

Avoiding the Bankruptcy Code's Ratable Distribution Scheme

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There are very limited circumstances in which a purported unsecured creditor of a debtor in bankruptcy can extract itself from the statutory scheme that gives priority first among unsecured creditors holding claims in the categories identified in 11 USC Section 507(a) and then to nonpriority unsecured creditors.¹ In part, this is because of the strong policy in favor of ratable distribution among similarly situated creditors.² Such circumstances exist, however, when the purported creditor establishes that it is not really a creditor at all but instead is the beneficiary of an express, implied, or statutory trust relationship, under which alleged assets are collected in trust by the debtor for the benefit of the beneficiary and then paid to the beneficiary under applicable state or federal trust law.

Under 11 USC Section 541, the debtor's estate consists of all of the "legal or equitable interests of the debtor in property as of the commencement of the case," "wherever [such property is] located and by whomever held."³ However, the legislative history of Section 541 clearly states that assets held by a debtor in trust for a third party are not part of the debtor's bankruptcy estate.⁴ As one court observed, "Congress plainly excluded property of others held by the debtor in trust at the time of the filing of the petition."⁵

Understanding the applicability of these principles requires an awareness of what constitutes the types of trusts recognized by bankruptcy courts, which include statutory⁶ as well as express and implied trusts. An express trust, according to one court, is "a fiduciary relationship with respect to property, subjecting the person by whom the title to property is held to equitable duties to deal with the property for the benefit of another person, which arises as a result of a manifestation of an intention to create it."⁷ Another court noted, "An express trust may be created 'without the use of technical words.'"⁸ Nevertheless, the everyday dealings

between parties can establish a debtor-creditor relationship notwithstanding the existence of an express trust relationship between them.⁹

A trust that is implied may be a constructive trust or a resulting trust. One court wrote, "A constructive trust is an equitable remedy designed to prevent unjust enrichment, and restore legal title to one who, in equity, owns the res."¹⁰ One species of a constructive trust occurs when a debtor has obtained property by fraud and that property is identifiable.¹¹ However, as to alleged trust assets in the debtor's possession on the petition date, the constructive trust remedy is typically useless, unless the constructive trust was imposed pre-petition by a court. Many courts have held that the remedy of a constructive trust will not be awarded postpetition because the remedy is "inchoate" as of the petition date and because the trustee's strong arm powers under 11 USC Section 544(a) generally are superior to that remedy under the laws of most states.¹² If a court has imposed a constructive trust against certain assets pre-petition or has issued an order for specific performance from which a constructive trust must be inferred, bankruptcy courts exclude the assets in question from the debtor's estate,¹³ although there is limited authority to the contrary.

Resulting trusts also are implied trusts, but they differ from constructive trusts: "A resulting trust arises by operation of law to enforce the inferred intention of the parties to the transaction."¹⁴ The parties' intentions can be ascertained from the language of the parties, but intentions also can be determined from the parties' conduct.¹⁵ The trust proponent need not show an actual intent to establish a resulting trust, but it "must prove the absence of an intent for the transferee to have a beneficial interest in the property."¹⁶ Resulting trusts often arise in the "straw man" real estate transaction, in which one person takes title after consideration for the

purchase is provided by another.¹⁷

There are various other circumstances, however, under which a resulting trust is created, including the failure of an express trust due to an invalidity, such as lack of a definite purpose or legality or if the trustee of an express trust has remaining property after a trust is fully performed.¹⁸ Once a resulting trust is implied by law to carry out the intention of the parties, the trustee's only purpose is to hold or convey the trust assets to the beneficiary.¹⁹ The bankruptcy policy of ratable distribution has not been viewed as applicable to resulting trusts.²⁰ However, even a determination that there is a resulting trust does not always eliminate a bankruptcy estate's interest in the asset. The assets subject to a resulting trust will remain in the estate if applicable state law provides a lienholder or a bona fide purchaser with superior rights to the beneficiary of the resulting trust. For example, a trustee may use Section 544(a)(3) to avoid an unrecorded resulting trust interest in real property under Florida law.²¹

