No.

IN THE

Supreme Court of the United States

LAW OFFICE OF ROGELIO SOLIS PLLC;
ANA GOMEZ, PETITIONERS

v.

CATHERINE STONE CURTIS, TRUSTEE

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

DAVID L. CURRY, JR.
Counsel of Record

MATTHEW S. OKIN

EDWARD A. CLARKSON, III

Okin, Adams, Bartlett, Curry LLP
1113 Vine St.
Suite 240
Houston, TX 77002
dcurry@okinadams.com
(713) 228-4100

CURRY & TAYLOR ♦ 202-350-9073

QUESTION(S) PRESENTED

Section 547 of the Bankruptcy Code authorizes a trustee to avoid the transfer of property preferentially transferred by a debtor prior to the commencement of the debtor's bankruptcy case. 11 U.S.C. § 547. Congress expressly limited such avoidance powers to "transfer[s] of an interest of the debtor in property." *Id.* § 547(b). The question presented to this Court relates to the proper interpretation of this limitation under section 547.

In the proceedings below, both the Bankruptcy Court and the Fifth Circuit erroneously determined that whether a transfer involved an interest of a debtor in property was controlled by federal bankruptcy law, not applicable Texas law.

The ruling is in direct conflict with Supreme Court precedent set forth in *Erie Railroad Co. v. Tompkins*, 304 U.S. 64, 78 (1938), *Butner v. United States*, 440 U.S. 48, 55, 99 S. Ct. 914 (1979), and recently reaffirmed in *Rodriguez v. FDIC*, 140 S. Ct. 713, 717-18 (2020).

Specifically, the ruling below contravenes Supreme Court precedent that property interests in bankruptcy are created and defined by state law. The ruling below, instead establishes a federal common law property right that is not soundly rooted in any legitimate federal interest.

The question presented is as follows:

Whether a transfer of property, in which a debtor has no interest recognized under applicable state law, may be avoided pursuant to 11 U.S.C. § 547.

PARTIES TO THE PROCEEDING

All the parties in this proceeding are listed in the caption.

RULE 29.6

Pursuant to this Court's Rule 29.6, petitions state that there is no parent or publicly held company that owns 10% or more of the stock of Petitioner Law Office of Rogelio Solis, PLLC. Petitioner Ana Gomez is not a corporate entity.

STATEMENT OF RELATED CASES

- *Catherine Stone Curtis, Chapter 11 Trustee v. Law Office of Rogelio Solis, PLLC and Ana Gomez,* Adversary No. 21-07002 (EVR), U.S. Bankruptcy Court for the Southern District of Texas. Order (Denying Motion to Dismiss Plaintiff's Complaint) entered November 9, 2022.

- *Catherine Stone Curtis, Chapter 11 Trustee v. Law Office of Rogelio Solis, PLLC and Ana Gomez,* Civil Action No. 7:22-cv-00418, U.S. District Court for the Southern District of Texas. Certification of Direct Appeal entered January 6, 2023.

- *Law Office of Rogelio Solis, PLLC and Ana Gomez, Appellants v. Catherine Stone Curtis, Trustee, Appellee,* No. 23-40125, U.S. Court of Appeals for the Fifth Circuit. Judgment entered October 6, 2023. Order on Petition for Rehearing *En Banc* (and dissent) entered February 14, 2024.

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LAW OFFICE OF ROGELIO SOLIS PLLC;
ANA GOMEZ, PETITIONERS

v.

CATHERINE STONE CURTIS, TRUSTEE

PETITION FOR WRIT OF CERTIORARI

Petitioners Law Office of Rogelio Solis, PLLC and Ana Gomez (collectively "Petitioners") respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The Fifth Circuit's opinion is found at 83 F.4th 409 (5th Cir. 2023) and reproduced at App. 1a-8a. The Fifth Circuit's order denying Petitioners' petition for rehearing *en banc* is found at 2024 U.S. App. LEXIS 3484 (5th Cir. Feb. 14, 2024) and reproduced at App. 30a-35a. The District Court's unpublished Certification of Direct Appeal is reproduced at App. App. 36a. The Bankruptcy Court's opinion is found at 645 B.R. 208 (Bankr. S.D. Tex. 2022) and reproduced at App. 9a-29a.

JURISDICTION

The judgment of the Fifth Circuit was entered on October 6, 2023. App. 1a-8a. On February 14, 2024, the Fifth Circuit entered an order denying Petitioners' timely petition for rehearing *en banc*. App. 30a-35a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

RELEVANT PROVISIONS INVOLVED

11 U.S.C. § 105 provides, in relevant part:

> (a) The court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title.

11 U.S.C. § 541 provides, in relevant part:

> (a) The commencement of a case under section 301, 302, or 303 of this title creates an estate. Such estate is comprised of all the following property, wherever located and by whomever held:
> (1) Except as provided in subsections (b) and (c)(2) of this section, all legal or equitable interests of the debtor in property as of the commencement of the case.

11 U.S.C. § 547 provides, in relevant part:

> (b) Except as provided in subsections (c) and (i) of this section, the trustee may, based on reasonable due diligence in the circumstances of the case and taking into account a party's known

or reasonably knowable affirmative defenses under subsection (c), avoid any transfer of an interest of the debtor in property—

(1) to or for the benefit of a creditor;

(2) for or on account of an antecedent debt owed by the debtor before such transfer was made;

(3) made while the debtor was insolvent;

(4) made—

(A) on or within 90 days before the date of the filing of the petition; or

(B) between ninety days and one year before the date of the filing of the petition, if such creditor at the time of such transfer was an insider; and

(5) that enables such creditor to receive more than such creditor would receive if—

(A) the case were a case under chapter 7 of this title;

(B) the transfer had not been made; and

(C) such creditor received payment of such debt to the extent provided by the provisions of this title.

STATEMENT

This Appeal arises from within chapter 7 proceedings initially commenced by an involuntary petition against Josiah's Trucking, LLC (the "Debtor") filed in the United States Bankruptcy Court for the Southern District of Texas. The involuntary petition was by the surviving family of one of two victims killed in a tragic automobile accident caused by an employee of the Debtor. The primary purpose of the involuntary bankruptcy was not to gather, administer, and liquidate assets of the

Debtor, of which few to none existed, but instead, to avoid a pre-petition settlement payment made by the Debtor's insurance carrier to Petitioners, who are the mother of the second victim and her counsel, in satisfaction of the carriers' duties, known as *Stowers*[1] duties, under applicable Texas law.

In the Adversary Proceeding subsequently commenced by Appellee to effectuate that avoidance, Petitioners sought dismissal pursuant to FED. R. CIV. P. 12(B)(6) made applicable to adversary proceedings brought in bankruptcy court through Bankruptcy Rule 7012(b)(6) on grounds that, because the Debtor lacked any interest in the insurance proceeds under Texas state law, the payment could not be avoided under 11 U.S.C. § 547. The Bankruptcy Court disagreed and entered the Order. Upon direct appeal to the Fifth Circuit, the Fifth Circuit affirmed. In finding that the settlement payment constituted a transfer of the Debtor's interest in property, both the Bankruptcy Court and the Fifth Circuit improperly declined to apply Texas law. Bankruptcy Opinion, App., 21a. ("Defendants' argument regarding whether an insured lacks control over the disbursement of liability insurance proceeds [under Texas law] is simply not relevant as to whether Debtor had an interest in the Policy Proceeds under § 547."); Panel Opinion, App., 8a. ("To this end, Appellants' arguments that Texas law, not federal bankruptcy law, controls are incorrect.").

Jurisdiction in the court of first instance is pursuant to 28 U.S.C. § 1334, 28 U.S.C. § 157(a) and

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[1] *G. A. Stowers Furniture Co. v. Am. Indem. Co.*, 15 S.W.2d 544 (Tex. Civ. App. 1929). (holding that an insurer may be liable for damages in excess of policy limits if it unreasonably fails to accept a settlement offer within policy limits).

the District Court's standing order of reference, General Order 2012-6.

I. The Disputed Transfer

On December 19, 2020, a trailer from a tractor trailer owned by the Debtor entered into the oncoming lane of traffic and collided with a vehicle carrying Carlos Tellez, Jr., and Anna Isabel Ortiz, ultimately resulting in their deaths (the "Accident"). Panel Opinion, App. 2a. Anna Isabel Ortiz is survived by Petitioner Gomez and Reyes Adrian Ortiz (collectively, the "Ortiz Family"). Panel Opinion, App. 2a. Carlos Tellez, Jr. is survived by Sonia Tellez, Carlos Tellez, Rose Mary Rodriquez, and I. Tellez, a minor (collectively, "Tellez Family"). Panel Opinion, App. 2a.

Shortly after the Accident both Gomez and the Tellez Family engaged counsel and began the claims process. Panel Opinion, App. 2a. Gomez employed Petitioner, Solis, which made a settlement demand on the Debtor's insurance company, Brooklyn Specialty Insurance Company RRG, Inc. ("Brooklyn Specialty"), pursuant to Texas' *Stowers* doctrine for settlement of claims against the Debtor within applicable policy limits of $1,000,000.00 (the "Policy Limits"). Panel Opinion, App. 2a. On or about January 12, 2021, Brooklyn Specialty paid $1,000,000.00 (the "Policy Proceeds") directly into the Solis's firm IOLTA account for Gomez (the "Transfer") – exhausting available coverage and discharging its *Stowers* duty under Texas law. Panel Opinion, App 2a-3a.

II. The Avoidance Litigation

The Tellez Family received none of these Policy Proceeds and commenced an involuntary bankruptcy proceeding against the Debtor under chapter 7 of title 11 of the United States Code (the "Bankruptcy Code") in the Bankruptcy Court. Panel Opinion, App. 3a. Shortly thereafter, Respondent, then the interim trustee, commenced the Adversary Proceeding alleging that the Transfer of the Policy Proceeds to Petitioners was an avoidable preference which could be clawed back for distribution through the Debtor's bankruptcy case. Panel Opinion, App. 3a.

