INFORMATION ON REPORTING CLE CREDITS FOR THIS COURSE

Colorado attorneys and judges may report CLE Credits earned at this seminar or homestudy by logging into the Online CLE Transcript. You can access the online entry of Affidavits by visiting http://www.cletrack.com Click on CLE Transcripts, login and select Enter Online Affidavits. You can enter your affidavit using the Course ID located on the lower left corner of your affidavit.

Please note: All homestudies that are accredited are valid for two years, expiring in the month of December of the two-year period. Some courses are reapplied for through the Supreme Court Board for an extended time. Please contact CLE at (303) 860-0608 if you have any further questions.
AGENDA

3:30 PM: Registration

4:00 PM: Bankruptcy Case Law Update

Discussion Includes recent bankruptcy cases of interest issued by the Supreme Court, the Tenth Circuit Court of Appeals, the Bankruptcy Appellate Panel for the Tenth Circuit, and District Courts and Bankruptcy Courts within the Tenth Circuit

Presented by Honorable Joseph G. Rosania, Nicole M. Detweiler, Esq., and Matthew D. Skeen, Jr., Esq.

6:00 PM: Adjourn to Networking Reception Sponsored by the CBA Business Law Section
BIOGRAPHICAL INFORMATION

Honorable Joseph G. Rosania was appointed in December 2016 to the United States Bankruptcy Court, District of Colorado. He replaced Judge Sid Brooks who retired after serving as a Bankruptcy Court Judge for 28 years. Prior to taking the bench, Judge Rosania practiced as an attorney for more than 30 years in bankruptcy law and was a longtime Chapter 7 trustee. His experience also includes serving as a Chapter 11 trustee, examiner, and counsel to unsecured creditors committees, and representing Chapter 11 debtors. He is a graduate of the University of Colorado Law School, and served as a judicial clerk for the Honorable Jay L. Gueck, United States Bankruptcy Court Judge, District of Colorado.

Nicole M. Detweiler, Esq., Allen Vellone Wolf Helfrich & Factor P.C., represents trustees, creditors and debtors in a wide variety of bankruptcy matters. Prior to joining her firm, Ms. Detweiler served as a judicial clerk for Judges Elizabeth Brown and Bruce Campbell of the United States Bankruptcy Court, District of Colorado. She also served as a judicial clerk for Judge Bruce Black of the United States Bankruptcy Court for the Northern District of Illinois. In law school, Ms. Detweiler served as editor for The John Marshall Law Review and was a member of the Moot Court Honors Council.

Matthew D. Skeen, Jr., Esq., Skeen & Skeen P.C., focuses on representing debtors, creditors and trustees in all areas of bankruptcy litigation in Colorado. His firm also handles cases involving probate and real estate matters as well as consumer advocacy matters. A graduate of the University of Colorado Law School, Mr. Skeen clerked for Judge Dennis A. Graham, Colorado Court of Appeals, and is a member of numerous professional legal associations, including the Colorado and Denver Bar Associations and the American Bankruptcy Institute.
Exemptions

*In re Long*, 843 F.3d 871 (10th Cir. 2016); *Nelson v. Long*, Case No. 16-6073, December 12, 2016

In an appeal from the US District Court for the Western District of Oklahoma, the 10th Circuit affirmed the district court and the bankruptcy court in holding that $60,000 worth of life insurance proceeds that the debtor received shortly before filing bankruptcy were exempt from his bankruptcy estate under Section 3631.1 of Oklahoma’s Insurance Code. The code section exempts from all demands in any bankruptcy proceeding “[a]ll money or benefits of any kind, including policy proceeds and cash values, *to be paid or rendered* to the insured or any beneficiary under any policy of insurance issued by a life, health or accident insurance company . . .” Okla. Stat. tit. 36, § 3631.1(A)(emphasis added).

The Trustee argued that the phrase “to be paid or rendered” placed a temporal limitation on the exemption and that the exemption is intended to apply only up to the point at which the policy proceeds are actually paid out. The 10th Circuit stated that the plain language appeared to support the Trustee’s argument because the common reading of “to be paid” is in the future tense. However, the Court concluded that two Oklahoma Supreme Court cases, which interpreted similarly worded insurance statutes, compelled the Court to interpret the statute in a broader manner with no temporal limitation on the money or benefits.

Lien Avoidance

*Clabaugh v. Grant (In re Grant)*, Case No. 16-6062 (10th Cir. September 20, 2016) (unpublished)

A bank, which had lost the ownership records to a safety deposit box, used information in the box to contact Mr. Jerry Grant, the Debtor, who falsely stated that the contents of the box belonged to him. The contents of the box, valuable coins and heirlooms worth approximately $2 million, actually belonged to June Clabaugh. When confronted, Mr. Grant claimed to have sold them for $488.00.

Ms. Clabaugh settled with the bank and received a $1.25 million judgment against Mr. Grant for conversion. She recorded her judgment, which attached a judicial lien on Mr. Grant's house. Mr. Grant filed bankruptcy and claimed an Oklahoma homestead exemption, exempting the entire value of the house from the bankruptcy estate. Mr. Grant then moved to avoid Ms. Clabaugh's lien under 11 U.S.C. § 522(f)(1)(A), which allows a debtor to remove a judicial lien on property to the extent to which it would impair a claimed exemption.

The bankruptcy court found that all the requirements for lien avoidance under § 522(f)(1)(A) were present and granted Mr. Grant's motion. Ms. Clabaugh appealed to the 10th Circuit BAP, which affirmed. The basis of her appeal was, among other arguments, that the bankruptcy court had the equitable power to deny Mr. Grant's right to avoid the judgment lien on his house because he was a dishonest debtor with a non-dischargeable debt who was concealing his assets from the court.
She argued that *Marrama v. Citizens Bank of Massachusetts*, 549 U.S. 365 (2007), supported a broad interpretation of the bankruptcy court’s power under § 105(a) to police bad faith and abuse of process.

On appeal from the BAP, the 10th Circuit Court of Appeals noted that the Supreme Court’s decision in *Law v. Siegel*, 134 S. Ct. 1188 (2014) refined Marrama’s holding by declaring that the equitable powers of the bankruptcy courts "must and can only be exercised within the confines of the Bankruptcy Code." Id. at 1194. The Court of Appeals affirmed the BAP, holding that "[h]owever persuasive Ms. Clabaugh’s equitable arguments may be, we agree with the BAP that, under *Siegel*, the bankruptcy court could not exercise its equitable powers to deny Mr. Grant’s § 522(f)(1)(A) avoidance motion because there is no statutory basis to do so."

**Chapter 13 Dismissal**

*In re Waring*, 555 B.R. 754 (Bkrtcy.D.Colo. 2016); Case No. 16-12624 TBM, August 22, 2016

Debtors, a married couple, filed a joint petition under Chapter 13. Husband died 26 days after filing the petition but before plan confirmation. The Court undertook what it felt was an independent duty to determine whether the plan should be confirmed or the case should be dismissed. Ultimately, the Court concluded that a debtor’s Chapter 13 case had to be dismissed if the debtor died before a plan was confirmed.

To determine if bankruptcy can offer a fresh start to a deceased debtor, the Court looked to various sources. It noted that the statutory framework of Chapter 13 required active participation in the case, e.g., attending a meeting of creditors and proposing a plan, that could only be completed by a living human being. The Court also relied heavily on Fed. R. Bankr. P. 1016 which states that upon death or incompetency of a Chapter 13 debtor “the case may be dismissed; or if further administration is possible and in the best interest of the parties, the case may proceed and be concluded in the same manner, so far as possible, as though the death or incompetency had not occurred.” The Advisory Committee note states that in Chapter 11 or 13, “the likelihood is that the case will be dismissed.” Finally, upon examination of relevant case law, the Court could only find examples of deceased debtors completing a plan and receiving a discharge when the plan had already been confirmed and payments had been commenced.

After digesting the above sources, the Court reasoned that “further administration” of a case is almost always impossible if a debtor dies before confirmation of a plan because “no terms for administration of the estate have been established.” The Court ordered that confirmation of the proposed plan be denied, that husband be dismissed as a debtor from the case, and that wife be allowed to continue as a separate debtor in the same case if such were her wishes.


The Debtor filed a Chapter 13 case with the sole purpose of stopping a foreclosure on her house. She failed to list or notify the majority of her other creditors who began to file claims after the claims bar date, to which the Debtor objected as untimely filed. The Debtor proposed five different
plans, none of which were confirmed. Two of her creditors filed a motion to convert to Chapter 7 under 11 U.S.C. § 1307(c), for cause, alleging bad faith and unreasonable delay. The Debtor filed a motion for voluntary dismissal. The Creditors objected to the Debtor’s motion to dismiss and the Debtor asserted an absolute right to dismiss her Chapter 13 case under 11 U.S.C. § 1307(b).

