**BANKRUPTCY UPDATE**
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# Recent Developments in Bankruptcy Law

(Covering cases reported through 465 B.R. 346 and 666 F.3d 1265)

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## 1. AUTOMATIC STAY

### 1.1 Covered Activities

**1.1.a. Automatic stay applies to creditor's unjust enrichment action against debtor's bank to prevent double recovery.** The debtor ran a fraudulent scheme that involved moving money between bank accounts. The trustee sued the bank as a fraudulent transferee. One investor claimed that it could trace its investment through the debtor's accounts. The investment was the subject of the trustee's fraudulent transfer action. The investor sued the bank on an unjust enrichment theory. Fearing double liability for the same transfer, the lender asked the bankruptcy court to apply the automatic stay against the investor to prohibit the investor from proceeding with the unjust enrichment action. The bank, because of the double liability risk, has a sufficient personal stake in the matter to have standing to seek to enforce the automatic stay. The automatic stay applies only to actions that belong to the estate, not to actions that only a creditor may bring. The stay applies to "any act … to recover a claim against the debtor". A creditor's fraudulent transfer action seeks to recover a claim against the debtor and is therefore stayed. An unjust enrichment action, as well as a constructive trust action, shares this quality with a creditor's fraudulent transfer action. It is an effort to recover a claim against the debtor, rather than to redress harm the bank caused the investor. The stay therefore applies. *Meoli v. The Huntington Nat'l Bank (In re Teleservices Group, Inc.)*, 463 B.R. 28 (Bankr. S.D. Mich. 2012).

**1.1.b. Automatic stay applies to, and court may properly enjoin, creditor's common law action that duplicates estate's fraudulent transfer action.** The trustee sued a Ponzi scheme transferee in bankruptcy court to recover a fraudulent transfer. Investors brought tort claims against the same transferee in state court, asserting damages to them from the transferee's participation in the Ponzi scheme. The investors' action alleged the same operative facts as in the trustee's complaint, although they sought different damages from the defendant. The harm for which the investors sought damages was harm that all of the debtor's creditors had been suffered in the same way. Any creditor could have brought the action. The automatic stay enjoins any act to exercise control over property of the estate or to collect or recover on a claim against the debtor. The trustee's fraudulent transfer claims were property of the estate, and the investors' action against the transferee was to collect on their claims against the debtor. In essence, the state court claims duplicate the trustee's fraudulent transfer claims and therefore violate the stay. Finally, the investors' action also harms the trustee more directly by creating a double liability risk for the transferee, thereby impeding the trustee's efforts to reach a settlement on the fraudulent transfer claim. An injunction enforcing the stay is appropriate. *Fox v. Picard (In re Bernard L. Madoff Inv. Secs. LLC)*, ___ B.R. ___, 2012 U.S. Dist. LEXIS 41262 (S.D.N.Y. Mar. 26, 2012).

**1.1.c. Enforcement of a condominium association by-law provision that denies voting rights to a delinquent debtor violates the automatic stay.** The debtor real estate developer owned about 20% of the units in a condominium development. The condominium association asserted assessment claims against the debtor with respect to only one of the debtor's units. The debtor disputed the assessment. After a state court judgment against the debtor for the assessment, the debtor filed a chapter 11 case. An association by-law denies a delinquent unit holder the right to vote at a unit-holders meeting. Through canceling several annual unit-holder meetings, the association board effectively denied the debtor the ability to vote at the annual meeting. The court construes the denial as an attempt to enforce the by-law provision. The automatic stay prohibits any act to collect a prepetition debt. Denial of the vote may be designed to pressure a delinquent unit-holder to pay a delinquent assessment. Based on the debtor's voting power and the history between the debtor and the board, the court concludes that the meeting cancellation is an attempt to enforce the by-law provision and therefore violates the stay. *Gordon Props., LLC v. First Owners Assoc. of Forty Six Hundred (In re Gordon Props., LLC)*, 460 B.R. 681 (Bankr. E.D. Va. 2011).

**1.1.d. Declaratory action against the trustee to determine avoidability of a transfer violates the automatic stay.** The trustee brought an action to recover voidable transfers from the initial transferee and from its related subsequent transferee. The subsequent transferee then brought an action in the Grand Court of the Cayman Islands for a declaration that it was not liable to the trustee. The automatic stay applies to "any act to obtain possession of … or to exercise control over property of the estate". Property of the estate includes "all legal or equitable interests of the debtor in property as of the commencement of

the case" "wherever located and by whomever held". It includes any cause of action the debtor had on the petition date as well as avoidance actions. By bringing the Cayman action, the subsequent transferee sought to control the avoiding power action by interfering with the trustee's ability to choose the forum in which to litigate it. The foreign action "seeking declaratory relief from a debtor's claim" therefore violates the automatic stay. *Picard v. Maxam Absolute Return Fund, L.P. (In re Bernard L. Madoff Inv. Secs., LLC)*, 460 B.R. 106 (Bankr. S.D.N.Y. 2011).

### 1.2 Effect of Stay

### 1.3 Remedies

## 2. AVOIDING POWERS

### 2.1 Fraudulent Transfers

**2.1.a. Estate representative may pursue avoiding power action even after unsecured claims are paid in full.** The debtor in possession brought a fraudulent transfer action against a lender. The debtor confirmed a plan that provided for full payment of unsecured claims and the vesting of avoiding power actions in an asset recovery corporation, which succeeded as plaintiff to the fraudulent transfer action. The estate's right to avoid a transfer vests as of the petition date. Section 550 permits recovery "for the benefit of the estate". The estate is not synonymous with unsecured creditors. Therefore, despite the payment in full of unsecured claims, an avoiding power action persists until it no longer benefits the estate, and the asset protection corporation has standing to pursue the claim. The court does not provide any guidance on when an action will no longer benefit the estate. *MC Asset Recovery LLC v. Commerzbank A.G. (In re Mirant Corp.)*, ___ F.3d ___, 2012 U.S. App. LEXIS 5773 (5th Cir. Mar. 20, 2012).

**2.1.b. Legal title is not required for property to be property of the debtor.** A group of related companies conducted a fraudulent investment scheme. All investors deposited their funds into a bank account that was titled in the name of a Curaçao bank that was an affiliate of the debtors and had no business operations of its own. One of the debtors completely controlled all withdrawals from the account; the Curaçao bank had no authority over the account. The debtor directed transfers to its insiders with actual intent to defraud creditors. The trustee may avoid a fraudulent transfer of property of the debtor. Property ownership depends on the individual facts of each case, not merely on legal title to the property. Control may constitute ownership even where the control party does not have legal title. Where evidence of fraud and the debtor's strict control are strong, legal title is a less compelling factor. Based on the facts here, the funds in the account were property of the debtor, and the transfers to insiders from the account were avoidable in the debtor's bankruptcy case. *Stettner v. Smith (In re IFS Fin. Corp.)*, 669 F.3d 255 (5th Cir. 2012).

