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SECTIONS 542 AND 543—TURNOVER OF PROPERTY OF THE ESTATE

By Bruce Grohsgal,[*] Gregory J. Flasser[**] and Katharina Earle[***]

I. INTRODUCTION

Section 542 of the Bankruptcy Code generally requires a noncustodial entity who has possession, custody, or control of property of the estate that the trustee may use, sell, or lease under § 363, or that the debtor may exempt under § 522, to deliver to the trustee the property or the value of the property, and to account for such property.[1] Section 543 similarly requires a custodian with knowledge of the commencement of the case to deliver such property and the proceeds of such property to the trustee and account for such property.[2] This paper reports on opinions regarding turnover published since the 2017 Annual Survey.[3]

II. JURISDICTION AND AUTHORITY OF THE BANKRUPTCY COURTS

Jurisdiction and Authority—Generally

Bankruptcy jurisdiction is essentially in rem, based on the district court's exclusive jurisdiction over all property,

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[1]11 U.S.C.A. § 542.

[2]11 U.S.C.A. § 543.

[3]The opinions considered in this update are mostly from early 2017 through early 2018.

wherever located, of the debtor's estate.[4] The court's jurisdiction begins on the filing of the bankruptcy case and for most purposes ends when the property is transferred from the estate or revests in the debtor[5] or the case is dismissed.[6] The bankruptcy court stands in the district court's shoes with respect to its jurisdiction over estate property, by virtue of the standing order of reference from its district court, and has exclusive jurisdiction over property of the debtor's estate.[7]

The statutory framework for this jurisdiction is set forth in 28 U.S.C.A. § 157. Section 157(b) gives bankruptcy judges the statutory authority to enter final judgments on certain "core" matters arising under or arising in the bankruptcy case. "Core" matters expressly include "orders to turn over property of the estate."[8]

By comparison, the bankruptcy judge does not have authority under § 157 to enter a final judgment on a matter that is not core but is merely "related to" the bankruptcy case. A ubiquitous example of a non-core action is a suit by a debtor to recover a disputed prepetition account receivable. The bankruptcy judge may hear such a non-core, "related to" matter, but it cannot enter final judgment on it unless the parties have consented to the bankruptcy court's authority to enter final judgment. Absent such consent, the bankruptcy judge may only submit his proposed findings of fact and conclusions of law to the district court. The district judge following de novo consideration of both the facts and the law, then enters or declines to enter the final judgment.[9]

Following the jurisdictional foundation set forth above, it seems clear that a turnover action with respect to estate prop-

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[4]*Central Virginia Community College v. Katz*, 546 U.S. 356, 126 S. Ct. 990, 995, 163 L. Ed. 2d 945, 45 Bankr. Ct. Dec. (CRR) 254, 54 Collier Bankr. Cas. 2d (MB) 1233, Bankr. L. Rep. (CCH) P 80443 (2006).

[5]*In re Wellesley Realty Associates, LLC*, 2015 WL 2261680, *13 (Bankr. D. Mass. 2015).

[6]*In re Goldsmith*, 2012 WL 3201840, *2–3 (Bankr. W.D. Pa. 2012) (effect of dismissal).

[7]28 U.S.C.A. § 1334(c).

[8]28 U.S.C.A. § 157(b)(2)(E).

[9]28 U.S.C.A. § 157(c).

erty is a core proceeding, and the jurisdictional statute governing bankruptcy proceedings expressly so provides.[10]

The Supreme Court, however, threw this statutory regime into Constitutional chaos when it issued its 2011 opinion in *Stern v. Marshall*.[11] *Stern* held that because the bankruptcy courts are established under Article I rather than Article III of the Constitution, and bankruptcy judges do not have lifetime tenure as required for Article III judges, a bankruptcy judge may have statutory authority but not the Constitutional authority to enter a final order on some matters defined as "core" in § 157(b). The Supreme Court would later describe this type of proceeding as "a so-called '*Stern* claim,' that is, 'a claim designated for final adjudication in the bankruptcy court as a statutory matter but prohibited from proceeding in that way as a constitutional matter.' "[12]

The proper characterization of any specific turnover claim, for jurisdictional purposes, was problematic before *Stern*, and has become more so since *Stern* was decided. The bankruptcy court's authority to enter a final judgment on the turnover count of a complaint depends entirely on whether the turnover action involves a straightforward surrender of estate property—which is a "core" proceeding—or is more properly characterized as another kind of dispute, such as a prepetition contract claim, that is only "related to" the bankruptcy case. Only the former proceeding is "Constitutionally core," on which the bankruptcy court can enter a final judgment. Accordingly, turnover complaints continue to be closely scrutinized, especially in the wake of the Supreme Court's *Stern* decision.

The bankruptcy court in *In re Lamplight Condo. Ass'n, Inc.* upheld the statutory framework regarding turnover actions when it held that a debtor did not need to obtain permission from the state court to bring suit against a state court-appointed receiver. Before the court was the receiver's

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[10]28 U.S.C.A. § 157(b)(2)(E).

[11]*Stern v. Marshall*, 564 U.S. 462, 131 S. Ct. 2594, 180 L. Ed. 2d 475, 55 Bankr. Ct. Dec. (CRR) 1, 65 Collier Bankr. Cas. 2d (MB) 827, Bankr. L. Rep. (CCH) P 82032 (2011).

[12]*Wellness Intern. Network, Ltd. v. Sharif*, 135 S. Ct. 1932, 1941–1942, 191 L. Ed. 2d 911, 61 Bankr. Ct. Dec. (CRR) 32, 73 C.B.C. 1575, Bankr. L. Rep. (CCH) P 82806 (2015).

amended motion to dismiss the turnover proceeding filed by the debtor. In denying the receiver's motion to dismiss, the court determined that the receiver became a custodian under 11 U.S.C.A. § 101(11)(A) when the debtor's Chapter 11 case was filed. Accordingly, the debtor did not need permission from the state court to bring suit against the receiver because the "Bankruptcy Code contains the controlling federal law on the subject, and the Bankruptcy Court has plenary power to decide all issues concerning such charges against that property."[13]

In contrast, the court in *In re Oliver C & I Corp.*, held that the court lacked jurisdiction over a turnover action. There, the Chapter 11 debtor's general partners disputed the debtor's rights to yearly distributions from several partnerships. The debtor filed an adversary proceeding to resolve the disputes and the general partners moved to dismiss for lack of subject matter jurisdiction.[14] Specifically, the general partners argued that the bankruptcy court lacked jurisdiction to interpret the partnership agreements under which the debtor alleged a breach. The court rejected the debtor's argument that it had core jurisdiction for turnover actions, because "complaints to recover property of the estate do not automatically grant jurisdiction."[15] Indeed, the debtor had sufficient funds to pay its claims in full, it did not have any secured creditors, and any potential recovery would only benefit the debtor. As such, the court held that the creditors and the estate would not gain any benefit from the adversary proceeding, which could be brought instead in local court. The court held that it did not have "related to" jurisdiction because the resolution of the complaint did not serve any bankruptcy purpose.[16]

In *In re DeFlora Lake Dev. Assocs., Inc.*, also discussed in § VII below, the debtor sought a determination that certain escrow funds were property of the estate. In response, the defendant moved to dismiss for lack of subject matter

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[13]*In re Lamplight Condominium Association, Inc.*, 2017 WL 1843510, *3–4 (Bankr. D. Conn. 2017).

[14]*In re Oliver C & I Corp.*, 2017 WL 5035079, *1 (Bankr. D. P.R. 2017).

[15]In re Oliver C & I Corp., 2017 WL 5035079, *2.

[16]In re Oliver C & I Corp., 2017 WL 5035079, *2–3.

jurisdiction.[17] The defendant argued that the bankruptcy court lacked jurisdiction to enter a turnover order because the escrow funds were not property of the estate and the escrow agent was not a custodian. In denying the defendant's motion to dismiss, the court found that the debtor's complaint alleged sufficient jurisdictional facts to place the proceedings within the court's core jurisdiction. The court stated that the defendant's argument "put[] the cart before the horse" because the argument was dependent on the assumption that the escrow funds were not property of the estate, whereas, a determination on whether certain property is property of the bankruptcy estate is a question only the bankruptcy court can make.[18]

See also § X, "Section 542(B)—Debts Matured or Payable on Demand or Order But § 542 Not Available to Liquidate Disputed Contract Claims," below.

Alter Ego Claims

In *In re Glick*, also discussed in § IV below, the court denied the defendants' motions to dismiss based on jurisdictional grounds. There, the Chapter 7 trustee filed a complaint against the debtor, his lawyers, his business associates and his parents, alleging that the debtor's businesses were a sham that were simply alter egos of the debtor himself. The trustee sought to have the businesses declared alter egos and to have their assets turned over to the estate.[19] Glick and the other defendants moved to dismiss for lack of jurisdiction. Taking a very straight forward approach, the court held that it had jurisdiction over most of "[the trustee's] claims because they plainly [arose] under title 11." The turnover claims arose under title 11 because they were based on section 542(a), which requires parties holding or controlling property of the bankruptcy estate to deliver it to the trustee.[20] The court nonetheless dismissed all but one of the turnover claims on other grounds, finding that they required the trustee to succeed on piercing theories that had yet to be recognized in the

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[17] *In re DeFlora Lake Development Associates, Inc.*, 571 B.R. 587, 589 (Bankr. S.D. N.Y. 2017).

[18] In re DeFlora Lake Dev. Assocs., Inc., 571 B.R. at 593.

[19] *In re Glick*, 568 B.R. 634 (Bankr. N.D. Ill. 2017).

[20] In re Glick, 568 B.R. at 653.

relevant state courts. The remaining turnover claim, regarding assets in a trust, was not dismissed because it did not require piercing of the trust's veil. Accordingly, any interest the debtor had in the trust became property of the estate on the petition date, and the court had jurisdiction.[21]

The court in *In re Builders Grp. & Dev. Corp.* also faced a veil piercing claim. There, the trustee filed a motion for summary judgment regarding his adversary proceeding, by which he requested the court to find that the defendant was personally liable to the estate and that he be ordered to turn over certain funds pursuant to section 542. In denying the trustee's motion for summary judgment, the court held that there were genuine issues of material fact as to whether the defendant could be held personally liable for the alleged debts, or if the amounts sought to be turned over were actually owed.[22] Though neither party raised the issue of jurisdiction, the court also considered whether it had jurisdiction over the turnover action. Specifically, the court noted that "[t]urnover proceedings are core matters when their purpose is to collect a debt rather than create it, recognize it or liquidate it."[23] The court looked to *Stern* in stating that the question is whether the action at issue stems from the bankruptcy itself or would necessarily be resolved in the claims allowance process. Though the court suggested that, in its view of *Stern*, veil-piercing issues are not issues that stem from the bankruptcy or would be resolved in the claims allowance process, the court ordered the parties to submit positions as to whether the turnover issue was a core or non-core matter and whether the court could issue a final determination in the adversary proceeding.[24]

The district court in *In re Prosser* outright rejected the debtors' jurisdictional argument. There, the bankruptcy court entered a turnover order finding that the debtors' wine collec-

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[21] In re Glick, 568 B.R. at 669–70.

[22] *In re Builders Group & Development Corp.*, 580 B.R. 593, 602–603 (Bankr. D. P.R. 2017).

[23] *In re Builders Group & Development Corp.*, 580 B.R. 593, 604 (Bankr. D. P.R. 2017) (quoting *In re Mec Steel Bldgs., Inc.*, 136 B.R. 606, 609 (Bankr. D. P.R. 1992)).

[24] *In re Builders Group & Development Corp.*, 580 B.R. 593, 604 (Bankr. D. P.R. 2017).

tion was property of the estate and making a preliminary injunction permanent. The preliminary injunction provided that the debtors "shall not spend, consume, damage, dispose of, sequester, abscond with, secrete, or transfer Property in any form whatsoever without prior written approval . . . of the Court."[25] The trustee later filed a motion to enforce the turnover order, for contempt, and for sanctions after discovering that the debtors had disposed of, damaged, and destroyed a significant portion of the wine that was previously determined to be property of the estate. The bankruptcy court granted the trustee's motion. The debtors argued that the bankruptcy court did not have subject matter jurisdiction to enter the preliminary injunction because the ownership of the wine was in dispute. The district court rejected the debtors' jurisdictional attack as barred by the law of the case doctrine because that argument had previously been rejected twice by the bankruptcy court, and by the district court and the Third Circuit on appeal.[26]

The district court in *Lulay Law Offices v. Rafter*, also discussed in § VII below, vacated the bankruptcy court's turnover order and remanded the case to the bankruptcy court for further proceedings.[27] The proceeds in a personal injury claim held by the debtor were at issue. The debtor settled the claim two weeks after filing for Chapter 7 bankruptcy. The bankruptcy court subsequently granted the motion of the debtor's personal injury law firm (the "Law Firm") to approve disbursement of its fees and costs. By the same order, the bankruptcy court stated that it would not rule on the distribution of the remainder of the assets because the trustee had abandoned the assets.[28] The bankruptcy court also entered an order purporting to avoid three liens on the assets obtained in connection with medical care received after the injury. The order also allowed an exemption claimed by the debtor. The disbursement order in favor of the Law Firm and the order granting the debtor's exemptions conflicted. The bankruptcy court held a hearing and determined that the trustee had

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[25] *In re Prosser*, 2017 WL 721991, *2 (D.V.I. 2017).

[26] In re Prosser, 2017 WL 721991, *13–14.

[27] *Lulay Law Offices v. Rafter*, 579 B.R. 827, 829, Bankr. L. Rep. (CCH) P 83164 (N.D. Ill. 2017).

[28] Lulay Law Offices v. Rafter, 579 B.R. at 831.

abandoned the assets, and, therefore lacked jurisdiction over their distribution. The court rescinded the disbursement order and ordered the Law Firm to turn over the exempted amount from the proceeds in its possession.[29]

The Law Firm appealed. On appeal, the district court emphasized that all of the parties had agreed that the trustee had abandoned the assets at some point early in the bankruptcy proceeding. Upon abandonment, the bankruptcy court's subject matter jurisdiction lapsed because the property left the estate. Accordingly, the district court held that any order—including the turn over order—entered after an effective abandonment was void for lack of subject matter jurisdiction. Therefore, the district court vacated the turnover order and remanded the case to the bankruptcy court to determine exactly when, or if, an effective abandonment occurred.[30]

See also, *In re Royce Homes, LP*, discussed in § XVII below.

Arbitration Clauses

In *In re E & G Waterworks, LLC*, the court denied the motion to compel arbitration filed by the defendant. The court determined that the turnover action at issue was a core proceeding and that arbitration would inherently conflict with the Chapter 7 trustee's right to demand turnover pursuant to § 542(b).[31] It was undisputed that the defendant owed the debtor, a subcontractor, for prepetition work. The defendant asserted, however, that the relief sought by the trustee was a non-core state-law breach of contract claim that should be submitted to arbitration pursuant to the arbitration provision contained in their contract.