Finally, while equitable liens occasionally have been recognized by bankruptcy courts,²² they are conceptually different from trusts. Pursuant to 11 USC Section 541(d), the better-reasoned cases hold that "[i]f the debtors do not have an equitable interest" in the asset in question, then "the trustee takes only bare legal title subject to equitable encumbrances that can be proved."²³ Express, implied (resulting or constructive), and statutory trusts all form grounds for excluding property from a bankruptcy estate. The existence of an equitable lien, however, should not prevent the debtor's bare legal interest from becoming an asset of the debtor's estate. Instead, the equitable lien "is simply a charge upon the property, which charge subjects the property to the payment of the debt of the creditor in whose favor the charge exists."²⁴ That conceptual distinction may limit the rights of an equitable lienholder to being paid on its equitable lien from the proceeds of the sale of the asset rather than being able to prevent the sale.²⁵

Tracing Alleged Trust Funds

If an alleged trust beneficiary has consented to a debtor commingling alleged trust funds with its general revenues rather than

requiring the segregation of the alleged trust funds, courts are reluctant to determine that an implied trust exists, because consent to commingling typically creates a debtor-creditor relationship.²⁶ This is even more true in the context of an express trust, when courts have found a beneficiary's implied or express consent to commingling to be inconsistent with the existence of an express trust.²⁷ In circumstances in which it would be unduly burdensome to segregate alleged trust funds, however, courts have found that the commingling of funds does not preclude the existence of an implied trust.²⁸ Further, a long-term course of dealing between parties has been deemed to result in a trust relationship despite the commingling of funds.²⁹

If a trust relationship with a debtor is shown and the debtor has wrongfully commingled alleged trust funds without the trust beneficiary's consent, the court usually will impose tracing requirements regarding the commingled funds.³⁰ Indeed, wrote one court, "The remedies of constructive trust, sequestration, and the like cannot be applied, however, where the subject res cannot be traced or presently identified, and the interests of numerous other similarly-situated claimants are implicated."³¹ This involves meeting the "lowest intermediate balance" test, described by a court as "[t]he normal procedure for tracing trust proceeds which have been commingled in a bank account."³² When that test is applied to trust funds that have been commingled with other funds, the trust fund is treated as lost if all funds are withdrawn. However, if the amount on deposit is reduced below the amount of the trust fund but is not depleted, the trust fund claimant is entitled to the lowest intermediate balance in the account—based upon the fiction that non-trust fund monies have been withdrawn first.³³

The timing of the collection of alleged trust funds is a critical factor in tracing the funds and the trust beneficiary's ability to recover. First, if the funds have been collected pre-petition by a debtor, commingled with the debtor's general revenues, and spent pre-petition, the funds will be gone when the debtor files a bankruptcy petition, and the trust beneficiary will be left with a pre-petition unsecured claim arising from the wrongful diversion of trust funds.

Second, if the funds have been collected pre-petition and tracing proves that those funds are still held in the debtor's account on the petition date, then the alleged trust res still exists, against which the trust may be imposed.³⁴ If the collected trust funds remain in the debtor's control as of the petition date and later are used for the debtor's benefit, then the trust beneficiary may hold an administrative expense claim.

Third, if the funds have been collected postpetition, tracing will not be as important, because it is a virtual certainty that all such funds will be deposited in the debtor's postpetition accounts. In these circumstances, the trust beneficiary should have an administrative expense claim under 11 USC Section 507(a)(1)(A) to the extent any such funds have been spent by the debtor.³⁵

Recognition of Trusts

Bankruptcy courts agree that they are required to apply nonbankruptcy law to determine whether a trust relationship exists. That nonbankruptcy law typically is the law of the relevant state,³⁶ but it may be federal law if there are significant federal interests involved.³⁷

In choosing whether to apply federal common law, courts have applied the generally accepted criteria of whether there is a "significant conflict between some federal policy or interest and the use of state law,"³⁸ and whether a "unique federal interest exists"³⁹ that would warrant the application of federal common law. The cases in which the Supreme Court has created and applied federal common law are few and restricted,⁴⁰ and they are "limited to situations where there is a 'significant conflict between some federal policy or interest and the use of state law.'"⁴¹ There are, however, cases in which bankruptcy courts have chosen to apply federal common law.⁴²

Bankruptcy courts have recognized statutory trusts under two federal laws—the Perishable Agricultural Commodities Act of 1930,⁴³ and the Packers and Stockyards Act⁴⁴—as well as under state laws that protect subcontractors and suppliers.⁴⁵ Bankruptcy courts also have enforced express trusts in various contexts, including joint deposit

accounts,⁴⁶ prepaid affordable college tuition contracts,⁴⁷ funds held by a loan servicing agent,⁴⁸ and properly funded escrow accounts.⁴⁹

