JENNER&BLOCK

Recent Developments in Bankruptcy Law, July 2015

(Covering cases reported through 530 B.R. 829 and 783 F.3d 265)

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2.1.a **Bank's application of the debtor's deposits in a check kiting scheme is a transfer of property of the debtor.** The debtor ran an extensive check kiting scheme. The bank honored overdrafts, which it covered by applying the debtor's later deposits. The trustee alleged that the bank knew or should have known of the scheme and sought to avoid and recover the overdraft payments as fraudulent transfers. The trustee may avoid a transfer of an interest of the debtor in property that the debtor made with actual intent to hinder, delay, or defraud creditors. A check kiting scheme is designed to hinder, delay, or defraud creditors. When the debtor deposits funds, the funds are property of the debtor. The deposit transfers the funds to the bank in exchange for the debtor's demand deposit account claim against the bank. When the bank applies the deposit to the overdraft, it transfers property of the debtor (the demand deposit account claim) to the bank. Therefore, the trustee's complaint adequately alleged a transfer of property of the debtor. *Welch v. Highlands Union Bank*, 526 B.R. 152 (E.D. Va. 2015).

2.1.b **A fraudulent transfer claim sounds in contract and does not support a civil conspiracy claim.** The trustee sued the debtor's principal and another, whom the trustee alleged participated in a fraudulent transfer from the debtor to a corporation owned by the other, for civil conspiracy to violate the Uniform Fraudulent Transfer Act. A civil conspiracy is a combination of two or more persons to accomplish an unlawful purpose or to accomplish a purpose, not itself unlawful, by unlawful means. The cause of action relies on the existence of an underlying wrongful act or means, such as a crime or a tort. A UFTA action to avoid a transfer, even a transfer with actual intent to defraud, sounds in contract rather than in tort. Therefore, the court dismisses the civil conspiracy cause of action. *Sheehan v. Saoud*, 526 B.R. 166 (N.D. W.Va. 2015).

2.1.c **Section 546(e) does not pre-empt an unjust enrichment claim based on actual fraudulent intent.** The debtor issued notes whose proceeds were used to pay preferred equity interests and fees of its ultimate parent entity's shareholders. The trustee sued to avoid and recover the payments as actual fraudulent transfers and for recovery based on unjust enrichment. Section 546(e) is a safe harbor that protects a settlement payment or transfer in connection with a securities contract from a trustee's avoiding powers, except under section 548(a)(1)(A), which permits a trustee to avoid an actual fraudulent transfer. Most courts hold that a trustee may not plead around section 546(e) by asserting a common law cause of action, such as unjust enrichment, that is based on the same facts as a constructive fraudulent transfer claim, against a transferee protected by section 546(e). Otherwise, section 546(e) would have little or no practical effect, contrary to Congress's intent to protect the securities markets. However, because section 546(e) allows a trustee to recover an actual fraudulent transfer, permitting a common law action to recover a transfer made with actual intent to hinder, delay, or defraud creditors would not undercut section 546(e)'s policies or protections. Therefore, based on the trustee's allegations of actual fraud in this transaction, the court denies the defendants' section 546(e) motion to dismiss the unjust enrichment claim. *Hosking v. TPG Cap. Mgmt., L.P. (In re Hellas Telecommunications (Luxembourg) II SCA)*, 526 B.R. 499 (Bankr. S.D.N.Y. 2015).

2.1.d **Ponzi scheme presumption does not apply to a legitimate business gone bad.** The debtor organized limited partnerships to invest in low-income housing and solicited limited partner investors, who would receive substantial tax benefits as well as returns on their investments. The debtor acted as general partner for some but not all of the limited partnerships. As the debtor's financial condition worsened, the debtor started raiding some limited partnership accounts to fund other accounts. The debtor paid interest to one limited partnership investor. The trustee sought to avoid the payment as a preference. Under section 547(c)(2), the trustee may not avoid a transfer made in the ordinary course of business of the debtor and the creditor. A Ponzi scheme does not engage in a legitimate business enterprise, so the ordinary course of business exception to preference avoidance does not apply. However, where the debtor actually conducted a legitimate business and only when it encountered financial trouble did it divert a small portion of its funds to pay other investors, the Ponzi scheme presumption does not apply, and the defendant may show that the payment was in the ordinary course of business. *Templeton v. O'Cheskey (In re Am. Housing Found.)*, __ F.3d ___ (5th Cir. Apr. 28, 2015).

