JENNER&BLOCK

Recent Developments in Bankruptcy Law, April 2022

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

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2.2 Preferences

2.2.a **First cousins are "relatives."** The trustee sued a first cousin of the debtor's principal to avoid as a preference a transfer made more than 90 days before the petition date. Section 547(b) permits the trustee to avoid a transfer to a "relative" made within one year before the petition date. The Bankruptcy Code defines "relative" as one within the third degree of affinity or consanguinity as determined by the common law. Courts have generally used state, not federal, law, but are divided on whether to use state common or civil law. Because of the ambiguity in the definition, the court may look to legislative history. The definition derives from the Bankruptcy Act of 1898 with no meaningful revision. The legislative history of that act shows that Congress intended reference to the common law of England, and case law supports that interpretation. Using English common law rather than state law also promotes uniformity. Under English common law, relation is defined by distance from a common ancestor. For first cousins, the common ancestor is the grandparent. The cousins are each two degrees removed from a common grandparent and so come within the third degree. *Ehrenberg v. Halajyan (In re Victory Entm't, Inc.)*, 634 B.R. 90 (Bankr. C.D. Cal. 2021).

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2.6.a **Section 544(b) permits reliance only on filed or listed claims.** In its first-day motions, the debtor in possession obtained authority to pay prepetition withholding and employment taxes to the IRS. The debtor did not list the claims on its schedule of liabilities, and the IRS did not file a proof of claim. Under the Internal Revenue Code, the IRS fraudulent transfer avoiding power has a ten-year reachback. Section 544(b) permits a trustee to avoid any transfer "by the debtor that is voidable under applicable law by a creditor holding an unsecured claim that is allowable under section 502." Section 502 authorizes the filing of a proof of claim, and unless a party in interest objects, the claim is deemed allowed. Section 1111(a) deems allowed in a chapter 11 case any claim that is listed on the debtor's schedules as undisputed, liquidated, and not contingent. If a claim is not listed and the creditor does not file a proof of claim, the claim cannot be allowed. Therefore, the trustee may not rely on such a claim under section 544(b). Because the IRS did not file a proof of claim, and the debtor did not list the IRS's claim on its schedules, the trustee may not rely on the IRS as the triggering creditor under section 544(b). *Miller v. Fallas (In re J & M Sales Inc.)*, 2022 Bankr. LEXIS 434 (Bankr. D. Del. Feb. 22, 2022.

2.7 Recovery

3. BANKRUPTCY RULES

3.1.a **Court denies *ex parte* motion to extend statute of limitations.** The debtor refused to cooperate with the trustee's investigation of avoidable transfers. As a result, the trustee was delayed in learning the identity of transferees and other potential defendants. With the two-year statute of limitations approaching, the trustee filed an *ex parte* motion to extend the statute on equitable tolling grounds. Bankruptcy Rule 9006 governs extensions of time but does not permit extension of a congressionally mandated time period, such as the statutes of limitations in section 546 or 549. Equitable tolling may excuse a late-filed complaint. A defendant may contest the late filing and challenge whether equitable tolling applies. But an unknown defendant is unable to do so in response to an *ex parte* motion to extend the statute on equitable grounds. And an *ex parte* order would not bind a future defendant who had no notice of the motion because due process requires that the defendant have notice and an opportunity to be heard. Therefore, the court denies the motion as ineffective and seeking only an advisory ruling. *In re Cramer*, ___ B.R. ___ (Bankr. C.D. Cal. Feb. 8, 2022).

3.1.b **Failure to follow local rule requiring motion to withdraw reference waives jury trial right.** The bankruptcy court's local rules provide that a party waives the right to a jury trial unless the party files a motion to withdraw the reference at least 14 days before the initial status conference in the adversary proceeding. Although the defendant demanded a jury trial in the answer, she did not timely file a motion to withdraw the reference. The local rule implements, rather than overrides, Bankruptcy Rule 7038, because without consent, the bankruptcy court may not try a case before a jury. Only the district court may do so, which requires a motion to withdraw the reference. Therefore, by failure to follow the required procedure, the defendant waived the right to a jury trial. *Welt v. Bumshteyn (in re Bumshteyn)*, 2022 Bankr. LEXIS 90 (Bankr. S.D. Fla. Feb. 1, 2022).

