SECTIONS 542 AND 543—TURNOVER OF PROPERTY OF THE ESTATE

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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 2018 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 2018 through early 2019.

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.

In *In re Oliver C & I Corp.*, also discussed in § VII below, the debtor filed a complaint against its partners and other non-creditor third parties seeking turnover of partnership distributions. The defendants moved to dismiss the debtor's turnover claim on the ground that they disputed it. The

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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).

defendants moved to dismiss based on the court's lack of jurisdiction to interpret the partnership agreements over which the debtor alleged a breach. The court acknowledged that "a turnover action can only be considered a core proceeding when the purpose of the proceeding is to obtain the turnover of property or the collection of a matured debt, rather than the creation, recognition, or liquidation of a debt." But because the turnover claim was dependent on a determination that the unpaid distributions were property of the estate, the court declined to dismiss the turnover count "at this juncture of the proceedings."[13]

In *In re Chapman*, the bankruptcy court recommended to the district court that the defendants' motion to dismiss for lack of subject matter jurisdiction be granted because the ownership of the property at issue was in dispute. There, the debtor sought, among other things, the turnover of net income of a trust. Though the court found that turnover claims are typically core, it clarified that Congress intended section 542 "to apply to claims for tangible property and money due to the debtor without dispute which are fully matured and payable on demand." The court accordingly recommended that the turnover claim be dismissed because the ownership of the trust property was "undeniably in dispute" and, therefore, the bankruptcy court did not have subject matter jurisdiction.[14]

In *In re Reed*, the Court of Appeals for the Eighth Circuit, also discussed in § XII below, affirmed the lower courts' decisions sanctioning a lawyer for failing to comply with an order compelling turnover. On appeal from the district court, the lawyer claimed that as an Article I court, the bankruptcy court did not have constitutional authority to sanction under the circumstances. The Eighth Circuit disagreed, finding that, unlike in *Stern*, the order at issue stemmed from the bankruptcy itself and did not implicate a common-law claim. Rather, the bankruptcy court had authority to enter sanc-

[13] *In re Oliver C & I Corp.*, 2018 WL 6841767, *1–5 (Bankr. D. P.R. 2018).

[14] *In re Chapman*, 2018 WL 4620719, *1 (Bankr. S.D. Tex. 2018).

tions for events that occurred in connection with its enforcing the turnover order.[15]

Timing can mean everything. In a chapter 7 case, claims that accrue after the commencement of the case generally are not property of the estate. The debtor in *Williamson v. Peters*, a construction company, had hired the defendants to represent it in a prepetition action in which the debtor obtained a judgment. The defendants registered the judgment incorrectly, with the result that the debtor did not obtain a judgment lien. The chapter 7 trustee discovered the alleged negligence and maintained that the court had jurisdiction over her claim to recover on it under Code section 542(b). Specifically, she asserted that the debtor suffered damages as a result of the defendants' negligence and that, because the claim was "sufficiently rooted" in prepetition conduct, the claim was property of the bankruptcy estate.[16] The district court declined to utilize the conduct theory. It instead looked to state law to determine when the malpractice claim accrued. The court determined that the malpractice claim accrued after the petition was filed and was not property of the estate. Accordingly, the court lacked jurisdiction over the malpractice case and dismissed the complaint.[17]

Other areas in which the questions arise regarding the bankruptcy court's turnover jurisdiction include: alter ego claims, arbitration provisions, comity in cross-border chapter 15 cases, application of the Rooker-Feldman doctrine, state and federal sovereign immunity, and the effect of confirmation of the chapter 11 debtor's plan. Several cases since last year's Annual Survey, considered below, have addressed some of these questions.

Alter Ego Claims

In *In re Wolf*, also discussed in §§ V and VII below, the court held that the court could not enter a final judgment on the trustee's alter ego claim without litigant consent, because the

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[15] *In re Reed*, 888 F.3d 930, 934–36, 65 Bankr. Ct. Dec. (CRR) 144 (8th Cir. 2018), cert. denied, 139 S. Ct. 461, 202 L. Ed. 2d 349 (2018).

[16] *Williamson v. Peters*, 2018 WL 780554, *1 (D. Kan. 2018).

[17] *Williamson v. Peters*, 2018 WL 780554, *1 (D. Kan. 2018).

claim though statutorily core was not constitutionally core.[18] The court, though, found that two of the defendants had consented to entry of a final judgment by filing motions for summary judgment with respect to the turnover count and other counts of the complaint, in which they argued that a transfer of corporate property was not a transfer of shareholder property, and that the trustee's alter ego theory was not in accordance with applicable state law. The court held that the defendants, by moving for a final judgment as a matter of law, had consented to entry of a final judgment on the turnover count and other counts.[19]

Arbitration Clauses

The chapter 11 debtor in *In re Rotondo Weirich Enters., Inc.*, also discussed in § X below, who was a subcontractor in a prison construction project, sued the general contractor and the California Department of Corrections and Rehabilitation seeking damages for alleged breach of contract. The contract provided for the mandatory arbitration of disputes. The debtor argued that enforcing the arbitration provision would "undermine the bankruptcy process's role as a centralized and collective proceeding for adjudication and dealing with claims by and against" a debtor. The bankruptcy court rejected this argument based on binding precedent in its circuit court of appeals.[20] The debtor also sought "to depict its claims as turnover claims," arguing that section 542 turnover actions are not subject to mandatory arbitration. The court held that the debtor's claims were not bona fide section 542 turnover claims, and that disputed contract claims are not encompassed by section 542. Thus, this argument also was not available to the debtor. Finding no conflict between the

[18] *In re Wolf*, 595 B.R. 735, 752 (Bankr. N.D. Ill. 2018).

[19] *In re Wolf*, 595 B.R. 735, 770–771 (Bankr. N.D. Ill. 2018). The court, though, denied the trustee's motion for default judgment because it did not consider the alleged transferee of the business to be the alter ego of the debtor. The court cited In re Veluchamy, to say that "a turnover action cannot be used where the property in question was transferred to someone else prior to the petition date . . ."

[20] *In re Rotondo Weirich Enterprises, Inc.*, 583 B.R. 860, 871, 65 Bankr. Ct. Dec. (CRR) 150 (Bankr. E.D. Pa. 2018), citing *Hays and Co. v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 885 F.2d 1149, 19 Bankr. Ct. Dec. (CRR) 1344, Bankr. L. Rep. (CCH) P 73091, Fed. Sec. L. Rep. (CCH) P 94568 (3d Cir. 1989) and *In re Mintze*, 434 F.3d 222 (3d Cir. 2006).

arbitration clause at issue and the Bankruptcy Code, the court granted the defendant's motion to dismiss in favor of mandatory arbitration.[21]

Comity

The authors are not aware of any significant published opinions since last year's Annual Survey addressing the issue of comity in a turnover action.

Rooker-Feldman

The authors are not aware of any significant published opinions since last year's Annual Survey addressing the application of the Rooker-Feldman doctrine in a turnover proceeding.

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.[22] 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 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

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[21] In re Rotondo Weirich Enters., Inc., 583 B.R. at 871–72.

[22] *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).

Bankruptcies.' "[23] But that consent does not extend to all matters on which a state might be sued in a bankruptcy case.

The chapter 11 debtor in *In re Institute of Cardiovascular Excellence* filed an adversary complaint against the Florida Agency for Health Care Administration (the "AHCA") seeking turnover of amounts owed under a provider agreement. The AHCA filed a motion to dismiss arguing, among other things, that the funds were properly withheld and that the AHCA retained 11th Amendment immunity. Although the AHCA conceded that it did not have immunity against a "true" turnover claim under section 542, it argued that the claims were "actually immunized claims for in personam damages masquerading as a non-immunized § 542 turnover claim."[24] In denying the motion to dismiss, the court held that it had jurisdiction to determine whether the subject funds constituted a matured debt owed as of the petition date, subject to turnover under section 542(b). If the funds were found to be property of the estate, that AHCA was withholding without legal justification, then the court would be required to order turnover "without interference of the Eleventh Amendment." If, instead, the evidence showed that the funds were not estate property, the court would be without jurisdiction because the 11th Amendment precluded in personam jurisdiction over the AHCA.[25]

In *United States v. Copley* the debtors sought turnover of a federal tax refund and the bankruptcy court ordered it. The United States appealed, arguing for the first time that it had not waived sovereign immunity for the purpose of the debtors' claims. The district court remanded the case to the bankruptcy court to rule on the issue, and the bankruptcy court ruled that Congress abrogated the United States' sovereign

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[23] *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).

[24] *In re Institute of Cardiovascular Excellence, PLLC*, 589 B.R. 204, 207 (Bankr. M.D. Fla. 2018).

[25] In re Institute of Cardiovascular Excellence, PLLC, 589 B.R. at 210–11.

immunity under Code section 106.[26] The United States renewed its appeal, on several grounds. The district court began, "as it must, by assessing the threshold jurisdictional challenge."[27] The United States argued that none of Code sections 505, 522, 542, and 553 abrogated its sovereign immunity in the case because none of those Code provisions created a cause of action like the one at bar. The district court disagreed and affirmed — without reference to Code section 542 — concluding as "have other courts" that "section 106(a) abrogates the United States' sovereign immunity under §§ 522 and 553, meaning that the Bankruptcy Court properly exercised jurisdiction over the claims before it."[28]

The bankruptcy court in *In re Univ. of Wisconsin Oshkosh Found., Inc.* rejected the state of Wisconsin's assertion of 11th Amendment sovereign immunity to a turnover claim. The chapter 11 debtor, a state university-affiliated charitable organization, commenced its case when the state "refused to honor financial commitments made" to the debtor by the former chancellor and vice chancellor of the University of Wisconsin. The debtor filed a complaint against the state in its bankruptcy case, alleging breach of contract and seeking turnover of those commitments.[29]

The state moved for summary judgment arguing that sovereign immunity barred the debtor's claims.[30] The debtor argued that the state had waived any claim that it had to sovereign immunity on two grounds: the state had not raised the defense in its earlier motion to dismiss; and it had consented to the bankruptcy court's entry of a final order.[31] The court held a state's waiver of sovereign immunity must be explicit and unambiguous, and that it was required to consider sovereign immunity even though the issue was not raised in the prior motion. The court also held that the state's

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[26] *United States v. Copley*, 591 B.R. 263, 270–271, Bankr. L. Rep. (CCH) P 83300, 2018-2 U.S. Tax Cas. (CCH) P 50406, 122 A.F.T.R.2d 2018-5891 (E.D. Va. 2018).

[27] 591 B.R. at 271.

[28] 591 B.R. at 274.

[29] *In re University of Wisconsin Oshkosh Foundation, Inc.*, 586 B.R. 458, 461 (Bankr. E.D. Wis. 2018).

[30] 586 B.R. at 461.

[31] 586 B.R. at 464.

consent to entry of a final order did not waive the defense, but merely established that the court could enter a final order with respect to the non-core claims raised in the complaint.[32] Ultimately, however, the court denied the state's motion for summary judgment. The court reasoned that the money was property of the estate subject to turnover. Under *Katz*, when the state ratified the Constitution it subordinated whatever sovereign immunity it had "in proceedings necessary to effectuate the in rem jurisdiction of the bankruptcy courts."[33]

Jurisdiction after Chapter 11 Plan Confirmation

The authors are not aware of any significant published opinions since last year's Annual Survey addressing the issue of the bankruptcy court's jurisdiction over a turnover action after the debtor's chapter 11 plan has been confirmed.

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)[34] 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,[35] and a turnover action for recorded information under § 542(e),[36] 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

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[32]586 B.R. at 464.

[33]586 B.R. at 465.

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

[35]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).

[36]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.

§ 542(a) and (b) and § 543(a) to be commenced by an adversary proceeding.[37]

In *In re 18 Audubon Place, LLC*, for example, the court applied the rule that a request for turnover may be brought by motion when the debtor has the property. The appellants in that case sought a stay of the court's eviction order pending appeal. In considering the likelihood of the appellant's success on the merits, the court stated that though a request to turnover property of the estate generally must be made by adversary proceeding, when the property is held by the debtor, it may be brought by motion. Because the debtor had so commingled its affairs with the appellants, the turnover motion was in essence a motion against the debtor. Accordingly, the court found that the appellants were unlikely to succeed on their appeal based on this issue.[38]

The bankruptcy court in *City of Chicago v. Kennedy*, also discussed in §§ VII and XIV below, granted turnover by confirming the debtor's chapter 13 plan. The plan provided for the debtor's payment to the city of the "full secured value of the vehicle," and the return to the debtor of the car. The city objected, arguing that the plan deprived it of its possessory lien. The court's order confirming the plan ordered the car released to the debtor. The city appealed and obtained a stay of the bankruptcy court's order.[39] The district court reversed and vacated the order, on the ground that an adver-

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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).

[37]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).

[38]*In re 18 Audubon Place, LLC*, 2018 WL 5733662, *4–5 (Bankr. E.D. La. 2018).