2.2 Preferences

2.3 Postpetition Transfers

2.4 Setoff

2.5 Statutory Liens

2.6 Strong-arm Power

2.6.a **Assigned financing statement retains vitality after loan payoff.** The debtor was an asset-based commercial lender. It obtained a secured bank loan in 2001. The bank filed a UCC-1 financing statement to perfect its security interest. The debtor paid off the loan in 2004. In 2006, the debtor obtained another loan from the bank and a second bank, naming the first bank as administrative agent for the two banks in the second loan. The first bank amended the UCC-1 financing statement to name itself, as agent, and assigned the financing statement to itself, as agent, to perfect its security interest for the second loan. It also filed a new UCC-1 financing statement for the security interest for the second loan. It allowed the new financing statement to lapse before bankruptcy but timely and properly filed continuation statements for the 2001 financing statement. After the 2006 financing statement lapsed, the debtor sold true participations in a loan to one of its customers. Under the UCC, a loan participation is treated as a secured transaction, because it is the sale of a payment intangible. Under section 9-309(3), the participant's interest was automatically perfected without the need to file a financing statement. Under the UCC, a financing statement is effective as of the filing date, even long before the security interest attaches to the collateral. The effectiveness of an amendment of the secured party or an assignment of a financing statement to a different secured party is not limited to transactions after the amendment or assignment. Nor does it matter that the original loan for which the financing statement was filed was paid or that the original lender assigned only the financing statement and not the underlying security interest to the new lender. The UCC.'s filing system is to provide notice. Even an old financing statement does that, and a new lender is charged with whatever knowledge the UCC filing system yields. Therefore, the security interest of the bank, as agent, has priority over the participant's interest in the debtor's loan to its customer. *In re Oak Rock Financial, LLC*, 527 B.R. 105 (Bankr. E.D.N.Y. 2015).

2.7 Recovery

3. BANKRUPTCY RULES

3.1.a **Single publication in Wall Street Journal and debtor's local newspaper 39 days before the bar date did not provide adequate notice to customers.** The mortgage originator debtor operated nationwide and had more than a million borrowers. It published 39 days' notice of the bar date in the *Wall Street Journal* and in its local newspaper, the *Orange County Register*. The liquidating trustee objected to a claim by a borrower who was an unknown creditor on the ground that it was filed after the bar date. Due process requires notice reasonably calculated under all the circumstances to apprise parties of the action and afford them an opportunity to protect their rights. The *Wall Street Journal* is directed at a sophisticated audience, and the *Orange County Register* does not have nationwide reach. The publication period was short, and notice was published only once. Such notice is not adequate to advise unknown creditors who were the debtor's customers of the bar date. Therefore, the court denies the trustee's timeliness objection. *White v. Jacobs (In re New Century TRS Holdings, Inc.)*, 528 B.R. 251 (D. Del. 2014).

4. CASE COMMENCEMENT AND ELIGIBILITY

4.1 Eligibility

4.2 Involuntary Petitions

4.2.a **Court dismisses involuntary case against medical marijuana entity whose activities violate federal law.** Creditors filed an involuntary petition against a company that had operated a medical marijuana dispensary and currently licensed its intellectual property to a dispensary. State law permitted the business's operation, but the federal Controlled Substances Act made it illegal. Section 707(a) permits a court to dismiss a case for cause. If the court granted an order for relief, the trustee would necessarily violate federal law and would be at risk for forfeiture of the debtor's assets and for criminal liability. Such circumstances constitute cause for dismissal Therefore, the court dismisses the case. *In re MedPoint Mgmt, LLC*, 528 B.R. 178 (Bankr. D. Ariz. 2015).

