SAN ANTONIO BANKRUPTCY BAR ASSOCIATION
2020 CASE UPDATE

THE HONORABLE RONALD B. KING, CHIEF U.S. BANKRUPTCY JUDGE,
WESTERN DISTRICT OF TEXAS

NICK MILLER, LAW CLERK
ALLIE BRAK, LAW CLERK

UNITED STATES SUPREME COURT

Ritzen Grp., Inc. v. Jackson Masonry, LLC, 140 S. Ct. 582 (2020) (Ginsburg, J.).

Summary: (9-0): A creditor who seeks relief from the automatic stay can immediately appeal a bankruptcy court's order denying relief from the stay because such an order is "final" under 28 U.S.C. § 158(a).

Ritzen Group, Inc. (Ritzen) contracted with Jackson Masonry, LLC (Jackson) to buy real property in Nashville, TN. The sale never occurred, and Ritzen sued Jackson in Tennessee state court for breach of contract. On the eve of trial, Jackson filed for bankruptcy and the automatic stay put the state-court lawsuit on hold. Ritzen filed a motion for relief from the stay, which the bankruptcy court denied. Ritzen did not appeal this denial within fourteen days. Meanwhile, Ritzen pursued the breach of contract claim in bankruptcy court through a proof of claim and an adversary proceeding against Jackson. Ritzen lost the adversary: the bankruptcy court disallowed Ritzen's claim, finding "that Ritzen, not Jackson, was the party in breach of the land-sale contract because Ritzen failed to secure financing by the closing date."

Ritzen filed two notices of appeal, one as to the bankruptcy court's refusal to lift the stay and the other as to the breach-of-contract claim. Both the District Court and the Sixth Circuit held that the appeal of the order denying relief from the stay was untimely and affirmed the bankruptcy court's ruling on the breach-of-contract claim on the merits. The Supreme Court granted certiorari on the question of whether a bankruptcy court's order denying relief from the stay is final and immediately appealable under 28 U.S.C. § 158(a).

The unanimous Supreme Court held that such an order is final and immediately appealable, relying on their analytical framework from ***Bullard v. Blue Hills Bank***, 575 U.S. 496, 501 (2015). In *Bullard*, the Court held that an order denying confirmation of a chapter 13 plan, but not dismissing the case, is not immediately appealable because it "did not conclusively resolve the relevant 'proceeding.'" Because § 158(a) makes "proceedings," rather than "cases," subject to immediate appeal if the proceeding "finally dispose[s] of discrete issues within the larger case," some orders can—and effectively must—be appealed during the bankruptcy case rather than after dismissal or final confirmation.

To determine whether an order denying relief from the stay was a final order, the Court focused on the kind of issues determined and rights affected by the "proceeding" for relief from the stay. The Court held that an order denying relief from the stay is "properly considered a discrete 'proceeding'" because it "disposes of a procedural unit anterior to, and separate from," the underlying proceeding to resolve the claim on the merits. Whether the stay remains in place or is lifted "forms no part" of the adjudication process on the underlying claim, which typically revolves around state substantive law. Further, the lift-stay proceeding is not merely a forum-choice contest; the resolution can have large practical consequences for the parties involved, including whether the creditor can employ nonjudicial remedies, which may not involve a proceeding at all.

The Court also found Ritzen's argument that the holding "will encourage piecemeal appeals and unduly disrupt the efficiency of the bankruptcy process" unavailing. Allowing immediate appeal

would "permit creditors to establish their rights expeditiously outside the bankruptcy process," and the Court noted that under Ritzen's preferred alternative, more of these proceedings would get swept into the already busy bankruptcy case and force creditors to appeal after the case is completed, potentially upending the resolution the court worked so hard to achieve. Were Ritzen allowed to appeal at this time, it would call into question the months of hard work the parties put into litigating the underlying claim dispute on the merits and allow a counterproductive "do-over" separate from the appeal on the merits

PENDING SUPREME COURT CASES

City of Chicago v. Fulton, 926 F.3d 916 (7th Cir. 2019), *cert. granted*, 140 S. Ct. 680 (Dec. 18, 2019) (No. 19-357).

Summary: The Supreme Court is set to determine whether an entity that passively retains possession of property of the estate has an affirmative obligation under the Bankruptcy Code to return that property to the estate upon the filing of the bankruptcy petition.

The case arose out of four separate bankruptcy cases consolidated on appeal. In each case, the City of Chicago had impounded the debtor's vehicle for failure to pay traffic fines. After the debtors filed their Chapter 13 petition, the City refused to return their vehicles, claimed that it needed to maintain possession to continue perfection of its possessory liens on the vehicles, and stated that it would only return the vehicles after the fines had been paid in full. In each case the bankruptcy courts held that the City violated the automatic stay by "exercising control" over property of the bankruptcy estate, ordered the City to return the debtors' vehicles, and imposed sanctions on the City for violating the automatic stay. On appeal, the Seventh Circuit noted that it had previously addressed the issue in ***Thompson v. General Motors Acceptance Corp.***, 566 F.3d 699 (7th Cir. 2009), in which the court held that a creditor must comply with the automatic stay and return a debtor's vehicle upon filing of a bankruptcy petition. In *Thompson*, the Seventh Circuit rejected the argument that passively holding an asset did not satisfy the Bankruptcy Code's definition of "exercising control" and held that retaining possession of the car was a violation of the automatic stay under 11 U.S.C. § 362(a)(3). Further, the Seventh Circuit in *Thompson* held that § 362(a)(3) worked in tandem with § 542(a), which requires that a creditor in possession of property of the estate "shall deliver" such property to the estate unless it is of inconsequential value or benefit to the estate, to draw back the right of possession into the estate without requiring the debtor to first bring a turnover action. The Seventh Circuit applied ***Thompson*** to the case at hand and ignored the City's request to overrule ***Thompson***. After determining that no exceptions to the automatic stay applied, the Seventh Circuit held that the City's retention of the debtors' vehicles violated the automatic stay. The Seventh Circuit thus (re)joined the Second, Eighth, Ninth, and Eleventh Circuits in holding that passive retention of property of the estate violates the automatic stay, with the Tenth and D.C. Circuits on the other side of a circuit split on the issue.

The Supreme Court heard oral arguments on Tuesday, October 13, 2020.[1] The argument revolved around the distinction between action and inaction, as § 362(a)(3) prohibits "any act to . . . exercise

[1] The following summary of oral argument is adapted from Danielle D'Onfro, *Argument analysis: Bankruptcy metaphysics*, SCOTUSBLOG (Oct. 16, 2020 11:24 AM), https://www.scotusblog.com/2020/10/argument-analysis-bankruptcy-metaphysics/.

control over property of the estate." The City, as well as amici on the City's behalf, explained that the automatic stay was intended to preserve the status quo of possession when the stay goes into effect and that keeping an impounded car need not be viewed as an "act." As to these points, Chief Justice Roberts asked whether retaining a car after someone requested its return was an act. Justice Alito asked whether moving cars among impound lots would be an act, and Justice Sotomayor asked about subjecting a car to weather or the chance that thieves might break in. Justice Sotomayor also referred to other cases in which courts have held that colleges that refuse to release transcripts to students with a balance on their accounts have violated the stay. When the Court was told that those cases were decided under § 362(a)(6), which bars "any act to collect" debt, Justice Gorsuch questioned whether the City might also be violating that provision separately from § 362(a)(3). Meanwhile, Justice Kagan questioned whether the stay was about preserving the status quo or about marshaling the assets for the estate and whether the stay barred creditors from keeping property that debtors wanted back.

The justices then questioned the debtors as to whether the 1984 amendments to the Bankruptcy Code, which added the phrase "exercise control" to § 362(a)(3), were meant to change bankruptcy practice, an allusion to a well-established canon that the Bankruptcy Code does not change existing bankruptcy practice. Justices Gorsuch and Kavanaugh also asked why Congress did not add a phrase like "retain possession" if that's what they meant. Chief Justice Roberts and Justices Thomas and Breyer also questioned whether the debtors' reading of § 362(a)(3) rendered § 542 superfluous.

UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Bailey Tool & Mfg. Co. v. Comerica Bank, 795 F. App'x 288 (5th Cir. 2020) (per curiam).

Summary: The Fifth Circuit affirmed the fee application of a law firm that provided legal services to four debtors in jointly administered chapter 11 proceedings, which later converted to chapter 7.

Hayward & Associates, P.L.L.C. ("Hayward") provided legal services to four interrelated debtors throughout jointly administered chapter 11 proceedings. After nearly a year of joint administration, the bankruptcy court converted all four bankruptcy proceedings to chapter 7. The court imposed a deadline for parties-in-interest to file chapter 11 administrative expense claims, and Hayward filed a timely fee application in each of the four cases. Comerica Bank, the primary creditor of the debtors, filed a limited objection. The bankruptcy court awarded Hayward $346,042.50 in fees and $24,594.22 in expenses which covered all requested fees and expenses but for $6,712.50 in fees incurred for preparing the fee application after conversion to chapter 7.

One debtor, Bailey Shelter, was liable for only 12% of the awarded attorney's fees because it was not party to certain financing transactions or the adversary proceedings that accounted for a portion of the fee award. The other three debtors split the remainder of the fees equally, and all four debtors split the expenses equally. The district court affirmed the award. Comerica Bank appealed, arguing that the bankruptcy court erred in (1) not holding the debtors jointly and severally liable for all fees and expenses, (2) determining that certain portions of the attorney's fees did not benefit Bailey Shelter, and (3) declining to award fees for preparing the fee application post-conversion. The Fifth Circuit affirmed, finding no reversable error by either the district court or the bankruptcy court.

Bonakdar v. Ramos (In re Ramos), 789 F. App'x 417 (5th Cir. 2019) (per curiam).

Summary: In an action to avoid a time-barred loan, a creditor could not overcome the statute of limitations because it failed to argue a key element of its "acknowledgment" cause of action at trial—that the amount of the obligation is readily ascertainable.

A chapter 13 debtor initiated this adversary proceeding to invalidate a creditor's lien on her home. The debtor argued that the lien was invalid because the four-year statute of limitations under Texas law had run on the loan. The loan was executed in May 2009 and was secured by a vendor's lien and deed of trust on the debtor's property. The loan required the debtor to make 36 monthly payments until the note matured on May 1, 2012, at which time the debtor and her husband would be responsible for a balloon payment of the full remaining balance. The debtor failed to pay the remaining balance at the maturity date, but she kept making monthly payments. The debtor filed bankruptcy in March 2017 following the creditor's attempt to foreclose on the property.

In response, the creditor argued that the lien was not invalidated because the debtor "acknowledged" the loan by continuing to make monthly payments after the loan matured. The creditor provided money orders paid by the debtors and an amortization schedule to prove acknowledgment. After a trial, the bankruptcy court entered a declaratory judgment for the debtor. The bankruptcy court held that the creditor did not sufficiently prove "acknowledgment" for two reasons: (1) acknowledgement is its own cause of action that should be pleaded as a counterclaim, not an affirmative defense and (2) even if the creditor had properly pleaded acknowledgement, the elements were not established at trial. The district court affirmed, and the creditor appealed.

The Fifth Circuit affirmed. Under Texas law, the four-year statute of limitations may be avoided by a written acknowledgement of a debt. The three requirements of acknowledgement are (1) a signed writing, (2) unequivocal acknowledgment of the debt, and (3) a willingness to honor that obligation. TEX. CIV. PRAC. & REM. CODE § 16.065. The amount of the obligation must also be "susceptible of ready ascertainment." The Fifth Circuit noted that the creditor failed to address the "ready ascertainability" element, so it was forfeited on appeal. The creditor's forfeiture was fatal to its claim. The Fifth Circuit did not comment on whether acknowledgement cannot be pleaded as an affirmative defense.

Brown v. Viegelahn (In re Brown), 960 F.3d 711 (5th Cir. 2020) (Southwick, J.).

Summary: A Chapter 13 debtor should not have been required to include a provision in his Chapter 13 plan restricting his ability to modify the plan in order to obtain confirmation.

Debtor Freddie Lee Brown filed for Chapter 13 bankruptcy in the Western District of Texas. Brown's Chapter 13 plan provided for five years of monthly payments of $1,080 to pay secured creditors in full and "approximately 100%" of the $7,728.18 in unsecured debt. The Chapter 13 Trustee objected to the plan on the bases that: (1) Brown's income was overstated on Schedule I; (2) the plan was not feasible under 11 U.S.C. § 1325(a)(6) because Brown may not be able to make plan payments given that he was behind on post-petition mortgage payments; and (3) Brown had not included the income he received from the Department of Veterans Affairs on Schedule I or Schedule B. The Trustee also objected based on § 1325(a), which requires the plan to comply with

all other applicable provisions of the Bankruptcy Code. Brown amended his schedules that had misstated his income and failed to include his veterans benefits, and his disposable monthly income was calculated at $2,191. This would leave him $1,111 in excess disposable income each month after making his $1,080 monthly plan payments. At confirmation, the Trustee continued to object, and the bankruptcy court informed Brown that it would confirm the plan only under one of two conditions. The first option would require Brown to divert all disposable income to pay unsecured creditors for the first seven months of the plan, at which point he would begin paying a lower amount. The second option would require the plan to include so-called *Molina* language, taken from ***Molina v. Langehennig***, No. SA-14-CA-926, 2015 WL 8494012 (W.D. Tex. Dec. 10, 2015), which would not require Brown to pay all his disposable income to the plan but which would restrict Brown's future ability to modify the plan by requiring any modification to provide for a 100% dividend to unsecured claims. Brown chose to include the *Molina* language. Brown appealed to the district court, which *sua sponte* certified the appeal to the Fifth Circuit.

On appeal, the Trustee argued that § 1325(a)(1) requires that a plan comply with "other applicable provisions" of the Bankruptcy Code beyond Chapter 13, and that Brown's failure to commit all of his disposable income to his plan payments violated provisions applicable to the Trustee's duties. Specifically, the Trustee argued that 11 U.S.C. §§ 1302 and 704 impose duties on the Trustee, including the duty to "be accountable for all property received." The Fifth Circuit dispelled this argument, noting that Brown's excess disposable income was not property that the Trustee had *received*, and thus the Trustee had no statutory duty to preserve it. The Trustee also argued that Brown did not act in good faith as required by the Bankruptcy Code because his proposed plan made "creditors bear the risk of default should there be a future change in the Debtor's circumstances" and because Brown initially failed to disclose his veterans benefits as income. The Fifth Circuit also rejected this argument and observed the "sensible rule" that debtors are not acting in bad faith simply for doing what the Bankruptcy Code permits them to do.

Absent any shortfall related to § 1325(a) criteria, the Fifth Circuit held that the court was required to confirm the plan subject to § 1325(b). When a Trustee objects to confirmation of a Chapter 13 plan, the bankruptcy court may not confirm the plan unless: (A) the full value of the claim is to be paid under the plan, or (B) the plan provides that all the debtor's disposable income will go toward payments. The Fifth Circuit noted that the use of the word "or" in § 1325(b) indicated that the requirements were disjunctive and therefore alternatives. Thus, Brown needed not comply with both requirements. As long as the full value of claims was to be paid under the plan, Brown need not commit all disposable income toward payments. Because Brown's plan would pay secured creditors "approximately 100%," and because the word "approximately" is required by a standing order in the Western District of Texas, the plan complied with § 1325(b), and the bankruptcy court was not prohibited by that section from confirming the plan.

Though the Fifth Circuit found that Brown's plan should have been confirmed, it stopped short of issuing a blanket prohibition on bankruptcy courts imposing conditions on confirmation of compliant plans. Instead, the Fifth Circuit held that inclusion of the *Molina* language violated 11 U.S.C. § 1329 by restricting Brown's right to modify a confirmed plan. The Fifth Circuit further held that if the *Molina* language were to preclude Brown from receiving a discharge even if he were to complete all plan payments, then it would violate 11 U.S.C. § 1328 as well.

United States v. Chesteen (In re Chesteen), 799 F. App'x 236 (5th Cir. 2020) (per curiam).

Summary: The Affordable Care Act's shared-responsibility payment, a penalty that, prior to a 2017 amendment, the IRS collected when individuals did not purchase required health insurance, is not entitled to priority treatment in bankruptcy as an "excise tax."

Debtor John D. Chesteen, Jr., filed for Chapter 13 bankruptcy in the Eastern District of Louisiana. In 2016, prior to filing and prior to the 2017 amendment to the ACA, Chesteen failed to make a $695 shared-responsibility payment (or "SRP") under the ACA's individual mandate. Chesteen's Chapter 13 plan did not include this $695 SRP. The Government subsequently filed an amended proof of claim for unpaid taxes to seek the SRP's inclusion in Chesteen's plan as a priority "excise tax" on a transaction that Chesteen would be required to pay in full under 11 U.S.C. § 1322(a)(2). The bankruptcy court concluded that the SRP was a penalty and not a tax for bankruptcy purposes and that, as such, the Government's claim for the SRP was not entitled to priority. The district court reversed, concluding that the SRP functioned more like a tax than a penalty based on the Supreme Court's decision in ***National Federation of Independent Business v. Sebelius***, 567 U.S. 519 (2012), which upheld Congress's authority to impose the SRP pursuant to its taxing power.

The Fifth Circuit reversed once more, concluding that, even assuming *arguendo* that the SRP is a tax in bankruptcy, the SRP is not entitled to priority under 11 U.S.C. § 507(a)(8)(E)(i) as an "excise tax" on a transaction. The Fifth Circuit agreed with Chesteen's argument that, to constitute an "excise tax on a transaction," the SRP must tax an activity. The SRP, however, does not tax activity, but instead taxes inactivity and is thus not entitled to priority. The Fifth Circuit noted that the consensus definition of an "excise tax" as used in § 507(a)(8)(E) is a "tax imposed on the manufacture, sale, or use of goods (such as a cigarette tax), or on an occupation or activity (such as a license tax or an attorney occupation fee)." An excise tax thus typically requires a discrete act by the person or entity being taxed. Because the SRP is not a tax on a discrete act, the SRP is not an excise tax. In reaching this conclusion the Fifth Circuit rejected the Government's argument that the discrete act is the "taxpayer's exercise of his or her right to choose not to purchase health insurance," holding that such failure to act would be inactivity rather than activity.

The Fifth Circuit also refused to consider the Government's argument, raised for the first time on appeal, that the SRP was entitled to priority as a "tax on or measured by income" under § 507(a)(8)(A). The Government contended that the appeals court could affirm a lower court ruling on any ground supported by the record, but the Fifth Circuit rejected this argument and stated that the Government had deprived the bankruptcy court of the opportunity to rule on the issue and had deprived both the district court and the Fifth Circuit of the bankruptcy court's knowledge and experience in applying the Bankruptcy Code.

Diaz v. Viegelahn (In re Diaz), 972 F.3d 713 (5th Cir. 2020) (Clement, J.).

Summary: A provision in the model Chapter 13 plan used in the Western District of Texas that requires debtors to turn over to the Chapter 13 Trustee any tax refund amounts received in excess of $2,000 is invalid because it abridges debtors' substantive rights.

In October 2017, the United States Bankruptcy Court for the Western District of Texas adopted a district-wide "form" Chapter 13 plan. Section 4.1 of the form plan provided that any annual tax refund received by the debtor in excess of $2,000 would be turned over to the Chapter 13 Trustee. In December 2017, Debtor Annette Marie Diaz, a single mother with two minor sons and an income below the median for the State of Texas, filed for Chapter 13 bankruptcy in the Western District of Texas. Diaz's initial schedules did not indicate that she expected to receive a tax refund, though Diaz later filed an amended Schedule I indicating that she was to receive a refund of $3,261, amortized at $272 per month for twelve months, for tax year 2017. Diaz also filed an amended Schedule J that included additional monthly expenses that essentially offset her tax refund. Diaz concurrently filed an amended Chapter 13 plan that struck through Section 4.1. The bankruptcy court denied confirmation of Diaz's plan and held that Diaz could not strike Section 4.1, that Diaz's argument that only a debtor may propose the form and terms of a Chapter 13 plan was incorrect, that tax refunds are disposable income, and that the instructions of Section I do not require debtors to account for annual tax refunds as monthly income. Diaz subsequently filed a revised plan that did not strike Section 4.1. The bankruptcy court then confirmed this revised plan and issued a confirmation order that required Diaz to pay $1,261 of her $3,261 tax refund through the plan. Diaz appealed the bankruptcy court's denial of her amended plan that had stricken Section 4.1. The district court affirmed the bankruptcy court's decision, and Diaz appealed to the Fifth Circuit.

Because the Trustee objected to confirmation of Diaz's plan, § 1325(b) required Diaz to commit all her projected disposable income to plan payments. The Bankruptcy Code does not define "projected disposable income," but it does set out how to calculate "disposable income." For below-median-income debtors such as Diaz, disposable income is calculated as the debtor's average monthly income for the six-month period prior to filing the bankruptcy petition minus "amounts reasonably necessary to be expended" for the debtor's maintenance and support. The Fifth Circuit noted that the Supreme Court in ***Hamilton v. Lanning***, 560 U.S. 505 (2010), held that determination of "projected disposable income" begins by calculating "disposable income." In unusual cases, though, a court may take into account known or virtually certain information about the debtor's future income or expenses in calculating projected disposable income.