The Court was faced with a circuit split on whether a bad faith exception exists to the absolute right to dismiss a Chapter 13 case with no binding precedent in the 10th Circuit. Courts which have recognized a bad faith exception point to the U.S. Supreme Court’s decision in Marrama v. Citizen’s Bank of Massachusetts, 549 U.S. 365 (2007). Marrama did not specifically address § 1307, but rather a similarly worded provision of Chapter 7, 11 U.S.C. § 706, which sets the guidelines for conversion from Chapter 7 to Chapter 13.

The Court joined the District of Kansas in holding that a Chapter 13 debtors have an absolute right to dismiss their case (See In re Mills, 539 B.R. 879 (Bkrtcy.D.Kan. 2015). The Court wrote that “the statutory language of the Code, and the conflicting case law addressing this issue, compel the Court to dismiss the Debtor’s chapter 13 case, rather than convert the Debtor’s case to one under Chapter 7 for bad faith.”

The court did find that the Debtor had acted in bad faith, characterizing her conduct during the case as “egregious.” Rather than convert the case, the court found “grounds to impose conditions and sanctions in connection with dismissal of the case.” The court barred the Debtor from filing another case for 180 days, declared her debts non-dischargeable barring final orders from a state court and a bankruptcy court ruling on dischargeability, and requiring specific permission from the court to file another case within three years.

**Student Loan Debt**

*In re Robinson,* Case No. 15-21797-HRT, 560 B.R. 352 (Oct. 26, 2016)

The UST moved to dismiss the Debtor’s Chapter 7 case arguing that it was an abuse of the Bankruptcy Code under 11 U.S.C. § 707(b)(2) because the majority of Debtor’s debts are consumer debts and her disposable income over five years exceeds 25% of her non-priority unsecured debts. The UST also sought dismissal under Section 707(b)(3), the totality of the circumstances. Debtor filed for bankruptcy relief, claiming that her debts were primarily non-consumer debts. The UST and the Debtor disagreed as to whether Debtor’s student loan debts were properly classified as “consumer” versus “non consumer” debts for purposes of the means test and the abuse standards. The outstanding balance of Debtor’s student loan debt, as of the petition date, was $69,208.82.

The Court held that Debtor’s student loan debts were consumer debts and thus granted the UST’s motion to dismiss under section 707(b)(2). In doing so, the Court cited to the case of *In re Palmer,* 542 B.R. 289 (Bankr. D. Colo. 2015) and found that the student loan debts at issue were consumer debts because they were not incurred “with a motivation to benefit an existing business or in furtherance of an ongoing job or business requirement.” *Robinson,* 560 B.R. at 355 (citing *In re Palmer,* 542 B.R. at 297). The Court noted that Debtor’s education was not required to maintain her employment and instead satisfied her personal goal of professional advancement and enhanced
her personal financial prospects. After analyzing the UST’s analysis of Debtor’s financial situation, which was unrebutted by Debtor, the Court found that an unrebutted presumption of abuse arose under Section 707(b)(2) and dismissed the case.

The Court also found that cause existed to dismiss the case under section 707(b)(3) because Debtor had the ability, over the course of a five year chapter 13 plan, to repay the entirety of her student loan debt and every other claim filed in the case. Noting that the Debtor’s ability to pay is a strong indication of abuse under Section 707(b), the Court found that the totality of the circumstances showed that granting relief under chapter 7 would constitute an abuse. The Court granted the UST’s motion to dismiss and dismissed the case.

_Palmer v. Laying, 559 B.R. 746 (D. Colo. 2016)_

Debtors filed for chapter 7 relief and listed a student loan debt of $9,312 on their schedules. The UST thereafter filed a motion to dismiss, alleging that the Debtors’ debts were primarily consumer debts, including the student loan debt, and that a presumption of abuse arose under Section 707(b)(2). Before the scheduled evidentiary hearing in the bankruptcy court, the parties agreed to limit the scope of the dispute and agreed that if the court found that the student loan debt was a consumer debt, then the motion to dismiss should be granted. Conversely, if the court found that the student loan debt was not a consumer debt, the motion to dismiss should be denied. After the evidentiary hearing, the Bankruptcy Court determined that the student loan debt was a consumer debt and thus granted the motion to dismiss. The Debtors appealed.

On appeal, the District Court reversed and remanded, finding that student loan debt at issue was a non-consumer debt. The Court said he was bound by the Tenth Circuit’s 1999 decision in Stewart III, which says that non-consumer debts are distinguished by a “profit motive.” The Court noted that the Tenth Circuit has given little guidance on how to characterize educational expenses, leaving the case before the Court to fall “nicely into the void left unresolved by Stewart III.”

The District Court noted that student loans can be non-consumer if they are “incurred primarily as a business investment in oneself.” Significantly, the Court said a debtor is not required to have achieved his or her objectives before a loan is classified as non-consumer. On the other hand, he said that a student must show an attempt at using the education to realize profit. If a former student, for example, takes out loans but only aims for a job requiring no education, the loans would be consumer in nature.

The Chapter 7 debtor's student loan debt, incurred in undertaking a doctorate program in business administration, was not consumer debt, although the debtor's employer did not require that he take the courses and did not pay for the program, where the debtor undertook the program with a profit motive, in that his personal goal in undertaking the program was to advance his business knowledge and, ultimately, own and run a profitable business. The debtor's education could properly be characterized as a business investment in himself.

_Turnover_

The Trustee in a Chapter 7 bankruptcy case filed a motion for turnover and request for a 90-day extension to object to the Debtor’s discharge. His turnover motion sought a fairly extensive and varied list of assets, documents, and information including an account receivable allegedly paid the day after filing, copies of loan and credit applications, loan documents, titles to vehicles, tax returns, and an “explanation concerning the disposition of property awarded to [Debtor] in his most recent divorce decree”. Although the Debtor did not object to the motion, the bankruptcy court denied both the requests for an extension and for turnover. As grounds for denying the motion, the bankruptcy court stated that the Trustee’s motion lacked sufficient detail as to the requested relief, failed to demonstrate that the requested items were in the possession or control of the Debtor, and that information and explanations were not properly the subject of a turnover motion, but rather should be obtained either informally or through a Rule 2004 examination. The Court denied the extension because the Trustee had not stated any cause. The Trustee appealed.

The BAP held that the Trustee’s request for an extension was moot because the Trustee had not requested a stay pending appeal and even if the additional 90-days were granted the deadline to object had long passed.

On the turnover issue, the BAP reversed the bankruptcy court and reached several conclusions regarding the duties of a debtor and the trustee’s options for forcing a debtor to comply with those obligations. The BAP specifically considered the debtor’s duties to deliver property of the estate under § 542(a), to cooperate with the trustee under § 521(a)(3), and to surrender to the trustee any recorded information related to the property of the estate under § 521(a)(4). The BAP held that the Trustee’s requests were proper, that present possession was not a prerequisite for ordering turnover of estate property (citing *In re Ruiz*, 455 B.R. 745 (10th Cir. BAP 2011), and that a turnover motion was an acceptable means to enforce the Debtor’s duty to surrender documents and information, there being nothing in the code or the rules which required the Trustee to first conduct an inquiry under Rule 2004.

**Collateral Estoppel**

*Hoffman v. Educational Credit Management Corporation (In re Hoffman), Case No. 15-01484-HRT; Order entered September 7, 2016*

The Debtor and his wife filed Chapter 13. Education Credit Management Corporation (“ECMC”) filed a proof of claim for student loan distributions made between 1990 and 1992. The Debtor objected to the proof of claim and asked the court to issue a declaratory judgment that the debt was invalid and not owed by the Debtor. ECMC failed to respond to the objection so the claim was disallowed, but the court stated that it would not make a determination as to the dischargeability of the claim because no adversary had been filed.

A year later the Debtor opened an adversary procedure for determination of dischargeability under § 523(a)(8). ECMC filed a motion for summary judgment asserting, primarily, that the outcome of a 2005 Wage Withholding Administrative Hearing in its favor should be given preclusive effect under res judicata and/or collateral estoppel.
The bankruptcy court held that res judicata did not apply because the administrative hearing did not involve the same cause of action, dischargeability claims being substantially different from ordinary collection proceedings (citing Brown v. Felson, 422 U.S. 127 (1979)). However, it held that all the elements of collateral estoppel (identical issues, identical parties, final adjudication on the merits, and full and fair opportunity to litigate) had been met and therefore the debt’s validity had already been determined and the Debtor’s claims were barred. The bankruptcy court further found that the Debtor had not raised any specific facts that evidenced a genuine issue for trial and thus granted summary judgment in favor of ECMC.

