

10TH CIRCUIT CONTROLLING CASE LAW - BANKRUPTCY¹

(Highlights from 2009 and 2010)

2010

Pg 41 - This Court has established six important rules to apply when a performance enhancement is sought in a fee application: 1) a "reasonable" fee is one that is sufficient to induce a capable attorney to undertake the representation; 2) there is a "strong" presumption that the lodestar method yields a sufficient fee; 3) an enhancement may be awarded in "rare" and "exceptional" circumstances; 4) the lodestar includes most, if not all, of the relevant factors constituting a "reasonable" attorney's fee. An enhancement may not be based on a factor that is subsumed in the lodestar calculation, such as the case's novelty and complexity, or the quality of an attorney's performance; 5) the burden of proving that an enhancement is necessary must be borne by the fee applicant; 6) an applicant seeking an enhancement must produce "specific evidence" supporting the award to assure that the calculation is objective and capable of being reviewed on appeal. Perdue v. Kenny, 130 S.Ct. 1662 (2010).

Pg 42 - We decline to adopt a rule that prohibits a highly experienced, nationally prominent lawyer from serving as co-counsel where another attorney with arguably commensurate experience is available from co-counsel's firm. There is nothing inherently unreasonable about a client having multiple attorneys. Anchondo v. Anderson, Crenshaw & Associates, L.L.C., F.3d (10th Cir. August 16, 2010)

Pg 52 - Excepted from the automatic stay, however, is any act to perfect, or to maintain or continue the perfection of, an interest in property to the extent that the trustee's rights and powers are subject to such perfection under § 546(b). A bank's perfection of a motor vehicle lien post-petition, but within the statutory time period to perfect falls within the exception under § 362(b)(1)(A). In re Roser, 613 F.3d 1240 (10th Cir. 2010).

Pg 59 - Defending one's rights in a state court action brought by a debtor is not a

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violation of the automatic stay. A motion to set aside a default judgment does not violate the automatic stay. In re Bryner, 425 B.R. 601 (10th Cir. BAP 2010).

Pg 67 - As a general rule, the automatic stay does not prevent the automatic termination of a contract. If a lease contract terminates postpetition, the lease ceases to be property of the estate. If the termination does not occur automatically but instead requires further action by the landlord, the automatic stay applies. A notice of termination must comply with all applicable provisions of the lease. It must also be clear and unequivocal that termination will occur. The presence of a right to cure changes the automatic termination analysis. If the right to cure has not expired, the contract is still executory. In re C.W. Mining Company, 422 B.R. 746 (10th Cir. BAP 2010).

Pg 85 - A trustee has no duty to object to property claimed as exempt if the stated value of each interest, and thus of the "property claimed as exempt," was within the limits the Code allows. Schwab v. Reilly, 130 S. Ct. 2652 (2010).

Pg 105 - "The essence of the test is whether or not under all the circumstances the transaction carries the earmarks of an arm's length bargain. If it does not, equity will set it aside." We believe that this formulation expresses the meaning of the phrase "fiduciary duty" in 15 U.S.C. § 35(b). Jones v. Harris, 130 S.Ct. 1418 (2010).

Pg116 - A Chapter 13 plan that proposes to discharge a student loan debt without a determination of undue hardship violates §§ 1328(a)(2) and 523(a)(8). Failure to comply with this self-executing requirement should prevent confirmation of the plan even if the creditor fails to object, or to appear in the proceeding at all. United Student Aid Funds, Inc. v. Espinosa, 130 S.Ct. 1367 (2010).

Pg 120 - A Chapter 7 debtor's agreement to pay a pre-existing marital debt owed to a third party as part of a separation agreement which omitted a hold harmless agreement, was a debt "to a former spouse" and was excepted from discharge even if the debtor's direct obligation to the third party has been discharge. In re Wodark, 25 B. R. 834 (10th Cir BAP 2010).

Pg 126 - Even a contingent reversionary interest is included in a debtor's estate under § 541. When a debtor elects, under 26 U.S.C. § 6513(d) to leave a tax refund on deposit with the United States and apply the overpayment to their future tax liability, the election is irrevocable. Only that portion of the following year's tax refund, if any, that is attributable to the debtor's pre-petition earnings becomes property of the estate. In re Graves, 609 F.3d 1153 (10th Cir. 2010).

