Commercial Law League
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Ron Peterson
Case Law Update

SUPREME COURT UPDATE

***Ritzen Group, Inc. v. Jackson Masonry, LLC*,** 140 S. Ct. 582 (2020)

Issue: Is an order denying a motion to lift the automatic stay a final order and thus appealable as of right?

Holding: Yes - 9 to 0 Opinion by Justice Ginsburg

Facts: This case involves a dispute where Ritzen agreed to buy land in Nashville, TN from Jackson Masonry, LLC ("Jackson"). The land sale was never effected. Ritzen sued Jackson for breach of contract, but Jackson filed for bankruptcy a few days before the trial was to begin. Ritzen filed a motion in the Bankruptcy Court for relief from the automatic stay. The Bankruptcy Court denied the motion, and Ritzen did not appeal the Bankruptcy Court's decision (thinking that the order was not final). The Bankruptcy Court later found that Ritzen had breached the contract. The Bankruptcy Court ultimately confirmed Jackson's plan of reorganization. Ritzen then appealed both the order denying the lifting of the stay, as well as the order finding in favor of Jackson on the underlying merits.

Procedural History: Both the District Court and the Court of Appeals found that Ritzen's appeal was untimely.

Opinion: In civil litigation generally, a court's decision ordinarily becomes "final," for purposes of appeal, only upon completion of the entire case. There is nothing left for the trial court to do. This prevents piecemeal appeals. However, a bankruptcy case embraces "an aggregation of individual controversies." Many of these controversies would have involved discrete actions had

there been no bankruptcy. Orders in bankruptcy cases qualify as "final" when they definitively dispose of discrete disputes within the overreaching bankruptcy. See *Bullard v. Blue Hills Bank*, 575 U.S. 496 (2015). An order denying confirmation of a chapter 13 plan is not final since the bankruptcy court still has before it the entire case.

Practice pointer: Always review an order that is adverse to your position. Failure to appeal a final order may make it practically permanent unless the litigant lucks out under Fed. R. Bankr. Pro. 9024. Failure to appeal a final order when there would have been merit to the appeal could be considered malpractice.

***Rodriguez v. FDIC*,** 140 S. Ct. 713 (2020)

Issue: When a corporate group receives a tax refund, how is it allocated among the corporate family? What is basis for decision – federal substantive common law or state law?

Holding: The Bankruptcy Court must look to state law, not federal common law. 9-0 Opinion by Gorsuch

Facts: United Western Bank hit hard times, entered receivership and the Federal Deposit Insurance Corporation took the reins. Not long after that, the Bank's parent, United Western Bancorp. Inc., faced its own problems and was forced into bankruptcy. Simon Rodriguez became the trustee. Subsequently, the IRS issued a $4 million refund and the fun started. Both the Bankruptcy Trustee and the FDIC Receiver squared off and claimed that each was entitled to the refund. United Western Bank did have an allocation agreement.

Procedural History: The Court of Appeals adopted the rule of *In re Bob Richards Chrysler-Plymouth Corp.,* 473 F.2d 262 (1973), and found for the Receiver. The Trustee appealed.

Opinion: The Supreme Court noted that many corporate groups have developed "tax allocation agreements." These agreements not only deal with allocating a share of the taxes each member of the group must pay, but also each member's share of the refunds. Despite this trend, the Supreme Court noted that some courts have adopted the *Bob Richards Chrysler-Plymouth Corp.* rule. The *Rob Richards* rule originally held that when there was no tax allocation agreement, the refund went to the entity that generated the refund. That rule was expanded to provide later that unless the allocation agreement is unequivocal and unambiguous, the *Bob Richards* rule applies.

Not all circuits, however, followed *Bob Richards*. The Court of Appeals for the Sixth Circuit observed that "federal common law constitutes 'an unusual exercise of lawmaking which should be indulged' … 'only when there is a significant conflict between some federal policy or interest and the use of state law.'" *FDIC v. AmFin Fin. Corp*., 757 F. 3d 530 (6th Cir. 2014). The Supreme Court agreed and did not find any justification for ignoring state law in favor of a federal substantive common law rule. Congress has generally left the determination of property rights in the assets of a bankrupt's estate to state laws. *Butner v. United States*, 440 U.S. 48, 99 (1979). This decision stems from a long line of cases starting with *Erie R. Co. v. Tompkins,* 304 U.S. 64 (1938), and the Tenth Amendment.