[39]*City of Chicago v. Kennedy*, 65 Bankr. Ct. Dec. (CRR) 164, Bankr. L. Rep. (CCH) P 83246, 2018 WL 2087453, *1–2 (N.D. Ill. 2018). 2019 WL 2521455 *1 (7th Cir. 2019)

Toyota Motor Credit Corporation v. Brinkley, 2019 WL 317446, *2 (N.D. Tex. 2019).

sary proceeding is required to obtain turnover of property from a third party who is not the debtor.[40]

Similarly, the court in *In re McCray* denied the Trustee's motion to compel turnover of a money judgment because the Trustee failed to properly file and serve a complaint to commence an adversary proceeding for turnover of property and money as required by Bankruptcy Rule 7001(1).[41]

In *In re Fulton*, also discussed in §§ VI, VII and XIV below, the court held that the debtor, who had an equitable interest in a car that the City of Chicago had seized prepetition, was not required to file an adversary proceeding to seek turnover of the car. The city argued that the debtor needed to file an adversary proceeding. The court disagreed. The court emphasized that the debtor's motion was not merely for turnover, but also sought sanctions for violation of the automatic stay, which included turnover of the vehicle. Thus, the court could rely on its inherent power to impose those sanctions even though the debtor had not filed an adversary proceeding.[42]

Moreover, a tension regarding the proper procedure for obtaining turnover exists because most courts hold that the requirement of turnover is self-executing and mere notice of the commencement of the bankruptcy case is sufficient to trigger it. This doctrine arguably makes strict compliance with Rule 7000(1) little more than a nicety, and because of it, many courts have granted turnover relief sought by motion against a third party notwithstanding the requirements of Bankruptcy Rule 7001(1).

This issue was confronted by the Seventh Circuit on the appeal in *In re Fulton*, discussed above. The Seventh Circuit described turnover as a "compulsory" obligation, stressing the words "shall deliver" in section 542(a). Moreover, the party in possession of the property must turn it over before the court

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[40]2019 WL 317446 at *4.

[41]*In re McCray*, 2018 WL 6422719, *2–3 (Bankr. W.D. La. 2018).

[42]*In re Fulton*, 2018 WL 2392854, *1 (Bankr. N.D. Ill. 2018), opinion amended and superseded, 2018 WL 2570109 (Bankr. N.D. Ill. 2018), stay pending appeal denied, 588 B.R. 834 (Bankr. N.D. Ill. 2018) and aff'd, 926 F.3d 916, 67 Bankr. Ct. Dec. (CRR) 100 (7th Cir. 2019).

can provide it with adequate protection of its interest (typically its lien) in the property.[43]

The district court in *Toyota Motor Credit Corp. v. Brinkley*, also discussed in §§ V, IX, XIV and XVIII below, similarly rejected the auto lender's argument that the chapter 7 trustee had never demanded turnover, stating that "the onus is on the creditor, not the trustee."[44]

Proper Parties

In addition to the manner by which turnover actions are required to be brought, courts have to be careful to ensure that turnover actions are filed against the proper parties.

In *In re Collins*, also discussed in §§ VI and IX below, the chapter 7 trustee filed a complaint seeking the turnover of a trust corpus from the co-trustees and an accounting for the property or its value pursuant to section 542(a). The corpus consisted of non-residential real estate and a 70% interest in a corporation. The chapter 7 trustee asserted that the trust corpus had vested in the debtor on the death of the grantor's spouse. The co-trustees moved to dismiss. The bankruptcy court denied the motion, but sua sponte ordered the chapter 7 trustee to amend, pursuant to Bankruptcy Rule 7019, to join the grantor of the trust, both because she might have an interest in the trust and because the beneficiaries' respective interests in the trust were at issue.[45]

V. STANDING

A debtor in possession, whether under chapter 11 or chapter 13,[46] and a chapter 7 or 11 trustee, each has standing to bring an action under Code § 542.[47] Most courts have held that a chapter 7 debtor — whose property is under the authority of

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[43] *In re Fulton*, 926 F.3d 916, 924, 67 Bankr. Ct. Dec. (CRR) 100 (7th Cir. 2019).

[44] *Toyota Motor Credit Corporation v. Brinkley*, 2019 WL 317446, *2 (N.D. Tex. 2019).

[45] *In re Collins*, 2018 WL 878877, *1, *6 (Bankr. E.D. N.Y. 2018).

[46] *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).

[47] 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 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.

In *In re Wolf*, also discussed in § II above and § VII below, the court stressed that the chapter 7 trustee's "standing and/or authority to bring these causes of action [was] at the heart" of the trustee's case. The defendants argued that a divorce ruling dividing the property of the debtor with his ex-wife precluded the trustee from asserting causes of action for, among other things, turnover. Specifically, though the family court awarded the debtor's ex-wife a 49% interest in the company at issue, the trustee's ability to bring causes of action for the other 51% remained intact.[48]

The debtor in *In re Picacho Hills Util. Co., Inc.*, also discussed in §§ X and XIX below, was a public utility company. A real estate developer, 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. In 2010 the Commission issued a decision that required the developer to pay the debtor $168,000 but the appellant never made the payment. Years later, 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 developer argued that the trustee lacked standing to enforce the Commission's 2010 decision. The court held that utilities have standing under state law to enforce the Commission's orders, in the narrow context of Commission orders that specially benefit them. Further, even if the trustee could not enforce the 2010 Commission order in state court, the turnover provisions of the Code gave the trustee standing to enforce the Commission's order. The appellant appealed, and the case was referred to the U.S. magistrate to proceed with

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The language of statute clearly demonstrates that it is a claim available only to trustees after a bankruptcy petition has been filed.").

[48] *In re Wolf*, 595 B.R. 735, 755–60 (Bankr. N.D. Ill. 2018).

the hearings and legal analysis required for it to recommend to the district court an ultimate disposition of the case.[49]

The magistrate made several proposed conclusions of law in connection with its recommendation to the district court regarding the appeal. The magistrate determined that the New Mexico legislature did not intend to permit utilities to sue to enforce Commission orders and, therefore, that the trustee did not have a private right of action under the New Mexico statute to enforce the Commission's order. The magistrate agreed with the bankruptcy court, though, that the trustee had standing to bring a turnover action under section 542.[50]

The district court in *Toyota Motor Credit Corp. v. Brinkley*, also §§ IV above and IX, XIV, and XVIII below, the debtor financed the purchase of a truck through Toyota Motor Credit Corporation. The debtor became delinquent on his payments and Toyota repossessed the truck. Four days later the debtor filed for chapter 7 bankruptcy. Toyota refused to return the truck after being notified of the bankruptcy. The debtor filed a complaint seeking turnover of the truck and the bankruptcy court held that the debtor did not have standing under section 542, because the trustee was entitled to possession of the truck. The bankruptcy court noted, however, that the order was without prejudice for the debtor to seek sanctions for potential violation of the automatic stay. The case was converted to a chapter 13 case. The bankruptcy court granted the debtor's motion for sanctions against Toyota under Code section 362(k), for violation of the automatic stay.[51]

Toyota appealed. The district court affirmed, holding that while the chapter 7 trustee had never demanded turnover of the truck, "the onus is on the creditor, not the trustee." The debtor, even if it lacked standing regarding turnover, had

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[49] *In re Picacho Hills Utility Company, Inc.*, 2019 WL 259133, *1–3 (D.N.M. 2019), report and recommendation adopted, 67 Bankr. Ct. Dec. (CRR) 42, 2019 WL 1375757 (D.N.M. 2019).

[50] 2019 WL 259133 at *5–6.

[51] *Toyota Motor Credit Corporation v. Brinkley*, 2019 WL 317446, *1 (N.D. Tex. 2019).

"standing to bring a claim for an alleged violation of the automatic stay."[52]

The debtor in *In re Peterson* filed a complaint against the former chapter 13 trustee alleging that she had failed to pursue collection of various judgments and assets on behalf of the debtor's estate. The bankruptcy court dismissed, holding that in chapter 13 cases, the debtor, not the trustee, has standing under section 542(a). The court also described as "erroneous" the debtor's assertion that the former chapter 13 standing trustee had a duty to pursue collection of assets in the debtor's bankruptcy case.[53]

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."[54] To succeed, the moving party must carry the burden by a preponderance of the evidence.[55]

The court in *In re Dixon*, also discussed in § XIV below, held that the chapter 13 debtor did not carry her burden because she failed to prove that she had any interest in the property at issue. The debtor had defaulted under her car lease with Brite Financial, LLC and Brite repossessed the vehicle shortly before the debtor filed for bankruptcy.[56] Postpetition, the debtor demanded turnover, and then moved to hold Brite in contempt, for the return of the car, and for sanctions for willful violation of the stay. Brite argued that the repossession and a notice of right to cure default that was sent prepetition terminated the lease and, therefore, the debtor had no interest in the vehicle. The court looked at the language of the lease and found that once Brite repossessed the car, the debtor had no further rights in it. The court could not compel turnover or find that Brite violated the stay, because the

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[52]2019 WL 317446 at *2.

[53]*In re Peterson*, 585 B.R. 1, 10–12 (Bankr. D. Conn. 2018).

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

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

[56]*In re Dixon*, 2018 WL 400722, *1 (Bankr. E.D. Wis. 2018).

debtor had not carried her burden of proving that she had any interest in the leased car as of the petition date.[57]

The court in *In re Fulton*, also discussed in §§ IV above and VII and XIV below, found that the City of Chicago failed to meet its burden to show that it should be allowed to retain the debtor's car that the city had seized prepetition. The court cited the Seventh Circuit's *Thompson v. Gen. Motors Acceptance Corp., LLC*, which placed the burden squarely on creditors to show why they should be allowed to retain a debtor's vehicle that it seized prepetition. The court found that the city ignored its burden under *Thompson* to show why it should be allowed to retain the car.[58]

See also *In re Collins* discussed in §§ IV above and IX below.

See also *Manson v. Nathan* discussed in §§ XVII and XX below, in which a district court reversed and remanded because the bankruptcy court could "not grant summary judgment based upon a credibility assessment drawn from a cold record."[59]

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."[60]

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[57] *In re Dixon*, 2018 WL 400722, *1 (Bankr. E.D. Wis. 2018).

[58] *In re Fulton*, 2018 WL 2392854, *1 (Bankr. N.D. Ill. 2018), opinion amended and superseded, 2018 WL 2570109 (Bankr. N.D. Ill. 2018), stay pending appeal denied, 588 B.R. 834 (Bankr. N.D. Ill. 2018) and aff'd, 926 F.3d 916, 67 Bankr. Ct. Dec. (CRR) 100 (7th Cir. 2019).

[59] *Manson v. Nathan*, 2018 WL 705154, *1–2 (E.D. Mich. 2018).

[60] *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.[61] 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.[62]

See also the cases discussed in this §§ II and VII, under the headings "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 generally means that it is property of the estate under Code § 541.[63]

The bankruptcy court in *In re Ventura* found that the debtor's dower interest was not transferred to the chapter 7 trustee during her bankruptcy case. Even though the dower interest was property of the estate, it was not "something that Trustee could 'use, sell, or lease' " under Code section 363. Nor did it vest or become valuable to the bankruptcy estate within 180 days of the filing of the case (which might have made it subject to Code section 541(a)(5)). "In fact, it never became a right with any value or potential salability until after the bankruptcy case closed." Though the debtor's dower interest, while "technically part of her bankruptcy estate — practically and effectively remained her own inchoate interest unaffected by the bankruptcy in any real way."[64]

In *In re Cross*, also discussed in § VIII below, the City of Chicago had seized the debtor's car prepetition, for unpaid

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[61] *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).

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

[63] *In re Mickens*, 575 B.R. 797, 809 n.12 (Bankr. W.D. Mich. 2017), aff'd, 589 B.R. 594 (W.D. Mich. 2018); *In re Vaughan Company, Realtors*, 61 Bankr. Ct. Dec. (CRR) 101, 2015 WL 4498748, *3 (Bankr. D. N.M. 2015).

[64] *In re Ventura*, 582 B.R. 755, 766 (Bankr. N.D. Iowa 2018).

parking tickets, and asserted a statutory possessory lien in the car to secure payment of towing and storage fees.[65] The city argued that the debtor did not have an interest in the car requiring turnover, and that section 542 was "merely an enabling statute" that did "not allow the alteration of its substantive, possessory lien rights, and thus, [was] not an avenue for Debtor to seek turnover of the vehicle." The bankruptcy court held that the city was "clearly incorrect," because she was both the owner of the car and had an interest in it the moment that she requested turnover of it during the pendency of her bankruptcy case.[66] See also, *In re Fulton*, discussed in §§ IV and VI above and XIV below, reaching the same conclusion on the same facts.[67]

See also, *City of Chicago v. Kennedy*, also discussed in § IV above and § XIV below, noting that requiring the city to release the debtor's car, "provided that adequate safeguards are put in place, aligns not only with the text, but also with the purpose, of the Bankruptcy Code. . . . The city is entitled to adequate protection of its interest, but it must also follow the procedures outlined in the Bankruptcy Code, including § 542," but vacating the bankruptcy court's order on procedural grounds.[68]

The debtors in *In re Brizinova*, also discussed in § XIX below, owned the shares of stock in a company which sold auto parts on the internet. The chapter 7 trustee sought turnover of proceeds of such sales. The bankruptcy court dismissed the turnover count of the trustee's complaint, because the debtor's ownership of the corporate "*shares* [did] not give her legal title to, or an ownership interest in, [the corporation's] *assets*."

