

Circuit Splits: A Preview of Possible Supreme Court Bankruptcy Cases

I. Cases Before the Court

- a. ***Harrington v. Purdue Pharma, LP***, 23-124 (cert. granted Aug. 10, 2023).

QP.: Whether the Bankruptcy Code authorizes a court to approve, as part of a plan of reorganization under Chapter 11 of the Bankruptcy Code, a release that extinguishes claims held by nondebtors against nondebtor third parties, without the claimant's consent?

Briefing Schedule: Petitioner's Brief: September 20, 2023
Respondent's Brief: October 20, 2023
Argument: December, 2023

b. **State of Case Law:**

- i. **Yes.** *In re Purdue Pharma, L.P.*, 69 F.4th 45 (2d Cir. 2023); *In re Seaside Eng'g & Surveying, Inc.*, 780 F.3d 1070 (11th Cir. 2015); *In re Airadigm Commc'ns, Inc.*, 519 F.3d 640 (7th Cir. 2008); *In re Dow Corning Corp.*, 280 F.3d 648 (6th Cir. 2002); *In re A.H. Robbins Co.*, 880 F.2d 694 (4th Cir. 1989).
- ii. **No.** *In re Lowenschuss*, 67 F.3d 1394 (9th Cir. 1995); *In re Zale Corp.*, 62 F.3d 746 (5th Cir. 1995); *In re Western Real Estate Fund, Inc.*, (10th Cir. 1991).

II. Pending Cert. Petitions

- a. ***Highland Capital Mgmt., L.P v. NexPoint Advisors, L.P.***, 22-631 (petition filed Jan. 5, 2023)(views of the Solicitor General sought on May 15, 2023).

Q.P.: Whether Section 524(e) of the Bankruptcy Code, as its text suggests, states only the effect of a discharge on third parties' liability for a debtor's own debts or instead constrains the power of the court when confirming a plan of reorganization.

- i. **Section 524(e) states only the effect of a discharge.** *In re Metromedia Fiber Network, Inc.*, 416 F.3d 136, 142-43 (2d Cir. 2005); *In re PWS Holding Corp.*, 228 F.3d 224, 247 (3d Cir. 2000); *In re A.H. Robbins Co.*, 880 F.2d 694, 702 (4th Cir. 1989); *In re Dow Corning Corp.*, 280 F.3d 648, 657-58 (6th Cir. 2002); *In re Airadigm Commc'ns, Inc.*, 519 F.3d 640, 656 (7th Cir.

2008); *Blixseth v. Credit Suisse*, 961 F.3d 1074, 1082 (9th Cir. 2020), *cert. denied*, 141 S. Ct. 1394 (9th Cir. 2021); *In re Seaside Eng'g & Surveying, Inc.*, 780 F.3d 1070, 1078 (11th Cir. 2015).

- ii. **Section 524(e) constrains the power of the court.** *Nexpoint Advisors, L.P. v. Highland Cap. Mgmt., L.P. (In re Highland Capital Mgmt., L.P.)*, 48 F.4th 419 (5th Cir. 2022); *In re Pacific Lumber Co.*, 584 F.3d 229, 252-53 (5th Cir. 2009); *In re Western Real Estate Fund, Inc.*, 922 F.2d 592, 600 (10th Cir. 1990) (per curiam).

- b. **U.S. Bank Nat'l Assoc. v. Windstream Holdings, Inc.**, 22-926 (petition filed March 15, 2023) (set for conference on Sept. 26, 2023).

Q.P.: 1. Does the lack of statutory and constitutional basis for the equitable mootness doctrine, combined with its demonstrated potential for abuse, require it to be abolished?

- i. No split identified. All Circuits faced with the questions about equitable mootness have upheld the doctrine. See, *In re Tribune Media Co.*, 799 F.3d 272, 286 (3d Cir. 2015) (Ambro, J. concurring). But some judges would not. See *In re Continental Airlines*, 91 F.3d 553, 567 (3d Cir. 1996) (en banc) (Alito, J., dissenting), *cert. denied*, 519 U.S. 1057 (1997); *In re One2One Comm'cns, LLC*, 805 F.3d 428, 446-47 (3d Cir. 2015) (Krause, J., concurring); *Cobb v. City of Stockton (In re City of Stockton, Cal.)*, 909 F.3d 1256, 1270 (9th Cir. 2018) (Friedland, J., dissenting); *In re City of Detroit, Michigan*, 838 F.3d 792, 805 (6th Cir. 2016) (Moore, J., dissenting), *cert. denied*, 581 U.S. 918 (2017).

2. Does the Second Circuit's rule that an appeal from a substantially consummated plan is automatically equitably moot if the appellant did not pursue a stay, regardless of a stay's availability or any other equitable factors, undermine any prudential purpose for the doctrine?

