JENNER&BLOCK

Commercial Law League of America
Case Law Update

Supreme Court Corner

The following three U.S. Supreme Court cases having been briefed and argued. They are now *sub judice*. When decided, I shall amend my case law update.

A. ***William K. Harrington, United States Trustee, Region 2, Petitioner v. Purdue Pharma LP*, et al No. 23-124, Docketed August 10, 2023, Argued December 4, 2023. Sub Judice**

The facts are that Purdue Pharma, a Chapter 11 Debtor, confirmed a plan that released non-debtors, primarily members of the Sackler family, from the claims of creditors. The issue is whether there is any statutory authority that permits a bankruptcy court to grant third party releases. In addition to the statutory authority question, there are critical questions of the standing of the United States Trustee, public policy and the Seventh Amendment right to a jury.

B. ***Office of the United States Trustee v. John Q. Hammons Fall 2006 LLC,* No. 22-1238, Docketed June 23, 2023, Argued January 9, 2024. Sub Judice**

Congress authorized the U.S. Trustee to increase quarterly fees in U.S. Trustee Districts. The fee increase did not cover non-U.S. Trustee Districts. The U.S. Supreme Court struck down the fee increase as a non-uniform act of bankruptcy in contravention to the constitution. *Siegel v. Fitzgerald,* 142 S.Ct. 177 (2022). However, the court left open the remedy. The U.S. Truste claims

that Chapter 11 estates are only entitled to prospective relief, while the affected parties claim the relief is retroactive and they are entitled to a refund.

C. *Truck Insurance Exchange v. Kaiser Gypsum Co.*, No. 22-1079, Docketed October 13, 2023, Argued March 19, 2024

Issue: Whether an insurer with financial responsibility for a bankruptcy claim is a "party in interest" that may object to a Chapter 11 plan or reorganization. This is a standing case which raises the issue of both Article III standing and statutory standing under 11 U.S.C. 1109.

CASE WITH A PETITION FOR *CERTIORARI* PENDING OR DENIED.

The following cases are the decisions of the Court of Appeals where petitions for certiorari are pending.

A. *Castleman v. Burman,* 75 F.4th 1052 (9th Cir.2023). Cert. Denied February 20, 2024.

Background: Debtors commenced a chapter 13 case and listed their home among their assets. At the time of the petition, the house was valued at $500,000. The mortgage on the house had an outstanding balance of $375,077. The debtors claimed a homestead exemption of $124,923. Thus, there was no equity in the home for the estate on the petition date. The bankruptcy court confirmed a chapter 13 plan, but after 18 months the debtors could no longer make their required payments. The debtors then converted their chapter 13 case to a chapter 7 case. In the meantime, the value of the house increased by an estimated $200,000. The chapter 7 trustee filed a motion to sell the house to recover the increase in value for the creditors. The debtors objected, arguing that

the increased equity in the house belonged to them, not the bankruptcy estate, under section 348(f)(1)(A).

Issue: Whether post-petition, pre-conversion increases in the equity of an asset belonging to the bankruptcy estate or to debtors who, in good faith, convert their chapter 13 case into a chapter 7 liquidation.

Holding: In a case converted from chapter 13 to chapter 7, a post-petition, pre-conversion increase in the equity of an asset belongs to the bankruptcy estate, not the debtor, even when the debtor has converted the case in good faith.

Rationale: This court's decision rests on the plain language of section 348(f)(1)(A) and the Ninth Circuit's previous interpretation of section 541(a). Property of the estate in the converted chapter 7 case is defined by section 348(f), which provides: "Property of the estate in the converted case shall consist of property of the estate, as of the date of filing the petition, that remains in the possession of or is under the control of the debtor on the date of conversion[.]" Under section 541(a)(1), when a debtor files for bankruptcy an estate is created that includes "all legal or equitable interests of the debtor in property as of the commencement of the case," including all "proceeds, product, offspring, rents, or profits of or from property of the estate." Therefore, the equity is not separable from the home, which under section 541(a) is always considered property of the estate. The Ninth Circuit has previously held that the breadth of section 541(a), especially 541(a)(6), means that any post-petition appreciation in assets inures to the bankruptcy estate. The definition of property of the estate in section 541(a) applies the same in both chapter 7 and chapter 13 cases.