3.1.c **Failure to move to apply Rule 23 to a putative class claim does not constitute excusable neglect to file late proofs of claims.** The claimants began a class action against the debtor before bankruptcy, which stayed the action. The court fixed a claims bar date, confirmed a plan, and granted the class representatives stay relief to pursue the class action. The class representatives and some putative class members filed proofs of claim. After stay relief, the class action court found the class action improper and dismissed the case. The remaining claimants then sought leave to file late individual claims in the bankruptcy court, nearly three years after the bar date. A court may permit late filing upon a showing of excusable neglect, considering four factors: prejudice to the estate, length of delay, reason for the delay (including whether it was within the claimant's reasonable control), and good faith. No factor is more important than any of the others. Prejudice requires substantive prejudice, which was not present here, not merely litigation costs and delay, especially because the debtor was aware of the pending claims. However, the nearly three-year long delay was too long, and the delay could significantly affect the resolution of the litigation and the bankruptcy. The reason for the delay—awaiting the outcome of the class action litigation—did not constitute excusable neglect. Several individual claimants filed proofs of claim before the bar date, so the delay was within the claimants' reasonable control. Finally, the claimants' and their counsel's failure to move under Rule 9014 for application of Rule 7023 to the purported class proof of claim evinced a lack of diligence and a misunderstanding of the Bankruptcy Rules and showed lack of good faith. As a result, the court denies the motion to file late claims. *W. Wilmington Oil Field Claimants v. Nabors Corp. Servs., Inc. (In re CJ Holding Co.)*, 27 F. 4th 1105 (5th Cir. 2022).

4. CASE COMMENCEMENT AND ELIGIBILITY

4.1 Eligibility

4.1.a **Court denies motion to dismiss divisional merger debtor's filing to address mass tort claims.** A consumer products company was subject to an increasing number of tort claims, some of which resulted from asbestos exposure. The litigation and liability costs exceeded the company's operating income. Using the Texas divisional merger statute to resolve all the tort claims without subjecting the entire enterprise to the bankruptcy process, the company divided into one company that continued the consumer products business, assuming all the assets and the ordinary course liabilities associated with that business, and another that received certain royalty streams and assumed all the tort liabilities. The continuing company agreed, without any reimbursement rights, to fund a trust to resolve the other company's litigation and bankruptcy expenses and tort liabilities to the extent its royalty streams and other assets were insufficient. The funding agreement was limited in amount to the value of the continuing company. The ultimate parent company guaranteed the funding agreement. Immediately after completing the divisional merger, the other company filed a chapter 11 case with the goal of addressing the tort claims through an asbestos claims trust, funded by the royalty streams, the funding agreement, and insurance proceeds. A chapter 11 case that is not filed in good faith is subject to dismissal. Good faith is determined based on the totality of the circumstances, focusing on whether the debtor's objectives are within the legitimate scope of the bankruptcy laws, including whether the petition serves a valid reorganization purpose or is filed merely to obtain a tactical litigation advantage. A desire to take advantage of a particular Bankruptcy Code provision, standing alone, is not determinative. A debtor need not be insolvent to qualify for a chapter 11 case, although to be eligible, it should show a need for a financial restructuring. The mounting costs of the tort claims litigation would likely drive the debtor (and, without the divisional merger, the continuing company) into insolvency, which creates a need for financial relief. Here, the debtor's intent is to use the Code as a whole to address its financial needs. The class action system is not available to address mass tort claims, and using the bankruptcy system, rather than the tort system, is a substantially better approach to addressing both present and future tort claims for both the debtor and the claimants. Because the tort claimants are in no worse position under the divisional merger and bankruptcy filing than they would be otherwise, the filing was not made to secure a tactical litigation advantage. Moreover, the debtor has the funding necessary to satisfy tort obligations to the extent of its pre-merger valuation, with a contractual right to look to the ultimate parent without having to establish independent liability. Finally, the potential business disruption, professional fees, and loss in market value that would likely result from a filing by the pre-merger company justifies the division and concentration of the bankruptcy on the resulting debtor company. *In re LTL Mgmt., LLC*, 2022 LEXIS Bankr. 510 (Bankr. D.N.J. Feb. 25, 2022).

4.2 Involuntary Petitions

4.2.a **Convertible notes give rise to contingent claims.** The debtor issued convertible promissory notes, which were convertible at their maturity at the holder's option into equity in the debtor. The holders of the notes filed an involuntary petition against the debtor before the notes' due date. To be an eligible petitioning creditor, the creditor must hold a claim that is not contingent. A claim is contingent if it remains uncertain at the petition date whether the debtor will be liable to pay it. The debtor would not be required to pay the notes if the holders converted. Therefore, the claims were contingent, and the creditors were not eligible petitioners. *In re Qdos, Inc.*, 634 B.R. 552 (Bankr. C.D. Cal. 2021).

