Bench-Bar Retreat 2015
Case Law Update
Judge Russ Kendig

Supreme Court

Bullard v. Blue Hills Bank, 135 S.Ct. 1686 (2015)

Subject: chapter 13 denial of confirmation, final appealable order

Chapter 13 debtor proposed to bifurcate a secured, multi-family residential mortgage claim into secured and unsecured portions. The secured portion would be paid in full as long-term debt and the unsecured portion would receive approximately five percent under the plan, subject to discharge. The creditor objected and the bankruptcy court denied confirmation. Debtor appealed to BAP, which determined the denial of confirmation was not a final order because the debtor could propose another plan. The First Circuit agreed. (Note: The procedural maneuverings in this case are interesting as well. Because the order was not a final order, it raised additional jurisdictional concerns. The BAP merely gave leave and treated it as an interlocutory appeal. The circuit court faced the conundrum that the BAP had said the order was not final, which would result in dismissal of the appeal, but managed to consider the underlying issue of whether denial is a final order.)

According to the Supreme Court, the relevant "proceeding" is the confirmation process in its entirety, not each individual plan proposal. Only when the process concludes with confirmation or dismissal of the case are the parties' rights set, creating finality for appeal. Denial of confirmation, however, leaves the debtor free to propose another plan, and is therefore not final.

Harris v. Viegelahn, 135 S.Ct. 1829 (2015)

Subject: disposition of funds held by chapter 13 trustee upon conversion to chapter 7

Behind on his mortgage, Debtor filed a chapter 13 case. His confirmed plan provided for him to make the on-going mortgage payments and submit $530 to the chapter 13 trustee to pay toward the mortgage arrearage and other claims. After a postpetition default, the mortgage company foreclosed and Debtor converted to chapter 7. The chapter 13 trustee then distributed $5500 in funds on hand to Debtor's attorney, trustee's administrative fees, the secured electronics store creditor, and unsecured creditors. Debtor objected, arguing the funds should have been returned to him and the Supreme Court agreed.

Unlike chapter 13, a chapter 7 estate does not include postpetition wages. According to the court, the logical reading of § 348(f) demonstrates an intent to exclude postpetition wages from the chapter 7 estate upon conversion unless the conversion is made in bad faith. Further, a chapter 13 trustee's services terminate upon conversion per § 348(e), rendering a trustee unable to provide the § 1326(c) "service" of disbursing to creditors. Court noted that if a trustee is making regular, timely disbursements, the trustee will generally have little or no funds on hand to return to a debtor who converts from 13 to 7.

Bank of Am. v. Caulkett, 135 S.Ct. 1995 (2015)

Subject: lien stripping underwater junior lien in chapter 7

Section 506(d) permits a debtor to strip a lien that is not an "allowed secured claim." A chapter 7 debtor sought to strip a wholly unsecured junior mortgage on his residence. The Supreme Court rejected his attempt, relying on its previous definition of "secured claim" in the Dewsnup case. Under this definition, if an allowed claim is backed by collateral, it is a secured claim, irrespective of the value of the collateral. The Court pointed out that the parties had not asked for Dewsnup to be overruled, suggesting it was limited to this decision. HELD: "[A] debtor in a Chapter 7 bankruptcy proceeding may not void a junior mortgage lien under §506(d) when the debt owed on a senior mortgage lien exceeds the current value of the collateral."

Wellness Int'l Network, Ltd. v. Sharif, 135 S.Ct. 1932 (2015)

Subject: Bankruptcy court jurisdiction, consent

In a 6-3 decision, Supreme Court found that a bankruptcy court can exercise jurisdiction over Stern claims when the parties knowingly and voluntarily consent, making express consent unnecessary. Because bankruptcy courts operate through grants of authority bestowed by district (Article III) courts and operate under that control, no separation or usurpation of power issues are created, thereby allowing the bankruptcy courts to enter final judgment on Stern claims without violating Article III.

Baker Botts, LLP v. ASARCO, LLC, 135 S.Ct. 2158 (2015)

Subject: entitlement to fees spent in defense of fee application

Debtor's bankruptcy counsel pursued a fraudulent transfer action against Debtor's parent company and recovered sufficient funds to pay creditors in full. After the recovery, the parent company resumed control of Debtor and objected to bankruptcy counsel's fee application. Supreme Court held to the American Rule on fees, where each party pays its own fees, win or lose, unless a statute specifically provides an alternative. Accordingly, counsel was not entitled to substantial fees incurred in defense of its own fee application.

Clark v. Rameker, 134 S.Ct. 2242 (2014)

Subject: exemption in inherited IRA

Daughter inherited IRA from mother. When she filed bankruptcy, she exempted the IRA as a "retirement fund." Trustee and creditors objected. Bankruptcy court sustained objection and district court reversed. Seventh Circuit reversed again. Supreme Court unanimously sided with trustee and creditors. Since "retirement fund" is not defined, have to look to ordinary meaning, using objective review of the legal characteristics of the account. Inherited IRAs have three unique features: (1) inheriting holder cannot contribute funds, (2) the funds have to be withdrawn regardless of the holder's age or proximity to retirement, and (3) the funds can be withdrawn in full at any time. None of these is typical of funds set aside for retirement and is counter to the purpose of the exemption for retirement funds. The fact that funds may have originally qualified as retirement funds does not save the IRA.

Jesinoski v. Countrywide Home Loans, Inc., 135 S.Ct. 790 (2015)

Subject: Truth-in-Lending-Act (TILA)

TILA gives a consumer a three year rescission right when a lender fails to make specified disclosures. District Court said that a lawsuit must be commenced within three year period and Eighth Circuit affirmed. Supreme Court disagreed, saying that borrower only needs to provide written notice to lender within the three year period per section 1635(a) of the statute.

Pending Supreme Court Cases

Spokeo, Inc. v. Robins, Docket No. 13-1339

From: 742 F.3d 409 (9th Cir. 2015)

Supreme Court granted writ certiorari on following question:

Issue: Whether Congress may confer Article III standing upon a plaintiff who suffers no concrete harm, and who therefore could not otherwise invoke the jurisdiction of a federal court, by authorizing a private right of action based on a bare violation of a federal statute.

In the underlying case, Robins sued Spokeo, a website providing information about individuals, under the Fair Credit Reporting Act for publishing false information even though he did not identify an actual injury. According to the website, Robins had a graduate degree and was wealthy, which he claims are false. Since Robins is unemployed, he alleged the misinformation could negatively impact his job search. The Ninth Circuit found Robins had standing to sue because the FCRA created a statutory right that did not require proof of actual harm.

Sixth Circuit Court of Appeals

Baxter v. Sarmadi, 602 Fed.App'x 322 (6th Cir. 2015) (unpublished)

Subject: 362(a)

Prepetition, Samardi purchased a bank note secured by her ex-business partner's real estate. He did not make payments and she foreclosed. Afterward, she learned he filed a chapter 13 petition the day before the foreclosure sale. She moved for relief from stay and for confirmation of the foreclosure sale. The bankruptcy court granted the relief. As cause for annulling the stay and confirming the sale, the bankruptcy court relied on the credibility of witness testimony to find that Debtor did not act in good faith in filing the petition. Reviewing the bankruptcy decision for abuse of discretion, and its factual findings under a clear error standard, the Sixth Circuit affirmed, finding "the bankruptcy court was in the best position to evaluate the credibility of the witnesses, and the evidence of [Debtor's] lack of good faith was considerable."

<u>Ellmann v. Baker (In re Baker)</u>, 2015 WL 4033098 (6th Cir. 2015) (reporter citation not yet available)

Subject: § 522, Bankruptcy Rule 1009, exemptions in late-scheduled assets

In 2007, Debtors' house was foreclosed. They filed a chapter 13 case in 2008, subsequently converted to chapter 7, and received a discharge. In 2009, Debtors sued the mortgage company. When the chapter 7 trustee learned of the action, he reopened the case and pursued settlement of the action. In 2013, Debtors amended their schedules to list the asset and exempt portions of it. The trustee objected. The bankruptcy court rejected the trustee's attempts and district court affirmed.

Supreme Court case of <u>Law v. Siegel</u>, 134 S.Ct 1188 (2014) does not allow exemptions to be "surcharged" based on concealment of assets or bad faith. Trustee's attempt to distinguish <u>Law v. Siegel</u> because it did not involve a reopened case were rejected. Sixth Circuit further declared that <u>Siegel</u> abrogated its previous decision of <u>Lucius v. McLemore</u>, 741 F.2d 125 (6th Cir. 1984) which sanctioned disallowance of exemptions for bad conduct.

Relying on Rule 1009, Trustee also argued that Debtors' amendments to the schedules were untimely because they were made after the case was closed. This argument was not raised in his original objection but mounted only after <u>Law v. Siegel</u> was issued. Court found that since the trustee did not timely assert this argument, it was waived, especially since he had never argued that Debtors did not have the right to amend their schedules.

<u>Chrysler Grp. LLC v. Fox Hills Motor Sales, Inc.</u>, 776 F.3d 411 (6th Cir. 2015)

Subject: Consolidated Appropriations Act § 747 (Chrysler franchisee arbitration provision)

Congress established an arbitration provision for Chrysler franchisees terminated through Chrysler's bankruptcy. This case examined issues that arose when the franchisees prevailed at arbitration, resulting in Chrysler's issuance of a usual and customary letter of intent to enter into a sales and service agreement with the successful franchisee. The court found the letter of intent to be the sole remedy provided by § 747, rejecting one franchisee's argument that reinstatement was an available remedy. The Sixth Circuit also found that § 747 preempted state dealer protest laws because the state laws potentially thwarted the remedies provided for by Congress in § 747. The court also concluded that Congress did not create a separation of powers problem with the act, which provided for prospective relief and did not interfere with any final court judgments. With the exception of one term in one letter of intent, the Sixth Circuit upheld the lower court's decision that the letters of intent were "usual and customary," it did so using more than letters of intent issued under § 747 as comparables. The "relevant universe" of letters of intent included those Chrysler issued in its normal and voluntary course of business, not just the letters of intent issued under § 747, which were not freely negotiated.

Starkey v. JPMorgan Chase Bank, N.A., 573 Fed.App'x 444 (6th Cir. 2014) (unpublished)

Subject: pleading fraud, dismissal, failure to state a claim

In 2012, the Starkeys received a letter from Chase informing them that, under the National Mortgage Settlement Act, it was releasing loan x2307, a loan that had been discharged in bankruptcy and refinanced by their existing mortgage, account x5399. Debtors contacted Chase and were told it was account x5399 that was to be released. Debtors stopped paying and Chase eventually declared a default. The Starkeys sued Chase and included a claim for fraud, which they pled on "information and belief." Since at least one of the Starkeys should have had specific and direct knowledge of what occurred during the phone call, the failure to plead those specific facts was detrimental to establishment of a plausible claim. Plus, all of the evidence showed account x2307 was released, not x5399. The Sixth Circuit upheld dismissal of the Starkeys' complaint, with prejudice.

Plymouth Park Tax Servs., LLC v. Bowers (In re Bowers), 759 F.3d 621 (6th Cir. 2014)

Subject: tax lien rate of interest in chapter 13

Debtors owed two tax lien certificates, one at 0.25% and the other at 18%. Their chapter 13 plan proposed to pay the liens at the certificate rates of interest. Creditor argued it was entitled to the 18% statutory rate of interest. Bankruptcy court, BAP and Sixth Circuit rejected Creditor's position. The interest payable in chapter 13 is the certificate rate of interest.

Kelly v. Mace (In re Mace), 573 Fed.App'x 490 (6th Cir. 2014) (unpublished)

Subject: appellate review, enforceability of oral agreement (Pennsylvania law)

Debtors objected to a proof of claim. The bankruptcy court found creditors' testimony to be more credible than Debtor's and determined that Debtors, pursuant to Pennsylvania law, had made oral agreement to release creditors from personal guaranty. BAP reversed, finding that it was a conditional promise. Sixth Circuit upheld bankruptcy court, concluding the facts were supported by the record and the legal conclusions were in accordance with applicable law. Sixth

Circuit suggested that BAP substituted its view of the evidence over the bankruptcy court which would only be appropriate if the bankruptcy court committed a mistake.