Increased equity in a prepetition asset is the same property interest, not separate, after-acquired property interest. The Ninth Circuit did not look to the legislative history of section 348(f) because it concluded that when read with the rest of the Bankruptcy Code, the statutory language is not ambiguous. The court also stated that if Congress intended to exclude any increase in equity of an estate asset from the bankruptcy estate, it could have amended section 348(f) to make that clear.

The court concluded by stating: In sum, the plain language of § 348(f)(1) dictates that any property of the estate at the time of the original filing that is still in debtor's possession at the time of conversion once again becomes part of the bankruptcy estate, and our case law dictates that any change in the value of such an asset is also part of that estate. In this case, the property increased in value. In other cases, the value might decline, or the value of one asset in the estate might increase while other property depreciates in value. This is simply a happenstance of market conditions, which sometimes will benefit the debtor and sometimes benefit the estate. The district court and bankruptcy court correctly concluded that the [debtors'] home (including any post-petition, pre-conversion increase in equity) was again part of the bankruptcy estate pursuant to § 348(f)(1) and available to the Trustee for the benefit of the creditors.

Dissent: The dissent stated that post-petition, pre-conversion increases in equity belongs to the debtors, not the bankruptcy estate. It reasoned that the majority opinion improperly punishes debtors for initially filing under chapter 13 by forcing the sale of their home. Section 348(f)(1)(A) defines the property of an

estate converted from chapter 13 to chapter 7 in good faith as limiting the converted estate to the property of the debtor at the time of the initial petition. This removes a potential disincentive to chapter 13 filings by putting debtors in the same position as if they initially filed chapter 7. The majority's view, the dissent argues, takes too simple of an approach to the plain meaning of section 348(f). A reading of section 348(f) in light of the Bankruptcy Code as a whole shows that "property of the estate" is defined differently in chapter 13 cases. Upon confirmation of a chapter 13 plan, the property vests in the debtor. Consequently, when a chapter 13 plan is confirmed, any subsequent appreciation accrues to the debtor. The dissent also highlighted the statute's legislative history, which suggests that Congress was attempting to address this very issue. The House Report on the Bankruptcy Reform Act of 1994, which added section 348(f) to the Bankruptcy Code, suggests that home equity that accrues during chapter 13 proceedings should not be included in the converted estate. The purpose of the statute was to avoid disincentivizing debtors from attempting to pay creditors over time through chapter 13.

B. *Miller v. United States,* 71 F. 4th 1247 (10th Cir.2023). This case arose from a converted Chapter 7 case of All Resorts Group Inc. Petition for *Cert.* Filed January 29, 2024.

The Debtor paid the personal income taxes of two of its principals, a total of $145,138.78 to the Internal Revenue Service. The Trustee brought an action in the bankruptcy court against the United States to avoid the transfer as a fraudulent transfer under applicable Utah law and 11 U.S.C. 544(b). The government defended the action by arguing that the Trustee could not satisfy