Petitioners filed their Motion to Dismiss pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure seeking dismissal of Respondent's Complaint arguing—*inter alia*—that payment of the Policy Proceeds was not a "transfer of an interest of the debtor in property" under 11 U.S.C. § 547. Bankruptcy Opinion, App. 16a-17a. The Bankruptcy Court disagreed, entering the Order [App. 37a] and issuing the accompanying Memorandum Opinion. App. 9a-29a.

Relying, first, upon the Fifth Circuit's ruling in *Martinez v. OGA Charters, L.L.C. (In re Charters, L.L.C.)*, 901 F.3d 599, 604 (5th Cir. 2018), the Bankruptcy Court concluded that because the pre-petition claims against the Debtor arising from the Accident significantly exceeded the Policy Limits, the Policy Proceeds would have become property of the Debtor's estate under 11 U.S.C. § 541(a)(1). Bankruptcy Opinion, App. 18a-19a. Relying next upon the decision in *Begier v. IRS*, 496 U.S. 53, 58 (1990), the Bankruptcy Court determined that the payment of the Policy Proceeds to Petitioners constituted an avoidable "transfer of an interest of the debtor in property," because the purpose of section 547's "avoidance provision is to preserve the property includable within the bankruptcy estate." Bankruptcy Opinion, App. 19a-20a.

III. The Appeal

Petitioners timely filed a Notice of Appeal and moved for certification for direct appeal to the Fifth Circuit. Respondent opposed Certification. Finding that "the Bankruptcy Court's order involves a question of law as to which there is no controlling decision," the District Court granted Certification. App. 36a. Petitioners then timely filed their Petition for Direct Appeal Pursuant to 28 U.S.C. § 158(d)(2) with the Fifth Circuit, initiating miscellaneous proceeding 23-90005. On February 28, 2023, Fifth Circuit entered the order granting Petitioners' petition for direct appeal.

The Fifth Circuit's opinion (the "Panel Opinion"), entered on October 6, 2023, relied solely upon the prior *Charters* holding that "pre-petition payment of the Policy Proceeds does not affect the Debtor's equitable interest in them at the time the petition was filed." Panel Opinion, App. 6a. Further, the Panel Opinion rejected Petitioners' contention that the Debtor lacked an interest in the Policy Proceeds under Texas law holding that the Fifth Circuit's prior holding in *Charters* controlled. Specifically, the Panel Opinion, relying on *Charters*, found that, in the limited circumstances where a siege of tort claims threaten to overwhelm available policy limits, the policy proceeds become property of the estate. Panel Opinion, App. 4a. Additionally, the Fifth Circuit stated, "Appellants' arguments that Texas law, not federal bankruptcy law, controls are incorrect." Panel Opinion, App. 8a.

Petitioners subsequently filed a petition for rehearing *en banc*. The Fifth Circuit denied Petitioners' petition for rehearing *en banc*; however, seven out of sixteen judges would have granted rehearing. Writing for the dissent, Judge Oldham stated that "Our decision in this case recognizes a form of property—an equitable interest in insurance proceeds—that Texas state law does not." Dissent, App. 31a. The dissent recognized that such a ruling implicates principles of federalism, including the Supreme Court's longstanding declaration that "there is no general federal common law." *Erie Railroad Co. v. Tompkins*, 304 U.S. at 78.

IV. Applicable Law

Section 547 of the Bankruptcy Code permits a trustee to avoid certain pre-petition transfers of a debtor's property if the transfer meets certain conditions established by statute. 11 U.S.C. § 547(b). An essential element of a claim under section 547 requires a showing that a transfer of "an interest of the debtor in property" occurred.

The question of whether a debtor has a legal or equitable interest in property is determined under applicable state law. *See Butner v. United States*, 440 U.S. 48, 54 (1979) ("Congress has generally left the determination of property rights in the assets of a bankrupt's estate to state law."). Under Texas law, the Debtor did not hold any interest – legal or equitable – in the Policy Proceeds. Dissent, App., 31a. ("Our decision in this case recognizes a form of property—an equitable interest in insurance proceeds—that Texas state law does not.”).

As the Debtor never had an interest in the Policy Proceeds, Respondent’s avoidance action under section 547 of the Bankruptcy Code must fail. Because, under Texas law, the Debtor lacked legal title to or a right to control or otherwise direct the disposition of the Policy Proceeds, the payment of the Policy Proceeds did not involve a transfer of an interest of the Debtor in property.

REASONS FOR GRANTING THE PETITION

The questions presented in this case are of critical importance to federalism, bankruptcy law, and the principles of *stare decisis*. Bankruptcy courts are afforded substantial power under the Bankruptcy Code, which, in turn, requires that the application of those powers must be strictly limited to those that are clearly enumerated.

The Fifth Circuit, in affirming the Bankruptcy Court’s decision, should be overturned on the basis that it has ignored this Court’s opinions in both *Butner* and *Erie*, and affirmed in *Rodriguez;* instead finding a “property right” where none exists under Texas law and formulating a rule that it finds more equitable.

A. The Fifth Circuit's Panel Opinion decided an important question of federal law that conflicts with relevant decisions of the Supreme Court, namely *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938), *Butner v. United States*, 440 U.S. 48 (1979), and *Rodriguez v. FDIC*, 140 S. Ct. 713, 717-18 (2020).

Section 547 of the Bankruptcy Code provides for the avoidance of pre-petition transfers of a debtor's property if certain statutory conditions are met. 11 U.S.C. § 547(b). This avoidance power is referred to as a "preference," and exists to prevent a debtor from "preferring" one creditor over another by making payments to certain creditors on the eve of bankruptcy.

An essential element of a preference claim under section 547(b) requires a showing that the allegedly avoidable transaction involved a transfer of "an interest of the debtor in property." *Id.; see also Southmark Corp. v. Crescent Heights VI, Inc.* (*In re Southmark Corp.*), No. 95-10849, 1996 U.S. App. LEXIS 43591, at *3 n.3 (5th Cir. July 26, 1996) (noting that the absence of an interest in transferred property would be fatal to plaintiff's avoidance claims); *Cage v. Hardy Rawls Enters., L.L.C.* (*In re Moye*), 486 F. App'x 485, 488 n.7 (5th Cir. 2012) (citing *Coral Petrol., Inc. v. Banque Paribas-London*, 797 F.2d 1351, 1355 (5th Cir. 1986) ("For a preference to be voided under section 547, 'it is essential that the debtor have an interest in the property transferred so that the estate is thereby diminished.'")).

The phrase "interest in property" is not defined in the Bankruptcy Code. Generally, courts have held that "whether transferred funds [constitute] property of [the debtor] is a question of state law." *Templeton v.*

O'Cheskey (*In re Am. Hous. Found.*), 785 F.3d 143, 158 (5th Cir. 2015) (citing *De La. Pena Stettner v. Smith* (*In re IFS Fin. Corp.*), 669 F.3d 255, 261-62 (5th Cir. 2012) and *Butner v. United States*, 440 U.S. 48, 54 (1979)).

Courts have further interpreted section 547 in accordance with Congressional intent of preventing debtors from illegitimately disposing of property that should be available to their creditors.[2] With that policy goal as guidance, the interests reachable under section 547 has been held to be coextensive with the definition of property of the bankruptcy estate as set forth in 11 U.S.C. § 541. *Begier v. IRS*, 496 U.S. 53, 59 n.3, 110 S. Ct. 2258, 2263 (1990). Ultimately, however, while federal law governs whether a debtor's interest in property becomes property of the estate (*see* 11 U.S.C § 541), the nature and extent of such interests are defined by state law. *See Butner*, 440 U.S. 48 (1979).

Ignoring *Butner*, the Fifth Circuit failed to look to state law to determine the nature and extent of the Debtor's interest in the Policy Proceeds. Instead, the court erroneously inferred the existence of such an interest solely from prior precedent not directly on point. The reasoning for this flawed outcome is thus: If, under *Charters*, the Policy Proceeds would be classified as property of the estate, and, if, under *Begier*, "an interest of the debtor in property" means any property that would have become property of the estate, then the alleged transaction must involve a transfer of an

[2] *Tow v. Rafizadeh (In re Cyrus II P'ship)*, 413 B.R. 609, 613 (Bankr. S.D. Tex 2008) ("[T]he purpose of …avoidance powers of the bankruptcy trustee …is to prevent deb tors from illegitimately disposing of property that should be available to their creditors.") (citing *Palmer & Palmer, P.C. v. U.S. Tr. (In re Hargis)*, 887 F.2d 77, 79 (5th Cir. 1989).

"interest of a debtor in property" regardless of whether any such interest exists under applicable state law.

The result, in this case, establishes a property interest that does not exist under applicable state law, but exists under federal general common law. As discussed below, such an outcome not only conflicts with *Butner*, but is also in conflict with *Erie* and its progeny. *See Rodriguez*, 140 S. Ct. at 718 (noting that *Erie* and *Butner* require the same result).

B. The Fifth Circuit Impermissibly Created a Property Right in Direct Violation of *Butner*.

The Fifth Circuit's Panel Opinion impermissibly creates a property interest, an "equitable" interest in insurance proceeds, that does not exist under Texas state law. Texas state law is clear that an insured has no interest in, nor the ability to direct or control, insurance proceeds. *See Farmers Ins. Co. v. Soriano*, 881 S.W.2d 312, 315 (Tex. 1994). (finding that the only duties an insurer owed its insured were those set forth in *Stowers*); *Travelers Indem. Co. v. Citgo Petrol. Corp.*, 166 F.3d 761, 764-65 (5th Cir. 1999) (gathering authority and noting that Texas law does not permit an insured to assert a claim against an insurer for settlement of the "wrong" claim even where such settlement may leave the insured exposed to another claim).

