JENNER&BLOCK

Recent Developments in Bankruptcy Law, January 2018

(Covering cases reported through 576 B.R. 995 and 874 F.3d 123)

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1. AUTOMATIC STAY

1.1 Covered Activities

1.2 Effect of Stay

1.3 Remedies

1.3.a **Debtor may recover attorneys' fees for litigating a damages claim for stay violation, including fees on appeal.** The debtor moved for damages for a creditor's stay violation. The bankruptcy court granted the motion, including attorneys' fees. The creditor appealed to the district court and the court of appeals, which both affirmed. The creditor also sought the bankruptcy judge's recusal, which the court denied; the appellate courts affirmed, and the Supreme Court denied certiorari. The district court awarded the debtor fees for defending all the appeals. Section 362(k) provides "an individual injured by any willful violation of a stay provided by this section shall recover actual damages, including costs and attorneys' fees." The mandatory language overrides the American Rule, under which each party pays its own fees. The use of "including" broadens the scope of "actual damages" beyond the immediate injury resulting from the stay violation. Fee-shifting statutes such as section 362(k) entitle the party to fees not only at the trial level but also on appeal. Therefore, the debtor is entitled to all fees for litigating the damages claim and the subsequent appeals, including on the recusal motion, which was related to the stay violation litigation. *Mantiply v. Horne (In re Horne)*, 876 F.3d 1076 (11th Cir. 2017).

2. AVOIDING POWERS

2.1 Fraudulent Transfers

2.1.a **Trustee has a right to a jury trial in a fraudulent transfer avoiding power action.** The trustee sued a lender to avoid a fraudulent transfer. The debtor had fully paid the loan, and the lender had not filed a proof of claim. The loan agreement waived the debtor's right to a jury trial. A fraudulent transfer avoiding power action that seeks to recover a money judgment is an action at law, in which the parties each have a Seventh Amendment right to a jury trial. The debtor's prepetition waiver of a jury trial right does not apply to an action that the Bankruptcy Code creates and vests in the trustee. Because the creditor did not file a proof of claim, the action is not part of the claims allowance process, which is a core proceeding in which the parties do not have a jury trial right. The creditor's possible assertion of a claim under section 502(h) upon payment of any judgment the trustee might obtain does not convert the action to one that involves the claims allowance process. Therefore, the trustee has a right to a jury trial in the action. *Bakst v. Bank Leumi, USA (In re D.I.T., Inc.)*, 575 B.R. 524 (Bankr. S.D. Fla. 2017).

2.1.b **Delaware UFTA does not permit avoidance of a transfer by a non-debtor.** To evade paying a judgment, Venezuela caused its indirect third-tier U.S. subsidiary to incur debt and to transfer the proceeds as dividends through the subsidiary's parent and "grandparent" corporations to Venezuela. The creditor sued the parent, which was not liable on the judgment, to avoid and recover the transfer as an actual fraudulent transfer under the Delaware Uniform Fraudulent Transfer Act (DUFTA). DUFTA permits a creditor to avoid a "transfer made … by a debtor … if the debtor made the transfer … with actual intent to hinder, delay, or defraud any creditor of the debtor." This statute requires proof of three elements: a transfer, by the debtor, with actual intent to hinder, delay, or defraud a creditor. The transfer was part of a scheme to remove assets from the United States to hinder or delay U.S. creditors. But the actual transferor was not liable on the creditor's judgment and therefore not a debtor to the creditor. DUFTA does not apply *to* a transfer to a debtor, only a transfer *by* a debtor. Therefore, the court dismissed the action. *Crystallex Int'l Corp. v. Petróleos de Venezuela, S.A.*, ___ F.3d ___, 2018 U.S. App. LEXIS 95 (3d Cir. Jan. 3, 2018).

