BANKRUPTCY UPDATE
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Recent Developments in Bankruptcy Law

(Covering cases reported through 510 B.R. 438 and 747 F.3d 267)

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1. AUTOMATIC STAY

1.1 Covered Activities

1.2 Effect of Stay

1.3 Remedies

2. AVOIDING POWERS

2.1 Fraudulent Transfers

2.1.a. In a SIPA case, lack of good faith under section 548(c) requires actual knowledge of or willful blindness to fraud. The debtor stockbroker ran a Ponzi scheme and was being liquidated under SIPA. The trustee brought fraudulent transfer actions against both initial and subsequent transferees to avoid and recover withdrawals of principal. Section 548(c) gives an initial transferee a defense to the extent that the transferee took for value and in good faith; section 550(b) gives a subsequent transferee essentially the same defense. In the bankruptcy law, courts generally construe "good faith" as meaning a lack of information that would require a prudent person to investigate. SIPA incorporates the Bankruptcy Code "to the extent consistent with the provisions" of SIPA. Where SIPA and the Code are in conflict, the Code must yield. SIPA is part of the securities laws and its construction should be informed by the securities laws. "Good faith" in the securities laws implies a lack of fraudulent intent. The securities laws do not impose a burden on an investor to investigate a stockbroker. Therefore, in a SIPA proceeding, a transferee is not liable unless the transferee had actual knowledge of the fraud or was willfully blind to it. The Bankruptcy Code sets out the defense as an affirmative defense. But requiring the defendant to plead and prove good faith would undercut SIPA's goals of maintaining market stability and encouraging investor confidence. Therefore, the trustee has the burden of pleading and proving a lack of good faith. *Securities Investor Protection Corp. v. Bernard L. Madoff Investment Securities LLC (In re Bernard L. Madoff Investment Securities LLC)*, ___ B.R. ___, 2014 U.S. Dist. LEXIS 58709 (S.D.N.Y. Apr. 28, 2014).

2.1.b. Return of fraudulently transferred property provides a defense to an avoiding power claim. The debtor transferred real property to his brother-in-law, who transferred it back to him about one year later. The debtor later sold the property for reasonably equivalent value. Circumstances suggested that the debtor might have made the initial transfer with actual intent to hinder, delay, or defraud creditors. The trustee sued under section 544(b) to avoid the transfer to, and to recover the real property or its value from, the brother-in-law. Under section 544(b), the trustee may avoid an actual or constructive fraudulent transfer of property of the debtor under applicable nonbankruptcy fraudulent transfer law, in this case the Pennsylvania Uniform Fraudulent Transfer Act. The UFTA's and section 544(b)'s purpose is to preserve estate assets for creditors' benefit. To that end, the trustee's remedy is recovery from the transferee of fraudulently transferred property or its value. If the estate has already recovered the property's value, a judgment against the transferee would allow the estate double recovery. Therefore, where the transferee returns the property to the debtor before bankruptcy, the trustee may not recover the property or its value. *Finkel v. Polichuk (In re Polichuk)*, 506 B.R. 405 (Bankr. E.D. Pa. 2014).

2.1.c. Section 544(b) does not apply to a postconfirmation transfer. The debtor's plan provided for revesting property of the estate in the debtor upon confirmation. After revesting, the debtor sold the property (a house) for about 2½ times the value listed on the schedules. The debtor transferred the proceeds to a newly formed corporation owned by the debtor's principal. About five months later, the court converted the case to chapter 7. Section 544(b) permits the trustee to avoid a "transfer of an interest of the debtor in property … that is voidable under applicable law by a creditor holding an unsecured claim that is allowable under section 502(a) …." Section 544(b) does not include a temporal limitation, but it applies only to an interest of the debtor, not of the estate. Section 549 addresses transfers of property of the estate that occur postpetition. Section 549 and other avoiding power sections, including section 544(a), which operate "as of the commencement of the case," and the section 546(a) statute of limitations that runs from the order for relief, suggest that section 544(b) applies only to prepetition transfers. The transfer here to the buyer occurred postpetition but was not a transfer of property of the estate. Therefore, the trustee may not avoid the transfer under section 544(b). *Casey v. Rotenberg (In re Kenny G Enterps., LLC),* ___ B.R. ___, 2014 U.S. Dist. LEXIS 87302 (C.D. Cal. June 24, 2014).

2.2 Preferences

2.3 Postpetition Transfers

2.3.a. Section 549(a) permits the trustee to avoid a transfer of the debtor's foreign land to a foreign buyer. The debtor purchased an interest in Mexican land. The seller sued the debtor for disputes arising out of the sale. While the action was pending, the debtor purchased a shell corporation and transferred the land interest to the shell without consideration. Despite the transfer, the debtor controlled the land interest and received all rental income. After the seller prevailed in the lawsuit, the debtor filed bankruptcy. Six months later, the corporation sold the land interest to a Mexican national in a transaction that the debtor controlled. The debtor lowered the purchase price on account of a debt he owed the purchaser, who was instructed to pay most of the purchase price to entities other than the corporation. In addition, the corporation did not observe corporate requirements for the sale, and the purchaser knew of the debtor's bankruptcy and the possibility of litigation over the transfer to the corporation. The court determined the corporation to be the debtor's alter ego and substantively consolidated the corporation with the debtor effective as of the petition date. The local action rule bars a federal court from exercising jurisdiction over an action directly affecting land in a different state or country. But the Code preempts the rule. Section 541(a)(1) creates an estate comprising all of the debtor's interest in property, wherever located, and section 1334(e) gives the court exclusive jurisdiction over property of the debtor and property of the estate, wherever located. The land interest here was property of the estate because of the court's consolidation order, so the court had exclusive jurisdiction, and the local action rule did not apply. Section 549(a) permits the trustee to avoid a postpetition transfer of property of the estate that is not authorized by the Code or the court. A court may not apply a federal statute extraterritorially unless Congress clearly expresses such intent. If not, the statute applies only if the action concerns acts that implicate the focus of Congressional concern. Here, Congress intended extraterritorial application as it applies to property of the estate. Therefore, the court may avoid and order recovery of the land interest that the corporation transferred to the purchaser. *Kismet Acquisition, LLC v. Icenhower (In re Icenhower)*, ___ F.3d ___, 2014 U.S. App. LEXIS 12618 (9th Cir. July 3, 2014).