The Panel Opinion, relying on *Charters* to create a property right derived from decisional federal law, violates a bedrock principle of bankruptcy law – "[p]roperty interests are created and defined by state law." *Butner*, 440 U.S. at 54; *accord Rodriguez*, 140 S. Ct. at 718 ("As this Court has long recognized, "Congress has generally left the determination of property rights in the assets of a bankrupt's estate to state law. "Filing for bankruptcy does not create new property rights or value where there previously were none." *Magestic Star Casino, LLC v. Barden Dev., Inc. (In re Majestic Star Casino, LLC)*, 716 F.3d 736, 751 (3d Cir. 2013) (quoting *In re Messina*, 687 F.3d 74, 82 (3d Cir. 2012); *cf. Butner*, 440 U.S. at 56) (noting that the holder of a property interest "is afforded in federal bankruptcy court the same protection he would have had under state law if no bankruptcy had ensued").

The *Butner* doctrine directly constrains the legitimate scope of bankruptcy courts' equitable powers under Bankruptcy Code section 105(a). Indeed, the *Butner* Court itself emphasized that "[t]he equity powers of the bankruptcy court play an important part in the administration of bankrupt estates in countless situations," but "undefined considerations of equity provide no basis for adoption of a…federal rule" giving a party substantive "rights that are not his as a matter of state law." *Butner*, 440 U.S. at 55-56. Indeed, the scope of a bankruptcy court's equitable power must be understood in the light of the principle of bankruptcy law" at issue. *Raleigh v. Ill. Dep't of Revenue*, 530 U.S. 15, 24-5 (2000). "Bankruptcy courts are not authorized in the name of equity to make wholesale substitution of underlying law controlling the validity of the creditors' entitlements, but are limited to what the bankruptcy code itself provides." *Id.* (citing *United States v. Reorganized CF&I Fabricators of Utah, Inc.*, 518 U.S. 213, 228-229, 135 L. Ed. 2d 506, 116 S. Ct. 2106 (1996); *United States v. Noland*, 517 U.S. 535, 543, 134 L. Ed. 2d 748, 116 S. Ct. 1524 (1996)); *see also Fahs v. Martin*, 224 F. 2d 387, 395 (5th Cir. 1995) ("[t]he Supreme Court has recognized that the constitutional grant of power to Congress to enact uniform laws on the subject of bankruptcies, Art. I, § 8, cl. 4, though plenary, nevertheless is subject to due process clause limitations; too radical a departure from the common law concept of the effect of bankruptcy, or from the norms created by state law, may exceed federal bankruptcy powers").

Here, the Fifth Circuit failed to analyze Texas state law to determine whether "an equitable interest in insurance proceeds" existed. Instead, by following the reasoning of the Bankruptcy Court, the Fifth Circuit effectively determined that Texas state law was irrelevant.

C. The Fifth Circuit Impermissibly Created "Federal Common Law" in Direct Violation of *Erie*

"Instead of following *Rodriquez* and *Butner*, [Fifth Circuit] precedent does the one thing *Erie* prohibits: It embraces federal common law without identifying a valid fount of it." *Dissent*, App., 33a. (citing *Kamen v. Kemper Fin. Servs.*, 500 U.S. 90, 99, 111 S. Ct. 1711, 1718 (1991) ("Having undertaken to decide this claim, the Court of Appeals was not free to promulgate a federal common law demand rule without identifying the proper source of federal common law in this area.").

Here, by creating a federal common law property right, the Fifth Circuit has expanded Congress' authority under the Bankruptcy Powers of the Constitution, when Congress itself has failed to do so. This is in direct violation of the *Erie* doctrine.

The Fifth Circuit's departure from *Erie* is exacerbated in that the federal common law established created a property right contrary to state law. The ruling also intrudes into Texas's power to regulate the business of insurance. As discussed above, in making the Transfer, Brooklyn Specialty acted in accordance with a well-established body of Texas law commonly referred to as the *Stowers* doctrine.

The duties owed under *Stowers* are the primary tort duties owed by an insurer to an insured under Texas law. Under *Stowers*, an insurer, defending an insured in a lawsuit on a covered claim, when faced with a settlement offer within policy limits, must accept the offer on behalf of its insured when an ordinarily prudent insurer would do so in light of the reasonably apparent likelihood and degree of that insured's potential exposure to a valid judgment in the suit in excess of policy limits. *Travelers Indem. Co. v. Citgo Petroleum Corp.*, 166 F.3d 761, 764 (5th Cir. 1999) (citing *American Physicians Insurance Exchange v. Garcia*, 876 S.W.2d 842, 848-49 (Tex. 1994)). In this context, the *Stowers* duty is the only tort duty the insurer owes its insured; the duty of good faith in handling insurance claims does not apply. *Id.* (citing *Maryland Insurance Co. v. Head Industrial Coatings and Services, Inc.*, 938 S.W.2d 27, 28 (Tex. 1996)). The Fifth Circuit has noted that the *Stowers* doctrine reflects a sound public policy of encouraging settlement. *Id.; Tex. Farmers Ins. Co. v. Soriano*, 881 S.W.2d at 315 (Tex. 1994).

By recognizing an equitable property interest in policy proceeds that has been expressly withheld under Texas law, the Fifth Circuit ruling in this case impermissibly invades two areas of law reserved to the states. *See Dissent*. App., 31a-32a. ("[I]t has long been settled that insurance – and the property rights it creates – are questions of state law.) (citing *McCarran-Ferguson Act,* 15 U.S.C. §§ 1011 *et seq.*; *U.S. Dep't of Treasury v. Fabe*, 508 U.S. 491 (1993) (holding that the McCarran-Ferguson Act transformed the legal landscape by overturning the normal rules of preemption . . . by stating that . . . 'for the purpose of regulating the business of insurance' do not yield to conflicting federal statutes unless a federal statute specifically requires otherwise.'").

D. The Fifth Circuit Failed to Identify a Federal Interest

Both *Butner* and *Erie* contain exceptions permitting "federal common law" to be created to protect a federal interest. *See*, *generally*, *Rodriguez*, 140 S. Ct. at 717 (gathering authority); *Kamen*, 500 U.S. at 99 ("Having undertaken to decide this claim, the Court of Appeals was not free to promulgate a federal common law demand rule without identifying the proper source of federal common law in this area."); *Butner*, 440 U.S. at 918 ("Unless some federal interest requires a different result, there is no reason why such interests should be analyzed differently simply because an interested party is involved in a bankruptcy proceeding.").

In this case, the lower court has applied a rule of decision that alters the parameters of state property and insurance law but has not identified any federal interest requiring such alteration. In fact, no federal interest exists here. As noted by the Dissent, the [Panel Opinion] "does the one thing *Erie* prohibits: It embraces federal common law without identifying a valid fount of it." Dissent, App. 33a.

Bankruptcy law is solely dependent upon state law to determine the extent of property of a bankruptcy estate. In fact, there is no definition of the term "property" in the Bankruptcy Code. "In the absence of a controlling federal rule, we generally assume that Congress has 'left the determination of property rights in the assets of a bankrupt's estate to state law,' since such 'property interests are created and defined by state law.'" *Nobelman v. Am. Sav. Bank*, 508 U.S. 324, 329, 113 S. Ct. 2106, 2110 (1993) (citing *Butner*).

CONCLUSION

Based upon the foregoing, the petition for a writ of certiorari should be granted.

Respectfully submitted,

David L. Curry, Jr.
Matthew S. Okin
Edward A. Clarkson, III
OKIN ADAMS
BARTLETT CURRY LLP
1113 Vine St., Suite 240
Houston, Texas 77002
Telephone: (713) 228-4100
Fax: (346) 247-7158
dcurry@okinadams.com

Counsel for Petitioners

APPENDIX

83 F.4th 409

United States Court of Appeals, Fifth Circuit.

LAW OFFICE OF ROGELIO SOLIS PLLC; Ana Gomez, Appellants,

v.

Catherine Stone CURTIS, Appellee.

No. 23-40125

FILED October 6, 2023

Appeal from the United States District Court for the Southern District of Texas, USDC Nos. 7:21-AP-7002, 7:22-CV-418, Eduardo V. Rodriguez, Chief Judge

Attorneys and Law Firms

David L. Curry, Jr., Edward A. Clarkson, III, Matthew Scott Okin, Okin Adams Bartlett Curry, L.L.P., Houston, TX, for Appellants.

Simon Richard Mayer, Elizabeth M. Guffy, Senior Counsel, Locke Lord, L.L.P., Houston, TX, for Appellee.

Before Graves, Higginson, and Ho, Circuit Judges.

Opinion

Stephen A. Higginson, Circuit Judge:

In this direct appeal from the bankruptcy court, we are tasked with answering whether the pre-petition payment of insurance proceeds to a tort claimant creditor of a debtor, made in accordance with state insurance law, constitutes a “transfer of an interest of the debtor in property" under 11 U.S.C. § 547. The bankruptcy court found that, in the circumstances present here, such payment could be a transfer of the debtor's property. We AFFIRM.

I.

This bankruptcy case arises out of a terrible tragedy. As alleged in the complaint in the underlying adversary proceeding, on December 19, 2020, a tractor-trailer owned by Josiah's Trucking LLC (the "Debtor") crashed into a vehicle (the "Accident") in which Carlos Tellez, Jr. and Anna Isabel Ortiz were riding, ultimately resulting in their deaths. Ortiz was survived by her mother, Ana Gomez, and father, Reyes Adrian Ortiz (collectively, the "Ortiz Family"). Tellez was survived by Sonia Tellez, Carlos Tellez, Rose Mary Rodriquez, and I. Tellez (collectively, the "Tellez Family").

At the time of the Accident, the Debtor was insured by Brooklyn Specialty Insurance Company RRG, Inc. ("Brooklyn Specialty") for a policy limit of $1,000,000. Soon after the Accident, both families engaged counsel and began the insurance claims process. Gomez employed the Law Firm of Rogelio Solis, PLLC (the "Solis Law Firm"), and the Tellez family engaged Escobar & Cardenas, L.L.P. In the weeks following the Accident, the Tellez Family engaged in discussions with Brooklyn Specialty and ultimately filed suit against the Debtor, the Debtor's owner, and the driver. In contrast, Gomez, through the Solis Law Firm, made a *Stowers* demand on Brooklyn Specialty for the limits of the policy.[1]

On January 12, 2021, Brooklyn Specialty transferred $1,000,000 (the "Policy Proceeds") to the

Solis Law Firm's Interest on Lawyers' Trust Account ("IOLTA") in settlement of Gomez's claims. That same day, Brooklyn Specialty informed the Tellez Family that the policy limit had been exhausted. Then, on January 18, 2021, two checks were issued: one for $680,000 to Gomez for settlement of her claims, and the other for $320,000 to the Solis Law Firm for attorneys' fees.