2.2 Preferences

2.2.a **Mandatory Victims Restitution Act does not preempt trustee's preference avoiding power as to pre-conviction payments.** The debtor embezzled from his employer. During negotiations for a federal criminal conviction, the debtor made an initial restitution payment to the employer. Within 90 days after making the initial payment, the debtor filed a chapter 7 bankruptcy case. The debtor later entered into a plea agreement that provided for full restitution, subject to credit for the amount already paid. After the court imposed the sentence, the trustee sued the employer to recover the partial restitution payment as a preference. The federal Mandatory Victims Restitution Act (MVRA) requires a criminal sentence to impose a full restitution obligation on the defendant and permits the United States to enforce the judgment, notwithstanding any other federal law, against all the defendant's property. The automatic stay does not apply to such enforcement. Ordinarily, that would permit the United States to enforce against the debtor's property that became property of the estate. However, in this case, the debtor no longer had an interest in the property paid to the employer, either at the time of bankruptcy or the later time the criminal judgment issued and the government's lien arose. Therefore, the MVRA does not prevent the trustee's avoidance of the pre-bankruptcy, pre-conviction payment to the employer. Under section 541(a)(3), the payment becomes property of the estate when the trustee recovers it, not before. The government may trace the debtor's property into the estate and enforce the restitution obligation against it after bankruptcy. But in this case, the property was not the debtor's as of the bankruptcy date, so the government may not enforce its claim against it. *Spero v. Community Chevrolet, Inc. (In re Grooms)*, 572 B.R. 559 (W.D. Pa. 2017).

2.2.b **Transfers between New York bank correspondent bank accounts are not extraterritorial transfers.** The debtor Bahraini bank filed a chapter 11 case in New York. Before bankruptcy, the debtor transferred funds to two other foreign banks' New York correspondent accounts to purchase investments. The foreign banks refused to return the funds upon maturity, offsetting the amounts against their claims against the debtor. The creditors' committee sued to recover the amounts under sections 362, 542, 547, and 550. International comity is the respect the courts of one country give to another country. Comity among courts depends on the existence of a proceeding in a court in the foreign country and does not apply here. Legislative or prescriptive comity is the respect a court gives to the laws of another country, based on factors that are similar to choice of law factors. In this case, the foreign banks' choice of New York correspondent accounts to receive the debtor's investment from New York and the United States' interest, including under the Bankruptcy Code, in regulating conduct among parties transacting business in the United States, militates against dismissal of the action based on international comity. To determine whether the presumption against extraterritorial application of U.S. statutes applies, the court examines whether Congress intended extraterritorial application. If so, the inquiry is complete. If not, the court determines whether the litigation involves an extraterritorial application of the statute. The transfer between two New York bank accounts created sufficient contacts with the United States that the application of section 547 to the transfer would not involve its extraterritorial application. Nor does the application of section 362 or section 542 involve extraterritorial application, because they both operate on the premise that the bank accounts are property of the estate. Moreover, because those sections apply to property of the estate, which includes property "wherever located," Congress intended that those sections apply extraterritorially. Accordingly, the court denies the banks' motion to dismiss on comity and extraterritoriality grounds. *Official Comm. v. Bahrain Islamic Bank (In re Arcapita Bank B.S.C.(c))*, 575 B.R. 229 (Bankr. S.D.N.Y. 2017).

2.3 Postpetition Transfers

2.4 Setoff

2.5 Statutory Liens

2.6 Strong-arm Power

2.7 Recovery

2.7.a **Fraudulent transfer recovery is not limited to the amount of unpaid claims.** The debtor failed after an LBO, which the buyer claimed resulted from the seller's fraudulent representations. The chapter 11 plan distributed equity in the reorganized debtor to the unsecured noteholders, which the court found satisfied 40% of their allowed claim, and established a litigation trust. The noteholders were entitled to 50% of the litigation trust recoveries, the buyer shareholder the other 50%. After the litigation trust sued the seller shareholder on actual and constructive fraudulent transfer theories, the reorganized debtor was sold for an amount substantially exceeding the value the court had placed on the stock the noteholders received under the plan. Sections 544(b) and 548 permit the trustee to avoid a fraudulent transfer; section 550 permits the trustee to recover from the transferee for the benefit of the estate. The estate comprises all interests, not just creditors' interests. The selling shareholders also had an interest in claims against the buyers and therefore in the litigation trust. Moreover, *Moore v. Bay*, 284 U.S. 4 (1931), held that a trustee could avoid the entirety of a fraudulent transfer, not limited to the triggering creditor's claim amount, for the benefit of the estate, not just for the benefit of the triggering creditor. The reorganized debtor's value appreciation after emerging from chapter 11 should not affect the trustee's recovery amount; the noteholders who received the stock took the risk of decline, which would not have affected recoveries, and so appreciation should not affect recoveries either. Therefore, the litigation trust's recoverable amount is not limited to the amount of the unpaid unsecured claims. *PAH Litigation Trust v. Water St. Healthcare P'ners, L.P. (In re Physiotherapy Holdings, Inc.)*, ___ B.R. ___, 2017 Bankr. LEXIS 3774 (Bankr. D. Del. Nov. 1, 2017).

