JENNER&BLOCK

Recent Developments in Bankruptcy Law, July 2022

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

TABLE OF CONTENTS

1. AUTOMATIC STAY

1.1 Covered Activities

1.1.a **Order granting counterclaim declaring validity of mortgage on the debtor's property does not violate the stay.** The debtor acquired property subject to a disputed mortgage. The debtor brought a quiet title action against the mortgagee. The mortgagee counterclaimed to declare the mortgage valid. While summary judgment motions were pending, the debtor filed a chapter 11 case. The nonbankruptcy court granted summary judgment to the mortgagee after the debtor's petition date. The automatic stay prohibits continuation of any action against the debtor that was or could have been commenced before the petition date, any act to obtain possession or exercise control of property of the estate, and any act to create, perfect, or enforce a lien against property of the debtor. Because the mortgagee's counterclaim was simply the mirror image of the debtor's complaint, did not seek additional relief, and was only a defense to the complaint, the mortgagee's counterclaim was not an action against the debtor. The counterclaim also sought only to maintain the status quo and as such, did not constitute an act to obtain possession or control of property of the debtor or the estate. It simply affirmed the validity of an existing lien. Finally, the judgment on the counterclaim did not create, perfect, or enforce a lien on the debtor's property. It only declared existing rights. Therefore, the nonbankruptcy court's summary judgment order did not violate the stay. *Censo, LLC v. Newrez, LLC (In re Censo, LLC)*, 638 B.R. 416 (9th Cir. B.A.P. 2022).

1.2 Effect of Stay

1.3 Remedies

2. AVOIDING POWERS

2.1 Fraudulent Transfers

2.1.a **A bank's customer is a financial institution for purposes of section 546(e)'s safe harbor.** The debtor's special purpose entity, which issued notes under note purchase agreements to facilitate the debtor's Ponzi scheme, transferred payments on the notes, as provided in the agreement, to the note holder at the holder's custodial account at a bank. Section 546(e) prohibits a trustee from avoiding a transfer that is a settlement payment or made in connection with a securities contract and that is by or to (or for the benefit of) a financial institution. The Code defines "financial Institution" to include a customer of a bank when the bank is acting as agent or custodian for the customer. The bank was an agent or custodian for the note holder, because it received the note payments into a custodial account for the note holder. Therefore, the note holder was a financial institution. The note is a security. But the court below did not adequately examine whether the transfer was made in connection with a securities contract. Therefore, the court remands for that determination. *Kelley v. Safe Harbor Managed Account 101, Ltd.*, 31 F.4th 1058 (8th Cir. 2022).

2.2 Preferences

2.2.a **Pleading the due diligence prerequisite for a preference complaint.** The debtor in possession analyzed transfers to a creditor, including days-to-pay information for each transfer and for pre-avoidance period transfers and any unusual collection activity, and included that information in a preference avoidance and recovery demand letter to the creditor. When the creditor did not respond, the DIP sued to avoid and recover the preferences. In the complaint, the DIP recited that it had conducted an analysis of the transfers and whether they were protected from avoidance by any applicable defense. The complaint also referred to, but did not attach, the demand letter. Section 547(b) permits a trustee or DIP to avoid a preference, "based on reasonable due diligence in the circumstances of the case and taking into account a party's known or reasonably knowable affirmative defenses." On a motion to dismiss, the court may consider a document the complaint references. Combined with the complaint's allegation that the DIP conducted an analysis, the letter satisfied the statutory prerequisite for bringing the complaint, whether or not the prerequisite is an element of the preference claim. *Center City Healthcare, LLC v. McKesson Plasma & Biologics LLC (In re Center City Healthcare, LLC)*, 2022 Bankr. LEXIS 1638 (Bankr. D. Del. June 13, 2022).

2.2.b **Ear-marking doctrine requires satisfaction of the dominion/control and diminution of the estate tests.** The closely held debtor owed money to an insider on a note that was to receive no payments until a separate series of notes was paid in full. The debtor's principal loaned money to the debtor specifically to make payments on the insider note and the other notes. Upon the debtor's bankruptcy, the trustee sued to avoid and recover the payments on the insider notes as preferences. A preference is a transfer of property of the debtor that meets certain additional conditions. If a new creditor loans money to a debtor to pay an old creditor, the payment might be protected by the ear-marking doctrine, which deems the money not to have been property of the debtor. To satisfy the ear-marking doctrine, the new money must not be subject to the dominion or control of the debtor—that is, the debtor must be under a binding agreement to use the new money to pay the old creditor and not for any other purpose—and the transaction must not result in the diminution of the estate—that is, the reduction in the amount of assets available to pay creditors. The doctrine's application is clearer when the new creditor pays the money directly to the old creditor and the money does not pass through the debtor's account, but that is not required. Here, the new lender (the principal) required the debtor (controlled by the principal) to use the new loan to pay the insider note, so the debtor did not have dominion and control over the funds. However, the insider note payments resulted in the diminution of the estate, because it replaced subordinated debt with general unsecured debt. Therefore, the court concludes, the transfer was of property of the debtor and avoidable. *Montoya v. Goldstein (In re Chuza Oil Co.)*, 639 B.R. 586 (10th Cir. B.A.P. 2022).

