



## LOWENSTEIN BANKRUPTCY LOWDOWN

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#### Video 9-

#### Can Avoidance Actions Be Sold in Bankruptcy? Circuit Courts Split

By [Colleen M. Restel](#) and [Lindsay H. Sklar](#)

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**Colleen M. Restel:** Hi, I'm Colleen Restel.

**Lindsay H. Sklar:** And I'm Lindsay Sklar. We're associates in Lowenstein Sandler's Bankruptcy & Restructuring Department, and we're here to bring you a quick update on the ever-evolving concept of the bankruptcy estate with respect to avoidance actions.

Section 541 of the Bankruptcy Code provides that the bankruptcy estate is comprised of "all legal or equitable interests of the debtor." Courts construe this definition broadly and have often disagreed on what exactly is part of the bankruptcy estate. One major source of disharmony among circuit courts has been whether avoidance actions are non-transferable statutory powers, or state property that may be sold. A recent decision for the Northern District of Iowa, *Simply Essentials LLC*, featured this exact issue.

**Colleen M. Restel:** In the *Simply Essentials* case, the Chapter 7 trustee had potentially valuable avoidance actions, but the estate lacked the funds necessary to pursue them. A creditor offered to buy the avoidance actions, pursue them, and to share any portion of the recovery with the estate. The potential target of the avoidance action objected to the sale in part on the basis that the avoidance actions are not property of the estate. The Bankruptcy Court ultimately approved the sale, stating that the decision was based on the Code, case law, and common sense. The Court noted that to allow a party otherwise facing potential liability to escape it because the trustee cannot afford to pursue the causes of action would be an absurd result.

**Lindsay Sklar:** However, not all courts would've decided the same way. Courts within the Third Circuit, for example, have consistently held that while property recovered pursuant to a fraudulent transfer action is property of the estate, the avoiding powers themselves are not property, but a statutorily created power to recover property. Courts within the Second Circuit have also found that avoidance actions are not property of the estate, although they've recognized that this area of the law is unsettled. Courts in the Seventh and Ninth Circuits have largely withheld opinions on this altogether, permitting the transfer of avoidance actions, but declining to opine on whether avoiding powers are estate property,

**Colleen M. Restel:**

The Supreme Court has held that the right to recover a post-petition transfer is property of the estate. Because that's a type of avoidance action, that ruling could arguably apply to all fraudulent transfers. As for the *Simply Essentials* case, an appeal to the District Court is now pending. While *Simply Essentials* may not result in a Supreme Court decision, it is possible that we have a final resolution or at least more dialogue on this open issue of law.

As always, be on the lookout for more interesting issues on the next installment of the [Lowenstein Bankruptcy Lowdown](#).