the requirement under 11 U.S.C. 544(b) that an actual creditor could have avoided the action under non-bankruptcy law. The government claimed that such a creditor would have been barred under the doctrine of sovereign immunity from suing the government. The Bankruptcy Court granted summary judgment to the Trustee on the grounds that 11 U.S.C. 106 (a) abrogated the government's right to claim sovereign immunity. 11 U.S.C. 106(a) states that "Notwithstanding an assertion of sovereign immunity, sovereign immunity is abrogated as to the governmental unit to the extent set forth in this section with respect to the following section 544. The Court found that Congress' abrogation of sovereign immunity must contain a clear statement. However, there is no requirement that Congress use magic words. *See LAC du Flambeau Band of Lake Superior Chippewa Indians v. Coughlin,* 55 U.S. _____ 2023 Lexis 2544 (2023). The Court found that when Congress uses the term "with respect to" has the effect of broadening the effect, ensuring that the scope of a statutory provision covers not only its subject but also matters relating to that subject. *Lamar, Archer & Cofrin, LLP v. Appling,* 138 S.Ct. 1752 (2018). Thus, the Court concluded that applying the term "with respect to" to section 106(a), Congress intended the broadest abrogation of sovereign immunity.

COURT OF APPEALS CASES OF INTEREST

A. *Fliss v. Generation Cap. I, LLC*, 87 F.4th 348 (7th Cir. 2023).

The Seventh Circuit recently held that the *Rooker-Feldman* doctrine, collateral estoppel, and res judicata did not preclude a bankruptcy court from disallowing a claim for a consent judgment issued in state court.

In this case, John Fliss and Larry Wojciak were business partners whose jointly owned companies defaulted on a bank loan that they had personally guaranteed. After the bank obtained a consent judgment (the "**Judgment**") in state court, Wojciak used one of his companies, Generation Capital I, LLC ("**Generation**"), to purchase the bank's Judgment and attempt to enforce the Judgment against Fliss.

Generation commenced a supplemental proceeding to compel Fliss to turnover property to satisfy the Judgment. In response, Fliss filed a motion for determination in the main proceeding, arguing that Generation's purchase of the Judgment extinguished the debt. The state court sided with Generation and entered a determination order (the "**Order**") stating that the debt was still owed.

Fliss then filed a voluntary Chapter 13 petition in bankruptcy court. Generation filed a secured claim for the Judgment plus interest, and upon Fliss's objection, the bankruptcy court disallowed the claim. The bankruptcy court found that the debt was extinguished because Wojciak, through Generation, was impermissibly both the creditor and debtor of the Judgment. The bankruptcy court further held that the doctrines of *Rooker-Feldman*, res judicata, and collateral estoppel did not bar it from deciding whether the claim should be disallowed. The district court affirmed, and Generation appealed to the Seventh Circuit.

The Seventh Circuit affirmed in all respects. It held that the bankruptcy court properly exercised subject matter jurisdiction when it disallowed Generation's claim. The Court reasoned that the bankruptcy court did not violate

the *Rooker-Feldman* doctrine—that precludes a federal court from overturning a state court order—because Fliss did not file a federal suit seeking to set aside a state court order and the state court never decided whether Generation's claim in bankruptcy was allowed. Instead, Fliss merely sought protections afforded to him under federal bankruptcy law.

The Seventh Circuit further held that neither the Judgment nor Order precluded Fliss from objecting to Generation's claim in bankruptcy under theories of collateral estoppel or res judicata. These theories preclude a party from re-litigating issues decided in a prior adjudication. The Court reasoned that the Judgment was not entitled to collateral estoppel because collateral estoppel relies on actual litigation of the issues in a prior proceeding, and consent judgments fall short of such actual litigation. The Court further reasoned that res judicata did not preclude Fliss's objection because the Judgment's preclusive effect was limited to the Judgment's scope: the existence of the debt and its amount. The Judgment did not decide whether Generation or Wojciak's enforcement of the Judgment as a claim in Fliss's bankruptcy was proper.

Finally, the Seventh Circuit reasoned that the Order was not subject to collateral estoppel or res judicata because the Order was not a final judgment under Illinois law. The Order did not dispose of the entire proceeding, and in such situations, Illinois Supreme Court Rule 304(a) requires an express written finding by the court "that there is no just reason for delaying either enforcement

or appeal or both" to be a final judgment. Accordingly, the Seventh Circuit affirmed that Generation's claim was disallowed, extinguishing Fliss's debt.

