COMPENDIUM UDPATE
August 31, 2018

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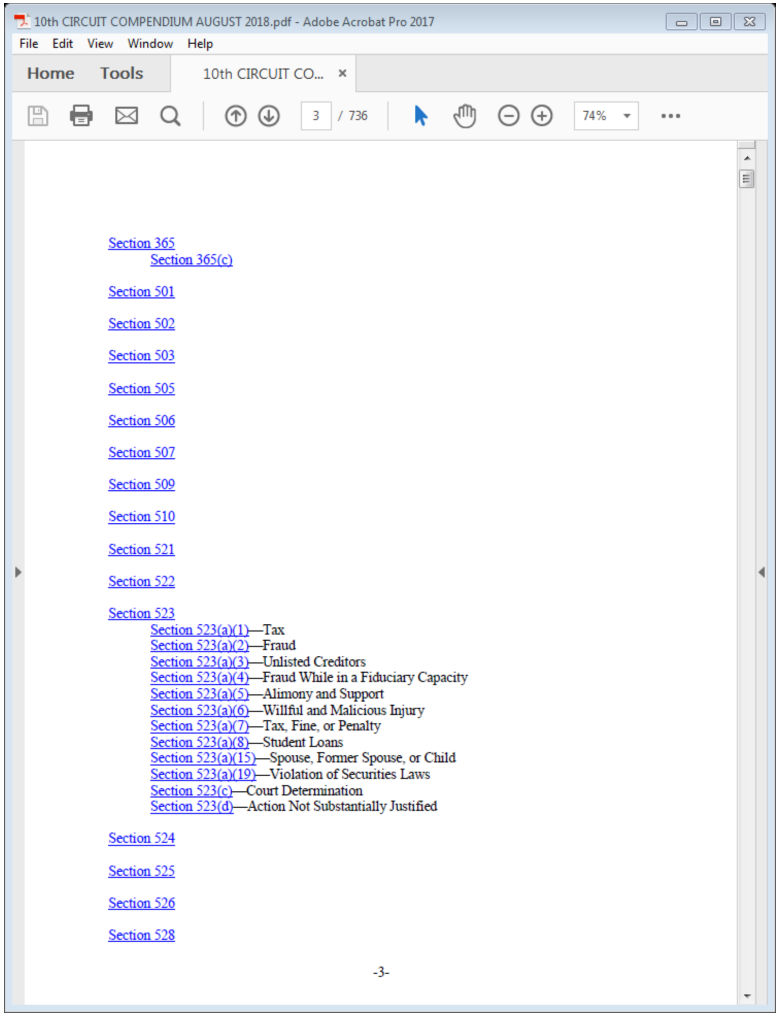
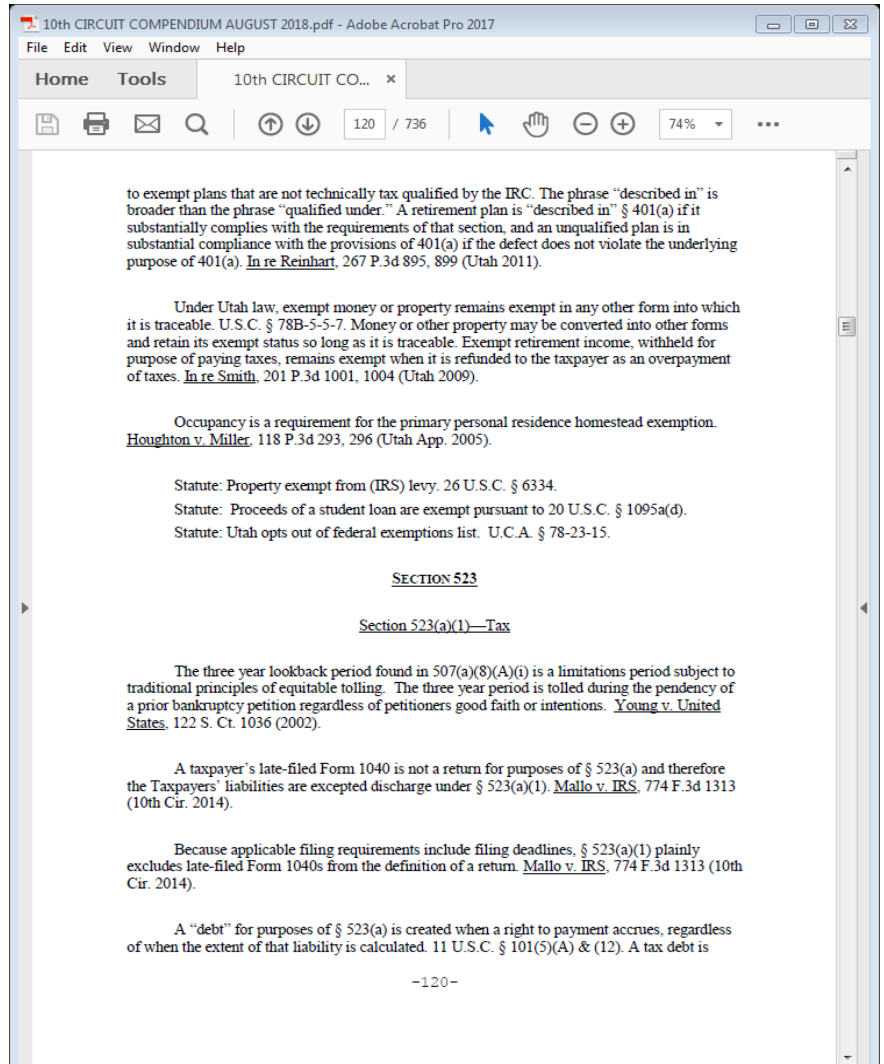
New Functionality & Improvements