- i. **Pursuit of Stay Required.** *U.S. Bank Nat'l Assoc. v. Windstream Holdings, Inc.*, 2022 U.S. App. LEXIS 29630 (2d Cir. Oct. 25, 2022); *In re Chateauguay Corp.*, 10 F.3d 944, 952-53 (2^d Cir. 1993); *Cobb v. City of Stockton (In re City of Stockton, Cal.)*, 909 F.3d 1256, 1263 (9th Cir. 2018).
- ii. **Pursuit of Stay One Factor.** *Cooperativa de Ahorro y Credito v. Fin. Oversight & Mgmt. Bd. (In re Fin. Oversight & Mgmt. Bd.)*,

989 F.3d 123, 129 (1st Cir. 2021); *In re Tribune Media Co.*, 799 F.3d 272, 278 (3d Cir. 2015), *cert. denied*, 577 U.S. 1230 (2015); *Bate Land Co. LP v. Bate Land & Timber LLC (In re Bate Land & Timber LLC)*, 877 F.3d 188, 195 (4th Cir. 2017); *Nexpoint Advisors, L.P. v. Highland Cap. Mgmt., L.P. (In re Highland Capital Mgmt., L.P.)*, 48 F.4th 419, 429-30 (5th Cir. 2022), *cert. pending*, 598 U.S. ___ (2023); *Ochadleus v. City of Detroit (In re City of Detroit)*, 838 F.3d 792, 798 (6th Cir. 2016); *In re VeroBlue Farms*, 6 F.4th at 889; *Dill Oil Co. v. Stephens (In re Stephens)*, 704 F.3d 1279, 1282-83 (10th Cir. 2013); *In re Club Assocs.*, 956 F.2d 1065, 1069 n.11 (11th Cir. 1992); *In re Aov Indus.*, 792 F.2d 1140, 1147 (D.C. Cir. 1986).

3. Does the Second Circuit’s rule that the appellant bears the burden of proof in showing lack of equitable mootness cause reviewing courts to speculate that effective relief is unavailable without any evidence?

- i. **Burden on Appellant.** *U.S. Bank Nat’l Assoc. v. Windstream Holdings, Inc.*, 2022 U.S. App. LEXIS 29630 (2d Cir. Oct. 25, 2022).
- ii. **Burden on Appellee.** *In re SemCrude, L.P.*, 728 F.3d 314, 321 (3d Cir. 2013); *In re Paige*, 584 F.3d 1327, 1339-40 (10th Cir. 2009); *In re Focus Media, Inc.*, 378 F.3d 916, 923 (9th Cir. 2004), *cert. denied*, 506 U. S. 811 (1992).

c. *Office of the United States Trustee v. John Q. Hammons Fall 2006, LLC*, 22-1238 (petition filed June 23, 2023).

QP: Whether the appropriate remedy for the constitutional uniformity violation found by this Court in *Siegel v. Fitzgerald* is to require the United States Trustee to grant retrospective refunds of the increased fees paid by debtors in U.S. Trustee districts during the period of disuniformity, or is instead either to deem sufficient the prospective remedy adopted by Congress or to require the collection of additional fees from a much smaller number of debtors in Bankruptcy Administrator districts.

- i. The petitioner does not identify a circuit split as the 11th, 10th and 2nd Circuit have ordered retrospective relief (*i.e.*, a refund to the debtor of the trustee fees). *USA Sales, Inc. v. Office of the United States Trustee*, No. 21-55643, 2023 U.S. App. LEXIS 20794 (9th Cir. Aug. 10, 2023); *United States Trustee Region 21 v. Bast Amron LLP (In re Mosaic Mgmt. Grp., Inc.)*, 71

F.4th 1341 (11th Cir. 2023); *In re Clinton Nurseries, Inc.*, 53 F.4th 15, 29 (2d Cir. 2022); *In re John Q. Hammons Fall 2006, LLC*, 2022 U.S. App. LEXIS 22859 (10th Cir. Aug. 15, 2022).

- ii. The question of retrospective relief is before one other Circuit: *Siegel v. United States Trustee Program*, No. 19-ap-3091, 2022 WL 17722849 (Bankr. E.D. Va. Dec. 15, 2022), direct appeal pending, No. 23-135 (4th Cir.).

III. Business Case Splits.

a. Does a Creditors Committee have an absolute right under 11 U.S.C. §1109(b) to intervene in an adversary proceeding?

- i. **Yes.** *Assured Guar. Corp. v. Fin. Oversight & Mgmt. Bd. For P.R. (In re Fin. Oversight & Mgmt. Bd. For P.R.)*, 872 F.3d 57 (1st Cir. 2017); *Official Unsecured Creditors' Committee v. Michaels (In re Marin Motor Oil, Inc.)*, 689 F.2d 445 (3d Cir. 1982).
- ii. **No.** *Richman v. First Woman's Bank (In re Richman)*, 104 F.3d 654 (4th Cir. 1997); *Vermejo Park Corp. Kaiser Coal Corp. (In re Kaiser Steel Corp.)*, 998 F.2d 783 (10th Cir. 1993); *Fuel Oil Supply and Terminaling v. Gulf Oil Corp.*, 762 F.2d 1283 (5th Cir. 1985).

b. Is subjective bad faith required to dismiss a chapter 11 case?