4.2.b **Court may award damages only against "petitioners," not against agents who signed the petition.** Three creditors filed an involuntary petition, which the court dismissed. The debtor sought attorneys' fees and damages from the petitioners and from the individuals who signed the petition on behalf of the petitioners. Section 303(i) permits the court to grant judgment in favor of the debtor and against the petitioners for costs, fees, and in some cases, damages. "Petitioner" does not include the individual employees or agents of the entities that hold the claims.

Therefore, the court dismisses the claims against the individuals. *Visium Techs., Inc. v. Tarpon Bay P'ners, LLC (In re Visium Techs., Inc.)*, 635 B.R. 428 (Bankr. S.D. Fla. 2022).

4.3 Dismissal

5. CHAPTER 11

5.1 Officers and Administration

5.1.a **Court approves payment during the case of RSA Parties' professional fees.** Before bankruptcy, the debtor negotiated restructuring support agreements with three ad hoc committees of creditors. The agreements provided for payment of the groups' professional fees. After filing chapter 11, the debtor in possession sought approval of the assumption of the agreements to pay professionals and approval of postpetition agreements to pay professionals of additional ad hoc committees that agreed to the RSA. If the court did not authorize the payments, the committees would be released from any obligation to support a plan on the terms previously agreed, and early indications in the case were that negotiations would have collapsed and would need to start from scratch. Section 363(b) authorizes the debtor in possession to use property of the estate outside the ordinary course of business. Section 365(a) authorizes the debtor in possession, subject to court approval, to assume executory contracts. Both sections permit approval if the debtor in possession's action reflects a valid business justification. The prepetition reimbursement agreements require both sides to cooperate toward confirmation of a plan and require the debtor in possession to pay fees. Therefore, the agreements are executory and subject to assumption under section 365. The potential collapse of negotiations and the attendant increase in expenses supported the judgment to assume the agreements and pay the professionals. Section 503(b)(4) permits payment as an administrative expense, after the fact, of professional fees of creditors who have made a substantial contribution to the case. It provides for retroactive review and payment and does not restrict the court's authority under sections 363 and 365 to approve payments during the case. *City of Rockford v. Mallinckrodt PLC (In re Mallinckrodt PLC)*, 2022 U.S. Dist. LEXIS 54785 (D. Del. Mar. 28, 2022).

5.2 Exclusivity

5.3 Classification

5.4 Disclosure Statement and Voting

5.5 Confirmation, Absolute Priority

5.5.a **Unfair discrimination may be measured against a baseline entitlement recovery amount.** The debtors comprised over 60 related entities. Most creditors' claims were against only a few entities, but a class of unsecured notes claims were guaranteed by nearly all entities. The plan provided for a distribution to the notes class of about 90%, which was less than the claims' full entitlement based on the debtors' value, and distribution of substantially lower percentages to seven other unsecured claims classes. The baseline entitlements of many of the seven other classes was zero, but the plan provided for recoveries to those classes derived from the value the notes class was foregoing. Those classes did not accept the plan. Section 1129(b) permits confirmation over the nonacceptance of one or more classes if the plan is fair and equitable to and does not discriminate unfairly against the nonaccepting classes. Unfair discrimination can be measured by relative recoveries between similar priority classes or by comparison of the plan recovery to a hypothetical baseline recovery under the absolute priority rule. Because the nonaccepting classes were receiving a recovery in excess of their baseline amounts as a result of the notes class's acceptance of less than its full absolute priority entitlement, the plan does not discriminate unfairly and may be confirmed. *In re Mallinckrodt PLC*, ___ B.R. ___, Case No. 20-12522 (Bankr. D. Del. Feb. 3, 2022).

6. CLAIMS AND PRIORITIES

6.1 Claims

6.1.a **Court provides treatise on postpetition interest in solvent debtor case, allowing postpetition interest.** The individual debtor suffered a substantial prepetition judgment. He filed chapter 11 to prevent execution on the judgment. Under applicable nonbankruptcy law, interest on the judgment ran at 12%. Because of favorable postpetition events, the debtor was solvent both in a hypothetical liquidation and on a balance sheet basis and had sufficient assets to pay all creditors in full plus postpetition interest. The debtor proposed a plan that provided for payment in full, without postpetition interest. The class comprising the claims of the judgment creditors did not accept the plan. Section 1129(b) permits plan confirmation over the nonacceptance by a class of unsecured claims if the plan is fair and equitable with respect to the class. The "fair and equitable" requirement incorporates pre-Code law, which required payment of postpetition interest on unsecured claims if the debtor was solvent, and permits the court to consider the equities to determine to appropriate interest rate, despite section 502(b)(2), which disallows postpetition interest as part of an allowed claim. Generally, the contract rate should apply. But the consideration supporting the contract rate—negotiated at arms' length—do not apply to a state-law judgment rate. Still, considering all the factors in this case, including the debtor's ability to pay, the court requires application of the judgment rate for the plan to be fair and equitable. Section 1129(a)(7) requires that a plan provide as much value on claims and interests as would be paid in a liquidation case. Section 726(a)(5) provides for surplus funds to be paid to creditors for interest "at the legal rate." Uniformity within federal law and equality of treatment of creditors require that "the legal rate" be interpreted as the federal judgment rate. *In re Mullins*, 633 B.R 1 (Bankr. D. Mass. 2021).