- Hyperlinks from the Table of Contents to each heading and subheading.



New Functionality & Improvements

- More visible headings.



to exempt plans that are not technically tax qualified by the IRC. The phrase "described in" is broader than the phrase "qualified under." A retirement plan is "described in" § 401(a) if it substantially complies with the requirements of that section, and an unqualified plan is in substantial compliance with the provisions of 401(a) if the defect does not violate the underlying purpose of 401(a). In re Reinhart, 267 P.3d 895, 899 (Utah 2011).

Under Utah law, exempt money or property remains exempt in any other form into which it is traceable. U.S.C. § 78B-5-5-7. Money or other property may be converted into other forms and retain its exempt status so long as it is traceable. Exempt retirement income, withheld for purpose of paying taxes, remains exempt when it is refunded to the taxpayer as an overpayment of taxes. In re Smith, 201 P.3d 1001, 1004 (Utah 2009).

Occupancy is a requirement for the primary personal residence homestead exemption. Houghton v. Miller, 118 P.3d 293, 296 (Utah App. 2005).

Statute: Property exempt from (IRS) levy. 26 U.S.C. § 6334.

Statute: Proceeds of a student loan are exempt pursuant to 20 U.S.C. § 1095a(d).

Statute: Utah opts out of federal exemptions list. U.C.A. § 78-23-15.

SECTION 523

Section 523(a)(1)—Tax

The three year lookback period found in 507(a)(8)(A)(i) is a limitations period subject to traditional principles of equitable tolling. The three year period is tolled during the pendency of a prior bankruptcy petition regardless of petitioners good faith or intentions. Young v. United States, 122 S. Ct. 1036 (2002).

A taxpayer's late-filed Form 1040 is not a return for purposes of § 523(a) and therefore the Taxpayers' liabilities are excepted discharge under § 523(a)(1). Mallo v. IRS, 774 F.3d 1313 (10th Cir. 2014).

Because applicable filing requirements include filing deadlines, § 523(a)(1) plainly excludes late-filed Form 1040s from the definition of a return. Mallo v. IRS, 774 F.3d 1313 (10th Cir. 2014).