The Fifth Circuit recognized that the Federal Rules of Bankruptcy Procedure permit courts to create local forms for Chapter 13 plans such as the one from the Western District of Texas at issue here. As procedural rules, however, they may not abridge, enlarge, or modify any substantive right. Diaz argued that the Bankruptcy Code and *Lanning* would allow her, as a below-median-income debtor, to retain any tax-refund amount to the extent that amount is "reasonably necessary to be expended" for her maintenance and support. Thus, Section 4.1 abridged her substantive rights as a below-median-income debtor by requiring her to turn over any tax-refund amount over $2,000. The Fifth Circuit agreed, noting that Diaz's projected expenses of $536 per month in her amended Schedule J—which were adjusted to offset the $3,261 refund that she amortized on her amended Schedule I—were well below the IRS National Standards for an above-median family of three. Accordingly, the Fifth Circuit found it "entirely plausible" that Diaz would use her "excess" tax refund of $1,261 for expenses that were reasonably necessary for her maintenance and support. Thus, because Section 4.1 abridged the substantive rights of below-median-income debtors, and because the provisions of local Chapter 13 form plans must be procedural rather than substantive, the Fifth Circuit held that Section 4.1 of the form plan was invalid.

Double Eagle Energy Servs., L.L.C. v. MarkWest Utica EMG, L.L.C., 936 F.3d 260 (5th Cir. 2019) (Costa, J.).

Summary: Applying the longstanding "time-of-filing" rule, the Fifth Circuit held that "related-to" subject matter jurisdiction over a debtor's state law breach-of-contract claim was not lost when the debtor assigned the claim to one of its creditors.

After filing for chapter 11 bankruptcy, a debtor sued defendants MarkWest and Ohio Gathering on a breach of contract claim in Louisiana federal court. The district court exercised "related to" subject matter jurisdiction under 11 U.S.C. § 1334(b) over the cause of action. The debtor subsequently assigned the cause of action to one of its creditors. The defendants moved to dismiss the claim, arguing that (1) the assignment destroyed § 1334(b) subject matter jurisdiction, and (2) the court lacked personal jurisdiction over the defendants. The United States Magistrate Judge granted the defendants' motion to dismiss, which the district court adopted over the debtor's objection.

The Fifth Circuit first addressed subject matter jurisdiction. The district court failed to apply the "longstanding" time-of-filing rule to § 1334(b), which states that "the jurisdiction of the court depends upon the state of things at the time of the action brought." The district court's "related to" subject matter jurisdiction, therefore, was not destroyed by the debtor's subsequent assignment of the state law breach-of-contract claim. The Fifth Circuit noted that, to require dismissal of a case due to changes in "the facts determining jurisdiction," would be "wasteful."

Next the Court addressed personal jurisdiction. The district court found that the defendants' lacked "minimum contacts" with Louisiana. The Fifth Circuit explained, however, that the district court had "another route for service of summons." Bankruptcy Rule 7004 permits nationwide service of process without limitation to the reach of the forum state's courts. With nationwide service, minimum contacts with Louisiana is not necessary. The Fifth Circuit concluded that the jurisdiction that existed at the outset of the case under § 1334(b) meant there was both subject matter and personal jurisdiction. The Fifth Circuit vacated and remanded the district court's judgment.

Dropbox, Inc. v. Thru Inc. (In re Thru, Inc.), 782 F. App'x 339 (5th Cir. 2019) (per curiam).

Summary: The doctrine of equitable mootness barred a creditor from challenging a confirmed Chapter 11 plan of reorganization.

Dropbox, Inc. held a $2.3 million judgment from a California federal court against Debtor Thru, Inc. and was Thru's largest creditor. Over Dropbox's objection, the U.S. Bankruptcy Court for the Northern District of Texas confirmed Thru's plan, which proposed to pay Dropbox the full amount of the $2.3 million claim over a 6.5-year amortization schedule with interest at the federal judgment rate of 1.22%. Dropbox appealed to the district court but did not obtain a stay, and the plan was consummated. Thru filed a motion to dismiss the appeal as equitably moot because of significant post-confirmation transactions made as authorized by the plan, including assumption of executory contracts, obtaining exit-financing loans, payment of creditors, and entering into

contracts related to conducting Thru's business. The district court granted the motion to dismiss, and the decision was appealed to the Fifth Circuit.

The Fifth Circuit agreed with the district court that the "well-established doctrine of equitable mootness" applied. The doctrine allows appellate courts to decline review of an appeal of a Chapter 11 plan if the reorganization has progressed too far for the requested relief practically to be granted. In determining whether to apply the doctrine of equitable mootness, courts will consider: (1) whether a stay was obtained; (2) whether the plan has been "substantially consummated;" and (3) whether the relief requested would affect either the rights of parties not before the court or the success of the plan. The Fifth Circuit held that Thru had demonstrated that the plan had progressed too far and that reversal would require third-party creditors to return distributions already paid and would upset the expectation and reliance interests of third-party customers, vendors, and partners who entered in good faith into post-confirmation transactions with Thru.

The Fifth Circuit did review Dropbox's claim that the district court erred in finding that federal judgment interest rate of 1.22% satisfied the cramdown requirements of § 1129(b), which requires that a plan not discriminate unfairly and be fair and equitable with respect to each class of claims or interests that is impaired and has not accepted the plan. To be fair and equitable under § 1129(b), the plan must provide unsecured creditors with "property of a value, as of the effective date of the plan, equal to the allowed amount of such claim." While the Fifth Circuit acknowledged that the federal judgment rate was lower than the rate of inflation at the time of confirmation, it nevertheless provided unsecured creditors with the same amount they would receive outside of bankruptcy. Thus, the Fifth Circuit found no clear error in the bankruptcy court's choice of interest at the federal judgment rate.

Elbar Invs., Inc. v. Prins (In re Okedokun), 968 F.3d 378 (5th Cir. 2020) (Elrod, J.).

Summary: A foreclosure investment firm's funds, which were misappropriated by an attorney acting as trustee for a foreclosure sale, could not recover a portion of those funds that the attorney had used to pay back two other entities from whom he had previously stolen.

United Sentry Mortgage Investment Fund, a private lender, provided financing to an entity owned by Debtor Oluyemisi Omokafe Okedokun to purchase real property in Houston, Texas. After Okedokun defaulted, United Sentry retained attorney Todd Prins to post the property for notice of sale. The morning of the foreclosure sale, Okedokun filed for Chapter 7 bankruptcy and faxed a notice of bankruptcy filing to Prins. The foreclosure sale proceeded anyway, and Elbar Investments, Inc., a privately held foreclosure investment firm, won the auction with a bid of $2.4 million. Elbar initially sent the $2.4 million to Prins via eleven cashier's checks, but Prins claimed that his bank could not except eleven checks and would require either a single check or a wire transfer instead. The next morning, Prins received a recorded deed evidencing a transfer of the property to Okedokun and records from the Harris County Appraisal District evidencing a homestead claim on the property. Elbar was informed of this and, knowing that the automatic stay would preclude transfer of title, wired $2.4 million to Prins's IOLTA account anyway. Prins subsequently transferred $2 million from his IOLTA account into his Prins Law Firm Wells Fargo account and absconded with the money to travel across Europe. Prins also used some of the money

to pay two former clients, TransWorld Leasing Corp. and Industry Drive Partners, from whom he had previously stolen. Prins paid the parties $164,807.29 and $300,000, respectively. A few weeks later, Elbar's counsel requested that Prins return the $2.4 million he had stolen from Elbar, but by that point only $13,414.57 remained. Prins later pled guilty to wire fraud and was sentenced to seventy-two months imprisonment, three years of supervised release, and was ordered to pay $2,975,264 in restitution. Of the $2.4 million Elbar wired to Prins, Elbar recovered a total of $1,683,915.42. Elbar then sought to recover $716,084.58, the balance of the $2.4 million, from a combination of United Sentry, TransWorld, and Industry Drive as part of Okedokun's bankruptcy proceeding. Elbar brought claims for equitable subrogation, unjust enrichment, and money had and received. After a multi-day trial, the U.S. Bankruptcy Court for the Southern District of Texas denied Elbar all relief. The district court affirmed, and Elbar appealed to the Fifth Circuit.

The bankruptcy court found that the most significant factor weighing against Elbar's recovery was Elbar's multiple violations of the automatic stay. On appeal, the Fifth Circuit agreed with the bankruptcy court's findings and held that Elbar had violated the automatic stay on three occasions. The first violation came when Elbar was the high bidder at the foreclosure sale and tendered cashier's checks to Prins three hours after Okedokun filed for bankruptcy. The Fifth Circuit held that this was an "act to obtain possession of property of the estate" under § 362(a) even though Elbar may have been unaware of the bankruptcy petition. Though the violation was not willful, it was nevertheless a violation. The second violation occurred when Elbar wired $2.4 million into Prins's IOLTA account after having learned of the bankruptcy petition. The Fifth Circuit agreed with the bankruptcy court that this was a willful violation of the automatic stay. The third violation occurred when Elbar filed a notice of *lis pendens* against the foreclosed property a few months after the foreclosure sale. Once more, the Fifth Circuit agreed with the bankruptcy court that, because Elbar was aware of the automatic stay and intentionally field a post-petition *lis pendens* action, this was another willful violation of the automatic stay.

The first of Elbar's three claims considered by the Fifth Circuit was Elbar's claim for equitable subrogation against United Sentry. Elbar argues that because it paid Prins following the foreclosure sale but never received title to the property from United Sentry, it should be subrogated to United Sentry's lien on the property. Under Texas law, equitable subrogation applies when one person, not acting voluntarily, has paid a debt for which another was primarily liable and which in equity should have been paid by the latter. Texas courts will consider the following equitable factors when balancing the equities in an equitable-subrogation claim: (1) the negligence of the party claiming subrogation; (2) whether that party had notice of other interests; and (3) whether the superior or equal equities of other interests will be prejudiced if equitable subrogation is allowed. The bankruptcy court held that Elbar failed to satisfy the elements of the cause of action because it did not pay a debt. The bankruptcy court also held that, even if Elbar had paid a debt, it would not prevail on the equities, again largely because of its knowing violation of the automatic stay. The Fifth Circuit agreed with the bankruptcy court that Elbar failed to satisfy the elements of equitable subrogation and that the equities weighed against it. The Fifth Circuit also rejected Elbar's claim that United Sentry was liable for fraud in a real estate transaction and found that Elbar had not submitted evidence that United Sentry or Prins, as United Sentry's agent, had acted in bad faith at the time of the foreclosure sale.

Elbar also raised claims of money had and received, unjust enrichment, and conversion against TransWorld and Industry Drive. Under Texas law, a plaintiff seeking recovery under a theory of money had and received must prove that the defendant holds money which in equity and good conscience belongs to the plaintiff. The bankruptcy court found that Elbar had satisfied the elements under the theory but that once again the equities weighed against Elbar, in large part because of Elbar's multiple and willful violations of the automatic stay. The Fifth Circuit found no reversible error. The Fifth Circuit also agreed with the bankruptcy court's conclusion that Elbar could not recover from TransWorld or Industry Drive under an unjust-enrichment theory because both parties believed in good faith that they were receiving back their own funds. As for Elbar's conversion claim, the Fifth Circuit held that Elbar could not prove that the money in question was delivered to Industry Drive or to TransWorld for safekeeping, a necessary element for a claim of conversion of money.

French v. Linn Energy, L.L.C (In re Linn Energy, L.L.C.), 936 F.3d 334 (5th Cir. 2019) (Clement, J.)

Summary: Payments owed by debtor to a shareholder which were "not quite dividends," but "certainly look[ed] a lot like dividends," were treated like equity interests of a shareholder and were subordinated to the claims of creditors.

The estate of Clarence Bennett, a former shareholder of the chapter 11 debtor, filed claims for almost $10 million dollars in unpaid "deemed dividends." The claim originated from Bennett's inheritance from a wealthy uncle. The uncle's 1930 will created a trust consisting of 250 shares of a company owned by the uncle, Berry Holding Co. Under the terms of the trust, Bennett had an interest in 37.5% of the income paid as dividends on the 250 shares and he owned 31.5 shares of the stock outright. In 1986, Berry Holding Co. underwent a merger and became Berry Petroleum Co. ("BPC"), and a trust was created that retired a nonparty investor's shares in the company. Certain beneficiaries of the original trust, including Bennett, were harmed by the retirement of the nonparty investor's shares as a result of the merger. To compensate those beneficiaries, BPC agreed to act as though the dividend obligation was part of the merger. They were considered "deemed dividends."

In 2013, BPC entered a share-for-share exchange with Linn Energy, LLC ("Linn"). To win over Bennett's approval for the deal as a stockholder in BPC, Linn Energy promised to continue BPC's obligation to pay Bennett the deemed dividends. After the deal closed, payments to Bennett ceased. Linn, BPC, and associated entities filed for chapter 11 bankruptcy in May 2016 and Bennett's estate filed claims for almost $10 million in unpaid deemed dividends. The debtors objected, arguing that the claims should be subordinated under 11 U.S.C. § 510(b) because Bennett was an investor. The Bankruptcy Court for the Southern District of Texas subordinated half of the estate's claims, which "effectively gutted the Estate's chances to receive any money." The district court affirmed the subordination order, and the estate immediately appealed. In the meantime, the bankruptcy court subordinated the estate's remaining claims, and certified this second subordination for immediate appeal. The appeals were consolidated before the Fifth Circuit.

The Fifth Circuit affirmed the subordination of Bennett's claims. Section 510(b) of the Bankruptcy Code effectuates the principle that "creditors are entitled to be paid ahead of shareholders in the

distribution of corporate assets." Claims that fall within § 510(b) must be subordinated. Citing § 510(b)'s ambiguity, the Fifth Circuit drew from case law for the structure of its subordination analysis. The Fifth Circuit considered (1) whether the nature of the estate's interest made the estate more like an *investor* or a *creditor*, (2) whether the estate's claims pertain to securities, and (3) whether the estate's claims arose from the purchase or sale of the debtor's securities.

The Fifth Circuit first held that the deemed dividends conferred benefits akin to those reserved for equity investors. Policy considerations underlying § 510(b) support subordination because the interest Bennett's estate sought to recover is more like an investor's interest than a creditor's interest. Second, while the Bankruptcy Code's long definition of a "security" does not mention equitable charges or payments pursuant to a trust or settlement agreement, the Fifth Circuit held that the deemed dividends fell within the definition's broad residual clause. The residual clause states that a claim, assuming it is not explicitly excluded, will be considered a security if it is any "other claim or interest commonly known as a 'security.'" 11 U.S.C. § 101(49)(A)(xiv). Bennett's claim bore the "hallmarks of interests commonly known as securities" because he had the same risk and benefit expectations as shareholders do—Bennett's dividend payments were not guaranteed payments, they were dependent the firm's overall success.

Last, the Fifth Circuit held that the estate's claims arose from the purchase of a security of the debtor. There must be a nexus or causal relationship between the claim and the sale. Considering the policy behind the absolute priority rule, that an investor cannot seek equal treatment with creditors, each transaction since the 1930 stock bequest "counts as a purchase or sale" of securities of the debtors. Therefore, there was clearly a causal link between the estate's claims and the 2013 deal with Linn.

Hidalgo Cty. Emergency Serv. Found. v. Carranza (In re Hidalgo Cty. Emergency Serv. Found.), 962 F.3d 838 (5th Cir. 2020) (Smith, J.).

Summary: A bankruptcy court's injunction mandating that the SBA process a chapter 11 debtor's PPP loan application regardless of its status as a debtor in bankruptcy exceeded the court's authority under Fifth Circuit precedent and the Small Business Act.

The CARES Act, among other things, made billions of government-guaranteed loans available to qualified small businesses through the Paycheck Protection Program ("PPP"), which is administered by the Small Business Administration ("SBA"). Following the CARES Act's passage, the SBA "quickly promulgated several regulations." One such regulation states that debtors in bankruptcy are ineligible to receive a PPP loan.

The chapter 11 debtor in this case initiated an adversary proceeding against the SBA because it was denied a PPP loan due to its status as a debtor in bankruptcy. The debtor argued that the SBA's regulation (1) violates 11 U.S.C. § 525(a)'s prohibition on discrimination based on bankruptcy status under certain circumstances, (2) is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law" under 5 U.S.C. § 706(2)(A), and (3) is "in excess of statutory jurisdiction, authority, or limitations, or short of statutory right" under 5 U.S.C. § 706(2)(C). The Bankruptcy Court for the Southern District of Texas agreed with the debtor and issued a

preliminary injunction mandating that the SBA process the debtor's PPP application regardless of its bankruptcy. The district court stayed the injunction and certified for direct appeal.

The Fifth Circuit vacated the preliminary injunction and held that the bankruptcy court lacked the authority to enjoin the SBA Administrator. The Fifth Circuit relied on its own precedent, where it concluded that "all injunctive relief directed at the SBA is absolutely prohibited." ***Enplanar, Inc. v. Marsh***, 11 F.3d 1284, 1290 n.6 (5th Cir. 1994). Additionally, the Small Business Act prohibits injunctive relief against "the Administrator or his property." 15 U.S.C. § 634(b)(1).

Hill v. King (In re King), 802 F. App'x 133 (5th Cir. 2020) (per curiam).

Summary: The chapter 7 trustee in a no-asset case, who retained his own law firm to investigate the debtor's financial affairs, was only entitled to approximately $5,000.00 of a $28,000.00 fee request, and that trustee violated his fiduciary duty by letting his own firm seek excess fees.

Raquel Tricia King filed for chapter 7 bankruptcy on January 24, 2013, and a chapter 7 trustee was appointed. The schedules indicated that this was a no-asset case, yet the trustee determined that issues relating to the debtor's "recent acrimonious divorce" required further investigation. Specifically, the trustee was interested in assets owned jointly by the debtor and her ex-husband. The trustee engaged, and the court approved, the trustee's own law firm to investigate. The firm filed an application for $123,282.25 in fees and $4,560.03 in expenses for services rendered in the case. The largest creditor objected to the fee request. In an opinion following a hearing, the bankruptcy court approved a reduced fee award in the amount of $42,140.75 and $3,712.26 in expenses. The fees requested were problematic—some time entries covered multiple services "lumped" into one entry.

Next, the trustee filed his own application for compensation at the statutory maximum under 11 U.S.C. § 326(a) of $28,461.93 and expenses in the amount of $253.50. After an evidentiary hearing, the bankruptcy court held that the trustee was entitled to total fees of $5,692.39 and expenses of $111.88. The court found that the trustee had: (1) violated his fiduciary duty by allowing his law firm to seek excessive fees, (2) violated Bankruptcy Rule 9019 by settling a portion of the objection to exemption without court approval, (3) allowed his firm to bill $515.50 for reviewing claims but stated in his application to retain the firm that he would review claims, and (4) violated Bankruptcy Rule 2016(a) by not submitting detailed statements with his fee application. On appeal by the trustee, the district court affirmed. The trustee appealed again.

The trustee argued that the bankruptcy court applied the wrong standard in determining his compensation and erred in finding that he had breached his fiduciary duty. The trustee asserted that compensation of a chapter 7 trustee is controlled by § 330(a)(7), not by § 330(a)(3). Relying on precedent, the Fifth Circuit noted that the percentage amounts listed in § 326 are presumptively reasonable for chapter 7 trustee awards. ***In re JFK Capital Holdings***, 880 F.3d 747, 753 (5th Cir. 2018). Treating the trustee's compensation as commission leaves open "the possibility of a reduced commission based on 'extraordinary circumstances.'" The Fifth Circuit held that the bankruptcy court applied the correct standard in the alternative, so remand on this issue was unnecessary. The Fifth Circuit held that the trustee failed to prove any abuse of discretion or clearly erroneous finding of fact and affirmed the bankruptcy court's fee awards.

Hobbs v. Buffets, L.L.C. (In re Buffets, L.L.C.), No. 19-50765, 2020 WL 6443567 (5th Cir. Nov. 3, 2020) (Costa, J.)

Summary: The Fifth Circuit upheld the constitutionality of the U.S. trustee fee increase in the 2017 amendment to 28 U.S.C. § 1930(a)(6)(B).

The debtors in this chapter 11 filed for bankruptcy on March 7, 2016 in the Western District of Texas, a U.S. trustee district. On April 27, 2017, the debtors confirmed a plan and were substantively consolidated. In October 2017, Congress amended Title 28, section 1930, to provide for an 833 percent increase in the maximum post-confirmation quarterly fees payable by certain chapter 11 debtors with disbursements that equal or exceed $1 million when the UST System Fund Balance is less than $200 million. The debtors filed a motion requesting the court limit "disbursements" in § 1930(a)(6) to disbursements under the plan, which would result in quarterly-fee liability of $4,875 per quarter. The bankruptcy court denied that motion, but the reorganized debtors filed a motion to reconsider and filed a subsequent brief arguing that the statute violated the Uniformity Clause of the U.S. Constitution and was retroactive.