"Let no good deed go unpunished." The Supreme Court reversed the Court of Appeals decision in favor of the Receiver and asked the Court of Appeals to apply the state rule. But the Trustee's victory was a pyrrhic one. On July 24, 2020, the Court of Appeals for the Tenth Circuit reaffirmed its prior decision in favor of the Receiver, but this time applied Colorado law.

In re Fulton, 926 F.3d 916 (7th Cir. 2019)

Certiorari: The Supreme Court granted *certiorari* on December 18, 2019, *City of Chicago v. Fulton*, 140 S. Ct. 680 (2019). The case was to have been argued in March 2020, but due to the pandemic, oral argument was moved to October 2020.

Issue: Does the plain possession of a debtor's property in which the secured creditor holds a lien or security interest violate the automatic stay when the debtor files bankruptcy? If the answer to that question is yes, what are the options: (1) immediate surrender of the property to the debtor; (2) an administrative freeze to allow the secured creditor to move the court for adequate protection or stay relief; or (3) compel the debtor to file a turnover complaint?

Facts: Chicago is unique for many reasons. Traffic fines and parking tickets are a significant source of revenue for the City. If a lucky driver fails to pay his parking fines, the City can put a Denver boot on it or even worse, tow it away to the pound where the hapless debtor must pay hundreds or thousands of dollars to get her car back. In the *Fulton* case, the City seized her car on Christmas Eve and refused to give it back post-bankruptcy. She filed a chapter 13 petition, but the City refused to return the impounded car. The City's arguments were that (1) mere naked passion is not a stay violation; (2) the City's lien is a possessory lien and once it loses possession there is no lien; and (3) it is incumbent on the debtor to seek turnover of the car from the Bankruptcy Court.

Court of Appeals Opinion: The Court first stated that the debtor had at least an equitable interest in the vehicle. As such, that interest became property of the bankruptcy estate. One of the purposes of a reorganization bankruptcy is to group all of the debtor's property together in her estate such that she may rehabilitate her credit and pay off her debts. This necessarily

extends to all the debtor's property, even property lawfully seized pre-petition. *United States v. Whiting Pools, Inc.*, 462 U.S. 198 (1983); *Thompson v. Gen. Motors Acceptance Corp.*, 566 F.3d 699 (7th Cir. 2009). The Court also noted that the statute was amended; in 1984, Congress amended 11 U.S.C. §362(a)(3) to prohibit conduct that "exercise[d] control over estate assets." Next, the Court ruled that the City was compelled to turn over the car immediately. The court denied the City's argument that losing possession would mean forfeiture of its lien. The lien will remaining perfected if the loss of the lien is the result of the bankruptcy itself. Finally, the Court rejected the argument that the police power exception to the automatic stay is applicable. While the Court concluded that serious crimes that affect the public's safety, health and morals is outside the stay, parking tickets simply do not make the cut. The police powers exception should be construed narrowly.

Impact: The case has broad implications not only to consumer cases, but commercial cases where the lender has taken custody of its collateral through a lock box or other means of absolute physical possession. One of the reasons that that the U.S. Supreme Court granted *certiorari* is the split in the circuits The Second Circut, *In re Weber*, 719 F.3d 72 (2d Cir. 2013); Eighth Circuit, *In re Knaus*, 889 F.2d 773 (8th Cir. 1989); Ninth Circuit, *In re Del Mission Ltd.*, 98 F.3d 1147 (9th Cir. 1996); and Eleventh Circuit, *In re Rozier*, 376 F.3d 1323 (11th Cir. 2004), join the Seventh Circuit. The case is not without its critics. *In Denby-Peterson*, 941 F.3d 115 (3d Cir. 2019), went the other way, following *United States v. Inslaw, Inc*. 932 F.2d 1467 (D.C. Cir. 1991), and *In re Cowen*, 849 F.3d 943 (10th Cir. 2017).

Courts of Appeal
Consumer Corner

When Is a Tax Return Not a Tax Return?