A "debt" for purposes of § 523(a) is created when a right to payment accrues, regardless of when the extent of that liability is calculated. 11 U.S.C. § 101(5)(A) & (12). A tax debt is

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New Functionality & Improvements

- Division of large sections into subparts, e.g., Rule 60(b) (ongoing).
- Organization of sections with broad, foundational principles first, more esoteric matter later. (ongoing).
- Available only in PDF.
- Suggestions for further improvement are always welcome.

WORD OF THE DAY

<u>abrogate</u> (**ab**-ruh-gāt), *vb.* To abolish (a law or custom) by formal or authoritative action; to annul or repeal. Cf. OBROGATE. – **abrogation,** *n.*

- *Abrogate*, BLACK'S LAW DICTIONARY (8th ed. 2005).

§ 523(a)(2)(B)

- Generally speaking, § 523(a)(2)(B) excepts debts from discharge that are obtained by:
  - Use of a written statement,
  - That is materially false,
  - Respecting the debtor's or insider's financial condition,
  - On which the creditor reasonably relied,
  - That the debtor made with intent to deceive.

§ 523(a)(2)(B)

What constitutes a statement "respecting the debtor's or an insider's financial condition"?

- Courts split on a broad vs. strict interpretation.
  - Broad: written statements concerning the condition or quality of a **single asset or liability** bearing on the debtor's financial picture.
  - Strict: written statements purporting to present a picture of the debtor's **overall financial health**, e.g., balance sheets, income statements, tax returns, etc.

§ 523(a)(2)(B)

- Tenth Circuit adopted the strict interpretation in Cadwell v. Joelson (In re Joelson), 427 F.3d 700 (10th Cir. 2005). At the time, it was the emerging viewpoint.
  - Though Joelson relied on the text of the statute, one argument made in favor of the strict interpretation was that it "promotes better bankruptcy policy, because narrowing the definition of financial condition in § 523(a)(2)(B) necessarily expands those statements, both written and oral, that do not relate to financial condition that fall within § 523(a)(2)(A) and better harmonizes the statute." Joelson, 427 F.3d at 712.
  - "[T]he strict view promotes better bankruptcy policy. Virtually any statement concerning an asset or liability arguably relates to financial condition. If drawn too broadly, the definition will sweep in many oral misrepresentations, and therefore exclude them from coverage under subdivision (A). These debtors will thereby escape the anti-discharge provisions completely." Weiss v. Alicea (In re Alicea), 230 B.R. 492 (Bankr. S.D.N.Y. 1999).

§ 523(a)(2)(B)

- Supreme Court abrogated Joelson by adopting the broad interpretation in Lamar, Archer & Cofrin, LLP v. Appling, 138 S.Ct. 1752 (2018).
  - The decision is a plain meaning reading of the statute, focusing intensely on the word "respecting," not "financial condition." The Court argued that the strict interpretation reads "respecting" out of the statute.
  - The statutory language [of § 523(a)(2)(B)] makes plain that a statement about a single asset can be a "statement respecting the debtor's financial condition." If that statement is not in writing, then the associated debt may be discharged, even if the statement is false.
  - A statement is "respecting" a debtor's financial condition if it has a direct relation to or impact on the debtor's overall financial status. A single asset has a direct relation to and impact on aggregate financial condition, so a statement about a single asset bears on a debtor's overall financial condition and can help indicate whether a debtor is solvent or insolvent, able to repay a given debt or not.