Courts, however, have wrestled with finding implied trusts, especially constructive trusts. The biggest hurdle typically faced by the alleged beneficiary of a constructive trust is that the beneficiary is viewed as a mere creditor when the remedy of a constructive trust has not been imposed pre-petition against the debtor and the assets in question. Nevertheless, "[s]ome courts have concluded that pursuant to section 541(d), where the debtor holds property under conditions in which state law would impress a constructive trust, the property never becomes property of the estate and the trustee's strong arm powers cannot defeat the creditor's equitable interest."⁵⁰ On the other hand, "[o]ther courts have found that section 541(d) does not limit a trustee's avoidance powers so that the trustee may avoid the previously undeclared equitable interest of a constructive trust claimant."⁵¹ Applying Virginia law, however, one court has found that a trustee held title to real property subject to a constructive trust interest of a third party even though a pre-petition judgment had not been entered.⁵² Similarly, in a recent decision, a constructive trust was enforced under Illinois law against personal property in the debtor's name, notwithstanding the lack of a pre-petition judgment. The court reached this decision because the constructive trust was deemed to arise at the time of the wrong rather than at the time of the judicial imposition of the remedy, and because the rights of a hypothetical lien creditor under Illinois law are not superior to the rights of the beneficiary of the constructive trust.⁵³

Constructive trusts also have been imposed for purposes of determining whether the property of the debtor was transferred pre-petition in the context of a voidable preference action, though courts may require the creditor to trace the funds that the debtor had wrongfully withheld.⁵⁴ One court imposed a constructive trust postpetition against traceable funds in favor of a group of insurers, notwithstanding the fact that a constructive trust had not been judicially imposed before the bankruptcy filing. The funds had been received pre-petition by the debtor to reimburse it for damages covered by the

insurers.⁵⁵

Similarly, one divided court of appeal recently found that the nondebtor spouse was entitled to the remedy of a constructive trust against community assets when the debtor spouse filed for bankruptcy, notwithstanding the fact that neither a pre-petition division of marital property nor a pre-petition state court order had occurred.⁵⁶ The court, however, distinguished the case before it “from those cases in which the courts have concluded that the filing of a bankruptcy petition cut off the unrecorded equitable rights of a non-debtor spouse” on the grounds that the trustee did not attempt to avoid the nondebtor spouse’s interest in the IRA that was at issue but instead supported the award.⁵⁷ Thus, it would appear that a nondebtor spouse’s inchoate constructive trust claim against marital property that is the subject of a debtor spouse’s bankruptcy estate may not survive the trustee’s strong arm powers in the context of chapter 7 or chapter 11 cases, if those powers are available to the trustee and the trustee asserts them.

Resulting trusts, which give effect to the parties’ inferred intentions, have been imposed by bankruptcy courts in many contexts:

- A van paid for by the debtor, registered in the debtor’s name, and used exclusively by the debtor’s boyfriend.⁵⁸
- A certificate of deposit that was titled a “Joint Account with Right of Survivorship” and that named the debtor as one of four individuals on the account.⁵⁹
- Commingled utility payments collected by a chapter 11 debtor department store, though the utility company was required to trace those funds and they were subject to the “lowest intermediate balance” test.⁶⁰
- Real property to which debtors held bare legal title because it was placed in their names to avoid acreage restrictions on an irrigation district, and the property was paid for by the parents of one of the debtors.⁶¹
- Bringing real and personal property into a bankruptcy estate after that property had been transferred by a debtor to a nondebtor spouse and a nondebtor family partnership.⁶²

An analogous nonbankruptcy circumstance in which courts have found implied trusts occurs in SEC receivership actions, when investors’ monies have been collected under a Ponzi scheme operated by the debtor but certain investors’ monies have remained segregated and are traceable.⁶³ However, “[c]ourts have favored pro rata distribution of assets where, as here, the funds of the defrauded victims were commingled and where victims were similarly situated with respect to their relationship to the defrauders.”⁶⁴

Any practitioner who has litigated the existence of a trust relationship in bankruptcy court undoubtedly has been met with comments about how the recognition of a trust relationship would have the effect of preferring the “trust creditor” over other creditors and would reduce the distribution to other creditors, especially in chapter 7 cases or liquidating chapter 11 cases. However, a similar effect occurs as a result of the recognition of secured debt, reclamation rights, and setoff rights. If a trust relationship exists, the trust beneficiary can and should receive the appropriate recognition, rather than having its trust claim viewed with skepticism. After all, a secured creditor and a creditor with reclamation or setoff rights are mere creditors, whereas a trust beneficiary is not even a creditor. Instead, a trust beneficiary simply asks that the court recognize that the debtor and the debtor’s estate should not be allowed to wrongfully convert the trust beneficiary’s assets to the benefit of the debtor and its creditors. Proper application of federal and state law should assist in the fair recognition of that right.