**2.1.c. Federal Debt Collection Procedures Act is not "applicable nonbankruptcy law" for purposes of section 544(b).** The estate representative sought to avoid a guarantee under section 544(b), relying on the Federal Debt Collection Procedures Act (FDCPA) as applicable law and the United States' claim as the triggering allowable claim. The FDCPA has a long statute of limitations for recovery of a fraudulent transfer. 28 U.S.C. § 3003(c) provides that the FDCPA "shall not be construed to supersede or modify the operation of title 11". Therefore, it may not be used to apply section 544(b). *MC Asset Recovery LLC v. Commerzbank A.G. (In re Mirant Corp.)*, ___ F.3d ___, 2012 U.S. App. LEXIS 5773 (5th Cir. Mar. 20, 2012).

**2.1.d. Payment of noncompensatory tax penalties is not a fraudulent transfer.** Before bankruptcy, the debtor became delinquent on its withholding taxes. The IRS assessed the taxes and penalties. The debtor paid some of the amounts owing. The IRS applied the payments first to the penalties. After bankruptcy, the debtor in possession filed an action to avoid the payments that the IRS applied to penalties as fraudulent transfers. A debtor in possession may avoid a transfer as a constructively fraudulent transfer if the transfer was made for less than reasonably equivalent value while the debtor was insolvent. "Value" includes satisfaction or securing of an antecedent debt. A dollar-for-dollar reduction in debt in exchange for a payment is reasonably equivalent value. Although the penalties were not in compensation for actual pecuniary loss and their payment did not reduce the debtor's tax liability, the IRS

gave reasonably equivalent value in exchange for the payments because they reduced the debtor's liability for the penalties, which were valid, pre-existing debts. *Southeast Waffles, LLC v. U.S. (In re Southeast Waffles, LLC)*, 460 B.R. 132 (6th Cir. B.A.P. 2011).

**2.1.e. Fraudulent transfer law of state with most significant relationship to transaction applies under section 544(b).** In a bankruptcy case pending in Texas, the debtor in possession brought an action under section 544(b), relying on New York fraudulent transfer law, to avoid a prepetition guarantee that was negotiated and executed in New York. The debtor's headquarters were in Georgia. New York's fraudulent transfer law permits the avoidance of a guarantee. Unlike all other states' fraudulent transfer laws, Georgia's law in effect at the time of the action did not, though it later amended its law to permit avoidance. A fraudulent transfer avoidance action sounds in tort. Texas applies the "most significant relationship" test to determine choice of law in a tort action. Sections 6 and 145 of the Restatement (Second) of Conflicts describe the most significant relationship. Section 145(b) requires that the contacts to be taken into account in applying section 6 include the places where the injury and the conduct causing the injury occurred, the domicile or residence of the parties and the place where their relationship is centered. Where an injury, such as a fraudulent transfer, is intangible, it is difficult to assign a location, and the facts here make it impossible to define what conduct caused the injury or where it occurred. The relevant parties are in both New York and Georgia, and there is no one location where their relationship is centered. Therefore, these contacts are of limited importance in applying section 6. Section 6 looks to the needs of the interstate system, the relevant policies of the interested states and the basic policies underlying the law, among other things. Here, the fraudulent transfer law's basic policy is creditor protection. Applying the approach taken by the overwhelming majority of states best serves the needs of the interstate system. Finally, Georgia does not have a strong interest in applying its now-repealed law, because its citizens would not benefit from it in this case. Therefore, New York law should apply. *MC Asset Recovery LLC v. Commerzbank A.G. (In re Mirant Corp.)*, ___ F.3d ___, 2012 U.S. App. LEXIS 5773 (5th Cir. Mar. 20, 2012).

## 2.2 Preferences

**2.2.a. Court may extend time for service of preference complaint until after plan confirmation.** The debtor in a complex chapter 11 case needed more time to develop a plan. The bankruptcy court, after notice to all potential defendants, granted the debtor in possession authority to file an omnibus preference complaint against over 400 defendants and to delay service of the summons and complaint until after plan confirmation. The debtor hoped that a 100% plan might obviate the need for preference actions, and it did not want the preference litigation to interfere with the plan process. The debtor in possession filed the complaint within the two-year statute of limitations. Consistent with the court's order, the creditors trust, which succeeded to the avoiding power actions, did not serve the complaint on each defendant until after plan confirmation, nearly three years after the statute of limitations had expired. After service, the court authorized bifurcation of the complaint for administrative convenience, and the trustee filed amended complaints against the defendants. Rule 7004, incorporating Fed. R. Civ. Proc. 4(m), requires service of the complaint within 120 days. Rule 9006 authorizes the court to enlarge a time period set by the Rules for cause. The court did so here by its original order authorizing the omnibus complaint and the delay in service. The effort to develop and confirm a plan that would have obviated the need for preference actions provided good cause for the delay. Therefore, the statute of limitations did not bar the action. *U.S. Bank Nat'l Assoc. v. SMF Energy Corp. (In re Interstate Bakeries Corp.)*, 460 B.R. 222 (8th Cir. B.A.P. 2011).

**2.2.b. A prepetition real property foreclosure sale may result in an avoidable preference.** The debtor's lender foreclosed on real property within 90 days before bankruptcy in a regularly conducted, noncollusive foreclosure sale. The lender purchased the property for a credit bid of about half of the debt. The debtor in possession brought an action to avoid the foreclosure as a preference, alleging that the property's fair market value was substantially higher than the debt. The creditor filed a motion to dismiss for failure to state a claim. A preference is a transfer of the debtor's property to or for the benefit of a creditor within 90 days before bankruptcy on account of an antecedent debtor that enables the creditor to receive more than it would receive in a chapter 7 liquidation case if the transfer had not been made. The foreclosure sale is a transfer that may meet all of these elements. *In re BFP, Inc.*, 511 U.S. 531 (1994), ruled that a regularly conducted, noncollusive foreclosure sale produced "reasonably equivalent value" for purposes of section 548(a)(1)(B), recognizing that a foreclosure sale seldom produces a fair market value purchase price, in part to prevent a cloud on titles of real estate that had gone through foreclosure.