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[65] *In re Cross*, 584 B.R. 833, 837–838 (Bankr. N.D. Ill. 2018).

[66] 548 B.R. at 843.

[67] *In re Fulton*, 2018 WL 2392854, *6–7 (Bankr. N.D. Ill. 2018), opinion amended and superseded, 2018 WL 2570109 (Bankr. N.D. Ill. 2018), stay pending appeal denied, 588 B.R. 834 (Bankr. N.D. Ill. 2018) and aff'd, 926 F.3d 916, 67 Bankr. Ct. Dec. (CRR) 100 (7th Cir. 2019).

[68] *City of Chicago v. Kennedy*, 65 Bankr. Ct. Dec. (CRR) 164, Bankr. L. Rep. (CCH) P 83246, 2018 WL 2087453, *3–4 (N.D. Ill. 2018).

Thus, neither the auto parts inventory nor the proceeds arising from the sale of it were estate assets subject to turnover.[69]

Property that the Debtor May Exempt

The application of the turnover provisions to property asserted by the debtor to be exempt is somewhat peculiar — even though Code section 542 requires turnover to the trustee of property that the debtor may exempt, the debtor's exemption once elected would appear to put the exempt property beyond a trustee's reach.

The bankruptcy court in *In re Sain* addressed this issue in the context of a debtor who asserted that he had reinvested the proceeds of his exempt homestead in new real property. The court found that the debtor's "homestead proceeds were put to a proper use that was not detrimental to creditors," and that if the debtor "were required to turn over the homestead proceeds, creditors would receive an impermissible windfall." The court permitted the debtor to be reimbursed for his deposits into escrow "as a proper reinvestment in his home."[70]

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

See *In re Wolf* discussed in §§ II and V above and § VII below.

Accounts Receivable

An account receivable that is disputed and unliquidated is not subject to turnover (see § X below). But an undisputed receivable is subject to turnover. The bankruptcy court in *In re Digital Networks North America, Inc.*, also discussed in § X below, declined to dismiss the turnover count of the chapter 7 trustee's complaint, noting that the court, as the trustee at the early stage of the proceeding, was "operating with a

[69] *In re Brizinova*, 588 B.R. 311, 329 (Bankr. E.D. N.Y. 2018). See also *In re Brizinova*, 592 B.R. 442, 462 (Bankr. E.D. N.Y. 2018).

[70] *In re Sain*, 584 B.R. 325, 333 (Bankr. S.D. Cal. 2018).

dearth of information," but that "as presented, there [was] not a bona fide dispute as to the Receivable."[71]

Avoidable Transfers

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

The court in *In re BMT-NW Acquisition, LLC*, also discussed in § X below, dismissed a turnover count in a complaint, holding that: "Property of the estate does not apply to property which has been fraudulently or preferentially transferred before the bankruptcy filing, because such property does not become 'property of the estate until it has been recovered by the estate.' "[72]

The bankruptcy court in *In re Wolf*, also discussed in §§ II and V above, noted that a turnover action cannot be used when the property in questions was transferred to someone else prepetition, and that a turnover action generally cannot substitute for a fraudulent transfer avoidance action.[73]

The bankruptcy court in *In re Kittery Point Partners, LLC*, similarly, held that there could be no serious dispute that the chapter 11 debtor's resort to Code section 542 was inappropriate because any payments made on a note and mortgage that the debtor sought to recover "would only become property of the estate upon avoidance of the Note and Mortgage." The court thus dismissed the turnover count for failure to state a claim.[74]

The unsecured creditors committee in *Official Comm. of Unsecured Creditors of Exeter Holding, Ltd. v. Haltman* sued officers, directors and insiders alleging that they defrauded the debtor's creditors by transferring $29 million to themselves and to trusts and other entities that they controlled, and seeking to avoid the transfer of, and recover, the $29 mil-

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[71] *In re Digital Networks North America, Inc.*, 2018 WL 3869599, *6 (Bankr. D. Del. 2018).

[72] *In re BMT-NW Acquisition, LLC*, 582 B.R. 846, 865–866 (Bankr. D. Del. 2018), quoting Collier on Bankruptcy, ¶ 542.03 (16th ed. 2010), and *In re Conex Holdings, LLC*, 518 B.R. 792, 801, 60 Bankr. Ct. Dec. (CRR) 58, 114 A.F.T.R.2d 2014-6439 (Bankr. D. Del. 2014).

[73] *In re Wolf*, 595 B.R. 735 (Bankr. N.D. Ill. 2018), citing *In re Veluchamy*, 879 F.3d 808, 816, 65 Bankr. Ct. Dec. (CRR) 24, Bankr. L. Rep. (CCH) P 83199 (7th Cir. 2018).

[74] *In re Ang*, 2018 WL 1613573, *14 (Bankr. D. Me. 2018).

lion as a fraudulent transfer. The defendants argued that the committee's turnover and accounting claims should be dismissed, because until the assets were recovered the committee could not assert a claim for turnover. The committee responded "that pairing the fraudulent transfer claims and the turnover claims promote[d] judicial economy."[75] The court held that the committee had not sufficiently pled fraudulent transfer claims against the trusts or their trustees, but declined to dismiss the turnover and accounting claims against one of the other defendants in light of the fact that the committee had asserted a viable fraudulent transfer claim against her.[76]

Bank Accounts

The bankruptcy court in *In re AEH Trucking Co., LLC* held that funds seized by the IRS from the debtor's bank account prepetition which were applied in partial satisfaction of the debtor's "trust fund" tax debt, were no longer the debtor's property at the time the debtor filed its case, and thus did not have to be turned over.[77]

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."

A turnover proceeding may not be used, though, to liquidate a disputed contract claim, as discussed in § X below.

Customer Lists and Other Proprietary Information

The chapter 11 debtor in *In re Patriot Nat'l Inc.*, also discussed in § XIV below, asserted that a former employee had possession of the debtor's customer lists and other proprietary information, and sought turnover of it, asserting that it was property of the estate. The court agreed that the debtor

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[75] *Official Committee of Unsecured Creditors of Exeter Holding, Ltd. v. Haltman*, 2018 WL 1582293, *12 (E.D. N.Y. 2018).

[76] 2018 WL 1582293 at *12.

[77] *In re AEH Trucking Co., LLC*, 586 B.R. 566, 575, 65 Bankr. Ct. Dec. (CRR) 243, 2018-2 U.S. Tax Cas. (CCH) P 50308, 121 A.F.T.R.2d 2018-5075 (Bankr. M.D. Pa. 2018).

had appropriately alleged a turnover claim and declined to dismiss that count of the debtor's complaint.[78]

The bankruptcy court in *In re Cmty. Home Fin. Serv's, Inc.* also discussed in §§ XII, XIV and XVIII below, found that information and data on CDs — which contained information about the debtor's "rogue operations" — were intangible assets of the estate under Code section 542, and ordered turnover of the CDs to the trustee.[79]

Insurance Agent's Rights to Assign Policies

The debtor in *In re Cicirello* was an insurance agent for an insurance company, whose agency agreement permitted him to assign policies to another agent in exchange for compensation. The chapter 7 trustee filed a motion for turnover, seeking to assign the policies to another agent under the agency agreement. The debtor objected, contending that the agency agreement was an executory contract that the trustee needed to assume in order to exercise any rights under it, and that Code section 365(c)(1) prohibited the trustee from assuming it.[80] The bankruptcy court agreed with the debtor, holding that under Wisconsin law the agency agreement was a personal services contract and the insurance company was required to accept performance only from the debtor.[81] The court rejected the trustee's further argument that the contract contained two severable contracts: an executory contract related to the selling and servicing of the policies, and a non-executory contract related to assigning existing policies to another agent and terminating the agreement, and denied turnover.[82]

Partnership Distributions

The chapter 11 debtor in *In re Oliver C&I Corp.*, also discussed in § II above, sought turnover of partnership distributions that it alleged had not been paid to it. The bank-

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[78] *In re Patriot National Inc.*, 592 B.R. 560, 573, 2018 I.E.R. Cas. (BNA) 284933 (Bankr. D. Del. 2018).

[79] *In re Community Home Financial Services, Inc.*, 583 B.R. 1, 17, 114, 95 U.C.C. Rep. Serv. 2d 86 (Bankr. S.D. Miss. 2018).

[80] *In re Cicirello*, 66 Bankr. Ct. Dec. (CRR) 32, 2018 WL 4008349, *1 (Bankr. E.D. Wis. 2018).

[81] 2018 WL 4008349 at *3.

[82] 2018 WL 4008349 at *4–5.

ruptcy court declined to dismiss the turnover count in the debtor's complaint, stating that it could not at this juncture of the proceeding determine whether the distributions were property of the estate subject to turnover, or instead were subject to a bona fide dispute and thus were not.[83]

Property Left by the Debtor in Leased Premises

The chapter 13 debtor's lease in *In re Sipe*, also discussed in § XIV below, had terminated, and the landlord had regained possession of the space. The landlord sought relief from the automatic stay so that it could dispose of a large quantity of personal property that the debtor had left behind, including used wooden fruit containers and trays, used bricks, old machinery, a semi-tractor, a cargo trailer, a conveyor system, a horse trailer, a recreational vehicle, a rusted asphalt truck, and a crane. The court rejected the landlord's contention that its possession of the property was involuntary and ordered turnover.[84]

The bankruptcy court in *In re Flaberg Solar US Corp.* entered an order setting a deadline for the chapter 11 debtor to remove its property from premises that it formerly leased, and surrender the premises to the landlord. If the debtor failed to do so, the order "entitled [the debtor] to exercise its self-help remedies."[85] The court, while not expressly addressing the issue of turnover under section 542, interpreted its order as granting the landlord "unfettered authority" with respect to the property remaining after the deadline. This lead to only one conclusion: that the estate had no interest in the property as of the passing of the applicable deadline.[86]

Property of Others

See also *In re Brizinova* discussed in this § VII above and in §§ IX, XIV and XIX below, in which the court held that the proceeds of the sale of assets by a corporation were not estate property subject to turnover, but remained assets of the corporation.

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[83] *In re Oliver C & I Corp.*, 2018 WL 6841767, *5 (Bankr. D. P.R. 2018).

[84] *In re Sipe*, 2018 WL 5748630, *1, *5–6 (Bankr. E.D. Cal. 2018).

[85] *In re Flabeg Solar US Corporation*, 584 B.R. 110, 112, 65 Bankr. Ct. Dec. (CRR) 159 (Bankr. W.D. Pa. 2018).

[86] 584 B.R. at 115.

Tax Refunds

The debtor in *In re RedF Mktg., LLC*, also discussed in § X below, was a limited liability company (an LLC). The bankruptcy court held that the actions of the *members* (i.e., the equity owners) of the LLC in filing amended income tax returns to obtain a refund of taxes paid by the LLC did not state a plausible claim for turnover of the refunds, because the LLC was a "pass through" entity and any rights to the LLC's tax refunds "passed through" to the members and were not property of the chapter 7 estate or trustee.[87]

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 chapter 13 debtor in *Matter of Madden* "pointed to no evidence in the record to establish" that the defendant was in possession, custody or control of her car, or that a second party who might have been in possession of the car was the agent of the defendant. Because there were no material facts in dispute, the defendant was entitled to summary judgment on the debtor's turnover complaint.[88]

Deliver to the Trustee Property or the Value of Such Property

The person in possession, custody or control of the property "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."[89] Most courts 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.[90]

In *In re Cross*, also discussed in § VII above, the City of

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[87] *In re RedF Marketing, LLC*, 589 B.R. 534, 543–544, 65 Bankr. Ct. Dec. (CRR) 249 (Bankr. W.D. N.C. 2018).

[88] *Matter of Madden*, 2018 WL 1229692, *5 (Bankr. M.D. Ga. 2018).

[89] 11 U.S.C.A. § 542(a) (emphasis supplied).

[90] *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).

Chicago — which asserted a possessory lien in the debtor's car — failed to show that only possession would suffice to protect its right to collect payment of fines. The court noted that the grant of a replacement lien would suffice, and ordered turnover.[91]

Action for Accounting

Section 542(a) also requires an entity to account for property subject to turnover.[92] The authors are not aware of any significant cases considering this provision of section 542(a).

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."[93]

The defendants in *In re Brizinova*, also discussed in §§ VII above and XIV and XIX below, argued, "in substance," that the property at issue, consisting of sale proceeds, was of inconsequential value to the bankruptcy estate because it was not property of the estate. The chapter 7 trustee responded that the proceeds had a value of at least $250,000. The bankruptcy court found that the proceeds were not of inconsequential value, though it denied turnover on the ground that the proceeds were not estate property.[94]

The chapter 7 trustee in *In re Brannon* sought turnover of co-owned property. The trustee alleged that selling the property likely would result in a $50,000+ distribution to the estate which would outweigh any burden to the non-debtor co-owner, thus satisfying the requirement for his selling the property pursuant to Code section 363(h). The bankruptcy court agreed that the property was not of inconsequential value and was an estate asset that could be sold pursuant to Code section 363(h), and ordered the property to be turned

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[91] In re Cross, 584 B.R. at 844.