2.4 Setoff

2.5 Statutory Liens

2.6 Strong-arm Power

2.7 Recovery

2.7.a. Trustee may not sell homestead based on avoidance and preservation of first mortgage. The debtor claimed a homestead exemption in her home, which was subject to first and second mortgages. She was current on both mortgages. The home's value exceeded the sum of the two secured claims but was less than that amount plus the homestead exemption, leaving no equity for the estate. The trustee avoided the first mortgage on the debtor's home because the mortgagee did not properly record it. Under section 551, an avoided transfer is preserved for the benefit of the estate. The preservation does not give the trustee an ownership right in the underlying property. Rather, the trustee steps into the creditor's shoes, preserving the avoided mortgage for the estate, but not acquiring anything more. Accordingly, the trustee may not sell the home to realize the value of the mortgage but may sell only the mortgage. *DeGiacomo v. Traverse (In re Traverse)*, 753 F.3d 19 (1st Cir. 2014).

2.7.b. Section 550(a)(2) does not apply to a transfer between foreign entities. The trustee had a judgment avoiding fraudulent transfers against a non-U.S. investment fund that was in liquidation in its home country. He sued the fund's non-U.S. transferees under section 550(a)(2) to recover the transfers that they received from the fund. The court must determine whether the case's circumstances require extraterritorial application of the statute and, if so, whether Congress intended it to apply extraterritorially. The court looks to the focus of the statute and Congressional concern in its enactment to determine whether the proposed application is domestic or foreign. The avoiding powers' focus is the debtor's transfers, not the debtor itself. Transfers occur extraterritorially based on the location of the transfers and their component events. Here, the subsequent transfers were foreign, even though they originated in the United States, because the foreign fund transferred assets abroad to its foreign investors. A court must presume a statute applies only domestically unless Congress clearly expresses an intention to the contrary. Nothing in section 550(a)(2) suggests extraterritorial application. Section 541(a)(1) includes as property of the estate the debtor's interests in property, "wherever located," but the avoiding powers and section 550 do not contain a similar reference. Section 541(a)(1)'s broad reference cannot be imported into the avoiding powers, because property recovered under the avoiding powers and section 550 becomes property of the estate only under section 5541(a)(3). Finally, comity counsels against extraterritorial application. The trustee's use of section 550 to recover from the fund's transferees might interfere with the fund liquidator's use of comparable local statutes to recover transfers the fund made before its liquidation. *Securities Investor Protection Corp. v. Bernard L. Madoff Inv. Secs. LLC*, ___ B.R. ___, 2014 U.S. Dist. LEXIS 91508 (S.D.N.Y. July 7, 2014).

3. BANKRUPTCY RULES

3.1.a. Court seals "candid" report on attorney conduct. The bankruptcy court ordered a bankruptcy lawyer's counsel to file a report, "written candidly and not as an advocate for any party," on problems with the lawyer's conduct, which counsel did. As a result, the report contained statements that would not likely have been included in a report for publication. The bankruptcy lawyer asked that the report be filed under seal. Section 107(a) requires that a paper filed in a case is a public record open to inspection, but the court may seal it if it contains confidential commercial information or scandalous material. Confidential commercial information includes information whose disclosure could cause commercial injury. Here, the report's publication would put the lawyer in a worse competitive position in attracting and retaining clients and would serve no purpose for another law firm than to compete. Moreover, how a lawyer organizes his practice is his stock-in-trade and part of the lawyer's service. Therefore, the report contains confidential commercial information. In addition, though the paper was filed in a case, it addressed attorney discipline, not a pending bankruptcy case. State bar attorney discipline proceedings are confidential. Therefore, the court seals the report. *Robbins v. Tripp*, 510 B.R. 61 (E.D. Va. 2014).

4. CASE COMMENCEMENT AND ELIGIBILITY

4.1 Eligibility

4.1.a. LLC operating agreement prohibition on bankruptcy filing while loan is outstanding is unenforceable. The debtor LLC's Operating Agreement prohibited its filing a bankruptcy petition while its principal secured loan was outstanding. When the loan went into default, the debtor filed a chapter 11 petition. The lender moved to dismiss. Section 1109(b) provides that a party in interest, including a creditor, "may raise and may appear and be heard on any issue" in the case. A party in interest is one whose interest is directly and adversely affected pecuniarily by the case. Though a creditor seeking dismissal of a voluntary petition based on the debtor's organizational documents may be protecting only the creditor's own interest, rather than the debtor's equity owners who agreed to the documents, a creditor is a party in interest and has standing to challenge the filing as violating the organizational documents. A prebankruptcy waiver of a right to file a bankruptcy petition is unenforceable as against public policy, whether the waiver is found in a loan agreement or the debtor's organizational documents for the lender's benefit. If it were otherwise, such waivers would become standard. Therefore, the waiver is unenforceable. The court denies the creditor's motion to dismiss the petition. *In re Bay Club Partners-472, LLC*, ___ B.R. ___, 2014 Bankr. LEXIS 205 (Bankr. D. Ore. May 6, 2014).