Section 547 differs, and the statutory language controls. Section 547 does not use "reasonably equivalent value". Rather, the test is whether the creditor received more than it would have received in a hypothetical chapter 7 case. A trustee is more likely to conduct a more measured, better-marketed sale if there is equity in the property, so it may be possible that a creditor foreclosing on valuable property received more through the foreclosure sale. The potential cloud on title is limited, because the preference reach-back period is only 90 days, and the trustee may not recover from a third party buyer, only from the creditor. Therefore, the motion to dismiss is denied. *Whittle Dev. Inc v. Branch Banking & Trust Co. (In re Whittle Dev. Inc.)*, 463 B.R 796 (Bankr. N.D. Tex. 2011).

### 2.3 Postpetition Transfers

### 2.4 Setoff

### 2.5 Statutory Liens

### 2.6 Strong-arm Power

### 2.7 Recovery

**2.7.a. Recovery is not limited to the amount of allowed claims.** The debtor was the remains of a larger corporation that had previously spun off substantial assets to its shareholders, in part to shield those assets from liability for environmental and tort claims that were substantially more than other general unsecured claims. The estate asserted a fraudulent transfer claim arising out of the spin-off. The debtor proposed a plan that provided for transferring the fraudulent transfer claim to a liquidating trust for the benefit of holders of the environmental and tort claims and the distribution of the reorganized debtor's stock to the holders of other general unsecured claims. The holders of the environmental and tort claims were satisfied with that resolution and accepted the plan. Their acceptance of that recovery enabled the holders of other general unsecured claims to receive all of the reorganized debtor's stock under the plan, which those holders also accepted. Section 550(a) provides that to the extent a transfer is avoided, the trustee "may recover for the benefit of the estate, the property transferred, or … the value of such property". Under section 550(a), "benefit of the estate" may be either direct or indirect, including increasing the possibility of a successful reorganization. Thus, the ability to assign an avoiding power action for valuable consideration may provide a benefit to the estate, independent of the actual recovery in the action. The "estate" is created under section 541(a) and consists of assets. The estate is not limited to the allowed claims amount. Benefit to the estate is similarly not limited. Here, the fraudulent transfer action's availability and its transfer to the liquidating trust benefited the estate by making a plan agreement possible and benefited the general unsecured claims holders by removing from their claims pool the environmental and tort claims. Therefore, the amount of environmental and tort claims does not necessarily cap the trust's recovery. However, equitable principles may dictate a cap once the court examines all the facts after trial. *Tronox Inc. v. Anadarko Petro. Corp. (In re Tronox Inc.)*, 464 B.R. 606 (Bankr. S.D.N.Y. 2012).

## 3. BANKRUPTCY RULES

### 3.1

**3.1.a. Information in a document is scandalous if it is disgraceful, offensive or shameful or brings discredit.** Claimants in a case involving child sexual abuse sought public disclosure of a report filed under seal in the bankruptcy court that included the identity of two alleged perpetrators who were not parties to the case or any claim or adversary proceeding in the case. Section 107(a) provides for public access to all documents filed in a bankruptcy case, subject only section 107(b)'s exceptions. Section 107(b) requires a court, on request of a party in interest, to "protect a person with respect to scandalous or defamatory matter contained in a" filed document. Section 107 completely displaces the common law rule requiring public access to court proceedings and files, because it addresses the same question as the common law rule in a manner that differs from the common law rule. Therefore, common law precedents are of no assistance in interpreting section 107, and courts must interpret "scandalous" according to its ordinary meaning. Dictionaries define "scandalous" as "bringing discredit" and as "offensive to a sense of

decency or shocking to the moral feelings of the community; shameful". Disclosure of information about alleged child sexual abuse, whether or not true and whether or not filed with the court for a purpose unrelated to the litigation, would bring discredit on the individuals. It is therefore scandalous and should not be made public. *Father M v. Various Tort Claimants (In re Roman Catholic Archdiocese of Portland In Oregon)*, 661 F.3d 417 (9th Cir. 2011).

## 4. CASE COMMENCEMENT AND ELIGIBILITY

### 4.1 Eligibility

### 4.2 Involuntary Petitions

### 4.3 Dismissal

## 5. CHAPTER 11

### 5.1 Officers and Administration

**5.1.a. One case in an administratively consolidated group of cases may be a single asset real estate case.** The debtor was one of 53 single asset real estate debtors owned by a single parent debtor. They shared administrative services and cash management and operated as a consolidated enterprise. In the absence of substantive consolidation, the Code treats each corporate entity separately, even though the entities may be part of a consolidated enterprise. The definition of "single asset real estate debtor" does not contain any exceptions for such a debtor that is part of a consolidated enterprise. Therefore, the single asset real estate rules apply to each debtor in the corporate group. *Meruelo Maddux Props.-760 S. Hill St. v. Bank of Am. N.A. (In re Meruelo Maddux Props., Inc.)*, 667 F.3d 1072 (9th Cir. 2012).

### 5.2 Exclusivity

### 5.3 Classification

### 5.4 Disclosure Statements and Voting

**5.4.a. Subordination agreement vote assignment provision is not enforceable.** Under an intercreditor subordination agreement, the junior creditor assigned its bankruptcy voting rights to the senior creditor. Section 510(b) requires the court to enforce a subordination agreement, but not, however, to nullify other Code provisions. A subordination agreement provision that would alter a creditor's substantive rights under the Code is not enforceable. Therefore, the junior creditor may vote its own claim. *In re SW Boston Hotel Venture, LLC*, 460 B.R. 38 (Bankr. D. Mass. 2011).

### 5.5 Confirmation, Absolute Priority

**5.5.a. Treasury bonds are not the indubitable equivalent of real estate.** The single asset real estate debtor valued the collateral securing the secured lender's $38.3 million claim at $13.5 million. It proposed a plan that would substitute Treasury bonds, to be purchased by an investor in the reorganized debtor, with a face amount of $13.5 million and a total payment stream over 30 years of $38.3 million. The lender made the section 1111(b) election and did not accept the plan. Section 1129(b)(2)(A)(i) permits confirmation if the plan provides for a secured claim holder to retain its lien on the property and receive cash payments with a present value equal to the property's value. Section 1129(b)(2)(A)(iii) permits confirmation if the plan provides for the secured claim holder to receive the indubitable equivalent of its claim. Treasury bonds are not the indubitable equivalent of real estate, because they have a different risk and volatility profile. Substituting Treasury bonds, especially at today's very low interest rates, would deprive the secured claim holder of the possibility of collateral appreciation with general inflation and expose the holder to the risk of collateral deflation, as inflation causes interest rates to rise and bond values to decline. A 30-year maturity exacerbates the problem. If the reorganized debtor defaults, the creditor's Treasury bill collateral would likely be worth substantially less than its real estate collateral. Therefore, the court denies plan confirmation. *In re River East Plaza, LLC*, 669 F.3d 826 (7th Cir. 2012).