[92] 11 U.S.C.A. § 542(a).

[93] 11 U.S.C.A. § 542(a).

[94] In re Brizinova, 592 B.R. at 462–463.

over to the trustee effective on the court's approval of the sale.[95]

The debtor in *Toyota Motor Credit Corp. v. Brinkley*, also discussed in §§ IV and V above and XIV and XVIII below, urged the district court on appeal to hold that his truck, which the bankruptcy court had ordered him to turn over to the chapter 7 trustee, was of inconsequential value to the estate. The district court noted that it need not address this issue, because the debtor had not raised it in the bankruptcy court.[96]

The bankruptcy court in *In re Collins*, also discussed in §§ IV and VI above, put the burden on this issue on the party seeking turnover, at least at the pleading stage, stating that a trustee seeking turnover must allege that the property is not of inconsequential value or benefit to the estate. Drawing all inferences in favor of the chapter 7 trustee who was seeking turnover, the court determined that the property would at least provide "some value to the estate," and thus that the trustee had "plausibly stated a claim for turnover."[97]

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."[98]

Most courts — including *In re Digital Networks North America, Inc.* decided since last year's Annual Survey and also discussed in § VII above — hold that a properly pleaded complaint for turnover under section 542(b) must allege an

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[95] *In re Brannon*, 584 B.R. 417, 424–425 (Bankr. N.D. Ga. 2018).

[96] *Toyota Motor Credit Corporation v. Brinkley*, 2019 WL 317446, *1–2 (N.D. Tex. 2019).

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

[98] 11 U.S.C.A. § 542(b).

undisputed right to recover the claim debt.[99] Those courts hold that an unliquidated contract or other claim that is in dispute, while property of the estate, is not subject to turnover under section 542(b) which refers to a "matured" debt.

The district court in *In re Picacho Hills Util. Co., Inc.*, also discussed in § V above and § XIX below, assigned to the U.S. magistrate on appeal over the trustee's turnover action, for the magistrate's recommendation regarding conclusions of law and the disposition of the appeal. The magistrate determined that a New Mexico Utility Commission's decision that required a real estate developer to pay $168,000 to a utility was a matured debt subject to turnover under section 542(b).[100]

The bankruptcy court in *In re Hardy*, also discussed in § XX below, ordered turnover of the debtor's real property to the chapter 7 trustee. The debtor appealed, arguing that she disputed a lien against the property. The trustee countered that the issue in a section 542(b) turnover proceeding is whether *amounts* allegedly owed *to the estate* were disputed. The district court agreed, finding that though the debtor disputed the amounts that the estate owed *to the lien holder*, she did "not argue that the amounts *owed to her*" were disputed.[101]

The chapter 7 trustee in *In re Providence Fin. Inv's, Inc.* sought turnover of funds purportedly received prepetition by the debtor's law firm. The law firm disputed the trustee's claim, asserting that it never received any fee retainers or payments from the debtor, and that it was not holding any property of the debtor. The court, in light of the "disputed nature" of the turnover claim, characterized it as an extension of the trustee's aid and abetting claim "and/or a breach of

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[99] *In re Digital Networks North America, Inc.*, 2018 WL 3869599, *5 (Bankr. D. Del. 2018), citing *In re Conex Holdings, LLC*, 518 B.R. 792, 801, 60 Bankr. Ct. Dec. (CRR) 58, 114 A.F.T.R.2d 2014-6439 (Bankr. D. Del. 2014).

[100] *In re Picacho Hills Utility Company, Inc.*, 2019 WL 259133, *6 (D.N.M. 2019), report and recommendation adopted, 67 Bankr. Ct. Dec. (CRR) 42, 2019 WL 1375757 (D.N.M. 2019).

[101] *In re Hardy*, 589 B.R. 217, 222 (D.D.C. 2018).

contract claim. Accordingly, the court referred the claim to arbitration.[102]

The bankruptcy court in *In re RedF Mktg., LLC*, also discussed in § VII above, held that the chapter 11 liquidating agent's turnover complaint did not plead a valid action under Code section 542. The ownership of the tax refunds at issue was "at best in dispute, as both tax law and the relevant case law indicate[d] that these monies belonged to [the members of the debtor LLC] rather than the Estate. In short, the Liquidating Agent's claims [were] not demands for turnover of undisputed estate assets."[103]

The individual chapter 11 debtor in *In re Dale Wesley Chapman* filed an adversary proceeding, seeking turnover of the principal and income of a trust. The bankruptcy court concluded that it lacked subject matter jurisdiction over the proceeding because the ownership of the property was in dispute, and recommended to the district court that the turnover claims be dismissed.[104]

See also, *In re BMT-NW Acquisition, LLC*, also discussed in § VII above, in which the bankruptcy court dismissed the turnover count in the chapter 7 trustee's complaint based on an allegedly fraudulent transfer, noting that: "Turnover is not appropriate where there is a legitimate dispute over ownership of the property."[105]

In *In re Southern Pacific Janitorial Grp., Inc.* the bankruptcy court noted that while an account receivable owed to the debtor is estate property, the funds are not "until the account receivable has been converted into cash."[106]

The bankruptcy court in *In re Infinity Home Health Care, LLC* held that the trustee could not liquidate an alleged

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[102] *In re Providence Financial Investments, Inc.*, 593 B.R. 884, 892–893, 66 Bankr. Ct. Dec. (CRR) 85 (Bankr. S.D. Fla. 2018).

[103] In re RedF Mktg., LLC, 589 B.R. at 547.

[104] *In re Chapman*, 2018 WL 4620719, *1, *3, *8 (Bankr. S.D. Tex. 2018).

[105] In re BMT-NW Acquisition, LLC, 582 B.R. at 866, quoting *In re Conex Holdings, LLC*, 518 B.R. 792, 801, 60 Bankr. Ct. Dec. (CRR) 58, 114 A.F.T.R.2d 2014-6439 (Bankr. D. Del. 2014).

[106] *In re Southern Pacific Janitorial Group, Inc.*, 586 B.R. 769, 770, 65 Bankr. Ct. Dec. (CRR) 252 (Bankr. C.D. Cal. 2018).

breach of contract through a turnover action, and dismissed the turnover account in the trustee's complaint.[107]

The bankruptcy court in *In re Rotondo Weirich Enter's, Inc.*, also discussed in § II above, similarly noted that a turnover action under section 542 "does not lie" to liquidate a contract dispute. It was patently clear to the court that the debtor's claims were disputed contract claims that were not encompassed by section 542.[108]

The mere allegation of a dispute, though, is not enough. The bankruptcy court in *In re CIL Limited* noted that the defendants to the turnover action had "done nothing more than assert that they dispute" the debtor's claim to the cash at issue. That did not provide grounds for dismissing the turnover count of the debtor's complaint.[109]

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

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 and 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.[110]

The authors are not aware of any significant published opinions since last year's Annual Survey addressing good faith under Code section 542(c).

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[107] *In re Infinity Home Health Care, LLC*, 2018 WL 5310659, *2 (Bankr. D. N.M. 2018).

[108] *In re Rotondo Weirich Enterprises, Inc.*, 583 B.R. 860, 872, 65 Bankr. Ct. Dec. (CRR) 150 (Bankr. E.D. Pa. 2018).

[109] *In re CIL Limited*, 582 B.R. 46, 118 (Bankr. S.D. N.Y. 2018), amended on reconsideration, 2018 WL 3031094 (Bankr. S.D. N.Y. 2018).

[110] 11 U.S.C.A. § 542(C).

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."[111]

In *In re Correra*, an alleged creditor brought an action against the individual chapter 7 debtor and his former, longtime personal assistant, for sanctions in connection with the intentional concealment and destruction of the debtor's electronically stored financial records.[112] The assistant had "unexpectedly testified" at her Rule 2004 examination that she still had possession of the computer on which she had for many years stored the debtor's financial records. She also said that she had deleted all of the debtor's files from the computer when she stopped working for the debtor, a couple of years before the bankruptcy case. The creditor and the chapter 7 trustee "immediately surmised that the Computer — even if the files had been deleted — could be a Rosetta Stone, of sorts, in understanding the Debtor's financial maneuverings, and wanted a forensic expert to examine the computer's hard drive to determine whether the deleted files could be recovered.[113] The creditor, eventually, filed a "Motion to Compel — Computer," and as the court put it, "things evolved." In the court's view, that motion "triggered something different than a mere motion to compel production of documents." The assistant "became a party (or respondent) at that point, who was in possession of property of the estate (the Computer) and records of the estate (any electronic data thereon pertaining to the Debtor). This was no longer about producing *her own* documents. She had something of the Debtor's to which the trustee and creditors were entitled to have access. Regardless of the title used on the Motion to Compel — Computer, it was tantamount to a motion to compel a turnover of records of the estate and/or property of the

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[111] 11 U.S.C.A. § 542(E).

[112] *In re Correra*, 589 B.R. 76, 82 (Bankr. N.D. Tex. 2018).

[113] 589 B.R. AT 84.

estate pursuant to section 542(e) of the Bankruptcy Code."[114] The court sanctioned the assistant and the debtor. The court also gave the debtor "one more opportunity" to produce the records that had been kept on the computer, motivated in part by evidence that various flash drives had been inserted in the computer to which the information might have been backed up or copied.[115]

Such information may also be subject to turnover under section 542(a). The bankruptcy court in *In re Cmty. Home Fin. Serv's, Inc.,* also discussed in §§ VII above and XIV and XVIII below, found that information and data on CDs — which contained information about the debtor's "rogue operations" — were intangible assets of the estate under Code section 542, and ordered turnover of the CDs to the trustee.[116] The same court, in a separate opinion in the same case, found on the trustee's undisputed testimony that the defendants — the debtor's affiliated and insider companies, controlling director and officer, and a former employee — were in possession, custody, or control of books, records, operational documents and codes for the password protected portions of the debtor's computer servers "that would be of use to the Trustee." Accordingly, the court ordered the defendants, pursuant to section 542(a), "to turn over all relevant documents, records, passcodes, and computer servers to the Trustee."[117]

The court in *In re Citadel Watford City Disposal Partners, L.P.*, denied the defendants' motion to dismiss a request for turnover of books and records. The court held, based on the complaint's allegations of "falsifying or destroying records" of the debtors, and without reference to section 542(e), that the trustee's turnover claim was "valid and appropriate."[118]

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[114] 589 B.R. AT 115.

[115] 589 B.R. AT 137–138.

[116] *In re Community Home Financial Services, Inc.*, 583 B.R. 1, 17, 114, 95 U.C.C. Rep. Serv. 2d 86 (Bankr. S.D. Miss. 2018).

[117] *In re Community Home Financial Services, Inc.*, 2018 WL 1141759, *20–21 (Bankr. S.D. Miss. 2018).

[118] *In re Citadel Watford City Disposal Partners, L.P.*, 2018 WL 6841361, *6 (Bankr. D. Del. 2018).

Turnover of information pursuant to Code section 542(e) also is available to the foreign representatives in a cross-border bankruptcy case under chapter 15 of the Code.[119]

The failure to comply with an order issued pursuant to section 542(e) can result in severe consequences. The bankruptcy court in *In re Reed*, also discussed in § II above, sanctioned counsel to a bankruptcy services company for his noncompliance with a turnover order and for his alleged misrepresentations to the court, including by suspending the lawyer from practice. The order compelling turnover required the lawyer to make "efforts" to obtain the documents and information. The Eighth Circuit affirmed, citing the record that indicated that he had made no efforts to obtain the required documents and information from his client, "despite knowing that they had not complied with the turnover order, nor had he filed the "credible and specific affidavit detailing his efforts" that the order required him to file if he got "stonewalled."[120]

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).[121]

XIII. SECTION 543—TURNOVER OF PROPERTY BY A CUSTODIAN

Bankruptcy Code § 543[122] 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
(C) trustee, receiver, or agent under applicable law, or

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[119] *In re Platinum Partners Value Arbitrage Fund L.P.*, 583 B.R. 803, 65 Bankr. Ct. Dec. (CRR) 158 (Bankr. S.D. N.Y. 2018), stay pending appeal denied, 2018 WL 3207119 (S.D. N.Y. 2018).

[120] *In re Reed*, 888 F.3d 930, 936–937, 65 Bankr. Ct. Dec. (CRR) 144 (8th Cir. 2018), cert. denied, 139 S. Ct. 461, 202 L. Ed. 2d 349 (2018).

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

[122] 11 U.S.C.A. § 543.

> 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.[123]

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.[124]

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 . . .[125]

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

> (1) may excuse compliance with subsection (a), (b), or (c) of this section if the interests of creditors and, if the debtor

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[123] 11 U.S.C.A. § 101(11).

[124] 11 U.S.C.A. § 543(a) and (b).

[125] 11 U.S.C.A. § 543(c)(1) and (2).

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.[126]

Grounds for Turnover

The authors are not aware of any significant published opinions since last year's Annual Survey addressing the grounds for turnover under Code section 543.

Protect All Entities to which a Custodian Has Become Obligated

The authors are not aware of any significant published opinions since last year's Annual Survey addressing the protection of entities to which a custodian has become obligated.