Bavelis v. Doukas (In re Bavelis), 773 F.3d 148 (6th Cir. 2014)

Subject: jurisdiction

Debtor filed an action to nullify a prepetition note. In response, the creditor filed claims related to the note and sought rescission of an interrelated stock purchase agreement. The bankruptcy court disallowed the creditor's claims, finding a lack of consideration, fraudulent inducement, and no unlawfulness in the sale of the stock. The BAP affirmed. Creditor appealed and argued that the bankruptcy court could not enter judgment related to the stock rescission because it was a non-core claim and based on Florida law.

The Sixth Circuit supported jurisdiction. The issues were core because they involved allowance/disallowance of claims and adjustment of the debtor/creditor relationship. The court looked past the vehicle in which the issues arose (Debtor's complaint for declaratory judgment), likening Debtor's arguments to affirmative defenses to the creditor's claims. Further, the invited-error doctrine applied on the facts – the creditor had "invited the alleged error by seeking a ruling from the bankruptcy court regarding [Debtor's] legal obligations under Florida law."

Eifler v. Wilson & Muir Bank & Trust Co., 588 Fed.App'x 473 (6th Cir. 2014) (unpublished)

Subject: § 727(a)(2)(A) and (a)(4)

Approximately one year before he filed bankruptcy, and at a time when he had no income and his businesses were in financial trouble, Debtor drew down $340,000 from a HELOC on his residence, which was titled in his name alone. He first deposited the money in one bank account, but then moved it to joint accounts held by him and his wife, one at another bank and one at Fidelity Investments. When sued by the HELOC bank, he opened two new individual accounts at Fidelity, one in his wife's name and one in his name, and split the HELOC funds. Thereafter, and for the first time ever, he started splitting income with his wife but used only his account for large payments, including a $20,000 gift to his wife's sister and approximately $45,000 in nine months prepaid private school tuition for his children. When he filed, his account had $22 and his wife's had approximately $104,000. His Fidelity account and three other accounts were not listed on the petition. He also failed to list various transfers, including the initial transfer of one-half of the HELOC funds to his wife, income he deposited into her account, the gift to his sister-in-law, and the tuition payments, among others.

The bankruptcy court found ten false oaths related to the above items and denied discharge under § 727(a)(4)(A). The Sixth Circuit affirmed, upholding the bankruptcy court's assessment of Debtor's credibility. Further, it found an eleventh false oath related to Debtor's recollection of the time frame in which he sought bankruptcy advice. While he asserted it was months after he took the HELOC funds, the court found it was only one month later. The court rejected Debtor's "reliance on counsel" defense because it was plain from the bankruptcy documents that disclosure was required and neither Debtor nor his attorney testified that he was instructed not to disclose. Further, Debtor did not disclose everything to counsel and then acted on "stale" advice given before he changed his circumstances. Even if Debtor had succeeded otherwise, Sixth Circuit said record still showed he was acting in bad faith. Court also affirmed the denial of discharge under § 727(a)(2).

Kraus Anderson Capital, Inc. v. Bradley (In re Bradley), 588 Fed.App'x 480 (6th Cir. 2014) (unpublished)

Subject: appellate jurisdiction, final appealable orders

Bankruptcy court denied relief on § 523(a)(2)(A), (4) and (6) claims. BAP affirmed on § 523(a)(4) claim but found the debts were not dischargeable under § 523(a)(2)(A) and (6), and reversed and remanded for a determination on damages. Debtor appealed. Because bankruptcy court had to take evidence on damages, which was not a ministerial act, the BAP order was not final and Sixth Circuit did not have jurisdiction of appeal.

Council on Occupational Educ. v. Keats (In re Decker College, Inc.), 578 Fed.App'x 579 (6th Cir. 2014) (unpublished)

Subject: jurisdiction of appeal

Bankruptcy court issued findings of fact and party filed interlocutory appeal. District court affirmed findings and remanded to continue with remainder of case. Party appealed and Sixth Circuit determined it lacked jurisdiction because a remand to continue case was more than ministerial in nature and parties had not proceeded properly to obtain an interlocutory review from Sixth Circuit.

Hart v. Southern Heritage Bank (In re Hart), 564 Fed.App'x 773 (6th Cir. 2014) (unpublished)

Subject: jurisdiction, monetary judgment

Bankruptcy court found four debts to bank nondischargeable under § 523(a)(2)(B) and entered final monetary judgments over Debtor's Stern objection. The bank's claims clearly arose under bankruptcy law and could be resolved through the claim allowance process. Although Debtor argued that bankruptcy court's actions exceeded authority and extinguished her state court counterclaims, Sixth Circuit concluded she had never filed any counterclaims and, moreover, Debtor could not escape the collateral effects of action the bankruptcy court was authorized to make.

Ice House Am., LLC v. Cardin, 751 F.3d 734 (6th Cir. 2014)

Subject: absolute priority rule for individual chapter 11 debtors

Individual chapter 11 debtor proposed to retain his assets, with approximately $200,000 in equity, while paying his unsecured creditors cents on the dollar. Bankruptcy court approved, Sixth Circuit reversed. Under BAPCPA, § 1115 was amended to include postpetition property in the estate. The amendments to § 1129(b)(2)(B)(ii) referenced only this newly "included" property, not prepetition property that was already part of the estate. Consequently, it is only postpetition property that an individual debtor can retain without violating the absolute priority rule. Although the court recognized the predicament for debtors, it must assume Congress knowingly enacted the provision.

Keeley v. Grider, 590 Fed.App'x 557 (6th Cir. 2014) (unpublished)

Subject: default judgment, nondischargeability, Rule 9024

Creditor filed a § 523(a)(2)(A) action against Debtor. When Debtor did not answer the complaint, Creditor obtained an entry of default and moved for default judgment, which court granted. However, her judgment order never mentioned nondischargeability or § 523(a)(2), it merely set forth the judgment amount. A few months later, Debtor attempted to reopen the adversary to file an answer but the court found he failed to show cause for his delay and denied the motion. Several months later, on the day Debtor's discharge was granted, Creditor moved under Rule 9024 (Fed.R.Civ.Pro. 60(a)) to amend the judgment order to add language regarding nondischargeability. The bankruptcy court denied relief, finding that Creditor got the exact relief it requested and district court affirmed. Sixth Circuit agreed.

Rule 60(a) relief is intended to correct clerical or ministerial errors, not to make substantive changes. Altering the order to now declare it nondischargeable is beyond the scope of Rule 60(a). Creditor's arguments that the amendment will merely give her the relief she was clearly seeking was unavailing. The clerk could not have entered an order that established the judgment amount and determined nondischargeability because that was beyond the clerk's power. *Cf.* Fed.R.Bankr.Pro. 7055(a) and 7055(b). Creditor really needed to file a motion to alter or amend the judgment, now time-barred.

Rugiero v. Nationstar Mortg., LLC, 580 Fed.App'x 376 (6th Cir. 2014) (unpublished)

Subject: post-foreclosure action against mortgagee/servicer, claim as property of estate

Chapter 13 debtor filed petition after his house sold at foreclosure. He then brought claims against mortgagee/servicer/assignee for deceptive and predatory practices. Claims were dismissed on summary judgment after the debtor failed to respond. Debtor had no standing to sue as the claims belonged to the estate. His contention that he discovered the claims after he filed bankruptcy was not supported in the record. Court also upheld denial of the debtor's motion to amend his complaint because the state law claim he sought to add had to be brought prior to the foreclosure sale, making the amendment futile.

Assoc. First Capital Corp. v. Hensley (In re Hensley), 578 Fed.App'x 530 (6th Cir. 2014) (unpublished)

Subject: mistake in mortgage, equitable subrogation

Action involved efforts by mortgagee to obtain relief under a mortgage that mistakenly identified only one parcel of real estate, not the two parcels owned by Debtors. Both bankruptcy court and district court found in favor of the debtors, Sixth Circuit affirmed. Case was decided under Kentucky law. Actions based on a mistake are generally governed by five year statute of limitations, making the reformation action untimely. Although Debtors had not pled a statute of limitations defense, a court has discretion to grant leave to amend when justice requires. Sixth Circuit found no abuse in bankruptcy court decision allowing the amendment. Mortgagee also contended it had a lien under doctrine of equitable subrogation because it advanced funds that paid off the mortgage on both parcels, so it stepped into shoes of the previous mortgagee on the property that was not covered by in the mortgage. Court rejected, finding that it was too late to determine the parties' actual intent (and whether a mistake existed) and the purpose of the doctrine of equitable subrogation is to benefit the vigilant, not the negligent. Creditor fell into latter category as drafter. Court also mentioned that this was a mistake that could have been discovered earlier.

Dow Corning Corp v. Claimants' Advisory Comm. (In re Settlement Facility Dow Corning Tr.), 574 Fed.App'x 708 (6th Cir. 2014) (unpublished)

Subject: definition of term in plan

Question was whether term "breast implant" also included "tissue expanders." On first go, district court found definition was inclusive. Sixth Circuit agreed it could be, but also found another technical definition may exclude tissue expanders, thereby creating ambiguity, so case was remanded for consideration of extrinsic evidence. On second try, district court considered extrinsic evidence and reached the same conclusion, "breast implant" included "tissue expanders." Part of extrinsic evidence considered, and given weight, were the terms of the "Revised Settlement Program" which included tissue expanders as eligible for payment under breast implant claims. Sixth Circuit affirmed.

Underhill v. Huntington Nat'l Bank (In re Underhill), 579 Fed.App'x 480 (6th Cir. 2014) (unpublished)

Subject: § 541(a), property of the estate

Debtors filed chapter 7 and listed their 100% interest in an LLC. After case was discharged, LLC went out of business as a result of tortious interference from a competitor, from whom it obtained a recovery. Huntington National Bank reopened Debtors' bankruptcy to have the funds distributed to bankruptcy estate creditors. Both bankruptcy court and BAP determined the claim was rooted prepetition and was property of the estate. Sixth Circuit disagreed, determining that a prepetition injury or violation is necessary to bring the asset into the estate, not simply prepetition conduct or facts. One judge on the panel dissented.

Sinkfield v. State Farm Ins., 580 Fed.App'x 323 (6th Cir. 2014) (unpublished)

Subject: judicial estoppel, fraud

Debtor purchased Detroit home for $50,000 in November 2010 and obtained homeowner's insurance. Approximately one month later, she filed bankruptcy and valued the home at $27,000 and listed $4,000 in personal assets. She disclosed approximately $1,325 in income. In June 2012, she had a house fire. She filed an insurance claim for $143,000 in property damage $170,000 for loss of personal property. State Farm denied claim and she sued for breach of contract.

District court found for State Farm on judicial estoppel theory, which Sixth Circuit rejected. Judicial estoppel generally applies to arguments or claims. Here, the insurance claim didn't exist at the time of the bankruptcy, so it could not be completely estopped. As for factual estoppel, Debtor was not arguing that the bankruptcy valuations were wrong, but contended the house had appreciated and she had acquired substantial property since the bankruptcy. She also said she earned approximately three times more than she reported to the IRS. Although Sixth Circuit refused to recognize judicial estoppel on the facts, it found fraud as a matter of law because there was no reasonable explanation for the extreme difference in the figures advanced by Debtor.

Spradlin v. Richard, 572 Fed.App'x 420 (6th Cir. 2014) (unpublished)

Subject: jurisdiction, effect of settlement, authority of court when it lacks jurisdiction

Trustee entered into settlement that transferred claims from the bankruptcy estate to a third party. When third party and Trustee filed adversary action, other parties moved to dismiss for lack of jurisdiction. Before ruling on the dismissal motion, bankruptcy court mandated mediation, which was unsuccessful. Bankruptcy court later dismissed claims for lack of jurisdiction and then ruled on several other pending matters, including a motion to sanction a party for bad faith mediation participation, a motion to extend an appeal deadline, and dismissed certain claims for failure to state a claim. Sixth Circuit said some of these rulings went too far because when there is no jurisdiction, certain issues become moot. The sanctions decision, however, could stand because it was a collateral order that went to the heart of the judicial process.

U.S. v. Robinson (In re Robinson), 764 F.3d 554 (6th Cir. 2014)

Subject: § 362, 18 U.S.C. § 3613(a)

18 U.S.C. § 3613(a) supersedes the automatic stay, allowing the government to continue collect restitution judgments, even against bankruptcy estate property.