**5.5.b. Feasibility requires credible evidence, not merely consent, and a "drop dead" provision does not suffice.** The debtor proposed a plan to restructure substantial bond debt by issuance of three new bond series in substantially reduced amounts, some bearing pay-in-kind interest and requiring refinancing in seven years. Refinancing would require that three major contingencies, over which the reorganized debtor would have no control, all occur. Creditors overwhelmingly accepted the plan. Section 1129(a)(9) requires that the court find as a condition to confirmation that the plan is feasible, that is, not likely to be followed by liquidation or the need for further financial reorganization unless the plan so provides. Feasibility cannot be negotiated or based on the lack of an objection. The plan proponent must present some credible evidence that the plan, including any required refinancing, is feasible. A "drop dead" plan provision, which provides that the reorganized debtor will liquidate if it is unable to refinance, is insufficient to meet section 1129(a)(9)'s requirement. Therefore, the court denies confirmation. *In re Las Vegas Monrail Co.*, 462 B.R. 795 (Bankr. D. Nev. 2011)

## 6. CLAIMS AND PRIORITIES

### 6.1 Claims

**6.1.a. A prepetition forum's choice of law rules apply to a proof of claim.** A client filed a malpractice claim against its former law firm in Connecticut, where the claim had accrued. While the action was pending, the law firm filed bankruptcy in New York. The client filed a proof of claim. The action in Connecticut was timely under its statute of limitations but would not have been timely under New York's statute of limitations. To prevent forum shopping to gain a longer statute of limitations, New York has a "borrowing statute", which is a choice of law rule that requires a New York court to apply the shorter statute of limitations of New York or the state where the cause of action accrued. Under *Klaxon Co. v. Stentor Elec. Mfg. Co.*, 313 U.S. 487 (1941), a choice of law rule is part of a state's substantive law. A federal court sitting in diversity must apply the choice of law rule of the state where it sits. Bankruptcy courts must do the same when addressing state-law rights. A plaintiff may choose a forum based on its substantive law, including its choice of law rules. So when a defendant obtains a venue transfer from one federal court to another, the transferor court's state choice of law rules follow the action to the transferee court. When the defendant files a bankruptcy case, effectively forcing the plaintiff to continue the action in the bankruptcy court by filing a proof of claim, the rule is the same. Accordingly, Connecticut's choice of law rules applied to the court's adjudication of the client's proof of claim in the New York bankruptcy court. The court distinguishes some broad language in its prior decision in *In re Gaston & Snow*, 243 F.3d 599 (2d Cir. 2001), by noting the difference between the estate's collection action against a third party there and the proof of claim by a third party against the estate here. *Statek Corp. v. Devel. Spec., Inc. (In re Coudert Bros. LLP)*, 673 F.3d 180 (2d Cir. 2012).

### 6.2 Priorities

**6.2.a. Section 510(b) does not subordinate a claim under a tax agreement for tax benefits that accrue based on the debtor's profits.** Seven years before bankruptcy, the debtor's former parent spun off the debtor through an IPO of the debtor's stock. In connection with the spin-off, the debtor and its parent entered into a tax agreement, which required the debtor to pay the parent any benefits that the debtor received from use of tax net operating loss carry-forwards that the debtor had at the spin-off. The parent filed a claim in the debtor's bankruptcy case for damages for breach of the tax agreement in an amount equal to the tax benefits the debtor had received and not paid to the parent. Section 510(b) subordinates any claim "for damages arising from the purchase or sale" of a security of the debtor. The courts construe section 510(b) broadly, but only consistent with its intent and purpose, which was to subordinate the claim of a holder who took on a shareholder's risk and return expectations or seeks to recover a contribution to the debtor's equity pool. The risk analysis is the more important consideration and requires section 510(b)'s application if the claimant expected to profit from its agreement with the debtor and participate in corporate profits. Courts look through the form of the agreement and consider all related agreements in a transaction in determining whether the claimant relied on an equity participation. However, the fact that an agreement was part of an equity-related transaction does not require subordination of any resulting claim. Here, the parent did not contract for a return based on profits or stock price performance. It contracted only for a claim based on tax benefits. Even though the tax benefits arose based only on the

debtor's profits, the claim was not for a share of profits. Therefore, section 510(b) does not apply. *CIT Group Inc. v. Tyco Int'l Ltd. (In re CIT Group Inc.)*, 460 B.R. 633 (Bankr. S.D.N.Y. 2011).

## 7. CRIMES

## 8. DISCHARGE

### 8.1 General

### 8.2 Third-Party Releases

**8.2.a. Fourth Circuit permits third-party releases in a plan with specific factual findings to support them.** A non-profit debtor proposed a plan that released its officers and directors from claims arising before the effective date, including prepetition claims. The bankruptcy court confirmed the plan and approved the releases, finding that the case was quite a unique case, there were legitimate interests for approving the provisions, the potential for mischief by disgruntled creditors was high, the debtor's obligations to indemnify its directors could result in substantial legal costs, and the provisions would prevent an end run around the plan. Reaffirming its prior decisions and departing from other circuits, the Fourth Circuit rules that section 524(e) does not prohibit third party releases. To permit such a release in a plan, the bankruptcy court need not find a precise fit with the Circuit's prior precedents nor with any other multi-factor test. It may determine what factors may be relevant in each case. However, the court must make specific factual findings in support of its decision and its application of the factors. The bankruptcy court's general statements here did not suffice to support the release's' approval or meaningful appellate review. *Behrmann v. Nat'l Heritage Found.,* 663 F.3d 704 (4th Cir. 2011).

