Case Law Update

White Williams Bankruptcy Institute 2019

Judge Russ Kendig

Supreme Court

Lamar, Archer & Cofrin, LLP v. Appling, 138 S.Ct. 1752 (2018)

Subject: § 523(a)(2)(A)

Appling fell behind on payment of his legal fees. When the law firm threatened to withdraw, Appling said he could pay with a tax refund but then used the tax refund for other purposes. Law firm filed § 523(a)(2)(A) nondischargeability action in Appling's chapter 7 case. Court held "[t]he statutory language makes plain that a statement about a single asset can be a 'statement respecting the debtor's financial condition.' If that statement is not in writing, then, the associated debt may be discharged, even if the statement was false." Id. at 1757.

Henry Schein, Inc. v. Archer & White Sales, Inc., 139 S. Ct. 524 (2019)

Subject: arbitrability

Archer & White ("A&W"), a small business that distributes dental equipment, entered into a contract with a manufacturer, Pelton & Crane. Henry Schein, Inc. ("Schein") was the successor-in-interest to Pelton & Crane after the initial relationship soured. A&W sued both parties in federal court, alleging violations of federal and state antitrust law. The relevant contract provided that disputes related to intellectual property of Schein were to be resolved in binding arbitration. Schein invoked the Federal Arbitration Act to refer the parties' dispute to arbitration. However, A&W argued the dispute was not subject to arbitration, as the complaint sought injunctive relief, in part.

The Court addressed the core issue of who was to decide whether the dispute was subject to arbitration. Previously, the Court had held that parties to a contract could agree to have an arbitrator decide, not only the merits of a dispute, but also "gateway" questions of "arbitrability." Some circuit courts had held that the court, rather than an arbitrator, should determine those threshold questions of arbitrability "if, under the contract, the argument for arbitration is wholly groundless." However, the Court found that the "wholly groundless" exception was incompatible with the text of the Act. Under the logic of AT&T Technologies, Inc. v. Communications Workers, 475 U.S. 643, 650, the Court here found that "[j]ust as a court may not decide a merits question that the parties have delegated to an arbitrator, a court may not decide an arbitrability question that the parties have delegated to an arbitrator." Parties may delegate threshold arbitrability questions to arbitration so long as the agreement to do so is "clear and unmistakable."

Pending Supreme Court Cases

Obduskey v. McCarthy & Holthus LLP, Docket No. 17-1307

From: 879 F.3d 1216 (10th Cir. 2018)

Issue: Whether the Fair Debt Collection Practices Act applies to non-judicial foreclosure proceedings.

Tenth Circuit held that a law firm pursuing a non-judicial foreclosure on a mortgaged property was not a "debt collector" under the FDCPA. The action was limited to enforcement of the lien rights and proceeds from the sale. It did not seek to collect a judgment and was not demanding payment.

> NOTE: Tenth Circuit decision conflicts with the Sixth Circuit's take that a non-judicial foreclosure is covered by the FDCPA. Glazer v. Chase Home Finance LLC, 704 F.3d 453 (6th Cir. 2013).

Mission Product Holdings, Inc. v. Tempnology, LLC, Docket No. 17-1657

From: 879 F.3d 389 (1st Cir. 2018)

Issue: Whether, under Section 365 of the Bankruptcy Code, a debtor-licensor's "rejection" of a license agreement—which "constitutes a breach of such contract," 11 U.S.C. § 365(g)—terminates rights of the licensee that would survive the licensor's breach under applicable non-bankruptcy law.

Tempnology owned and manufactured products with its patented cooling technology. Mission and Tempnology executed a prepetition agreement giving Mission distribution rights, a nonexclusive license to Tempnology's intellectual property, and a license to use Tempnology's trademark to market the products. When Tempnology filed bankruptcy, it rejected the agreement. Unlike § 365(a), which gives a breached party a claim for damages, §365(n) allows a licensor of intellectual property to retain its rights to the intellectual property, forcing a debtor to continue to license it. Parties disagreed whether the trademark license was covered intellectual property. Fourth Circuit found the trademark was not intellectual property because it was not one of the six listed types of intellectual property specified in the statute and Mission could not force Tempnology to continue performance under the agreement.

Taggart v. Lorenzen, Docket No. 18-489

From: 888 F.3d 438 (9th Cir. 2018)

Issue: Whether, under the Bankruptcy Code, a creditor's good-faith belief that the discharge injunction does not apply precludes a finding of civil contempt.

Taggart held a 25% interest in a business center which he transferred to his attorney. Other owners sued Taggart for failing to give them the first right of refusal. Before conclusion of lawsuit, Taggart filed chapter 7 and received a discharge. Other owners pursued the lawsuit after the discharge but agreed that no monetary judgment would issue against Taggart. State court ultimately unwound the transfer, expelled Taggart from the company, and permitted parties to seek legal fees. Other owners' counsel sought post-discharge fees from Taggart because he had "returned to the fray." Ultimately, state court found he had not re-entered the fray. In meantime, Taggart had reopened his bankruptcy to seek civil contempt. Bankruptcy court found for Taggart, finding other parties knowingly violated the discharge injunction. BAP reversed. Ninth Circuit agreed with BAP, finding other owners had a good faith belief they were not in violation of the discharge order.

Sixth Circuit Court of Appeals

<u>Lowe v. Bowers (In re Nicole Gas Production, Ltd.)</u>, 2019 WL 850960 (6th Cir. 2019)

Subject: derivative standing, Ohio RICO statute, § 362

Owner of debtor filed state court RICO lawsuit against Columbia Gas during bankruptcy case, taking the position he could bring a claim directly on behalf of his "indirect" injuries and was not required to proceed derivatively. Bankruptcy court, BAP and Sixth Circuit all disagreed and found he violated the stay. Owner's reading of RICO statute was strained and against corporate law jurisprudence. Besides, he had alleged no personal injuries, his allegations all addressed harms to the corporation.

<u>Buchwald Capital Advisors, LLC v. Sault St. Marie Tribe of Chippewa Indians (In re Greektown Holdings, LLC)</u>, 2019 WL 922658 (6th Cir. 2019)

Subject: §§ 106, 101(27), tribal sovereign immunity, abrogation/waiver

Trustee sought to recover allegedly fraudulent transfers made to Defendants, who moved to dismiss based on sovereign immunity and won. The Sixth Circuit determined that § 106 was not an unequivocal abrogation of sovereign immunity. While an Indian tribe could be viewed as "domestic," a "government," or a "governmental unit," by not saying "Indian Tribes," or something comparable, the statute was equivocal. Court also rejected Trustee's waiver argument. Although litigation conduct may provide a basis for finding a waiver of sovereign immunity when such waiver is clear, the Tribe's filing of a bankruptcy case did not waive its sovereign immunity on the Trustee's fraudulent transfer claims.

<u>New Products Corp. v. Dickinson Wright, PLLC (In re Modern Plastics Corp.)</u>, 890 F.3d 244 (6th Cir. 2018)

Subject: Rule 45(d), discovery sanctions/fee shifting, non-parties

Bankruptcy court awarded non-parties over $165,000 in fees and expenses for responding to subpoenas related to an adversary proceeding against a bankruptcy trustee. District court affirmed, as did Sixth Circuit. Under Rule 45(d)(1), person "serving a subpoena must take reasonable steps to avoid imposing undue burden or expense on a person subject to the subpoena." When issuer fails to do so, sanctions may follow. There is no bad faith requirement. Bankruptcy court's findings that the scope, breadth and time period of the requests were burdensome warranted sanctions. Issuer failed to address the concerns of the parties who were subject to the subpoena, to narrow the requests, or to work toward a protective order. Under Rule 45(d)(2)(B), if a person served with a subpoena objects, and is ordered to comply, court can issue protections, including monetary protection. Court rejected issuer's arguments that documents were produced without a court order (court relied on the protective order), distinguished a case that failed to shift fees when the respondent didn't condition compliance on reimbursement (respondents here clearly indicated they would seek reimbursement) and discounted claims that respondents were not entitled to reimbursement because their objections to the subpoenas were untimely.

<u>Isaacs v. DBI-ASG Coinvestor Fund, III, LLC (In re Isaacs)</u>, 895 F.3d 904 (6th Cir. 2018)

Subject: §544(a), Rooker-Feldman doctrine

Debtor took a HELOC in 2003, mortgagee failed to record until after Debtor filed chapter 7 bankruptcy in 2004. Debtor received a discharge. Years later, successor mortgagee obtained a foreclosure judgment. Debtor filed chapter 13 prior to sale. She originally argued that the lien never attached because it was not recorded until after the bankruptcy was filed, leaving the Kentucky court with no means to enforce the lien. Bankruptcy court agreed, said the state court erred. BAP reversed, finding the mortgage attached when the documents were signed (prepetition), not when recorded (postpetition).

On appeal, Sixth Circuit found Debtor's first claim was a violation of the Rooker-Feldman doctrine, required the bankruptcy court to act as an appellate court voiding the state court foreclosure judgment. Although a federal court can review state court decisions that wrongly decide a dischargeability questions, such questions focus on personal liability. *In rem* liability is not affected by discharge. Since the foreclosure was an *in rem* action, it did not violate Rooker-Feldman. Debtor's second claim, where she argued the lien was not perfected under § 544(a) strong arm clause, did not violate Rooker-Feldman because the state court did not determine the timing of perfection, so the bankruptcy court was not acting in appellate review.

<u>East Coast Miner LLC v. Nixon Peabody LLP (In re Licking River Mining, LLC)</u>, 911 F.3d 806 (6th Cir. 2018)

Subject: carve-outs

In the involuntary chapter 11 of U.S. Coal Corp. and its subsidiaries, including debtor Licking River Mining ("LRM"), LRM's creditors asserted a lien on its cash collateral. The creditors consented to use of the cash collateral for operating funds, and the cash collateral order also authorized debtors to use the cash to fund the administration of the case through a carve-out for attorneys and other professionals. The case was converted to chapter 7, and the professionals filed their final fee applications. The creditors objected, arguing that the sums comprising the carve-out did not extend to the prepetition liens and cash collateral, but could only come from postpetition liens due to the conversion. The bankruptcy court overruled the objections, finding that the text of the cash collateral order and the record made it clear the carve-out extended to prepetition liens, and the professionals could be paid from cash collateral.

The Sixth Circuit reviewed the bankruptcy court's decision directly. Though the creditors claimed that they never intended the funds allocated to the carve-out to come from the prepetition liens, the court found that the text of the order, interpreted through general contract-interpretation principles, showed otherwise. The definition of cash collateral in the order specifically referenced prepetition liens and provided that the terms of the order would survive a conversion to Chapter 7. The court noted the creditors also represented as much to the bankruptcy court on at least two occasions. The creditors had also argued that under the Bankruptcy Code, they were entitled to new adequate protection after conversion, and that the carve-out became estate property at that time, which would necessitate distribution based on original priority. However, the court found that the Code does not prohibit the creditors from negotiating the terms of the carve-out, and the provision that the carve-out would survive conversion was allowed to stand. The court affirmed the bankruptcy court's decision.

Trost v. Trost (In re Trost), 735 Fed.Appx. 875 (6th Cir. 2018) (unpublished)

Subject: § 523(a)(6), conversion, collateral estoppel

Debtor was found liable for conversion under Michigan law. Judgment creditor petitioned court to find judgment nondischargeable. Applying collateral estoppel, courts found debt was willful and malicious and therefore nondischargeable. In Michigan, conversion is generally willful "unless the converter does not know about the owner's interest." Id. at 878. The lower court's factual findings clearly proved that Debtor was aware of the owner's interest in the property. In spite of fact that conversion focuses on the intent to act, not the intent to injure, the "record is replete with evidence regarding [Debtor's] subjective intent . . . . [he] knew he was not the rightful owner . . . and . . . nevertheless held onto [the property] despite [the owner's] repeated demands for its return." Id. at 879 (citation omitted). Collateral estoppel prevented relitigation.

Kentucky Employees Retirement System v. Seven Counties Services, Inc., 746 Fed.Appx. 528 (6th Cir. 2018) (unpublished)

Subject: § 101(27), governmental unit, § 365

Seven Counties is a mental health agency that elected to participate in the state retirement system ("KERS"). Because of underfunding, its employer contribution rate increased from single digits to more than 24%. Seven Counties filed chapter 11 and moved to reject the KERS contract. KERS opposed the effort, arguing that Seven Counties was a governmental unit, and not eligible to file a chapter 11 case, and that it was required to continue to make contributions during the bankruptcy. The bankruptcy court sided with Seven Counties.

Whether Seven Counties is an instrumentality of the State turns on the degree of governmental control over it. Here, the government did not create Seven Counties, does not appoint its leadership, and does not operate under an enabling statute, is not funded as state instrumentalities generally are, and the State cannot does not have authority to destroy Seven Counties. Court found it was not a governmental unit and could therefore file chapter 11. Judge McKeague dissented. Sixth Circuit certified question of whether Seven Counties' relationship with the State was contractual or statutory. If statutory, the KERS contract could not be rejected.

Ritzen Grp., Inc. v. Jackson Masonry, LLC (In re Jackson Masonry, LLC), 906 F.3d 494 (6th Cir. 2018)

Subject: relief from stay; final appealable order

Ritzen Group contracted to buy property from Jackson Masonry, but the sale fell through. Afterward, Ritzen sued Jackson for breach of contract in state court. Jackson filed for bankruptcy the week before trial, staying the litigation. Ritzen filed a motion to lift the stay, but the bankruptcy court denied it. Ritzen then brought a claim against the estate, but lost, with the bankruptcy court finding Ritzen was the one who breached the contract. Ritzen appealed both that decision and the denial of the stay-relief motion. The Sixth Circuit rejected some of the "vague tests" used by other circuits to determine whether a particular order in bankruptcy is final and appealable, and instead referred to the statutory text, focusing on the terms "proceeding" and "final." The court found that a proceeding is a "discrete dispute within the overall bankruptcy case, resolved through a series of procedural steps", and that stay-relief adjudication fits that description. The court also found that the stay-relief decision was final because it was not made without prejudice, and its consequences are both significant and irreparable; once denied, a creditor usually has no choice but to file a proof of claim, and litigate any dispute.

Goldstein v. Bavelis (In re Bavelis), 743 Fed. Appx. 670 (6th Cir. 2018) (unpublished)

Subject: sanctions

Creditor Quick Capital, owned by Doukas and its attorney Goldstein, filed a claim in debtor's Chapter 11 bankruptcy. Without informing the debtor, Doukas and Goldstein sold and assigned the claim to an unrelated entity, but continued to proceed throughout the bankruptcy as though Quick Capital were still the interested party. After the deception was uncovered, the bankruptcy court ordered the Doukas and Goldstein to pay $257,228.31 in sanctions, a portion of Bavelis's costs and attorney fees. The Sixth Circuit applied the Haeger framework, which states that the federal court's authority to order sanctions paying the other party's legal fees "is limited to the fees the innocent party incurred solely because of the misconduct." Goodyear Tire & Rubber Co. v. Haeger, 137 S. Ct. 1178 (2017). The Sixth Circuit found that the bankruptcy court followed this approached, and so affirmed.