Pg 138 - A bankruptcy court in a non-community property state should address the division of income tax refunds between debtors and their non-debtor spouses in the following way to determine how much of the tax refund is property of the estate. In re Crowson, 431 B.R. 484 (10th Cir BAP 2010).

Pg 141 - The trustee stands in the shoes of a hypothetical bona fide purchaser of the debtor's interest in real property as of the petition date and has all the rights such a purchaser would have, including the right to take title free and clear of implied trust interests. The rights and powers of a bona fide purchaser include the right to obtain title to property free of certain unrecorded interests; the exercise of that right does not necessarily require the avoidance of a transfer. In re Kasperek, 426 B.R. 332 (10th Cir. BAP 2010).

Pg 147 - Under § 551, a transferred lien is automatically preserved for the benefit of the estate, whereas recovery under § 550 is not automatic and requires action by the trustee. The language of § 550(a) suggests that the default rule is the return of the property itself, whereas a monetary recovery is a more unusual remedy to be used only in the court's discretion. In re Trout, 609 F.3d 1106 (10th Cir. 2010).

Pg 187 - The calculated "disposable income" of the debtor must be the starting point in determining "projected disposable income." The standards for determining "disposable income" initially anchor the term "projected disposable income. However, if the interpretation of "projected disposable income" is not to degenerate into absurdity, deriving "projected disposable income" from "disposable income" must be subject to the presentation fo contrary evidence before confirmation of a debtor's chapter 13 plan. Chapter 13 is not some alternative universe where reality dare not intrude. In re Lanning, 380 B.R. 17 (10th Cir. BAP 2007).

Pg 190 - Many limitation periods begin to run once the plaintiff actually discovers or a reasonable diligent plaintiff would have discovered the facts - whichever comes first. In the statute of limitations context, "discovery" is often used as a term of art in connection with the "discovery rule," a doctrine that delays accrual of a cause of action until the plaintiff has "discovered" it. "Discovery occurs both when a plaintiff actually discovers the facts and when a hypothetical reasonably diligent plaintiff would have discovered them. Merck & Co. v. Reynolds, 130 S.Ct. 1784 (2010).

Pg 222 - While technical fact pleading is not required, the complaint must still provide enough factual allegations for a court to infer potential victory. If allegations are so general that they encompass a wide swath of conduct, much of it innocent, then the plaintiffs have not nudged their claims across the line from conceivable to plausible. Peterson v. Grisham, 594 F.3d 723 (10th Cir. 2010).

Pg 228 - Relation back under rule 15(c)(1)(C) depends on what the party to be added knew or should have known, not on the amending party's knowledge or its timeliness in seeking to amend the pleading. The question under Rule 15(c)(1)(C)(ii) is what the prospective defendant reasonably should have understood about the plaintiff's intent in filing the original complaint against the first defendant. Krupski v. Costa Crociere S. p. A., 130 S.Ct. 2485 (2010).

Pg 304 - Criminal forfeiture and restitution are separate remedies with different purposes. Criminal forfeiture is an *in personam* action in which the forfeiture of and the vesting of title in the United States in the defendant's tainted property is imposed as a punishment against the defendant. Restitution is not punitive, but is instead designed to compensate victims. Because restitution and forfeiture are distinct remedies, ordering both in the same or similar amounts does not generally amount to a double recovery. United States v. McGinty, 610 F.3d 1242 (10th Cir. 2010).

Pg 354 - After the removal of an action from state court, the case will proceed as if it originally had been brought in the federal court and will be governed by the Federal Rules of Civil Procedure and all other provisions of federal law relating to procedural matters. Federal courts in removed cases look to the law of the forum state to determine whether service of process was perfected prior to removal. Wallace v. Microsoft Corporation, 596 F.3d 703 (10th Cir. 2010).