- i. **Yes.** *Carolin Corp. v. Miller*, 886 F.2d 693 (4th Cir. 1989).
- ii. **No.** *LTL Mgmt., LLC v. Those Parties Listed on Appendix A (In re LTL Mgmt., LLC)*, 64 F.4th 84 (3d Cir. 2023).

c. What does the term "necessary" in 11 U.S.C. §1113(b)(1)(A) require the trustee to prove to obtain the rejection of a collective bargaining agreement?

- i. **The proposed modifications must contain necessary but not absolutely minimal changes.** *Truck Drivers Local 807 v. Carey Transp. Inc.*, 816 F.2d 82 (2d Cir. 1987).
- ii. **The proposed modifications must be essential to preventing a liquidation of the debtor.** *Wheeling-Pittsburg Steel Corp. v. United Steelworkers of Amer. AFL-CIO-CIS*, 791 F.2d 1074 (3d Cir. 1986).

- d. May a corporation recover damages pursuant to 11 U.S.C. §362(h) for a violation of the automatic stay, or is recovery limited to human being debtors?**
- i. **No, corporations may not recover damages pursuant to §362(h).** *Spookyworld Inc. v. Town of Berlin (In re Spookyworld Inc.)*, 346 F.3d 1 (1st Cir. 2003); *Sosne v. Reinert & Duree, P.C. (In re Just Brakes Corp. Sys., Inc.)*, 108 F.3d 881 (8th Cir. 1997); *Jove Eng'g, Inc. v. IRS*, 92 F.3d 1539 (11th Cir. 1996); *Havelock v. Taxel (In re Pace)*, 67 F.3d 187 (9th Cir. 1995); *Johnston v. Envt'l Corp. v. Knight (In re Goodman)*, 991 F.2d 613 (9th Cir. 1993); *Mar. Asbestosis Legal Clinic v. LTV Steel Co. (In re Chateaugay Corp.)*, 920 F.2d 183 (2^d Cir. 1990).
 - ii. **Yes, corporations may recover damages pursuant to §362(h).** *Cuffee v. Atl. Bus. & Cmty. Dev. Corp. (In re Atl. Bus. & Cmty. Dev. Corp.)*, 901 F.2d 325 (3^d Cir. 1990); *Budget Serv. Co. v. Better Homes of Va., Inc.*, 804 F.2d 289 (4th Cir. 1986).
- e. May a debtor classify an undersecured lender's claim separately from other unsecured claims based solely upon the different origins of an unsecured claim?**
- i. **No.** *Boston Post Rd. Ltd P'ship v. Fed. Deposit Ins. Corp. (In re Boston Post Rd. Ltd. P'ship)*, 21 F.3d 477 (2^d Cir. 1994), cert. denied, 513 U.S. 1109 (1995); *John Hancock Mut. Life Ins. Co. v. Route 37 Bus. Park Assocs.*, 987 F.2d 154 (3^d Cir. 1993); *Travelers Ins. Co. v. Bryson Props., XVIII (In re Bryson Props., XVIII)*, 961 F.2d 496 (4th Cir. 1992); *Phoenix Mutual Life Ins. Co. v. Greystone III Joint Venture (In re Greystone III Joint Venture)*, 995 F.2d 1274 (5th Cir. 1991), cert. denied, 506 U.S. 821 (1992); *Lumber Exch. Bldg. Ltd. P'ship v. Mutual Life Ins. Co. of New York (In re Lumber Exch. Bldg. Ltd. P'ship)*, 968 F.2d 647 (8th Cir. 1992).
 - ii. **Yes, the debtor must separately classify.** *In re Woodbrook Assocs.*, 19 F.3d 312 (7th Cir. 1994).
- f. Is rent due under 11 U.S.C. §365(d) for the period between the petition date and date on which rent payments are first due post-petition (i.e., stub rent)?**
- i. **Yes, applying a proration approach and holding that rent is due for each day the debtor occupies the premises.** *K-4*,

Inc. v. Midway Engineered Wood Prods, Inc. (In re Treresource Indus., Inc.), 363 F.3d 994 (9th Cir. 2004).

- ii. **No, applying a billing date approach.** *In re Goody's Family Clothing, Inc.*, 610 F.3d 812 (3d Cir. 2010), *cert. denied*, 562 U.S. 1064 (2010); *HA-LO Indus., Inc. v. CenterPoint Props. Trust*, 342 F.3d 794 (7th Cir. 2003); *CenterPoint Props v. Montgomery Ward Holding Corp. (In re Montgomery Ward Holding Corp.)*, 268 F.3d 205 (3d Cir. 2001); *Koenig Sporting Goods, Inc. v. Morse Road Co. (In re Koenig Sporting Goods, Inc.)*, 203 F.3d 986 (6th Cir. 2000).