Mass. Dep't of Revenue v. Shek (In re Sheck), 947 F.3d 770 (11th Cir. 2020)

Issue: Is a late tax return a tax return for purposes of discharge?

Facts: The debtor filed his tax return for 2008 seven months late. He owed the Commonwealth of Massachusetts $11,489. Six years later, the debtor filed his petition under chapter 7 of the Bankruptcy Code in the U.S. Bankruptcy Court for the Middle District of Florida and subsequently received a discharge. Undaunted by the discharge, the Commonwealth commenced collection activity and the debtor then filed a motion to reopen the estate and seek a declaratory judgment as to whether the taxes were dischargeable.

Procedural History: The Bankruptcy Court found that the taxes were discharged and the District Court affirmed.

Holding: The Court of Appeals Affirmed.

Opinion: Before 2005, neither the Bankruptcy Code nor the Internal Revenue Code defined "return." Courts adopted what was known as the *Beard* test. *Beard v. Commissioner*, 82 T.C. 766 (1984), *aff'd* 793 F.2d 139 (6th Cir. 1986). The *Beard* test established four requirements a putative return must satisfy to constitute a "return": (1) it must purport to be a return; (2) it must be executed under penalty of perjury; (3) it must contain sufficient data to allow calculation of tax; and (4) it must represent an honest and reasonable attempt to satisfy the requirements of the tax law.

In 2005 Congress passed the Bankruptcy Abuse Prevention and Consumer Protection Act, which for the first time added a definition of "return" to the Code. 11 U.S.C. §523(a) contains a hanging paragraph containing a definition. The definition states:

> For purposes of this subsection , the term "return" means a return that satisfies the requirements of applicable non-bankruptcy law (including applicable filing requirements). Such term includes a return prepared pursuant to 26 U.S.C. §6020(a) or similar State or local law, or a written stipulation to a judgment or a final order enter by a non-bankruptcy tribunal, but does not include a return made pursuant to 26 U.S.C. §6020(b) or similar State or local law.

11 U.S.C. §523(a). For practical purposes, the IRS very seldom uses section 6020(a) which entails helping the taxpayer file a return. Section 6020(b) deals with a substitute return filed by the IRS with little or no help from the taxpayer. Numerous court as shown below have adopted the "day late" rule: If the return misses the midnight deadline, it's not a return.

In the case at bar, the Commonwealth first argued that the return failed to comply with the filing requirements of the Commonwealth because it was seven months late. Second, the Commonwealth argued that the "applicable non-bankruptcy law" was Massachusetts law, and that Massachusetts defines a "return" by reference to its timeliness.

In response to those two arguments, the Court first reviewed the Commonwealth's invocation of the day late rule. The Court conceded that three different circuits have sustained the day late rule: *In re McCoy*, 646 F.3d 924 (5th Cir. 2012); *In re Mallo*, 774 F.3d 1313 (10th Cir. 2014); and *In re Fahey*, 779 F.3d 1 (1st Cir. 2015). *In re Fahey* was also interpreting Massachusetts's filing requirements. The Court of Appeals focused on the word "applicable" in the hanging paragraph. What does it add? If "applicable" meant all tax returns, it would be superfluous.

As further evidence that the Commonwealth's interpretation is wrong, Congress left unchanged section 523(a)(1)(B)(ii). When Congress added the hanging paragraph in 2005, it left this section unchanged and left unchanged its clear provision that a late-filed return can qualify for discharge if the return is filed more than two years before the bankruptcy. If the one day late rule were to apply, it would render this section void. The Commonwealth rejoined that a section 6020(a) return

would still give this section vitality, but as the court noted, there are almost no section 6020(a) returns.

With respect to the Commonwealth's final argument, that its own regulations requires that a return be duly filed, the Court noted that Massachusetts tax regulations do deal with late-filed returns If a late-filed return is not a return, why is this regulation there?

Practice Pointers: Practitioners are telling me two things. *First*, the IRS, as a rule, is not contesting returns as long as they comply with the *Beard* test. *Second*, the cash-starved states are, on the other hand, relentlessly aggressive in enforcing the "day late" rule.

401(k)Plans in Bankruptcy

***Davis v. Helbling (In re Davis)*,** 960 F.3d 346 (6th Cir. 2020)

Issue: Must the Debtor's payments into her 401(k) plan be included in her disposable income for purposes of a chapter 13 plan?