On January 24, the Tellez Family, who received nothing from the Policy Proceeds, commenced an involuntary bankruptcy proceeding against the Debtor. On February 9, Appellee Catherine S. Curtis, then the Interim Trustee (now, the "Trustee"), brought an adversary proceeding against Appellants Gomez and the Solis Law Firm seeking to avoid and recover the transfer of the Policy Proceeds pursuant to 11 U.S.C. §§ 547 and 550 of the Bankruptcy Code (the "Complaint").[2] Appellants moved to dismiss on the ground that the Trustee failed to allege a transfer of the Debtor's property because the Debtor had neither legal title in nor a contractual right to receive the Policy Proceeds, and otherwise lacked control over their disbursement.[3]

The bankruptcy court denied the motion. The bankruptcy court first found that the Complaint, which alleged over $8,000,000 in claims related to the Accident against the $1,000,000 policy limit, satisfied the "limited circumstances" set forth in *Martinez v. OGA Charters, L.L.C.* (*In re OGA Charters*), 901 F.3d 599 (5th Cir. 2018), in which a Debtor may have an equitable interest in the insurance proceeds such that they can be classified as property of the estate. Then, the bankruptcy court considered whether the pre-petition payment of the Policy Proceeds affected this equitable interest. Relying on *Begier v. IRS*, 496 U.S. 53, 110 S.Ct.

2258, 110 L.Ed.2d 46 (1990), the bankruptcy court found that it did not.

The district court subsequently certified the following question for direct appeal to this court pursuant to 28 U.S.C. § 158(d)(2):

> Whether the pre-petition payment of insurance proceeds to a tort claimant creditor of a debtor constitutes a "transfer of an interest of the debtor in property" under 11 U.S.C. § 547 when such payment is made by an insurer of the debtor pursuant to a valid *Stowers* settlement demand under Texas law.

II.

"When directly reviewing an order of the bankruptcy court, we apply the same standard of review that would have been used by the district court." *SeaQuest Diving, LP v. S&J Diving, Inc.* (*In re SeaQuest Diving, LP*), 579 F.3d 411, 417 (5th Cir. 2009). Thus, "[w]e review conclusions of law and mixed questions of law and fact *de novo* and review findings of fact for clear error." *Dean v. Seidel* (*In re Dean*), 18 F.4th 842, 844 (5th Cir. 2021) (citation omitted).

On appeal, Appellants contend that the district court erred in determining that the Debtor held an equitable property interest in the Policy Proceeds. This is because, Appellants argue, the Debtor has neither a legal nor equitable right to the proceeds under Texas law. But, critically, Appellants fail to contend with *In re OGA Charters*, in which we held that "[i]n the 'limited circumstances,' as here, where a siege of tort claimants threaten the debtor's estate over and above the policy limits, we classify the proceeds as property of the estate." 901 F.3d at 604. As we explained, "this interest does not bestow upon the debtor a right to pocket the proceeds," but "[i]nstead ... 'serve[s] to reduce some claims and permit more extensive distribution of available assets in the liquidation of the estate.' " *Id.* (quoting *Nat'l Union Fire Ins. Co. v. Titan Energy, Inc.* (*In re Titan Energy, Inc.*), 837 F.2d 325, 329 (8th Cir. 1988)).

Appellants do not dispute the bankruptcy court's finding that the factual allegations here fall under the "limited circumstances" addressed in *In re OGA Charters*. As the bankruptcy court noted, the Complaint alleges over $8,000,000 in claims against the Debtor's estate arising from the Accident, far beyond the $1,000,000 policy limit. Although the facts in *In re OGA Charters* were more extreme, involving $400,000,000 in claims against a $5,000,000 policy and more claimants overall, *id.* at 602, the present case is still clearly one in which "the policy limit is insufficient to cover [the] multitude of tort claims" faced by the estate. *Id.* at 603-04. Thus, the bankruptcy court correctly concluded that, under binding precedent in *In re OGA Charters*, the Policy Proceeds would be considered property of the estate.

Appellants do not distinguish *In re OGA Charters* or otherwise explain why it does not control this case. Instead, Appellants suggest that *In re OGA Charters* must have been incorrectly decided because insureds have "no right" to insurance proceeds under Texas law. "Under our well-recognized rule of orderliness, however, a panel of this court is bound by circuit precedent," which clearly holds that insurance proceeds can, in the circumstances alleged here, be considered property of the estate.[4] *Hidalgo Cnty Emergency Serv. Found. v. Carranza* (*In re Hidalgo*

Cnty. Emergency Serv. Found.), 962 F.3d 838, 841 (5th Cir. 2020).

Granted, as the bankruptcy court recognized, *In re OGA Charters* addressed the question of whether insurance proceeds were property of the estate pursuant to § 541 of the Bankruptcy Code, not whether a transfer of those proceeds could be avoided pursuant to § 547. That is because, in *In re OGA Charters*, although the insurer had entered into settlements with some of the claimants, the insurance proceeds had yet to be disbursed. 901 F.3d at 601. In contrast, here Brooklyn Specialty transferred the Policy Proceeds fourteen days before the involuntary bankruptcy petition was filed, and two checks totaling the Policy Proceeds were made out to Appellants eight days before the involuntary petition was filed.

We find that this pre-petition payment of the Policy Proceeds does not affect the Debtor's equitable interest in them at the time the petition was filed. Section 541 of the Bankruptcy code, which governs the creation of an estate in bankruptcy and is at issue in *In re OGA Charters*, states that "such estate is comprised of all ... *legal or equitable interests of the debtor in property* as of the commencement of the case." § 541(a)(1) (emphasis added). Relatedly, § 547 provides the means by which a trustee "may ... avoid any transfer of *an interest of the debtor in property*," including those "made on or within 90 days before the date of the filing of the petition," if this transfer meets certain statutory conditions.[5] § 547(b) (emphasis added). Relevant here, courts understand "an interest of the debtor in property" as used in § 547(b) to be coextensive with "interests of the debtor in property" as used in § 541(a)(1). *Begier*, 496 U.S. at 59 n.3, 110 S.Ct. 2258; *see also Cullen Ctr. Bank*

& Trust v. Hensley (*In re Criswell*), 102 F.3d 1411, 1416 (5th Cir. 1997).

As the Supreme Court explained in *Begier*, "[b]ecause the purpose of the avoidance provision is to the preserve the property includable within the bankruptcy estate ... 'property of the debtor' subject to the preferential transfer provision is best understood as that property that would have been part of the estate had it not been transferred before the commencement of bankruptcy proceedings." 496 U.S. at 58, 110 S.Ct. 2258. The Policy Proceeds would have been property of the estate at the time the petition was filed if they had not been transferred. Thus, for the purposes of the avoidance provision as stated in *Begier*, the Policy Proceeds are the property of the estate. For the reasons discussed above, the Complaint alleges facts falling under the "limited circumstances" in which *In re Charters, L.L.C.* states that insurance proceeds are considered property of the estate.

Thus, we find that the bankruptcy court correctly found that the trustee had properly alleged a transfer of the Debtor's property as required by § 547. We therefore AFFIRM.

Footnotes

1Under *G.A. Stowers Furniture Co. v. American Indem. Co.*, 15 S.W.2d 544 (Tex. Comm'n. App. 1929, holding approved), Texas law imposes a "basic tort duty," known as the *Stowers* doctrine, under which insurers, "when faced with a settlement offer within policy limits, must accept the offer ... when an ordinarily prudent insurer would do so in light of the reasonably apparent likelihood and degree of that insured's potential exposure to a valid judgment in the suit in excess of policy limits." *Travelers Indem. Co. v. Citgo Petroleum Corp.*, 166 F.3d 761, 764 (5th Cir. 1999) (citation omitted).

2The Trustee filed the operative amended complaint on March 26, 2021.

3Although Appellants raised three main arguments for dismissal, only one is relevant as to this appeal.

4To this end, Appellants' arguments that Texas law, not federal bankruptcy law, controls are incorrect. *In re OGA Charters* similarly dealt with insurance proceeds governed by Texas law and explicitly rejected Appellants' argument that the Texas Supreme Court's decision in *Texas Farmers Insurance Co. v. Soriano*, 881 S.W.2d 312 (Tex. 1994) dictates the outcome of the case. *See In re OGA Charters*, 901 F.3d at 605 (explaining that, because "categorizing the [insurance] proceeds as property of the estate does not involve any sort of determination regarding the negligent-settlement liability of an insurer or the lack thereof," its holding was not "a 'collateral attack' on state law," including *Soriano*).

5Appellants do not argue that these statutory conditions are not satisfactorily pled.

645 B.R. 208
United States Bankruptcy Court, S.D. Texas, McAllen Division.

IN RE: JOSIAH'S TRUCKING, LLC, Debtor.

Catherine Stone Curtis, Plaintiff,

v.

Law Office of Rogelio Solis PLLC and Ana Gomez, Defendants.

CASE NO: 21-70009ADVERSARY NO. 21-7002
Signed November 9, 2022

Attorneys and Law Firms

Simon Richard Mayer, Locke Lord LLP, Houston, TX, for Plaintiff.
David L. Curry, Jr., Matthew Scott Okin, Okin Adams, LLP, Houston, TX, for Defendants.

MEMORANDUM OPINION

Eduardo Rodriguez, United States Bankruptcy Judge

The Law Office of Rogelio Solis, PLLC and Ana Gomez seek dismissal of chapter 7 trustee Catherine Stone Curtis's avoidance actions brought pursuant to 11 U.S.C. §§ 547 and 550. Catherine Stone Curtis filed a response on May 3, 2021. On November 3, 2022, the Court held a hearing and for the reasons stated herein, the Law Office of Rogelio Solis, PLLC and Ana Gomez's motion to dismiss the complaint is denied.