Sunshine Heifers, LLC v Citizens First Bank (In re Purdy), 763 F.3d 513 (6th Cir. 2014)

Subject: lease v. security interest

Debtor was a dairy farmer who leased cattle from Plaintiff. When Plaintiff went to take the cattle, Defendant-bank claimed a superior security interest in the cows. Court had to determine, using Arizona law, whether Debtor's agreement with Plaintiff was a lease or security interest. First step, the Bright-Line test, looks at whether the lease runs longer than the economic life of the collateral. If so, it is per se a security agreement, not a lease. Here, the bankruptcy court found that since culling would turn the entire herd over in forty months, which was shorter than the lease term, the agreement created a security interest in the cows. The Sixth Circuit rejected, finding that the bankruptcy court should have been looking at the herd as a whole, not at the individual cows. Although the individual cows were replaced through culling, the herd size remained the same, so the economic life exceeded the lease term and it was not, per se, a security agreement.

Next, consider the economic realities of the agreement, including the purchase option and whether the buildup of equity in the collateral. In this case, there was no purchase option and Plaintiff retained ownership of the cattle throughout the entire lease. Because of this, any build up in equity inured to Plaintiff's benefit, giving it a significant reversionary interest typical of a lease. One judge dissented.

Trimas Corp. v. Meyers, 572 Fed.App'x 347 (6th Cir. 2014) (unpublished)

Subject: inconsistent statements by a party, judicial estoppel

Retired executive was engaged in litigation to force payments under his 1995 SERP (supplemental executive retirement plan). Over the course of several years, the entities responsible for the SERP had changed through sales, acquisitions and other transfers. Additionally, the SERP was amended in 2000. In one action, Meyers relied on the 2000 agreement for his benefits, then later attempted to rely on the 1995 SERP in another action. District court found his reliance on the 1995 agreement to be inconsistent, forcing him to rely on the 2000 agreement. Sixth Circuit disagreed. It appeared district court relied on judicial estoppel or similar doctrine, which is equitable and seeks to prevent a party who has successfully taken a position from deviating from that position when interests suit. Here, Meyers had not been successful and was still trying to wade through the labyrinth of entities and agreements to determine who was responsible and which agreement was operative. Court suggested it was inequitable to force him to a position when parties were trying to deny responsibility for payments.

Court also looked at whether there was an enforceable arbitration agreement, ultimately denying summary judgment because it was not clear whether the first SERP agreement had been revived as a result of the rescission of the 2000 agreement. Remanded to district court.

In re Syncora Guarantee, Inc., 757 F.3d 511 (6th Cir. 2014)

Subject: appeals, mandamus

Syncora, an insurer of certain Detroit obligations, sought relief from stay to obtain casino tax revenues owed to Detroit, which claimed the revenues were property of the bankruptcy estate. Bankruptcy court denied relief and Syncora appealed. District court stayed the appeal pending the Sixth Circuit's determination of whether Detroit was an eligible chapter 9 debtor and Syncora sought mandamus relief. Sixth Circuit granted motion and ordered district court to hear the appeal. Otherwise, Detroit could confirm a plan and leave Syncora with only an emergency motion to stay the plan as its form of relief. Mandamus relief is not only for those who will undoubtedly suffer irreparable harm but also those who will be left with inadequate remedies or avenues of relief.

FDIC v. AmFin Fin. Corp., 757 F.3d 530 (6th Cir. 2014)

Subject: property of the estate, tax refunds

Court had to determine whether a $170 million tax refund from a consolidated tax return was property of the parent holding company or the subsidiary bank. The FDIC, appointed as receiver for the bank when it closed, argued that the holding company was an agent and that the refund belonged to the bank. District court disagreed, finding that the language in the tax-sharing documents between the parties established a debtor-creditor relationship, not an agency relationship. Sixth Circuit remanded for additional extrinsic consideration after finding the tax-sharing agreement ("TSA") ambiguous. Since the TSA said nothing about who owned the refunds, and case law that found terms "reimbursement" and "payment" do not necessarily create a debtor-creditor relationship, and Ohio law, not federal common law applies, need to look at parties' intent.

Thompson v. Bank of America, N.A., 773 F.3d 741 (6th Cir. 2014)

Subject: mortgage securitization, mortgage transfers, HAMP

In 2006, Plaintiff obtained mortgage from American Mortgage Express ("AME") and it was immediately transferred to Countrywide and later purchased by Bank of America ("BOA"). Facing foreclosure, Plaintiff sought HAMP modification of her mortgage from BOA, got run-around, and then was denied. She then sued under numerous theories, including fraud. She argued that the string of transfers altered her obligation on the note, she expected a traditional lender-borrower relationship when she signed the note, and BOA did not have authority to grant a mortgage modification in spite of its suggestion otherwise. Court rejected all her arguments.

Notes are negotiable instruments that can be securitized and the deed of trust follows the note, so whoever has the note also has the deed. The borrower's duties on the note are not changed in the process. Here, the note clearly allowed for the transfer/securitization, leaving Plaintiff out in the cold on her alleged expectation of a traditional relationship with AME and her claims of misrepresentation of who her lender was.

As for the HAMP run-around, Plaintiff's fraud claims failed because she could not show that BOA promised to modify her payments. *Even when the court accepted Plaintiff's allegations about being "stonewalled" in her HAMP quest as true, it said "this conduct does not support a claim for negligent or intentional misrepresentation."*

<u>Lawless v. Newton (In re Newton)</u>, 591 Fed.App'x 415 (6th Cir. 2014) (unpublished)

Subject: retirement funds, exemptions, 26 U.S.C. § 409(A), Tenn. Code Ann. § 26-2-111 et al.

Debtor had a non-qualified, deferred compensation retirement plan. In 2006, he selected a ten-year pay out when he became eligible to receive the funds (upon retirement, disability, death). He filed for bankruptcy in 2010 and claimed the plan as exempt. Sixth Circuit affirmed denial of his exemption. Although this was a retirement account, the Tennessee exemption statute makes an exception for retirement accounts that give the owner the ability to accelerate payments and obtain the funds in either one lump sum or in 60 months or less. Even though Debtor had not elected a payout option that satisfied the statute, he could change his election and a lump sum payout remained a present option, thereby invoking the statutory exception. Court also rejected Debtor's strained interpretation of new IRS rule where he argued that even if he elected a lump sum, it would not get paid until 62 months after his retirement, thereby exceeding the statutory time frame. The "sixty month" language clearly referred to periodic payments, not a lump sum payment, which comes at a single point in time, not over time.

<u>Hagan v. Baird (In re B & P Baird Holdings, Inc.)</u>, 591 Fed.App'x 434 (6th Cir. 2015) (unpublished)

Subject: in pari delicto defense, futility of amendments

Prior to bankruptcy, Debtor was held liable for patent infringement. During that litigation, Debtor sold its assets to a new entity, which agreed to collect receivables and use them for certain liabilities. Other liabilities, including the patent litigation, were retained by Debtor. At closing, approximately $4m was transferred to an individual account of Debtor's owners. Debtor later filed bankruptcy and trustee filed adversary to recover funds. After one owner got conversion count dismissed, trustee sought leave to amend complaint to allege additional fact to support claims. Bankruptcy court found amendment would be futile, describing the acts as embezzlement, to which in pari delicto provides a complete defense. District court affirmed, finding no facts supported the Trustee's newly developed innocent conversion claims against one owner.

Sixth Circuit disagreed. Trustee was permitted to plead alternate theories of his case. Under one theory, one owner participated in the activities and under another, she was an innocent shareholder. Under the latter theory, her actions would not be imputed to the corporation and therefore in pari delicto would not apply, rendering the claim non-futile. Since the extent of her participation was not clear, trustee should have been permitted to amend his complaint.

Westry v. Lim (In re Westry), 591 Fed.App'x 429 (6th Cir. 2014) (unpublished)

Subject: amending exemptions

Debtor exempted an "unknown amount" in her workers' compensation claim. The actual allowed amount of the exemption was around $10,000. When she was awarded $25,000, she amended Schedule C and added two new exemptions to protect the entire amount. Trustee objected, arguing prejudice at this late date. Debtor claimed only two exceptions barred her right to amend – bad faith and fraudulent concealment. Discussing the Supreme Court decision of Law v. Siegel, 134 S.Ct. 1188 (2014), the Sixth Circuit said "*Law* strongly suggests that the bankruptcy court exceeded its authority when it disallowed Westry's amendment, which asserted proper exemptions within the time period allowed for amendment." Id. at 6. Because the Sixth Circuit found no prejudice in the record, it didn't explore the breadth of a bankruptcy court's discretion over amended exemptions.

Buchanan v. Northland Grp., Inc., 776 F.3d 393 (6th Cir. 2015)

Subject: Fair Debt Collection Practices Act

Bad debt collector sent letter offering to settle a debt that was no longer collectable because the statute of limitations had expired. Obligor sued under FDCPA, arguing settlement offer would lead an obligor to believe that the debt was enforceable and was therefore misleading. The district court disagreed. Sixth Circuit sided with obligor. Although the debt remained a debt and was still owed after the statute of limitations expired, whether the letter was misleading was a question of fact and Plaintiff had alleged a sufficiently plausible claim to get her to discovery phase. Definitions of "settlement" often relate to lawsuits or litigation, so it was plausible for someone to be misled into believing that the debt was enforceable in court. Additionally, the letter could result in trapping the unwary: if someone without knowledge sent a partial payment, it would reinstate the statute of limitations on collection. Reversed and remanded. Dissenting opinion filed by Judge Kethledge, who found Plaintiff's definition of "settlement" to be implausible. Settlement was merely an attempt to accept less money than what was owed.

Thomas v. Clark (In re Thomas), 591 Fed.App'x 443 (6th Cir. 2014) (unpublished)

Subject: domestic support obligation (DSO), dischargeability

In divorce, Debtor-husband was ordered to pay half of the second mortgage payment. When house sold, his ex-wife was to get the proceeds of the sale. He didn't pay mortgage and when she sold house, she found judgment lien on house because of another debt he had not paid. Divorce court ordered him to pay the second mortgage and the judgment lien amounts. When he filed chapter 13, ex-wife filed claim for both and sought nondischargeability. Bankruptcy court and BAP found for ex-wife, Sixth Circuit affirmed. Bankruptcy court had correctly looked at the nature of the obligations and determined it was support even though not labeled as such in the divorce decree. The obligations were intended to allow the children to stay in the home and, if it sold, provide proceeds for purchase of another home. Court did not find the award to be unreasonable and Debtor's unemployment did not change the nature of the obligation. Court also rejected Debtor-husband's argument that the claim was improperly filed against his new wife because he had not raised that issue below.

Lawrence v. Kentucky Transportation Cabinet (In re Shelbyville Road Shoppes, LLC), 775 F.3d 789 (6th Cir. 2015)

Subject: §§ 541, 542, property of the estate, turnover

Eagle Development ("Eagle") contracted to purchase real estate from Kentucky Transportation Cabinet and paid a $963,000 deposit, subject to forfeiture if the sale did not close. Eagle later assigned its interest to Debtor. When Debtor filed bankruptcy two days before the extended deadline for closing expired, the trustee sought turnover of the good faith deposit. Bankruptcy court, district court and Sixth Circuit denied his request. The good faith deposit was not property of the estate. At the time of filing, Debtor had an interest in the contract which gave it "a limited, conditional interest in a credit of the deposit towards the balance of the purchase price at closing." Id. at 5. Rejection of the contract under § 365 resulted in rejection of this interest. Since Debtor had no right to a refund of the money, and no right to possess the deposit as of the filing date, it had no legal or equitable interest that made the deposit property of the estate.

FDIC v. Thornton, 595 Fed.App'x 513 (6th Cir. 2014) (unpublished)

Subject: unapplied $80,000 payment, don't call out a district court judge

Bowling Green Freight ("BGF") had four loans with Tennessee Commerce Bank ("Bank"), now in receivership with the FDIC as receiver ("Plaintiff"). The four loans were backed by collateral as well as personal and commercial guarantees. The largest loan was over $6m, the other three loans were substantially smaller. This case involves the fourth loan with an original principle balance of $171,500, reduced to approximately $115,000 under a second promissory note and an $80,000 payment that was not credited to any of the four loan accounts by the Bank. The parties subsequently entered into a forbearance agreement, thereafter amended. Defendants were sued following default. Defendants challenged the district court findings that set the amount they owed Plaintiff: (1) the $80,000 should have reduced the amount owed, (2) Plaintiff was not entitled to two late charges, and (3) Plaintiff was not entitled to a default rate of interest.