Facts: In 2017, Davis filed a petition for relief under chapter 13 of the Bankruptcy Code. She had over $200,000 ($189,000 unsecured) in debt, but only $39,000 in assets. She proposed to pay her unsecured creditors $19,380 in 60 payments of $323. To obtain court approval, her plan needed to provide for payment of all her 'projected disposable income' to her unsecured creditors. She had gross monthly income of $5,627 and claimed $5,304 in monthly expenses. These expenses included $220.66 in contributions to her 401(k) plan consistent with the amount she contributed pre-petition.

Procedural History: The chapter 13 trustee objected to excluding the $220.66 in plan contributions from disposable income, arguing that amount should go to creditors. The Bankruptcy Court agreed and sustained the trustee's objection. Davis then amended her plan to include the 401(k) payments as part of her repayment plan and the Bankruptcy Court confirmed

her plan. She then appealed the confirmation of her own plan. The Bankruptcy Court certified the question to the Court of Appeals, and the case then went on direct appeal to the Court of Appeals.

Opinion: The Court of Appeals had previously held in *Seafort v. Burden (In re Seafort*), 669 F.3d 662 (6th Cir. 2012), that a debtor could not exclude from disposable income 401(k) payments where she had no prior history of paying them. Would the same rule apply for a debtor continuing pre-petition payments?

The trouble starts with another infamous hanging paragraph. Section 541(b)(7) excludes from property of the estate "any amount…withheld by an employer from the wage of employees for payment as contributions." The hanging paragraph then continues, "except that such amount under this subparagraph shall not constitute disposable income as defined in §1325(b)(2)." 11 U.S.C. §541(b)(7). The Court conceded that there are at least four competing tests to determine whether 401(k) contributions should be included in disposable income. *In re Prigge*, 441 B.R. 667 (Bankr. D. Mont. 2010) (401(k) contributions must be included in disposable income); *Parks v Drummond (In re Parks),* 475 B.R. 703 (B.A.P. 9th Cir. 2012) (agreeing with *Prigge* but for different reasons). Some Courts have allowed 401(k) plan contributions to be excluded from disposable income. *In re Seafort,* 437 B.R. 204 (B.A.P. 6th Cir. 2010); *In re Thompson*, No. 17-02877-JC), 2018 WL 1320171 (Bankr. S.D. Ala. Feb. 28, 2019); *In re Reed*, 515 B.R. 586 (Bankr. E.D. Wis. 2014*)*; *In re Jenson*, 496 B.R. 615 (Bankr. D. Utah 2013); *In re Ann-Thu Thi Vu*, No. 15-41405-BDL, 2015 WL 6684227 (Bankr. W.D. Wash. June 16, 2015).

The court also conceded that the hanging paragraph is a grammatical mess that allows for any of these interpretations. The clause starts with the phrase "except that." However, there is no logical link to the rest of the section. The court concluded that interpreting the grammatical

misconstruction as preventing a debtor from excluding her 401(k) payments from her chapter 13 plan would violate the cannon against ineffectiveness and surplusage.

The decision had a vigorous dissent. There is plenty of ambiguity in the statute to say that the debtor may only excluded payments from her 401(k) from pre-petition contributions.

Practice Pointers: If you are faced with this problem, this case is very good in explaining the textual problems and reviewing the four competing theories. In addition, this case, like some of the other cases covered in this program, shows the importance of knowing the cannons of construction. Antonin Scalia & Bryan A Garner, *Reading the Law* (2012), should be mandatory reading in trying to interpret ambiguous texts, particularly in hanging paragraphs.

Avoiding Avoidance Actions

Deutsche Bank Trust Co Ams v. Large Private Beneficial Owners (In re Tribune Co. Fraudulent Conv. Litig.), 946 F.3d 66 (2d Cir. 2019)

Issue: Does 11 U.S.C. §546(e) apply to non-Title 11 matters?