Pg 356 - The rules Enabling Act, 28 U.S.C. § 2072, not Erie, controls the validity of a Federal Rule of Procedure. Section 2072(b)'s requirement that federal procedural rules "not abridge, enlarge or modify any substantive right" means that a Rule must "really regulat[e] procedure, - the judicial process for enforcing rights and duties recognized by substantive law and for justly administering remedy and redress for disregard or infraction of them," Though a Rule may incidentally affect a party's rights, it is valid so long as it regulates only the process for enforcing those rights, and not the rights themselves, the available remedies, or the rules of decision for adjudicating either. Shady Grove Orthopedic Ass. v. Allstate Ins. Co., 130 S.Ct. 1431 (2010).

Pg 400 - Given the broad interests of a receiver, we should not apply the traditional preliminary injunction test in ruling on motions to except applicants from a blanket receivership stay. In a receivership-imposed stay, we balance the interests of the receiver and the moving party. Non-bankruptcy receiverships are relative rare. SEC v. Vescor Capital Corp., 599 F.3d 1189 (10th Cir. 2010).

Pg 411 - A debt collector who fails to comply with an FDCPA provision with respect to any person is liable to such person for actual damages, costs, a reasonable attorney's fees and statutory additional damages. 15 U.C.S. § 1692k(a). The bona fide error defense in § 1692k(c) does not apply to a violation resulting from a debt collector's mistaken interpretation of the legal requirements of the FDCPA. Congress did not confine FDCPA liability to "willful" violations. Jerman v. Carlisle, McNellie, Rini, Kramer & Ulrich LPA, 130 S.Ct. 1605 (2010).

Pg 431 - An agreement conditioned upon the bankruptcy court's approval of a debtor's plan of reorganization is not a contract until the plan is approved by the bankruptcy court. Without a contract being formed, there is no implied covenant of good faith and fair dealing. In re Mountain Highlands, LLC, F.3d (10th Cir. August 18, 2010).

Pg 439 - A loss-generating transaction must stand or fall on its own merit. A taxpayer is not permitted to deduct losses resulting from a transaction that lacks economic substance. The economic substance doctrine requires disregarding, for tax purposes, transactions that comply with the literal terms of the tax code but lack economic reality. Sala v. United States, 613 F.3d 1249 (10th Cir. 2010).

Pg 451 - Income taxes generated by gain realized on post-petition sales of qualified farm assets are administrative expenses incurred by the estate within § 503(b)(1)(B) and § 507(a)(2), and therefore must be claims eligible for the beneficial treatment afforded by § 1222(a)(2)(A). Use of the “marginal tax allocation method” rather than the “proportional tax allocation method” is appropriate for purposes of computing the income tax liability to receive beneficial, unsecured treatment under § 1222(a)(2)(A). In re Ficken, 430 B.R. 663 (10th Cir. BAP 2010).

Pg 455 - A trustee who holds an interest in a limited partnership is bound by the limited partnership’s buy/sell and dissolution terms as written. In re Baldwin, 593 F.3d 1155 (10th Cir. 2010).

Pg 455 - A district court has discretion to adopt local rules. Those rules have the force of law. Local rules typically may not be amended unless the district court gives appropriate public notice and an opportunity for comment. 28 U.S.C. § 2017(b) and F.R.C.P. 83(a). A limited exception permits dispensing with this notice-and-comment requirement only where there is an immediate need for a rule. § 2071(e). Hollingsworth v. Perry, 130 S.Ct. 705 (2010),

Pg 464 - In order to challenge a ruling which excludes evidence, the proponent must explain what it expects to show and the grounds for which the party believes the evidence to be admissible. Frederick v. Swift Transportation Co. F.3d (10th Cir. August 10, 2010).

Pg 487 - FRE 1006 requires a party offering a summary exhibit to make available to the opposing party the underlying records summarized in the exhibit, but it does not override the work-product privilege with respect to worksheets or a database created by the offering party. U. S. v. Lewis, 594 F.3d 1270 (10th Cir. 2010).

Pg 508 - The mere fact that an attorney was involved in a communication does not automatically render the communication subject to the attorney-client privilege, rather, the communication between a lawyer and client must relate to legal advice or strategy sought by the client. When an attorney conveys to his client facts acquired from other persons or sources, those facts are not privileged. The party seeking to assert attorney-client privilege must bear the burden of establishing the applicability as to

specific questions or documents, not by making a blanket claim. In re Grand Jury Proceedings, F.3d (10th Cir. August 18, 2010).