2.2.c **PPP loan rescission and return is not a preference.** The debtor applied for a Payroll Protection Program loan on April 24, 2020. It signed the note on May 5 and received the funds on May 8. It held the funds aside, pending a decision whether to revoke the loan and return the funds, which it did on May 13, under a "safe harbor," no-questions-asked provision in the PPP program policy, which permitted return of the funds and cancellation of the loan by May 14. The debtor filed a bankruptcy case on May 27. The trustee sued the lender to avoid the funds' return as a preference. A preference is a transfer of an interest of the debtor in property for or on account of an antecedent debt. Upon rescission of a contract, the contract become void *ab initio*, and the rescinding party must restore anything of value received. The court may impose a resulting trust to effectuate that result. Therefore, under the circumstances, the funds the debtor had held aside were subject to a resulting trust and were not property of the debtor. Moreover, because of the rescission, the transaction was cancelled, and there was no antecedent debt. Therefore, there was no avoidable preference. *Brady v. United States, SBA (In re Specialty's Café & Bakery, Inc.)*, 639 B.R. 548 (Bankr. N.D. Cal. 2022).

2.3 Postpetition Transfers

2.4 Setoff

2.5 Statutory Liens

2.6 Strong-arm Power

2.7 Recovery

3. BANKRUPTCY RULES

4. CASE COMMENCEMENT AND ELIGIBILITY

4.1 Eligibility

4.1.a **Debtor may not elect subchapter V during a pending chapter 11 case if it prejudices creditors.** The individual debtor purchased an historic home, which she used for her residence and as a bed and breakfast under a local ordinance that permitted short-stay rentals only if the owner also resided in the property. In October 2018, on the eve of foreclosure by the mortgage lender, the debtor filed a chapter 11 case, listing her debts as primarily consumer debts, and did not designate her case as a small business. Her debts included about $1.6 million on the mortgage and about $65,000 of general unsecured debts. After numerous cash collateral and preliminary plan proceedings, the court set deadlines for filing plans. The lender filed a plan that provided for foreclosure on the property. On the eve of the confirmation hearing for the creditor's plan, the debtor moved to amend her petition to designate her case as a small business case and to elect to proceed under then-new subchapter V, added by the Small Business Reorganization Act (SBRA), which became effective a week before the scheduled confirmation hearing. A small business debtor is "a person engaged in commercial or business activities" with total debt less than $2,725,625 (later amended effective March 27, 2020 to $7,500,000 for two years and then, under section 104 adjustment, to $3,024,725, and then again in June 2022 to $7,500,000), "not less than 50 percent of which arose from the commercial or business activities of the debtor." Bankruptcy Rule 1009(a) permits a debtor to amend a voluntary petition "as a matter of course," though the amendment is not necessarily controlling, and the original petition, signed under penalty of perjury, still retains evidentiary effect. However, the court should disallow an amendment where it would prejudice creditors. Prejudice is measured not by creditors' potential recoveries, but by whether the creditor detrimentally relied on the debtor's prior position. Here, the court and the creditor had spent considerable time and resources to get to the point where the creditor was ready to confirm its plan. Changing the rules, including imposing debtor plan exclusivity under subchapter V, after all the prior proceedings, prejudices the creditor, so the amendment is disallowed. *In re Ventura*, ___ B.R. ___ (E.D.N.Y. Apr. 21, 2022).

4.1.b **A non-operating non-profit business can be eligible for subchapter V.** The debtor was formed to acquire and sell interests in private aircraft, provide private air transportation, and provide depreciation tax benefits to its sole member and manager. It did not have a profit motive. A dispute with its fractional interests provider, which was the debtor's largest creditor, led to cessation of operations and related litigation. As of the petition date, it was engaging in litigation, paying its aircraft registry fees, remaining in good standing as a Delaware LLC, and filed tax returns and paying taxes. A person engaged in commercial or business activities at least 50 percent of whose debts arose from its commercial or business activities is eligible to proceed under subchapter V. The Code does not define "engaged in commercial or business activities." Commercial or business activities do not require historical operations. The present tense of "engaged" means the test applies as of the petition date. The activities in which the debtor was engaged as of the petition date qualify as commercial or business activities. And nothing in subchapter V requires that the debtor be a profit-motivated business; otherwise, churches and other nonprofits would be excluded, contrary to Congress' intent. *NetJets Aviation, Inc. v. RS Air, LLC (In re RS Air, LLC)*, 638 B.R. 403 (9th Cir. B.A.P. 2022).

4.2 Involuntary Petitions

4.3 Dismissal

5. CHAPTER 11

5.1 Officers and Administration

5.1.a **Court may order revocation of subchapter V election.** The debtor filed its chapter 11 petition and elected to proceed under subchapter V. It did not go well. After the court denied confirmation of the debtor's fifth amended plan, it determined the debtor could not successfully proceed under subchapter V. Because a subchapter V case is under chapter 11, the case may not be converted to an ordinary chapter 11 case. However, a debtor accesses subchapter V by an election on the petition, and a debtor may amend a petition filed under chapter 11 to elect to proceed under subchapter V. By the same token, the court, exercising its power under section 105 to carry out the provision of the Code, should be able to order the amendment of a petition to revoke the subchapter V election. Because the debtor has a viable business, that is the appropriate remedy here. But because of the debtor's inability to manage the subchapter V case, the court orders the appointment of a chapter 11 trustee upon the revocation of the election. *In re Nat'l Small Bus. Alliance, Inc.*, 2022 Bankr. LEXIS 1811 (Bankr. D.D.C. June 29, 2022).