IV. Consumer Case Splits.

a. Is post-petition appreciation in the value of property during a chapter 13 case property of the estate upon conversion to chapter 7?

- i. **Yes.** *Castleman v. Burman (In re Castleman)*, 2023 U.S. LEXIS 19470 (9th Cir. July 28, 2023).
- ii. **No.** *Rodriguez v. Barrera (Barrera III)*, 22 F.4th 1217 (10th Cir. 2022).

b. Must the court dismiss a chapter 13 case when the debtor requests dismissal even if the filing was in bad faith?

- i. **Yes.** *Smith v. U.S. Bank N.A. (In re Smith)*, 999 F.3d 452 (6th Cir. 2021).
- ii. **No.** *Jacobsen v. Moser (In re Jacobsen)*, 609 F.3d 647 (5th Cir. 2010).
- iii. **Switching Sides.** *Nichols v. Marana Stockyard & Livestock Market Inc. (In re Nichols)*, 10 F.4th 956 (9th Cir. 2021) (yes); *Rosson v. Fitzgerald (In re Rosson)*, 545 F.3d 764 (9th Cir. 2008) (no).

c. Can a chapter 13 debtor cure a post-confirmation default on a mortgage after the five-year plan has expired?

- i. **No.** *Kinney v. HSBC Bank USA, N.A. (In re Kinney)*, 5 F.4th 1136 (10th Cir. 2021), *cert. denied sub. Nom.*, 2022 U.S. LEXIS 4578 (Oct. 11, 2022).

- ii. **Yes.** *In re Klaas*, 858 F.3d 820 (3d Cir. 2017); *Germeraad v. Powers*, 826 F.3d 962 (7th Cir. 2016).
- d. If the automatic stay is terminated pursuant to 11 U.S.C. §362(c)(3) is the stay terminated as to property of the estate or just as to the debtor and the debtor’s property?**
- i. **Stay terminated only as to debtor and debtor’s property.** *Rose v. Select Portfolio Servicing, Inc.*, 945 F.3d 226 (5th Cir. 2019), *cert. denied*, 141 S. Ct. 158 (2020).
 - ii. **Stay terminated as to property of the estate too.** *Smith v. Maine Bureau of Revenue Services*, 910 F.3d 576 (1st Cir. 2018).
- e. May the bankruptcy court lengthen the 180-day time period set forth in 11 U.S.C. §109(g) barring the refiling of a bankruptcy case?**
- i. **Yes.** *Dietrich v. Nob-Hill Stadium Properties*, 2007 WL 579547 (6th Cir. 2007); *In re Dempsey*, 247 Fed. App’x. 21 (7th Cir. 2007); *Casse v. Key Bank Nat’l Ass’n (In re Casse)*, 198 F.3d 327 (2d Cir. 1999).
 - ii. **No.** *Frieouf v. United States (In re Frieouf)*, 938 F.2d 1099 (10th Cir. 1991), *cert. denied*, 502 U.S. 1091 (1992).
- f. Whether the requirement in 11 U.S.C. §1328(a) that a debtor make “all payments under the plan” to receive a discharge includes payments made directly to a mortgage lender?**
- i. **Yes.** *Kessler v. Wilson (In re Kessler)*, 655 Fed. App’x. 242 (5th Cir. 2016).
 - ii. **No.** *Dukes v. Suncoast Credit Union (In re Dukes)*, 909 F.3d 1306 (11th Cir. 2018).
- g. What is the appropriate standard of review for determining whether an obligation is a consumer or business debt?**
- i. **Clear Error.** *Aspen Skiing Co. v. Cherrett (In re Cherrett)*, 873 F.3d 1060 (9th Cir. 2017).
 - ii. **De Novo.** *Stewart v. U.S. Trustee (In re Stewart)*, 175 F.3d 796 (10th Cir. 1999); *In re Booth*, 858 F.2d 1051 (5th Cir. 1988).

h. Is a late tax filing a “return” rendering the tax debt dischargeable under 11 U.S.C. §523(a)(1)(B)(i)?