4.2 Involuntary Petitions

4.3 Dismissal

5. CHAPTER 11

5.1 Officers and Administration

5.1.a. Party in interest standing requires a pecuniary interest. The debtor in possession settled a coverage dispute with its primary layer insurer for less than half of the policy face amount. The excess coverage carrier, who did not have any claims against the debtor, objected to the settlement. Only a party in interest may appear and be heard in a bankruptcy case. A party in interest is one who has a legally recognized interest in the debtor's assets or is a creditor. Suffering a collateral pecuniary effect, such as requiring excess coverage after less primary coverage, from an action of the debtor in possession is not such a legally recognized interest. Therefore, the excess carrier does not have standing to object to the settlement. *In re C.P. Hall Co.*, 750 F.3d 659 (7th Cir. 2014).

5.2 Exclusivity

5.3 Classification

5.4 Disclosure Statements and Voting

5.4.a. Approval of a third-party release requires adequate disclosure and evidence of adequate consideration. The debtor's bond indenture trustee re-perfected a lapsed security interest within 90 days before bankruptcy. The debtor in possession sued to avoid the re-perfection as a preference. The debtor in possession and the indenture trustee settled the litigation by allowance of the bonds as secured claims in a substantially reduced amount. The settlement provided for the indenture trustee's release of its contractual indemnification claims against the debtor and for a third-party release of the bondholders' claims against the indenture trustee. However, the settlement was contingent upon confirmation of a plan that incorporated its terms. The court approved the settlement and later approved a disclosure statement, which mentioned the third-party release in the course of describing all plan releases, but did not highlight it or call specific attention to it through boldface, italic, underlined or all-capitals type. The bondholders overwhelmingly accepted the plan, but one bondholder objected to confirmation based on the third-party release. A court may approve a third-party release in a plan if the third party has made an important contribution to the reorganization, the release is essential to confirmation, a large majority of creditors accept the plan, there is a close connection between the claims against the third party and the debtor, and the plan provides for payment of substantially all affected claims. Rule 3016(c) requires a disclosure statement to "describe in specific and conspicuous language" any injunction the plan proposes. A third-party release has the same effect as an injunction, so the Rule's requirements apply equally. Here, because the disclosure was not clear and conspicuous, the disclosure statement did not comply with the Rule. Therefore, the plan's acceptance by a large majority of bondholders was inadequately informed and therefore did not satisfy the third requirement for approval of a third-party release. In addition, there was insufficient evidence of what the bondholders received in exchange for the release or whether it was adequate. *In re Lower Bucks Hosp.*, ___ F.3d ___, 2014 U.S. App. LEXIS 12633 (3d Cir. July 3, 2014).

5.4.b. Section 1129(a)(10)'s non-insider voting requirement applies at the time of the vote. The debtor proposed a plan that paid all creditors in cash in full, except creditors in a class consisting of contingent, unliquidated, disputed claims of directors and officers and former directors and officers for indemnification arising out of illegal prepetition securities issuances. Because the plan provided for full cash payment of claims in the other classes, only that class voted on the plan. All holders of claims in that class accepted. Under section 1129(a)(10), the court may confirm a plan only if, among other things, at least one class of claims accepts the plan, without counting acceptances by insiders. A director or officer is an insider. For purposes of determining whether an acceptance is by an insider, the court determines insider status when the debtor formulates and the creditor votes on the plan, not when the claim arose. Section 1129(a)(10)'s purpose is to prevent confirmation when only insiders favor the plan or control plan formulation without outside creditor acceptance. If a creditor is not an insider when voting, then the purpose is met, because the creditor does not have an insider's influence in that process. Therefore, the plan satisfies section 1129(a)(10). *In re Neogenix Oncology, Inc.*, 508 B.R. 345 (Bankr. D. Md. 2014).

5.5 Confirmation, Absolute Priority

5.5.a. Court denies confirmation because appointment of proposed directors is not consistent with public policy. The plan provided for the debtor holding company to retain one fledgling operating subsidiary and remain a publicly traded company. The CEO and CFO were creditors and stockholders and were to be the sole directors of the reorganized company. Both were to receive substantial salaries and termination benefits. In testimony at the confirmation hearing, it was clear the CEO did not understand many plan provisions. Two other stockholders engaged in a battle for control over the debtor against the CEO and CFO for over a year before bankruptcy. Section 1129(a)(5)(A)(ii) requires as a condition to confirmation that the appointment of individuals as directors of the reorganized debtor be "consistent with the interests of creditors and equity security holders and with public policy." The Bankruptcy Code's lack of definition of "public policy" leaves its interpretation to the court's sound discretion. In exercising its discretion, a court should consider, to the extent appropriate, whether the plan continues the debtor as a publicly held company, whether the individuals are competent, experienced, unaffiliated with groups inimical to the debtor's best interests, and disinterested, provide adequate representation of all creditors and shareholders, and will receive reasonable compensation, and whether there will be independent outside directors. Here, the debtor was to remain as a publicly held company, the individuals did not show competence, were not disinterested, had not previously represented other shareholders adequately, and were being overcompensated. In addition, there were no outside directors. Accordingly, the plan does not meet section 1129(a)(5)(A)(ii)'s requirement, and the court denies confirmation. *In re Digerati Techs., Inc.*, ___ B.R. ___, 2014 Bankr. LEXIS 2352 (Bankr. S.D. Tex. May 27, 2014).