Custodian's Claim for Fees and Expenses

The debtor in *In re Stainless Sales Corp.* made a prepetition assignment for the benefit of its creditors, by which the assignee took possession and control of the debtor's assets. A day after an auction conducted by the assignee, but prior to the consummation of the auction, creditors commenced an involuntary chapter 11 case against the debtor. The bankruptcy court, pursuant to Code section 543, allowed the assignee to remain in possession of the assets postpetition.[127] The bankruptcy court applied Code section 503(b)(3)(E) analysis — whereby a party, including a custodian, may be allowed an administrative expense claim for "actual and necessary" expenses incurred by the estate postpetition — to the determination of the extent to which the assignee's postpetition fees and expenses should be allowed. The court found that the

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[126] 11 U.S.C.A. § 543(d)(1).

[127] *In re Stainless Sales Corporation*, 583 B.R. 717, 65 Bankr. Ct. Dec. (CRR) 140 (Bankr. N.D. Ill. 2018).

custodian's fees and expenses were actual and necessary expenses of the estate.[128]

The custodian in *In re Earl Gaudio & Son, Inc.* was a state-court appointed receiver, whose engagement as an estate professional was approved by the court postpetition, pursuant to Code section 327. The bankruptcy court noted that the appropriate standard to apply to the allowance of a custodian's fees and expenses was within its discretion. The court then analyzed the fee application of the custodian under Code section 330 which applies to the compensation of estate professionals, including those engaged under section 327. The court found "no meaningful difference between the standard for compensation under section 503(b)(3)(E) and that under section 330(a)," and therefore would proceed under section 330(a) as requested by the custodian.[129]

The court emphasized that while section 330 states that properly employed professionals are entitled to "reasonable compensation for actual, necessary services rendered" and "reimbursement for actual, necessary expenses," whether the time spent and fees charged are reasonable is for the court to decide.[130] The court also stressed that it was up to the custodian "to justify the necessity of its services, and that included explaining why it was necessary to perform work that other professionals were employed to provide or how the services it provided were distinct. At a minimum, the applications needed to make clear why the custodian was entitled to receive what it sought.[131] Moreover, the custodian had not paid attention to the court's prior admonitions regarding the custodian's fees and fee applications. As a result, the court determined that the "requested fees must be significantly reduced and disallowed."[132]

The bankruptcy court in *In re Montemurro* applied section 503(b)(3)(E), but similarly held that the custodian had "failed to establish that its claim [met] the applicable standard set

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[128]583 B.R. AT 733.

[129]*In re Earl Gaudio & Son, Inc.*, 2018 WL 3388917, *4, n.4 (Bankr. C.D. Ill. 2018).

[130]2018 WL 3388917 at *19.

[131]2018 WL 3388917 at *19.

[132]2018 WL 3388917 at *23.

forth in the statute. As a result, the court require[d] a further hearing on the reasonableness of the compensation sought."[133]

XIV. Automatic Stay

In *In re Fulton*, also discussed under §§ IV, VI, and VII above, the bankruptcy court followed the Seventh Circuit's opinion in *Thompson v. Gen. Motors Acceptance Corp., LLC*, which held that "passively holding onto an asset constitutes 'exercising control' over it, and [that] such action violates section 362(a)(3) of the Bankruptcy Code."[134] The court noted that the proper procedure is for the creditor to either return the vehicle to the debtor and then seek adequate protection from the debtor or, alternatively, to seek relief from the automatic stay.[135] In *Thompson*, the court clarified that the burden is on the creditor to show why it should be allowed to retain vehicles that were seized prepetition.[136] Here, the city failed to show that it had a possessory lien under state law.[137] The court nevertheless emphasized that "even if the City could [have] demonstrate[d] that it ha[d] a valid possessory lien under Illinois law, the *Thompson* decision clearly requires secured creditors to turnover the property to the estate of the

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[133] *In re Montemurro*, 581 B.R. 565, 567–568, 578, 65 Bankr. Ct. Dec. (CRR) 67 (Bankr. N.D. Ill. 2018).

[134] *In re Fulton*, 2018 WL 2392854, *3 (Bankr. N.D. Ill. 2018), opinion amended and superseded, 2018 WL 2570109 (Bankr. N.D. Ill. 2018), stay pending appeal denied, 588 B.R. 834 (Bankr. N.D. Ill. 2018) and aff'd, 926 F.3d 916, 67 Bankr. Ct. Dec. (CRR) 100 (7th Cir. 2019) (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), aff'd 2019 WL 2521455 (7th Cir. 2019).

[135] *In re Fulton*, 2018 WL 2392854, , *4 (Bankr. N.D. Ill. 2018), opinion amended and superseded, 2018 WL 2570109 (Bankr. N.D. Ill. 2018), stay pending appeal denied, 588 B.R. 834 (Bankr. N.D. Ill. 2018) and aff'd, 926 F.3d 916, 67 Bankr. Ct. Dec. (CRR) 100 (7th Cir. 2019).

[136] *In re Fulton*, 2018 WL 2392854, *1 (Bankr. N.D. Ill. 2018), opinion amended and superseded, 2018 WL 2570109 (Bankr. N.D. Ill. 2018), stay pending appeal denied, 588 B.R. 834 (Bankr. N.D. Ill. 2018) and aff'd, 926 F.3d 916, 67 Bankr. Ct. Dec. (CRR) 100 (7th Cir. 2019), citing *Thompson v. General Motors Acceptance Corp., LLC*, 566 F.3d 699, 61 Collier Bankr. Cas. 2d (MB) 1611, Bankr. L. Rep. (CCH) P 81490 (7th Cir. 2009).

[137] *In re Fulton*, 2018 WL 2392854, *6 (Bankr. N.D. Ill. 2018), opinion amended and superseded, 2018 WL 2570109 (Bankr. N.D. Ill. 2018), stay pending appeal denied, 588 B.R. 834 (Bankr. N.D. Ill. 2018) and aff'd, 926 F.3d 916, 67 Bankr. Ct. Dec. (CRR) 100 (7th Cir. 2019).

debtor upon request or seek adequate protection (for instance, a replacement lien offered in a plan) by emergency motion for relief from stay."[138] The court ordered the creditor to, among other things, return the vehicle.[139] The city appealed to the Seventh Circuit.

The Seventh Circuit affirmed the bankruptcy court's ruling in *Fulton* on June 19, 2019, in a consolidated appeal of four cases.[140] The court followed the majority of circuits, holding that the city violated the automatic stay by its continued, passive postpetition retention of motor vehicles impounded prepetition.[141] The court also held that the stay exception for "any act to perfect, or to maintain or continue the perfection of, an interest in property" did not permit the city to continue to retain possession of motor vehicles, and that the "police or regulatory power" exception to the automatic stay did not apply.[142]

See also, *City of Chicago v. Kennedy*, another case involving a car seizure in Chicago, discussed in §§ IV and VII above.

In *In re Patriot Nat'l Inc.*, also discussed in § VII above, the bankruptcy court found that the adversary complaint alleged sufficient facts to support violations of, among other things, both the Code's automatic stay and its turnover provisions.[143] The debtors initiated an adversary proceeding against their former chief operations officer and her new employer alleg-

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[138] *In re Fulton*, 2018 WL 2392854, *6 (Bankr. N.D. Ill. 2018), opinion amended and superseded, 2018 WL 2570109 (Bankr. N.D. Ill. 2018), stay pending appeal denied, 588 B.R. 834 (Bankr. N.D. Ill. 2018) and aff'd, 926 F.3d 916, 67 Bankr. Ct. Dec. (CRR) 100 (7th Cir. 2019), citing *Thompson v. General Motors Acceptance Corp., LLC*, 566 F.3d 699, 707, 61 Collier Bankr. Cas. 2d (MB) 1611, Bankr. L. Rep. (CCH) P 81490 (7th Cir. 2009).

[139] *In re Fulton*, 2018 WL 2392854, *9 (Bankr. N.D. Ill. 2018), opinion amended and superseded, 2018 WL 2570109 (Bankr. N.D. Ill. 2018), stay pending appeal denied, 588 B.R. 834 (Bankr. N.D. Ill. 2018) and aff'd, 926 F.3d 916, 67 Bankr. Ct. Dec. (CRR) 100 (7th Cir. 2019).

[140] *In re Fulton*, 926 F.3d 916, 920, 67 Bankr. Ct. Dec. (CRR) 100 (7th Cir. 2019), aff'd 2019 WL 2521455 (7th Cir. 2019).

[141] *In re Fulton*, 926 F.3d 916, 920, 67 Bankr. Ct. Dec. (CRR) 100 (7th Cir. 2019), aff'd 2019 WL 2521455 (7th Cir. 2019).

[142] *In re Fulton*, 926 F.3d 916, 930, 67 Bankr. Ct. Dec. (CRR) 100 (7th Cir. 2019), aff'd 2019 WL 2521455 (7th Cir. 2019).

[143] *In re Patriot National Inc.*, 592 B.R. 560, 571–74, 2018 I.E.R. Cas. (BNA) 284933 (Bankr. D. Del. 2018).

ing, among other things, that the defendant, after leaving the debtors' employment, continued to use the debtors' customer and proprietary information she obtained during her employment with the debtors in violation of a confidentiality and non-interference agreement.[144] The debtors argued that the acts of "obtaining and maintaining possession of, exercising control over, and using and benefitting" from the misappropriated information constituted a violation of the automatic stay.[145] The defendants disagreed arguing that the complaint failed to allege that the defendants engaged in a "post-petition affirmative act" and that "a passive act of holding onto, and failing to remit" is not sufficient for a stay violation.[146] The court, at the motion to dismiss stage, did not analyze the issue in depth, but noted that "[it] does not agree [with defendant's argument]."[147]

In *Toyota Motor Credit Corp. v. Brinkley*, also discussed in §§ IV, V and IX above and XVIII below, the bankruptcy court held that the creditor who repossessed the debtor's truck a few days prior to the chapter 7 bankruptcy filing violated the automatic stay by refusing to return the vehicle postpetition despite its knowledge that the automatic stay was in effect.[148] The district court, affirming the bankruptcy court's decision, held that the creditor had an "affirmative duty to return the Vehicle."[149] The Court further held that a creditor's retention of estate property constitutes an "act . . . to exercise control over property of the estate" that constitutes a violation of the automatic stay.[150]

In *In re Adler*, also discussed in § XVIII below, the chapter

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[144] *In re Patriot National Inc.*, 592 B.R. 560, 569, 2018 I.E.R. Cas. (BNA) 284933 (Bankr. D. Del. 2018).

[145] *In re Patriot National Inc.*, 592 B.R. 560, 571, 2018 I.E.R. Cas. (BNA) 284933 (Bankr. D. Del. 2018).

[146] *In re Patriot National Inc.*, 592 B.R. 560, 571, 2018 I.E.R. Cas. (BNA) 284933 (Bankr. D. Del. 2018).

[147] *In re Patriot National Inc.*, 592 B.R. 560, 571, 2018 I.E.R. Cas. (BNA) 284933 (Bankr. D. Del. 2018).

[148] *Toyota Motor Credit Corporation v. Brinkley*, 2019 WL 317446, *3 (N.D. Tex. 2019).

[149] *Toyota Motor Credit Corporation v. Brinkley*, 2019 WL 317446, *2 (N.D. Tex. 2019).

[150] *Toyota Motor Credit Corporation v. Brinkley*, 2019 WL 317446, *3 (N.D. Tex. 2019), quoting 11 U.S.C.A. § 362(a)(3).

7 debtor was a law firm engaged in debt collections on behalf of its clients.[151] The trustee accused the debtor's president of directing estate property to his and his wife's personal bank accounts and instructing garnishees and counsel for judgment debtors to send checks directly to their personal residence in violation of the automatic stay.[152] The bankruptcy court granted the chapter 7 trustee's motion for contempt and sanctions for the willful violation of the automatic stay and the turnover order.[153] The court followed the Seventh Circuit's opinion in *Thompson v. Gen. Motors Acceptance Corp., LLC*, noting that "[u]nder the broad definition of 'exercising control' espoused by [*Thompson*], clearly the [debtor] has violated [the automatic stay]."[154] It rejected the president's argument that he had since returned the estate property to the trustee, noting that "[w]ere that the case, any creditor who got caught exercising control over property of the estate would simply return said property and wash their hands of any wrongdoing."[155]

In *In re Denby-Peterson v. Nu2u Auto World*, also discussed under § XX below, a New Jersey district court declined to follow *Thompson*.[156] The chapter 13 debtor's car was repossessed prepetition due to the debtor's failure to make timely payments.[157] Postpetition, the debtor filed a motion to compel return of the car and for damages for the creditor's alleged violation of the automatic stay under 362(k).[158] The bankruptcy court held that the creditor did not violate the auto-

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[151] *In re Arthur B. Adler and Associates, Ltd.*, 588 B.R. 864, 866 (Bankr. N.D. Ill. 2018).

[152] *In re Arthur B. Adler and Associates, Ltd.*, 588 B.R. 864, 866–69 (Bankr. N.D. Ill. 2018).

[153] *In re Arthur B. Adler and Associates, Ltd.*, 588 B.R. 864, 866–67, 874 (Bankr. N.D. Ill. 2018).