- i. **Yes.** *Mass. Dept. of Rev. v. Shek (In re Shek)*, 2020 WL 372995 (11th Cir. 2020); *Smith v. IRS (In re Smith)*, 828 F.3d 1094 (9th Cir. 2016), *cert. denied*, 137 S. Ct. 1066 (2017); *Justice v. IRS (In re Justice)*, 817 F.3d 738 (11th Cir. 2016); *Maryland v. Ciotti (In re Ciotti)*, 638 F.3d 276 (4th Cir. 2011); *Colsen v. IRS (In re Colsen)*, 446 F.3d 836 (8th Cir. 2006); *In re Payne*, 431 F.3d 1055 (7th Cir. 2005); *United States v. Hatton (In re Hatton)*, 220 F.3d 1057 (9th Cir. 2000); *United States v. Hindenlang (In re Hindenlang)*, 164 F.3d 1029 (6th Cir. 1999).
- ii. **No.** *Fahey v. Mass. Dep’t of Rev. (In re Fahey)*, 779 F.3d 1 (1st Cir. 2015); *Mallo v. IRS (In re Mallo)*, 774 F.3d 1313 (10th Cir. 2014); *McCoy v. Mississippi State Tax Comm’n (In re McCoy)*, 666 F.3d 924 (5th Cir. 2012).

i. Does sovereign immunity prohibit an award of emotional distress damages against the United States for a willful violation of the automatic stay?

- i. **Yes.** *Hunsaker v. United States*, 902 F.3d 963 (9th Cir. 2018).
- ii. **No.** *United States v. Rivera Torres (In re Rivera Torres)*, 432 F.3d 20 (1st Cir. 2005).

j. Does a chapter 7 trustee have standing to extend the time to object to the dischargeability of a debt?

- i. **No.** *In re Farmer*, 786 F.2d 618 (4th Cir. 1986).
- ii. **Yes.** *Brady v. McAllister (In re Brady)*, 101 F.3d 1165 (6th Cir. 1986).

k. Whether a homestead exemption to which a debtor is entitled on the date he files for bankruptcy can vanish if the debtor sells his homestead during the pendency of bankruptcy proceedings and does not reinvest the proceeds in another homestead?

- i. **Yes, the exemption is eliminated.** *Wells v. McCallister*, No. 20-35984, 2021 WL 5755086 (9th Cir. Dec. 3, 2021), *cert. denied*, 143 S. Ct. 2449 (2023); *In re Jacobson*, 676 F.3d 1193 (9th Cir. 2012).

- ii. **No, the exemption is determined as of the petition date.** *In re Rockwell*, 968 F.3d 12, 23 (1st Cir. 2020), *cert. denied*, 141 S. Ct. 1372 (2021).
- iii. **Yes, in chapter 13 cases, but no in chapter 7 cases.** *In re DeBerry*, 884 F.3d 526 (5th Cir. 2018) (no in chapter 7 cases); *In re Frost*, 744 F.3d 384 (5th Cir. 2014) (yes, in chapter 13 cases).

V. Governmental Entity Cases.

a. Does the Takings Clause in the Fifth Amendment prohibit the impairment or discharge of prepetition claims for just compensation where a public debtor takes private property for public use?

- i. **Yes.** *Fin. Oversight & Mgmt. Bd. for Puerto Rico v. Cooperativa de Ahorro y Credito Abraham Rosa*, 41 F.4th 29 (1st Cir. 2022), *cert. denied* (2023).
- ii. **Perhaps, no, because the case relies heavily on California inverse condemnation law.** *Cobb v. City of Stockton (In re City of Stockton, Cal.)* 909 F.3d 1256 (9th Cir. 2018).

VI. Procedural and Jurisdictional Splits.

a. Does the bankruptcy court have the constitutional authority to enter a judgment granting a third-party release?

- i. **No.** *Purdue Pharma, L.P. v. City of Grande Prairie (In re Purdue Pharma L.P.)*, 69 F.4th 45, 68 (2d Cir. 2023).
- ii. **Yes.** *In re Millennium Lab Holdings II, LLC*, 945 F.3d 126, 137-40 (3d Cir. 2019).

b. Is the deadline to appeal a bankruptcy court decision set forth in Bankruptcy Rule 8002(a)(1) jurisdictional?

- i. **No.** *Tennial v. REI Nation, LLC (In re Tennial)*, 978 F.3d 1022 (6th Cir. 2020).
- ii. **Yes.** *In re Sobczak-Slomczewski*, 826 F.3d 429 (7th Cir. 2016), *cert. denied*, 137 S. Ct. 1119 (2017); *Berman-Smith v. Gartley (In re Berman-Smith)*, 737 F.3d 997 (5th Cir. 2013); *In re*

Caterbone, 640 F.3d 108 (3d Cir. 2011); *Emann v. Latture (In re Latture)*, 605 F.3d 830 (10th Cir. 2010).

c. When does the Trustee lose the protection of the *Barton* doctrine?

- i. **When the receivership/bankruptcy case is closed.** See *Chua v. Ekonomou*, 1 F.4th 948 (11th Cir. 2021) and *Tufts v. Hay*, 977 F.3d 1204 (11th Cir. 2020).
- ii. **The doctrine continues to apply after a receivership/bankruptcy case is closed.** *Satterfield v. Malloy*, 700 F.3d 1231 (10th Cir. 2012); *In re Crown Vantage, Inc.*, 421 F.3d 963 (9th Cir. 2005); *Muratore v. Darr*, 375 F.3d 140 (1st Cir. 2004); *In re Linton*, 136 F.3d 544 (7th Cir. 1998).

d. What is the level of culpability required for a trustee to be held personally liable for mistakes or misconduct?