Facts: The Chicago Tribune Company had done an $11 billion leveraged buyout in which the shareholders received approximately $8 billion for their shares. In 2008, the Tribune filed for chapter 11 relief in the U.S. Bankruptcy Court for the District of Delaware and the United States Trustee appointed a creditors committee. In 2010, the committee sued the shareholders, claiming that they had received their $8 billion dollars as a result of a fraudulent transfer made with the actual intent to delay, hinder or defraud creditors. In 2011, and more than two years after the filing of the petition, certain creditors asked for stay relief so that they could bring state court actions to avoid constructive fraudulent transfers. Subsequently, subsets of unsecured creditors, the retirees, and note holders brought constructive fraudulent transfer actions in state courts. These cases were consolidated and ultimately wound up in the U.S. District Court for the

Southern District of New York. That court dismissed the claims on the grounds that the plaintiffs had violated the automatic stay. The District Court also found that the safe harbor provisions of section 546(e) did not apply. This section shelters certain settlement payments from avoidance.

In 2016, the Court of Appeals ruled that the automatic stay did not apply, but the safe harbor did. *In re Tribune Co. Fraudulent Conv. Litigation ("Tribune 1")*, 818 F.3d 98 (2d Cir. 2016). The plaintiffs asked the Supreme Court to grant *certiorar*i. The Supreme Court held the case instead and decided *Merit Mgmt. Crp. LP v. FTI Consulting Inc.*, 138 S.Ct. 883 (2018). In the *Merit* case, the Supreme Court held that the only relevant party for purposes of the section 546(e) was the last party in the chain and the fact that there were protected parties under section 546(e) in the middle of the transaction was irrelevant. After its decision, the Supreme Court sent the *Tribune* case back to the Court of Appeals.

Upon remand, the Court of Appeals held that the last party in the chain of title was a protected party. Therefore, the only remaining question was whether section 546(e) applied to state law fraudulent transfer actions. The Court then considered whether, under the implied preemption doctrine, state laws were pre-empted to the extent of any conflict with a federal statue. A conflict occurs when state laws stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress. *Hillman v. Maretta*, 569 U.S. 483, (2013).

The Court concluded that Congress extensively regulated the securities industry and section 546(e), while in the Bankruptcy Code, was intended to have nationwide application and apply to state law avoidance actions.

***In re Picard*,** 917 F.3d 85 (2d Cir. 2019)

This case arises from the Madoff Ponzi scheme. The trustee pursuant to 11 U.S.C. §550 sued

88 secondary transferees who were citizens of foreign countries. The issue before the court was the application of extraterritoriality. Could foreign citizens be sued in a U.S. bankruptcy court? The US. District Court for the Southern District of New York withdrew the reference from the Bankruptcy Court and held that the "presumption against extraterritoriality" applied and absent a specific Congressional authorization, such suits could not be maintained. Such suits against foreign nationals would violate principals of comity. Foreign courts and laws had a greater interest than the bankruptcy courts of the United States.

The Court of Appeals reversed. First, the Court noted that avoidance and recovery under the Bankruptcy Code cannot be separated. The presumption against extraterritoriality should not apply when the court is making a domestic application of the statute. The initial transfer occurred in the United States. The Bankruptcy Court should be free to take whatever necessary actions it deems appropriate to collect the proceeds regardless of the location of the subsequent transferee

The Court also dismissed the international comity holding. What is important about the court's analysis was that there were no foreign bankruptcy proceedings. Absent such proceedings, a U.S. court should feel free to recover what is avoided. In addition, these foreign nationals knew that their investments were being placed with Madoff and should have had an expectancy that U.S. law would apply.

In the spring of 2020, the U.S. Supreme Court denied the defendant's petition for a writ of c*ertiorari*.

Isaiah v. JPMorgan Chase Bank, 960 F.3d 1296 (11th Cir. 2020).

The Eleventh Circuit recently held that a party who deposits money into, and transfers money among, its own bank accounts does not "transfer" an interest in property under the terms of the Uniform Fraudulent Transfer Act.

Coravca Distributions, LLC ("Coravca") and a related entity operated as a Ponzi scheme. When the fraud broke, a Florida state court appointed a receiver to manage Coravca and prevent the further dissipation of investors' assets. The receiver sued JPMorgan Chase, Coravca's bank, in order to recover deposits that Coravca made into its JPMorgan accounts, as well as transfers amongst those accounts that Coravca approved to perpetrate the Ponzi scheme. The receiver asserted fraudulent transfer claims, among others. The receiver alleged that JPMorgan was "aware[] of suspicious banking activity on [Coravca's] accounts" and yet did not act to curtail Coravca's fraudulent activity, such as by restricting access to Coravca's accounts or closing them entirely. *Id.* at 1300.

