for specified purposes, the loan is forgiven. Congress placed the PPP loans under section 7(a) of the Small Business Act. Section 7(a) requires that SBA-guaranteed loans are subject to a "sound value" requirement so as reasonably to assure repayment. An SBA rule excludes debtors in possession from section 7(a) loans. The SBA continued to apply that rule to PPP loans. A court may hold an agency action or rule unlawful if it exceeds the agency's statutory jurisdiction, authorization, or limitations. An agency has not done so if Congress has not spoken to the issue and left it to the agency's rule-making and if the agency's interpretation of the statute is reasonable. Here, Congress did not directly address eligibility of borrowers in bankruptcy; by enacting the program under section 7(a), it left to the SBA the implementation rules. The rule is a reasonable interpretation of section 7(a) and the "sound value" requirement. Finally, the court may hold the rule unlawful if it is arbitrary and capricious. The SBA determined that because of competing creditors' claims and interests in bankruptcy, loans to borrowers in bankruptcy would present an unreasonably high risk of unauthorized use of funds and or default. Because bankruptcy debtors in possession are financially distressed, the SBA's conclusion is not unreasonable. Therefore, the court denies the motion to enjoin the SBA to provide the loan guarantee. *USF Fed. Credit Union v. Gateway Radiology Consultants, P.A. (In re Gateway Radiology Consultants, P.A.)*, 983 F.3d 1239 (11th Cir. 2020).

5.1.b **State law governs a debtor's corporate governance.** The debtor manager-managed LLC's operating agreements vested two managers with complete authority over the management of the LLC. The debtor's secured lender had control rights upon a default, which it tried to exercise. The debtor filed a chapter 11 case to stay the exercise. Shortly after the filing, the debtor and the lender agreed upon the appointment of a CRO, and the two managers delegated the exclusive exercise of all their management duties under a stipulation to be filed with, and subject to the approval of, the court. They did not execute manager resolutions to confirm the delegation. A Delaware LLC may vest complete management authority in the managers and does not require a board of directors or any formal means of exercising that authority. As such, the delegation in the stipulation sufficed under Delaware law. Except in narrow circumstances, the Bankruptcy Code does not interfere with a debtor's corporate governance and does not give the court or the US trustee authority to do so. Accordingly, the court approves the stipulation. *In re K.G. IM, LLC*, 620 B.R. 469 (Bankr. S.D.N.Y. 2020).

5.2 Exclusivity

5.3 Classification

5.4 Disclosure Statement and Voting

5.4.a **A class that receives full cash payment with postpetition interest at the federal judgment rate is unimpaired.** The solvent debtor proposed a plan that left the class of general unsecured creditors unimpaired by providing for payment in cash in full with interest at the legal rate. Section 726(a)(5) requires payment of interest on unsecured claims before equity may receive any recovery. Section 1129(a)(7) effectively incorporates that requirement into a chapter 11 plan, although it does not expressly apply to an unimpaired class. More generally, the "solvent debtor" exception requires payment of postpetition interest. Leaving a class unimpaired requires the plan not alter the legal, contractual, or equitable rights of claims in the class, but it does not require undoing alterations that are effected by the Code's operation, rather than by the plan. The Code suspends accrual of postpetition interest. Accordingly, a plan may leave a class unimpaired even if it does not provide for payment of interest at the contract rate. In such a case, application of the federal judgment rate is appropriate. The use of the term "legal rate" in section 726(a)(5) suggests Congress did not intend application of the contract rate but rather a rate imposed by statute. Moreover, a single rate applicable to all claims simplifies administration, especially in cases with a large number of unsecured claims. Therefore, a plan that provides for payment of a class of unsecured claims in cash in full with postpetition interest at the federal judgment rate to date of payment leaves the class unimpaired. *In re Cuker Interactive, LLC*, 622 B.R. 67 (Bankr. S.D. Cal. 2020).