**David Terrell v. Internal Revenue Service, BAP No. 16-7, United States Bankruptcy Court for the Western District of Oklahoma, February 17, 2017 (unpublished)**

In 2005, Mr. Terrell pled guilty to filing a false tax return for the 1997 tax year. He was ordered to pay approximately $16k in restitution and was assessed approximately $116,000 for income tax and interest. He filed a Chapter 7 bankruptcy petition in 2010 and received his discharge. In 2015, Terrell filed an adversary proceeding seeking a determination that any amounts owed to the IRS had been paid in full or discharged. The IRS filed a motion for summary judgment, arguing that as a result of the plea agreement Terrell was barred by collateral estoppel from disputing any material facts in the adversary. The bankruptcy court granted summary judgment to the IRS and concluded that Terrell’s tax liability was nondischargeable under § 523(a)(1)(C) (filing a fraudulent return or willfully attempting to evade paying taxes). Terrell appealed the summary judgment order to the BAP.

The BAP held that the bankruptcy court did not err in concluding that collateral estoppel prevented Terrell from challenging the nondischargeability of his tax debt. The BAP reviewed the bankruptcy court’s application of the collateral estoppel doctrine and determined, de novo, that all the necessary elements of collateral estoppel were met. The factual issues underlying the criminal conviction were the same issues in considering nondischargeability under § 523(a)(1)(C). His guilty plea constituted a full adjudication on the merits. Terrell and the IRS were the identical parties in the criminal case and the adversary. Terrell had a chance to fully and fairly litigate the criminal case.


Debtor filed the underlying Chapter 7 bankruptcy case. The claimants in an underlying FINRA arbitration (“Claimants”) sought relief from the automatic stay to confirm the arbitration award. In the underlying FINRA arbitration, Claimants alleged that Debtor sold them securities in circumstances that constituted fraud and a violation of federal and state securities laws. Debtor filed an answer denying liability. The FINRA panel required the Claimants to prove both liability and damages, which they did, and an Award was entered, wherein the panel stated that it had “found multiple violations of the Colorado State and Federal Securities Laws.” The Award further stated that the “arbitrators had provided an explanation of their decision in this award. The explanation is for the information of the parties only and is not precedential in nature.”
The bankruptcy court granted relief from the automatic stay and the Claimants confirmed the arbitration Award in state court. Debtor did not oppose the effort to obtain confirmation nor did he appeal that order and judgment. The Claimants then initiated an adversary action, seeking to have the FINRA award debt declared non-dischargeable under §523(a)(19) of the Bankruptcy Code, which excludes the discharge in bankruptcy of any debt for the violation of any federal or state securities laws. The bankruptcy court granted Claimants’ motion for summary judgment and Debtor appealed.

On appeal, Debtor argued that the bankruptcy court erred when it applied collateral estoppel to the FINRA Award and the state court order confirming the Award as a basis for finding the underlying debt non-dischargeable. In rejecting that argument, the District Court applies the more stringent Colorado standard, which only applies when (1) the issue is identical to an issue actually litigated and necessarily adjudicated in the prior action; (2) the party against whom estoppel is sought was either a party to the prior action or in privity with a previous party; (3) a final judgment was entered on the merits in the prior proceeding; and (4) the party against whom estoppel is sought had a full and fair opportunity to litigate the issues in the prior proceeding.

The Court found that the Panel required the Claimants to prove both liability and damages and that the Panel made conclusions of law, finding multiple violations of Colorado state and federal securities laws. The statements made in the Award demonstrate that the issue of securities law violations was actually litigated and necessarily adjudicated, as was the issue of damages attributable to those violations. The Court also rejected Debtor’s argument that he did not have a full and fair opportunity to litigate the issue, finding that a person who was on notice that this issue was being litigated and was a party to that litigation may not claim that he did not have a full and fair opportunity to litigate solely because he chose not to participate in the litigation. Accordingly, the FINRA Panel and the corresponding damages awarded involve a liability that is not dischargeable under §523(a).

**Settlement**

*Scott v. King (In re Amerson), Case No. 15-1343 (10th Cir. October 28, 2016)*

The Debtor in a case filed under Chapter 7 did not list her interest in a spendthrift trust that was set up by her father as part of a pour-over will, nor did she amend her schedules to list her part in a will-contest brought against her mother and brother by the Debtor and her half-sister. After the case was closed “no-asset”, the Debtor reopened her case to amend Schedule B to list a claim for wrongful foreclosure. The amended Schedule B also included the probate case with value listed as “unknown $0.00”. The Trustee withdrew his notice of no-asset report, was successfully substituted for the Debtor in the will contest, and settled in mediation.

The Debtor objected to the motion to approve the settlement agreement. The bankruptcy court held an evidentiary hearing and approved the settlement based on the cost and complexity of the litigation and the uncertain likelihood of prevailing. The BAP affirmed the bankruptcy court’s ruling. At the Tenth Circuit, the Debtor argued that the bankruptcy court lacked subject matter jurisdiction under 28 U.S.C. § 1334(e)(1) to administer her interest in the spendthrift trust because
it was not an asset of the estate under 11 U.S.C. § 541(c)(2). Section 541(c)(2) recognizes restrictions on the transfer of a beneficial interest in a trust if enforceable under state law.

The Tenth Circuit held that the § 541(c)(2) exclusion is permissive rather than mandatory, citing the Ninth Circuit case of *Rains v. Flinn (In re Rains)*, 428 F.3d 893, 905 (9th Cir. 2005) and that it is a debtor’s choice whether the interest is included in the bankruptcy estate. The Tenth Circuit held that the Debtor’s interest in the spendthrift trust was the kind of interest which, under Florida law, could be excluded under § 541(c)(2). However, because she had listed the interest in her amended Schedule B, and had never argued that it was excluded in the bankruptcy court, insisting rather that the trust was invalid because the will was invalid, the Court decided that the Debtor had opted to include the interest in the estate. The Tenth Circuit also held, even though the Debtor did not raise the argument, that the interest in the will contest was not subject to any spendthrift provision and thus was also property of the estate.


Debtor D.J. Christie, Inc., its principal D.J. Christie, and another defendant owed Alen Meyer and John Pratt $7.1 million after a failed real estate venture resulted in a federal jury verdict and judgment. The Christie parties, in turn, acquired state court judgments in Iowa against Meyer and Pratt for approximately $7.4 million. Meanwhile, plaintiff Liberty Bank had two judgments against Alan Meyer totaling $948,084.11. Liberty Bank attempted to collect on these judgments by serving Christie with a garnishment summons. Christie claimed it had the right to offset the acquired judgments. Christie then filed Chapter 11 bankruptcy in Kansas and initiated an adversary proceeding to offset the federal judgments against it with the Iowa judgments in its possession. Christie and Meyer and Pratt entered into a settlement agreement in which the parties agreed to the offset and a $1.8 million payment from D.J. Christie, Inc. to Meyer and Pratt. Liberty Bank was not a party to the settlement, but intervened, objecting to the offset as improper and to the settlement on the grounds that it impaired its rights as garnishing creditor.

The bankruptcy court approved the settlement, but the district court reversed and remanded. On remand, the bankruptcy court again approved the settlement agreement. The district court affirmed and denied rehearing and Liberty Bank appealed. The 10th Circuit affirmed. The 10th Circuit held that the bankruptcy court had fulfilled its role by canvassing the issues to determine whether the settlement was fair and equitable and in the best interests of the estate, and that it’s analysis of four factors impacting approval (chance of success on the merits, problems in collecting judgment, expense and complexity of the litigation, and interest of creditors (citing *In re Rich Global*, 652 F. App’x 625, 631 (10th Cir. 2016))) was sound.

The 10th Circuit determined that Liberty Bank’s rights as a third party intervenor were not unfairly compromised for numerous reasons. Liberty Bank was allowed to intervene; the bankruptcy court conducted two separate reviews of the settlement and came to the same conclusion; Liberty Bank’s claims against Meyer remained intact; the agreement imposed no legal duty on Liberty Bank; the bankruptcy court found no ground to deny the offset that the parties to the agreement had agreed to; the bankruptcy court was not required to conduct an evidentiary hearing; and Liberty Bank’s garnishment rights did not take priority over the prior offsetting judgments under Kansas state law.
Property of the Estate


United Western Bancorp, Inc., a bank holding company, was the Debtor in a Chapter 11 case which was converted to Chapter 7. Prior to the bankruptcy, the Debtor filed consolidated federal income tax returns for itself and 13 affiliated companies for the 2008 tax year. The affiliated group of companies included United Western Bank, a failed bank in FDIC receivership. The Debtor requested a $4 million loss carryback tax refund based on United Western’s offset of 2010 net operating losses against 2008 income.

