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Bankruptcy & Commercial Law

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ABSTRACT

This Article analyzes and discusses cases—arising from the U.S. Court of Appeals for the Fifth Circuit, the Bankruptcy Courts in Texas, the Texas Supreme Court, and the Texas Courts of Appeals—that resolved some fascinating and important issues in the areas of bankruptcy and commercial law during this Survey period.

I. EXCULPATION CLAUSES

One of the most controversial topics in large Chapter 11 reorganizations is the so-called "exculpation clause," a common provision that protects entities that participated in a Chapter 11 case from liability for actions they took during the case.[1] The clause has been controversial because it has been construed to be a type of "third-party release," another controversial topic in reorganization plans that has either been limited or banned in some circuits.

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1. *See* 11 U.S.C. §§ 1101–1195.

A third-party release is the release of a non-debtor in a Chapter 11 reorganization case, usually included as a provision in the reorganization plan. These releases first came to prominence in the case of *Johns-Manville*,[2] a company that had manufactured materials containing asbestos. While a number of circuit courts have either affirmed orders confirming reorganization plans that contained third-party releases or suggested they might be permissible in limited circumstances,[3] the Ninth, Tenth and Fifth Circuits have held that—except in cases involving liability for asbestos[4]—third party releases that are not consensual are impermissible.[5] Those courts rely on Bankruptcy Code (the Code) Section 524(e), which provides that "discharge of a debt of the debtor does not affect the liability of any

2. Kane v. Johns-Manville (*In re* Johns-Manville Corp.), 843 F.2d 636, 638–39 (2d Cir. 1988) (affirming order confirming reorganization plan that included third-party releases).

3. *See* SE Prop. Holdings, LLC v. Seaside Eng'g & Surveying (*In re* Seaside Eng'g & Surveying), 780 F.3d 1070, 1081 (11th Cir. 2015) (affirming confirmation order providing for limited third-party releases of insiders related to actions taken in connection with the bankruptcy case); Behrmann v. National Heritage Found., Inc., 663 F.3d 704, 711–12 (4th Cir. 2011) (remanding for determination of whether facts supported allowing third-party release in reorganization plan); *In re* Johns-Manville Corp., 600 F.3d 135, 152–53 n.13 (2d Cir. 2010) (per curiam) (bankruptcy court has jurisdiction to approve third-party releases if the claims released affect rest of the bankruptcy estate); *In re* Ingersoll, Inc., 562 F.3d 856, 864–65 (7th Cir. 2009) (bankruptcy court has limited authority in appropriate cases to enter third-party releases as part of a reorganization plan); Airadigm Commc'ns, Inc. v. F.C.C. (*In re* Airadigm Commc'ns, Inc.), 519 F.3d 640, 657 (7th Cir. 2008) (third-party release that was "necessary for the [case] and appropriately tailored" approved); Deutsche Bank AG v. Metromedia Fiber Network, Inc. (*In re* Metromedia Fiber Network, Inc.), 416 F.3d 136, 141 (2d Cir. 2005) (dicta that third-party releases appropriate in "rare cases;" issue was moot); Class Five Nev. Claimants v. Dow Corning Corp. (*In re* Dow Corning Corp.), 280 F.3d 648, 658 (6th Cir. 2002) (seven factors must be met to meet the "unusual circumstances" appropriate for a third-party release; case remanded to determine if release was appropriate under the factors); Munford v. Munford, Inc. (*In re* Munford, Inc.), 97 F.3d 449, 455 (11th Cir. 1996) (approving settlement releasing third party from claims of co-defendants); Menard-Sanford v. Mabey (*In re* A.H. Robins Co.), 880 F.2d 694, 701–02 (4th Cir. 1989) (plan provided for 100% payout to claimants and possibility of payments in lieu of punitive damages).

4. *See* 11 U.S.C. § 524(g) (providing for third-party releases in certain cases involving claims arising from asbestos).

5. *See* Bank of N.Y. Tr. Co. v. Off. Unsecured Creditors' Comm. (*In re* Pac. Lumber Co.), 584 F.3d 229, 252–53 (5th Cir. 2009) (refusing to approve broad exculpation clause except as it related to creditors' committee); Resorts Int'l, Inc. v. Lowenschuss (*In re* Lowenschuss), 67 F.3d 1394, 1401 (9th Cir. 1995) ("[Section] 524(e) precludes bankruptcy courts from discharging the liabilities of non-debtors"); Feld v. Zale Corp. (*In re* Zale Corp.), 62 F.3d 746, 754-55 (5th Cir. 1995) (refusing to approve settlement with third-party releases); Landsing Diversified Props.-II v. First Nat'l Bank & Trust Co. of Tulsa (*In re* W. Real Estate Fund, Inc.), 922 F.2d 592, 601–02 (10th Cir. 1990) (per curiam) ("[W]e follow the Ninth Circuit's lead . . . and hold that while a temporary stay prohibiting a creditor's suit against a non[-]debtor . . . during the bankruptcy proceeding may be permissible . . . the stay may not be extended post-confirmation [to] relieve[ ] the non[-]debtor from its own liability to the creditor."); American Hardwoods, Inc. v. Deutsche Credit Corp., 885 F.2d 621, 626 (9th Cir. 1989) ("Section 524(e) . . . limits the court's equitable power under Section 105 to order the discharge of the liabilities of non[-]debtors . . . ."). *Cf.* Ad Hoc Grp. of Vitro Noteholders v. Vitro, S.A.B. de C.V. (*In re* Vitro, S.A.B. de C.V.), 701 F.3d 1031, 1061 (5th Cir. 2012) (holding that releases of third parties in Mexican reorganization plan violated United States' public policy; Chapter 15 case).

other entity on, or the property of any other entity for, such debt."[6] Critics of the exculpation clause have contended that it is just a type of third-party release, which historically was either prohibited or severely limited in some circuits.[7]

While the Fifth Circuit had clearly and repeatedly held that reorganization plans could not contain third-party releases, the U.S. Court of Appeals for the Fifth Circuit had previously held in *Pacific Lumber*[8] that a reorganization plan could exculpate members of a creditors' committee, but it had not permitted other entities to be exculpated. The circuit court had reasoned that:

> [T]he essential function of the exculpation clause proposed here is to absolve the released parties from any negligent conduct that occurred during the course of the bankruptcy. The fresh start [Section] 524(e) provides to debtors is not intended to serve this purpose.
>
> We agree, however, . . . that 11 U.S.C. § 1103(c), which lists the creditors' committee's powers, implies committee members have qualified immunity for actions within the scope of their duties. . . The Creditors' Committee and its members are the only disinterested volunteers among the parties sought to be released here. The scope of protection, which does not insulate them from willfulness and gross negligence, is adequate.[9]

"Consequently," the Fifth Circuit had held, "the non-debtor releases [in the plan on appeal] must be struck except with respect to the Creditors Committee and its members."[10]

While some case law has not distinguished the exculpation clause from the general third-party release,[11] other case law has distinguished the two. Notably, the U.S. Court of Appeals for the Ninth Circuit, which had

6. 11 U.S.C. § 524(e).