3. BANKRUPTCY RULES

4. CASE COMMENCEMENT AND ELIGIBILITY

4.1 Eligibility

4.2 Involuntary Petitions

4.2.a **CLO noteholders may not waive common security interest to qualify as unsecured petitioning creditors.** Three senior noteholders filed an involuntary petition against a CLO, that is, a special purpose entity that issued notes to fund purchases of loans that would both generate cash flows to pay the notes and act as collateral for the notes. Under an indenture, the CLO granted a trustee a security interest in the loans for the equal and ratable benefit of all noteholders. The loans' aggregate value was less than the notes' aggregate amount. The petitioning creditors waived their security interest in an aggregate amount equal to $15,777. Section 303(b)(1) permits three or more creditors holding at least $15,775 in unsecured claims to file an involuntary petition against their debtor. Neither section 303(b)(1) nor the case law addresses whether a creditor holding a secured claim may waive its lien to qualify as an unsecured creditor. However, the indenture in this case grants the security interest to the trustee, not to the noteholders. As a result, the noteholders do not have authority to waive their security interest. Their waiver was ineffective to qualify them as petitioning creditors holding unsecured claims. *In re Taberna Preferred Funding IV, Ltd.*, 578 B.R. 244 (Bankr. S.D.N.Y. 2017).

4.3 Dismissal

5. CHAPTER 11

5.1 Officers and Administration

5.2 Exclusivity

5.3 Classification

5.4 Disclosure Statement and Voting

5.5 Confirmation, Absolute Priority

6. CLAIMS AND PRIORITIES

6.1 Claims

6.1.a **Future claim arises only once the debtor can identify class of potential claimants or once claimants know facts connecting them to debtor's conduct.** The debtor manufactured iron pipe at a plant built in 1910. It filed chapter 11 in 1989 and confirmed a plan in 1995. The reorganized debtor closed the plant in 2010. Around the time the plant closed, the EPA designated an area around the plant as a Superfund site. Plaintiffs sued the reorganized debtor in state and federal court for personal and property injuries resulting from the environmental problems. The plaintiffs did not know of their injuries before plan confirmation. The reorganized debtor brought an action in the bankruptcy case to enforce the chapter 11 discharge against the plaintiffs. A chapter 11 discharge operates to discharge all claims that arose before confirmation. The Code defines "claim" broadly to include contingent and unmatured rights to payment. The courts have adopted a variety of tests to determine when a claim arose, including the state law accrual test, the conduct test, the prepetition relationship test, and the fair contemplation test. In the Eleventh Circuit, the *Piper Aircraft* decision, 58 F.3d 1573 (11th Cir. 1995), adopted a version of the prepetition relationship test: "The debtor's prepetition conduct gives rise to a claim to be administered in bankruptcy only if there is a relationship established before confirmation between an identifiable claimant or group of claimants and that prepetition conduct." Based on that test, the debtor's prepetition release of contaminants is not enough to establish the necessary relationship. For practical as well as due process reasons, to establish the relationship, during the bankruptcy case, either the debtor must be able to identify, from knowledge of its own conduct, a class of potential future claimants, or future claimants must have knowledge of facts connecting them to the debtor's conduct. Otherwise, a claim could not be administered during the bankruptcy case. The record here showed no evidence of the debtor's or the plaintiffs' knowledge of any potential injuries or relationship before confirmation. Therefore, the claims did not arise before confirmation and were not discharged. *U.S. Pipe & Foundry Co. v. Adams (In re U.S. Pipe & Foundry Co.)*, 577 B.R. 916 (Bankr. M.D. Fla. 2017).

6.2 Priorities

7. CRIMES

8. DISCHARGE

8.1 General

8.2 Third-Party Releases

8.2.a **Plan may not grant third-party release of claims of non-voting creditors.** The debtor's plan provided broad third-party releases of claims by any creditor who was entitled to accept or reject the plan and that did not reject. The disclosure statement notified creditors clearly of that provision. Based on general contract law principles, a third-party release under a plan to which a creditor consents is binding on the creditor. But under such principles, silence does not constitute consent absent a duty to speak, except in limited circumstances, including when silence would be misleading. The disclosure statement's warning to creditors did not create in the creditors a duty to speak. Accordingly, a creditor's failure to reject the plan or the release did not constitute consent to the release. *In re SunEdison, Inc.*, 576 B.R. 453 (Bankr. S.D.N.Y. 2017).