- i. **Negligent Conduct.** *Le Blanc v. Salem (In re Mailman Steam Carpet Cleaning Corp.)*, 196 F.3d 1 (1st Cir. 1999); *In re Gorski*, 766 F.2d 723 (2d Cir. 1985); *Hall v. Perry (In re Cochise College Park, Inc.)*, 703 F.2d 1339 (9th Cir. 1983); *Red Carpet Corp. of Panama City Beach v. Miller*, 708 F.2d 1576 (11th Cir. 1983).
- ii. **Willful and Deliberate Conduct.** *Maxwell v. KPMG LLP*, 2008 WL 6140730 (7th Cir. 2008); *United States v. Sapp (In re S. Found Corp.)*, 641 F.2d 182 (4th Cir. 1987); *Ford Motor Credit Co. v. Weaver*, 680 F.2d 451 (6th Cir. 1982); *Sherr v. Winkler*, 552 F.2d 1367 (10th Cir. 1977).

e. May bankruptcy courts exercise supplemental jurisdiction?

- i. **No.** *Edge Petrol. Operating Co., Inc. v. GPR Holdings, L.L.C. (In re TXNB Internal Case)*, 483 F.3d 292 (5th Cir. 2007).
- ii. **Yes.** *Montana v. Goldin (In re Pegasus Gold Corp.)*, 394 F.3d 1189 (9th Cir. 2005); see also *Chapman v. Currie Motors, Inc.*, 65 F.3d 78 (7th Cir. 1995) (court assumed without deciding that 28 U.S.C. §1367 is not applicable to bankruptcy cases).

f. Does the doctrine of derivative jurisdiction apply when a trustee removes a case from state court and the state court lacks personal jurisdiction over the defendant?

- i. **The doctrine does not apply.** *Reynolds v. Behrman Capital IV PL*, 988 F.3d 1314 (11th Cir. 2021), *cert. denied*, 142 S. Ct. 239 (2021).
 - ii. **The doctrine applies.** *Aanestad v. Beech Aircraft Corp.*, 521 F.2d 1298(9th Cir. 1974); *Meyer v. Indian Hill Farm, Inc.*, 258 F.2d 287(2d Cir. 1958); *Garden Homes, Inc. v. Mason*, 238 F.2d 651 (1st Cir. 1956); *Block v. Block*, 196 F.2d 930(7th Cir. 1952).
- g. Does the waiver of sovereign immunity under Section 106(a)(1) bar the trustee from suing the government under Section 544(b) on a claim based on state law?**
- i. **Yes.** *In re Equip. Acquisition Res., Inc.*, 742 F.3d 743 (7th Cir. 2014).
 - ii. **No.** *Zazzali v. United States (In re DBSI Inc.)*, 869 F.3d 1004 (9th Cir. 2017); *Miller v. United States*, 71 F.4th 1247 (10th Cir. 2023).
- h. Does the doctrine of judicial estoppel include a presumption that the debtor acted in bad faith for failing to disclose an asset?**
- i. **Yes.** *Browning Mfg. v. Mims (In re Coastal Plains, Inc.)*, 179 F.3d 197 (5th Cir. 1999), *cert. denied*, 528 U.S. 1117 (2000); *Eastman v. Union Pac. R.R. Co.*, 493 F.3d 1151 (10th Cir. 2007).
 - ii. **No.** *Martineau v. Wier*, 934 F.3d 385 (4th Cir. 2019); *Ah Quin v. Cty of Kauai Dep't of Transp.*, 733 F.3d 267 (9th Cir. 2013); *Slater v. U.S. Steel Corp.*, 871 F.3d 1174 (11th Cir. 2017).
- i. Does a party that fails to appear at a hearing and object to the relief that is being sought lack standing to appeal the order that is entered?**
- i. **Yes.** *In re Schultz Mfg. Fabricating Co.*, 956 F.2d 686 (7th Cir. 1992).
 - ii. **No, so long as the party's pecuniary interests are directly and adversely impacted by the order.** *In re Matter of Point Center Financial, Inc.*, 890 F.3d 1188 (9th Cir. 2018); *White v.*

Univision of Va. Inc. (In re Urban Broad Corp.), 401 F.3d 236 (4th Cir. 2005).

j. Does the Social Security Act bar bankruptcy courts from exercising jurisdiction over Medicare provider agreements?