§ 523(a)(2)(B)

- <u>Consequences for the § 523(a)(2) "donut hole"?</u>
  - <u>Statutory donut hole:</u> False oral statements respecting a debtor's financial condition are not covered by § 523(a)(2)(A) since they concern the debtor's financial condition, but they are also not covered by § 523(a)(2)(B) because they aren't in writing. Instead, debts obtained by such statements are <u>**dischargeable**</u>.
  - The breadth of "respecting financial condition" determines the size of the donut hole.
  - <u>Joelson's</u> strict interpretation meant that false oral statements about a single asset could form the basis of a § 523(a)(2)(A) claim since the statement didn't concern financial condition.
  - Under <u>Appling's</u> broad interpretation, false oral statements about a single asset are now dischargeable because they concern financial condition.

§ 523(a)(2)(B)

- Consequences for the § 523(a)(2) "donut hole"?
  - While Appling's broad interpretation widened the donut hole and increased the class of dischargeable false **oral** statements under § 523(a)(2)(A) (as Joelson cautioned against), the dichotomy between § 523(a)(2)(A) and (B) means that Appling also increased the class of non-dischargeable false **written** statements under § 523(a)(2)(B).

§ 523(a)(2)(B)

- Policy Aftermath:
  - Joelson discussed the Supreme Court's Field v. Mans decision and it's statement that common-law torts lie at the heart of § 523(a)(2)(A). Joelson expressed concern that if the broad interpretation were adopted, it would render dischargeable many of these common-law torts. E.g., a seller's fraudulent misrepresentation to a buyer that land is free from encumbrances. Is that now dischargeable?
  - What did Appling have to say about policy?
    - Congressional intent of § 523(a)(2)(B) was to insulate debtors from abusive lending practices.
    - Does the broad interpretation further that goal?

§ 546(e)

- <u>Safe harbor provision:</u> protects transfers, i.e., insulates them from avoidance, where they are "made by or to (or for the benefit of) a . . . financial institution."
- How does the safe harbor work when the transfer was executed via multiple component parts?
  - E.g., suppose transfers A → B → C → D.
  - TR wants to avoid transfer A → D, which does not qualify for the safe harbor.
  - But transfer B → C qualifies for the safe harbor.
  - Should a court look at all components or just the transfer to be avoided in determining if the safe harbor applies?

§ 546(e)

- In Kaiser Steel Corp. v. Pearl Brewing Co. (In re Kaiser Steel Corp.), 952 F.2d 1230 (10th Cir. 1991), the Tenth Circuit found the safe harbor applied where a covered entity acted as an intermediary.
- Supreme Court abrogated Kaiser Steel's conclusion that intervening transfers "by or to" a stockbroker, financial institution, or clearing agency place the overarching transfer within the safe harbor. Merit Mgmt. Group, LP v. FTI Consulting, Inc., 138 S.Ct. 883 (2018).

§ 546(e)

- <u>Merit:</u> "The relevant transfer for purposes of the § 546(e) safe-harbor inquiry is the overarching transfer that the trustee seeks to avoid under one of the substantive avoidance provisions. . . . [The] component parts are simply irrelevant to the analysis under § 546(e). The focus must remain on the transfer the trustee [seeks] to avoid."

§ 546(e)

- Merit is another textualist case. While one party made an argument about congressional intent, the Court expressly repudiated the notion that this was the "type of case in which the Court would consider statutory purpose." Instead, the statutory language, plus its surrounding context, led the Court to conclude that the transfer at issue in § 546(e) is the one the trustee seeks to avoid.
- "If a trustee properly identifies an avoidable transfer, the court has no reason to examine the relevance of component parts when considering a limit to the avoiding power, where that limit is defined by reference to an otherwise avoidable transfer, as is the case with § 546(e)."

§ 362(a)(3) and (k)

- Does a creditor violate the stay by refusing to turn over property of the estate if it is only holding onto that asset?
  - The longstanding rule in this District, and the majority rule nationwide, was yes. See In re Jackson, 251 B.R. 597 (Bankr. D. Utah 2000) (Clark, J.). That rule was adopted by the BAP in In re Yates, 332 B.R. 1 (10th Cir. BAP 2005).
  - The Tenth Circuit abrogated Yates and adopted the minority rule in WD Equip., LLC v. Cowen (In re Cowen), 849 F.3d 943 (10th Cir. 2017).

