White Williams Bankruptcy Institute
Live Interactive Webinars
August 20 & 21, 2020

CASE LAW UPDATE

Presenter

Judge Russ Kendig

Case Law Update

2020

Judge Russ Kendig

Supreme Court

Mission Prod. Holdings, Inc. v. Tempnology, LLC, 139 S.Ct. 1652 (2019)

Subject: § 365, effect of contract rejection

Tempnology owned and manufactured products with its patented cooling technology. Prepetition, it gave Mission distribution rights, a nonexclusive intellectual property license, and a trademark license for marketing purposes. When Tempnology filed bankruptcy, it rejected the agreement. The question before the court was "whether the debtor-licensor's rejection of that contract deprives the licensee of its rights to use the trademark?" Supreme Court said "no," "a rejection breaches a contract but does not rescind it. And that means all the rights that would ordinarily survive a contract breach, including those conveyed here, remain in place." Id. at 1657-8.

Taggart v. Lorenzen, 139 S.Ct. 1795 (2019)

Subject: discharge injunction, good faith violation

Taggart transferred his interest in a company and the other owners sued him for failing to give them the first right of refusal. Before conclusion of the 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. 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 the meantime, Taggart 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. Supreme Court upheld unanimously. "A court may hold a creditor in civil contempt for violating a discharge order if there is no fair ground of doubt as to whether the order barred the creditor's conduct. In other words, civil contempt may be appropriate if there is no objectively reasonable basis for concluding the creditor's conduct might be lawful." Id. at 1799.

Rotkiske v. Klemm, 140 S.Ct. 355 (2019)

Subject: FDCPA, statute of limitations

Plaintiff defaulted on credit card debt incurred in 2003-2005. Klemm attempted to sue Plaintiff in 2008 but dismissed the case when it could not locate him. In 2009, Klemm attempted again, at the same address, eventually obtaining default judgment after a third party accepted service. Plaintiff did not learn of the judgment until 2014 when he applied for a mortgage and later sued under the FDCPA. Klemm argued the FDCPA claim was untimely because it was brought more than a year after the violation occurred. Plaintiff argued the time to act is keyed to his discovery of the violation. Per the Supreme Court, the statute of limitations runs from the violation, not its discovery, but left the door ajar for equitable doctrines to be a factor on the statute of limitations.

Ritzen Grp., Inc. v. Jackson Masonry, LLC, 140 S.Ct. 582 (2020)

Subject: relief from stay, finality

The bankruptcy court denied Ritzen's motion for relief from stay. Ritzen appealed the relief from stay denial after it lost its claim dispute. District court found the appeal was untimely and the Sixth Circuit agreed, finding that "stay-relief denial ends a proceeding, fixes the rights of the parties, and has significant consequences for them," making it a final order which should have been immediately appealed. Its decision conflicted with First and Third circuit decisions finding that stay relief is not final. Supreme Court unanimously upheld Sixth Circuit. The stay relief order conclusively determined a discrete dispute within the bankruptcy case that was separate from the claim adjudication controversy and therefore was immediately appealable.

Rodriguez v. FDIC, 140 S.Ct. 713 (2020)

Subject: federal common law, ownership of joint tax return

IRS issued a tax refund to Debtor United Western Bancorp, Inc., derived from the net operating losses of its subsidiary United Western Bank. Chapter 7 trustee argued the refund was part of the Debtor's estate. The bankruptcy court agreed but district court reversed. Tenth Circuit affirmed the district court, relying on federal common law (the Bob Richards rule) that asserts a refund generally belongs to the entity responsible for the losses, while other circuits rely on state law to determine ownership of a refund. Supreme Court rejected the common law approach, finding courts overstepped their authority in creating common law when no unique federal interest at stake and state law was fully capable of determining ownership. The Supreme Court relied on a Sixth Circuit case, FDIC v. AmFin Fin. Corp., 757 F.3d 530 (6th Cir. 2014), in reaching this conclusion.

Roman Catholic Archdiocese of San Juan, Puerto Rico v. Feliciano, 140 S.Ct. 696 (2020)

Subject: jurisdiction, void orders, nunc pro tunc orders

The case is about who is responsible to pay pensions to former Catholic school employees in Puerto Rico following termination of the trust that had provided benefits. The employees filed an action naming several defendants and multiple issues arose regarding the identity of the defendants, whether they were separate legal entities, etc. A Puerto Rican court issued payment and seizure orders which were challenged. The Supreme Court found the court in Puerto Rico did not have jurisdiction to enter the orders and the orders were void. At the time they were issued, the case had been removed to federal district court and was not remanded until approximately five months after the orders were entered, leaving the Puerto Rican court without jurisdiction. It further opined that the parties could not "consent" to state court jurisdiction by filing motions there. It also rejected the state court's *nunc pro tunc* order, finding that a *nunc pro tunc* order "cannot make the record what it is not." (citation omitted)

<u>Barr v. Am. Ass'n of Political Consultants Inc.</u>, 2020 WL 3633780 (2020)

Subject: Government-debt exception to the Telephone Consumer Protection Act, First Amendment, severability

A TCPA exception to the robocall ban allows calls to collect debts owed to or guaranteed by the federal government but not for other purposes, such as political activity. Political action organizations challenged the exemption. Fourth Circuit determined the exemption was a content-based restriction on speech that failed to survive strict scrutiny because it was not narrowly tailored to protect the privacy interests underlying the statute. It severed the exception, leaving the TCPA otherwise intact. Supreme Court affirmed. The government failed to satisfactorily differentiate debt-collection speech from other types of content-based speech and therefore failed to pass the strict scrutiny test. The provision was severable, leaving the remainder of the TCPA intact.

<u>Financial Oversight and Mgmt. Bd. For Puerto Rico v. Aurelius Inv., LLC</u>, 140 S.Ct. 1649 (2020)

Subject: Puerto Rico Oversight, Management and Economic Stability Act ("PROMESA")

PROMESA was enacted to provide debt relief to Puerto Rico. PROMESA created the Financial Oversight and Management Board, which is run by board members appointed by the President. The First Circuit determined the board members were "officers of the United States" improperly appointed under the Appointments Clause. However, it allowed the Puerto Rico case to continue because the board members were acting under color of law in good faith and dismissal would impact thousands of people who relied on the Board's action. Challengers appealed. The Supreme Court determined "the Appointments Clause does not restrict the appointment of local officers that Congress vests with primarily local duties."

<u>Seila Law LLC v. Consumer Financial Protection Bureau</u>, 2020 WL 3492641 (2020)

Subject: Separation of powers, CFPB director

Seila Law, under investigation by the CFPB, argued the CFPB structure was unconstitutional because the director, appointed by the President and confirmed by the Senate, could only be removed by the President for cause. Seila Law argued this violated the separation of powers clause. Ninth Circuit rejected. Supreme Court disagreed. The CFPB director exercises significant executive authority and Congress' limitation on the President's ability to remove the director violates the separation of powers. However, the provision is severable under the Dodd-Frank

Act and does not affect the constitutionality of entire CFPB.