The Chapter 7 Trustee claimed entitlement to the refund on behalf of the Debtor. The FDIC claimed entitlement to the refund on behalf of United Western, arguing that the Debtor had acted as a mere conduit of the refund and had no real rights thereto. The Chapter 7 Trustee sought a declaratory judgment under Section 541 and turnover of the refund under Section 542 of the Bankruptcy Code. The FDIC counterclaimed and the parties filed cross-motions for summary judgment. The facts were undisputed. The parties agreed that ownership of the tax refund, which had been deposited in the registry of the court, should be decided primarily based upon a Tax Allocation Agreement, which provided for an equitable allocation of the tax liability between the members of the affiliated group of companies.

The Court concluded that the Debtor had a legal interest in the tax refund in its capacity as a holding company which wholly owned United Western and the other companies. Under the Tax Allocation Agreement, the Internal Revenue Code, and Internal Revenue Service regulations, the Debtor owned the tax obligation, and thus rights to the refund. In the Court’s view, the FDIC had not met its burden to show that it owned a beneficial interest in the tax refund. The Tax Allocation Agreement was found to have created a debtor-creditor relationship between the Debtor and United Western. The Court granted summary judgment to Chapter 7 Trustee and declared the tax refund property of the estate.

Dischargeability


In this Chapter 13 case, the State of Colorado filed a complaint under § 523(a)(2)(A) to determine the dischargeability of $18,452.93 arising from overpaid unemployment compensation. Prior to bankruptcy, the Debtor had lost an appeal of a Determination of Overpayment of Benefits and Demands for Payment in the Appeals Section of the Colorado Department of Labor and Employment, which made a specific determination of fraud. The Debtor had misrepresented the dates of his employment and the hours he had worked. The assessed liability consisted of $9,056 of overpaid benefits, $5,706.35 of statutory penalties, and $3,690.58 of collection fees. The Debtor filed a motion to dismiss, acknowledging that the overpaid benefits were non-dischargeable, but arguing that Colorado had no cause of action to seek a determination that the penalties and fees were not dischargeable in Chapter 13.
Judge McNamara, guided by the plain language of § 523(a)(2)(A) in conjunction with the Supreme Court’s opinion in *Cohen v. de la Cruz*, 523 U.S. 213 (1998), held that “penalties arising from overpaid unemployment compensation obtained by false pretenses, a fraudulent representation, or actual fraud are nondischargeable under Section 523(a)(2)(A) to the same extent as the restitutionary debt for overpaid unemployment compensation.” (internal quotations omitted).

The Debtor further argued that the State’s only cause of action for arguing the nondischargeability of penalties was § 523(a)(7), and this claim is not listed as an exception to discharge under § 1328(a)(2). The Court held that the discharge exceptions of § 1328(a)(2) are not exhaustive, and that the State should be treated as an ordinary creditor and therefore not limited to a single non-dischargeability claim. The Court stated that the State’s cause of action could be brought under either § 523(a)(2)(A) or § 523(a)(7) and that the two code sections could intersect without being completely duplicative.


The Debtor and her ex-husband entered into a pre-nuptial agreement under which attorney’s fees and costs would be paid to the prevailing party in any disputed divorce proceedings. The Debtor disputed the validity of the agreement and the appropriate amount of alimony. The Utah divorce court upheld the agreement and awarded the Debtor $15,000 a month in alimony and awarded her ex-husband $167,884.75 in attorney fees and costs at 6.99% per year. The divorce court order provided that the ex-husband could reduce his alimony payments by $5,000 until his fees were paid. The Debtor appealed the decision and lost, incurring an additional $77,745.33 in fees and costs. Later, the ex-husband filed a motion asking the divorce court to find that the Debtor had cohabitated and her alimony should be further reduced per the pre-nuptial agreement. Debtor opposed the motion. Following a trial, the divorce court reduced the Debtor’s alimony from $10,000 to $7,500 and awarded an additional $125,000 in fees and costs to the ex-husband. The Debtor appealed. After filing her appeal she filed Chapter 13 bankruptcy, but converted, first to chapter 11 and then to chapter 7. She again lost her appeal, and, after getting relief from stay, the divorce court awarded another $52,263.58 in attorney’s fees to her ex-husband.

The ex-husband filed a complaint seeking a determination of the dischargeability of the attorney’s fees judgment under § 523(a)(5) and (15). The Debtor filed an answer and counter claim asserting a violation of the automatic stay. The Debtor argued that by continuing to reduce the alimony payments to recoup the attorney’s fees without bankruptcy court permission, the ex-husband had violated the automatic stay. The ex-husband filed motions to dismiss under C.R.C.P. 12(b)(1) and (b)(6). The bankruptcy court dismissed the counter claim because it sought to alter the Utah state court orders in a manner prohibited by the Rooker-Feldman Doctrine. The Court also found that the ex-husband was following the orders of the Utah state court by paying the amount specified in the orders and judgments. The Court went on to rule in the ex-husband’s favor on summary judgment, holding that the attorney’s fees were not incurred solely as a result of the pre-nuptial agreement, but in the course of an on-going divorce proceeding and were thus non-dischargeable under § 523(a)(15).
On appeal, the 10th Circuit BAP affirmed the bankruptcy court on the dismissal of the counter claim and the determination of dischargeability. It held that the Debtor failed to argue against the Rooker-Feldman Doctrine on appeal and would not consider whether the bankruptcy court had erred in applying the doctrine. The BAP also affirmed nondischargeability on summary judgment, stating that “exceptions to discharge under § 523(a)(15) are construed more liberally than other provisions of § 523 (citing In re Taylor, 478 B.R. 419, 427 (10th Cir. BAP 2012), aff’d, 737 F.3d 670 (10th Cir. 2013).

Fraudulent Transfers


Ms. Nela-bovige bought a house in Fairplay with her own money and, without receiving advice or counsel, titled the house in her name along with her daughter and son-in-law (Mr. Kirst). Five months later, after speaking with an estate planner, the daughter and Mr. Kirst executed a quitclaim deed to transfer title to the house back to Ms. Nela-bovige. The daughter and Kirst lived with Ms. Nela-bovige in the house but “paid rent” in the form of utilities, trash, propane, snow removal, and general maintenance. Eventually Ms. Nela-bovige sold the house in Fairplay and the family moved to another house in Park County where they maintained the same arrangement.

Mr. Kirst filed bankruptcy, and the Chapter 7 Trustee filed a complaint seeking 1/3rd of the proceeds of the sale of the Fairplay house as a constructively fraudulent transfer under 11 U.S.C. § 548(a)(1)(B). The elements at issue in the case were whether Kirst had an interest in the property, and whether he was insolvent or rendered insolvent by the transfer.

The Court looked to state law to determine whether Nela-bovige made a gift of 1/3 interest in the Fairplay house to Kirst. If there was no gift, a resulting trust would arise in her favor. In Colorado, “[i]ntent controls and the presumption of a gift can be overcome by certain, definite, reliable, and convincing evidence, sufficient to leave no reasonable doubt that the intent of the parties was not in the nature of a gift.” (Citing Fister v. Fister, 122 Colo. 432, 435, 222 P.2d 620, 622 (Colo. 1950)).

The court found by strong and convincing evidence, “from the attendant facts and circumstances and her conduct which occurred subsequent to the transfer of title” that Nela-bovige did not intend the titling of the property to be a gift and that Kirst had only transferred bare legal title with no economic value. Finding no interest in the property, the Court did not address the question of whether Kirst was insolvent when the transfer occurred.

Rebein v. Cornerstone Creek Partners, LLC (In re Expert South Tulsa, LLC), Case No. 15-3190 (10th Circuit, Dec. 6, 2016)

The debtor owned a parcel of real estate subject to a $7.75-million mortgage and other liens totaling roughly $500,000. After defaulting on the mortgage loan, the debtor chose to find a buyer for the property rather than defend a foreclosure action brought by the mortgagee. It eventually found a buyer, Cornerstone Creek Partners, LLC (“Cornerstone”), who paid $3 million “contingent
on delivery of free and clear title.” At the closing, the purchase price was distributed as follows: $1.74 million to the mortgagee; $115,000 to other lienholders; $686,000 to the debtor’s unsecured creditors; and $261,000 to the debtor. Cornerstone then sold the property for $4.4 million eleven days after closing.