B. *Matter of Imperial Petroleum Recovery Corp.*, 84 F.4th 264 (5th Cir. 2023).

The Fifth Circuit recently held that the plaintiff in a bankruptcy adversary proceeding was entitled to post-judgment interest under 28 U.S.C. § 1961 that permits such interest on "any money judgment in a civil case recovered in a district court."

In this case, Imperial Petroleum Recovery Corporation ("**IPRC**") marketed microwave separation technology ("**MST**") units that recovered usable oil from emulsions, and the Carmichaels held security interests in the MST units. In 2013, the Carmichaels filed an involuntary Chapter 7 liquidation proceeding against IPRC, and in 2014, the Trustee assigned IPRC's assets to the Carmichaels. The Carmichaels expected to recover two MST-1000 units, but instead, Thomas Balke and his company Basic Equipment - who were hired to refurbish the MST units - sent the Carmichaels a single MST-1000 unit that was partially disassembled and damaged.

The Carmichaels filed an adversary proceeding against Balke in bankruptcy court alleging that Balke violated the automatic stay by converting IPRC's physical assets and infringing IPRC's intellectual property. Bankruptcy Judge Bohm found that Balke had stolen one MST unit, destroyed one MST unit, and founded a business that improperly used IPRC's intellectual property. Judge Bohm awarded the Carmichaels $2 million in damages, $325k in attorney fees,

and post-judgment interest. He ordered Balke to turnover any converted IPRC property to the Carmichaels.

Balke then appealed to the district court. While the appeal was pending, the case was reassigned to Bankruptcy Judge Isgur who commented that Balke's appeal raised an important issue regarding the meaning of Federal Rule of Bankruptcy Procedure 8008(a). This led the district court to remand the case. On remand, Judge Isgur issued new findings, a final opinion, and an amended judgment that reduced damages to $4k, attorney fees to $92k, and did not specifically provide for post-judgment interest. Judge Isgur instead found that IPRC sent Balke two MST units, an MST-1000 and an MST-150, with the latter intended to be broken down and used to maintain the former, based on the testimony of an IPRC employee. The district court affirmed, and the Carmichaels appealed to the Fifth Circuit.

The Fifth Circuit held that Judge Isgur did not err in reaching his factual findings. The Court reasoned that Judge Isgur did not abuse his discretion in admitting the employee's testimony under the residual exception to hearsay rule and that Judge Isgur did not err merely because his findings did not match those of Judge Bohm. The Court further held that Judge Isgur did clearly err in calculating the cost to reassemble the MST-1000 because he used a "sufficient factual foundation" standard that elevated the burden of proof beyond preponderance.

The Fifth Circuit also held that the Carmichaels were entitled to post-judgment interest under 28 U.S.C. § 1961 that permits such interest on "any

money judgment in a civil case recovered in a district court." The Court reasoned that bankruptcy adversary proceedings are civil cases, relying on references in the Federal Rule of Bankruptcy Procedure, Bankruptcy Code, and the Supreme Court's decision in *Grogan v. Garner*, 498 U.S. 279, 287 (1991) (treating a Title 11 dispute as a "civil action[]"). The Court further reasoned that bankruptcy courts are included under "district court[s]" because bankruptcy courts exercise jurisdiction at the suffering of supervising district courts. The Court held that the post-judgment interest began to accrue as of Judge Bohm's initial judgment.

The Fifth Circuit further held that IPRC's assignable intellectual property was assigned to the Carmichaels in 2014, that the Carmichaels are not estopped from arguing that IPRC's property is worth more than the value assigned in IPRC's bankruptcy petition, and that the Carmichaels' appeal is not frivolous and deserving of sanctions. The Fifth Circuit then remanded the case to the bankruptcy court to determine the damage award, attorney fees, and post-judgment interest.

C. *Matter of Thornhill Bros. Fitness, L.L.C.*, 85 F.4th 321 (5th Cir. 2023).

The Fifth Circuit held that executory contracts cannot be partially assigned.