4.3 Dismissal

5. CHAPTER 11

5.1 Officers and Adminisration

5.1.a **Court approves structured dismissal.** The debtor in possession liquidated all assets except a fraudulent transfer claim against its secured lender who had financed the debtor's LBO and against the shareholder who had lent additional funds and had a remaining claim secured by all the estate's $1.7 million in cash. There were allowed administrative, tax, WARN Act and general unsecured claims. The bankruptcy court had denied a motion to dismiss the fraudulent transfer action, but litigation would have been difficult, complex and risky against the well-financed defendant. There was no prospect of confirming a plan, and conversion to chapter 7 would have left the trustee without any assets to pursue claims, because the secured creditor had a lien on all cash. All parties other than the WARN Act claimants negotiated a settlement of all issues: The secured lender would contribute $2 million to an account earmarked to fund administrative expenses; the shareholder, also a fraudulent transfer defendant, would assign its lien on the estate's $1.7 million in cash to a trust to pay administrative and tax claims, with any balance distributed pro rata on general unsecured claims; all parties would exchange releases; and the case would be dismissed. The WARN Act claimants would receive nothing. Bankruptcy Rule 9019 authorizes settlements of disputed claims based on the probability of success in litigation, likely difficulties in collection, complexity, expense and delay, and creditors' paramount interests. The litigation settlement (without regard to the WARN Act claimants' exclusion or the dismissal) met these requirements. The three principal exit routes from chapter 11 are plan confirmation, conversion to chapter 7, and dismissal. Section 1112(b) authorizes the court to dismiss a case for cause, including continuing loss to or diminution of the estate, which applied here. Section 349(b) provides for reinstatement of the prepetition state of affairs, unless the court orders otherwise "for cause." A dismissal coupled with a settlement providing for distribution of estate assets is therefore permissible, so long as the procedure is not being used to effect a *sub rosa* plan or circumvent the plan confirmation process or conversion to chapter 7. Because neither was possible here, the bankruptcy court may approve a structured dismissal. *Official Committee v. CIT Group Bus. Credit Inc. (In re Jevic Holding Corp.)*, ___ F.3d ___ (3d Cir. May 21, 2015).

5.2 Exclusivity

5.3 Classification

5.4 Disclosure Statement and Voting

5.5 Confirmation, Absolute Priority

5.5.a **Court approves distribution under structured dismissal that violates absolute priority rule.** The debtor in possession liquidated all assets except a fraudulent transfer claim against its secured lender who had financed the debtor's LBO and against the shareholder who had lent additional funds and had a remaining claim secured by all the estate's $1.7 million in cash. There were allowed administrative, tax, WARN Act and general unsecured claims. The bankruptcy court had denied a motion to dismiss the fraudulent transfer action, but litigation would have been difficult, complex and risky against the well-financed defendant. There was no prospect of confirming a plan, and conversion to chapter 7 would have left the trustee without any assets to pursue claims, because the secured creditor had a lien on all cash. All parties other than the WARN Act claimants negotiated a settlement of all issues: the secured lender would contribute $2 million to an account earmarked to fund administrative expenses; the shareholder, also a fraudulent transfer defendant, would assign its lien on the estate's $1.7 million in cash to a trust to pay administrative and tax claims, with any balance distributed pro rata on general unsecured claims; all parties would exchange releases; and the case would be dismissed. The WARN Act claimants would receive nothing. Section 507(a), which applies in a chapter 11 case, gives priority to WARN Act claims over tax and general unsecured claims. *Protective Comm. v. Anderson (In re TMT Trailer Ferry)*, 390 U.S. 414 (1968), requires that a settlement in a chapter 11 case be fair and equitable, words of art that import the absolute priority rule. However, *TMT Trailer Ferry* and other cases requiring settlements to be fair and equitable arise in the plan confirmation context, not to all settlements in bankruptcy, where the Code and the Bankruptcy Rules leave more flexibility. Still, the absolute priority rule should ordinarily apply to settlements to ensure evenhanded and predictable treatment of creditors, and a bankruptcy court may deviate only based on specific and credible grounds to justify the deviation. Here, the settlement and proposed distribution "remained 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." Therefore, the court approves the settlement, the structured dismissal, and the distribution. *Official Committee v. CIT Group Bus. Credit Inc. (In re Jevic Holding Corp.)*, ___ F.3d ___ (3d Cir. May 21, 2015).

6. CLAIMS AND PRIORITIES

6.1 Claims

6.1.a **Refinancing accelerated debt is not a prepayment that gives rise to an allowable make-whole claim.** The debtor's indenture required a make-whole payment upon an optional redemption of the notes. It also automatically accelerated the notes' maturity upon a bankruptcy filing, without reference to the make-whole payment. After bankruptcy, the debtor in possession refinanced the notes, paying them in cash in full. Before the refinancing, the indenture trustee attempted to give notice rescinding the acceleration. Acceleration of a note changes the maturity date, and under New York law, which governs the indenture, a borrower's repayment after acceleration is not considered voluntary or optional, so payment after an acceleration is not a *pre*-payment. New York law requires express language imposing a prepayment penalty upon acceleration. The indenture here does not contain such language, because it does not provide that payment on acceleration constitutes a prepayment. The indenture permits the indenture trustee to rescind acceleration, but doing so violates the automatic stay, because it is an act to assess or recover on a claim, and so is void. The court defers to an evidentiary hearing whether there is cause to annul the automatic stay to permit the trustee to rescind acceleration. *Del. Trust Co., v. Energy Future Intermediate Holding Co LLC (In re Energy Future Holdings Corp.)*, ___ B.R. ___ (Bankr. D. Del. Mar. 26, 2015).

