Recent Developments in Bankruptcy Law, October 2021

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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 **Trustee may avoid transfer as actual fraudulent transfer only if ultimate decision-maker has fraudulent intent.** Before entering into a two-step LBO transaction, the debtor formed a special board committee of independent directors, which hired professional advisers. Each step required separate financing. It sought solvency opinions for each step of the transaction. The opinions were based on management projections, but before the issuance of the first opinion, management had concluded the company would not make the projections, yet the opining firm was not advised of this new information. The transaction's first step closed using borrowed money, and major shareholders, who were represented on the board, sold their shares. Before the second step, management revised its projections again. The opining firm, based on management misrepresentations, ultimately issued a second solvency opinion. Although two other advisers did not agree with the opinion, they did not try to stop the transaction, which then closed. The company failed one year later. The liquidating trustee sued to avoid the transactions as actual fraudulent transfers. A corporation can act only through individuals; state law determines who has authority to act for the corporation—in this case, the board of directors—which delegated its authority to the special committee. Actual fraudulent intent can be established only through the intent of the individuals who have the authority to control the transfer. Here, the management projections may have misled the special committee and the advisers, but there was no allegation that the board itself intended to hinder, delay, or defraud creditors. Moreover, it is "unreasonable to assume actual fraudulent intent whenever the members of a board [stand] to profit from a transaction they recommended or approved." Therefore, the complaint fails to allege actual fraudulent intent adequately, and the court dismisses the complaint. *In re Tribune Co. Fraudulent Conveyance Litigation*, 10 F. 4th 147 (2d Cir. 2021).

2.2 Preferences

2.2.a **Critical vendor order does not vitiate preference liability.** Early in the chapter 11 case, the debtor in possession was authorized but not required to pay certain amounts to critical customers to be able to continue to receive necessary services from the customers. The liquidating trustee under the confirmed chapter 11 plan sued one customer to avoid and recover a preference. The customer order does not vitiate the trustee's preference claim. The debtor made the payments before the customer order and so, absent specific protection, could not have been protected by authorization to make future payments. Moreover, the order was permissive, not mandatory, and did not specifically identify the customer or require that its claims be paid. Therefore, the order does not protect the prepetition payments from preference attack. *Insys Liquidation Trust v. McKesson Corp. (In re Insys Therapeutics, Inc.)*, ___ B.R. ___, 2021 Bankr. LEXIS 1923 (Bankr. D. Del. July 21, 2021).

2.3 Postpetition Transfers

2.4 Setoff

2.5 Statutory Liens

2.6 Strong-arm Power

2.6.a **Trustee may not avoid unrecorded mortgage that does not transfer an interest in property.** The bank failed to record the Puerto Rico mortgage. Under Puerto Rico law, recording a mortgage is a "constitutive act," and an unrecorded mortgage does not transfer any interest in the mortgaged property but gives the mortgagee only an unsecured claim. Under section 544(a)(3), a trustee may avoid "a transfer of property of the debtor … that is voidable" by a bona fide purchaser. Because the failure to record the mortgage prevented the transfer of any interest in the property, there was no transfer for the trustee to avoid. The court does not address the consequence, which would appear to be that the real property becomes unencumbered property of the estate, the same as if the mortgage had been avoided. *Miranda v. Banco Popular de Puerto Rico (In re Lopez Cancel)*, 7 F.4th 23 (1st Cir. 2021).

2.7 Recovery

2.7.a **Good faith under sections 548(c) and 550(b)(1) is measured by an inquiry notice standard.** The broker-dealer debtor ran a Ponzi scheme and was liquidated under the Securities Investor Protection Act. The SIPA trustee sued under section 550(a) to recover customer property from subsequent transferees of the debtor's account holders who withdrew funds within two years before the liquidation. A SIPA trustee has the same avoiding powers as a bankruptcy trustee. Section 550(a) authorizes the trustee to recover an avoided transfer from the initial transferee or from subsequent transferees, but section 550(b) prohibits a trustee from recovering from a subsequent transferee who took for value, in good faith, and without knowledge of the voidability of the transfer. "Good faith" is based on inquiry notice, that is, what the transferee should have known, even in a SIPA stockbroker case. However, the test is not purely objective or a negligence standard. "[W]hat the transferee should have known depends on what it actually knew, and not what it was charged with knowing on a theory of constructive notice." The test requires a three-step analysis: what did the transferee actually know; do those "facts put the transferee on inquiry notice of the fraudulent purpose behind a transaction—that is, whether the facts … would have led a reasonable person in the transferee's position to conduct further inquiry into possible fraud," and if so, whether "diligent inquiry would have discovered the fraudulent purpose." *Picard v. Citibank, N.A. (In re Bernard L. Madoff Inv. Secs. LLC)*, 12 F.4th 171 (2d Cir. 2021).

