JENNER&BLOCK

Recent Developments in Bankruptcy Law, April 2018

(Covering cases reported through 581 B.R. 694 and 882 F.3d 136)

RICHARD LEVIN
Partner
+1 (212) 891-1601
rlevin@jenner.com

TABLE OF CONTENTS

1. AUTOMATIC STAY

1.1 Covered Activities

1.2 Effect of Stay

1.3 Remedies

2. AVOIDING POWERS

2.1 Fraudulent Transfers

2.1.a **Supreme Court narrows financial transactions avoiding power safe harbors.** While insolvent, the debtor significantly overpaid for the stock of a competitor. The debtor funded the purchase price by a bank loan, which was wired directly to another bank who acted as escrow agent for the purchase transaction. At closing, the escrow bank paid the selling shareholders. After the debtor filed bankruptcy, the trustee brought an action to avoid and recover the payment to the selling shareholder as a constructively fraudulent transfer. Section 546(e) provides that notwithstanding the trustee's avoiding powers, a trustee may not avoid a transfer that is a settlement payment or a payment made in connection with a securities contract "by or to (or for the benefit of)" a financial institution. Here, a financial institution made the initial payment into escrow, and another financial institution made the payment to the shareholder, though neither financial institution had any beneficial interest in the payment. Section 546(e) is closely coordinated with the avoiding powers themselves, so it should be construed as negating only the transfer that the trustee seeks to avoid under the avoiding powers. Here, the transfer the trustee seeks to avoid is the transfer to the selling shareholder, not either of the intermediate transfers by and to the two financial institutions. Because the transferee of the transfer that the trustee seeks to avoid is not a financial institution (or any other kind of entity that section 546(e) protects), the safe harbor by its terms does not apply. *Merit Mgmt Group, LP v. FTI Consulting, Inc.*, 583 U.S. ___, 138 S. Ct. 883 (2018).

2.1.b **Trustee may transfer section 544(b) claims.** The debtor's largest creditor had sued the debtor and numerous transferees before bankruptcy for fraudulent transfers the debtor had made. After bankruptcy, the trustee took over the claims under section 544(b). After a partial settlement of one action, the trustee transferred the remaining claims back to the creditor, which continued to pursue them in district court. The creditor agreed to waive its claim in the case and to pay over to the trustee any amount by which its recovery exceeded its underlying nondischargeable claim against the debtor. A trustee may not transfer an asset that is not property of the estate. A majority of decisions hold that a section 544(b) claim is property of the estate. Although some courts have held that a trustee may not transfer avoiding power claims that arise only under the Bankruptcy Code, a section 544(b) claim differs, because the claim exists before bankruptcy, and the trustee only steps into the creditors' shoes for such a claim. The trustee may transfer such claims where doing so is necessary and beneficial to the estate. In this case, the transfer facilitated a partial settlement, which brought funds into the estate, eliminated the largest claim against the estate, and provided the possibility of additional recovery if the creditor pursued the claim successfully. Accordingly, the court approved the transfer. *Cedar Rapids Lodge & Suites, LLC v. Seibert*, ___ B.R. ___, 2018 U.S. Dist. LEXIS 47912 (D. Minn. Feb. 7, 2018).

2.1.c **"*Jewel*" waiver is not a transfer of property.** Before a law firm partnership dissolved, its partners signed an amendment to their partnership agreement that waived any claim of the partnership to any portion of fees that the partners might earn at their new firms, a so-called *Jewel v. Boxer* waiver. After dissolution, partners joined other law firms and performed work on matters previously handled at the dissolved law firm on an hourly fee basis. The dissolved law firm filed a chapter 11 petition. After plan confirmation, the liquidating trustee sued the partners' new law firms for a share of the profits the new firms earned from the transferred hourly-rate matters, claiming that the waiver transferred property of the law firm to the partners and their new law firms. Because clients have the right to retain and dismiss counsel at any time, the law firm did not have a property interest in future hourly-rate fees that the clients might pay to the former partners. The law firm had a mere expectancy, the loss of which upon dissolution and transfer of pending matters did not constitute a transfer of an interest in property. *Heller Ehrman LLP v. Davis Wright Tremaine LLP*, 4 Cal. 5th 467 (2018).

2.2 Preferences

2.3 Postpetition Transfers

2.4 Setoff

2.4.a **Plan provision for "substantive consolidation for voting and distribution" does not combine debtors to create setoff mutuality.** The state paid the debtor the amount of tax credit certificates shortly after the order for relief but before it had audited the credits. The debtor's parent, also in chapter 11, had separate tax credit certificates, which the state had not paid. The debtors' plan provided for "substantive consolidation for voting and distribution purposes only." It also prohibited the assertion of any setoff or recoupment. The court confirmed the plan. After confirmation, the state sought to audit the debtor's tax credits and to offset any overpayment amount against the tax credit certificates the debtor's parent owned. Section 553(a) provides that the Bankruptcy Code does not affect the right of a creditor to offset mutual prepetition debts and credits, but setoff requires mutuality. Section 1141(d) provides a chapter 11 confirmation order discharges all prepetition debts. Section 553(a)'s broad language permits a creditor to use a prepetition setoff defensively, despite the broad discharge in section 1141(d). The plan provision providing for substantive consolidation did not actually consolidate the debtor and its parent; it provided for consolidation only for voting and distribution purposes and was not a true consolidation. Therefore, the debtor and its parent remained separate entities. Accordingly, the state's claim against the debtor and its debt to the parent are not mutual and not subject to offset. *In re Cook Inlet Energy, LLC*, 580 B.R. 842 (Bankr. D. Alaska 2017).