The court stated a two-part test to determine if it should compel arbitration. First, the court must determine whether the dispute falls within the scope of the relevant arbitration clause. If so, the court must determine "whether Congress has evinced an intention to preclude a waiver of judicial rem-

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[29]Lulay Law Offices v. Rafter, 579 B.R. at 831.

[30]Lulay Law Offices v. Rafter, 579 B.R. at 833–36.

[31]*In re E & G Waterworks, LLC*, 571 B.R. 500, 509, 64 Bankr. Ct. Dec. (CRR) 138 (Bankr. D. Mass. 2017).

edies for the statutory rights at issue."[32] The burden for the first prong of the test is on the party seeking arbitration, whereas the burden for the second prong is on the party resisting arbitration. With respect to the first part, the court held that the matter was within the scope of the agreement's arbitration clause because the right to turnover arose from the debtor's performance under the subcontract. Turning to the second part, the court stated that the "primary question for a bankruptcy court is whether arbitrating the dispute poses an 'inherent conflict' with the Bankruptcy Code."[33] The court stated that a turnover action under section 542 is a specifically enumerated power of a trust in bankruptcy, and one that is "integral to the bankruptcy case administration process."[34] The court held that requiring arbitration of a turnover demand would undermine the trustee's power to seek an efficient resolution of outstanding, matured debts under section 542, and denied the motion to compel arbitration.[35]

In contrast, the district court in *Gavilon Grain LLC v. Rice*, reversed the bankruptcy court's order denying the defendant's motion to compel arbitration.[36] The district court was faced with whether a contract-based dispute should be arbitrated, as the parties had agreed in their contract, or decided by the bankruptcy court in a turnover action filed by the Chapter 7 trustee. The contract contained a provision requiring all related disputes to be arbitrated, and the parties to the contract had stipulated that the arbitration provision was enforceable. The bankruptcy court determined that the trustee's complaint presented a bona fide claim for turnover of a matured debt, and that the arbitration clause conflicted with the trustee's authority to seek turnover under the Bankruptcy Code. The bankruptcy court denied the motion to compel arbitration.[37]

The district court, on appeal, disagreed, finding that the parties had not agreed on liability and thus there was no

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[32]In re E & G Waterworks, LLC, 571 B.R. at 504 (quoting *Green Tree Financial Corp.-Alabama v. Randolph*, 531 U.S. 79, 90, 121 S. Ct. 513, 148 L. Ed. 2d 373, 84 Fair Empl. Prac. Cas. (BNA) 769 (2000)).

[33]In re E & G Waterworks, LLC, 571 B.R. at 505.

[34]In re E & G Waterworks, LLC, 571 B.R. at 509.

[35]In re E & G Waterworks, LLC, 571 B.R. at 509.

[36]*Gavilon Grain LLC v. Rice*, 2017 WL 3508721, *7 (E.D. Ark. 2017).

[37]Gavilon Grain LLC v. Rice, 2017 WL 3508721, *2.

matured debt. Because the obligation was not definite and certain, matured, payable on demand, or payable on order, it was not property of the estate.[38] The district court also considered, among other things, the federal policy favoring arbitration agreements, and the fact that the debtor was liquidating and not reorganizing.[39]

The Chapter 15 debtor in *In re Zhejiang Topoint Photovoltaic Co., Ltd.* sought turnover of property from the defendant. The defendant responded that the court should enforce the parties' agreement to arbitrate. The court held that it had subject matter jurisdiction over the turnover action because it was one that arises under the Code and is a core proceeding. It granted the defendant's motion to dismiss nonetheless on the ground that turnover is not a cause of action that can be brought under Chapter 15.[40]

See also *Golden v. O'Melveny & Meyers LLP*, discussed in § XII, below.

Comity

In *In re Arcapita Bank B.S.C.(c)*, the official committee of unsecured creditors sought the return of funds that the debtor, a Bahraini investment bank, had invested with the defendants just before the debtor filed for bankruptcy. The defendants argued that because of the foreign aspects of the transactions, the claims should be dismissed based on the presumption against extraterritoriality and the principle of international comity.[41]

Prior to filing for bankruptcy, the debtor made several short-term investments through the defendants. The investment agreements were negotiated and signed in Bahrain and provided that the laws of Bahrain would govern. Pursuant to the investment agreements, the defendants were obligated to repurchase the investments from the debtor on a deferred payment basis for an amount equal to the original investment, plus an agreed-upon return (the "Proceeds"). The

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[38]Gavilon Grain LLC v. Rice, 2017 WL 3508721, *3.

[39]Gavilon Grain LLC v. Rice, 2017 WL 3508721, *3–6.

[40]*In re Zhejiang Topoint Photovoltaic Co., Ltd.*, 2017 WL 6513433, *4 (Bankr. D. N.J. 2017).

[41]*In re Arcapita Bank B.S.C.(c)*, 575 B.R. 229, 233, 64 Bankr. Ct. Dec. (CRR) 228 (Bankr. S.D. N.Y. 2017).

defendants would transfer the Proceeds to the debtor on a designated maturity date.[42] In order to execute the investment transactions, the debtor transferred funds from its account in New York to accounts maintained in New York by the defendants. The investments matured less than a month after the debtor's bankruptcy filing, but the defendants failed to deliver the Proceeds, and the committee sought turnover of the Proceeds.

International comity is "the recognition which one nation allows within its territory to the legislative executive or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens, or of other persons who are under the protection of its laws."[43] Under international comity, states "normally refrain from prescribing laws that govern activities connected with another state when the exercise of such jurisdiction is unreasonable."[44] On this point, the court held that international comity was inapplicable because there was no parallel foreign bankruptcy proceeding.

The presumption against extraterritoriality is a principle of American law. The supposition is that a U.S. statute is meant to apply only within the territorial jurisdiction of the United States, and ordinarily relates to domestic, and not foreign, matters.[45] To determine whether the presumption applies, a court must examine whether (i) Congress intended for the relevant statue to apply extraterritorially, and (ii) the litigation at issue involves an extraterritorial application of the statue in question.[46] The bankruptcy court in *Arcapita Bank B.S.C.(c)* held, first, that the conduct at issue "touched and concerned" the United States sufficiently to displace the presumption against extraterritoriality because of the defendants' receipt of the transferred funds in New York bank accounts. Second, the court held that section 542(b) explicitly

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[42]In re Arcapita Bank B.S.C.(c), 575 B.R. at 234.

[43]In re Arcapita Bank B.S.C.(c), 575 B.R. at 237 (quoting *Hilton v. Guyot*, 159 U.S. 113, 164, 16 S. Ct. 139, 40 L. Ed. 95, 2007 A.M.C. 2028 (1895)).

[44]In re Arcapita Bank B.S.C.(c), 575 B.R. at 237 (quoting *In re Maxwell Communication Corp. plc by Homan*, 93 F.3d 1036, 1047-48, 29 Bankr. Ct. Dec. (CRR) 788 (2d Cir. 1996)).

[45]In re Arcapita Bank B.S.C.(c), 575 B.R. at 242.

[46]In re Arcapita Bank B.S.C.(c), 575 B.R. at 243.

references property of the estate, and that because section 541 gives a trustee title over the debtor's property "wherever located and by whomever held[,]" it is clear that Congress intended provisions of the Bankruptcy Code—including section 542—to apply extraterritorially.[47]

Rooker-Feldman

"The Rooker-Feldman doctrine recognizes that 28 U.S.C.A. § 1331, which provides that federal district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States, is a grant of original jurisdiction, and does not authorize district courts to exercise appellate jurisdiction over state-court judgments, which Congress has reserved to the Supreme Court."[48] In *Lamplight Condo. Ass'n,* also discussed in this § II above, the receiver argued, inter alia, that the Rooker-Feldman doctrine compelled dismissal of the debtor's turnover action. The court disagreed with the receiver, finding that the receiver's motion to dismiss should be denied because, among other things, the state superior court's order approving the receiver's report did not operate as a final order entitled to judicial deference under Rooker-Feldman.[49]

Sovereign Immunity

Another area in which difficulties persist is where a turnover proceeding implicates the sovereign immunity from suit of the federal government or a state under the 11th Amendment pursuant to *Seminole Tribe of Fla. v. Florida* and its progeny.[50] Neither the bankruptcy court nor the district court has jurisdiction if the defendant is a sovereign that has not consented to suit or agreed in the plan of the Constitutional Convention or by later joining the federal union not to assert

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[47]In re Arcapita Bank B.S.C.(c), 575 B.R. at 246–51.

[48]*In re Lamplight Condominium Association, Inc.*, 2017 WL 1843510, n.1 (Bankr. D. Conn. 2017) (citing *McKithen v. Brown*, 481 F.3d 89, 96 (2d Cir. 2007).

[49]*In re Lamplight Condominium Association, Inc.*, 2017 WL 1843510, *3 (Bankr. D. Conn. 2017).

[50]*Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 116 S. Ct. 1114, 134 L. Ed. 2d 252, 34 Collier Bankr. Cas. 2d (MB) 1199, 42 Env't. Rep. Cas. (BNA) 1289, 67 Empl. Prac. Dec. (CCH) P 43952 (1996) (Congress does not have the power under Article I of the Constitution to abrogate a state's sovereign immunity from suit).

a sovereign immunity defense with respect to certain matters in a bankruptcy proceeding.

The Supreme Court in *Cent. Virginia Cmty. Coll. v. Katz*, held that sovereign immunity does not bar suit by the Chapter 7 trustee against a state to avoid and recover an alleged preferential transfer because the state agreed in the plan of the Convention or by later joining the federal union "not to assert any sovereign immunity defense they might have had in proceedings brought pursuant to 'Laws on the subject of Bankruptcies.' "[51] But that consent does not extend to all matters on which a state might be sued in a bankruptcy case.

In *Lamplight Condo. Ass'n,* also discussed in this § II above, a state court-appointed receiver asserted sovereign immunity in its attempt to have the debtor's turnover action dismissed. The bankruptcy court held that the court need not decide whether the receiver was a sovereign entitled to sovereign immunity because the Supreme Court in *Katz* held that, "in enacting § 106(a), Congress codified the States' concession of their right to assert a sovereign immunity defense brought pursuant to laws on the subject of bankruptcies."[52]

The bankruptcy court in *In re Young*, also discussed in §§ VIII and XVIII below, held that a debtor's turnover action was barred by the six-year statute of limitations contained in 28 U.S.C.A. § 2401. Accordingly, the court also held that the court must dismiss the action for lack of subject matter jurisdiction.[53] The court framed the issue in terms of a six-year waiver of sovereign immunity by the United States, by operation of the statute.

The bankruptcy court in *In re Copley* held, on remand, that the United States was not entitled to the defense because its sovereign immunity with respect to the tax refund sought by the debtors was abrogated by Code section 106(a)(1). Section 106(a)(1) of the Bankruptcy Code provides that the sovereign immunity of the United States and certain state, local and foreign governmental units is abrogated with respect to

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[51] *Central Virginia Community College v. Katz*, 546 U.S. 356, 126 S. Ct. 990, 163 L. Ed. 2d 945, 45 Bankr. Ct. Dec. (CRR) 254, 54 Collier Bankr. Cas. 2d (MB) 1233, Bankr. L. Rep. (CCH) P 80443 (2006).

[52] *In re Lamplight Condominium Association, Inc.*, 2017 WL 1843510, *3 (Bankr. D. Conn. 2017).

[53] *In re Young*, 2017 WL 3190576, *3 (Bankr. W.D. Va. 2017).

specifically designated sections of the Bankruptcy Code, including section 505.[54] Section 505(a), gives a bankruptcy court the ability to determine the amount or legality of any tax. Section 505(a)(2)(B), however, limits this power by providing that a bankruptcy court may not determine "any right of the estate to a tax refund, before the earlier of (i) 120 days after the trustee properly requests such refund from the governmental unit . . .; or (ii) a determination by such governmental unit of such request."[55] The United States argued that the restriction in section 505(a)(2)(B) applied to the debtors, and thus that it was not subject to the broad abrogation of sovereign immunity contained in section 106(a)(1). The court disagreed and found that the debtors were not working on behalf of the Chapter 7 trustee, who had filed a Report of No Distribution and abandoned any claim to the tax refund. Accordingly, the debtors were not trustees as contemplated by section 505(a)(2)(B), and the United States was bound by the abrogation of sovereign immunity under section 106(a).[56]

Jurisdiction after Chapter 11 Plan Confirmation

Some courts have held that § 542(a) is "inapplicable" once property has revested in the reorganized debtor pursuant to a Chapter 11 plan "because there is no longer a trustee (or debtor-in-possession) to whom property can be delivered and the estate cannot benefit."[57]

In *Roussos v. Ehrenberg*, also discussed in § VII below, the properties at issue were two apartment buildings that the debtors had sold pursuant to a sale order entered in their Chapter 11 cases that subsequently were closed. The bankruptcy cases were reopened after a creditor asserted that the debtors had committed a fraud on the bankruptcy court. The Chapter 7 trustee filed adversary proceedings against the debtors. The parties entered into a settlement agreement that

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[54] 11 U.S.C.A. § 106(a)(1).

[55] 11 U.S.C.A. § 505(a)(2)(B).

[56] *In re Copley*, 572 B.R. 808, 808-12 (Bankr. E.D. Va. 2017), on remand from United States v. Copley, 2017 WL 3620369 at *5 (E.D. Va. Mar. 31, 2017) ("[T]he Court finds that the Bankruptcy Court must determine the effect, if any, of the United States' assertion of sovereign immunity.").

[57] *In re Goldsmith*, 2012 WL 3201840, *2–3 (Bankr. W.D. Pa. 2012) (effect of dismissal).

provided, in relevant part, that the two apartment buildings would be conveyed to the debtors' bankruptcy estates.[58] The settlement agreement was approved by the bankruptcy court and implemented by judgments against the properties (the "Property Judgments") that voided the original sales. Following the settlement, the bankruptcy court granted the trustee's motion compelling the debtors to turn over the properties. The debtors appealed, arguing that the bankruptcy court did not have jurisdiction over a landlord-tenant dispute that was uniquely within the jurisdiction of the state court. The district court disagreed and affirmed the bankruptcy court's turnover order.[59] In support of its ruling, the district court stated that "legal title of the [properties] revested in the . . . bankruptcy estates by virtue of the Property Judgments, and for that reason, the Trustee had the legal right to seek surrender and delivery of the [properties]."[60]

III. PREEMPTION OF STATE LAW BY THE BANKRUPTCY CODE; PREEMPTION OF THE BANKRUPTCY CODE BY OTHER FEDERAL LAW

The authors are not aware of any significant published opinions since last year's Annual Survey addressing preemption issues in connection with turnover actions

IV. FORM OF ACTION/SERVICE

Federal Rule of Bankruptcy Procedure 7001(1)[61] includes in the list of relief requiring the commencement of an adversary proceeding, "a proceeding to recover money or property, other than a proceeding to compel the debtor to deliver property to the trustee." Thus, a request for turnover of estate property from a debtor,[62] and a turnover action for recorded informa-

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[58] *In re Roussos v. Ehrenberg*, 2017 WL 2259674, *2–3 (C.D. Cal. 2017), appeal dismissed, 2018 WL 1150465 (9th Cir. 2018).