8.2.b **Bankruptcy court has limited jurisdiction to grant broad third-party release.** The debtor's plan provided broad third-party releases of all the debtor's directors, officers, employees, professionals, and underwriters, and of many of its lenders and all their directors, officers, employees, and professionals, from all claims arising through the plan's effective date, related to the debtor and its chapter 11 case, and asserted or assertable by third parties. The debtor had indemnification obligations to some but not all of the proposed releasees. The bankruptcy court has jurisdiction to approve a settlement that provides for the release, and therefore an injunction against assertion of, third party claims against a non-debtor, only if the outcome of the released claim might have any conceivable effect on the estate. Assertion of a third-party claim might have a conceivable effect on the estate if the debtor indemnified the defendant or if the defendant made a substantial contribution to the estate in exchange for the release. Here, the release is broader than the debtor's indemnification obligations, and the debtor did not have indemnification obligations to many of the proposed releasees. Under these circumstances, the court refuses to approve the release. *In re SunEdison, Inc.*, 576 B.R. 453 (Bankr. S.D.N.Y. 2017).

8.2.c **A third party may not purchase a third-party release solely by making a contribution to the estate.** The debtor's plan provided broad third-party releases of all claims by non-objecting creditors against the debtor, the committee, the lenders, and all their directors, officers, employees, and professionals in any way related to the debtors, the plan, or the chapter 11 case. A bankruptcy court's jurisdiction is limited. Its related-to jurisdiction reaches only to claims whose outcome could have any conceivable effect on the estate. If neither the debtor nor the estate has an indemnification obligation to a potential releasee, then the third party's claim against the potential releasee could not have any conceivable effect on the estate. That the claim arose in or in connection with the chapter 11 case is not sufficient to create jurisdiction. The bankruptcy court does not have jurisdiction to approve a release of the claim. A bankruptcy court should not permit a third party to purchase a release simply by making a contribution to the estate if the other requirements, both jurisdictional and substantive, are not otherwise present. The court denies approval of the releases to that extent. Moreover, a creditor's non-objection to the release or even its consent cannot confer subject matter jurisdiction on the court to approve the release and make it binding. *In re Midway Gold US, Inc.*, 575 B.R. 475 (Bankr. D. Colo. 2017).

8.3 Environmental and Mass Tort Liabilities

8.3.a **A RCRA or Clean Water Act injunction is not a claim.** The debtor operated a farm. An environmental organization had sued the debtor under the Resource Conservation and Recovery Act and the Clean Water Act for an injunction against continued pollution of a stream. Neither RCRA nor the CWA authorizes a polluter to pay monetary damages in lieu of taking action to stop polluting or authorize a plaintiff to seek monetary damages. Under the Bankruptcy Code, a claim is a right to payment or "a right to an equitable remedy for breach of performance if such breach gives rise to a right to payment." The RCRA and CWA claims do not give rise to any right to payment. Therefore, they are not claims. *Sound Rivers, Inc. v. Taylor (In re Taylor)*, 572 B.R. 592 (Bankr. E.D.N.C. 2017).

9. EXECUTORY CONTRACTS

9.1.a **Rejection terminates licensee's right to use licensed trademark.** The debtor in possession rejected a contract that provided the counterparty a perpetual, royalty-free, non-exclusive license of patents and technology, an exclusive distributorship of certain products within a limited territory, and a license to use the debtor's trademark. Section 365(g) treats rejection as a breach, converting rights under the contract to a prepetition damages claim. However, section 365(n) permits an intellectual property licensee, in lieu of accepting a damages claim, "to retain its rights (including a right to enforce any exclusivity provision of such contract …) … to such intellectual property." As defined in section 101, "'intellectual property' means trade secret, invention, process, design, or plan protected under title 35, patent application, plant variety, work of authorship protected under title 17, or mask work protected under chapter 9 of title 17." Section 365(n) addresses only intellectual property, as defined. Therefore, the "exclusivity" provision referenced in the parenthetical applies only to license exclusivity provisions for intellectual property, not all exclusivity provisions in the contract, such as distribution rights.