7. Here is an excerpt from an exculpation clause:

> None of [the Exculpated Parties] shall have or incur any liability to any Person for any act or omission in connection with, relating to or arising out of the *Chapter 11* cases, the formulation, negotiation, implementation, confirmation or consummation of this Plan, the Disclosure Statement, or any contract, instrument, release or any agreement or document entered into during the *Chapter 11* Cases or otherwise created in connection with the Plan . . . .

Blixseth v. Credit Suisse, 961 F.3d 1074, 1078–79 (9th Cir. 2020) (emphasis added).

8. Bank of N.Y. Tr. Co. v. Off. Unsecured Creditors' Comm. (*In re* Pac. Lumber Co.), 584 F.3d 229, 252–53 (5th Cir. 2009).

9. *Id.* at 252–53.

10. *Id.* at 253.

11. *See* SE Prop. Holdings, LLC v. Seaside Eng'g & Surveying (*In re* Seaside Eng'g & Surveying), 780 F.3d 1070, 1076 (11th Cir. 2015) (affirming confirmation order providing for limited third-party releases of insiders; decision refers to the provisions as being third-party releases, but those provisions are more akin to exculpation clauses, as the term is usually used because the releases at issue in the case are of insiders in connection with actions taken in the Chapter 11 case); Airadigm Commc'ns, Inc. v. F.C.C. (*In re* Airadigm Commc'ns, Inc.), 519 F.3d 640, 657 (7th Cir. 2008) (third-party release that was "necessary for the [case] and appropriately tailored" approved; affirming third-party release that was akin to an exculpation clause in that it released entities for actions taken during the Chapter 11 case).

reiterated its ban on third-party releases in three cases,[12] held in 2021 that an exculpation clause was not a forbidden third-party release because it did not release the exculpated parties from the debtor's wrongdoing, but rather from allegations of their own wrongdoing.[13] Unlike in some cases approving exculpation clauses, the clause before the Ninth Circuit exculpated Credit Suisse, which was not an estate fiduciary, but which had been a prepetition lender to the estate and had been embroiled in a great deal of litigation with the debtor.[14]

Perhaps that Ninth Circuit decision emboldened the litigants when the issue reached the Fifth Circuit Court of Appeals in the *Highland Capital* Chapter 11 case to hope that the Fifth Circuit would (1) also distinguish its "no-third-party release" cases from a case involving an exculpation clause; (2) agree with the distinction the Ninth Circuit had made; and (3) affirm on appeal an order confirming a plan including exculpation provisions that exculpated numerous interested parties.[15]

That was not going to happen. Rather, in *Nexpoint Advisors, L.P. v. Highland Capital Management, L.P. (In re Highland Capital Management, L.P.)*,[16] the Fifth Circuit Court reiterated its rule that third-party releases are not allowed in Chapter 11 reorganization plans; it held that the exculpation clause before it was a third-party release and was—for the most part—impermissible.[17]

In short, if the *Highland Capital* plan proponents thought that the reasoning in *Blixeth* might persuade the court to change its mind, they were wrong: the U.S Court of Appeals for the Fifth Circuit continued to view exculpation clauses as being third-party releases, which it holds are generally improper.[18] However, in *Highland Capital*, the Fifth Circuit did waiver somewhat from its previous rule limiting third-party releases to creditors' committee members.[19] The Fifth Circuit held that, in the case before it, independent directors had overseen the reorganization and therefore undertaken the role of a debtor-in-possession.[20] Because

12. *See* Resorts Int'l, Inc. v. Lowenschuss (*In re* Lowenschuss), 67 F.3d 1394, 1401 (9th Cir. 1995) (Section 524(e) prohibits third-party releases); American Hardwoods, Inc. v. Deutsche Credit Corp., 885 F.2d 621, 626 (9th Cir. 1989) ("Section 524(e) . . . limits the court's equitable power under Section 105 to order the discharge of the liabilities of non[-] debtors . . . ."); Underhill v. Royal, 769 F.2d 1426, 1432 (9th Cir. 1985) (explaining that the bankruptcy court has no power to release non-debtor based on the consent of creditors).

13. *See* Blixseth v. Credit Suisse, 961 F.3d 1074, 1085 (9th Cir. 2020) ("[W]e hold that [Section] 524(e) does not prohibit the Exculpation Clause at issue[] because the Clause covers only liabilities arising from the bankruptcy proceedings and not the discharged debt").

14. *See id.* at 1080–81.

15. *See id.* at 1085.

16. 48 F.4th 419, 438 (5th Cir. 2022).

17. *Id.* at 437–38.

18. *See id.*

19. *See id.* at 437–38.

20. *See id.*

the independent directors had acted as estate fiduciaries, they could be exculpated under the plan.[21]

All hope was not lost, however, for those entities that had not been exculpated. The Fifth Circuit indicated that the bankruptcy court could act as a "gatekeeper" as to further litigation, involving the plan, the plan process, and the entities who were proposed to have been exculpated.[22]

These gatekeeper provisions have been gaining some popularity. For example, in the *Adelphia Communications* case, the bankruptcy court refused to enter an exculpation order covering all the entities that the plan proposed to cover but indicated that it would enter a gatekeeper order.[23] The question remains, though: are these orders legally justified? The Fifth Circuit did not explain the rationale for approving gatekeeper provisions, but it may lie in an old series of cases originating in the U.S. Supreme Court and limiting the venue in which receivers can be sued.[24] Time may answer these questions, but only if a litigant decides to ignore the gatekeeper provision and proceed in another court. The U.S. Supreme Court has already told us, in *Celotex Corp. v. Edwards*,[25] that the bankruptcy court has jurisdiction over matters between third parties that affect the bankruptcy estate, but will a claim against a party who might be exculpated be something that will affect the estate if the estate is closed? Stay tuned.

II. INTERACTION OF BANKRUPTCY CODE AND FEDERAL ENERGY REGULATORY COMMITTEE

Another issue addressed by the Fifth Circuit during 2022 was the role of the Federal Energy Regulatory Commission (FERC) in bankruptcy cases and the interaction of the Bankruptcy Code and The Natural Gas Act

21. *Id.* at 438 ("Consistent with [Section] 524(e), we strike all exculpated parties from the Plan except Highland Capital, the Committee and its members, and the Independent Directors.").

22. *See id.* at 439. Moreover, in a later case, the Fifth Circuit upheld a revision to the plan that indemnified certain entities in connection with the implementation of the plan. *See* Highland Cap. Mgmt. Fund Advisors, L.P. v. Highland Cap. Mgmt., L.P. (*In re Highland Cap. Mgmt., L.P.)*, 57 F.4th 494, 503 (5th Cir. 2023).

23. *See In re* Adelphia Communs. Corp., 368 B.R. 140, 269 (Bankr. S.D.N.Y. 2007) ("I fully understand the legitimate needs and concerns of parties to seek some protection from the continuing threats that creditors have launched against each other . . . But I cannot, consistent with [Second Circuit case law] give the prospective targets of further intercreditor disputes releases in advance from such threats. What I will do, if desired, is provide for exclusive jurisdiction in this Court to consider any claims concerning the Covered Matters—all or substantially all of which involve the administration of the estates and my earlier rulings and orders in these cases. I will be able to tell the difference between legitimate claims, on the one hand, and harassment, or retaliation, or frivolous litigation, on the other.").