[59] In re Roussos v. Ehrenberg, 2017 WL 2259674, *5–6.

[60] In re Roussos v. Ehrenberg, 2017 WL 2259674, *5.

[61] Fed. R. Bankr. P. 7001(1).

[62] See e.g., *In re McCrory*, 2011-2 U.S. Tax Cas. (CCH) P 50626, 108 A.F.T.R.2d 2011-6299, 2011 WL 4005455, *3 (Bankr. N.D. Ohio 2011); *In re Rogove*, 443 B.R. 182 (Bankr. S.D. Fla. 2010).

tion under § 542(e),[63] may be brought by motion, while Rule 7001(1) requires an action for turnover of property that is not a document, against a third party who is not the debtor, under

Section 542(a) and (b) and § 543(a) to be commenced by an adversary proceeding.[64] Courts nonetheless have granted turnover relief sought by motion against a third party.

The court in *In re Dodart*, also discussed in §§ VII and XIX below, granted the Chapter 7 trustee's motion for turnover of proceeds that the debtor had obtained from a trust established by his late mother.[65] The court noted that in *In re Auld*, the Bankruptcy Appellate Panel for the Tenth Circuit had already addressed the issue, when it endorsed the practice of ordering turnover from a non-debtor on a motion, notwithstanding the requirement of Rule 7001(1).[66]

Many courts take the view that section 542 is "self-executing" and no motion or complaint is required. In *In re McKeever*, also discussed in § VIII below, the court granted in part, and denied in part, the trustee's motion for summary judgment with respect to a turnover complaint that she brought against the debtor and his uncle. The court held that the "turnover requirement under section 542(a) is self-executing and no demand by a trustee is required."[67] But turnover proceedings are strictly limited to actions to recover property that is indisputably part of the estate. The court ordered turnover of real property from some parties who were occupying the property to conduct their business. But it did not order turnover from a tenant who was in occupancy

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[63]See e.g., *In re MV Pipeline Co.*, 2007 WL 1452591, *8 (Bankr. E.D. Okla. 2007). A turnover action against a debtor may also be brought by adversary proceeding. *In re McKenzie*, 2011 WL 4600407, *6 (Bankr. E.D. Tenn. 2011), aff'd, 476 B.R. 515 (E.D. Tenn. 2012), decision aff'd, 716 F.3d 404, 57 Bankr. Ct. Dec. (CRR) 280 (6th Cir. 2013).

[64]See e.g., *In re MF Global Inc.*, 531 B.R. 424, 431, 61 Bankr. Ct. Dec. (CRR) 27, Comm. Fut. L. Rep. (CCH) P 33487, Comm. Fut. L. Rep. (CCH) P 33488 (Bankr. S.D. N.Y. 2015); *In re Spence*, 2009 WL 3756621 (Bankr. W.D. Tex. 2009); *In re Hodge*, 2009 WL 3645172 (Bankr. W.D. Tex. 2009); and *In re Clark*, 2009 WL 2849785 (Bankr. D. D.C. 2009).

[65]*In re Dodart*, 577 B.R. 406, 407 (Bankr. D. Utah 2017).

[66]In re Dodart, 577 B.R. at 414 (citing *In re Auld*, 561 B.R. 512, 77 Collier Bankr. Cas. 2d (MB) 15, Bankr. L. Rep. (CCH) P 83052 (B.A.P. 10th Cir. 2017).

[67]*In re McKeever*, 567 B.R. 652, 663 (Bankr. N.D. Ga. 2017).

because the trustee had not indicated whether the lease had been assumed or rejected, or whether the tenant had exercised its rights to remain in possession after a rejection.[68] The court also found that the defendants had repeatedly transferred estate assets post-petition, thereby frustrating the trustee's ability to gather and administer the assets of the estate. Despite the defendants' lack of notice as to the new claims, the court allowed the trustee 30 days to amend her complaint to seek turnover of property and an injunction against the defendants.[69]

The court in *In re Delano Retail Partners, LLC*, also discussed in § IX below, granted the trustee's motion for summary judgment on a section 542(a) turnover claim. There, the trustee filed a complaint seeking the turnover of settlement funds arising out of a stipulation she entered into with the defendant. The stipulation authorized the defendant to pursue a separate preference action on behalf of the estate in return for a portion of the recovery obtained. Accordingly, the trustee sought turnover of her portion of the settlement funds. The defendant argued in opposition, that the stipulation did not state when it had to pay the trustee. The court disagreed, finding that the Bankruptcy Code provides for the timing of the payment because section 542 "creates an affirmative obligation on the part of the party holding estate property to turn the property over."[70] Therefore, once the court determined that the stipulation and the funds were property of the state, the defendant had an affirmative obligation to turn over the settlement funds.[71]

In *In re LB Steel, LLC*, also referred to in § XIII below, the Chapter 11 debtor filed an adversary complaint seeking a determination that certain funds were property of the estate

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[68]In re McKeever, 567 B.R. at 664. A debtor-landlord may reject a real estate lease, but, if it does, the non-debtor tenant may remain in possession provided it pays the rent and performs its other obligations under the lease. 11 U.S.C.A. § 365(a), (h).

[69]In re McKeever, 567 B.R. at 663. Federal Rule of Civil Procedure 15, made applicable pursuant to Federal Rule of Bankruptcy Procedure 7015, provides that "[t]he court should freely give leave when justice so requires."

[70]*In re Delano Retail Partners, LLC*, 2017 WL 3500391, *14, 93 U.C.C. Rep. Serv. 2d 472 (Bankr. E.D. Cal. 2017).

[71]*In re Delano Retail Partners, LLC*, 2017 WL 3500391, *14, 93 U.C.C. Rep. Serv. 2d 472 (Bankr. E.D. Cal. 2017).

and seeking turnover of those funds. The court found that the funds were not property of the estate and granted the defendant's motion to dismiss. The debtor then brought a second adversary proceeding against the defendant, seeking to avoid and recover the funds as an avoidable setoff under section 553, or as an avoidable preference under section 547. The defendant again moved to dismiss, arguing that the second adversary proceeding was barred under res judicata.[72] The court held that res judicata was inapplicable to the debtor's claims based on the "statutory scheme exception." That doctrine provides that the general rule against claim splitting does not apply where "it is the sense of the [statutory] scheme that the plaintiff should be permitted to split [its] claim."[73] The essential question for the court was whether the statutory scheme of the Bankruptcy Code required the debtor to bring a claim for turnover and a claim for avoidance in the same suit. In denying the defendant's motion to dismiss based on res judicata, the court found that nothing in the Bankruptcy Code requires turnover and avoidance claims to be brought together. Moreover, the court pointed out that the procedural context in which avoidance claims and turnover claims are typically brought also supports the finding that res judicata does not bar the second adversary complaint. A request for turnover is brought as a contested matter, which is a "procedural vehicle designed to decide quickly those matters that move ahead the administration of the estate[,]" whereas the more complex allegations of an avoidance action must be brought by an adversary proceeding.[74] In this case, the debtor was required to bring its turnover claim in an adversary proceeding pursuant to Bankruptcy Rule 7001(9) because the complaint sought a declaratory judgment. Taken as a whole, the court held that the Bankruptcy Code evidences an intent to separate the turnover process from the avoidance process, and court denied the defendant's motion to dismiss.[75]

In *In re Glick*, also discussed in § II above, the Chapter 7

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[72] *In re LB Steel, LLC*, 572 B.R. 690, 694–97, 64 Bankr. Ct. Dec. (CRR) 110 (Bankr. N.D. Ill. 2017).

[73] In re LB Steel, LLC, 572 B.R. at 703–04.

[74] In re LB Steel, LLC, 572 B.R. at 706 (quoting *In re Hooker Investments, Inc.*, 131 B.R. 922, 931 (Bankr. S.D. N.Y. 1991)).

[75] In re LB Steel, LLC, 572 B.R. at 706.

trustee filed a complaint asserting that the debtor's businesses were a sham and were simply alter egos of the debtor himself. The trustee's amended complaint did not contain a turnover count, notwithstanding that he believed that he was asserting turnover claims under section 542(a). Despite this deficiency, the court held that the failure to specifically demand turnover was not a reason to dismiss the complaint. Rather, the court said, "[the trustee's] turnover claims are lurking in the shadows. Because they are, they must be addressed."[76]

See also *In re Lamey*, discussed in §§ VII, VIII, and XVIII, below, and *In re Joy R. Denby-Peterson*, discussed in § XIV, below.

V. STANDING

A debtor in possession, whether under Chapter 11 or Chapter 13,[77] and a Chapter 7 or 11 trustee, each has standing to bring an action under Code § 542.[78] Most courts have held that a Chapter 7 debtor—whose property is under the authority of the trustee—lacks standing. A debtor also lacks standing to assert a stay violation with respect to his exempted interest in connection with his turnover claim brought in a Chapter 7 case, because the exempted interest is no longer estate property.

The district court in *In re Perry* considered both of these issues when it affirmed the bankruptcy court's grant of summary judgment with respect to the debtor's turnover count.[79] The debtor had sought turnover of a car that had been repossessed by the bank. The debtor claimed an exemption with respect to the car, which was not opposed. The bankruptcy court granted the bank's motion for summary judgment finding that the debtor lacked standing to pursue violations under sec-

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[76]In re Glick, 568 B.R. at 653.

[77]*In re Shapphire Resources, LLC*, 2016 WL 320823, *5 (Bankr. C.D. Cal. 2016) (Chapter 11 debtor in possession); *In re Roberts*, 556 B.R. 266, 282–283 (Bankr. S.D. Miss. 2016), subsequent determination, 570 B.R. 532 (Bankr. S.D. Miss. 2017) (Chapter 13 debtor).

[78]See e.g., *In re Flanagan*, 415 B.R. 29, 36 (D. Conn. 2009) ("turnover is not a cause of action available to debtors at the time they file for bankruptcy. The language of statute clearly demonstrates that it is a claim available only to trustees after a bankruptcy petition has been filed.").

[79]*In re Perry*, 2017 WL 1276075, *5 (C.D. Cal. 2017).

tions 362 and 542. The debtor appealed the bankruptcy court's opinion. In affirming, the district court agreed with the bankruptcy court that the debtor lacked standing to assert a stay violation under section 362(a)(3), following the Ninth Circuit's decision in *In re Mwangi*. *Mwangi* held that, "prior to successfully claiming an exemption, a Chapter 7 debtor has no standing to assert a violation of 11 U.S.C.A. § 362(a)(3), because exempt property 'remain[s] estate property' and debtors 'ha[ve] no right to possess or control' that property. After a debtor successfully claims an exemption, the estate property revests to the debtor, and the debtor lacks standing because that property is 'no longer estate property, [and thus,] no longer subject to the protections of § 362(a)(3)'s automatic stay provision.' "[80]

The trustee had retained possession of the car in *Perry* because the debtor's exemption extended only to some of the value and thus a partial interest in the car. The bankruptcy court ruled that the debtor lacked standing to assert a stay violation with respect to the interest that remained in the estate, with respect to which only the trustee had standing. The court ruled that the debtor lacked standing to assert a stay violation with respect to his exempted interest, which by the debtor's claiming an exemption had become the debtor's property, was no longer property of the estate, and thus was no longer subject to the automatic stay.[81]

In *In re Picacho Hills Util. Co., Inc.*, also discussed in § X below, the bankruptcy court held that the Chapter 7 trustee had standing to bring a cause of action to compel payment of a matured obligation involving certain utility payments.[82] The debtor was a public utility company. The defendant corporation was a real estate developer who, decades prior to the debtor's bankruptcy filing, had developed a number of subdivisions and provided water and sewer services to the residents without approval of the New Mexico Utility Commission (the "Commission"). Shortly thereafter, the Commission issued a decision stating that the defendant agreed to transfer owner-

[80] *In re Perry*, 2017 WL 1276075, *5 (C.D. Cal. 2017) (quoting *In re Mwangi*, 764 F.3d 1168, Bankr. L. Rep. (CCH) P 82683 (9th Cir. 2014)).

[81] *In re Perry*, 2017 WL 1276075, *5 (C.D. Cal. 2017).

[82] *In re Picacho Hills Utility Company, Inc.*, 579 B.R. 245, 250–51 (Bankr. D. N.M. 2017).

ship of water rights to the debtor.[83] Fifteen years later, in 2010, the Commission issued another decision that required the defendant to pay the debtor $168,000. The defendant never made the payment. Years later still, the debtor filed for bankruptcy. After the case was converted to Chapter 7, the trustee filed an adversary proceeding seeking turnover of the $168,000. The defendant argued that the trustee lacked standing to enforce the Commission's 2010 decision. The bankruptcy court held that, in the narrow context of Commission orders specially benefitting New Mexico utilities, such utilities have standing under state law to enforce the Commission's orders. The court went further to say that, even if the trustee could not enforce the 2010 Commission order in state court, the Bankruptcy Code's turnover provisions provided the necessary standing to enforce the Commission's order.[84]

In *In re Harlan*, also discussed in § VII below, the Chapter 13 debtor filed an adversary proceeding for turnover of the surplus proceeds from a prepetition tax sale. The defendant moved for summary judgment, arguing that the debtor lacked standing. The court held that the debtor could not seek turnover of the tax surplus because the debtor's present right to the tax surplus—and hence whether it was estate property subject to turnover—was the very nature of the dispute.[85] The court stated its view that the debtor really was seeking a determination of her interest in the tax surplus, and that the adversary proceeding was the proper procedural vehicle to determine those rights. The court disregarded the title of the complaint, treated it as a complaint to determine the debtor's interest in the property, and held that the debtor had standing.[86]

In *In re Zhejiang Topoint Photovoltaic Co., Ltd.*, also discussed in § II above, the court granted the defendant's motion to dismiss because turnover is not a cause of action that can be brought in Chapter 15. Rather, the court held, section 1523 of the Bankruptcy Code provides that a foreign repre-

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[83]In re Picacho Hills Util. Co., Inc., 579 B.R. at 248.

[84]In re Picacho Hills Util. Co., Inc., 579 B.R. at 251–52.

[85]*In re Harlan*, 580 B.R. 249, 253 (Bankr. S.D. Ind. 2017).