**8.2.b. Due process protections prevent a section 363 sale order from releasing future claims.** The debtor manufactured truck bodies. During its chapter 11 case, it sold its assets comprising the truck-body production line under section 363 to a competitor, who continued the line. The sale order provided that the sale was free and clear of all claims, including "all debts arising in any way in connection with any acts of the debtor" and that the buyer would not, by virtue of the sale, have any successor liability arising from the asset purchase. After bankruptcy, a truck driver was injured in a truck that the debtor (not the successor) had manufactured and sued the successor under the product-line exception to the general rule against an asset buyer's successor liability. Due process requires that notice reasonably calculated to apprise interested parties of the action precede any order that affects a person's rights. A court cannot provide any notice at all to a person who is injured after a bankruptcy case is closed because of the debtor's prepetition conduct. Therefore, barring such a victim's claim, whether against the debtor or a successor, violates the victim's due process rights to notice. The court declines to address whether the appointment of a future claims representative would permit release of future claims. *Morgan Olson L.L.C. v. Frederico (In re Grumman Olson Indus., Inc.)*, ___ B.R. ___, 2012 U.S. Dist. LEXIS 44314 (S.D.N.Y. Mar. 29, 2012).

### 8.3 Environmental and Mass Tort Liabilities

## 9. EXECUTORY CONTRACTS

**9.1.a. Rejection of master lessee's lease permits master lessor to terminate sublease.** Before bankruptcy, the debtor lessee subleased real property to an unrelated third party. The master lease permitted the lessor to terminate it if the lessee became the subject of a bankruptcy case. The sublease provided that it terminates if the master lease terminates. In the debtor's chapter 11 case, the debtor in possession did not timely assume the lease, which was then deemed rejected under section 365(d)(4). Section 365(d)(4) requires the trustee to surrender possession upon such a deemed rejection, which could create a conflict with section 365(h), which protects a sublessee's right to possession of real

property under a rejected lease. Rejection constitutes a breach, not a termination. Section 365(e) prohibits a lessor from terminating a lease because of the lessee's bankruptcy. However, once the lease is rejected, it is no longer property of the estate and is not protected by the automatic stay. Section 365(e) applies only during the bankruptcy case and does not affect the lessor's rights outside of bankruptcy. Therefore, applicable nonbankruptcy law governs the master lessor's rights against the sublessee. In this case, Alabama law permits the lessor to enforce the ipso facto clause and to terminate the master lease based on the rejection and consequent breach. The sublease then automatically terminates, because of the sublease provision that so provides. *Cahaba Forests, LLC v. Hay*, 2012 U.S. Dist. LEXIS 13877 (M.D. Ala. Feb. 6, 2012).

**9.1.b. Contract counterparty's claim for WARN Act liability resulting from contract rejection is a prepetition claim.** The debtor in possession rejected a transportation agreement with a trucking company. The trucking company laid off its employees immediately after the rejection. The employees sued the trucking company in state court for a WARN Act violation. The trucking company sought permission from the bankruptcy court to cross-claim in the state court against the debtor in possession either as a controlling employer or for contribution. Under section 365(g), any claim arising from rejection of an executory contract is treated as a prepetition claim. Even though the liability that the trucking company may have incurred to its employees as a result of the rejection of the transportation agreement occurred postpetition, the trucking company's claim against the debtor arising from the rejection is treated as a prepetition claim, and pursuit of such a claim is permissible only by filing a proof of claim in the bankruptcy case. *Grocery Haulers, Inc. v. The Great Atlantic & Pac. Tea Co, Inc. (In re The Great Atl. & Pac. Tea Co., Inc.)*, 2012 WL 264187 (S.D.N.Y. Jan. 30, 2012).

**9.1.c. Contract that limits debtor's right to assign claims to a section 524(g) trust is unenforceable.** Before bankruptcy, the debtor entered into a settlement agreement with its general liability insurer relating to asbestos claims. The debtor warranted that it had not assigned and would not assign any claims against the insurer and that it would not assist others in pursuing claims against the insurer. The agreement required arbitration of disputes. As its asbestos woes mounted, the debtor began negotiations with its other insurers and with asbestos claimants over a possible bankruptcy plan, which would provide for assigning contribution claims that other insurers might have against the settling insurer to the debtor, who would assign them under a plan to an asbestos trust under section 524(g). The insurer filed a proof of claim for breach of the settlement agreement, alleging that the negotiations for the debtor's receipt of claims against the insurer and their assignment to the asbestos trust violated the settlement agreement's anti-assignment provision. Public policy prohibits enforcement of a debtor's prepetition waiver of bankruptcy rights, to prevent astute creditors from routinely requiring such waivers. The settlement agreement provisions therefore were unenforceable to the extent that they would have prohibited the debtor from proposing or confirming a plan that used section 524(g)'s benefits, and any claim for breach of such a provision should be disallowed. *Continental Ins. Co. v. Thorpe Insulation Co. (In re Thorpe Insulation Co.)*, 671 F.3d 1011 (9th Cir. 2012).

## 10. INDIVIDUAL DEBTORS

### 10.1 Chapter 13

### 10.2 Dischargeability

**10.2.a. Defalcation requires a known breach of a known fiduciary duty.** The debtor was a trustee of a trust. He borrowed from the trust for his own benefit and repaid all the loans. When the beneficiaries learned of the loans, they sued and received 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. Defalcation does not require fraud, embezzlement or misappropriation. However, it requires more than an innocent mistake or mere negligence. It requires a known breach of a known fiduciary duty, such that the conduct can be objectively described as reckless. The debtor's conduct here met that standard, so the debt is nondischargeable. *Bullock v. Bankchampaign (In re Bullock)*, 670 F.3d 1160 (11th Cir. 2012).

### 10.3 Exemptions

### 10.4 Reaffirmation and Redemption

## 11. JURISDICTION AND POWERS OF THE COURT

### 11.1 Jurisdiction

**11.1.a. Bankruptcy judge may constitutionally enjoin litigation to protect the estate.** The bankruptcy court preliminarily enjoined asbestos claimants from pursuing certain claims against the debtor's parent corporation and related insurance policies and proceeds that were allocated to fund the debtor's chapter 11 plan. A claimant asserted a claim against the parent based on an independent legal right against the parent. The parent was entitled to coverage from the insurance policies for defending the action and for any liability, so that the pursuit of the action would deplete the assets available to fund the plan. Under *Stern v. Marshall*, 131 S. Ct. 2594 (2011), a bankruptcy judge does not have authority to issue a final order against a non-estate party in a traditional common law action. *Stern*'s holding was narrow. Whatever its contours, it does not prevent a bankruptcy judge from enjoining litigation to protect a bankruptcy estate during a bankruptcy case. Therefore, the bankruptcy judge's injunction against the claimant did not exceed its constitutional authority. *Quigley Co., Inc. v. Law Offices of Peter G. Angelos (In re Quigley Co., Inc.)*, ___ F.3d ___, 2012 U.S. App. LEXIS 7167 (2d Cir. Apr. 10, 2012).