U.S. v. Estate of Chicorel, 907 F.3d 896 (6^{th} Cir. 2018)

Subject: statute of limitations; tax collections

The government sought to collect income taxes for the 2002 tax year owed by the decedent, first by filing a proof of claim in his probate proceedings. This didn't yield results for over 7 years, so the government then moved on to initiating the instant action. The estate argued that the statute of limitations barred the second action. The government's theory was that the statute was satisfied because the proof of claim was a timely filed proceeding. Under Michigan law, the proof of claim has significant legal consequences for the parties, and thus qualified as a proceeding for purposes of the tolling provision of the statute of limitations. Since the estate's representative did not provide notice to the government to present its claims, the four-month window to file did not apply, and the government was instead allowed to file within three years of the anniversary of the decedent's death. The court found that as long as the liability remained unsettled, "a single timely proceeding extends the ability of the government to collect the assessment by levy beyond the ten-year limitations period in §6502(a)."

Daniel v. Goodyear Tire/CBSD, 2018 U.S. App. LEXIS 29345 (6^{th} Cir. 2018) (unpublished)

Subject: Fair Credit Reporting Act

Daniel *pro se* sued Citibank, under the name Goodyear Tire/CBSD ("Citibank"), alleging that it willfully and negligently accessed her credit report without a permissible purpose, in violation of the FCRA, and that she suffered an invasion of privacy through intrusion upon seclusion. The lower court granted Citibank's motion to dismiss, and she appealed. Though Citibank requested a credit report on Daniel, and she had never applied to Citibank for credit or any other purpose, those facts alone did not establish that any violation was willful. Her conclusory statements regarding the emotional distress suffered as a result of the violation also failed to state a claim. The court also found that the intrusion upon seclusion claim was properly dismissed, as it required Daniel to object to the *method* through which Citibank accessed her credit report, not merely the fact that it did.

Newman v. Univ. of Dayton, 2018 U.S. App. LEXIS 29937 (6^{th} Cir. 2018) (unpublished)

Subject: judicial estoppel

After listing himself in his Chapter 13 schedules as disabled with no income, Newman was subsequently hired as an adjunct professor at the University of Dayton. Though he had filed a plan in which he agreed to keep the trustee informed regarding any change in status of his claims, he did not tell the trustee about his new job. He later filed an amended plan, still listing himself as disabled and failing to disclose his job or income. His plan was then confirmed. In the discrimination case, the defendants moved to dismiss, claiming that Newman was judicially estopped from asserting the claims since he had failed to disclose both the claims and his income in his bankruptcy petition. Newman did amend his schedules to reflect the claims, but only after the motion to dismiss was already pending. The district court granted the motion, agreeing with the defendants that Newman was estopped from advancing any of his claims.

The court noted that it has explicitly held that "judicial estoppel may bar employment-related claims where the plaintiff has failed to disclose as an asset in a bankruptcy proceeding either the existence of such a claim or income derived from the employment relationship at issue." The court followed the White framework to analyze the issue, finding that Newman assumed a position that was contrary to the one asserted in the instant suit, the bankruptcy court adopted that position, and his omission was not the result of mistake or inadvertence. In particular, Newman could not claim mistake or inadvertence because he did not lack knowledge of the factual basis for either his claims or his income. Nor was the court impressed with his argument that he was simply following the advice of counsel; an individual is responsible for the actions taken on his behalf by his attorney under agency law.

Andrews v. Mich. Unemployment Ins. Agency, 891 F.3d 245 (6th Cir. 2018)

Subject: § 523(a)(2)

This consolidated case involved two debtors who fraudulently obtained employment benefits from the state of Michigan, and once in chapter 13 bankruptcy, attempted to have the penalties discharged. The lower court found that the penalties for both debtors were nondischargeable under § 523(a)(2). The debtors argued on appeal that their penalties instead fell under § 523(a)(7), which encompasses fines and penalties "payable to and for the benefit of a governmental unit" that are not "compensation for actual pecuniary loss." The circuit court read the Supreme Court's decision in Cohen v. De la Cruz, 523 U.S. 213 (1998) as reasoning that "the penalties associated with fraud should be regarded as essentially the same as the fraud itself and are to be included under" the fraud exception to discharge. The court also found that, despite debtors' argument to the contrary, the presumption that exceptions to discharge be strictly construed against the creditors is intended to benefit honest debtors.

Hagan v. Baird (In re B&P Baird Holdings, Inc.), 2019 U.S. App. LEXIS 507 (6th Cir. 2019) (unpublished)

Subject: state law conversion; law of the case; judicial estoppel

The defendant Baird was the controlling shareholder, director, and officer of closely-held corporation B&P Baird Holdings, Inc. ("B&P"), the Chapter 7 debtor. Baird entered into an asset purchase agreement in which it sold most of its assets, and transferred the sale proceeds to a personal bank account owned by Baird and his wife. The trustee sued the Bairds to recover the funds, asserting two theories of conversion under state law. The first theory, that the Bairds converted the funds by transferring them to the bank account, was rejected by the Sixth Circuit. Because B&P was a closely held corporation, it was essentially an "alter ego" of its shareholders – namely, Baird. Because Baird was in "near complete control" of B&P, he was authorized to enter into the purchase agreement on the debtor's behalf, and no conversion occurred. The second theory of conversion rested on the argument that the funds were to remain "corporate" after the transfer, and thus the Bairds converted them by using some of them for personal purposes like travel. The court did not adopt the trustee's reasoning that the "law of the case" from an earlier proceeding established the corporate nature of the funds, since "the law of the case doctrine does not apply to earlier proceedings where a different legal standard governs." Wilkins v. Jakeway, 44 F. App'x 724, 727-28 (6th Cir. 2002). The court ultimately barred the second theory of conversion by judicial estoppel, as in an earlier proceeding the trustee had argued that the debtor did *not* retain a property interest in the sale proceeds after the transfer.

Davis v. Fiat Chrysler Automobiles, 747 Fed. Appx. 309 (6th Cir. 2018) (unpublished)

Subject: judicial estoppel

Davis was an employee of Fiat Chrysler Automobiles ("FCA") who alleged that she was subjected to racial discrimination in the workplace. After filing for bankruptcy under chapter 13, she filed a hostile work environment lawsuit. The district court granted summary judgment for FCA, finding that Davis was judicially estopped from bringing her EEOC claim because she did not list that potential claim as an asset in her bankruptcy. The Sixth Circuit referred to its own precedent, which held that failing to disclose a known potential claim is "equivalent to a statement that there were no such claims." Stephenson v. Malloy, 700 F.3d 265, 274 (6th Cir. 2012). The debtor claimed that she had refrained from scheduling the claim because she didn't yet know all the facts that would be needed to support it, but the court found that the test was not whether she knew *all* of the relevant facts, but whether she "had sufficient information to know that she had a possible cause of action" against FCA. The court found that her failure to disclose was not the result of any mistake or inadvertence, and affirmed the district court's grant of summary judgment.

Community Financial Services Bank v. Edwards, 748 Fed.Appx. 695 (6th Cir. 2019) (unpublished)

Subject: appeal deadlines

Edwards filed late notice of appeal and sought to extend deadline. Sixth Circuit found he did not demonstrate excusable neglect. Court clarified that the first Pioneer factor involves consideration of prejudice to the non-moving party, not the debtor specifically. And did not matter whether the Pioneer test is four or five factors because lower court considered both aspects of delay, reviewing whether the delay was in the debtor's reasonable control and the reason for his delay. Court acknowledged he was looking for an attorney during the appeal period but said he could have filed a pro se notice of appeal. Although he was pro se, which sometimes provides latitude, this was a clear deadline and court was immovable. Appeal dismissed.

Giese v. Lexington Coal Co. (In re HNRC Dissolution Co.), 2019 WL 326484 (6th Cir. 2019) (unpublished)

Subject: "related to" jurisdiction, abstention

Several years after sale of the debtors' assets, Plaintiff filed lawsuit asserting interest in a bank account that was split between two purchasers following an interpleader action during the bankruptcy case. Sixth Circuit found several of the counts involved core claims. It concluded that bankruptcy court had "related to" jurisdiction even though there was technically no bankruptcy estate remaining. There was a nexus between the bankruptcy case and the current lawsuit that hinged on interpretation of the bankruptcy court's orders, could possibly leave the purchasers with a claim against the estate, or could upset the sale and require redistribution of assets. Court also declined to require mandatory abstention because "the substance of [his] claims could not exist outside the bankruptcy." Id. at *13. Court also promoted denial of abstention when bulk of claims are core. Finally, dismissal upheld. The confirmation order was res judicata, notice was sufficient, and Plaintiff's predecessor in interest should have maintained the claims during the bankruptcy.

New Products Corp. v. Tibble (In re Modern Plastics Corp.), 732 Fed.Appx. 379 (6th Cir. 2018) (unpublished)

Subject: Rule 52(c), trustee duties

Debtor owned real estate, a former manufacturing facility, that sat next to Plaintiff's business. The real estate, mortgaged to Bank of America, was in poor condition prepetition. Bankruptcy trustee tried to sell, unsuccessful. Trustee paid insurance until Bank said it would not foot the bills or put any money into the property. Bank did not want to foreclose because of potential contamination issues. Eventually, Plaintiff purchased mortgage and note, then found facility had been pillaged by scrappers and roof was failing. Plaintiff sued Trustee for breach of fiduciary duties for not maintaining the property.

Trustee's duties in § 704(a)(2) do not require work for secured creditors at the expense of the estate. Trustee's duties to secured creditors are proportionate to the equity in the property. Here, real estate was underwater. In determining value of property, court looked at the sale offer, bank's decision to not insure, and redevelopment as highest value/best use.

Rule 52 allows a court, after affording a full opportunity for hearing in a nonjury trial, to enter judgment on any claims or defenses that cannot be maintained. Court as to set forth the factual foundation and appellate court reviews for clear error. Sixth Circuit found no clear error in finding Plaintiff's expert's testimony on value was 'problematic' and based on 'questionable assumptions.' Plaintiff could not complain about admission of two expert reports after it rested because it was not prevented from calling or cross-examining the experts.

In other holdings, Bank's assignment to Plaintiff, interpreted under contract rules, transferred only interests under the loan docs. It did not transfer tort claims. With the appointment of a successor trustee, the successor trustee had the right to sue the former trustee on behalf of the unsecured creditors, not Plaintiff. Plaintiff did not have derivative standing.

Jodway v. Fifth Third Bank (In re Jodway), 719 Fed.Appx 502 (6th Cir. 2018) (unpublished)

Subject: §§ 1307(c)(6), 1330(a)

Debtors' confirmed plan provided for surrender of real estate and payment on the deficiency balance. Debtors did not surrender and got behind on payments, leading to dismissal. They appealed. Jodway argued bankruptcy court did not fairly consider his proposal to reduce payments on the deficiency. Sixth Circuit said bankruptcy court was within its rights because Debtors refused to surrender the property as the plan required. Debtors' argument that bankruptcy court overstepped Rooker-Feldman failed because the bankruptcy court did nothing to review the state court foreclosure action. Res judicata barred Debtors from arguing against validity of the mortgage and their wrongful concealment claim failed because Mr. Jodway had signed the loan document at issue. Finally, they could not revoke the confirmation order because the six month window in §1330(a) expired regardless when Debtors learned of the fraud.

Circuit Courts of Appeal - Other

Bertram v. HSBC Mortg. Servs. (In re Bertram), 746 Fed. Appx. 943 (11th Cir. 2018)

Subject: Rooker-Feldman doctrine

After state court entered a final foreclosure judgment in favor of creditor HSBC against the debtors, they filed for Chapter 7 bankruptcy. The debtors initiated an adversary against HSBC, claiming that the foreclosure judgment was invalid because the debt owed was unsecured and in the alternative, even if foreclosure was proper, the subsequent sale was not. The Eleventh Circuit found that the Rooker-Feldman doctrine barred the debtors' claims challenging the validity of the state court foreclosure judgment, but it did not bar their claims challenging the sale itself, which were not raised or inextricably intertwined with the issues resolved in the state court judgment. The court held that because the claims regarding HSBC's conduct with regards to the sale were claims about conduct that occurred after the final foreclosure judgment was entered and time for appeal had expired, Rooker-Feldman did not bar the claims.

Hunsaker v. U.S., 902 F.3d 963 (9th Cir. 2018)

Subject: sovereign immunity; violation of the automatic stay

The debtors filed for Chapter 13 bankruptcy. Despite being informed of the bankruptcy, the IRS violated the automatic stay by sending multiple notices demanding payment and threatening imminent action, including a levy on Social Security benefits. The debtors brought an adversary, seeking only emotional damages for violating the automatic stay under § 362(k). The government argued that sovereign immunity barred such relief, but the bankruptcy court awarded the debtors $4,000 in damages. The government appealed. The court noted that violation of the automatic stay is explicitly established through §§ 106(a) and 362 as a waiver of sovereign immunity. The inclusion of the automatic stay provision as a waiver was "unambiguous" in the statute. The court recognized that the First Circuit reached a different conclusion, centered on the fact that the Supreme Court read the previous version of § 106(a) as "fail[ing] to unequivocally subject the government to 'claims for monetary relief.'" U.S. v. Nordic Village, Inc., 503 U.S. 30, 39 (1992). The provision was then amended in 1994, but the First Circuit held that Congress' original intent – whether the pre-1994 version would have contemplated emotional distress damages – should control. This court disagreed, holding that the debtors were entitled to the damages.

William F. Sandoval Irrevocable Trust v. Taylor (In re Taylor), 899 F.3d 1126 (10th Cir. 2018)

Subject: homestead exemption; impairment

The debtor owns an undivided 50% interest in a residential property, the remainder of which is owned by his ex-wife. The William Sandoval Irrevocable Trust ("Trust") recorded liens on the property totaling $461,472.86, and subsequently attempted to foreclose on the property. The debtor filed for Chapter 13 bankruptcy, and his ex-wife was not a debtor in the proceeding. The Trust filed an adversary alleging its liens are non-dischargeable under § 523(a)(4) and (a)(6). The case was converted to Chapter 7, and the debtor moved to avoid the liens by arguing that the sum of the liens and his exemption exceeded the value of his actual interest in the property. Because the impairment of multiple other liens on the residence exceeds the amount of the Trust's liens, the debtor argued that the Trust's liens should be avoided in their entirety. The bankruptcy court granted the motion.

The court addressed the question of whether "all other liens on the property", as contemplated by the lien avoidance statute, § 522(f)(1), refers to the total lien amounts on the entire residence, or only the lien amounts corresponding to the debtor's half-ownership interest. The court adopted the latter, which represented the view of the majority of circuits to take up the issue. The former approach would, the court decided, "produce[] an unreasonably high impairment that has the effect of creating additional equity for the debtor at the expense of the lienholder." In re Kolich, 328 F.3d 406, 409 (8th Cir. 2003).

Evans v. Portfolio Recovery Assocs., LLC, 889 F.3d 337 (7th Cir. 2018)

Subject: FDCPA

This appeal concerned four consolidated cases in which plaintiffs faced the same situation: they each defaulted on credit card accounts, and Portfolio Recovery Associates ("PRA") sought collection on the debts. Each plaintiff, through Debtors Legal Clinic, informed the PRA that the amounts reported were not accurate, but PRA reported the debts to the relevant credit reporting agencies without noting that the amounts were disputed. The lower court granted summary judgment in favor of the plaintiffs. The Seventh Circuit found that, despite PRA's protestations, the plaintiffs had standing, as PRA's alleged violation of FDCPA § 1692(e)(8) was sufficient to establish an injury-in-fact – the risk of financial harm caused by an inaccurate credit rating. Sayles v. Advanced Recovery Sys., Inc., 865 F.3d 246, 250 (5th Cir. 2017). Most importantly, the court also found that PRA's failure to flag the credit reports as containing disputed information was a clear violation of § 1692(e)(8), which prohibits "communicating or threatening to communicate to any person credit information which is known or which should be known to be false, including the failure to communicate that a disputed debt is disputed."