The bankruptcy court relied on the Ninth Circuit's decision in *St. Angelo v. Victoria Farms, Inc*. and held that the statute violated the Uniformity Clause because the increase in quarterly fees only applied to U.S. trustee districts and not to Bankruptcy Administrator Program districts in Alabama and North Carolina until the final quarter of 2018. *See* ***St. Angelo v. Victoria Farms, Inc.***, 38 F.3d 1525, 1533, 1535 (9th Cir. 1994) (striking down the statutory amendment that extended the BA program because it violated the Uniformity Clause). While the Judicial Conference of the United States eventually approved the Bankruptcy Committee's recommendation to apply the fees to BA districts, the fees were not uniform for the first three quarters of 2018. Therefore, the debtors were not required to pay the increased amount of $250,000 per quarter for the first three quarters of 2018. Additionally, the bankruptcy court held that the statute violates the presumption against retroactivity. *See* ***Landgraf v. USI Film Prods.***, 511 U.S. 244, 286 (1994). In *Landgraf*, the Supreme Court laid out the guidelines for determining whether a statute applies retroactively. The bankruptcy court followed the guidelines and determined that the amendment to § 1930(a)(6)(B) did not indicate an intent by Congress to apply the amendment retroactively. Moreover, the amendment imposed new duties and liabilities on the debtors, which increased financial liability to an already expensive case. The court concluded that the retroactive application also violated the Due Process Clause because the debtors did not receive enough notice of the increased fees prior to filing chapter 11 or confirmation of a plan.

The United States trustee appealed the bankruptcy court's decision on the constitutionality and retroactive application of the statute. The debtors cross-appealed on the broad interpretation of the term "disbursements." The United States District Court for the Western District of Texas, Judge Ezra, certified both issues on direct appeal to the Fifth Circuit.

A Fifth Circuit panel reversed the bankruptcy court in a 2-1 decision penned by Judge Costa. The Fifth Circuit upheld the constitutionality of the fee increase. First, the Fifth Circuit addressed the cross-appeal on the "disbursements" question and held that the bankruptcy court correctly concluded that "disbursements" include all the debtors' payments, including its operating expenses. The plain meaning of "disbursements" is "money paid out," which would

include all payments, not just "bankruptcy-related" expenses. Additionally, adopting the debtors' interpretation of "disbursements" would give the term a different meaning before and after confirmation.

Next, the Fifth Circuit addressed whether the amendment to § 1930(a)(6)(B) applies to cases that were pending when the amendment took effect. The Fifth Circuit concluded that "the statute gives a straightforward answer: yes." The amendment applies to every "quarter in which disbursements equal or exceed $1,000,000" for "fiscal years 2018 through 2022." Additionally, the amendment states that the fee increases apply to "disbursements made in any calendar quarter that begins on or after" the enactment date of October 26, 2017. The Fifth Circuit cited the statutory history as support for the plain meaning of the text, explaining that "new disbursements, not new cases, trigger the higher fees." The statute is not impermissibly retroactive. The presumption against retroactivity, the Fifth Circuit explains, applies only when a law "attaches new legal consequences to events completed before its enactment." *Landgraf*, 511 U.S. at 269–70. Because the fee increase applies only to future disbursements, payments that occur after the law's effective date, it is a *prospective* law not subject to the presumption against retroactivity.

The Fifth Circuit next addressed the constitutionality issues. First, the Court concluded that the fee increase does not violate constitutional uniformity requirements. The Court recognized that the uniformity requirement does not bar every law that allows for nonuniform treatment. For example, bankruptcy laws that use state law to classify exempt property are permissible. The uniformity requirement only prohibits "arbitrary regional differences" in Bankruptcy Code provisions, therefore, only arbitrary geographic differences are unconstitutional. Here, the increase in U.S. trustee fees applied initially to U.S. trustee districts. This program-specific distinction does not amount to an arbitrary geographic difference because the government has a legitimate interest in replenishing the funds of the U.S. trustee program.

Last, the Fifth Circuit addressed the debtors' substantive due process challenge to the excessiveness of the increased fees. The Court explained that the fee increase "easily survives rational basis review" because it addresses the government's legitimate need to fund the U.S. trustee system. Similarly, the debtors' Fifth Amendment takings claim was defeated because a "user fee is not a taking when it is a 'reasonable' amount 'imposed for the reimbursement of the cost of government services.'" ***United States v. Sperry Corp.***, 493 U.S. 52, 63 (1989). Because the fee increase is capped at 1% of disbursements for large chapter 11 debtors, the Fifth Circuit determined that it was a reasonable and "fair approximation of the cost of benefits supplied" to debtors by the U.S. trustee program.

Judge Clement dissented. The Bankruptcy Clause of the U.S. Constitution authorizes Congress to establish "uniform Laws on the subject of Bankruptcies throughout the United States." U.S. CONST. art. I, § 8. Judge Clement agreed that the Bankruptcy Clause forbids arbitrary regional differences. She explained, however, that the division of the country into two factions—U.S. trustee districts and Bankruptcy Administrator districts—violates the Bankruptcy Clause because it "is itself an arbitrary regional difference." Judge Clement would have limited the remedy by allowing the debtor to pay the fees that were in effect before the amendment to § 1930(a)(6)(B) came into effect.

McCoy v. United States (In re McCoy), 810 F. App'x 315 (5th Cir. 2020) (per curiam).

Summary: A Chapter 7 debtor suffering from severe health issues failed to show that repayment of her student loans would impose an "undue hardship" on her and thus could not discharge the loans.

Debtor Thelma McCoy incurred over $345,000 of debt in pursuit of advanced degrees beginning in her forties. She consolidated her loans and entered an income-based repayment plan but was unable to pay. McCoy subsequently filed for bankruptcy in the Southern District of Texas seeking relief from her student-loan debt. At the time of her bankruptcy filing, her repayment plan required payments of zero dollars per month due to low income, and her repayment obligation would remain zero post-bankruptcy should her income not improve. McCoy's repayment plan allowed for debt forgiveness twenty-five years after the first payment under the plan. Such forgiveness would have tax implications, though, as any forgiven amount would be subject to whatever tax laws were in effect at the time of forgiveness.

Under § 523(a)(8), student-loan debt is generally not dischargeable in bankruptcy unless failure to discharge the debt would impose an "undue hardship" on the debtor. The Bankruptcy Code does not define "undue hardship," but the Fifth Circuit has adopted a test to determine whether a debt imposes undue hardship. Under the test, which was set forth in ***Brunner v. N.Y. State Higher Education Services Corp.***, 831 F.2d 395 (2d Cir. 1987), the debtor must show that: (1) the debtor cannot maintain a minimal standard of living if forced to repay the loans; (2) additional circumstances exist indicating that this state of affairs is likely to persist for a significant portion of the repayment period; and (3) the debtor has made good-faith efforts to repay the loans. The Fifth Circuit held that McCoy did not satisfy the second prong, as she had not shown additional circumstances demonstrating that her ability to pay a higher monthly amount would persist. McCoy argued that her age—62—and her severe mental and physical disabilities that were unlikely to recede or resolve were two major additional circumstances demonstrating that the state of affairs was likely to persist. The Fifth Circuit rejected these arguments, however, and noted that McCoy's critical health issues stemmed from a car accident and a facial-burning incident that occurred before she took out the bulk of the loans and did not prevent her from obtaining a doctorate and various forms of employment. Thus, the Fifth Circuit held that the bankruptcy court did not clearly err in its determination that McCoy had not satisfied the second prong.

Permula Corp. v. Pacheco (In re Pacheco), 788 F. App'x 288 (5th Cir. 2019) (per curiam).

Summary: Failure to file a brief within 30 days of appeal from a bankruptcy court's decision is adequate grounds for dismissal under Bankruptcy Rule 8018.

This dispute revolves around an approximately $800,000.00 loan to the debtor and his ex-wife from Permula Corporation ("Permula"), which was used to purchase a house in El Paso, Texas. The house was lost to El Paso County for unpaid real property taxes. The debtor later filed for chapter 7 bankruptcy and Permula initiated an adversary proceeding for nondischargeability of the debt. Permula, however, failed to timely amend its complaint, retain counsel, file a pre-trial order, and file proposed findings of fact and conclusions of law. The Bankruptcy Court for the Western District of Texas dismissed the adversary proceeding for want of prosecution.

Permula's attorney filed a timely notice of appeal in district court, and the debtor's attorney moved to dismiss the appeal because there was no appellate briefing for Permula filed on record. The district court granted the debtor's motion to dismiss. Permula timely appealed. The Fifth Circuit looked to Bankruptcy Rule 8018(a)(1), which requires an appellant to serve and file its brief with the court within 30 days of appealing a bankruptcy decision. If an appellant fails to timely file its brief, the appellee may move for dismissal under Bankruptcy Rule 8018(a)(4). Because Permula did not timely file its brief with the district court, the Fifth Circuit affirmed the district court's dismissal.

Phan v. Truong (In re Truong), 789 F. App'x 420 (5th Cir. 2019) (per curiam).

Summary: A creditor's state court judgment against chapter 7 debtors, which was awarded for non-payment of a mortgage payoff advance, was not enforceable against the debtors' homestead because it was not an "encumbrance properly fixed on homestead property."

The debtors in this chapter 7 bankruptcy indicated on their schedules that their only creditor was Tan Phan, that his claim was unsecured, and that Phan had obtained a judgment against the debtors in state court in the amount of $148,142. The debtors asserted that their homestead was exempt under Texas law on Schedule C. The debtors obtained a discharge in their no-asset chapter 7 case. Phan filed an objection in the bankruptcy court arguing that the debtors' homestead was not exempt from his claim under Texas law. Phan pointed to Section 41.001 of the Texas Property Code, which states that homesteads "are exempt from seizure for the claims of creditors except for encumbrances properly fixed on homestead property for (1) purchase money; . . . [or] . . . (5) the refinance of a lien against a homestead . . . ."

Phan had loaned the debtors funds to pay off their mortgage and/or refinance the mortgage on their home in 2009. Phan argued, therefore, that the homestead is a nonexempt asset subject to liquidation. A copy of the final judgment from state court indicates that it was a judgment on Phan's "claim for breach of contract," and awarded Phan $127,294 in damages, $20,122 in attorney's fees, and $726 in costs. The debtors did not dispute the judgment, instead, they denied that any loan documents were ever executed between the parties and denied that they created any security interest to Phan in their homestead. The bankruptcy court overruled Phan's objection, noting that the state court judgment did not award an interest in the homestead and Phan presented no evidence of a deed conveying the property to him. Additionally, Phan's interest was unrecorded because no abstract of judgment was filed in the real property records of Harris County. The district court affirmed.

Phan argued on appeal to the Fifth Circuit that the Texas Property Code does not require a written agreement for his claim to be enforceable against the debtors' homestead. Phan again argued that his claim falls within an exception to Texas's homestead exemption law because his claim is a "judgment debt from the refinance of a lien against debtors' homestead." The Fifth Circuit disagreed, noting that the money judgment obtained in state court does not fall within the exceptions to the Texas homestead exemption. The exceptions involve an *encumbrance* properly fixed to the debtors' homestead. Phan's loan could have been an "encumbrance" within the meaning of the Texas Property Code, except he did not obtain an encumbrance "in the form of

another mortgage or lien at that time." Because the state court judgment awarding damages for the debtors' breach of contract was not an "encumbrance properly fixed on the homestead property," the Fifth Circuit affirmed that Phan's objection was properly overruled.

Port of Corpus Christi Auth. v. Sherwin Alumina Co., L.L.C. (In re Sherwin Alumina Co., L.L.C.), 952 F.3d 229 (5th Cir. 2020) (Higginbotham, J.).

Summary: Approval of the sale of a chapter 11 debtor's land free and clear of encumbrances, including a port authority's easement over the land, in an in rem proceeding did not violate the port authority's Eleventh Amendment sovereign immunity rights, and any objection to the sale process should have been raised on direct appeal of plan confirmation.

In 1998, the Port of Corpus Christi Authority ("Port") purchased an 1,100-acre parcel adjacent to land owned by the debtor, with an easement granting use and access to a private road on the debtor's land. This easement was the main roadway for commercial access to the Port's parcel. The debtor filed for chapter 11 bankruptcy in 2016 in the Bankruptcy Court for the Southern District of Texas. The debtor's joint plan of reorganization proposed, in part, to sell real property of the estate free and clear of all liens, claims, and encumbrances under 11 U.S.C. § 363(f). "Permitted encumbrances" was defined in the plan's confirmation order to include a number of specific servitudes, which did not include the Port's easement, and included a catchall for "easements or encumbrances . . . recorded prior to July 1, 2009." The bankruptcy court entered the confirmation order without objection, and the plan went into effect on February 27, 2017. The confirmation order became final and non-appealable on March 3, 2017.

The land encompassing the Port's easement was sold on March 31, 2017 to Cheniere Land Holdings LLC ("Cheniere"). Cheniere notified the Port that its easement was extinguished by the sale. Because the time to appeal the confirmation order had expired, the Port filed an adversary complaint with the bankruptcy court to collaterally attack the confirmation order as having been procured by fraud, barred by Texas sovereign immunity, and for a denial of due process for want of notice. The bankruptcy court dismissed the fraud and sovereign immunity claims without leave to amend but denied dismissal of the due process claim. The Port appealed the dismissals and denial of leave to amend to the district court, which affirmed.

The Fifth Circuit affirmed the bankruptcy court and found no Eleventh Amendment violation and no basis for fraud under 11 U.S.C. § 1144. First, the Court addressed sovereign immunity. Under the Eleventh Amendment, federal courts generally lack jurisdiction over suits against a state. State sovereign immunity is limited in the bankruptcy realm by the Bankruptcy Clause, which grants Congress the power to establish "uniform laws on the subject of Bankruptcies throughout the United States." U.S. CONST. art. I, § 8, cl. 4. The Fifth Circuit held that the Eleventh Amendment is not violated where the bankruptcy court's disposition of a bankruptcy estate is "principally in rem and avoids coercive judicial process against the state." Here, the bankruptcy court did not award affirmative relief nor use coercive judicial process against the Port—it did not exercise in personam jurisdiction over the state. Next, the Court addressed 11 U.S.C. § 1144, which states that a court may revoke a confirmation order after notice and a hearing "if and only if such order was procured by fraud." The Port failed to allege any intentional false representation, the first element of a claim for fraud.

The dissent, penned by Judge Jones and joined by nearly half of the active judges, disapproved of the way the confirmation hearing was conducted, the alleged fraud committed by debtor's counsel, and noted that the taking of the easement raises "troubling due process questions." The dissent notes that the confirmation order, which included the "vague definitions" of "permitted encumbrances," was uploaded after midnight preceding the confirmation hearing.

Rai v. Henderson (In re VCR I, L.L.C.), 789 F. App'x 992 (5th Cir. 2019) (per curiam).

Summary: A chapter 7 debtor's managing member could not appeal the sale of property, which was approved by the bankruptcy court, because the property was purchased at auction in good faith and the objecting party did not obtain a stay of the sale pending appeal under 11 U.S.C. § 363(m).

A chapter 7 trustee, with the approval of the bankruptcy court, hired an auctioneer to sell tracts of land belonging to the debtor, VCR I, L.L.C. ("VCR"). The auctioneer marketed the sale, 24 bidders attended the auction, and the final sale price averaged "one-and-a-half times higher than the trustee's presale estimate." Dr. Pradeep Rai, the manager and a member of VCR, objected to the sale. After a hearing, the bankruptcy court found that the auction was "properly . . . and adequately marketed," had "adequate participation," encouraged competitive bidding, there was no collusion, and the sale was at arms-length to good faith purchasers. Rai's objections were overruled, and the sale was approved. Rai appealed to the district court but did not obtain a stay of the sale pending appeal. The trustee conveyed the property by special warranty deed to the purchasers. Unclear of whether the court's good faith finding under § 363(m) is reviewed de novo or for clear error, the district court held that the bankruptcy court was "correct under either standard." The district court dismissed Rai's appeal as moot under § 363(m).

The Fifth Circuit held that Rai's appeal was moot under § 363(m) and affirmed the district court's dismissal because Rai failed to obtain a stay of the sale pending appeal and the purchasers bought the real estate in good faith. Section 363(m) of the Bankruptcy Code bars appellate review of a sale approved by the bankruptcy court "if the purchaser acted in good faith and no one obtained a stay pending appeal." The only issue before the Fifth Circuit was whether the winning bidders were good faith purchasers. A good faith purchaser is "one who purchases the assets for value, in good faith, and without notice of adverse claims." The trustee bears the burden of establishing good faith. Here, the Fifth Circuit noted that "[o]verwhelming evidence shows this was a good faith purchase."

Reach, Inc. v. Smith (In re Alabama-Mississippi Farm Inc.), 791 F. App'x. 466 (5th Cir. 2019) (per curiam).

Summary: Considering the reach of 11 U.S.C. § 363(m), the Fifth Circuit held that a creditor's adversary proceeding intended to attack the bankruptcy court's disallowance of its secured claim on the debtor's already-sold farm was not moot under § 363(m). Because the creditor failed to timely appeal the bankruptcy court's disallowance of its claim, however, the creditor could not use "use a collateral attack to circumvent the normal appellate process."

A secured creditor attempted to claim a security interest in the debtor's farm and sought an injunction to prevent the farm from being sold. Instead of filing a timely proof of claim and timely objection to the sale, the creditor made "two irregular filings: (i) a six-months-late proof of claim asserting a claim secured by the farm, filed eight days before the farm's sale; and (ii) a post-sale complaint commencing an adversary proceeding in which [the creditor] sought an injunction prohibiting the already-consummated sale." The Bankruptcy Court for the Southern District of Mississippi entered an order disallowing the secured creditor's proof of claim and denying its request for an injunction. The district court dismissed the creditor's appeal as moot.

The Fifth Circuit affirmed, holding that the creditor's appeal from the bankruptcy court was statutorily moot under § 363(m) once the farm was sold to a good faith purchaser. The creditor's request for a security interest in the farm's proceeds, however, was not moot under § 363(m), which only limits the effect of appellate review over consummated sales, because the creditor's request does not implicate the validity of the sale. The Fifth Circuit was bound by precedent which bars appellate review of the distribution of sale proceeds when the sale and the distribution are "mutually dependent." ***New Indus., Inc. v. Byman (In re Sneed Shipbuilding, Inc.)***, 916 F.3d 405, 410 (5th Cir. 2019). Here, no evidence suggested that the sale of the farm was dependent on how the proceeds of the sale were distributed, so the Fifth Circuit was free to consider whether the creditor was entitled to a secured claim in sale proceeds. The Fifth Circuit held, however, that the creditor could not circumvent the normal appellate process and use the adversary filing as a collateral attack on the bankruptcy court's decision to disallow its claim.

Rohi v. Brewer & Pritchard P.C. (In re ABC Dentistry, P.A.), 978 F.3d 323 (5th Cir. 2020) (Ho, J.).

Summary: A dentist was permitted to amend his complaint against the attorneys that represented him in a lawsuit in a dental group's chapter 11 bankruptcy because the amendment did not run afoul of res judicata.

This case stems from the 2016 bankruptcy case of ABC Dentistry, P.A. During the bankruptcy, Dr. Saeed Rohi settled a Texas False Claims Act suit on behalf of the State of Texas against ABC Dentistry for $4 million. On November 7, 2017, the bankruptcy court proposed the following allocation of the settlement proceeds: $1,599,000 to Texas, $720,000 to Dr. Rohi, and $1,681,000 to his attorneys. Then, the court granted a "brief recess to allow the parties to consult with counsel." In order to induce Dr. Rohi to agree to the settlement, Dr. Rohi alleged that his attorneys made material representations to him about how the recovery would be split. Relying on these representations, Dr. Rohi did not oppose or appeal the court's proposed allocation. The bankruptcy court issued an oral order distributing the funds as proposed, no party appealed, and the bankruptcy was closed.

Dr. Rohi filed a lawsuit in Texas state court against the law firm of Brewer & Pritchard over their disagreement about how the funds were apportioned. The lawsuit alleged breach of contract, breach of fiduciary duty, misapplication of fiduciary property, money had and received, and violations of the Texas Deceptive Trade Practices and Theft Liability Acts. The law firm moved to reopen the bankruptcy case and remove the lawsuit to bankruptcy court. The bankruptcy court held that it had "arising in or under" jurisdiction, that abstention was inappropriate, and that res

judicata precluded Dr. Rohi's lawsuit. The district court affirmed the bankruptcy court.