5.5 Confirmation, Absolute Priority

6. CLAIMS AND PRIORITIES

6.1 Claims

6.1.a **Make-whole is not unmatured interest**. The debtor's credit agreement provided for a make-whole payment if the loan became or was declared to be due and payable before its original maturity. The make-whole amount was calculated as the excess of the discounted present value, at 0.5% over the yield to maturity of specified US Treasury securities, of the early payment amount, over the early payment amount. The loan accelerated automatically upon the debtor's bankruptcy. Section 502(b)(2) disallows a claim for interest on a loan that is unmatured as of the petition date. It applies also to the economic equivalent of interest. Interest is a charge for the use or forbearance of money that accrues over time. A liquidated damages clause is a provision that determines in advance the amount of damages payable for breach of contract. A make-whole "is not interest because it does not compensate [the lender] for [the borrower's] use or forbearance of the [lender's] money, it compensates the [lender] for [the borrower's] breach of a promise to use money." It is also not the equivalent of interest for the same reason and because it does not accrue over time. It compensates for the loss of interest. Therefore, it is a liquidated damages clause and is allowable as such and not disallowed as unmatured interest. *In re Ultra Petroleum Corp.*, ___ B.R. ___, 2020 Bankr. LEXIS 2999 (Bankr. S.D. Tex. 2020).

6.1.b **Collateral sold under a plan is valued at replacement cost.** The debtor operated a coal mine. In the operation, it used heavy equipment, which was subject to a security interest. The chapter 11 plan provided for a sale of the mine, including the equipment. The buyer did not allocate the purchase price between the equipment and the rest of the mine. The secured lender filed a proof of secured claim based on the replacement value of the equipment. Section 506(a) bifurcates a claim secured by collateral into an allowed secured claim equal to the lesser of the claim amount or the collateral value and an unsecured claim equal to any balance and directs that collateral valuation "be determined in light of the purpose of the valuation and of the proposed disposition or use" of the collateral. In *Assoc. Comm'l Corp. v. Rash*, 520 U.S. 953 (1997), the Supreme Court held that property that a chapter 13 debtor would retain and use in the operation of his business should be valued at replacement cost, as determined by the bankruptcy court. *Rash*'s principles apply equally in a chapter 11 case, and the reasons for use of replacement cost apply equally when the collateral is being sold, whether alone or as part of an operating business. Therefore, the court values the collateral at replacement cost, taking into account the current condition and possible depreciation of the equipment. *Murray Oak Grove Coal, LLC v. Bay Point Capital Partners II, LP (In re Murray Metallurgical Coal Holdings, LLC)*, 618 B.R. 220 (Bankr. S.D. Ohio 2020).

6.1.c **Unsuccessful credit bid does not set creditor's collateral value.** The debtor in possession auctioned its entire business but permitted bids for less than all of the business. One secured creditor, who had a lien on only the debtor's intellectual property, credit bid its claim for the IP. The bidding proceeded, and a higher bid for the whole business prevailed. The court determined the allocation of the proceeds by valuing the IP collateral and the value of other assets, which were subject to another creditor's lien. A secured creditor may credit bid up to the full amount of its secured claim. The highest bid, whether or not the bid of the secured creditor, determines the asset's value. Value of a creditor's collateral is not capped at the amount the secured creditor bids for it if there is a higher bid. *POLK 33 Lending, LLC v. THL Corp. Fin., Inc. (In re Aerogroup Int'l, Inc.)*, 620 B.R. 517 (D. Del. 2020).

6.1.d **Borrower's improper foreclosure claim against mortgage servicer debtor arose when borrower defaulted on mortgage.** The debtor serviced mortgages. A borrower defaulted postpetition but before the claims bar date. The borrowers had notice of the bar date and of the case but did not file a proof of claim. The reorganized debtor began foreclosure proceedings shortly after the plan effective date. The borrower answered and counterclaimed for damages for the reorganized debtor's failure to comply with the foreclosure procedures and give the notices required under the mortgage and federal and state law. The confirmed plan provided a broad discharge and injunction against litigation by any holder of a claim that arose before the effective date. The plan defined claim as broadly as section 101(5) does, which is sufficiently broad to encompass any possible right to payment, including a contingent claim. Courts apply the "fair contemplation" test to determine when a claim arises for breach of contract. Generally, a contingent claim arises when the claim is within the fair contemplation of the parties that the other party might breach the contract. Thus, contingent claims under a contract generally arise when the contract is executed. Because the borrower defaulted before the bar date, a claim for improper foreclosure was within the borrower's fair contemplation then and therefore arose then. The same analysis applies to claims arising under federal or state law related to the foreclosure. Therefore, the plan injunction bars the borrowers' counterclaims against the reorganized debtor. *In re Ditech Holding Corp.*, ___ B.R. ___, case no. 19-10412 (Bankr. S.D.N.Y. Nov. 30, 2020).