Perkins v. Oppenheimer & Co. (In re Int'l Mgmt. Assocs., LLC), 2018 U.S. App. LEXIS 17848 (11th Cir. 2018)

Subject: final appealable orders; summary judgment

The bankruptcy court granted the Chapter 11 debtor's motion for summary judgment, dismissing the trustee's adversary. The district court reversed, concluding that there were genuine issues of material fact to be resolved at trial. The debtor appealed. The Eleventh Circuit granted the trustee's motion to dismiss the appeal, as the reversal of the grant of summary judgment amounted to directing the bankruptcy court to "conduct a substantial amount of judicial proceedings on remand", making the order neither final nor appealable. The district court's order did not resolve any claims against any parties, so nor could the appeal be granted on the bankruptcy standard of finality or the practical finality doctrine.

Critique Servs., LLC v. Reed (In re Reed), 888 F.3d 930 (8th Cir. 2018)

Subject: sanctions power

The attorney in this case was ordered to disgorge some of his fees, and claimed that he didn't actually collect fees from his clients. The court ordered him to turn over documentation proving this claim, but he failed to do so. The court then ordered him to show cause why he should not be sanctioned, and after the hearing found him in contempt and imposed sanctions. On appeal, he argued that the bankruptcy court did not have the constitutional authority to sanction him. Under 28 U.S.C. § 157(b)(1), bankruptcy courts "may hear and determine all cases under title 11 and all core proceedings arising under title 11, or arising in a case under title 11", and also have the power to enter "appropriate orders and judgments." The circuit court found that all orders in this case were matters arising in a case under title 11, and the bankruptcy court had the authority to enter sanctions for events that occurred during the attempted enforcement of orders arising from the bankruptcy. Put more simply, "[b]ankruptcy courts have the authority to sanction persons appearing before them." Robinson v. Steward (In re Steward), 828 F.3d 672 (8th Cir. 2016). The court did find that the bankruptcy court erred in sanctioning the attorney for making misleading representations, because it based its conclusion on questions of fact not given a hearing. However, the error did not rise to the level of requiring remand.

SPV OSUS Ltd. v. UBS AG, 882 F.3d 333 (2d Cir. 2018)

Subject: bankruptcy "related to" jurisdiction

In this case, an investor defrauded by Bernie Madoff sued a foreign bank in U.S. court, alleging that the bank knew Madoff was running a Ponzi scheme, and aided and abetted his fraud. The bank removed to federal court on the basis of the general removal statute and "related to" bankruptcy jurisdiction under 28 U.S.C. § 1334(b). The investor attempted to remand, but the district court denied the motion, holding that there was bankruptcy jurisdiction; however, the case was ultimately dismissed for lack of personal jurisdiction. The investor's appeal is centered on the contention that there was no bankruptcy jurisdiction. The circuit court held to its own precedent that there is "related to" jurisdiction if "the action's outcome might have any conceivable effect on the bankruptcy estate." Parmalat Capital Fin. Ltd. v. Bank of Am. Corp., 639 F.3d 572, 579 (2d Cir. 2011). Here, if the investor were to prove the liability of the bank, it would have a claim that would be asserted in the bankruptcy proceedings. Thus, the court found the lower court did not err in finding bankruptcy jurisdiction existed. The court also affirmed the district court's holding that there was no personal jurisdiction over the bank, as the bank was headquartered in another country and did not satisfy the minimum contacts requirement.

Um v. Spokane Rock, 904 F.3d 815 (9th Cir. 2018)

Subject: discharge of Chapter 11 debt

Spokane Rock had obtained a state court judgment against the debtors before the commencement of their Chapter 11 bankruptcy. After the debtors initiated the case, Spokane Rock filed an adversary complaint, alleging that its judgment was nondischargeable under the §523(a)(3) fraud exception. The bankruptcy court granted summary judgment in favor of Spokane Rock, and the debtors appealed. Under § 1141(d)(3), a prepetition debt is not discharged if three requirements are satisfied: the plan provides for the liquidation of all or substantially all of the property of the estate; the debtor does not engage in business after consummation of the plan; and the debtor would be denied discharge if the case were a case under Chapter 7. Though debtors acknowledged that they would not be granted a discharge in a Chapter 7 case, they denied that the other two requirements applied. The Ninth Circuit disagreed. It found that, despite not providing for the sale of some ultimately-worthless membership interests in various LLCs, the Chapter 7 liquidation plan did indeed provide for the liquidation of the estate. Though the requirement that the debtors no longer engage in business was more challenging to apply to individuals rather than a corporation, the circuit court found that the "mere employment in someone else's business" did not constitute engaging in business. The court refrained from endorsing the bankruptcy court's reading of this requirement, which interpreted "engaging in business" to mean continuing the debtors' prepetition enterprise. The debtors were not entitled to discharge of the Spokane Rock debt.

The Slovak Republic v. Loveridge (In re Eurogas, Inc.), 2019 WL 103891 (10th Cir. 2019) (unpublished)

Subject: § 554(a), prudential standing

Tenth Circuit reviewed bankruptcy court's abandonment of talc claims. Parties disagreed on proper standard of review. Tenth Circuit identified the four considerations, and the various legal standards of review:

1. Court had to legally define "burdensome" and "inconsequential." Legal determinations are reviewed de novo.
2. Required to make factual findings about the asset to be abandoned, reviewed for clear error.

3. Apply the facts to the legal definitions to determine if satisfied. Standard varies depending on overall focus. If it is legal, de novo. If factual, clear error.
4. Review whether the trustee abused his/her discretion in abandoning, reviewed for abuse of discretion.

Abandonment was upheld. "The Trustee could not sell or liquidate the talc claims without becoming embroiled in expensive litigation, and the estate had no resources with which to pursue the talc claims." Id. at *6.

The BAP found plaintiff lacked prudential standing because it was not a person aggrieved. The settlement improved the position of the unsecured creditors (which plaintiff was) without a corresponding detriment. Tenth Circuit assumed, without deciding, that plaintiff had standing, finding it was a prudential limitation, not jurisdictional. Concurrence found that plaintiff was a person aggrieved.

Wilk Auslander LLP v. Murray (In re Murray), 900 F.3d 53 (2nd Cir. 2018)

Subject: dismissal of involuntary petition

Judgment creditor filed involuntary petition and Second Circuit upheld bankruptcy court's 707(a) dismissal. Debtor owned Manhattan real estate as tenant by entirety with his wife. Under New York law, creditor could only execute on Debtor's interest. Creditor filed involuntary petition to attempt to force a 363(h) sale, selling the entire property and paying wife for her share. Bankruptcy court cited nine reasons for cause to dismiss, including the case involved a two party dispute, there were adequate remedies under state law, unclear that a 363(h) sale would be approved, no other creditors and no need for *pari passu* distribution.

Berg v. Social Security Administration, 900 F.3d 864 (7th Cir. 2018)

Subject: § 553, setoff, accrual of social security benefits

Debtor owed Social Security Administration for overpayment. When she obtained social security disability benefits, the SSA set off the amount owed with her lump sum award. Debtor filed bankruptcy shortly after and filed adversary under § 553(b) to recover the setoff. Bankruptcy court allowed recovery of $2,015, the amount SSA's position improved in the preference period, not the nearly $20,000 she sought. Debtor appealed, arguing her benefits accrued when she received the award notice. Court disagreed, finding her benefits accrued monthly "as soon as the recipient survives the month and is lawfully entitled to [the benefits]" dating back to the day she was entitled to receive benefits. Id. at 870. As of 90 days before she filed, she had accrued $17,385 in benefits. Her benefits did not accrue during the preference period when she received the award notice.

21st Mortgage Corporation v. Glenn (In re Glenn), 900 F.3d 187 (5th Cir. 2018)

Subject: mobile home valuation

Debtor moved for § 506 valuation of the mobile home she was keeping in her chapter 13. Creditor argued that the delivery and set up costs should be included. Court said "no." Need to consider the proposed disposition or use of the property in determining replacement value. Since Debtor was keeping the home, exclude these costs.

Sino Clean Energy, Inc. v. Seiden (In re Sino Clean Energy, Inc.), 901 F.3d 1139 (9th Cir. 2018)

Subject: receiver, board authority to file petition

Former board members filed a chapter 11 petition for corporation. Receiver obtained dismissal on basis that board members lacked authority. Ninth Circuit affirmed. Receiver had reconstituted board and former board members were not authorized to file the petition.

Fallon Family, LP v. Goodrich Petroleum Corp. (In re Goodrich Petroleum Corp.), 894 F.3d 192 (5th Cir. 2018)

Subject: 544(a), strong arm clause

Prepetition settlement agreement ratified a lease and stated the consideration was fully paid. Actually, the parties had executed a $1m promissory note. Before the second payment, lessee filed chapter 11. Landowner sought to reject and/or dissolve the settlement. Bankruptcy court denied relief, finding the agreement was not an executory contract because the only remaining obligation was a payment obligation. Court refused to dissolve settlement for the breach. District court and Fifth Circuit affirmed. Fifth Circuit noted that in exercising the strong arm powers, a chapter 11 debtor has powers of a bona fide purchaser to avoid transfers, giving it more power than it would have as a chapter 11 debtor alone. Under Louisiana law, a good faith purchaser is a third person, meaning that any interest in real estate has to be recorded in order to be effective against the third-party-good-faith-purchaser. Since the recorded documents stated consideration was fully paid, cannot dissolve the agreement against the third party.

Rotkiske v. Klemm, 890 F.3d 422 (3rd Cir. 2018) (certiorari granted, Supreme Court Case No. 18-328)

Subject: FDCPA statute of limitations

Per FDCPA, "an action to enforce any liability created by this subchapter may be brought . . . within one year from the date on which the violation occurs." Plaintiff argued for a discovery rule. Court disagreed, saying statute was plain. Further, "Congress's explicit choice of an occurrence implicitly excludes a discovery rule." Id. at 426.

JPMCC 2007-C1 Grasslawn Lodging, LLC v. Transwest Resort Properties, Inc. (In re Transwest Resort Properties, Inc.), 881 F.3d 724 (9th Cir. 2018)

Subject: §§ 1111(b)(2), 1129(a)(10)

Five jointly-administered-but-not-substantively-consolidated debtors owned two hotel/resort properties. Undersecured prepetition mortgage lender objected to confirmation of plan that contained a due-on-sale clause which was not effective in years five to ten of the repayment term. Bankruptcy court confirmed plan, district court affirmed. Following appeal and remand back to district court, which again confirmed plan, Ninth Circuit affirmed.

The lender elected to be treated as fully secured under § 1111(b)(2). It argued that the due-on-sale clause exception negated its election. District court found that a due-on-sale clause is not required and therefore overruled the objection. The statutory language does not explicitly call for the clause, nor is it implicitly included. Further, it is not required under § 1123, and § 1123(b)(5) allows modification of secured claims. Section 1129(b)(2)(A)(i)(I) allows for sale as long as the creditor retains the lien. Court stated that the due-on-sale clause was a "mechanism regarding the terms of repayments of a debtor, not a substantive right of creditors making an election pursuant to section 1111(b)(2)." Id. at 728.

Lender also argued that § 1129(a)(10) requires an impaired class of each debtor to accept the plan. Court disagreed. Each impaired class must either accept the plan or the court must approve a cramdown. Section 1129(a)(10) is a cramdown safeguard and its plain language indicates approval is per plan, not per debtor. A concurring opinion suggested that the lender should have objected to the plan on the grounds it created a de factor substantive consolidation, which may have provided more roadway resulting from the intermingled estates.

U.S. v. Williams, 892 F.3d 242 (7th Cir. 2018)

Subject: bankruptcy fraud, sentence enhancements

Following trial, Debtor was found guilty of bankruptcy fraud. Debtor owned a condo unit, became delinquent on mortgage and association fees, and filed her first of five chapter 13 cases in 2003. She developed a pattern of filing, not paying, getting dismissed, only to refile when the condo association sought eviction and/or collection. Debtor also had shady deed transfers intermingled. Her sentence was enhanced based on finding the losses exceeded $150,000 and there were more than ten victims. Debtor argued the loss to the condo association was $46,000 and the condo association was the only victim, making the enhancements wrong. Court rejected. Looking at her petitions, court said her debt between 2003 and 2009 increased $193,000. In 2003 she had 31 creditors, in 2009 she had 60. The automatic stay applies to all creditors, meaning all were harmed. Sentence enhancements upheld.

RPD Holdings LLC v. TechPharmacy Servs. (In re Provider Meds LLC), 907 F.3d 845 (5th Cir. 2018) (petition for certiorari filed, Case No. 18-988)

Subject: § 365(d)(1)

Debtors failed to list a license agreement with TechPharm in their schedules. RPD purchased certain assets from the estate. The license was not mentioned in any of the APAs but a provision stated that executory contracts assumed by the estate were assigned to RPD. In subsequent litigation, RPD claimed it had rights to and under the license agreement. Bankruptcy court found against RPD, concluding the license agreement was not part of the purchase and was rejected by operation of law. Decision affirmed.

In chapter 7, an executory contract is deemed rejected 60 days after the order for relief unless the trustee assumes it. The license agreements were executory contracts because of the continuing obligations of the parties, including an anti-sue provision and continuing duty to provide quarterly reports. Barring intentional concealment, an agreement is deemed rejected when it was is not assumed before the 60 day window closes. Section 365(d)(1) does not require notice of rejection. A trustee has a duty to investigate a debtor's affairs, presumed to know what contracts exists. Here, the license agreements were rejected and were not part of the estate when the sale orders were issued and therefore were not transferred in the sales.

Tepper v. Amos Financial, LLC, 898 F.3d 364 (3d Cir. 2018)

Subject: FDCPA; debt collectors

The Teppers entered into a loan with NOVA Bank. When the bank closed, the FDIC received their loan, and subsequently sold it to the Appellant, Amos Financial ("Amos"). The Teppers alleged that Amos violated the FDCPA because it increased their loan's interest rate without adhering to the requirements of their loan agreement. Amos' sole business is purchasing debts and collecting on them. Though the FDCPA applies only to debt collectors, it is possible for an entity to be both a debt collector and a creditor. The district court found that this duality applied to Amos, qualifying it as a debt collector and the Teppers' loan as debt. Amos appealed. The circuit court determined that the central question was whether Amos fit the "principal purpose" definition of a debt collector, as suggested by Henson v Santander Consumer USA Inc., 137 S. Ct. 1718 (2017); that is, whether the entity's "principal purpose" is to collect debt. The court found that Amos' principal purpose was the purchase and collection of debt, and that for purposes of the definition, it did not matter to whom the debt was owed. Thus, the fact that Amos also owned the debt was immaterial.