[86]In re Harlan, 580 B.R. at 253.

sentative in a Chapter 15 case does not have standing to bring a turnover action.[87]

VI. BURDEN OF PROOF

"In a motion for turnover, the burden falls upon the . . . moving party, to establish a prima facie case that the property sought is property of the estate."[88] To succeed, the moving party must carry the burden by a preponderance of the evidence.[89]

In *In re Purcell*, also discussed in § VII below, the court denied a Chapter 13 trustee's motion for turnover of settlement proceeds from a personal injury lawsuit filed more than five years after the debtor's bankruptcy case had closed. The court had to decide whether the settlement proceeds were property of the estate, where the debtor was not aware of the cause of action until after the case had closed, even though the medical procedure giving rise to the cause of action occurred while the bankruptcy case was still open. To decide the issue, the court looked to when the debtor's cause of action arose under state law. In Kansas, a cause of action does not arise until the discovery of the injury. The trustee failed to show that the debtor had any factual basis on which to bring the action before her bankruptcy case was closed. Accordingly, the court denied the trustee's turnover motion.[90]

In *In re Vasquez*, also discussed in §§ II above and VII below, the bankruptcy court reached the same conclusion. There, the court held that the debtor's personal injury cause of action did not accrue under applicable governing state law prior to the petition date. The trustee had not demonstrated the debtor's cause of action was "sufficiently rooted" in the debtor's pre-bankruptcy past such that it could be brought into the estate. More specifically, the medical records did not show that the debtor had suffered any injury prepetition, the record did not prove that the debtor or the medical community knew of the defect in the medical device at issue, and the debt-

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[87] *In re Zhejiang Topoint Photovoltaic Co., Ltd.*, 2017 WL 6513433, *4 (Bankr. D. N.J. 2017).

[88] *In re Purcell*, 573 B.R. 859, 862, Bankr. L. Rep. (CCH) P 83133 (Bankr. D. Kan. 2017).

[89] In re Purcell, 573 B.R. at 862.

[90] In re Purcell, 573 B.R. at 867–68.

or's physicians did not recommend removing the medical device until years after the debtor filed for bankruptcy.[91] Accordingly, the trustee had not satisfied his burden of proof.

In *Ehrlich v. McLane Global*, the district court affirmed the bankruptcy court's decision granting summary judgment dismissing the trustee's adversary complaint. The trustee's turnover claim was based on the allegation that the defendant had earned profits from customer information gained from the debtor through an alleged misappropriation of trade secrets.[92] The bankruptcy court found that the debtor's customer information was not a trade secret under New York law and granted the defendant's motion for summary judgment. The bankruptcy court found that the trustee had presented no evidence that the confidential customer information was conveyed to the defendant.[93] The district court, in affirming, stated that the trustee made no showing that the defendant actually acquired the customer information.[94]

VII. SECTION 542(A)—PROPERTY OF THE ESTATE THAT THE DEBTOR MAY USE, LEASE, SELL, OR EXEMPT

Generally—Property of the Estate

"It is crucial to the trustee's claim that the asset to be turned over is property of the estate."[95]

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[91] *In re Vasquez*, 581 B.R. 59, 69 (Bankr. D. Vt. 2018).

[92] *Ehrlich for Hoffmans Trade Group LLC v. McLane Global*, 2017 WL 2633528, *4 (N.D. N.Y. 2017).

[93] Ehrlich for Hoffmans Trade Group LLC v. McLane Global, 2017 WL 2633528, *4.

[94] Ehrlich for Hoffmans Trade Group LLC v. McLane Global, 2017 WL 2633528, *4.

[95] *In re Hoerr*, 2004 WL 2926156, *2 (Bankr. C.D. Ill. 2004). "Federal law determines what property is included in the estate, while state law controls whether the debtor has a legal or equitable interest in the property at the time the bankruptcy case is filed." *In re Living Hope Southwest Medical SVCS, LLC*, 450 B.R. 139, 157, 54 Bankr. Ct. Dec. (CRR) 131 (Bankr. W.D. Ark. 2011), order aff'd, 2012 WL 1078345 (W.D. Ark. 2012), aff'd, 509 Fed. Appx. 578 (8th Cir. 2013); *In re Miller*, 66 Collier Bankr. Cas. 2d (MB) 1855, 2011 WL 6217342, *2 (Bankr. D. Colo. 2011), citing *Butner v. U.S.*, 440 U.S. 48, 55, 99 S. Ct. 914, 59 L. Ed. 2d 136, 19 C.B.C. 481, Bankr. L. Rep. (CCH) P 67046 (1979).

Property rights generally are determined by state law.[96] If under the applicable state law, the debtor has no interest in the property turnover of which is sought, then the court will deny turnover.

Some property rights, though, are determined by federal law. The bankruptcy court in *In re Dawson*, also discussed in §§ VIII and XVIII below, held that a passport is not property of the estate, but "at all time remains property of the United States and must be returned to the U.S. Government on demand." Accordingly, the debtor's passport was not subject to turnover under Code section 542.[97]

The bankruptcy court in *In re Madeoy* held that the debtor's turnover count was premature, because the complaint did not identify any undisputed assets of the estate.[98] The bankruptcy court in *In re Dots, LLC* noted that, for turnover, "the property must, first and foremost, be undisputed property of the bankruptcy estate."[99]

In *In re Guarracino*, the court partially granted a creditor's motion for reconsideration of a sale order, authorizing the Chapter 7 trustee to sell two trucks that the court previously had held were property of the debtor's estate and had ordered turned over.[100] In its reconsideration motion, the creditor asserted that the court erred when it found that the trucks became property of the debtor's estate when the charter of the company that the debtor owned was revoked. Applying state law regarding corporate dissolutions, the court on reconsideration held that it was wrong in finding that one of the trucks was property of the debtor's estate, because the company had purchased it before its charter was revoked. Therefore, the company's creditors were entitled to the proceeds from the sale of that truck, and any surplus was

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[96] *Nobelman v. American Sav. Bank*, 508 U.S. 324, 113 S. Ct. 2106, 2110, 124 L. Ed. 2d 228, 24 Bankr. Ct. Dec. (CRR) 479, 28 Collier Bankr. Cas. 2d (MB) 977, Bankr. L. Rep. (CCH) P 75253A (1993) (1978 Code case); *Butner v. U.S.*, 440 U.S. 48, 55, 99 S. Ct. 914, 59 L. Ed. 2d 136, 19 C.B.C. 481, Bankr. L. Rep. (CCH) P 67046 (1979) (1898 Act case).

[97] *In re Dawson*, 2017 WL 3888289, *2 (Bankr. D. Me. 2017), quoting 22 C.F.R. § 51.7(a).

[98] *In re Madeoy*, 576 B.R. 484, 505 (Bankr. D. Md. 2017).

[99] *In re Dots, LLC.*, 2017 WL 3311223, *7 (Bankr. D. N.J. 2017).

[100] *In re Guarracino*, 2017 WL 3326689, *1 (Bankr. D. N.J. 2017).

payable to the debtor's estate.[101] With respect to the other truck, the court held that it was property of the estate because it was purchased after the company's charter was revoked. Therefore, it was never a corporate asset, but instead was property of the debtor's estate.[102]

Courts have struggled with cases involving disputed title. The debtor in *In re Harlan* owned real property by inheritance, but the property was sold at a prepetition tax sale after she had fallen behind in the payment of her property taxes. The debtor sought turnover of the amount the tax surplus, consisting of the sale proceeds in excess of the unpaid taxes and costs of sale. The court determined that the debtor's right to redeem the real property had not expired, and that the debtor had not exercised that right of redemption at the time that she filed her Chapter 13 case. Thus, the debtor's interest in the real property itself remained property of the estate.[103] The debtor's right to the tax surplus at the time she sought turnover, though, was in dispute. The court noted that section 542 may not be used to adjudicate a debtor's underlying rights in property where ownership of the property is in dispute. The court also emphasized that the debtor had no present right to possess or use the tax surplus, that a debtor's right to turnover "springs from the debtor's present right to use the property under § 363," and denied turnover.

See also *In re Faasoa*, discussed in § II above, and *In re Glick*, discussed in § II above.

See also the cases discussed in this § VII, under the heading "Alter Ego Claims."

The Property Must be Property That the Debtor May Use, Lease, Sell or Exempt

Property that the Debtor May Use, Lease or Sell

The property, to be subject to turnover, must be property that the debtor may use, lease or sell under section 363, which

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[101] *In re Guarracino*, 2017 WL 3326689, *11 (Bankr. D. N.J. 2017).

[102] In re Guarracino, 2017 WL 3326689, *11.

[103] *In re Harlan*, 580 B.R. 249, 251 (Bankr. S.D. Ind. 2017).

generally means that it is property of the estate under Code § 541.[104]

In *Erlich v. McLane Global*, also discussed in § VI above, the Chapter 7 trustee asserted that McLane Global had misappropriated the debtor's trade secrets and sought monetary damages and other relief.[105] The trustee's claims hinged on the trustee's allegation that McLane had on numerous occasions obtained the debtor's customer information "by improper and unlawful means." The district affirmed the bankruptcy court's granting summary judgment to McLane because the trustee had made no showing that McLane actually acquired the customer information.[106]

See also *In re Harlan* in this Section VII above.

Property that the Debtor May Exempt

The application of the turnover provisions to property asserted by the debtor to be exempt is somewhat peculiar, because even though § 542 requires turnover to the trustee of property that the debtor may exempt, the debtor's exemption would appear to put the exempt property beyond a trustee's reach. The bankruptcy court in *Lulay Law Offices v. Rafter*, also discussed in § II above, explained this part of the turnover provision, Code section 542(a), as follows, contrasting it with the abandonment provisions of section 554. "Exemption," the court wrote, operates under a "set of principles in which the debtor regains certain rights to exempt property, but the property remains in the estate until the case is closed." The exempted asset is protected from the claims of creditors, but "the exempt asset itself remains administrable by the trustee and the bankruptcy court."[107] In contrast, when the estate abandons property under section 554, the court's jurisdiction lapses, and any order entered by the court after an effective

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[104] *In re Mickens*, 575 B.R. 797, 809 n.12 (Bankr. W.D. Mich. 2017); *In re Vaughan Company, Realtors*, 61 Bankr. Ct. Dec. (CRR) 101, 2015 WL 4498748, *3 (Bankr. D. N.M. 2015).

[105] *Ehrlich for Hoffmans Trade Group LLC v. McLane Global*, 2017 WL 2633528, *3 (N.D. N.Y. 2017).

[106] Ehrlich for Hoffmans Trade Group LLC v. McLane Global, 2017 WL 2633528, *9.

[107] *Lulay Law Offices v. Rafter*, 579 B.R. 827, 833, Bankr. L. Rep. (CCH) P 83164 (N.D. Ill. 2017), citing *In re Witt*, 473 B.R. 284, 289 (Bankr. N.D. Ind. 2012).

abandonment is void for lack of subject matter jurisdiction.[108] In *Lulay* the bankruptcy court had at different times both determined that the debtor had abandoned the asset, yet had also ordered turnover of an exempted portion of it.[109] Because the effective date of the abandonment was at issue, the district court remanded the case to the bankruptcy court with an instruction that it "determine exactly when (or indeed if) an effective abandonment occurred."[110]

Types of Property Interests Subject to Turnover

Several opinions in the last year have made the threshold determination of whether the property sought was estate property, with respect to myriad types of property interests, as set forth in the following subsections of this § VII.

Alter Ego Claims

The debtors in *In re Veluchamy*, also discussed in § VIII below, transferred, prepetition, $5.5 million to a bank account maintained by a company that the debtors controlled. Thus, the debtors argued, ownership of the funds was in "legitimate dispute," and that they were not liable to turn over the funds. Rather, the trustee's "proper course" was to seek avoidance of the transfer.[111] The lower courts had found that the funds were "property of the estate, controlled by" the debtors—and not by the company which maintained the bank account into which the debtors had deposited the funds—and ordered turnover. The Seventh Circuit, relying on these factual findings, affirmed.[112]

In *In re Kellogg-Taxe*, the bankruptcy court drew "a reasonable inference" that the debtor and her husband owned the stock in a corporation whose assets the husband controlled (notwithstanding the husband's denying that he and the

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[108]In re Lulay Law Offices v. Rafter, 579 B.R. at 833.

[109]In re Lulay Law Offices v. Rafter, 579 B.R. at 831.

[110]In re Lulay Law Offices v. Rafter, 579 B.R. at 836.

[111]*In re Veluchamy*, 879 F.3d 808, 815, 817, 65 Bankr. Ct. Dec. (CRR) 24, Bankr. L. Rep. (CCH) P 83199 (7th Cir. 2018).

[112]In re Veluchamy, 879 F.3d at 818.

debtor owned the stock).[113] The court ordered turnover of the corporation's assets to the Chapter 7 trustee.[114]

Avoidable Transfers

Avoided transfers are subject to turnover. Avoidable transfers are another matter.

The debtor in *In re Hoffman* owned a herd of horses. The state court found that the horses had been treated cruelly, and as a consequence, terminated the debtor's ownership of the horses in accordance with state law. The court also ordered the transfer of the horses to the HSPCA, a non-profit animal welfare organization. The debtor appealed, lost, and shortly thereafter filed his Chapter 12 case.[115]

The debtor asserted that the transfer to the HSPCA was a fraudulent transfer under Code section 548. The bankruptcy court acknowledged that property rights are determined under state law, and that under the applicable Texas law the debtor had been divested of his ownership of the horses upon the state court's having made its cruelty finding. The bankruptcy court concluded that the debtor's lapse in ownership was fatal to his claim, and that he had no interest in the property that he was seeking to avoid. This conclusion also defeated the debtor's turnover claim because that claim required the debtor's ownership or possession of the property prior to transfer.[116]

Causes of Action

A cause of action that the debtor has on the date on which a bankruptcy case is commenced is "property of the estate."

The Chapter 13 debtor in *In re Purcell* had a pelvic mesh device implanted five days after she received her bankruptcy discharge, but while her bankruptcy case was pending. Sixty-three days later the final decree was entered and her bankruptcy case was closed. Months later, she discovered a problem with the device and brought suit, alleging that the

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[113] *In re Kellogg-Taxe*, 2017 WL 980328, *5–6 (Bankr. C.D. Cal. 2017).

[114] In re Kellogg-Taxe, 2017 WL 980328, *10.

[115] *In re Hoffman*, 63 Bankr. Ct. Dec. (CRR) 206, 2017 WL 727543, *1 (Bankr. S.D. Tex. 2017).

[116] *In re Hoffman*, 63 Bankr. Ct. Dec. (CRR) 206, 2017 WL 727543, *5 (Bankr. S.D. Tex. 2017).

device was defective. The debtor settled the claim. The Chapter 13 trustee—five years after the case was closed—successfully reopened the case and filed a motion for turnover. The bankruptcy court ruled that, under Kansas law, the debtor's cause of action did not accrue until after her bankruptcy case was closed, and thus the settlement proceeds were not property of her bankruptcy estate. The court emphasized that the "most critical element" creating the former debtor's interest—her discovery that there was a defect in the medical device—did not occur more than five years after she filed her case, and after the case was closed[117]

The bankruptcy court in *In re Vasquez*, also discussed in §§ II and VI above, faced the same question, regarding a different defective medical device. The court held that the debtor's cause of action did not accrue, "under the governing state [Vermont] law," prior to the debtor's filing of her bankruptcy case, and that the trustee had not demonstrated that the debtor's causes of action "were 'sufficiently rooted' in her pre-bankruptcy past to be brought into the estate." The court accordingly denied the trustee's motion to reopen the case because there was "no asset to be administered."[118]

Conversion to a Different Chapter of the Code

The debtors in *In re Kerr* filed a Chapter 13 case, and made payments to the Chapter 13 trustee. The case then converted to Chapter 7. The Chapter 7 trustee contended that the funds that the debtor paid to the Chapter 13 trustee revested in the debtor on the conversion and should be turned over to the trustee. The debtors argued that their Chapter 13 counsel should be paid before the funds were turned over to the trustee. The bankruptcy court agreed with the debtors, reasoning that under Code section 1326(a)(2), if a Chapter 13 plan is not confirmed, the Chapter 13 trustee must "return such payments . . . to the debtor, after deducting any unpaid claim allowed under section 503(b)." Because Chapter 13 counsel's fees were administrative expenses under section

[117] *In re Purcell*, 573 B.R. 859, 867–868, Bankr. L. Rep. (CCH) P 83133 (Bankr. D. Kan. 2017).