In this case, William Flynn suffered neuromuscular injuries from an alleged equipment malfunction at an Anytime Fitness location. Flynn then filed a personal injury suit in state court against the franchisee, Thornhill Brothers Fitness, LCC ("**Thornhill**") and franchisor Anytime Fitness, LCC ("**Anytime**"). Anytime argued that the involved equipment was unauthorized by the Thornhill-

Anytime franchise agreement (the "**Franchise Agreement**") and that Anytime was not otherwise liable for Flynn's injuries. The state court agreed and dismissed Anytime from the case with prejudice. The state appellate court affirmed.

Five days before Flynn's case against Thornhill went to a jury trial, Thornhill filed a voluntary petition for bankruptcy and listed Flynn's litigation claim as a liability with an unknown amount exceeding $1 million. Two days later, Thornhill informed the bankruptcy court that Flynn and Thornhill had reached a settlement, and the bankruptcy judge approved the settlement.

The settlement contained two important documents. First, the "**Stipulation**" stated that Thornhill's insurer would pay Flynn $1 million plus interest and that Flynn was able to sue Anytime despite the previous state court order dismissing these claims with prejudice. Second, the "**Confession of Judgment**" stated that Thornhill admitted $7 million in total liability to Flynn. In connection with the settlement, Thornhill assigned its indemnity rights contained in the Franchise Agreement to Flynn, and Thornhill otherwise retained the Franchise Agreement. Flynn and Thornhill further agreed that Thornhill would remain a defendant in name only because Thornhill needed to be on the jury verdict to recover against Anytime.

Anytime did not learn about this settlement until Flynn filed another state court suit against Anytime. In this suit, Flynn argued that Thornhill's Confession of Judgment, assignment of the Franchise Agreement's indemnity rights, and the bankruptcy court's approval of the foregoing, resulted in Anytime

being liable for up to $7 million. The state court then denied Anytime's motion to dismiss. The bankruptcy court permitted Anytime a hearing, but ultimately entered an order ratifying its actions that was subsequently affirmed by the district court. Anytime then appealed to the Fifth Circuit.

The Fifth Circuit held that Thornhill's assignment of only the Franchise Agreement's indemnity rights to Flynn was noncompliant with the Bankruptcy Code. The Court held that the Franchise Agreement was likely an executory contract - a contract in which neither party has finished performing a post-petition debtor may assume, reject, or assign - and that executory contracts must be assumed, rejected, or assigned in their entirety. The Court reasoned that this interpretation was consistent with the statute's language that referred to executive contracts in their entirety and Supreme Court caselaw holding that a debtor cannot use the bankruptcy process to possess anything more than it did outside of bankruptcy. *See* 11 U.S.C. § 365(f); *Mission Prod. Holdings, Inc. v. Tempnology, LLC*, 139 S. Ct. 1652 (2019). The Court stated that permitting a debtor to partially assign executory contracts would impermissibly empower it with rights the debtor does not have outside of bankruptcy. Thus, the Court held that Thornhill's assignment of the Franchise Agreement's indemnity rights, while otherwise retaining the Franchise Agreement, was improper and remanded the case to the bankruptcy court.

D. *In re Myers*, No. 22-16615, 2023 WL 8047842 (9th Cir. Nov. 21, 2023).

The Ninth Circuit Court of Appeals held that Rule 3001, not state law, controls the requirements for a proof of claim.

In this case, LVNV Funding, LCC (“**LVNV**”) filed a proof of claim in the bankruptcy proceeding of David and Mary Myers (the “**Myers**”). LVNV’s claim was for credit card debt. The bankruptcy court allowed LVNV’s proof of claim over the Myers’ objection, and the Myers appealed to the United States Bankruptcy Appellate Panel of the Ninth Circuit (the “**BAP**”).