I. BACKGROUND

1. On December 19, 2020, an automobile accident occurred when the trailer from a tractor trailer owned by Josiah's Trucking, LLC ("*Debtor*") entered into the southbound lane of FM 493 and collided with a vehicle carrying Carlos Tellez, Jr., and Anna Isabel Ortiz, ultimately resulting in their deaths ("*Accident*").[1]
2. Anna Isabel Ortiz is survived by Defendant Ana Gomez ("*Gomez*") and Reyes Adrian Ortiz (collectively, "*Ortiz Family*").[2]
3. Carlos Tellez, Jr. is survived by Sonia Tellez, Carlos Tellez, Rose Mary Rodriquez, and I. Tellez, a minor (collectively, "*Tellez Family*" or "*Petitioning Creditors*").[3]
4. Shortly after the Accident both Gomez and the Tellez Family engaged counsel and began the claims process. Gomez employed the Solis Law Firm ("*Solis*" and together with Gomez, "*Defendants*"); and the Tellez Family engaged Escobedo & Cardenas, L.L.P.[4]
5. At the time of the Accident, Brooklyn Specialty Insurance Company RRG, Inc. ("*Brooklyn Specialty*") insured Debtor under Policy ATP-4-062020 ("*Policy*"). Brooklyn Specialty has alleged that the applicable limit of liability under the policy is $1,000,000.00 ("*Policy Limit*").[5]
6. Gomez, through the Solis Law Firm, made a *Stowers* demand on Brooklyn Specialty for the limits of the Policy.[6]
7. On January 12, 2021, Brooklyn Specialty paid as much as $1,000,000.00 ("*Policy Proceeds*") into Solis's IOLTA account Ana Gomez, thereby exhausting the alleged Policy Limits.[7]
8. On January 18, 2021, the Solis Law Firm caused two checks to be drafted from its IOLTA account. Check number 223, in the amount of $680,000.00, was made

payable to Gomez. Check number 224, in the amount of $320,000.00, was made payable to Solis, for Gomez's attorney's fees.[8]

9. On January 26, 2021, the Tellez Family filed an involuntary bankruptcy petition ("*Involuntary Proceeding*") against Debtor under chapter 7 of title 11 of the United States Code[9] in the United States Bankruptcy Court for the Southern District of Texas, McAllen Division.
10. On February 9, 2021, Catherine Curtis ("*Trustee*" or "*Plaintiff*"), then the interim trustee, filed the "Complaint to Avoid and Recover Transfer Pursuant to 11 U.S.C. §§ 547 and 550"[10] initiating this Adversary Proceeding against Defendants.
11. On February 9, 2021, Trustee, filed her Emergency Motion for Temporary Restraining Order and Preliminary Injunction[11] ("*TRO Motion*"), seeking a temporary restraining order and preliminary injunction enjoining Defendants from distributing or otherwise disbursing any of the Policy Proceeds or funds they received, whether directly or from their counsel, from the Policy or from Brooklyn Specialty.
12. On February 11, 2021, the Court entered a Stipulation and Agreed Order, which resolved the temporary restraining order of the TRO Motion and sought to maintain the status quo until March 11, 2021.[12]
13. On February 25, 2021, the Court entered its "Order Granting Emergency Motion of Josiah's Trucking LLC to Convert to Chapter 11"[13] converting the Involuntary Proceeding into a bankruptcy case under chapter 11 of the Bankruptcy Code.
14. On March 3, 2021, the Court entered its "Order Vacating Order Directing Appointment of Chapter 11 Trustee"[14] and "Corrected Order Directing

Appointment of Chapter 11 Trustee Pursuant to 11 U.S.C § 1104"[15] directing the appointment of a chapter 11 trustee by the United States Trustee ("*UST*").

15. On March 9, 2021, the UST filed its "Application for Order Approving Appointment of Chapter 11 Trustee."[16]
16. On March 9, 2021, the Court entered another Stipulation and Agreed Order[17] ("*Second Stipulation*") which, among other things, requires that Defendants will maintain in their possession, custody, and control a combined balance of not less than $400,000 during the time period the Second Stipulation is in effect, which period shall be no less than sixty days from the date the Court enters the Second Stipulation.
17. On March 10, 2021, the Court entered the "Order Approving Appointment of Chapter 11 Trustee in the Josiah's Trucking, LLC Case,"[18] approving the appointment of Catherine Stone Curtis as chapter 11 trustee.
18. On March 22, 2021, Trustee filed her "Expedited Motion To Convert Chapter 11 Case To Chapter 7."[19]
19. On March 25, 2021, Debtor filed "David Vasquez's Non-Opposition To Trustee's Motion To Convert Chapter 11 Case To Chapter 7."[20]
20. On March 26, 2021, Trustee filed her amended complaint[21] ("*Complaint*") setting forth two causes of action: Count I – Transfer Avoidable Under 11 U.S.C. § 547; and Count II – Transfer Recoverable Under 11 U.S.C. § 550.[22]
21. On April 7, 2021, the Court signed an order converting the case to chapter 7.[23]
22. On April 9, 2021, Defendants filed the instant "Defendants' Motion to Dismiss the Plaintiff's Complaint"[24] ("*Motion to Dismiss*"). On the same date,

Defendants filed their "Defendants' Motion to Withdraw the Reference."[25]

23. On May 3, 2021, Trustee filed "Plaintiff's Objection to Defendants' Motion to Withdraw the Reference."[26]
24. On May 13, 2021, this Court issued its Report and Recommendation to the United States District Court recommending that the reference be immediately withdrawn, but that the District Court then refer the adversary proceeding to the undersigned judge for adjudication of all pretrial matters, with the undersigned judge thereafter notifying the District Court when the dispute is ready to be tried.[27]
25. On July 14, 2022, the United States District Court adopted this Court's recommendation.[28]
26. On November 3, 2022, a hearing on the Motion to Dismiss was held (the "*Hearing*") and the Court now issues the instant memorandum opinion.[29]

II. JURISDICTION AND VENUE

This Court holds jurisdiction pursuant to 28 U.S.C. § 1334, which provides "the district courts shall have original and exclusive jurisdiction of all cases under Title 11 or arising in or related to cases under Title 11." An adversary proceeding falls within the Court's "related to" jurisdiction if the "outcome of that proceeding could conceivably have any effect on the estate being administered in bankruptcy."[30] Section 157 allows a district court to "refer" all bankruptcy and related cases to the bankruptcy court, wherein the latter court will appropriately preside over the matter.[31] This Court determines that since the Complaint alleges a preference claim under § 547 and for recovery of the funds under § 550 of the Bankruptcy Code, the adjudication of preference claims and for recovery are statutorily "core" under 28 U.S.C. § 157(b)(2)(A), (F), and (O).

Furthermore, this Court may only hear a case in which venue is proper.[32] Pursuant to § 1409(a), "a proceeding arising under title 11 or arising in or related to a case under title 11 may be commenced in the district court in which such case is pending."[33] Debtor's underlying chapter 7 case is presently pending in this Court and therefore, venue of this adversary proceeding is proper.

III. ANALYSIS

A. Standard of Review for Motions to Dismiss Under Federal Rule of Civil Procedure 12(b)(6)

To survive a motion to dismiss under Rule 12(b)(6), a plaintiff's complaint must clear two hurdles. First, the complaint must describe the claim in enough detail to give fair notice of the claim and the grounds for it.[34] "[A] formulaic recitation of the elements of a cause of action will not do."[35] Specifics are unnecessary, but some facts must support each element.[36] Second, the complaint must state a claim "plausible on its face,"[37] meaning the plaintiff's right to relief must rise above a "speculative level."[38] Rule 8(a)(2) requires a plaintiff to plead "a short and plain statement of the claim showing that the pleader is entitled to relief."[39] In *Ashcroft v. Iqbal*, the Supreme Court held that Rule 8(a)(2) requires that "the well-pleaded facts ... permit the court to infer more than the mere possibility of misconduct."[40] "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged."[41] "The plausibility standard is not akin to a 'probability requirement,' but it asks for more than a sheer possibility that a defendant has acted unlawfully."[42]

Motions to dismiss are disfavored and thus, rarely granted.[43] When considering a motion to dismiss under Rule 12(b)(6), courts accept well-pleaded allegations as true and liberally construe the complaint in favor of the plaintiff.[44] This Court reviews motions under Rule 12(b)(6) by "accepting all well-pleaded facts as true and viewing those facts in the light most favorable to the plaintiffs."[45] When considering a motion to dismiss under Rule 12(b)(6), the Court must assess the legal feasibility of the complaint, not weigh the evidence that might be offered in its support.[46] The Court's consideration "is limited to facts stated on the face of the complaint and in the documents appended to the complaint or incorporated in the complaint by reference, as well as to matters of which judicial notice may be taken." [47] And although this Court "will not strain to find inferences favorable to the plaintiff[ ],"[48] the facts need only be sufficient "for an inference to be drawn that the elements of the claim exist."[49]

B. Defendants' Motion to Dismiss

In the Complaint, Plaintiff pleads that on or around January 12, 2021, Brooklyn Specialty made a $1,000,000 transfer to Solis's IOLTA account on behalf of Gomez.[50] From the IOLTA, a check for $680,000 was made payable to Gomez and another check for $320,000 was made payable to Solis in satisfaction of the attorney's fees owed by Gomez.[51] Plaintiff alleges that Gomez was an initial transferee and Solis was an immediate or mediate transferee.[52] Trustee seeks to avoid the initial transfer of $1,000,000 pursuant to 11 U.S.C. § 547 and to recover $680,000 from Gomez and $320,000 from Solis pursuant to 11 U.S.C. § 550.[53]

Defendants offer three main arguments as to why their Motion To Dismiss should be granted. First, Defendants argue that Plaintiff's § 547 claim should be dismissed because Plaintiff has failed to allege a transfer of Debtor's property.[54] Second, Defendant's assert that since Plaintiff's § 547 claim for avoidance should be dismissed, both of Plaintiff's § 550 claims for recovery must also be dismissed.[55] Finally, in the alternative, Defendants argue that because Solis is as an immediate or mediate good faith transferee, Plaintiff's claim to recover the $320,000 transfer to Solis under § 550(b)(1) should be dismissed.[56] The Court will consider each in turn.

