97th Annual National Conference of Bankruptcy Judges
October 11–14, 2023 Austin, TX

Who Wants to Be a Millionaire?: NCBJ/ABA Special Edition

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2. **Bad faith may forfeit the debtor's right to convert to chapter 13.** The debtor filed for relief under chapter 7. He failed to disclose assets. When the trustee discovered the assets and sought recovery, the debtor converted his case to chapter 13 under section 706(a) by filing a notice of conversion. Rule 1017(c)(2) treats the notice as a motion, which the bankruptcy court denied based on the debtor's bad faith in concealing assets. The Supreme Court affirmed. Section 706(a) grants a debtor the right to convert, but section 706(d) limits the right to a debtor eligible to be a debtor under the target chapter. If a debtor files a chapter 13 case in bad faith, the court may dismiss under section 1307(c). The court's determination to dismiss for bad faith pre-petition (or pre-conversion) conduct "is tantamount to a ruling that the individual does not qualify as a debtor under [c]hapter 13" and therefore does not meet section 706(d)'s eligibility requirement. A bad faith determination should be limited, however, to "atypical" or "extraordinary" cases, so as not to affect the vast majority of filers who are "honest but unfortunate debtors." In addition, section 105(a) gives the court the power to issue any order to prevent an abuse of process and is adequate to authorize denial of a conversion motion. The dissent relies on the plain language of section 706(a) to resolve whether bad faith is properly treated as an eligibility issue and whether section 105(a) should override section 706(a)'s express conversion authorization. *Marrama v. Citizens Bank of Mass.*, 549 U.S. 365, 127 S. Ct. 1105, 166 L. Ed. 2d 956 (2007).

3. **A claim for post-petition attorney's fees is allowable.** During the chapter 11 case, the debtor and its workers' compensation surety bond issuer disputed the treatment under the plan of the issuer's unsecured claim. The dispute focused solely on bankruptcy law issues, not on the enforceability of the bond or the allowability or amount of the surety's claim. The parties

ultimately settled (except as to the allowability of attorney's fees). The Bankruptcy Code does not by its terms disallow the surety's claim for attorney's fees incurred in the dispute. Section 502(b) specifies the grounds for claims disallowance. Generally, state law determines contract rights. Section 502(b)(1) incorporates state law grounds into the claims allowance process. Neither section 502(b)(1) nor any of the other grounds requires disallowance of attorney's fees for disputes related solely to bankruptcy law issues. Therefore, if a claim is enforceable under a contract and non-bankruptcy law, the Bankruptcy Code does not require that it be disallowed. The Supreme Court did not address whether section 506(b), which allows an oversecured creditor's attorney's fees as part of the secured claim, implicitly or explicitly requires disallowance of an unsecured creditor's attorney's fees claim because the debtor did not timely raise the issue. However, the Court did allow the court below to consider that issue, as well as non-bankruptcy law enforceability, on remand. *Travelers Cas. & Sur. Co. v. Pac. Gas & Elec. Co.*, 549 U.S. 443, 127 S. Ct. 1199, 167 L. Ed. 2d 178 (2007).

4. **Section 1146(a) does not exempt a pre-plan sale from stamp taxes.** The debtor in possession agreed to sell substantially all of the estate's assets as an ongoing concern in a section 363(b) sale. As part of the negotiations for consent to the sale, the debtor reached a global settlement agreement concerning proceeds distribution with representatives of its secured and unsecured creditors. The debtor filed a plan embodying the agreement ten days after the sale closed. The court ultimately confirmed the plan. The order approving the sale exempted the sale from stamp taxes under section 1146(a), which provides that "the making or delivery of an instrument of transfer *under a plan confirmed under section 1129 of this title*[] may not be taxed under any law imposing a stamp tax or similar tax." The more natural reading of "under a plan confirmed under section 1129" is that the transfer must be authorized by a plan that has been confirmed under section 1129, rather than "in accordance with a plan confirmed under section 1129," without a temporal (*i.e.*, post-confirmation) requirement. The statutory context supports this reading because the section appears in a subchapter entitled "Post[-]confirmation Matters." In addition, a pre-confirmation transfer cannot be said to be "in accordance with" a plan that has not yet been drafted or filed, let alone confirmed. Rather, a pre-confirmation transfer is made "in accordance with" or "under" section 363(b), not a plan. Finally, canons of statutory construction lead to the same reading. A statute limiting state taxation must be narrowly construed in the absence of a clear exemption (which this is not), and the Bankruptcy Code, though a remedial statute, balances many policies and therefore cannot be liberally construed to favor the estate against state taxation. Although the reason for treating pre-confirmation and post-confirmation transfers differently may not be readily apparent, such a distinction is not absurd and will not be overturned. Therefore, the property sale here is subject to state real property stamp taxes. *Fla. Dep't of Rev. v. Piccadilly Cafeterias, Inc.*, 554 U.S. 33, 128 S. Ct. 2326 (2008).