6.1.e **Layering subsidiary guarantors does not violate successor assumption obligation.** The borrower parent issued notes that were guaranteed by its parent and its newly formed holding company subsidiaries. The notes provided the guarantors to dispose of all their assets, but if the disposal was not to the borrower or parent, the obligations under the guarantees had to be expressly assumed by the transferee. Later that year, the borrower offered to exchange the notes for new notes that would be guaranteed by newly created subsidiaries of the subsidiary guarantors, giving the new notes structural seniority over the original notes. Such a "successor obligor" provision is common boilerplate in notes; they are not the consequence of particular negotiations, and their meaning does not depend on the parties' intentions. Whether there is a triggering transfer depends on the nature of the transfer and amount of assets transferred, including the overall effect of the transaction on the company. Here, there was no material change in the company or its assets. The addition of another layer of holding companies did not result in a material change in the guarantors' assets or effect a novel transaction. The operating subsidiaries remained available to satisfy the upper tier guarantees. Therefore, the transaction does not violate the original notes. *Whitebox Relative Value P'ners., LP v. Transocean Ltd.*, ___ F. Supp. 3d ___, 2020 U.S. Dist. LEXIS 237497 (S.D.N.Y. Dec. 16, 2020).

6.2 Priorities

6.2.a **"Hanging [suspension] paragraph" in section 507(a)(8)(A) applies in a chapter 11 case.** The state taxing authority asserted claims for franchise taxes for numerous tax years in the debtor's first two chapter 11 cases. During the second case, the debtor settled with the taxing authority on the claim amount and a payment schedule. The second case's confirmed plan provided that creditors, including the taxing authority, were enjoined from collecting any prepetition claims except as provided in the plan. After making three of the four required payments, the debtor filed a third chapter 11 case. The taxing authority asserted priority for its stipulated claim from the prior case. Section 507(a)(8)(A) grants priority to taxes on or measured by income if the taxes are less than three years old, are assessed within 240 days before bankruptcy or are still assessable. However, the "hanging paragraph" at the end of subparagraph (A) suspends the 240-day period for any period during which a collection stay was in effect under a confirmed plan in a prior case.

That paragraph applies here, so the taxing authority's claim is entitled to priority in the third case. *Buffets, LLC v. Calif. Franchise Tax Bd. (In re Buffets, LLC)*, 617 B.R. 880 (W. D. Tex. 2020).

6.2.b **Subordinated IRS lien on real property takes priority in insurance proceeds over senior liens.** The debtor secured two loans by a mortgage on his real property. The IRS agreed to subordinate a preexisting tax lien on the property to the mortgages in exchange for payment of a portion of the loan proceeds. The mortgages required the debtor to insure the property, but the mortgagees were not named as additional insured on the policy. The structure on the property burned down. The insurer paid the policy proceeds to the trustee. The tax lien attached to the insurance proceeds. Because they were not named as additional insureds on the policy, the mortgagees did not have ownership interests in the policy proceeds, but because the mortgages required insurance, they had equitable liens on the insurance proceeds. The tax lien in the policy proceeds has priority over the mortgagees' liens unless the mortgagees' liens were choate before the tax lien attached. A lien is choate when the identity of the lienor, the property subject to the lien, and the lien amount are all established. Although the lienors and the amounts were established, the property subject to the lien was not established until the insurance proceeds were paid (or at least until the debtor was entitled to receive them). The tax lien attached no later. Therefore, the tax lien has priority, despite the subordination agreement. *Wolinsky v. Frye (In re Frye)*, 620 B.R. 61 (Bankr. D. Vt. 2020).