5.1.b **Court does not consider prepetition decisions in evaluating the debtor in possession's business judgment.** The debtor vacated the premises on the lease expiration date, although the landlord claimed the debtor had exercised a lease extension option. The debtor filed a chapter 11 petition six days later. Because of the landlord's extension claim, the debtor in possession filed a motion the day after the petition date for approval of the rejection of the lease, effective as of the petition date or the motion date, arguing in part that its prepetition vacating of the premises supported its postpetition decision to reject the lease. Lease rejection requires court approval under a business judgment standard. The court should evaluate the debtor in possession's business judgment. Whether the prepetition debtor properly exercised sound business judgment is not before the court, which must address the situation as it exists as of the petition date or when the motion is filed. *In re Player's Poker Club, Inc.*, 636 B.R. 811 (Bankr. C.D. Cal. 2022).

5.2 Exclusivity

5.3 Classification

5.4 Disclosure Statement and Voting

5.5 Confirmation, Absolute Priority

5.5.a **Mortgagee's failure to participate in chapter 11 case results in plan divesting it of its mortgage.** The debtor mortgaged real property and later took out a second loan, which purported to pay off the earlier loan. But the title company erred, and the prior loan was not paid off. The debtor continued to make payments on both loans. Some years later, the debtor filed a chapter 13 case. During the chapter 13 case, the earlier mortgage holder appeared, filed a proof of claim, and ultimately obtained stay relief. The debtor converted the case to chapter 11. During the chapter 11 case, the title company paid the earlier mortgagee, took an assignment of the mortgage, and subordinated it to the later mortgage. The title company did not file a notice of the transfer of the claim. The debtor confirmed a plan that said the earlier mortgage had been satisfied by the later mortgage and that the earlier mortgage would receive nothing under the plan and the mortgage would be released. Although the debtor continued to send notices to the earlier mortgagee, neither the title company nor the earlier mortgagee appeared in connection with plan confirmation. After the debtor received his discharge, the title company sought to enforce the earlier mortgage. Under section 1141(c), property "dealt with" by a plan is free and clear of any claim or lien except as provided in the plan. A court may revoke a confirmation order obtained by fraud only if revocation is requested within 180 days after confirmation. Whether or not the debtor's treatment of the earlier mortgage in the plan was fraudulent, the title company's request to avoid the plan's treatment of its mortgage was too late and was therefore barred. Lack of notice may be a ground for avoiding treatment under the plan, but here, the debtor continued to send notice to the earlier mortgagee, and the title company failed to receive notice only because it did not file a notice of transfer of claim or arrange with the earlier mortgagee for forwarded notices. Accordingly, the title company is deemed to have participated in the case. Stay relief does not remove the property from the estate, so the creditor is not relieved of having to appear and protect its rights. Therefore, the property revested in the debtor free and clear of the earlier mortgage. *Beyha v. Conestoga Title Ins. Co. (In re Beyha)*, 2022 Bankr. LEXIS 635 (Bankr. E.D. Pa. 2022).

5.5.b **Effective date payment may satisfy subchapter V cramdown requirement.** The debtor proposed a plan under subchapter V that would make a large payment on the effective date in an amount materially in excess of the debtor's projected disposable income for the three years after the effective date and would make additional payments from actual disposable income received during the three years after the effective date. The debtor's major creditor did not accept the plan and objected to confirmation. Section 1191(c)(2) permits nonconsensual plan confirmation if the value of property to be distributed under the plan in the three years after the effective date is not less than the debtors' projected disposable income over the three-year period. Because the effective date payment is greater than the present value of the debtor's post-effective date projected disposable income, the plan satisfies section 1191(c)(2) and is properly confirmed. *Legal Service Bureau, Inc. v. Orange County Bail Bonds, Inc. (In re Orange County Bail Bonds, Inc.)*, 638 B.R. 137 (9th Cir. B.A.P. Apr. 27, 2022)

6. CLAIMS AND PRIORITIES

6.1 Claims

6.1.a **COVID-19 pandemic excuses the debtor from WARN Act compliance.** The debtor suffered financial losses, leading to a chapter 11 filing on March 8, 2020. It entered chapter 11 with a wind-down budget and plan to operate one line of stores pending a going-concern sale and to liquidate the remainder of its inventory. The COVID-19 emergency was declared on March 13, 2020, after which the debtor in possession concluded it could no longer operate or continue the liquidation sales. It terminated all employees about a week later. The WARN Act requires an employer to provide 60 days' notice of a mass layoff but permits exceptions for a liquidating fiduciary, an unforeseen business circumstance, and a natural disaster. A liquidating fiduciary is one whose sole operation is the liquidation of the business. Here, because the debtor continued some operations in aid of liquidating, the liquidating fiduciary exception does not apply. An unforeseen business circumstance involves a sudden, dramatic, and unexpected action or condition outside the employer's control that is the cause of the layoff. It need not be the sole cause, but it will suffice if it is the straw that broke the camel's back. Here, the sudden onset of the COVID-19 pandemic, which the employer could not predict or control, pushed the debtor over the edge, resulting in the closing of the business and the mass layoffs. The natural disaster exception applies in the case of "any form of natural disaster, such as flood, earthquake, or drought and similar effects of nature." Similar to the unforeseen business circumstances, the pandemic was a natural disaster that contributed substantially to the business closure and resulting layoffs. Therefore, the employer was excused from WARN Act compliance. *Steward v. Art Van Furniture, LLC (In re Art Van Furniture, LLC)*, 638 B.R. 523 (Bankr. D. Del. 2022).