24. *See* Barton v. Barbour, 104 U.S. 126, 136–37 (1881) (holding that a receiver in one state may not be sued in the courts of another state); Leonard v. Vrooman, 383 F.2d 556, 560 (9th Cir. 1967); *In re* DeLorean Motor Co., 991 F.2d 1236, 1240–41 (6th Cir. 1993); *In re* Castillo, 297 F.3d 940, 945 (9th Cir. 2002) (suits against trustee); Carter v. Rodgers, 220 F.3d 1249, 1251, 1252 n.4 (11th Cir. 2000) (holding that the Barton doctrine applies to entities that conduct sales of estate property).

25. 514 U.S. 300, 309–10 (1995).

(NGA), which regulates firms that move and sell natural gas in interstate commerce.[26] In *In re Ultra Petroleum*[27] and *Gulfport Energy Corp. v. FERC*,[28] the U.S. Court of Appeals for the Fifth Circuit reiterated its position that debtors are entitled to reject contracts even when those contracts have been approved by FERC.

This was the conflict in *Ultra Petroleum*: the Chapter 11 debtor sought to reject a contract for the transportation of natural gas because it was going out of the natural gas business.[29] FERC, which has exclusive jurisdiction over certain rates (the so-called "filed rate doctrine"), claimed that the debtor could not reject the contract in its Chapter 11 case because only it (FERC) had jurisdiction over filed rates and the transportation contract contained a rate that FERC previously had approved.[30]

In reaching its decision in *Ultra Petroleum* and holding that the contract could be rejected, the Fifth Circuit stressed that its decision was consistent with *Official Committee of Unsecured Creditors of Mirant Corp. v. Potomac Electric Power Co. (In re Mirant Corp.)*.[31] Rejection, the Fifth Circuit reasoned, did not undermine the rate structure because it set the basis for the calculation of damages arising from the rejection of the contracts.[32] The Fifth Circuit nevertheless acknowledged the importance of FERC: in *Mirant,*[33] the Fifth Circuit had recognized—and it reiterated the rule in the case before it—that the pricing of energy involved the public interest and accordingly, the standard for rejection of an energy contract should be higher than the usual "best interest of the estate."[34] Moreover, the Fifth Circuit had emphasized that FERC should be granted standing to participate in the motion to reject the contract.[35] Finally, the Fifth Circuit recognized that the Constitution requires that bankruptcy be "uniform" throughout the United States, and a sister court, the U.S. Court of Appeals for the Sixth Circuit, had agreed with the Fifth Circuit's conclusions regarding the interaction of bankruptcy law and energy law in *In re FirstEnergy Solutions Corp.*[36]

In *Gulfport Energy*, decided a few months later, FERC proved it had difficulty taking "no" for an answer.[37] There, in anticipation of Gulfport's bankruptcy, FERC had issued four orders that provided that Gulfport

26. *See* 15 U.S.C. § 717(a).

27. FERC v. Ultra Res., Inc. (*In re* Ultra Petro. Corp.), 28 F.4th 629, 641–42 (5th Cir. 2022).

28. 41 F.4th 667, 671 (5th Cir. 2022).

29. *See In re Ultra Petro. Corp.*, 28 F.4th at 635.

30. *See id.*

31. 378 F.3d 511, 519–20 (5th Cir. 2004). *See In re Ultra Petro. Corp.*, 28 F.4th at 640–43.

32. *See In re Ultra Petro. Corp.*, 28 F.4th at 642.

33. *In re Mirant Corp.*, 41 F.4th at 671.

34. *In re Ultra Petro. Corp.*, 28 F.4th at 639 ("As a panel of this court, we are bound by our precedent in *Mirant*, which holds that a bankruptcy court can authorize rejection of a filed-rate contract, and that, post-rejection, FERC cannot require continued performance on the rejected contract.").

35. *See id.* at 642–43.

36. *See id.* at 641; 945 F.3d 431, 437 (6th Cir. 2019).

37. *See* Gulfport Energy Corp. v. FERC, 41 F.4th 667, 671 (5th Cir. 2022).

could not reject the energy contracts to which it was a party and committed Gulfport to continue to perform under the contracts.[38] Reasoning that FERC could not abrogate Gulfport's rights under the Bankruptcy Code, the Fifth Circuit agreed that the FERC orders should be vacated, concluding that the Bankruptcy Code does not abrogate the filed-rate doctrine because it survives to provide the measure of damages of any contact that is rejected during a bankruptcy case.[39] The Fifth Circuit explained:

> FERC can decide whether *actual* modification or abrogation of a filed-rate contract would serve the public interest. It even may do so before a bankruptcy filing. But rejection is just a breach; it does not modify or abrogate the filed rate, which is used to calculate the counterparty's damage. So FERC cannot prevent rejection. It cannot bind a debtor to continue paying the filed rate after rejection. And it cannot usurp the bankruptcy court's power to decide Gulfport's rejection motions.[40]

III. MAKE WHOLE PREMIUMS

A "make-whole premium" is a contractual claim that arises when an obligor defaults on an obligation and as a result, the counterparty does not receive the interest it had anticipated receiving when it entered into a deal.[41] Post-petition interest is not allowed on unsecured or undersecured claims in Chapter 11,[42] and courts have split on whether a make-whole premium is disguised interest.[43] In 2022, however, the Fifth Circuit ruled (correctly, I believe) that the make-whole premium is in fact unmatured interest and should be treated as such.[44]

That would have been the end of the inquiry because post-petition interest on unsecured claims is specifically disallowed under the Code.[45] However, the Chapter 11 case before the Fifth Circuit was characterized by an amazing and unusual development: during the course of the case the price of natural gas had soared, and therefore the debtor, an entity in the natural gas business, was solvent at the time it confirmed its reorganization

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38. *See id.* at 671.

39. *See id.*

40. *Id.* at 685 (emphasis in original).

41. *See* Ultra Petro. Corp. v. Ad Hoc Comm. of OpCo Unsecured Creditors (*In re* Ultra Petro. Corp.), 51 F.4th 138, 142 (5th Cir. 2022).

42. *See* 11 U.S.C. § 502(b)(2).

43. *See, e.g.*, Noonan v. Fremont Fin. (*In re* Lappin Elec. Co.), 245 B.R. 326, 330 (Bankr. E.D. Wis. 2000) (explaining that a prepayment charge is liquidated damages, not unmatured interest); *In re* Ridgewood Apts. of DeKalb Cnty., Ltd., 174 B.R. 712, 721 (Bankr. S.D. Ohio 1994) (explaining that a prepayment penalty is unmatured interest); *In re* 360 Inns, Ltd., 76 B.R. 573, 576–77 (Bankr. N.D. Tex. 1987) (explaining that a prepayment penalty is not unmatured interest).

44. *See In re* Ultra Petro. Corp., 51 F.4th at 142.