In re Kenny G Enterprises, LLC, 727 Fed.Appx. 455 (9th Cir. 2018) (unpublished)

Subject: civil contempt, incarceration

Bankruptcy court ordered incarceration for continued civil contempt following man's failure to turn over more than $1m in estate property. He had been jailed more than two years. Although at some point, the incarceration could cross the line to punitive, courts continued to refer to it as a coercive measure. District court and Ninth Circuit affirmed.

Dukes v. Suncoast Credit Union (In re Dukes), 909 F.3d 1306 (11th Cir. 2018)

Subject: §§ 1328(a), 1322(b)(2), "provided for" in plan

Debtor filed a chapter 13. Under confirmed plan, she paid her first and mortgages directly. Both were current as of filing. She received a discharge. She had become delinquent in her mortgages during plan and second mortgage foreclosed. Bankruptcy case was reopened to determine whether the mortgages were "provided for" by the plan and discharged. Bankruptcy court, district court and Eleventh Circuit all found the mortgages were not "provided for" in the plan. To "provide for" mortgage, plan must 'make a provision for' or 'stipulate to something.' Id. at 1314. A debt is "provided for" when the plan establishes a repayment schedule. Paying a debt per the original loan terms does not count as making a provision for the debt. Since not provided for, no discharge. Regardless, anti-modification provision would prevent discharge.

Bankruptcy Appellate Panel for the Sixth Circuit

In re Jackson, 585 B.R. 410 (B.A.P. 6th Cir. 2018)

Subject: jurisdictional time limits

The debtor attempted to appeal the bankruptcy court's disposition of her case and a variety of requests, filing her notice of appeal 28 days after the final order. 28 U.S.C. § 158 confers jurisdiction to hear appeal from bankruptcy courts upon district courts and BAPs. §158(c)(2) provides that Bankr. R. 8002 governs the time limits for filing an appeal. The appellate panel addressed the question of whether this imposes a jurisdictional time limit or a claims-processing one. In Hamer v. Neighborhood Hous. Servs, 138 S. Ct. 13, 20 (2017), the Supreme Court articulated a simple test: "[i]f a time prescription governing the transfer of adjudicatory authority from one Article III court to another appears in a statute, the limitation is jurisdictional"; otherwise, it "fits within the claim-processing category." The court found that the deadline imposed by § 158(c)(2) was set by statute, and therefore jurisdictional; despite the fact that the provision referred to the Bankruptcy Rule, the court found the deadline was not set *by* the rule, but rather the statutory provision *incorporated* the rule. The court also found that the language of §158(c)(2), which mirrored language in another provision found to set a jurisdictional deadline, signaled congressional intent to do so here as well.

Giese v. Lexington Coal Co. (In re HNRC Dissolution Co.), 585 B.R. 837 (B.AP. 6th Cir. 2018)

Subject: mandatory abstention

The debtor filed a complaint in Kentucky state court which claimed an interest in certain funds disbursed by the Bankruptcy Court for the Eastern District of Kentucky, and included seven causes of action. Two of the defendants removed the case to the district court, where the debtor moved for remand, or in the alternative, mandatory abstention. The district court referred the case to the bankruptcy court, where the debtor renewed his request for mandatory abstention, arguing that state law, not bankruptcy law, created his causes of action. The bankruptcy court disagreed, and denied his request. The debtor appealed the order, arguing that two of the counts of his complaint were non-core, and the court should have abstained from hearing them. The court decided the core causes of action were "inextricably intertwined" with the "non-core" causes of action, and opted to hear them all.

One of the factors used to determine whether abstention is mandatory is that the case is a "non-core proceeding." The debtor argues that "proceeding" here referred to discrete claims within the case, and therefore the doctrine applies to each claim individually. The panel did not agree, finding that "proceeding" referred to the entire case, and where some of the claims *do* arise out of Title 11, mandatory abstention is not appropriate. The panel did not believe that hearing additional "non-core" claims, when the court is already hearing core claims based on the same facts and involving the same parties, would improperly overextend bankruptcy courts' jurisdiction.

Church Joint Venture, L.P. v. Blasingame (In re Blasingame), 585 B.R. 850 (B.A.P. 6th Cir. 2018)

Subject: derivative standing

During a 2008 bankruptcy, the trustee and the creditor filed an adversary against the debtors and several others, trying to recover assets from the non-debtor defendants. Two years later, the trustee and the creditor entered an agreement in which the creditor purchased the bankruptcy estate's claims and causes of action, including the claim for a declaratory judgment that the non-debtor defendants are actually sham alter egos of the debtors, used to thwart/deceive their creditors. The bankruptcy court approved the sale. The purchased causes of action/claims were then dismissed from the adversary for lack of subject matter jurisdiction, as "the outcome of those disputes could have no economic effect upon the bankruptcy estate." After filing an unsuccessful case in the district court, creditor filed a new complaint, at issue here, against the non-debtor defendants in bankruptcy court, invoking derivative standing. This new complaint sought a declaration that the Blasingame Family Business Trust is a self-settled trust, and thus its assets are not excluded from the debtor's bankruptcy estate. Defendants moved to dismiss for lack of subject matter jurisdiction, arguing that due to the sale in the earlier complaint, the trustee no longer owned the claims and the creditor could not pursue them derivatively on the trustee's behalf. The bankruptcy court granted the motion.

The court found that the trustee had transferred away the right to pursue the claims asserted in the new complaint, thereby losing legal standing to assert them. Applying the state law of Tennessee, the court found that an assignment "passes the whole right of the assignor, nothing remaining in him capable of being assigned." S&M Brands, Inc. v. Summers, 420 F.Supp.2d 840, 848 (M.D. Tenn. 2006).

Church Joint Venture v. Blasingame (In re Blasingame), 2018 WL 2084789 (6th Cir. B.A.P 2018) (appealed to Sixth Circuit, Case 18-5549)

Subject: § 541

Prior to bankruptcy Debtors owned their residential real estate and became delinquent on payments. Mr. Blasingame's mother paid for release of one mortgage, then the she and Debtors transferred the real estate into a generation-skipping trust she established. When Debtors filed bankruptcy, a creditor argued that Debtors' interest in the property was a legal life estate that became part of the bankruptcy estate. Debtors argued it was an equitable life estate and bankruptcy court agreed. BAP affirmed. Under Tennessee law, trusts are interpreted as contracts and wills. The trust revealed an intent to protect the residence for the benefit of Debtors' children and contained a spendthrift provision to prevent creditors from reaching it. The trust only gave Debtors the right to live there during their lives, they had no other rights in the property. The entire purpose of a trust is for the trust to hold legal title to property for the beneficiaries, making it equitable in nature. Nothing in the trust gave Debtors legal title to the property. Court rejected creditor's argument that the trust was "dry," finding that Debtors (trustees and beneficiaries) had duties and obligations under the trust. Court also noted that trust provisions extended beyond life of Debtors, supporting "active" trust.

In re Lane, 591 B.R. 298 (B.A.P. 6th Cir. 2018)

Subject: appealable final orders

Before filing for bankruptcy, the debtor sold her residence to the Deans. They subsequently discovered mold in the home, and filed a civil complaint against her. The state court submitted the matter to binding arbitration, where the Deans prevailed and obtained a judgment against the debtor. Once the Deans filed their judgment lien against her current residence, the debtor filed for Chapter 13 bankruptcy. Her plan proposed to avoid the lien as impairing her exemption rights. The Deans objected. By the time the confirmation hearing was held, the Deans' counsel stated on the record that the only remaining issue was the interest rate. The plan was confirmed, with the interest rate set by the Till standard. The Deans did not appeal the confirmation order. Instead, a few weeks later they filed a dismissal motion, the subject of this appeal. The motion challenged the confirmability of the plan. The bankruptcy court denied the motion, noting that the confirmation order had not been appealed and was now a final order, and that the Deans had waived any confirmability issues.

The panel found that the proceeding addressed by the Deans' motion was not the confirmation of the plan, but the bankruptcy case itself, as evidenced by the relief sought – dismissal. Thus, the finality of the order denying the Deans' motion was to be evaluated in the context of the proceeding encompassing the entire case. Denying a creditor's motion to dismiss is not final, in that it does not "end the litigation on the merits, leaving nothing to be done but execute the judgment." The Sixth Circuit has held that, in the bankruptcy context, a final order is required to be "both procedurally complete and determinative of substantive rights." In re Jackson Masonry, LLC, 906 F.3d 494, 497-98 (6th Cir. 2018). When the bankruptcy court denied the Deans' motion, the proceeding remained pending, so it was not a final order. The court found no basis to permit an interlocutory appeal of the confirmation order, and dismissed the appeal for lack of jurisdiction.

N5ZX Aviation, Inc. v. Bell (In re Bell), 2018 Bankr. LEXIS 3881 (B.A.P. 6th Cir. 2018) (limited precedential effect)

Subject: dischargeability under § 523(a)(2); issue preclusion

Bell sold N5ZX Aviation ("Aviation") a plane ("N5ZX"). Another plane modified by Bell crashed, prompting the FAA to ground all planes with similar modifications by Bell until their airworthiness was assessed. Aviation sued Bell in federal court on several theories, including misrepresentation/fraud regarding N5ZX. The jury found for Aviation. Bell later filed for Chapter 7 bankruptcy, and Aviation filed an adversary to determine that the fraud award was nondischargeable. Aviation argued the state fraud cause of action used at trial was virtually indistinguishable from § 523(a)(2). Aviation's motion for summary judgment was granted, and Bell appealed. The panel found that the bankruptcy court properly applied issue preclusion to find the judgment nondischargeable as fraud. The court also struck down Bell's attempt to collaterally attack the original fraud judgment by arguing in this appeal that opposing counsel and Aviation's witnesses made false statements at trial.

In re McCormick, 2018 Bankr. LEXIS 4041 (B.A.P. 6th Cir. 2018) (limited precedential effect)

Subject: contempt; sanctions

The debtor filed two motions, each alleging a violation of the automatic stay: his landlord emailed him inquiring about his plans to continue occupation of the premises, and his creditor WOW! Internet, Cable, & Phone sent him a bill for $1,451.90 in cable and equipment fees. However, the landlord's email was not coercive or threatening, and though the cable bill was automatically generated and sent after the stay went into effect, it also included a "bankruptcy/DO NOT COLLECT" notation. The bankruptcy court denied both motions after an evidentiary hearing, finding that the debtor had not provided evidence supporting specific damages or sanctions, and the debtor appealed. The panel found that the debtor did not satisfy two of the three § 362(k) elements required for sanctions and a finding of contempt: there was no proof of willful violation, or proof of injury as a result.

In re Bonfiglio, 2018 Bankr. LEXIS 3281 (B.A.P. 6th Cir. 2018) (limited precedential effect)

Subject: Fed. R. Civ. P. 60(b)

Creditor SRP failed to timely oppose a motion by the debtors to avoid its lien, and the court thus ordered it avoided. SRP moved for relief under rule 60(b)(1), arguing that their failure to oppose the avoidance was an excusable mistake, but the motion was denied. SRP appealed, claiming that the bankruptcy court abused its discretion by failing to properly consider all relevant factors: culpability (whether the mistake was excusable), prejudice to the opposing party, and whether the underlying claim or defense is meritorious. SRP had been under the impression that there would be a valuation hearing on the motion to avoid, as they were in contact with the debtors' counsel. SRP argued that the bankruptcy court had only assessed the first factor. However, the panel found that the bankruptcy court was not required to address the other two factors unless it found that the neglect *was* excusable. "Out-and-out lawyer blunders . . . do not qualify as 'mistake' or 'excusable neglect' within the meaning of Rule 60(b)(1)." Barron v. Univ. of Mich., 613 F. App'x. 480, 487 (6th Cir. 2015). The panel emphasized that a lawyer cannot use Rule 60(b) to avoid the consequences of a particular litigation strategy.

Doe v. Boland (In re Boland), 2019 WL 580720 (B.A.P. 6th Cir. 2019)

Subject: § 523(a)(6)

As part of his work as an attorney and expert witness, Boland created virtual child pornography by morphing innocent images of children taken from the internet with sexually explicit material. He was charged under a federal pornography statute and sued by two of the child victims whose photos were used. Each victim was awarded $150,000 in actual damages. After Boland filed chapter 7, the victims filed a § 523(a)(6) nondischargeability action. Looking at Boland's motivation in making the images, which was not intended to harm the victims, bankruptcy court found debt dischargeable. BAP said this was erroneous, the correct focus in on the consequences of the act, harm to the children's privacy and reputation. Boland was subjectively aware that the harm would follow from his acts. BAP found debt nondischargeable.

In re Perkins, 581 B.R. 822 (B.A.P. 6th Cir. 2018)

Subject: § 109(f), chapter 12 eligibility

To qualify as a family farmer, a debtor must meet three requirements: (1) aggregate debt limit under $4,153,150, (2) more than 50% of noncontingent, liquidated debt (excluding principal residence) must be farm debt, and (3) more than 50% of income must be farm income. Creditor argued debtor was not eligible under (1) and (3).

In reviewing meaning of aggregate, court determined it is total of farm and nonfarm debt. Finding policies and structure of chapter 12 similar to chapter 13, court extended Pearson case, relying on a debtor's schedules, to chapter 12. Comprehensive Accounting Corp. v. Pearson (In re Pearson), 773 F.2d 751 (6th Cir. 1985). Debtor's schedules, when filed in good faith, create a rebuttable presumption of the amount of debt. Absolute certainty of the amount is not required. Court rejected the creditor's push to determine aggregate amount by totaling filed claims and the schedules amounts of unfiled claims, finding it too unworkable and an unnecessary delay. A creditor can defeat the presumption by demonstrating, with legal certainty, that a debtor is over limit or by proving bad faith. Because actual proofs of claim were higher than listed in Debtor's schedules was not bad faith per se.

Regarding the 50% farm income requirement, court rejected creditor's argument that the income she received from separate S-corp and partnership farming operations, the bulk of her income, should be excluded, and only her individual farm income counted. Court found nothing in definitions to narrow income in this manner. As long as debtor owned or operated the farming operation at issue, the income qualified toward the amount.

In re Johnson, 583 B.R. 682 (B.A.P. 6th Cir. 2018)

Subject: appeal of confirmation order, equitable mootness

BAP found creditor's appeal of confirmation order was equitably moot. First, the creditor did not obtain a stay of the confirmation order, resulting in the creation of reliance interests, weighing against the creditor. Second, substantial consummation of plan existed. The effective date occurred, property transferred, a creditor trust established, and the trustee filed adversaries. Court said fact that significant future earnings were yet to be paid into plan was not unusual and did not preclude the substantial consummation finding. Third, reversing the confirmation order on the creditor's argument that plan was unfeasible would require rewriting plan, affecting the settlements of other creditors. Court also rejected creditor's argument that the bankruptcy court failed to correctly consider the creditor's potential nondischargeable claim. An unsecured creditor with a nondischargeable claim shares in the unsecured distribution, difference is the balance of the nondischargeable claim can be collected after discharge. A plan can deem what property remains property of the estate, thereby protecting said property with the automatic stay, leaving the creditor's collection efforts limited until after plan concludes.