5. **A creditor may not collaterally attack a bankruptcy court's jurisdiction to issue a confirmation injunction.** The debtor asbestos manufacturer confirmed a plan based on a settlement with, among others, its insurance carriers. The plan and the settlement contained a channeling injunction that enjoined all persons from suing the carriers for all "claims, demands, allegations, duties, liabilities and obligations … which have been, or could have been, or might be, asserted by any Person against [the carriers] based upon, arising out of or relating to any or all of the Policies." Many years after plan confirmation, some plaintiffs brought actions against the carriers alleging that the carriers, based on information they had learned from their insurer

relationship with the debtor, had conspired to hide the dangers of asbestos from the public and had failed to warn about those dangers. The plaintiffs sought recovery only for the carriers' alleged state law violations, not for anything that the debtor had done. The confirmation injunction did not contain any express limitation as to the extent of the bankruptcy court's jurisdiction or power under the Bankruptcy Code. The carriers sought to enforce the injunction against the new lawsuits. The bankruptcy court construed the plan injunction as broad enough by its terms to cover those lawsuits. Once a confirmation order becomes final, it is res judicata as to parties and those in privity with them, even as to the issuing court's subject matter jurisdiction. Thus, parties may no longer attack the bankruptcy court's jurisdiction to issue the injunction in general or even as to matters at the periphery that might be beyond the bankruptcy court's reach. The only issue that the party objecting to the application of the injunction may address is whether the injunction's terms apply to the party's conduct, not whether the terms *may* apply to the conduct. *Travelers Indemn. Co. v. Bailey*, 557 U.S. 137, 129 S. Ct. 2195, 174 L. Ed. 2d 99 (2009).

6. **BAPCPA's restriction on attorney advice and its advertising requirement are constitutional.** An attorney, her law firm, and her clients challenged the constitutionality under the First Amendment of sections 526(a)(4), 528(a), and 528(b)(2), which BAPCPA added to the Bankruptcy Code. Section 526(a)(4) prohibits a "debt relief agency" from advising "an assisted person . . . to incur more debt in contemplation of such person filing a case under this title." A "'debt relief agency'" is "'any person who provides any bankruptcy assistance to an assisted person'" for valuable consideration. "'Bankruptcy assistance'" is any service "'provided to an assisted person with the express or implied purpose of providing information, advice, [or] counsel . . . or providing legal representation with respect to a case or proceeding'" under this title. Although the "debt relief agency" definition excludes five categories of persons and institutions, it does not expressly exclude attorneys. Under the plain meaning rule, therefore, "debt relief agency" includes attorneys. The phrase "in contemplation of bankruptcy," in turn, has commonly been associated with abusive conduct. Thus, its use here "refers to a specific type of misconduct designed to manipulate the protections of the bankruptcy system," that is, "to incur more debt because the debtor is filing for bankruptcy, rather than for a valid purpose." Other statutory provisions—such as those denying discharge for fraud or false pretenses or for luxury purchases on the eve of bankruptcy, dismissing a case for abuse, or requiring an attorney to certify that a bankruptcy filing does not constitute an abuse—support this reading. Such activities can be harmful to the debtor or to creditors and are therefore the focus of the prohibition. When so interpreted, the prohibition does not prevent discussion of the covered subjects, but rather affirmative advice to engage in abusive conduct. Nor does section 526(a)(4) prohibit advice to incur debt for other purposes, such as to refinance a mortgage at a lower rate, to buy a reliable car on credit, or to make purchases necessary to support the debtor or a dependent of the debtor. Interpreted in this way, the provision is both sufficiently narrow and not too vague to pass constitutional muster. Finally, subsections (a)(4) and (b)(2) of section 528 require a debt relief agency's advertisements of bankruptcy or debt relief services to contain the statements "We are a debt relief agency. We help people file for bankruptcy," or substantially similar statements. A statute may require commercial speech if the requirement is reasonably related to preventing consumer deception. The disclosure requirement is directed at ensuring that the advertisements of debt relief agencies disclose that their services involve bankruptcy, which is reasonably related to Congress's purpose and factually correct. The requirement does not prevent the agencies from disclosing additional

information about their services or a statement that they are attorneys as well as debt relief agencies. Thus, the requirement is constitutional. Notably, the Court determined that the context in which the statute uses the term "assisted person" shows that the term does not include a consumer creditor. *Milavetz, Gallop & Milavetz, P.A. v. United States*, 559 U.S. 229, 130 S. Ct. 1324, 176 L. Ed. 2d 79 (2010).

7. **A confirmation order that lacks statutory authority is not void or subject to collateral attack.** The debtor proposed a chapter 13 plan that provided for payment in full of only the principal amount of his student loan debt and discharge of any interest or other amounts. The clerk gave notice of the plan to the creditor, who filed a proof of claim for principal and accrued interest. Although section 523(a)(8) permits discharge of a student loan only if the court determines that payment would constitute an undue hardship, Bankruptcy Rule 7001(6) requires that such a determination be made in an adversary proceeding, and section 1325(a)(1) requires the bankruptcy court to find, as a condition to confirmation, that the plan complies with the applicable provisions of title 11. Ultimately, the court confirmed the plan. The debtor performed and, at the end of the plan period, received a discharge. Later, the creditor moved under Federal Rule of Civil Procedure 60(b)(4) (made applicable to adversary proceedings by Federal Rule of Bankruptcy Procedure 9024) to set aside the confirmation order. The confirmation order was a final judgment. Rule 60(b)(4) permits the court to set aside a final judgment if the judgment is "void." A judgment is void only if it is affected by a fundamental infirmity, such as absence of even an arguable basis for jurisdiction or a due process violation. The creditor did not argue that the bankruptcy court lacked jurisdiction to confirm the plan. Even though the creditor did not receive a summons and complaint as it would have in an adversary proceeding, the creditor received actual notice of the plan and the confirmation hearing. Due process does not require any particular form of notice, so confirmation did not violate due process requirements, and the creditor could not ignore the notice. Legal error or even lack of statutory authority, as here, is not sufficient to render a judgment void and subject to attack under Rule 60(b)(4). *United Student Aid Funds, Inc. v. Espinosa*, 559 U.S. 260, 130 S. Ct. 1367, 176 L. Ed 2d 158 (2010).