6.2 Priorities

6.2.a **Court may subordinate lien as well as claim under section 510(b).** The creditor and individual debtor were partners in several ventures. After a falling out and litigation, they settled under an agreement that provided for the creditor to transfer all his interests in the ventures and other consideration in exchange for four payments, secured by a lien on the interests in the ventures. The debtor made only two of the payments. The creditor obtained a judgment for breach of the settlement agreement. Section 510(b) provides that a claim "for damages from the purchase or sale of [a security of the debtor or an affiliate of the debtor] … shall be subordinated to all claims or interests that are senior to or equal the claim or interest represented by such security." Because the settlement provided for the sale of the securities in the ventures, it was subject to subordination under section 510(b), even though the judgment arose from a claim for violation of the settlement agreement that resulted in the sale. Because the settlement agreement did not apportion the payments between payments for interests in the ventures and the other consideration, the entire claim was subordinated. Even though section 510(b) addresses only claims, it permits the court to subordinate liens as well. The term "claim" encompasses the right to payment, whether personal or *in rem*. Failure to subordinate the lien would defeat the purpose of section 510(b). Therefore, the creditor's claim may receive a distribution only after all general unsecured claims are paid in full. *Kurtin v. Ehrenberg (In re Elieff)*, 2022 Bankr. LEXIS 711 (9th Cir. B.A.P. Mar. 21, 2022).

6.2.b **Underfunded defined benefit pension plan liability is not an administrative expense.** The debtor maintained a defined benefit pension plan for its employees. At the petition date, there was a substantial underfunding liability. During the chapter 11 case, the debtor in possession continued to employ the employees and incurred administrative and current service liabilities for the plan. Section 503(b) grants administrative expense priority to the actual and necessary costs of preserving the estate. Employee compensation is such an expense. But only the administrative and current expenses of the plan are payable on account of the employees' postpetition services. The underfunding liability existed at the petition date and arose because of prepetition services.

Accordingly, the underfunding liability is not an administrative expense. *In re Verity Health Sys. of Cal.*, 633 B.R. 607 (Bankr. C.D. Cal. 2021).

7. CRIMES

8. DISCHARGE

8.1 General

8.2 *Taggart v. Lorenzen* applies to violations of chapter 11 plan confirmation orders. The debtors confirmed a chapter 11 plan that provided for reinstatement of payments on a home mortgage, although the amount of payments required was unclear. The new mortgage servicer determined that the debtors had not made payments during the chapter 11 case and began foreclosure proceedings. The debtors sought a contempt citation for violating the plan's terms. *Taggart v. Lorenzen*, 139 S. Ct. 1795 (2019), held that a civil contempt citation for violating a chapter 7 discharge order required the same findings as any contempt citation for violating an injunction. A "bankruptcy court's authority to enforce its own orders … derives from the same statutes and the same general principles the Supreme Court relied on in *Taggart*." Therefore, the *Taggart* standard applies equally to any contempt proceeding for violating a chapter 11 plan's terms. *Beckhart v. Newrez, LLC*, ___ F.4th ___, 2022 U.S. App. LEXIS 10287 (4th Cir. Apr. 15, 2022).

8.3 Third-Party Releases

8.3.a **Chapter 11 plan release of an "affiliate" does not include a creditor's direct claims against the affiliate.** The debtor leased a retail store. Its parent unconditionally guaranteed the lease. Because of the pandemic, the debtor never opened the store and filed chapter 11. The plan released claims of creditors against affiliates (among others) that arise out of or relate to the debtor. The release should be read to release only claims that are derivative of the debtor's claims, not an independent obligation, such as a guarantee, that the parent owed to the lessor. *605 Fifth Prop. Owner, LLC v. Abasic, S.A.*, 2022 U.S. Dist. LEXIS 41123 (S.D.N.Y. Mar. 8, 2022).