Therefore, section 365(n) does not protect the licensee's exclusive distributorship rights. The "intellectual property" definition does not include trademarks. Rejection relieves the estate of performance obligations to unburden a reorganizing debtor or enhance the value of assets sold to a third party. A trademark license requires the licensor to monitor quality and otherwise protect the mark, else the licensor forfeits the mark. Allowing the licensee to retain trademark use after rejection would undermine a central purpose of section 365, because it would impose on the estate the continued monitoring obligations. Therefore, section 365(n) does not override section 365's general applicability to trademarks, and rejection terminates the licensee's right to use the trademark. *Mission Prod. Holdings, Inc. v. Tempnology, LLC (In re Tempnology, LLC)*, ___ F.3d ___, 2018 U.S. App. LEXIS 870 (1st Cir. Jan. 12, 2018).

10. INDIVIDUAL DEBTORS

10.1 Chapter 13

10.1.a **Confirmation objection is not necessary to preserve a creditor's right to challenge the plan.** Before bankruptcy, the debtor had pledged his car to a pawn broker as security for a small loan, delivering the certificate of title but retaining possession of the car. State law gives the borrower 30 days after the loan's due date to redeem, but after that, it provides that the goods are automatically forfeited to the pawn broker. Just before the redemption period expired, the debtor filed chapter 13 with a plan that treated the pawn broker as fully secured and provided for payment under the plan, with interest. Before the confirmation hearing, the pawn broker filed a stay relief motion to recover the car, claiming that the Georgia statute had vested title in the pawn broker upon the expiration of the redemption period (or at least upon the expiration of the Bankruptcy Code's 60-day extensions of time for the debtor under section 108(a)). Before the stay relief hearing, the bankruptcy court held the confirmation hearing and confirmed the plan. The court heard the stay relief motion three months later. The pawn broker did not object to confirmation or appeal the confirmation order. Section 1327(a) provides that a confirmed plan binds the debtor and all creditors. However, the creditor was not required to file a formal objection to confirmation to preserve its rights; it had preserved its position by its pre-confirmation stay relief motion. Thus, it was not bound by the confirmation order and could challenge the debtor's ownership of the car through its stay relief motion based on the Georgia forfeiture statute. *Title Max v. Northington (In re Wilber)*, ___ F.3d ___ (11th Cir. Dec. 11, 2017).

10.1.b **State forfeiture statute operates after bankruptcy to divest estate of property.** Before bankruptcy, the debtor had pledged his car to a pawn broker as security for a small loan, delivering the certificate of title but retaining possession of the car. State law gives the borrower 30 days after the loan's due date to redeem, but after that, it provides that the goods are automatically forfeited to the pawn broker. Just before the redemption period expired, the debtor filed chapter 13. Section 541(a) provides that all of the debtor's interests in property as of the commencement of the case become property of the estate. So the debtor's redemption right became property of the estate at the commencement of the case. But property of the estate is not static. It can be added to or subtracted from during the case. Because property interests are created and defined by state law, the Georgia statute determines what property interest the debtor and the estate had. It operated to divest the estate of ownership of the car when the redemption period expired. The automatic stay prohibits any act to obtain possession of property of the estate, among other things, but it does not stay the running of a redemption period, as section 108 covers that issue. And it does not prevent property interests from "evaporating," where no "act" is involved. Thus, the car ceased to be property of the estate before plan confirmation, and the plan could not treat the pawn broker as a creditor secured by property of the estate. *Title Max v. Northington (In re Wilber)*, 876 F.3d 1302 (11th Cir. 2017), *motion for reh'g pending*.

10.2 Dischargeability

10.2.a **Debt for third party's violation of securities laws is nondischargeable under section 523(a)(19).** An arbitrator found the debtor liable to an investor in the debtor's company based on securities law violations. The state court confirmed the award. The debtor claimed the award found only that he was liable for a third party's securities law violation, not that he violated the securities laws. The investor sought to have the debt declared nondischargeable under section 523(a)(19), which makes nondischargeable a "debt … that is for the violation of any of the Federal securities laws … and results … from any judgment … entered in any Federal or State judicial or administrative proceeding." Based on the grammatical structure of paragraph (19), and unlike other nondischargeability provisions in section 523(a), it does not require that the debtor have violated the securities laws, only that the debtor's liability be "for the violation of" securities laws. Therefore the debt is nondischargeable. *Lunsford v. Process Techs. Servs., LLC (In re Lunsford)*, 848 F.3d 963 (11th Cir. 2017).