8. **"Projected disposable income" must take account of known or virtually certain changes in the debtor's circumstances.** The debtor received a buyout payment from her former employer within six months of filing her chapter 13 petition, inflating her "current monthly income" substantially above the income from her new job and placing her above the means test cutoff. Subsequently, the debtor filed a plan that did not provide for full payment of her unsecured debts; instead, the plan proposed to pay only her disposable income calculated based on actual income and actual expenses, rather than the higher amount that would result from using "current monthly income" and those expenses allowed under section 707(b)(2). The debtor could not afford to make plan payments of the higher amount. The trustee objected to confirmation. Section 1325(b)(1) requires the court to deny confirmation of a plan that does not pay unsecured claims in full, unless, as of the effective date, the plan provides for payment to creditors of all of the debtor's "projected disposable income to be received in the applicable commitment period." Section 1325(b)(2) defines "disposable income" as "current monthly income" minus certain charitable contributions, business expenses, and amounts reasonably necessary to be expended for maintenance or support of the debtor and dependents. The amount reasonably necessary for support is calculated as actual expenses, unless the debtor's current monthly income is above the means test. The statute does not, however, define "projected."

Therefore, "projected" should be given its ordinary meaning, requiring the court to look into the future (in contrast to "current monthly income," which is strictly a backward-looking concept). As such, in determining compliance with the "projected disposable income" test, the court must take account of known or virtually certain changes to the debtor's income or expenses as of confirmation. In this case, the lower amount that the plan proposed to pay, calculated as of the confirmation hearing date—not the higher amount based on the petition date means test calculation—was the debtor's projected disposable income, and the plan could be confirmed. *Hamilton v. Lanning*, 560 U.S. 505, 130 S. Ct. 2464, 177 L. Ed. 2d 23 (2010).

9. **The trustee need not object to the debtor's valuation of exempt property.** The debtor claimed property as exempt. She valued that property at less than the maximum allowed exemption and listed her valuation in the exemption claim. The trustee did not object to the exemption within the thirty-day period permitted under Bankruptcy Rule 4003(b) but later moved to sell the property at a price higher than the debtor's valuation and more than the permitted exemption amount. Section 522(*l*) provides that "[u]nless a party in interest objects, the property claimed as exempt [on the schedules] is exempt." Section 522(d) provides that the debtor's exemption is the debtor's "interest" and cannot exceed a specified dollar amount. Where the debtor claims an exemption of a value of property that is less than the amount allowed, the exemption claim is proper, up to that value, so the trustee need not object to the exemption claim to preserve his right to object to the valuation. To preserve her right to claim the full property in kind as exempt and still require the trustee to raise any valuation objection within the thirty-day period, the debtor must value the property either as "unknown," as "100% of fair market value," or at a dollar value above the exemption limits. *Schwab v. Reilly*, 560 U.S. 770, 130 S. Ct. 2652 (2010).

10. **A debtor is entitled to a car ownership cost deduction only if the debtor has actual expenses for a loan or lease.** The chapter 13 debtor owned a car free and clear of any loan or lease and therefore had no actual loan or lease payments. Chapter 13 requires that a debtor devote his or her "disposable income" to plan payments. "Disposable income" is "current monthly income" minus "amounts reasonably necessary to be expended" for "maintenance or support." For an above-median income debtor, such amounts are "the debtor's applicable monthly expense amounts specified under the National Standards and Local Standards, and the debtor's actual monthly expenses for the categories specified as Other Necessary Expenses issued by the Internal Revenue Service [IRS] for the area in which the debtor resides." The Local Standards include a table for car Ownership Costs; according to the IRS guidelines, the figures in that table are based on average loan and lease costs and are disallowed if the taxpayer does not have loan or lease costs. The word "applicable" in the expense definition limits the expense deduction to those expenses that are applicable to the debtor, in part because the phrase defines the more general standard, "amounts reasonably necessary to be expended." The use of "actual" in the expense definition does not detract from this interpretation because such expenses may be deducted only to the extent actually incurred, whereas the car Ownership Cost may be deducted based on the Local Standards, whether or not that is the debtor's actual cost, as long as the debtor has some such cost. Finally, disallowing the expense deduction where the debtor does not incur any ownership cost comports with the statute's policy to require debtors to pay all of their disposable income under a plan. Because the debtor had no loan or lease payments on his car, he was not entitled to the car Ownership Cost deduction. *Ransom v. FIA Card Servs., N.A.*, 562 U.S. 61, 131 S. Ct. 716, 178 L. Ed. 2d 603 (2011).

11. **The "tax priority stripping" provision of section 1222(a)(2)(A) does not apply to a chapter 12 post-petition farm asset sale.** The debtor farmers sold their farm at a gain during their chapter 12 case and proposed a plan that did not provide for payment in full of the resulting capital gains taxes. Section 1222(a)(2)(A) permits a plan to provide for less than full payment of a tax claim that arises from a property sale and that is entitled to priority under section 507. A tax on a post-petition transaction would be entitled to priority, if at all, only under section 507(a)(2), which grants priority to claims allowed under section 503(b), including "'any tax … incurred by the estate.'" The Internal Revenue Code provides that a chapter 12 petition does not create a separate taxable estate. Therefore, the chapter 12 estate does not incur a tax upon a gain on sale. The tax remains with the debtor. Therefore, the plan could not be confirmed. *Hall v. United States*, 566 U.S. 506, 132 S. Ct. 1882 (2012).