The Fifth Circuit noted that the bankruptcy court denied Dr. Rohi's request to amend his pleadings to add facts and causes of action. Additionally, the district court noted that the amendments would not have altered the res judicata analysis because the proposed amendments would have been futile. Res judicata "bars the litigation of claims that either have been litigated *or should have been raised* in an earlier suit." The Fifth Circuit began its analysis with whether the previously unlitigated claim could or should have been brought in the original bankruptcy case. Dr. Rohi sought to include additional allegations that his law firm "assured him during the recess that they would treat the bankruptcy court's proposed fees as part of Rohi's 'Gross Recovery' under his written agreement" with the law firm. The Fifth Circuit disagreed with the district court and held that the conduct that Dr. Rohi sought to challenge is the breach of fiduciary duty based on new representations made to him during the November 2017 hearing. Dr. Rohi could not have even known that those were misrepresentations at the time of the hearing, "let alone that he should challenge them as such." It was not until after the hearing that Dr. Rohi could discover the attorneys' breach of fiduciary duty. The Fifth Circuit reversed and remanded, holding that the district court erred in denying Dr. Rohi leave to amend his complaint.

Rose v. Select Portfolio Servicing, Inc., 945 F.3d 226 (5th Cir. 2019) (per curiam).

Summary: Texas's four-year statute of limitations for a judicial foreclosure claim was tolled by the automatic stay with respect to real property that belonged to a bankruptcy estate, and 11 U.S.C. § 362(c)(3)(A) terminated the automatic stay as to actions against the debtor only, not to actions against property of the estate.

This lawsuit, which was removed from state court to the United States District Court for the Western District of Texas, was initiated by a mortgagor against a mortgagee and loan servicer. Each time the defendants in this case sent the mortgagor a notice of acceleration, setting a date for a foreclosure sale on the mortgagor's property, the mortgagor filed for bankruptcy. Between 2015 and 2019, the mortgagor filed for bankruptcy four times, usually within days of the scheduled sale. The four bankruptcy proceedings, in total, were pending for at least 269 days. The mortgagor sued the defendants in state court and asserted a claim to quiet title and sought declaratory judgment that the statute of limitations under Texas law expired on the defendants' ability to foreclose. The defendants counterclaimed for judicial foreclosure, arguing primarily that the statute of limitations was tolled for the time period that the automatic stay was in effect. The district court granted the defendants' motion for summary judgment and entered a final judgment and order of foreclosure. The plaintiff-mortgagor appealed.

The Fifth Circuit affirmed. Because the automatic stay with respect to the property at issue in this case was in effect for 269 days, the statute of limitations for the defendants' judicial foreclosure counterclaim was tolled for at least the same amount of time. Under Texas Civil Practice and Remedies Code Section 16.035(a), the statute of limitations for judicial foreclosure is "four years after the day the cause of action accrues." Texas common law tolls the statute of limitations during a bankruptcy stay. Section 362(c)(3)(A) of the Bankruptcy Code limits the automatic stay for debtors who have filed for bankruptcy within the past year. The majority view, adopted by three

bankruptcy courts in the Fifth Circuit, interprets this provision to terminate the automatic stay as to actions against the debtor, but *not* to actions against the bankruptcy estate.

Russell v. Russell (In re Russell), 941 F.3d 199 (5th Cir. 2019) (Smith, J.).

Summary: The attorney of a chapter 7 debtor's ex-wife did not have apparent authority to collect, on the ex-wife's behalf, the amount owed to her by an arbitration order.

Janna Russell sued her ex-husband and chapter 7 debtor, David Russell, in bankruptcy court over a debt of $32,500 plus interest. The debt arose from a pre-bankruptcy legal battle that resulted in a mediation statement mandating that David pay Janna $32,500. After David failed to pay, a state court ordered the parties to arbitration. The arbitration order again awarded Janna $32,500 plus interest and ordered David to make payments *directly* to Janna. Two days after the state court arbitration order, Janna's attorney moved to withdraw from representing her. Janna owed her attorney over $60,000 in unpaid fees at the time of withdrawal. Subsequently, David visited the office of Janna's former counsel and paid the $32,500 in cash.

Years later, in 2016, David filed for chapter 7 bankruptcy. Janna filed a claim for the $32,500 that she was owed under the arbitration order and David objected, asserting that he satisfied the claim when he made the pre-petition cash payment to Janna's former counsel. The bankruptcy court ruled for the debtor, finding that Janna got "the benefit of the money" and the debtor satisfied his obligation to Janna. The district court reversed.

The Fifth Circuit focused its analysis on whether Janna's former counsel was authorized to act on Janna's behalf when she accepted the cash payment from David. The Court noted that "debt payments made to a creditor's agent do not bind the creditor unless the agent is authorized" to collect on the creditor's behalf. Authority requires "some communication by the principal either to the agent (actual or express authority) or to the third party (apparent or implied authority)." Authority does not depend on whether the principal receives "the benefit of the money." Janna's former counsel accepted the cash payment against the terms of the arbitration order and Janna's instructions, therefore, there was no authority to collect on Janna's behalf. The judgment of the district court, reversing the bankruptcy court, was affirmed.

SE Prop. Holdings, L.L.C. v. Green (In re Green), 968 F.3d 516 (5th Cir. 2020) (Willett, J.).

Summary: A creditor with a $41 million judgment should have had the opportunity to prove that a Debtor acted willfully and maliciously when his disaster-relief company failed to pay the creditor with money received from FEMA.

Debtor Jefferey Green owned several natural-disaster remediation businesses and had personally guaranteed debts that his business owed to Vision Bank, the predecessor-in-interest to SE Property Holdings. After Green's businesses defaulted on the debts in 2014, SEPH obtained a judgment and a charging order directing certain of Green's companies to "distribute to SEPH any amounts that become due or distributable to [Green]." A few years later, Green filed for Chapter 7 bankruptcy in the Middle District of Louisiana. SEPH subsequently filed an adversary proceeding against Green alleging that the 2014 judgment, worth more than $41 million, was nondischargeable

under 11 U.S.C. § 523(a)(2)(A) and (a)(6), which bar discharge of debts resulting from fraudulent activity and for willful and malicious conduct, respectively. The bankruptcy court granted summary judgment for Green on all but one of SEPH's claims. SEPH appealed on its claim that Green's company violated the charging order by spending money it received from FEMA. In granting summary judgment, the bankruptcy court discounted an affidavit of Jennifer Corbitt, a vice president of SEPH, which stated that SEPH never consented to any use of the FEMA money other than to repay SEPH's claim. The bankruptcy court questioned the veracity of the affidavit and found that it was not based on Corbitt's personal knowledge.

On appeal, the Fifth Circuit held that the bankruptcy court had erred by assessing the evidence and evaluating the credibility of a witness when ruling on a motion for summary judgment. Judge Willet, writing for the panel, stated that the "Bankruptcy Court was permitted to consider only whether the competing affidavits diverged on specific facts to determine whether a factual dispute existed for trial. And it failed to stay within this limited scope of authority." The Fifth Circuit also noted that, while the affidavit did not include an explicit statement of Corbitt's personal knowledge, Corbitt's personal knowledge "can be inferred if such knowledge reasonably falls within the person's 'sphere of responsibility,' particularly as a corporate officer." The Fifth Circuit held that Corbitt likely knew whether Vision Bank had allowed the borrower to use money that was contractually obligated to pay the debt. The panel thus held that Corbitt's attestation that Green was not authorized to use the funds at issue for anything other than making payments to SEPH was sufficient to create a genuine dispute of material fact sufficient to overturn summary judgment.

Smith v. Dynasty Grp., Inc. (In re Heritage Real Estate Inv. Inc.), 783 F. App'x 403 (5th Cir. 2019) (per curiam).

Summary: A Chapter 7 Trustee had the strong-arm power under 11 U.S.C. § 544(a)(3) to avoid a purported prior purchaser's quitclaim deed on property owned by the debtor real-estate company.

Debtor Heritage Real Estate Investment, Inc. purchased 80 acres of land in Kemper County, Mississippi, in 1995 and recorded a warranty deed in the Office of the Chancery Clerk of Kemper County. In November 2014, Heritage filed for Chapter 11 bankruptcy in the Southern District of Mississippi but did not list the property in its schedule of assets. Heritage's Chapter 11 case was subsequently converted to Chapter 7. After the conversion, Defendant-Appellant Dynasty Group, Inc. recorded a quitclaim deed that purported to show that Heritage had conveyed the property to Dynasty in 2008. The Chapter 7 Trustee then filed an adversary proceeding seeking to avoid the quitclaim deed under 11 U.S.C. § 544(a). After trial, the bankruptcy court held, among other things, that the Trustee had the power to avoid the quitclaim deed under § 544(a)(3) as a hypothetical bona fide purchaser. The district court affirmed the bankruptcy court's decision.

The Fifth Circuit affirmed the district court's judgment and upheld the bankruptcy court's decision. The Fifth Circuit noted that the issue was whether the Trustee, as a hypothetical bona fide purchaser, had the power to obtain legal title to the property at issue under Mississippi law despite the existence of the quitclaim deed, and the Court held that the Trustee did. Mississippi is a race-notice jurisdiction that grants superior rights to a bona fide purchaser over a previous purchaser unless the previous transaction was recorded or the bona fide purchaser had notice of the previous

transaction before purchasing the land. Because Dynasty did not record the quitclaim deed until after Heritage had filed its bankruptcy petition, and because at that time the most recently recorded instrument for the property at interest was a valid deed showing Heritage as the owner, the Fifth Circuit held that the Trustee had the power to avoid the quitclaim deed pursuant to § 544(a)(3) as a hypothetical bona fide purchaser.

Trendsetter HR L.L.C. v. Zurich Am. Ins. Co. (In re Trendsetter HR L.L.C.), 949 F.3d 905 (5th Cir. 2020) (Willett, J.).

Summary: A bankruptcy court was correct to concurrently allow an insurer's unpaid-invoices and future-losses claims because they did not constitute impermissible double recovery.

In this "mathematically complex but legally straightforward" bankruptcy, the debtor purchased workers' compensation insurance from Zurich. Zurich provided coverage from May 2011 to June 2015, at which point the debtor got a new insurance provider. The debtor and Zurich had negotiated four agreements. Two of the agreements provided for traditional "paid loss" plans, and the other two agreements created complex "incurred loss" plans. The debtor later filed for bankruptcy and Zurich filed a claim for approximately $9 million dollars. Of its claim, approximately $3 million dollars covered future losses. After a four-day trial, the bankruptcy court allowed, and the district court affirmed, Zurich's claim in the amount of $7,603,017 for unpaid invoices and future losses.

The Fifth Circuit addressed whether the bankruptcy court's award to Zurich for future losses as part of the unpaid-invoice claim, while also allowing a separate claim for future losses, constituted impermissible double recovery. The Fifth Circuit affirmed, holding that: (1) the bankruptcy court properly made concurrent allowance for unpaid-invoices and future-losses claims; (2) under New York law, Zurich had an enforceable contractual right to payment for unpaid invoices; (3) the bankruptcy court was not clearly erroneous in assessing Zurich's future losses claims in the amount of $4,674,629; (4) under New York law, Zurich had an enforceable contractual right to fee schedule write-down fees; and (5) the bankruptcy court did not clearly err in determining that unconscionability doctrine did not apply under New York law to deprive Zurich of an enforceable claim for fee schedule write-down fees.

Ultra Petroleum Corp. v. Ad Hoc Comm. Of Unsecured Creditors of Ultra Res., Inc. (In re Ultra Petroleum Corp.), 943 F.3d 758 (5th Cir. 2019).

Summary: A reorganization plan does not "impair" creditors if the plan simply provides for treatment allowed by the Bankruptcy Code.

This case involves a chapter 11 debtor that became solvent during the pendency of the case "by virtue of a lottery-like raise in commodity prices." The debtor's subsidiary took on debt to finance its oil and gas exploration operations. The subsidiary issued unsecured notes worth $1.46 billion to various noteholders between 2008 and 2010, and it borrowed another $999 million in 2011 under a revolving credit facility. The debtor guaranteed these debts. In April 2016, damaged by a drop in oil prices, the debtor and its subsidiaries filed for chapter 11 bankruptcy. When oil prices rose again during bankruptcy, the debtors became solvent and filed a plan that would compensate the creditors in full. The creditors with claims under the notes and revolving credit facility would

be paid three sums: (1) the outstanding principal, (2) pre-petition interest at a rate of 0.1%, and (3) post-petition interest at the federal judgment rate. These creditors were treated as "unimpaired" under the plan, therefore, they could not object. The creditors objected anyway, asserting that their claims were impaired because the plan did not require the debtors to pay a contractual make-whole amount and additional post-petition interest at contractual default rates. Overall, the creditors argued that they were owed an additional $387 million.

The Bankruptcy Court for the Southern District of Texas found that the plan impaired the creditors because it failed to provide the creditors with all that they would receive under state law. The Fifth Circuit addressed the following questions on direct appeal: (1) whether creditors are impaired by a plan that pays their claim in full under the Code's requirements, but fails to include payment of additional funds included in the parties' pre-petition loan documents; and (2) whether the creditors' claims for the make-whole amount and post-petition interest at contractual default rates should be awarded under the "solvent-debtor" exception.

The Fifth Circuit reversed in part, vacated in part, and remanded in part the bankruptcy court's decision. Section 1124(1) of the Bankruptcy Code states that a class of claims is not impaired if "the [reorganization] plan . . . leaves unaltered the legal, equitable, and contractual rights to which such claim . . . entitles the holder." The Fifth Circuit explained that a creditor is impaired under this provision if the plan, not the Code or other law, alters the claimant's rights. Altering a creditor's rights by provision of the Bankruptcy Code is not an impairment under § 1124. Addressing the second issue, the Fifth Circuit noted that the answer turns on whether the solvent-debtor exception applies here. Because the issue was not addressed by the bankruptcy court, the Fifth Circuit remanded for further proceedings.

Veritex Cmty. Bank v. Osborne (In re Osborne), 951 F.3d 691 (5th Cir. 2020) (Davis, J.).

Summary: A Texas cardiologist could not discharge a $500,000 debt because he furnished the bank a materially false written statement regarding his personal finances.

Veritex Community Bank loaned $500,000 to State of the Heart PLLC, a medical practice formed and owned by John A. Osborne. Osborne and his wife, Karen, personally guaranteed the loan. As part of the loan application, the Osbornes provided Veritex a personal financial statement that required them to notify the bank of any material unfavorable change in their financial condition. After providing the financial statement but before the loan closed, Osborne and State of the Heart entered a lease with Phillips Medical Capital, LLC for $1,000,000 of medical equipment. The Osbornes personally guaranteed the lease as well, but they did not update their financial disclosure with Veritex to disclose the lease guarantee. The Osbornes also failed to inform the bank that, after they defaulted on the lease, Phillips obtained a $2.1 million judgment against the Osbornes. Osborne subsequently sought to extend the loan with Veritex after failing to pay it off when matured. Veritex requested updated financial information, and Karen provided a one-page spreadsheet listing the Osbornes' assets and liabilities and showing a net worth of $1.5 million. The spreadsheet did not list the judgment. Veritex agreed to renew the loan for one year. A month later, State of the Heart filed for Chapter 11 bankruptcy in the Northern District of Texas. Shortly thereafter, the Osbornes filed for Chapter 7 bankruptcy. Veritex brought an adversary proceeding against Osborne in

the Osbornes' Chapter 7 case, arguing that Osborne should not be discharged from the debt to Veritex under 11 U.S.C. § 523(a)(2)(B), which prevents a debtor from discharging a debt obtained through a materially false written statement.

The bankruptcy court found that the financial statement submitted by Karen was false and intended to deceive Veritex. The bankruptcy court also imputed Karen's intent to Osborne because she had acted as his agent. Nevertheless, the bankruptcy court held that the Veritex's claim was dischargeable because Veritex's reliance on the financial statement was not reasonable. The district court affirmed, and Veritex appealed to the Fifth Circuit.

In finding that Veritex had not reasonably relied on the false financial statement, the bankruptcy court pointed out that the financial statement was unsigned and not on the bank's form. The bankruptcy court also pointed to red flags that should have alerted the bank to the fact that State of the Heart may not have been able to repay the loan, such as the fact that State of the Heart was struggling and losing money, and that it relied on Osborne to fund its losses with loans and on the Osbornes' guarantee for repayment. The Fifth Circuit, however, said that nothing required the Osbornes' financial statement to be on the bank's form or signed, and that the soundness of the bank's decision to make the loan did not go to the soundness of the Osbornes' guarantee. The panel then agreed with the bankruptcy court that Karen's intent to deceive the bank could be imputed to Osborne. The Fifth Circuit thus reversed Osborne's discharge of the debt to Veritex.

Wal-Mart Stores, Inc. v. Parker (In re Parker), 789 F. App'x 462 (5th Cir. 2020) (per curiam).

Summary: A Chapter 13 debtor was not judicially estopped from pursuing a personal-injury claim that he failed to disclose to the bankruptcy court, but he was required to turn over any recovery to the bankruptcy trustee.

Debtor Tobin Parker filed for Chapter 13 bankruptcy in the Western District of Louisiana in February 2009 and confirmed a plan in July 2009. In December 2010, Parker was involved in an on-the-job accident while completing a delivery to a Wal-Mart store. Parker suffered injuries to his hand that required surgeries. Parker filed a personal-injury suit against Wal-Mart in Louisiana state court, but he failed to inform the bankruptcy court of the personal-injury claim or to amend his bankruptcy schedules to disclose the same. Parker completed his plan payments and received a discharge in 2014, at which point his lawsuit against Wal-Mart was still pending. In 2017, the bankruptcy court granted a motion from Wal-Mart to reopen Parker's bankruptcy so that Wal-Mart could file an adversary proceeding against Parker. Wal-Mart argued that Parker was judicially estopped from pursuing his personal-injury claim because he had failed to disclose the claim in his bankruptcy filings. The bankruptcy court determined that the elements of judicial estoppel were met but nevertheless declined to apply the doctrine on equitable grounds, as Parker's failure to disclose the lawsuit did not harm any party in his bankruptcy case. Wal-Mart appealed, and the bankruptcy court certified its judgment for direct appeal to the Fifth Circuit.

The usual approach that the Fifth Circuit takes in cases similar to Wal-Mart's is to hold that a debtor is estopped from pursuing a claim on his own behalf but that the bankruptcy trustee is not similarly estopped and may pursue the claim for the benefit of the creditors. The bankruptcy court

in this case had taken an alternate route, but one that the Fifth Circuit found led to the same outcome. The bankruptcy court declined to apply judicial estoppel to Parker, thus allowing him to pursue the claim himself, but ordered Parker to turn over any recovery to the trustee to be administered for the benefit of creditors. The panel wrote that judicial estoppel is equitable in nature and thus "should be applied flexibly, with an intent to achieve substantial justice." Though the Fifth Circuit noted that the bankruptcy court's decision was "certainly odd" and not the route the panel would have chosen, the final outcome would be the same in either case, and thus the Fifth Circuit refused to find that the bankruptcy court had abused its discretion in declining to apply judicial estoppel.

Whitlock v. Lowe (In re DeBerry), 945 F.3d 943 (5th Cir. 2019) (Oldham, J.).

Summary: An initial transferee of a fraudulent transfer was not liable for the amount of the transfer because she returned the funds to the debtor prior to the filing of the bankruptcy petition.

Debtor Curtis DeBerry, who owned a produce-distribution business in San Antonio, filed for Chapter 7 bankruptcy in the Western District of Texas. DeBerry was later convicted of bankruptcy fraud and sentenced to 24 months in prison. A few months before DeBerry filed for bankruptcy, his wife, Kathy, opened a joint bank account with her sister-in-law, Cheri Whitlock, in order to transfer money to her and DeBerry's children, who were away at school. Kathy gave Whitlock a $275,000 cashier's check from the DeBerrys' joint account, and Whitlock deposited it into the joint account with Kathy. Kathy then removed herself from the joint account, leaving it solely in Whitlock's name. Whitlock then transferred the funds in the account to various parties, including $32,000 to Kathy's personal bank account, $200,000 to DeBerry's LLC, and $9,200 to another person. The Chapter 7 Trustee filed an adversary proceeding against Whitlock and others to avoid and recover the $275,000 as a fraudulent transfer. The Trustee settled one of the claims, worth $33,500, leaving $241,500 left to recover. The Trustee argued that Whitlock was liable for all of the $241,500 as an initial transferee of an avoidable transfer under 11 U.S.C. § 550. The bankruptcy court agreed with the trustee and found that the $275,000 transfer to Whitlock was fraudulent and that the estate could recover the $241,400 from Whitlock as an initial transferee. This district court affirmed, and Whitlock appealed to the Fifth Circuit.

On appeal, Whitlock argued that the $232,000 she transferred to DeBerry's LLC and to Kathy's personal account had already been returned to the debtor and that the Trustee thus could not recover them again. Under the single-satisfaction rule in § 550(d), a trustee is entitled to only a single satisfaction for avoidable transfers subject to recovery under § 550(a). The Fifth Circuit held that the Trustee could not recover property that the transferee had returned to the debtor prior to the bankruptcy filing, saying that "obtaining a duplicate of something is not getting it back; it's getting a windfall." The panel held that prepetition repayment of fraudulent transfers puts an estate in the same position it would have been in notwithstanding the transfers. The Fifth Circuit also rejected as irrelevant the Trustee's argument that recovery from Whitlock would not result in a windfall because the DeBerrys had allegedly spend the entire $232,000 transferred back to them. The Fifth Circuit held that Whitlock received fraudulently transferred funds, that she thus had an obligation to return the funds to DeBerry for the benefit of the creditors, and that she satisfied that obligation by transferring the funds back to him prior to the bankruptcy filing.