VandeRyt v. Peace (In re Peace), 581 B.R. 856 (B.A.P. 6th Cir. 2018)

Subject: § 523(a)(6), 60(b), Rule 8009(e)

BAP granted motion to strike two documents attached to appellant's brief. Both documents were part of record in state court, so they could not be considered "newly discovered" even though one was not submitted to bankruptcy court. In affirming bankruptcy court's denial of appellant's 60(b) motion, BAP endorsed findings that (1) pro se litigant's unsworn opinions did not constitute clear and convincing proof that witness testimony was fake; (2) appellant could not rely on fraud on appeal because he had ample opportunity to depose witness and/or hire an expert to aid in his case, providing an opportunity to root out any fraud; and (3) Rule 60(b) motion is not an opportunity to relitigate the case or a substitute for appellant's (dismissed) appeal.

Chenault v. Great Lakes Higher Educ. Corp. (In re Chenault), 586 B.R. 414 (B.A.P. 6th Cir. 2018)

Subject: § 523(a)(8), Rule 12(b)(6), failure to state a claim

Defendant U.S. Department of Education ("DOE") moved to dismiss Debtor's § 523(a)(8) complaint. Bankruptcy court concluded original complaint did not establish the second Brunner prong, that Debtor's state of affairs was likely to persist throughout the repayment period, and gave him fourteen days to amend. Debtor amended and provided proof that he was a parolee. DOE moved to dismiss the amended complaint and court granted. The assertions were conclusory and being a parolee in and of itself is not sufficient, especially because Debtor's status as a parolee was not out of his control. BAP affirmed.

Bankruptcy Appellate Panels - Other

Moti Partners, LLC v. Desert Palace, Inc. (In re Caesars Entm't Operating Co.), 588 B.R. 233 (B.A.P. 9th Cir. 2018)

Subject: removal

The Chapter 11 debtors and their affiliates operate casinos, and prepetition had contracted with other entities to design and implement restaurants in their properties. After filing for Chapter 11, the debtors sought to reject the agreements. During the pendency of the motions, the debtors also brought an action in state court seeking declaratory relief from the contracts. The restaurant operators removed some of the claims from state court, initiating adversaries. Debtors moved to remand, as they argued the claims did not satisfy the "close nexus" test for post-confirmation jurisdiction; they argued equitable consideration in the alternative. The bankruptcy court agreed based on lack of subject matter jurisdiction and remanded. The operators appealed, and the debtors countered that the orders were not appealable. The panel found that two federal statutes were relevant to the question of reviewability. 28 U.S.C. § 1447(d) establishes that "an order remanding a case to the State court from which it was removed is not reviewable on appeal or otherwise." In connection with § 1447(c), this provision has been interpreted by the Supreme Court as only applying to remands based on lack of subject-matter jurisdiction. Another statute, 28 U.S.C. § 1452, also provides that remands based on "equitable grounds" are not reviewable. The panel thus dismissed the appeals.

Bank of New York Mellon v. Lane (In re Lane), 589 B.R. 399 (B.A.P. 9th Cir. 2018) (appealed to 9th Circuit, Case No. 18-60059)

Subject: disallowed claims; § 506(d)

The debtor objected to the lender's secured proof of claim showing a first mortgage of $675,000, claiming that the lender lacked standing. The lender did not file an opposition, and the bankruptcy judge entered an order disallowing the claim. The debtor's Chapter 13 plan did not provide for payments to the lender, as distributions in Chapter 13 are only made to allowed claims. The debtor received a discharge. The lender then reopened the case and moved to set aside the disallowance order; the bankruptcy court denied the motion. The debtor initiated an adversary to void the lien, and won on summary judgment.

Section 506(d) provides that when a lien secures a claim that is not an allowed secured claim, the lien is void, unless it falls within an exception. The parties agreed neither of the two exceptions applied. The lender argued that the claim disallowance didn't fall under § 506(d) because the ruling was procedural, not substantive; the bankruptcy court had not adjudicated the validity of the lien, simply a standing issue. Since the lender lacked standing, the panel found that the "'true' lienholder" was never involved, and as such its claim was never filed, and so could not be disallowed. The panel reversed the summary judgment order to the extent that it voided the lien.

Belew v. Rucker (In re Belew), 588 B.R. 875 (B.A.P. 8th Cir. 2018)

Subject: exemptions

The trustee in this case objected to debtor's claimed exemptions, arguing they were made in bad faith. The court referred to the Supreme Court's finding in Law v. Siegel, 541 U.S. 415, 425 (2014) that "federal law provides no authority for bankruptcy courts to deny an exemption on a ground not specified in the Code." Even if this statement was dicta, the court found it to be an "unambiguous statement of the law" by the Supreme Court. Since bad faith is not one of the grounds enumerated in the Code for denying an exemption, the panel affirmed the bankruptcy court's order overruling the objection.

Rigby v. Mastro (In re Mastro), 585 B.R. 587 (B.A.P. 9th Cir. 2018)

Subject: consent directives

The involuntary Chapter 7 debtor and his wife fled the country and took up residence in France. The trustee was convinced that there remained assets outside of the estate, and asked the bankruptcy court to take the rare step of issuing and requiring the debtor to sign a consent directive. Such a directive would have been sent to various international banks and other financial entities in order to smoke out any undisclosed accounts. The bankruptcy court declined. The panel found that the lower court did have the authority to compel the signature of the consent directive. The panel was unconvinced by the debtor's argument that the forced signature of the document would violate his constitutional rights, including the right against self-incrimination; the panel pointed to clear Supreme Court precedent stating that the signing of a consent directive was not testimonial in nature. Doe v. U.S., 487 U.S. 201 (1988). The panel found that, given the chapter 7 trustee's duty to collect the property of the estate and investigate the debtor's financial affairs, the trustee also has statutory authorization to require production of documents that facilitate those duties. The panel reversed and remanded.

Elite of Los Angeles, Inc. v. Hamilton (In re Hamilton), 2018 WL 3637905 (B.A.P. 9th Cir. 2018) (unpublished)

The Chapter 11 debtor's plan precluded enforcement of a $2.2 million nondischargeable judgment over the life of the plan. If the creditor were paid, it would have received 6-9% of its claim during the five years. The bankruptcy court confirmed the plan despite the creditor's objection, and the creditor appealed. The panel reversed confirmation, finding that the plan delayed payment of the claim "without any definite proposal" for payment, and "essentially neuter[ed]" the creditor's right to be paid. The panel was also concerned by the fact that, with the accrual of interest, the claim would increase, ending the plan with more owed on the claim than when the plan began. This, the court pointed out, "does not constitute an attempt to effect a speedy, efficient reorganization." This case, however, did not create a per se rule requiring nondischargeable debt to be paid in full through the plan.

Northern District of Ohio

Sequatchie Mountain Creditors v. Lile, 585 B.R. 426 (N.D. Ohio 2018)

Subject: § 523(a)(2)(A)

The debtor was the sole owner and director of two LLCs, one of which was created solely to facilitate a development project straddling Tennessee and Georgia. Lots were sold to the plaintiffs, who allege that the debtor's misrepresentations and fraudulent conduct related to the land purchases resulted in $13.5 million in nondischargeable damages. The central issue before the district court was the validity of the bankruptcy court's finding that neither the debtor nor his agents made false representations regarding construction completion timelines. The district court found that the bankruptcy court did not err in refusing to apply a gross recklessness standard to determine fraudulent intent under § 523(a)(2)(A), since gross recklessness is not relevant to that element.

Bash v. Textron Financial Corp., 592 B.R. 819 (Bankr. N.D. Ohio 2018)

Subject: fraudulent transfers, novation, civil conspiracy

Parties had two contracts, one from 2002 and one from 2004. In the fraudulent transfer action, the trustee argued the 2004 operated as a novation of the 2004 agreement. Sixth Circuit previously found the 2004 agreement was ambiguous. Although both parties had presented evidentiary support for their respective positions, District Court concluded that, when viewed in light most favorable to non-movant (trustee), a jury could find grounds for novation and denied Textron's motion for summary judgment.

Alternatively on his fraudulent transfer claim, trustee argued that Textron's later bad faith rendered the lien ineffective. Court disagreed, finding no support that subsequent fraud can reach back to invalidate a lien when the initial transfer was not fraudulent.

Court also considered whether a government regulator, from outside the corporation, can be considered an "innocent insider." The innocent insider is a layer of exceptions to the *in pari delicto* defense which prohibits a plaintiff from recovering when plaintiff was equally responsible for the bad conduct. However, *in pari delicto* does not apply when an agent acts against a principal's interest, the conduct cannot be imputed to the principal (the adverse interest exception). However, the adverse interest exception is subject to the sole actor doctrine, which says that if the agent(s) were officers/directors who controlled the entity and left it no free will or a separate existence, then imputation of conduct to the principal is possible. The innocent insider defeats application of the sole actor doctrine: if there is an innocent insider who could stop the bad conduct, then the sole actor doctrine is unavailing. Court determined that a government regulator from outside the corporation cannot be an innocent insider.

Finally, Court looked at whether, as a matter of law, trustee established a presumption that a Ponzi scheme existed in January 2004. Court found questions of fact that precluded finding presumption as a matter of law. Items it noted in denying existence of the presumption: company had a profit for the year ending 2004, testimony said its factoring business was growing at that time, and the indictment alleging fraud used February 2005 as start date. Summary judgment in favor of trustee denied.

District Courts - Other

Official Comm. of Unsecured Creditors v. Constellation Enters. LLC (In re Constellation Enters. LLC), 587 B.R. 275 (D. Del. 2018)

Subject: unsecured creditors committee; conversion

The Chapter 11 debtors, together with the official committee of unsecured creditors, filed a joint motion for an order approving a "structured dismissal" settlement, including a case-ending mechanism and agreement to distribute assets to certain creditors. The motion was denied, and subsequently the court granted the debtors' motion to convert to Chapter 7. The committee appealed both orders and sought a stay of conversion pending appeal. The U.S. trustee and a number of creditors moved to dismiss the appeals, arguing that the committee had automatically dissolved immediately upon conversion, and had no remaining power to file notice of appeal.

The court agreed, finding that the committee was created under § 1102, which exists only under the framework of a Chapter 11 case. That provision does not apply to a Chapter 7 case. The court was persuaded by In re Great Northern Paper, Inc., 299 B.R. 1 (D. Me. 2003), in which the court held that, when the statutory basis of a case is changed, either through dismissal or conversion, the statute under which the committee was created no longer applies, and the committee is automatically dissolved. The court in this case also found that an ad hoc committee consisting of members of the original committee could not be substituted as the appellant, as only Congress could determine whether there is a successor in interest to a dissolved committee.

Hampton v. Ontario Cty., 588 B.R. 671 (W.D.N.Y. 2018)

Subject: tax foreclosure; fraudulent transfer

This case addressed two virtually identical appeals. In both, the debtors owned their homes free of any mortgages, but stopped paying real estate taxes when they became unemployed. Ontario County initiated tax foreclosure actions and later obtained judgment entitling the county to possession of and all equity in the properties. Debtors each filed a chapter 13 petition before the properties were sold, and submitted plans that would pay the taxes in full. The county conducted the auctions anyway. The auction prices would generate substantial surpluses, and under state law, the surpluses would go the county, not to the debtors. The debtors filed adversaries declaring that the tax foreclosures were constructive fraudulent transfers under § 548(a)(1)(B). The bankruptcy court dismissed both adversaries, relying mainly on BFP v. Resolution Trust

Corp., 511 U.S. 531 (1994), which held that mortgage foreclosure sales cannot be avoided as fraudulent transfers.

The district court reversed and remanded, finding that BFP's holding was limited and did not apply to tax foreclosure sales. The court only held that the complaints did state a claim, and did not rule on the merits. However, the opinion implies that the foreclosures would be set aside for lack of reasonably equivalent value, assuming the debtors were insolvent.

Hargreaves v. Nuverra Envtl. Sols., Inc. (In re Nuverra Envtl. Sols., Inc.), 590 B.R. 75 (D. Del. 2018)

Subject: equitable mootness

Secured creditors in this Chapter 11 case, who were not ultimately going to receive a 100% payout in any event, opted to make a "gift" to unsecured creditors in order to facilitate the reorganization. However, one of the classes of unsecured creditors – noteholders – objected to the plan as nonconsensual, arguing it would result in some unsecured creditors receiving less than others. The plan was confirmed, and a noteholder appealed. On appeal, the noteholder argued the appeal was not equitably moot, because the appellate court could order payment in full of its claim without impacting the plan. The district court disagreed, stating there was no support for the idea that one creditor in a class could be paid in full without also paying the other class members in full. It also pointed out that it was "unclear" where the funding would come from. The court held that the appeal was equitably moot because the Code would not permit giving the appellant a higher payout than the other noteholders, and to pay all class members equally would disrupt the plan. The court found no discrimination.

U.S. v. Seiller Waterman LLC (In re St. Catherine Hosp. of Ind., LLC), 2018 U.S. Dist. LEXIS 165112 (S.D. Ind. 2018)

Subject: disgorgement of fees in administrative insolvency

During its period as debtor-in-possession, the debtor was represented by a law firm ("Seiller"). Two years later, the debtor moved the bankruptcy court to appoint a Chapter 11 trustee, and Seiller's representation on behalf of the debtor ended. During its representation period, Seiller was granted two fee applications; after the appointment of the trustee, Seiller filed a third. After the trustee objected, Seiller and the trustee filed an agreed entry providing that the fees were allowed, but they would not be paid by the trustee, the debtor, or the estate; essentially, Seiller was only to be paid the $135,572.22 approved in the previous two applications, but with a release of any claims or demands relating to the bankruptcy. Two years later, the trustee filed a motion to disburse funds, and for an orderly dismissal of the case, arguing that orderly dismissal was preferable to conversion because there were not sufficient funds to pay administrative claimants in full, and to convert would cause the costs of administration in Chapter 7 to outweigh the value from the trustee's services.

The central issue here was whether the bankruptcy court was required to disgorge fees from Seiller to the extent necessary to create a pro rata distribution among the Chapter 11 administrative claimants. The court was not persuaded by the government's reference to Czyzewski v. Jevic Holding Corp., 137 S. Ct. 973 (2017), which held that bankruptcy courts must adhere to pro rata distribution in a structured dismissal, and must abide by the priority hierarchy. The court here noted that this case was dealing with pro rata distributions within classes of creditors, an issue upon which Czyzewski was silent. The court found that the bankruptcy court had the authority to decline the disgorgement, as there was no requirement to do otherwise, and disgorgement was not appropriate given the value of Seiller's work to the estate and absence of inappropriate conduct or amassing of fees.

U.S. v. Copley, 591 B.R. 263 (E.D. Va. 2018) (appealed to Fourth Circuit, Case No. 18-2347)

Subject: exemption vs. government right of setoff

The debtors filed for Chapter 7 bankruptcy, and scheduled a debt of unpaid taxes owed the IRS. They used the state law "wild card" exemption to claim $3,000 in expected income tax refunds due to overpayment in 2013, and the IRS did not object. However, after actually filing their 2013 tax returns, the IRS informed the couple that it was going to apply their overpayment to offset the taxes they already owed. The couple filed a complaint in bankruptcy court seeking to compel the government to turn over the refund. The bankruptcy court granted the request under § 522 and § 542(a).