7. CRIMES

8. DISCHARGE

8.1 General

8.2 Third-Party Releases

8.3 Environmental and Mass Tort Liabilities

9. EXECUTORY CONTRACTS

9.1.a **Sixth Circuit treats retention of possession under section 365(h) as assumption by the tenant of the lease.** The debtor entered into five integrated agreements. One sold a power plant to an operator. A second required the operator to provide power to the debtor. A third leased the land underlying the plant to the operator for $1 per year. And a fourth provided the debtor a guarantee from the operator's parent. In its bankruptcy, the debtor in possession rejected all five agreements. The operator elected under section 365(h) to remain in possession of the leased premises for the lease's remaining term. After the term expired, the debtor's successor, who acquired the land, brought a claim against the parent under its guarantee for environmental damages to the land. Rejection constitutes a breach. Rejection and assumption operate on the contract as a whole, not any single part or provision, including all integrated agreements that are treated as a single contract. Here, when the operator elected to assume the benefits of the lease by remaining in possession for the balance of the term, it also assumed all other obligations under the integrated agreements. Therefore, the parent remained liable on the guarantee, despite the debtor's rejection/breach of the agreements. *EPLET, LLC v. DTE Pontiac N., LLC*, ___ F.3d ___, 2021 U.S. App. LEXIS 253 (6th Cir. Jan. 5, 2021).

9.1.b **A contingent duty or obligation under a contract may be sufficiently material to render the contract executory.** The debtor financed its credit card receivables by selling existing and future receivables to a counterparty under a sale and servicing agreement. In the agreement, the debtor agreed to continue to sell future receivables and to service them. The counterparty agreed to make continuing payments based on the sale of the new receivables. The agreement contained "trigger events," the occurrence of which would terminate the counterparty's obligation to make payments to the debtor, but only temporarily. A debtor in possession may reject an executory contract. An executory contract is one under which the breach of an obligation of one party would excuse the other party's performance. Where the contract provides for termination upon a party's breach of an obligation, the obligation is a material one for these purposes. Where an obligation's termination is temporary, subject to reinstatement upon the obligee's cure, the obligation remains material for these purposes. A contingent obligation is also sufficient to render a contract executory. Therefore, the sale and servicing agreement is an executory contract the DIP may reject. *In re Avianca Holdings S.A.*, 618 B.R. 684 (Bankr. S.D.N.Y. 2020).

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 Code does not preempt tortious inference claim against nondebtor who caused the debtor to violate its contract in a way that affects the bankruptcy.** The single asset real estate debtor took out a mortgage loan, which prohibited other borrowings and certain other corporate actions that would make the Bankruptcy Code's single asset real estate provisions inapplicable. When the debtor encountered financial difficulty, its principals caused it to borrow more money and violate the other loan covenants so that it would not qualify for SARE treatment under the Code. When the state court lifted a temporary stay of foreclosure on the mortgage, the debtor filed a chapter 11 case and ultimately proceeded to confirm a plan under which the lender acquired the property through a credit bid. The lender initially moved to dismiss the case as filed in bad faith, but when the bankruptcy court ruled the motion premature, it withdrew the motion. It later sued the principals for tortious interference with the contract between the lender and the borrower, claiming damages from the breaches resulting in a longer, more expensive, and lower value result in the bankruptcy case. Federal law may preempt otherwise applicable state law either expressly or by implication. Implied preemption results when federal law occupies the field or when the state law stands as an obstacle to the implementation of the federal law. Because the state action here was between only nondebtors and the Code does not suggest a Congressional intent to interfere with state court authority to provide traditional tort remedies among nondebtors, field preemption does not apply. Because the action between the nondebtors addressed only actions before the bankruptcy, which did not interfere with the bankruptcy or assert any bankruptcy-related claims such as a bad faith or abusive filing, the maintenance of the action does not stand as an obstacle to the conduct of the bankruptcy case, and obstacle preemption does not apply. *Sutton 58 Assoc LLC v. Pilevsky*, ___ N.Y. ___ (Nov. 24, 2020).

11.2 Sanctions

11.3 Appeals

11.3.a **Rule 8002's notice of appeal deadline is not jurisdictional.** The debtor filed a notice of appeal after the 14-day period specified in Rule 8002. The appellee moved to dismiss on the ground that the appellate court lacked jurisdiction. Section 158(c)(2) of title 28 provides an appeal shall be taken in the time provided by Rule 8002. Rule 8002(a)(1) requires an appeal to be filed within 14 days after entry of judgment. An appeal deadline is jurisdictional if a statute provides the time limit, but not if a rule does. Otherwise, Congress would be delegating to the rules-making process the determination of the scope of the federal courts' jurisdiction, which the Constitution does not permit. Therefore, the deadline is not jurisdictional. However, the notice of appeal was still untimely, and the appeal must be dismissed. *Tennial v. REI Nation, LLC (In re Tennial)*, 978 F.3d 1023 (6th Cir. 2020).