**11.1.b. Bankruptcy court jurisdiction depends on whether the proceeding affects the estate, not on whether it is derivative.** The bankruptcy court preliminarily enjoined asbestos claimants from pursuing certain claims against the debtor's non-debtor parent corporation and against related insurance policies and proceeds that were allocated to fund the debtor's chapter 11 plan. A claimant asserted a claim against the parent based on an independent legal right against the parent. The parent was entitled to coverage from the insurance policies for defending the action and for any liability, so that the pursuit of the action would deplete the assets available to fund the plan. Section 1334(b) confers bankruptcy jurisdiction over a proceeding that directly affects property of the estate. A proceeding involving liability that is derivative of the debtor's liability or that relates in some way to the debtor's conduct or legal rights may affect property of the estate, while a proceeding that asserts a legal claim against a third party that is independent of any of the debtor's rights does not. Bankruptcy jurisdiction does not require both that the proceeding directly affect the estate and that it be derivative. The latter is just a means to determine the effect on the estate, but it is the effect on the estate that determines jurisdiction. Thus, even a non-derivative proceeding that has a direct effect on the estate is subject to bankruptcy jurisdiction. Because the proceeding would deplete assets available to fund the plan, section 1334(b) provides jurisdiction to enjoin the action. *Quigley Co., Inc. v. Law Offices of Peter G. Angelos (In re Quigley Co., Inc.)*, ___ F.3d ___, 2012 U.S. App. LEXIS 7167 (2d Cir. Apr. 10, 2012).

**11.1.c. Bankruptcy court has discretion to require arbitration of claims.** Before bankruptcy, the debtor entered into a settlement agreement with its general liability insurer relating to asbestos claims. The debtor warranted that it had not assigned and would not assign any claims against the insurer and that it would not assist others in pursuing claims against the insurer. The agreement required arbitration of disputes. As its asbestos woes mounted, the debtor began negotiations with its other insurers and with asbestos claimants over a possible bankruptcy plan, which would provide for assigning contribution claims that other insurers might have against the settling insurer to the debtor, who would assign them under a plan to an asbestos trust under section 524(g). The debtor then filed a chapter 11 case and negotiated a plan consistent with the prepetition discussions. The insurer filed a proof of claim for breach of the settlement agreement, alleging that the negotiations for the debtor's receipt of claims against the insurer and their assignment to the asbestos trust violated the settlement agreement's anti-assignment provision. The Federal Arbitration Act requires a federal court to enforce an arbitration clause unless another statute provides otherwise. Although the Code does not expressly override the Arbitration Act, enforcement of an arbitration clause can interfere with the conduct of a bankruptcy case. Where it does, a bankruptcy court has discretion not to order arbitration, but only if it would conflict with the Code's underlying purpose. Arbitration of a non-core proceeding generally will not interfere with the bankruptcy case's conduct. Arbitration of a core proceeding presents a greater danger, as the core proceeding may be more central to the case's progress. The Code's purposes include the centralization of disputes and preventing piecemeal litigation, the more so in an asbestos case that attempts to use section 524(g) to address numerous

asbestos claims. Here, the claim challenged the debtor's efforts to seek bankruptcy relief and confirm a plan using section 524(g). Therefore, the bankruptcy court properly denied arbitration. *Continental Ins. Co. v. Thorpe Insulation Co. (In re Thorpe Insulation Co.)*, 671 F.3d 1011 (9th Cir. 2012).

### 11.2 Sanctions

### 11.3 Appeals

**11.3.a. 28 U.S.C. § 1291 finality rules apply to an order of a district court who has withdrawn the reference of a bankruptcy case.** The debtor was a defendant before the district court in Nevada. After an adverse ruling, it filed a chapter 11 case in New York. The New York court transferred the case to the District of Nevada, and the district judge withdrew the reference of the case. The district judge converted the case to chapter 7 and issued monetary sanctions against the debtor and its attorneys for a frivolous filing and for attempting to evade the court's jurisdiction. The court of appeals has jurisdiction over appeals from final orders of a district court under 28 U.S.C. § 1291 and, in bankruptcy cases and proceedings, under 28 U.S.C. § 158(d) when the district court sits as an appellate court in bankruptcy. The finality standards differ under the two sections, because of the need for a more flexible finality standard in bankruptcy. However, the flexibility applies only in appeals under section 158(d); section 1291 does not vary depending on the kind of case from which the appeal arises. Therefore, the strict finality rules of section 1291 apply when a district court has withdrawn the reference and is sitting as a court of original jurisdiction. Under strict finality rules, a sanction order is not a final order and is not appealable until the end of the case. Therefore, the court of appeals does not have jurisdiction to hear the appeal. A concurrence argues vigorously that the Ninth Circuit should reconsider its precedent requiring this result. *Klestadt & Winters, LLP v. Cangelosi*, 672 F.3d 809 (9th Cir. 2012).

**11.3.b. Appeal from denial of stay relief motion is not moot because the issue is capable of repetition but evading review.** The bankruptcy court determined that the debtor was not a single asset real estate debtor and denied the secured creditor stay relief. The secured creditor appealed. While the appeal was pending and briefing had been completed, the bankruptcy court confirmed a plan, which was consummated. The secured creditor retained its lien and claim under the plan. Confirmation terminated the automatic stay, making unavailable the relief the secured creditor had sought. However, the dispute here is capable of repetition if the reorganized debtor files another chapter 11 case, and the time required to resolve an appeal may prevent review in this or future cases. Abandoning the case now would be wasteful of judicial resources. Therefore, the appeal is not moot. *Meruelo Maddux Props.-760 S. Hill St. v. Bank of Am. N.A. (In re Meruelo Maddux Props., Inc.)*, 667 F.3d 1072 (9th Cir. 2012).

**11.3.c. Appeal from orders approving a settlement and denying derivative standing is not moot.** The lenders demanded that the trustee pursue a fraudulent transfer claim. The trustee investigated and settled with the defendants for a cash payment. The lenders objected to approval of the settlement and sought derivative standing to pursue the claims. The court approved the settlement and denied derivative standing. The settling parties paid the trustee, who held the cash. The lenders appealed but did not obtain a stay. An appeal is moot if the appellate court cannot grant effective relief. If the settlement can be unwound, then the appeal is not moot. Here, the cash remained with the Trustee, who could return it if the appellate court reversed the settlement approval order. Unwinding the settlement would not be difficult or complex and would not defeat any party's reliance on finality. Therefore, the appeal is not moot. *In re VOIP, Inc.*, 461 B.R. 899 (S.D. Fla. 2011).