3. BANKRUPTCY RULES

3.1.a **Bankruptcy Rule 3002.1 does not authorize punitive sanctions.** The mortgagee added additional charges to the debtor's account statement without compliance with Bankruptcy Rule 2002.1, which requires a mortgagee to provide notice of any such charges to the trustee and the debtor. The mortgagee ignored the trustee's requests to delete the charges, after which the trustee brought a motion for contempt and sanctions. The mortgagee then removed the charges and opposed the sanctions motion. Rule 3002.1 provides remedies for noncompliance. If the creditor fails to give the required notice, the court may preclude the creditor from presenting evidence in support of the charge and "award other appropriate relief, including reasonable expenses and attorney's fees caused by the failure." "Other appropriate relief" should be construed consistent with the other terms in the same provision. Expenses and fees are compensatory, suggesting that other relief is limited to non-punitive sanctions. *PHH Mortgage Corp. v. Sensenich (In re Gravel)*, 6 F.4th 503 (2d Cir. 2021).

3.1.b **Bankruptcy Rules apply in a related-to action in the district court.** A tort plaintiff sued a defendant that it claimed was responsible with the debtor for the plaintiff's injuries. The state court action was removed to federal district court on the ground that it was related to the debtor's bankruptcy case and transferred to the district where the debtor's case was pending. Among other reasons, because the case was a personal injury tort claim, the district court did not refer it to the bankruptcy court. The defendant moved to dismiss on jurisdictional grounds. The court granted the motion. The plaintiff moved for reconsideration 28 days later. The court denied

reconsideration, and the plaintiff appealed. Bankruptcy Rule 1001 provides that the Rules "govern procedure in cases under title 11." Although the phrase is ambiguous as to whether it includes related-to proceedings, practicalities require it to be read that way. Otherwise, a district court handling both core and non-core proceedings in a single case would have to apply two different sets of Rules. Bankruptcy Rule 9023 requires that a motion for reconsideration be filed within 14 days after the order or judgment. It applies here. Therefore, the filing 28 days after the order was late. Under Rule 9023, a timely-filed motion tolls the time period for filing a notice of appeal. Because the motion did not toll the time period for filing a notice of appeal, the notice of appeal was late, and the court of appeals lacks jurisdiction to hear it. *Roy v. Canadian Pac. Ry. Co. (In re Lac-Mégantic Derailment Litig.)*, 999 F.3d 72 (1st Cir. 2021).

3.1.c **Email service of a bar date notice is not adequate.** The claims agent mailed the bar date notice to the creditor's address shown on the schedules, which the parties stipulated was not the creditor's last known address. It also emailed the notice to the creditor's email address, which the creditor regularly used, including for communications relating to the case. The parties stipulated that the creditor did not receive the mail notice, and the creditor claimed he did not see the email notice. Due process requires at a minimum notice reasonably calculated to inform. While due process is necessary, it might not be sufficient. Bankruptcy Rule 2002(a)(7) requires that notice of a bar date be sent by mail. Because the parties stipulated that the address to which the notice was sent was not the creditor's last known address, the notice did not comply with Rule 2002(a)(7). Bankruptcy Rule 9005 incorporates Fed. R. Civ. P. 61, which requires the court to disregard errors and defects that do not affect substantial rights—the harmless error doctrine. To show harmless error here in the absence of properly mailed notice, the debtor would have to show the creditor had actual knowledge of the bar date. Because the debtor could not show that, the court denies the bar date objection to the claim. *In re Cyber Litigation Inc.*, ___ B.R. ___ (Bankr. D. Del. Oct. 21, 2021).