1. Whether Plaintiff has failed to allege a transfer of Debtor's property as required by § 547

Defendants first argue that Plaintiff's claim to avoid the initial transfer of $1,000,000 pursuant to 11 U.S.C. § 547 should be dismissed because Plaintiff failed to allege a transfer of Debtor's property.[57] Section 547 of the Bankruptcy Code permits a trustee to avoid transfers of a debtor's property if the transfer meets certain conditions established by statute.[58] An essential element of a claim under § 547(b) requires a showing that a transfer of "an interest of the debtor in property" occurred.[59] Section 541 provides that "the commencement of a case under ... this title creates an estate." "Such estate is comprised of all ... legal or equitable interest of the debtor in property as of the commencement of the case."[60] In *Begier v. IRS*, 496 U.S. 53, 59 n.3, 110 S.Ct. 2258, 110 L.Ed.2d 46 (1990), the

Supreme Court read the phrase "an interest of the debtor in property" to be coextensive with "interests of the debtor in property" as used in § 541(a)(1).

In the Complaint, Plaintiff alleges that because the sum of all claims arising from the Accident exceed the coverage provided by the Policy, Debtor had an equitable interest in the Policy Proceeds at the time the Accident occurred.[61] In the Motion to Dismiss, Defendants assert that Plaintiff failed to allege that Debtor held legal title in or a contractual right to receive the Policy Proceeds.[62] Therefore, since an insured (i.e., Debtor) lacks control over the disbursement of liability insurance proceeds under Texas law, Defendants contend that the transfer of the Policy Proceeds was not a transfer of an interest of the Debtor as required under 11 U.S.C. § 547.[63]

Plaintiff, in response, citing to *Martinez v. OGA Charters, L.L.C. (In re Charters, L.L.C.)*, 901 F.3d 599, 604 (5th Cir. 2018), pled that Debtor had an equitable interest (i.e., a property interest) in the Policy Proceeds at the time the Accident occurred because the sum of all claims against Debtor arising from the Accident significantly exceeds the coverage provided by the Policy.[64] Thus, Plaintiff continues, Debtor had a property interest in the Policy Proceeds when the Transfer occurred because upon the filing of the bankruptcy case, the Policy Proceeds would have become property of the bankruptcy estate under 11 U.S.C. § 541(a)(1) had they not been transferred pre-petition.[65]

At first blush, the case at bar appears to mimic the Fifth Circuit's *In re Charters, L.L.C., Inc.* There, a bus owned by a charter company rolled while on its way to a casino in Eagle Pass, Texas.[66] Nine passengers were killed, and more than 40 others were injured.[67] The charter company owned an insurance policy that provided $5,000,000 in liability coverage for "covered autos."[68] A small group of victims and their representatives entered into settlements with the insurance provider that—if valid and enforceable—would exhaust the $5,000,000 in liability coverage.[69] Before the insurance proceeds were paid to the settling victims, the victims that had not settled with the insurance company filed an involuntary bankruptcy petition against the charter company.[70] The claims against the charter company's estate exceeded $400,000,000.[71]

On direct appeal to the Fifth Circuit, the bankruptcy court certified the following question:

> "Are proceeds of a debtor-owned liability insurance policy property of the debtor's bankruptcy estate when: (1) the policy covers the debtor's liability to third parties; (2) the debtor cannot make a legally cognizable claim against the policy; and (3) the claims by third parties exceed the coverage limits of the policy[?]"[72]

The Fifth Circuit held that "[i]n the 'limited circumstances' as here, where a siege of tort claimants threaten the debtor's estate over and above the policy limits, we classify the proceeds as property of the estate."[73] The Court further found that "the language of § 541(a)(1) is broad enough to cover an interest in liability insurance, namely, the debtor's right to have the insurance company pay money to satisfy debts accrued through the insured's negligent behavior."[74]

Here, there were two victims of the Accident.[75] A survivor of one of those victims, Gomez, made a *Stowers* demand on Brooklyn Specialty, which resulted in Brooklyn Specialty paying the Policy Proceeds into Solis's IOLTA for the benefit of Gomez, exhausting the policy limits.[76] The survivors of the other victim, the Tellez Family, who did not settle with Brooklyn Specialty, filed the instant involuntary bankruptcy petition against Debtor.[77] According to the well-pleaded facts of the Complaint, which the Court must take as true at this stage of the proceeding, claims against Debtor's estate arising from the Accident amount to $8,000,000, far beyond the Policy Limit.[78] Thus, the facts here appear to be the "limited circumstances" addressed in *In re Charter, L.L.C.*

However, there is one critical difference between the present case and *In re Charter, L.L.C.* that the Court must carefully consider. In *In re Charter, L.L.C.*, although the insurance company settled with certain victims and their representatives before the involuntary bankruptcy petition was filed against the charter company, the policy proceeds had not been paid out by the time the involuntary petition was filed.[79] Here, according to Plaintiff's Complaint, the Policy Proceeds were transferred to Solis's IOLTA account fourteen days before the involuntary bankruptcy petition was filed against Debtor.[80] Additionally, two checks totaling the Policy Proceeds—one for $680,000 to Gomez and one for $320,000 to Solis—were made payable eight days before the involuntary petition was filed.[81] The question then is whether the pre-petition payment of the Policy Proceeds affects whether Debtor had an equitable interest in the Policy Proceeds when the petition was filed.

Looking to *Begier*, the Court finds that the pre-petition disbursement of the Policy Proceeds does not affect Debtor's equitable interest therein. In *Begier*, the Supreme Court stated that

> Because the purpose of the avoidance provision is to preserve the property includable within the bankruptcy estate -- the property available for distribution to creditors -- "property of the debtor" subject to the preferential transfer provision is best understood as the property that would have been part of the estate had it not been transferred before the commencement of bankruptcy proceedings.[82]

Then, in *In re Charters, L.L.C.* the Fifth Circuit held that "over $400 million in related ***218** claims threaten the debtor's estate over and above the $5 million policy limit, giving rise to an equitable interest of the debtor in having the proceeds applied to satisfy as much of those claims as possible."[83]

According to Plaintiff's Complaint, over $8,000,000 in claims related to the Accident threaten Debtor's estate here, far above the $1,000,000 Policy Limit.[84] Like in *In re Charters, L.L.C.*, this gives rise to an equitable interest of Debtor in having the Policy Proceeds applied to satisfy as much of the $8,000,000 in related claims as possible. Following the rationale of *Begier*, the fact that the Policy Proceeds were subsequently transferred fourteen days prior to Debtor's bankruptcy does not eliminate Debtor's equitable interest in the Policy Proceeds since the purpose of the avoidance provision is to preserve the property includable within the bankruptcy estate and Debtor would have had an equitable interest in the Policy Proceeds but for the transfer.

Lastly, Defendants' argument that under Texas law "an insured lacks control over the disbursement of liability insurance proceeds" and thus, Trustee's claims fail as a matter of law lacks merit.[85] In *In re Charters, L.L.C.*, the Fifth Circuit specifically cited to *Soriano*, a Texas Supreme Court case cited by Defendants, and stated that:

> Under Texas law, insurers do not incur independent liability solely by reason of entering into reasonable settlements that exhaust or diminish the proceeds available to satisfy other claims. However, categorizing the proceeds as property of the estate does not involve any sort of determination regarding the negligent-settlement liability of an insurer or the lack thereof.[86]

As the Fifth Circuit made clear, the subject of insurance carrier liability is separate and distinct from classification of the insurance proceeds as property of the estate. Defendants' argument regarding whether an insured lacks control over the disbursement of liability insurance proceeds is simply not relevant as to whether Debtor had an interest in the Policy Proceeds under § 547. Thus, the Texas law cited by Defendants in this case is inapposite and Defendants' argument fails.

Accordingly, Plaintiff has properly pled that Debtor had an interest in the Policy Proceeds and Defendants' first argument that Plaintiff has failed to allege a transfer of Debtor's property as required by § 547 is denied.

2. Whether Plaintiff's § 550 claims for recovery should be dismissed because Plaintiff's § 547 claims for avoidance were dismissed

The basis of Defendants' second argument was that Plaintiff's § 550 claims should be dismissed since § 550 only applies "if a transfer is avoided under § 547" and Defendants have raised an argument warranting dismissal of Plaintiff's § 547 claims.[87] Section 550 of the Bankruptcy Code allows a trustee to recover transferred property after avoidance.[88] In pertinent part, § 550 provides:

> (a) Except as otherwise provided in this section, to the extent that a transfer is avoided under section ... 547 ... of this title, the trustee may recover, for the benefit of the estate, the property transferred, or, if the court so orders, the value of such property, from—

(1) the initial transferee of such transfer or the entity for whose benefit such transfer was made; or
(2) any immediate or mediate transferee of such initial transferee.

In their second argument, Defendants contend that Plaintiff's § 550 claims should be dismissed because Plaintiff failed to state a claim under § 547 and thus § 550 does not apply.[89] The problem with Defendants' second argument is that it rests upon Defendants' unsuccessful first argument to dismiss Plaintiff's § 547 claim. As discussed above, Defendants' first argument fails since they have not raised a sufficient basis for dismissal under § 547. Thus, Defendant's second argument is also without merit.

Accordingly, Defendants' second argument that Plaintiff's § 550 claims should be dismissed is denied.

3. Whether Plaintiff is precluded from recovery from Solis under § 550(b)(1) as an immediate or mediate good faith transferee

Next, Defendants assert that under § 550(b)(1) Plaintiff is precluded from recovering $320,000 from Solis because Solis is an immediate or mediate good faith transferee. Section 550(a) provides:

> (a) Except as otherwise provided in this section, to the extent that a transfer is avoided under section ... 547 ... of this title, the trustee may recover, for the benefit of the estate, the property transferred, or, if the court so orders, the value of such property, from—
>
> (1) the initial transferee of such transfer or the entity for whose benefit such transfer was made; or
> (2) any immediate or mediate transferee of such initial transferee.