Pending Supreme Court Cases

City of Chicago v. Fulton, Docket No. 19-357

From: 916 F.3d 916 (7th Cir. 2019)

Issue: Whether an entity that is passively retaining possession of property in which a bankruptcy estate has an interest has an affirmative obligation under the Bankruptcy Code's automatic stay, 11 U.S.C § 362, to return that property to the debtor or trustee immediately upon the filing of the bankruptcy petition.

An attorney garnished a former client's wages. When Debtor filed bankruptcy, $1,000 was being held by the state court. Counsel refused to affirmatively release the garnishment. The Second, Seventh, Eighth, Ninth and Eleventh Circuits require creditors to return property upon a bankruptcy filing, while the Third, Tenth and D.C. circuits do not require affirmative action.

Sixth Circuit Court of Appeals

Church Joint Venture, L.P. v. Blasingame (In re Blasingame), 920 F.3d 384 (6th Cir. 2019)

Subject: derivative standing, causes of action, equitable interests

Creditor-plaintiff ("Plaintiff") sought to recover assets from Debtors' trusts. Initially, it obtained derivative standing from the bankruptcy trustee to pursue the claims. Later, the trustee sold Plaintiff the causes of action. Plaintiff filed an action in district court alleging the trusts were alter egos, which was dismissed because court found Tennessee law did not recognize the legal theory. It then filed another case in bankruptcy court, this time arguing the trusts were self-settled. Sixth Circuit said that causes of action are determined by the underlying facts and since the self-settled claim arose from the same facts as the action(s) sold by the trustee, Plaintiff could not pursue the claim. Trustee's sale of the cause of action left no claims with the bankruptcy estate, destroying Plaintiff's derivative standing. Court also rejected Plaintiff's argument that Debtors' life estates were property of the bankruptcy estate, finding those interests were equitable, not legal.

H.D.V.-Greektown, LLC v. Detroit, 774 Fed.Appx. 968 (6th Cir. 2019) (unpublished)

Subject: attorney fee enhancement

In 2011, Appellants obtained a $3m consent decree in a First Amendment action and were entitled to attorney fees. They requested $1.5m, including a 10% fee enhancement. A magistrate judge awarded part of the fee request but the action was stayed by Detroit's bankruptcy. Following confirmation of Detroit's plan, which proposed a distribution of 10-13%

on Appellants' claims, the stay was lifted and the district court adopted the magistrate's finding. On appeal, the Sixth Circuit affirmed in part, reversed in part, and remanded. Appellants then filed a supplemental fee request for a 1000% enhancement, citing the bankruptcy case as an "exceptional" circumstance. The magistrate denied the fee enhancement and awarded $905,000 in fees, finding the new fee enhancement request was an attempt to end run the confirmation order. District court and Sixth Circuit agreed with magistrate. Sixth Circuit opined that Appellants should have contested the confirmation order and failed to prove that the bankruptcy case was an "exceptional" circumstance entitling them to a fee enhancement.

Buchwald Capital Advisors, LLC v. Papas (In re Greektown Holdings, LLC), 765 Fed.Appx. 132 (6th Cir. 2019) (unpublished)

Subject: § 546(e), safe harbor

Recognizing the Supreme Court decision in Merit Mgmt Grp., LP v. FTI Consulting, Inc., 138 S.Ct. 883 (2018) overturned Sixth Circuit precedent that said a financial institution did not need a beneficial interest in the transaction subject to recovery, the Sixth Circuit vacated the district court's decision and remanded to the bankruptcy court.

Carl F. Schier PLC v. Nathan (In re Capital Contracting Co.), 924 F3d 890 (6th Cir. 2019)

Subject: jurisdiction, standing, right to appeal

Prepetition, Schier represented Debtor in state court litigation, which it lost to the song of a $5m judgment, resulting in its bankruptcy. Schier filed a claim for unpaid attorney's fees and the Chapter 7 trustee filed a malpractice action. The parties settled, Schier paid $600,000 to the estate and withdrew its attorney fee claim. When the trustee filed his final report, Schier objected, arguing the trustee failed to include the right to appeal the state court litigation as an asset. The bankruptcy court overruled the objection, concluding that Schier did not have standing to object to the final report because he did not have a pecuniary interest in the outcome. District court said Schier did not have standing to appeal because he did not have a direct interest in approval of the final report.

After presenting an overview of questions and challenges of jurisdiction and standing, Sixth Circuit opined that Schier needed Article III standing to enter an Article III court. To determine whether he did, it looked at the injury resulting from the order approving the final report. Schier was not, and could not be, affected personally from the order, even if the state court judgment was reduced to zero. He had no claim in the bankruptcy and therefore could not benefit. Dismissal of the appeal upheld.

Nathan Hake Farms, LLC v. Simpson (In re Hake), 770 Fed.Appx. 733 (6th Cir. 2019)

Subject: state court judgment, Rooker Feldman

Debtor complained that parties violated his 14th Amendment due process rights when they sold farm crops in violation of a bankruptcy stay. Sixth Circuit affirmed the lower court dismissal, finding the action was taken on order of the state court. "Defendants' actions—foreclosing upon and physically removing the crops—were the product of a state court judgment, and Plaintiff in fact impermissibly seeks redress for the state court judgment itself," leaving the district court without the ability to exercise subject matter jurisdiction.

Buchholz v. Meyer Njus Tanick, P.A., 946 F.3d 855 (6th Cir. 2020)

Subject: injury, standing, FDCPA

Law firm sent standard collection letters on behalf of Synchrony. Plaintiff sued under FDCPA, alleging the letters made him anxious he would be sued. Sixth Circuit said he failed to show an injury in fact and therefore could not establish standing. To qualify as an injury, anxiety must result from extreme and outrageous conduct and be severe, which he did not show. Further, his anxiety concerned the possibility of a future injury, the fear of a lawsuit, not an impending or actual injury. Additionally, any injury was traceable to him, resulting from his failure to pay debts he owed. The harm he alleged was not of the type that Congress intended to prevent under the FDCPA, nor an injury redressed at common law. Dismissal upheld.

Doe v. Boland (In re Boland), 946 F.3d 335 (6th Cir. 2020)

Subject: § 523(a)(6)

Bankruptcy court found that Debtor, an attorney who created child pornography for use as an expert witness, did not willfully and maliciously injure the children in the images. Sixth Circuit reversed, finding the bankruptcy court committed clear error in its factual findings. Injury to the children was substantially certain to follow the lawyer's intentional actions.