4. CASE COMMENCEMENT AND ELIGIBILITY

4.1 Eligibility

4.1.a **Subchapter V eligibility does not require business operations, only activities.** The debtor ceased operations in October 2020 and filed a subchapter V petition in April 2021 to liquidate assets valued at about $300,000 and disburse sale proceeds to creditors. At the filing date, the debtor maintained business bank accounts, had accounts receivable, worked with insurance adjusters and insurers to address prepetition insurance claims, and was preparing assets for sale. Subchapter V eligibility is limited to a "person engaged in commercial or business activities." "Engaged" is tested as of the petition date. "Commercial or business" means dealings or transaction of an economic nature. "Activities" requires behavior, actions, or acts. Under these definitions, the debtor's conduct on the petition date included commercial or business activities and is therefore eligible for subchapter V. Operations are not required. *In re Vertical Mac Construction, LLC*, ___ B.R. ___ (Bankr. M.D. Fla. July 23, 2021); *accord In re Blue*, 630 B.R. 179 (M.D.N. Car. 2021).

4.1.b **Debtor's eligibility is determined based on its law of formation.** A REIT formed in Singapore under Singapore law filed a chapter 11 case. Only a person is eligible to file a chapter 11 case. "Person" is defined to include a business trust. Under the principles of *Butner v. United* States, bankruptcy courts should apply nonbankruptcy law unless there is a bankruptcy-based reason for not doing so. Thus, determination of whether an entity is a business trust that is a qualified debtor should be based on the entity's law of formation, not on federal common law. Breaking with the majority of courts to address this issue, the court looks to Singapore law to determine the debtor's status as a business trust and its eligibility for chapter 11. *In re Eht Us1*, 630 B.R. 410 (Bankr. D. Del. 2021).

4.2 Involuntary Petitions

4.2.a **Official Form 105 contains adequate allegations to withstand a motion to dismiss.** The petitioning creditor filed an involuntary petition using Official Form 105, checking the boxes on that form to allege the debtor is eligible for involuntary relief, the creditor is eligible to file the petition, and the debtor is generally not paying his debts as they become due, unless subject to a bona fide dispute as to liability or amount. In response to an additional question on the form, the petitioner also listed the amount of the petitioner's claim and asserted it was matured and unpaid. A debtor may respond to an involuntary petition with a motion to dismiss for failure to state a claim under Rule 12(b)(6). Rule 9009(a) requires that Official Forms be used without alteration, which establishes the legal sufficiency of the form. Therefore, absent some defect in use of the form or in the information provided with the form, the court should deny a motion to dismiss under Rule 12(b)(6). The better approach is to hold a prompt trial on the merits. *In re Haymond*, ___ B.R. ___ (Bankr. S.D. Tex. Sept. 28, 2021).

4.3 Dismissal

5. CHAPTER 11

5.1 Officers and Administration

5.1.a **Court permits structured dismissal.** The debtor in possession sold all its assets and had a pot of cash and some administrative claims, as well as its general unsecured claims. However, it did not have enough to pay all administrative claims and the cost of preparing, soliciting, and confirming a plan. It moved for a dismissal, contingent upon payment of all administrative claims (including US trustee fees) and a small payment on unsecured claims, with the court retaining jurisdiction over a pending adversary proceeding and an exception to the default rule in section 349 so that all orders issued during the case would remain in force. Section 349 permits dismissal of a case and provides that unless the court orders otherwise, dismissal vacates all orders entered during the case, among other things. Although the Supreme Court limited structured dismissals in *Czyzewski v. Jevic Holding Corp. (In re Jevic Holding Corp.)*, 137 S. Ct. 973, 197 L. Ed. 2d 398 (2017), where the dismissal violated bankruptcy priorities, it did not prohibit them. Because the estate has limited remaining assets and no real alternatives, a structured dismissal is appropriate. The court has discretion to permit retention of jurisdiction of an adversary proceeding, which it does here, and to leave orders entered during the case in place, so as, among other things, to preserve the sale authorization. *In re KG Winddown, LLC*, 628 B.R. 739 (Bankr. S.D.N.Y. 2021).