Furthermore, under § 550(b), the liability of the subsequent transferee is subject to a "good faith purchaser for value" defense.[90] Under § 550(b)(1), a trustee may not recover from a subsequent transferee that takes for value, in good faith, and without knowledge of the voidability of the transfer avoided.

Here, Defendants argue that a § 550(a)(2) claim against Solis is prohibited because as demonstrated on the face of the Complaint, Solis took for value and in good faith by accepting payment for legal services rendered.[91] Defendants also assert that Solis took without knowledge of voidability because the insurer had the absolute right under Texas law to settle with Gomez.[92] Defendants cite to § 550(b)(1), which provides that "[t]he trustee may not recover under section (a)(2) of this section from a transferee that takes for value, including satisfaction or securing of a present or antecedent debt, in good faith, and without knowledge of the voidability of the transfer avoided." In response, Plaintiff asserts that Defendants did not carry their burden to establish that the property was taken without knowledge of voidability.[93]

"Although dismissal under rule 12(b)(6) may be appropriate based on a successful affirmative defense, that defense must appear on the face of the complaint."[94] Section 550(b)(1) sets forth an affirmative defense to a trustee's recovery action.[95] Defendants face a high bar to demonstrate an affirmative defense on the face of the Complaint.[96] Defendants assert that the face of the Complaint demonstrates that Solis took for value and in good faith, but then point to Texas state law in asserting that Solis lacked knowledge of the voidability of the transfer sought to be avoided.[97] The Texas state law cited by Defendants does not appear on the face of Plaintiff's Complaint, nor does it control the outcome of this case, as discussed above. Thus, the face of the Complaint does not show that Solis received the transfer without knowledge of voidability. Absent that, dismissal under Rule 12(b)(6) is not appropriate.[98]

Accordingly, Defendants' third argument that Plaintiff is precluded from recovery from Solis under § 550(b)(1) as an immediate or mediate good faith transferee is denied.

IV. CONCLUSION

An order consistent with this Memorandum Opinion will be entered on the docket simultaneously herewith.

Footnotes

1 ECF No. 38 at 8, ¶ 8.
2 *Id.* at ¶ 9.
3 *Id.* at ¶ 10.
4 *Id.* at ¶ 11.
5 *Id.* at 4, ¶ 12.
6 *Id.* at 5, ¶ 18.
7 *Id.*
8 *Id.* at 5, ¶ 19.
9 Any reference to "Code" or "Bankruptcy Code" is a reference to the United States Bankruptcy Code, 11 U.S.C., or any section (i.e., §) thereof refers to the corresponding section in 11 U.S.C. Citations to the docket in this adversary proceeding styled *Catherine Stone Curtis v. The Law Offices of Rogelio Solis, PLLC and Ana Gomez* 21-7002 ("*Adversary Proceeding*"), shall take the form "ECF No. ___," while citations to the bankruptcy case, 21-70009 (the "*Bankruptcy Case*"), shall take the form "Bankr. ECF No. __."; Any reference to "Code" or "Bankruptcy Code" is a reference to the United States Bankruptcy Code, 11 U.S.C., or any section (i.e., §) thereof refers to the corresponding section in 11 U.S.C. Bankr. ECF No. 1.
10 ECF No. 1.
11 ECF No. 2.
12 ECF No. 17.
13 Bankr. ECF No. 61.
14 Bankr. ECF No. 62.
15 Bankr. ECF No. 69.

16 Bankr. ECF No. 74.
17 ECF No. 30.
18 Bankr. ECF No. 77.
19 Bankr. ECF No. 89.
20 Bankr. ECF No. 97.
21 ECF No. 38.
22 *Id.*
23 Bankr. ECF No. 114.
24 ECF No. 41.
25 ECF No. 42.
26 ECF No. 53.
27 ECF No. 56.
28 ECF No. 59.
29 ECF No. 68.
30 *In re Trevino*, 535 B.R. 110, 125 (Bankr. S.D. Tex. 2015) (quoting *Wood v. Wood* (*In re Wood*), 825 F.2d 90, 93 (5th Cir. 1987)).
31 28 U.S.C. § 157(a); *see also In re Order of Reference to Bankruptcy Judges*, Gen. Order 2012-6 (S.D. Tex. May 24, 2012).
32 28 U.S.C. § 1408.
33 28 U.S.C. § 1409(a).
34 *See* FED. R. BANKR. P. 7008 (incorporating FED. R. CIV. P. 8(a)).
35 *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007).
36 *Ashcroft v. Iqbal*, 556 U.S. 662, 678, 129 S.Ct. 1937, 173 L.Ed.2d 868 (2009).
37 *Twombly*, 550 U.S. at 570, 127 S.Ct. 1955.
38 *Id.* at 555, 127 S.Ct. 1955.
39 FED. R. CIV. P. 8(a).
40 556 U.S. at 679, 129 S.Ct. 1937 (quoting Rule 8(a)(2)).
41 *Id.* at 678, 129 S.Ct. 1937.
42 *Id.* (quoting *Twombly*, 550 U.S. at 556, 127 S.Ct. 1955); *see also Lormand v. US Unwired, Inc.*, 565 F.3d

228, 232 (5th Cir. 2009) ("A complaint does not need detailed factual allegations, but must provide the plaintiff's grounds for entitlement to relief – including factual allegations that when assumed to be true raise a right to relief above the speculative level.") (citations omitted).

43 *Test Masters Educ. Servs., Inc. v. Singh*, 428 F.3d 559, 570 (5th Cir. 2005).

44 *Campbell v. Wells Fargo Bank*, 781 F.2d 440, 442 (5th Cir. 1986).

45 *Stokes v. Gann*, 498 F. 3d 483, 484 (5th Cir. 2007) (per curiam).

46 *Koppel v. 4987 Corp.*, 167 F.3d 125, 133 (2d Cir. 1999).

47 *Hertz Corp. v. City of New York*, 1 F.3d 121, 125 (2d Cir. 1993).

48 *Southland Sec. Corp. v. INSpire Ins. Solutions Inc.*, 365 F.3d 353, 361 (5th Cir. 2004) (internal quotations omitted).

49 *See Harris v. Fidelity Nat'l Info. Serv.* (*In re Harris*), Nos. 03-44826, 08-3014, 2008 WL 924939 at *4, 2008 Bankr. LEXIS 1072 at *11 (Bankr. S.D. Tex. Apr. 4, 2008) (citing *to Walker v. South Cent. Bell Tel. Co.*, 904 F.2d 275, 277 (5th Cir. 1990)).

50 ECF No. 38.

51 *Id.* at 5, 9, ¶¶ 18–19, 40–41.

52 *Id.* at 5, 9, ¶¶ 19, 41.

53 *Id.* at 1, 9, ¶¶ 1, 42.

54 ECF No. 41 at 9-12.

55 *Id.* at 12.

56 *Id.* at 12-13.

57 ECF No. 41 at 9-12.

58 11 U.S.C. § 547(b).

59 *Moser v. Bank of Tyler (In re Loggins)*, 513 B.R. 682, 696 (Bankr. E.D. Tex. 2014).

60 11 U.S.C. § 541(a)(1).

61 ECF No. 38 at 7, ¶ 30.
62 ECF No. 41 at 10, ¶ 33.
63 *Id.*
64 ECF No. 38 at 7, ¶ 30.
65 *Id.*
66 901 F.3d at 601.
67 *Id.*
68 *Id.*
69 *Id.*
70 *Id.* at 602.
71 *Id.*
72 *Id.*
73 *Id.* at 604.
74 *Id.* at 605 (cleaned up) (quoting *Tringali v. Hathaway Machinery Co.*, 796 F.2d 553, 560 (5th Cir. 2018)).
75 ECF No. 38 at 3, ¶ 38.
76 *Id.* at 5, ¶ 18.
77 Bankr. ECF No. 1.
78 ECF No. 38 at 6, ¶ 32.
79 *In re Charters, L.L.C.*, 901 F.3d at 602.
80 *Id.* at 5, ¶ 18.
81 *Id.* at 5, ¶ 19.
82 496 U.S. 53, 58, 110 S.Ct. 2258, 110 L.Ed.2d 46 (1990).
83 901 F.3d at 604.
84 ECF No. 38 at 6, ¶ 32.
85 ECF No. 41 at 2, ¶ 1 (first citing *Travelers Indem. Co. v. Citgo Petroleum Corp.*, 166 F.3d 761, 764 (5th Cir. 1999), then citing *Tex. Farmers. Ins. Co. v. Soriano*, 881 S.W.2d 312, 315 (Tex. 1994)).
86 *In re Charters, L.L.C.*, 901 F.3d at 605.
87 ECF No. 41 at 12.
88 11 U.S.C. § 550.
89 ECF No. 41 at 12.
90 11 U.S.C. § 550(b).

91 ECF No. 41 at 12–13, ¶ 39.
92 *Id.* at 13, ¶ 40.
93 ECF No. 52 at 8, ¶¶ 23–24.
94 *EPCO Carbon Dioxide Prods., Inc. v. JP Morgan Chase Bank, N.A.*, 467 F.3d 466, 470 (5th Cir. 2006).
95 *E.g.*, *Schmidt v. Meridian Capital Found. (In re Black Elk Energy Offshore Operations, LLC)*, Case No. 19-03330, 2019 WL 3889761 at *6, 2019 Bankr. LEXIS 2561 at *34 (Bankr. S.D. Tex. Aug. 16, 2019).
96 *Schmidt v. Fuchs (In re Black Elk Energy Offshore Operations, LLC)*, Case No. 19-3459, 2021 WL 346226 at *8, 2021 Bankr. LEXIS 227 at *37 (Bankr. S.D. Tex. Feb. 1, 2021) (citing *EPCO Carbon Dioxide Prods., Inc.*, 467 F.3d at 470–71).
97 ECF No. 41 at 13, ¶ 40.
98 *See EPCO Carbon Dioxide Prods., Inc.*, 467 F.3d at 470–71.