Pg 527 - An expert designated to testify regarding trucking safety and regulatory compliance went beyond mere trucking safety or regulation compliance and beyond the expert's designation when the expert ventured into the realm of accident reconstruction. Frederick v. Swift Transportation Co. F.3d (10th Cir. August 10, 2010).

Pg 540 - Hearsay evidence is generally not admissible, but an exception is made for statements relating to a startling event or condition. The so-called excited-utterance exception has three requirements: 1) a startling event; 2) the statement was made while the declarant was under the stress of the event's excitement; and 3) a nexus between the content of the statement and the event. United States v. Smith, 606 F.3d 1270 (10th Cir. 2010).

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Pg 20 - Recoupment is an equitable doctrine in bankruptcy that allow one party to a transaction to withhold funds due another party where the debts arise out of the same transaction. The doctrine allows a creditor to recover a pre-petition debt out of payments owed to the debtor post-petition. The doctrine is to be narrowly construed because its affect is to allow one creditor to attain priority over other creditors. In re Beaumont, 586 F.3d 776 (10th Cir. 2009).

Pg 38 - Absent extraordinary circumstances, bankruptcy estates should not be consumed by the fees and expenses of court-appointed professionals. Cause must be shown to depart from the normal standard of one attorney. Denial of joint employment avoids the problem of reduction of requested compensation that has been previously been appointed. While the right to select counsel of one's own choice is an undeniable right afforded to participants in bankruptcy, that right is not without boundaries. In re Southwest Food Distributors, LLC, 561 F.3d 1106 (10th Cir. 2009).

Pg 46 - When a fee application is filed, the attorney seeking approval of the fee has the burden to establish the reasonableness of each dollar for each hour above zero. Courts which allow presumptive fees have merely set a maximum allowable fee without the submission of a fee application. In re Rogers, 401 B.R. 490 (10th Cir. BAP 2009).

Pg 48 - Conversion from one chapter in bankruptcy to another may render a case on appeal moot due to the conversion to a different bankruptcy code chapter. The election to convert the proceedings may prevent a party from further pursuing issues under the previous chapter on appeal. In re Hunt, 550 F.3d 1002 (10th Cir. 2009).

Pg 65 - Because the Code does not define “proof of claim,” we look to the Rules. Rule 3001(a) requires that a proof of claim shall conform substantially to the appropriate Official Form. Form 10 requires a claimant to attach supporting documentation. When a proof of claim is executed and filed in accordance with Rule 3001 (including Official Form 10), it constitutes prima facie evidence of the validity and amount of the claim. In re Kirkland, 572 F.3d 838 (10th Cir. 2009).

Pg 77 - Four requirements must be met in order for an oversecured creditor to be entitled to attorney fees and expenses as part of its allowed secured claim; 1) creditor must hold an allowed secured claim; 2) that is oversecured; 3) the creditor must demonstrate a right to the fees and expenses either by agreement or statute; and 4) the fees and expenses must be reasonable. A mortgage agreement is not extinguished upon entry of a decree of foreclosure where the debtor’s bankruptcy filing prevented the sale from occurring. In re Sun ‘N Fun Waterpark LLC, 408 B.R. 361 (10th Cir. BAP 2009).

Pg 91 - As a general rule, tax refunds are not exempt from a debtor’s bankruptcy estate. Utah’s exemption statutes provide that certain classes of exempt property, including retirement income (U.C.A. § 78B-5-505(1)(xiv)) remain exempt in any other form into which it is traceable (U.C.A. § 78B-5-507(2)). Utah law recognizes further that exempt property retains its exempt character if the property can be traced by “any other reasonable basis for tracing selected by the individual,” (U.C.A. § 78B-5-507(3)(b)). By filling out tax forms for withholding of taxes and filling out forms to request a tax refund, the exempt funds can be reasonably traced since the amounts paid and received have been tracked throughout the process. Even though debtor’s exempt retirement income may have been converted into taxes and then into a tax refund before being returned to her, it was reasonably traceable through the entire process and remains exempt under Utah law. In re Smith, 401 B.R. 487 (10th Cir. BAP 2009).