[118] *In re Vasquez*, 581 B.R. 59, 75–76 (Bankr. D. Vt. 2018).

503(b)(2), the court ordered payment of the fees prior to turnover.[119]

Deposits and Escrows

The debtors in *Nebel v. Warfield* made three payments in the month prior to their filing their Chapter 7 petition, —for an airline ticket, one-half payment of tuition, and the cost of room and board, all of which would be used postpetition by their minor daughter in connection with a ballet course.[120] The court held that the debtors had a property interest in the tickets and in the course and ordered the debtors to turn over an amount equal to the amounts paid.[121] *Nebel v. Warfield* is also discussed below in this § VII and in § VIII.

In *In re DeFlora Lake Development Associates, Inc.*, also discussed in § II above, the debtor, a real estate holding company, initiated an adversary proceeding against the buyer of certain real property from the debtor's predecessor, Hyde Park, seeking turnover of certain funds in escrow.[122] The parties previously had been engaged in a related breach of contract action that reached the Second Circuit Court of Appeals.[123] The Second Circuit determined that "neither party's respective interests in the escrow funds had been determined."[124]

Hyde Park filed a motion to dismiss the adversary proceeding arguing that the court lacked subject matter jurisdiction on grounds of res judicata and judicial estoppel.[125] The bankruptcy court, in denying the motion to dismiss, disagreed. The court held that the adversary complaint was not barred by res judicata because the Second Circuit expressly stated that the parties' interests in the special escrow funds "re-

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[119] *In re Kerr*, 570 B.R. 74, 75 (Bankr. N.D. Ind. 2017).

[120] *Nebel v. Warfield*, 2017 WL 2480728, *2 (D. Ariz. 2017)

[121] *Nebel v. Warfield*, 2017 WL 2480728, *3 (D. Ariz. 2017).

[122] *In re DeFlora Lake Development Associates, Inc.*, 571 B.R. 587, 581 (Bankr. S.D. N.Y. 2017).

[123] In re DeFlora Lake Dev. Assoc., Inc., 571 B.R. at 590–91.

[124] In re DeFlora Lake Dev. Assoc., Inc., 571 B.R. at 591.

[125] In re DeFlora Lake Dev. Assoc., Inc., 571 B.R. at 591–92.

mained unresolved."[126] The bankruptcy court added that a determination of property of the estate could not have been made by the Second Circuit in the other proceeding prior to the debtor's filing for bankruptcy.[127] Such a determination was a separate cause of action under Bankruptcy Code sections 541 and 543, and was a "determination within the exclusive province of the Bankruptcy Court."[128]

The court further held that the equitable doctrine of judicial estoppel was inapplicable for various reasons.[129] First, Hyde Park's arguments were based upon the debtor's allegedly inconsistent legal theory, not on any factual inconsistencies.[130] Second, at the motion to dismiss stage, the court would have to make a determination that the debtor asserted facts that were inconsistent with the facts alleged in the adversary complaint, a determination that it could not make on a motion to dismiss where a court is required to assume that all factual allegations are true.[131]

Employee Benefits

The debtors in *Nebel v. Warfield* had accrued paid time off (PTO) prepetition. The bankruptcy court held that their interests in the PTO were estate property. The court ordered each debtor, when he or she used PTO by taking a day off, to turn over 25% of the salary attributable to that day of PTO. The district court affirmed.[132]

Leases

Key to whether a debtor's interest in leased property is property of the estate is whether the lease remains in effect. The bankruptcy court in *In re Dixon* held that the debtor had not carried her burden of proving that the car lease had not

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[126] In re DeFlora Lake Dev. Assoc., Inc., 571 B.R. at 598.

[127] In re DeFlora Lake Dev. Assoc., Inc., 571 B.R. at 599.

[128] In re DeFlora Lake Dev. Assoc., Inc., 571 B.R. at 600.

[129] In re DeFlora Lake Dev. Assoc., Inc., 571 B.R. at 600.

[130] In re DeFlora Lake Dev. Assoc., Inc., 571 B.R. at 600.

[131] In re DeFlora Lake Dev. Assoc., Inc., 571 B.R. at 600.

[132] *Nebel v. Warfield*, 2017 WL 2480728, *3–4 (D. Ariz. 2017).

been terminated prepetition or that she had any interest in the leased vehicle at the time she filed her petition.[133]

The debtor in *Roussos v. Ehrenberg*, also discussed in § II above, asserted a leasehold interest in real estate, but failed to produce the leases until the debtor was "facing removal from and the sale" of the property. The bankruptcy court held that the debtor was judicially estopped from presenting the leases as evidence of the leasehold interest, and the district court affirmed.[134]

Property of Others

Title is not dispositive of ownership. The debtor in *In re Denby-Peterson* purchased a car on an installment agreement. The seller never titled the car in the debtor's name. But the debtor made the weekly payments, maintained and insured the car, and "made costly repairs." The bankruptcy court found that, without question, the debtor had an equitable ownership interest in the car. Thus, the car was estate property subject to turnover.[135]

Repossession, Execution, Foreclosure and Setoff

The questions of when in the course of repossession, execution, foreclosure or setoff property of the estate is metamorphosed into property of the lender, and accordingly is not subject to turnover, and whether there has been an absolute assignment of rents in connection with a mortgage loan, are questions of state law under *Butner v. U.S.*[136]

The bankruptcy court in *In re Ball* held that, once a bank exercised its enforceable right of setoff against a bank account maintained by the debtors at the bank, the funds rightfully belonged to the bank and were no longer property of the estate. Thus, unless the debtors asserted a cause of action

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[133]*In re Dixon*, 2018 WL 400722, *3–4 (Bankr. E.D. Wis. 2018).

[134]*In re Roussos v. Ehrenberg*, 2017 WL 2259674, *5 (C.D. Cal. 2017), appeal dismissed, 2018 WL 1150465 (9th Cir. 2018).

[135]In re Denby-Peterson, 576 B.R. 66, 77–78 (Bankr.D.N.J. 2017) (the court also found that the seller had failed to obtain title in the debtor's name despite the debtor's having made enough regular installment payments to cover the cost).

[136]*Butner v. U.S.*, 440 U.S. 48, 99 S. Ct. 914, 59 L. Ed. 2d 136, 19 C.B.C. 481, Bankr. L. Rep. (CCH) P 67046 (1979).

that would bring the assets back into the estate, the funds were not subject to turnover.[137]

The IRS in *In re Faasoa*, also discussed in § II above, intercepted the debtor's tax overpayment and used it to offset the debtor's credit card debt to the Army and Air Force Exchange Service. The bankruptcy court held that the tax refund was not subject to turnover because, as a result of the setoff, it never became of the estate.[138]

The bankruptcy court in *In re Brandao* similarly held that, once a bank had foreclosed prepetition on real property mortgaged by the debtor, and the debtor's equity of redemption had been terminated, the property was no longer the debtor's property. Thus, when the debtor filed her bankruptcy petition, the real property did not become property of the bankruptcy estate and was not subject to turnover.[139]

By contrast, the bankruptcy court in *In re Hutton* held that if the secured party had not completed its execution sale of the debtor's car as of the petition date, the debtor retained its right to redeem the car. On such facts, the debtor retained an interest in the car and it is subject to turnover.[140]

Similarly, in *In re Walker*, also discussed in § XIV below, the bankruptcy court ordered the City of Chicago—which had impounded the Chapter 13 debtor's car and asserted a statutory, possessory lien against it—to turn over the car. The court in *Walker* disagreed with another bankruptcy judge in the same district, who had ruled in *In re Aviva* that the City was not required to turn over such a car under such circumstances, because the City's remaining in possession of the car was necessary for the perfection of its possessory lien.[141] The *Walker* court entered its turnover order notwithstanding that the City and the debtor had "reached an agreement" that resulted in the debtor's withdrawing her turnover motion, to

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[137] *In re Ball*, 573 B.R. 708, 714–715 (Bankr. E.D. Ky. 2017).

[138] *In re Faasoa*, 576 B.R. 631, 646 (Bankr. S.D. Cal. 2017).

[139] *In re Brandao*, 567 B.R. 396, 410 (Bankr. D. Mass. 2017).

[140] *In re Hutton*, 2017 WL 3704526, *7 (Bankr. E.D. N.C. 2017).

[141] *In re Walker*, 2017 WL 6547730, *2 (Bankr. N.D. Ill. 2017), opinion withdrawn, 2018 WL 799150 (Bankr. N.D. Ill. 2018), disagreeing with *In re Avila*, 566 B.R. 558, 77 Collier Bankr. Cas. 2d (MB) 709 (Bankr. N.D. Ill. 2017).

"serve as instruction for the City in cases where similarly situated debtors request turnover of their vehicle."[142]

Retirement Accounts and Plans; Spendthrift Trusts

Section 541(b)(7) of the Bankruptcy Code excludes certain retirement accounts and plans that contain anti-alienation provisions from property of the estate.[143] Section 541(c)(2) of the Code similarly provides that: "A restriction on the transfer of a beneficial interest of the debtor in a trust that is enforceable under applicable nonbankruptcy law is enforceable in a case under this title."[144] The Supreme Court in *Patterson v. Shumate* held that "nonbankruptcy law" extends to spendthrift trust law, and includes any state or federal law that makes enforceable a trust or plan provision that prohibits the beneficiary from transferring her or his interest in the trust or plan, thus putting the assets of the trust or plan beyond the reach of the beneficiary's creditors.[145]

The Federal Trade Commission (FTC) in *In re Sann* had recommenced a civil enforcement action against Sann and other defendants prepetition, alleging that Sann engaged in deceptive business practices. Sann and the FTC entered into a stipulated preliminary injunction that froze Sann's assets pending the outcome of the FTC litigation, subject to a carveout that allowed Sann to receive $18,000 per month to pay his personal and business expenses.[146] Sann filed a Chapter 11 case, which was converted to Chapter 7. The trustee contended that the assets were property of the estate and sought turnover, which was ordered by the bankruptcy court.[147]

Sann et al. appealed, arguing that the assets were excluded from the estate because the stipulated preliminary injunction froze the debtor's assets and thus, like a spendthrift trust,

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[142] *In re Walker*, 2017 WL 6547730, *4 (Bankr. N.D. Ill. 2017), opinion withdrawn, 2018 WL 799150 (Bankr. N.D. Ill. 2018).

[143] 11 U.S.C.A. § 541(b)(7).

[144] 11 U.S.C.A. § 541(c)(2).

[145] *Patterson v. Shumate*, 504 U.S. 753, 112 S. Ct. 2242, 119 L. Ed. 2d 519, 23 Bankr. Ct. Dec. (CRR) 89, 26 Collier Bankr. Cas. 2d (MB) 1119, 15 Employee Benefits Cas. (BNA) 1481, Bankr. L. Rep. (CCH) P 74621A (1992).

[146] *In re Sann*, Bankr. L. Rep. (CCH) P 83167, 2017 WL 4678196, *1 (D. Mont. 2017), dismissed, 2018 WL 2372549 (9th Cir. 2018).

[147] In re Sann, Bankr. L. Rep. (CCH) P 83167, 2017 WL 4678196, *2.

"placed a restriction on those funds."[148] The court could not find that the appellants had "demonstrated the existence of a spendthrift trust under Montana law by 'clear, unmistakable, satisfactory and convincing evidence,' " and affirmed.[149]

The death of the settlor of the trust in *In re Dodart*, also discussed in § IV above and § XIX below, changed everything. Under the spendthrift provision at issue, on the settlor's death, "the purpose of the Trust changed from providing for the needs of the settlor and her children to dividing the Trust assets equally and distributing them to the beneficiaries."[150] Most significantly, the beneficiaries, on the settlor's death, "acquired the right to request a distribution of their shares in the Trust's assets," which "right of distribution trumped the spendthrift clause." A spendthrift clause is valid only if it restrains both a voluntary and involuntary transfer of a beneficiary's interest.[151] Because the spendthrift provision was no longer in force on the petition date, the exception in Code section 541(c)(2) no longer applied, and the debtors' interest in the trust was property of the estate. Accordingly, the Chapter 7 trustee was entitled to turnover of the amounts that the debtor had received since the petition date.[152]

Tax Refunds

In *In re Faasoa*, also discussed in this § VII above and in § X below, defendant Army & Air Force Exchange Service (the "AAFES") filed a motion to dismiss the debtor's complaint for turnover of a tax refund. The IRS had intercepted the refund prepetition and applied it to credit card debt that the debtor owed to the AAFES. The AAFES contended that the debtor's right to a tax refund did not arise until after the AAFES exercised its setoff rights, and the refund was not property of the estate.[153] The court first ruled that AAFES had properly exercised its non-bankruptcy law setoff rights. Thus, no funds were owed to the debtor as of the petition date, the tax refund

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[148]In re Sann, Bankr. L. Rep. (CCH) P 83167, 2017 WL 4678196, *3.

[149]In re Sann, Bankr. L. Rep. (CCH) P 83167, 2017 WL 4678196, *5

[150]*In re Dodart*, 577 B.R. 406, 411–412 (Bankr. D. Utah 2017).

[151]In re Dodart, 577 B.R. at 412.

[152]In re Dodart, 577 B.R. at 414.

[153]*In re Faasoa*, 576 B.R. 631, 634–36 (Bankr. S.D. Cal. 2017).

did not become property of the estate, and section 542(a) was inapplicable.[154]

The bankruptcy court in *In re Thiel*, also discussed in § XVIII below, held that the definition of property of the estate in Code section 541(a) "catches a debtor's anticipated tax refund attributable to pre-petition events." No party in *Thiel* had disputed whether the tax refunds at issue were part of the bankruptcy estate.[155]

See also *In re Lamey* in §§ VIII and XVIII below.