45. *See* 11 U.S.C. § 502(b) (providing that "the court, after notice and a hearing, shall determine the amount of such claim in lawful currency of the United States . . . except to the extent that . . . (2) such claim is for unmatured interest.").

plan.[46] This led to another wrinkle: the case law under the Bankruptcy Act (the bankruptcy law that predated the current Bankruptcy Code that was passed in 1978) had provided that if a debtor were solvent, the debtor was obligated to pay post-petition interest on claims.[47] This case law, the Fifth Circuit held, had not been specifically repealed by the passage of the Bankruptcy Code and was still valid.[48] Therefore, according to the Fifth Circuit, even though the make-whole premium was unmatured interest, and even though the Bankruptcy Code specifically disallows the payment of interest on unsecured claims, the debtor was obligated to pay interest on the claims.[49] Moreover, the circuit court reasoned the payment of interest was consistent with the absolute priority rule of Section 1129(b) as it applied to unsecured claims (although the court did not convincingly explain how the absolute priority rule would apply to a claim that was being paid in full in the amount allowed under the Code).[50] The court also explained that the interest on the claim should be paid at the pre-petition contract rate, rather than at the judgment rate.[51]

One circuit judge dissented.[52] He reasoned that the pre-Code law did not support a long-standing practice of allowing solvent debtors interest notwithstanding a statutory bar to the payment of interest on unsecured claims.[53] In fact, he argued, the prohibition on interest had not been at all clear under the pre-Code Act, and therefore the cases that had allowed interest on unsecured claims did not establish a compelling precedent.[54] While he agreed that the make-whole provision was interest, he also reasoned that he would not have allowed the payment in the case of a solvent debtor at the contractual amount, but rather at the judgment rate.[55]

The holding of the case certainly seems fair—why should a debtor that is solvent be relieved of its promise to pay interest? However, this holding also is inconsistent with the premise that the plain language of a statute should control. Moreover, the U.S. Supreme Court had previously stressed in *Union Bank v. Wolas* that pre-Code practice does not control

46. *See In re* Ultra Petro. Corp., 51 F.4th at 143 (recounting the fluctuation of the price of natural gas).

47. *See id.* at 145 (describing the issues before the court as "whether the solvent-debtor exception survived the enactment of the Bankruptcy Code in 1978 and thus whether it still applies to suspend the Code's disallowance of the Make-Whole Amount as unmatured interest").

48. *See id.* at 150 (concluding "that the pre-Code doctrine concerning solvent debtors' obligations remains good law").

49. *See id.* at 150–56.

50. *See id.* at 159–60.

51. *See id.* at 158–60.

52. *See id.* at 160–64.

53. *See id.*

54. *See id.*

55. *See id.* at 164.

the interpretation of the Bankruptcy Code because the Bankruptcy Code introduced a new, complete scheme.[56]

If anything, the argument that pre-Code practice should not apply is even stronger in the case of unmatured interest on unsecured claims than in the situation in the *Union Bank* case because Congress specifically and clearly provided in the Bankruptcy Code that unmatured interest is not allowed.[57] By contrast, in *Union Bank*, the Supreme Court was interpreting a somewhat vague phrase, "ordinary course of business," that did not clearly and specifically address whether payments on long-term debt should be deemed to be ordinary course.[58] In short, although the Fifth Circuit correctly construed the make-whole provision as being disguised interest, in Ultra Petroleum Corp.,[59] it ignored a fundamental canon of construction when it held that a solvent debtor must pay post-petition interest.

Notwithstanding the Fifth Circuit having arguably been wrong to have relied on pre-Code law, there is, nevertheless, another justification for the allowance of post-petition interest on unsecured claims in a solvent Chapter 11 case. Code Section 1129(a)(7) provides that any individual creditor that is impaired and does not vote for a plan is entitled to be paid the amount it would be paid if the debtor were liquidated under Chapter 7 on the confirmation date,[60] and Code Section 726(a)(5) provides that, before a debtor may retain any property, unsecured creditors must be paid interest at the judgment rate.[61] Several courts have followed this reasoning to award post-petition interest to unsecured creditors. There is, however, a problem with applying this limitation in this particular case because, in 2019, the Fifth Circuit had held that a claim (in this same Chapter 11 case) that was not being paid interest by virtue of Code Section 502(b)(2)'s prohibition on the payment of interest was not impaired.[62] For that reason, Code Sections 726 and 1129(a)(7)—allowing interest on certain impaired claims—are inapplicable to this case.[63]

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56. *See* Union Bank v. Wolas, 502 U.S. 151, 160 (1991).

57. *See generally id.*

58. *Id.* at 155.

59. See *In re* Ultra Petro. Corp., 51 F.4th at 160–64.

60. *See* 11 U.S.C. § 1129(a)(7)(A) (2021) (providing that "[w]ith respect to each impaired class of claims or interests . . . each holder of a claim or interest of such class . . . has accepted the plan; or . . . will receive or retain under the plan on account of such claim or interest property of a value, as of the effective date of the plan, that is not less than the amount that such holder would so receive or retain if the debtor were liquidated under Chapter 7 of this title on such date . . ."). *See also Union Bank*, 502 U.S. at 160.

61. *See* 11 U.S.C. § 726(a) (providing in part that "property of the estate shall be distributed—. . . in payment of interest at the legal rate from the date of the filing of the petition . . . [and] to the debtor.").

62. *See* Keystone Gas Gathering, L.L.C. v. Ad Hoc Comm. (*In re* Ultra Petro. Corp.), 943 F.3d 758, 765 (5th Cir. 2019).

63. *See generally* Ultra Petro. Corp. v. Ad Hoc Comm. of OpCo Unsecured Creditors (*In re* Ultra Petro. Corp.), 51 F.4th 138 (5th Cir. 2022).

IV. SUBCHAPTER V DISCHARGEABILITY ISSUE

In 2019, Congress created the new Subchapter V of Chapter 11 of the Bankruptcy Code.[64] That Subchapter was designed to make emergence from bankruptcy less expensive and more predictable for small businesses.[65] The law was intended to affect very small businesses, as, when the law was passed, businesses would be ineligible for Subchapter V if they had more than $2,765,625.00 in liquidated debts.[66] Like most numbers in the Bankruptcy Code, that figure was subject to tri-annual adjustment to reflect changes in the All-Urban Consumer Price Index.[67]

Then, Covid-19 spread. By March 27, 2020, Congress temporarily raised the cap for eligibility for Subchapter V to make entities having liquidated debts of no more than $7.5 million eligible[68]—a cap that has been repeatedly extended and that, as of now, is due to expire in June 2024.[69] The new Subchapter V has been hailed as a great innovation and has become very popular with small business debtors, even though it is optional.[70] Among other provisions, it allows a debtor to confirm a reorganization plan even if no class of claims votes for the plan in the requisite numbers and amounts.[71] Moreover, it allows a debtor to retain equity in its property even if unsecured claims are not being paid in full, provided the debtor pays its disposable income to creditors for three to five years.[72] In other words, the debtor can retain its property through "sweat equity," a right forbidden in "regular" Chapter 11 cases.[73]

The new Subchapter V is not without its unsettled issues, however, and already Congress has had to make technical adjustments to the Code, refining the definition of "Subchapter V debtor" and clarifying the findings regarding feasibility of a plan that a court must make to confirm the plan.[74] Perhaps the most divisive issue, however, has been the scope of the discharge for a Subchapter V non-individual debtor in a cramdown case.