8.4 Environmental and Mass Tort Liabilities

9. EXECUTORY CONTRACTS

9.1.a **U.S. government may waive Anti-Assignment Act.** The debtor leased a hotel and related facilities from a "non-appropriated fund instrumentality" of the United States. The lease and contract prohibited assignment without the government's consent, which consent was not to be unreasonably withheld. The debtor in possession moved for approval of the assumption of the lease and related contracts. Section 365(c) prohibits assumption of a contract that is non-assignable under applicable non-bankruptcy law. The federal Anti-Assignment Act prohibits assignment of a contract with the U.S. government without the government's consent. Under applicable circuit law, the court applies the "hypothetical test" to determine whether the debtor in possession may assume a contract or lease that is otherwise non-assignable. Here, the hypothetical test would ordinarily prohibit contract assumption. But the government may waive the Anti-Assignment Act and may do so prospectively. By limiting its power in the lease to reject assignments, the government waived the assignment prohibition of the Anti-Assignment Act. *In re Minesen Co.*, 2021 Bankr. LEXIS 3178 (Bankr. D. Haw. Nov. 17, 2021).

10. INDIVIDUAL DEBTORS

10.1 Chapter 13

10.2 Dischargeability

10.2.a FCC nonpecuniary penalty is nondischargeable in a chapter 11 case. The telecommunications provider debtor defrauded customers. The FCC brought an action against the debtor, in which the debtor agreed to reimburse customers and pay a civil penalty to the FCC, which was not defrauded and did not suffer loss. Section 1141(d)(6) makes nondischargeable in a corporate case any debt that would be excepted from discharge under section 523(a)(2), which excepts from discharge in an individual case any debt for money, property, or services to the extent obtained by fraud or false pretenses. In *Cohen v. de la Cruz*, 523 U.S. 213 (1998), the Supreme Court held that nonpecuniary loss penalties (in that case, treble damages) arising from a debtor's fraud fell within section 523(a)(2) because "to the extent obtained by" modifies "money, property, or services," not "any debt." Because section 1141(d)(6) makes section 523(a)(2) applicable in a corporate chapter 11 case, the FCC penalty is nondischargeable. *U.S. v. Fusion Connect, Inc. (In re Fusion Connect, Inc.)*, 634 B.R. 22 (S.D.N.Y. 2021).

10.3 Exemptions

10.4 Reaffirmations and Redemption

11. JURISDICTION AND POWERS OF THE COURT

11.1 Jurisdiction

11.2 Sanctions

11.2.a **Court distinguishes sources of bankruptcy court's sanction authority.** Debtor's counsel filed a chapter 7 case as a litigation tactic, omitted substantial assets and transfers from the schedules and statement of affairs, failed to ensure that the debtor complied with the trustee's information requests, used state court litigation, including an action against the chapter 7 trustee, to attempt to dismiss the case, withdrew as attorney of record yet still moved to dismiss the case. A bankruptcy court may sanction counsel under Bankruptcy Rule 9011, under section 105(a), and under its inherent authority. Sanctions under Rule 9011 may be imposed only for filing a paper with the court in violation of the requirements of that Rule. Sanctions under section 105(a) may be imposed for civil contempt to remedy a violation of a specific order, including an "automatic" order such as the automatic stay or discharge injunction. Sanctions under the court's inherent authority may be imposed to deter and provide compensation for improper litigation tactics, including bad faith litigation tactics. This last power is broader than the other two, is not mutually exclusive with the others, and extends to the full range of litigation abuses. It requires a finding of recklessness plus frivolousness, harassment, or an improper purpose or of bad faith (or conduct tantamount to bad faith). Here, although the bankruptcy court imposed sanctions under section 105(a), counsel's conduct amounted to improper litigation tactics and purpose and bad faith and should have been imposed under the court's inherent power. But because the bankruptcy court made sufficient finding to support sanctions under its inherent authority, the appellate court affirms the award. *Stanley v. Mason (In re BCB Contracting Servs., LLC)*, ___ B.R. ___ (9th Cir. B.A.P. Apr. 21, 2022) (unpublished).

11.3 Appeals

11.3.a **Notice of appeal on main case docket does not bring up adversary proceeding order for review.** The confirmed plan established a litigation trust with a limited life, vested causes of action in the trust, and continued the automatic stay to protect the trust. Former shareholders brought an action in the bankruptcy court that belonged to the trust. The trustee moved to dismiss the adversary proceeding and sought sanctions. The bankruptcy court issued an order in the adversary proceeding dismissing it and an order in the main bankruptcy case granting sanctions. The shareholders filed a notice of appeal in the main case but not in the adversary proceeding, attaching a copy of only the sanctions order. The main case and the adversary proceeding are distinct for purposes of appeal. Moreover, Bankruptcy Rule 8003(a)(3)(B) requires an appellant to attach a copy of the order appealed from to the notice of appeal. Therefore, the notice of appeal in this case did not bring up the dismissal order for review, and the court of appeals lacked jurisdiction to hear it. *Kreit v. Quinn (In re Cleveland Imaging and Surg. Hosp., L.L.C.)*, 26 F.4th 285 (5th Cir. 2022).