[154] *In re Arthur B. Adler and Associates, Ltd.*, 588 B.R. 864, 873 (Bankr. N.D. Ill. 2018).

[155] *In re Arthur B. Adler and Associates, Ltd.*, 588 B.R. 864, 873 (Bankr. N.D. Ill. 2018).

[156] *Denby-Peterson v. Nu2u Auto World*, 595 B.R. 184, 189–90 (D.N.J. 2018).

[157] *Denby-Peterson v. Nu2u Auto World*, 595 B.R. 184, 187 (D.N.J. 2018).

[158] *Denby-Peterson v. Nu2u Auto World*, 595 B.R. 184, 187 (D.N.J. 2018).

matic stay by merely passively retaining it postpetition.[159] The district court affirmed, noting the circuit split and that the Third Circuit had not decided which position to take.[160] The court, following the minority position, held that mere possession, or "merely maintain[ing] the status quo in effect at the time of the automatic stay," does not constitute a violation of the automatic stay.[161] The debtor appealed to the Third Circuit, which heard oral argument in May, 2019, but at the time of this writing has not yet ruled.

In *In re Dixon*, also discussed under §§ VI above, the debtor sought a contempt order and sanctions against a creditor for the creditor's failure to return a car that it had repossessed prepetition.[162] The car was subject to a lease the creditor and debtor entered into in 2017.[163] The creditor argued that it terminated the lease prior to the petition date due to the debtor's failure to cure her default, and that, as a result, the debtor had no interest in the lease or the car.[164] The court agreed, holding that the stay was not violated because the car never became property of the estate.[165]

In *In re Carter*, also discussed in § XVIII below, the debtors commenced an adversary proceeding against their secured auto lender who, postpetition, repossessed and subsequently refused to return the debtors' truck.[166] The debtors sought actual as well as punitive damages and attorneys' fees for a violation of the automatic stay.[167] The bankruptcy court found that the lender had "actual knowledge . . . and . . . deliberately violated the stay by repossessing the vehicle."[168]

The Court in *In re Sipe*, also discussed under § VII above, explained the interaction between sections 542 and 362 of the

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[159] *Denby-Peterson v. Nu2u Auto World*, 595 B.R. 184, 187 (D.N.J. 2018).

[160] *Denby-Peterson v. Nu2u Auto World*, 595 B.R. 184, 188 (D.N.J. 2018).

[161] *Denby-Peterson v. Nu2u Auto World*, 595 B.R. 184, 189 (D.N.J. 2018).

[162] *In re Dixon*, 2018 WL 400722, *1 (Bankr. E.D. Wis. 2018).

[163] *In re Dixon*, 2018 WL 400722, *1 (Bankr. E.D. Wis. 2018).

[164] *In re Dixon*, 2018 WL 400722, *2 (Bankr. E.D. Wis. 2018).

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

[166] *In re Carter*, 2018 WL 4789997, *1 (Bankr. S.D. Ga. 2018).

[167] *In re Carter*, 2018 WL 4789997, *1 (Bankr. S.D. Ga. 2018).

[168] *In re Carter*, 2018 WL 4789997, *3 (Bankr. S.D. Ga. 2018).

Bankruptcy Code.[169] Namely, "§ 542 provides the right to the return of estate property [and] . . . § 362 provides the remedy for the recovery of costs and expenses associated with obtaining possession of estate property from the entity holding it."[170] At issue was property the debtor left behind in a leased property.[171] The court held that the landlord had an affirmative duty to deliver the personal property or its value to the debtor and that the landlord had to bear the cost or expense of its "removal, transportation, and delivery."[172] The court, agreeing with *Abrams v. Southwest Leasing and Rental, Inc.*, emphasized Congress' intent that the party in possession of estate property should be required to absorb the cost and expense of turning over estate property because requiring the debtor to do so "diminishes the value of the recovered property to the estate."[173]

The debtor in *In re James-Jenkins* commenced an adversary proceeding seeking damages against her secured auto lender for the postpetition repossession of her car.[174] She also filed a motion for turnover of the car.[175] In awarding the debtor $1,500 in attorney's fees she had incurred as the result of the creditor's willful violation of the automatic stay, the court found that the creditor's conduct in, among other things, requesting that the debtor sign a release in exchange for its returning car, "indicate[d] a disregard for the bankruptcy process and the automatic stay."[176]

In *In re Brizinova*, also discussed in §§ VII and IX above and XIX below, the chapter 7 trustee brought an adversary proceeding against the debtors alleging that they, in violation of the automatic stay, transferred and refused to turn over

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[169] *In re Sipe*, 2018 WL 5748630, *6 (Bankr. E.D. Cal. 2018).

[170] *In re Sipe*, 2018 WL 5748630, *6 (Bankr. E.D. Cal. 2018), citing *In re Abrams*, 127 B.R. 239, 242–43, 21 Bankr. Ct. Dec. (CRR) 1283, 25 Collier Bankr. Cas. 2d (MB) 15, Bankr. L. Rep. (CCH) P 74023 (B.A.P. 9th Cir. 1991).

[171] *In re Sipe*, 2018 WL 5748630, *1 (Bankr. E.D. Cal. 2018).

[172] *In re Sipe*, 2018 WL 5748630, *7 (Bankr. E.D. Cal. 2018).

[173] *In re Sipe*, 2018 WL 5748630, *6, *7 (Bankr. E.D. Cal. 2018).

[174] *In re James-Jenkins*, 2019 WL 354700, *1 (Bankr. D. S.C. 2019).

[175] *In re James-Jenkins*, 2019 WL 354700, *1 (Bankr. D. S.C. 2019).

[176] *In re James-Jenkins*, 2019 WL 354700, *4 (Bankr. D. S.C. 2019).

estate property.[177] As discussed under § VII above, the court found that the trustee did not adequately allege that the property was estate property.[178] The debtors did not violate the automatic stay because "actions with respect to property that is not property of the estate simply do not violate the automatic stay."[179]

The debtor (CHFS) in *In re Cmty. Home Fin. Serv's, Inc.*, also discussed in §§ VII and XII above and XVIII below, was a mortgage servicing company, managed by Dickson.[180] Dickson had a business partner, Dr. Edwards.[181] Dickson and Edwards entered into various business deals together, but grew suspicious of each other and litigation ensued.[182] Dickson transferred and diverted approximately $3.7 million from CHFS' operating account to a bank in Panama before commencing CHFS' chapter 11 case.[183] Dickson subsequently withdrew over $9 million from CHFS' accounts and fled to Costa Rica.[184] He was eventually convicted and sent to federal prison.[185] The bankruptcy court appointed a chapter 11 trustee.[186]

Edwards, without the knowledge of the chapter 11 trustee, began communicating with Dickson's business partners in Costa Rica to gain information about CHFS' operations and

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[177] *In re Brizinova*, 592 B.R. 442, 449 (Bankr. E.D. N.Y. 2018).

[178] *In re Brizinova*, 592 B.R. 442, 465–66 (Bankr. E.D. N.Y. 2018).

[179] *In re Brizinova*, 592 B.R. 442, 466 (Bankr. E.D. N.Y. 2018).

[180] *In re Community Home Financial Services, Inc.*, 583 B.R. 1, 16, 95 U.C.C. Rep. Serv. 2d 86 (Bankr. S.D. Miss. 2018).

[181] *In re Community Home Financial Services, Inc.*, 583 B.R. 1, 16, 95 U.C.C. Rep. Serv. 2d 86 (Bankr. S.D. Miss. 2018).

[182] *In re Community Home Financial Services, Inc.*, 583 B.R. 1, 17, 95 U.C.C. Rep. Serv. 2d 86 (Bankr. S.D. Miss. 2018).

[183] *In re Community Home Financial Services, Inc.*, 583 B.R. 1, 17, 95 U.C.C. Rep. Serv. 2d 86 (Bankr. S.D. Miss. 2018).

[184] *In re Community Home Financial Services, Inc.*, 583 B.R. 1, 17, 95 U.C.C. Rep. Serv. 2d 86 (Bankr. S.D. Miss. 2018).

[185] *In re Community Home Financial Services, Inc.*, 583 B.R. 1, 17, 95 U.C.C. Rep. Serv. 2d 86 (Bankr. S.D. Miss. 2018).

[186] *In re Community Home Financial Services, Inc.*, 583 B.R. 1, 40, 95 U.C.C. Rep. Serv. 2d 86 (Bankr. S.D. Miss. 2018).

to gain access to CHFS' computers.[187] These contacts culminated in Edwards' receiving 2 CDs without the trustee's knowledge and in violation of the automatic stay.[188] The court found that Edwards' "concerted efforts . . . constitute[d] violations of the automatic stay and an attempt to circumvent the bankruptcy process."[189] It further held that the stay violations were ongoing because Edwards refused to surrender the CDs.[190] The court rejected, among other things, the Edwards' arguments that there was no violation of the automatic stay because no useful property had been transferred to him and "the estate suffered no negative impact as a result of his actions."[191]

XV. Setoff

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

XVI. Free Exercise of the First Amendment; Fourth and Fifth Amendment Privilege

The Fifth Amendment of the United States Constitution provides that "[n]o person . . . shall be compelled in any criminal case to be a witness against himself."[192] Generally, the Fifth Amendment "can be asserted in any proceeding, civil or criminal, administrative or judicial, investigatory or adjudicatory," including a bankruptcy proceeding.[193]

In the bankruptcy case, though — as noted by the bankruptcy court in *In re Laforce*, "blanket assertions of the 5th

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[187] *In re Community Home Financial Services, Inc.*, 583 B.R. 1, 111, 95 U.C.C. Rep. Serv. 2d 86 (Bankr. S.D. Miss. 2018).

[188] *In re Community Home Financial Services, Inc.*, 583 B.R. 1, 111, 95 U.C.C. Rep. Serv. 2d 86 (Bankr. S.D. Miss. 2018).

[189] *In re Community Home Financial Services, Inc.*, 583 B.R. 1, 111, 95 U.C.C. Rep. Serv. 2d 86 (Bankr. S.D. Miss. 2018).

[190] *In re Community Home Financial Services, Inc.*, 583 B.R. 1, 112, 95 U.C.C. Rep. Serv. 2d 86 (Bankr. S.D. Miss. 2018).

[191] *In re Community Home Financial Services, Inc.*, 583 B.R. 1, 111–12, 95 U.C.C. Rep. Serv. 2d 86 (Bankr. S.D. Miss. 2018).

[192] U.S. Const. Amend. V.

[193] *In re Laforce*, 593 B.R. 853, 860 (Bankr. S.D. Ala. 2018), citing *In re Connelly*, 59 B.R. 421, 430, 14 Bankr. Ct. Dec. (CRR) 274 (Bankr. N.D. Ill. 1986).

Amendment are insufficient for a debtor to remain silent" because "blanket assertions can delay or even entirely prevent the administration of a debtor's estate."[194] Rather, "each assertion [of the 5th Amendment] must be accompanied by a demonstration of real and appreciable danger of self-incrimination."[195] The court in *LaForce* held that the debtor had waived his Fifth Amendment privilege by failing to assert it in connection with completing his schedules and the statement of financial affairs that he filed in connection with his case.[196] Therefore, he could not invoke it in connection with his being questioned and examined at the Code section 341 meeting of creditors on the information in those filings.[197] The court said: "a debtor may not turn the shield of the Fifth Amendment into a sword to cut his way to a discharge while carrying his property with him."[198] The court also held that the debtor could not invoke the 5th Amendment to protect him from turning over tangible property of the estate, specifically money that he received from a limited liability company in which he was a member.[199]

XVII. Seventh Amendment — Right to Jury Trial

The district court in *Manson v. Nathan*, also discussed in §§ VI above and XX below, reversed and remanded on an appeal from an order that granted the chapter 7 trustee summary judgment on a turnover claim.[200] The chapter 7 trustee for the debtor's estate sought the turnover of certain manuscripts from Manson and his company.[201] Manson claimed that he owned the documents and that they were therefore not property of the debtor's estate.[202] The trustee disagreed.[203] The bankruptcy court entered summary judgment in the

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[194] *In re Laforce*, 593 B.R. 853, 861 (Bankr. S.D. Ala. 2018).

[195] *In re Laforce*, 593 B.R. 853, 861 (Bankr. S.D. Ala. 2018).

[196] *In re Laforce*, 593 B.R. 853, 861 (Bankr. S.D. Ala. 2018).

[197] *In re Laforce*, 593 B.R. 853, 861 (Bankr. S.D. Ala. 2018).

[198] *In re Laforce*, 593 B.R. 853, 860 (Bankr. S.D. Ala. 2018), quoting *In re Connelly*, 59 B.R. 421, 448, 14 Bankr. Ct. Dec. (CRR) 274 (Bankr. N.D. Ill. 1986).

[199] *In re Laforce*, 593 B.R. 853, 859, 861 (Bankr. S.D. Ala. 2018).

[200] *Manson v. Nathan*, 2018 WL 705154, *1 (E.D. Mich. 2018).

[201] *Manson v. Nathan*, 2018 WL 705154, *1 (E.D. Mich. 2018).