¹ 11 U.S.C. §§507(a), 726(a).

² *Torres v. Eastwick* (In re N. Am. Coin & Currency, Ltd.), 767 F. 2d 1573, 1575 (9th Cir. 1985); *Carlson Orchards, Inc. v. Linsey* (In re Linsey), 296 B.R. 582, 586 (Bankr. D. Mass. 2003).

³ 11 U.S.C. §541(a)(1).

⁴ H.R. Rep. No. 595, 95th Cong., 1st Sess. 368 (1977); S. Rep. No. 989, 95th Cong., 2d Sess. 82 (1977), *reprinted in* 1978 U.S. Code Cong. & Admin. News 5787, 6324.

⁵ *United States v. Whiting Pools, Inc.*, 462 U.S. 198, 205 (1983).

⁶ *In re McGee*, 258 B.R. 139, 145-46 (Bankr. D. Md. 2001) (identifying various statutory trusts); *Texas Comptroller of Pub. Accounts v. Megafoods Stores, Inc.* (In re Megafoods Stores, Inc.), 163 F. 3d 1063,

1067 (9th Cir. 1998) (statutory trust for collected sales taxes); *In re Regional Bldg. Sys., Inc.*, 273 B.R. 423, 440 n.21 (Bankr. D. Md. 2001) (statutory trust in favor of subcontractor). *But see* *Spinoso v. Heilman* (In re Heilman), 241 B.R. 137, 162 (Bankr. D. Md. 1999); *Bezner v. United Jersey Bank* (In re Midway, Inc.), 166 B.R. 585, 591-92 (Bankr. D. N.J. 1994).

⁷ *LFD Operating, Inc. v. Ames Dep't Stores, Inc.* (In re Ames Dep't Stores, Inc.), 274 B.R. 600, 623 (Bankr. S.D. N.Y. 2002) (citation omitted).

⁸ *Old Republic Nat'l Title Ins. Co. v. Tyler* (In re Dameron), 155 F. 3d 718, 722 (4th Cir. 1998) (citation omitted).

⁹ *In re Morales Travel Agency*, 667 F. 2d 1069, 1072 (1st Cir. 1981).

¹⁰ *Tekinsight.Com, Inc. v. Stylesite Mktg., Inc.* (In re Stylesite Mktg., Inc.), 253 B.R. 503, 508 (Bankr. S.D. N.Y. 2000); *accord*, *Moon v. Anderson* (In re Hixon), 295 B.R. 866, 871 (B.A.P. 8th Cir. 2003).

¹¹ *Manty v. Miller & Holmes, Inc.* (In re Nation-Wide Exch. Servs.), 291 B.R. 131, 144 (Bankr. D. Minn. 2003).

¹² *Airwork, Inc. v. Markair Express, Inc.* (In re Markair, Inc.), 172 B.R. 638, 642 (B.A.P. 9th Cir. 1994).

¹³ *Poss v. Morris* (In re Morris), 260 F. 3d 654, 668 (6th Cir. 2001); *In re Indian River Estates, Inc.*, 293 B.R. 429, 436-37 (Bankr. N.D. Ohio 2003).

¹⁴ *Markair*, 172 B.R. at 641.

¹⁵ *In re Penn Cent. Transp. Co.*, 486 F. 2d 519, 524 (3d Cir. 1973), *cert. denied*, 415 U.S. 990 (1974).

¹⁶ *Mazer v. Jones* (In re Jones), 184 B.R. 377, 382 (Bankr. D. N.M. 1995).

¹⁷ *Sacramento Real Estate Corp. v. First Chi. Bank, Ravenswood* (In re Sacramento Real Estate Corp.), 201 B.R. 225, 233 (Bankr. N.D. Ill. 1996).