12. **A plan that proposes a collateral sale may not deprive a secured creditor of the right to credit bid its claim.** The lender had a lien on substantially all of the debtor's assets, which were worth less than the claim amount. The debtor's plan proposed a sale of all assets, with the sale proceeds paid to the lender, according to sale and bid procedures that prohibited the lender from credit bidding its secured claim. The lender objected to confirmation. The court may confirm a plan without the acceptance of a class of claims if the plan is fair and equitable as to that class. Under section 1129(b)(2)(A), a plan is fair and equitable to a class of secured claims if it proposes (i) that the holders of a secured claim retain their lien and receive payments with a present value equal to the amount of the secured claims, "(ii) for the sale, subject to section 363(k)," of the encumbered property free and clear of the lien or "(iii) for the realization by such holders of the indubitable equivalent of such claims." Section 363(k) authorizes the holder of a secured claim to credit bid its claim unless the court for cause orders otherwise. In construing a statute, "the specific governs the general," so as to give effect to every provision. Clause (ii) is a specific provision that governs the general "catch-all" provision of clause (iii). Therefore, even if the result of a sale would be to provide the secured creditor the indubitable equivalent of its claim, the plan must satisfy clause (ii). To do so, section 363(k) must apply, and the secured creditor must be permitted to credit bid unless the court for cause orders otherwise. Because the debtor did not point to any such cause, the plan did not meet section 1129(b)(2)'s requirements and could not be confirmed. *RadLAX Gateway Hotel, LLC v. Amalgamated Bank*, 566 U.S. 639, 132 S. Ct. 2065 (2012).

13. "Defalcation" requires a culpable state of mind. The debtor was a trustee of a trust. He borrowed from the trust for his own benefit and repaid all of the loans. When the beneficiaries learned of the loans, they sued and obtained a judgment against the debtor for damages arising from his self-dealing. Under section 523(a)(4), a debt for fraud or defalcation while acting in a fiduciary capacity is nondischargeable. Precedents from prior bankruptcy law have established that the term "fraud" was intended to cover positive fraud, as opposed to fraud implied in law or "bad faith, moral turpitude, . . . other immoral conduct[,] . . . [or] an intentional wrong." "Where actual knowledge of wrongdoing is lacking," conduct is equivalent "if the fiduciary 'consciously disregards' (or is willfully blind to) 'a substantial and unjustifiable risk' that [the] conduct will turn out to violate a fiduciary duty." The Court remanded the case for a determination as to whether the debtor's conduct met that standard. *Bullock v. BankChampaign, N.A.*, 569 U.S. 267, 133 S. Ct. 1754 (2013).

14. **The court may not surcharge exempt property based on a debtor's misconduct.** The debtor reported two liens on his homestead, which left less equity than the homestead exemption amount. The second lien was fraudulent. If invalidated, there would be equity for the estate. The trustee discovered the fraud and sued to invalidate the lien. A defendant appeared, but the court found, after lengthy litigation, that the "defendant" was most likely the debtor in sheep's clothing. The trustee sought to surcharge the debtor's exemption with the litigation cost. Section 105(a) authorizes the court to "issue any order, process, or judgment that is necessary or appropriate to carry out the provisions" of the Bankruptcy Code. However, the statute does not authorize the bankruptcy court, through its equitable powers, to override any specific statutory provision. Section 522 authorizes the debtor to exempt property, subject to "meticulous—not to say mind-numbingly detailed—enumeration of exemptions and exceptions." The detail confirms that those are the only permitted exceptions to exemptions. Fashioning additional exceptions under section 105(a) would contravene those specific Code provisions. The bankruptcy court must exercise its equitable powers within the Code's statutory limits and therefore may not surcharge the debtor's exemptions based on the debtor's misconduct. The bankruptcy court has other powers to respond to debtor misconduct, including denial of discharge, sanctions under Rule 9011, and its inherent powers, and the debtor may be subject to criminal prosecution. *Law v. Siegel*, 571 U.S. 415, 134 S. Ct. 1188 (2014).

15. **An inherited IRA is not exempt**. The debtor inherited an IRA from her mother and claimed it as exempt in her bankruptcy case. Section 522(b)(3)(C) permits the debtor to exempt "retirement funds . . . in a fund or account that is exempt from taxation under [listed sections] . . . of the Internal Revenue Code." The Bankruptcy Code does not define "retirement funds," so the term should be given its ordinary meaning: funds set aside for retirement. The Internal Revenue Code requires that funds in an inherited IRA be withdrawn, regardless of the beneficiary's retirement status. As such, they are not funds set aside for retirement. In addition, exemptions protect the debtor's essential needs and effectuate a careful balancing of debtors' and creditors' interests. Inherited IRAs do not necessarily serve that purpose or effectuate such a balance. Therefore, the inherited IRA was not exempt as retirement funds. *Clark v. Rameker*, 573 U.S. 122, 134 S. Ct. 2242 (2014).

16. **An order denying a chapter 13 plan confirmation is not a final order.** The court denied confirmation of a chapter 13 plan based solely on a legal issue that had split courts within the circuit but gave the debtor a chance to propose an amended plan. The debtor appealed the denial to the Bankruptcy Appellate Panel (BAP) of the First Circuit, which heard the appeal as an interlocutory appeal under section 158(a)(3) of title 28. After the BAP affirmed, the debtor appealed to the court of appeals. The BAP did not certify the appeal for immediate review under section 158(d)(2). The First Circuit dismissed the appeal under section 158(d)(1), which permits an appeal of only a final order because the underlying bankruptcy court order was not a final order. An order's finality in a bankruptcy case is measured at the "proceeding" level, not at the level of the entire bankruptcy case, and an order is final if it disposes of a discrete dispute within the larger case. Here, the "proceeding" is the process of attempting to confirm a plan, which only a confirmation order can conclude, not an order denying confirmation with leave to amend. Plan confirmation changes the status quo, finally affecting the parties' rights, while denial changes little. Therefore, an order denying confirmation with leave to amend the plan is not a final order. Where the court denies confirmation solely on a legal issue, a debtor's protection is to seek first-level interlocutory review under section 158(a)(3) and certification

for interlocutory review to the court of appeals under section 158(d)(2). *Bullard v. Blue Hills Bank*, 575 U.S. 496, 135 S. Ct. 1686 (2015).