2.5 Statutory Liens

2.6 Strong-arm Power

2.7 Recovery

2.7.a **Trustee may bring recovery action within one year after termination of avoidance action, whether or not the transfer is avoided.** The debtor conducted a fraudulent scheme. In the course of the scheme, the debtor paid kickbacks to a purported customer. The customer had a single shareholder and officer, who caused the customer to pay himself from the debtor's payments to the customer. The trustee sued the customer to avoid the payments as fraudulent transfers but later dismissed the action after determining that the customer was defunct and could not answer a judgment. Within one year after dismissal, but more than two years after the petition date, the trustee sued the sole shareholder and officer to recover the transfers, alleging that the shareholder was an entity for whose benefit the initial transfers were made as well as a subsequent transferee of the transfers. Section 550(a) permits the trustee to recover an avoided transfer from the initial transferee or an entity for whose benefit the transfer is made. Section 550(d) requires the action to recover be commenced within one year after the transfer is avoided. If the trustee brings an avoidance action within section 546(a)'s two-year statute of limitation for avoidance actions but either settles the avoidance action without an admission of liability or dismisses the avoidance action where it is useless to pursue it, the trustee may commence a recovery action under section 550(a) within section 550(d)'s one-year period after the termination of the avoidance action. Any other result would require the trustee to continue to pursue a pointless avoidance action to enable recovery against an entity for whose benefit the transfer was made or a subsequent transferee. Because the trustee alleged the transfers were made for the benefit of the sole shareholder, the court permits the trustee to pursue the recovery action against him, despite having dismissed the initial recovery action. *Geltzer v. ContinuityX, Inc. (In re ContinuityX, Inc.)*, 582 B.R. 124 (Bankr. S.D.N.Y. 2018).

2.7.b **Court determines trustee' remaining single satisfaction recovery limitation after a settlement by analyzing each underlying transfer.** The trustee brought an action against the initial transferee and a subsequent transferee to avoid multiple transfers as fraudulent transfers and to recover their value. The initial transferee had transferred only some of the initial transfers to the subsequent transferee. The initial transferee and the trustee settled for an amount substantially less than the total value of all the transfers. The subsequent transferee sought to offset the full settlement amount against its potential liability. Section 550 permits the trustee to recover an avoided transfer from the initial transferee or a subsequent transferee, but section 550(d) limits the trustee to only a single satisfaction in the aggregate. Where the trustee recovers part of the fraudulent transfers' value from the initial transferee by settlement, the court must determine the settlement value's effect on the subsequent transferee's potential liability under the "single satisfaction" rule. The court rejects an allocation solely to the transfers that were not followed by a subsequent transfer as too favorable to the trustee and harsh to the subsequent transferee, rejects the opposite result for the opposite reason, and rejects a pro rata allocation of the settlement amount among all transfers as potentially unfair based on the nature of each transfer. The court also refuses to allocate the settlement based on the settling parties' agreement, because the subsequent transferee is not a party to those negotiations, and the settling parties have incentives that could result in an unfair result to the subsequent transferee. Instead, the court concludes that it must allocate the settlement amount among each of the challenged transfers based on such factors as strength of the claims, collectability, and other factors used in evaluating a settlement. In this case, the court determines those factors apply equally to all the settled transactions and so pro rates the settlement amount among all the transfers. *Segner v. Ruthven Oil & Gas, LLC (In re Provident Royalties, LLC)*, 581 B.R. 185 (Bankr. N.D. Tex. 2017).

2.7.c **Section 560 protects collateral liquidation and distribution upon termination of a swap with the debtor.** The debtor entered into several transactions involving a credit default swap between the debtor and synthetic collateralized debt obligation SPVs (issuers), which issued notes under an indenture. The notes' proceeds were held as collateral for the issuers' obligations under both the notes and the swaps. After the debtor filed bankruptcy, the indenture trustee sent a notice of default and termination under the swaps, liquidated the collateral and distributed the proceeds to the noteholders. Section 560 exempts from the automatic stay and the avoiding powers "the exercise of any contractual rights of any swap participants … to cause the liquidation, termination or acceleration of one or more swap agreements" based on an ipso facto clause. Courts interpret section 560 broadly to protect swap participants. The section protects not only the liquidation of the amount owing upon swap termination, which by itself would not provide security to a nondefaulting swap participant, but also the liquidation of the collateral and its distribution to the noteholders, which enables the swap participant to liquidate, that is, bring the transaction to a close. Therefore, the court dismisses the debtor in possession's complaint to avoid and recover the distributions. The section also applies to permit the indenture trustee to liquidate the swap, even though the trustee was not the "swap participant," because the indenture trustee was exercising the right "of" the swap participant, and the section does not require that the exercise be "by" the swap participant. *Lehman Bros. Special Financing Inc. v. Bank of Am. N.A. (In re Lehman Bros. Holdings Inc.)*, ___ B.R. ___, 2018 U.S. Dist. LEXIS 42548 (S.D.N.Y. March 14, 2018).