¹⁸ *Bainbridge v. Stoner*, 16 Cal. 2d 423, 428 (1940); *accord*, *Weiner v. A.G. Minzer Supply Corp.* (In re UDI Corp.), 301 B.R. 104, 112 (Bankr. D. Mass. 2003).

¹⁹ *Bainbridge*, 16 Cal. 2d at 428.

²⁰ *Siegel v. Boston* (In re Sale Guar. Corp.), 220 B.R. 660, 667 (B.A.P. 9th Cir. 1998).

²¹ *In re Loewen Group Int'l, Inc.*, 292 B.R. 522, 527 (Bankr. D. Del. 2003).

²² *Swanson v. Stoffregen* (In re Stoffregen), 206 B.R. 939, 944 (Bankr. E.D. Wis. 1997).

²³ *Lubman v. Wells* (In re Wells), 296 B.R. 728, 732-33 (Bankr. E.D. Va. 2003).

²⁴ *In re Surplus Furniture Liquidators, Inc. of High Point*, 199 B.R. 136, 145 (Bankr. M.D. N.C. 1995) (citation omitted).

²⁵ *Id.* at 145.

²⁶ *Foothill Capital Corp. v. Clare's Food Mkt., Inc.* (In re Coupon Clearing Serv., Inc.), 113 F. 3d 1091, 1100 (9th Cir. 1997).

²⁷ *Evans Fur Co. of Houston, Inc. v. Chase Manhattan Bank, N.A.* (In re Sakowitz, Inc.), 949 F. 2d 178, 182 (5th Cir. 1991); *LFD Operating, Inc. v. Ames Dep't Stores, Inc.* (In re Ames Dep't Stores, Inc.), 274 B.R. 600, 623 (Bankr. S.D. N.Y. 2002).

²⁸ *Official Comm. of Unsecured Creditors of the Columbia Gas Transmission Corp. v. Columbia Gas Sys. Inc.* (In re Columbia Gas Sys. Inc.), 997 F. 2d 1039, 1061 (3d Cir. 1993); *In re Penn Cent. Transp. Co.*, 486 F. 2d 519, 522, 525 (3d Cir. 1973), *cert. denied*, 415 U.S. 990 (1974).

²⁹ *ShIPLEY Co., Inc. v. Darr* (In re Tap, Inc.), 52 B.R. 271, 277 (Bankr. D. Mass. 1985); *Firestone Tire & Rubber Co. v. Goldblatt Bros., Inc.* (In re Goldblatt Bros., Inc.), 33 B.R. 1011, 1014-15 (Bankr. N.D. Ill. 1983), *appeal dismissed*, 758 F. 2d 1248 (7th Cir. 1985); *Weiner v. A. G. Minzer Supply Corp.* (In re UDI Corp.), 301 B.R. 104, 114 (Bankr. D. Mass. 2003).

³⁰ *In re JD Servs., Inc.*, 284 B.R. 292, 297-98 (Bankr. D. Utah 2002); *LFD Operating*, 274 B.R. at 625-26 n.16.

³¹ *Manty v. Miller & Holmes, Inc.* (In re Nation-Wide Exch. Servs.), 291 B.R. 131, 144 (Bankr. D. Minn. 2003).

³² *Carlson Orchards, Inc. v. Linsey* (In re Linsey), 296 B.R. 582, 586 (Bankr. D. Mass. 2003).

³³ *Id.*

³⁴ *Golden Mortgage Fund #14 v. Kennedy* (In re Golden Triangle Capital, Inc.), 171 B.R. 79, 82 (B.A.P. 9th Cir. 1994).

³⁵ *In re JD Servs., Inc.*, 284 B.R. at 299; *Firestone Tire & Rubber Co. v. Goldblatt Bros., Inc.* (In re Goldblatt Bros., Inc.), 33 B.R. 1011, 1013 (Bankr. N.D. Ill. 1983), *appeal dismissed*, 758 F. 2d 1248 (7th Cir. 1985).

³⁶ *Butner v. United States*, 440 U.S. 48, 55 (1979).

³⁷ *City of Springfield v. Ostrander* (In re Lan Tamers, Inc.), 329 F. 3d 204, 214 (1st Cir. 2003).

³⁸ *O'Melveny & Myers v. FDIC*, 512 U.S. 79, 87 (1994) (citation omitted).

³⁹ *Ledo Fin. Corp. v. Summers*, 122 F. 3d 825, 829 (9th Cir. 1997).

⁴⁰ *O'Melveny & Myers*, 512 U.S. at 87.