6.1.b **Debt to a trustee for avoidance and recovery is incurred on the petition date, not at the time of the transfer.** The SIPA trustee sued a partnership and its former general partner to avoid and recover fraudulent transfers. The partner disassociated himself from the partnership nine months before the filing of the SIPA proceeding. The court found the partnership liable for the fraudulent transfers. A general partner is liable for the partnership's debts incurred while a general partner, or, under the state statute in effect, within two years after disassociation, unless the creditor knew of the disassociation. The debtor's transfers to the partnership were proper transactions when made and became voidable only upon the filing of the SIPA petition. Because the partnership became liable to the trustee within two years after the partner's disassociation from the partnership, the partner was also liable to the trustee. *Sec. Investor Prot. Corp. v. Bernard L. Madoff Inv. Secs. LLC (In re Madoff)*, 638 B.R. 41 (Bankr. S.D.N.Y. 2022).

6.2 Priorities

6.2.a **Goods supplied in connection with a service contract are entitled to section 503(b)(9) administrative priority.** In the 20-day period before bankruptcy, a supplier provided "acidizing services" to the debtor, which necessitated the use of certain chemicals. The supplier sought administrative expense priority for the cost of the chemicals. Section 503(b)(9) grants administrative expense priority to goods sold to the debtor within the 20 days before the petition date. Generally, courts look to U.C.C. Article 2 to determine what constitutes goods. Although chemicals are goods, they were supplied here as part of a service. The U.C.C. uses the "predominate purpose" test to determine whether a transaction that includes both goods and services should be subject to Article 2, which governs the sale of goods. Section 503(b)(9) addresses only priority for the sale of goods, not an entire body of law to govern transactions involving goods. Therefore, the predominate purpose test does not apply in determining section 503(b)(9)'s applicability. Nor does the apparent link between Article 2 and section 546 reclamation rights on the one hand and section 503(b)(9) on the other suggest that the latter should apply only where a reclamation right might otherwise exist, because nothing in the statute or the legislative history supports such a reading. Therefore, the supplier is entitled to administrative expense priority for the chemicals used in the service. *In re Sklar Exploration Co., LLC*, 638 B.R. 627 (Bankr. D. Colo. 2022).

7. CRIMES

8. DISCHARGE

8.1 General

8.1.a ***Taggart v. Lorenzen* applies to chapter 11 confirmation order.** The debtor confirmed a chapter 11 plan, which provided for reinstating a home mortgage. The reorganized debtor paid according to the plan's terms, but the lender, based on faulty records, continued to send notices claiming the loan was in default and later began foreclosure. The debtor moved in the bankruptcy court for civil contempt penalties against the lender for violating the plan confirmation order. *Taggart v. Lorenzen*, 139 S. Ct. 1739 (2019), held that violations of the stay included in a discharge order must be evaluated under the general process for evaluating a civil contempt citation. Because a chapter 11 confirmation order serves the same purpose as a chapter 7 discharge order, the same standard should apply—whether there is a fair ground of doubt about whether the conduct violates the order. The standard is an objective one; advice of counsel is not a defense. *Beckhart v. Newrez LLC*, 31 F.4th 274 (4th Cir. 2022)

8.1.b **Section 523(a) exceptions to discharge apply to a nonconsensual subchapter V plan.** The creditor obtained a prepetition judgment for willful and malicious injury against the corporate subchapter V debtor, which the creditor sought to except from discharge. Section 1192(2) excepts from discharge under a nonconsensual subchapter V plan any debt "of the kind specified in section 523(a)." Section 523(a) excepts certain debts of an individual debtor, including a debt for willful and malicious injury, from a discharge granted under section 1192. Section 1192(2) refers to kinds of debts, without regard to the kind of debtor, and not to kinds of debtors, and so should be construed to apply equally to corporate and individual debtors. In addition, the structure of chapter 11's general discharge provision, which distinguishes between individual and corporate debtors, contrasts with section 1192(2), which does not distinguish. Identical language in chapter 12 has been construed to apply to corporate debtors. Finally, Congress reasonably traded off dischargeability for the elimination of the absolute priority rule in a nonconsensual subchapter V plan. Therefore, the debt is not dischargeable. *Cantwell-Cleary Co. v. Cleary Packaging LLC (In re Cleary Packaging LLC)*, 36 F.4th 509 (4th Cir. 2022).