11.3.b **Appeal from confirmation order is equitably moot when requested relief would violate the Code.** The debtor confirmed a plan that paid trade creditors in full and nothing to unsecured note holders, one of whom objected and appealed. The district court denied a stay, and the parties consummated the plan. An appeal from a confirmation order is equitably moot if the plan has been substantially consummated and granting relief would fatally scramble the plan or significantly harm third parties who have justifiably relied on confirmation. Only two forms of relief would be available to the appellant: requiring payment in full of his claim, or requiring payment in full of his class. The former would violate section 1123(a)(4)'s equal treatment rule; the latter would fatally scramble the plan. Therefore, the appeal is moot and is dismissed. *In re Nuverra Environmental Solutions, Inc.*, ___ F.3d ___, 2021 U.S. App. LEXIS 244 (3d Cir. Jan. 6, 2021).

11.4 Sovereign Immunity

12. PROPERTY OF THE ESTATE

12.1 Property of the Estate

12.1.a **Funds used to purchase a cashier's check remain property of the debtor until the check is finally honored.** The debtor's officer drew a cashier's check on the debtor's bank account. The debtor's owner asserted fraud and demanded the bank stop payment on the check, which the bank did and retained the funds in a suspense account at the bank. Before ownership of the funds was resolved in state court litigation among the parties, the debtor filed bankruptcy. Property of the estate includes all interests of the debtor in property as of the commencement of the case. A debtor retains an interest in funds in its bank account against which a check has been drawn until the check is honored. For fraudulent transfer avoidance purposes, the debtor's purchase of a cashier's check, which transfers funds from the debtor's account to the bank's, is not an "initial transfer," and the bank is a mere conduit. Similarly here, the purchase of the cashier's check did not render the bank the transferee of the funds the check represented, which remained property of the debtor until the check was finally honored. *Gould v. BOKF, N.A. (In re Artfolio LLC)*, 618 B.R. 29 (Bankr. W.D. Ok. 2020).

12.2 Turnover

12.3 Sales

13. TRUSTEES, COMMITTEES, AND PROFESSIONALS

13.1 Trustees

13.2 Attorneys

13.2.a **Court disallows oversecured creditors' fees as unreasonable.** The chapter 12 debtor's secured creditor was substantially oversecured. The debtor proposed four different plans during the case. The creditor's counsel spent substantial time preparing for the confirmation hearing for each plan, even though the issues were largely the same for each one. Fees totaled about $220,000, while debtor's counsel's fees totaled only $160,000, at higher hourly rates. Section 506(b) allows an oversecured creditor to recover reasonable attorneys' fees provided in the credit agreement; it does not provide unfettered license to bill. Counsel's duplicative efforts and overall fees were not reasonable, especially in light of debtor's counsel's fees by comparison. The court disallows fees to that extent. *In re Kurtenbach*, ___ B.R. ___, 2020 Bankr. LEXIS 3336 (N. D. Iowa Nov. 30, 2020).

13.3 Committees

13.3.a **Committee counsel need not be disinterested.** The committee sought approval under section 1103 of the employment of counsel who had, three years before the chapter 11 case, represented one of the debtor's 50% shareholders in estate planning matters. The representation had concluded. Section 1103 authorizes a committee to employ counsel who does not "represent any other entity having an adverse interest in connection with the case." Section 327(a)'s disinterestedness requirement does not apply. Therefore, the counsel's prior representation of a shareholder is not disqualifying. However, the court notes that section 328, which governs compensation of committee professionals, permits the court to deny compensation "if, at any time during such professional person's employment under section ... 1103, such professional person is not a disinterested person" but leaves application of that section (or not) to the determination of any fee application. *Bingham Greenebaum Doll, LLP v. Glenview Health Care Facility, Inc. (In re Glenview Health Care Facility, Inc.)*, 620 B.R. 582 (6th Cir. B.A.P. 2020).

13.4 Other Professionals

13.5 United States Trustee

14. TAXES

15. CHAPTER 15—CROSS-BORDER INSOLVENCIES