**11.3.d. Bankruptcy court may not strike issue from statement of issues of appeal.** After the bankruptcy court's decision, the defendant appealed. In compliance with the Bankruptcy Rules, the appellant filed a statement of issues on appeal, listing an issue that the appellant had not raised below. The bankruptcy court issued an order striking that issue from the statement of issues. If the bankruptcy court could strike an issue from the statement of issues on appeal, it could effectively insulate its decisions from appellate review. Accordingly, the district court vacates the bankruptcy court's order striking the issue. *Fox v. Picard (In re Bernard L. Madoff Inv. Secs. LLC)*, ___ B.R. ___, 2012 U.S. Dist. LEXIS 41262 (S.D.N.Y. Mar. 26, 2012).

### 11.4 Sovereign Immunity

## 12. PROPERTY OF THE ESTATE

### 12.1 Property of the Estate

**12.1.a. Only the trustee may pursue a successor liability claim.** The debtor law firm filed bankruptcy. Most of its partners decamped to four other firms, taking their clients and business with them. The firm's partnership agreement provided for retirement pay for retired partners, payable only by the firm or by "a partnership which may fairly be considered a successor partnership of the Partnership by reason of continuity of personnel and clients". A group of retired partners sued the four firms on a successor liability theory. A claim against a third party on a successor liability theory that does not allege particularized harm to the plaintiff but could be brought by any creditor of the debtor belongs to the estate, not to any creditor. This principle is based on the policy of vesting the estate with exclusive standing to pursue certain kinds of claims to prevent a race to the courthouse among creditors. If the four other law firms were a successor to the debtor, they would be liable to all creditors for all claims against the debtor. Therefore, the claim belongs only to the estate, and the retired partners do not have standing to bring it. *Retired Partners of Coudert Bros. Trust v. Baker & McKenzie LLP (In re Coudert Bros. LLP)*, ___ B.R. ___, 2012 WL 1267827 (S.D.N.Y. Apr. 12, 2012).

**12.1.b. *In pari delicto* bars trustee's action against the debtor's auditor.** The trustee sued the debtor's auditor for negligence in failing to detect a Ponzi scheme in which the debtor participated. The trustee succeeds to the debtor's rights under section 541(a). Applicable nonbankruptcy law determines the extent of those rights; there is no bankruptcy public policy exception that permits expansion of the debtor's (and hence the trustee's) rights against third parties. Here, applicable nonbankruptcy law gave the auditor an *in pari delicto* defense to liability. The defense applies to the trustee's action, which must be dismissed. *Peterson v. McGladrey & Pullen, LLP*, ___ F.3d ___, 2012 U.S. App. LEXIS 6608 (7th Cir. Apr. 3, 2012).

**12.1.c. Tax refunds payable to a subsidiary under a tax sharing agreement is property of the parent's estate.** The debtor and its bank subsidiary had entered into a tax sharing agreement. The agreement provided that the debtor would act as the subsidiary's agent for purposes of filing tax returns and managing all procedural matters with the IRS and to prosecute and settle any refund claims. Shortly before bankruptcy, the debtor filed a refund claim for the consolidated group based on carryback of losses that the bank incurred in the most recent tax year. The IRS had not paid the refund as of the petition date. The FDIC was appointed receiver for the bank on the same day as the petition date and later in the receivership repudiated the tax sharing agreement. IRS regulations provide that a parent is the sole agent for members of the consolidated group with authority to act on all tax matters for the group's members. However, the regulation is solely for the IRS's protection. It does not establish an agency relationship, nor determine the relative rights, among a tax group's members, which an agreement among the members may determine. A tax sharing agreement that does not require a refund to be held in trust or placed in escrow for the group members and that requires only that the subsidiary's "share" of a tax refund be paid to the subsidiary within a reasonable period after receipt does not create an ordinary agency relationship under which the parent acts at the subsidiary's direction and control and instead creates a debtor-creditor relationship between the parent and the subsidiary. The absence of any trust or escrow requirement or limitation on the parent's use of a tax refund leads to the conclusion that the agreement created a debtor-creditor relationship. The debtor had the right to the tax refund on the petition date. All of a debtor's interests in property as of the petition date are property of the estate. Therefore, the tax refund was property of the estate. The FDIC's repudiation of the tax sharing agreement after the petition date does not retroactively change the estate's ownership of the asset. Therefore, the FDIC, as the bank's receiver, had only an unsecured claim under the tax sharing agreement. *Zucker v. Fed. Deposit Ins. Corp. (In re Netbank, Inc.)*, 459 B.R. 801 (Bankr. M.D. Fla. 2010).

### 12.2 Turnover

### 12.3 Sales

## 13. TRUSTEES, COMMITTEES, AND PROFESSIONALS

### 13.1 Trustees

**13.1.a. Credit bid is not "moneys disbursed" for the purpose of calculating a trustee's compensation.** The chapter 7 trustee negotiated the sale of the estate's principal asset to the secured creditor, by credit bid, subject to overbids. There were no overbids. At closing, the trustee conveyed the property free and clear of liens to the secured creditor's designee and applied the credit bid to reduce the amount owing on the lien. The trustee sought compensation for his work in the case. Section 326(a) limits a trustee's compensation to a percentage of "moneys disbursed or turned over in the case by the trustee to parties in interest … including holders of secured claims". "Money" is a medium of exchange. "To disburse" means to pay out money. A credit bid is not a medium of exchange that would constitute money disbursed under section 326(a). Such a reading is consistent with the use of "money" elsewhere in the Code, such as in section 345 and in section 704(a)(1), which requires a trustee to "collect and reduce to money the property of the estate". It is also consistent with the purpose of section 704(a)(1), because it measures the trustee's compensation only by the amount of money that the trustee produces consistent with the section 704(a)(1) duty, not by the value of property that the trustee simply turns over to parties in interest. Property turnover or transfer on a credit bid does not produce a net benefit to the estate or additional disbursements to holders of unsecured claims, who would have to bear the expense of the trustee's compensation based on the credit bid. Therefore, the trustee may not base compensation on the amount of a secured creditor's credit bid. *U.S. Trustee v. Tamm (In re Hokulani Square, Inc.)*, 460 B.R. 763 (9th Cir. B.A.P. 2011).