In a cramdown Subchapter V case—in which the debtor has not received the affirmative vote of all classes of claims or interests in the requisite

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64. *See* Small Business Reorganization Act of 2019, Pub. L. No. 116-54, 133 Stat. 1079, 1079 (2019) (codified as 11 U.S.C. § 1182).

65. *See id.*

66. *See id.*

67. *See* 11 U.S.C. § 104(a).

68. *See* Coronavirus Aid, Relief and Economic Security Act, Pub. L. No. 116-136, 134 Stat. 281, 310 (2020).

69. *See* Bankruptcy Threshold Adjustment and Technical Corrections Act, Pub. L. 117-151, 136 Stat. 1298, 1299 (2022).

70. *See* 11 U.S.C. § 101(51C).

71. *See* 11 U.S.C. § 1191(b).

72. *See* 11 U.S.C. § 1191.

73. *See* Norwest Bank Worthington v. Ahlers, 485 U.S. 197, 206 (1988) (holding that, even if "new value" doctrine survived passage of Bankruptcy Code, debtors could not retain equity in farm by contributing labor to enterprise).

74. *See* Bankruptcy Threshold Adjustment and Technical Corrections Act, Pub. L. 117-151, 136 Stat. 1298, 1298–99 (2022) (amending definition of "debtor" in Subchapter V; reducing plan requirements when debtor has proven by preponderance of the evidence that it can make the payments contemplated in the reorganization plan).

amounts or numbers—there is a special discharge provision.[75] That provision, Code Section 1192, provides:

> [In a cramdown case] the court shall grant the debtor a discharge of all debts provided in Section 1141(d)(1)(A) of this title, and all other debts allowed under Section 503 of this title and provided for in the plan except any debt—
>
> . . . .
>
> (2) of the kind specified in Section 523(a) of this title.[76]

The question, then, is what does "debt . . . of the kind specified in Section 523(a) of this title" mean?[77]

For context, Code Section 523 provides, in part, that "[a] discharge under Section[s] 727, 1141, 1192, 1228(a), 1228(b), or 1328(b) of this title does not discharge an individual debtor from any debt," and then sets forth various debts such as debts for child support, fraud, personal injury caused by intoxicated drivers, securities fraud, certain taxes, etc.[78] More specifically, the question is whether in a Subchapter V cramdown case, the debts that are listed as being non-dischargeable in Code Section 523 are non-dischargeable only for individual debtors or also for non-individual debtors, such as corporations, LLPs, and LLCs.[79]

The only circuit court to address this question is the U.S. Court of Appeals for the Fourth Circuit, which held that an entity debtor—there, an LLC—that was liable for debts of the type set forth in Section 523(a) had non-dischargeable debts.[80] It came to this conclusion for several reasons.[81] First, it looked closely at the language of Code Section 1192, and concluded that the key language was "debt of a kind."[82] "Debt," the Fourth Circuit explained, focuses on the nature of the debt, not on the holder of the debt.[83] Moreover, the phrase "of a kind" refers to the various *types* of debts listed in 523, not the kind of creditor holding the debt.[84] In addition, the Fourth Circuit noted that, in construing a statute, the more specific provision should be given greater weight than a more general provision, and here "while [Section] 523(a) references numerous discharge provisions of the Bankruptcy Code, [Section] 1192(2) is the more specific, addressing only Subchapter V discharges."[85]

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75. 11 U.S.C. § 1192.
76. *Id.*
77. *Id.*
78. *Id.* § 523.
79. *Id.*
80. *See* Cantwell-Cleary Co. v. Cleary Packaging, LLC (*In re* Cleary Packaging, LLC), 36 F.4th 509, 513 (4th Cir. 2022).
81. *Id.* at 514–15.
82. *Id.* at 515.
83. *Id.* at 515–16.
84. *Id.* at 515.
85. *Id.*

The Fourth Circuit found it to be "even more telling" that Subchapter V had been based on Chapter 12 of the Bankruptcy Code—the family farmer chapter—and that the two cases to construe similar language under Chapter 12, the family farmer repayment chapter, had held that the language applied to entity debtors as well as to individuals.[86] Based on those two cases that were decided before Congress passed Subchapter V (and were the only cases construing Chapter 12's similar language), the Fourth Circuit relied on the canon of construction that Congress is deemed to be aware of relevant case law when it amends a code.[87] Moreover, the language of the statute supported this reading. In addition, while the Fourth Circuit noted that Code Section 523(a) had been amended to provide that it was applied to discharge under Section 1192, that language was not surplusage because the introduction to Code Section 523 also provided that it was applied to discharge under Sections 1228(a) and 1228(b), which, as noted above, has very similar language and had been construed to apply to entity as well as individual debtors.[88] Moreover, the Fourth Circuit reasoned that the limitation on discharge as applied to legal entities such as corporations made sense because Congress had eliminated the absolute priority rule in cramdown Subchapter V cases; and thus preserving the non-dischargeability of claims owed by all entities, including corporations and LLPs, was just and a fair trade off.[89]

This past year, however, the Bankruptcy Court in the U.S. District Court for the Western District of Texas disagreed with the Fourth Circuit's analysis. In *Avion Funding, LLC v. GFS Indus., LLC (In re GFS Indus., LLC)*, the court agreed with other bankruptcy courts and reasoned that the phrase "debt . . . of a kind" referred only to certain debts owed by individuals, not certain debts owed by entities, stressing that Code Section 523(a) provides that "[a] discharge under this chapter does not discharge a debtor who is an individual from any debt excepted from discharge under Section 523 of this title."[90] The key word, in the court's estimation, was "individual."[91]

The court also emphasized that corporate and other entity debtors have never been subject to the dischargeability limitations of Code Section 523(a)

86. *See* Sw. Ga. Farm Credit v. Breezy Ridge Farms, Inc. (*In re* Breezy Ridge Farms, Inc.), Bankr. No. 08-12038-JDW, Adv. No. 09-1011, 2009 WL 1514671 at *2 (Bankr. M.D. Ga. May 29, 2009); New Venture P'ship v. JRB Consol., Inc., 188 B.R. 373, 374 (Bankr. W.D. Tex. 1995).

87. *See Cantwell-Cleary Co.*, 36 F.4th at 516–17.

88. *Id.*

89. *See id.*

90. Avion Funding, LLC v. GFS Indus., LLC (*In re* GFS Indus., LLC) 647 B.R. 337, 342 (Bankr. W.D. Tex. 2022). *See, e.g.*, Jennings v. Lapeer Aviation, Inc. (*In re* Lapeer Aviation, Inc.), Chap. 11 No. 21-31500-jda, Adv. No. 22-3002, 2022 WL 11100073, at *4–5 (Bankr. E.D. Mich. Apr. 13, 2022); Catt v. Rtech Fabrications, LLC (*In re* Rtech Fabrications LLC), 635 B.R. 559, 564 (Bankr. D. Idaho 2021); Cantwell-Cleary Co., Inc., v. Cleary Packaging, LLC (*In re* Cleary Packaging, LLC), 630 B.R. 466 (Bankr. D. Md. 2021), *rev'd* 36 F.4th 509 (4th Cir. 2022); Gaske v. Satellite Rests. Inc. (*In re* Satellite Rests. Inc.), 626 B.R. 871, 873 (Bankr. D. Md. 2021).