Giese v. Lexington Coal Co. (In re HNRC Dissolution Co.), 761 Fed.App'x 553 (6th Cir. 2019) (unreported)

Subject: jurisdiction, removal, abstention

One of Debtors' assets was a "restricted" bank account with over $300,000 labeled "E. Begley Escrow." Two purchasers bought Debtors' assets, including the account. Following demands by both purchasers, Bank filed interpleader. In spite of Bank's alleged attempts to contact E. Begley, only the purchasers responded and the funds were split between the two purchasers. Plaintiff later surfaced and filed state court action claiming an interest in the funds and the action was removed to bankruptcy court. Sixth Circuit affirmed the removal, finding the claim related to the bankruptcy because Debtors could be liable for a breach of the purchase agreements and/or the confirmation order could be subject to vacation or modification and redistribution of the account if Plaintiff succeeded. Mandatory abstention was not required because the majority of his claims were core to the bankruptcy, arising from the interpleader action and distribution of an asset. Ultimately, Sixth Circuit affirmed dismissal, finding his claims were barred by res judicata of the sale and confirmation orders. His predecessor in interest should have maintained an action during the bankruptcy case and had a 'shared identity with the claims available to his predecessors during the bankruptcy case.' (citation to lower court opinion omitted)

Lanton v. Ocwen Loan Servicing, LLC, 793 Fed.App'x 398 (6th Cir. 2019)

Subject: RESPA, FDCPA, damages, supplemental jurisdiction

Plaintiffs sued Ocwen regarding improper application of mortgage payments and erroneous credit reporting following their bankruptcy case. District court granted summary judgment to Ocwen. Because RESPA is a consumer protection statute, business damages are not recoverable, and Mrs. Lanton testified her only damages resulted from her business's inability to purchase equipment, defeating the claim. Sixth Circuit reversed, finding Mrs. Lanton would not have understood the legal nuances of "actual damages" when testifying and the record alluded to other recoverable damages. It upheld dismissal of the FDCPA claims, however, because Plaintiffs failed to provide sufficient evidence of actual harm to entitle them to statutory damages. When the district court dismissed the FDCPA and RESPA claims, it declined to exercise supplemental jurisdiction over the remaining state law claims. Since the Sixth Circuit reversed on the RESPA claim, district court should reconsider whether to exercise supplemental jurisdiction.

FERC v. FirstEnergy Solutions Corp. (In re FirstEnergy Solutions Corp.), 945 F.3d 431 (6th Cir. 2019)

Subject: § 362, bankruptcy v. FERC jurisdiction, standard of review for rejection

Chapter 11 debtors wanted to reject contracts to purchase electricity previously approved by FERC. FERC argued the regulatory power exception to the automatic stay applied, allowing it to proceed to address the contracts. The bankruptcy court disagreed, found it had exclusive jurisdiction, enjoined FERC from a broad array of actions, and allowed Debtors to reject the contracts under a standard business-judgment rule. FERC got a direct appeal to the 6th Circuit, which affirmed in part, reversed in part and remanded.

Sixth Circuit recognized that filing an energy contract with FERC sometimes elevates it to the equivalent of a federal regulation or statute, rendering it not subjection to rejection. Further, FERC has "plenary and exclusive jurisdiction over wholesale power rates, terms, and conditions of service" concerning said contracts. But "the public necessity of available and functional bankruptcy relief is generally superior to the necessity of FERC's having complete or exclusive authority to regulate energy contracts and markets." While it concluded the contracts were not de jure regulations and could be rejected, FERC's jurisdiction was important enough to leave the bankruptcy court with concurrent, but primary, jurisdiction.

For the regulatory power exception to apply to the automatic stay, FERC had to advance a public policy interest. Based on "the tiny (relative to the market) amounts of energy involved . . . [Debtors'] small stake in the ICPA (4.85%) [contract], and the lack of damages to the PPA counterparties versus the disproportionate harm to the other creditors," the Sixth Circuit upheld the bankruptcy court's conclusion that this was more a matter of private rights. But it found the bankruptcy court's injunction against FERC was far too broad. FERC had the right to proceed at its own risk of running afoul of the automatic stay as long as its actions were not in direct conflict.

Finally, the Sixth Circuit found the standard business-judgment rule insufficient to balance the competing federal interests of bankruptcy and energy regulation. It remanded, instructing the court to "consider the public interest and ensure that the equities balance in favor of rejecting the contract, and it must invite FERC to participate and provide an opinion in accordance with the ordinary FPA approach."

Church Joint Venture, LP v. Blasingame, 947 F.3d 925 (6th Cir. 2020)

Subject: trusts, reverse veil piercing, reverse alter ego theory

Plaintiff purchased judgments against Defendants from the bankruptcy estate and sought recovery from various sources. In this case, it wanted the legal form of certain trusts and corporations connected to Defendants disregarded and the assets of those entities made available. District court dismissed claims based on reverse alter ego and reverse veil piercing. Sixth Circuit affirmed, concluding Tennessee law did not recognize either theory. It also upheld the lower court's denial of a certification to the Tennessee Supreme Court because the area of law was not sufficiently unsettled to warrant certification. Judge Sutton concurred but opined that veil piercing and alter ego should never be applied to trusts because of their very distinct nature.

Vanderkodde v. Mary Jane M. Elliott, P.C., 951 F.3d 397 (6th Cir. 2020)

Subject: Rooker-Feldman

Plaintiffs were Michigan state-court defendants subject to garnishment actions who filed FDCPA actions alleging Defendants improperly calculated the interest in the garnishment requests. District Court dismissed the claims under the Rooker-Feldman doctrine, contending Plaintiffs were essentially appealing the state court judgments and the writs of garnishment. Sixth Circuit reversed. Rooker-Feldman only applies when the state court judgment causes the injury at issue. Writs of garnishment are not judgments. Besides, the writs did not cause the injury, the injury was caused by the costs included in the writs, as calculated by Defendants.

Coslow v. Reisz, 2020 WL 2317493 (6th Cir. 2020)

Subject: § 554(b)

When he filed bankruptcy, Debtor's house was subject to a first and second mortgage, leaving no equity. However, as part of an asset purchase agreement, a third party was paying the second mortgage down quickly, creating equity. Debtor moved for abandonment of the property and bankruptcy court granted, finding the date of filing controlled and there was no equity at the time of filing. It also said the equity was created from Debtor's postpetition labor so it did not become part of the estate. Trustee appealed, district court affirmed, and Sixth Circuit reversed.

The Sixth Circuit found no support for claiming the equity resulted from Debtor's postpetition services, so the equity became part of the estate. The court looked at the equity situation as of the date of the motion, not the filing date. It noted the statute was in the present tense, other courts view it as of the date of the motion, and the Code provides for administration of assets that will benefit the estate, not merely have "present value" to the estate. It concluded the trustee could not be compelled to abandon the real estate.