Sixth Circuit found district court clearly erred in not finding that Bank received the funds. There was no dispute that Defendants issued the $80,000 check to Bank and that the funds were withdrawn from their account. Add the fact that the check was not endorsed by a third party, it was enough to show that Bank, rather than an unknown entity, likely received the $80,000. Bank's reliance on the figures in the forbearance agreement, which did not reflect the payment and was signed by Defendants, was unavailing because Defendants had clearly argued that the figures were either a mistake or the figures were accurate but had not yet been credited with the payment. Either way, Sixth Circuit found that Defendants' evidence was more persuasive to establish that Bank got the payment. Whether the payment should have applied to the fourth loan was an open question resulting in remand. While Tennessee law provides for the court to decide which loan gets the payment, and secured and the most onerous debts take priority for the payment, Sixth Circuit was not completely convinced of Defendants' position that the payment should have applied to this loan. They left the matter for district court because (1) it needed to consider whether Plaintiff had abandoned part of its position on the issue because it was not raised below, and (2) district court had never decided which loan was the most onerous.

Regarding the late charge, Plaintiff imposed two late charges under a promissory note, one after the forbearance agreement was in effect. Sixth Circuit concluded (1) the "late" charge in the promissory note could not refer to a payment under the forbearance agreement because that agreement was not contemplated when the promissory note was executed, (2) the forbearance agreement deferred payments due under the promissory note. As a result, the district court erred in imposing the second late fee under the promissory note. Defendants unsuccessfully argued that Plaintiff was foreclosed from instituting the default interest rate because it was not included in the damage calculations, finding the error harmless because Defendants knew of the default rate provision.

Finally, Defendants also suggested that the district court judge allowed "procedural irregularities." Sixth Circuit disagreed, finding the attached "unwarranted" and admonishing parties to "think twice" before attacking and advising the better approach is to lay out the facts and let the court arrive at its own conclusion. Sixth Circuit found nothing prejudicial or warranting reversal, mainly because the issues had been decided in Defendants' favor in spite of the allegations.

Dow Corning Corp. v. Claimants' Advisory Comm. (In re Settlement Facility Dow Corning Tr.), 592 Fed.App'x 473 (6th Cir. 2015) (unpublished)

Subject: contract interpretation, standard of review

The settlement agreement created a hierarchy of payment on claims. The Second Priority tier included certain Premium payments that enhanced payments on First Priority claims. However, in order to make the Second Tier payments before all First Priority claims were paid in full, agreement provided that the district court must find "adequate provision . . . to assure" the payment of a lower priority claim. District court authorized payment of Second Priority premiums after adopting an "adequate assurance" view. Sixth Circuit reversed and remanded.

First, Sixth Circuit refused to adopt the "abuse of discretion" standard set forth in the agreement. The court, not parties, sets the appropriate standard. (READ: you can't contract a standard of review.) Then it looked at meaning of "adequate provision . . . to assure" payment and found that district court was wrong to reject a "virtual guarantee" standard on its belief that it would frustrate the purpose behind paying the two types of claims together. Court said looking that this as the primary purpose was wrong because payment was contingent on court approval, so approval could not be subordinate to paying claims together. Secondly, district court wrongly found that “adequate provision” modified “assure.” Assure has to modify “adequate provision” because that is the measuring stick. Without knowing what the provision is, cannot determine if it is assured. After determining that an “absolute guarantee” standard was too strict, because of impossibility of accounting for every conceivability that may happen in the future, Sixth Circuit adopted the “virtual guarantee” standard.

The agreement also said that district court approval of “adequate provision . . . to assure” had to be “based on” an independent assessor’s analysis and projections. The district court prevented Appellants from challenging the projections on basis that years had passed without any challenge to the figures. Sixth Circuit disagreed, finding that the agreement provided an opportunity for an objecting party to be heard and under due process, this means heard at a meaningful time. The underlying confidence in the projections may have never been put into question until now.

Sutherland v. DCC Litig. Facility, Inc. (In re Dow Corning Corp.), 778 F.3d 545 (6th Cir. 2015)

Subject: choice of law, jurisdiction

Sutherland, a Virginian, got breast implants with Dow Corning silicone in North Carolina in 1988. When problems arose, she sued Dow in North Carolina in 1993 using diversity jurisdiction. In 1995, when Dow filed bankruptcy in Michigan, her case was transferred to Michigan under 28 U.S.C. § 157(b)(5). In 2009, her case was certified for trial after settlement failed. Relying on Michigan law, the district court dismissed her claim on the basis that the statute of limitations expired. Sixth Circuit reversed. Section 157(b)(5) is a venue provision and merely changes the courtroom, not the underlying substantive law. Here, North Carolina law should have applied. Case remanded.

The CIT Grp./Commercial Serv., Inc. v. Constellation Energy Commodities Grp., Inc. (In re Black Diamond Mining Co., LLC), 596 Fed.App’x 477 (6th Cir. 2015) (unpublished)

Subject: netting obligations per contract

Prepetition, Defendant and Debtor had coal supply agreement that permitted to them to offset amounts owed to avoid redundant payments. Debtor assigned its right to payments under the contract to Plaintiff. When Debtor later filed bankruptcy, Plaintiff was owed $10m for coal provided to Debtor and demanded payment. Defendant refused, arguing it could offset the $10m with the $90m Debtor owed. Plaintiff disagreed, argued its debt could not be offset by debt owed by Debtor. Sixth Circuit determined, under New York law, assignee steps into same shoes as assignor, with same rights/obligations, and netting was permissible.

JPMorgan Chase Bank, N.A. v. Winget, 602 Fed.App’x 246 (6th Cir. 2015) (unpublished)

Subject: reformation of contract, ambiguity, equitable remedy

A clause in a guaranty limited the exposure of an individual. District court reformed the clause to also include a living trust under the limitation. Sixth Circuit overturned district court, finding no ambiguity in the contract. The individual and the trust were listed as separate entities elsewhere in the document, making it clear the two were not treated as one, so inclusion of only the individual in the clause could not be viewed as ambiguous. An 'unambiguous contract reflects the parties' intent as a matter of law.' Id. (citing In re Smith Tr., 745 N.W.2d 754, 758 (Mich. 2008) (emphasis and other citations omitted)). As an equitable remedy, reformation is curbed. Although a mutual mistake of fact may qualify for reformation, these facts did not concern a mutual mistake of fact covered in the agreement, but involved an omission of a material term from the agreement. Nor did it present a scrivener's error where the parties intended a term to carry forward from a previous agreement because there was no prior agreement. Further, the document contained an integration clause stating that everything intended was included.

Next, court turned to Stern's impact on the defenses raised, specifically whether they were purely state law matters, or matters that would fall under bankruptcy jurisdiction. One defense alleged that a subsequent pledge rendered the former pledge unenforceable, a simple matter of contract interpretation not related to the bankruptcy proceeding. The delay defense, alleging Chase did not act quickly and maximize the value of the assets at sale, challenged the bankruptcy sale.

Court upheld district court conclusion that res judicata did not apply. Court found no identity of claims, which requires overlap of fact and evidence. The previous case involved inspection rights to the collateral in the event the guaranties became enforceable. According to the Sixth Circuit, actual enforcement of the guaranties, the present issue, requires different evidence.

Haddad v. Randall S. Miller Assoc., PC, 587 Fed.App'x 959 (6^{th} Cir. 2014) (unpublished)

Subject: FDCPA, sworn bankruptcy statements, judicial estoppel

Prepetition, Husband refinanced mortgage loans, signing for himself and his wife, per the loan officer's direction. In response to a lawsuit by lender following a default, Wife claimed she had not signed the mortgage. Debtors filed bankruptcy and listed ownership of the property and the mortgage but did not claim an exemption, did not note that the mortgage was disputed, and sought to reaffirm the note. After discharge, mortgagee pursued foreclosure by advertisement under Michigan law. Debtors sued the law firm representing the mortgagee under FDCPA, arguing there was no enforceable security interest. Court found they were judicially estopped from contesting the validity of the mortgage because (1) their position was counter to their sworn bankruptcy statements, (2) the bankruptcy court accepted their representations in their schedules, and (3) Debtors were aware of their position prior to the bankruptcy filing and had a motive to keep the invalidity from the bankruptcy trustee, who might have pursued sale of real estate subject to an invalid mortgage, which suggests of bad faith.

Circuit Courts of Appeal – Other

<u>Barron & Newberger, P.C. v. Texas Skyline, Ltd. (In re Woerner)</u>, 783 F.3ed 266 (5th Cir. 2015)

Subject: § 330, attorney's fees

Debtors originally filed a chapter 11 case that converted to chapter 7. Upon conversion, Debtors' counsel filed a $130,000 fee application and was awarded only $20,000 after the court concluded the remaining services did not result in a benefit to the estate. The decision was affirmed by the district court and a Fifth Circuit panel. However, the panel requested en banc reconsideration of the underlying precedent that tied compensation to services with a "material benefit." Upon reconsideration, including a review of the legislative history of § 330, the Fifth Circuit reversed course on the "material benefit" standard and adopted the "reasonably likely to benefit the estate" standard used by other circuits. Section § 330 is meant to be applied prospectively at the time services are rendered, not retrospectively.

<u>Pensco Tr. Co. v. Tristar Esperanza Prop., LLC (In re Tristar Esperanza Prop., LLC)</u>, 782 F.3d 492 (9th Cir. 2015)

Subject: § 510, subordination of judgment for repurchase value of minority interest

Prepetition, minority member sought withdrawal from LLC and obtained judgment of $400,000+, representing the repurchase value of her interest. When she filed a claim in the subsequent chapter 11 case, Debtor sought § 510(b) or (c) subordination of the claim. There was no question that the membership interest was a "security of the debtor" under the provision, but question was whether the claim resulted from "damages arising from the purchase or share" of that interest? Debtor argued the claim was not a "damage" claim, merely a valuation of a fixed debt. Court disagreed, citing the "broad sweep" of the provision, covering even breach of contract claims like this, "so long as there is a sufficient nexus between the claim and the purchase of securities." <u>Id</u>. at 495 (citations omitted). Although claimant also argued this was not a purchase or sale, because she had converted her equity interest to debt before the bankruptcy was filed, court rejected her argument. The statute does not address what the claim is as of the date of filing, but focuses on where it "arises from." Since this debt arose from the withdrawal and repurchase of her interest, it was subject to subordination. Court also referenced the creditor protection policy behind mandatory subordination.

<u>Rourk v. Bank of American Nat'l Assoc.</u>, 587 Fed.App'x 597 (11th Cir. 2014) (unpublished)

Subject: mortgage payment default, effect on mortgagor's claims

Rourk sued her mortgage company for breach of contract, conversion, wrongful foreclosure, and RESPA. Court granted summary judgment to mortgagee, finding that Rourk's failure to make payments she knew she was responsible for was fatal and caused her damages.

State Bank of Toulon v. Covey (In re Duckworth), 776 F.3d 453 (7^{th} Cir. 2014)

Subject: security interest, mistake in description, parol evidence

A lender cannot use the parol evidence rule against a bankruptcy trustee to correct a mistake in a security agreement. In this case, the security agreement identified a note date December 13, 2008 but the promissory note was actually dated December 15, 2008. Although the original parties may be able to use parol evidence to vary the unambiguous terms of the agreement, "[l]ater creditors and bankruptcy trustees are entitled to treat an unambiguous security agreement as meaning what it says . . . ."

Beeman v. BGI Creditors' Liquidating Tr. (In re BGI, Inc.), 772 F.3d 102 (2d Cir. 2014)

Subject: equitable mootness

Case involves efforts of Borders' gift card holders to obtain a piece of the liquidated estate. They sought authority to file late proofs of claim, which the bankruptcy court rejected, concluding that as unknown, not easily-ascertainable creditors, they were entitled to constructive notice, not actual notice. Publication in the New York Times provided appropriate notice. On appeal, the district court found the appeal to be equitably moot. Second Circuit affirmed. Equitable mootness doctrine allows dismissal of a bankruptcy appeal when relief, although possible, is inequitable and substantial confirmation of the underlying reorganization plan occurred. In this case, court also applied equitable mootness doctrine to liquidation proceedings. In denying relief, court found that unsecured creditors, who had not been notified of the appeal, stood to be adversely affected without "adequate process" and that gift card holders had not acted diligently or obtained a stay to slow or prevent substantial consummation of plan.