6.1.b **Court denies stay relief to permit noteholders to rescind acceleration notice to gain make-whole payment.** The debtor's first lien notes indenture contained a "make-whole" provision under which the debtor was obligated to pay a premium to the noteholders if the debtor voluntarily redeemed the notes before their stated maturity date. The indenture also provided that a bankruptcy filing was an automatic default and automatically accelerated the notes' maturity date and that the noteholders, by a majority vote, could rescind a default and reinstate the notes and their original maturity date. Shortly after the commencement of the chapter 11 case, the debtor in possession sought approval to refinance the notes at a substantially lower interest rate. The indenture trustee moved for a declaration that a default rescission notice would not violate the automatic stay or, in the alternative, for stay relief to deliver such a notice and, acting on the noteholders' instructions, gave the debtor in possession a default and acceleration rescission notice that was expressly conditioned on the court's granting stay relief. After the refinancing, the court ruled that the rescission notice would violate the stay and that the indenture's terms did not entitle the noteholders to the $431 million make-whole payment, because the automatic acceleration advanced the maturity date to the petition date, so the payment was not before the notes' maturity. The court considered whether to grant retroactive stay relief to validate the rescission notice, assuming the debtor was solvent. For purposes of this proceeding, the court assumed, with the parties' consent, that the debtor was solvent. A court may grant stay relief for "cause," which must be determined based on the totality of the circumstances, including whether the harm to the party seeking stay relief substantially outweighs the potential harm to the estate. The estate includes the interests of shareholders, not just of creditors. Here, the savings to the estate from not paying the make-whole equals the gain to the noteholders, so the relative direct harms are equal. However, the estate would suffer much greater indirect harm: three other note issues had similar make-whole provisions that would generate claims of over an additional $500 million in the aggregate. Allowance of the additional claims would not only harm the estate directly but also would make plan confirmation more difficult. The court denies stay relief. *Del. Trust Co. v. Energy Future Intermediate Holding Co. LLC (In re Energy Future Holdings Corp.)*, ___ B.R. ___ (Bankr. D. Del. July 8, 2015).

6.1.c **Prepetition arbitration costs and attorneys' fees are not subject to lease termination damages cap.** Before bankruptcy, the debtor failed to pay rent. The lessor brought an unlawful detainer action. They agreed on a surrender date but arbitrated the lessor's claim for unpaid rent. The arbitrator issued an award against the debtor for unpaid past and future rent and for arbitration costs and attorneys' fees. After bankruptcy, the lessor filed a proof of claim for all amounts. The debtor and the lessor agreed on the amount of the statutory cap under section 502(b)(6) but not on whether the arbitration costs and attorneys' fees were subject to the cap. Section 502(b)(6) limits a lessor's claim "for damages resulting from the termination of a lease." A lessor might suffer both rent and non-rent damages from lease termination. Non-rent damages are not subject to the cap if the lessor would have had the same claim if the tenant assumed the lease, because such a claim does not result from lease termination. A claim for arbitration costs and attorneys' fees would not normally arise if the lease termination results from post-bankruptcy rejection. But here, lease termination occurred before bankruptcy. The costs and fees did not result from lease termination but from the debtor's refusal to pay and could have been prevented by an earlier bankruptcy filing. Therefore, the costs and fees are not subject to the cap. *In re Kupfer*, 526 B.R. 812 (N.D. Cal. 2015).

6.1.d **City may not have unsecured claim under section 1111(b) for the portion of a property tax claim that is disallowed under section 502(b)(3).** The city asserted a secured real property tax claim for over three times the property's value. Section 502(b)(3) disallows a tax claim assessed against property of the estate to the extent the claim exceeds the property's value. The court allowed the claim only for the property's value. The city sought to make the section 1111(b) election. Section 1111(b) permits a secured creditor to treat the entire amount of its claim as secured, even though the undersecured portion would be allowed under section 506(a) only as an unsecured claim. Here, however, the unsecured portion of the city's tax claim had been disallowed under section 503(b)(3), not merely disallowed as a secured claim. Permitting the city to make the section 1111(b) election would effectively nullify section 502(b)(3). Therefore, the court denies the election. *In re 300 Washington St. LLC*, 528 B.R. 534 (Bankr. E.D.N.Y. 2015).