3. BANKRUPTCY RULES

4. CASE COMMENCEMENT AND ELIGIBILITY

4.1 Eligibility

4.2 Involuntary Petitions

4.2.a **Lender may not offset prepetition claim against section 303(i) judgment for bad faith filing.** The lender obtained a judgment against the debtor on its claim and then, with affiliates, filed an involuntary petition against the debtor. The debtor obtained dismissal of the involuntary and a judgment under section 303(i) against the lender and its affiliates for actual and punitive damages for a bad faith filing. Before obtaining the judgment, the debtor transferred the claim underlying the judgment to a third party. The lender sought to offset the two judgments, because the debtor was likely judgment proof. Setoff requires mutuality. In this case, mutuality was uncertain, because the debtor's judgment was against the lender's affiliates as well as the lender, and the debtor had assigned the underlying claim. Moreover, a court may deny setoff where the creditor has committed inequitable, illegal, or fraudulent acts. Section 303(i) discourages abuse of the involuntary bankruptcy process. The lender's bad faith in filing the petition provides equitable grounds to deny the setoff. *U.S. Bank, N.A. v. Rosenberg*, 581 B.R. 424 (E.D. Pa. 2018).

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 **Section 1129(a)(10) requires one accepting class per plan, not per debtor.** The debtor comprised two operating hotel entities, two mezzanine entities, and a holding company. The operating debtors' lender purchased the mezzanine debtors' loans. The debtor proposed a plan to sell the hotels to a third party and to restructure the operating debtors' loan. Creditor classes of the operating debtors accepted the plan, but no mezzanine debtor creditor classes did. Section 1129(a)(10) requires as a confirmation condition that "at least one class of claims that is impaired under the plan has accepted the plan." The statute refers to only one plan, so under its plain language, acceptance of the plan by a single class suffices, even if the plan covers more than one debtor. The rule of construction that "the singular includes the plural" does not change the result, as applying the rule would result in construing the condition as "at least one class of claims that is impaired under the plans has accepted the plans," and the per-plan approach is consistent with this reading as well. In the bankruptcy court, the lender had waived any argument, which it raised on appeal, that the per-plan approach effected a de facto substantive consolidation of the estates, so the court did not consider that, although a concurrence opined that consolidation should change the analysis. *JPMCC 2007-C1 Grasslawn Lodging, LLC v. Transwest Resort Props. Inc. (In re Transwest Resort Props. Inc.)*, 881 F.3d 724 (9th Cir. 2018).

5.5.b **Partial dirt-for-debt plan may meet "indubitable equivalent" cram down standard.** The bankruptcy court confirmed a cram down partial dirt-for-debt plan that valued the surrendered land as sufficient to pay the remaining balance of the secured lender's claim. Section 1129(b)(2)(A)(iii) permits confirmation over a secured creditor class's rejection if the plan provides for distribution of the indubitable equivalent of the secured claim. The inherent uncertainty of valuations do not require a full collateral surrender to satisfy section 1129(b)(2)(A)(iii); a plan may provide for surrender of some of the collateral at the valuation the bankruptcy court determines. Here, the bankruptcy court determined the value, which was adequate, with an additional cash payment, to satisfy the lender's claim, so confirmation was proper. *Bate Land Co. v. Bate Land & Timber LLC (In re Bate Land & Timber LLC)*, 877 F.3d 188 (4th Cir. 2017).

6. CLAIMS AND PRIORITIES

6.1 Claims

6.1.a **Municipal Bankruptcy Amendments do not require turnover of pledged special revenues.** The debtor issued revenue bonds, pledging the revenues from a system to bondholders. After filing a case under Title III of PROMESA, which is a bankruptcy-like case that incorporates most of chapter 9's provisions, the debtor continued to collect and hold the revenues, some of which the debtor and the bondholders stipulated were "special revenues." The bondholders sought an order requiring turnover of the pledged special revenues that the debtor held. Section 928(a) provides that a prepetition security interest in special revenues continues in special revenues the debtor receives postpetition, despite section 552(b), which cuts off a security interest in postpetition receipts that are not proceeds. Section 922(d) provides an exception to the automatic stay for the "application of pledged special revenues" consistent with section 928. PROMESA section 305, which mirrors Bankruptcy Code section 904, prohibits the court from interfering with the debtor's property or revenues. Section 928(a)'s plain language operates only to preserve the bondholders' security interest in postpetition revenues, nothing more. It does not require turnover. Similarly, section 922(d) operates only to exempt from the automatic stay the application of pledged special revenues, whether by the debtor, the bondholders, or the indenture trustee, nothing more. It does not require turnover. Section 305 prohibits the court from interfering with the debtor's property and therefore from ordering the debtor to turnover pledged special revenues. Therefore, the court dismisses the bondholders' complaint. *Assured Guar. Corp. v. Commonwealth of Puerto Rico (In re Fin. Oversight & Mgmt. Board for Puerto Rico)*, ___ B.R. ___, 2018 U.S. Dist. LEXIS 34837 (D.P.R. Jan. 30, 2018).