5.5.b. Court may supply commercially reasonable terms to plan documents and order parties to execute them. Mediation between the debtor and its secured lender resulted in agreement on a plan and a detailed agreement on the restructured secured lender's loan. The plan required the debtor and the lender to execute new loan documents on the plan's effective date. They could not reach agreement on the documents. Section 1142(a) authorizes the court to direct the debtor and other necessary parties to execute documents necessary to consummate the plan. A court should not supply plan terms where the parties have not agreed, but a plan typically does not contain all the detail that loan documents contain. Where the plan provides sufficient detail to evidence a meeting of the parties' minds on material terms, the court may determine commercially reasonable terms for the remaining provisions in the loan documents and order the debtor and the lender to execute them to consummate the plan. *In re Chatham Parkway Self Storage, LLC*, 507 B.R. 13 (Bankr. S.D. Ga. 2014).

6. CLAIMS AND PRIORITIES

6.1 Claims

6.1.a. Right to purchase shares is not a claim. Before bankruptcy, the chapter 11 debtor guaranteed a nondebtor's obligation to the bank. The debtor's affiliate, also a chapter 11 debtor, gave the bank the right to purchase up to $10 million in shares in its subsidiary if the debtor did not pay on the guarantee. The bank could offset the purchase price against the amount owing on the guarantee. The debtor defaulted before bankruptcy. The bank filed a claim against the affiliate for $10 million. A claim is a right to payment or a right to an equitable remedy for breach of performance if the breach gives rise to a right to payment. Here, the bank's right against the affiliate was for performance—the sale of the subsidiary's shares. Breach of performance does not give rise to a right to performance where the claimant does not have the option to accept money in lieu of performance. The bank's right to offset the purchase price against the unpaid guarantee amount is not an alternative right to payment, because the setoff would be a triangular setoff, which the Bankruptcy Code does not permit. Therefore, the court disallows the bank's claim. *In re Arcapita Bank B.S.C.*, ___ B.R. ___, 2014 Bankr. LEXIS 2237 (Bankr. S.D.N.Y. May 20, 2014).

6.1.b. Court disallows yield maintenance premium that accrues after the petition date as unmatured interest. The debtor guaranteed all of a nondebtor affiliate's obligations under a promissory note, including an obligation for yield maintenance premium that arose upon acceleration of the note. The note calculated the yield maintenance premium as the amount necessary to purchase U.S. government obligations with a payment stream that most nearly resembled the note's payment stream, so as to allow the noteholder to receive the full payment of principal and interest over the note's life that it would have received if the note had not been accelerated. Three months after the debtor's bankruptcy filing, the noteholder commenced an action against the affiliate on the note. The action accelerated the note. The noteholder filed a claim in the debtor's case for principal, interest matured to the petition date, and yield maintenance premium. Section 502(b)(2) disallows a claim for unmatured interest as of the petition date. Courts look to economic substance to determine what constitutes interest. *In re Chateaugay Corp.*, 961 F.2d 378, 380 (2d Cir. 1992), ruled that original issue discount, which compensates a creditor for a low interest rate, amounts to interest. A yield maintenance premium similarly compensates a creditor for the use of money, is part of the price of money to be repaid in the future, and is therefore interest under an economic analysis. As of the petition date, the noteholder had not accelerated the loan, so the interest represented by the yield maintenance premium was then unmatured and is disallowed. *Paloian v. LaSalle Bank N.A. (In re Doctors Hosp. of Hyde Park, Inc.)*, 508 B.R. 697 (Bankr. N.D. Ill. 2014).

6.2 Priorities

7. CRIMES

8. DISCHARGE

8.1 General

8.1.a. Section 108(c)'s statute of limitations tolling ends upon general discharge, even for claims that are not discharged. The plaintiff's husband died from an asbestos-related disease during the debtor's chapter 11 case. The debtor's plan created an asbestos trust, vested the trust with authority to bring claims on behalf of all asbestos personal injury claimants against the reorganized debtors who were insured under a particular insurance policy, and discharged the debtor from all other claims. The trust brought a claim against one of the reorganized debtors over three years after the plan's effective date but while the case was still open. The state statute of limitations for a tort claim is three years. Upon filing a bankruptcy petition, the automatic stay prohibits the commencement or continuation of an action or proceeding asserting a prepetition claim against the debtor. The stay continues until the case is closed or dismissed or until a discharge is granted. Section 1141(d) grants a corporate chapter 11 debtor a discharge effective upon confirmation. Section 108(c) tolls a statute of limitations to bring claims against the debtor until "30 days after notice of the termination or expiration of the stay under section 362 … with respect to such claim." Section 108(c) operates as of the general discharge date, not on a claim-by-claim basis. Therefore, the statute of limitations tolling for the plaintiff's claim ended on plan confirmation and the discharge, even though plaintiff's claim was not discharged. *Barraford v. T&N Ltd.*, ___ B.R. ___, 2014 U.S. Dist. LEXIS 24401 (D. Mass. Feb. 25, 2014).