17. **The chapter 13 trustee must return undisbursed funds to the debtor after chapter 7 conversion.** The debtor filed a chapter 13 case. The trustee collected post-petition wages for distribution to creditors. The debtor then converted the case to chapter 7, while the trustee retained some undistributed funds. Under chapter 7, post-petition earnings are property of the debtor; under chapter 13, they are property of the estate. Section 348(f)(1)(A) provides that in a case converted in good faith from chapter 13, a debtor's post-petition earnings do not become property of the new chapter 7 estate. In addition, a chapter 13 trustee's service terminates upon conversion. Therefore, the trustee had to return the retained funds to the debtor, not distribute them to creditors. *Harris v. Viegelahn*, 575 U.S. 510, 135 S. Ct. 1829 (2015).

18. **A debtor may not void a wholly underwater lien under chapter 7.** The debtor's home was worth less than the first mortgage lien. In his chapter 7 case, the debtor moved to strip off the second lien under section 506(d). Section 506(d) voids a lien securing a claim that is not an allowed secured claim. Section 506(a) provides that an allowed claim is an allowed secured claim to the extent of the collateral's value and is an allowed unsecured claim for the balance. A straight statutory reading would permit the debtor to void the junior mortgage. But *Dewsnup v. Timm*, 502 U.S. 410 (1992), held that "allowed secured claim" means an allowed claim that is secured by a lien, whatever the value, so a debtor may not strip down a partially underwater lien. That ruling compelled the same result here: The junior mortgagee had an allowed secured claim that the debtor could not void. *Bank of Am., N.A. v. Caulkett*, 575 U.S. 790, 135 S. Ct. 1995, 192 L. Ed. 2d 52 (2015).

19. **Section 330(a) does not allow compensation for defending a fee application.** Counsel for the debtor in possession successfully sued the debtor's parent company to recover a fraudulent transfer and guided the debtor through a chapter 11 case that resulted in full payment of creditors and return of the company to the parent company. The parent company objected to counsel's fees. Under the American Rule, each party in a dispute must bear its own legal fees, unless a statute provides otherwise. Section 330(a)(1) permits a court to award "reasonable compensation for actual, necessary services rendered." "Services" refers to "labor performed for another," in this case, the estate, not the professional itself. Preparation of a fee application is a service for the estate required by the Code, but defense of an application is not. Rather, defense of an application is a service for only the professional. Therefore, section 330(a) does not displace the American Rule. Fees for defending a fee application are not compensable by the estate. *Baker Botts L.L.P. v. ASARCO LLC*, 576 U.S. 121, 135 S. Ct. 2158 (2015).

20. **An actual fraudulent transfer constitutes "actual fraud" for purposes of nondischargeability under section 523(a)(2)(A).** The individual debtor owned at least a 30% interest in a company that purchased goods from a creditor. After the purchases, the debtor caused the purchaser to transfer substantial amounts of cash to other companies that the debtor owned and controlled, leaving the purchaser unable to pay the creditor. The debtor admitted that the transfers were actual fraudulent transfers. The creditor sued the debtor, claiming that the transfers were "actual fraud" for purposes of a state statute that allows a creditor to hold a shareholder liable for corporate debt. After the debtor filed bankruptcy, the creditor sought to have the debt declared nondischargeable under section 523(a)(2)(A) as a debt "for money, property, [or] services . . . to the extent obtained by . . . false pretenses, a false representation,

or actual fraud." Actual fraud does not require a representation and is a ground for nondischargeability separate from false pretenses and false representation. An actual fraudulent transfer involves the transferor's actual fraud. The statute does not require that the property be obtained by the debtor; an actual fraudulent transfer's recipient might obtain the fraudulently transferred property by fraud if the recipient had the requisite intent. In any event, the statute does not apply only where the fraud occurred at the transaction's inception. Because an actual fraudulent transfer comes within section 523(a)(2)(A)'s scope, the lower court had to determine whether the debt was obtained by the asset-transfer scheme. *Husky Int'l Elecs., Inc. v. Ritz*, 578 U.S. 356, 136 S. Ct. 1581 (2016).

21. **The Supreme Court rejects distribution under a structured dismissal that violates Bankruptcy Code priorities.** The debtor in possession liquidated all assets except fraudulent transfer claims against its secured lender, who had financed the debtor's LBO, and against the shareholder, who had lent additional funds and had a remaining claim secured by all of the estate's $1.7 million in cash. Also among the claims were allowed administrative, tax, priority claims pursuant to the Worker Adjustment and Retraining Notification (WARN) Acts, as well as general unsecured claims. The bankruptcy court had denied a motion to dismiss the fraudulent transfer action, but litigation would have been difficult, complex, and risky against the well-financed defendant. There was no prospect of confirming a plan, and conversion to chapter 7 would have left the trustee without any assets to pursue because the secured creditor had a lien on all cash. All parties other than the priority WARN Act claimants had negotiated a settlement of all issues: The secured lender would contribute $2 million to an account earmarked to fund administrative expenses; the shareholder (also a fraudulent transfer defendant) would assign its lien on the estate's $1.7 million in cash to a trust to pay administrative and tax claims, with any balance distributed pro rata on general unsecured claims; all parties would exchange releases; and the case would be dismissed. The priority WARN Act claimants would receive nothing. Section 349 authorizes dismissal, includes provisions designed to restore the pre-bankruptcy status quo, and permits the bankruptcy court to order otherwise "for cause." The "cause" must be consistent with the general purpose of section 349 to restore the pre-bankruptcy status quo. The Bankruptcy Code imposes priorities on distributions, both in chapter 7 and under a chapter 11 plan, which generally may not be changed without the consent of the holders of the priority claims. Although courts have in some circumstances approved distributions that deviate from Code-mandated priorities, they do so in service of a larger bankruptcy objective that is designed to enhance overall recoveries in the case. Here, the court approved the deviation as part of a final distribution in connection with a dismissal, and the order's provisions providing for distribution that differed from the Code's priority scheme were not consistent with restoring the pre-bankruptcy status quo. The Code does not authorize such deviations. Therefore, the structured dismissal order was reversed. *Czyzewski v. Jevic Holding Corp.*, 580 U.S. 451, 137 S. Ct. 973 (2017).