⁴¹ *Id.* (citation omitted).

⁴² For interline rail carriers, see *Missouri Pac. R.R. Co. v. Escanaba & Lake Superior R.R. Co.*, 897 F. 2d 210 (6th Cir. 1990); *but see* *Union Pacific R.R. Co. v. Moritz* (In re Iowa R.R. Co.), 840 F. 2d 535 (7th Cir. 1988), *cert. denied*, 488 U.S. 899 (1988). For motor carriers, see *Parker Motor Freight, Inc. v. Fifth Third Bank*, 116 F. 3d 1137, 1140 (6th Cir. 1997); *but see* *Delta Pride Catfish, Inc. v. Marine Midland Bus.*

Loans, Inc., 767 F. Supp. 951, 962-63 (E.D. Ark. 1991). For refunds due to natural gas customers by a power company, *see* Official Comm. of Unsecured Creditors of the Columbia Gas Transmission Corp. v. Columbia Gas Sys. Inc. (In re Columbia Gas Sys. Inc.), 997 F. 2d 1039, 1055 (3d Cir. 1993). For proceeds from overfunded pension plans, *see* EBS Pension L.L.C. v. Edison Bros. Stores, Inc. (In re Edison Bros. Stores, Inc.), 243 B.R. 231, 237 (Bankr. D. Del. 2000).

⁴³ 7 U.S.C. §499e(c)(1980).

⁴⁴ 7 U.S.C. §§196 et seq. (1976).

⁴⁵ In re McGee, 258 B.R. 139, 145-46 (Bankr. D. Md. 2001).

⁴⁶ T & B Scottsdale Contractors, Inc. v. United States, 866 F. 2d 1372, 1376 (11th Cir. 1989).

⁴⁷ Darby v. McGregor (In re Darby), 226 B.R. 126, 129 (Bankr. M.D. Ala. 1998).

⁴⁸ Golden Mortgage Fund #14 v. Kennedy (In re Golden Triangle Capital, Inc.), 171 B.R. 79, 83 (B.A.P. 9th Cir. 1994).

⁴⁹ Murphy v. Arrow Elecs., Inc. (In re RISCmanagement, Inc.), 304 B.R. 566, 580-89 (Bankr. D. Mass. 2004) (collected citations).

⁵⁰ Gurley v. Mills (In re Gurley), 222 B.R. 124, 135 (Bankr. W.D. Tenn. 1998).

⁵¹ *Id.*

⁵² Lubman v. Wells (In re Wells), 296 B.R. 728, 734 (Bankr. E.D. Va. 2003).

⁵³ In re DVI, Inc., 306 B.R. 496, 503 (Bankr. D. Del. 2004).

⁵⁴ Mitsui Mfrs. Bank v. Unicom Computer Corp. (In re Unicom Computer Corp.), 13 F. 3d 321, 325 n.5 (9th Cir. 1994).

⁵⁵ American Hull Ins. Syndicate v. U.S. Lines, Inc. (In re U.S. Lines, Inc.), 79 B.R. 542 (Bankr. S.D. N.Y. 1987).

⁵⁶ Davis v. Cox, 356 F. 3d 76, 84 (1st Cir. 2004).

⁵⁷ *Id.* at 92 (collected citations).

⁵⁸ In re Amos, 201 B.R. 184, 187-88 (Bankr. N.D. Ohio 1996). *But see* In re Ward, 300 B.R. 692, 696-99 (Bankr. S.D. Ohio 2003).

⁵⁹ In re Goldstein, 135 B.R. 703, 705 (Bankr. S.D. Fla. 1992).

⁶⁰ Pennsylvania Power & Light Co. v. Globe Store Acquisition Co., Inc. (In re Globe Store Acquisition Co., Inc.), 178 B.R. 400, 403 (Bankr. M.D. Pa. 1995).

⁶¹ Torrez v. Torrez (In re Torrez), 63 B.R. 751, 754 (B.A.P. 9th Cir. 1986).

⁶² McGavin v. Segal (In re McGavin), 189 F. 3d 1215, 1218 (10th Cir. 1999). *But see* Feinman v. Lombardo, 214 B.R. 260, 267 (D. Mass. 1997).

⁶³ SEC v. Credit Bancorp, Ltd., 290 F. 3d 80, 90 (2d Cir. 2002).

⁶⁴ *Id.* at 88-89.