6.1.b **Reorganized debtor's stock is not proceeds of collateral.** Two groups of secured creditors shared substantially all the debtor's assets as collateral. Early in the chapter 11 case, the court approved a cash collateral stipulation that recognized the creditors' rights under section 552(b) to ensure that the security interest attached to proceeds of the collateral. The debtor completed an internal reorganization, in which it transferred all its assets to a newly-formed subsidiary and spun off the subsidiary to the creditors by distributing to the prepetition secured creditors the stock in the new subsidiary, all cash on hand, and cash proceeds of the new subsidiary's borrowings. An intercreditor agreement allocated collateral proceeds received in connection with a sale or other disposition of collateral between the two groups. The plan provisions controlled allocation of other distributions. Although the creditors received the stock distribution in exchange for a release of their security interests in the collateral, the spin-off was not a sale that generated proceeds. Nor was it a "disposition," because the collateral was not transferred to another. Rather, it was a debt-for-equity reorganization where the collateral was transferred internally, and the reorganized entity retains control of the collateral. Section 552(b) provides that a security interest in collateral attaches to proceeds. However, it requires tracing of the proceeds to the petition-date collateral. Even where a secured creditors has a security interest in all or substantially all of the debtor's assets, postpetition cash is not necessarily proceeds of petition-date collateral. Accordingly, because the creditors did not trace the cash to petition-date collateral, the cash payments were not proceeds that were subject to the intercreditor agreement's allocation provisions. *Del. Trust Co. v. Wilmington Trust, N.A. (In re Energy Future Holdings Corp.)*, ___ B.R. ___, 2018 U.S. Dist. LEXIS 52476 (D. Del. Mar. 29, 2018).

6.1.c **Payment of a recovery judgment does not vitiate other grounds for objection to a claim.** The debtor issued a note to repurchase stock from an investor and paid a portion of the note within four years before bankruptcy. The investor filed a proof of claim for the balance owing on the note. The trustee avoided the prepetition payment and obtained a judgment for recovery of the payment. The investor paid the amount of the judgment. The trustee then objected to the investor's claim. Section 502(d) disallows "any claim of any entity from which property is recoverable under section …550 …, unless such entity …has paid the amount, or turned over any such property, for which such entity is liable …." Payment of the judgment undoes the effect of disallowance under section 502(d), but it does not entitle the claimant to an allowed claim if there are other grounds for objection, as there were in this case. *RNI-NV Ltd. P'shp. v. Field (In re Maui Indus. Loan & Fin. Co.)*, 580 B.R. 886 (D. Haw. 2018).

6.1.d **State law determines whether a claimant is an employee and the burden of proof.** The debtor operated gas stations. One of the debtor's managers hired the claimant to work the night shift as a floater among several of the stations. The manager paid the claimant off the books in cash. When the debtor filed its petition, the claimant filed a proof of claim for his unpaid wages and asserted priority. Section 507(a) grants priority to a claim for "wages … owed to an individual." Wages derive only from an employment relationship, not a contractual relationship. An employment relationship requires that the employer control and direct the manner of the employee's work. The Fair Labor Standards Act and the New York Labor Law, which use essentially that same definition of employee, are relevant to the determination. The court should apply state law in determining the allowability of a claim. State law includes the burden of proof. Although Bankruptcy Rule 3001 imposes the burden of persuasion on the claimant, the objector's obligation to rebut the claimant's prima facie case is defined by the state law burden of proof rules. The court remands to the bankruptcy court to determine the claimant's claim in accordance with these principles. *Gyalpo v. Holbrook Devel. Corp.*, 577 B.R. 629 (E.D.N.Y. 2017).

6.2 Priorities

6.2.a **Section 546(e) gives DIP lender priority over prepetition supplier's reclamation claim.** The debtor's secured lender entered into a secured postpetition financing agreement with the debtor in possession on the petition date. The order approving the financing provided that it did not "impair, extinguish, subordinate or prime any party's rights under section 2-702 of the [U.C.C.], subject, however, to section 546(c) of the Bankruptcy Code." A prepetition inventory supplier demanded reclamation of its good under U.C.C. section 2-702 five days after the petition date. Section 546(e) makes a seller's reclamation rights "subject to the prior rights of a holder of a security interest." Here, the lender's lien chain on the debtor's goods remained unbroken. Although section 2-702 might have permitted reclamation, section 546(e) subordinates that claim to the lender's security interest. Therefore, the court denies the seller's reclamation claim. *Whirlpool Corp. v. hhgregg, Inc. (In re hhgregg), Inc.)*, 578 B.R. 814 (Bankr. S.D. Ind. 2017).

6.2.b **Cigarette taxes whose collection were delayed by appeal are not entitled to priority.** The state imposes an excise tax on wholesale cigarette sales and requires sellers to file tax returns reflecting the amounts owing. The state taxing authority audited the debtor's sales and tax returns and determined that the debtor had underpaid its taxes for sales that occurred more than seven years before bankruptcy. The debtor appealed to the taxing authority appeal board. The appeal board issued its ruling, which required further calculations by the taxing authority, after the debtor's bankruptcy. The taxes did not become due and payable until the appeal process concluded. Section 507(a)(8)(E)(i) grants priority to an excise tax on "a transaction occurring before the date of the filing of the petition for which a return, if required, is last due … after three years before the date of the filing of the petition." The "flush paragraph" following section 507(a)(8) provides for extension of a period in section 507(a)(8) "for any period during which a governmental unit is prohibited under applicable law from collecting a tax as a result of a request by the debtor for a hearing and an appeal of any collection action taken or proposed against the debtor." Because the taxes were not due and owing until after final determination, the debtor's appeal addressed only liability for the taxes, not any proposed collection action against the debtor. Therefore, the flush paragraph extension does not apply, and the taxes were too old to be entitled to priority. *In re USA Sales, Inc.*, 580 B.R. 852 (Bankr. C.D. Cal. 2018).