8.1.c **Court may award debtor attorneys' fees for appeal from order granting sanctions for discharge injunction violation.** The creditor violated the discharge injunction. The debtor sought contempt sanctions, which the court awarded, along with attorneys' fees. The creditor appealed. The district court affirmed but remanded for clarification of one aspect of the ruling. The bankruptcy court clarified, and the debtor sought an additional award of attorneys' fees for the appeal, which the bankruptcy court and the district court both denied. Section 524 operates as an injunction. For violation of an injunction, a court who issued the injunction may award sanctions, including attorneys' fees incurred in enforcing the injunction and including fees incurred on an appeal. The debtor need not seek appellate fees from the appellate court, because the fees are incurred only because of the initial stay violation and are awardable even if the contemnor's appeal is not frivolous. *Law Offices of Francis J. O'Reilly, Esq. v. Selene Fin., L.P. (In re DiBattista)*, 33 F.4th 698 (2d Cir. 2022).

8.1.d **1992 Coal Act obligations are claims that are discharged.** The Coal Industry Retiree Health Benefit Act of 1992 imposed retiree health benefit obligations on coal companies and their affiliates. Companies who had signed wage agreements with the United Mine Workers of America before then were required to continue to provide health benefits to employees by paying premiums to the Combined Benefit Fund in an annual amount determined by the Commissioner of Social Security to provide benefits directly through individual employer plans. Those companies that did not provide benefits directly were required to pay premiums to the 1992 UMWA Benefit Plan. The Act gave the plan trustees the right to enforce these obligations. A group of related companies, including a coal company, confirmed a chapter 11 plan in 1995, discharging all claims that arose before the plan effective date and not provided for in the plan. In 2015, the reorganized coal company again filed a chapter 11 case, and the bankruptcy court terminated obligations to provide retiree benefits under the Coal Act. The plan trustees sought to require related companies, who were debtors in the 1995 chapter 11 cases, to provide health benefits to the coal company's employees and retirees or to pay premiums to the 1992 Plan. A claim includes a right to payment, even if contingent, unliquidated, unmatured, or unenforceable, and a right to an equitable remedy for breach of performance where such breach gives rise to a right to payment, even if contingent, unliquidated, unmatured, or unenforceable. A claim arises when a debtor's liability is based on past conduct and there is an established relationship between an identifiable claimant and the past conduct. The debtors' liability for Combined Plan premiums arose before the 1995 effective date from the debtors' past conduct of conducting coal mining operations, even though the future premiums were not yet due (unmatured) and their amounts were not yet determined (unliquidated). Therefore, they were discharged. So too the obligations to provide health benefits or pay premiums to the 1992 Plan. The plan trustees held a right in 1995 to an equitable remedy for breach of the companies' obligations to provide health benefits, and breach of that obligation gave rise to a right to payment, even though the right was unmatured, presently unenforceable, and unliquidated. It too was discharged. *U.S. Pipe and Foundry Co., LLC v. Holland (In re U.S. Pipe & Foundry Co.)*, 32 F. 4th 1324 (11th Cir. 2022).

8.2 Third-Party Releases

8.3 Environmental and Mass Tort Liabilities

9. EXECUTORY CONTRACTS

9.1.a **Bankruptcy court may authorize rejection of FERC-regulated filed-rate contract.** The debtor natural gas producer had contracted with a pipeline company to transport its gas. They filed the contract with the Federal Energy Regulatory Commission. Under the filed rate doctrine, the contract became legally binding as though FERC had specifically approved it, and it could not be modified or abrogated without FERC's approval. Fearing the debtor might file bankruptcy, the pipeline company sought, and FERC granted, orders determining that it had exclusive jurisdiction over the contract and that the contract could not be rejected in the debtor's bankruptcy case without FERC approval, which would be based on the public interest under its regulatory authority. The next day, the debtor filed a chapter 11 case, and its plan proposed rejection of the contract. The bankruptcy court has exclusive jurisdiction over the debtor's and the estate's property, including contracts. Rejection amounts to a breach, for which damages will lie, nothing more. It does not change or rescind the contract. As such, rejection does not violate the filed rate doctrine, as the counterparty's damage claim is determined based on the filed rate. Therefore, FERC does not have exclusive jurisdiction over rejection of filed rate contracts, and the bankruptcy court may approve rejection. *Gulfport Energy Corp. v. F.E.R.C.*, 2022 U.S. App. LEXIS 19986 (5th Cir. July 19, 2022).

9.1.b **Court approves retroactive approval of lease rejection.** The debtor vacated the premises on the lease expiration date, although the landlord claimed the debtor had exercised a lease extension option. The debtor filed a chapter 11 petition six days later. Because of the landlord's extension claim, the debtor in possession filed a motion the day after the petition date for approval of the rejection of the lease, effective as of the petition date or the motion date. The Court of Appeals has approved retroactive approval of lease rejection under section 105(a) on the ground that such an order may be necessary and appropriate to carry out the provisions of section 365(d)(3) and (4) to encourage prompt surrender of premises and lease rejection. In *Roman Catholic Diocese v. Acevedo Feliciano*, 140 S. Ct. 696 (2020), in a *per curiam* opinion that followed prior decisions, the Supreme Court rejected the use of *nunc pro tunc* orders except to correct the record to reflect what actually happened on an earlier date. However, in other precedents, the Court had also permitted such orders where the delay in issuing an order was due to the court's delay, not the parties', so that neither party would be prejudiced by the courts' delay. The Ninth Circuit was presumably aware of these precedents when it approved retroactive rejection approval. Moreover, retroactive approval is rooted in the Bankruptcy Code because of a court's power under section 105(a), does not "revise" history by a later order, and is necessitated only by the court approval process, not by the parties. Accordingly, the court approves rejection retroactive to the motion date, which is the date on which the debtor in possession unequivocally expressed its decision to reject. *In re Player's Poker Club, Inc.*, 636 B.R. 811 (Bankr. C.D. Cal. 2022).