11.3.b **Court denies defendant standing to appeal approval of trustee's litigation funding order.** The liquidating trustee under a chapter 11 plan entered into a litigation funding agreement to pursue claims against the debtor's bank. The agreement required the trustee to consult in good faith with the funder over any settlement discussions. The bank objected, contending that the funder would unduly influence the litigation and prevent settlement. As of the time of the bank's appeal, no settlement discussions had occurred. To appeal, a party must have Article III standing and be a "person aggrieved." Article III standing requires a concrete, particularized, and imminent injury in fact. Here, the bank's injury is not imminent but is speculative, based on an attenuated chain of possibilities, because no settlement discussions have taken place, and the result of any future discussions is uncertain. An appellant is a person aggrieved only if it has a direct and substantial interest in the question being appealed. Being subject to litigation and risking liability in an adversary proceeding is not such an interest. Moreover, the interest must be one the Code protects or regulates. A defendant's interest in avoiding liability is antithetical to the Code's goals. Finally, a desire to preserve the integrity of the bankruptcy process is not sufficient to give an appellant "person aggrieved" status. Therefore, the bank lacks standing to appeal. *Valley Nat'l Bank v. Warren (In re Westport Holdings Tampa, Ltd. P'shp)*, ___ 4th ___, 2022 U.S. App. LEXIS 8480 (11th Cir. Mar. 31,

11.4 Sovereign Immunity

11.4.a **Section 106 abrogates U.S. sovereign immunity for actions under section 544(b).** The trustee sued the United States under section 544(b), relying on state fraudulent transfer law, to avoid tax penalty obligations and to recover the tax penalty payments. The United States would have a sovereign immunity defense to an action by a creditor under a state fraudulent transfer law. Section 106(a) abrogates sovereign immunity for actions under section 544. Therefore, the trustee is not barred by sovereign immunity from suing the United States. *Cook v. U.S. (In re Yahweh Center, Inc.)*, 27 F.4th 960 (4th Cir. 2022).

12. PROPERTY OF THE ESTATE

12.1 Property of the Estate

12.1.a **Liquidation trustee has standing to defend appeal even after termination of the trust.** The confirmed plan established a litigation trust with a limited life, vested causes of action in the trust, and continued the automatic stay to protect the trust. After the trust terminated, former shareholders brought an action in the bankruptcy court that belonged to the trust. The trustee sought sanctions, which the bankruptcy court granted and the shareholders paid. The shareholders appealed. An appellate court does not have jurisdiction over an appeal unless both parties have standing. An appellee must show an ongoing interest in the dispute. Although the trust had terminated, the trustee had the payment from the shareholders and still had an obligation to return trust property to the beneficiaries. Therefore, even though the trustee lacked wind-up power, he had an interest in defending the appeal, which gives him standing. *Kreit v. Quinn (In re Cleveland Imaging and Surg. Hosp., L.L.C.)*, 26 F.4th 285 (5th Cir. 2022).

12.1.b **Liquidation trustee may continue litigation after trust terminates if trust agreement so provides.** The confirmed plan established a liquidation trust to prosecute claims against third parties. The trustee brought the claims; the court denied motions to dismiss, and the litigation was in discovery. After the filing of the complaint and the motions to dismiss but before the court's denial of the motions, the trust terminated by the terms of the trust agreement. However, the trust agreement also provided that after termination, "for the purpose of liquidating and winding up the affairs of the Liquidation Trust, the Liquidation Trustee "shall continue to act as such until its duties have been fully performed." Because the trust agreement requires the trustee to continue to act after the trust terminates, and because the trustee has not "fully performed" his duties while litigation remains pending, the trustee retains standing to prosecute litigation that he commenced before termination. Therefore, the court denies the defendants' motion to dismiss the litigation. *Energy Conversion Devices Liquidation Trust v. Ovonyx, Inc. (In re Energy Conversion Devices, Inc.)*, 634 B.R. 537 (Bankr. E.D. Mich. 2021).