UNITED STATES DISTRICT COURT

Fed. Trade Comm'n v. Educare Ctr. Servs., Inc., 611 B.R. 556 (W.D. Tex. 2019) (Cardone, J.)

Summary: The "police and regulatory power" exception to the Bankruptcy Code's automatic stay applied to allow the FTC's action against a Canadian citizen and corporation for violations of the Federal Trade Commission Act and related Ohio state laws.

This case involves claims by the Federal Trade Commission and the State of Ohio against the defendants, a Canadian citizen and corporation, as well as other corporate individual defendants, alleging that the defendants engaged in a deceptive telemarketing scheme targeting consumers throughout the United States in violation of federal and state law. On November 15, 2019, the Canadian defendant filed for bankruptcy in Canada and all proceedings were stayed in recognition of the foreign bankruptcy proceeding pursuant to 11 U.S.C. § 1520(a). Shortly thereafter, the Canadian defendants objected to discovery in light of the automatic stay, and the plaintiffs filed a motion to compel after attempting unsuccessfully to resolve the discovery dispute.

The district court relied on chapter 15 of the Bankruptcy Code in its analysis on the plaintiffs' motion to compel. Chapter 15 creates a "formal structure for administering" foreign proceedings, and "allows a debtor in a foreign bankruptcy proceeding to obtain relief under the U.S. Bankruptcy Code—including the automatic stay provision's protections . . . when certain prerequisites are met." Upon recognition of a foreign bankruptcy, "sections 361 and 362 apply with respect to the debtor and the property of the debtor that is within the territorial jurisdiction of the United States." 11 U.S.C. § 1520(a)(1). One exception to the automatic stay is § 362(b)(4)'s "police and regulatory power" exception, which excepts from the stay actions brought by a governmental unit to enforce policy or regulatory powers. The district court granted the plaintiff's motion to compel because the "police and regulatory power" exception applied to the causes of action in this case.

Ibarra v. FCA US LLC, No. DR-19-CV-003-AM/VRG, 2019 WL 5387423 (W.D. Tex. Sept. 11, 2019) (Moses, J.).

Summary: The district court abstained from and remanded a suit for negligence and product liability for lack of jurisdiction under 28 U.S.C. § 1334 where the defendant who bought a chapter 11 debtor's assets was excluded from liability.

This case involves a single-vehicle car accident that occurred in Eagle Pass, Texas. The plaintiff, Vince Ibarra, alleges that the defendant, Gerard Santellano, was driving a 2004 Dodge Neon with plaintiff in the passenger seat. The Dodge struck a tree as a result of Santellano's negligence. The engine caught fire and caused severe, life-threatening injuries to Ibarra. Ibarra asserts that the engine caught fire due to negligent design. Ibarra sued in Maverick County, Texas bringing negligence claims against Santellano and product liability claims against FCA US LLC ("FCA"), formerly known as Chrysler Group, LLC. FCA removed to federal court, and Ibarra filed a motion to remand.

The district court examined Ibarra's motion to remand. FCA's notice of removal invoked the

bankruptcy jurisdiction conferred on federal district courts by 28 U.S.C. § 1334. A party may rely on bankruptcy jurisdiction to support the removal of a claim to federal court under 28 U.S.C. § 1452(a). On April 30, 2009, Chrysler LLC, later known as Old CarCo LLC, and affiliated entities filed a petition for chapter 11 bankruptcy. FCA purchased substantially all of the assets from the bankruptcy estate under the terms of a Master Transaction Agreement ("MTA"). The MTA set forth FCA's assumed and excluded liabilities resulting from the purchase and identified "all Product Liability Claims arising from the sale of Products or Inventory prior to Closing" and "all liabilities in strict liability, negligence, gross negligence or recklessness for acts or omissions arising prior to or ongoing at the Closing" as excluded liabilities. The bankruptcy court issued an order approving the sale and the MTA. The order also shielded FCA from any liability for any claims that arose prior to the closing date and from successor, derivative or vicarious liabilities of any kind.

FCA asserted that the district court had jurisdiction as a case "arising under" title 11 or "arising in" a case under title 11. Ultimately, the district court held that this case did not "arise under" or "arise in" a case under title 11 for multiple reasons. First, the case is not a core proceeding under 28 U.S.C. § 157(b)(2). Second, the bankruptcy court's orders did not create the rights asserted by the plaintiffs. Next, this case did not "arise in" a case under title 11 because, by its nature, it is not a case that could arise only in the context of a bankruptcy case. There was no "related to" jurisdiction because that jurisdiction is limited to "matters pertaining to the implementation or execution of the plan." Plaintiff also requested that the district court abstain from the case under 28 U.S.C. § 1334(c)(2), and the district court agreed. Plaintiff's motion to remand to state court was granted.

In re Pool, Cause No. 1:19–CV–307–LY, 2020 WL 903006 (W.D. Tex. Feb. 25, 2020) (Yeakel, J.).

Summary: Rural homestead exemptions may include property where a debtor conducts a business that supports the family.

The chapter 7 debtors filed for bankruptcy on August 8, 2018. In their schedules, they claimed two noncontiguous tracts of real property as exempt under the rural homestead exemption set forth in the Texas Constitution and the Texas Property Code. The debtors lived on one of the tracts of land (the "Residence") and they operated a business on the other property (the "Body Shop"). The properties are 23 miles apart. Nathan Harrington, a creditor with a judgment against the debtors in the amount of $84,055.81, and the chapter 7 trustee objected to the debtors' exemption regarding the Body Shop. The bankruptcy court denied the objections, and Harrington appealed to the district court.

The sole issue for the district court was whether Texas law allows a noncontiguous tract upon which a business is conducted to be part of a rural homestead exemption. The district court affirmed the bankruptcy court's denial of Harrington's objection. Texas courts and the Fifth Circuit have held that a rural homestead may include property where a debtor conducts business that supports the family. Here, the debtors established a sufficient nexus between the Residence and the Body Shop, and both parcels of land were protected as rural homestead.

Jefferson Capital Sys., LLC v. Bankr. Processing Sols., Inc., 1-19-CV-760-RP, 2020 WL 502964 (W.D. Tex. Jan. 31, 2020) (Austin, J.).

Summary: A state court lawsuit could not be removed to federal court under "related to" jurisdiction because the notice of removal was untimely filed under FRBP 9027(a)(2)(A).

Jefferson Capital Systems, LLC ("Jefferson Capital") initiated a civil suit in Travis County, Texas on July 26, 2018 to recover its alleged interest in a portfolio of consumer credit accounts and the receivables obtained from those accounts. Jefferson Capital asserted claims against BorrowersFirst, Inc. and Bankruptcy Processing Solutions, Inc. for breach of contract, conversion, and unjust enrichment. While the state court litigation was pending, BorrowersFirst filed for chapter 7 bankruptcy in Delaware. Jefferson Capital later amended its petition and dropped all claims against BorrowersFirst. Bankruptcy Processing Solutions, the only remaining defendant in the state court litigation, removed the lawsuit to federal court on the grounds that the case is "related" to the bankruptcy case under §§ 1334 and 1452. Jefferson Capital moved to remand the action back to state court.

Jefferson Capital argued that the district court should remand the lawsuit because (1) removal was untimely, (2) the district court lacked jurisdiction over the claims, (3) the matter is subject to mandatory abstention; and alternatively, (4) the district court should remand and abstain on equitable grounds. The district court first addressed the timeliness of removal. Where a civil action is pending prior to the commencement of a bankruptcy case, Federal Rule of Bankruptcy Procedure 9027 requires that notice of removal must be filed within 90 days after the order for relief. Here, the order for relief was entered on August 10, 2018, but Bankruptcy Processing Solutions did not file its notice of removal until July 29, 2019, which is more than 90 days after the deadline. The district court remanded the case to state court because the removal was untimely.

Merkle v. Gragg, No. SA-19-CV-00640-XR, 2019 WL 6327584 (W.D. Tex. Nov. 26, 2019) (Rodriguez, J.).

Summary: A debtor's motion for withdrawal of the reference of a state-court premises liability lawsuit was denied because judicial economy and uniformity of bankruptcy administration is best served in bankruptcy court until the parties are ready for a trial.

The chapter 11 debtor, a pro se litigant, filed a "Notice of Removal and Mandatory Withdrawal of the Reference" removing a state court lawsuit to federal court. The state court lawsuit was a personal injury premises liability claim filed by the debtor against James Thompson based on an injury that debtor sustained on a shopping premises owned by Thompson. The incident occurred before the debtor's bankruptcy, and the debtor asserted that the claim was owned by his bankruptcy estate. The debtor moved to withdraw the reference for the district court to consider this lawsuit after multiple non-related appeals from the bankruptcy court had been entered.

The district court referred the personal injury case to the bankruptcy court pursuant to the Standing Order of Reference of Bankruptcy Cases and Proceedings dated October 4, 2013, which

automatically refers to the bankruptcy judges of the Western District of Texas "[a]ll bankruptcy cases and proceedings filed under Title 11 of the United States Code, or arising from or related to any case or proceeding filed under Title 11." Because the debtor's bankruptcy case was still open and the lawsuit against Thompson case might affect the bankruptcy estate, the district court found that it is subject to the Referral Order.

Normally, the district court noted, a personal injury claim is subject to mandatory withdrawal of the reference for trial. The district court found, however, that the bankruptcy court could conduct pre-trial proceedings. The district court noted that judicial economy and uniformity of bankruptcy administration would be best served by leaving the lawsuit in bankruptcy court until it is determined that a trial is necessary. The debtor's motion to withdraw the reference was denied.

Schott v. Massengale, 618 B.R. 444 (M.D. La. 2020) (DeGravelles, J.).

Summary: Two years after withdrawing reference in an adversary claim against members of an LLC debtor, a district judge revisited his decision and held that the bankruptcy court could preside over pretrial and discovery matters.

Debtor InforMD, LLC was a Louisiana LLC formed in 2010 and engaged in medication and compound pharmacy sales. It filed for Chapter 7 bankruptcy in the Middle District of Louisiana in June 2017 after having ceased operations the prior October. In June 2018, Chapter 7 Trustee Martin A. Schott filed an adversary proceeding alleging fraudulent conveyances, breaches of fiduciary duties, conversion of funds owed to InforMD, self-dealing, fraud and conspiracy to commit fraud, receipt of payments not due, and unjust enrichment against the family of deceased InforMD CEO Richard Massengale and two other members of InforMD as well as several of their LLCs. Shelley Massengale, wife of Richard Massengale, became the sole member and manager of co-defendant C-Squared Management LLC, through which Richard had received all of his InforMD income, after Richard's death. After Schott filed the adversary complaint, Shelley and C-Squared filed a jury-trial demand and a motion asking the district court to withdraw the adversary proceeding's bankruptcy reference. The motion invoked 28 U.S.C. § 157(d), which allows a district court to withdraw for cause a bankruptcy reference made pursuant to 28 U.S.C. § 157(a). Judge deGravelles granted the motion in September 2018 before revisiting the order *sua sponte* two years later.

Upon review, Judge deGravelles noted that, when considering whether to withdraw reference under § 157(d), courts apply six factors set forth in ***Holland American Insurance Co. v. Succession of Roy***, 777 F.2d 992 (5th Cir. 1985): (1) whether the nature of the proceedings are core or non-core; (2) whether withdrawal promotes the economical use of the parties' resources; (3) whether withdrawal will promote uniformity in bankruptcy administration; (4) whether withdrawal motivates forum-shopping; (5) whether withdrawal will expedite the bankruptcy process; and (6) whether a party has demanded a jury trial.

The case at hand involved both core matters, such as fraudulent-transfer claims, and non-core matters, such as breach of fiduciary duty and other claims arising in nonbankruptcy law. Judge deGravelles also noted, however, that, even in non-core matters, bankruptcy courts may submit proposed findings of fact and conclusions of law for the district court's review. Thus, Judge deGravelles found the first factor neutral. Judge deGravelles then rejected the argument that

withdrawal would promote judicial efficiency, uniformity in the bankruptcy administration, and economical use of party resources, saying that those ends would be better served by maintaining reference. Judge deGravelles next found that a demand for a jury trial supports withdrawal only when it becomes necessary to empanel a jury and proceed to trial, as the bankruptcy court can handle pretrial matters even if it lacks constitutional authority to enter a final judgment. Lastly, Judge deGravelles found that where, as in this case, a number of defendants had submitted proofs of claim and it was not clear how judicial efficiency or the administration of the bankruptcy would be promoted, forum shopping or opportunistic delay could be the motivating factor in seeking withdrawal. This factor weighed against withdrawing the reference. Thus, the court held that withdrawing only the trial portion and leaving the remainder of the case to be handled by the bankruptcy court would be the more pragmatic option for efficient case administration. Judge deGravelles thus reinstated the bankruptcy reference.

Tango Delta Fin., Inc. v. Lowe (In re Dickinson of San Antonio, Inc.), No. 5:19-cv-01011-XR, 2020 WL 264976 (W.D. Tex. Jan. 16, 2020) (Rodriguez, J.).

Summary: The district court affirmed summary judgment in favor of a chapter 7 trustee's right to hold the maker of Master Promissory Notes liable for payment to the payee in whose favor the Notes were made despite an assignment of a security interest in the Notes to another party.

Dickinson of San Antonio, Inc. d/b/a Career Point ("Career Point"), a former for-profit college for nurses, filed for chapter 7 bankruptcy on October 31, 2016. John Patrick Lowe was appointed as the chapter 7 trustee to administer the estate. The trustee brought suit on October 27, 2018 against Tango Delta Financial, Inc. f/k/a American Student Financial Group, Inc ("ASFG"), Cottingham Management Company, LLC ("Cottingham Management"), and Cottingham Apex Texas Fund, LLC ("Cottingham-Texas"), alleging various causes of action against each entity in a 29-count complaint. The trustee brought counts 1, 2, and 3 against Cottingham-Texas alone, seeking to enforce a set of Master Promissory Notes (the "Notes") executed by Cottingham-Texas in favor of the debtor.

The trustee and Cottingham-Texas filed cross-motions for summary judgment as to counts 1, 2, and 3. The bankruptcy court entered summary judgment against Cottingham-Texas on May 1, 2019. It its order, the bankruptcy court found that Cottingham-Texas defaulted under the terms of the Notes by failing to make the required payments and was therefore liable to the trustee for $8,236,787.40 plus post-judgment interest. Cottingham-Texas was also held liable for the trustee's attorney's fees and costs in the amount of $125,909.05 and was ordered to pay the trustee certain sums if the trustee engaged in post-judgment discovery to collect on the judgment or if Cottingham-Texas filed for post-judgment or appellate relief. The trustee obtained an order from the bankruptcy court certifying the summary judgment order as final under Rule 54(b). ASFG and Cottingham-Texas appealed to the district court.

The district court held that summary judgment against Cottingham-Texas on counts 1, 2, and 3 was proper. The trustee presented enough summary judgment evidence for the elements of breach of contract, which Cottingham-Texas did not dispute. Cottingham-Texas did not dispute its own breach of contract on the Notes, its own default under the Notes, or the amount due and payable under the Notes. Instead, Cottingham-Texas argued that the trustee could not properly enforce the

Notes against Cottingham-Texas because the debtor "endorsed, transferred and assigned" the Notes to ASFG at the time they were executed, so the trustee cannot be a "holder" of the Notes entitled to enforce them and lacks standing to do so. In response, the trustee argued that ASFG was assigned a security interest in the Notes, which did not extinguish the trustee's right to enforce them.

Pursuant to the assignment language at issue, which was attached as Schedule G to separate agreements entered into between the debtor and ASFG, the debtor agreed to "endorse, assign, pledge, convey, transfer and deliver to ASFG all right, title and interest of" the debtor in and to the Notes "pursuant to the terms of" the Notes and other agreements. This assignment was made "as security for the full performance of" the debtor's obligations to ASFG. The district court held that this assignment did not affect the trustee' entitlement to enforce the Notes executed by Cottingham-Texas in the debtor's favor. The district court affirmed that, as a matter of law, the assignment did not extinguish the trustee's right to enforce the Notes or his standing to do so.

After affirming summary judgment, the district court vacated in part the bankruptcy court's order with respect to the imposition of fees on Cottingham-Texas for future post-judgment or appellate actions. The bankruptcy court awarded certain sums conditional on the trustee's engaging in post-judgment discovery to collect on the judgment or Cottingham-Texas filing for post-judgment or appellate relief. The Fifth Circuit typically disfavors such conditional fees, but they are permitted when "conditioned upon ultimate success of the party receiving the award, and the awarding court should conduct an analysis on the reasonableness of the fee." Here, because the bankruptcy court did not condition the award upon the ultimate success of the trustee and made no findings as to the reasonableness or necessity of such fees, the imposition of fees was inappropriate.

UNITED STATES BANKRUPTCY COURT

In re Alfonso, Case No. 16-51448-RBK, 2019 WL 4254329 (Bankr. W.D. Tex. Sept. 6, 2019) (King, C.J.).

Summary: A trustee's proposed settlement of a pre-petition personal injury claim was denied because it was not "fair and equitable" due to the low settlement price and the failure to account for a probability of success.

The bankruptcy court in this case addressed whether it should approve a chapter 7 trustee's proposed settlement of a personal injury claim against a co-debtor's employer. The debtors, Jorge Alfonso and Naydimar Diaz, filed for chapter 7 bankruptcy on June 29, 2016. The trustee later filed a no-asset report, and the debtors subsequently received their chapter 7 discharge and the case was closed. The debtors did not mention or disclose any possible pre-petition claim against the employer, Nordstrom, Inc. Meanwhile, on September 8, 2016, Ms. Diaz hired a law firm to pursue potential workplace injury claims against Nordstrom arising out of injuries she sustained from a "slip and fall" on Nordstrom's premises on October 30, 2015. This claim, therefore, arose pre-petition based on a pre-petition injury. In total, Ms. Diaz incurred $367,828.87 in post-petition medical expenses. Ms. Diaz filed a lawsuit against Nordstrom in Travis County state court, which

was referred to arbitration. Ms. Diaz did not disclose that she was a debtor in bankruptcy, nor did she inform her bankruptcy attorney of her state court lawsuit. When her bankruptcy was eventually discovered, Nordstrom moved to dismiss the lawsuit, and the trustee moved to reopen the bankruptcy case on August 24, 2018. After the bankruptcy case was reopened, the debtors amended their schedules to disclose the pre-petition claim and Ms. Diaz claimed a portion in the amount of $23,675.00 as exempt.

No party disputed that (1) Ms. Diaz is entitled to exempt the first $23,675.00 of any recovery from the Nordstrom claim, and (2) some portion of the claim belongs to the estate as non-exempt property. Initially, the trustee, debtors, and the law firm agreed that the trustee would retain the law firm to represent the estate in pursuing the Nordstrom claim. The trustee even proposed a contingency fee arrangement to compensate the firm and pay post-petition medical creditors. The trustee, however, negotiated and moved the bankruptcy court to approve a settlement of the Nordstrom claim without the participation or consent of the law firm. The proposed settlement, filed jointly by Nordstrom and the trustee, settled the claim for $105,000 under Bankruptcy Rule 9019(a). The law firm objected to the settlement, arguing that the claim was worth between $500,000 and $1.5 million.

The bankruptcy court denied approval of the trustee's proposed settlement because it was not "fair and equitable." The court examined case law from the Fifth Circuit, which requires courts to compare the terms of the compromise with the likely rewards of litigation by evaluating (1) the probability of success in litigating the claim subject to settlement, (2) the complexity and likely duration of litigation, (3) the best interest of the creditors, (4) the extent to which the settlement is truly the product of arms-length bargaining, and (5) all other factors bearing on the wisdom of the compromise. Here, the Nordstrom claim had a strong factual basis. The law firm demonstrated high confidence that Ms. Diaz could prevail on liability and had "excellent facts for proving damages" of at least $367,828.87. Overall, the settlement failed to account for a probability of success in pending arbitration and resulted in a low settlement figure, so the bankruptcy court denied approval.

Aurzada v. Jenkins et al. (In re Jenkins), 617 B.R. 91 (Bankr. N.D. Tex. 2020) (Morris, J.).

Summary: A contractor's $82,000 "gift of equity" to his adult children was avoidable as a constructively fraudulent transfer even though it was community property under Texas law.