10. INDIVIDUAL DEBTORS

10.1 Chapter 13

10.2 Dischargeability

10.2.a **Takings Clause claims are not dischargeable in a municipal bankruptcy.** The municipal debtor condemned properties. The owners asserted claims for the value of the properties. The debtor proposed a plan that treated the claims as general unsecured claims that were subject to adjustment under the plan. The Fifth Amendment provides that private property may not "be taken for public use, without just compensation." It imposes a condition on condemnation and a specific remedy, unlike other constitutional provisions that do not state a remedy for their violation. Bankruptcy laws are subordinate to the Fifth Amendment; Congress' bankruptcy power does not permit taking a creditor's interest in property during or as a result of a bankruptcy without just compensation. But impairment of a claim arising from a prepetition taking would effect the same result and is therefore equally prohibited. Therefore, discharge of a takings claim would violate the constitution and is not permitted. *Fin. Oversight & Mgmt Bd. v. Cooperativa de Ahorro Y Credito Abraham Rosa (In re Fin. Oversight & Mgmt Bd.)*, 2022 U.S. App. LEXIS 19736 (1st Cir. July 18, 2022).

10.3 Exemptions

10.4 Reaffirmations and Redemption

11. JURISDICTION AND POWERS OF THE COURT

11.1 Jurisdiction

11.1.a **Bankruptcy court has constitutional authority to order attorneys' fee disgorgement.** Debtor's counsel did not disclose fees received from the debtor's principal and was evasive and contradictory when the bankruptcy court asked him about it. The bankruptcy court denied his fee application and ordered disgorgement of fees already paid. The bankruptcy court has constitutional and statutory authority to issue final orders in title 11 proceedings in matters that arise in the title 11 case. Payment of legal fees is strictly governed by Bankruptcy Code provisions, not on common law or other nonbankruptcy law sources, even though some of the fees were paid by the nondebtor principal. Therefore, the bankruptcy court acted within its authority in ordering disgorgement. *In re Greenville Ave LLC*, 2022 U.S. App. LEXIS 10468 (3d Cir. Apr. 19, 2022).

11.2 Sanctions

11.3 Appeals

11.3.a **District court may not refer a bankruptcy appeal to a magistrate judge.** After the defendant won summary judgment in the bankruptcy court, the debtor appealed to the district court. With the parties' consent, the district court referred the appeal to a magistrate judge under 28 U.S.C. § 636(c). The debtor lost and appealed to the court of appeals, which first examined its own jurisdiction. 28 U.S.C, § 158 allows an appeal from a bankruptcy court order to be taken to a district court or a bankruptcy appellate panel. Because section 157 does not authorize referral to a magistrate judge, the district court improperly referred the appeal to the magistrate judge. The court of appeal remands to the district court to hear the appeal. *S. Central Houston Action Coun. v. Oak Baptist Church (In re S. Central Houston Action Coun.)*, 35 F.4th 1277 (5th Cir. 2022).

11.3.b **Only trustee, not debtor, may appeal chapter 7 conversion order.** The bankruptcy court converted the corporate chapter 11 case to chapter 7, resulting in the appointment of a trustee. The debtor appealed. When a chapter 7 trustee is appointed, the trustee takes over all the debtor's management functions and authority. Therefore, only the trustee may appeal the conversion order on the debtor's behalf. However, the debtor's former management may appeal in their own name if they have a sufficient pecuniary interest to satisfy the "person aggrieved" standing standard. *Bear Creek Trail, LLC v. BOKF, N.A. (In re Bear Creek Trail, LLC)*, ___ F.4th ___ (10th Cir. June 7, 2022).

11.4 Sovereign Immunity

11.4.a **Section 106 abrogates tribal immunity.** An instrumentality of an Indian tribe violated the automatic stay in an individual debtor's case. The individual sued, seeking stay enforcement, prohibiting further collection actions, and damages, attorneys' fees, and expenses. Congress may abrogate a tribe's sovereign immunity only if it does so clearly and unequivocally. Section 106(a) abrogates sovereign immunity with respect to a governmental unit in the application of Bankruptcy Code sections listed in section 106(a). Section 101(27) defines "governmental unit" capaciously to include "other foreign or domestic government." Neither section 106(a) nor section 101(27) refers to Indian tribes. Because they act as governing authorities of their members and have sovereignty over the members and territories, they are governments. Because they operate within the territorial boundaries of the United States, they are domestic governments. The application of the two sections is a clear and unequivocal expression of Congress' intent to abrogate the tribes' sovereign immunity. *Coughlin v. Lac Du Flambeau Band of Lake Superior Chippewa Indians (In re Coughlin)*, 33 F.4th 600 (1st Cir. 2022).