8.2 Third-Party Releases

8.3 Environmental and Mass Tort Liabilities

9. EXECUTORY CONTRACTS

9.1.a. Trademark license agreement that is part of a business sale is not an executory contract. As part of a sale of part of its business, the debtor licensed trademarks to the buyer under a license agreement that was signed and effective at the same time as the asset purchase agreement. The debtor's chapter 11 plan assumed the license agreement. A plan may assume an executory contract. Under the Countryman definition, an executory contract is one under which both parties' obligations "are so far unperformed that the failure of either to complete performance would constitute a material breach excusing the performance of the other." The definition includes the concept of substantial performance. If a party has substantially performed, the party's later nonperformance would not excuse the other party from performance but would only give rise to a damage claim. Related agreements signed at the same time covering the same transaction should be treated as a single contract. Here, though performance by both parties remained under the license agreement, the sale and purchase of the business constituted substantial performance of the integrated agreement. The debtor's remaining obligations under the license agreement concerned only one aspect of the sale, and nonperformance would not have excused the buyer from further performance under the license agreement. Therefore, the license contract is not an executory contract and could not be assumed. *Lewis Bros. Bakeries Inc. v. Interstate Brands Corp. (In re Interstate Brands Corp.)*, 751 F.3d 955 (8th Cir. 2014).

9.1.b. Court reconciles apparent conflict between sections 363(f) and 365(h). The plan provided for rejection of the debtor's lease to a tenant of real property and sale of the underlying property free and clear of the tenant's interest. Section 365(f) permits the trustee to sell property of the estate free and clear of a third party's interest if, among other reasons, "(1) applicable nonbankruptcy law permits sale" free and clear of the interest or "(5) [the interest holder] could be compelled, in a legal or equitable proceeding, to accept a money satisfaction of such interest." A leasehold estate is an interest in property. Section 365(h) provides that upon a trustee's rejection of a lease, the tenant may "retain its rights under such lease … that are in or appurtenant to the real property for the balance of the term." A lease gives a tenant a property interest, which the tenant may retain even if the trustee rejects the lease. Rejection is not an avoiding power. But it protects the tenant only to the extent of the tenant's nonbankruptcy rights and does not impair the trustee's Bankruptcy Code rights to deal with the property, for example, to avoid an unperfected or fraudulently transferred interest or, therefore, to sell free and clear under section 363(f). Based on the "active" voice in the lead-in to section 363(f), section 363(f)(1) should be read narrowly to apply only when applicable nonbankruptcy law would permit the property's owner, not any other third party such as a foreclosing creditor, to sell free and clear of the interest. Section 363(f)(5) should be read the same way for the same reason, especially because the broader reading would render paragraphs (1) through (4) superfluous. Where the buyer has notice of the lease, such as by the tenant's possession, the seller will not be able to sell free and clear under nonbankruptcy law. Therefore, the trustee may not do so here. If the trustee could, the tenant would be entitled to adequate protection of his interest. The most reasonable adequate protection for a tenant is to permit him to remain in possession for the remainder of the lease term. *Dishi & Sons v. Bay Condos LLC*, ___ B.R. ___, 2014 U.S. Dist. LEXIS 72698 (S.D.N.Y. May 28, 2014).

10. INDIVIDUAL DEBTORS

10.1 Chapter 13

10.2 Dischargeability

10.3 Exemptions

10.4 Reaffirmation and Redemption

11. JURISDICTION AND POWERS OF THE COURT

11.1 Jurisdiction

11.1.a. An unconstitutional core proceeding should be treated as a non-core proceeding. The trustee sued in the bankruptcy court to recover a fraudulent transfer from a defendant who had not filed a proof of claim. The bankruptcy judge granted the trustee summary judgment. The defendant appealed to the district court, which conducted a *de novo* review, determined that there were no disputed issues of material fact, and affirmed. Section 157(b) of title 28 authorizes a bankruptcy judge to hear and determine core proceedings, which expressly include proceedings to recover fraudulent conveyances. But Article III prohibits a non-Article III bankruptcy judge from issuing a final judgment in a "*Stern v. Marshall*" action (131 S. Ct. 2594 (2011)), that is, an action to augment the estate against a third party who has not filed a claim against the estate. Section 157(c)(1) permits a bankruptcy judge to hear noncore proceedings and recommend proposed findings and conclusions to the district court, who must then review them *de novo* and enter judgment. Section 157(c)(1) does not directly cover a proceeding that is defined as "core" but that may not constitutionally be determined by a non-Article III judge. However, the 1984 act that enacted section 157 contained a severability provision: Any holding that the 1984 act or its application to any person or circumstance was invalid does not affect the remainder of the act or its application to other persons and circumstances. Classification in section 157(b) of fraudulent conveyance proceedings as core is constitutionally invalid. Therefore, section 157(c) and its report and recommendation procedure apply to those proceedings. The bankruptcy judge here did not characterize his ruling as a report and recommendation. But by giving the bankruptcy judge's ruling *de novo* review, the district court treated it as such and therefore fulfilled constitutional requirements. Section 157(c)(2) authorizes a bankruptcy judge to hear and determine a noncore proceeding with all the parties' consent. The Court does not address whether the defendant consented, what is required to evidence consent, or whether consent vitiates any constitutional objection to the bankruptcy judge's authority. *Executive Benefits Ins. Agency v. Arkison*, 573 U.S. ___, 134 S. Ct. ___ (2014).