Debtor Stephen Jenkins, a self-employed contractor, purchased a $325,000 home in Fort Worth financed by a loan from a family friend. Jenkins intended to renovate the house and then flip the property. As a result of losing large amounts of money on other house-flipping projects, Jenkins and his wife decided to sell their own home. Jenkins committed to pay $100,000 of the sale proceeds toward repaying the friend's loan, but after closing he was only able to pay $50,000. Needing to refinance the loan, Jenkins found a new lender that provided $295,000 on the understanding that the Fort Worth property would be flipped and the lender paid off out of the proceeds. Instead, Jenkins and his wife moved into the Fort Worth property and defaulted on the loan soon after. Again needing to refinance the loan, Jenkins decided to sell the property to his two adult children while Jenkins and his wife continued to live on the property. A mortgage company agreed to provide a $300,000 mortgage to the Jenkinses' children under terms that

included a $376,000 purchase price and $16,000 in closing costs. Jenkins satisfied the remainder of the sales price by giving his children an $82,266 "gift of equity." Several months after the sale closed, Jenkins filed for Chapter 7 bankruptcy. Chapter 7 Trustee Areya Aurzada subsequently filed an adversary complaint seeking to avoid the equity transfer as constructively fraudulent under 11 U.S.C. § 548.

The Jenkins children asserted that, under Texas law, the gift of equity was community property of Jenkins and his nondebtor wife, and thus a portion of the equity was the wife's property interest and not "an interest of the debtor in property" under § 548(a)(1)(B). Judge Morris agreed that Jenkins's "contractual right to receive" the $82,000 payment was indeed community property under Texas law because it was acquired during marriage. Under Texas Family Code section 3.102(a), however, each spouse has sole management, control, and disposition of community property that the spouse would have had if single. Thus, Judge Morris found that the entire $82,000 would have been part of Jenkins's bankruptcy estate but for the transfer. Judge Morris then avoided the transfer and concluded that the Trustee was entitled to recover the $82,000 from Jenkins's children as the value of Jenkins's contractual right to receive the payment.

In re Axline, 618 B.R. 454 (Bankr. N.D. Tex. 2020) (Morris, J.).

Summary: A Texas couple spending more than $2,000 a month on luxury-car leases are required to commit more than half of that money to their Chapter 13 plan payments.

Debtors Bradley and Meredith Axline owed the IRS $70,130.75 for unpaid 2015 and 2016 federal income taxes. After the IRS filed a tax lien against their home in October 2018, the Axlines filed jointly for Chapter 13 bankruptcy in the Northern District of Texas. The Axlines valued the house at $710,000, and the monthly mortgage payment was $5,499. Prior to filing for bankruptcy, the Axlines agreed to lease a 2017 Lexus RX 350 with monthly payments of $934 and a 2018 Lexus GX 460 with monthly payments of $1,129. After filing for bankruptcy, the Axlines' schedules listed a monthly income of $18,356.80 and monthly expenses, including the mortgage and car payments, of $16,328.42, leaving a net monthly income of $2,028.38. Using Form 122C-2, the Axlines calculated that they had no disposable income that they would be required to contribute to their Chapter 13 plan. The Axlines' proposed plan contemplated a base amount of $120,565.00 to be paid out over 60 months on top of their regular monthly mortgage and car payments. The plan also estimated a total payout of approximately 5%, or $11,374, on unsecured claims totaling $227,480.45. The Chapter 13 Trustee objected to confirmation on the basis of the plan's alleged failure to satisfy the disposable income test of 11 U.S.C. § 1325(b)(1)(B). The Trustee asserted that the Debtors had erroneously calculated their monthly disposable income under § 1325(b)(2) by impermissibly deducting from their monthly income their mortgage and car payments in excess of the IRS Local Standard expense allowance levels provided for under the "means test" provisions of 11 U.S.C. § 707(b)(2)(A)(ii)(I). The Trustee, citing the Supreme Court's decision in ***Ransom v. FIA Card Services, N.A.***, 562 U.S. 61 (2011), argued that the means test capped the Axlines' mortgage and car payments.

In *Ransom*, the Supreme Court ruled that an above-median-income debtor who had no car was not entitled to claim the IRS's standardized car-ownership cost allowance because the allowance was not "applicable" under § 707(b)(2)(A)(ii). Judge Morris held that Ransom's reasoning applied to

the Axlines' car payments but not to the mortgage payments. According to Judge Morris, the car payments were governed by § 707(b)(2)(A)(ii), but the mortgage payments were instead governed by § 707(b)(2)(A)(iii). As expenditures for secured debt, the mortgage payments were not limited by the IRS standards. Because the Axlines failed to show special circumstances warranting car payments in excess of the IRS standards, however, Judge Morris sustained the Trustee's objection and denied confirmation of the Axlines' plan.

Baptist Memorial Health Care Corp. v. Webb (In re Webb), 2020 WL 1060743 (Bankr. S.D. Miss. Mar. 3, 2020) (Olack, J.).

Summary: Costs incurred by a healthcare system to have the debtor, a former employee, certified in the use of job-required software were not an educational loan and were thus dischargeable in bankruptcy.

Debtor Terra Leigh Webb was hired as an associate clinical analyst at Baptist Memorial Health Care Corporation, a nonprofit healthcare system, on the condition that she secure certification in the use of certain electronic medical-record software. Baptist agreed to incur costs of approximately $12,000 for Webb to complete the necessary certification training and to forgive Webb for repayment should she continue working for Baptist in a full-time position for at least three years following receipt of certification. In the event Webb resigned or was terminated for cause, she would be required to repay Baptist for the certification costs less 1/36 of the total cost for each month of work she performed. Thirteen months after receiving certification, Webb voluntarily resigned from Baptist and thus owed Baptist a total of $7,666.66 for breaching her agreement with Baptist. Baptist sued to recover the damages for Webb's breach, and two months later Webb filed for Chapter 7 bankruptcy. Baptist then commenced an adversary proceeding asserting that their claim was nondischargeable as an educational benefit loan under 11 U.S.C. § 523(a)(8).

The bankruptcy court noted that Fifth Circuit precedent holds that the purpose of a loan determines whether it is "educational" for purposes of § 538(a)(8). Judge Olack, citing the Eighth Circuit in ***U.S. Department of Health and Human Services v. Smith***, 807 F.2d 122 (8th Cir. 1986), stated that educational loans are those "made without business considerations, without security, without cosignors, and relying for repayment solely on the debtor's future increased income resulting from education." On the other hand, Judge Olack noted that loans made for a business purpose are not "educational" obligations under § 538(a)(8). As for Baptist's claim against Webb, Judge Olack found that Baptist's purpose was not to enable Webb to pursue an education, but rather that Baptist had a business purpose for incurring the costs of the certification program. Judge Olack concluded that Baptist's purpose was to provide Webb the training necessary for her to use the software in exchange for "continued, enhanced employment." Because Baptist failed to show that it incurred the certification cost to increase Webb's marketability, Judge Olack held as a matter of law that Baptist's claim against Webb was dischargeable.

In re Baribeau, 603 B.R. 797 (Bankr. W.D. Tex. 2019) (Gargotta, J.).

Summary: A debtor was not entitled to reconsideration of a conversion order because she

failed to "specifically identify unusual circumstances" establishing that conversion was not in the best interest of creditors or the estate.

The debtor, Paulette Baribeau, filed for chapter 11 relief on June 3, 2019. Hill Country later filed a motion to convert the case to chapter 7, which the bankruptcy court granted after a hearing on June 24, 2019. The debtor filed a motion for reconsideration under Federal Rule of Civil Procedure 9023, made applicable to bankruptcy cases under Bankruptcy Rule 9023. The bankruptcy court noted that, pursuant to Federal Rule of Civil Procedure 59, a party may file a motion "to alter or amend a judgment" no later than 28 days after the entry of judgment. To prevail on a motion to alter or amend, the movant has the burden of establishing one of the following: "(1) an intervening change in controlling law; (2) the availability of new evidence not previously available; or (3) the need to correct a clear error of law or prevent manifest injustice." In the Fifth Circuit, relief under Rule 59(e) is an "extraordinary remedy that should be used sparingly."

In her motion for reconsideration, the debtor restated events that occurred after her case was converted to explain why the changes in circumstance warranted a reconsideration. The trustee entered into a settlement agreement post-conversion with Hill Country that reduced the creditor's judgment against debtor from approximately $1.5 million to $1 million in exchange for debtor dismissing its appeal against Hill Country. The court acknowledged that converting the case could result in the settlement with Hill Country, and the trustee was entitled to do so. The bankruptcy court held that the debtor's evidence of a "change of events" since conversion did not "serve as newly available evidence under Rule 59(d) that would persuade the Court to reconsider" its decision to convert the case.

Next, the debtor argued that 11 U.S.C. § 1112(b)(2) provides that a court cannot convert a case to chapter 7 if the debtor can establish that there is reasonable likelihood that a plan can be confirmed within a reasonable time and if the acts of "cause" under § 1112(b)(4) can be cured. The bankruptcy court rejected the debtor's arguments. Under § 1112(b)(1), a party in interest can file a motion to convert a chapter 11 case "for cause." While "cause" is not defined in the Bankruptcy Code, § 1112(b)(4) provides a non-exhaustive list of examples of "cause." If the movant establishes that there is cause for conversion, then conversion is mandatory unless the debtor meets its burden to establish and exception under § 1112(b)(2). Section § 1112(b)(2) requires the debtor to prove first that there are "specifically identify unusual circumstances establishing that converting" the case is not in the best interest of the creditors and the estate. Second, the debtor must prove all of the following: (1) there is a reasonable likelihood that a plan will be confirmed within a reasonable time; (2) the "cause" for dismissal or conversion is something other than a continuing loss or diminution of the estate under § 1112(b)(4)(A); (3) there is reasonable justification or excuse for a debtor's act or omission; and (4) the act or omission will be cured within a reasonable time. Because the debtor failed to prove "unusual circumstances" at the hearing on the motion to convert, the motion to reconsider was denied.

In re Blanchard, No. 19-12440, 2020 WL 4032411 (Bankr. E.D. La. July 16, 2020) (Grabill, J.).

Summary: A business-owning married couple were allowed to proceed under Subchapter V of

Chapter 11 as small-business debtors despite objections from the U.S. Trustee and a creditor, who argued that the debtors were not "engaged in commercial or business activities" as required by the statute.

Debtors Andrew and Christine Blanchard filed for Chapter 11 bankruptcy in September 2019. In April 2020, the United States Trustee filed a motion to convert the case to Chapter 7 or, in the alternative, dismiss the case. The Blanchards subsequently amended their petition and elected to proceed under Subchapter V of Chapter 11 as small-business debtors. The U.S. Trustee objected to the Blanchards' election, arguing that allowing them to proceed under Subchapter V after eight months in Chapter 11 with no real progress toward reorganization would allow them to bypass deadlines that would be long overdue in a Subchapter V case. One of the Blanchard's creditors, WBL SPO I, LLC, filed a joinder to the U.S. Trustee's motion to convert as well as a memorandum in support of the U.S. Trustee's objection. WBL argued that the Blanchards could not proceed as small-business debtors because they were not "engaged in commercial or business activities" as required by the statute. According to WBL, an individual debtor with debt resulting from a guarantee of commercial or business loans to an entity in which the individual debtor has a controlling interest does not qualify the individual debtor as a small-business debtor under Subchapter V. For an individual to qualify under Subchapter V, the separate entity must also be a debtor.

After oral argument on the issues, the bankruptcy court denied the Trustee's motion to convert and WBL's joinder and allowed the Blanchards to proceed under Subchapter V. The bankruptcy court found that the Blanchards qualified as small-business debtors, as they were "engaged in commercial or business activities." The Blanchards were sole owners of multiple companies and owned two rental properties from which they received rental income. Furthermore, their business debts stemmed from personal guarantees of debts from their various businesses and from mortgages on their rental properties. Adopting the reasoning of the court in ***In re Wright***, No. 20-1035, 2020 WL 2193240 (Bankr. D.S.C. Apr. 27, 2020), Judge Grabill found that nothing in the legislative history of Subchapter V or the definition of a small-business debtor limited application to debtors currently engaged in business or commercial activities. Because a majority of the Debtors' debts stemmed from operation of both currently operating businesses and non-operating businesses and did not exceed Subchapter V's debt limit, the Blanchards qualified as small-business debtors under Subchapter V. As to the U.S. Trustee's procedural objection based on deadlines, Judge Grabill found "no bases in law or rules to prohibit a resetting or rescheduling of these procedural matters." The bankruptcy court thus allowed the Blanchards to proceed under Subchapter V.

In re BVS Constr., Inc., No. 19-60004-RBK, 2020 WL 1479826 (Bankr. W.D. Tex. July 16, 2020) (King, C.J.).

Summary: Post-petition penalties incurred by a chapter 11 debtor as a result of workplace safety violations were civil in character, and therefore allowable as an administrative expense under 11 U.S.C. § 503(b)(1)(A).

The chapter 11 debtor, BVS Construction, Inc., filed its second chapter 11 bankruptcy on January 2, 2019, rendering the debtor a "chapter 22" filer. After its second petition, the debtor was cited

for 18 workplace safety violations by the Mine Safety and Health Administration ("MSHA") and incurred $34,676.58 in fines in connection with the debtor's mining operations in Brazos County, Texas. MSHA filed a motion to allow administrative expenses under 11 U.S.C. § 503(b) to compel payment of the post-petition penalties. The debtor objected and argued that the penalties are not allowable as administrative expenses under § 503(b)(1)(A).

The bankruptcy court found that MSHA met the requirements for an administrative expense under § 503(b). Section 503(b) of the Bankruptcy Code states that, after notice and a hearing, "there shall be allowed administrative expenses . . . including . . . the actual, necessary costs and expenses of preserving the estate." To make a prima facie case for allowance of an administrative expense, the movant must show (1) that the claim arises from a transaction with the debtor's estate, and (2) that the claim has directly and substantially benefitted the estate. The court explained that liabilities incurred by an estate for post-petition operations constitute "actual and necessary" costs. Next, even though penalties do not benefit the bankruptcy estate in the traditional sense, the second prong is met because the penalties are costs incident to the debtor's business operation. Case law supports the proposition that post-petition civil fines and penalties are allowed as an administrative expense because they are simply part of the cost of doing business. Noncompensatory criminal penalties, on the other hand, are not given administrative expense priority because they are not ordinarily incident to the operation of a business.

The debtor supported its assertion that these penalties are criminal in character by citing cases from Delaware and the Third Circuit Court of Appeals which barred criminal penalties from treatment as an administrative expense. *Pa. Dep't of Envtl. Res. v. Tri-State Clinical Labs., Inc.*, 178 F.3d 685 (3d Cir. 1999); *In re Exide Techs.*, 601 B.R. 271 (Bankr. D. Del. 2019) (Carey, J.). The bankruptcy court noted that the post-petition MSHA penalties are civil in nature, and the *Tri-State* and *In re Exide* cases are inapposite to the present case.

The bankruptcy court also looked to the language of the Mine Safety and Health Act of 1977. The statute contains specific provisions for the treatment of criminal penalties separate from civil penalties. The MSHA citations issued in this case did not fall within the criminal penalty provisions, so the court categorized them as "civil" in nature. The bankruptcy court granted MSHA's motion to allow an administrative expense for the post-petition penalties under § 503(b)(1)(A).

In re Double H Transp. LLC, 614 B.R. 553 (Bankr. W.D. Tex. 2020) (Mott, J.).

Summary: A chapter 11 debtor that filed for bankruptcy months before Subchapter V was added to the Bankruptcy Code could not amend its petition to elect to proceed under Subchapter V.

Double H Transportation LLC, filed its original petition under chapter 11 on November 4, 2019. The debtor subsequently filed its amended petition on February 28, 2020. The amended petition elected to proceed under "Subchapter V" of the Bankruptcy Code. Subchapter V was added to the Code by the Small Business Reorganization Act of 2019 ("SBRA"). The SBRA became effective on February 19, 2020, 107 days after the debtor filed its bankruptcy case. Nothing in the SBRA statute indicates that it was intended to have retroactive effect.

The bankruptcy court struck the amended petition. The bankruptcy court noted that, to permit the debtor to elect Subchapter V status "at this stage of the bankruptcy case would create a procedural quagmire and likely create 'cause' to dismiss or convert the debtor's case." For example, Subchapter V debtors must file a plan of reorganization within 90 days of the order for relief, which would have expired on November 4, 2019 in this case. Additionally, the court must hold a mandatory status conference in a Subchapter V case within 60 days of the order for relief, and the debtor must file a status report no later than 14 days prior to the status conference. Those deadlines had also passed.

In re Easter, No. 19-12063-SDM, 2020 WL 6009201 (Bankr. N.D. Miss. Oct. 9, 2020) (Maddox, J.).

Summary: Debtors were allowed to amend their voluntary petition to proceed under Subchapter V, which took effect nine months after they initially filed for Chapter 11 bankruptcy.

Debtors Tony and Melissa Easter, who operated a trucking business, filed for Chapter 11 bankruptcy in May 2019. Two months later, they amended their petition to change their designation to small-business debtors. In January 2020, the Easters filed their disclosure statement and plan of reorganization. Several parties objected to confirmation. The Easters acknowledged that their plan was not confirmable due to noncompliance with the "absolute priority rule" and filed a motion to amend their petition and proceed under Subchapter V, which took effect in February 2020. Judge Maddox determined that the Easters did not require permission to amend their voluntary petition at any time before the case closed and thus denied their motion as procedurally improper. The Easters then amended their petition to proceed under Subchapter V. The U.S. Trustee and several creditors filed responses and motions to strike the amended voluntary petition.

The U.S. Trustee and creditors argued that the Easters should not be allowed to proceed under Subchapter V because the Easters were simply attempting to further delay confirmation and evade the 45-day confirmation deadline under 11 U.S.C. § 1129(e) and because a retroactive application of Subchapter V would affect the preexisting property rights of creditors by eliminating the absolute priority rule. As to the first argument, Judge Maddox relied on the decisions in ***In re Twin Pines, LLC***, 2020 WL 5576957 (Bankr. D.N.M. Apr. 30, 2020) and ***In re Deidre Ventura***, 615 B.R. 1 (Bankr. E.D.N.Y. 2020) to find that the Easters' inability to meet the deadlines imposed by Subchapter V was a circumstance for which they should not be held accountable and which warranted an extension. Judge Maddox also rejected the argument that a retroactive application of Subchapter V would affect preexisting property rights of creditors so long as the Easters' reason for electing Subchapter V was not made in bad faith and would not unduly prejudice a party. Finding no evidence of either bad faith or undue prejudice, Judge Maddox held that the Easters could proceed under Subchapter V.

In re Gilbert, No. 16-12120, 2020 WL 5939097 (Bankr. E.D. La. Oct. 5, 2020) (Grabill, J.).

Summary: The CARES Act did not foreclose the ability of debtors to modify confirmed Chapter 13 plans where the debtors had fallen behind on plan payments prior to the enactment of the Act and where the debtors suffered financial hardship due to the COVID-19 pandemic.

Several Chapter 13 debtors fell behind in making plan payments in the months before the enactment of the CARES Act and alleged to have fallen further behind on plan payments as a result of the COVID-19 pandemic. Three debtors thus sought to catch up on payments by extending the terms of their confirmed plan past sixty months. A fourth sought not to extend the plan but to modify it by decreasing recovery to unsecured creditors. The CARES Act allows such modification if the plan were initially confirmed before March 27, 2020, when the CARES Act took effect, and if the debtor "is experiencing or has experienced a material financial hardship due, directly or indirectly," to the pandemic. The Chapter 13 Trustee objected to modification of the confirmed plans under the CARES Act unless the debtors fell behind after March 27, 2020, when the CARES Act took effect, and unless the sole reason for the arrearages could be traced to the pandemic.

Judge Grabill noted that, in ***In re Meza***, 467 F.3d 874 (5th Cir. 2006), the Fifth Circuit held that debtors are not required to prove an unanticipated, substantial change in circumstances in order to take advantage of the Bankruptcy Code's modification provision, 11 U.S.C. § 1329(a). Judge Grabill thus held that each of the debtors had an absolute right to request modification of their plans under § 1329 without having to show a change in circumstances prior to the enactment of the CARES Act. The CARES Act then modified § 1329 to impose on debtors the requisite to show a material financial hardship due directly or indirectly to the pandemic. Judge Grabill further noted, however, that nothing in the text of the CARES Act foreclosed relief to the debtors simply because they were behind in plan payments prior to March 27, 2020. The court then found that the debtors had shown that they were experiencing or had experienced a material financial hardship due directly or indirectly to the pandemic and, subject to any other objections the U.S. Trustee might have, indicated an intent to enter orders granting the debtors' requested modifications.

Hobbs v. Roberts (In re Roberts), 611 B.R. 261 (Bankr. W.D. Tex. 2020) (Gargotta, J.).

Summary: A chapter 7 debtor's failure to disclose wage income warranted the denial of her discharge under 11 U.S.C. § 727(a)(4)(A), the false oath discharge exception.