The BAP held that, although LVNV’s proof of claim was entitled to prima facie validity because it complied with Federal Rule of Bankruptcy Procedure 3001 (“**Rule 3001**”). The claim was disallowed under 11 U.S.C. § 502(b)(1) because the provided documentation was insufficient to enforce the credit debt under state law. Rule 3001 sets out the procedural requirements for a proof of claim and specifies when a proof of claim is prima facie valid. The BAP then vacated the bankruptcy court’s order and remanded the case. On remand, the bankruptcy court disallowed LVNV’s claim. LVNV then appealed the BAP’s decision and bankruptcy court’s order disallowing the claim to the Ninth Circuit.

The Ninth Circuit held that the principles of *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938), dictate that Rule 3001, not state law, controls the requirements for a proof of claim. The Court reasoned that *Erie* stands for the proposition that federal courts, including bankruptcy courts, should apply federal procedural law and state substantive law. Therefore, if a state law conflicts with a valid federal procedural law in a federal action, the federal procedural law will control and the conflicting state law will be rendered inapplicable. Here, the Ninth Circuit held that the state law requiring certain documentation to enforce LVNV’s credit card debt claim conflicted with Rule 3001, a valid federal procedural law, because the

laws required LVNV to provide different documentation to enforce its claim. Therefore, the Court held that Rule 3001 controls over the state law, and LVNV's failure to comply with the state law did not disallow its claim. The Ninth Circuit reversed the BAP decision.

E. *Montoya v. Goldstein (In re Chuza Oil Co.)*, 88 F. 4th 849 (10th Cir. 2023).

Ear-marking doctrine requires satisfaction of the dominion/control and diminution of the estate tests. The closely held debtor owed money to an insider on a note that was to receive no payments until a separate series of notes was paid in full. The debtor's principal loaned money to the debtor specifically to make payments on the insider note and the other notes. Upon the debtor's bankruptcy, the trustee sued to avoid and recover the payments on the insider note as preferences and as constructively fraudulent transfers. Both a preference and a fraudulent transfer are transfers of an interest. *Montoya v. Goldstein (In re Chuza Oil Co.),* in property of the debtor that meets certain additional conditions. If a new creditor loans money to a debtor to pay an old creditor, the payment might be protected by the ear-marking doctrine, which deems the money not to have been property of the debtor. To satisfy the ear-marking doctrine, the new money must not be subject to the dominion or control of the debtor - that is, the debtor must be under a binding agreement to use the new money to pay the old creditor and not for any other purpose - and the transaction must not result in the diminution of the estate - that is, the reduction in the amount of assets available to pay creditors. The doctrine's application is clearer when the new creditor pays the money directly to the old creditor and the

money does not pass through the debtor's account, but that is not required. Here, the new lender (the principal) required the debtor (controlled by the principal) to use the new loan to pay the insider note, so the debtor did not have dominion and control over the funds. Because the principal loaned substantially more to the debtor that was used for the insider note payments, the transaction did not result in a diminution of the estate. Therefore, the transfer was not property of the debtor and was not avoidable.

F. *In re FTX Trading Ltd.*, 91 F. 4th 148 (3rd Cir. 2024).

The new CEO determined that the debtor's books and records were in a shambles, with a complete failure of corporate controls and a complete absence of reliable financial information. The debtors lacked appropriate corporate governance and a functioning board of directors. The new CEO began an investigation into the multiple failures. Meanwhile, the former CEO was indicted and later convicted of numerous federal crimes in connection with the debtor's operation. Section 1104(c) provides that "on request of a party in interest or the United States trustee ..., the court shall order the appointment of an examiner to conduct such an investigation of the debtor as is appropriate" if unsecured debts exceed $5 million. The use of "shall" makes the appointment mandatory, not discretionary, with the bankruptcy court. The phrase "to conduct such an investigation of the debtor as is appropriate" addresses only the nature and scope of the investigation. "As is appropriate" modifies "investigation," not "shall order the appointment." Thus, the bankruptcy court may limit the investigation to

prevent tactical delays or duplication of effort Recent Developments in Bankruptcy Law, January 2024, but may not dispense with it altogether.