The district court dismissed the receiver's claims and the Eleventh Circuit affirmed. On the fraudulent transfer claim, the Eleventh Circuit held that a "routine bank deposit" does not "constitute[] a transfer to the bank within the meaning of the [Uniform Fraudulent Transfer Act]." *Id.* at 1302. It rejected the receiver's argument that a transfer, subject to UFTA's avoidance provisions, occurs when a debtor deposits money in a bank and title to that money passes from the debtor to the bank. Even if title passes as a formal matter, the Eleventh Circuit concluded that the "bank's right to use those funds is subject always to its obligation to the accountholder to return the funds upon request." *Id.* at 1302-03; *see also id.* at 1304-05 ("To establish that a [UFTA] transfer occurred, a plaintiff must show that the debtor relinquished control over the property such that he can be said to have disposed of or parted with an interest in it."). Put differently, because

deposited funds are always subject to withdrawal on an accountholder's demand, the accountholder never actually "relinquishes his interest in or control over the funds." *Id.* at 1303. The accountholder therefore does not "transfer" a property interest in any funds by depositing them in a demand account at a bank, or by moving them among multiple such accounts. *Id.* at 1303-05. On the facts of the case, the Eleventh Circuit concluded that no UFTA transfer to JPMorgan occurred because "the Ponzi schemers retained full access to and control over the funds in the [Coravca's] bank accounts: they withdrew funds, wrote countless checks, made several purchases, and initiated wire and other transfers at will." *Id.* at 1303. Because they only deposited money into, and moved money among, Coravca's *own* accounts at JPMorgan, no "transfer" to JPMorgan from Coravca occurred. *Id.* at 1304. However, the court indicated that the result would be different if the receiver had pled any facts showing that Coravca transferred funds into any accounts that were not its own. *Id.* at 1304. Even then, the proper defendants for any fraudulent transfer claims arising from such transfers would be the account owners, not the bank.

Finally, the Eleventh Circuit concluded that, because no transfer occurred, there was no cause to determine if JPMorgan was entitled to a "mere conduit" defense. That affirmative defense precludes recovery against a transferee who received funds in good faith and without knowledge of fraudulent conduct, and then transferred them to another entity without exercising dominion over the funds in the interim. The court concluded that this defense presupposes that a "transfer" to the conduit occurred as a threshold matter. Because Coravca did not actually transfer any property interest to JPMorgan, there was no need to consider whether JPMorgan should be considered a mere conduit.

***Generation Res. Holding Co., LLV v. Spencer Fane LLP*,** No. 19-3226, 2020 WL 3887850 (10th Cir. July 10, 2020).

In a similar vein, the Tenth Circuit held that a trustee can only recover the property conveyed in a fraudulent transfer, rather than proceeds of that fraudulently transferred property. Generation Resources entered into an agreement with Edison Capital to fund Generation's development of numerous wind power projects. While Generation created separate special purpose vehicles for each project, the original development agreement provided that Edison would transfer all funds to Generation, rather than directly to each project-level SPV. Generation informed its creditors that this structure would allow it to repay their debts before repaying Edison. However, during the course of development, Generation created new holding companies for each project-level SPV and then designated these new holding companies as the "developers" of each project. The effect of this restructuring was to transfer Generation's right to receive all development funds from Edison to the holding companies as the new developers of each project. *Id.* at *2.

Without the funds from Edison, Generation became insolvent and filed for chapter 7. During the bankruptcy case, Edison made payments under the development agreements to the SPVs' holding companies. The chapter 7 trustee moved to enjoin distribution of those funds, arguing that they were property of Generation's estate. The bankruptcy court denied the trustee's motion because the Trustee had not yet sought to avoid any transfer of Generation's own property as a fraudulent transfer, and so the development funds were not yet property of Generation's estate. After this ruling, the SPVs distributed a portion of the development funds to two law firms that represented them in the litigation concerning the development funds.