Debtor was forced into an involuntary bankruptcy, but promptly converted the case to Chapter 11 and sued Cornerstone to avoid the property sale, alleging a fraudulent transfer because it had not received reasonably equivalent value for the property. The bankruptcy court granted summary judgment dismissing the debtor’s suit and the BAP affirmed.

Debtor asserted two claims of fraudulent or constructively fraudulent transfer under federal and state law. Both claims require that a transfer of property by debtor have been for less than reasonably equivalent value. The Tenth Circuit began by noting that fraudulent-transfer statutes are for the protection of unsecured creditors and thus measured the value received in terms of the effect on those creditors. Significantly, the Court noted that “value” includes more than the exchange of cash, but also includes satisfaction of a debt.

The Tenth Circuit found that debtor not only received part of the $3-million purchase price from the sale, but also obtained the release of the more than $6 million it would still owe on the mortgage loan. The Court also dismissed the debtor’s argument that the mortgagee’s release of its debt was not in exchange for the property it sold, and, therefore, not value received as part of the deal. Finding that “extinguishment of the debt” was simultaneous with the rest of the deal, the Court concluded that “[s]imply put, the sale was undoubtedly a but-for cause of the extinguishment of the debt.” The Tenth Circuit affirmed the bankruptcy court’s decision to enter summary judgment against debtor.

**Automatic Stay**

*WD Equipment v. Cowen (In re Cowen), 15-1413 (10th Cir. Feb. 27, 2017)*

A lender repossessed the debtor’s truck prepetition. After filing chapter 13, the debtor requested the truck be returned. The creditor refused, claiming he had sold the truck before the bankruptcy filing. The debtor filed a motion to hold the creditor in contempt for willful violation of the automatic stay, which the bankruptcy court granted, directing the creditor to turn the truck over immediately, and threatening to impose monetary damages for willful violation of the stay under Section 362(k)(1).

When the creditor did not comply, the debtor opened an adversary proceeding. At trial, the creditor contended there was no stay violation because the debtor’s ownership interest was terminated by the sale before bankruptcy. The bankruptcy judge concluded that the creditor violated Section 362(a)(3) and imposed actual and punitive damages under Section 362(k)(1). On appeal, the district court set aside the calculation of damages but otherwise upheld the bankruptcy court.

The Tenth Circuit deepened an existing split among the circuits by ruling that passively holding an asset of the estate, in the face of a demand for turnover, does not violate the automatic stay in Section 362(a)(3) as an act to “exercise control over property of the estate.”
The majority rule, adopted by the Seventh, Second, Ninth and Eighth Circuits, views retention of estate property after demand for turnover as a violation of the automatic stay because the act of passively holding onto an asset constitutes “exercising control” over it, and such violates Section 362(a)(3).

Concluding that the language of the statute is “plain,” Judge McKay allied the Tenth Circuit with the District of Columbia Circuit by adopting the minority rule: “only affirmative acts to gain possession of, or to exercise control over, property of the estate violate Section 362(a)(3).” Because the stay prohibits “doing something,” he said, “It does not cover ‘the act of passively holding onto an asset.’” He described the majority as “driven more” by “practical” and “policy considerations” than by “faithful adherence to the text.”

Chapter 13 Objection to Discharge

In re Diggins, Case No. 10-40335-JGR, Order entered December 20, 2016

The Court weighed in on the recent trend of lenders objecting to discharge at the conclusion of a Chapter 13 case because a debtor failed to make post-petition mortgage payments. In this case, the mortgage lender filed a response to the Trustee’s Notice of Final Cure Payment indicating Debtor had failed to make post-petition mortgage payments, but that the parties were in the process of a loan modification. As a result, the Trustee filed a motion to dismiss under § 1307 for failure to comply with provisions of the Debtor’s Chapter 13 Plan. Subsequently, the mortgage lender filed a supplemental response indicating the loan had been modified and the Debtor was no longer in default.

The Trustee conceded a loan modification may cure deficiencies in post-petition mortgage payments under some circumstances, but questioned the timing of the loan modification, which was not finalized until after the 60-month plan period had ended. Debtor argued it would be inequitable to deny discharge, when she had made mortgage payments for most of the plan term, but entered a loan modification with her mortgage lender when her income dropped during the last year of her plan, and, pursuant to instructions from her mortgage lender, did not make payments for a certain amount of time.

The Court recognized the holdings of other divisions of this Court that post-petition mortgage payments are “payments under the plan” pursuant to § 1328(a). However, the Court agreed with the reasoning of In re Binder, 224 B.R. 483, 490 (Bankr.D.Colo. 1998), that, for a creditor holding a “long-term debt secured only by a lien against the debtor’s residence” the debtor is allowed to “cure arrearages over a reasonable period of time” so long as they keep current with regard to other obligations. Here, the Court held any default was not material under § 1307(c)(6), because it was technical and temporary, and had since been cured to the mortgage lender’s satisfaction.

The Court also determined that, while §§ 1322 and 1325 prohibit a debtor and a bankruptcy court from knowingly extending a plan that extends beyond five years, these sections do not mandate dismissal of a bankruptcy case if a debtor needs a reasonable period of time to cure an unanticipated arrearage incurred during the sixty-month period. (Citing In re Handy, 557 B.R. 625, 628 (Bankr. N.D. Ill. 2016)).
Ultimately, the Court denied the Trustee’s motion to dismiss, determined it would be inequitable under these circumstances to deny discharge, and ordered the Clerk to enter Debtor’s discharge and close the case.

Subpoenas

In re SBN Fog Gap II, LLC, Case No. 16-13815-TBM and In re Fog Cap Retail Investors, LLC, Case No. 16-13817-TBM (jointly administered); Order entered December 8, 2016.

The Unsecured Creditors’ Committee served subpoenas to produce documents (subpoenas duces tecum) on two non-parties pursuant to Fed. R. Bankr. P. 2004 and 9016, as well as Fed. R. Civ. P. 45. The subpoenas were properly issued by the Bankruptcy Court for the District of Colorado but required that the entities produce documents in New York, New York. The subpoenaed entities contested the subpoenas by filing a motion to quash in the Bankruptcy Court for the District of Colorado. The Bankruptcy Court noted that the new version of Fed. R. Civ. P. 45(d)(3) mandates that attacks on subpoenas initially must be prosecuted in “the court for the district where compliance is required.” Because the subpoenas required compliance in New York, the Court held that it lacked authority to adjudicate the motion to quash and that the non-parties must seek relief in the United States District Court for the Southern District of New York (or possibly the Bankruptcy Court for the Southern District of New York).

Administrative Expense Claim

In re Escalera Resources Co., Bankruptcy 15-22395 TBM, February 10, 2017

Public utility creditor, PacifiCorp d/b/a Rocky Mountain Power (“PacifiCorp”), supplied electrical energy to the Debtor, Escalera Resources Co., before and after the Debtor sought protection under Chapter 11 of the Bankruptcy Code. PacifiCorp filed an Application under 11 U.S.C. § 503(b)(9) seeking approval of an administrative expense priority claim for the value of the electrical energy supplied by PacifiCorp to the Debtor during the 20-day period prior to the bankruptcy petition date. The Debtor opposed the Application arguing that electrical energy does not constitute “goods” under Section 503(b)(9).

This is an issue of first impression within the Tenth Circuit. The Court focused on the plain meaning of the word “goods” within the statutory framework. Since the term is not defined in the Bankruptcy Code, the Court analyzed the ordinary and legal meaning of the word “goods” in dictionaries and under a variety of legal regimes including the Uniform Commercial Code, federal antitrust law, federal labor law, federal energy regulatory law, state tort law, tax law, and international treaties. After analysis, the Court ultimately adopted the definition of “goods” in the UCC Section 2-105 for purposes of Section 503(b)(9) and determined that electrical energy constitutes “goods” within the ambit of Section 503(b)(9). Therefore, the Court granted administrative expense priority status for the value of electrical energy supplied by PacifiCorp to the Debtor during the 20-day period prior to the bankruptcy petition date.

Objection to Discharge (§727)

Rupp v. Pearson, Case No. 15-4191 (10th Circuit, Nov. 7, 2016)
Debtor filed for Chapter 13 relief and agreed in her confirmed plan to contribute her expected tax refund to the plan to the extent it exceeded $2,000. Instead, Debtor kept the entire $4,829 refund and spent it on non-exempt personal items. As a result, the bankruptcy court dismissed her Chapter 13 case. Two weeks later, she filed the current Chapter 7 case. The trustee filed an adversary complaint seeking to have her discharge denied due to her misappropriation of the tax refund with intent to defraud creditors, in violation of 11 U.S.C. § 727(a)(2)(A). The bankruptcy court found that the trustee had failed to allege facts to support the element of intent and it dismissed the complaint. The district court affirmed.