93 F.4th 276
United States Court of Appeals, Fifth Circuit.
LAW OFFICE OF ROGELIO SOLIS PLLC; Ana Gomez, Appellants,
v.
Catherine Stone CURTIS, Appellee.
No. 23-40125
Filed February 14, 2024

Appeal from the United States District Court for the Southern District of Texas USDC No. 7:21-AP-7002 USDC No. 7:22-CV-418, Eduardo V. Rodriguez, Chief Judge

ON PETITION FOR REHEARING EN BANC

Attorneys and Law Firms

David L. Curry, Jr., Edward A. Clarkson, III, Matthew Scott Okin, Okin Adams Bartlett Curry, L.L.P., Houston, TX, for Appellants.

Simon Richard Mayer, Elizabeth M. Guffy, Locke Lord, L.L.P., Houston, TX, for Appellee.

Before Graves, Higginson, and Ho, Circuit Judges.

Opinion

Per Curiam:*

Treating the petition for rehearing en banc as a petition for panel rehearing (5TH CIR. R. 35 I.O.P.), the petition for panel rehearing is DENIED. The petition for rehearing en banc is DENIED because, at the request of one of its members, the court was polled, and a majority did not vote in favor of rehearing (FED. R. APP. P. 35 and 5TH CIR. R. 35).

In the en banc poll, seven judges voted in favor of rehearing (JONES, SMITH, ELROD, HO, DUNCAN, ENGELHARDT, AND OLDHAM), and nine voted against rehearing (RICHMAN, STEWART, SOUTHWICK, HAYNES, GRAVES, HIGGINSON, WILSON, DOUGLAS, and RAMIREZ).

Andrew S. Oldham, Circuit Judge, joined by Jones, Smith, Elrod, Ho, Duncan, and Engelhardt, Circuit Judges, dissenting from denial of rehearing en banc.

This case implicates federalism, bankruptcy, the rule of orderliness, and the party-presentation principle. Today our en banc court chooses to follow circuit precedent over a controlling, unanimous Supreme Court decision. And it apparently does not matter that our circuit precedent embraces a form of federal-common-law property that has no basis in our post-*Erie* federal system. I respectfully dissent.

*

Our decision in this case recognizes a form of property—an equitable interest in insurance proceeds—that Texas state law does not. *See L. Off. of Rogelio Solis PLLC v. Curtis*, 83 F.4th 409, 413 n.4 (5th Cir. 2023) ("Appellants' arguments that Texas law, not federal bankruptcy law, controls are in-correct."). This is erroneous for at least three reasons. *First*, the Supreme Court recently and unanimously held that "the determination of property rights in the assets of a bankrupt's estate" has been left "to state law." *Rodriguez v. Fed. Deposit Ins. Corp.*, 589 U.S. ––––, 140 S. Ct. 713, 718, 206 L.Ed.2d 62 (2020) (quoting *Butner v. United States*, 440 U.S. 48, 54, 99 S.Ct. 914, 59 L.Ed.2d 136 (1979)). *Second*, it has long been settled that insurance—and the property rights it creates—are questions of state law. *See, e.g.*, McCarran–Ferguson Act, 15 U.S.C. §§ 1011 *et seq.*; *U.S. Dep't of Treasury v. Fabe*, 508 U.S. 491, 113 S.Ct. 2202, 124 L.Ed.2d 449 (1993). *Third*, after *Erie Railroad Co. v. Tompkins*, "there is no general federal common law." 304 U.S. 64, 78, 58 S.Ct. 817, 82 L.Ed. 1188 (1938). And that whatever limited remaining role there might be for federal common law-making in this situation, it must be justified as "necessary to protect uniquely federal interests." *Texas Indus., Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630, 640, 101 S.Ct. 2061, 68 L.Ed.2d 500 (1981). And as we all know, these principles do not derive just from bankruptcy law, insurance law, and *Erie*; in our federal system, virtually all property law is a creature of state sovereignty.

*

True, the parties did not cite *Rodriguez* in their briefing before this court. But it is untrue that the party-presentation principle somehow limits federal judges to reading only those cases cited in a Table of Authorities. Our en banc conclusion to the contrary is insupportable.

The Supreme Court has repeatedly emphasized that parties present *issues* or *claims* for decision; they do not present *arguments, theories*, or *precedents*. For example, in *Kamen v. Kemper Financial Services, Inc.*, 500 U.S. 90, 99, 111 S.Ct. 1711, 114 L.Ed.2d 152 (1991), the Court said: "When an issue or claim is properly before the court, the court is not limited to the particular legal theories advanced by the parties, but rather retains the independent power to identify and apply the proper construction of governing law." *See also Elder v. Holloway*, 510 U.S. 510, 515–16, 114 S.Ct. 1019, 127 L.Ed.2d 344 (1994) (holding that an appellate court should take notice of relevant legal precedent overlooked by the parties). And more recently in *United States v. Sineneng-Smith*, 590 U.S. ——, 140 S. Ct. 1575, 1581–82, 206 L.Ed.2d 866 (2020), the Court reminded us that we are not bound by the precise arguments of counsel. *Accord Johnson v. City of Shelby*, 574 U.S. 10, 12, 135 S.Ct. 346, 190 L.Ed.2d 309 (2014) (holding plaintiffs must plead facts, not theories); *Rodgers v. Lancaster Police & Fire Dep't*, 819 F.3d 205, 207 n.2 (5th Cir. 2016) ("A complaint need not cite a specific statutory provision or articulate a perfect 'statement of the legal theory supporting the claim asserted.' " (citation omitted)).

Here, the parties squarely presented the issue: whether the property rights at issue are governed by state law or federal common law. Argument C in the Blue Brief was "**Texas Law Controls – Whether a debtor owns property is a question of applicable state law**." Blue Br. 12–15. The panel reply brief reiterated this point. *See* Grey Br. 2–3. And argument I.A in the petition for rehearing was "**Whether a debtor has an interest in property is determined under state law**." EB Pet. 5–7. The parties thus presented that issue for our decision. We should roundly reject the idea that, in exercising the judicial power vested in us by Article III, we're somehow *prohibited* from considering a unanimous 2020 Supreme Court decision that answers the issue presented because the appellant failed to cite it.[**]

Instead of following *Rodriguez* and *Butner*, our circuit precedent does the one thing *Erie* prohibits: It embraces federal common law without identifying a valid fount of it. *See Kamen*, 500 U.S. at 99, 111 S.Ct. 1711 ("Having undertaken to decide this [federal common law] claim, the Court of Appeals was not free to promulgate a federal common law ... rule without identifying the proper *source* of federal common law in this area.") (emphasis in original); *cf. Lamar v. Micou*, 114 U.S. 218, 223, 5 S.Ct. 857, 29 L.Ed. 94 (1885) ("The law of any State of the Union, whether depending upon statutes or upon judicial opinions, is a matter of which the courts of the United States are bound to take judicial notice, without plea or proof." (citations omitted)); *Bowen v. Johnston*, 306 U.S. 19, 23, 59 S.Ct. 442, 83 L.Ed. 455 (1939) (same).

The business of insurance, the contours of property rights, and the policy choices inherent in developing common law belong to Texas—not us. I respectfully dissent.

Footnotes

*Judge Willett did not participate in the consideration of the rehearing en banc.

**Our "limited to cases in the TOA" view of party presentation is particularly indefensible here because the appellants *did* cite *Butner*, which held "Congress has generally left the determination of property rights in the assets of a bankrupt's estate to state law." *Butner*, 440 U.S. at 54, 99 S.Ct. 914; *see* EB Pet. 5 (citing *Butner*). So even if we're somehow precluded from rejecting the panel's decision under the uncited *Rodriguez* decision, which we plainly are not, we still could and should reject the panel's decision under the cited *Butner* decision. Of course, none of this matters to the party-presentation principle properly understood. *Cf.* Kevin Bennardo & Alexa Z. Chew, *Citation Stickiness*, 20 J. App. Prac. & Proc. 61, 84 (2019) (finding 51% of cases cited in 325-opinion dataset "were endogenous—they originated from somewhere else [*i.e.*, *not* the parties' briefs], most likely the courts' own research"); *id.* at 115 (finding our circuit's endogeneity percentage was 52%).

1/6/23s

UNITED STATES DISTRICT COURT SOUTHERN DISTRICT OF TEXAS MCALLEN DIVISION

In re: JOSIAH'S TRUCKING, LLC, Debtor,

CATHERINE STONE CURTIS, CHAPTER 11 TRUSTEE, Plaintiff,

VS.

LAW OFFICE OF ROGELIO SOLIS, PLLC; et al. Defendants.

CIVIL ACTION NO. 7:22-cv-00418 BANKR. CASE NO. 21-70009 ADV. NO. 21-7002

CERTIFICATION OF DIRECT APPEAL

Defendants' request for certification1 is GRANTED. The Court hereby certifies Defendants' notice of appeal2 for a direct appeal to the United States Court of Appeals for the Fifth Circuit on the following question: Whether the pre-petition payment of insurance proceeds to a tort claimant creditor of a debtor constitutes a "transfer of an interest of the debtor in property" under 11 U.S.C. § 547 when such payment is made by an insurer of the debtor pursuant to a valid Stowers settlement demand under Texas law.
IT IS SO ORDERED.
DONE at McAllen, Texas, this 6th day of January 2023.

Micaela Alvarez United States District Judge

Footnotes
1 Dkt. No. 3.
2 Dkt. No. 4-1.

2/25/21

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF TEXAS
MCALLEN DIVISION

IN RE: JOSIAH'S TRUCKING LLC Alleged Debtor

(Involuntary Proceeding)

ORDER DENYING MOTION OF JOSIAH'S TRUCKING LLC TO DISMISS INVOLUNTARY PETITION PURSUANT TO 11 U.S.C. § 303

The Court, having considered the Motion of Josiah's Trucking LLC to Dismiss Involuntary Petition Pursuant to 11 U.S.C. § 303, is of the opinion that said Motion should be denied It is therefore, ORDERED that the Motion To Dismiss is DENIED

February 25, 2021

Eduardo V. Rodriguez
USBKR Judge