6.2 Priorities

6.2.a **Court grants late filed tax return penalties administrative priority.** The chapter 7 trustee for a subchapter S corporation, under the mistaken belief that he did not need to file the corporation's annual information returns, filed them late. Though no tax is due from a subchapter S corporation, the IRS assessed penalties for the late filings, which the bankruptcy court allowed as an administrative expense. The bankruptcy appellate panel reversed, holding that the penalties did not qualify under section 503(b)(1)(A) as "actual, necessary costs and expenses of preserving the estate" and remanded for the bankruptcy court to determine whether there was any other basis for administrative expense priority. Under *Nicholas v. U.S.*, 384 U.S. 678 (1966), interest that accrues on postpetition taxes and a penalty incurred for failure to file a return are entitled to administrative priority. Late filing of a return is similar to late payment of a tax, so the rule that applies to interest for late payment should apply to a penalty for late filing. *In re 800Ideas.com, Inc.*, 527 B.R. 701 (Bankr. S.D. Cal. 2015).

6.2.b **Section 510(b) subordinates claim on debtor's guarantee of affiliated limited partnership investments.** The debtor organized limited partnerships to invest in low-income housing and solicited limited partner investors, who would receive substantial tax benefits as well as returns on their investments. The debtor acted as general partner for some but not all of the limited partnerships. As the debtor's financial condition worsened, the debtor started raiding some limited partnership accounts to fund other accounts. The debtor had guaranteed one limited partner's investment. After bankruptcy, the investor filed a proof of claim against the debtor on the guarantee. Section 510(b) requires the court to subordinate the claim of a creditor for damages arising from the purchase or sale of a security of the debtor or an affiliate of the debtor. The investor asserted his claim for breach of the guarantee, which is a breach of contract claim and therefore a claim for damages. Moreover, it would elevate form over substance not to apply section 510(b) to a claim for a guarantee rather than a claim for return of the equity investment in the limited partnership. The limited partnership interests that the investor purchased are "securities" under section 101(49)(A)(xiii). A claim arises from the purchase or sale of a security if there is a nexus or causal relationship between the claim and the sale. The guarantee claim stems directly from the limited partnership interest purchases. Finally, an affiliate includes a "person whose business is operated under a lease or operating agreement by a debtor …." For the limited partnerships in which the debtor was the general partner, the debtor operated the partnership. For the others, the debtor's actual control over the limited partnerships was sufficient to treat them as being operated under an operating agreement by the debtor. Therefore, the limited partnerships are affiliates of the debtor. The claims meet all section 510(b) elements and must be subordinated. *Templeton v. O'Cheskey (In re Am. Housing Found.)*, __ F.3d ___ (5th Cir. Apr. 28, 2015).

7. CRIMES

8. DISCHARGE

8.1 General

8.2 Third-Party Releases

8.2.a **Eleventh Circuit adopts *Dow Corning* factors to permit third-party releases.** The principals of a professional engineering and surveying firm created real estate development companies and guaranteed their loans. The companies failed, and the lender pursued the principals, ultimately acquiring stock in the engineering firm. The firm filed a chapter 11 petition and proposed a plan under which the principals would continue business as a new entity, which would pay the lender for the debtor's stock with a promissory note with interest. The plan provided a release of the principals from any creditor's claims. All classes of creditors accepted the plan; the lender (as stockholder) rejected the plan. The majority view among the courts of appeals is that a plan may provide a non-consensual third party release under limited circumstances in unusual cases. The Eleventh Circuit adopts the Sixth Circuit's *In re Dow Corning*, 280 F.3d 468 (2002), non-exclusive, non-mandatory factors to determine when to permit such a release of the principals. The circumstances here satisfy a sufficient number of the *Dow Corning* factors to permit the release: the identity of interests between the reorganized debtor and the principals; their contribution to the plan by continuing to work for the reorganized debtor; protecting them from the lender's continued litigation was essential to providing them adequate time and concentration to conduct the reorganized debtor's business and service its clients; and all classes other than the lender, whose interests were fully compensated, accepted the plan. In addition, the court required the principals to drop their litigation against the lender, so that the release would not unfairly prejudice the lender. *SE Prop. Holdings, LLC v. Seaside Eng'r'g and Surveying, Inc. (In re Seaside Eng'r'g and Surveying, Inc.)*, 780 F.3d 1070 (11th Cir. 2015).