The trustee then brought actual fraudulent transfer claims against the SPVs (seeking to avoid and recover the transfer of Generation's rights to receive funding under the development agreements)

and against the SPVs' law firms (seeking to avoid and recover the funds paid to the firms as "proceeds" of the fraudulent transfer of Generation's development rights).

While the Tenth Circuit determined that the Trustee had a meritorious avoidance claim against the SPVs, it concluded that he could not avoid and recover the payments the SPVs made to their counsel. The court focused on the specific property of the estate that the trustee sought to recover—*e.g.*, Generation's "right and interest to be paid" under the development agreement with Edison. *Id.* at *4. The firms did not qualify as initial or subsequent transferees subject to the Bankruptcy Code's avoidance provisions because they "never received" the "contractual right" to the development funds from Edison. *Id.* at *5.

The Tenth Circuit concluded that, at most, the firms received the proceeds of Generation's rights under the development agreements. But the court construed proceeds of property fraudulently transferred as distinct from that property, only the latter of which is avoidable and recoverable under the Bankruptcy Code. In support of this conclusion, the court looked to section 541, which defines property of the estate. That section separately notes that "interests in property that the trustee recovers" under section 550 are property of the estate as well as "proceeds of or from property of the estate." *Id.* at *6. The court concluded that Congress thus knew how to distinguish between specific property and its proceeds and yet drafted section 550 without any reference to a trustee's right to recover *proceeds* of property fraudulently transferred. In light of this omission in section 550, the Tenth Circuit concluded that the trustee could only avoid and recover Generation's transfer of its rights under the development agreements and not any proceeds that the law firms received as a result of that transfer.

The Tenth Circuit likely reached this result due to a concern for avoiding payments to law firms for services that they provided to the SPVs in good faith. But the court could have reached this

result in a more straightforward way, which would not unduly hamper trustees' ability to recover fraudulently transferred property in the future. The Tenth Circuit simply could have concluded that the law firms were entitled to section 550(b)'s defense for subsequent transferees who receive fraudulently transferred property for value, in good faith, and without knowledge of the transfer's voidability. That result would avoid the unduly formalistic property/proceeds distinction the court employed here, even though transfers of funds were the only fraudulent transfers at issue.

Potpourii

***In re Lane*,** 959 F.3d 1226 (9th Cir. 2020).

The Ninth Circuit recently held that disallowing a secured claim does not automatically void a related lien against property of the estate. Lane filed a chapter 13 case and scheduled real property worth $420,000. He disclosed further that the property was subject to secured claims totaling $699,514. He listed Bank of America as a creditor holding a secured claim against the estate for $625,620. Thereafter, Bank of New York Mellon ("BONY") filed a secured claim for $676,341.19, identifying the real property as BONY's collateral. The proof of claim attached a promissory note showing that the original lender was Countrywide Home Loans. Countrywide had endorsed the note "in blank" so that it became payable to its bearer. *Id.* at 1228. The claim also attached an assignment of the note to BONY.

Lane objected to BONY's secured claim on the basis that it did not prove that BONY, as compared to Countrywide, was the entity "entitled to enforce payment on the claim." *Id.* BONY did not respond to the claim objection. In light of BONY's default, the bankruptcy court sustained the claim objection and disallowed BONY's secured claim in its entirety.

Lane next commenced an adversary complaint against BONY seeking to void the lien against the real property. Lane relied on section 506(d) of the Bankruptcy Code, which generally provides that

"to the extent that a lien secures a claim against the debtor that is not an allowed secured claim, such lien is void." The bankruptcy court entered summary judgment in favor of Lane and voided the lien.

The Ninth Circuit reversed. It highlighted an exception to section 506(d): the general rule voiding a lien does not apply where the related secured claim is "not an allowed secured claim due only to the failure of any entity to file a proof of such claim under section 501 of this title." *Id.* at 1230 (citing 11 U.S.C. § 506(d)(2)).

Here, that exception applied because the bankruptcy court disallowed BONY's secured claim for the sole reason that BONY lacked standing to enforce the mortgage. There was another real party in interest who could enforce the mortgage, and whose own claim against the estate was "not an allowed secured claim due only to [its] failure . . . to file a proof of such claim." 11 U.S.C. § 506(d)(2). Because "the claim belonged to someone other than BONY, and if a lien secured that person's claim, then BONY's actions in the bankruptcy case could not result in voidance of the lien securing the claim. In a nutshell, a bankruptcy court cannot destroy the property rights of the person who is the real party in interest based on the actions of a person who is not the real party in interest." *Lane*, 959 F.3d at 1232.