Davis v. Helbling (In re Davis), 960 F.3d 346 (6th Cir. 2020)

Subject: § 1325(b), § 541(b)(7), disposable income, voluntary retirement contributions

Court considered whether Debtor's $221 per month voluntary contribution to her 401(k) plan was disposable income. The bankruptcy court, relying on dicta in Seafort v. Burden (In re Seafort), 669 F.3d 662 (6th Cir. 2012), said it was and denied confirmation. Sixth Circuit vacated and remanded. Prior to BAPCPA, consensus was voluntary retirement contributions were disposable income. Under BAPCPA, legislature added § 541(b)(7)(A), excluding 401(k) contributions from property of the estate. Recognizing the "grammatical puzzle" created under § 541(b)(7)'s hanging paragraph, which states "except that such amount under this subparagraph shall not constitute disposable income as defined in section 1325(b)(2)," the court provided an overview of the four interpretations developed by courts. In a 2-1 decision, the court adopted the majority position, interpreting the statute to except 401(k) contributions from disposable income.

CMCO Mortg., LLC v. Hill (In re Hill), 957 F.3d 704 (6th Cir. 2020)

Subject: § 523(a)(6), collateral estoppel, default judgment for damages

Debtor failed to convince the court that the $3m+ damages default judgment from state court was not preclusive. Prepetition, he sold a business to Plaintiff, worked for Plaintiff for a period, then went to work for a competitor. Plaintiff sued on various counts. Initially, his new employer footed the legal bill. When Plaintiff settled the claims with his employer, it stopped paying legal fees and Debtor began representing himself, participating erratically in the state court litigation. After being warned of potential consequences for failing to appear, he did not show up for a pretrial conference and the court entered default judgment for damages. Court concluded all the collateral estoppel elements were satisfied, including that the matter was "actually litigated" even though it arose from a Kentucky default judgment.

Circuit Courts of Appeal – Other

Hurlburt v. Black, 925 F.3d 154 (4th Cir. 2019)

Subject: § 1322(c)(2)

Fourth Circuit overturned its previous decision disallowing cramdown of a mortgage that matured before a debtor's Chapter 13 case concluded. Previously, the Fourth Circuit had determined that § 1322(c)(2) permitted only modification of the payment, not the claim, preventing cramdown into secured and unsecured portions. It said its previous decision erroneously concluded that the statute was ambiguous, and now joins other courts in determining that a loan that matures before the last payment due under a Chapter 13 plan may be subject to cramdown pursuant to §§ 1322(c)(2), 1325(a)(5) and 506(a). First Union Mortg. Corp. v. Eubanks (In re Eubanks), 219 B.R. 468 (B.A.P. 6th Cir. 1998). In this case, the mortgage lender's $131,000+ claim was reduced to a $41,000 secured claim (the $47,000 value of the property less a $6,000 first position tax lien) and the balance was an unsecured claim scheduled to receive no distribution.

McBride v. Riley (In re Riley), 923 F.3d 433 (5th Cir. 2019)

Subject: § 503 administrative expenses, § 330, Chapter 13 no-look fee, Chapter 13 "no money down" case

Attorney filed case, advancing the filing, credit counseling and credit report fees for a Louisiana debtor. At confirmation, he sought separate reimbursement of the advanced expenses. The bankruptcy court denied the request, finding the no-look fee included the expenses, which were not necessary administrative expenses and were not compensable under § 330(a). District court affirmed. Fifth Circuit agreed, in part.

The Fifth Circuit concurred with the bankruptcy court's interpretation that its no-look fee order included the expenses as part of the no-look fee. Counsel argued that deletion of specific language stating the fees were included in the current no-look fee order meant they were not included. Fifth Circuit said no, the fees were presumed included because the only one specific expense, postage cost, was allowed to be reimbursed above the no-look fee.

To qualify as a § 503(b)(1)(A) administrative expense, the expense has to be a postpetition obligation of the estate, not the debtor personally, and must benefit the estate. The credit counseling was required of debtor to be eligible to file, making it prepetition and personal to debtor. The credit report was not necessary, merely helpful. Because the filing fee was paid at filing, the Fifth Circuit found it was a prepetition, personal obligation of the debtor, not the estate.

Fifth Circuit disagreed that expenses cannot be included as § 330(a) compensation. The term compensation is broad enough to include reimbursement. Unlike § 503(b)(1), § 330(a)(4)(B) is not specifically linked to the estate but allows compensation for "representing the interests of the debtor in connection with the bankruptcy case," which may include reimbursement of fees. Fifth Circuit left it to the discretion of the courts to determine.

In re Sterling, 933 F.3d 828 (7th Cir. 2019)

Subject: § 524(a), discharge injunction, contempt

Debtor was jailed postpetition after failing to appear in a prepetition state court lawsuit involving a discharged debt. While counsel for the creditor was not aware of the discharge, the creditor was. When debtor filed contempt action against both, the bankruptcy court and district court ruled against her, concluding counsel pursued collection of the debt but did not have knowledge of the discharge; the creditor had knowledge of the discharge but did not take action to collect. Seventh Circuit affirmed in part and reversed in part. While the creditor did not act to collect the debt, under agency theory, its counsel's conduct is imputed to it.

Martineau v. Wier, 934 F.3d 385 (4th Cir. 2019)

Subject: FRCP 17(a)(3), standing, real party in interest, judicial estoppel

Prepetition, Debtor was brutally attacked and settled her claim with third parties, only to later learn those third parties had more knowledge of her attacker's mental health history than originally disclosed. Representing herself, she filed a Chapter 7, did not list any tort claims against the third parties, and got a discharge. Approximately a year later, she filed an action against the third parties to rescind the settlement agreement. District court granted the defendants' summary judgment motion, concluding Debtor lacked standing because the claims were property of the bankruptcy estate when the complaint was filed and Debtor was judicially estopped from litigating the claims because she failed to list them as assets. Fourth Circuit reversed.

Fourth Circuit found that lower court conflated Article III standing with the real party in interest consideration. There was no dispute that Debtor had a claim against defendants, satisfying Article III standing. The real party in interest requirement focuses on who can bring claims. When the claims were filed, the trustee was the real party in interest. However, the trustee later abandoned the claims, giving Debtor the right to pursue them. The real party in interest requirement is not static, and Federal Civil Rule 17(a)(3) allows the real party to "ratify, join, or be substituted into the action."

According to the Fourth Circuit, the lower court also improperly imposed a bad faith presumption in the judicial estoppel inquiry. To apply judicial estoppel, there must be an intentional change that is unfair. The lower court found Debtor knew of the claims when she filed bankruptcy, and her failure to disclose them resulted in a presumption she acted in bad faith. The appellate court found this presumption operated against the equitable underpinning of the judicial estoppel doctrine, which should consider the facts of each individual case. It suggested that a pro se debtor may not have understood that an unfiled legal claim should be listed, and also that it is unfair to allow a presumption to potentially be a windfall to civil defendants when no ill motive or intent is present.