In this appeal, the government claimed that the bankruptcy court lacked jurisdiction to compel the turnover of the refund due to sovereign immunity, and that its setoff right under § 553 superseded the debtors' right to an exemption. The court found that the sovereign immunity argument lacked merit, as the suit directly implicated both the exemption and setoff provisions, and §106(a)(2) thus allowed the court to hear any case "arising with respect to" the enumerated sections. Though the government claimed the refund was never estate property, the judge agreed with the majority of courts, reasoning that the *right* to the refund was estate property. Because the refund belonged to the estate, the IRS couldn't "unilaterally take property from the bankruptcy estate" by exercising the right of setoff. The court found that the bankruptcy court did not abuse its discretion in prioritizing the right to exemption over the right to setoff, as the setoff right is "permissive, not mandatory", and narrower in scope than the exemption provision.

Evolve Federal Credit Union v. Barragan-Flores (In re Barragan-Flores), 585 B.R. 397 (W.D. Tex. 2018)

Subject: § 1325(a)(5), cross-collateralization

Debtor had two loans from a credit union secured by vehicles and cross-collateralized. His plan proposed to surrender one vehicle and retain the other. Bankruptcy court confirmed plan over creditor's objection that Debtor has to either surrender all collateral or retain all collateral, cannot create hybrid approach. District court reversed, finding in favor of creditor. "[U]nder § 1325(a)(5), the debtor's plan had to treat all collateral securing the claim similarly." Id. at 402.

Law Solutions Chicago LLC v. United States Trustee, 592 B.R. 624 (W.D. La. 2018)

Subject: §§ 526, 528

In a "horribly screwed up" case, Upright Law was ordered to disgorge fees, refund the $30 credit counseling fee, and pay a $5,000 civil penalty to the U.S. Treasury. It was also temporarily banned from filing new cases, had to provide documents with actual or wet signatures, and faced numerous other court-imposed sanctions. The "local" attorney was suspended for 90 days and her ECF privileges were revoked pending 15 hours of bankruptcy-specific CLE. Upright appealed. District court affirmed. It found that a suspension is not an injunction and therefore did not have to meet the same legal criteria. Courts have the authority to regulate the practice before them. Since the proscriptions were limited to the individual court, not other jurisdictions, they were not too broad.

District court found no due process violations because much of the relief fell short of sanctions or discipline that require heightened notice. Upright had "detailed notice of the allegations," had a chance to respond, and the court conducted a hearing where Upright presented witnesses. The sanctions were narrowly tailored and related to problems supported in the record. Finally, there is no requirement that a court find bad faith in order to enforce its local rules.

Bankruptcy Courts for the Northern District of Ohio

Launder v. Doll (In re Doll), 585 B.R. 446 (Bankr. N.D. Ohio 2018) (Gustafson)

Subject: § 523(a)(2)(A) and (a)(6); issue preclusion

The debtor was a mechanic who owned a body and paint shop. While undertaking repairs of the plaintiff's vehicle, the debtor allegedly increased the price beyond his estimate, and the plaintiff terminated their agreement. The debtor later refused to release some of the plaintiff's car parts to him, claiming "Ohio common law" protection. The plaintiff filed a complaint against the debtor in the Hancock County Court of Common Pleas, alleging money damages from improper handling of the project, and violations of the Ohio Consumer Sales Practices Act. The plaintiff obtained a default judgment against the debtor. The debtor then filed for bankruptcy, and listed the default judgment as a nonpriority unsecured claim with an unknown value. The plaintiff filed an adversary complaint, arguing that under the doctrine of *res judicata*, the default judgment must be given preclusive effect and the debt deemed nondischargeable. The debtor argued that *res judicata* does not apply, since the judgment contained no findings of fact, and he had no opportunity to present evidence. He also argued that his debt was not nondischargeable under §523(a)(2)(A), since he thought his retention of the auto parts was protected by Ohio's repairman's lien law, his actions were not wrongful and malicious, and the plaintiff suffered no irreparable economic harm.

The court found that *res judicata* did not apply, noting that the four-factor test outlined in Sill v. Sweeney (In re Sweeney), 276 B.R. 186 (6th Cir. BAP 2002) failed on the "identical issue" factor; a successful OCSPA claim does not require wrongful intent, whereas § 523(a)(2)(A) does. The state court did not make any findings as to material misrepresentation or fraud. Similarly, the default judgment could not support the § 523(a)(6) claim, since that exception to discharge requires a showing of willfulness and malice, and the default judgment provided no findings as to the debtor's state of mind.

Parker v. Nationwide Mut. Ins. Co. (In re Duran), 586 B.R. 7 (Bankr. N.D. Ohio 2018) (Gustafson)

Subject: permissive abstention; equitable remand

The trustee field a civil complaint in the Lucas County Court of Common Pleas on behalf of the debtor, limited to causes of action arising under Ohio law. The defendant filed a timely notice of removal to the bankruptcy court, and the trustee subsequently filed a motion for remand and abstention.

The court found that a number of the factors relevant to permissive abstention weighed heavily in favor of doing so, especially the lack of effect on efficient administration of the estate, the extent to which state law issues predominated, the degree of remoteness of the proceeding to the main bankruptcy case, and the existence of a right to a jury trial. Parrett v. Bank One, N.A. (In re Natl. Cent. Fin. Enters., Inc., Inv. Liti.), 323 F.Supp.2d 861, 884-85 (S.D. Ohio 2004). The only basis for bankruptcy court jurisdiction was "related to" jurisdiction under § 1334(b); the claims at issue are non-core, state claims. Additionally, the court referred to the general principle that "unless the balance is strongly in favor of the defendant, the plaintiff's choice of forum should rarely be disturbed." Gulf Oil Corp. v. Gilbert, 330 U.S. 501, 508 (1947).

The court also found that equitable remand was appropriate, considering the non-core nature of the removed state court action, the trustee's demand for a jury trial, and the uneconomical use of judicial resources that might result.

In re FirstEnergy Solutions Corp., 591 B.R. 688 (Bankr. N.D. Ohio 2018) (Koschik)

Subject: §§ 363(b), 503(c)(3), KERP, business judgment standard

Debtors sought bankruptcy court approval of a key employee retention plan ("KERP") to retain employees of nuclear power stations scheduled to close. Although court noted most courts analyze non-insider KERP plans using the sound business judgment standard, some courts find that more is required following addition of § 503(c)(3) to the bankruptcy code in 2005. Because the parties were in agreement as to which factors were most important to assess the case under the business judgment standard, the court opted to use the Dana II factors. In re Dana Corp ("Dana II"), 358 B.R. 567 (Bankr. S.D.N.Y. 2006). The court found that this was essentially a plan for a nuclear power plant shutdown, rather than a Chapter 11 reorganization; therefore, the business judgment to which this plan should be compared is that of a company engaging in the former, not the latter. Based on multiple specifics of the plan, such as its exclusion of admittedly critical employees, the court found that the revised KERP did not bear a reasonable relationship to the debtor's purpose in proposing a retention plan. The court found that the plan discriminated unfairly among its employees, and was inconsistent with industry standards regarding size of budget and number of employees retained. The court denied the motion with leave to amend the plan.

In re Purdy, 591 B.R. 307 (Bankr. N.D. Ohio 2018) (Gustafson)

Subject: judgment liens

A couple obtained a judgment against the debtor, attaching to the two parcels that the debtor owned in Allen County. The debtor argued that the certificate of judgment was not facially compliant with the requirements of § 2329.02, namely, that it did not state the amount of the court costs, the rate of interest, or the date from which interest will accrue. The court found that a certificate stating "plus court costs" instead of a specific number requires only checking readily available court records for the amount, and is compliant with the statute. In the same vein, substituting "plus interest at the statutory rate" and "from date of judgment" for the other values is acceptable, as the numbers are readily ascertainable.

Eisenberg v. Toledo-Lucas Cty. Port Auth. (In re BX Acquisition, Inc.), 588 B.R. 798 (Bankr. N.D. Ohio 2018) (Gustafson)

Subject: cash collateral orders

This chapter 11 debtor included within its agreed first and second cash collateral orders that it would use the collateral to make payments on a prepetition debt. The debtor did make several of these payments. Shortly thereafter, the debtor's business ceased operations, necessitating the development of a liquidation plan and appointment of a liquidation trustee. The new trustee sought to avoid the payments debtor had made, arguing that they were not authorized by the cash collateral order. The bankruptcy court disagreed, finding that both orders sufficiently set out that the payments were necessary to the debtor's attempt at reorganization. The court found that any relevant creditors received proper notice of the orders and had ample opportunity to object. No objections had been raised, and the controlling second order was not appealed. The orders operated similar to a consent decree. The court held that the order did authorize the payments, and granted the debtor judgment as a matter of law. The court also concluded the trustee of the liquidation trust was bound by acts of his predecessor in interest, the debtor-in-possession.

In re Bosserman, 587 B.R. 668 (Bankr. N.D. Ohio 2018) (Gustafson)

Subject: eligibility

The Chapter 13 debtor filed schedules that indicated First Federal held a contingent, unliquidated, and disputed claim of $440,000. First Federal filed a proof of claim for an unsecured claim of $17,484,300.63, complete with supporting documents. The trustee filed a motion to dismiss, alleging that the debtor was ineligible for being over the debt limit. The court followed the Sixth Circuit's precedent and focused on the debtor's schedules and evidence pertaining to the claims listed therein, rather than the proof of claim. In re Pearson, 773 F.2d 751, 756 (6^{th} Cir. 1985). Because the eligibility question is a "threshold inquiry", comparable to subject-matter jurisdiction determination in diversity cases, "extensive inquiry" would be “inconsistent with the language of § 109(e) and its underlying congressional intent.” Id. at 756-57. The court found that, despite the way the debt was listed in the schedules, the claim under consideration was not contingent. For purposes of § 109(e) analysis, a partially unsecured debt with collateral valued at $0 will be considered fully unsecured; the court thus considered the debt here to be unsecured as well.

Pierson v. Navient (In re Pierson), 2018 Bankr. LEXIS 3106 (Bankr. N.D. Ohio 2018) (Woods)

Subject: hardship discharge of student loans

The debtor in this case was functionally illiterate and disabled, suffering from bipolar disorder, and only earning $14,000 per year. He lived in a mobile home with no furnace or working stove, and his wife only made about $230 per week. He was found eligible for an income-based repayment plan to pay off his student loans, and sought a hardship discharge of the debt. The court applied the Brunner test, the first factor of which asks whether the debtor could maintain a minimal standard of living while paying off the loans. The lender argued that, because debtor had the option to pay nothing under the repayment plan due to his low income, the loans did not pose a hardship. However, the court noted that the plan was not static or guaranteed, requiring annual renewal, and if eligibility for the program precluded hardship discharge, the people who needed such discharge the most would be unable to obtain it. As to the other prongs of the test, the court rejected the lender’s argument that the debtor should simply get a second job or move in order to improve his financial situation; his support system and family were in Toledo, and it was not unreasonable for him to live there while trying to pay off his debts. Also, the court noted, his situation would likely not improve if he got a second job, as he would simply lose his food stamp benefits without increasing his disposable income. Ultimately, the court found that the debtor had acted in good faith, and granted the discharge.

In re Nacci, 586 B.R. 733 (Bankr. N.D. Ohio 2018) (Kendig)

Subject: incurring postpetition debt

Above-median chapter 13 debtors moved to incur debt for their daughter’s private college tuition. According to court, have to look at facts in each case “with an eye on the reasonableness and necessity of the postpetition debt and any impact on the confirmed plan,” as well as the ‘financial rehabilitation and a fresh start for the debtor.’ Id. at 739 (citation omitted). Debtors had good, steady income. The PLUS loan terms were not onerous, and Debtors were borrowing below the maximum allowable amount. They were paying 100% to creditors, were current on payments, and the loan would become due after the chapter 13 completed. Although the court stressed it thought borrowing was a very bad choice, it found nothing to prevent it and approved the motion.

In re Fisher, 584 B.R. 185 (Bankr. N.D. Ohio 2018) (Woods)

Subject: O.R.C. § 1303.16(A), 11 U.S.C. § 108

Debtors defaulted on mortgage and the mortgage company accelerated the note as of December 20, 2006. Court examined the six year statute of limitations for collecting the balance, as well as whether the limitations period was tolled. Debtors argued the creditor had six years from acceleration to collect on the note and failed to timely act. Since it dismissed the foreclosure and did not file within the one year savings clause of O.R.C. § 2305.19, reinstatement occurred. The note was never brought current since it was accelerated. Since creditor could not enforce the note, it could not enforce the mortgage. Creditor argued that Debtors' chapter 13 plan deaccelerated the mortgage, stopping the statute of limitations. Alternatively, creditor argued dismissal of the foreclosure in 2013 reinstated the mortgage, constituting deacceleration or that the statute only applies to personal liability, not *in rem* liability.

Bankruptcy court find that Debtors' personal liability was discharge in 2007. The surviving mortgage lien was a claim that could be included in their chapter 13. The § 1322 cure and maintain provision constitutes deacceleration but if the debt is not current at the end of the case, the loan reaccelerates. Deacceleration and reinstatement are distinct, not synonymous. No tolling of the statute occurred with deacceleration or reinstatement. A creditor cannot unilaterally reinstate the note. The six year statute of limitations applies to a foreclosure action, barring creditor from pursuing the foreclosure and Creditor could bring an ejectment action.

In re Wilcoxon, 2018 WL 6016540 (Bankr. N.D. Ohio 2018) (Kendig)

Subject: §§ 1307(c)(1), 105(a)

Serial filer with over $1,240 in unpaid case filing fees found to be acting in bad faith. Since 2017, Debtor had followed pattern of filing a case without any payment, obtaining authority to pay the filing fee in installments, then making no payments. Additionally, he continually filed cases without a credit counseling certificate, resulting in dismissals. Each case also thwarted state court foreclosure or garnishment actions. Court established a payment plan for the unpaid fees and imposed a conditional five year filing ban, advising Debtor that if the current case was dismissed, he would not be able to file a new case for five years without leave of court.

In re FirstEnergy Solutions Corp., 2019 WL 211807 (Bankr. N.D. Ohio 2019) (Koschik)

Subject: §§ 362, 365(e), 556

Customer unilaterally terminated its power supply contract with Debtor, relying on language in their agreement that said bankruptcy constitutes a default, providing a basis for termination. Debtor alleged the customer's action violated the stay. Bankruptcy court agreed with Debtor. First, the court refused to rely on language in the contract that declared the parties to be participants in a forward contract, finding it usurped the court's authority to legally determine the true nature of the contract the parties' status. Looking at the definitions that would entitle the customer to avail itself of the § 556 safe harbor provision, court concluded the customer was not in the business of entering into forward contracts for electricity, but manufactured steel parts for the auto industry, defeating its status as a forward contract merchant.

<u>In re Buckeye Activewear, LLC</u>, 589 B.R. 772 (Bankr. N.D. Ohio 2018) (Gustafson)

Subject: § 303, bona fide dispute

Court dismissed a petitioning creditor's involuntary chapter 7 petition against Debtor, finding factual and legal issues created a bona fide dispute on whether the creditor held a claim against Debtor. The court adopted a shifting burden paradigm, where the petitioning creditor bears the initial burden to show there is no bona fide dispute, then the debtor must come forward to show objective evidence to the contrary. However, the ultimate burden rests on the petitioning creditor. One item the court noted that hindered creditor's case was the fact it filed a lawsuit in Texas court against multiple parties attempting to collect what appeared to be the same debt.