12. PROPERTY OF THE ESTATE

12.1 Property of the Estate

12.1.a **Trustee's claim against investment banker is barred by *in pari delicto*.** The debtor used an investment banker to help it raise capital based on some dodgy accounting practices. When the debtor ultimately failed, its chapter 7 trustee sued the banker for fraud, breach of fiduciary duty, and aiding and abetting breach of fiduciary duty. Section 544(a) gives the trustee the rights of a hypothetical judicial lien creditor. A judicial lien creditor could execute on all the debtor's assets, including claims it might have against third parties. However, a debtor's claim for fraud or breach of fiduciary duty is subject to the *in pari delicto* defense, under which a debtor may not recover against a wrong-doer when the debtor itself was part of the wrong-doing, that is, in equal (or greater) fault. A judicial lien creditor suing the third party would be subject to all defenses the third party would have against the debtor, including the *in pari delicto* defense. The trustee is similarly subject to the defense. *Anderson v. Morgan Keegan & Co., Inc. (In re Infinity Bus. Group, Inc.)*, 31 F.4th 294 (4th Cir. 2022).

12.2 Turnover

12.3 Sales

12.3.a **Court authorizes sale free and clear of successor multi-employer pension plan liability.** The debtor operated a grocery store. After it filed chapter 11, the debtor in possession proposed to sell the estate's assts to another grocery store operator. The debtor had been a signatory to a collective bargaining agreement that required the debtor to contribute to a multi-employer pension plan. It had accrued a large liability to the plan when the closure of its other stores resulted in withdrawal liability. It sought to sell the remaining store free and clear of any successor liability to the pension fund, which the buyer refused to assume. Section 363(f) permits a sale to be free and clear of any interests in property of the estate if one of five conditions is met, including if the interest holder could be compelled to accept a money satisfaction of the interest. As a claimant, the fund could be compelled to accept money to satisfy its claim. "Interest" is broader than lien and includes any claim or interest arising out of the operation of the debtor's property. Here, the claim arose only by reason of the debtor's operation of the assets that are being sold, and the buyer would be liable only because it intended also to operate a grocery store. Therefore, the fund's claim is an interest in the estate's property, and the court may order the sale to be free and clear of that interest, thereby obviating successor liability. *In re Norrenberns Foods, Inc.*, 2022 Bankr. LEXIS 1896 (Bankr. S.D. Ind. July 8, 2022).

12.3.b **Credit bid may be subject to auctioneer's buyer's premium.** The debtor in possession proposed an auction sale of assets that were subject to a lender's lien. The auction procedures provided for the payment of a "buyer's premium," essentially a commission to the auctioneer payable by the buyer, rather than the seller, in cash to the auctioneer. Section 506(c) permits the trustee to recover from collateral the reasonable, necessary costs and expenses of preserving or disposing of the collateral to the extent of any benefit to the creditor. To the extent the trustee can show that the buyer's premium meets these requirements, neither section 506(c) nor any other Code provision prohibits the imposition of the charge. *In re Dalton Crane, LC.*, ___ B.R. ___ (Bankr. S.D. Tex. June 29, 2022).

12.3.c **Settlement of an estate's claim is not necessarily a sale.** A business divorce situation resulted in a chapter 7 for the business and a chapter 11 for its former principal. The business' creditors, who had forced out the principal, asserted claims against the business and the principal. The principal asserted claims against the creditors. The chapter 7 trustee asserted claims against both the principal and the creditors. The trustee agreed to compromise with the principal, transferring the claims against the creditors to an affiliate of the principal, accepting a cash payment and a percentage of the affiliate's recovery on the claims against the creditors, and allowing as subordinated claims the principal's claims against the chapter 7 estate. Bankruptcy Rule 9019 governs approval of a compromise of claims, and section 363 governs approval of a sale of assets. A compromise of an estate's claims against a third party may be evaluated as a sale of the claim, but it need not be. Evaluation as a sale is more appropriate where the defendant does not assert claims against the estate. Where the transaction involves a complex exchange of consideration and mutual release of claims, sale analysis is not required. *Spark Factor Design, Inc. v. Hjelmeset (In re Open Medicine Inst., Inc.)*, 639 B.R. 169 (9th Cir. B.A.P. 2022).

13. TRUSTEES, COMMITTEES, AND PROFESSIONALS

13.1 Trustees

13.1.a ***Barton*** **doctrine does not apply after a case is closed.** After the closing of a chapter 7 case, the debtor and his affiliates sued the chapter 7 trustee in a distant federal district court. Under

Barton v. Barbour, 104 U.S. 126 (1881), a court other than the appointing court does not have subject matter jurisdiction over an action against a receiver or trustee. The rule's purpose is to prevent another court from interfering with the *in rem* jurisdiction of the appointing court. Otherwise, the other court could issue orders that would require expenditure or other use of property that is *in custodia legis* of the appointing court. Once a case is closed and the appointing court no longer has *in rem* jurisdiction over property, an action in another court does not interfere with the appointing court's jurisdiction. Accordingly, the *Barton* doctrine does not apply after the case is closed. The trustee's remedy is to rely on judicial immunity. *In re Keitel*, 636 B.R. 845 (Bankr. S.D. Fla. 2022).