The Tenth Circuit inferred from the history of Debtor’s bankruptcy filings that she routinely filed Chapter 13 cases simply to forestall collection efforts and with no actual intention of complying with the terms of her own plans. She then filed for Chapter 7 relief as soon as the law allowed. The Tenth Circuit found that “[i]n our view, the [trustee’s] complaint states a plausible claim that [Debtor’s] failure to turn over to the Chapter 13 bankruptcy estate the required portion of the tax refund was part of a scheme to hinder and delay creditors.”

The court rejected the reasoning of the lower courts in finding that the complaint failed to state a claim for relief due to an absence of “fraud markers” and the fact that the complaint failed to negate the possibility of innocent uses of the tax refund. Rather, the circuit court noted that cases under § 727(a)(2)(A) are fact-specific and not subject to rigid formulas. Additionally, even if Debtor used the tax refund for legitimate expenses, she might still have filed her Chapter 13 case for the improper purpose of hindering and delaying her creditors. The possibility of exigent circumstances justifying Debtor’s actions could be raised in the course of the § 727(a)(2)(A) action but should not have led to dismissal of that claim.

Default Judgment

**Jeffrey Weinman v. James Kelley, III, BAP No. CO-16-004, Nov. 30, 2016**

Debtor appealed the bankruptcy court’s order denying his motion to set aside default judgment and order denying motion for reconsideration of default judgment. Debtor was a real estate investor who bought and sold real estate and leased various properties. He would routinely collect security deposits from his tenants in North Carolina and commingled them with his personal funds in violation of North Carolina law, and would regularly fail to return security deposits to tenants citing unsubstantiated claims that the tenants left the leased properties in a damaged state or owed bills. He filed one previous Chapter 11 bankruptcy in North Carolina which was ultimately dismissed prior to plan confirmation. In July 2013, the North Carolina Attorney General filed a complaint against him in connection with his violations of North Carolina law and his deceptive trade practices. On November 13, 2013, Debtor filed his second Chapter 11 case in Colorado. His case was converted to Chapter 7 in October 2014. Jeffrey Weinman was appointed as Chapter 7 Trustee.

On April 6, 2015, the North Carolina court entered judgment against Debtor requiring him to pay restitution, civil penalties, and attorney’s fees and included a permanent injunction against him from accepting further security deposits. The Trustee filed an adversary complaint against Debtor objecting to his discharge under Section 727(a)(2), (a)(3), (a)(4)(D), and (a)(5). The complaint
alleged that Debtor failed to provide information to the Trustee and that he undertook transactions with the intent to hinder, delay, and defraud creditors. The Trustee sent a complaint to Debtor’s address of record in Colorado. The Trustee thereafter filed an Amended Complaint and served Debtor via his Colorado address. On August 28, 2015, the Trustee filed a motion for default judgment, which was served via Debtor’s Colorado and North Carolina addresses.

The Court entered default judgment on September 14, 2015. On September 28, 2015, Debtor filed a motion to set aside default and default judgment under Rule 60(b), alleging that he did not receive the default judgment at the North Carolina address until September 14, 2015, the day that default judgment was entered. On December 31, 2015, the Court denied the motion to set aside default judgment and discussed at length each subsection of Rule 60(b) and concluded there was no basis to set aside default judgment. Debtor filed a motion to reconsider which the Court denied.

On appeal, Debtor argues that default judgment was void due to lack of notice and lack of personal jurisdiction. The Trustee argued that Debtor failed to raise this insufficient service argument in the bankruptcy court and thus it was waived and that even if he could assert the argument, the bankruptcy court found sufficient service. The BAP held that this argument was forfeited. The BAP also noted that under F.R.C.P. 12, any objection to personal jurisdiction is waived if the party fails to assert it in the first responsive pleading. The BAP goes on to state that even if they were to consider Debtor’s arguments, they are not persuasive. Debtor did not contest that he was properly served with the complaint and amended complaint and failed to answer either. Debtor’s argument of lack of notice fails because the F.R.C.P. does not require service of the default judgment motion on Debtor and the Rules do not predicate the completeness of service upon receipt but upon mailing. The BAP affirmed the bankruptcy court.

**Lien Stripping in Plan**

*Egbune v. Kiel (In re Egbune), CO-16-006 (10th Circuit BAP, Nov. 30, 2016)*

Debtor guaranteed a bail bond issued by A-1 Bail Bonds which was secured by a lien on debtor’s house. Debtor filed bankruptcy but failed to list A-1 as a creditor. A-1 actively participated in the case, filed a claim, and objected to debtor’s plan. A-1 withdrew its objection after debtor agreed that A-1’s lien on his house was not affected by the plan or otherwise stripped by debtor’s § 506 motion. The confirmed plan provided that A-1’s claim was secured by the house. After discharge, A-1 sought to foreclose its lien and debtor filed his objection to A-1’s claim, approximately 4 years after the claim was filed. The bankruptcy court looked at all the types of objections raised by Debtor and concluded that they all related to alleged misconduct in 2009 when the Note was signed or when the A-1 claim was filed in January 2012, and the bankruptcy court denied the claim objection.

On appeal, the Debtor argued that the bankruptcy court erred in holding that the A-1 Claim superseded the provisions of the Plan and further argued that the Plan and the § 506 motion stripped A-1’s lien, leaving A-1’s claim unsecured. Debtor claimed that the Plan superseded A-1’s claim and that its claim was extinguished because it was not recognized in the Plan. A-1 argued that the bankruptcy court did not strip the lien and that the Plan treated A-1 as a secured creditor retaining its lien on Debtor’s residence. The Court found that the 506 motion addressed the junior lienor
only and not A-1 and that the confirmation order contained no language stripping or extinguishing A-1’s lien.

The BAP noted that the bankruptcy court’s conclusion was consistent with Section 1327(a), which provides that confirmation of a chapter 13 plan is binding not only on the debtor but also every creditor whether or not the plan treats their claims or whether the creditor has objected or accepted the plan. Any action taken post-confirmation to otherwise alter the secured status provided by the plan is barred by res judicata. The BAP also noted that the bankruptcy court appropriately considered whether there was “cause” under Section 507(j) to reconsider the A-1 claim and the decision to overrule the claim objection was not “arbitrary, capricious or whimsical” or a “manifestly unreasonable judgment” and that the bankruptcy court correctly weighed the equities in determining that the equities weighed against reconsidering the A-1 claim.

Final Orders


Rhino purchased assets from the bankruptcy estate, including leases with COP, and COP alleged that Rhino defaulted on those leases. As a result, Rhino filed an adversary proceeding in Debtor’s bankruptcy case, seeking a declaratory judgment defining its obligations to COP. COP filed counterclaims against Rhino. Rhino filed a motion for summary judgment. Instead of ruling on the summary judgment motion, the bankruptcy court dismissed four claims and all counterclaims for lack of jurisdiction. The district court reversed dismissal of the claims, holding that the bankruptcy court erred when it concluded that it lacked jurisdiction to hear these claims and counterclaims. The district court remanded to the bankruptcy court to consider the summary judgment motion on the merits. Rather than accept the district court’s remand, COP filed an appeal challenging the district court’s ruling that the bankruptcy court had jurisdiction to hear the issues before it.

The Tenth Circuit held that the district court’s order was not a final and appealable order under 28 U.S.C. § 158(d)(1) and also that the collateral order doctrine is not applicable because the district court’s order is reviewable on appeal. The court concluded that it did not have jurisdiction because the district court remanded to the bankruptcy court for determination of the motion for summary judgment. The court also concluded that the collateral order doctrine does not apply because the order will be effectively reviewable on appeal.

**Omission from Schedules**

**Hermann v. Hartford Casualty Insurance Co., Case No. 16-1145 (10th Circuit, Jan. 12, 2017)**

In this action, Debtor claimed Hartford Casualty Insurance Co. (“Hartford”) unreasonably denied and delayed payment for his workers’ compensation claim. Hartford moved for summary judgment, arguing that Debtor’s action should be barred under the doctrine of judicial estoppel because Debtor did not disclose his claim against Hartford in his bankruptcy petition.
Hermann had disclosed a potential personal injury claim in his schedules, but did not disclose a potential claim against Hartford. Debtor was discharged in November, 2010, and the suit against Hartford was filed in October, 2011. When Hartford sought summary judgment, Debtor reopened the bankruptcy case to include the claim against Hartford. The bankruptcy court also approved an agreement between the Trustee and Debtor assigning the bankruptcy estate’s interest in his claim against Hartford to Debtor.