5.1.b **Court subordinates to general unsecured claims an unauthorized postpetition loan.** During its chapter 11 case, without court approval under section 364, the debtor borrowed from an insider to acquire real property. The lender asserted an administrative claim for the loan amount. Section 503(b) allows claims for actual amounts necessary to the preservation of the estate and grants them priority over prepetition claims. Section 364 permits the court to authorize postpetition loans with administrative expense priority. Failure to obtain prior approval defeats a claim for administrative expense priority. Section 503(b)(3) allows an administrative expenses claim of a creditor and certain other specified entities for making a substantial contribution to the case. An insider lender is not among the specified entities and so may not rely on the substantial contribution provision. A court may grant administrative expense priority to an unauthorized postpetition loan on equitable principles. To do so, the court must find that the court would have granted approval of the loan before it was made, the loan would not impair creditor interests, and the property acquired with the loan proceeds would provide a substantial distribution to creditors, all measured as of the time the loan was made. None of those factors was present here. Therefore, the court denies administrative expense priority to the loan. The court may disallow the claim in its entirety, but here, the court allowed it and subordinated it to the claims of general unsecured creditors based on the insider's inequitable conduct. *Norcross Hospitality, LLC v. Glass (In re Nilhan Devs., LLC)*, ___ B.R. ___ (N.D. Ga. Sept. 30, 2021).

5.2 Exclusivity

5.3 Classification

5.4 Disclosure Statement and Voting

5.5 Confirmation, Absolute Priority

6. CLAIMS AND PRIORITIES

6.1 Claims

6.1.a **Court may set bar date for, and plan may discharge, claims arising between confirmation and effective date.** The debtor confirmed a chapter 11 plan, which provided for discharge of all claims arising before the effective date. In the long period between confirmation and the effective date, the debtor in possession discharged an employee, who sued for age discrimination in federal court after the effective date. The employee had notice of the general bar date and the administrative claims bar date, which was 30 days after the effective date, but did not file a proof of claim or request for payment of an administrative expense. Section 503(b) provides that the actual, necessary expenses of preserving the estate are administrative expenses, which are entitled to priority. The estate lasts until the plan effective date, so claims arising between confirmation and the effective date may qualify as administrative expenses. Although a tort or similar claim is not necessary to preserving the estate, *Reading Co. v. Brown*, 391 U.S. 471 (1968), held that such claims are administrative expenses. By referring to timely filed claims, section 503 authorizes the bankruptcy court to set a bar date for the filing of requests for payment of administrative expenses and to bar unfiled claims from sharing in any distribution under a plan. Section 1141(d) discharges all claims that arose before confirmation, except as otherwise provided in the plan. The plan may modify not only the kinds of claims excepted from discharge, but also the effective date of the discharge. Therefore, the unfiled employment discrimination claim was barred by the bar date and discharged by the plan. *Ellis v. Westinghouse Electric Co., LLC*, 11 F.4th 221 (3d Cir. 2021).

6.1.b **Guaranteed creditor may waive setoff rights before guarantor pays creditor in full.** The debtor owed the United States, supported by a surety bond, and was entitled to a tax refund from the United States. The United States and the trustee settled: the United States' claim was allowed, and the United States waived the right to offset the tax refund. The surety had acknowledged its obligation to pay the United States but had not yet completed payment by the time the United States and the trustee settled. As subrogee to the debtor's rights against the United States, the surety claimed the right to the tax refund, which the United States had waived in the settlement. Section 509 subrogates a surety to the creditor's rights to the extent of payment but subordinates the surety's claim to the principal creditor's claim until the creditor's claim is paid in full. Because the surety had not paid the United States in full by the time of the settlement, its rights were subordinated, and the United States could use its setoff rights to protect its own interests without the surety's approval. *Giuliano v. Ins. Co. of Penn. (In re LTC Holdings, Inc.)*, 10 F.4th 177 (3d Cir. 2021).

6.2 Priorities

6.2.a **Employee benefit priority applies separately to multiple employee benefit plans.** Under a collective bargaining agreement, the debtor funded three employee benefit plans. When the debtor filed bankruptcy, each of the plans filed a proof of claim. Section 507(a)(6) grants priority to a claim of an employee benefit plan for services rendered within 180 days before the petition date "for each such plan, to the extent of the number of employees covered by each such plan multiplied by $12,850." Because the statute uses the term "each such plan," the priority amount is set separately for each plan. The plans are not required to share the priority. *Algozine Masonry Restoration, Inc. v. Local 52 (In re Algozine Masonry Restoration, Inc.)*, 5 F.4th 827 (7th. Cir. 2021).