22. **The Supreme Court narrows financial transactions avoiding power safe harbors.** While insolvent, the debtor significantly overpaid for the stock of a competitor. The debtor funded the purchase price with a bank loan, which was wired directly to another bank that acted as escrow agent for the purchase transaction. At closing, the escrow bank paid the selling shareholders. After the debtor filed its bankruptcy petition, the trustee brought an action to avoid and recover the payment to the selling shareholder as a constructively fraudulent transfer. Section 546(e) provides that, notwithstanding his or her avoiding powers, a trustee may not

avoid a transfer that is a settlement payment or a payment made in connection with a securities contract "by or to (or for the benefit of)" a financial institution. Here, a financial institution made the initial payment into escrow, and another financial institution made the payment to the shareholder, though neither financial institution had any beneficial interest in the payment. Section 546(e) is closely coordinated with the avoiding powers themselves, so it should be construed as negating only the transfer that the trustee seeks to avoid under the avoiding powers. Here, the transfer the trustee seeks to avoid is the transfer to the selling shareholder, not either of the intermediate transfers by and to the two financial institutions. Because the transferee of the transfer that the trustee seeks to avoid is not a financial institution (or any other kind of entity that section 546(e) protects), the safe harbor by its terms does not apply. *Merit Mgmt. Grp., LP v. FTI Consulting, Inc.*, 138 S. Ct. 883, 200 L. Ed. 2d 183 (2018).

23. **Appellate review of an "insider" determination is for clear error.** The real estate LLC debtor had two principal creditors, a secured creditor and its managing member, which held a $2.76 million unsecured claim. After the bankruptcy filing, one of the five managing member directors approached a close personal and business friend and offered on behalf of the managing member to sell its claim to him for $5,000. The claim buyer did not live or share expenses with his director friend, and neither controlled the other in their business relationships. Before the purchase, the buyer had no relationship with the managing member or its other directors and knew little of its business. After the sale, the debtor proposed a plan that distributed $30,000 on the unsecured claim. The buyer did not know the plan's terms before his purchase, which he made as a speculative investment. The buyer accepted the plan, creating an impaired accepting class; the secured creditor did not accept and objected to confirmation. Section 1129(a)(10) requires, as a confirmation condition, that at least one impaired class accept the plan; a creditor who is also an insider of the debtor may not be counted for this purpose. Section 101(31) defines "insider" to include persons with certain defined formal relations with the debtor, generally one with a sufficiently close formal relationship to warrant special treatment or scrutiny. A non-statutory insider is one who has any other sufficiently close relationship such that he or she falls within the definition. Three kinds of issues determine whether a person is a non-statutory insider—one legal, one factual, and one a combination of the two. The courts of appeals set the legal standard; the bankruptcy courts' selection of the legal standard is subject to *de novo* review. The bankruptcy court determines the basic or historical facts about the relationship between the alleged insider and the debtor, which is subject to clear error review. The bankruptcy court applies the legal standard to the facts to decide whether those facts meet the legal standard, a so-called mixed question of law and fact. The standard for review of such a determination depends on whether the determination is primarily factual (a detailed examination of the facts) or legal (requiring amplification of the legal standard or development of auxiliary legal principles to apply in other cases). The legal question here is essentially whether the parties' transaction was at arm's length, which is a factually driven determination. Therefore, the standard of review is for clear error. Because the bankruptcy court found that the claim buyer was not an insider and the court of appeals reviewed only for clear error, the Supreme Court affirmed the judgment. *U.S. Bank, Nat'l Ass'n ex rel. CWCapital Asset Mgmt. LLC v. Vill. at Lakeridge, LLC*, 138 S. Ct. 960 (2018).

24. **A statement about an asset is a "statement respecting financial condition."** To induce his lawyer to continue working on his case without paying him at that time, the debtor told his

lawyer that he was expecting a large tax refund. The refund turned out to be smaller than expected, and the debtor did not tell his lawyer once he received it, continuing to deceive the lawyer into thinking that the money would become available. As a result, the lawyer kept working on the debtor's case. When the case was over, the lawyer presented a large bill, which the debtor could not pay. The debtor then filed for bankruptcy relief under chapter 7. Discovering the truth about the tax refund, the lawyer sought to except his claim against the debtor from discharge. Section 523(a)(2)(A) excepts from discharge a debt incurred through fraud, false representation, or false pretenses, other than a "statement respecting the debtor's . . . financial condition." Section 523(a)(2)(B), in turn, excepts from discharge a false statement respecting the debtor's financial condition only if the statement is in writing. "Respecting" has a broad meaning, including "about," "concerning," and "related to." A statement about an asset is a statement "respecting" financial condition and is broader than "a statement of financial condition." The Court held that a statement about a single asset can be a "statement respecting the debtor's financial condition" under section 523(a)(2). *Lamar, Archer & Cofrin, LLP v. Appling*, 138 S. Ct. 1752, 201 L. Ed. 2d 102 (2018).