Pg 91 - The choice of laws provisions found in § 522(b) do not override, or preempt, state laws that prohibit the application of a state’s exemption laws to property located outside the state. Given that most, if not all, state courts generally require homestead

exemptions to be liberally construed in favor of debtors, it is very likely that a state's homestead exemption will be given extraterritorial effect absent a limitation placed on the exemption by either the statute itself, or a case interpreting that statute. In re Stephens, 402 B.R. 1 (10th Cir. BAP 2009).

Pg 114 - It is a clearly established principal that interest imposed under the Internal Revenue Code is not a penalty but is intended only to compensate the Government for delay in payment of a tax. Springer v. C.I.R., 580 F.3d 1142 (10th Cir. 2009).

Pg 115 - IRC § 6702 refers to the filing of a return in which the taxpayer takes a frivolous position as offending conduct, and penalizes the specific conduct of filing a frivolous return. Because IRC § 6702 refers to the act of filing a purported return and is designed to discourage such filings, the frivolous filing triggers the § 523(a)(7)(B) "event" not the failure to file. In re Wilson, 407 B.R. 405 (10th Cir. BAP 2009).

Pg 121 - In 1994 Congress explicitly authorized bankruptcy courts, in some circumstances, to enjoin actions against a nondebtor alleged to be directly or indirectly liable for the conduct of, claims against, or demands on the debtor to the extent such alleged liability arises by reason of the third party's provision of insurance to the debtor or a related party, and to channel those claims to a trust. 11 U.S.C. § 524(g)(4)(A)(ii). Section 524(h) provides that under some circumstances, § 523(g) operates retroactively to validate an injunction. Travelers Indemnity v. Bailey, 129 S.Ct. 2195 (2009).

Pg 135 - State law defines and creates property interests. Once property rights are determined under state law, federal bankruptcy law establishes the extent to which the property interest is property of the bankruptcy estate. A "legal interest" is an interest recognized by law. An "equitable interest" is an interest held by virtue of an equitable title or claim on equitable grounds, such as the interest held by a trust beneficiary. The expectation of a distribution that was unenforceable on the petition date does not rise to the level of a legal or equitable interest in property. In re Dittmar, 410 B.R. 71 (10th Cir. BAP 2009).

Pg 135 - Section 551 provides relief that is automatic and does not require a separate pleading or process to obtain. Section 541(a)(4) makes property preserved by § 551 a part of the property of the estate and essentially effects its "recovery" from the

transferee. Thus the liens, once avoided and preserved, become property of the estates. In re Bremer, 408 B.R. 355, 358 (10th Cir. BAP 2009).

Pg 140 - Purchasers are deemed to know the contents of recorded documents in the chain of title. If a possible cloud on the seller's title appears, the prospective purchaser must either clear the cloud or proceed at his own risk. A recorded mortgage on a debtor's home that recites the correct street address and parcel identification number for the house but misstates the lot number cannot be avoided by a bankruptcy trustee under § 544(a) as a hypothetical lien creditor or a hypothetical BFP of the property. In re Colon, 563 F.3d 1171 (10th Cir. 2009).

Pg 170 - A false oath is "material" if it bears a relationship to debtor's business transactions or estate, or concerns discovery of assets, business dealings, or existence and disposition of debtor's property. "Materiality" is not defeated by the fact that the undisclosed property was without value. In re Garland, 417 B.R. 805 (10th Cir. BAP 2009).

Pg 188 - A trade-in exchange is essentially a single transaction. The expense incurred in retiring the lien on the trade-in vehicle, therefore, is an "expense incurred in connection with acquiring rights" in the new car. A debtor may not bifurcate the negative equity portion of a trade in vehicle from the debt owed on a 910 vehicle under the "hanging paragraph" found in § 1325(a). In re Ford, 574 F.3d 1279 (10th Cir. 2009).