7. CRIMES

8. DISCHARGE

8.1 General

8.1.a **Bankruptcy court may deny arbitration of an action to enforce the discharge injunction.** A bank that had charged off the debtor's credit card debt and reported the charge off to the credit reporting agencies did not report the discharge to the agencies. The debtor alleged the failure to report the discharge operated as an act to collect the discharged debt, because debtors would be more inclined to pay the charged-off debts to clear their credit reports. The debtor brought a class action against the bank for damages for violation of the discharge injunction. The credit card agreement required arbitration of disputes arising from the agreement. The Federal Arbitration Act establishes a federal arbitration policy in favor of arbitration, but in a core proceeding in bankruptcy, the bankruptcy court has discretion not to order arbitration where arbitration would present an inherent conflict with the Bankruptcy Code. The discharge injunction embodies the fundamental fresh start policy of the Code. Requiring arbitration to enforce the discharge could seriously jeopardize the effectiveness of the discharge. The bankruptcy courts have the power to enforce their own orders, including the discharge order. Therefore, arbitration of disputes involving violation of the discharge injunction presents an inherent conflict with a central policy of the Code, and a bankruptcy court may property exercise discretion to deny arbitration. *Anderson v. Credit One Bank, N.A. (In re Anderson)*, 884 F.3d 382 (2d Cir. 2018).

8.2 Third-Party Releases

8.3 Environmental and Mass Tort Liabilities

9. EXECUTORY CONTRACTS

9.1.a **Contract rejection releases the nondebtor counterparty from any liability for a postpetition breach.** The liquidating trustee under a chapter 11 plan sued the debtor's supplier for postpetition violations of the supply agreement, which the debtor in possession had rejected during the chapter 11 case. After the petition date, an executory contract is enforceable by the debtor in possession but not against the debtor in possession. Rejection of the contract constitutes a breach as of the time immediately before the filing of the petition. A breach relieves the counterparty of any future performance obligations. As a result, the rejection relieved the supplier of any liability for postpetition breach, even a breach that occurred before actual rejection. *Lauter v. Citgo Petroleum Corp.*, ___ B.R. ___, 2018 U.S. Dist. LEXIS 21065 (S.D. Tex. Feb. 8, 2018).

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 judge has constitutional authority to sanction counsel for contempt for disobeying orders in the bankruptcy case.** The bankruptcy judge ordered counsel under section 542(e) to provide information regarding his representation of numerous chapter 13 debtors to determine whether disgorgement under section 329 was required. Counsel made no sincere effort to comply. After notice and a hearing, the court sanctioned counsel for contempt, prohibiting him from filing any chapter 13 cases in the district for six months and requiring him to take 12 hours of ethics education. Under Article III, without the defendant's consent, a bankruptcy court may not issue a final judgment against a defendant on a state-law claim or cause of action that is not resolved in ruling on the defendant's proof of claim. Because the bankruptcy judge's orders were issued under Bankruptcy Code provisions and related to actions in bankruptcy cases, the sanctions order was not based on a state law claim or cause of action but arose in the bankruptcy case. A bankruptcy judge has constitutional authority to issue such an order. *Critique Servs., LLC v. Reed (In re Reed)*, ___ F.3d ___, 2018 U.S. App. LEXIS 10416 (8th Cir. Apr. 25, 2018).

11.1.b **Bankruptcy court may not release maritime lien on ship that is subject to admiralty court's in rem jurisdiction.** An injured seaman sued his employer *in personam* and its ship *in rem* in admiralty in the district court. An injured seaman's claim for "maintenance and cure" after an injury operates as a maritime lien on the ship. After the district court acquired *in rem* jurisdiction over the ship, the employer filed a chapter 7 petition. The district court stayed proceedings because of the bankruptcy automatic stay, but the bankruptcy court granted stay relief to permit the liquidation of the claim. The bankruptcy court then approved a sale of the ship free and clear of the seaman's maritime lien, and the trustee then claimed that the seaman's claims became moot. Section 362(a)(4) stays "any act to create, perfect, or enforce any lien against property of the estate." However, under an 1898 Supreme Court decision, a seaman's maritime lien is a "sacred lien," and in general, maritime liens differ from liens on land-based assets. Because Congress did not overrule this principle by expressly including maritime liens in section 362(a)(4), the stay does not apply to maritime liens. The court that first obtains *in rem* jurisdiction over an asset prevents another court from obtaining jurisdiction over the asset. Once the district court acquired *in rem* jurisdiction over the ship, the bankruptcy court did not have *in rem* jurisdiction to adjudicate the seaman's maritime lien. Even if it did, a maritime lien stays with the ship until extinguished through the application of admiralty law, and a bankruptcy court may release such a lien only under admiralty law, not under the bankruptcy power. Because the seaman did not submit to admiralty jurisdiction in the bankruptcy court, the court's free and clear sale order did not release the lien. *Barnes v. Sea Haw. Rafting, LLC*, ___ F.3d ___, 2018 U.S. App. LEXIS 7740 (9th Cir. Mar. 28, 2018).