District Court for the Northern District of Ohio

In re Polyurethane Foam Antitrust Litig., 2015 WL 507141 (N.D. Ohio 2015) (reporter citation not available)

Subject: liability of purchase of ch. 11 assets, price-fixing,

This is a case under the Sherman Act concerning price-fixing in the polyurethane industry. The court considered whether the claims against one manufacturer (Foamex) were discharged in either of its two separate bankruptcy cases and whether the entity that emerged with the assets (FXI) was liable. The court found that antitrust claims were discharged through the confirmed plan in the first bankruptcy case because they were not on the list of unliquidated claims that were excepted from discharge. In the second bankruptcy case, a § 363 sale of assets occurs free and clear of any "interests," which includes claims. Thus, the claims did not follow the assets in the purchaser's hands but were attached to the proceeds of the sale, leaving FXI free of the claims. Court rejected contention that there was defect in notice of the sale because Plaintiffs were informed of bankruptcy and knew or should have known of their claims. FXI was not a successor because it had not assumed the liabilities, there was no continuity of ownership between the two entities, and the corporate entity changed. Further, the competitive bidding at the sale countered any suggestion that this was a plan for Foamex to continue as FXI. In spite of the above, FXI could still be liable for damages if Plaintiffs could meet the high burden of proof and establish FXI joined the price-fixing conspiracy. After reviewing record, Court allowed Plaintiffs to proceed on this claim because there was a scintilla of evidence in the record supporting the claim.

Bash v. Textron Fin. Corp., 524 B.R. 745 (N.D. Ohio 2015)

Subject: fraudulent transfer, Ponzi scheme

This is an adversary in the Fair Finance case seeking, in part, recovery of fraudulent transfers. The reference was withdrawn but district court sent case back to bankruptcy court for pretrial matters. Cross-motions for summary judgment were filed and the bankruptcy court issued proposed findings of fact and conclusions of law for review by district court. After a de novo review, District court accepted the recommendation to deny the motions for summary judgment but made additional findings.

Of note is District Court's view of what constitutes a Ponzi scheme. Defendant argued for the Canyon Systems test: "(1) deposits were made by investors; (2) the Debtor conducted little or no legitimate business operations as represented to investors; (3) the purported business operations of the Debtor produced little or no profits or earnings; and (4) the source of the payments to investors was from cash infused by new investors." In re Canyon Sys. Corp., 343 B.R. 615, 630 (Bankr. S.D. Ohio 2006). Trustee urged court to consider 'any sort of fraudulent arrangement that uses later acquired funds or products to pay off pervious (sic) investors." Id. (citing In re Bullion Reserve of N. Am., 836 F.2d 1214 (9th Cir. 1988) (other citations omitted)). Defendant argued that its legitimate business activities prevented Fair Finance from being deemed a Ponzi scheme but the court concluded otherwise, finding that the legitimate activities could not support the flow of money out of the company. Court adopted the broader definition of a Ponzi scheme advanced by Trustee.

Getzler Heinrich & Assoc, LLC v. Wojcik, 2015 WL 235819 (N.D. Ohio 2015) (slip copy)

Subject: Stern fraudulent transfer claim, jurisdiction, withdrawing reference

Fraudulent transfer action by trustee against a non-creditor, which moved for withdrawal of reference following the bankruptcy court's denial of a motion for summary judgment. Trustee opposed withdrawal. District court noted the matter clearly involved a Stern claim requiring a trial by District court. Bankruptcy court had supervised the pretrial process to the summary judgment stage, leaving nowhere else for case to go save trial, so withdrawal was proper. Trustee's argument that motion was untimely under 28 U.S.C. § 157(d) failed. Section 157(d) applies to permissive withdrawals, not mandatory ones like this one. Regardless, District court said bankruptcy court could handle the matter until it exceeded its constitutional authority, making the motion timely.

<u>Bilfield v. Bankers Healthcare Grp., Inc.</u>, 2014 WL 7185472 (N.D. Ohio 2014) (slip copy)

Subject: 28 U.S.C. § 1927, sanctions

Bankruptcy court found that defendant violated the automatic stay. It also granted partial summary judgment in Debtors' favor after finding that Defendant was not the real party in interest when it filed its adversary proceeding. Debtors filed a motion for sanctions under 28 U.S.C. § 1927, which bankruptcy court denied. Debtors appealed and District court affirmed. Bankruptcy court did not abuse its discretion with the denial. Bankruptcy court had not relied on erroneous facts and was permitted to consider the totality of the circumstances in determining whether sanctions were warranted.

<u>Spirit SPE Portfolio 2007-1 LLC v. Paxos</u>, 2014 WL 5091740 (N.D. Ohio 2014) (slip copy)

Subject: procedural deadlines

Bankruptcy court dismissed complaint after (1) deeming admissions admitted following Spirit SPE's failure to respond, and (2) using the deemed admissions to grant Debtor's motion for summary judgment. Spirit SPE appealed. District court dismissed appeal. In addition to the bankruptcy record, Spirit SPE missed appellate deadlines, one by a minute, which court found "indicative of a larger problem—appellant's complete indifference to the procedural rules government bankruptcy and the overall judicial process." District court found no abuse in deeming the admissions admitted considering Spirit SPE's failure to respond to the admissions after the bankruptcy court issued a revised deadline.

<u>Bash v. Laikin</u>, 2014 WL 3842884 (N.D. Ohio 2014) (slip copy)

Subject: district court review of bankruptcy court's reports and recommendations

The bankruptcy court issued post-trial findings and submitted a report and recommendation to district court. District court approved some and rejected others. Of note, District court agreed that doctrine of first material breach is an affirmative defense and must be so pled or subject to forfeiture if not timely raised. Additionally, District court found that the waiver of a jury trial in a note survived assignment of that note and was enforceable.

<u>Floyd v. Bank of Am.</u>, 2014 WL 3732591 (N.D. Ohio 2014) (slip copy)

Subject: FDCPA

Action by mortgagors under the FDCPA, Ohio Consumer Sales Practice Act, etc. The Floyds alleged that the foreclosing entity lacked standing to initiate the foreclosure action because the transfers and assignments to it were invalid. District court noted the Sixth Circuit's recent focus on the defendant's conduct, rather than plaintiff's standing, to determine whether defendant had a right to initiate a foreclosure. Since the plaintiff in the foreclosure action had a note endorsed in blank, and an assignment of the mortgage, both which were attached to the foreclosure complaint, it could not have falsely asserted that it had standing.

Moreover, another flaw exists in the FDCPA claim. Under the FDCPA, a debt must be for personal, family or household purposes. A bankruptcy petition from 2010 showed that Debtors used the property as a rental. "By omitting the purpose for which they obtained the property on the mortgage, the [Plaintiffs] have not adequately alleged that they incurred an FDCPA 'debt.'' Id. at *6.

Emerson v. Treinish, 2014 WL 2807481 (N.D. Ohio 2014) (slip copy)

Subject: 28 U.S.C. § 157(d), withdrawal of reference, fraudulent transfer claim

Case involved a Stern fraudulent transfer claim. Court outlined state of bankruptcy jurisdiction following Supreme Court Arkinson decision and determined that the bankruptcy court could hear the claim and issue proposed findings of fact and conclusions of law and could even conduct a jury trial to the extent of the parties' consent. In spite of this authority, District court found cause to grant the motion for permissive withdrawal of the reference. First, the core/non-core distinction is a paramount consideration and fraudulent transfer claims against non-creditors are no longer treated as core, but non-core, related proceedings. Second, the non-creditor did not consent to a jury trial by the bankruptcy court. Finally, since a final decision rested with District court, judicial economy and preservation of the parties' resources favored withdrawal.

District Courts – Other

Wong v. HSBC Bank USA, N.A. (In re Lehman Bros. Holdings Inc.), 2015 WL 3778512 (S.D.N.Y. 2015) (reporter citation not yet available)

Subject: withdrawing reference, Stern claims

Plaintiffs filed an adversary proceeding that included a count to declare certain collateral their property, not property of the estate. They then moved to withdraw the reference, arguing that Stern mandated withdrawal because of the common law claims. The court declined the suggestion that the existence of Stern claims necessitates withdrawal, instead choosing to employ the traditional test for withdrawal in tandem with Stern considerations. The court suggested that Plaintiffs' characterization of the claims as Stern claims was erroneous because the determination of estate property is clearly a core issue, giving the bankruptcy court the ability to enter final judgment. Further, even if the reference was not withdrawn and the bankruptcy court issued a final judgment on a Stern claim, the district court could still simply review the judgment as proposed findings of fact and conclusions of law, thereby curing any defect. After reviewing the remaining factors, the court denied the motion to withdraw the reference.

Taylor v. Midland Funding, LLC, 2015 WL 1456442 (N.D. Ill. 2015) (reporter citation not yet available)

Subject: Fair Debt Collection Practices Act, time-barred claims

Illinois law provides a five year statute of limitations for collecting delinquent credit card accounts based on the date of last activity. Plaintiffs sued Defendant under FDCPA for filing time-barred claims in bankruptcy cases. Court denied Defendants' motion to dismiss the FDCPA claim for failure to state a claim. Creditor argued because § 1692e(5) references a "threat" to take action, and complaint pled actual action, the claim was not viable. Relying on Seventh Circuit precedent that found the action of filing an untimely lawsuit may violate the FDCPA, the court refused to dismiss for failure to state a claim. Defendants' argument citing case law in their favor was also rejected. Court noted there was contrary case law as well and that all reasonable inferences at this stage must be drawn in favor of Plaintiff, leaving the court to conclude Plaintiff had stated a claim under FDCPA, making dismissal at this stage unwarranted.

Torres v. Cavalry SPV I, LLC, 530 B.R. 268 (E.D. Penn. 2015)

Subject: Fair Debt Collection Practices Act, time-barred claims

Under Pennsylvania law, breach of contract claims are subject to a four year statute of limitations. Defendant filed a time-barred proof of claim in a chapter 13 case and Plaintiff sued under FDCPA. Typically, Third Circuit precedent looked at whether the FDCPA claim was in direct conflict with the Code or Rules to determine whether the FDCPA claim was viable. On these facts, that inquiry was not helpful. The court found that although the Code allowed for the filing of a time-barred claim under § 502(b)(1), a creditor could comply with the FDCPA and the Code by not filing the time-barred claim and thereby avoid direct conflict. The court looked to other circuit decisions and followed the Second Circuit which barred the FDCPA action, finding no need to allow the FDCPA action in light of the protections and remedies offered debtors by bankruptcy law. *See* Simmons v. Roundup Funding, LLC, 622 F.3d 93 (2nd Cir. 2010).

Residential Funding Co., LLC v. Greenpoint Mortgage Funding, Inc. (In re Residential Capital, LLC), 519 B.R. 593 (S.D.N.Y. 2014)

Subject: withdrawal of reference, core/non-core, jurisdiction

Prepetition, Debtor obtained and securitized residential mortgages from various originators, then pooled and distributed the mortgages in residential-backed security trusts. After Debtor entered into a global settlement for its defective loan packages in bankruptcy, it sued various originators seeking indemnity under breach of contract theory. Defendant sought to withdraw the reference and have matter heard in district court. Court denied request. First, the claims "related to" the bankruptcy case because the liquidation plan authorized the liquidation trust to prosecute the claims for the benefit of creditors and called for the bankruptcy court's retention of jurisdiction.

Because the claims were based on state law, did not invoke any bankruptcy rights, and Defendant had not filed a proof of claim, court said they were not core. However, bankruptcy court still has jurisdiction over non-core claims, so court weighed additional considerations, including judicial economy. The bankruptcy judge's familiarity with the specifics of the global settlement convinced court to deny withdrawal and allow the bankruptcy court to enter proposed findings of fact and conclusions of law.

Bankruptcy Appellate Panel for the Sixth Circuit

In re Fremont Hospitality Grp., LLC, 2015 WL 3824701 (B.A.P. 6th Cir. 2015) (unpublished)

Subject: designation of record on appeal, Rule 8006

BAP dismissed an appeal for a "plethora of procedural shortcomings." The notices of appeal referenced an order denying relief from the automatic stay and and an order on cross motions for summary judgment but appellant's brief raised issues unrelated to those orders. Additionally, the designation of record did not contain the documents related to the orders identified in the notices of appeal. Since appellant failed to bear its burden of providing an adequate record, there was no basis to determine that the bankruptcy court acted improperly. BAP also questioned propriety of counsel's representation of the debtor and the creditor on the appeal: debtor's counsel's motion to withdraw was granted prior to the appeal and another attorney had entered an appearance on the creditor's behalf.