Thompson v. Gargula (In re Thompson), 939 F.3d 1279 (11th Cir. 2019)

Subject: § 727(d)(1), (d)(2) and pre-discharge knowledge of fraud

Prior to discharge, a former employee made a fraud referral to the Chapter 7 trustee, who investigated. Debtors obtained a discharge, only to have it revoked on the trustee's 727(d)(2) action. Debtors claimed trustee's pre-discharge knowledge was fatal to his claim. Bankruptcy, district and appellate courts disagreed. Statutory text is clear. Section 727(d)(1) prevents revocation of a discharge when the objecting party has pre-discharge knowledge of the fraud. Section 727(d)(2) does not contain the same limitation. Congress' omission of the language from § 727(d)(2) is a clear expression of its intent.

Murphy v. Snyder (In re Snyder), 939 F.3d 92 (2nd Cir. 2019)

Subject: default judgment, collateral estoppel

During state court litigation, the Snyders refused to cooperate in discovery, ultimately leading to entry of a default judgment. When they filed for bankruptcy, the creditors filed an adversary proceeding and the bankruptcy court declared the debt nondischargeable, using the default judgment as a basis for collateral estoppel. The district court and Second Circuit affirmed. While the general rule is that a default judgment cannot provide a basis for collateral estoppel because the issues are not actually litigated, there is an exception: "where the default judgment is entered as a sanction for bad conduct, and the party being estopped had the opportunity to participate in the underlying litigation, the default judgment has preclusive effect when determining the nondischargeability of a debtor in a bankruptcy proceeding." Id. at 100 (citations omitted). This prevents bad faith litigants from obtaining a second bite of the apple.

CranGrow v. Layng (In re Cranberry Growers Coop.), 930 F.3d 844 (7th Cir. 2019)

Subject: §1930(a)(6), UST fees, disbursements

The UST is entitled to collect fees on disbursements made by Chapter 11 debtors. Debtor argued that payments its customers made directly to the bank toward its prepetition revolving line of credit were not disbursements subject to UST fee calculations. The UST objected and the bankruptcy court sided with Debtor. On a direct appeal, the Seventh Circuit reversed, concluding that the payments reduced the revolver balance and therefore qualified as disbursements. If Congress wanted to narrow what constituted "disbursements," it could have done so when it amended the fee statute. The court found no authority for a waiver under 28 U.S.C. § 1930(f).

Debtor also argued that the statute increasing fees violated the uniformity clause because, in the districts without a UST presence, the fee increase came later and did not apply to pending cases. Since Debtor did not raise the argument below, it was deemed waived.

DeGiacomo v. Sacred Heart Univ., Inc. (In re Palladino), 942 F.3d 55 (1st Cir. 2019)

Subject: § 548, fraudulent transfer, Ponzi scheme

During the period Debtors were running a Ponzi scheme, they were also paying their 18 year old daughter's college tuition. After they filed bankruptcy, the Chapter 7 trustee sought to recover the tuition payments as fraudulent transfers. The bankruptcy court found that having an economically independent daughter provided reasonably equivalent value for the transfers and then certified the issue for direct appeal. First Circuit reversed, finding the "tuition payments . . . depleted the estate and furnished nothing of direct value to the creditors who are the central concern of the code provisions at issue." The tuition payments were not one of the five types of transactions listed in section 548(d)(2)(A) that confer value, plus Debtors were under no legal obligation to pay for their daughter's tuition.

Rose v. Select Portfolio Svc., Inc., 945 F.3d 226 (5^{th} Cir. 2019)

Subject: § 362(c)(3)(A), judicial foreclosure

Rose and her husband got a mortgage in 2005, they divorced in 2010, payments on the mortgage stopped in 2011, and the property was set for foreclosure sale in 2014. Rose filed a state court case that stopped the sale; the case was ultimately dismissed. Rose then filed four bankruptcy cases, each stopping a sheriff's sale. After dismissal of the last case, Rose filed an action in state court arguing the statute of limitations for pursuing a foreclosure of the property expired. Defendant filed a counterclaim in 2018 for judicial foreclosure, which the court granted. Rose appealed.

In Texas, a bankruptcy stay will toll the statute of limitations for a foreclosure, so the court had to calculate the length of the bankruptcy stays. In doing so, it found that § 362(c)(3)(A) only terminates the stay as to the debtor, not to estate property. Thus, the shortened stays for repeat filers applied to debtor, not the property. Since the stay was in place against the property, the tolling was for a longer period than argued by Rose, making the judicial foreclosure action timely.

Wal-Mart Stores, Inc. v. Parker (In re Parker), 789 Fed.App'x 462 (5^{th} Cir. 2020)

Subject: judicial estoppel, personal injury, equitable principles

Debtor filed a Chapter 13 in 2009. In 2010, he was injured at work and filed a lawsuit against Wal-Mart in 2011, never disclosing the claim in his Chapter 13 case. In 2014, he completed plan payments and received a discharge. In 2017, Wal-Mart moved to reopen his case, arguing Debtor was now judicially estopped from asserting the claim because of his failure to disclose it. The bankruptcy court found judicial estoppel was met but refused to apply it because it would punish innocent parties like his unsecured creditors, ordering Debtor to pay any recovery to the Chapter 13 trustee. Wal-Mart appealed. Fifth Circuit affirmed, recognizing that judicial estoppel is an equitable doctrine and a court is not required to apply it. Court suggested a better route was to apply judicial estoppel and allow the Chapter 13 trustee to pursue the personal injury claim. Since the outcome was the same for the parties, court accepted bankruptcy court's approach.

PC Puerto Rico, LLC v. Empresas Martinez Valentin Corp. (In re Empresas Martinez Valentin Corp.), 948 F.3d 448 (1^{st} Cir. 2020)

Subject: appeals, Bankruptcy Rules 8002 and 7058

This case is a strong reminder that you must appeal a decision that determines all the underlying claims even if a collateral motion for fees and costs remains undecided. The bankruptcy court found a willful violation of the automatic stay under § 362(a)(3) and awarded damages under § 105(a). Months later, after the court granted Debtor's request for attorneys' fees and costs related to the violation of the automatic stay, the creditor appealed. First Circuit said it was too late to appeal the stay violation but it could consider the propriety of the fee and cost awards.

The court analyzed the deadline to appeal. Per Rule 8002, an appeal has to be filed within 14 days of the judgment. If the judgment requires a separate document under Rule 58, the date the document is entered starts the clock. If a separate document is not entered, it will be deemed entered in 150 days, starting the clock.