VIII. SECTION 542(A)—DELIVER TO THE TRUSTEE AND ACCOUNT FOR THE PROPERTY OR THE VALUE OF SUCH PROPERTY IN POSSESSION, CUSTODY, OR CONTROL DURING THE CASE OF THE ENTITY, OTHER THAN A CUSTODIAN, FROM WHOM TURNOVER IS SOUGHT

The bankruptcy court in *In re Xiang Yong Gao* followed the majority rule that the party from whom turnover is sought under § 542(a) must be in the "possession, custody, or control" of the property at some time "during the case." Because the trustee had not proven this, the court denied the turnover motion.[156]

In *In re Dawson*, also discussed in § VII above, the debtor sought release of his passport by the Maine Department of Health and Human Services (ME DHHS) pursuant to a turnover motion under Code section 542. The ME DHHS had reported the debtor's unpaid child support to the U.S. State Department, which under applicable statutory law could revoke, restrict or limit the debtor's passport because of the nonpayment. The court held that these facts did not mean that the ME DHHS had possession of, or power or control over, the passport at any time during the case.[157]

Deliver to the Trustee Property or the Value of Such Property

The person in possession, custody or control of the property

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[154]In re Faasoa, 576 B.R. at 645–46.

[155]*In re Thiel*, 579 B.R. 527, 531 (Bankr. D. Minn. 2018).

[156]*In re Xiang Yong Gao*, 64 Bankr. Ct. Dec. (CRR) 67, 2017 WL 2544132, *3 (Bankr. E.D. N.Y. 2017).

[157]*In re Dawson*, 2017 WL 3888289, *1 (Bankr. D. Me. 2017).

"during the case" has the duty under§ 542(a) to "deliver to the trustee, and account for, such property or the value of such property."[158] Most courts—including *In re Young* decided since last year's Annual Survey—hold that "during the case" means at any time during the pendency of the bankruptcy case, and not solely at the time the turnover proceeding is commenced.[159]

The evidence in *In re Lamey* showed that the debtor's tax refunds were at one point deposited in the debtor's accounts postpetition. The bankruptcy court emphasized, moreover, that the Chapter 7 trustee did not need to show that the debtor had received the tax refunds but needed to show only that the debtor had the right to receive the property postpetition.[160]

If the property has been spent, transferred or otherwise dissipated, the person who was in possession, custody or control of it will in most cases remain obligated to turn over its value. In *Nebel v. Warfield*, also discussed in § VII above, the debtors had paid, in the month before they filed their Chapter 7 petition, for an airline ticket, tuition, and room and board, for their minor daughter to attend a ballet school postpetition. The district court affirmed the bankruptcy court's determination that the estate was entitled to turnover of the full amount that the debtor had paid.[161]

Action for Accounting

Section 542(a) also requires an entity to account for property subject to turnover.[162] The bankruptcy court in *In re McKeever*, also discussed in above § IV, held that the continued postpetition control over real property by defendants (the debtor and other entities) warranted turnover and an accounting for any rents received, but did not require the

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[158] 11 U.S.C.A. § 542(a) (emphasis supplied).

[159] *In re Young*, 578 B.R. 312, 324 (Bankr. M.D. N.C. 2017). See also e.g., *In re Elliott*, 544 B.R. 421, 435 (B.A.P. 9th Cir. 2016), aff'd, 692 Fed. Appx. 472 (9th Cir. 2017).

[160] *In re Lamey*, 2017 WL 3575845, *5 (Bankr. D. N.M. 2017).

[161] *Nebel v. Warfield*, 2017 WL 2480728, *3 (D. Ariz. 2017).

[162] 11 U.S.C.A. § 542(a).

defendants to pay the fair rental value for their own postpetition use of the property.[163]

IX. UNLESS SUCH PROPERTY IS OF INCONSEQUENTIAL VALUE OR BENEFIT TO THE ESTATE

Section 542(a) does not require turnover of "property that is of inconsequential value or benefit to the estate."[164]

Whether the value of property is consequential can depend on the debtor's need for the property. The bankruptcy court in *In re Hutton*, also discussed in § VII above, found that the debtor had no equity in the trucks turnover of which was sought. But the trucks were a benefit to the debtor's estate and business because they would allow both the debtor and his wife to continue to generate income through the debtor's business. Accordingly, the trucks were not of inconsequential value to the debtor's estate.[165]

The bankruptcy court in *In re Delano Retail Partners, LLC* found that $429,505 was not inconsequential value.[166]

The bankruptcy court in *In re Collins* found that the assets in a trust would at least provide "some value" to the estate, and thus were not of inconsequential value.[167]

X. SECTION 542(B)—DEBTS MATURED OR PAYABLE ON DEMAND OR ORDER BUT § 542 NOT AVAILABLE TO LIQUIDATE DISPUTED CONTRACT CLAIMS

Bankruptcy Code § 542(b) provides that, subject to the exceptions in § 542(c) and (d) and to offset under § 553, "an entity that owes a debt that is property of the estate and that is matured, payable on demand, or payable on order, shall pay such debt to, or on the order of, the trustee."[168]

The bankruptcy court in *In re E & G Waterworks, LLC*, also

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[163] *In re McKeever*, 567 B.R. 652, 664 (Bankr. N.D. Ga. 2017).

[164] 11 U.S.C.A. § 542(a).

[165] *In re Hutton*, 2017 WL 3704526, *8 (Bankr. E.D. N.C. 2017).

[166] *In re Delano Retail Partners, LLC*, 2017 WL 3500391, *14, 93 U.C.C. Rep. Serv. 2d 472 (Bankr. E.D. Cal. 2017).

[167] *In re Collins*, 2018 WL 878877, *6 (Bankr. E.D. N.Y. 2018).

[168] 11 U.S.C.A. § 542(b).

discussed in § II above, described Code section 542(b) as "integral to the bankruptcy case administration process." Turnover "is a simple, efficient mechanism to collect matured debts currently due to the bankruptcy estate" that "avoids the time and expense that would be required if a trustee had to act piecemeal, employing special or local counsel and commencing disconnected, individual civil actions in foreign fora to collect every debt owed to a debtor." The court declined to enforce a contractual mandatory arbitration clause with respect to turnover, on the ground that it would "undermine the trustee's power to seek a quick and inexpensive resolution of outstanding, matured debtors for the benefit of all creditors."[169]

The bankruptcy court in *In re Picacho Hills Util. Co., Inc.*, also discussed in § V above, characterized the $168,000 that a state utility commission previously ordered the defendant to pay, as a past due and liquidated debt that was subject to turnover under section 542(b).[170]

The Chapter 7 trustee in *In re JCC Envtl., Inc.*, also discussed in § XIX below, sued the defendant on an unpaid account. The section 542(b) count of the complaint alleged that the debtor, JCC, shipped oil to the defendant over a three-year period, with a "market value totaling, at minimum," $1,355,849, and that the defendant never paid for the oil. The defendant moved to dismiss this count of the complaint, arguing that the trustee had not alleged facts to show an existing revolving credit facility or a series of open-ended credit transfers, or even a predetermined price for the transferred oil. The bankruptcy court denied the motion to dismiss, determining that the trustee had made allegations sufficient to identify an open account transaction. It did not expressly rule, though, on whether section 542(b) was a proper basis for relief.[171]

By contrast, a disputed contract claim is not subject to turnover under section 542(b). The bankruptcy court in *In re Ladder 3 Corp*. emphasized that turnover actions "involve the return of undisputed funds." The complaint before the court

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[169] *In re E & G Waterworks, LLC*, 571 B.R. 500, 509, 64 Bankr. Ct. Dec. (CRR) 138 (Bankr. D. Mass. 2017).

[170] *In re Picacho Hills Utility Company, Inc.*, 579 B.R. 245, 252 (Bankr. D. N.M. 2017).

[171] *In re JCC Environmental, Inc.*, 575 B.R. 692, 701–702 (E.D. La. 2017).

asserted state law breach of contract claims, and the defendant had filed an answer disputing liability. "Since an action involving a disputed state law claim is not properly characterized as an action for turnover," the claims asserted in the complaint could not be characterized as an action for turnover under section 542.[172]

The bankruptcy court in *In re Builders Group & Development Corp.* similarly could not conclude that the accounts receivable were owed. Accordingly, the court did not order turnover.[173]

Turnover under § 542(b) is limited to debts owed to the estate to the extent not subject to setoff. The court in *In re Faasoa*, also discussed in § II and § VII above, held that the debtor's tax refund never became estate property, and in any event was subject to a proper prepetition setoff, thus triggering § 542(b)'s exception. The court added that it would not have ordered turnover in any event, because the debtor disputed both the ownership of the funds and whether a rightful setoff had taken place.[174]

The Fourth Circuit in *Agnew v. United Leasing Corporation*, without specifically referring to Code section 542(b), stated that the Chapter 11 debtors were seeking turnover under section 542 in an effort to "evade the statute of limitations" for their state law claims. The court emphasized that section 542 "is not meant as a substitute method for resolving contractual disputes." The debtors had pled "garden-variety breach of contract claims, and these simply cannot be raised under § 542."[175]

See also § II, "Jurisdiction and Authority—Generally," above.

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[172] *In re Ladder 3 Corp.*, 571 B.R. 525, 533, 64 Bankr. Ct. Dec. (CRR) 125 (Bankr. E.D. N.Y. 2017), motion to certify appeal denied, 2018 WL 2298349 (E.D. N.Y. 2018).

[173] *In re Builders Group & Development Corp.*, 580 B.R. 593, 604 (Bankr. D. P.R. 2017).

[174] In re Faasoa, 576 B.R. at 647.

[175] *Agnew v. United Leasing Corporation*, 680 Fed. Appx. 149, 154 (4th Cir. 2017). The debtors' bankruptcy case was dismissed while the appeal was pending to the Fourth Circuit, and prior to the court's deciding the matter. The court issued its ruling and opinion nonetheless, exercising its discretion to retain jurisdiction over the adversary proceeding. 680 Fed.Appx. at 155 n. 1.

XI. SECTION 542(C)—THE "GOOD FAITH" EXCEPTION TO TURNOVER

Bankruptcy Code section 542(c) provides that:

> Except as provided in section 362(a)(7) of this title, an entity that has neither actual notice nor actual knowledge of the commencement of the case concerning the debtor may transfer property of the estate, or pay a debt to the debtor, in good faith an other than in the manner specified in subsection (d) of this section, to an entity other than the trustee, with the same effect as to the entity making such transfer or payment as if the case under this title concerning the debtor had not been commenced.[176]

The Chapter 7 debtor in *In re McDuffie* sought damages after a self-storage company sold the contents of her leased storage unit for $10, in an online sale shortly after her bankruptcy case commenced, because she was 45 days delinquent in her rental payments to the self-storage company.[177] The bankruptcy court held that the good faith rule of section 542(c) applied because the sale occurred before either the self-storage company or the buyer had notice or knowledge of the debtor's bankruptcy case.[178]

XII. SECTION 542(E)—OBLIGATION TO TURN OVER RECORDED INFORMATION

Section 542(e) of the Bankruptcy Code provides that "[s]ubject to any applicable privilege, after notice and a hearing, the court may order an attorney, accountant, or other person that holds recorded information, including books, documents, records, and papers, relating to the debtor's property or financial affairs, to turn over or disclose such recorded information to the trustee."[179]

The absence of evidence on which to base a claim for turnover of property under section 542(a) or (b) does not prevent turnover of existing documentation related to that property under section 542(e). Specifically, the information sought does not need to be property of the estate, but simply must relate either to property of the estate or the debtor's financial affairs.

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[176] 11 U.S.C.A. § 542(C).

[177] *In re McDuffie*, 2017 WL 3098099, *1–2 (Bankr. N.D. Ohio 2017).

[178] In re McDuffie, 2017 WL 3098099, *6.

[179] 11 U.S.C.A. § 542(E).

The bankruptcy court in *In re Xiang Yong Gao*, also discussed in § VII above, found that the information sought by the Chapter 7 trustee related to $690,000 that was, "at some point," the debtor's property. The court noted that, aided by the information sought, the trustee might be able to determine what happened to the funds and ordered turnover of the information under section 542(e).[180]

The reach of section 542(e) has some limitations. The Chapter 7 trustee in *Golden v. O'Melveny & Meyers LLP* brought an action in the debtor's bankruptcy case, suing former lawyers for the debtor for malpractice and other claims. The bankruptcy court referred the matter to arbitration. The trustee, following a status conference in the arbitration proceeding, filed a motion in the bankruptcy case seeking turnover of records from the defendants pursuant to section 542(e).[181] The bankruptcy court denied the motion, noting that its prior orders compelling arbitration "necessarily encompass[ed] all discovery disputes arising in the course of the arbitration." The court viewed the turnover motion as "a motion to compel O'Melveny to produce certain documents that the Trustee alleges were improperly withheld in the arbitration." The court ordered the trustee to withdraw the turnover motion and seek any relief that he requested with respect to discovery matters from the arbitrator.[182]

XIII. SECTION 543—TURNOVER OF PROPERTY BY A CUSTODIAN

Bankruptcy Code § 543[183] is entitled "Turnover of Property by a Custodian" and is the parallel to § 542. The party from whom the turnover is sought must be a custodian for § 543 to apply. A "custodian" is defined in Code § 101(11) as a:

(A) receiver or trustee of any of the property of the debtor, appointed in a case or proceeding not under this title;
(B) assignee under a general assignment for the benefit of the debtor's creditors; or

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[180] *In re Xiang Yong Gao*, 64 Bankr. Ct. Dec. (CRR) 67, 2017 WL 2544132, *3 (Bankr. E.D. N.Y. 2017).

[181] *Golden v. O'Melveny & Meyers LLP*, 2017 WL 5178721, *1–2 (C.D. Cal. 2017).

[182] Golden v. O'Melveny & Meyers LLP, 2017 WL 5178721, *3.

[183] 11 U.S.C.A. § 543.

(C) trustee, receiver, or agent under applicable law, or under a contract, that is appointed or authorized to take charge of property of the debtor for the purpose of enforcing a lien against such property, or for the purpose of general administration of such property for the benefit of the debtor's creditors.[184]

Subsections 543(a) and (b) provide that:

(a) A custodian with knowledge of the commencement of a case under this title concerning the debtor may not make any disbursement from, or take any action in the administration of, property of the debtor, proceeds, product, offspring, rents, or profits of such property, or property of the estate, in the possession, custody, or control of such custodian, except such action as is necessary to preserve such property.

(b) A custodian shall—

(1) deliver to the trustee any property of the debtor held by or transferred to such custodian, or proceeds, product, offspring, rents, or profits of such property, that is in such custodian's possession, custody, or control on the date that such custodian acquires knowledge of the commencement of the case; and

(2) file an accounting of any property of the debtor, or proceeds, product, offspring, rents, or profits of such property, that, at any time, came into the possession, custody, or control of such custodian.[185]

Subsection 543(c)(1) and (2) provide that the court, after notice and a hearing, shall —

(1) protect all entities to which a custodian has become obligated with respect to such property or proceeds, product, offspring, rents, or profits of such property;

(2) provide for the payment of reasonable compensation for services rendered and costs and expenses incurred by such custodian . . .[186]

Subsection 543(d)(1) and (2) provides that after notice and hearing, the bankruptcy court —

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[184] 11 U.S.C.A. § 101(11).

[185] 11 U.S.C.A. § 543(a) and (b).

[186] 11 U.S.C.A. § 543(c)(1) and (2).