<u>Belfance v. Shelton (In re Shelton)</u>, 593 B.R. 755 (Bankr. N.D. Ohio 2018) (Koschik)

Subject: §§ 544(a)(3), bona fide purchaser

Prepetition, Debtor transferred Alabama real estate owned by her mother to herself under a POA. Debtor's chapter 7 trustee filed a complaint to sell the property. Court granted summary judgment in Debtor's favor, concluding Debtor did not have an interest in the property as of the date of filing. Under Alabama law, a POA cannot transfer real estate to oneself unless the POA specifically authorizes it. The POA in this case did not, making the deed void, and leaving Debtor "incapable of conveying legal title sufficient to permit a transferor to become a *bona fide* purchaser." <u>Id</u>. at 764 (citation omitted). The trustee therefore could not exercise her strong arm powers. Regardless, the trustee had constructive knowledge of the issue with the transfer from the recorded documents. "Constructive knowledge . . . flows from the actual recorded chain of title." <u>Id</u>. at 762.

<u>Corzin v. Emergency Medical Transport, Inc. (In re Myers)</u>, 592 B.R. 171 (Bankr. N.D. Ohio 2018) (Koschik)

Subject: § 547, cashier's check

Prepetition, third party used funds from his personal account to obtain a cashier's check and pay an obligation owed by Debtor. Debtor's signature was on the cashier's check. With a cashier's check, "the payee is entitled to receive the funds and the issuing bank is obligated to disperse them." <u>Id</u>. at 176 (citation omitted). Since the funds were not Debtor's property, and would not have been estate property, trustee failed to satisfy preference element.

Other Bankruptcy Courts

In re D'Arata, 587 B.R. 819 (Bankr. S.D.N.Y. 2018)

Subject: appearance counsel

The debtor's attorney, Ragues, filed incorrect documents on his behalf. The court issued an order to show cause whether Ragues should be require to return the fee that he charged the debtor for filing his bankruptcy case. The court found that Ragues effectively left the debtor without representation at not one but two 341 meetings, by hiring appearance counsel – a different person each time – who did not have the opportunity to familiarize themselves with the debtor's case before each meeting. Ragues also copied the debtor's signature, using it to file documents without his consent. Given the pattern of impropriety that emerged, the court ordered that Ragues return his fees to the debtor. The opinion contained a somewhat advisory element as well, as the court made clear that it is very wary of appearance counsel in these situations, as it seems they are frequently used in the way that Ragues used them, which leaves debtors without effective representation. The court encouraged the entire S.D.N.Y. to consider a rule barring appearance counsel for 341 meetings.

In re La Paloma Generating, Co., 588 B.R. 695 (Bankr. D. Del. 2018)

Subject: sovereign immunity; § 106(a)

Before bankruptcy, the debtor paid several years of real estate taxes on its electric generating plant. The debtor also initiated proceedings before the California State Board of Equalization ("SBE") claiming refunds because the assessments were too high. After confirmation, the creditors' trust filed suit against the SBE and the county, asking the bankruptcy court to value the property, reduce the assessments, and direct the county to pay refunds based on the new assessments. The SBE essentially moved to dismiss, arguing that sovereign immunity prevented the bankruptcy court from lowering the assessments, for want of jurisdiction. The bankruptcy court agreed and dismissed the proceedings against the SBE. The trust then sued under § 505(a), which provides that bankruptcy courts, in particular circumstances, may determine the amount of legality of any tax, regardless of whether or not it's been previously assessed, paid, or contested and adjudicated before another tribunal.

The court assessed whether § 106(a), waiver of sovereign immunity which stated that it is abrogated as to a governmental unit to the extent set forth in § 505, is constitutional. Though the Supreme Court had twice undermined its own *dicta*, the dissent in Seminole Tribe of Florida v. Florida, 517 U.S. 44 (1996) having said that the majority opinion prohibited federal jurisdiction to enforce bankruptcy laws against the states, the bankruptcy court was still bound by the Third Circuit's decisions on the matter. The Third Circuit had previously said, because a sovereign immunity defense is jurisdictional in nature, the court will have no jurisdiction, even under § 505(a), if the government has such a defense. The trust thus argued several theories of waiver. The court found that sovereign immunity will not bar "proceedings that effectuate the *in rem* jurisdiction of bankruptcy courts." The court then concluded that the new assessments would not invoke *in rem* jurisdiction as the claim for a refund pertained to taxes already paid. However, there *would* be jurisdiction if the refund claim had pertained to post-petition payments, or if the state were lodging a claim for unpaid taxes, as the state would be seeking taxes collected from real estate property.

In re Parks, 2018 Bankr. LEXIS 3946 (Bankr. D. Kan. 2018)

Subject: exemptions

Before filing for bankruptcy, the debtors purchased $4,000 worth of gift cards to Costco, Target and Quick Trip, which were listed in their petition as Schedule C exemptions for household furnishings and supplies. The court rejected this claimed exemption because the cards were not actual household furnishings or supplies, and could be sold for cash which could be used to pay creditors. Additionally, the Kansas exemption statute exempted only furnishings in the debtor's present possession – i.e., actually in existence at the time the petition is filed.

In re Nine West Holdings, Inc., 588 B.R. 678 (Bankr. S.D.N.Y. 2018)

Subject: § 327; § 363(b); business judgment

The debtor and its non-debtor affiliates had been using a distress management consultant to oversee operations, and moved the court to retain the consultant and provide an interim CEO. They sought to do this under § 363(b), the provision authorizing use of estate property outside of the ordinary course of business for good business reason. The U.S. trustee objected, arguing that the only way for the debtor to retain the consultant was under the "professional persons" provision, § 327. The consultant could not be retained under this provision, in the trustee's view, because it could not be considered disinterested. The court found that there was a "mountain of precedent" allowing the retention of distressed management consultants under § 363(b). The court also mentioned the Jay Alix Protocol, a non-binding policy adopted by the U.S. trustee that provides for the UST to allow the retention of such consultants so long as they comply with certain requirements. Because of this protocol, the court stated, "the crisis and interim management industry has relied on the implicit consent of the U.S. Trustee that such firms can be retained in a bankruptcy case pursuant to section 363 rather than section 327 if they meet the requirements of the Protocol." It would be "starkly inequitable" to allow the trustee to reverse course now. The court also found that such firms provide vital services to companies in financial trouble, and to only permit their retention under § 327 would mean they would be "jettisoned" at the time of bankruptcy, due to the disinterestedness requirement. This, the court found, would "disrupt company management at the precise time when management services are most needed."

In re Lister, 593 B.R. 587 (Bankr. S.D. Ohio 2018)

Subject: mixed-use residential property

The debtors had operated a daycare business out of their home for 21 years. When their plan sought to cram down a mortgage on the property, the lender objected, arguing that the claim was secured by the principal residence and thus not subject to alteration. The court noted that there is a messy circuit split on this issue. On one side, both the First and Third Circuits, as well as a majority of courts, have adopted a bright-line rule that allows modification of a mortgage on residential property if it also has a commercial use. The two circuits arrived at this rule via different theories, however, with the First Circuit favoring statutory interpretation, and the Third using legislative history. On the other side, the Ninth Circuit B.A.P. and a minority of courts have devised a bright-line rule exactly opposite. A handful of other courts simply rely on a totality of the circumstances analysis. There is also a three-way split regarding the date from which the property's use will be determined: a majority, including the Ninth Circuit B.A.P., use the petition date; the Third Circuit and some other courts refer to the date the lender took a security interest; and a third group once again looks at the circumstances surrounding both dates. In this case, the court found in favor of the lender, and used the filing-date standard.

Metz v. Navient Educ. Loan Corp. (In re Metz), 589 B.R. 750 (Bankr. D. Kan. 2018)

Subject: § 523(a)(8)

The debtor had just completed payments in her chapter 13 plan, and sought discharge of her student loans under § 523(a)(8). The court took into account that she was 59, single, with income of between $40,000-43,000 per year and unlikely to increase. She had taken out $17,000 in loans for college, but despite paying almost that amount into the loans, it had increased to $67,000 due to interest. Under income-based repayment, even paying the minimum payment for which she was eligible, that total amount would more than double in the next 25 years. The court found this was not a fresh start, and that she would be unable to maintain a minimal living standard unless she was granted a partial discharge. The court discharged everything but the $16,000 principal balance, and strongly encouraged her to adopt a monthly payment that would pay off that amount in the next 5-10 years.

In re Bartlett, 590 B.R. 175 (Bankr. D. Mass. 2018)

Subject: § 326(a), trustee's compensation after conversion

The former chapter 7 trustee sought reasonable compensation after the case was converted to Chapter 13. The debtor argued that, though the fees were reasonable, § 326(a) prohibited compensation for work done in the Chapter 7 case because the trustee never disbursed or turned over any funds. The § 326(a) limitation has created a split amount bankruptcy courts, with a majority deciding that "a literal reading of § 326(a) should apply only in fully administered cases", and otherwise compensation should be awarded on a *quantum meruit* basis, where the trustee performed "substantial services" without making disbursements. Matter of Parameswaran, 64 B.R. 341, 343 (Bankr. S.D.N.Y. 1986). However, more recent decisions have signaled something of a shift away from the *quantum meruit* position, with many courts denying the Ch. 7 trustee fees in converted cases with no disbursements. The court here agreed that *quantum meruit* doesn't provide the basis for divergence from the Code, but determined that since § 326(a) applies only to Chapters 7 and 11, and the instant case was no longer a Chapter 7 case, the provisions did not preclude compensation. The court allowed the fees in the amount requested.

In re Tara Retail Group, 2018 Bankr. LEXIS 2854 (Bankr. N.D.W. Va. 2018)

Subject: prepayment premium

The debtor secured a loan of more than $13 million by pledging its Crossings Mall property as collateral. In the loan agreement, the date of maturity was set at Oct. 6, 2023, and an included provision stated that if, in the event of default, the debtor made a prepayment, the debtor would also pay the yield maintenance default premium, along with accrued interest and other sums due and payable. The agreement also provided that the lender could declare the note immediately due upon default, regardless of any other available remedies. A flood in 2016 rendered the property inaccessible, and resulted in default. The lender declared the default and filed a receivership action in the district court. A receiver was appointed, and the debtor subsequently filed its bankruptcy case. The debtor proposed a plan of reorganization which would provide for payments to the lender over a period extending past the maturity date.

Relying on the Second Circuit's treatment of the issue, the debtor argued that at least $3 million should be disallowed, because the lender's acceleration of the note changed the maturity date, meaning any payment attempt within the reorganization would not be a prepayment. In re MPM Silicones LLC, 874 F.3d 787 (2d Cir. 2017). Meanwhile, the creditor adopted the Third Circuit's posture in this split, claiming that acceleration advances the maturity date, such that payment made afterward isn't actually prepayment, so the option to prepay can't be exercised. In re Energy Future Holdings Corp., 842 F.3d 247 (3rd Cir. 2016). However, the Third Circuit held, parties may agree to impose a prepayment penalty after acceleration if it is clearly stated in the agreement. The court sided with the debtor in this case, finding that the prepayment provision of the loan agreement did not entitle the lender to the premium, because the debtor could no longer "prepay" the note. The court found that the provision's language "contemplates a 'prepayment' during an event of default in the absence of an accelerated Note."

Firstrust Bank v. Indus. Bank (In re Essex Constr., LLC), 591 B.R. 630 (Bankr. D. Md. 2018)

Subject: effect of lapse in perfection on seniority

Two secured lenders both held liens on the debtor's assets. The senior lender's financing statement lapsed after bankruptcy, and the lender filed a continuation statement about two weeks later. When the trustee sold the assets and found that it could not pay both lenders in full, the junior lienholder argued that it had moved to first position when the lapse had occurred. Outside of bankruptcy, the lienholders agreed that the junior lienholder would have moved to first position. However, the court found comment 4 to UCC § 9-515 to be critical, as it said that "if the debtor enters bankruptcy before lapse, the provisions [of the UCC] with respect to lapse would be of no effect to the extent that federal bankruptcy law dictates a contrary result." The court invoked the "freeze rule", a principle that holds that a lien that is valid at the time of bankruptcy filing does not lose validity for the trustee's purposes unless a statute explicitly provides that it does.

Simon v. Finley (In re Finley), 2018 Bankr. LEXIS 2585 (Bankr. S.D. Ill. 2018)

Subject: conduit vs. direct payments

In order to obtain their discharge, the Chapter 13 debtors stated that they had made all required plan payments. However, after a mortgage lender filed a response to the trustee's notice of final cure payment, alleging a large delinquency in postpetition mortgage payments, the trustee filed a complaint to revoke the discharge. The trustee argued that since the debtors had made a material misstatement regarding completion of the plan payments, the discharge was revocable for fraud. The debtors countered that the mortgage payments were outside of the plan, and thus failure to make them was not a failure to make plan payments. The court adopted the majority view that "payments under the plan" refers to any payments made *pursuant* to the plan, and found that the debtors remained obligated to make payments on the postpetition delinquency. The court declined to decide the question of whether the debtors' statement constituted fraud.

In re Ayodele, 590 B.R. 342 (Bankr. E.D.N.C. 2018)

Subject: conduit mortgage payments

In accordance with a local rule, the debtor's motion to pay his mortgage payments outside of the Chapter 13 plan was denied. Under the rule, a debtor is only excused from the requirement if the trustee allows it. The court discussed the rule's relationship to the Code, finding that nothing in the Code prohibits direct payment to creditor, and the local rule reflects that while still permitting direct payments where appropriate. The court found that the local rule "facilitates the Bankruptcy Code's overarching purposes in several ways," by steering debtors into the framework most likely to be orderly and efficient, and less likely to jeopardize discharge by allowing debtors to fall behind in payments. The court was not moved by the debtor's argument that the delay in disbursement to the mortgagee would impact his home mortgage interest tax deduction, finding it to be *de minimis*. The court similarly disposed of his argument that the trustee's commission on his monthly mortgage payment would be unduly burdensome.

In re Abdemur, 587 B.R. 167 (Bankr. S.D. Fla. 2018)

Subject: lease assumption; reaffirmations

During his bankruptcy case, the debtor entered into a lease assumption agreement with Toyota. Debtor did not seek the court's approval, nor did he have the agreement entered on the docket. At a later date, the debtor found he was unable to maintain his obligations under the lease, and turned his vehicle over. He then filed a notice of rescission of lease assumption with the court. Debtor argued that any *in personam* liability under the lease would be discharged when he received his discharge, on either of two alternative theories: either because he did not reaffirm the lease in accordance with § 524(c), or because of the rescission of assumption.

The court found that reaffirmation and assumption are separate procedures, and they are not interdependent. If one accepted that reaffirmation was required to effect *in personam* liability under an assumed lease under § 542(c), it would also mean that assumption post-discharge would not be possible, despite being clearly contemplated by § 365(p)(2)(C). The court noted that there was nothing in § 365(p) to indicate that a chapter 7 debtor was to be treated differently than any other debtor assuming a lease. Thus, the court held that "*in personam* liability under an assumed lease is not dependent on adherence to the reaffirmation provisions of § 524(c)."