- i. **Yes.** *Florida Agency for Health Care Admin. v. Bayou Shores SNF, LLC (In re Bayou Shores SNF, LLC)*, 828 F.3d 1297 (11th Cir. 2016), *cert. denied*, 137 S. Ct. 2214 (2017); *Nichole Med. Equip. & Supply, Inc. v. TriCenturion, Inc.*, 694 F.3d 340 (3^d Cir. 2012); *BP Care, Inc. v. Thompson*, 398 F.3d 503 (6th Cir. 2005); *St. Vincent's Med. Ctr. v. United States*, 32 F.3d 548 (Fed. Cir. 1994); *Bodimetric Health Servs., Inc. v. Aetna Life & Cas.*, 903 F.2d 480 (7th Cir. 1990).
- ii. **No.** *Benjamin v. United States (In re Benjamin)*, 924 F.3d 180 (5th Cir. 2019); *Do Sung Uhm v. Humana, Inc.*, 620 F.3d 1134 (9th Cir. 2010).

VII. Avoidance Action Splits.

a. Must new value remain unpaid on the petition date to qualify as a preference defense?

- i. **No.** *Kaye v. Blue Bell Creameries, Inc. (In re BFW Liquidation, LLC)*, 899 F.3d 1178 (11th Cir. 2018); *Hall v. Chrysler Credit Corp. (In re JKJ Chevrolet, Inc.)*, 412 F.3d 545 (4th Cir. 2005); *Jones Truck Lines, Inc. v. Cent. States, Se. & Sw. Areas Pension Fund (In re Jones Truck Lines, Inc.)*, 130 F.3d 323 (8th Cir. 1997); *Mosier v. Ever-Fresh Food Co. (In re IRFM Inc.)*, 52 F.3d 228 (9th Cir. 1995); *Laker v. Vallette (In re Toyota of Jefferson, Inc.)*, 14 F.3d 1088 (5th Cir. 1994).
- ii. **Yes.** *Levin v. Verizon Business Global, LLC (In re One-Star Long Distance, Inc.)*, 872 F.3d 526 (7th Cir. 2017); *Comm. Of Sparrer Sausage Co. v. Jason's Foods, Inc.*, 826 F.3d 388 (7th Cir. 2016).

b. Does state or federal law govern an action to recharacterize debt as equity?

- i. **Federal Law Governs.** *Bayer Corp. v. MasoTech Inc. (In re AutoStyle Plastics Inc.)* 269 F.3d 726 (6th Cir. 2001) relying upon *Roth Steel Tube Co. v. Comm'r of Internal Revenue*, 800 F.2d 625 (6th Cir. 1986); *Redmond v. Jenkins (In re Alternate*

Fuels, Inc.) 789 F.3d 1139 (10th Cir. 2015); *Cohen v. KB Mezzanine Fund II (In re SubMicron Sys. Corp.)*, 432 F.3d 448 (3d Cir. 2006); *Fairchild Dornier GMBH v. Official Comm. Of Unsecured Creditors (In re Dornier Aviation (N. Am.), Inc.)*, 453 F.3d 225 (4th Cir. 2006); *Sender v. The Bronze Grp., Ltd., (In re Hedged-Invs. Assocs., Inc.)*, 380 F.3d 1292 (10th Cir. 2004).

- ii. **State Law Governs.** *Grossman v. Lothian Oil Inc. (In re Lothian Oil Inc.)*, 650 F.3d 539 (5th Cir. 2011); *Official Comm. Of Unsecured Creditors v. Hancock Park Capital II, L.P. (In re Fitness Holdings Int'l, Inc.)*, 714 F.3d 1141 (9th Cir. 2013).

c. Whether the rule in *BFP v. Resolution Trust Corp.* applies to regularly conducted tax foreclosure sales?

- i. **Yes.** *In re Tracht Gut, LLC*, 836 F.3d 1146 (9th Cir. 2016); *Kojima v. Grandote Int'l, LLC*, 252 F.3d 1146 (10th Cir. 2001); *T.F. Stone Co. v. Harper*, 72 F.3d 466 (5th Cir. 1995).
- ii. **No.** *Gunsalus v. County of Ontario*, 37 F.4th 859 (2d Cir.), *cert. denied*, 143 S. 447 (2022); *Hall v. Meisner*, Case No. 21-1700 (6th Cir. Oct. 13, 2022); *Smith v. SIPI, LLC*, 811 F.3d 228 (7th Cir. 2016), *cert. denied*, 580 U.S. 823 (2016).

VIII. Other Interesting Issues/Future Splits

a. Whether unsecured creditors of a solvent debtor are entitled to interest at the contract/state law rate or the federal judgment rate.