The district court granted summary judgment in Hartford’s favor on the basis of judicial estoppel. The district court rejected the argument that the integrity of the judicial system was sufficiently protected because Debtor reopened case and amended schedules to disclose his claim against Hartford. Debtor’s listing of “Potential Personal Injury Award” in his bankruptcy schedules was insufficient to disclose his potential claim against Hartford for unreasonable denial of and delay in processing his workers’ compensation insurance claim. Debtor had taken clearly inconsistent positions in the bankruptcy court and in the district court regarding the existence of his claim against Hartford. The integrity of the judicial system required the use of judicial estoppel. The Tenth Circuit agreed with the district court’s reasoning and affirmed summary judgment.

Supreme Court Case

Czyzewski v. Jevic Holding Corp., Docket No. 15-649, United States Supreme Court, Decided March 22, 2017

Jevic filed for Chapter 11 bankruptcy after its purchase in a leveraged buyout. Former Jevic drivers were awarded a judgment for violations of state and federal Worker Adjustment and Retraining Notification (WARN) Acts, part of which was a priority wage claim under 11 U.S.C. 507(a)(4), entitling them to payment ahead of general unsecured claims. In another suit, a court-authorized committee representing unsecured creditors sued Sun Capital and CIT for fraudulent conveyance in the buyout; the parties negotiated a structured dismissal of Jevic’s bankruptcy, under which the drivers would receive nothing on their WARN claims, but lower-priority general unsecured creditors would be paid. The Bankruptcy Court reasoned that the proposed payouts would occur under a structured dismissal rather than an approved plan, so failure to follow ordinary priority rules did not bar approval. The district court affirmed.

The Third Circuit majority affirmed the order approving the settlement on the basis that this was “the least bad alternative since there was ‘no prospect’ of a plan being confirmed and conversion to Chapter 7 would have resulted in the secured creditors taking all that remained of the estate in ‘short order.’” In allowing the structured dismissal, the majority’s decision aligned with the Second Circuit’s decision in In re Iridium Operating LLC, 478 F.3d 452, 453 (2d Cir. 2007), which had held that “the absolute priority rule ‘is not necessarily implicated’ when ‘a settlement is presented for court approval apart from a reorganization plan.’”

The Second and Third Circuit approaches conflict with the approach adopted by the Fifth Circuit in In re AWECO Inc., 725 F.2d 293, 298 (5th Cir.), cert. denied, 469 U.S. 880 (1984). The AWECO court held “that the ‘fair and equitable’ standard applies to settlements, and ‘fair and equitable’ means compliant with the priority system.” The Fifth Circuit thus adopted a per se rule and rejected a settlement that did not comply with the Bankruptcy Code’s priority scheme.
The Supreme Court granted certiorari and reversed. First, the Court held that the drivers have standing, having “suffered an injury in fact” or “likely to be redressed by a favorable judicial decision.” A settlement that respects ordinary priorities remains a reasonable possibility and the fraudulent-conveyance claim could have litigation value. Second, the Court held that bankruptcy courts may not approve structured dismissals that provide for distributions that do not follow ordinary priority rules without the consent of affected creditors. The Court noted that Section 349(b) governing dismissal, which permits a bankruptcy judge “for cause, [to] orde[r] otherwise,” gives courts flexibility to protect reliance interests, but not to make general end-of-case distributions that would be impermissible in a Chapter 11 plan or Chapter 7 liquidation. Here, the priority-violating distribution is attached to a final disposition and does not preserve the debtor as a going concern, nor make the disfavored creditors better off, promote the possibility of a confirmable plan, help to restore the status quo ante, or protect reliance interests. Lastly, the Supreme Court held that there is no “rare case” exception, permitting courts to disregard priority in structured dismissals for “sufficient reasons.”

Dissent

The Supreme Court granted certiorari to decide, “[w]hether a bankruptcy court may authorize the distribution of settlement proceeds in a manner that violates the statutory priority scheme.” The dissent noted that the issue was reformulated and narrowed after certiorari was granted to, “[w]hether a Chapter 11 case may be terminated by a ‘structured dismissal’ that distributes estate property in violation of the Bankruptcy Code’s priority scheme.” The dissent thought it was unwise for the Court to decide the reformulated question because they could benefit from the views of additional courts of appeals on the issue and that deciding this question may invite future petitioners to seek review of a circuit conflict only to change the question to one that seems more favorable after certiorari is granted.

Pending Supreme Court Case

Midland Funding, LLC v. Johnson: Docket No. 16-348, United States Supreme Court, Oral argument conducted January 17, 2017

Issues: (1) Whether the filing of an accurate proof of claim for an unextinguished time-barred debt in a bankruptcy proceeding violates the Fair Debt Collection Practices Act; and (2) whether the Bankruptcy Code, which governs the filing of proofs of claim in bankruptcy, precludes the application of the Fair Debt Collection Practices Act to the filing of an accurate proof of claim for an unextinguished time-barred debt.

In oral arguments before the Supreme Court, the justices were asked to consider the overlap between the FDCPA and the Bankruptcy Code. Midland Funding, the debt buyers in this case, argued that the Code validates everything they do in the bankruptcy process, that the filing of
claims accurately note the date of the transactions, and that time-barred debt may even fall under the Code’s broad definition of a “claim”. The FDCPA prevents creditors from using false, deceptive, or misleading practices in the collection of debt. Lower courts have generally held that debt collectors violate this ban on deceptive practices when they file suit to collect on time barred debts, but the debt buyers argue that filing a claim should be distinguished from filing an actual lawsuit.

At oral argument, several of the justices expressed dismay at the practice of filing claims on time barred debt, most notably, Justice Sotomayor:

I’m having a great deal of difficulty with this business model. Completely. You buy old, old debts that you know for certain are not within any statute of limitations. You buy them and you call up [debtors] and you say to them “You don’t have to pay me. But out of the goodness of your heart, you should”? Or do you just call them up and say “You owe me money” and you hope that they’ll pay you? And is it the same thing in bankruptcy court? You file a claim and you hope the trustee doesn’t see that it’s out of time? And apparently you collect on millions of dollars of those debts. So is that what you do?

Sotomayor also expressed concern about the procedural cost to the bankruptcy system, accusing the debt buyers of wasting trustee time and administrative costs, as well as the time and efforts of other creditors.

Kagan seemed to focus on whether the fact that the Code did not specifically disallow the practice prevented a party from suing under another statute. She seemed to think it did not. Ginsburg stated that there seemed to be “no point in making a claim for a debt that’s clearly time barred … except for the chance that it will be overlooked …. And that you will get paid on the assumption that it’s a good claim when, in fact, it isn’t.”

Justice Breyer expressed concern about duplicative remedies under Bankruptcy Rule 9011, through actions brought by the FTC, and additionally the FDCPA. Roberts and Alito wondered why these claims were a problem that the trustees were incapable of dealing with by objecting to the claims. Alito asked “why do these time-barred claims slip though? Why don’t trustees and attorneys for the debtor automatically object to any claim that is beyond the number of years set out in the statute of limitations?”

SCOTUS Blog predicts that based on these conflicting attitudes towards the business practices of the defendants, that the Court will issue a divided opinion.

Credit to: Ronald Mann, Argument analysis: Justices appear divided over treatment of stale claims in consumer bankruptcies, SCOTUSBLOG (Jan. 18, 2017, 9:12 AM).
Get unlimited access to the best Catalog of CLE seminars in Colorado!
With this incredible resource, you get unlimited access to the best catalog of CLE seminars in Colorado, all at a fraction of what you would normally pay!