11.2 Sanctions

11.3 Appeals

11.3.a **Appellate review of an "insider" determination is only for clear error.** The real estate LLC debtor had two principal creditors, a secured creditor and its managing member, which held a $2.76 million unsecured claim. After bankruptcy, one of the five managing member directors approached a close personal and business friend and offered on behalf of the managing member to sell its claim to him for $5,000. The claim buyer did not live or share expenses with his director friend, and neither controlled the other in their business relationships. Before the purchase, the buyer had no relationship with the managing member or its other directors and knew little of its business. After the sale, the debtor proposed a plan that distributed $30,000 on the unsecured claim. The buyer did not know the plan's terms before his purchase, which he made as a speculative investment. The buyer accepted the plan, creating an impaired accepting class; the secured creditor did not accept and objected to confirmation. Section 1129(a)(10) requires as a confirmation condition that at least one impaired class accept the plan, not counting any insider's acceptances. Section 101(31) defines insider to include persons with certain defined formal relations with the debtor, generally one with a sufficiently close formal relationship to warrant special treatment or scrutiny. A non-statutory insider is one who has any other sufficiently close relationship to fall within the purpose of the definition. Three kinds of issues determine whether a person is a non-statutory insider, one legal, one factual, and one a combination of the first two. The courts of appeals set the legal standard; the bankruptcy courts' selection of the legal standard is subject to *de novo* review. The bankruptcy court determines the basic or historical facts about the relationship between the alleged insider and the debtor, which is subject to clear error review. The bankruptcy court applies the legal standard to the facts to decide whether the facts meet the legal standard, a so-called mixed question of law and fact. The standard for review of such a determination depends on whether the determination is primarily factual (a detailed examination of the facts) or legal (requiring amplification of the legal standard or development of auxiliary legal principles to apply in other cases). The legal rule here is essentially whether the parties' transaction was at arms' length, which is a factually-driven determination. Therefore, the standard of review is for clear error. Because the bankruptcy court found the claim buyer was not an insider and the court of appeals reviewed only for clear error, the Court affirms the judgment. A dissent questions whether the legal standard was proper, but the certiorari grant excluded consideration of that question. *U.S. Bank, N.A. v. Village at Lakeridge, LLC*, 583 U.S. ___, 138 S. Ct. 960 (2018).

11.3.b **Secured lender's appeal from confirmation order is not equitably moot where only relief is increased payments.** The bankruptcy court confirmed a cram down partial dirt-for-debt plan that valued the surrendered land as sufficient to pay the remaining balance of the secured lender's claim. There were few other creditors. The lender appealed, claiming the land valuation and the amount of postpetition interest the court allowed were too low, and sought a stay pending appeal, which the district court and the court of appeals denied. An appeal is equitably moot if, because of the passage of time, effective relief on appeal has become impractical, imprudent, and therefore inequitable. Relevant factors include whether the appellant has obtained a stay, whether the plan has been substantially consummated, whether appellate relief would affect the plan's success, and whether relief would affect third parties' interests. Here, the remedy if the bankruptcy court erred was to increase the reorganized debtor's payments to the lender. It would not affect other creditors, whose claims were satisfied under the plan. The case is essentially a two-party dispute. Under the circumstances, the appeal is not equitably moot. *Bate Land Co. v. Bate Land & Timber LLC (In re Bate Land & Timber LLC)*, 877 F.3d 188 (4th Cir. 2017).

11.4 Sovereign Immunity

12. PROPERTY OF THE ESTATE

12.1 Property of the Estate

12.1.a **Determination of attachment of PACA trust requires true sale analysis of factoring agreement.** The debtor produce dealer factored its accounts. Under the Perishable Agricultural Commodities Act, the debtor held the produce it purchased and their proceeds (accounts receivable from its customers) in trust for its grower suppliers. However, the trust assets are no longer held in trust if the debtor sells them in a commercially reasonable manner. Here, the growers claimed that the debtor's factoring arrangement was not a true sale of its accounts receivable but a secured lending arrangement. Because PACA releases the trust on assets only upon sale, the court must determine whether the factoring arrangement was a true sale or a secured lending arrangement. In doing so, the court should not be guided by the labels the parties use in the agreement but should apply a transfer-of-risk test to determine whether the accounts receivable were truly sold. *S & H Packing & Sales Co. v. Tanimura Distrib., Inc.*, 883 F.3d 797 (9th Cir. 2018).

12.1.b **The debtor holds unclaimed (escheat) funds in trust, and they do not become property of the estate.** At the petition date, the debtor held unclaimed property that was scheduled to escheat to the state. The state treasurer filed a proof of claim for the funds but did not pursue the claim further before plan confirmation and did not object to confirmation. After the plan effective date, the treasurer sought to recover the funds. Under applicable state law, the debtor held the funds as trustee for the true owner. The funds did not become property of the estate. The treasurer is entitled to the funds, also as a trustee for the rightful claimants, and so is not a creditor whose rights are cut off by plan confirmation. *Oklahoma State Treasurer v. Linn Operating, Inc.*, ___ B.R. ___, 2018 U.S. Dist. LEXIS 52890 (S.D. Tex. March 29, 2018).