12.1.c **Lender is liable for concealment, excessive fees, breach of loan agreement, and fraud.** After a new lender's due diligence over several months, the debtor entered into replacement financing facility with the new lender, comprising an accounts receivable factoring and an inventory line of credit. Within months, the lender declared a default over a minor, curable breach and began reducing availability under the lines. Though availability remained, the lender represented otherwise to the debtor and refused to advance, despite continuing to collect all the debtor's receivables. The lender also took over payment of the debtor's payables, dictating which vendors would be paid. The lender also charged excessive fees that were not authorized by the credit agreement and refused to disclose the charges to the debtor. The lender then promised to restore availability if the debtor's principal pledged his homestead but reneged after receiving the pledge. The lender then terminated the agreements but continued to collect all receivables, even after internal documents showed that the debtor's obligations had been satisfied in full. All the while, the lender's internal emails showed malice and an intent to destroy the debtor's business. The debtor filed a chapter 11, but the business failed. The principal and the chapter 7 trustee sued the lender under multiple theories. The lender breached the credit agreements by withholding the debtor's accounts receivable collections and demanding that the debtor continue to send new receivables to the lender even after termination of the agreement. The breaches caused the loss of the debtor's legacy business; the lender was liable to the debtor for its value. It also caused the loss of an anticipated future business line, and the lender was liable for that value too. When a lender takes excessive control over a business, it becomes a fiduciary and owes a duty of transparency and loyalty. Here, the lender breached those duties. The lender also defrauded the debtor by misrepresenting the lack of availability under the credit lines and concealing information about fees and charges, which were not authorized. The court holds the lender liable for breach of contract and breach of the duty of good faith and fair dealing, fraudulent misrepresentation, the tort of contractual and business interference, and willful automatic stay violations (to the extent the withholding of collections occurred after the petition date). *Bailey Tool & Mfg. Co. v. Republic Bus. Credit, LLC (In re Bailey Tool & Mfg. Co.)*, 2021 Bankr. LEXIS 3502 (Bankr. N.D. Tex. Dec. 23, 2021).

12.2 Turnover

12.3 Sales

12.3.a **Buyer with actual knowledge of adverse interest is not a good faith purchaser under section 363(m).** A partnership granted a right of first refusal over a real estate parcel; the grantee recorded the right in the land records office. The partnership later dissolved, and the individual partners obtained the real estate. The individual partners filed bankruptcy. They did not list the grantee as a creditor or party in interest. The trustee sold the parcel free and clear of adverse interests to a buyer who had searched the land records and learned of the right. Neither the trustee nor the buyer notified the grantee of the sale. Later, the buyer sought to sell the parcel. The grantee objected and sued in state court to assert the right. Section 363(m) provides that an appellate court's reversal or modification of an order approving a sale may not affect the validity of a sale to a good faith purchaser of property of the estate. Section 363(m) applies broadly to protect any good faith purchaser's interest and so would protect the buyer here if in good faith.

However, the buyer's constructive knowledge (through the recorded interest) and actual knowledge (through its examination of the land records) of the adverse interest and its failure to notify the grantee or the court of the right prevented the buyer from being a good faith purchaser. *Archer-Daniels-Midland Co. v. Country Visions Coop.*, ___ F.4th ___, 2022 U.S. Ap.. LEXIS 9008 (7th Cir. Apr. 4, 2022).

13. TRUSTEES, COMMITTEES, AND PROFESSIONALS

13.1 Trustees

13.1.a **Barton doctrine applies to a subpoena issued to an estate fiduciary.** The chapter 7 trustee received two subpoenas from a federal criminal case pending in another district, seeking production of information in the trustee's possession. The *Barton* doctrine requires leave of the bankruptcy court before one may bring any legal proceeding against a trustee in another forum. Without leave, the other forum is without jurisdiction to hear the matter. A subpoena is an order of the issuing court commanding the recipient to appear in another court and may require a trustee who receives a subpoena to expend estate assets to comply, defend, or face contempt proceedings for noncompliance. In addition, a subpoena may seek to control information that is property of the bankruptcy estate in potential violation of the automatic stay. Another court may not interfere with such property or, in effect, order the trustee to expend estate property to address the subpoena. Therefore, the *Barton* doctrine applies to a subpoena as much as to an action against an estate fiduciary. *In re Eagan Avenatti, LLP*, 2022 Bankr. LEXIS 552 (Bankr. C.D. Cal. Mar. 3, 2022).