Bankruptcy Appellate Panel for the Sixth Circuit

Church Joint Venture, L.P. v. Blasingame (In re Blasingame), 597 B.R. 614 (B.A.P. 6th Cir. 2019)

Subject:	bankruptcy malpractice claim, property of the estate

Debtors' discharges were denied. Plaintiff obtained derivative standing to pursue a malpractice claim against Debtors' original counsel and filed a declaratory judgment action to deem the claim property of the estate. Bankruptcy court found the cause of action accrued postpetition and therefore belonged to the Debtors. BAP affirmed, relying on Underhill v. Huntington Nat'l Bank (In re Underhill), 579 F.App'x 480 (6th Cir. 2014). While state law creates and defines property interests, federal law determines when those interests become property of a bankruptcy estate. Per Underhill, a prepetition injury is necessary for the malpractice claim to have a sufficient prebankruptcy root to bring it into the bankruptcy estate. Although much of the objectionable conduct occurred before or at the time of filing, Debtors' injury, the loss of their discharges, occurred postpetition.

Church Joint Venture, L.P. v. Bedwell (In re Blasingame), 598 B.R. 864 (B.A.P. 6th Cir. 2019)

Subject:	§ 554

Trustee moved to abandon claims in a pending adversary complaint that sought to determine whether certain property held in trusts and/or titled to Debtors' children was property of the estate. Plaintiff had derivative standing to pursue the adversary although the action itself remained estate property. Exercising his business judgment, the trustee moved to abandon the action as inconsequential/burdensome. Trustee estimated the property might be worth $200,000. Considering the $293,000 IRS tax lien and administrative costs, the trustee determined it was not worth pursuing. The creditor objected. Bankruptcy court granted abandonment and BAP upheld, finding the creditor failed to meet its burden of proof that the action would benefit the estate and that trustee had abused his discretion in his decision to abandon.

Eisenberg v. Toledo-Lucas Co. Port Authority (In re BX Acq., Inc.), 2019 WL 1768144 (B.A.P. 6th Cir. 2019)

Subject:	§ 549, cash collateral order

Litigation trustee attempted to recover postpetition payments made by Debtor to the port authority under a facility/service agreement. Court denied recovery, finding that it was immaterial whether the payments were for pre- or postpetition rent because the payments were approved by the cash collateral orders which had been noticed to interested parties.

In re Roberson, 2019 WL 2320809 (B.A.P. 6th Cir. 2019)

Subject: § 365, residential lease

Sixty days after filing Chapter 7, Debtors' lease was deemed rejected under § 365(d)(1). Pursuant to § 365(g), the rejection constituted a prepetition breach of the lease, discharging both pre- and postpetition liabilities. Landlord argued Debtors' continued post-rejection occupancy of the premises made them holdover tenants, giving the landlord a right to recoup the value of Debtors' use and occupancy of the premises under state law, separate from the lease. Court rejected the landlord's argument. Termination of the lease is required for Debtors to be holdover tenants. "Rejection of an unexpired lease under § 365(g) creates a breach of the lease, not a termination." Id. at *5.

Rhiel v. The Bank of New York Mellon (In re Perry), 600 B.R. 584 (B.A.P. 6th Cir. 2019)

Subject: parol evidence, ambiguity in mortgage

Prepetition, Debtors signed a mortgage. Although only Mr. Perry was identified as the "Borrower," Mrs. Perry initialed each page and signed as a borrower in the signature block. Question arose whether she had conveyed her half interest in the property. Bankruptcy court found the term "Borrower" to be ambiguous on the facts, determined that parol evidence could be used to interpret the contract, and after trial, held that Mrs. Perry intended to mortgage her interest. Upon appeal and after two certified questions to the Ohio Supreme Court, the BAP affirmed.

Summarizing the Ohio Supreme Court's conclusion, the BAP stated "[o]verall, the Court concluded that the signature within the contractual terms as a whole must be considered to determine a party's intent to be bound by a contract, and further, it is presumed that a person who signs a mortgage, even if she is not described within the body of the document, is acting as a mortgagor regarding her own property interest so long as there is nothing in the mortgage itself that negates this presumption." Bank of New York Mellon v. Rhiel, 2018 WL 6778145, *4 (Ohio Sup. Ct. 2018).

In re Prather, 2019 WL 3714971 (B.A.P. 6th Cir. 2019)

Subject: § 105, § 349, dismissal, preservation of matter for appeal, service

Pro se debtor with four cases in four years appealed dismissal of her case and imposition of a two year bar on refiling. Debtor claimed she did not receive the deficiency notice advising her about the missing documents. BAP affirmed the dismissal and the filing bar. Since Debtor did not raise the service issue prior to the appeal, it was deemed waived and the BAP declined to create an argument for her. Moreover, the certificate of service attesting to service created a rebuttable presumption of service which Debtor failed to contest.

Dean v. Lane (In re Lane), 604 B.R. 23 (B.A.P. 6th Cir. 2019)

Subject: Rule 9011, sanctions, pro se creditors

After closing, the Deans discovered mold in the basement of the house Debtor sold them. They were awarded over $126,000 and took a lien on Debtor's residence. When Debtor filed Chapter 13, her confirmed plan paid the Deans' claim in full, with interest. The litigious Deans filed various pleadings throughout the case to harass Debtor, including two adversary proceedings which were dismissed. When Debtor sent a settlement offer, specifically designated inadmissible as evidence, the Deans filed the letter and included it in the designation of the record on appeal. Even though they did not sign the settlement letter, they filed it with an improper purpose and therefore violated Rule 9011 and were sanctioned. BAP upheld. While sanctions should be limited to the amount necessary to deter future conduct, and ability to pay is a consideration, the burden of proof was on the Deans, who did not present any evidence of their financial situation. Moreover, they had not been cashing their plan disbursement checks, negating their argument that they did not have the ability to pay. Sanctions upheld.

<u>Smith v. U.S. Bank Nat'l Ass'n (In re Smith)</u>, 2019 WL 4271977 (B.A.P. 6^{th} Cir. 2019)

Subject: finality

Debtor dismissed his Chapter 13 case, only to have a creditor successfully vacate the order to dismiss for the purpose of seeking *in rem* relief. Debtor appealed both the reinstatement and subsequent denial of his motion for reconsideration of the reinstatement order. BAP determined that the order reinstating was not a final appealable order because the parties' substantive rights, specifically the question regarding *in rem* relief, remained to be determined. BAP denied Debtor's motion for leave to appeal and also his request for an interlocutory appeal because it would delay determination of creditor's request for *in rem* relief.

<u>Pasley v. Keats (In re Pasley)</u>, 603 B.R. 6 (B.A.P. 6^{th} Cir. 2019)

Subject: debtor's standing to appeal, trustee's sale of LLC real estate

Court approved trustee's request to sell real estate owned by Debtor's LLC. Debtor objected, arguing it was not estate property. Court overruled his objection, finding trustee stepped into Debtor's shoes as sole owner of the LLC and could exercise Debtor's ownership rights. Debtor appealed and BAP concluded he lacked standing. The LLC owned the real estate and Debtor would not be a person aggrieved by the sale. All proceeds would flow to the LLC's creditors, then to bankruptcy estate.