8.3 Environmental and Mass Tort Liabilities

9. EXECUTORY CONTRACTS

9.1.a **Debtor in possession may not assume trademark license without licensor's consent.** The debtor licensed its trademark under a license agreement that required the debtor to maintain certain quality standards and prohibited assignment. Before bankruptcy, the licensor brought a state court action to terminate the license based on the debtor's violation of quality standards. The debtor proposed a plan that would have provided for conversion of the secured lender's debt to equity and for assumption of the license agreement. The licensor sought stay relief to pursue the termination action. A trademark license is an executory contract. Section 365(c) prohibits assumption of an executory contract if applicable law excuses the counterparty from accepting performance from an entity other than the debtor, whether or not the contract prohibits assignment. The hypothetical test measures assumability by assignability, whether or not the debtor in possession intends to assign the contract. Although section 365(f)(1) invalidates antiassignment clauses, section 365(c) permits them but only when nonassignability is based on the identity of the contracting party. Federal trademark law prohibits assignment of a trademark license without the licensor's consent, to protect the licensor's ability to police the quality of the trademarked goods or services. Therefore, trademark nonassignability is based on the contracting party's identity, so section 365(c) applies, prohibiting assumption. The court grants stay relief. *In re Trump Entertainment Resorts, Inc.*, 526 B.R. 116 (Bankr. D. Del. 2015).

10. INDIVIDUAL DEBTORS

10.1 Chapter 13

10.1.a **Debtor may not void wholly underwater lien under chapter 13 plan.** The debtor's home was worth less than the first mortgage lien. His chapter 13 plan proposed to strip off the second lien under section 506(d). Section 506(d) voids a lien securing a claim that is not an allowed secured claim. Section 506(a) provides that an allowed claim is an allowed secured claim to the extent of the collateral's value and is an allowed unsecured claim for the balance. A straight statutory reading would permit the debtor to void the junior mortgage. But *Dewsnup v. Timm*, 502 U.S. 410 (1992), held that "allowed secured claim" means an allowed claim that is secured by a lien, whatever the value, so a debtor may not strip down a partially underwater lien. That ruling compels the same result here: the junior mortgagee has an allowed secured claim that the debtor may not void. *Bank of America, N.A. v. Caulkett*, 575 U.S. ___, ___ S. Ct. ___ (June 1, 2015).

10.2 Dischargeability

10.3 Exemptions

10.4 Reaffirmations and Redemption

11. JURISDICTION AND POWERS OF THE COURT

11.1 Jurisdiction

11.1.a **Bankruptcy judges may hear *Stern* claims with the parties' consent.** As a discovery abuse sanction, the bankruptcy court awarded judgment against the debtor on objections to discharge and on a claim that a trust for which the debtor was the trustee was the debtor's alter ego. The debtor had not objected before the bankruptcy judge to his statutory or constitutional authority to do so, but objected on appeal. Article III, section 1 of the Constitution vests the judicial power of the United States in judges who hold office during good behavior and whose salaries may not be diminished. Bankruptcy judges are appointed by the court of appeals for 14-year terms. They may hear only matters referred by the district court, which may withdraw a reference at any time on its own or a party's motion. As non-Article III judges, they may not issue a judgment in a matter involving private rights, whether core or non-core, if it does not involve resolution of the party's claim against the estate (a *Stern* claim) and, without the parties' consent, may only propose findings of fact and conclusions of law to the district court in non-core proceedings. But they may hear and determine core proceedings that do not involve adjudication of private rights. Article III reflects structural separation of powers concerns as well as a personal right. Although a party may waive personal constitutional rights, including the right to trial before an Article III court, a party may not waive structural protections. Determining whether a scheme threatens structural protections requires analysis of practical considerations rather than application of formal rules. Here, bankruptcy judges serve as officers of the Article III district courts and hear matters solely on reference by the district courts, who may withdraw a reference at any time. Their ability to hear Article III matters is limited to a narrow class of common law claims as an incident to their primary adjudicative function. There is no indication that Congress gave bankruptcy judges authority to aggrandize itself or humble the Article III judiciary. Therefore, the system and the parties' consent do not implicate structural concerns, and the parties' consent constitutionally permits a bankruptcy judge to hear and determine a *Stern* claim. *Wellness Int'l Network, Ltd. v. Sharif*, 575 U.S. ___, ___ S. Ct. ___ (2015).