In re Wring, 2015 WL 3824860 (B.A.P. 6th Cir. 2015) (unpublished)

Subject: § 324(a), appeal of orders denying the removal of chapter 11 trustee and denying chapter 11 trustee's motion for instructions

BAP affirmed bankruptcy court's denial of Debtor's motion to remove the chapter 11 trustee appointed in his case. Debtor did not meet burden of proving cause for the removal, showing no incompetency or wrong-doing that justified removal, so the decision was not an abuse of discretion by the bankruptcy court. Debtor did not have standing to appeal the bankruptcy court's denial of the trustee's motion for instructions because he was not a "person aggrieved" by the order. Regardless, BAP indicated that the motion for instructions was beyond scope of bankruptcy court's powers because trustee is charged to exercise his business judgment in operating a debtor's business.

In re Sheppard, 2015 WL 4114655 (B.A.P. 6th Cir. 2015) (reporter citation not yet available)

Subject: Bankruptcy Rules 4004, 4007

Debtor owed money to Utica National Insurance Group following his failure to remit settlement proceeds to the company, which was operated through its subsidiary, Republic Franklin Insurance Company. When Debtor filed bankruptcy, notices went to Utica's corporate office, not to Republic Franklin. On May 28, 2014, after appellant filed a state court lawsuit against Debtor, it received actual notice of the bankruptcy. The deadline to object to discharge was May 30, 2014. On May 29, 2014, appellant filed a motion to extend the deadline, citing an inability to adequately prepare a complaint in on such short notice. The bankruptcy court denied the motion, finding no cause.

BAP stated that although courts have discretion to determine cause on a case-by-case basis, the bar for cause is low. This corresponds to other jurisdictions which apply a liberal standard for granting extensions of this kind. Further, the Sixth Circuit prefers matters to be decided on their merits, "not on technicalities and missed deadlines." BAP suggested that bankruptcy court put too much emphasis on a single factor, notice. While creditor may have had constructive notice earlier, its actions indicated it had actual notice much later. When it learned of the bankruptcy at that late date, it acted diligently. Court reversed bankruptcy court, finding it abused its discretion in denying the motion to extend the deadline to object to discharge.

In re Royal Manor Mgmt., 525 B.R. 338 (B.A.P. 6th Cir. 2015)

Subject: 28 U.S.C. § 1927, § 105 (attorney sanctions); 28 U.S.C. § 455 (recusal)

Attorney was sanctioned $207,000, the amount expended by opposition, following years of litigation related to a claim he contended was a loan but the court determined was an equity investment. His request for recusal of the bankruptcy judge was denied. He appealed both rulings and BAP affirmed bankruptcy court.

A sanction order is a final order reviewed for an abuse of discretion. 28 U.S.C. § 1927 provides:

> Any attorney or other personal admitted to conduct cases in any court of the United States or any Territory thereof who so multiplies the proceedings in any case unreasonably and vexatiously may be required by the court to satisfy personally the excess costs, expenses, and attorneys' fees reasonably incurred because of such conduct.

Although there is a case law split about whether a bankruptcy court is a "court of the United States," the Sixth Circuit has approved a bankruptcy award of sanctions under § 1927. In re Schaefer Salt Recovery, Inc., 542 F.3d 90 (3d Cir. 2008) (parenthetical omitted). Section 1927 is not intended to remedy mere incompetence or negligence but is not reserved solely for subjective bad faith, either. A court is to look at the vexatious conduct and determine whether it was the result of bad faith or, if not, whether the actions multiplied the proceedings. The purpose of sanctions is 'to deter dilatory litigation practices and to punish aggressive tactics and far exceed zealous advocacy.' Id. at 30 (citing Red Carpet Studios Div. of Source Advantage, LTD v. Sater, 465 F.3d 642, 646 (6th Cir. 2006) (citation omitted)). This differs from a bankruptcy court's inherent authority to issue sanctions, which can be premised on bad faith.

In this case, the bankruptcy court concluded that the underlying claim was frivolous. Counsel vexatiously pursued not only the claim, but also various arguments arising during litigation. The bankruptcy court had adequately set forth the foundation for sanctioning counsel and had provided counsel with due process. Counsel's argument that Trustee's failure to file a motion for summary judgment earlier in the litigation would have lessened his sanction was unavailing, as was his contention that his client's settlement with Trustee should reduce his sanction. There was no abuse of discretion by the bankruptcy court on these matters.

The recusal statute contemplates recusal in two situations: (1) when impartiality is questioned (§ 455(a)) and (2) when the judge holds a personal bias or prejudice against a party (§ 455(b)). Using the objective standard of a reasonable person, recusal is mandatory under § 455 but recusal is not appropriate unless the standard is met.

A court can express an opinion about litigation without violating the statute. The judge can also give way to normal human emotions, like annoyance, anger, and impatience, without crossing into bias or prejudice. Bias or prejudice results when something more extreme is involved which plainly impacts the ability to decide a matter fairly.

Here, the bankruptcy court did not cross a line necessitating recusal. Although she had inquired whether counsel could engage in settlement negotiations under the premise it would require a "substantial contribution" from him, recusal was not warranted because it did not plainly indicate bias. The comment could reference her understanding of Trustee's threshold for negotiating, or it could be a suggestion related to a larger sanction the judge could impose.

In re Doyne, 520 B.R. 566 (B.A.P. 6th Cir. 2014)

Subject: extending deadline to object to discharge

A day after the deadline to object to discharge expired, a creditor moved for leave to file a complaint. Creditor's counsel had "suffered a disabling brain injury in a car wreck" approximately seven weeks before the deadline and had been out of the office, plus he had just hired a new paralegal the week the deadline expired. Debtors objected to motion. Bankruptcy court said deadline was not jurisdictional and was subject to equitable tolling but denied motion on grounds that Debtor had done nothing to obstruct the filing of the complaint. BAP affirmed. BAP noted some confusion over the standard employed by the bankruptcy court but found the correct legal standard was applied. Appellant-creditor focused his argument on whether he had diligently pursued his rights. Although bankruptcy court had not discussed the brain injury, and focused on Debtor's lack of culpability, BAP said the silence didn't mean the injury was not considered but could mean it was rejected or discounted. BAP suggested that the creditor, who bore the burden of persuasion, had not made a thorough enough record upon which an extension could be found. Consequently, BAP found the bankruptcy court's decision was reasonable and affirmed the denial.

Wojcik v. Gold (In re Daher), 522 B.R. 743 (B.A.P. 6th Cir. 2014) (unpublished)

Subject: 541(a), insurance proceeds

While Debtor's house was in foreclosure, he discovered damage to the property, filed an insurance claim, and received a check from the insurance company payable to himself and the two mortgage holders. He signed the check and sent it on to the banks. The property then sold and Debtor filed a bankruptcy case in 2010. In 2012, he learned that the insurance check had never been cashed and was being held as unclaimed funds. When he could not obtain release of the funds, he filed a lawsuit seeking sole claim to the funds. His trustee reopened his bankruptcy case. The state court ruled that the proceeds belonged to Debtor and the trustee filed a complaint to recover the proceeds for the estate.

Debtor argued that since the trustee had premised reopening on participation in the state court action, and then did not intervene, trustee was foreclosed from taking other action against Debtor. The court refused to read the reopening order this narrowly because of the incongruity that would result in allowing participation but not administration of a recovered asset. Plus, other orders spoke to an intent to allow for administration of any asset that came into Debtor's hands. The court found the proceeds were property of the estate. Even though he had to pay the proceeds to the mortgage company, he owned the underlying insurance policy and the mortgagees were merely loss payees. He had a vested interest in the proceeds as of the filing date. Debtor remained a beneficiary of the proceeds because they reduced the mortgage balance. Additionally, the proceeds were rooted prepetition: the damage, claim and payment were all made prepetition. The postpetition state court action did not create Debtor's interest in the proceeds.

In re E.C. Morris Corp., 523 B.R. 77 (B.A.P. 6th Cir. 2014)

Subject: successor liability, jurisdiction

Prior to bankruptcy, creditors initiated state court claims against Debtor's successors on variety of theories. During bankruptcy case, trustee compromised similar claims against the successors on behalf of the estate and the associated adversary was dismissed without prejudice. Postpetition, the creditors reactivated their claims against the successors, who argued the claims were settled during the bankruptcy. Court disagreed, finding the state court claims against the non-debtor successors would have no impact on the bankruptcy estate and therefore lacked a "related to" jurisdictional basis. Court also found that the claims were abandoned by the trustee. (And, also remember there is no discharge for a corporation.) Additionally, the court found no basis to enjoin the state court action under the Anti-Injunction Act, which authorizes federal court to stay a state court action only under (1) an act of Congress, (2) to aid in jurisdiction, or (3) to protect or enforce judgments.

Church Joint Venture, LP v. Blasingame (In re Blasingame), 525 B.R. 675 (B.A.P. 6th Cir. 2015)

Subject: Rule 7058, final orders, appeals

Bankruptcy court issued a 30 page order, including its analysis, sanctioning attorneys under Rule 9011 but left open determination of sanctions under 28 U.S.C. § 1927. An attorney filed a motion for leave to appeal and a notice of appeal. Bankruptcy court later imposed sanctions under § 1927, issuing an order and an amended order. Creditor filed motion to dismiss appeal as untimely (too early). Attorney filed amended motion/notice of appeal. BAP concluded that the first order was not final because of the open § 1927 issue. Because the amended second order disposed of all issues, it constitute the final order. However, since the original judgment and order were contained in the same document, not separate documents as required by Rule 7058, the appeal time was calculated under Rule 7058(c), resulting in a 164 day appeal period: fourteen (14) days under Rule 8002(a) and an additional one hundred fifty (150) days under Rule 7058(c).

<u>In re SII Liquidation Co.</u>, 517 B.R. 72 (B.A.P. 6th Cir. 2014)

Subject: standing, law of case

Shareholders and directors ("Plaintiffs") brought malpractice action against Debtors' bankruptcy counsel and bankruptcy court dismissed claim, citing lack of standing and res judicata. Plaintiffs did not appeal. A year later, they filed a motion to reconsider under Rule 60(b), which bankruptcy court denied. BAP affirmed denial of motion to reconsider, stating that 'the law-of-the-case doctrine bars challenges to a decision made at a previous state of litigation which could have been challenged in a prior appeal, but were not.' <u>Id</u>. at 75 (citing <u>JGR, Inc. v. Thomasville Furniture Indus., Inc.</u>, 505 Fed.App'x 430, 435 (6th Cir. 2012)). Since Plaintiffs lacked standing and had not appealed the decision, they lacked standing to bring the motion for relief. Bankruptcy court decision affirmed.

<u>Anderson v. Fisher (In re Anderson)</u>, 520 B.R. 89 (B.A.P. 6th 2014)

Subject: § 523(a)(2)

Bankruptcy court applied collateral estoppel and found the debt arising from a Tennessee penalty default judgment was nondischargeable and BAP affirmed. Tennessee courts would give preclusive effect to a true default judgment, so collateral estoppel will also apply where a party appears, answers, and then is subject to a default judgment for failing to participate in discovery.

<u>Trudel v. U.S. Dep't of Educ. (In re Trudel)</u>, 514 B.R. 219 (B.A.P. 6th Cir. 2014)

Subject: § 523(a)(8), undue hardship

Pro se debtor attempted to discharge her student loans based on her medical conditions. Bankruptcy court found no undue hardship and BAP agreed. Her subjective opinion that the conditions impacted her ability to work was not enough to overcome physician statements to the contrary. Debtor also failed to show hopelessness in her situation because she did not provide evidence that she was unable to secure more lucrative employment or job advancement. Court also found lack of good faith effort to repay the loans. She had not made payments, gone almost twenty years without requesting a deferment, and not participated in the ICRP. Her argument that she avoided the ICRP because it would affect her ability to obtain credit in the future did not resonate with the court.

In re Cain, 513 B.R. 316 (B.A.P. 6th Cir. 2014)

Subject: lien-stripping in a chapter 20 case

Debtor filed a chapter 7 case and obtained a discharge, then filed a chapter 13 case proposing to strip the wholly unsecured second mortgage on her residence. Bankruptcy court denied the request to strip the lien. BAP reversed and remanded. BAP reviewed the lines of authority on chapter 20 lien-stripping: (1) it is impermissible, (2) it is allowed but the loan is "reinstated" upon completion of the plan, leaving debtor liable for any amounts that are not paid through the plan, and (3) it is permissible. BAP adopted the third (majority) approach. The first step is § 506, not § 1325(a)(5)(B) as promoted by the bankruptcy court. Under § 506, the lien has no secured value and is unsecured, rendering it outside the protections of §§ 1322(b)(2) and 1325(a)(5). There is nothing in the Bankruptcy Code to prevent a debtor from availing of the benefits of chapter 13, nor is lien-stripping premised on discharge.