25. **Rejection is a breach, not a rescission.** The debtor gave a distributor a time-limited, non-exclusive, limited license to use the debtor's trademarks. After filing bankruptcy, the debtor in possession rejected an agreement with its distributor, who then asserted its rights under section 365(n) to retain licensed intellectual property. Section 365(n) provides that a licensee under a rejected license of intellectual property may retain its rights to the licensed intellectual property. However, rejection is not rescission. Under section 365(g), rejection is a breach, which is deemed to have occurred immediately before the commencement of the case. Once there has been a rejection, the same consequences follow as those under applicable non-bankruptcy law after a breach. A breach does not permit a breaching trademark licensor to rescind a trademark license. Therefore, the licensee retains all rights granted under the contract. *Mission Prod. Holdings, Inc. v. Tempnology, LLC*, 139 S. Ct. 1652, 203 L. Ed. 2d 876 (2019).

26. **A court may not sanction a party for violating the discharge injunction if the party had an objectively reasonable belief that the conduct was permitted.** Before the debtor filed bankruptcy, creditors sued him and his transferee in state court to recover an LLC interest that the LLC operating agreement required be offered first to the creditors. During the litigation, the debtor filed for relief under chapter 7 and received a discharge. Subsequently, the state court litigation continued; after the creditors prevailed, they sought attorneys' fees from the transferee and from the debtor. Although a discharge injunction prohibits collection on a discharged debt, a creditor may pursue a debtor for post-discharge attorneys' fees if the debtor returns to "the fray" after filing for bankruptcy. The creditors relied on this exception. While the attorneys' fee petition was pending, the debtor moved in the bankruptcy court to hold the creditors in contempt for violating the discharge injunction. Later, the state court determined that the debtor had returned to the fray and granted the fee petition against the debtor. The bankruptcy court also found that the debtor had returned to the fray; on appeal, however, the district court reversed, finding the creditors in contempt for violating the discharge injunction. Section 524(a)(2) provides that a discharge order operates as an injunction, and section 105(a) gives the bankruptcy court authority to issue any order or judgment necessary to carry out other Bankruptcy Code provisions. Because these specific provisions are transplanted from the general rules that govern how courts enforce injunctions, they bring with them those rules.. Courts enforce injunctions through the power to cite for civil contempt, which a court should

not impose "where there is [a] fair ground of doubt as to the wrongfulness of the defendant's conduct." The standard is an objective one, not dependent on the defendant's subjective belief that its conduct was permitted, although a good faith belief might help to determine an appropriate sanction. These standards apply equally to civil contempt for violation of the discharge injunction. The Court remanded the case for the court below to determine whether the conduct here met the standard. *Taggart v. Lorenzen*, 139 S. Ct. 1795, 204 L. Ed. 2d 129 (2019).

27. **A conclusive determination of a stay relief motion is a final order.** On the eve of trial in state court, the debtor filed a chapter 11 case. A creditor moved for stay relief to permit state court litigation to proceed. The bankruptcy court denied the motion. The creditor filed a proof of claim, which the bankruptcy court tried and disallowed. The bankruptcy court then confirmed a plan. The creditor appealed both the stay relief denial and the disallowance of its claim. Section 158(a) gives the district courts appellate jurisdiction over final orders of the bankruptcy courts. Rule 8002(a) requires the appellant to file the notice of appeal within fourteen days after entry of the final order. Although a civil action involves a single unit of litigation that concludes with a final order, a bankruptcy case involves multiple proceedings, each of which can be a unit of litigation resulting in a final order. A stay relief ruling does not address the merits of the claim resolution but disposes of a procedural unit separate from other proceedings in the case, including claim resolution. The stay relief ruling only directs where and when claim resolution will occur. Accordingly, it is a discrete unit of litigation, and an order conclusively resolving the stay relief motion is a final order that is immediately appealable. *Ritzen Grp., Inc. v. Jackson Masonry, LLC*, 140 S. Ct. 582, 205 L. Ed. 2d 419 (2020).

28. **State law, not federal common law, determines property rights.** The FDIC took over a failed bank. Its parent corporation filed bankruptcy. The trustee filed a tax refund request with the IRS, which issued the refund. The refund was due to losses that the bank, not the parent, suffered, so the FDIC, as the bank's receiver, claimed the refund. The FDIC relied on *In re Bob Richards Chrysler-Plymouth Corp.*, 473 F.2d 262 (1973), in which the court fashioned a federal common law rule to determine entitlement to a tax refund among corporate group members. However, under *Butner v. United States*, 440 U.S. 48 (1979), property rights in bankruptcy are determined by state law, unless a federal interest requires otherwise. More generally, federal courts are not free to fashion federal common law rules except in areas in which a federal interest predominates. There is no such federal interest in determining which a member of a corporate group receives a tax refund. Therefore, courts must look to state law, including any applicable tax allocation agreement, to determine entitlement. *Rodriguez v. Fed. Deposit Ins. Corp.*, 140 S. Ct. 713, 206 L. Ed. 2d 62 (2020).

29. **Section 362(a)(3) does not require turnover of property of the estate.** The city of Chicago impounded debtors' vehicles for nonpayment of traffic fines. The debtors filed chapter 13 petitions and demanded turnover of their cars. Section 362(a)(3) stays any act to "exercise control over property of the estate." Section 542(a) requires an entity in possession of property of the estate to deliver it to the trustee. The most natural reading of section 362(a)(3) is that it prohibits affirmative acts that alter the status quo and does not impose an affirmative obligation on a party holding property of the estate to turn it over. Section 542(a) performs that function.

Therefore, the city could retain the vehicles without violating the automatic stay. *City of Chi. v. Fulton*, 141 S. Ct. 585, 208 L. Ed. 2d 384 (2021).