§ 362(a)(3) and (k)

- Prior decisions, such as Jackson and Yates, focused on the "to exercise control" portion of § 362(a)(3) to conclude that refusing to turn over an asset was a stay violation. As Yates said, "if the exercise of control means anything, it means the ability to keep others from access to or use of an object."
- But Cowen emphasized the "any act" portion of § 362(a)(3). "Any act" is the modifier of the infinitive phrase "to exercise control," and an act, as commonly defined, means "to take action" or "do something." Since passively holding an asset isn't "doing something," it doesn't count as a violation of the automatic stay.

§ 362(a)(3) and (k)

- Cowen: Only affirmative acts to gain possession of, or to exercise control over, property of the estate violate § 362(a)(3). That section stays entities from *doing* something to obtain possession of or to exercise control over the estate's property. It does not cover the act of passively holding onto an asset, nor does it impose an affirmative obligation to turn over property to the estate.

§ 362(a)(3) and (k)

- <u>What remedies do debtors have?</u>
  - Seek turnover of the property. <u>Cowen</u> didn't decide whether § 542 is self-executing, but it suggested that courts could use their powers under § 105(a) to "provide equitable relief as necessary or appropriate to carry out the provisions of § 542(a)."
  - Civil contempt sanctions under § 105(a) may provide a substitute for damages under § 362(k).

§ 522(f)

- How is the lien avoidance calculation performed when the debtor has a non-filing co-obligor (typically a spouse) on debt encumbering an asset they own together?
- Specifically, is the joint debt allocated completely to the debtor or divided proportionally between the debtor and the non-filing co-obligor?
- Statutory language allocates the whole debt against the debtor's fractional interest in the property.

§ 522(f)

- In Ziegler Eng'g Sales, Inc. v. Cozad (In re Cozad), 208 B.R. 495 (10th Cir. BAP 1997), the BAP held that the entirety of the debt is allocated to the debtor even though there is a non-filing co-obligor.
- While admittedly faithful to the literal language of § 522(f), Cozad was the subject of much criticism. See In re Steinke, 522 B.R. 331 (Bankr. D. Colo. 2014).
  - First, Third, and Eleventh Circuits also disagreed with the literal approach, arguing that it ran contrary to legislative intent.

§ 522(f)

- The Tenth Circuit abrogated Cozad in William F. Sandoval Irrevocable Trust v. Taylor (In re Taylor), --- F.3d ----, 2018 WL 3849032 (10th Cir. 2018) by holding that the debt should be allocated proportionally.
- Taylor refers to Cozad once during the entire opinion to note that it "cursorily reasoned that 'all other liens on the property' refers to all liens including those that proportionally belong to a non-debtor joint owner."

§ 522(f)

- Taylor: The term “all other liens on the property” [in § 522(f)(2)] is most faithfully read as meaning the quantity of liens shared with a co-debtor fairly attributable to the debtor. We agree with our sibling circuits that the correct approach is to view the debtor as owning one half of the property to which one half of the mortgage debt is thus attributable and therefore to regard “property” in subsection (ii) to mean the debtor’s interest in the property and then to allocate the lien among the interests in the property proportionally. . . . [T]he impairment calculation must use the value of other liens on the home corresponding to the debtor’s percentage of ownership, rather than the full amount of the liens.

§ 522(f)

- Is Taylor textualist?
  - Taylor's textual argument is that property means the debtor's interest, so "all other liens on the **property**" means the debtor's interest, not the property as a whole.
  - But its conclusions are buttressed by policy: the Cozad approach would produce "an unreasonably high impairment that has the effect of creating additional equity for the debtor at the expense of the lienholder," which would "extend the protection Congress sought to provide debtors and distort priorities between creditors."