10.3 Exemptions

10.4 Reaffirmations and Redemption

11. JURISDICTION AND POWERS OF THE COURT

11.1 Jurisdiction

11.1.a **The bankruptcy court has no power to transfer an action over which it does not have jurisdiction.** The liquidating trustee filed an action for breach of fiduciary duty against the debtor's former directors. The bankruptcy court concluded it did not have jurisdiction. The trustee moved for transfer to the district court for a different district which, the trustee claimed, had jurisdiction. Section 1631 of title 28 permits "a court as defined in section 610" of title 28 to transfer an action over which it lacks jurisdiction "to any other such court in which the action … could have been brought at the time it was filed or noticed." Section 610 provides: "As used in this chapter the word 'courts' includes the courts of appeals and district courts of the United States, the United States District Court for the District of the Canal Zone … Guam [and] the Virgin Islands, the United States Court of Federal Claims, and the Court of International Trade." Bankruptcy courts are constituted under a different chapter of title 28 than the other listed courts. Their authority is more circumscribed than the district courts'. Their position as units of the district court do not bring them within section 1631, because Congress created them as separate courts for these purposes. By reference to section 610, Congress was specific in what courts were included within the power to transfer. Bankruptcy courts were not included. Therefore, the bankruptcy court does not have authority to transfer the case. *Troisio v. Erickson (In re IMMC Corp.)*, ___ B.R. ___, 2018 U.S. Dist. LEXIS 203 (D. Del. Jan. 2, 2018).

11.1.b **The *Rooker-Feldman* doctrine does not prevent a fraudulent transfer action arising from a state court judgment.** The debtor paid the state a substantial sum for a gaming license. When the debtor failed to comply with some of the license's terms, the state instituted proceedings before the gaming commission to revoke the license. The state's appellate courts affirmed the commission's decision to revoke the license, and the debtor lost the license. It then filed a chapter 11 petition and, as debtor in possession, sued the state to avoid the loss of the license without compensation as a fraudulent transfer. The *Rooker-Feldman* doctrine deprives federal courts of actions that are essentially appeals of state court judgments. It applies when the federal plaintiff lost in state court before the federal suit was filed, complains of injuries from the state court judgment, and invites the federal court to review and reject the state court judgment. A fraudulent transfer action, which seeks recovery for a transfer without reasonably equivalent value, does not challenge the underlying validity of the state court judgment but only its effect on the bankruptcy estate. Therefore, it does not meet the last requirement for the doctrine's application, and the action may proceed. *Phila. Entertainment & Dev. P'ners, LP v. Comm. Of Pa. (In re Phila.*

Entertainment & Dev. P'ners, LP), ___ F.3d ___, 2018 U.S. App. LEXIS 674 (3d Cir. Jan. 11, 2018).

11.2 Sanctions

11.3 Appeals

11.3.a A bankruptcy judge's order denying a motion to dismiss an adversary proceeding is an interlocutory order, not proposed findings and conclusions. The bankruptcy judge denied the defendant's motion to dismiss an adversary proceeding for failure to state a claim. The defendant sought review in the district court. Section 157(c)(1) of title 28 requires the district court to enter judgment in a related proceeding after reviewing *de novo* the bankruptcy judge's proposed finding of fact and conclusions of law. Section 158(a)(3) permits an appeal to the district court from a bankruptcy judge's interlocutory order with leave of the district court. A bankruptcy judge may issue an interlocutory order in a non-core proceeding; not all its orders are proposed findings and conclusions. An order denying a motion to dismiss is an interlocutory order. Therefore, the defendant must seek leave to appeal; it does not have a right of de novo review under section 157(c)(1). *Canadian Pac. Ry Co. v. Keach*, __ B.R. ___, 2017 U.S. Dist. LEXIS 177452 (D. Me. Oct. 26, 2017).