<u>In re Renegar Golf, LLC</u>, 2019 WL 3318139 (B.A.P. 6^{th} Cir. 2019)

Subject: § 105, equitable powers of the court

A creditor objected to the trustee's final report, arguing that the pro-rata distribution unfairly rewarded a party responsible for Debtor's bankruptcy filing. The bankruptcy court offered the creditor an opportunity to file an adversary seeking equitable subordination, which he declined, and the court overruled the objection. The creditor appealed. The BAP considered whether the bankruptcy court's decision to not use its equitable powers was an abuse of discretion. A bankruptcy court must exercise its equitable powers within the confines of the Bankruptcy Code and Rules, which require an adversary proceeding. The bankruptcy court could not use its equitable powers to sidestep the adversary requirement and therefore did not abuse its discretion in overruling the objection.

McDermott v. Perez (In re Perez), 2019 WL 7341580 (B.A.P. 6th Cir. 2019)

Subject: § 727(a)(4)

Debtor appealed the bankruptcy court's denial of his discharge for making a false oath or account. BAP affirmed. Debtor failed to list his ownership interest in an LLC and its real estate. His explanation that he did not disclose it because it was owned by his other LLC ("Precision") was rejected because, even if true, he had an opportunity at the 341 to disclose it as an asset of Precision. He also failed to list a personal Chase account. Because this nondisclosure was not identified as a trial issue, and Debtor did not expressly or impliedly consent to try the issue, the UST could not use it as a basis for a false oath. However, because it did speak to UST's claim that he failed to disclose all of his income, it could be considered as evidence regarding his income.

Santander Consumer USA Inc. v. Donnadio (In re Donnadio), 2019 WL 6270946 (B.A.P. 6th Cir. 2019)

Subject: § 1325(a)(5)(B)

Creditor objected to confirmation of plan because it did not provide for retention of the creditor's lien on a "910" vehicle until either discharge or payment in full under nonbankruptcy law. Unlike section 3.2 of the plan, section 3.3 does not contain any lien retention language. The bankruptcy court overruled the objection, finding lien retention language unnecessary because a 910 claim is not subject to bifurcation. BAP reversed and remanded, opining that the plain language of § 1325(a)(5) requires lien retention.

Dean v. Lane (In re Lane), 598 B.R. 595 (B.A.P. 6th Cir. 2019)

Subject: interim fee order, finality, appealability, 28 U.S.C. § 158(a)(1) and (a)(3)

Attorney for Chapter 13 debtor filed an interim fee application and a creditor objected. The court approved certain fees and disallowed other portions. Creditor appealed. BAP said order was not final because the bankruptcy court could readjust upon consideration of future fee applications, leaving it outside the BAP's 28 U.S.C. § 158(a)(1) jurisdiction. It also denied leave to appeal under § 158(a)(3) because the appeal did not involve an issue that would "materially advance the litigation."

Rockne's, Inc. v. Dan Mazzola, Inc. (In re Dan Mazzola, Inc.), 2020 WL 529604 (B.A.P. 6th Cir. 2020)

Subject: termination of franchise agreement, contract interpretation

Debtor is a Rockne's restaurant franchisee. Prepetition, Rockne's terminated the franchise agreement primarily for Debtor's continued use and provision of romaine lettuce during an E. coli outbreak when corporate instructed franchisees not to serve any romaine lettuce. When Rockne's filed a lawsuit to enforce the termination agreement, Debtor filed Chapter 11. Rockne's moved to dismiss or convert, arguing that termination of the franchise agreement left Debtor unable to reorganize. Court denied the motion, finding the franchise agreement was not terminated prepetition. BAP upheld.

The franchise agreement permitted Rockne's to immediately terminate the agreement for "a threat or danger to public health or safety . . . ." The court did not disagree that romaine lettuce was a threat at the time during the time period specified. The problem was Rockne's issued the termination letter after the threat had passed, not during the event. Looking at the franchise agreement, the BAP concluded the immediate termination provision was intended to be used in the face of an existing danger or threat, not a past danger or threat. "Allowing Rockne's to use the immediate termination clause [as it did in this case] would allow Rockne's to side step the notice and opportunity to cure requirements [in other sections of the franchise agreement.]" Id. at *6.

Orlandi v. Leavitt Family Ltd. P'ship (In re Orlandi), 612 B.R. 372 (B.A.P. 6th Cir. 2020)

Subject: § 524, discharge injunction, personal guaranty

Debtor was the personal guarantor of a commercial property lease. Debtor and his wife filed bankruptcy, included the lessor as a creditor, and received a discharge. Postpetition, the lease was extended for five years. Debtor signed the extension in his corporate capacity. The corporation defaulted on the lease and lessor filed suit against Debtor. He argued the debt was discharged. Bankruptcy court agreed, found a willful violation of the discharge injunction, and awarded damages. Lessor appealed and BAP affirmed in part and reversed in part.

Not all courts find that personal guarantees are discharged. When Debtor filed, the corporation was current on lease payments, thus no claim existed. It was the corporation's postpetition default that created a liability for Debtor. BAP rejected, siding with the other line of cases that conclude a personal guaranty is a contingent claim discharged in bankruptcy. Relying on the Supreme Court's recent Taggart v. Lorenzen decision, *supra*, BAP found that the split of authority provided grounds for the creditor to understand it was acting lawfully, negating any willful violation of the stay, and reversed the bankruptcy court's finding of a willful violation and damage award.

Johnston v. Hildebrand (In re Bagsby), 2020 WL 2025906 (B.A.P. 6th Cir. 2020)

Subject: Rule 9011 sanctions, § 109, eligibility to be a debtor

Attorney was sanctioned for filing two skeletal chapter 13 petitions for a deceased debtor ten years after her death at the request of her daughter, the administratrix. The cases were filed to stop a foreclosure on real estate occupied by the daughter but titled and mortgaged to her deceased mother. Court based sanctions on counsel's signing a petition when he had not researched the eligibility of a deceased debtor. It noted that nowhere in the papers filed with the court did it indicate that the debtor was deceased, nor was anything filed with the court signed in a representative capacity. It found that counsel should not have objectively believed that a deceased debtor could complete a chapter 13 plan. BAP affirmed.