G. *Farm Credit Servs. Of Am. v. Topp (In re Topp)*, 75 F. 4th 959 (8th Cir. 2023).

Court may use Treasury rate as a starting point to determine the appropriate cram down interest rate. The chapter 12 debtor proposed a plan that would pay its largest secured creditor an interest rate equal to the Treasury bill rate, plus 2%. The creditor argued for the prime rate, plus 2%. Under *Till v. SCS Credit Corp.*, 541 U.S. 465 (2004), the Supreme Court approved using a formula approach - a risk free rate plus a risk adjustment - to determine an appropriate cram Recent Developments in Bankruptcy Law, January 2024, down interest rate. It did not require use of a bank prime rate as the risk-free rate, especially since the prime rate includes some risk of nonpayment. Which rate to use as the starting point is a question of fact for the bankruptcy court. Here, the bankruptcy court properly calculated the risk-free rate, based on Treasury rates, and the appropriate premium. *Farm Credit Servs. Of Am. v. Topp (In re Topp)*, 75 F. 4th 959 (8th Cir. 2023).

H. *Kirkland v. United States Bankr. Court for the Cent. Dist. of Cal. (In re Kirkland)*, 75 F. 4th 1030 (9th Cir. 2023)

A remote witness may not be compelled to testify by video transmission. The trustee sued an investor in a Ponzi scheme. The investor had lived and worked in the debtor's city but had since moved to a distant location. The trustee issued a subpoena to compel the investor to testify at trial by contemporaneous video transmission. F.R.C.P. 45(c), made applicable in bankruptcy cases by

Bankruptcy Rule 9016, permits a subpoena for testimony only at a place within 100 miles of the witness' residence or place of employment. F.R.C.P. 43(a), made applicable by Bankruptcy Rule 9017, requires a court to take trial testimony in open court, but "for good cause and in compelling circumstances, may permit testimony in open court by contemporaneous transmission from a different location." Rule 45 specifies who may be compelled to attend trial and testify; Rule 43 specifies how the testimony may be taken. Rule 43 addresses a different issue and does not override Rule 45's 100-mile limitation nor mean the place of testimony is wherever the witness is located. Otherwise, Rule 45's limitation and Rule 43's requirement that testimony be taken in open court would be effectively repealed.

I. ***Carmichael v. Balke (In re Imperial Petro. Recovery Corp.), 84 F. 4th 264*** **(5th Cir. Oct. 6, 2023).**

A debtor in possession may assign preference actions in a plan. As part of a settlement among the debtor and secured creditors, the plan provided that a major preference action would be sold to one of the secured creditors, who could keep any litigation proceeds, even if in excess of the amount of its claim. Section 363(b) permits sale of property of the estate outside of a plan, and section 1123(a)(5) permits transfer of property of the estate under a plan. Under section 541(a)(1), "property of the estate" "is intended to include in the estate any property made available to the estate by other provisions of the Bankruptcy Code." *U.S. v. Whiting Pools, Inc.,* 462 U.S. 198, 205 (1983). Preference claims, which are created by the Code on the filing of the petition, make recovered preferences available to the estate. Therefore, they are property of the estate. In

addition, section 541(a)(7) includes in the property of the estate any property that the estate acquires during the case. It is all-embracing to ensure that later-created property interests become property of the estate, including the right to pursue preferences. Because preference claims are property of the estate, whether under section 541(a)(1) or (7), they may be sold under section 363(b) or transferred under a plan.

See also *Briar Capital Working Fund Capital, LLC v. Remmert* 91 F. 4th 376 (5th Cir. 2024); *Pitman Farms. V. ARKK Food Co. (In re Simply Essentials, LLC*) 78 F.4th 1006 (8th Cir. 2023).