91. *In re GFS Indus., LLC*, 647 B.R. at 344.

except as provided for in Section 1141(d)(6) (which makes certain debts of corporations arising from fraud and certain taxes non-dischargeable) and in Chapter 12 cases.[92] If Congress were going to make such a radical departure from its historical approach, the court reasoned it might have expected to find some mention of the change in the legislative history, or clearer language.[93] After all, as the Supreme Court has repeatedly emphasized, "Congress . . . does not, one might say, hide elephants in mouseholes."[94] The court was also not persuaded by the Chapter 12 caselaw construing similar language in the family farmer chapter to make Section 523(a) debts owed by entities non-dischargeable, reasoning that the overall structure of Chapter 12 was so different from the structure and purpose of Subchapter V that the Chapter 12 cases were not meaningful in construing similar language in Subchapter V.[95]

The issue is far from clear. On the one hand, it does not seem unfair to make Subchapter V debtors in cramdown cases liable for debts that arise from serious wrongdoing. Moreover, it seems unusual that non-cramdown debtors would be subject to non-dischargeability actions under 11 U.S.C. § 1141(d)(6), which makes some 523(a) debts of corporations non-dischargeable, but that debtors who confirmed a plan without creditor approval could walk away from more debts than debtors that confirmed consensual plans because Section 1192 does not make Section 1141(d)(6) applicable to plans confirmed without required creditor approval. In addition, it seems unusual that Congress did not just incorporate Section 1141(d)(2)—which provides that "[a] discharge under this chapter does not discharge a debtor who is an individual from any debt excepted from discharge under Section 523 of this title"—into Code Section 1192(b) when it incorporated 1141(d)(1) into the Section 1192.[96] That would have been much clearer had Congress not intended to make entities as well as individuals subject to the limitations on discharge of Code Section 523(a).[97] In any event, we may have some further clarity on the issue because the case is being directly appealed to the Fifth Circuit Court of Appeals.[98]

V. SUBCHAPTER V DEADLINES

As noted above, Subchapter V was added to Chapter 11 in 2019 to make reorganization easier and less expensive for small business debtors. One of the ways in which Subchapter V works to keep the costs of reorganization

92. *See id.*

93. *See id.* at 346–47.

94. Czyzewski v. Jevic Holding Corp., 580 U.S. 451, 465 (2017) (quoting Whitman v. American Trucking Assns., Inc., 531 U.S. 457, 468 (2001)).

95. *See In re GFS Indus., LLC*, 647 B.R. at 348–49.

96. 11 U.S.C. § 1141(d)(2).

97. *See id. See generally* 11 U.S.C. § 523(a).

98. *See* Avion Funding, LLC v. GFS Indus., LLC (*In re* GFS Indus., LLC), Chap. 11 No. 22-50403-cag, Adv. No. 22-05052-cag, 2023 WL 1768414, at *1 (Bankr. W.D. Tex. Feb. 3, 2023) (granting motion for direct appeal to the Fifth Circuit Court of Appeals).

down is to require that the debtor file a reorganization plan within ninety days after the entry of the order for relief (usually the petition date), unless the failure to meet the deadline is "attributable to circumstances for which the debtor should not justly be held accountable."[99] In *In re Excellence 2000*, the court would not extend the 90-day plan filing deadline under 11 U.S.C.S. § 1189(b) because the debtor had failed to show that its request was attributable to circumstances for which the debtor should not be held accountable.[100] Indeed, the debtor presented no evidence explaining why its motion was untimely despite knowing of a property ownership dispute well in advance of the plan-filing deadline.[101] Accordingly, the court refused to extend the deadline.[102]

VI. CHAPTER 7 DISMISSAL FOR BAD FAITH

In In re Nawab, the total amount of the debtor's consumer debt was larger than the total amount of his business debt.[103] The question the Bankruptcy Court for the U.S. District Court for the Western District of Texas faced was whether it needed to consider the number of business creditors versus the number of consumer creditors, rather than the total amount of the business debts versus the total amount of the consumer debt, in determining whether the debtor's Chapter 7 bankruptcy case should be dismissed under 11 U.S.C. § 707(b) as being abusive.[104] This mattered because Section 707(b) allows a court to dismiss the case of a debtor whose "debts are primarily consumer debts."[105] Interestingly, the only Fifth Circuit case on point, *In re Booth*, suggested that the court should consider the number of creditors as well as the total amount of the debts in making the comparison.[106] The court, however, believed that the Fifth Circuit Court of Appeals would follow the majority view of other courts regarding the construction of 11 U.S.C. § 707(b), and determined that only the dollar amount of a debtor's debts should be used in determining whether the case should be dismissed.[107] Based on the emerging trend in other circuits, the court concluded that the total amount of business debts rather than the number of business debts should be compared to the consumer debts and dismissed the case.[108]

99. 11 U.S.C. § 1189(b) (providing that "[t]he debtor shall file a plan not later than 90 days after the order for relief under this Chapter, except that the debtor should not justly be held accountable.").

100. *See* In re Excellence 2000, 636 B.R. 475, 477 (Bankr. S.D. Tex. 2022).

101. *See id.* at 482–83.

102. *See id.*

103. *See In re* Nawab, 645 B.R. 853, 854 (Bankr. W.D. Tex. 2022).

104. *See id.*

105. 11 U.S.C. § 707(b)(1).

106. *See In re* Booth, 858 F.2d 1051, 1055 (5th Cir. 1988).

107. *See In re Nawab*, 645 B.R. at 856–57.

108. *See id.*

VII. SURETY AGREEMENT IS NOT EXECUTORY

The Bankruptcy Code has many important provisions regarding executory contracts,[109] but the term "executory contract" is not defined in the Code. Practitioners have had to rely on inconsistent case law and important law review articles by giants in the field, such as Jay Westbrook[110] and Vern Countryman,[111] in trying to understand what constitutes an executory contract, and it hasn't been easy. In particular it has not been clear with respect to surety contracts, such as those in a case that came before the U.S. Court of Appeals for the Fifth Circuit in 2022 in *Argonaut Ins. Co. v. Falcon V., L.L.C. (In re Falcon V, L.L.C.)*.[112]

In *Argonaut*, the debtor was party to four surety contracts that primarily addressed plugging, abandonment, and restoration of oil and gas wells.[113] The obligations of the surety to certain third parties were irrevocable.[114] The debtor, Falcon, was obligated to pay premiums for surety bonds, but even the failure of the debtor to pay those premiums would not excuse the surety from having to pay on the bonds.[115] Falcon had confirmed a reorganization plan that provided for the assumption of executory contacts to which it was a party.[116]

In total, the surety was obligated to pay almost $10,500,000.00 on the bonds, and only part of the reimbursement obligation from the debtor was secured.[117] In the bankruptcy court, the surety had argued that a provision in the debtor's reorganization plan providing for the assumption of all executory contracts had the effect of assuming the surety contracts, but both the bankruptcy court and the district court rejected those arguments.[118] Not surprisingly, so did the Fifth Circuit.[119] The Fifth Circuit reasoned that, even if the surety were not reimbursed for the payments, the surety would have to pay on the surety bonds because they were irrevocable, and therefore the contracts were not executory.[120] The key was that the surety was obligated to perform even if the debtor failed to perform its obligation under the contract.[121]

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109. *See, e.g.*, 11 U.S.C. §§ 365, 1113, 1114.
110. *See* Jay Westbrook, *A Functional Analysis of Executory Contracts*, 74 MINN. L. REV. 227, 230 (1989).
111. *See* Vern Countryman, *Executory Contracts in Bankruptcy, Part I*, 57 MINN. L. REV. 439, 460 (1973).
112. 44 F.4th 348, 350 (5th Cir 2022).
113. *See id.* at 350–51.
114. *See id.*
115. *See id.*
116. *See id.* at 351.
117. *See id.*
118. *See id.* at 351–52.
119. *See id.*
120. *See id.* at 355.
121. *See id.* at 355–56.