11.3.b **Federal Arbitration Act does not bar district court appeal from bankruptcy court order compelling arbitration.** After confirmation, the estate representative sued the debtor's insurer. Based on an arbitration clause in the insurance policy, the bankruptcy court stayed the litigation and compelled arbitration. The estate representative filed an interlocutory appeal. Section 16(b) of the Federal Arbitration Act, 9 U.S.C. § 16(b), prohibits an appeal from an interlocutory order compelling arbitration or staying a proceeding pending arbitration, "except as otherwise provided in section 1292(b) of title 28." Section 1292(b) applies to interlocutory appeals from the district court to the court of appeals. The relationship between the bankruptcy court and the district court differs. Congress granted the district courts, not the bankruptcy courts, original jurisdiction over bankruptcy proceedings, subject to referral to the bankruptcy courts. The fortuity of referral or of withdrawal of the reference should not affect a litigant's opportunity to have an arbitration claim heard by an Article III court. Therefore, section 16(b) does not prohibit an interlocutory appeal to the district court from a bankruptcy court order compelling arbitration or staying proceedings pending arbitration. *MF Global Holdings Ltd. v. Allied World Assurance Co., Ltd (In re MF Global Holdings Ltd.)*, ___ B.R. ___, 2017 U.S. Dist. LEXIS 177452 (S.D.N.Y. Oct. 30, 2017).

11.4 Sovereign Immunity

12. PROPERTY OF THE ESTATE

12.1 Property of the Estate

12.2 Turnover

12.3 Sales

12.3.a **Lack of time between sale approval order and closing for appellant to seek stay does not affect section 363(m)'s applicability.** The debtor in possession conducted an auction sale under section 363. The winning bidder was the debtor's sole shareholder, who had not been involved at all in the debtor's management for over two months before bankruptcy. The court approved the sale over the competing bidder's objection. The DIP advised the court of the need to close quickly to avert further financing needs. The court waived Rule 6004(h)'s automatic 14-day stay, enabling the sale to close later on the day the order was entered. The disappointed bidder appealed. Under section 363(m), the reversal or modification of a sale order may not affect the validity of a sale to a good faith purchaser. The "good faith" requirement imports three factors: the purchaser (i) acted without fraud, misconduct, or collusion and did not take grossly unfair advantage of other bidders; (ii) gave value, and (iii) did not know of any adverse claims. In this case, the purchaser's prior relationship with the debtor did not give rise to collusion or unfair advantage. When a purchaser buys at a fairly conducted auction, the purchaser gives value. A competing bidder's objection and even the bidder's expressed intention to appeal do not constitute knowledge of an adverse claim, else section 363(m) could be neutered in every case by an appeal. The lack of time between the sale's approval and consummation for an appellant to seek a stay pending appeal does not deprive the appellant of due process, especially here, where the DIP made clear for several weeks before closing that it intended to close immediately. Therefore, the court dismisses the appeal as moot. *Mission Prod. Holdings, Inc. v. Old Cold LLC (In re Old Cold LLC)*, ___ F.3d ___, 2018 U.S. App. LEXIS 884 (1st Cir. Jan. 12, 2018).

13. TRUSTEES, COMMITTEES, AND PROFESSIONALS

13.1 Trustees

13.2 Attorneys

13.3 Committees

13.3.a **Creditors committee's ability to seek derivative standing prevents tolling of statute of limitations under adverse domination doctrine.** The debtor corporation's principals breached their fiduciary duty to the debtor, resulting in a loss of the debtor's valuable license. After the initial administrative ruling on the license revocation, the debtor filed a chapter 11 case. The revocation did not become final until years later, after the state supreme court affirmed the revocation order. The court then converted the case to chapter 7, and a trustee was appointed. By then, the state statute of limitations for a claim for breach of fiduciary duty had run. The state statute permitted tolling while the corporation was under adverse domination, which was the case here. However, during the chapter 11 case, the creditors committee could have asked the bankruptcy court for permission to sue the principals on the estate's behalf but, hoping for a settlement and a sale of the license, did not do so. Because the committee was independent of the debtor and its management and could have sought authority to sue, the statute was not tolled. *Gecker v. Estate of Flynn (In re Emerald Casino, Inc.)*, 867 F.3d 743 (7th Cir. 2017).

13.4 Other Professionals

13.4.a **Real estate broker may not recover attorney's fees for defending a fee application.** The estate employed a real estate broker on a 4% commission. The engagement letter contained a prevailing party attorneys' fees provision, but the order approving the employment did not specifically approve that provision. After the court overruled the estate's objection to the commissions, the broker sought its attorneys' fees for defending its commission. Under *Baker Botts L.L.P. v. ASARCO LLC*, 135 S. Ct. 2158 (2015), a professional may not receive reimbursement of attorneys' fees for defending a fee application under section 330(a)(1) because the American Rule requires each party to bear its own litigation costs and because such fees are not for services provided to the estate, as required under section 330(a)(1) for allowance. Although some courts have approved such fees where a specific agreement with the estate so provides, here, the order approving employment did not specifically approve such fees, and approval would be contrary to section 330(a)(1)'s command that professional fees be awarded only for services provided to the estate. Moreover, the broker's attorney's employment was not approved by the bankruptcy court, so its fees did not qualify for award under section 330(a). *In re Capitol Litho Printing Corp.*, 573 B.R. 771 (Bankr. D. Ariz. 2017).