Structured Dismissals and Priority

- A distribution scheme ordered in connection with the dismissal of a Chapter 11 case [i.e., a structured dismissal] cannot, without the consent of the affected parties, deviate from the basic priority rules that apply under the primary mechanisms the Code establishes for final distributions of estate value in business bankruptcies. <u>Czyzewski v. Jevic Holding Corp.</u>, 137 S.Ct. 973, 978 (2017).

Structured Dismissals and Priority

- How broad is <u>Jevic's</u> holding?
  - In dissent, Thomas (joined by Alito) noted that the Court granted cert on the question of "whether a bankruptcy court may authorize the distribution of settlement proceeds in a manner that violates the statutory priority scheme."
  - After cert, however, the petitioners narrowed the question to "whether a Chapter 11 case may be terminated by a 'structured dismissal' that distributes estate property in violation of the Bankruptcy Code's priority scheme."

Structured Dismissals and Priority

- Though important, the decided question is narrower than, and different from, the one on which the Court granted cert.
- Jevic may signal the Court's concern for priority-skipping distributions of estate assets, no matter the context.
- What about short-sale carve-outs? Can proceeds go to the estate and skip junior lienholders or exemptions?

FDCPA Cases

- The definition of “debt collector” in 15 U.S.C. § 1692a(6) that encompasses any person who “regularly collects or attempts to collect . . . debts owed or due . . . another,” does not include individuals and entities who regularly purchase debts originated by someone else and then seek to collect those debts for their own account. Henson v. Santander Consumer USA Inc., 582 U.S. ----, ----, 137 S.Ct. 1718 (2017). N.B.: the Court expressly did not address whether such debt purchasers would fall within the alternative definition of “debt collector” in § 1692a(6), *i.e.*, any person engaged “in any business the principal purpose of which is the collection of any debts.” Id. at 1721.
- A creditor’s filing in a chapter 13 case of a proof of claim that on its face indicates that the limitations period has run is not a false, deceptive, misleading, unfair, or unconscionable debt collection practice within the meaning of the Fair Debt Collection Practices Act. Midland Funding, LLC v. Johnson, 581 U.S. ----, ----, 137 S.Ct. 1407, 1415-16 (2017).

Midland Funding

- The issue of filing stale claims in bankruptcy divided circuits, circuit panels, and the Supreme Court.
- Chief Judge Wood (7th Cir.) wrote a strong dissent in Owens v. LVNV Funding, LLC.
- "The reason this case is important is because the protections the majority believes exist in the bankruptcy courts are only as good as the human actors working in those courts."

Midland Funding

- At the Supreme Court, Justice Breyer joined Roberts, Kennedy, Thomas, and Alito in the majority. Sotomayor wrote a dissent, joined by Kagan and Ginsburg. (Gorsuch wasn’t involved in the case.)
- Sotormayor’s dissent is a defense of vulnerable debtors beset by aggressive and predatory debt collectors.
- “In the majority's view, the trustee's gatekeeping role makes it ‘considerably more likely that an effort to collect upon a stale claim in bankruptcy will be met with resistance, objection, and disallowance.’ The problem with the majority's *ipse dixit* is that everyone with actual experience in the matter insists that it is false. The Government, which oversees bankruptcy trustees, tells us that trustees “cannot realistically be expected to identify every time-barred ... claim filed in every bankruptcy.”

Zone of Interests Doctrine

- Facts of <u>Lee v. McCardle</u>:
  - Lees obtained state court judgments against Peepleses and sought to garnish distributions allegedly owed to Adam Peeples from a trust.
  - When McCardle, the trustee, said Peeples wasn't owed anything, Lee sued him in state court, arguing McCardle's undue influence over the settlor caused her to disinherit Peeples.
  - State court dismissed the case and awarded McCardle fees. While determination of the fees was pending, the Peepleses filed bankruptcy.
  - Lee moved to stay the state-court action, arguing that the automatic stay applied to his lawsuit against McCardle. The state court denied his motion and assessed fees.