Collett v. Lee Oil Co. (In re Collett), 2014 WL 2111309 (B.A.P. 6th Cir. 2014) (slip copy)

Subject: § 362, criminal investigation

Debtor ran a convenience store/gas station and Defendant supplied the gas. Debtor fell behind on gas payments and Defendant went to the police to file a theft report, then learned its insurance carrier would act only if a criminal case was filed. Debtor filed bankruptcy and listed Defendant has a creditor. Ten days later, a criminal complaint was filed by law enforcement. Defendant cooperated in the investigation, which led to Debtor's arrest. She later filed a motion for violation of the automatic stay, which the bankruptcy court denied. Debtor appealed and BAP affirmed. Section 362(b)(1) provides an exception to the automatic stay for criminal actions but there is a question as to whether the exception is absolute, or whether it applies only when the motivating force of the criminal action is to collect a debt. The Sixth Circuit has not decided the issue and the bankruptcy court sidestepped it as well, concluding there was no violation of the stay. Defendant started the criminal process for theft before the bankruptcy was filed and was motivated by a desire to pursue an insurance claim. Defendant's comptroller testified that its postpetition activity was limited to cooperation in the investigation. Since credibility is left to the bankruptcy court, and its findings were not clearly erroneous, BAP affirmed.

Bankruptcy Appellate Panels – Other

Gray v. Warfield (In re Gray), 523 B.R. 170 (B.A.P. 9th Cir. 2014)

Subject: Rule 1009(a), amending exemption, bad faith

Debtors failed to list and exempt prepaid rent. When trustee sought turnover, they amended their schedules to add exemption. Bankruptcy court denied on bad faith grounds. Relying on Supreme Court decision in Law v. Siegel, 134 S.Ct. 1188 (2014) (concerning denial of trustee's attempt to surcharge homestead to cover his administrative expenses), Ninth Circuit BAP found no statutory basis for a court's exercise of equitable powers to disallow the amendment under federal law, thereby abrogating court's ability to deny or disallow exemptions/amendments to exemptions on bad faith. Rule allows amendment at any time and any exceptions are court-created. Left door open to determine whether bad faith could factor into entitlement to exemption under state law.

Elliot v. Weil (In re Elliot), 523 B.R. 188 (B.A.P. 9th Cir. 2014)

Subject: Rule 1009(a), amending exemption, bad faith

Companion case to Gray, above. Debtor did not list any interest in real estate, claim a homestead exemption, or list judgment lien creditors at filing. After bankruptcy, a company he controlled gifted real estate to him. When he sought release of the judgment lien, the creditors investigated and reopened the bankruptcy case a year later. Debtor then amended petition to list real estate and claim a homestead exemption. "[U]nless statutory power exists to do so, a bankruptcy court may not bar a debtor's exemption claim amendment on the basis of bad faith or of prejudice to creditors." Id. at 189 (citations omitted). However, Trustee could pursue course under California law to see whether Debtor had abandoned his right to the homestead exemption following transfers of the real estate to his third party entities.

Bankruptcy Courts for the Northern District of Ohio

In re Gilica, 530 B.R. 429 (Bankr. N.D. Ohio 2015) (J. Gustafson)

Subject: O.R.C. § 2329.66(A)(2), exemption for a boat as a motor vehicle

Court declined to grant exemption for a boat as a motor vehicle. After looking at (1) other states' exemption laws, which do not exempt boats or watercraft and do not traditionally include boats in the definition of "motor vehicle" and (2) bankruptcy court opinions which generally reject boats as "motor vehicles," for context, the court turned to the Ohio Revised Code provisions, specifically O.R.C. §§ 4501.01 and 2329.66(a)(2). The court found that the former provision had a different purpose and therefore should not be read conjunctively with the exemption statute. The court cited cases that suggested that motor vehicles were intended to apply to vehicles with wheels and runners and operated on roads and highways. Court also found numerous provisions that listed both motor vehicles and "watercraft," suggesting that they are not one and the same.

Burton Food Serv., Inc. v. Aseireh (In re Aseireh), 526 B.R. 246 (Bankr. N.D. Ohio 2015) (J. Harris)

Subject: Rule 12(b)(6), Rule 9(b), Rule 8, pleading fraud

Creditor filed a complaint under §§ 523(a)(2)(A), (a)(4), (a)(6) and 727(a)(3), (4) and (5). Debtor moved to dismiss for failure to properly plead the claims. Court agreed on § 523(a)(4) count but denied motion as to other counts. When actual fraud is pled, it must be pled with particularity under Rule 9(b). Here, creditor agreed it had failed to plead fraud with particularity in the § 523(a)(4) count and the court dismissed that claim. However, creditor had met pleading standard for actual fraud under § 727(a)(4) by citing the allegedly false representations made by debtor in Item One of his Statement of Financial Affairs and indicating why they were false/fraudulent. The court found the creditor's pleading for the remaining counts met the general pleading standards of Rule 8(a) and set forth plausible claims.

In re Aubiel, 516 B.R. 476 (Bankr. N.D. Ohio 2014) (J. Gustafson)

Subject: homestead exemption in boat

Debtor claimed homestead exemption in 46' Sea Ray boat, trustee objected, court sustained. Court acknowledged that Ohio homestead exemption may cover personal property used as a residence. However, Debtor's statement that he had used the boat as his residence for 3-4 years was contradicted by other evidence. First, a judgment entry in his divorce case recited that he had lived in Tuscarawas County for at least six months approximately a year before his bankruptcy case was filed. Second, he testified that he does not live on the boat in winter but puts it in storage around November 15. Third, various documents, including bank statements, tax returns, and recent deeds, referenced Debtor's address was Tuscarawas County, Ohio, not the boat location.

In re Kemmery, 516 B.R. 485 (Bankr. N.D. Ohio 2014) (J. Koschik)

Subject: interest rate on 910 car claims in chapter 13

Creditor argued for the contract rate of interest and Debtor argued for a Till rate. Court sided with Debtor. According to court, the fact that the claim was a 910 claim only prevented strip down of the claim under § 506, mandating treatment of claim as fully secured. Since Debtor was proposing to change only the interest rate on the claim, but the full secured value, it was a cram-down plan, and creditor was entitled to present value of its claim to account for the fact that payment was made over time, the debtor may default, and the collateral may depreciate. Till set prime-plus as the appropriate interest rate when payments are made over time, making 5.25% the correct rate.

Lamento v. U.S. Dep't of Educ. (In re Lamento), 520 B.R. 667 (Bankr. N.D. Ohio 2014) (J. Morgenstern-Clarren

Subject: § 523(a)(8), student loan dischargeability

Court found that repayment of student loans would be an undue hardship on debtor, a divorced mother of two employed part-time at Giant Eagle who lived with family. Decision was not based on medical issues, but on Debtor's inability to maintain a minimum standard of living for her and her children and the projection that her situation was unlikely to change. She had never completed any of the three schools she had started, mainly due to a controlling ex-husband, and had no identifiable job skills. Her hourly rate of $10.15 was above minimum wage and above the rate for jobs which she qualified. She barely covered her expenses, which did not include rent and utilities or health insurance. She drove a 10+ year old car with over 160,000 miles. Her decision not to sign up for the income contingent repayment plans offered, under which she would make no payments, was not bad faith. She didn't have the ability to pay now, or in the foreseeable future, and "she is entitled to sleep at night without these unpayable debts continuing to hang over her head for the next 25 years." Id. at 679.

Ohio Dep't of Job and Family Serv. v. Urbina (In re Urbina), 519 B.R. 694 (Bankr. N.D. Ohio 2014) (J. Gustafson)

Subject: §§ 523(a)(2)(A), (B) and 523(a)(6), default judgment

Plaintiff filed complaint for nondischargeability under § 523(a) and (4) based on Debtor's receipt of unemployment benefits while he was employed. Debtor did not respond to complaint and Plaintiff filed a motion for default judgment. Since default judgment is not a matter of right, court reviewed complaint to assure that sufficient facts had been pled to support the claims asserted and found for Plaintiff on both counts.

Graham v. The Huntington Nat'l Bank (In re Medcorp, Inc.), 521 B.R. 259 (Bankr. N.D. Ohio 2014) (J. Gustafson)

Subject: § 547, allegation not included in complaint but raised in pleadings, insider status

Chapter 11 trustee sought to recover an alleged preferential transfer to Bank. Bank had a security interest in Debtor's assets, including bank accounts. Debtor was awarded a $750,000 settlement from litigation and deposited the money in a Bank account, then used those funds to pay Bank approximately $683,000. The complaint alleged that the latter transfer was preferential. In responding to a motion for summary judgment, Trustee altered course and considered the prior transfer, the deposit to the account, to be preferential. The complaint was never amended. Although court recognized the failure to amend can be fatal, it is not always so. Looking at the facts of this case, and calling it "close," court found Defendant had adequate notice of Trustee's new theory and was not subjected to unfair surprise. Court also found that Defendant was not prejudiced: the complaint contained all the factual allegations, the difference between the two transfers was six days, the same discovery applied to both theories, and the new theory did not push time sensitive legal considerations. Court permitted Trustee to proceed with the new theory.

Court also contemplated the insider status of Bank. Debtor was in receivership prepetition and Trustee urged court to find the alliance between Defendant and receiver made Defendant an insider, especially in light of receiver's failure to get court approval before making transfer of the settlement proceeds from Debtor to bank. Courts look at control, specifically "whether the creditor had more ability to assert control than the other creditors, whether the creditor made management decisions for the debtor, directed work performance, and directed payment of the debtor's expenses." Id. at 273 (citation omitted). Court concluded Bank was not an insider. Transactions between Bank and receiver were typical of what is expected between receiver and secured creditor and there were no indications that either Bank or receiver could dictate corporate policy of Debtor. While their interests may have been closely aligned, and Bank may have intrusively pushed its agenda, could not find genuine issue of material fact that Bank was insider.

In re Oglesby, 519 B.R. 699 (Bankr. N.D Ohio 2014) (J. Whipple)

Subject: § 350, § 522(f), reopening to avoid judgment liens

Debtor moved to reopen his chapter 7 case to avoid two judgment liens and two creditors objected. Section 350 reopenings are at the discretion of the court. Although § 522(f) lien avoidances generally constitute cause for reopening a case, limitations exist, including denial when reopening would be futile or unduly prejudicial. In face of prejudice to one of the lienholders, the court conditioned reopening on Debtor paying the creditor certain fees and expenses it incurred as a result of Debtor's failure to timely avoid the lien. The creditor had been pursuing foreclosure during the year leading up to Debtor's bankruptcy filing and Debtor had listed the creditor and the lawsuit in his petition. Debtor did not avoid the lien during the chapter 7 case and waited several months after the foreclosure case was reactivated to seek relief.

McLane v. Bostater (In re McLane), 526 B.R. 238 (Bankr. N.D. Ohio 2015) (J. Gustafson)

Subject: § 547, wage garnishment

Landlord garnished Debtors' wages prepetition. Debtors filed preference action to recover the money. Debtors had standing because the trustee did not seek recovery and the monies constituted exempt wages. Debtors demonstrated the elements of a preference claims. In defense, landlord argued § 523(a)(6) nondischargeability, which court rejected because it was not a statutory defense to a preference action and the landlord had not timely pursued a nondischargeability action. In spite of their success, Debtors did not recover the full amount deducted from their pay stubs because the landlord's testimony that she had not received the full amount was credible. Court noted that the difference could be funds taken as fees or frozen by the county court and left door open for Debtors to return to recover those funds.

Bankruptcy Courts – Other

Nunez v. Key Educ. Res/GLESI (In re Nunez), 527 B.R. 410 (Bankr. D. Oregon 2015)

Subject: § 523(a)(8)

Bankruptcy court determined that student loan owed to flight school was dischargeable. Defendant Key was neither a governmental entity nor a nonprofit institution under § 523(a)(8)(A)(i), nor was the loan a "qualified education loan" for an "eligible educational institution" under § 523(a)(8)(A)(ii), as determined by review of the school code lists promulgated by the Internal Revenue Service.