11.1.b. Plan's retention of jurisdiction provision is not a consent under section 157(c)(2). Before bankruptcy, the debtor sued its landlord in state court for breach of the debtor's lease. After bankruptcy, the landlord removed the action and filed an adversary proceeding against the debtor asserting claims under the lease. The debtor assumed the lease under its plan. The plan retained jurisdiction for the bankruptcy court to hear and determine all pending adversary proceedings and all claims against or on behalf of the debtor. The litigation between the debtor and the landlord continued after the effective date and after the final decree in both actions over the lease's interpretation and over cure amounts. The district courts have subject matter jurisdiction over core proceedings and over proceedings that are related to a case under title 11. The district courts may refer related proceedings to the bankruptcy judges to hear and recommend proposed findings and conclusions, and parties may consent to a bankruptcy judge's issuance of a final judgment in a related proceeding, but a bankruptcy judge may not determine a related proceeding without the parties' consent. Plan confirmation narrows bankruptcy jurisdiction to proceedings that have a close nexus to the plan's interpretation or implementation. A plan's retention of jurisdiction cannot expand the bankruptcy court's statutory jurisdiction. In addition, it cannot constitute consent to a bankruptcy judge's determining a related proceeding. Bankruptcy Rules 7008(a) and 7012(b) provide the proper means for evidencing a party's position on whether a proceeding is core or related and whether the party consents to the bankruptcy judge's determining the matter. *N.Y. Skyline, Inc. v. Empire State Bldg. Trust Co. (In re N.Y. Skyline, Inc.)*, ___ B.R. ___, 2014 U.S. Dist. LEXIS 82477 (S.D.N.Y. June 16, 2014).

11.1.c. Exceptions to *Barton* doctrine are limited to cases of harm to third parties. A federal district court receiver took possession of and operated the debtor's business for 16 months before filing a bankruptcy petition for the debtor in the same district. The trustee sued the receiver for improper disbursement of receivership funds to the creditor in the district court action and to recover, on preference and fraudulent transfer grounds, the receiver's payment of his own compensation. *Barton v. Barbour*, 104 U.S. 126 (1881), deprives a court of subject matter jurisdiction to hear a claim against a receiver appointed by another court. The *Barton* doctrine has two principal exceptions. A receiver may be sued without leave of court under 28 U.S.C. § 959(a) with respect to acts or transactions in carrying on the receivership property's business. However, this exception is limited to claims by third parties for harm to them, not harm to the receivership estate, which is under the sole supervision of the receivership court. A receiver may also be sued for an *ultra vires* act, but this exception is also limited. It applies only to a receiver's wrongful seizure of a third party's property. Therefore, the trustee's claims for improper disbursements and to recover avoidable transfers are not within either exception. However, rather than dismiss for lack of subject matter jurisdiction, the bankruptcy judge issues a report and recommendation to the district court requesting the district court to consider the trustee's request to proceed with the litigation, withdraw the reference to hear it, grant *Barton* relief to permit the bankruptcy judge to hear it, or dismiss the case for lack of subject matter jurisdiction. *Kaliner v. Antonoplos (In re DMW Marine, LLC)*, 508 B.R. 497 (Bankr. E.D. Pa. 2014).

11.2 Sanctions

11.3 Appeals

11.3.a. Court of appeals issues mandamus to require district court to decide bankruptcy appeal before plan confirmation hearing. The bankruptcy court applied the automatic stay to prevent a creditor from trapping the debtor's revenue that had been paid into a lockbox account, on the ground that the funds were property of the debtor. The creditor appealed. After briefing and over the creditor's objection, the district court stayed the appeal pending a decision by the court of appeals on the bankruptcy court's ruling that the debtor was eligible for bankruptcy. The creditor then petitioned the court of appeals for a writ of mandamus. The All Writs Act authorizes an appellate court to issue a writ of mandamus in aid of its present or future jurisdiction, but mandamus is an extraordinary remedy. The court of appeals should consider whether the party has other means of redress and will suffer irreparable damage and whether the district court's order was clearly erroneous, incorporates an oft-repeated error, or raises new and important issues. Although a reversal of the eligibility ruling would moot the stay appeal, the appeals are independent, and both should proceed, lest the creditor be denied its statutory right of judicial review. Moreover, the risk of irreparable harm is substantial, because the stay ruling will affect plan confirmation. The rules seek to expedite bankruptcy appeals, and the courts have more flexible, pragmatic rules on what is a final judgment. They contemplate early appeals to inform the confirmation process. Therefore, the court issues the writ to require the district court to rule on the appeals within 12 days. *In re Syncora Guar. Inc.*, ___ F.3d ___, 2014 U.S. App. LEXIS 12557 (6th Cir. July 2, 2014).

11.3.b. Bankruptcy court's stay pending appeal ends when BAP issues its mandate. A fraudulent transfer defendant appealed the bankruptcy court's judgment and obtained a stay pending appeal. The BAP affirmed; the defendant appealed to the court of appeals. Bankruptcy Rule 8005, which applies to appeals from the bankruptcy court to the district court or BAP, permits a bankruptcy judge to issue a stay "during the pendency of an appeal." Bankruptcy Rule 8017 permits the district court or the BAP to "stay its judgment pending an appeal to the court of appeals" and provides that the stay "shall continue until final disposition by the court of appeals." In light of Rule 8017, governing stays pending appeal to the court of appeals, the bankruptcy court's stay pending appeal to the BAP terminates when the BAP issues its mandate. *Lofstedt v. Kendall (In re Kendall)*, 510 B.R. 356 (Bankr. D. Colo. 2014).