(1) may excuse compliance with subsection (a), (b), or (c) of this section if the interests of creditors and, if the debtor is not insolvent, of equity security holders would be better served by permitting a custodian to continue in possession, custody, or control of such property.
(2) shall excuse compliance with subsections (a) and (b)(1) of this section if the custodian is an assignee for the benefit of the debtor's creditors that was appointed or took possession more than 120 days before the date of the filing of the petition, unless compliance with such subsections is necessary to prevent fraud or injustice.[187]

Grounds for Turnover

The bankruptcy court in *In re Lamplight Condo. Ass'n, Inc.* characterized section 543 as the Congressional authorization, "under the Supremacy Clause of the United States Constitution, to review and conclude matters related to a state court receivership, once a bankruptcy petition is filed." Since the receivership assets become property of the bankruptcy estate after the filing of the bankruptcy, they become, once the bankruptcy case is commenced, "contained within the domain of the bankruptcy court."[188]

The bankruptcy court has discretion under section 543to deny turnover if leaving the custodian in possession and authority is in the best interest of creditors. The status of important matters in the proceedings at the time the court considers turnover can be key to whether it orders turnover. In *In re Packard Square LLC*, the court had denied the debtor's motion for postpetition financing, and all parties agreed that it was in the best interest of the debtor and its creditors that the debtor's real estate development be completed and rented.[189] Because these objectives could not be achieved without financing, and the receiver could obtain such financing, the court determined that the interests of the debtor's creditors and equity owners would be better served by the

[187] 11 U.S.C.A. § 543(d)(1).

[188] *In re Lamplight Condominium Association, Inc.*, 2017 WL 1843510, *3 (Bankr. D. Conn. 2017).

[189] *In re Packard Square LLC*, 575 B.R. 768, 781, 64 Bankr. Ct. Dec. (CRR) 222 (Bankr. E.D. Mich. 2017), order aff'd, 2018 WL 2159791 (E.D. Mich. 2018) and appeal dismissed, 2018 WL 2184356 (E.D. Mich. 2018).

receiver's remaining in possession and authority, and dismissed the case.[190]

Hybrid proceedings can be problematic. The debtors in *In re Briar Hill Foods, LLC* operated several grocery stores, which ceased operations several months before the debtor's bankruptcy filing. The secured lender filed foreclosure actions in five counties and had a receiver appointed in each. The debtors filed their Chapter 11 petitions to "facilitate the sale of their assets" and, with the support of the secured lender and the United States Trustee, sought approval for the receiver "to retain the property and operate as a property manager and unretained realtor."[191] The court denied the motion, reasoning that it could not "concoct procedures and rules to accommodate a good result, especially when the means circumvent the bankruptcy code."[192] The Code provides for a debtor in possession or a trustee, and no other alternative. "It is the Bankruptcy Code, not the Bankruptcy Suggestions." The court declined "the invitation to act in a legislative (and management) capacity," and denied the motion.[193]

Protect All Entities to which a Custodian Has Become Obligated

The bankruptcy court in *In re Stainless Sales Corp.* denied the motion of the owner of a forklift for an administrative expense claim as protection under Code section 543(c)(1).[194] The owner had leased the forklift to the debtor prepetition. The debtor had made a prepetition assignment for the benefit of creditors to an assignee, and the assignee had scheduled an auction of the debtor's assets. The owner requested return of the forklift from the assignee. But though the assignee was willing to return the forklift, it was sold to a third party at

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[190] In re Packard Square LLC, 575 B.R. at 783.

[191] *In re Briar Hill Foods, LLC*, 2017 WL 4404274, *1 (Bankr. N.D. Ohio 2017).

[192] In re Briar Hill Foods, LLC, 2017 WL 4404274, *2, citing *Czyzewski v. Jevic Holding Corp.*, 137 S. Ct. 973, 197 L. Ed. 2d 398, 63 Bankr. Ct. Dec. (CRR) 242, 77 Collier Bankr. Cas. 2d (MB) 596, 41 I.E.R. Cas. (BNA) 1613, Bankr. L. Rep. (CCH) P 83082 (2017).

[193] *In re Briar Hill Foods, LLC*, 2017 WL 4404274, *2 (Bankr. N.D. Ohio 2017).

[194] *In re Stainless Sales Corporation*, 579 B.R. 836, 838, 65 Bankr. Ct. Dec. (CRR) 15 (Bankr. N.D. Ill. 2017).

the auction. Creditors of the debtor then filed an involuntary bankruptcy petition against the debtor, and an order for relief was entered.[195]

The owner of the forklift filed an application for an administrative expense claim under Code section 503(b)(3)(E).[196] The bankruptcy court ruled that while a custodian can assert an administrative expense claim, the owner of the forklift could not.[197] The owner though, was entitled to protection under section 543(c)(1), and "that same section affords the court latitude to set that protection . . . as a right to an administrative expense." Accordingly, the court granted the owner's application.[198]

Custodian's Claim for Fees and Expenses

The prepetition receiver in *In re Montemurro* filed in the bankruptcy court its application for approval of its prepetition fees and expenses. The bankruptcy court noted that Code section 543, regarding payment of prepetition custodian's fees and expenses, and Code section 503, regarding payment of administrative expenses in bankruptcy cases, "create different standards for compensation."[199] Regardless, though, the custodian's application was a "jumbled mess—a data dump with no guidance whatsoever for the court to follow in determining whether asserted items meet the applicable standards." While the court did not require the application to conform to the standards for professional compensation for estate professionals such as a debtor's or creditors' committee's counsel, the court said that it would be "guided somewhat by those standards when the time comes."[200]

See also *In re LB Steel, LLC* discussed in § IV above.

XIV. AUTOMATIC STAY/ADEQUATE PROTECTION

In *In re Walker*, also discussed in § VII above, the bankruptcy court held that the City of Chicago, which had repos-

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[195]In re Stainless Sales Corporation, 579 B.R. at 839.

[196]In re Stainless Sales Corporation, 579 B.R. at 841.

[197]In re Stainless Sales Corporation, 579 B.R. at 842.

[198]In re Stainless Sales Corporation, 579 B.R. at 845.

[199]*In re Montemurro*, 581 B.R. 565, 572, 65 Bankr. Ct. Dec. (CRR) 67 (Bankr. N.D. Ill. 2018).

[200]In re Montemurro, 2018 WL 836387 *11.

sessed the debtor's car prepetition, had to turn over the car upon the request of the debtor post-petition.[201] The court followed the Seventh Circuit's opinion in *Thompson v. Gen. Motors Acceptance Corp., LLC*, which held that the act of a creditor, "of passively holding onto an asset constitutes 'exercising control' over it, and such action violates section 362(a)(3) of the Bankruptcy Code."[202] The court noted that the City, as any other creditor, must file a motion to modify the automatic stay in order to protect its possessory lien.[203] It could not gain the protection of section 362(b)(3) by simply passively possessing the debtor's vehicle. In so holding, the *Walker* Court stressed that the language "act or omission" is not found in that section. Notably, in this case, the City and the debtor had reached an agreement that resulted in the debtor's withdrawal of her motion to compel turnover. The court ruled nonetheless, taking the opportunity to announce that the holding of *Thompson* would apply prospectively to all similarly situated debtors.[204]

In contrast, the bankruptcy court in *In re Joy R. Denby-Peterson* held that a creditor who repossessed the debtor's vehicle prepetition did not violate the automatic stay by merely passively retaining it postpetition.[205] The debtor sought turnover of the vehicle pursuant to section 542(a) and damages for violation of the automatic stay under section 362(a)(3).[206] Recognizing that this issue stems from an interaction between sections 542(a), 363(e) and 362(a)(3), the court followed the minority view, namely that a creditor does not violate the

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[201] *In re Walker*, 2017 WL 6547730, *2 (Bankr. N.D. Ill. 2017), opinion withdrawn, 2018 WL 799150 (Bankr. N.D. Ill. 2018).

[202] *In re Walker*, 2017 WL 6547730, *2 (Bankr. N.D. Ill. 2017), opinion withdrawn, 2018 WL 799150 (Bankr. N.D. Ill. 2018), quoting *Thompson v. General Motors Acceptance Corp., LLC*, 566 F.3d 699, 703, 61 Collier Bankr. Cas. 2d (MB) 1611, Bankr. L. Rep. (CCH) P 81490 (7th Cir. 2009).

[203] *In re Walker*, 2017 WL 6547730, *4 (Bankr. N.D. Ill. 2017), opinion withdrawn, 2018 WL 799150 (Bankr. N.D. Ill. 2018).

[204] *In re Walker*, 2017 WL 6547730, *4 (Bankr. N.D. Ill. 2017), opinion withdrawn, 2018 WL 799150 (Bankr. N.D. Ill. 2018).

[205] *In re Denby-Peterson*, 576 B.R. 66, 93 U.C.C. Rep. Serv. 2d 1367 (Bankr. D. N.J. 2017).

[206] In re Denby-Peterson, 576 B.R. at 82.

stay if it merely retains possession of the property.[207] Noting that the Third Circuit has not yet addressed the issue, the court thoroughly analyzed the circuit split on the topic. The court criticized the majority view that the act of passively holding onto an asset constitutes "an act . . . to exercise control" under section 362(a)(3) "as it does not allow for the possibility of defenses to turnover."[208] Particularly in cases as the one before the court, in which the debtor's interest in the vehicle was unknown until the court decided the matter, the court held that it would "simply be unfair" to declare a stay violation.[209]

A few days prior to the debtor's filing a Chapter 7 petition in *In re Parham*, the Credit Acceptance Corporation obtained a state-court judgment against the debtor and lawfully garnished and received funds from the debtor's bank account.[210] Though the bank properly and promptly authorized a garnishment release, the funds had not been returned at the time the debtor received a discharge and the bankruptcy case was closed.[211] The debtor moved to reopen the bankruptcy case in order to recover the garnished funds as a preferential transfer.[212] The debtor further sought damages, including attorney fees, for a violation of the automatic stay.[213] The court initially granted the debtor's motion. Upon reconsideration, however, the court held, among other things, that the garnished funds were not property of the estate and that the stay therefore was not violated.[214] The court explained that the debtor's interest in the garnished funds "terminated with finality" upon CAC's prepetition receipt of the funds.[215]

XV. SETOFF

See cases discussed in § VII, "Repossession, Execution, Foreclosure and Setoff," above.

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[207] In re Denby-Peterson, 576 B.R. at 82.

[208] In re Denby-Peterson, 576 B.R. at 82.

[209] In re Denby-Peterson, 576 B.R. at 82.

[210] *In re Parham*, 2017 WL 3207663, *1 (Bankr. E.D. Mich. 2017).

[211] In re Parham, 2017 WL 3207663, *1.

[212] In re Parham, 2017 WL 3207663, *1.

[213] In re Parham, 2017 WL 3207663, *1.

[214] In re Parham, 2017 WL 3207663, *2.

[215] In re Parham, 2017 WL 3207663, *2.

XVI. FREE EXERCISE CLAUSE OF THE FIRST AMENDMENT; FOURTH AND FIFTH AMENDMENT PRIVILEGE

The authors are not aware of any significant published opinions since last year's Annual Survey addressing the relation between the First, Fourth or Fifth Amendment privilege and turnover actions.

XVII. SEVENTH AMENDMENT—RIGHT TO JURY TRIAL

The Seventh Amendment of the U.S. Constitution preserves the right of trial by jury for civil actions.[216] The right to a jury trial extends to proceedings at law. There is no right to a jury trial in proceedings in equity.

In *In re Royce Homes, LP*, also discussed in § II above, the Chapter 7 trustee commenced an adversary proceeding against Park Lake to obtain turnover in connection with a prepetition debt that Park Lake owed to the debtor, by compelling Park Lake to remit to the estate proceeds from a certain receivable that the Montgomery County Municipal Utility District owed to Park Lake.[217] Park Lake requested withdrawal of the reference arguing, among other things, that it was entitled to a jury trial because the trustee sought a legal remedy by requesting a judgment on the debt.[218] The court extensively discussed the requirements of both mandatory and permissive withdrawal of the reference.[219] The withdrawal of the reference is mandatory "if the court determines that resolution of the proceeding requires consideration of both title 11 and other laws of the United States regulating organizations or activities affecting interstate commerce."[220] The Court held that mandatory withdrawal of the reference did not apply because no causes of action involving federal law outside of the Bankruptcy Code were involved.[221] Next, the court considered the requirements for permissive with-

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[216]U.S. Const. Amend. VII.

[217]*In re Royce Homes, LP*, 578 B.R. 748, 750 (Bankr. S.D. Tex. 2017).

[218]In re Royce Homes, LP, 578 B.R. at 764.

[219]In re Royce Homes, LP, 578 B.R. at 755–64.

[220]In re Royce Homes, LP, 578 B.R. at 756, quoting 28 U.S.C.A. § 157(d).

[221]In re Royce Homes, LP, 578 B.R. at 756.

drawal of the reference: "The district court may withdraw, in whole or in part, any case or proceeding referred under this section, on its own motion or on timely motion of any party, for cause shown."[222] The Fifth Circuit has held, to determine if "cause" exists, a court should consider whether: "(1) the underlying lawsuit is a non-core proceeding; (2) uniformity in bankruptcy administration will be promoted; (3) forum shopping and confusion will be reduced; (4) economical use of debtors' and creditors' resources will be fostered; (5) the bankruptcy process will be expedited; and (6) a party has demanded a jury trial."[223] In addressing the sixth factor, the bankruptcy court adopted the holding of a recent First Circuit case, namely that "[a] turnover action is not an action to recover damages for the taking of estate property belonging to the estate at the time of the filing. It invokes the court's most basic equitable powers to gather and manage property of the estate."[224] Having determined that a turnover proceeding invokes a court's equitable powers, and thus the right to a jury trial does not apply, the bankruptcy court denied the motion to withdraw the reference.

Park Lake then moved the district court to withdraw the reference.[225] The district court, emphasizing that "the monetary nature of the remedy does not make the action legal in nature,"[226] affirmed.

XVIII. REVOCATION OR DENIAL OF DISCHARGE AND OTHER SANCTIONS FOR FAILURE TO TURNOVER OR COMPLY WITH TURNOVER ORDER

In *In re Thiel*, also discussed in § VII above, the Chapter 7 trustee commenced an adversary proceeding seeking to

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[222]In re Royce Homes, LP, 578 B.R. at 756, quoting 28 U.S.C.A. § 157(d).

[223]In re Royce Homes, LP, 578 B.R. at 756, quoting *Holland America Ins. Co. v. Succession of Roy*, 777 F.2d 992, 999, 13 Bankr. Ct. Dec. (CRR) 1256, 13 Collier Bankr. Cas. 2d (MB) 1462, Bankr. L. Rep. (CCH) P 70874 (5th Cir. 1985).

[224]In re Royce Homes, LP, 578 B.R. at 764, quoting *Braunstein v. McCabe*, 571 F.3d 108, 122, 51 Bankr. Ct. Dec. (CRR) 232, Bankr. L. Rep. (CCH) P 81518 (1st Cir. 2009).