The Ninth Circuit noted that the result would have been different if the bankruptcy court had disallowed the secured claim on the merits—*e.g.*, if it determined that Lane had already repaid the mortgage in full, or if the mortgage had not been properly recorded under state law. *Id.* at 1230. Since the bankruptcy court did not do so, and since a presumably valid secured claim existed in the hands of another party who had not participated in the chapter 13 case, the lien survived Lane's bankruptcy. The secured creditor entitled to enforce the mortgage could foreclose on the property

and lien after Lane's bankruptcy, even though any deficiency claim would be discharged in the bankruptcy.

***In re Cumbess*,** 960 F.3d 1325 (11th Cir. 2020).

A chapter 13 debtor's decision to assume an unexpired lease in his chapter 13 plan does not, without the trustee's independent decision to assume the lease, bind the estate or give rise to an administrative expense claim, according to the Eleventh Circuit.

Paul Cumbess leased an HVAC unit from Microf LLC for use at his home. After filing for chapter 13, Cumbess proposed a chapter 13 plan that assumed the lease with Microf and provided that Cumbess would make lease payments to Microf directly (rather than through his chapter 13 trustee). The trustee did not separately move to assume the lease. After the bankruptcy court confirmed the plan, Cumbess failed to make timely payments to Microf. Microf then moved to compel the lease payments as administrative expenses, namely as "necessary costs and expenses of preserving the estate" under section 503(b)(1). The trustee objected to Microf's motion, arguing that the lease obligations were not administrative expenses but were merely unsecured claims.

The bankruptcy court denied Microf's administrative expense motion and the Eleventh Circuit affirmed. In the Eleventh Circuit's view, the plain meaning of provisions in section 365 precluded administrative priority for Microf.

Section 365(a) first provides that "the trustee, subject to the court's approval, may assume or reject any executory contract or unexpired lease of the debtor." Then section 365(d)(2) states that, in chapter 13 cases, "the trustee may assume or reject an executory contract or unexpired lease of . . . personal property of the debtor at any time before the confirmation of a plan." And, finally, section 365(p)(1) provides that "If a lease of personal property is rejected or not timely assumed

by the trustee under subsection (d), the leased property is no longer property of the estate and the stay under section 362(a) is automatically terminated."

Reading these provisions together, the Eleventh Circuit concluded that a chapter 13 estate is only bound to perform under an executory contract or unexpired lease if the trustee, rather than the debtor, assumes the lease prior to plan confirmation. In the words of the statute, if the chapter 13 trustee does not assume an unexpired lease of personal property "at any time before the confirmation of a plan," that lease is "not timely assumed by the trustee" and therefore "is no longer property of the estate" post-confirmation.

The Eleventh Circuit therefore held that, on the facts of this case, "the Microf lease dropped out of the estate upon confirmation of Cumbess's chapter 13 plan" because "the trustee never assumed the lease." *Cumbess*, 960 F.3d at 1332. Cumbess's assumption of the lease for purposes of the plan only represented his personal agreement to continue to perform under the lease. But without the trustee's concurrence, in the Eleventh Circuit's view, Cumbess's assumption did not involve property of the estate, did not create a liability for the estate, and therefore could not give rise to Microf's requested administrative expense claim.

In so holding, the Eleventh Circuit rejected Microf's legislative history and policy arguments in favor of its position, holding instead that the statute's plain text controlled. *Id.* at 1333-38. And in response to the argument that the Bankruptcy Code at times refers to "debtors" and "trustees" interchangeably, at least in the chapter 11 context, the Eleventh Circuit highlighted section 1303. That section does not broadly given chapter 13 debtors the powers and duties of a trustee, as does section 1107 for chapter 11 debtors. It instead only gives chapter 13 debtors the powers that a trustee has under section 363, and makes no mention of a trustee's powers under section 365. As

such, a chapter 13 debtor does not have the trustee's power under section 365 to assume executory contracts.