12.1.c **First chapter 11 court may determine whether property transferred from old to new debtor is property of the estate in second chapter 11 case.** The old debtor confirmed a chapter 11 plan under which it retained real property subject to a mortgage. The plan permitted the reorganized debtor to sell or refinance the property only if the proceeds were sufficient to pay all allowed claims in the case. The court retained jurisdiction over the reorganized debtor and the property until full consummation to restrain interference with the plan or its execution and "to determine any dispute arising in connection with the interpretation, implementation, execution or enforcement of the Plan." The reorganized debtor defaulted on the mortgage. Shortly before the foreclosure sale, it transferred the property to a new debtor, who filed a chapter 11 case in a different judicial district. The mortgagee filed a proceeding in the old district to reopen the case and to enforce the plan by voiding the transfer of the real property to the new debtor without satisfaction of the mortgage as having violated the plan. A court may retain post-confirmation jurisdiction over matters that have a close nexus to the plan if the plan provides for retention of jurisdiction. The proceeding in the old district required the court to determine whether the real property remained property of the reorganized debtor or was properly transferred. The court properly retained jurisdiction to do so. Until the court determined that issue, it was unclear whether the real property was property of the new bankruptcy estate and therefore whether the automatic stay applied to the mortgagee's actions against the property, including the action to reopen the old case. Therefore, the court denies the debtor's motion in the new case to enforce the automatic stay against the mortgagee's action in the old case. *MLMT 2005-MCP1 Washington Office Properties, LLC v. Olympia Office LLC (In re Olympia Office LLC)*, ___ B.R. ___, 2018 U.S. Dist. LEXIS 30548 (E.D.N.Y. Feb. 26, 2018).

12.2 Turnover

12.3 Sales

13. TRUSTEES, COMMITTEES, AND PROFESSIONALS

13.1 Trustees

13.2 Attorneys

13.2.a **Counsel does not violate a lender's unperfected security interest in cash by receiving a prepetition retainer from a debtor.** The debtor paid counsel a prepetition security-type retainer after it had defaulted on its bank loan agreement and before filing its chapter 11 petition. Counsel knew of the default when the debtor paid the retainer. The bank claimed a security interest in the deposit account from which the debtor paid the retainer, but the security interest was not at the lender bank and was unperfected by a control agreement. In the chapter 11 case, the bank sought to require counsel to turn over the retainer to the estate so that it would be subject to the bank's security interest and available for payment of the bank's claim. Because the bank's security interest was unperfected, it could be avoided in the case. As a result, counsel was not liable for collusion with the debtor to violate the bank's right, for unjust enrichment, for conversion, or for tortious interference. The court also strongly suggests that even if the bank's security interest were perfected, counsel would not have been liable to return the retainer, because such a ruling would effectively prevent debtors from retaining counsel to file chapter 11 cases. *Armstrong Bank v. Shraiberg, Landau & Page, P.A. (In re Tuscany Energy, LLC)*, 581 B.R. 681 (Bankr. S.D. Fla. 2018).

13.3 Committees

13.4 Other Professionals

13.5 United States Trustee

14. TAXES

15. CHAPTER 15—CROSS-BORDER INSOLVENCIES

15.1.a **U.S. situs of foreign debtor's claims is sufficient for chapter 15 jurisdiction.** The foreign representatives of an Australian debtor filed a chapter 15 petition in New York to pursue discovery on breach of fiduciary duty claims the Australian estate had against two Australian insiders who currently resided in New York. Section 109(a) permits a chapter 15 case only if the debtor has "a domicile, a place of business, or property in the United States." The substantive law of the breach of fiduciary duty claim determines the situs of the claim. Under Australian law, the situs of a breach of fiduciary duty claim is where the defendant resides. As the defendants reside in New York, the debtor has property in the United States and is eligible for chapter 15. *In re B.C.I. Finances Ptg Ltd.*, ___ B.R. ___, 2018 Bankr. LEXIS 1217 (Bankr. S.D.N.Y. Apr. 24, 2018).

15.1.b **Court grants recognition to Italian foreign main proceeding and requires U.S. creditor to liquidate its claim there.** The Italian debtor confirmed a restructuring under an Italian *Concordata Preventivo*. The Italian foreign representative obtained recognition of the Italian proceeding as a foreign main proceeding under chapter 15 and sought recognition and enforcement of the Italian confirmation order, which resulted in a discharge of the debtor. A U.S. creditor objected, claiming that its contract was governed by Florida law and provided for Florida jurisdiction to resolve any claims. Chapter 15 does not require such a result. It is appropriate to require U.S. creditors to file and litigate their claims in the foreign main proceeding court. Therefore, the court overrules the objection and grants the recognition order. *In re Energy Coal S.P.A.*, ___ B.R. ___, 2018 Bankr. LEXIS 10 (Bankr. D. Del. Jan. 2, 2018).

15.1.c **Court grants recognition to Hong Kong voluntary liquidation.** The debtor commenced a voluntary liquidation in Hong Kong under the Companies (Winding Up and Miscellaneous Provisions) Ordinance. A liquidator administers the liquidation without direct court supervision, but creditors may seek court intervention. The liquidator sought recognition under chapter 15, which permits recognition of a "foreign proceeding." The Code defines "foreign proceeding" as "a collective judicial or administrative proceeding in a foreign country … under a law relating to insolvency or adjustment of debt in which proceeding the assets and affairs of the debtor are subject to control or supervision by a foreign court, for the purpose of reorganization or liquidation. A proceeding is a statutory framework that sets forth a liquidator's duties and responsibility, distribution priorities, and rights to pursue avoiding powers. A proceeding is administrative if the liquidator's task are administrative, including collecting and distributing assets, conducting investigations and pursuing recovery of voidable transfers, and preparing reports to and convening meetings of creditors. It also might be judicial if creditors may involve the courts in the process. Court or governmental supervision is not required to meet this test. A proceeding is collective if it considers all creditors' rights, rather than just the rights of the initiating creditors, such as in a receivership action. The Hong Kong liquidation meets all these requirements and is in a foreign country, subject to supervision and control by a foreign court, and for the purpose of liquidation. Therefore, it is a foreign proceeding. Because it also meets the requirements under section 1515 and 1517 for recognition, the court grants recognition to the liquidation. *In re Manley Toys Ltd.*, 580 B.R. 632 (Bankr. D.N.J. 2018).