The U.S. Court of Appeals for the Fifth Circuit had addressed a similar issue once before, in *In re Mirant*.[122] There, the Fifth Circuit had held that the ability of the debtor should not be undermined because the rejection did not interfere with the filled rate doctrine.[123] Rather, the filed-rate that had been approved by FERC was still applicable and would be the rate at which damages for the breach of the contract—caused by the rejection of the contract—would be calculated.[124]

VIII. CFPB APPROPRIATION PROVISIONS ARE UNCONSTITUTIONAL

Both the Fifth Circuit Court of Appeals and the Supreme Court have been especially active in making landmark decisions in the area of administrative law.[125] The U.S. Court of Appeals for the Fifth Circuit, in *Community Financial Services Association of America, Ltd. v. Consumer Finance Protection Bureau*,[126] rendered yet another landmark decision in 2022.

At issue was the power of the Consumer Financial Protection Bureau (the CFPB) to issue the 2017 Payday Lending Rule in light of the CFPB being funded by the Federal Reserve, rather than directly from Congress.[127] To decrease the power of Congress to eviscerate the CFPB, Congress provided in the Dodd-Frank Act that the CFPB would be funded not from annual Congressional appropriations but rather from the Federal Reserve Bank.[128] This law is one of many laws that have attempted over the years to insulate financial regulation from the whims of Congress.[129] The appellant argued that this funding provision violated the Appropriations Clause of the Constitution by taking the funding power away from Congress even though at any time Congress could change the manner in which the CFPB was funded.[130]

The Fifth Circuit Court of Appeals agreed.[131] The fact that the funding violated the Constitution did not necessarily answer the second question: did the infirmity in funding require that the 2017 Payday Lending Rule be vacated? The Fifth Circuit reasoned that the self-funding mechanism of CFPB violated the Appropriations Clause, which provides that "[n]o Money

122. *See* Off. Comm. of Unsecured Creditors of Mirant Corp. v. Potomac Elec. Power Co. (*In re* Mirant Corp.), 378 F.3d 511, 521 (5th Cir. 2004).

123. *See id.*

124. *See id.*

125. *See e.g.*, West Virginia v. EPA, 142 S. Ct. 2587, 2595 (2022) (holding that the Environmental Protection Agency exceeded its statutory authority because Congress did not clearly authorize its actions taken to address an issue of "economic and political significance").

126. 51 F.4th 616, 623 (5th Cir. 2022), *cert. granted*, Consumer Fin. Prot. Bureau v. Cmty. Fin. Services Ass'n of Am., 143 S. Ct. 2453 (2023).

127. *See id.* at 623.

128. *See id.* at 623–24.

129. *See id.* at 638–39.

130. *See id.*

131. *See id.* at 643–44.

shall be drawn from the Treasury, but in Consequence of Appropriations made by Law."[132] Accordingly, the Bureau's funding used to promulgate the 2017 Payday Lending Rule was entirely dependent upon the agency's unconstitutional funding scheme: "[T]here was a linear nexus between the infirm provision (the Bureau's funding mechanism) and the challenged action (promulgation of the rule) which required that the Payday Lending Rule be vacated."[133]

By contrast, in 2019 in *Seila Law LLC v. Consumer Fin. Prot. Bureau*,[134] the U.S. Supreme Court had not taken as radical an approach. It had held that the limitation on removal by the President of the head of the CFPB was unconstitutional, but that problem did not mean that the CFBP's investigation of a law firm necessarily had to be discontinued.[135] The Supreme Court explained:

> The provisions of the Dodd-Frank Act bearing on the CFPB's structure and duties remain fully operative without the offending tenure restriction. Those provisions are capable of functioning independently, and there is nothing in the text or history of the Dodd-Frank Act that demonstrates Congress would have preferred *no* CFPB to a CFPB supervised by the President. Quite the opposite. Unlike the Sarbanes-Oxley Act at issue in *Free Enterprise Fund*, the Dodd-Frank Act contains an express severability clause. There is no need to wonder what Congress would have wanted if "any provision of this Act" is "held to be unconstitutional" because it has told us: "the remainder of this Act" should "not be affected."
>
> . . . .
>
> Because we find the Director's removal protection severable from the other provisions of Dodd-Frank that establish the CFPB, we remand for the Court of Appeals to consider whether the civil investigative demand was validly ratified.[136]

IX. AUTOMATIC STAY VIOLATION

Giles-Flores was a Chapter 13 debtor who claimed a homestead exemption on certain residential property.[137] No one objected to the exemption.[138] During the course of Mr. Giles-Flores Chapter 13 repayment plan, however, he fell behind on common changes and Braeburn Plaza, Inc. (Braeburn) foreclosed on the property.[139]

132. U.S. Const. art. I, § 9, cl. 7; *see Cmty. Fin. Servs. Ass'n of Am., Ltd.*, 51 F.4th at 644.
133. *Cmty. Fin. Servs. Ass'n of Am., Ltd.*, 51 F.4th at 643.
134. 140 S. Ct. 2183 (2020).
135. *See id.* at 2191–92.
136. *Id.* at 2209, 2211 (quoting 12 U.S.C. § 5302) (internal citations omitted).
137. *See* Giles-Flores v. Braeburn Plaza, Inc. (*In re* Giles-Flores), 646 B.R. 787, 789–90 (Bankr. S.D. Tex. 2022).
138. *See id.* at 789.
139. *See id.*

There were some pretty bad facts here: the creditor, Braeburn, was well aware that the Giles-Flores bankruptcy case was pending, that Giles-Flores claimed a homestead exemption on the property, and Braeburn was also aware of the automatic stay.[140] Nevertheless, Braeburn foreclosed on the debtor's property.[141] After Braeburn foreclosed on the property, Giles-Flores commenced an adversary proceeding and Braeburn moved to dismiss, relying on a recent Supreme Court case, *Taggart v. Lorenzen*,[142] which held that civil contempt damages for violating the discharge injunction could only be imposed if there were no fair grounds for dispute that the injunction had been violated.[143] The Supreme Court case, however, had addressed the discharge injunction, not the automatic stay, and the bankruptcy court reasoned that it had not displaced Fifth Circuit authority, *Lopez v. City of Houston*,[144] that would have required Braeburn to have moved to lift the stay or at least seek guidance from the court before beginning to foreclose.[145] Accordingly, Braeburn prevailed and the motion to dismiss was denied.[146]

X. (ANOTHER) LAWYER TRICKED BY WIRE TRANSFER SCAM

This is a too-familiar story: a scammer tricks someone into wiring money abroad; scammer and money disappear.[147] Someone is left holding the bag.