[202] *Manson v. Nathan*, 2018 WL 705154, *1 (E.D. Mich. 2018).

trustee's favor, on the ground that Manson lacked credibility and that his ownership claims did not pass the "laugh test."[204] The district court disagreed and reversed, on the ground that the bankruptcy court could "not grant summary judgment based upon a credibility assessment drawn from a cold record."[205] The district court emphasized, though, that while the trustee "may not have been entitled to summary judgment, there may well be ample basis to rule in his favor on the turnover claim without holding a jury trial."[206]

XVIII. Revocation or Denial of Discharge and other Sanctions for Failure to Turnover or Comply with Turnover Order

In *Toyota Motor Credit Corp. v. Brinkley*, also discussed in §§ IV, V, IX and XIV above, the bankruptcy court held that an auto lender who repossessed the debtor's truck a few days prior to the debtor's chapter 7 bankruptcy filing violated the automatic stay by refusing to turn over the vehicle postpetition despite its knowledge that the automatic stay was in effect.[207] In affirming the bankruptcy court's order granting sanctions pursuant to section 363(k), the district court held that the auto lender had an "affirmative duty to return" the vehicle.[208] The district court further held that a creditor's retention of estate property constitutes an "act . . . to exercise control over property of the estate" that constitutes a violation of the automatic stay.[209]

In *In re Carter*, also discussed under § XIV above, the debtors commenced an adversary proceeding against an auto lender who, postpetition, repossessed and subsequently refused to return the debtors' vehicle despite knowledge of

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[203] *Manson v. Nathan*, 2018 WL 705154, *1 (E.D. Mich. 2018).

[204] *Manson v. Nathan*, 2018 WL 705154, *1 (E.D. Mich. 2018).

[205] *Manson v. Nathan*, 2018 WL 705154, *1, *2 (E.D. Mich. 2018).

[206] *Manson v. Nathan*, 2018 WL 705154, *2 (E.D. Mich. 2018).

[207] *Toyota Motor Credit Corporation v. Brinkley*, 2019 WL 317446, *2 (N.D. Tex. 2019).

[208] *Toyota Motor Credit Corporation v. Brinkley*, 2019 WL 317446, *2 (N.D. Tex. 2019).

[209] *Toyota Motor Credit Corporation v. Brinkley*, 2019 WL 317446, *3 (N.D. Tex. 2019), quoting 11 U.S.C.A. § 362(a)(3).

the debtors' pending bankruptcy.[210] The debtors sought actual as well as punitive damages and attorneys' fees for a violation of the automatic stay.[211] In rejecting the auto lender's argument that it had no knowledge of the debtors' bankruptcy filing, the bankruptcy court found that the lender had "actual knowledge . . . and . . . deliberately violated the stay by repossessing the vehicle."[212] Due to certain delay tactics employed by the lender, it took the debtors several days to retrieve their vehicle, which was ultimately located at a nearby junkyard.[213] The bankruptcy court found that the lender engaged in "egregious misconduct . . . taken in arrogant defiance of federal law."[214] Noting that "discretionary punitive damages may also be awarded under section 362(k)(1) 'when the violator acts in an egregious intentional manner,' " the bankruptcy court found that "[d]efendant's conduct was deliberate, wrongful, and inexcusable" and awarded punitive damages.[215] The court declined to award damages for emotional distress, because the evidence presented on that issue was insufficient.[216]

The chapter 7 debtor in *In re Adler*, also discussed above in § XIV above, was a law firm engaged in debt collections on behalf of its clients.[217] The chapter 7 trustee accused the debtor's president of directing estate property to his and his wife's personal bank accounts and instructing garnishees and counsel for judgment debtors to send checks directly to their personal residence in violation of the automatic stay.[218] With respect to the stay violation, the debtor's president argued that the trustee could not be awarded punitive damages

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[210] *In re Carter*, 2018 WL 4789997, *3 (Bankr. S.D. Ga. 2018).

[211] *In re Carter*, 2018 WL 4789997, *1 (Bankr. S.D. Ga. 2018).

[212] *In re Carter*, 2018 WL 4789997, *3 (Bankr. S.D. Ga. 2018).

[213] *In re Carter*, 2018 WL 4789997, *2 (Bankr. S.D. Ga. 2018).

[214] *In re Carter*, 2018 WL 4789997, *6 (Bankr. S.D. Ga. 2018), quoting *In re Pawlowicz*, 337 B.R. 640, 647 (Bankr. N.D. Ohio 2005).

[215] *In re Carter*, 2018 WL 4789997, *5, *6 (Bankr. S.D. Ga. 2018), quoting *In re White*, 410 B.R. 322, 327 (Bankr. M.D. Fla. 2009).

[216] *In re Carter*, 2018 WL 4789997, *5 (Bankr. S.D. Ga. 2018).

[217] *In re Arthur B. Adler and Associates, Ltd.*, 588 B.R. 864, 866 (Bankr. N.D. Ill. 2018).

[218] *In re Arthur B. Adler and Associates, Ltd.*, 588 B.R. 864, 866–67, 870 (Bankr. N.D. Ill. 2018).

because he was not an "individual" under section 362(k) — which provides that "an individual injured by any willful violation of a stay provided by this section shall recover actual damages, including costs and attorneys' fees, and, in appropriate circumstances, may recover punitive damages."[219] The bankruptcy court rejected this argument, holding that a bankruptcy court may use its "powers pursuant to 11 U.S.C.A. § 105(a) to award damages to a non-individual entity injured by another party's sanctionable conduct," and that its doing so does not overstep the Supreme Court's rule in *Law v. Siegel*, namely, "that a bankruptcy court may not contravene the provisions of the Code through 11 U.S.C.A. § 105(a)."[220] The bankruptcy court granted the trustee's motion for contempt and held that the trustee was entitled to reasonable attorneys' fees and costs.[221]

The bankruptcy court in *In re Cmty. Home Fin. Serv's, Inc.*, also discussed in §§ VII, XII, and XIV above, reached a similar conclusion.[222] The defendants argued that damages under section 362(k) are "available only to individuals."[223] The court rejected this argument, noting that "this Court and others have awarded damages to trustees and corporate debtors for stay violations under § 105(a)."[224] The court awarded the trustee damages in the amount of $71,458.25 for, among other things, attorneys' fees and expenses incurred in connection with the adversary proceeding.[225]

The bankruptcy court in *In re Porter* denied the debtor's

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[219] *In re Arthur B. Adler and Associates, Ltd.*, 588 B.R. 864, 873 (Bankr. N.D. Ill. 2018).

[220] *In re Arthur B. Adler and Associates, Ltd.*, 588 B.R. 864, 874 (Bankr. N.D. Ill. 2018), citing *Law v. Siegel*, 571 U.S. 415, 421, 134 S. Ct. 1188, 188 L. Ed. 2d 146, 59 Bankr. Ct. Dec. (CRR) 43, Bankr. L. Rep. (CCH) P 82592 (2014).

[221] *In re Arthur B. Adler and Associates, Ltd.*, 588 B.R. 864, 874 (Bankr. N.D. Ill. 2018).

[222] *In re Community Home Financial Services, Inc.*, 583 B.R. 1, 95 U.C.C. Rep. Serv. 2d 86 (Bankr. S.D. Miss. 2018).

[223] *In re Community Home Financial Services, Inc.*, 583 B.R. 1, 113, 95 U.C.C. Rep. Serv. 2d 86 (Bankr. S.D. Miss. 2018).

[224] *In re Community Home Financial Services, Inc.*, 583 B.R. 1, 113, 95 U.C.C. Rep. Serv. 2d 86 (Bankr. S.D. Miss. 2018).

[225] *In re Community Home Financial Services, Inc.*, 583 B.R. 1, 113, 95 U.C.C. Rep. Serv. 2d 86 (Bankr. S.D. Miss. 2018).

discharge because she failed to turn over the estate's portion of her tax refund.[226] Five years later, the debtor paid the trustee and then moved to reopen her bankruptcy case in an attempt to receive her discharge.[227] The bankruptcy court denied the motion.[228] The court explained that "vacating a judgment is 'extraordinary relief and should only be granted in exceptional circumstances.' "[229] Moreover, the court held that "a judgment denying or revoking a debtor's discharge falls outside the scope of judgments that can be satisfied under Rule 60(b)(5)," because to "grant the debtor's motion because he has now done something he should have done months ago would encourage others to ignore the trustee's letters or informal requests, motions seeking turnover, the orders granting them, and adversary proceedings based upon those orders without much danger of jeopardy."[230]

The bankruptcy court in *In re Johnson* revoked the debtor's discharge for her failure to turn over the nonexempt portion of her 2016 federal and state income tax refund despite a court order directing her to do so.[231] At the motion to dismiss stage, the court addressed in detail the circuit split surrounding the intent requirement under section 727(d)(6).[232] Some courts have held that the term "refused" in section 727(d)(6) means that a debtor would have to "willfully and intentionally refuse[] to obey" a court order.[233] Other courts compare section 727(d)(6) to civil contempt "negating the intent requirement."[234] Agreeing with the latter, the court noted that "if Congress had intended to include a willfulness or intentional standard in § 727(a)(6), Congress could have done so,

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[226] *In re Porter*, 2019 WL 364273, *1 (Bankr. W.D. Okla. 2019).

[227] *In re Porter*, 2019 WL 364273, *1 (Bankr. W.D. Okla. 2019).

[228] *In re Porter*, 2019 WL 364273, *2, *3 (Bankr. W.D. Okla. 2019).

[229] *In re Porter*, 2019 WL 364273, *1 (Bankr. W.D. Okla. 2019), quoting *Zurich North America v. Matrix Service, Inc.*, 426 F.3d 1281, 1289, 36 Employee Benefits Cas. (BNA) 1341, 23 I.E.R. Cas. (BNA) 1132 (10th Cir. 2005).

[230] *In re Porter*, 2019 WL 364273, *2 (Bankr. W.D. Okla. 2019), quoting *In re Mrozinski*, 489 B.R. 818, 822–23 (Bankr. N.D. Ind. 2013).

[231] *In re Johnson*, 2019 WL 171583, *3 (Bankr. N.D. Ohio 2019).

[232] *In re Johnson*, 2019 WL 171583, *2 (Bankr. N.D. Ohio 2019).

[233] *In re Johnson*, 2019 WL 171583, *2 (Bankr. N.D. Ohio 2019).

[234] *In re Johnson*, 2019 WL 171583, *2 (Bankr. N.D. Ohio 2019).

as it did in § 727(a)(2)."[235] The court next addressed each requirement for civil contempt, namely "(1) the alleged contemnor had knowledge of the order which he is said to have violated; (2) the alleged contemnor did in fact violate the order; and (3) the order violated must have been specific and definite."[236] The court found that all elements were satisfied and revoked the debtor's discharge under 727(d)(3) and 727(d)(6).[237]

The bankruptcy court in *In re Pryor* ordered the debtor to turn over to the chapter 7 trustee, within 30 days, certain property of the estate, including solar panels affixed to real property.[238] The debtor failed to turn over the property and the court entered an order holding the debtor in contempt for violating the turnover order.[239] The bankruptcy court denied the debtor's discharge pursuant to section 727.[240] The debtor appealed.[241] The district court affirmed, finding "no clear error" in the bankruptcy court's determination that the debtor had willfully and knowingly violated the court's order.[242]

The debtors in *In re Prosser* owned a collection of fine wines that they were ordered to safeguard and turnover to the trustee.[243] The wine collection was subsequently destroyed.[244] The bankruptcy court granted the chapter 7 trustee's motion for enforcement of the court's turnover order and for sanctions, which included the debtors' conveying title to exempt property to the trustee to be sold to satisfy the trustee's administrative expenses.[245] The district court reversed in part

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[235] *In re Johnson*, 2019 WL 171583, *2 (Bankr. N.D. Ohio 2019).

[236] *In re Johnson*, 2019 WL 171583, *2 (Bankr. N.D. Ohio 2019), quoting *In re Watson*, 247 B.R. 434, 436 (Bankr. N.D. Ohio 2000).

[237] *In re Johnson*, 2019 WL 171583, *3 (Bankr. N.D. Ohio 2019).

[238] *In re Pryor*, 2018 WL 3435402, *1 (C.D. Cal. 2018).

[239] *In re Pryor*, 2018 WL 3435402, *2 (C.D. Cal. 2018).

[240] *In re Pryor*, 2018 WL 3435402, *3 (C.D. Cal. 2018).

[241] *In re Pryor*, 2018 WL 3435402, *3 (C.D. Cal. 2018).

[242] *In re Pryor*, 2018 WL 3435402, *5 (C.D. Cal. 2018).

[243] *In re Prosser*, 2018 WL 3041067, *2 (D.V.I. 2018).

[244] *In re Prosser*, 2018 WL 3041067, *2 (D.V.I. 2018).