7. CRIMES

8. DISCHARGE

8.1 General

8.1.a **Section 523(a) exceptions to discharge do not apply to a nonconsensual subchapter V plan.** The creditor obtained a prepetition judgment against the corporate subchapter V debtor, which the creditor sought to except from discharge. Section 523(a) excepts certain debts from the discharge of an individual debtor under section 1192. Section 1192(2) excepts from discharge under a nonconsensual subchapter V plan any debt "of the kind specified in section 523(a)." The reference to section 1192 in section 523(a) means that the limitation of the exceptions to discharge in section 523(a) applies to individual debtors and that the exceptions do not apply to a corporate debtor. *Cantell-Cleary Co. v. Cleary Packaging LLC (In re Cleary Packaging LLC)*, 630 B.R. 466 (Bankr. D. Md. 2021).

8.1.b **Signing of guaranty creates dischargeable contingent debt.** The debtor personally guaranteed his company's debts to a supplier. He did not list the supplier as a creditor in his schedules. After his no-asset bankruptcy and discharge, his company continued to purchase from the guaranteed supplier but later failed to pay the supplier for those purchases. A discharge applies to all debts that arose prepetition. Under controlling circuit precedent, when a debt arises is based on the conduct test, not the state-law focused accrual test. Conduct is measured by the existence of a prepetition relationship. Here, the signing of the guarantee, rather than the making of the guaranteed loan, established the relationship and was the conduct under which the contingent claim arose, so the claim was potentially dischargeable. However, under section 523(a)(3)(A), the claim of a creditor who did not receive timely notice of the bankruptcy is not discharged, except in a no-asset case. Therefore, the lack of notice to the supplier does not except the debt from discharge. *Reinhart FoodService L.L.C. v. Schlundt (In re Schlundt)*, ___ B.R. ___, 2021 Bankr. LEXIS 2577 (Bankr. E.D. Wis. Aug. 19, 2021).

8.2 Third-Party Releases

8.3 Environmental and Mass Tort Liabilities

8.3.a **CERCLA response cost claim arises when the debtor deposited waste.** The debtor contributed waste to a hazardous waste site in the 1950s and 1960s. It filed chapter 11 in 1992 and confirmed a plan, which provided for discharge of all claims that arose before the effective date. In 2017, the EPA issued a decision and decree for remedial action at the site against a group of settling defendants. The settling defendants brought an action for contribution against potentially responsible parties, including the debtor. A claim for contribution lies only when the plaintiff and the defendant are both liable on the same claim, in this case, to the United States. If the United States' claim against the debtor arose before the plan effective date, it was discharged, and a contribution claim would not lie. Under the "underlying acts" approach the Fourth Circuit has adopted, a claim arises when the acts underlying the claim occurred. Here, the underlying acts were the deposit of waste in the hazardous waste site in the 1950s and 1960s. The claim arose then, which was before the plan's effective date, and therefore was discharged. *68thSt. Site Work Group v. Airgas, Inc.*, ___ B.R. ___, 2021 U.S. Dist. LEXIS 199088 (D. Md. Oct. 15, 2021).

9. EXECUTORY CONTRACTS

9.1.a **Remaining covenants that do not go to a contract's essence do not make the contract executory.** The debtor contracted with a movie producer to produce a film, which the producer did. The contract provided for contingent consideration based on the film's profits over time. However, the debtor was not obligated to pay the contingent compensation if the producer was in

breach of its continuing obligations not to interfere with the debtor's intellectual property in the film, indemnify the debtor for breach of reps and warranties, and limit assignment of the contract. Six years later, the debtor filed a chapter 11 petition. Under its plan, it sold its business, including the contract with the producer, to a buyer, who refused to pay the producer any arrearages owing under the contract. An executory contract is one under which a party's material breach would excuse the other party's remaining performance. If a party has substantially performed the essence of the contract, that party's future breach is not material. Here, the producer substantially performed the contract obligations by producing and delivering the film. Although the parties can contract around the rule by designating certain obligations as material and providing for termination upon breach, the producer's remaining obligations did not go to the essence of the contract, and their breach would not excuse the debtor's remaining performance. They were merely covenants or conditions precedent to continued payment of contingent consideration. Therefore, the contract was not executory, and the buyer was not required to cure the unpaid prepetition amounts the debtor owed. *Spyglass Media Grp., LLC v. Bruce Cohen Prods. (In re Weinstein Co. Holdings, LLC)*, 997 F.3d 497 (3d Cir. 2021).