Zone of Interests Doctrine

- Facts of <u>Lee v. McCardle</u>:
  - The Lees then filed an adversary proceeding in bankruptcy court, seeking (1) a declaratory judgment that the stay applied to the state-court lawsuit and (2) damages for the stay violation.
  - The bankruptcy court granted summary judgment to McCardle, holding that the automatic stay didn’t apply to the state-court lawsuit since Lee had asserted claims against McCardle, not Peeples.
- On appeal, the Tenth Circuit held that Section 362(a)’s zone of interests doesn’t extend to a creditor’s attempt to avoid attorney’s fees assessed against him in state court.

Zone of Interests Doctrine

The zone-of-interests doctrine isn't a matter of standing. . . instead, it merely asks whether a particular federal cause of action encompasses a particular plaintiff's claim. . . . To answer this question, we presume that a statute ordinarily provides a cause of action only to the plaintiffs whose interests fall within the zone of interests protected by the law invoked.

There's no single test to determine whether a cause of action falls within a statute's zone of interests; rather the breadth of the zone of interests varies according to the provisions of law at issue. . . . We must therefore use traditional tools of statutory interpretation to decide whether a claim falls within a particular statute's zone of interests.

[A party's] ability to redress [its] injury is irrelevant to the zone-of-interests analysis. The very point of the zone-of-interests doctrine is that not every injury traceable to the violation of a federal statute is remediable in the federal courts.

Because the zone-of-interests doctrine presumes congressional intent to limit causes of action, Congress can expand a statute's zone of interests with language indicating that a cause of action extends to a broader range of claims. <u>Lee v. McCardle (In re Peeples)</u>, 880 F.3d 1207, 1213-15 (10th Cir. 2018).

Rooker-Feldman Doctrine

- In the last 15 years, appellate courts have determined that lower courts have expanded the *Rooker-Feldman* doctrine beyond its original boundaries and have sought to cut it back.
- In particular, the complaint is that courts have confused it with and applied it alongside or in place of preclusion doctrines.
- But *Rooker-Feldman* does not "override or supplant preclusion doctrine." <u>Exxon Mobil Corp. v. Saudi Basic Industries Corp.,</u> 544 U.S. 280, 284 (2005).

Rooker-Feldman Doctrine

- *Rooker-Feldman* applies only when a party brings an action in federal court and seeks to change a state-court judgment because the state court got it wrong.
- When *Rooker-Feldman* does apply, it deprives lower federal courts of subject-matter jurisdiction.

Rooker-Feldman Doctrine

- *Rooker-Feldman* does not deprive a federal court of jurisdiction to hear a claim just because it could result in a judgment inconsistent with a state-court judgment. There is no *jurisdictional* bar to litigating the same dispute on the same facts that led to the state judgment. . . . [T]hat is a problem to be resolved under preclusion doctrine, not *Rooker-Feldman*. A party's claims in a later federal action could be barred by claim preclusion or issue preclusion. But the federal court has *jurisdiction* to determine whether there is such a bar. What *is* prohibited under *Rooker-Feldman* is a federal action that tries to *modify or set aside* a state-court judgment because the state proceedings should not have led to that judgment. Seeking relief that is *inconsistent* with the state-court judgment is a different matter, which is the province of preclusion doctrine. Mayotte v. U.S. Bank Nat'l Ass'n, 880 F.3d 1169, 1174-75 (10th Cir. 2018).

§ 727(a)(3)

A prima facie case under § 727(a)(3) requires a showing that a debtor failed to maintain and preserve adequate records and that the failure made it *impossible* to ascertain his or her financial condition and *material* business transactions. If a creditor or trustee meets this initial burden, the burden then shifts to the debtor to justify his or her failure to maintain the records.

The scope of the debtor's duty to maintain records depends on the nature of the debtor's business and the facts and circumstances of each case. When a debtor carries on a business involving substantial assets, greater and better record keeping is warranted. Martinez v. Sears (In re Sears), 565 B.R. 184, 189-90 (10th Cir. BAP 2017).