30. **The 2018 U.S. trustee fee increase violates the Constitution's Uniformity Clause.** In 2017, Congress enacted U.S. trustee fee increases for all pending and future chapter 11 cases, effective January 1, 2018. The Judicial Conference is authorized to impose fees on chapter 11 cases in bankruptcy administrator districts and had done so since 2001, mirroring the same rates as those for U.S. trustees. However, the 2018 increase was not implemented until October 1, 2018, and it was applied only to newly filed cases. The Bankruptcy Clause of the U.S. Constitution requires that "Laws on the subject of Bankruptcies" be uniform throughout the United States. The Bankruptcy Clause is broad and encompasses both substantive and procedural laws. This law, which addresses bankruptcy fees, is therefore a law on the subject of bankruptcies. Although the uniformity requirement gives Congress some flexibility to address regional or geographic differences, it does not permit arbitrary, geographically disparate treatment of debtors. The fee difference here resulted from a budgetary shortfall in the U.S. trustee districts that did not occur in the bankruptcy administrator districts. That difference, however, resulted only from Congress's arbitrary separation of the districts into two separate systems with two separate funding mechanisms. Debtors may not be treated differently based on an artificial funding distinction that Congress itself created. Therefore, the Court held that the fee disparity violated the uniformity requirement. *Siegel v. Fitzgerald*, 142 S. Ct. 1770 (2022).

31. **Debt for fraud incurred by a debtor's partner or agent is nondischargeable.** The debtor and her boyfriend purchased a house to repair and sell. The boyfriend did nearly all of the work; the debtor was largely uninvolved. Their buyer later obtained a judgment against them for defects that the boyfriend had knowingly concealed or misrepresented. Section 523(a)(2)(A) excepts from discharge a debtor for money, property, or services to the extent obtained by false pretenses, a false representation, or actual fraud. The bankruptcy court determined that the boyfriend's debt to the buyer was nondischargeable under this provision. The statute is written in the passive voice—a debt for money or property obtained by fraud—without regard to the actor who perpetrated the fraud—such as a debt obtained by the fraud of the debtor. Where, under applicable non-bankruptcy law, a person is liable for the debt of another, such as in a partnership or agency relationship, and the debt is nondischargeable in the fraudster's case, the debt is similarly nondischargeable in the second person's case. *Bartenwerfer v. Buckley*, 143 S. Ct. 665, 214 L. Ed. 2d 434 (2023).

32. **Section 363(m) is not jurisdictional.** The debtor sold its assets, including the right to designate assignees of its real property leases. The buyer exercised the designation right, the landlord objected on adequate assurance grounds, the court overruled the objection and approved the assignment, and the landlord appealed. Relying on section 363(m), the district court dismissed the appeal. Section 363(m) provides that a reversal or modification of a sale order on appeal may not affect the validity of the sale to a good faith purchaser. First, an appeal is moot if the appellate court cannot grant effective relief. However, a dispute over whether the court can grant relief goes to the merits—the extent and applicability—of the statutory limitation on the court's authority. The mootness doctrine does not limit the appellate court's determination of that issue. Second, a statutory precondition to relief is jurisdictional only if it is clearly stated as such. Section 363(m) does not speak in jurisdictional terms but as a

limitation on the remedy that an appellate court may apply on reversal or modification of a sale authorization order. Therefore, the statute does not deprive the appellate court of jurisdiction to hear an appeal of such an order. *MOAC Mall Holdings LLC v. Transform Holdco LLC*, 143 S. Ct. 927 (2023).

33. **The government may not retain more than the taxes owing in a tax foreclosure sale.** The homeowner failed to pay property taxes for several years. Applicable law provides that after three years, absolute title vests in the government, whether or not the property value exceeds the tax debt. Here, after obtaining absolute title, the government sold the property for substantially more than the tax debt (including interest and penalties) and did not remit the excess to the homeowner. The Takings Clause of the Fifth Amendment prohibits the taking of property for a public use without just compensation. Existing rules and understandings define property, including applicable state law and traditional property law principles. Under these principles, a homeowner's equity in real estate is "property" for Fifth Amendment purposes. England and the American colonies and states have long recognized that a surplus resulting from a tax sale had to be returned to the property owner. Supreme Court precedent since the 1880s has concurred. Therefore, the Takings Clause prohibits the government from retaining more of a property's value than required to pay the debt owing to the government. *Tyler v. Hennepin Cnty.*, 143 S. Ct. 1369 (2023).

34. **Section 106 waives sovereign immunity as to Indian tribes.** The debtor borrowed from a commercial entity owned by an Indian tribe. After the bankruptcy filing, the lender pursued the debtor in violation of the automatic stay. The debtor filed a motion seeking to have the stay enforced. Indian tribes and their commercial entities enjoy sovereign immunity. Section 106(a) abrogates sovereign immunity of "governmental units," as defined in the Bankruptcy Code. The definition does not specifically include Indian tribes but concludes with "other foreign or domestic government." Indian tribes are neither clearly foreign nor clearly domestic governments; they have aspects of each. To abrogate the sovereign immunity of Indian tribes, Congress must do so with unmistakable clarity, without ambiguity. However, the clear-statement rule is not a "magic-words requirement," and clarity may be determined using traditional statutory interpretation principles. Here, the definition is comprehensive and broad. By using two opposing terms in a "catchall phrase," Congress covered all that comes between "foreign or domestic" and therefore included Indian tribes. Other Bankruptcy Code provisions reinforce this conclusion. Because the Code is intended as broad regulation of all matters related to bankruptcy, excluding Indian tribes from the definition of "governmental units" would exclude them from many other Code provisions, contrary to Congress's apparent intent. Thus, section 106 waives immunity as to Indian tribes. *Lac du Flambeau Band of Lake Superior Chippewa Indians v. Coughlin*, 143 S. Ct. 1689 (2023).