9.1.b **A surety bond is not an executory contract.** Before bankruptcy, the debtor obtained surety bonds to guarantee performance of its obligations to mineral rights lessors. The surety's obligations to the lessors were irrevocable, but once it issued the bonds, it had no further obligations to the debtor. In connection with obtaining the bonds, the debtor entered into indemnification agreements with the surety, obligating the debtor to pay the surety or provide collateral under certain circumstances. Under its chapter 11 plan, the debtor assumed all contracts not rejected. The surety bonds were not among the contracts listed for rejection. After the effective date, the reorganized debtor defaulted on some of the leases, the lessors demanded payment from the surety, and the surety demanded the reorganized debtor reimburse it or post collateral. An executory contract is one under which "performance remains due to some extent on both sides and … if the failure of either party to complete performance would constitute a material breach." Here, the surety had no remaining performance obligation to the debtor, and because the bonds are irrevocable, the debtor's failure to perform under the indemnity agreement would not constitute a breach excusing the surety's performance to the lessors. Therefore, the contract is not executory, it was not assumed under the plan, and the surety may not enforce any obligations under the indemnity agreement against the reorganized debtor. *Argonaut Ins. Co. v. Falcon V, L.L.C.*, ___ B.R. ___, 2021 U.S. Dist. LEXIS 188686 (M.D. La. Sept. 29, 2021).

9.1.c **Court order enforcing contract makes the contract not executory.** The debtor contracted to sell a liquor license. The sale required city council approval, which the contract required the debtor to request. The buyer put the purchase price in escrow, to be released on closing. The debtor breached. The buyer obtained a state court order requiring the debtor to cooperate with the buyer in obtaining approval, make the request to the council, and close the sale upon approval. The debtor made the request but filed a chapter 11 petition three days before the approval hearing and moved for approval to reject the contract. A contract is executory if performance remains on both sides, failure of which would constitute a material breach that would relieve the other party of further performance. When a court orders performance of a contract, any remaining performance obligation of the party is ministerial, because the court may enforce the order and cause the performance. Therefore, a contract obligation that has been reduced to judgment is no longer executory. In addition, applying a purchase price to a contract where the only remaining contingency to doing so is not within the parties' control is a ministerial act. Therefore, the contract itself, regardless of the court order, is not executory. The court denies the rejection motion. *In re Bennett Enters.*, 628 B.R. 481 (Bankr. D.N.J. 2021).

9.1.d **Rejection terminates granted rights that are useful solely in contract performance.** The debtor contracted with a pipeline company to use a pipeline the company was constructing to deliver oil and gas to a collection point. Under the contract, the debtor exclusively dedicated, granted, and committed to the performance of the contract all the debtor's interests in specified mineral leases, all gas and water produced or delivered from the leases, and all the debtor's future interests in certain wells, and agreed not to deliver any gas from those properties to any

other pipeline company. Upon filing chapter 11, the debtor in possession moved for court approval to reject the contract. The pipeline company claimed the dedication survived rejection. Under *Mission Product Holdings, Inc. v. Tempnology, LLC*, 139 S. Ct. 1652 (2019), rejection operates only as a breach and not as a rescission or avoiding power that allows a debtor in possession to recapture rights already granted to the contract counterparty. Here, the contract counterparty cannot use the dedicated and granted rights unless the debtor continues to perform under the contract. Rejection relieves the debtor of future performance, rendering the dedicated rights useless to the counterparty, except as a way to enforce the contract's exclusivity provision, which rejection relieves the debtor from performing. Therefore, the counterparty may not retain the dedicated and granted interests after rejection. *Caliber N. Dak., LLC v. Nine Point Energy Holdings, Inc. (Nine Point Energy Holdings, Inc.)*, ___ B.R. ___ (D. Del. July 30, 2021).