- i. In 2022, in a split decision, the Ninth Circuit rejected its prior precedent, *Oink v. Cardelucci (In re Cardelucci)*, 285 F.3d 1231 (9th Cir. 2002), which held that the federal judgment rate applied, and held in *In re PG&E Corp.*, 46 F.4th 1047 (9th Cir. 2022) that the contract or state law rate applied if the class of creditors was classified as unimpaired. The dissent would have held that no interest was due to an unimpaired creditor class in a solvent chapter 11 case.
- ii. The Fifth Circuit agreed with the Ninth Circuit. *See In re Ultra Petroleum Corporation*, 51 F.4th 138 (5th Cir. 2022). The Ninth Circuit held that the make whole premium included in the loan agreement must be paid notwithstanding that it qualifies as unmatured interest under 11 U.S.C. § 502(b)(2) because “the solvent-debtor exception” requires a debtor “to pay what it promised now that it is financially capable.” In addition, the

court held that interest must be paid on the claim at the state law or contract rate. Petitions for certiorari were denied in both cases. See *Ultra Petroleum Corporation v. Ad Hoc Committee of OpCo Unsecured Creditors*, 22-272 (cert. denied May 22, 2023); *Pacific Gas & Electric Co. v. Ad Hoc Committee of Holders of Trade Claims*, 22-733 (cert. denied May 22, 2023).

- iii. But a Delaware bankruptcy court reached the opposite conclusion in *Wells Fargo Bank, N.A. v. Hertz Corp. (In re Hertz Corp.)*, 637 B.R. 781 (Bankr. D. Del. 2021) and *Wells Fargo Bank, N.A. v. Hertz Corp. (In re Hertz Corp.)*, 2022 Bankr. LEXIS 3358 (Bankr. D. Del. Nov. 21, 2022). The Third Circuit has accepted the case for direct appeal and oral argument is scheduled for October 25, 2023.
- iv. The Fifth Circuit’s decision also raises another issue where a split is brewing – the enforceability of make whole premiums. The Fifth Circuit held that make-whole premiums are the economic equivalent of unmatured interest” and is therefore disallowed by 11 U.S.C. § 502(b)(2), except in instances where the debtor is solvent. The Third Circuit allowed a make-whole premium in *Delaware Trust Co. v. Energy Future Intermediate Holding Co. LLC (In re Energy Future Holdings Corp.)*, 842 F.3d 247 (3d Cir. 2016), but the Second Circuit disallowed make-wholes in *BOKF NA v. Momentive Performance Materials Inc. (In re MPM Silicones LLC)*, 874 F.3d 787 (2d Cir. 2017), cert. den. sub nom *BOKF N.A. v. Momentive Performance Materials Inc.*, 138 S. Ct. 2653 (2018).

b. Section 546(e) Safe Harbor Post-Merit Management – The Second Circuit gutted the Supreme Court’s holding in *Merit Management Group LP v. FTI Consulting Inc.*, 138 S. Ct. 883 (2018) in *In re Tribune Co. Fraudulent Transfer Litigation*, 946 F.3d 66 (2d Cir. 2019), holding that a customer of a financial institution becomes a financial institution and thus, the safe harbor applied even though on the facts, the transfers at issue were nearly identical to those the Supreme Court held in Merit management were not protected by Section 546(e). The Solicitor General weighed in, arguing the Second Circuit decision was incorrect, but that certiorari should not be granted because there was no circuit split yet. The Court denied, cert. *Deutsche Bank Trust Co. v. Robert R. McCormick Foundation*, 946 F.3d 66 (2d Cir. 2019), cert. denied, 141 S. Ct. 2552 (2021).

c. What is the rule for enforcing arbitration clauses in bankruptcy cases? In *Epic Systems Corp. v. Lewis*, 138 S. Ct. 1612 (2018), the Court held that an arbitration agreement is enforceable in the absence of a contrary legal or equitable basis not to enforce it and that the language of the statute must be clear and manifest to override the agreement. In *Shearson American Express, Inc. v. McMahon*, 482 U.S. 220 (1987), the Court held that the Federal Arbitration Act does not make arbitration agreements more enforceable than other agreements and thus a court can decline to enforce an arbitration agreement if there is an inherent conflict between the agreement and the purpose of the statute. Pre-*Epiq*, five circuits held that bankruptcy courts may disregard arbitration clauses if: (i) the dispute is a core proceeding; and (ii) arbitration conflicts with a purpose of the Bankruptcy Code. See *In re Anderson*, 884 F.3d 382 (2d Cir. 2018), *cert. denied*, 139 S. Ct. 144 (2018); *Kirkland v. Rund (In re EPD Inv. Co.)*, 821 F.3d 1146 (9th Cir. 2016); *Whiting-Turner Contracting Corp. v. Elec. Mach. Enters. Inc. (In re Elec. Mach. Enters. Inc.)*, 479 F.3d 791 (11th Cir. 2007); *Mintze v. Amer. Gen'l Fin'l Servs., Inc. (In re Mintze)*, 434 F.3d 222 (3d Cir. 2006); *White Mountain Mining Co., LLC v. Congelton LLC (In re White Mountain Mining Co., LLC)*, 403 F.3d 164 (4th Cir. 2005).