In re 800Ideas.com, Inc., 527 B.R. 701 (Bankr. S.D. Cal. 2015)

Subject: § 503(b)

Chapter 7 trustee "unreasonably" failed to timely file postpetition, zero liability tax returns for S corporation debtor, resulting in an IRS penalty assessment. Question was whether the IRS penalty claim was a priority administrative expense claim under § 503(b)? Trustee argued that since there was no tax incurred from the filed returns, the penalty should not be given administrative priority status, thereby resulting in lower distribution to unsecured creditors. The bankruptcy court disagreed. Although postpetition penalties are specifically delineated in § 503(b), the list of administrative expenses is non-exhaustive. The court allowed the claim, finding strong policy supporting enforcement of tax filing laws and no reason to hold a trustee to a lesser standard or insulate him from noncompliance.

Kohut v. Wayne Co. Treasurer (In re Lewiston), 528 B.R. 387 (Bankr. E.D. Mich. 2015)

Subject: § 544(b)(1), § 550, § 106(a)(1)

Trustee sought to recover more than $300,000 in real estate tax payments and fees made by Debtor in six years preceding bankruptcy as allegedly fraudulent transfers. Treasurer sought dismissal on two grounds, including one on sovereign immunity, asserting it was political subdivision of the state entitled to the protection of sovereign immunity. Trustee argued that sovereign immunity was abrogated for actions under the Michigan Uniform Fraudulent Transfer Act ("MUFTA") pursuant to § 106(a)(1) of the Bankruptcy Code. Court agreed. Treasurer also contended that § 544(b) requires Trustee to demonstrate that an unsecured creditor could successfully bring an action against the Treasurer under MUFTA, which the trustee could not do because the claims of unsecured creditors would be hampered by sovereign immunity. Looking at plain text of statute, court found that sovereign immunity was unambiguously abrogated for fifty-nine provisions in the Bankruptcy Code, including § 544, thereby ending the inquiry. Court also noted the circular nature of Treasurer's argument: an unsecured creditor would fail because of sovereign immunity, the very defense that was abrogated and which would allow the trustee to pursue the action.

Herbert v. Hesse (In re Hesse), 516 B.R. 491 (Bankr. S.D. Ohio 2014)

Subject: § 523(a)(4)

Debtor owned a separately incorporated plumbing corporation which failed to fully fund an employee 401(k) plan and to make matching contributions as agreed. A former employee sued Debtor to except the unfunded and missing match contributions from discharge. Court denied motions for summary judgment on grounds that (1) record did not establish that Debtor controlled the corporation and its retirement plan and was therefore a fiduciary, (2) questions of fact existed as to the accuracy of the employee's figures and the amounts actually contributed to the 401(k) fund, (3) proof of a contractual obligation to pay is not the equivalent of fiduciary obligation over trust funds, so employee had failed to show a pre-existing fiduciary relationship with regarding the matching funds, and (4) liability could lie with Debtor if the employee established the requisite fiduciary relationship.

In re Headlee Mgmt. Corp., 519 B.R. 452 (Bankr. S.D.N.Y 2014)

Subject: disgorgement of interim fees

After case converted from chapter 11, the chapter 7 trustee moved to disgorge the interim fees of chapter 11 professionals in order to balance amounts administrative claimants would receive in the administratively insolvent estate. Adopting the minority view, the court rejected the attempt, finding no statutory basis for relief, concluding section 726(b) governs how undistributed funds are disbursed and is not a tool for enlarging available funds. This is counter to the Sixth Circuit decision in In re Specker Motor Sales Co., 393 F.3d 659 (6th Cir. 2004) which relied on § 726(b) to disgorge interim fees. Other courts find disgorgement is discretionary. Headlee court disagreed with both lines, noting how frequently the pro-disgorgement camps turn anti-disgorgement: when fees are paid prior to plan confirmation, or by a carve-out from a secured creditor, or under prepetition retainer agreement.

Pirinate Consulting Grp., LLC v. Avoca Bement Corp (In re Newpage Corp.), 517 B.R. 508 (Bankr. D. Del. 2014)

Subject: § 547, preferential transfer recovery, executory contracts

In the Third Circuit, transfers under an executory contract that is assumed post-petition cannot be avoided as preferential. Kimmelman v. Port Auth. of New York & New Jersey (In re Kiwi Int'l Airlines, Inc.), 517 B.R. 508 (3d Cir. 2003). Since the account must be brought current in order to assume, any transfers made under the contract do not give the creditor more than it is entitled to receive, defeating a required preference element. 11 U.S.C. § 547(b)(5). Here, the litigation trust trustee attempted to recover transfers under a coal supply agreement by arguing it was non-executory. First, he argued that the lack of a specific purchase requirement left the debtor with no unperformed obligation. Court rejected, finding the agreement for the general supply and purchase created obligations on both parties. Trustee's argument that the coal supply agreement was replaced or superseded by the critical vendor agreement also failed because the critical vendor agreement was intended to maintain the status quo and to reaffirm that supplier would continue business on prepetition terms. Trustee also argued that assumption was "smoke and mirrors" because the parties had entered into a new agreement before assumption, making assumption unnecessary. Court disagreed because the new agreement covered a period after the original agreement ended and the parties had conducted some business under the old agreement between execution of the new agreement and assumption of the old agreement, conferring a benefit on the debtor. Transfers under the executory contract were not avoidable.

<u>In re Byers</u>, 519 B.R. 519 (Bankr. S.D. Ohio 2014)

Subject: 28 U.S.C. § 1915, waiver of appellate filing fees

Chapter 13 creditor, Debtor's ex-spouse, applied for waiver of filing fees for two appeals. Court denied waiver, finding that the affidavits attached to her request were misleading because she did not pay many of the expenses claimed. Further, she could sell assets (furniture, boat and trailer) to raise the money, and had discretionary income used for golf outings and dining out that could be reallocated. Additionally, court indicated creditor was underemployed (she had a real estate license) and had not fully accounted for $5,000 insurance proceeds received for a totaled car.

<u>Byers v. Byers (In re Byers)</u>, 520 B.R. 246 (Bankr. S.D. Ohio 2014)

Subject: waiver of filing fee for appeal, 28 U.S.C. § 1915

See above. Same creditor sought waiver of filing fee for appeal of denial of motion for an expedited hearing. Section 1915 requires good faith in seeking waiver of fee for an appeal and court said it was lacking. To start, the creditor had cited a rule that was not applicable and titled her pleading and "objection to discharge," which the court viewed as a complaint objecting to dischargeability. The underlying motion for expedited hearing was premature because Debtor and his counsel had not been properly served with the summons and complaint and had not had time to respond. Court said appeal was frivolous, without merit, and not filed in good faith.

<u>In re Nicole Gas Prod., Ltd.</u>, 519 B.R. 723 (Bankr. S.D. Ohio 2014)

Subject: §§ 105(a), 362, 541, shareholder standing, violation of automatic stay, property of the estate

Owner of two corporate entities, one in chapter 7, filed a lawsuit against Columbia Gas alleging corrupt practices that harmed the business entities. At the time the lawsuit was filed, the chapter 7 trustee of the bankrupt entity was pursuing a settlement with Columbia Gas, causing the trustee to file an action claiming the owner's lawsuit violated the automatic stay. Court found that the claims were property of the bankruptcy estate and the right to pursue the claims vested with the trustee. An individual owner does not have standing to bring an action to redress an injury to the corporation. Owner's action was therefore a violation of the automatic stay, subjecting him to civil contempt penalties.

In re Nicole Gas Prod., Ltd., 518 B.R. 429 (Bankr. S.D. Ohio 2014)

Subject: Rule 9019, compromise

Trustee moved for court approval of compromise. Debtor was entity formed to sell gas from a sister company. Both entities were involved in lawsuits against Columbia Gas for under-crediting the amounts taken from the wells. While in Chapter 11, the sister company sold its claims to Columbia Gas for a total settlement value of $4.33m. When Debtor filed, Trustee sought to compromise its claims, and release all derivative claims, for $250,000. Court denied first motion for lack of information. Second motion succeeded. Court found that Debtor had fewer wells which were less profitable and it was not clear if the same metering applied to Debtor, so settlement was within range of reason when other settlement was considered. The settlement was within the range of reasonableness based on the potential recoveries when an estimated 20% likelihood of success was factored, plus litigation costs. Trustee could also enjoin derivative suits that belonged to the estate as part of settlement.

Kohut v. Lenaway (In re Lenny's Copy Ctr. & More LLC), 515 B.R. 562 (Bankr. E.D. Mich. 2014)

Subject: conflict of interest, attorney

Trustee moved to disqualify Debtor's counsel from representing Defendants, the members of the Debtor LLC. Court granted motion, finding adverse interests between the parties. Since Trustee was seeking to recover preferential transfers, and Debtor's obligation was to cooperate with Trustee, adverse interests between the parties existed.

In re Rice, 521 B.R. 405 (Bankr. N.D. Ga. 2014)

Subject: power of attorney, filing a petition, ratification, Rule 9011 sanctions

On January 2, 2014, the Rices executed a financial power of attorney allowing Mrs. Rice to act on Mr. Rice's behalf. They filed chapter 13 in April 2014 (with the /s/ signatures only). In May 2014, they amended the financial power of attorney to specifically authorize a bankruptcy filing. Chapter 13 trustee moved to dismiss their case and Debtors moved to ratify Mr. Rice's signature on the petition. Court said that since Mrs. Rice signed Mr. Rice's signature without noting her authority as POA, the signature was a forgery. However, Mr. Rice clearly intended to file and had signed other documents, plus appeared at the 341 meeting, with no intent to deceive, so court allowed the signature to be ratified. Counsel was subject to Rule 9011 sanctions for not having Mrs. Rice sign in her representative capacity and not filing the original power of attorney with the petition, instead waiting to file the amended version.

The Official Comm. of Unsecured Creditors of Allied Sys. Holding, Inc. v. Yucaipa Am. Alliance Fund I, L.P (In re Allied Sys. Holdings, Inc.), 524 B.R. 598 (Bankr. D. Del. 2015)

Subject: breach of fiduciary duty claims, core/non-core, right to jury trial

Unsecured creditors committee sued Debtor's CEO for breach of fiduciary duty and aiding and abetting breach of fiduciary duty. CEO filed a motion to dismiss. Bankruptcy court denied and included findings related to jurisdiction in the denial. CEO challenged those findings. In Third Circuit, whether a proceeding is core focuses on a two-step inquiry that looks at whether the claim involves a chapter 11 substantive right or if it is a proceeding that could only arise in a title 11 case. The breach of fiduciary claims satisfied neither and were therefore non-core. The fact they may be related to a related equitable subordination claim does not confer "core" status because each claim is reviewed individually. Because the claims could enlarge the estate, they were related to the bankaruptcy case, leaving the bankruptcy court with authority to enter proposed findings of fact and conclusions of law.

CEO also filed a jury demand which the committee wanted stricken, which requires review of legal/equitable nature of claim and the relief sought. Historically, English courts treated these claims as equitable. Where the purpose is restitutionary, damages traditionally are considered equitable. Upon review of the complaint, there was no indication that the committee was seeking amounts to be restored to Debtor or which the CEO received as a result of the breaches, resulting in a finding that the relief sought was for monetary (legal) damages. Since the damage consideration carries more weight over the nature of the claim, court found CEO had retained right to a jury trial and deny motion to strike the jury demand.

OTHER

State Bar of California, Formal Opinion 2014-191

State Bar of California said that an attorney could represent a chapter 7 debtor in a simple, no-asset case even though the attorney also represented creditors of the debtor on unrelated matters without written consent of both clients. Under these circumstances, no real adverse interest and chapter 7 is an *in rem* proceeding. Follows opinions from the Association of the Bar of the City of New York Committee on Professional and Judicial Ethics, Formal Opinion 2005-01 and the Boston Bar Association Ethics Committee Opinion 2008-01.

New receiver rules in Ohio, Substitute House Bill 9 (O.R.C. § 2735.01 et seq.)

- effective 3/23/15
- expands appointments to include ability to appoint receivers in:
    - insolvent/dissolved entities other than corporations, including LLCs, partnerships and limited partnerships
    - cases where a mortgagor consents
    - cases where there is an assignment of rents and leases
    - foreclosure cases when certain prerequisites are satisfied
- qualifications of receiver

    - while non-binding, the court is to give "priority consideration" to the receiver selected by the entity seeking the appointment
    - consent of all parties is necessary when the selected receiver is interested
- expands statutory scope of receivers powers to include, among other items:
    - permitted to sell real and personal property free and clear of liens (previously need court authorization) through a public or private sale or auction
    - bring and defend actions
    - enter into contracts, execute deeds, leases and other documents of conveyance for real and personal property
    - open and maintain deposit accounts in the receiver's name
- creates a new procedure for selling encumbered real property