This chapter 7 case involves an objection by the United States trustee to the debtor's discharge, alleging that (1) the debtor transferred or concealed assets with an intent to defraud creditors, (2) the debtor unjustifiably concealed, falsified, or failed to keep adequate books and records of her sole proprietorship, (3) the debtor knowingly and fraudulently made omissions and/or false statements in her schedules and statement of financial affairs and at her § 341 meeting, and (4) the debtor failed to satisfactorily explain the loss of asset to meet the debtor's liabilities.

After trial, the bankruptcy court denied the debtor's discharge under § 727(a)(4)(A) because the debtor's underreporting of her income on her statement of financial affairs, amended statement of financial affairs, and second amended statement of financial affairs by about $10,000 constituted a reckless disregard for the truth and violated § 727(a)(4)(A) by knowingly and fraudulently making a false oath or statement regarding her wage income. All other counts were denied.

In re Idell, No. 19-70114-TMD, 2020 WL 3445436 (Bankr. W.D. Tex. June 23, 2020) (Davis, J.).

Summary: A creditor cannot exercise a right of setoff when the debtor's only act of default was

the "mere act of filing for bankruptcy."

Kevin Idell and Kostadea Baldounis, the debtors in this case, borrowed a $9,430 loan from Complex Community Federal Credit Union ("Credit Union"). As security, the debtors gave the Credit Union a lien on a 2011 Harley Davidson and the right, upon default, to set off the funds in the Debtors' accounts at the Credit Union against what the debtors owed on the loan. The debtors stipulated that either insolvency or a bankruptcy filing would constitute default.

The debtors borrowed an additional $40,445 from the Credit Union seven months later, secured by a Dodge Ram 2500. The debtors again agreed to give the Credit Union a right to setoff with bankruptcy or insolvency constituting default-triggering events. Four months after the second loan, the debtors filed for bankruptcy. The Credit Union moved for relief from the automatic stay six days after the filing, seeking to set off the funds in the debtors' accounts against the two loans. At a hearing, the Credit Union admitted that the debtors were current on their payments on the two loans but argued that the debtors "defaulted on their loans because they were insolvent." The debtors executed reaffirmation agreements with the Credit Union in which both parties agreed to the value of the vehicles, and the debtors agreed that the Credit Union could set off the amounts owed if the court granted the lift-stay motion.

The bankruptcy court explained that a right to setoff "allows entities that owe each other money to apply their mutual debts against each other, thereby avoiding 'the absurdity of making A pay B when B owes A.'" A creditor seeking to exercise a right to setoff must do three things, (1) prove that right to setoff exists under state law, (2) show that § 533 preserves this state-created right, and (3) request and provide the necessary cause for a court to lift the automatic stay. The bankruptcy court established that a right to setoff existed under Texas state law, but it is limited to matured debt. The bankruptcy court held that there was no right to setoff here because the debt had not matured, and there was no proof that the debtors were insolvent (despite the Bankruptcy Code's presumption of insolvency in the context of preferential transfers). Further, the Credit Union had no right to setoff because no default existed under the contract, as the debtors had already received their discharge which cured the default of filing for bankruptcy.

LaFavers v. Arguello (In re Arguello), No. 18-08003, 2020 WL 4382759 (Bankr. S.D. Tex. July 30, 2020) (Norman, J.).

Summary: A debtor could not discharge $2 million in damages for shooting his stepson because his willful and malicious actions were not sufficiently justified.

Debtor Martin Arguello and his minor stepson, Collin LaFavers, were involved in an altercation at Arguello's home during which Arguello fired five shots from his 9mm Beretta—two warning shots into the air, one warning shot into the ground, and two shots that hit LaFavers in the arm. Between the three warning shots and the last two shots, LaFavers was able to strike Arguello in the face. LaFavers sued Arguello in state court, after which Arguello filed for Chapter 7 bankruptcy. LaFavers filed an adversary proceeding seeking a determination that the damages flowing from the gunshot wounds were nondischargeable. LaFavers alleged that Arguello acted willfully and maliciously in shooting his firearm at and near LaFavers and in wounding LaFavers twice. LaFavers further alleged that Arguello's conduct resulted in severe bodily injury to

LaFavers. The bankruptcy court agreed with LaFavers and found that Arguello's conduct was both willful and malicious and that the debt was not dischargeable. On appeal, the district court affirmed the bankruptcy court's finding that Arguello's conduct was willful and malicious but vacated the ruling that the debt was not dischargeable, as the bankruptcy court did not address whether the defendant was "sufficiently justified under the circumstances." The case was remanded to the bankruptcy court to determine whether Arguello's actions were sufficiently justified under the circumstances such that it rendered the debt dischargeable under 11 U.S.C. § 523(a)(6).

Though Arguello submitted evidence that he was hit in the face and suffered a bloody nose during the altercation, the bankruptcy court found that he failed to show that the shooting of LaFavers was sufficiently justified under the circumstances. The bankruptcy court stressed that LaFavers was a minor when the events occurred and that Arguello was the larger individual. The bankruptcy court also found that the warning shots put LaFavers into a "flight or fight" situation and that his choice to charge and hit Arguello were sufficiently justified. The court thus found that the damages arising from LaFavers's state-court action in the amount of $2,036,728.22 were nondischargeable pursuant to § 523(a)(6).

In re Levenson Grp., Inc., 613 B.R. 418 (Bankr. N.D. Tex. 2020) (Jernigan, J.).

Summary: A Chapter 7 trustee's proposed procedures for collecting a debtor's outstanding accounts receivable were not fair and equitable, in the best interest of the estate, or reflective of reasonable business judgment on the part of the trustee.

Debtor The Levenson Group, Inc. operated an advertising agency that acted as a "middleman-agent" between clients wishing to place advertisements and media vendors selling advertisement slots. The media vendors would bill Levenson, and Levenson would in turn bill the clients and add an upcharge for Levenson's commission or fee. When Levenson fell into financial distress, it ceased paying the media vendors and began relying on funds from clients to operate. Nearly $7 million in debt to these vendors, Levenson filed for Chapter 7 bankruptcy in December 2018. Because of Levenson's billing process, the Chapter 7 Trustee allegedly faced a challenge to collect the nearly $1.6 million in prepetition accounts receivable owed by Levenson's clients—more than 75% of which was owed by one client, Dickey's Barbecue Restaurants, Inc. Many of Levenson's clients feared the media vendors would sue them directly to recover the funds, so the Trustee proposed to accept voluntary assignments of the vendors' claims to pursue at the Trustee's discretion. The assigning vendor would receive 65% of any recovery on their claim. The majority of the remaining 35% would go to pay the Trustee's administrative claims, and the rest would be distributed pro rata to general unsecured creditors. The Trustee would also waive any preference claims under 11 U.S.C. § 547 against assigning vendors to further incentivize assignment. The Trustee filed a motion to approve these proposed assignment procedures. Cajun Operating Co. d/b/a Church's Chicken, one of Levenson's clients and creditors, objected on the grounds that the Trustee failed to exercise proper business judgment in proposing to waive preference actions against assigning vendors and that the Trustee would not have standing to bring the assigned claims if the court approved the assignment procedures.

The bankruptcy court sustained Church's objection and denied the Trustee's motion because of

insufficient evidence that the proposed assignment procedures were fair and equitable, in the best interest of the estate, and reflective of reasonable business judgment on the part of the Trustee. Looking to state law, Judge Jernigan determined that the claims at issue were akin to property-based and remedial claims, which are assignable under Texas law. Judge Jernigan, however, also viewed the assignment procedures as akin to both a compromise and settlement, in which case they would have to be fair and equitable and in the best interests of the estate, and a use of property under 11 U.S.C. § 363, which would require a showing that the Trustee exercised reasonable business judgment in proposing the transaction. Judge Jernigan held that the proposed assignment procedures failed under both standards. While individual assignments may be fair and equitable and in the best interest of the estate, "blanket approval of the overall assignment concept seem[ed] insupportable." Further, since the assigning vendors would still recover the primary benefits of the assigned claim, Judge Jernigan did not see them as true assignments. The court thus could not find that the proposed procedures would be reflective of reasonable business judgment. Lastly, Judge Jernigan pointed out that the challenge in collecting the accounts receivable was not as complex as the Trustee made it out to be, as collection would essentially amount to a two-party dispute between Levenson and its largest client/account debtor, Dickey's Barbecue. The bankruptcy court thus denied the Trustee's motion and the proposed assignment procedures.

Lewis v. Mass. Higher Educ. Assistance Corp. (In re Lewis), Case No. 17-06060-KMS, Adv. Proc. No. 17-06060-KMS, 2020 WL 489222 (Bankr. S.D. Miss. Jan. 29, 2020) (Samson, J.).

Summary: A debtor earning more than four times the federal poverty guideline for her household of three could not discharge over $288,000 in student loans as an undue hardship on herself and her children.

Debtor Altamic Lewis took out student loans to pay for her bachelor's degree from McNeese State University in Louisiana and later to pay for her doctorate degree from Texas Chiropractic College. Shortly after receiving her doctorate, Lewis was diagnosed with a pulmonary embolism and an unnamed blood disorder which will require her to take blood thinners for the rest of her life. She was also later diagnosed with Type I diabetes. Between 2006 and 2012, Lewis worked a series of jobs and earned an average of $30,000 to $35,000 a year. Since then, her and her husband's combined income has fluctuated from $103,724 in 2015 to $42,546 in 2017, when Lewis and her husband filed for Chapter 7 bankruptcy. By January 2020, Lewis was making approximately $92,000 a year, but her husband was unemployed and had been "for a long time." Lewis's student loans, the principal of which was originally $207,177, now sit at $288,080. Lewis filed an adversary proceeding seeking a ruling that she can discharge the loans under 11 U.S.C. § 523(a)(8), as repayment would allegedly impose an undue hardship on Lewis and her children.

Judge Samson outlined the three-prong test for determining undue hardship for purposes of § 538(a)(8) as set out in ***Brunner v. New York State Higher Education Services Corp.***, 831 F.2d 395 (2d Cir. 1987): (1) that the debtor cannot maintain, based on current income and expenses, a "minimal" standard of living for herself and her dependents if forced to repay the loans; (2) that additional circumstances exist indicating that this state of affairs is likely to persist for a significant portion of the repayment period of the student loans; and (3) that the debtor has made good faith efforts to repay the loans. Failure to satisfy even one of these prongs means the debt is not

dischargeable. Judge Samson found that Lewis was unable to satisfy the first prong. In examining the first prong, the court analyzed how much money was needed to maintain a minimal standard of living, whether Lewis had any money left after essential expenses to make payments on her loans, and whether Lewis had minimized living expenses and maximized financial resources. The court applied both a subjective standard based on life experience and an objective standard based on federal poverty guidelines and IRS Standards. Judge Samson found that Lewis's $5,390 in monthly net income, when considering that she had separated from her husband and reduced her household to herself and her two children, was more than quadruple the federal poverty guideline. Judge Samson also found that Lewis's reported expenses of $5,261 were excessive and reduced them to $4,391. Lastly, Judge Samson found Lewis's $229 monthly contribution to an employee stock purchase program was unnecessary and added that amount back to her income. These adjustments would allow Lewis to afford a $1,200 monthly payment, enough to completely pay off the loans after 30 years, and thus Judge Samson held that Lewis's loans were not dischargeable.

Lowe v. Am. Student Fin. Grp., Inc. (In re Dickinson of San Antonio, Inc.), Adv. Pro. No. 18-05259, 2020 WL 3443920 (Bankr. W.D. Tex. June 23, 2020) (King, C.J.).

Summary: A chapter 7 trustee successfully sued multiple defendants involved in a complicated transaction with a chapter 7 debtor, a for-profit college, designed to skirt the Department of Education's 90/10 rule.

Dickinson of San Antonio, Inc. d/b/a Career Point College ("Career Point"), was a for-profit college that derived a significant portion of its revenue from federal student loans and grants. American Student Financial Group, Inc ("ASFG") entered into a complicated transaction with Career Point, the debtor, through its principal, Lawrence Earle. The transaction provided a private source of student loan funding to Career Point's students, designed to allow Career Point to skirt the Department of Education's 90/10 rule and claim more money from federal sources than it otherwise would have been able to receive. After self-reporting its non-compliance to the Department of Education, Career Point filed for chapter 11 bankruptcy and soon thereafter converted to chapter 7. John Patrick Lowe, trustee for the chapter 7 estate, sued ASFG, Cottingham Management Company LLC ("Cottingham Management"), Cottingham Apex Texas Fund, LLC ("Cottingham-Texas"), and Tango Delta Financial, Inc. in a 29-count complaint. The trustee demanded repayment of over $8 million in Program Subsidy Loans ("PSLs") made by Career Point to Cottingham-Texas, and in turn lent back to ASFG by Cottingham-Texas. The trustee also sought to disallow the over $12 million-dollar claim of ASFG, which was based on Career Point's contractual obligations to repurchase individual student loans when a student defaulted, or to repurchase all outstanding loans if Career Point materially breached the contracts. Last, the trustee also claimed that the $5.1 million dollars Career Point paid to ASFG under these loan-repurchase obligations constituted a fraudulent transfer which ASFG must return to the estate.

The bankruptcy court previously granted partial summary judgment in favor of the trustee on counts 1, 2, and 3 against Cottingham-Texas, which the district court affirmed. After a five-day trial involving nearly a hundred exhibits and recorded deposition testimony, the bankruptcy court rendered judgment in favor of the trustee on most of the remaining counts.

To obtain Title IV funding from the Department of Education, for-profit colleges such as Career Point must comply with the Higher Education Act's 90/10 rule codified at 20 U.S.C. § 1094. The rule provides that at least 10% of a private for-profit school's funding must come from non-government sources, such as private student loan lenders like ASFG. On counts 1–3 alleging that Cottingham-Texas breached four Master Promissory Notes, the district court affirmed summary judgment in favor of the trustee because the notes were valid, and Cottingham-Texas breached its obligation to pay. The bankruptcy court denied count 5, which sought declaratory judgment that Cottingham-Texas is the alter ego of both ASFG and Cottingham Management because alter ego is an extraordinary remedy, even though some factors did support a finding of alter ego as to ASFG.

Next, the bankruptcy court granted count 12, which sought equitable subordination of ASFG's secured claim to share *pari passu* with the general unsecured creditor class. The trustee sought equitable subordination as an alternative method to avoid ASFG's lien. ASFG argued that there was no "inequitable conduct" that resulted in injury to the creditors or yielded an unfair advantage. The court held that the defendants failed to show that they operated in good faith, so the trustee was entitled to equitable subordination with two caveats. "First, the claim should only be subordinated to the extent it is allowed" and second, "the claim is subordinated, if at all, only to the extent necessary to prevent harm to other creditors."

The bankruptcy court also granted count 13, holding that ASFG's lien on the Master Promissory Notes should be avoided under § 544(b)(1) because ASFG's underlying claim should be disallowed under § 502(d). Next, counts 19–23 included five separate fraudulent transfer claims against ASFG (two under § 548 and three under the Texas Uniform Fraudulent Transfer Act). All five claims were based on sums Career Point paid to ASFG to repurchase defaulted student loans which ASFG "put" back to Career Point over the course of the transaction. The bankruptcy court granted judgment on four of the five fraudulent transfer theories but held that the trustee is entitled to only one satisfaction. The relief granted was supported by alternative rationales for awarding the trustee $5,170,034.36.

Count 27 was granted, which asked the court to avoid ASFG's post-petition transfer under § 549. The trustee sought to reclaim the value of a check ($62,843.28) that Cottingham-Texas sent to ASFG on November 1, 2016 because that payment was property of the estate which was diverted without permission. The bankruptcy court also granted count 26, which included the trustee's objection to ASFG's claim under § 502. Because ASFG is liable to the estate under §§ 544, 548, and 549, the court held that ASFG's claim was disallowed in full.

Last, the bankruptcy court denied count 28, which alleged that ASFG violated the automatic stay by retaining possession of the Master Promissory Notes and diverting payment on the Notes to itself rather than to Career Point. The bankruptcy court held that this claim was duplicative of other claims. The trustee was entitled to reasonable and necessary attorney's fees for bringing this action under Texas Business and Commerce Code § 24.013 and Bankruptcy Rule 7054.

In re McDermott Int'l, Inc., 614 B.R. 244 (Bankr. S.D. Tex. 2020) (Jones, J.).

Summary: An individual's prepetition service as chief transformation officer for a Chapter 11 debtor did not impute any alleged disinterestedness to his employers, and the debtor was allowed to employ the individual and his employers to assist with financial restructuring.

Debtor McDermott International, Inc. filed for Chapter 11 bankruptcy on January 21, 2020. A few months prior, in October 2019, McDermott and AP Services, LLC entered into an agreement whereby AP Services would provide its employee John Castellano to serve as McDermott's chief transformation officer and several temporary personnel to provide support services. In February 2020, McDermott filed an application to employ AP Services and to designate Castellano as McDermott's chief transformation officer pursuant to the prepetition agreement under 11 U.S.C. §§ 105 and 363. At a hearing, the bankruptcy court indicated that it had concerns about the application and invited McDermott to amend its pleading. McDermott did so and filed both an amended application to employ AP Services under §§ 105 and 363(b) and an application to employ AlixPartners as McDermott's financial advisor under 11 U.S.C. § 327(a). The U.S. Trustee filed a statement regarding the applications and argued that they should be granted only under § 363(b) and not § 327(a) based on the assertion that neither AP Services nor AlixPartners was eligible to be employed under § 327(a). The U.S. Trustee argued that Castellano's prepetition service as chief transformation officer made him an insider, that his status as such was *per se* imputed to both AP Services and AlixPartners, and that AP Services and AlixPartners were thus not disinterested under 11 U.S.C. § 101(14)(B).

Judge Davis, in approving the employment of AP Services and AlixPartners pursuant to § 327(a) and in designating Castellano as chief restructuring officer, noted that Castellano had never been employed by McDermott. Both the prepetition and postpetition relationships had involved McDermott on one hand and AP Services/AlixPartners on the other, and the prepetition employment by McDermott of AP Services/AlixPartners did not prevent their employment during the bankruptcy. Further, Judge Davis disputed whether, assuming *arguendo* that Castellano's prepetition service rendered him not disinterested, that lack of disinterestedness would be *per se* imputed to AP Services and AlixPartners. After a review of the plain reading of § 101(14) and (41), Judge Davis determined that the Bankruptcy Code was silent on the issue and that no *per se* rule existed. Judge Davis also noted that there was no evidence that AP Services or AlixPartners was a creditor, an equity security holder, or an insider of McDermott, nor was there evidence that Castellano's alleged disinterestedness should be imputed to AP Service or AlixPartners. Lastly, there was no evidence that either AP Services or AlixPartners had a material interest adverse to McDermott or any class of creditors or interest holders. Judge Davis thus found that AP Services and AlixPartners were disinterested persons as defined by § 101(14) and approved their employment under § 327(a). As a parting remark, Judge Davis stated that, "[i]n the future, the Court expects to see a single application for employment under § 327(a)" in order to avoid an "obfuscated process designed to skirt the bankruptcy process implemented by Congress."

In re Reddy Ice Holdings, Inc., 611 B.R. 802 (Bankr. N.D. Tex. 2020) (Jernigan, J.).

Summary: Where a prior order of the bankruptcy court reopening a long-closed chapter 11 case only to allow remaining settlement funds to be disbursed included a condition that any quarterly fees would be paid out of the settlement funds only, the U.S. trustee was collaterally estopped from asserting that the debtor is liable for the quarterly fees.

Over seven years ago, Reddy Ice Holdings, Inc. executed a multimillion-dollar prepackaged chapter 11 plan in an administratively consolidated bankruptcy case. Years after the debtor emerged from bankruptcy, lawyers for a putative class of plaintiffs that had sued the debtor pre-petition for allegedly conspiring with other ice makers to fix the price of bags of ice, moved to reopen the case for purely ministerial reasons. The bankruptcy court, in 2012, had approved a $700,000 settlement between the debtor and the plaintiffs, which had still not been fully disbursed. The debtor objected to reopening the bankruptcy case, arguing that it should not have to bear any liability for any U.S. trustee quarterly fees that might accrue during any window of time that the case was reopened, especially because the reopening had nothing to do with the debtor or its long-consummated plan. The lawyers for the plaintiffs and the debtor agreed that "the class settlement funds would bear liability for any U.S. Trustee's fees that might accumulate during the brief window of time that the bankruptcy case was reopened."

After the increase in U.S. trustee fees in 28 U.S.C. § 1930(a)(6), the U.S. trustee sent the debtor a bill for $250,000 which encompassed the window of time that the case was reopened. The debtor argued that it should not have to pay the "surprise bill." The bankruptcy court declined to reach the question of § 1930's constitutionality, but concluded that the U.S. trustee was estopped from seeking payment from the debtor because the order reopening the case indicated that "the class plaintiffs' settlement funds would be the source for payment of any U.S. Trustee fees."

Schmidt v. AAF Players LLC (In re Legendary Field Exhibitions, LLC), Case No. 19-50900-cag, Adversary No. 19-05053-cag, 2020 WL 211409 (Bankr. W.D. Tex. Jan. 10, 2020) (Gargotta, J.).