13.5 United States Trustee

14. TAXES

14.1.a **The IRS's claim against a debtor for transferee liability under IRC 6901(a) is not a priority tax claim.** The debtor was an employee of and owned a minority stock interest in a corporation that failed to pay any income taxes that it owed. The debtor received dividends on the stock interest while the corporation was insolvent. After the United States assessed the taxes against the corporation, it sued the debtor under the state's Uniform Fraudulent Transfer Act and obtained a judgment against the debtor, relying on section 6901(a) of the Internal Revenue Code, which provides that transferee liabilities under state law "shall be assessed, paid, and collected in the same manner … as in the case of the taxes with respect to which the liabilities were incurred." Section 507(a)(8)(A) grants a priority for any tax "on or measured by income or gross receipts." Section 6901(a) is a procedural statute providing for collection; it does not impose a tax. Liability under section 6901(a) is based solely on state transferee liability law and is measured by the transfer amount, not the tax amount. Accordingly, transferee liability under section 6901(a) does not meet the requirements of section 507(a)(8) for priority. *In re Kardash*, 573 B.R. 257 (Bankr. M.D. Fla. 2017).

15. CHAPTER 15—CROSS-BORDER INSOLVENCIES

15.1.a **Section 1517(d), not section 1517(a), governs an application to recognize a different foreign proceeding for a debtor whose foreign proceeding the court has already recognized.** The Brazilian debtor and its Netherlands-incorporated SPV finance subsidiary sought and obtained chapter 15 recognition of their Brazilian restructuring proceedings as foreign main proceedings. Soon thereafter, a major creditor initiated Netherlands insolvency proceedings against the SPV. The Netherlands insolvency trustee sought chapter 15 recognition of the Netherlands proceeding as a foreign main proceeding. Section 1517(a) requires the court to grant recognition of a foreign proceeding as a foreign main proceeding if, among other things, the foreign proceeding is pending in the jurisdiction in which the foreign debtor has its center of main interest. Section 1517(d) provides that chapter 15 provisions "do not prevent modification or termination of recognition if it is shown that the grounds for granting it were fully or partially lacking or have ceased to exist," giving due weight to possible prejudice to parties who relied on the recognition order. Subsection (d) does not require a court to modify or terminate recognition even if the necessary grounds are shown; the court has discretion. But modification or termination need not meet Rule 60(b) standards of mistake, inadvertence, surprise, excusable neglect, fraud, or newly discovered evidence, because the statute authorizes a modification or termination on specified grounds. In this case, the original recognition order was based on the SPV's single purpose and connection to the parent holding company, which used the SPV for financing. Nothing about the opening of the Netherlands proceeding changed the basis for recognition of the SPV's Brazilian proceeding. Accordingly, the court denies recognition of the Netherlands proceeding. *In re Oi Brasil Holdings Coöperatief U.A.*, 578 B.R. 169 (Bankr. S.D.N.Y. 2017).

15.1.b **Court recognizes and enforces a French court's order sanctioning a safeguard proceeding.** The French debtor commenced a "safeguard proceeding" in a French court and sought and obtained recognition of the proceeding as a foreign main proceeding in the bankruptcy court. The debtor prepared a plan, solicited acceptances, and obtained the requisite percentages of acceptances under French law, and the French court sanctioned the plan. The debtor then sought the bankruptcy court's recognition of the French judgment sanctioning the plan. Section 1521(a)(7) permits the court, after recognition of the foreign proceeding, to "grant appropriate relief" that is necessary to effectuate the purpose of chapter 15 and to protect the assets of the debtor and the interests of creditors, but only if the interests of creditors and other interested parties, including the debtor, are sufficiently protected. Appropriate relief may include enforcement of a foreign confirmation order. Because creditors accepted the plan under French law, the French court sanctioned the plan, and recognition and enforcement in the United States of the sanction order is a condition to implementation of the plan, such relief is appropriate in this case. *In re CGG S.A.*, ___ B.R. ___, 2017 Bankr. LEXIS 4353 (Bankr. S.D.N.Y. Dec. 21, 2017).