13.2 Attorneys

13.2.a **Court may not award attorney compensation for performing trustee duties.** The trustee employed counsel to assist in administering the estate. The trustee ultimately paid all claims and returned a surplus to the debtor. The attorney's services included some tasks that might have been part of the trustee's duties, such as reviewing the debtor's records, liquidating property of the estate, and investigation the debtor's financial affairs. Section 330(a) permits the court to authorize fees for actual, necessary services rendered by an attorney for the trustee. Section 704 specifies the trustee's duties. It is not "necessary" (or proper) for an attorney to perform any of the trustee's duties, since the trustee must perform them. Section 326 fixes the trustee's compensation as a commission. The trustee may not evade section 326's limits by delegating some of the duties to an attorney, who would be compensated separately. Finally, section 327 permits the trustee to serve as attorney or accountant for the estate, and section 328 limits the compensation for doing so to compensation for services generally performed by the trustee without the assistance of a professional. Taken together, these provisions require the court to scrutinize an attorney's services to ensure the attorney is not compensated for trustee services. The existence of a surplus estate does not lessen the court's duty. *Sylvester v. Chaffee McCall, L.L.P. (In re Sylvester)*, 23 F.4th 543 (5th Cir. 2022).

13.2.b **Court may approve attorney employment retroactively to petition date.** The debtor in possession filed an "ordinary course professionals" motion two days after the petition date, seeking to employ attorneys in the ordinary course, with approval *nunc pro tunc* to the petition date. The court granted the motion. Three months later, the debtor in possession filed a motion to employ one of the ordinary-course attorneys under section 327(e), *nunc pro tunc* to the petition date. In *Roman Catholic Archdiocese of San Juan v. Acevedo Feliciano*, 140 S. Ct. 696 (2020), the Supreme Court prohibited the use of *nunc pro tunc* orders except to reflect on the docket what had actually occurred. However, that case involved the lower court's jurisdiction, which could not be created retroactively. Properly read, the decision does not prohibit a court of equity "to deem an action to have been taken as of a time when it should have been taken, but was not due to circumstances not attributable to the laches of the parties." This principle permits a bankruptcy court, under appropriate circumstances, which are present here, to approve employment of professionals retroactive to the petition date. *City of Rockford v. Mallinckrodt PLC*, 2022 U.S. Dist. LEXIS 54786 (D. Del. Mar. 28, 2022).

13.3 Committees

13.4 Other Professionals

13.5 United States Trustee

14. TAXES

15. CHAPTER 15—CROSS-BORDER INSOLVENCIES

15.1.a **Section 109 eligibility requirements do not apply in chapter 15.** The foreign debtor did not own any property in the United States but owned a corporation that owned U.S. property. The foreign representatives sought recognition of the debtor's foreign proceeding. Section 109 permits only an entity with a domicile, a residence, property, or a place of business within the United States to be a debtor under the code. Section 103 provides that chapter 1 (which includes section 109) applies in a case under chapter 15. Section 1502(1) defines "debtor for purposes of chapter 15 as "an entity that is subject of a foreign proceeding." Section 1517 provides the court shall grant recognition if the foreign proceeding is a foreign main proceeding or a foreign nonmain proceeding, the foreign representative is a person or body, and the petition meets section 1515's requirements. Because chapter 15 uses a special definition of "debtor," section 109's eligibility requirements, which apply to a debtor as defined more generally in section 101, do not apply, and the mandatory language of section 1517 requires the court to grant recognition if section 1517's conditions are met. The court grants recognition. *In re Al Zawawi*, 634 B.R. 11 (Bankr. M.D. Fla. 2021).

15.1.b **Debtor's or foreign representative's bad faith is not a ground to deny recognition.** The foreign debtor and the foreign representative acted together in bad faith in filing a petition seeking recognition of a Monegasque insolvency proceeding. Section 1501 states the purposes of chapter 15, including to "promote fair and efficient administration of cross-border insolvencies" and "protect the interests of all creditors." Section 1517 requires recognition of a foreign proceeding if the petition meets section 1515's requirements. Section 1506 permits a court to deny recognition is it would be manifestly contrary to U.S. public policy. Section 1501 is not intended to confer any substantive rights, is intended only to assist in interpretation, and therefore is not a ground to deny recognition. Section 1506 applies only to the foreign law, not to the conduct of the debtor or the foreign representative. Here, the Monegasque insolvency regime, though differing in substantial ways from U.S. law, is not manifestly contrary to U.S. public policy. Therefore, the court must grant recognition to the Monegasque proceeding. The court may deal with bad faith through other means, including abstention under section 305, granting stay relief, or modifying or terminating recognition under section 1517(d) if grounds for granting it were fully or partially lacking or ceased to exist. *Samba v. Int'l Petro. Prods. and Additives Co., Inc. (In re Black Gold S.à.R.L.)*, 635 B.R. 517 (9th Cir. B.A.P. 2022).