11.1.b **Order denying plan confirmation is not a final order.** The court denied confirmation of a chapter 13 plan based solely on a legal issue that had split courts within the circuit but gave the debtor a chance to propose an amended plan. The debtor appealed the denial to the BAP, which heard the appeal as an interlocutory appeal under section 158(a)(3) of title 28. After the BAP affirmed, the debtor appealed to the court of appeals. The BAP did not certify the appeal for immediate review under section 158(d)(2). The court of appeals dismissed the appeal under section 158(d)(1), which permits an appeal only of a final order, because the underlying bankruptcy court order was not a final order. An order's finality in a bankruptcy case is measured at the "proceeding" level, not at the level of the entire bankruptcy case, and an order is final if it disposes of a discrete dispute within the larger case. Here, the proceeding is the process of attempting to confirm a plan, which is only a confirmation order conclude, not an order denying confirmation with leave to amend. Plan confirmation changes the status quo, finally affecting the parties' rights, while denial changes little. Therefore, an order denying confirmation with leave to amend the plan is not a final order. A debtor's protection where the court denies confirmation solely on a legal issue is to seek first level interlocutory review under section 158(d)(3) and certification for interlocutory review to the court of appeals under section 158(d)(2). *Bullard v Blue Hills Bank*, 575 U.S. ___, ___ S. Ct. ___ (May 4, 2015).

11.1.c **Bankruptcy court may exercise personal jurisdiction in stockbroker liquidation over account holder.** Based on a meeting with the debtor's representative in France, the French defendant opened an account with the debtor stockbroker in New York to invest in the U.S. stock market. The customer account agreement was written in French, governed by French law and signed in France. The defendant withdrew funds from the account by contacting the stockbroker in New York but never traveled to the United States to deal with the account. The trustee sued to avoid withdrawals as fraudulent transfers. A U.S. court may exercise personal jurisdiction over a foreign defendant who has at least minimum contacts with the United States if the exercise of personal jurisdiction comports with traditional notions of fair play and substantial justice, considering such factors as the potential burden on the defendant, the forum state's interest in adjudicating the dispute, the plaintiff's interest in obtaining convenient and effective relief, the judicial system's interest in efficiency and in furthering social policies. The defendant's decision to open a New York account to invest in the U.S. stock market provide sufficient contacts with the United States for the exercise of personal jurisdiction. The French aspects of the customer account agreement and the defendant's absence from the United States do not undermine the sufficiency of the contacts. The United States has a strong interest in enforcing its fraudulent transfer laws, and the trustee has a significant interest in expeditious resolution of the dispute. Therefore, the trustee has established a prima facie case that exercise of personal jurisdiction over the defendant in the United States comports with traditional notions of fair play and substantial justice and is reasonable. *Picard v. Estate of Igoin (In re Bernard L. Madoff Inv. Secs. LLC)*, 525 B.R. 871 Bankr. S.D.N.Y. 2015).

11.1.d **U.S. correspondent bank account does not subject account holder to personal jurisdiction.** The debtor Bahraini bank made short-term Bahraini law-governed investments in Bahrain in U.S. dollars through two Bahraini investment banks. The investments matured after the bank's chapter 11 filing. The investment banks offset their obligations to return the invested funds against the debtor's other obligations to them. The investment banks did not maintain offices, staff or telephone numbers in the United States and never solicited or conducted business or advertised in the United States. One of the banks maintained a New York bank correspondent account, through which it directed the debtor to transfer the funds to the investment bank; the other did not but directed the debtor to send funds through the investment bank's Bahraini commercial bank's correspondent account at a New York bank. The debtor's plan vested the right to pursue estate causes of action with the chapter 11 committee, which sued the investment banks for violating the automatic stay and for the return of the investments. A U.S. court may exercise personal jurisdiction over a foreign defendant if the defendant had minimum contacts with the United States and exercising jurisdiction would be reasonable and not offend traditional notions of fair play and substantial justice. Determining minimum contacts includes consideration of whether the defendant purposefully availed itself or doing business in the United States and could foresee being hailed into court there. Maintaining a correspondent account at a U.S. bank is not alone minimum contacts, nor is receiving funds in the United States. The passive receipt of funds is not a volitional act of doing business in the United States but rather the act of the transferor. Here, the defendants' only contact with the United States was their receipt of funds through New York correspondent bank accounts. Moreover, because the investments were made in Bahrain and governed by Bahraini law, neither investment bank could reasonably have expected to be hailed into court in the United States. A plaintiff may take jurisdictional discovery to uncover additional facts to support a personal jurisdiction claim if the complaint's allegations make a sufficient start toward showing personal jurisdiction and needs discovery to fill any holes, but not based on the speculation that the plaintiff will find sufficient facts to support personal jurisdiction. Here, the committee offered no support for its claim that discovery would fill holes in its complaint, only that it sought discovery to establish jurisdiction. Therefore, the court dismisses the complaint. *Official Committee of Unsecured Creditors v. Bahrain Islamic Bank (In re Arcapita Bank, B.S.C.(C))*, 529 B.R. 57 (Bankr. S.D.N.Y. 2015).