Pg 191 - The negative equity financed by a seller that enables a debtor to acquire a 910 vehicle is inextricably intertwined with the sales transaction and has a sufficiently close nexus to the acquisition. Accordingly, it constitutes a purchase money obligation and cannot be bifurcated from the secured creditor's 910 claim. In re Padgett, 408 B.R. 374 (10th Cir. BAP 2009).

Pg 242 - Rule 26 was changed in 2000. This change implemented a two-tiered discovery process; the first tier being attorney-managed discovery of information relevant to any claim or defense of a party, and the second being court-managed discovery that can include information relevant to the subject matter of the action. The standard for determining whether information is relevant for purposes of pretrial discovery is substantially broader than the standard for relevance during trial. In re

Cooper Tire & Rubber Co., 568 F.3d 1180 (10th Cir. 2009).

Pg 247 - Under Rule 32, a deposition may be used at trial against any party who was present or represented at the taking of the deposition or had reasonable notice of it when its use fits into one of three outlined provisions. One provision allows a deposition to be admitted into evidence for the purpose of impeaching the deponent as a witness. It is permissible under Rule 801(d)(2) to admit a deposition as a statement of a party-opponent. Neither Rule 801(d)(2) nor Rule 32(a)(1) require a showing of unavailability for admissions of party-opponents. Rule 32 allows a party to introduce as a part of his substantive proof, the deposition of his adversary, and it is quite immaterial that the adversary is available to testify at trial or has testified there. Creative Consumer Concepts, Inc. v. Kreisler, 563 F.3d 1070 (10th Cir. 2009).

Pg 253 - Background principles under Rule 41(b) instruct us to treat dismissal as carrying prejudice unless the dismissal order states otherwise. Dismissal of an action with prejudice is a severe sanction, applicable only in extreme circumstances. If the fault lies with the attorneys, that is where the impact of sanction should be lodged. If the fault lies with the clients, that is where the impact of the sanction should be lodged. Davis v. Miller, 571 F.3d 1058 (10th Cir. 2009).

Pg 258 - The appropriate standard for awarding prejudgment interest in Utah is found in Encon Utah, LLC v. Flour Ames Kraemer, LLC, 210 P.3d 263, 272 (Utah 2009) which provides that prejudgment interest may be recovered where the damage is complete, the amount of the loss is fixed as of a particular time, and the loss is measurable by facts and figures. Prejudgment interest is appropriate when the loss has been fixed as of a definite time and the amount of the loss can be calculated with mathematical accuracy in accordance with well-established rules of damages. AE, Inc., v. The Goodyear Tire & Rubber Co., 576 F.3d 1050 (10th Cir. 2009).

Pg 258 - A court possesses broad discretion in awarding costs. The taxing of costs rests in the sound judicial discretion of the court. Accordingly, we review costs awards only for an abuse of discretion. Even if litigation is complex or lengthy, instituted in good faith, and resolved early, we have rejected attempts to deny prevailing parties their otherwise taxable costs. In re Williams Securities Litigation - WCG Subclass, 558 F.3d 1144 (10th Cir. 2009).

Pg 270 - An affidavit may not be disregarded solely because it conflicts with the affiant's prior sworn statements. In assessing a conflict under these circumstances, however, courts will disregard a contrary affidavit when they conclude that it constitutes an attempt to create a sham fact issue. In determining whether an affidavit creates a sham fact issue, we consider whether: 1) the affiant was cross-examined during his earlier testimony; 2) the affiant had access to the pertinent evidence at the time of his earlier testimony or whether the affidavit was based on newly discovered evidence; and 3) the earlier testimony reflects confusion which the affidavit attempts to explain. The Law Company, Inc. v. Mohawk Construction and Supply Co., Inc., 577 F.3d 1164 (10th Cir. 2009).

Pg 275 - Because preliminary injunctions are customarily granted on the basis of procedures that are less formal and evidence that is less complete than in a trial on the merits, we do not require a moving party to prove his case in full at a preliminary injunction hearing. The findings of fact and conclusions of law made by a court granting a preliminary injunction are not binding at trial on the merits. Attorney General of the State of Oklahoma v. Tyson Foods, Inc., 565 F.3d 769 (10th Cir. 2009).