[245] *In re Prosser*, 2018 WL 3041067, *1–2 (D.V.I. 2018).

and remanded.[246] The court held that the exemption scheme contained in Code section 522 does not contain a "wrongful conduct" exception.[247] "Sale of the exempt property to satisfy a damages award for a debtor who was found in civil contempt would amount to the Bankruptcy Court either withdrawing the homestead exemption or creating an additional exception to § 522's exemptions."[248] Because the Code does not contain such a wrongful conduct exception, even on a finding of contempt of court, the court "would be creating an additional exception to the existing exemptions — or at the very least, surcharging the exemption — thereby running afoul" of the Supreme Court's pronouncements in the dicta of the *Law v. Siegel* decision.[249]

XIX. Time Limitations for Action; Issue Preclusion; Claim Preclusion

In *In re Picacho Hills Util. Co., Inc.*, also discussed in §§ V and X above, the magistrate noted that, as the chapter 7 trustee in that case had argued, "it may well be that there is no statute of limitations for turnover claims under Section 542(b)."[250] The developer had failed to meet its burden of demonstrating the defense of the statute of limitations.[251] But even if a statute of limitations did apply, it was the New Mexico statute that gave the utility 14 years within which to file an action against the developer to collect the judgment

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[246] *In re Prosser*, 2018 WL 3041067, *9 (D.V.I. 2018).

[247] *In re Prosser*, 2018 WL 3041067, *7 (D.V.I. 2018).

[248] *In re Prosser*, 2018 WL 3041067, *7 (D.V.I. 2018).

[249] *In re Prosser*, 2018 WL 3041067, *7 (D.V.I. 2018).

[250] *In re Picacho Hills Utility Company, Inc.*, 2019 WL 259133, *7 (D.N.M. 2019), report and recommendation adopted, 67 Bankr. Ct. Dec. (CRR) 42, 2019 WL 1375757 (D.N.M. 2019).

[251] *In re Picacho Hills Utility Company, Inc.*, 2019 WL 259133, *7 (D.N.M. 2019), report and recommendation adopted, 67 Bankr. Ct. Dec. (CRR) 42, 2019 WL 1375757 (D.N.M. 2019), citing *Adams v. American Medical System, Inc.*, 705 Fed. Appx. 744, 746, Prod. Liab. Rep. (CCH) P 20135 (10th Cir. 2017) (unpublished).

entered by the utility commission, and the utility brought the turnover action well within that timeframe.[252]

In *In re Brizinova*, also discussed under § VII above, the bankruptcy court rejected the defendant's, debtors' daughter-in-law's, argument that the trustee's turnover claim was barred by the doctrine of laches.[253] The trustee commenced the turnover action against five years after the debtors filed for bankruptcy.[254] The bankruptcy court noted that "turnover actions under Section 542 are 'subject to equitable defenses, such as laches, equitable estoppel, waiver, and acquiescence.' "[255] Thus, a turnover claim must be asserted within "a reasonable period of time."[256] The court held that the defendant had not established that the trustee delayed in bringing the claim, or that the defendant was prejudiced by the delay, or that she did not know that this claim might be asserted against her.[257]

In a different opinion in *Brizinova*, also discussed in §§ VII, VIII, IX, and XIV above, the bankruptcy court considered whether the doctrine of judicial estoppel applied.[258] The chapter 7 trustee brought a turnover action against the debtors for the proceeds of postpetition sales of inventory of a company owned by one of the debtors.[259] The court denied the debtors motion to dismiss.[260] The trustee next commenced an adversary proceeding against the defendants' daughter-in-law seeking to recover post-petition sale proceeds.[261] The daughter-in-law moved to dismiss, asserting that the proceeds

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[252] *In re Picacho Hills Utility Company, Inc.*, 2019 WL 259133, *7 (D.N.M. 2019), report and recommendation adopted, 67 Bankr. Ct. Dec. (CRR) 42, 2019 WL 1375757 (D.N.M. 2019).

[253] *In re Brizinova*, 588 B.R. 311, 331 (Bankr. E.D. N.Y. 2018).

[254] *In re Brizinova*, 588 B.R. 311, 330 (Bankr. E.D. N.Y. 2018).

[255] *In re Brizinova*, 588 B.R. 311, 330 (Bankr. E.D. N.Y. 2018), quoting *In re Swift*, 496 B.R. 89, 99 (Bankr. E.D. N.Y. 2013).

[256] *In re Brizinova*, 588 B.R. 311, 330–31 (Bankr. E.D. N.Y. 2018), quoting *In re De Berry*, 59 B.R. 891, 898, 14 Collier Bankr. Cas. 2d (MB) 792 (Bankr. E.D. N.Y. 1986).

[257] *In re Brizinova*, 588 B.R. 311, 331 (Bankr. E.D. N.Y. 2018).

[258] *In re Brizinova*, 592 B.R. 442, 456–57 (Bankr. E.D. N.Y. 2018).

[259] *In re Brizinova*, 592 B.R. 442, 450 (Bankr. E.D. N.Y. 2018).

[260] *In re Brizinova*, 592 B.R. 442, 450 (Bankr. E.D. N.Y. 2018).

[261] *In re Brizinova*, 592 B.R. 442, 450 (Bankr. E.D. N.Y. 2018).

were not estate property.[262] The court granted her motion.[263] The debtors then argued that the trustee was judicially estopped in the action against them, because the trustee in bringing the action against the daughter-in-law effectively " 'disavowed' his claims to recover the same property from the debtors.[264] The bankruptcy court explained that "[j]udicial estoppel is an equitable doctrine which 'prevents a party from asserting a factual position in one legal proceeding that is contrary to a position that it successfully advanced in another proceeding.' "[265] Specifically, a party invoking judicial estoppel must show that: "(1) the party against whom the estoppel is asserted took an inconsistent position in a prior proceeding and (2) that position was adopted by the first tribunal in some manner, such as by rendering a favorable judgment."[266] Thus, "in considering whether to apply judicial estoppel a court must focus on the conduct of the party to be estopped, not the party seeking estoppel . . . [I]t is unfair advantage to the potentially prejudiced party's adversary that is the touchstone of the doctrine."[267] The court acknowledged that the complaints in the two actions "contain[ed] similar allegations, and [sought] to recover the same asset."[268] But the debtors had failed to show that the trustee received an "unfair advantage" that would justify application of the doctrine.[269]

XX. Appeals

The bankruptcy court in *Manson v. Nathan*, also discussed in §§ VI and XVII above, found that the claims of Manson, the

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[262] *In re Brizinova*, 592 B.R. 442, 450 (Bankr. E.D. N.Y. 2018).

[263] *In re Brizinova*, 592 B.R. 442, 450 (Bankr. E.D. N.Y. 2018).

[264] *In re Brizinova*, 592 B.R. 442, 457 (Bankr. E.D. N.Y. 2018).

[265] *In re Brizinova*, 592 B.R. 442, 456 (Bankr. E.D. N.Y. 2018), quoting *Rodal v. Anesthesia Group of Onondaga, P.C.*, 369 F.3d 113, 118, 15 A.D. Cas. (BNA) 973 (2d Cir. 2004).

[266] *In re Brizinova*, 592 B.R. 442, 456–57 (Bankr. E.D. N.Y. 2018), quoting *Robinson v. Concentra Health Services, Inc.*, 781 F.3d 42, 45, 126 Fair Empl. Prac. Cas. (BNA) 925, 98 Empl. Prac. Dec. (CCH) P 45279 (2d Cir. 2015).

[267] *In re Brizinova*, 592 B.R. 442, 457 (Bankr. E.D. N.Y. 2018), quoting *In re Adelphia Recovery Trust*, 634 F.3d 678, 698–99, 54 Bankr. Ct. Dec. (CRR) 89 (2d Cir. 2011).

[268] *In re Brizinova*, 592 B.R. 442, 457 (Bankr. E.D. N.Y. 2018).

[269] *In re Brizinova*, 592 B.R. 442, 457 (Bankr. E.D. N.Y. 2018).

party from whom turnover was sought, that he owned the property lacked credibility.[270] The court dismissed.[271] Though the district court agreed on appeal that Manson's ownership claim lacked credibility, it nevertheless reversed and remanded noting that "even though Manson did not always offer consistent explanations as to how or when he obtained that ownership, on summary judgment, the bankruptcy court was required to accept Manson's sworn statements as true and construe any inconsistencies in the statements in his favor" as "a court may not grant summary judgment based upon a credibility assessment drawn from a cold record."[272]

The issue in In *Denby-Peterson v. Nu2u Auto World,* also discussed in § XIV above, arose in connection with an auto lender's failure to turn over the chapter 13 debtor's car on demand made postpetition.[273] The debtor, among other things, moved for sanctions against the auto lender for its stay violation, which the bankruptcy court denied, and the debtor appealed.[274] The district court ordered the debtor, sua sponte, to show cause why her appeal was not mooted by the bankruptcy court's dismissal of the underlying bankruptcy case.[275] The court was satisfied with appellant's showing as "[i]n cases where damages under 11 U.S.C. § 362(k) are at issue and the bankruptcy has been dismissed, the § 362(k) controversy generally survives."[276] The district court agreed with the Tenth Circuit holding in *In re Johnson* that a court "must have the power to compensate victims of violations of the automatic stay and punish the violators, even after the conclusion of the underlying bankruptcy case."[277]

In *In re Hardy*, also discussed in § X above, the debtor ap-

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[270] *Manson v. Nathan*, 2018 WL 705154, *1 (E.D. Mich. 2018).

[271] *Manson v. Nathan*, 2018 WL 705154, *1 (E.D. Mich. 2018).

[272] *Manson v. Nathan*, 2018 WL 705154, *2 (E.D. Mich. 2018).

[273] *Denby-Peterson v. Nu2u Auto World*, 595 B.R. 184, 186 (D.N.J. 2018).

[274] *Denby-Peterson v. Nu2u Auto World*, 595 B.R. 184, 187 (D.N.J. 2018).

[275] *Denby-Peterson v. Nu2u Auto World*, 595 B.R. 184, 188 (D.N.J. 2018).

[276] *Denby-Peterson v. Nu2u Auto World*, 595 B.R. 184, 188 (D.N.J. 2018), citing *In re Javens*, 107 F.3d 359, 364 n.2, 30 Bankr. Ct. Dec. (CRR) 541, 37 Collier Bankr. Cas. 2d (MB) 950, 1997 FED App. 0065P (6th Cir. 1997).

[277] *Denby-Peterson v. Nu2u Auto World*, 595 B.R. 184, 188 (D.N.J. 2018), quoting *In re Johnson*, 575 F.3d 1079, 1083, 62 Collier Bankr. Cas. 2d (MB) 315, Bankr. L. Rep. (CCH) P 81542 (10th Cir. 2009).

pealed six of the bankruptcy court's orders, among of them an order for the turnover of the debtor's real property.[278] The debtor argued, among other things, that the order was inappropriate because of a dispute over the validity of a purported deed of trust lien on the property.[279] The chapter 7 trustee filed a motion to dismiss the appeal as equitably moot because the property had since been sold to a third party.[280] Importantly, and as discussed here last year, the bankruptcy court denied the debtor's emergency motion for a stay of the turnover order.[281] The district court found that the sale of the debtor's property was "substantially implemented" and that the appeal was therefore moot.[282]

And in *In re Spenlinhauer*, the bankruptcy court entered an order to secure vehicles, which required the debtor to turn over classic cars to the chapter 11 trustee for storage.[283] The debtor, at the time, faced eviction from the property on which the vehicles were stored.[284] The debtor moved to vacate the order to secure the vehicles, which the bankruptcy court denied.[285] The debtor subsequently moved for a stay pending appeal of the order denying the motion to vacate.[286] The trustee proposed to store the vehicles with a licensed auctioneer and not at an unsecured property as proposed by the debtor.[287] In denying the debtor's motion for a stay pending appeal, the bankruptcy court held that the debtor did not carried his burden of showing a strong likelihood of success on the merits of the appeal, that he would be irreparably harmed absent injunctive relief, that the balance of harm was to the

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[278] *In re Hardy*, 589 B.R. 217, 220 (D.D.C. 2018).

[279] *In re Hardy*, 589 B.R. 217, 220 (D.D.C. 2018).

[280] *In re Hardy*, 589 B.R. 217, 220 (D.D.C. 2018).

[281] *In re Hardy*, 589 B.R. 217, 221 (D.D.C. 2018).

[282] *In re Hardy*, 589 B.R. 217, 221 (D.D.C. 2018).

[283] *In re Spenlinhauer*, 2018 WL 1956167, *1 (Bankr. D. Mass. 2018).

[284] *In re Spenlinhauer*, 2018 WL 1956167, *1 (Bankr. D. Mass. 2018).

[285] *In re Spenlinhauer*, 2018 WL 1956167, *2 (Bankr. D. Mass. 2018).

[286] *In re Spenlinhauer*, 2018 WL 1956167, *2 (Bankr. D. Mass. 2018).

[287] *In re Spenlinhauer*, 2018 WL 1956167, *1 (Bankr. D. Mass. 2018).

debtor, or that the public interest was implicated.[288] In denying the stay motion, the court stressed that sine qua non of a motion for stay pending appeal is that the party seeking the stay show a strong likelihood of success on the merits and that the debtor had failed do so.[289]

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[288] *In re Spenlinhauer*, 2018 WL 1956167, *3 (Bankr. D. Mass. 2018), citing *In re Elias*, 182 Fed. Appx. 3 (1st Cir. 2006).

[289] *In re Spenlinhauer*, 2018 WL 1956167, **3–5 (Bankr. D. Mass. 2018).