13.2 Attorneys

13.2.a **Section 327 protects the estate from conflicts but does not otherwise incorporate the rules of professional conduct.** Before bankruptcy, the debtor's general reorganization attorney represented the debtor's insurer on reinsurance matters related to the debtor's chapter 11 case. It ceased the representation around the petition date. The debtor had already retained separate insurance counsel to pursue its claims against the insurer, and the reorganization counsel had no involvement in those claims. Section 327(a) permits the debtor in possession to retain counsel who is disinterested and does not hold or represent an interest adverse to the estate. The focus is on protection of the estate, and the requirement does not incorporate the applicable rules of professional conduct except insofar as they implicate the interest of the estate. Here, counsel's prior representation of the insurer on matters related solely to reinsurance, and not to matters pending in the case, was not the representation of an interest adverse to the estate and therefore did not require denial of the application to approve the employment. *In re Boy Scouts of America*, 35 F.4th 149 (3d Cir. 2022).

13.3 Committees

13.3.a **Court has authority to disband a committee.** The debtor filed its chapter 11 case in a Bankruptcy Administrator district. The Administrator recommended a committee to the court, who appointed an eleven-member committee. The court then transferred venue to a United States trustee district. The U.S. trustee reconstituted the existing committee and appointed a new committee, with some of the members of the existing committee. The existing committee and the debtor in possession sought to void the U.S. trustee's appointment. Although the U.S. trustee ordinarily has authority to appoint and reconstitute committees, that authority does not extend to overruling an order in the case, which is law of the case. Because section 1102(a) permits a court to order appointment of an additional committee or order a change in committee membership, the court may review the U.S. trustee's action, including actions regarding committees. In addition, Bankruptcy Rule 2020 permits the court to review any act by the U.S. trustee. Under section 105(a), that review includes the power to disband a committee the U.S. trustee has appointed. Here, because the U.S. trustee asserted absolute authority over committee appointments, it did not provide a record to justify its actions. Without such a record, the court strikes the U.S. trustee's notice of appointment, with the effect of disbanding the additional committee and reconstituting the original committee. *In re LTL Mgmt., LLC*, 636 B.R. 610 (Bankr. D.N.J. 2022).

13.4 Other Professionals

13.4.a **Future Claims representative need not be disinterested.** The debtor moved for the appointment of a future claims representative who had served in that role prepetition. The FCR's law firm represented him and also represented several insurance companies in coverage litigation on asbestos issues. The law firm had obtained an advance conflicts waiver from the insurers, making explicit that the firm might serve as counsel to an asbestos FCR. Section 524(g) requires the bankruptcy court to "appoint a legal representative for the purposes of protecting the rights" of future claimants but does not specify the representative's necessary qualifications. A legal representative is by nature one who owes fiduciary duties to an absent, represented constituent. Therefore, an FCR is, and must meet the standards applicable to, a fiduciary. The FCR need not be disinterested, as defined in the Code. That definition applies to a professional who owes duties to the estate, not to creditors and other parties in interest as an FCR does. To the extent any ethical conflict might have disqualified the FCR, the advance waiver cured it. Prospective waivers do not require a second round of consent once the conflict arises. Moreover, the conflict is not direct, because the coverage litigation and the claimants the FCR represents do not involve substantially related matters. They do not involve the same transactions or legal disputes, nor was there any substantial risk that the FCR would use any confidential information from the insurers in representing the future claimants. *In re Imerys Talc Amer. Inc.*, 38 F.4th 361 (3d Cir. 2022).

13.5 United States Trustee

13.5.a **2018 U.S. trustee fee increase violates Constitution's Uniformity Clause.** Effective January 1, 2018, Congress enacted U.S. trustee fee increases for all pending and future chapter 11 cases. The Judicial Conference is authorized to impose fees on chapter 11 cases in Bankruptcy Administrator districts and had done so since 2001, mirroring the same rates as the U.S. trustee fees. However, it did not implement the 2018 increase until October 1, 2018 and applied it only to newly-filed cases. The Constitution requires that laws on the subject of bankruptcies be uniform throughout the United States. "Laws on the subject of bankruptcies" is broad and encompasses both substantive and procedural laws. This law, which addresses bankruptcy fees, is therefore a law on the subject of bankruptcies. Although the uniformity requirement permits Congress some flexibility to address regional or geographic differences, it does not permit arbitrary geographically disparate treatment of debtors. The fee difference here resulted from a budgetary shortfall in the U.S. trustee districts that did not occur in the Bankruptcy Administrator districts. But that difference resulted only from Congress' arbitrary separation of the districts into two separate systems with two separate funding mechanisms. Congress may not treat debtors differently based on an artificial funding distinction that Congress itself created. Therefore, the fee disparity violates the uniformity requirement. *Siegel v. Fitzgerald*, 596 U.S. ___, 142 S. Ct 1770 (2022).

14. TAXES

15. CHAPTER 15—CROSS-BORDER INSOLVENCIES