This is what happened in *Cadence Bank, N.A. v. Elizondo*.[148] A lawyer was contacted by a stranger who sought the lawyer's help in a collection matter.[149] Apparently eager for the business, the lawyer may not have engaged in an extensive "know your client" undertaking.[150] In any event, the "client" contacted the lawyer soon thereafter, told the lawyer that the collection matter had been settled, and the lawyer received a check purportedly representing the proceeds of the settlement.[151] The "client" simultaneously told the lawyer that the funds had to be wired immediately to Japan, and the lawyer arranged for his bank to do just that after depositing the check in his IOLTA account.[152]

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140. *See id.* at 789–90.
141. *See id.*
142. Taggart v. Lorenzen, 139 S. Ct. 1795, 1798 (2019).
143. *See id.*; *In re Giles-Flores*, 646 B.R. at 789–90.
144. Lopez v. City of Houston, No. H-09-0420, 2009 WL 1456487, at *55 (S.D. Tex. May 22, 2009), *aff'd*, 617 F.3d 336 (5th Cir. 2010).
145. *See In re Giles-Flores*, 646 B.R. at 793–94 (explaining that the court is "bound by Fifth Circuit precedent").
146. *See id.* 795.
147. *See e.g.*, Perlberger Law Assocs., P.C. v. Wells Fargo Bank, N.A., 522 F. Supp. 3d 490, 492–493 (E. D. Pa. 2021).
148. 642 S.W.3d 530, 531 (Tex. 2022).
149. *See id.*
150. *See id.*
151. *See id.*
152. *See id.*

The bank completed forms before the money was wired.[153] Two versions of the form had been produced in discovery.[154] One of the versions contained a handwritten note that the lawyer's account had a $467,643.80 "Ava Bal" (available balance) and also read "verified @ 11:08 am."[155] This Section included the signature "S. Baker."[156] The term "collected balance" was not defined in the form.[157]

We know how this story ends. The check was no good, the money had been wired before the check had cleared, and the money had disappeared into Japan.[158] Normally, the lawyer would bear the loss.[159] Yet, the lawyer argued that the bank should bear the loss because of a form the lawyer had signed before the money was wired out.[160] Because of the language on the forms, the lawyer argued the bank was obligated to wire out only funds that had been collected because the form was an enforceable contract.[161] Because the bank had not waited for the check to clear, the bank had violated its internal policies, and the lawyer, he argued, had relied upon the form.[162]

The lower courts agreed.[163] The court of appeals concluded that the wire transfer form had created a binding contract under which the bank had promised to wire transfer only collected funds.[164] The case was appealed to the Texas Supreme Court.[165]

The supreme court did not agree with the lower courts, concluding that the applicable law is Section 4.214(a) of the UCC.[166] That Section provides:

> If a collecting bank has made provisional settlement with its customer for an item and fails by reason of dishonor . . . or otherwise to receive settlement for the item that is or becomes final, *the bank may revoke the settlement given by it, charge back the amount of any credit given for the item to its customer's account, or obtain refund from its customer* . . . .[167]

Moreover, the deposit agreement had provided, "We may deduct funds from your account if an item . . . is returned to us unpaid, or if it was improperly paid, even if you have already used the funds."[168]

153. *See id.* at 531–32.
154. *See id.* at 532.
155. *Id.*
156. *Id.*
157. *Id.*
158. *See id.*
159. *See id.* at 533.
160. *See id.*
161. *See id.* at 533–34.
162. *See id.*
163. *See* Cadence Bank v. Elizondo, 606 S.W.3d 802, 819 (Tex. App.—Houston [1st Dist.] 2020), *rev'd*, 642 S.W.3d 530 (Tex. 2022).
164. *See id.* at 815 ("This evidence shows that the parties entered into a valid and enforceable agreement.").
165. *Cadence Bank, N.A.*, 642 S.W.3d at 532.
166. *See id.* at 533.
167. *Id.* (emphasis in original); Tex. Bus. & Com. Code Ann. § 4.214(a).
168. *Cadence Bank, N.A.*, 642 S.W.3d at 533.

While the supreme court recognized that some courts have held that the UCC provisions might be varied by contract, here no contract had been formed by the mere inclusion of the term "collected balance" on a form designed to initiate the wire transfer.[169] The meaning of the term "collected balance" therefore did not matter.[170] The supreme court explained that "[e]ven if the record conclusively supported [the lawyer's] definition—which it does not—[they] would nonetheless hold that the transfer-request form was not 'sufficiently definite to confirm that [the bank] actually intended to be contractually bound' by a promise to only transfer 'collected' funds."[171]

Accordingly, the Texas Supreme Court reversed and remanded, with instructions to consider any outstanding issues not relating to the contract argument.[172]

XI. PRIORITY OF PURCHASE MONEY SECURITY INTERESTS

Generally, a purchase money security interest in goods other than inventory and livestock primes a non-purchase money security interest so long as the security interest is perfected within twenty days of the debtor having received the goods.[173] The question in *Agrifund, LLC v. First State Bank of Shallowater* was (1) what was the collateral?; and (2) what was the proceeds of the collateral?[174] Agrifund, LLC had been the first to perfect a security interest in a farming operation's crops.[175] Subsequently, First Bank of Shallowater (the Bank) had financed the purchase of cotton seed for that same operation.[176]

The problem here was that Agrifund had a prior perfected security interest in the crops.[177] The Bank had a (later) perfected security interest in the seed that had been used to grow the crops.[178] The Bank argued that it had priority because the cotton was the proceeds of the seed.[179] The court, however, rejected that argument.[180] As the court explained, "[t]he very term '*purchase money* security interest' denotes that the security interest must be taken in the items actually purchased.

The Bank's loan to the [farmers] did not enable them to purchase a crop; it enabled them to produce one."[181] Seed, the court explained, is just one of the many inputs that result in a cotton crop; chemicals, fertilizer, soil, water,

169. *See id.*
170. *See id.* at 535.
171. *Id.* (quoting Fischer v. CTMI, L.L.C., 479 S.W.3d 231, 237 (Tex. 2016)).
172. *See id.*
173. *See* Agrifund, LLC v. First State Bank of Shallowater, 662 S.W.3d 523, 527 (Tex. App.—Amarillo 2022, pet. filed).
174. *Id.* at 525–26.
175. *See id.*
176. *See id.*
177. *See id.*
178. *See id.*
179. *See id.*
180. *See id.* at 527.
181. *Id.* (emphasis in original).

and the farmer's labor are all necessary for the crop to be created.[182] For that reason, the Bank did not have a purchase money security interest in the crops and Agrifund had priority.[183]

A dissenter, who acknowledged he was "tilting at windmills," parsed the statute and concluded that, because the loan that enabled the farmers to purchase the seed had enabled the farmer to acquire an interest in the cotton, that loan should have priority and entitle because it was a purchase money loan.[184]

182. *See id.* at 527–28.
183. *See id.* at 528.
184. *See id.* at 531 (Quinn, J., dissenting).