Summary: Two former professional football players dropped the ball and waived their Seventh Amendment right to a jury trial in their class-action adversary proceeding by filing a proof of claim in the underlying bankruptcy, as the proof of claim effectively converted their legal claim to an equitable claim.

Plaintiffs Colton Schmidt and Reggie Northrup were professional football players playing for the Alliance of American Football, a professional football league that operated for several months in 2019 before folding. They filed a class-action lawsuit against co-defendants AAF Players, LLC, AAF Properties, LLC, Legendary Field Exhibitions, LLC, and Ebersol Sports Media Group, Inc. in California state court in April 2019 seeking damages for breach of contract, fraud, and other causes of action. The lawsuit was removed to the U.S. District Court for the Northern District of California before being transferred to the Western District of Texas after the co-defendants each filed for Chapter 7 bankruptcy. Schmidt and Northrup also filed a proof of claim for nearly $674 million in the bankruptcy proceedings based on the class action. Schmidt and Northrup's original complaint in California state court included a jury demand. In the bankruptcy court,

Schmidt and Northrup filed an Amended Jury Demand and an Amended Statement Regarding Consent, the latter of which indicated that Schmidt and Northrup did not consent to conduct of a jury trial by the bankruptcy court nor to entry of final orders by the bankruptcy court. In response, Thomas Dundon and Charles Ebersol, two non-debtor co-defendants, and the Chapter 7 Trustee argued that Schmidt and Northrup waived their Seventh Amendment right to a jury trial by filing a proof of claim over the matters at issue.

Judge Gargotta recognized that, according to the Supreme Court in ***Granfinanciera SA v. Nordberg***, 492 U.S. 33 (1981), the Seventh Amendment provides a right to a trial by jury only if a cause of action is legal in nature and involves a matter of private right. The court must thus determine whether the remedy sought is legal or equitable in nature. The court must also determine whether the cause of action involves private rights or public rights. Citing ***U.S. Bank NA v. Verizon Communications Inc.***, 761 F.2d 409 (5th Cir. 2014), Judge Gargotta recognized that public rights include "seemingly 'private' right[s] that are created by Congress." Judge Gargotta noted that Schmidt and Northrup's amended complaint sought damages, not equitable remedies, for nearly all, if not all, of their causes of actions. By filing a claim in the bankruptcy court, however, Judge Gargotta stated that Schmidt and Northrup triggered "the process of 'allowance and disallowance of claims,'" thereby subjecting themselves to the bankruptcy court's equitable power. Furthermore, by filing their claim, Schmidt and Northrup asserted a right to bankruptcy-estate assets, and apportionment of estate assets is an equitable "public rights" procedure mandated by Congress under 28 U.S.C. § 157(b)(2)(B) to which a jury-trial right does not attach. Thus, by filing their proof of claim, Schmidt and Northrup "effectively converted their legal dispute to an equitable dispute" and lost their Seventh Amendment right to a jury trial.

In re Smith, No. 20-10507-JDW, 2020 WL 4690458 (Bankr. N.D. Miss. Aug. 12, 2020) (Woodard, J.).

Summary: The automatic stay did not prevent transfer of title of a debtor's home when a foreclosure sale concluded and the debtor lost his equitable right of redemption twenty minutes prior to filing a bankruptcy petition.

Debtor Darrell Smith filed for Chapter 13 bankruptcy in February 4, 2020, at 11:28 a.m. Creditor HSBC Bank USA, N.A., which held the mortgage to Smith's home, filed a motion for relief from the automatic stay and asserted that a foreclosure sale had concluded on February 4, 2020, less than half an hour before Smith filed his bankruptcy petition. The foreclosure sale had commenced at 11:05 a.m. and had taken approximately two to three minutes to complete, at which point HSBC was the highest bidder with a bid of $151,500. The gavel fell and a memorandum of sale was signed prior to the bankruptcy petition's filing at 11:28 a.m. The property deed was signed and delivered to HSBC the next day and was recorded in DeSoto County, Mississippi, on February 12, 2020. HSBC argued that Smith had no interest in the property because the foreclosure sale ended before he filed his bankruptcy petition. Smith argued that the sale was not complete until the day after the bankruptcy filing, when the deed was signed and delivered, and thus the automatic stay prohibited transfer of title.

Judge Woodard noted that, under Mississippi law, a traditional sale of land where "A" conveys its interest in real property to "B" is not complete until the deed is signed and delivered. Under

Mississippi foreclosure law, though, the focus is on when the debtor loses his rights in the property. The court then concluded that under Mississippi law, a mortgagor loses his rights in real property in two steps. First, legal title is lost when a default occurs, and, second, the equitable right of redemption is lost when a public-auction foreclosure sale concludes. Smith thus lost legal title to his home once he defaulted on the loan several months before his bankruptcy filing, but he still held title subject to his right to redeem the property by bringing the debt current before the conclusion of a foreclosure sale. Thus, Judge Woodard stated that he had to determine when the foreclosure sale of Smith's property completed. Judge Woodard determined that the auctioneer concluded the auction at approximately 11:08 a.m., twenty minutes before the bankruptcy petition was filed at 11:28 a.m. Though some jurisdictions follow a "gavel rule" whereby the sale is made and the foreclosure-sale process concludes when the gavel falls at the auction, Judge Woodard saw no need to establish such a bright-line rule. Judge Woodard instead concluded that, in addition to the gavel falling, there must be some form of writing to complete a real-property transfer. The memorandum of sale satisfied this writing requirement, and thus Smith lost his rights to the property when the gavel fell and the memorandum of sale was signed. Judge Woodard thus granted HSBC's motion for relief from the stay.

Trejo v. Navient (In re Trejo), Case No. 17-42439-MXM-7, 2020 WL 1884444 (Bankr. N.D. Tex. Apr. 15, 2020) (Mullin, J.).

Summary: A debtor with limited education and job skills who has two children with worsening medical and psychological conditions could discharge her student loans, as failure to do so would impose an undue hardship on her and her dependent daughters.

Debtor Jessica Garcia Trejo is a single mother in her late forties with three daughters: two teenage dependent daughters and one non-dependent daughter in her mid-twenties. The two dependent daughters have been diagnosed with serious Type II diabetes, high blood pressure, psoriasis, eating disorders, severe depression, suicidal tendencies, and ADHD, and they require constant care from Trejo. Between the years 2008 and 2013, Trejo took out more than $54,000 in student loans to pursue a degree in bilingual education, a degree which she ultimately never received. Trejo additionally signed a $13,522.00 Parent PLUS loan on behalf of her eldest daughter to help her complete her last semester of college and earn her degree. Trejo filed for Chapter 7 bankruptcy on June 8, 2017. That same day, she initiated an adversary proceeding against Navient Solutions, LLC and Sallie Mae to seek a discharge of her federal student loans under 11 U.S.C. § 523(a)(8) on the basis that excepting them from discharge would impose an undue hardship on her and her dependents. Garcia Trejo subsequently dismissed Sallie Mae and filed an amended complaint adding the U.S. Department of Education as a defendant. Navient then filed a motion to dismiss, which was granted. Trejo's adversary proceeding against the DOE continued to trial, at which point Trejo owned $82,442.65 in principal and $7,156.15 in interest on her student loans, a total debt of $90,598.80.

In determining undue hardship for purposes of § 523(a)(8), the Fifth Circuit follows the *Brunner* test set out by the Second Circuit in ***Brunner v. New York State Higher Education Services Corp.***, 831 F.2d 395 (2d Cir. 1987). Under the three-part *Brunner* test, the debtor must show that: (1) the debtor cannot maintain a minimal standard of living if forced to repay the loans; (2) additional circumstances exist indicating that this state of affairs is likely to persist for a significant portion

of the repayment period; and (3) the debtor has made good-faith efforts to repay the loans. Judge Mullin held that Trejo satisfied all three prongs.

First, Judge Mullin found that the deterioration of her two dependent daughters' medical and psychological conditions did not permit Trejo to seek or hold even part-time employment, as she had to constantly care for and supervise her daughters. Furthermore, Trejo's total monthly income to support herself and her daughters comes only in the form of her daughters' Supplemental Security Income benefits from the Social Security Administration in the amount of $1,470.00, food stamps worth $210.00, and occasional assistance with utility bills and food from local churches. As a result, Judge Mullin found that Trejo struggled each month to pay her "meager" monthly expenses of $1,750.00 for her family of three and that "no realistic 'belt tightening'" would create sufficient discretionary income to pay her loans.

Second, Judge Mullins found that Trejo's age, severely limited education, lack of job skills and experience, and the additional physical, medical, and psychological health challenges presented by her dependent daughters established "compelling circumstances that saddle Ms. Trejo with a total incapacity to pay her student loan debts." Accordingly, there existed "no realistic, foreseeable avenue through which Ms. Trejo could improve her condition and reach some untapped earning potential that would allow her to pay down her student loan debt without jeopardizing herself or her dependents."

Finally, Judge Mullin found that, while Trejo had not ever been able to make any payments on her student-loan debt, she had made good-faith efforts to seek payment deferrals and forbearances on her loans by being "in constant telephone contact with Sallie Mae, Navient, and [the DOE] seeking to explore more long-term, income-based repayment options for her student loans." Based on the foregoing conclusions, Judge Mullin found that Trejo had satisfied her burden of establishing undue hardship under "the demanding standard adopted by the Fifth Circuit for interpreting and applying 11 U.S.C. § 523(a)(8)."

Used Cars, Inc. v. Saaid (In re Saaid), No. 19-05021-cag, 2020 WL 61833 (Bankr. W.D. Tex. Jan. 6. 2020) (Gargotta, J.).

Summary: A used-car dealer could not discharge a $450,000 debt owed to his lender due to his schemes of hiding sales and failing to forward sales proceeds to the lender.

Debtor Abdelali Saaid, who owned a used-car dealership in San Antonio, executed a loan agreement with Used Cars, Inc. in April 2017. The agreement authorized Saaid's dealership to purchase specific units with advances from Used Cars and required Saaid to forward the original titles to Used Cars upon purchase. Used Cars would then hold the title until it received notification from the dealership that a specific unit had been sold. Used Cars would then send the title back to the dealership, and the dealership would send payment from the sale to Used Cars the day after the sale. Used Cars later found out that sixty-five units had been sold "out of trust," meaning that the cars were sold to customers, but the titles were either in the possession of Used Cars or the Texas Department of Motor Vehicles. The court determined that Saaid employed two schemes in the sale of the sixty-five units. For twenty-five of them, Saaid did not report the sale to Used Cars or request the vehicle title, and for the

other forty, he requested the title from Used Cars but failed to forward the sale proceeds to Used Cars. Used Cars sued Saaid in Texas state court in August 2019. Saaid filed for Chapter 7 bankruptcy a month later. Used Cars subsequently filed an adversary complaint alleging that Saaid obtained money, services, or an extension, renewal, or refinancing of credit from Used Cars by false representations or, alternatively, by actual fraud, and seeking a determination that the debt was nondischargeable pursuant to 11 U.S.C. § 523(a)(2)(A).

Citing ***General Electric Capital Corp. v. Acosta (In re Acosta)***, 406 F.3d 367 (5th Cir. 2005), Judge Gargotta held that, to succeed in its nondischargeability action under § 523(a)(2)(A), Used Cars had to show that Saaid made a representation that he knew was false with the intent to deceive Used Cars, that Used Cars actually and justifiably relied upon Saaid's false representation, and that Used Cars sustained a loss as a proximate result of its reliance. Judge Gargotta found that Used Cars satisfied all five elements: Saaid made representations regarding the sales of units; he knew that the sale proceeds were not remitted to Used Cars; he deceived Used Cars by representing either that the sale proceeds would be submitted to Used Cars or by not disclosing the sale of units; and Used Cars relied on these representations. Furthermore, there was no dispute as to the amount of unit-sale proceeds that were not remitted to Used Cars.

Judge Gargotta also found that the debt was nondischargeable under § 523(a)(6) for willful and malicious injury. Under § 523(a)(6), a debt is the result of willful and malicious injury if there was either an objective substantial certainty of harm or a subjective motive to cause harm. Judge Gargotta held that when a borrower intentionally and unjustifiably withholds proceeds from a secured lender, the violation is willful and malicious. In all instances regarding the sixty-five units at issue, Saaid received funds to purchase the units and failed to remit the proceeds of the sales of those units to Used Cars as required under the loan agreements. Accordingly, Judge Gargotta found that Used Cars was entitled to a declaration that Saaid's debt was nondischargeable and granted judgment against Saaid for $450,816.02 plus post-judgment interest for sale proceeds that Saaid failed to remit to Used Cars.

Vargas v. Prestamos Del Rey, LP (In re Vargas), 617 B.R. 547 (Bankr. W.D. Tex. 2020) (Gargotta, J.).

Summary: A creditor who conducted a "hard pull" of a chapter 7 debtor's credit report post-petition did not violate the automatic stay because a credit pull is not a "collections action."

A chapter 7 debtor filed an adversary proceeding for damages, injunctive relief, attorney's fees, and pre-judgment costs and interests for a creditor's alleged violations of the automatic stay under 11 U.S.C §§ 362(a)(1), (3), and (6). The creditor-defendant moved for partial summary judgment. The debtor signed a promissory note with the creditor, Prestamos Del Rey, LP ("PDR"), for $700.00 on July 30, 2018. The debtor sent a letter to PDR pre-petition notifying PDR that the debtor was falling behind on payments and planned to file for bankruptcy. The debtor filed for chapter 7 bankruptcy on March 23, 2019. Subsequently, on May 9, 2019, a PDR employee conducted a "hard pull" of the debtor's credit report.

The bankruptcy court noted that a claim for violating the automatic stay exists in the Fifth Circuit when (1) the defendant knew of the existence of the stay, (2) the defendant's acts were intentional, and (3) the acts violated the automatic stay. Section 362(k) of the Bankruptcy Code, which provides a private right of action for stay violations, does not require specific intent to violate the automatic stay. The court held that pulling the debtor's credit report did not violate the automatic stay because the pull was not an "act to collect, assess, or recover a claim against the debtor," so the third prong was not met. Specifically, pulling a credit report is an "act that is unlikely to succeed in collecting a debt," therefore, it is not a stay violation because it does not amount to a "collections action."

Viegelahn v. Ruben's Auto Sales (In re Daniel), Case No. 18-52576-RBK, Adversary. No. 20-05009-RBK, 2020 WL 4519041 (Bankr. W.D. Tex. Aug. 5, 2020) (King, C.J.).

Summary: A car dealer's security interest, which was perfected thirty-two days after the debtor took possession of the car, was not avoidable as a preferential transfer.

Debtor Jon Donald Daniel purchased a car from Ruben's Auto Sales, LLC on September 13, 2018. Daniel took possession of the car on the same day. Daniel borrowed a portion of the purchase price from Ruben's and granted Ruben's a security interest in the car. Ruben's perfected its security interest on October 15, 2018, thirty-two days after Daniel took possession of the car. Daniel filed for Chapter 13 bankruptcy on November 1, 2018. Ruben's filed a proof of claim for the loan it made to Daniel. The Chapter 13 Trustee objected to Ruben's claim. When Ruben's filed a separate motion for relief from the automatic stay, the Trustee filed an adversary proceeding seeking to avoid the security interest as a preference under 11 U.S.C. § 547(b). Ruben's did not dispute that the security interest met all the elements of § 547(b), but it did assert that the exception contained in § 547(c)(3)—for security interests that are perfected on or before 30 days after the debtor receives possession of the subject property—applied. Ruben's perfected its security interest thirty-two days after Daniel received possession of the car. Because the thirtieth day was a Saturday, however, Ruben's argued that Federal Rule of Bankruptcy Procedure 9006(a)(1) extended its time to perfect until the following Monday. Rule 9006(a) applies when "computing any time period specified in these rules, in the Federal Rules of Civil Procedure, in any local rule or court order, or in any statute that does not specify a method of computing time" and states that any period stated in days that ends on a Saturday, Sunday, or legal holiday continues to run until the end of the next day that is not a Saturday, Sunday, or legal holiday. Thus, because the thirtieth day after Daniel took possession of the car was a Saturday, Ruben's argued that the thirty-day period continued until the following Monday.

Judge King agreed with Ruben's and applied Rule 9006(a), thus holding that Ruben's perfection of its security interest was timely under § 547(c)(3) and thus not avoidable under § 547(b). In reaching this conclusion, Judge King distinguished two cases relied upon by the Trustee, ***Greene v. Locke (In re Greene)***, 223 F.3d 1064 (9th Cir. 2000) and ***In re Johnson***, 232 B.R. 399 (Bankr. W.D. Mo. 1999). *Greene* dealt with § 547(b)'s requirement that the targeted transfer occur on or within 90 days of the filing of the bankruptcy petition. In *Greene*, the ninety-day lookback period ended on a Saturday, and the Ninth Circuit refused to extend the time period, noting that Rule 9006(a) "is limited by the provision that '[s]uch rules shall not abridge, enlarge or modify any substantive right." Judge King distinguished *Greene* on two bases. First, Judge King pointed out

that *Greene* dealt with counting *backward* to ninety days rather than *forward* to thirty days. Judge King then concluded that, while there is no apparent reason to extend the backward-looking period, there is reason to extend the forward-looking period for taking an action that required a courthouse to be open. Second, when *Greene* was decided, Rule 9006(a) applied to "any applicable statute," but the Rule was subsequently amended to apply to "any statute that does not specify a method of computing time." Thus, Judge King stated that *Greene* was "unpersuasive now as to application of the new version of the Rule that, by its plain text, includes § 547(c)(3)—which does not specify how to count the thirty days."

Judge King also distinguished *Johnson* and the case that it, in turn, relied on, ***Barnes v. General Motors Acceptance Corp. (In re Ross)***, 193 B.R. 902 (Bankr. W.D. Mo. 1996). Those cases held that Rule 9006(a) did not apply to extend the then twenty-day deadline in § 547(c)(3) because the exception is a "substantive" provision to which a "procedural" rule does not apply. Judge King disagreed with both *Johnson* and *Ross* and determined that not all subsections of § 547 are necessarily "substantive" and that the deadline in § 547(c)(3) appears to be more procedural in nature. Judge King afforded neither *Johnson* nor *Ross* any procedural weight and held that that rule in those cases would significantly shorten the amount of time in which creditors could protect their liens from avoidance and would clearly abridge the rights provided by Congress in § 547(c)(3). Thus, Judge King held that Rule 9006(a)(1) applied, that Ruben's perfection of its security interest was timely for the purposes of § 547(c)(3), and that the Trustee could not avoid the security interest as a preferential transfer.

In re Whitt, 2020 WL 833808 (Bankr. S.D. Miss. Feb. 19, 2020) (Olack, J.).

Summary: Voluntary 401(k) payments are not disposable income, such that a Chapter 13 debtor was not required to contribute those payments to pay unsecured creditors through her plan.

Debtor Annalyn Nelson Whitt filed for Chapter 13 bankruptcy on October 24, 2019. In her schedules, Whitt disclosed a $144.52 voluntary monthly payment to her 401(k) plan among other payroll deductions. On the same day she filed her petition, Whitt filed a Chapter 13 plan that proposed a 0% distribution to unsecured creditors. The Chapter 13 Trustee objected to the proposed plan and claimed it was not filed in good faith. The Trustee argued that paying 0% to unsecured creditors while continuing to contribute to a voluntary 401(k) plan did not adhere to Whitt's obligation under 11 U.S.C. § 1325(b)(1)(B) to apply all of her projected disposable income to make payments to unsecured creditors under the plan.

Judge Olack noted that disposable income is defined as "'current monthly income received by the debtor' less 'amounts reasonably necessary to be expended' for the debtor's maintenance or support." Judge Olack also noted that, prior to the passage of the Bankruptcy Abuse Prevention and Consumer Protection Act in 2005, 401(k) contributions were considered disposable income and were not necessary expenses. BAPCPA, however, included the addition of 11 U.S.C. § 541(b)(7), which states that property of the estate does not include "any amount . . . withheld by an employer from the wages of employees for payment as contributions" to, among other things, an employee benefit plan. The new § 541(b)(7) also included a "hanging paragraph" that reads: "except that such amount under this subparagraph shall not constitute disposable income as defined in section 1325(b)(2)." Joining the majority of courts within the Fifth Circuit that had ruled on the

issue, Judge Olack held that the language of § 541(b)(7) was not ambiguous and excluded from the bankruptcy estate any funds already contained within a retirement account at the time of the filing of the petition. Judge Olack further held that the "hanging paragraph" demonstrated Congress's intent to exclude all retirement contributions, both prepetition and postpetition, from a debtor's disposable income. Thus, Judge Olack concluded that Chapter 13 debtors may continue to contribute to retirement plans during their Chapter 13 plan terms and need not devote that money to unsecured creditors. As to the question of good faith, Judge Olack held that Whitt's continued voluntary 401(k) contributions at the same amount as her prepetition contributions were permissible and thus not in bad faith.