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

11.2 Sanctions

11.3 Appeals

11.3.a **Eighth Circuit severely limits equitable mootness doctrine.** The preferred shareholder appealed the chapter 11 confirmation order. Before the appeal was heard, the plan sponsor funded the plan, all equity interests were canceled, the secured creditor received payment, unsecured creditors received partial payment, and the plan sponsor released its DIP financing claim and a prepetition claim. The equitable mootness doctrine is based on common sense or equitable considerations to justify declining to decide a case on the merits. In a case of first impression, the Eighth Circuit declines to adopt a specific multi-factor test, deferring instead to whether the court can grant effective relief without undermining the plan and thereby affecting third parties. Most important are whether the plan has been substantially consummated and what effects reversal might have on third parties. Seeking or obtaining a stay is not determinative. Therefore, the appellate court must undertake a preliminary review of the merits to determine the strength of the appeal and the time required to resolve it, as well as of the remedies available, so as not to undermine the plan and harm third parties. Therefore, dismissal for equitable mootness should be extremely rare. Here, because the district court did not undertake this review, the court of appeals remands, noting that the plan sponsor and the supportive secured creditors are not true third parties the doctrine is meant to protect. *FishDish, LLP v. VeroBlue Farms USA, Inc. (In re VeroBlue Farms USA, Inc.)*, 6 F.4th 880 (8th Cir. 2021).

11.3.b **Rule 8002 time limit is mandatory but not jurisdictional.** The court overruled a preferred shareholder's objection to the secured creditor's claim. The shareholder appealed 18 days after the order. Rule 8002 requires that a notice of appeal be filed "within 14 days after entry of the judgment, order, or decree being appealed." Section 158(a) of title 28 permits appeals of final judgments and of interlocutory orders. Section 158(c)(2) requires an appeal under subsection (a) to be taken "in the time provided by Rule 8002 of the Bankruptcy Rules." Only a statute may specify a court's jurisdiction. Because the Rules may be amended without Congressional action to change the time period for filing a notice of appeal, the Rule is not jurisdictional, despite the reference to the Rule in the statute. However, the deadline is mandatory, and the court dismisses

the appeal. *FishDish, LLP v. VeroBlue Farms USA, Inc. (In re VeroBlue Farms USA, Inc.)*, 6 F.4th 880 (8th Cir. 2021).

11.3.c **Chapter 13 dismissal moots appeal from order directing funds disbursement.** The court ordered the chapter 13 trustee to disburse to the secured lender insurance proceeds resulting from damage to the chapter 13 debtor's house. The debtor moved to dismiss her case, which the court granted. The debtor appealed the disbursement order. An appeal is jurisdictionally moot when the case or controversy it concerns is no longer live. Section 349(b)(3) provides that property of the estate revests in the entity in which the property was vested immediately before the petition. Once the trustee disbursed the funds, they were no longer property of the estate, and section 349(b)(3) does not authorize the court to recover funds that were already disbursed. Therefore, the court may not grant relief, and the appeal is moot. *Sundaram v. Briry, LLC (In re Sundaram)*, 9 F.4th 16 (1st Cir. 2021).

11.4 Sovereign Immunity

12. PROPERTY OF THE ESTATE

12.1 Property of the Estate

12.1.a **Court explains proper disposition of unclaimed creditor distribution.** The bank failed to record the mortgage but filed a proof of claim. The trustee avoided the unrecorded mortgage and sold the real property. The trustee issued a check to the mortgagee, but the mortgagee never cashed it. After 90 days, the trustee stopped payment under section 347(a) and deposited the funds into court. After five years, the clerk, under 28 U.S.C. 2041, deposited the funds with the U.S. Treasurer in the name and to the credit of the court. The debtor then sought recovery of the unclaimed funds. In a status of custodial escheat, the funds are not abandoned property under section 554 and remain property of the estate. Section 2041 provides that moneys paid into court may be paid to "the rightful owners." Section 2042 prohibits money deposited under section 2041 to be withdrawn except by court order and permits payment to a claimant "entitled thereto" upon "full proof of the right thereto." Although the funds remained property of the estate, the mortgagee is not deemed to have abandoned its claim. The survival of the mortgagee's claim prevents the case from being a surplus case, with funds being paid to the debtor under section 726(a)(6). Therefore, upon the mortgagee's proper proof of entitlement to the funds, the trustee will be required to pay them to the mortgagee. *In re Pickett*, ___ B.R. ___, 2021 Bankr. LEXIS 2203 (Bankr. E.D. Cal. Aug. 11, 2021).