2 GREAT CHOICES – Which one is for you?

<table>
<thead>
<tr>
<th>FEATURES of the CBA–CLE Pass:</th>
<th>BASIC</th>
<th>ELITE</th>
</tr>
</thead>
<tbody>
<tr>
<td>Unlimited Live Seminars and Video Replays:</td>
<td></td>
<td>✔</td>
</tr>
<tr>
<td>CLE Pass holders can attend unlimited live seminars and video replays held in CBA–CLE classrooms. This includes multi-day, full-day, half-day, luncheon programs, and Legal Connection programs. Attend just an hour or all day.*</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Unlimited Live Webcasts:</td>
<td></td>
<td>✔</td>
</tr>
<tr>
<td>Watch unlimited live webcasts held at the CBA–CLE classrooms from the comfort of your home, office or on your mobile device. This includes: multi-day, full-day, half-day, luncheon programs, and Legal Connection seminars.*</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Discounts on Off-Site Travel Seminars and Institutes:</td>
<td></td>
<td>✔</td>
</tr>
<tr>
<td>Elite Pass Holders receive up to a 50% discount on CLE Institutes, including but not limited to:</td>
<td></td>
<td></td>
</tr>
<tr>
<td>▪ Colorado Employment Law Conference</td>
<td>▪ Rocky Mountain Securities Conference</td>
<td></td>
</tr>
<tr>
<td>▪ Estate Planning Retreat</td>
<td>▪ Real Estate Symposium</td>
<td></td>
</tr>
<tr>
<td>▪ Family Law Institute</td>
<td>▪ Elder law Retreat</td>
<td></td>
</tr>
<tr>
<td>▪ Rocky Mountain Intellectual Property and Technology Institute</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Unlimited Online Homestudies:</td>
<td></td>
<td>✔ ✔</td>
</tr>
<tr>
<td>Includes instant access to all digital content (Products that do not involve shipping)</td>
<td></td>
<td></td>
</tr>
<tr>
<td>▪ MP3 Downloads, Videos On-Demand &amp; PDF Seminar Materials</td>
<td></td>
<td></td>
</tr>
<tr>
<td>▪ Available 24/7/365!</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Special Discount Pricing for CLE Seminars:</td>
<td></td>
<td>✔</td>
</tr>
<tr>
<td>Basic CLE Pass holders will receive special discount prices on selected events throughout the year. CLE Pass Holders will receive notification prior to the events.</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

*Some exclusions apply. See CLE Pass Terms and Conditions at www.cobar.org/cle.

GET YOUR CBA–CLE PASS TODAY
Phone: 303-860-0608 • Toll-Free: 888-860-2531 • Fax: 303-860-0624 • www.cobar.org/cle
INSTANT ACCESS

TO THE CLE HOMESTUDY CATALOG

- **BUDGET** – Budget in advance: You won’t go over your CLE budget for the year!
- **CHOICE** – Pick and choose the content you want – when you want it!
- **COLORADO** – Focusing on Colorado-specific law and updates, with outstanding faculty!
- **COMPLIANCE** – All the CLE credits you need to satisfy your compliance requirements
- **COMPREHENSIVE** – The most complete collection of Colorado law available
- **CONVENIENT** – Attend live events or tune into Live Webcasts anytime from the comfort of your home, office or on your mobile device (for Elite CLE Pass Holders) Available 24/7/365!
- **EASY** – CLE made easy – you don’t have to pass on any programs with the CLE Pass!
- **KNOWLEDGE** – Because learning never stops!
- **PRACTICE AREAS** – Access to programs in all practice areas, including Ethics programs
- **QUALITY** – You’ll get affordable and quality seminars
- **SKILLS** – Technology, software, writing and presentation seminars to sharpen your skills!
- **UP-TO-DATE** – Get the latest updates and content at your fingertips

– This is much more than merely getting CLE credits!

YOUR CHOICE

**BASIC** or **ELITE CLE Pass**

There are two great CLE pass choices: **Basic** and **Elite**—Choose the one that fits your needs.

**CBA-CLE Basic CLE Pass**: You get instant and unlimited access to the complete Colorado Bar Association CLE online seminar catalog. There are thousands of courses to choose from at one low annual fee — at a fraction of what you would normally pay. An incredible value worth thousands of dollars if purchased separately!

**CBA-CLE Elite CLE Pass**: You also get unlimited live seminars and live webcasts held at the CBA-CLE classrooms (with a few exceptions throughout the year). You don’t have to pick and choose which online seminars that you want to attend: it’s all included!

<table>
<thead>
<tr>
<th><strong>INDIVIDUAL Pricing:</strong></th>
<th><strong>BASIC</strong></th>
<th><strong>ELITE</strong></th>
</tr>
</thead>
<tbody>
<tr>
<td>CBA Members:</td>
<td>$595/year or $55/month*</td>
<td>$995/year or $90/month*</td>
</tr>
<tr>
<td>Non-Members:</td>
<td>$695/year or $65/month*</td>
<td>$1295/year or $110/month*</td>
</tr>
</tbody>
</table>

*Monthly payment option requires 12-month commitment.

**Firm Pricing**

There are substantial discounts for firm pricing. Please call 303.860.0608 or 888.860.2531 for details.
Ruth Achenon Appointed as New Mineral County Court Judge

On Thursday, August 30, 2012, Governor John Hickenlooper appointed Ruth Achenon to serve as a county court judge in the Twelfth Judicial District, which serves Mineral County. Achenon will fill the vacancy created by the retirement of the Honorable F. Tehran Lentz, effective January 8, 2013. Achenon currently is in private practice and works exclusively in child protective issues.

More Legislation Posts

Colorado State Judicial Branch Rends General Fiscal in Many Categories

The Colorado State Judicial Branch issued several revised forms in July across multiple practice areas. These include instructions for courts to file civil appeals, small claims, and court cases in various counties.

More Case Law Posts

Medical Marijuana

The four DU Law Starz attend Dr. Bill To Be Held Sept. 13

The University of Denver Sturm College of Law Starz event is being held on September 13, 2012. Earlier this year, law school names its awards recipients for the year, who will be honored at the event. Since 1993, DU Law Starz has been recognized distinguished alumni and faculty for their achievements at an annual gala, which includes a light-hearted, humorous, and personal commemorative video of each honoree, recognizing accomplishments both professional and personal.

Sign Up Now!
Why You Should Blog!

Not convinced you should write contribute to CBA-CLE Legal Connection? Here are 5 reasons why you should reconsider and increase your own or your firm’s guest blogging activity:

1. Develop relationships
Reaching out to others and contributing your thoughts and materials on their sites will help to develop your relationships not only with those other bloggers but also with their audience, particularly if the guest blog post is posted to the blogger’s social media channels.

Articles on CBA-CLE Legal Connection are always posted on our social media channels with thousands of followers!

2. Expand your breadth and depth of writing
There are many different types of bloggers. Each blogger’s blog will probably have a different focus and style. By writing posts for different blogs, you are encouraged to tailor your blog post slightly more to give it a better fit for the blog and its audience, while allowing the cross-pollination exercise to succeed.

Want to write about issues from your practice area or section, a law practice management tip, or a legal community event? CBA-CLE Legal Connection has an audience for any legal topic!

3. Reach a wider and varied audience
By guest blogging, a new audience can be reached. At the same time, the blog’s audience can be enhanced by additional views from followers of the guest blogger, thus creating a win-win situation.

Reach people you might not otherwise engage with and get your name out there!

4. Build your reputation
By guest blogging you can build your reputation as an expert in certain areas in a professional way. If the blog host trusts you enough to have your post published, then their audience will generally be more likely to trust you as well.

Show off your expertise!

5. Achieve further backlinks for Search Engine Optimization (SEO) purposes
While by no means the main reason, developing link building is nevertheless a valid reason for guest blogging. When writing for someone else’s blog, you will usually get a link back to your site. This will be valuable for SEO purposes and can sometimes be particularly significant.

CBA-CLE Legal Connection always links back to the author’s websites. SEO is key to an online presence, so draw more visitors to your site by sharing your wisdom with our readers!

Adapted from 5 Reasons to Guest Blog / Blawg by Gavin Ward.
http://wardblawg.com/2011/09/05/5-reasons-to-guest-blog-blawg/
LOGGING ON TO THE CBA-CLE WEBSITE:
Go to www.cobarcle.org and in the upper-right hand corner check to see if you are Logged in (your name will appear next to the “Log Out” button). If you are not Logged In, click on “Login” and input your UserName and Password. If you forget your login information, you can click on “Forgot your username/password?” to retrieve it.

HOW TO ACCESS YOUR CLE DASHBOARD
CLE Dashboard is located in the upper right-hand corner of the website.
Click on it to review all the great new features we’ve added.

CHOOSE YOUR PRACTICE AREAS AND INTERESTS IN CLE DASHBOARD
We want to send you information that you’re interested in. In your dashboard you can select options to receive information in your practice area, plus broader topics that you may be interested in.
We encourage you to log on and select the preferences you want.

WHAT’S IN YOUR CLE DASHBOARD?

LIVE SEMINAR & WEBCAST HISTORY
View Invoices, Supreme Court ID numbers, Download Materials, Download MP3s, and View Webcasts

YOUR HOMESTUDIES
View Invoice, Download Materials, Download MP3, View Video

YOUR ACCOUNT
Update Your Information, View Transaction History, View Event History

Visit www.cobarcle.org to login to the CLE website.
Based on your interests, we search our extensive catalog of programs and books to find additional resources we think would be of value to you!