11.4 Sovereign Immunity

12. PROPERTY OF THE ESTATE

12.1 Property of the Estate

12.2 Turnover

12.3 Sales

12.3.a. "Cause" permits court to limit credit bidding. The creditor had a $170 million claim secured by most of the debtor's assets, though the committee disputed the creditor's lien on some of the assets. The debtor agreed to sell the creditor all its assets in a chapter 11 case for a credit bid of $75 million, but only if the sale were conducted within 24 business days after the petition date. The estate could realize maximum value only if all the debtor's assets were sold together. The committee produced another bidder who would bid only if the creditor's credit bid were limited to $25 million. Section 363(k) permits a secured creditor to credit bid its claim unless the court orders otherwise "for cause." "Cause" is broader than presence of the creditor's inequitable conduct; it may include a case where credit bidding prevents a competitive bidding environment. Here, credit bidding would prevent any other bidding, the creditor did not have a lien on all the assets being sold, and the creditor insisted on a rushed, unfair process. Together, these provide cause to limit the creditor's credit bid to $25 million. *In re Fisker Automotive Holding, Inc.*, 510 B.R. 55 (Bankr. D. Del. 2014).

12.3.b. Inequitable conduct may lead to denial of credit bidding right. A creditor purchased a claim under a defaulted bank loan and immediately began negotiations with the debtor for a bankruptcy sale in which the creditor would credit bid to acquire all of the debtor's assets. The security interest for the loan did not encumber all of the debtor's assets. Without telling the debtor, the creditor filed financing statements to cover several otherwise unencumbered assets and continued to press the debtor to file a chapter 11 case and sponsor a section 363 sale. The creditor insisted that in advertising the debtor's assets for sale, the debtor's financial advisor prominently disclose that all assets were subject to the creditor's credit bid. The debtor resisted the creditor's demand and filed a chapter 11 case without an agreement. The debtor in possession promptly moved to sell substantially all its assets and challenged the creditor's security interest and its right to credit bid. The court determined that the creditor did not have a valid and perfected security interest in a substantial part of the debtor's assets. Generally, under section 363(k), a secured creditor may credit bid its claim in a sale of its collateral. But the court may order otherwise for cause. Cause includes a need to advance another policy of the Code, such as to ensure a successful reorganization, to facilitate a fully competitive auction, or to undo the effect of a creditor's inequitable conduct. Credit bidding generally protects against undervaluation of the assets at the sale, but where a credit bid of a purchased claim might depress market value, it does the opposite. Here, the court limits the amount of the creditor's claim it may bid because the creditor did not have a lien on all assets, because its loan-to-own strategy, including its aggressive negotiations and the unilateral filing of financing statements, was inequitable, and because its misconduct had an adverse effect on the auction. *In re The Free Lance-Star Publishing Co. of Fredericksburg, Va.*, ___ B.R. ___, 2014 Bankr. LEXIS 1611 (Bankr. E.D. Va. Apr. 14, 2014).

13. TRUSTEES, COMMITTEES, AND PROFESSIONALS

13.1 Trustees

13.1.a. Section 326(a) grants a chapter 7 trustee a commission. The court determined that the chapter 7 trustee did not adequately administer the estate and therefore awarded the trustee a fee based on an hourly rate, rather than the commission rate under section 326(a). Section 330(a)(1) permits the court to award reasonable compensation to a trustee. Section 330(a)(2) permits the court to award less compensation than requested. Section 330(a)(7) provides, "in determining the amount of reasonable compensation to be awarded to a trustee, the court shall treat such compensation as a commission, based on section 326." By this language, Congress determined that the commission rates in section 326(a) are reasonable compensation for a trustee, absent extraordinary circumstances. Although the statute does not use the term "extraordinary circumstances," using the term helps to reconcile section 330(a)(7) with sections 330(a)(1) and (2), permitting the court to award only reasonable compensation and less compensation than requested, and does not impute to Congress the intent to find the commission rates reasonable when extraordinary circumstances are present. However, in determining whether to reduce fees for extraordinary circumstances, the court must first determine the commission rate and then decide whether that fee is unreasonable under the circumstances, explaining the reasons for any reduction. The court of appeals remands for that determination. *Gold v. Robbins (In re Rowe)*, 750 F.3d 392 (4th Cir. 2014).

13.1.b. Standing chapter 13 trustee qualifies as a federal officer. A standing chapter 13 trustee fired an employee. The employee sued in state court for racial discrimination. The trustee removed the action to federal court. Section 1442(a)(1) of title 28 permits removal of an action against "any officer (or any person acting under that officer) of the United States … in an official or individual capacity, for or relating to any act under color of such office." A person acts under a federal officer if the person actively assists the officer in carrying out the officer's duties or functions. The standing trustee assists the United States Trustee in carrying out the duties of administering chapter 13 cases. An assertion that the defendant was acting under color of his office is a colorable federal defense and is adequate to qualify for removal. Because the trustee asserted that his actions in firing the employee were performed in his role as standing chapter 13 trustee, he adequately asserted that he was acting under color of his office. Therefore, removal is proper. *Bell v. Thornburg*, 743 F.3d 423 (5th Cir. 2014).