[225]*Tow v. Park Lake Communities (In re Royce Homes, LP), LP*, Bankr. L. Rep. (CCH) P 83200, 2018 WL 287861, *1 (S.D. Tex. 2018)

[226]Tow v. Park Lake Communities, LP (In re Royce Homes, LP), Bankr. L. Rep. (CCH) P 83200, 2018 WL 287861, *4.

revoke the debtor's discharge pursuant to section 727(d)(2) of the Bankruptcy Code because the debtor failed to turn over certain prepetition tax refunds related to his prepetition wages.[227] That provision authorizes the court to revoke a discharge if the debtor acquired or became entitled to acquire estate property and "knowingly and fraudulently failed to report the acquisition of or entitlement to such property, or to deliver or surrender such property to the trustee."[228] The debtor had not only failed to turn over the tax refunds, he had spent all of those refunds postpetition.

A trustee seeking revocation of a debtor's discharge must prove by a preponderance of the evidence that: "(1) the debtor acquired property of the estate; (2) and that the debtor knowingly and fraudulently failed to report, deliver, or surrender that property to the trustee."[229] The court emphasized that this provision "demands a balance of many interests" and because of its "concomitant stalling effect on the realization of the fresh start policy," it must be strictly construed against the party seeking a revocation of a discharge.[230] The *Thiel* court relied on *In re Davis*, in which the court found that knowledge and fraudulent intent may be inferred "from the debtor's 'whole pattern of conduct,' including conduct that exhibits a 'reckless indifference to the truth.' " The *Thiel* court, emphasizing the inconsistencies in the debtor's statements regarding the tax refunds, held that the debtor's conduct satisfied the fraudulent intent requirement of section 727(d)(2) and revoked the debtor's discharge.[231]

In *In re Dawson*, also discussed in §§ VII and VIII, the debtor's passport was revoked prepetition due to his failure to pay child support.[232] The debtor filed a motion asserting a stay violation and seeking the turnover of his passport and sanctions in the amount of the attorney fees he incurred in bring-

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[227] *In re Thiel*, 579 B.R. 527 (Bankr. D. Minn. 2018).

[228] 11 U.S.C.A. § 727(d)(2).

[229] In re Thiel, 579 B.R. at 530.

[230] In re Thiel, 579 B.R. at 530.

[231] In re Thiel, 579 B.R. at 531–32, quoting *In re Davis*, 538 B.R. 368, 384–85 (Bankr. S.D. Ohio 2015).

[232] *In re Dawson*, 2017 WL 3888289, *1 (Bankr. D. Me. 2017).

ing the motion for turnover.[233] The court found that the Maine Department of Health and Human Services ("ME DHHS") was never in possession of the passport and that the passport was the property of the United States.[234] The court rejected the debtor's assertion that ME DHHS had violated the automatic stay, noting that ME DHHS' involvement ended prior to the petition date when it reported the debtor's outstanding child support obligations to the United States Department of Health and Human Services.[235] Based upon the foregoing, the court denied the motion in its entirety, including the sanctions.[236]

The bankruptcy court in *In re Kenny G. Enterprises, LLC* entered contempt sanctions against the debtor's principal, Gharib, in the amount of the funds that he did not turn over plus $1,000 per day in fines.[237] The district court affirmed except for the $1,000 per diem fines.[238] Both parties appealed to the Ninth Circuit Court of Appeals.[239]

The Ninth Circuit reversed the district court's vacation of the per diem fines, finding that the bankruptcy court had acted within its civil contempt authority under Code section 105(a), which allows the court to "issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title."[240] The court remanded, but noted that in light of Gharib's incarceration for civil contempt since May 2015, "due process consideration will require the bankruptcy court to conclude that Gharib's continued detention and the daily $1,000 sanctions have ceased to be coercive and instead have become punitive."[241]

The debtors in *In re Madden* were ordered, but failed, to

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[233]In re Dawson, 2017 WL 3888289, *1.

[234]In re Dawson, 2017 WL 3888289, *2.

[235]In re Dawson, 2017 WL 3888289, *2.

[236]In re Dawson, 2017 WL 3888289, *2.

[237]*In re Kenny G Enterprises, LLC*, 692 Fed. Appx. 950, 952 (9th Cir. 2017).

[238]In re Kenny G. Enterprises, LLC, 692 F. App'x at 952.

[239]In re Kenny G. Enterprises, LLC, 692 F. App'x at 952.

[240]In re Kenny G. Enterprises, LLC, 692 F. App'x at 953.

[241]In re Kenny G. Enterprises, LLC, 692 F. App'x at 953.

turn over inheritances.[242] The bankruptcy court held the debtors in contempt and the debtors failed to appear in court as ordered.[243] The court, "[g]iven the Debtors' disturbing history of disobedience of the court's prior orders," issued two arrest warrants.[244]

In *In re Young*, the Chapter 7 trustee and the bankruptcy administrator commenced an adversary proceeding seeking the denial of the debtors' discharge.[245] They also sought a monetary judgment requiring the debtors to reimburse the estate for the value of the property transferred after the petition date.[246] The debtors had removed or sold all of their personal property despite having agreed that the property would be made available to the estate, and they withheld information about their disposition of the property from their attorney and the trustee.[247] Courts in the Fourth Circuit require that four elements be established for a prima facie case for denial of a discharge under 727(a)(2): "(1) [t]he transfer, removal, destruction, or concealment of property, (2) belonging to the debtor or estate, (3) within a year of filing the petition or after the filing of the petition, depending on the subsection, and (4) with the intent to hinder, delay, or defraud."[248] The bankruptcy court found that the debtors' conduct "show[ed] a pattern of concealment and nondisclosure sufficient to support the conclusion that . . . [the debtors] acted with the intent to hinder, delay, and defraud" the trustee and denied the discharge.[249] The bankruptcy court entered judgment denying the debtors' discharge and also awarded the trustee monetary damages in the amount of $937.50.[250]

The bankruptcy court in *In re 40 Lakeview Drive, LLC* entered an order compelling the debtor's managing member,

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[242] *In re Madden*, 576 B.R. 579 (Bankr. W.D. Mich. 2017).

[243] In re Madden, 576 B.R. at 579.

[244] In re Madden, 576 B.R. at 579.

[245] *In re Young*, 578 B.R. 312 (Bankr. M.D. N.C. 2017).

[246] In re Young, 578 B.R. at 318.

[247] In re Young, 578 B.R. at 323–24.

[248] In re Young, 578 B.R. at 318.

[249] In re Young, 578 B.R. at 324.

[250] In re Young, 578 B.R. at 325.

Ms. Wong, to turn over, within three days of the order, keys and alarm codes for access to the debtor's real property.[251] Ms. Wong did not turn over the items and filed a notice of appeal of the turnover order.[252] The trustee filed a motion seeking to compel Ms. Wong to pay the trustee's fees and a fine.[253] Ms. Wong objected to the motion raising the following three arguments: (1) that she filed an appeal and a motion to stay the turnover order; (2) that a third party was in possession of the keys to the property; and (3) that no determination as to the ownership of the property had been made.[254] The court held a hearing and rejected Ms. Wong's arguments.[255] Ms. Wong continued to refuse to comply. The court entered an order holding her in contempt of court, imposed a daily fine in the amount of $100.00 per day, and ordered her to pay $2,500.00 in legal fees to the trustee.[256]

The trustee in *40 Lakeview Drive* also brought an enforcement motion in which he specified that he would only seek the assistance of the marshals if he could not gain peaceful access to the property.[257] The court granted the enforcement motion, noting that an enforcement motion is "an appropriate application of this Court's inherent power to interpret and enforce its Orders and of 11 U.S.C.A. section 105(a)," which provides that "[t]he court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title."[258]

In *In re Lamey*, also discussed in §§ VII and VIII above, a creditor filed a motion seeking the denial of the debtor's discharge. The court granted the motion pursuant to Code section 727(a)(2)(B) because the debtor had concealed property of the estate, should have told the trustee about amendments that he made to his schedules, and should have turned

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[251] *In re 40 Lakeview Drive, LLC*, 2017 WL 3701215, *1 (Bankr. D. N.J. 2017), aff'd, 2018 WL 1665697 (D.N.J. 2018).

[252] In re 40 Lakeview Drive, LLC, 2017 WL 3701215, *2.

[253] In re 40 Lakeview Drive, LLC, 2017 WL 3701215, *2.

[254] In re 40 Lakeview Drive, LLC, 2017 WL 3701215, *2.

[255] In re 40 Lakeview Drive, LLC, 2017 WL 3701215, *2.

[256] In re 40 Lakeview Drive, LLC, 2017 WL 3701215, *3.

[257] In re 40 Lakeview Drive, LLC, 2017 WL 3701215, *6.

[258] In re 40 Lakeview Drive, LLC, 2017 WL 3701215, *7.

over tax refunds and other property to the estate. The court held that the debtor had an affirmative duty to turn over property of the estate without the trustee's first making a demand or filing a turnover motion. The debtor had not only failed to turn the property over, but he also concealed the property by not disclosing it on his schedules.[259]

See also *In re Hardy*, discussed in § II above.

XIX. TIME LIMITATIONS FOR ACTION; ISSUE PRECLUSION; CLAIM PRECLUSION

The debtor in *In re Young*, also discussed in §§ VIII and XVIII above, commenced an adversary proceeding for turnover certain real property from the U.S. Department of Veterans Affairs ("VA"). The bankruptcy court ruled that action was time-barred by the six-year statute of limitations contained in 28 U.S.C.A. section 2401. The six-year statute also constitutes the temporal limit on the waiver sovereign immunity by the U.S.[260] As such, the Court held that it lacked subject matter jurisdiction and dismissed the action.[261]

In *In re Dodart*, also discussed in §§ IV and VII above, the Chapter 7 trustee brought a motion for the turnover of proceeds the debtor had received as part of a distribution from a trust that had been established by his deceased mother.[262] The trustee brought his turnover action more than one and one-half years after the petition was filed, and more than a year after the Code section 341 meeting of creditors, at which the debtor was questioned about the trust.[263] The debtor argued that the motion was brought too late, relying on Code section 704(a)(1) which requires the trustee to "expeditiously" administer a bankruptcy estate.[264] The court disagreed.[265] Emphasizing that the motion for turnover was brought only three days after the trustee learned about the trust distributions—through documents that were obtained by subpoena—

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[259] *In re Lamey*, 574 B.R. 240, 247–48 (Bankr. D. N.M. 2017), subsequent determination, 2017 WL 3835797 (Bankr. D. N.M. 2017).

[260] In re Young, 2017 WL 3190576, *3.

[261] *In re Young*, 2017 WL 3190576, *3 (Bankr. W.D. Va. 2017).

[262] *In re Dodart*, 577 B.R. 406, 408 (Bankr. D. Utah 2017).

[263] In re Dodart, 577 B.R. at 414.

[264] In re Dodart, 577 B.R. at 414.

[265] In re Dodart, 577 B.R. at 414.

and that the trustee had otherwise properly administered the estate, the court concluded that the trustee had "not let this case languish."[266]

In *In re JCC Environmental, Inc.*, also discussed in § X above, the district court ruled that the trustee's turnover action was not time-barred.[267] The defendant argued that claims on an open account are time-barred after three years under Louisiana and Mississippi law.[268] The court disagreed, noting that "[i]f applicable nonbankruptcy law . . . fixes a period within which the debtor may commence an action, and such period has not expired before the date of the filing of the petition, the trustee may commence such action only before the later of—(1) the end of such period, including any suspension of such period occurring on or after the commencement of the case; or (2) two years after the order for relief."[269] A voluntary bankruptcy petition constitutes the order for relief.[270] Thus, the trustee had an additional two years to bring his action against the defendant, which he had done.[271]

XX. APPEALS

The standards for review by the courts of appeals of the decisions of the district courts, and by the district courts of the decisions of the bankruptcy courts, continue to adhere to established principles.

The bankruptcy court in *In re Hardy* entered an order directing the debtor to turn over a commercial real estate property. The debtor appealed and sought a stay, which the district court denied. The debtor also failed to comply with the turnover order. The trustee filed a motion for contempt[272] The court granted the trustee's contempt motion, and the debtor appealed and moved for a stay pending appeal. In analyzing the debtor's stay motion, the court considered, inter

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[266] In re Dodart, 577 B.R. at 414.

[267] *In re JCC Environmental, Inc.*, 575 B.R. 692, 702 (E.D. La. 2017).

[268] In re JCC Environmental, Inc. 575 B.R. at 702.

[269] In re JCC Environmental, Inc. 575 B.R. at 702, quoting *U.S. ex rel. Grubbs v. Kanneganti*, 565 F.3d 180, 190 (5th Cir. 2009).

[270] In re JCC Environmental, Inc. 575 B.R. at 702.

[271] In re JCC Environmental, Inc. 575 B.R. at 702.

[272] *In re Hardy*, 2017 WL 2491497, *2 (Bankr. D. D.C. 2017).

alia, the debtor's likelihood of success on the merits.[273] The debtor argued that the bankruptcy court had no authority to issue its order enforcing the turnover order while the appeal of the turnover order was pending, and also lacked authority to hold the debtor in contempt, because a bankruptcy judge does not have lifetime tenure under Article III of the U.S. Constitution. The bankruptcy court rejected these arguments. It reasoned that the "District Court denied a stay of the turnover order pending appeal, and where here is no stay in place the Bankruptcy Court plainly has authority to enforce the turnover order despite a pending appeal of that order."[274] The bankruptcy court also held that both the turnover claim and the contempt order enforcing it turnover order "stemmed from the bankruptcy case itself." Thus, both orders were constitutionally "core" it had the authority to enter the orders.[275]

In *In re Collins* the appellants filed an appeal from the bankruptcy court's order compelling them to turn over real property to the Chapter 7 trustee. The trustee moved to dismiss the appeal, arguing that the court lacked jurisdiction because the turnover order was not a final order within the meaning of 28 U.S.C.A. § 158(a)(1) and the circumstances did not justify the court's exercise of discretionary review under section 158(a)(3). The court applied the "traditional" concept of finality under 28 U.S.C.A. § 1291 and Federal Rule of Civil Procedure 54(b). Under the traditional approach, a final order is one that "ends the litigation on the merits and leaves nothing for the court to do but execute the judgment."[276] Pursuant to Rule 54(b), a trial court may enter an early final order that disposes of fewer than all the claims or fewer than all of the parties by making an express determination that there is no reason for delay with an express direction that judgment be entered. Applying these concepts of finality, the court held that the turnover order was not final because it did not include an express direction for entry of final judgment and a statement that there is no just reason for delay of an appeal. In fact, the turnover order expressly reserved one of the issues pursuant to section 542 for later determination and

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[273]In re Hardy, 2017 WL 2491497, *4.

[274]In re Hardy, 2017 WL 2491497, *4.

[275]In re Hardy, 2017 WL 2491497, *6.

[276]*In re Collins*, 2017 WL 4162336, *2 (S.D. Cal. 2017).

entry of final judgment. Accordingly, the court found that the turnover order was an interlocutory order and granted the trustee's motion to dismiss for lack of jurisdiction.[277]

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[277] In re Collins, 2017 WL 4162336, *5.