Discovery Sanctions

- Discovery sanctions under Rule 37(c)(1) require an analysis of the Woodworker's [Woodworker's Supply, Inc. v. Principal Mutual Life Ins. Co., 170 F.3d 985, 993 (10th Cir. 1999)] factors: (1) prejudice or surprise to the party against whom the testimony is offered; (2) the ability of the party to cure the prejudice; (3) the extent to which introducing such testimony would disrupt the trial; and (4) the moving party's bad faith or willfulness. HCG Platinum, LLC v. Preferred Product Placement Corp., 873 F.3d 1191, 1206 (10th Cir. 2017).
- But where the exclusion of evidence under Rule 37(c)(1) has the necessary effect of a dismissal, courts should, in conjunction with the traditional Woodworker's inquiry, carefully explore and consider the efficacy of less drastic alternatives, ordinarily reserving the extreme sanction of dismissal for cases involving bad faith or willfulness or instances where less severe sanctions would obviously prove futile. HCG Platinum, LLC v. Preferred Product Placement Corp., 873 F.3d 1191, 1206 (10th Cir. 2017).

Jurisdictional Time Bars

- Hamer v. Neighborhood Housing Services of Chicago, 583 U.S. ----, ----, 138 S.Ct. 13, 17, 20 (2017).
  - Jurisdictional time bars vs. mandatory claim-processing rules.
  - Is it prescribed by Congress? Does it appear in a statute?
  - Jurisdictional time bars cannot be waived. Can be raised at any time. Courts must raise them *sua sponte* because they deprive courts of adjudicatory authority.

Jurisdictional Time Bars

- <u>Hamer:</u> A provision governing the time to appeal in a civil action qualifies as jurisdictional only if Congress sets the time. A time limit not prescribed by Congress ranks as a mandatory claim-processing rule, serving to promote the orderly progress of litigation by requiring that the parties take certain procedural steps at certain specified times. . . . If a time prescription governing the transfer of adjudicatory authority from one Article III court to another appears in a statute, the limitation is jurisdictional; otherwise, the time specification fits within the claim-processing category. . . . Failure to comply with a jurisdictional time prescription deprives a court of adjudicatory authority over the case, necessitating dismissal—a drastic result. The jurisdictional defect is not subject to waiver or forfeiture and may be raised at any time in the court of first instance and on direct appeal. In contrast to the ordinary operation of our adversarial system, courts are obliged to notice jurisdictional issues and raise them on their own initiative. Mandatory claim-processing rules are less stern. If properly invoked, mandatory claim-processing rules must be enforced, but they may be waived or forfeited.

§ 506(c) Surcharging

Section 506(c) is an exception to the general rule that the expenses of administration may not be surcharged against secured collateral. The party seeking a § 506(c) surcharge bears the burden of proving (1) the expenditure was necessary, (2) the amounts expended were reasonable, and (3) the creditor benefited from the expenses. The benefit to the secured creditor must be "concrete" and "quantifiable." <u>Peters v. Clark (In re Bryan)</u>, 857 F.3d 1078, 1093 (10th Cir. 2017).

Expenses incurred contesting the validity of a secured creditor's lien cannot be said to provide a "benefit" to that secured creditor within the meaning of § 506(c). <u>Peters v. Clark (In re Bryan)</u>, 857 F.3d 1078, 1082 (10th Cir. 2017).

Rule 60(b)(6)

- Relief under Rule 60(b)(6) is available only in 'extraordinary circumstances.' In determining whether extraordinary circumstances are present, a court may consider a wide range of factors. These may include, in an appropriate case, the risk of injustice to the parties and the risk of undermining the public's confidence in the judicial process. <u>Buck v. Davis</u>, 580 U.S. ----, ----, 137 S.Ct. 759, 777-78 (2017).