11.2 Sanctions

11.3 Appeals

11.4 Sovereign Immunity

12. PROPERTY OF THE ESTATE

12.1 Property of the Estate

12.1.a **Social media accounts are property of the debtor.** An individual entrepreneur in Texas started a business that ultimately filed chapter 11. During the business's operation, the entrepreneur created a Facebook page and a Twitter account using the business's name. The accounts had thousands of followers. Upon confirmation of a plan that transferred control of the business to a minority shareholder, the entrepreneur refused to transfer the social media accounts on the ground that they were his personal property, not property of the business. However, the evidence showed that the accounts were used primarily, almost exclusively, to promote the business. Section 541(a)(1) includes in property of the estate all of the debtor's interests in property, wherever located, as of the commencement of the case. Texas courts have not yet resolved whether a social media account is a property interest, though other states' courts have. Like subscriber and customer lists, social media accounts provide valuable access to customers. Therefore, they are property and are property of the estate. The court orders the entrepreneur to turn over the accounts to the reorganized debtor. *In re CTLI, LLC*, 528 B.R. 359 (Bankr. S.D. Tex. 2015).

12.1.b **Ponzi scheme victim who had escrow agreement with debtor may trace funds to establish constructive trust.** The New York debtor operated a Ponzi scheme. In one transaction, it agreed to hold funds in escrow for a seller and buyer of assets. It had not disbursed the funds before bankruptcy. The seller, who was entitled to the funds under the escrow agreement, filed a secured claim in the bankruptcy case. Under New York law, an escrow requires delivery of property to a third party, who is to deliver it to the grantor or the grantee upon the performance of an act or the occurrence of an event. Title to escrowed funds remains in the grantor until the act or event and then immediately vests in the grantee. The escrow holder holds only a legal interest as trustee. Under section 541(d), the escrowed property does not become property of the estate. A secured claim is a claim secured by property of the estate. Therefore, neither escrow party has a secured claim against the debtor. An escrow party may impose a constructive trust on escrowed property only if it is specifically identifiable, such as by being held in a segregated account or by being traceable. Although, out of fairness to all other victims, a Ponzi victim's right to trace is severely limited, a victim who was the beneficiary of a specific escrow agreement may be permitted to trace. *Alarmex Holdings, LLC v. Gowan (In re Dreier LLP)*, 527 B.R. 126 (S.D.N.Y. 2014).

12.2 Turnover

12.3 Sales

13. TRUSTEES, COMMITTEES, AND PROFESSIONALS

13.1 Trustees

13.2 Attorneys

13.2.a **Section 330(a) does not allow compensation for defending a fee application.** The debtor in possession's counsel successfully sued the debtor's parent to recover a fraudulent transfer and guided the debtor through a chapter 11 that resulted in full payment of creditors and return of the company to the parent. The parent objected to counsel's fees. Under the American Rule, each party in a dispute must bear its own legal fees, unless a statute provides otherwise. Section 330(a)(1) permits a court to award "reasonable compensation for actual, necessary services rendered." "Services" refers to labor performed for another, in this case, the estate, not the professional itself. Preparation of a fee application is a service for the estate required by the Code, but defense of an application is not. It is a service only for the professional. Therefore, section 330(a) does not displace the American Rule. Fees for defending a fee application are not compensable by the estate. *Baker Botts L.L.P. v. ASARCO LLC*, 576 U.S. ___, ___ S. Ct. ___ (June 15, 2015).

13.3 Committees

13.3.a **Court may not disband additional statutory committee.** The U.S. Trustee appointed a committee of creditors holding unsecured claims and a separate committee of creditors holding second lien notes, which were likely undersecured or unsecured. The debtor moved to disband the noteholders committee. Section 1102(a)(1) authorizes the U.S. Trustee to appoint additional committees of creditors or equity security holders. Section 1102(a)(2) authorizes the court to order the appointment of additional committees. Section 1102(a)(4) authorizes the court to change committee membership if necessary to assure adequate representation. (Section 1102(a)(3) applies only in small business cases.) The Code does not grant the court any other powers over committee formation or membership. Therefore, under the statutory construction rule that expression of one thing excludes another, the court does not have authority to disband a committee the U.S. Trustee appointed. Section 105(a) does not provide an alternative route, because a court may rely on section 105(a) only to implement what the Code authorizes, not what it does not permit. *In re Caesars Entertainment Op. Co., Inc.*, 526 B.R. 265 (Bankr. N.D. Ill. 2015).

13.4 Other Professionals

13.5 United States Trustee

14. TAXES

15. CHAPTER 15—CROSS-BORDER INSOLVENCIES