12.1.b **Bank may force management change if authorized under the loan agreement.** The debtor defaulted on its loans. The bank agreed to amendments, but required a personal guarantee from the principal and the installation of a CRO. After further defaults, the debtor and guarantor handed the CRO full authority over the business. Yet the borrowers remained in default. A forbearance agreement then reaffirmed the validity of the debt, confirmed there were no valid defenses to enforcement, and waived all claims against the bank. After still more defaults, the lenders accelerated and foreclosed and called the guaranty. Ratification recognizes a contract as valid, having knowledge of all relevant facts. A guaranty that has been ratified cannot be avoided due to duress or fraudulent inducement. Duress exists only upon a threat to do something without a legal right, an illegal exaction or fraud, and an imminent restraint that destroys fee agency. The bank had the right to take action, including demanding management change, under the loan agreements, the amendments, and the forbearance agreement. Therefore, it did not act illegally in exercising its leverage and in enforcing the guarantee. *Lockwood Int'l, Inc. v. Wells Fargo, N.A.*, ___ Fed. Appx. ___, 2021 U.S. App. LEXIS 24385 (5th Cir. Aug. 16, 2021).

12.2 Turnover

12.3 Sales

13. TRUSTEES, COMMITTEES, AND PROFESSIONALS

13.1 Trustees

13.2 Attorneys

13.3 Committees

13.4 Other Professionals

13.5 United States Trustee

13.5.a **2018 U.S. Trustee fee increase is unconstitutional as applied to then-pending chapter 11 cases.** The debtors filed their cases in 2016. In 2017, Congress amended section 1930(a) of title 28, which governs U.S. trustee fees for chapter 11 cases, to increase the fees effective January 2018 for each case for disbursements made in each quarter after the effective date. The fee increase did not apply in Bankruptcy Administrator districts, where chapter 11 fees are set by the Judicial Conference under a statute that then authorized, but did not require, that the Judicial Conference set BA district fees to be equal to UST district fees. Courts apply a presumption against retroactive application of a new statute to avoid notice and other issues, first determining what the statute expressly provides and second whether the statute would impair a party's rights, increase liability for past conduct, or impose new duties regarding completed transactions. If it would, then the statute would not apply retroactively unless it expressly provided otherwise. Here, the statute is sufficiently clear that it applies to disbursements in each quarter starting in January 2018, without excluding pending cases, and so applies to the debtors' cases. Moreover, it applies only to post-enactment disbursements, so it does not apply to past conduct or completed transactions. The Constitution authorizes Congress to enact "uniform Laws on the subject of Bankruptcies throughout the United States," which requires geographic uniformity. Because the statute imposes a fee that estates must pay before paying creditors and therefore affects the relation between a debtor and its creditors, it is a law on the subject of bankruptcies. Uniformity requires that a bankruptcy law apply uniformly to a defined class of debtors, not based on their geographic location. The fee increase applies based on location and therefore violates the Uniformity Clause. *John Q. Hammons Fall 2006, LLC v. U.S. Trustee (In re John Q. Hammons Fall 2006, LLC)*, ___ F.4th ___, 2021 U.S. App. LEXIS 29917 (10th Cir. Oct. 5, 2021).

14. TAXES

15. CHAPTER 15—CROSS-BORDER INSOLVENCIES

15.1.a **Section 109 does not limit Chapter 15 eligibility.** The individual foreign debtor had no property in the United States. The foreign liquidators filed a chapter 15 petition to investigate the debtor's affairs in the United States, to recover any property they discovered, and to bring claims against third parties. Section 109(a) provides that only an entity with a domicile, residence, place of business, or property in the United States may be a debtor under the Bankruptcy Code. Section 1517 requires a court to recognize a foreign representative if the foreign proceeding is a foreign main proceeding or a foreign nonmain proceeding (as defined), the foreign representative is a person or body, and the petition meets section 1515's requirements. Section 1517 is mandatory and does not cross-reference section 109. The definition of "debtor" in chapter 15 ("entity that is the subject of a foreign proceeding") differs from the definition for section 109 (person "concerning which a case under this title has been commenced"). Section 109 specifies eligibility requirements only for other chapters, not chapter 15, and contains other eligibility requirements, such as credit counseling, that could not apply in a chapter 15 case. Chapter 15 permits commencement of an ordinary bankruptcy case against the debtor if the debtor has assets in the United States, implying that having assets in the United States is not a chapter 15 eligibility requirement. These provisions, taken as a whole, show that section 109 does not limit chapter 15

eligibility. *In re Abdulmunem al Zawawi*, ___ B.R. ___, 2021 Bankr. LEXIS 2367 (Bankr. M.D. Fla. Aug. 30, 2021).