15.1.d **Court denies recognition to Korean case commencement order to the extent it would apply Korean bankruptcy law in the United States.** A U.S. company licensed intellectual property and technology to a Korean company. The license contained a bi-directional ipso facto clause and specified that New York and federal law would apply, without regard to conflict of laws rules.

The U.S. company filed a chapter 11 case in New York. The Korean company filed a proceeding under the Korean Debtor Rehabilitation and Bankruptcy Act (DBRA) soon after. The Korean bankruptcy court accepted the petition but did not order a stay or grant any other relief. The Korean debtor obtained recognition under chapter 15 of the Korean proceeding. The DBRA renders ipso facto clauses unenforceable. The U.S. debtor terminated the license agreement under the ipso facto clause. The Korean debtor challenged the termination in the New York bankruptcy court. The New York choice of law clause is enforceable without a conflict of laws analysis. An ipso facto clause is enforceable under New York law. The federal choice of law clause does not incorporate federal comity principles. Those principles exist independently of the parties' agreement, because comity is "neither a matter of absolute obligation … nor of mere courtesy and good will." There is abstention comity (comity among courts), which is concerned with which court should decide and whether a U.S. court should enforce a foreign bankruptcy court's order relating to the debtor's assets and claims, and choice of law comity (comity among nations), which is concerned with which nation's laws should apply. Because the issue here is whether to enforce the DBRA's prohibition on enforcement of ipso facto clauses, this case involves choice of law. The contract selected New York law. The Korean order accepting the DBRA proceeding did not direct the application of Korean law throughout the world nor supersede U.S. bankruptcy law and state law. Nor does the chapter 15 recognition order provide for enforcement of Korean law in a U.S. bankruptcy case. Accordingly, the court declines to grant comity to the Korean order to prohibit the U.S. debtor's ipso facto termination of the contract. *SMP Ltd. v. SunEdison, Inc. (In re SunEdison, Inc.)*¸ 577 B.R. 120 (Bankr. S.D.N.Y. 2017).

15.1.e **Court enforces affiliate releases granted under U.K. scheme.** The U.K.-based debtor obtained sanction of a scheme that converted its New York law-governed junior notes to equity and released guarantees by its non-debtor affiliates. Over 98% of the affected class accepted the scheme. The foreign representative sought and obtained recognition of the scheme under chapter 15 and sought recognition and enforcement of the affiliate releases. Section 1521(a)(7) permits the court, upon recognition, to grant "any additional relief that may be available to a trustee" except avoiding power claims. Additional relief may include recognizing and enforcing a foreign plan confirmation order. Section 1507 requires a court in "determining whether to provide additional assistance [to] consider …consistent with principles of comity" a variety of factors. Comity is the most important consideration. A U.S. court should recognize and enforce a foreign judgment if the foreign forum has jurisdiction, fair procedures, due notice, and no prejudice against foreign litigants. Although granting third-party releases under U.S. law is limited, nothing in chapter 15 suggests they should not be recognized and enforced as part of a foreign plan confirmation order where the order is based on overwhelming non-insider creditors' plan acceptance. Here, over 98% of affected creditors accepted. The affiliate releases are central to the plan, and failure to enforce them could result in prejudicial treatment of creditors to the detriment of the plan and could prevent the fair and efficient administration of the scheme. Accordingly, comity principles permit enforcement, and the court so orders. *In re Avanti Comm'ns Group PLC*, ___ B.R. ___, 2018 Bankr. LEXIS 1078 (Bankr. S.D.N.Y. Apr. 9, 2018).

15.1.f **Chapter 15 court permits recognized Cayman liquidators to obtain broad discovery in the United States.** The Cayman liquidators of a Cayman investment fund obtained recognition as foreign representatives under chapter 15 and subpoenaed records of the funds accountants in New York. Section 1521(a)(4) permits the court, after granting recognition, to grant appropriate relief, including "the taking of evidence or the delivery of information concerning the debtor's assets, affairs, rights, obligations or liabilities" and "any additional relief that may be available to a trustee," but "only if the interests of the creditors and other interested entities … are sufficiently protected." Section 1507 permits additional assistance, consistent with principles of comity. Bankruptcy Rule 2004 authorizes a party in interest to subpoena documents relating to "the acts, conduct, or property or to the liabilities and financing condition of the debtor." Comity requires due regard for Cayman law, which might not permit such broad pre-litigation discovery as U.S. law does. But Cayman courts are receptive to evidence gathered in the United States under its more liberal pre-litigation discovery rules. Accordingly, enforcing the liquidators' subpoena is consistent with principles of comity. *In re Platinum P'ners Value Arb. Fund L.P. (In Official Liquidation)*, ___ B.R. ___, 2018 Bankr. LEXIS 1156 (Bankr. S.D.N.Y. April 17, 2018).