Pg 303 - 18 U.S.C. § 1028(a)(1) requires the Government to show that a defendant knowingly used, without authority, a means of identification of another person. The word "knowingly" is naturally read as applying to all the subsequently listed elements of the crime. Where a transitive verb has an object, listeners in most contexts assume that an adverb such as "knowingly" that modifies the verb tells the listener how the subject performed the entire action, including the object. Flores-Figueroa v. United States, 129 S.Ct. 1886 (2009).

Pg 318 - Where interpretation of an ambiguous contract is aided by extrinsic evidence, the resulting interpretation is factual and cannot be set aside unless clearly erroneous. Where there are two permissible views of the evidence, a finding adopting one of those views cannot be clearly erroneous. Ryan v. American Natural Energy Corp., 557 F.3d 1152 (10th Cir. 2009).

Pg 326 - For purposes of § 362(h) the term "individual" is limited to a natural person and does not include corporations. Bankruptcy courts frequently invoke § 105(a) powers to award damages in situations involving non-individual debtors which are not covered by § 362(h). As with § 362(h), courts considering sanctions for stay violations under § 105(a) usually require that the violation be "willful." In re Rafter Seven Ranches

L.P., 414 B.R. 722 (10th Cir. BAP 2009).

Pg 337 - An order is not any less preclusive because the attack is on the Bankruptcy Court's conformity with its subject-matter jurisdiction, for even subject-matter jurisdiction may not be attached collaterally. A party that has had an opportunity to litigate the question of subject-matter jurisdiction may not reopen that question in a collateral attack upon an adverse judgment. The need for finality forbids a court called upon to enforce a final order to tunnel back for the purposes of reassessing prior jurisdiction de novo. There are three exceptional circumstances in which a collateral attack on subject-matter jurisdiction may be permitted: 1) The subject matter was plainly beyond the court's jurisdiction; 2) Allowing the judgment to stand would substantially infringe upon another tribunal or agency of government; and 3) The judgment was rendered by a court lacking capability to make an adequately informed determination concerning its own jurisdiction. (The three exceptions are dicta). Travelers Indemnity v. Bailey, 129 S.Ct. 2195 (2009).

Pg 342 - A § 362(k)(1) proceeding is a core proceeding because it derives directly from the Bankruptcy Code and can be brought on in the context of a bankruptcy case. It is particularly appropriate for bankruptcy court to maintain jurisdiction over § 362(k)(1) proceedings because their purpose is not negated by dismissal of the underlying bankruptcy case. We see no basis for requiring a bankruptcy court to state explicitly that it is retaining jurisdiction over a § 362(k)(1) adversary proceeding when it dismisses an underlying Chapter 13 case, or for requiring the debtor to reopen the case to pursue the adversary proceeding. In re Johnson, 575 F.3d 1079 (10th Cir. 2009).

Pg 361 - The doctrine of issue preclusion prevents a party that has lost the battle over an issue in one lawsuit from relitigating the same issue in another lawsuit. Under federal law, issue preclusion attaches only when an issue of fact or law is actually litigated and determined by a valid and final judgment and the determination is essential to the judgment. Issue preclusion does not apply in the case of a judgment entered by confession, consent, or a default resulting from an affirmative decision not to contest a matter. Issue preclusion applies to a default judgment imposed as a sanction. In re Corey, 583 F.3d 1249 (10th Cir. 2009).

Pg 362 - The law of the case doctrine bars reopening a question already decided in an earlier stage of the same litigation except in narrow and exceptional circumstances. We have recognized only three such circumstances, One of which is the new evidence

rule that applies when a party can produce substantially different evidence from that which was available at the time of the original decision. The evidence must not only be different, but so different and so central to the decision of the case that we are left with substantial doubt as to the correctness of the prior decision. A party may not rely on evidence that was available to it at the time of the prior ruling. The new evidence exception will not be applied unless we are certain that it specifically and unquestionably applies. In re Antrobus, 562 F.3d 1092 (10th Cir. 2009).