**13.1.b. Declaratory action against the trustee to determine avoidability of a transfer violates *Barton v. Barbour*.** The trustee brought an action to recover voidable transfers from the initial transferee and from its related subsequent transferee. The subsequent transferee then brought an action in the Grand Court of the Cayman Islands for a declaration that it was not liable to the trustee. *Barton v. Barbour*, 104 U.S. 126 (1881), prohibits an action against a trustee without leave of the appointing court. The Cayman action violates *Barton*. The court enjoins the subsequent transferee from proceeding with the action. *Picard v. Maxam Absolute Return Fund, L.P. (In re Bernard L. Madoff Inv. Secs., LLC)*, 460 B.R. 106 (Bankr. S.D.N.Y. 2011).

### 13.2 Attorneys

### 13.3 Committees

**13.3.a. Court disbands committee after trustee's appointment.** The chapter 11 case was essentially a liquidation. The court ordered the appointment of a trustee. After the appointment, the committee continued to participate in the case, taking extensive discovery ostensibly to protect creditors' interests but not contributing to case's progress. Section 1102 requires the appointment of a committee to represent unsecured creditors' interests, whether or not a trustee is appointed. A chapter 11 trustee's role is also to represent unsecured creditors' interests. Section 105 permits the court, on its own motion, to issue an order "as the court deems appropriate to ensure that the case is handled expeditiously and economically" unless inconsistent with another Code provision. The Code does not provide for a committee in a chapter 7 case. This case is essentially a liquidation case, though under chapter 11. The trustee here adequately represents unsecured creditors' interests, and the committee is causing an increase in administrative burden in the case. Therefore, the court disbands the committee. *In re Pacific Ave., LLC*, 2012 Bankr. LEXIS 1444 (Bankr. W.D.N.C. Jan. 26, 2012)

### 13.4 Other Professionals

### 13.5 United States Trustees

## 14. TAXES

**14.1.a. Section 505(a) proceeding against a state does not violate sovereign immunity.** The state imposed a tax on the debtor's receipts. Before its chapter 11 case, the debtor paid the tax but challenged whether collections that it was required by statute to remit to third parties are included in "receipts". It sought a refund from the state of the excess taxes. After bankruptcy, the debtor in possession brought a motion under section 505(a) for a determination of the legality of the taxes. Section 505(a) permits a bankruptcy court to determine "the amount or legality of any tax … whether or not previously assessed, whether or not paid, and whether or not contested before and adjudicated by a judicial or administrative tribunal of competent jurisdiction." It confers jurisdiction on the bankruptcy court to determine federal and state tax claims, not to enjoin a state in its tax collection. Therefore, a section 505(a) motion does not seek an *in personam* injunction against the state, which might violate the state's sovereign immunity. Rather, it seeks a determination of issues concerning property of the estate by asking the court to determine whether the estate must keep making tax payments based on gross collections. As an *in rem* action relating to property of the estate, the motion does not violate the state's sovereign immunity. Similarly, the motion does not violate the Tax Injunction Act, which prohibits a federal court from enjoining the assessment or collection of a state tax, because the TIA does not affect a bankruptcy court's subject matter jurisdiction under section 505(a). *In re Indianapolis Downs, LLC*, 462 B.R. 104 (Bankr. D. Del. 2011).

## 15. CHAPTER 15—CROSS-BORDER INSOLVENCIES

**15.1.a. Court grants comity to Mexican order and stays against foreign debtor's nondebtor parent.** A Mexican debtor commenced an insolvency proceeding in Mexico. The Mexican court issued an order staying action against the debtor and against its shareholder, who had guaranteed its debts. The foreign representative obtained recognition of the Mexican proceeding. The major lender then commenced an action in the U.S. against the shareholder to collect on the guarantee. The foreign representative moved in the action for a stay of the proceeding based on the Mexican court's stay order and comity. Section 1509(b)(2) permits a foreign representative who has received recognition to apply directly to a U.S. court for appropriate relief. Section 1524 permits a recognized foreign representative to "intervene in any proceeding in a State or Federal court in which the debtor is a party". Section 1524 does not limit section 1509(b)(2)'s scope: a foreign representative may apply to a U.S. court for relief even if the debtor is not a party to the proceeding in which the foreign representative seeks relief. Section 1509(e) makes the foreign representative "subject to applicable nonbankruptcy law", whether or not a bankruptcy court recognizes the foreign representative. Section 1509(e) is, like 28 U.S.C. § 959, intended to make the foreign representative comply with U.S. law while acting in the U.S., not to limit the foreign representative's rights under section 1509(b)(2) to apply for relief. Therefore, the foreign representative need not comply with Fed. R. Civ. Proc. 24 regarding intervention to apply for relief. Section 1509(b)(3) requires a U.S. court to grant comity to the foreign representative. Section 1506 permits the court to deny relief if relief would be "manifestly contrary to the public policy of the United States". Bankruptcy courts frequently issue stays of action against a debtor's nondebtor affiliates. Accordingly, granting comity and enforcing the Mexican court's order to stay action against the debtor's parent on the guarantee is not manifestly contrary to U.S. public policy. The court therefore grants comity and stays the proceeding. *CT Inv. Mgmt Co., LLC v. Carbonell*, ___ B.R. ___, 2012 WL 92359 (S.D.N.Y. Jan. 11, 2012).

**15.1.b. Comity is based on whether foreign law governing a foreign proceeding, not the particular proceeding, protects foreign creditors' interests.** A French corporation commenced a French safeguard proceeding—analogous to a chapter 11 case—in France. After the commencement of the safeguard proceeding, a Canadian creditor obtained a judgment against the French company and domesticated it in Florida. It sought seizure of the French company's assets in Florida. The French foreign representative commenced a chapter 15 case in Florida to protect the assets. The Florida bankruptcy court recognized the safeguard proceeding as a foreign main proceeding. The creditor sought discovery to determine whether its interests were fairly treated in the safeguard proceeding. Under section 1521, upon recognition, the court may grant any appropriate relief, including entrusting the administration of the debtor's assets located in the United States to the foreign representative and the distribution of those assets by the foreign representative if "the interests of creditors in the United States are sufficiently

protected". In determining whether those interests are sufficiently protected, a court may review only the general operation of the laws governing the foreign proceeding, not whether the specific proceeding protected those interests. Such a review would set up the U.S. court as an appellate court over the foreign court. Therefore, the creditor is not entitled to discovery on conduct of the safeguard proceeding. *SNP Boat Serv. S.A. v. Hotel Le St. James*, ___ B.R. ___ (S.D. Fla. Apr. 18, 2012).