13.2 Attorneys

13.2.a. Court disallows fees for fee defense litigation. The debtor's reorganization resulted in 100% payment to creditors and a substantial return to shareholders, in large part because of the successful prosecution by counsel to the debtor in possession of a $6 billion fraudulent transfer action against the debtor's parent. Counsel applied for fees in excess of hourly rates. The debtor's revested parent objected, waging extensive fee review litigation against counsel. The bankruptcy court awarded $113 million in "core" fees at hourly rates plus a $4 million enhancement for work in the fraudulent litigation plus $5 million in fees for defending the fee award. The court of appeals affirmed the core fees and fee enhancement. Section 330(a) lists the factors the court must consider in awarding fees, including "whether the services were necessary to the administration of, or beneficial … toward the completion" of the case and disallows compensation for services that were not reasonably likely to benefit the estate or necessary to case administration. It limits compensation for fee application preparation "based on the level and skill reasonably required to prepare the application," implying that fee applications require "scrivener's skills over other professional work." Parties in interest receive notice of and may object to a fee application, so the Code contemplates possible fee litigation. Fee litigation benefits only the professional, not the estate. Attorneys can compensate for any potential dilution in fees resulting from disallowance of fee litigation fees by adjustment of their rates, and in any event, the dilution is not substantial. Fee litigation can become costly if counsel can be compensated for self-interested work. Therefore, the court of appeals reverses the award of fees for fee defense work. *Asarco, L.L.C. v. Jordan Hyden Womble Culbreth & Holzer, P.C. (In re Asarco, L.L.C.)*, 751 F.3d 291 (5th Cir. 2014).

13.2.b. Rule 2014 requires disclosure of lawyer in a law firm who represents creditors in unrelated matters but not personal relationships with other bankruptcy professionals. The closely held debtor consulted before bankruptcy with counsel at a law firm about a sale to its insiders. Once sale negotiations started, counsel recommended a friend with whom he had worked at a prior law firm to represent the insiders. In the debtor's chapter 11 case, the debtor in possession applied for approval of the law firm's employment. Counsel filed a Rule 2014 statement in which he disclosed the law firm's prior representation of 488 of the debtor's 1215 creditors, including the agents for the debtor's two secured loans in unrelated matters. But he did not disclose either that he personally represented the two agents in the unrelated matters or his prior relationship with the insiders' counsel. Rule 2014 requires proposed counsel to disclose all "connections" with creditors and other parties in interest and their professionals without limit, to allow the court, rather than counsel, to determine what information is relevant to the court's determination of whether counsel is disinterested. Information about lead counsel's, not just the lead law firm's, representation of significant creditors in unrelated matters is relevant and must be disclosed. However, information about personal relationships with other bankruptcy professionals in the case is not required. *KLG Gates LLC v. Brown*, 506 B.R. 177 (E.D.N.Y. 2014).

13.3 Committees

13.4 Other Professionals

13.5 United States Trustees

14. TAXES

15. CHAPTER 15—CROSS-BORDER INSOLVENCIES

15.1.a. Court need not give comity to all foreign proceeding orders after recognition. After obtaining recognition under chapter 15, the Mexican foreign representative represented to the bankruptcy court that the secured lender's claim was $103 million, but represented to the Mexican concurso court that the claim was only $27 million, and proposed a concurso plan that discharged all amounts over $27 million. The lender held $8 million in cash collateral, which was the foreign debtor's only U.S. asset. The foreign representative failed to report to the bankruptcy court, as ordered, on the status of Mexican proceedings. The representative also appeared to be working with the Mexican guarantors in Mexico in their effort to invalidate the New York law-governed guarantees. The lender moved to terminate the recognition order. Section 1517(d) permits termination if "the grounds for granting it were fully or partially lacking or have ceased to exist," bringing to bear the same considerations as apply to the original recognition grant. Section 1517 makes the recognition grant subject to section 1506, which permits the court to deny recognition if granting it would be "manifestly contrary" to U.S. public policy. Once a court grants recognition, it need not grant comity to every order the foreign court issues, but may refuse comity on the ground that a particular order is manifestly contrary to public policy. However, the court may not effectively act as an appellate court to the foreign court by invalidating or circumventing its orders, and dissatisfaction with the foreign court's order does not implicate the recognition decision. In this case, the foreign representative's behavior was less than exemplary, but proceedings were ongoing in Mexico, and the lender has appeal rights there. The bankruptcy court also need not grant comity to all final orders of the Mexican court. These protections, combined with the cash collateral deposit, provide the lender sufficient protection. Therefore, the court denies the motion to revoke recognition. *In re Cozumel Caribe, S.A. de C.V.*, 508 B.R. 330 (Bankr. S.D.N.Y. 2014).

15.1.b. Claim against a U.S. defendant is adequate property in the United States for purposes of section 109(a). The Australian foreign representative sought chapter 15 recognition of the Australian foreign main proceeding. The foreign debtor's only U.S. asset was a claim against a U.S. investment fund that was not subject to and had not consented to jurisdiction in the Australian courts to recover transfers that the foreign representative alleged were wrongfully transferred to the United States. The foreign representative had already commenced actions again the investment fund in state and federal courts. Section 109(a) requires as a condition to eligibility to file a bankruptcy petition that the debtor has a domicile, residence, place of business or property in the United States. A claim subject to litigation is located in a court that has both subject matter and personal jurisdiction, rather than at the plaintiff's domicile. The court distinguishes *In re Fairfield Sentry Ltd.*, 484 B.R. 615 (Bankr. S.D.N.Y. 2013), on the ground that the U.S. had no interest in that case in determining whether a foreign representative who held a claim against a U.S. bankruptcy estate could sell the claim without U.S. court authorization under section 1520(a)(2). Therefore, the court finds that the debtor has property in the United States and grants recognition to the foreign representative. *In re Octaviar Admin. Pty Ltd.*, ___ B.R. ___ (Bankr. S.D.N.Y. June 19, 2014).