Pg 466 - Under Utah law, an implied covenant of good faith and fair dealing inheres in every contract. The scope of implied covenant of good faith and fair dealing turns on the extent to which the contracting parties have defined their expectations and imposed limitations on contract terms. Four general principles limit the scope of the covenant: 1) the covenant cannot be understood to establish new, independent rights or duties to which the parties did not agree *ex ante*; 2) the covenant cannot result in rights and duties inconsistent with express contractual terms; 3) the covenant cannot force a contractual party to exercise a contractual right to its own detriment for the purpose of benefitting another party to the contract, and 4) the covenant cannot be used to achieve an outcome inconsistent with the written terms of the contract. J.R. Simplot v. Chevron Pipeline Co., 563 F.3d 1102 (10th Cir. 2009).

Pg 470 - The term *puffery* is used to characterize those vague generalities that no reasonable person would rely on as assertions of particular facts. In determining whether a statement is puffery, the context matters. The relative expertise of the speaker and the listener can be a critical factor. So can the size of the audience. What is said to a particular person may take on meaning that would not be present if made to a large group. Alpine Bank v. Hubbell, 555 F.3d 1097 (10th Cir. 2009).

Pg 487 - A party may only make an offer of proof under FRE 103 if the court has excluded some evidence tendered by the party. The purpose of FRE 103 is to allow the trial judge to make an informed evidentiary ruling and to create an adequate record for appellate review to determine whether exclusion of the evidence was reversible error. Creative Consumer Concepts, Inc. v. Kreisler, 563 F.3d 1070 (10th Cir. 2009).

Pg 511 - We will not impose on trial judges the distracting burden of *sua sponte* reconsidering all prior evidentiary rulings as new evidence is introduced. Judges have enough to keep their minds occupied during trial without having to carry out this additional chore. We may only evaluate the trial court's decision from its perspective

when it had to rule and not indulge in review by hindsight. Hertz v. Luzenac America, Inc., 370 F.3d 1014 (10th Cir. 2004).

Pg 535 - It is well settled that admitting evidence of both sides of a conversation is appropriate because statements are not hearsay to the extent they are offered for context and not for the truth of the matter asserted. Invoking the word "context" does not permit an end-run around the hearsay rules such that a party may smuggle into evidence all interviewer statements. We view such evidence with a particularly jaundiced eye when, as here, the "context" statements regularly overwhelm the defendant's. United States v. Collins, 575 F.3d 1069 (10th Cir. 2009).

Pg 540 - Courts consider a range of factors in determining whether a declarant made a statement under the stress of a particular event. Among the more relevant factors are: the amount of time between the event and the statement; the nature of the event; the subject matter of the statement; the age and condition of the declarant; the presence or absence of self-interest; and whether the statement was volunteered or in response to questioning. There is no precise amount of time between the event and the statement beyond which the statement cannot qualify as an excited utterance. U. S. v. Pursley, 577 F.3d 1204 (10th Cir. 2009).

Pg 577 - In Utah, deeds are construed according to ordinary rules of contract construction. Contract construction begins and ends with the language of the contract. A contract term is ambiguous if it is capable of more than one reasonable interpretation because of uncertain meanings of terms, missing terms, or other facial deficiencies. It is a question of law for the court to decide without reference to parol evidence. When parties offer opposing interpretations that are reasonably supported by the contract's language, the court should consider extrinsic evidence that supports the parties' interpretations of the contract. In contrast, when the contract language is not susceptible to contrary interpretations, the contract is not ambiguous, and its plain meaning should be enforced. Thus, evidence beyond the four corners of the contract cannot create an ambiguity when the language of the contract does not support one. U.S. v. Dunn, 557 F.3d 1165 (10th Cir. 2009).

Errata

Pg 121 - Change the statutory reference found in the Travelers Indemnity v. Bailey case from § 523(g) to § 524(g).

Pg 135 - The correct spelling is: In re Bremer, not In re Bremmer. The correct citation for In re Bremer, is 408 B.R. 355 (10th Cir. BAP 2009).

Pg 400 - With respect to the SEC v. Vescor Capital Corp., case, change the word "rate" to "rare" and change the cite from 588 F.3d 1189 to 599 F.3d 1189.