<u>Robbins v. Delafield (In re Williams)</u>, 2018 Bankr. LEXIS 382 (Bankr. W.D. Va. 2018)

Subject: sanctions

This case involved a nationwide law firm based in Chicago, which was utilizing unethical practices. The court made extensive factual findings of the specific ins and outs of the firm's conduct, but the most egregious actions in the eyes of the court were the format of the firm's solicitation of new clients, and its vehicle repossession program. The firm, being based in another state, would solicit clients on the internet, with intake performed by non-lawyers who nevertheless gave legal advice in many instances. The intake associates used "hard sell" tactics to get the prospective clients to sign up immediately and begin paying fees, either in a lump sum or in installments. The court was disturbed the lack of oversight of these individuals and the process used. However, the court's largest point of contention was the firm's vehicle repossession program, which the court referred to unequivocally as a "scam." The firm had a relationship with an outside company that would repossess the cars the debtors wished to surrender, and take them to a storage facility. The company would then notify the relevant lenders and demand payment for the cost of towing and storage. If the lenders did not pay, after the time prescribed by state law, the company would sell the vehicles at auction and keep the proceeds. Debtors were incentivized to enter this program because the company would pay their attorneys' fees. The court ultimately sanctioned the firm by revoking its right to practice in the Western District of Virginia for five years, and imposed $300,000 in fines. To a similar but lesser extent, the court also sanctioned the firm's local associates.

<u>Nelson v. Bolles (In re Bolles)</u>, 593 B.R. 832 (Bankr. D.N.M. 2018)

Subject: § 523(a)(6)

The debtor began dating a woman who he met on the dating app Tinder. When she asked him whether he had any sexually-transmissible diseases or infections, he responded that he did not. The two then had unprotected sex, that night and again on several occasions. The woman contracted herpes from the debtor, suffering a painful outbreak and ultimately receiving the diagnosis and a prescription for lifelong maintenance medication. She sued him in state court for a number of claims, including fraud, battery and intentional infliction of emotional distress, and the debtor filed the bankruptcy and stayed the proceeding. She then brought an adversary complaint. The bankruptcy court found that, because the debtor lied to the woman in order to facilitate sex, and she relied upon his statement and apparent trustworthiness, the facts supported a finding of both fraud and battery. The court held that the debtor's actions satisfied the standard of willful and malicious injury, rendering the resulting damages nondischargeable under § 523(a)(6).

<u>Gimbel v. U.S. Dep't of Educ. (In re Gimbel)</u>, 2018 WL 1229718 (Bankr. D.N.M. 2018)

Subject: § 523(a)(8)

The debtor filed a Chapter 7 bankruptcy, and included his student loan debt on schedule F. He was granted a discharge. More than six years later, the bankruptcy court granted the debtor's motion to reopen his case. He filed an adversary seeking a discharge of his student loan debt due to undue hardship under § 523(a)(8). The loan servicer intervened as the defendant in the adversary and filed a motion to dismiss. The court engaged in the usual Brunner analysis, and found that the debtor met the standard. However, the loan servicer argued three alternative reasons why the debt should not be discharged, which the court disposed of in due course. First, the loan servicer argued that, due to the fact that the amount of the loan had increased since his first discharge, the debtor was actually seeking the discharge of post-petition debt. However, as the court pointed out, this was due to interest accrual, not additional post-petition disbursements, so this argument was dismissed. Second, the loan servicer attempted to apply a nonexistent rule to the debtor's claim, arguing that he had not properly alleged that the hardship in the instant case was "reasonably related to the nature of the hardship" he suffered at the time of his previous discharge. The court found this argument to be "irrelevant" to the hardship prong of the Brunner test. Finally, the loan servicer made what was essentially a laches defense, alleging that the debtor's delay of six years was unreasonable and would prejudice their case due to stale evidence. The court found that neither the Code nor the Rules imposed a strict deadline for initiating an adversary. The motion to dismiss was denied.

Chorba v. Quantum3 Group LLC (In re Chorba), 582 B.R. 380 (Bankr. D. Md. 2018)

Subject: plan confirmation and res judicata

The debtor filed a chapter 13 plan, to which no parties objected, providing that general unsecured creditors would be paid "pro rata," and stating that "the amount of each claim to be paid under the plan will be established by the creditor's proof of claim" or court order. The defendants filed two proofs of claim before confirmation. Also prior to confirmation, the plaintiff filed an adversary complaint alleging that the defendants had violated the Maryland Consumer Debt Collection Act ("MCDCA") by filing their proofs of claim, because they were unlicensed debt collectors. The defendants argued that the debtor's claims were barred by the confirmed plan and the doctrine of res judicata, but the court held that the plan does not constitute a "'prior judgment', final or otherwise, 'on the merits' as to any individual unsecured creditor's claims." LVNV Funding, LLC v. Harling, 852 F.3d 367, 374 (4th Cir. 2017). The plan did not address the allowance of the defendants' claims. The court also concluded that even though defendants' claims might be unenforceable under nonbankruptcy law, that did not preclude their filing. Though the debtor's claims were not barred by her confirmed plan, the claims regarding the alleged MCDCA violations were preempted by the Bankruptcy Code, as no state law could penalize a party "for exercising a right under the Code". The court held that the defendants had a right to file the proofs of claim.

Reagan v. Educational Credit Management Corp. (In re Reagan), 587 B.R. 296 (Bankr. W.D. Penn. 2018)

Subject: § 523(a)(8)

Bankruptcy court denied ECMC's motion for summary judgment. ECMC argued that since Debtor was in an income based contingent repayment plan and her payments were $0, she could not demonstrate that repayment would be an undue hardship. Court disagreed, stating that question is whether debtor can maintain a minimal standard of living at any repayment amount.

In re HJH Consulting Group, 2018 WL 4090594 (Bankr. W.D. Tex. 2018)

Subject: Fifth amendment privilege

Former executive of debtor was sued for fraud and breach of fiduciary duty. Plaintiff moved to compel production of documents and Defendant asserted Fifth Amendment privilege against self-incrimination. Court partially denied request for production. When production of the documents may have a testimonial impact leading to incrimination, the privilege applies. Two exceptions may limit reach of the privilege: the foregone conclusion and the required records doctrines. The former, "where the document's existence and possession are not in question and the defendant is not asked to authenticate or verity the document" and the person is simply being asked to surrender the documents, was not applicable on these facts. Id. at *7. The latter requires production of records required to be kept by law. Executive had to produce tax returns and W-2s but not "his communications, bank account balances and information, or alleged written admissions of guilt." Id. Court noted that application of the privilege may lead to an adverse inference in a civil case.

In re Johnson, 580 B.R. 742 (Bankr. S.D. Ohio 2017)

Subject: § 330(a)

Hahn Loeser filed a $2m+ fee application in pro hockey player's chapter 11 case. Court disallowed $600,000+ in fees incurred representing the debtor in a failed attempt to convert to chapter 7, finding the services did not benefit the estate but were intended to benefit the debtor (whose good faith was questionable). Court also disallowed fees incurred opposing a motion for relief from stay of real estate on basis debtor should be permitted to market and sell for better return. Debtor's opposition was disingenuous because he had not attempted to sell the property in the months leading to the motion for relief. Even if there was (nominal) equity, the cost of Hahn Loeser's fees neutered any benefit that would have resulted. The cost benefit of the equity versus the time expended was completely unbalanced.

Court overruled creditor's objection that fees were excessive in this "simple" case. Debtor allowed his parents complete control of his finances, resulting in the need for a 300-page forensic accounting report. There were several adversary proceedings, plus atypical services. Court did not find the amount of work done by partners, versus associates, overly concerning in this case. It allowed some intra-office billing, in part because it was a miniscule amount of the total, not worth a fuss. Court reviewed multiple other objections, ultimately reduced award to $1.8m.

Martin v. Great Lakes Higher Educ. Grp. (In re Martin), 584 B.R. 886 (Bankr. N.D. Iowa 2018)

Subject: § 523(a)(8)

Fifty year old married debtor with a J.D. and M.P.A. obtained hardship discharge of more than $200,000 (mainly interest) in student loans. Court first declared that a partial discharge of student loan debt is not permissible. While the court may examine each loan individually to determine if it represents an undue hardship, discharge of an obligation is all-or-nothing. Court found "Debtor's lack of work experience and large gaps in employment make it unlikely that she will ever obtain and sustain employment for a period of time, and at a sufficient salary, to make any substantial payments on or reduction in her student loan balance." Id. at 892. Court noted that her husband, the family's sole income source, was 66 years old and his ability to maintain employment was questionable. Debtor's J.D. and legal experience were decades old. Her expenses were not unreasonable or unnecessary. Although she was currently on a $0/month income contingent repayment plan, this was simply one factor in the totality of circumstances. The debt would grow faster than she could repay it, the tax consequences of a write-off under an income contingent repayment plan would be severe, and Debtor would be in her 70s when it happened. She had made good faith efforts to repay the debt. Considering all factors, court discharged the loans.

Kravitz v. Deacons (In re Advance Watch Co., Ltd.), 587 B.R. 598 (Bankr. S.D.N.Y. 2018)

Subject: default judgment, service, foreign defendants

Creditor trustee filed §§ 547 and 550 adversaries against three separate foreign defendants who failed to answer or appear. Creditor trustee moved for default judgment. Court established it did have constitutional authority to enter default judgment provided that proper service was effectuated. By failing to respond, the defendants were impliedly consenting to the bankruptcy court's jurisdiction. Court reviewed Rule 4 and applicable provisions of the Hague Convention, plus the warnings contained in the complaint and summons, and found proper service. Additionally, it reviewed service of subsequent documents under Rule 5 and found it sufficient, as well. Default judgments granted.

In re Relativity Media, LLC, 2018 WL 3769967 (Bankr. S.D.N.Y. 2018)

Subject: § 327(a), conflict, representation of creditor

Proposed counsel for Debtor also represented Netflix, including in a pending patent case set for trial. Debtor and Netflix had a known prepetition contract dispute, over a contract Debtor wanted to assign to a third party. UST and Netflix objected to firm's representation of Debtor.

The bankruptcy looked at two views of what disqualifying conflicts. First, there is an objective view, where any conflict is a problem. Court found this too harsh, claiming it would nullify language in§ 327(a) that says firm is not disqualified solely because of representation of creditor. Under the less stringent standard, which it adopted, "active competition between two interests" is disqualifying. Court listed the numerous services that the firm would provide that would not involve Netflix at all and ultimately allowed firm to represent Debtor. However, it required separate counsel for any matters involving Netflix. Court rejected the "hot potato" approach, saying the firm could not eliminate a conflict by dropping one client.

In re Kiley, 595 B.R. 595 (Bankr. D. Utah 2018)

Subject: § 541, divorce, timing of bankruptcy

Prepetition, Debtor filed for divorce, received child support and alimony. Her husband fell behind, and the parties agreed he would pay her $225,000 from his employer retirement plan. Debtor filed a chapter 7 the day after this agreement. A month later, the divorce decree was issued by the state court, with the QDRO. In reviewing whether the retirement account was property of the bankruptcy estate, bankruptcy court found, as of the petition date:

1. Any interest Debtor had in the retirement account as a survivor beneficiary was excluded from the estate under § 541(c)(2).
2. Debtor had an equitable interest in the retirement plan because it was marital property.
3. The award was a hybrid support/property settlement. The property settlement portion was estate property under § 541(a)(5)(B); any amounts paid as support were not. When the agreement was made, Debtor was not an alternate payee, and it was not exempt.

READ: wait until the QDRO issues before filing.

Edwards v. City of Ferguson (In re Edwards), 2018 WL 6920374 (Bankr. E.D. Miss. 2018)

Subject: §§ 362, 525(a)

Years before filing, Debtor got a speeding ticket, did not pay, eventually had warrant issued. Went to court, fined $150, still did not pay, license suspended, another warrant issued. When she filed chapter 13, sent letter to prosecutor to release the warrant and remove suspension restrictions so she could renew her license. Prosecutor responded and invited Debtor to petition muni court for the relief, refusing to take any action. Debtor said prosecutor violated the stay and discriminated against her because of her bankruptcy filing. Court disagreed. Prosecutor took no action to collect, the warrant was issued well before the bankruptcy filing. A driver's license is a privilege, not a right, and is not automatically reinstated merely because a bankruptcy is filed. Concerning discrimination, court said Debtor was not treated any differently than a non-debtor. Relief denied.

McDaniel v. Navient Solutions, LLC (In re McDaniel), 590 B.R. 537 (Bankr. D. Colo. 2018)

Subject: §§ 523(a)(8), 524(a)(2), 105, Rule 12(b)(6)

Debtor listed student loans in chapter 13 plan. Following discharge, Debtor reopened case and sought declaratory judgment that certain Tuition Answer Loans were discharged. Court had to consider whether the debts in question were "educational benefits" under § 523(a)(8)(A)(ii). Debt was not made, insurance or guaranteed by the government or through a program funded by the government or nonprofit for nondischargeability under § 523(a)(8)(A)(i), nor was it a qualified education loan under § 523(a)(8)(B). Creditor has the burden to show its loan is one excepted from discharge but a debtor must demonstrate that it represents an undue hardship.

Creditor's argument that confirmed plan operated as res judicata against the action was unavailing, plan did not state whether loans were discharged or not discharged. In what it cited as the "trending narrow view," court found that absence of the word "loan" in §523(a)(8)(A)(ii) was intentional, means that loans should not be deemed an "educational benefit." Reading it Navient's way made part of the statute superfluous. Plus, when legislature lists items in a statute, have to interpret the words to have comparable meanings or ties. A loan is not similar to a scholarship or stipend, the other words that follow "educational benefit." Student loan was dischargeable.

In re Brookstone Holdings Corp., 592 B.R. 27 (Bankr. D. Del. 2018)

Subject: § 327(a), retention of liquidator as a professional, § 365(a), 363(b)

UST argued that the going-out-of-business liquidator in Debtor's chapter 11 case had to be retained as a professional. Court rejected UST argument, as well as its position that the liquidator was an auctioneer. The goods were not being sold to the highest bidder, or at a public sale but were sold in a typical retail manner. In determining liquidator was not a professional, court looked at six factors set forth in In re First Merchants Acceptance Corp., 1997 WL 873551 (D. Del. 1997), condensed as follows: (1) degree of control, management, administration of assets significant to the reorganization, (2) whether person will be part of reorganization plan negotiations, (3) relationship between the person's activities to the debtor's normal business, (4) the level of personal discretion the person has, (5) the extent of involvement in administering the estate, and (6) whether special skills or knowledge is involved to satisfy the "professional" title.

Cyrnek v. Oliva (In re Oliva), 591 B.R. 328 (Bankr. N.D. Ill. 2018)

Subject: Rule 4007, § 523(c), Civil Rule 5

Court granted the trustee's motion to extend the deadline to object to discharge of a debt. Plaintiff filed a § 523(a)(2) action within the extended deadline but after the original deadline expired. Debtor said court had no authority to extend the deadline on trustee's motion, so the extension was void. Under Rule 4007(a), only a debtor or creditor can extend the deadline to object to a particular debt, not the trustee. Court agreed but Rule 4007(c) is not as narrow, permitting "a party in interest" to extend the deadline. Following Sixth Circuit opinion in In re Brady, 101 F.3d 1162 (6^{th} Cir. 1996), court denied Debtor's motion to dismiss. The trustee is a party in interest. In reviewing service, court found the motion to extend was not a contested matter and therefore personal service on Debtor was not required, service per Rule 5 was sufficient.