Bentley v. OneMain Financial Grp., LLC (In re Bentley), 2020 WL 3833069 (B.A.P. 6th Cir. 2020)

Subject: § 524(a)(2)

Debtor owed creditor on a 2001 vehicle he alleged was "scrap." He stated an intention to surrender the vehicle but it remained in his possession. Post-discharge, he inquired of creditor about releasing the lien so he could dispose of it and the creditor provided options, none of which Debtor pursued. Debtor reopened his case and moved to find creditor in violation of the discharge injunction. Bankruptcy concluded the creditor's request for payment to release the lien was not an attempt to coerce payment on a discharged debt. BAP affirmed. "The lien survived discharge and was enforceable under state law to the extent of the Vehicle's value." Id. at 11. Record showed vehicle had nominal value and creditor's conditioning release of the lien on proof of value, and payment of that amount, did not violate the discharge injunction.

AllCare Med. Serv., LLC v. LaGroux (In re LaGroux), 2020 WL 3397838 (B.A.P. 6th Cir. 2020)

Subject: justiciability

Plaintiff filed a declaratory action against the chapter 7 trustee regarding Debtor's interest in Plaintiff. The bankruptcy court held that state law and the operating agreement controlled the trustee's interest and since Debtor transferred his interest prepetition, the estate only had an economic interest, to be valued at a later time. The trustee appealed, arguing that federal law would play a part in valuation of the estate's interest. BAP dismissed appeal as premature because the court had not considered valuation and therefore any discussion of how federal law factors into valuation was not ripe.

Riddle v. Greenberger (In re Riddle), 2020 WL 3498438 (B.A.P. 6th Cir. 2020)

Subject: § 707(a), § 105, § 349, bad faith dismissal, filing bar

After chapter 7 trustee and UST filed motions to dismiss for *pro se* Debtor's failure to cooperate, serial filings, and inaccuracies, the bankruptcy court dismissed the case and imposed a three year filing ban. Debtor appealed and BAP affirmed. *Pro se* debtors may have some latitude but must still fulfill their statutory duties, provide accurate information, and proceed in good faith. The bankruptcy court cited numerous facts supporting cause for dismissal, supporting the three year ban imposed.

Bankruptcy Appellate Panels - Other

Todeschi v. Juarez (In re Juarez), 603 B.R. 610 (B.A.P. 9th Cir. 2019)

Subject: § 1129(b)(2)(B), absolute priority rule, exempt property

Deciding an issue involving split authority, the BAP confirmed an individual Chapter 11 debtor's plan over creditor objections. Creditors argued that Debtor's new value contribution of $15,000 did not constitute sufficient "new value" to meet the exception to the absolute priority rule. In part, they argued that exempt property counted in determining the required value of the contribution. Court rejected, finding that exempt property is property that a debtor retains under exemption statutes, not "under the plan" or "on account of debtor's interest." Plus, factoring exempt property into the equation would "effectively make those assets available to creditors." Id. at 623.

Schatz v. Access Grp., Inc. (In re Schatz), 602 B.R. 411 (B.A.P. 1st Cir. 2019)

Subject: § 523(a)(8)

BAP highlighted the different tests for determining student loan dischargeability, approving the bankruptcy court's "totality of the circumstances" review. Although Debtor had medical issues and was "spartan" in her living, the bankruptcy court was influenced to deny discharge based on Debtor's free and clear home ownership. BAP remanded, finding bankruptcy court applied too much weight to the home equity, especially in light of the purpose of exemption statutes and the Supreme Court decision in Law v. Seigel, 571 U.S. 415 (2014). BAP indicated the bankruptcy court should have considered Debtor's future earning potential and the impact of her medical condition on future employment prospects.

Diamond Enter., Ltd., LP v. Younessi (In re Younessi), 601 B.R. 815 (B.A.P. 9th Cir. 2019)

Subject: § 1144, revocation of a confirmation order for fraud

A creditor obtained a modification of Debtor's Chapter 11 plan. 179 days later, it sought to revoke the confirmation order for fraud. The issue was whether the modification reset the 180 day window for a revocation action based on fraud or whether the 180 days should be calculated from the original confirmation order. The bankruptcy court sided with the Debtor, relying on a 9th Circuit opinion. Dale C. Eckert Corp. v. Orange Tree Assoc., Ltd. (In re Orange Tree Assoc., Ltd.), 961 F.2d 1445 (9th Cir. 1992). The BAP distinguished that precedent and sided with the creditor. Unlike the modification in the Orange Tree case, which involved "housekeeping" changes, the modification at issue made material and substantive changes that impacted creditors, entitling them to the full 180 day period, rendering the revocation action timely.

U.S. Bank N.A. v. Vertullo (In re Vertullo), 610 B.R. 399 (B.A.P. 1st Cir. 2020)

Subject: § 1322(c)(1), binding authority of BAP, stare decisis

Section 1322(c)(1) allows a debtor to cure a mortgage as long as the property has not been sold at a foreclosure sale conducted in accordance with nonbankruptcy law. Prepetition, Debtor's property was sold at foreclosure to a third party but the bank had not recorded the deed. Against the holding of a previous BAP case, which found a debtor lost the right to cure when the hammer fell, Debtor argued the court was not bound by the previous BAP decision and the sale was complete only when the deed was recorded. Bankruptcy court agreed and confirmed her plan proposing to cure the mortgage. Bank appealed and BAP reversed, applying stare decisis.

The BAP considered three situations limiting stare decisis: counter authority from a higher court, later reasoning or developments that suggest the previous court would issue a different decision, and being "dead wrong." The BAP found ample support and soundness in the "gavel rule," which interprets "sale" to mean the auction, rather than the entire foreclosure process, and found no reason to depart from its previous decision.

Northern District of Ohio

FirstEnergy Solutions Corp. v. Bluestone Energy Sales Corp., 2019 WL 3423157 (N.D. Ohio 2019)

Subject: 28 U.S.C. § 157, withdrawal of reference

Discretionary withdrawals of the reference order are permitted for "cause," governed by factors including "judicial economy; uniformity in bankruptcy administration; reduc[tion] of forum-shopping and confusion; conserving debtor and creditor resources; expediting the bankruptcy process; whether jury trial has been requested; and whether the proceeding is core or non-core." The party moving for withdrawal bears the burden of proof. Here, bankruptcy court had not determined whether the underlying matter was core/non-core, making the withdrawal motion "untimely and premature." District court further found the matter was not "trial-ready," the bankruptcy court had a much greater familiarity with the case, and withdrawal would cause delay, all militating against withdrawal regardless.

Taylor v. Deutsche Bank Nat'l Tr., 2019 WL 5684466 (N.D. Ohio 2019)

Subject: Rule 8007, stay of order granting relief from stay

Bankruptcy court granted relief from stay and abandonment to Defendant mortgage company which been deeded Debtor's home following a state court foreclosure sale. Although district court noted that Rule 8007 requires a party to first seek a stay in the bankruptcy court, because Debtor purported it to be an "emergency" motion due to a pending eviction, the district court considered and denied it. Debtor was unlikely to succeed on the merits because the federal court could do nothing to change the state court foreclosure action. Defendant had a right to possession of the property and the public interest lay with supporting that right, not Debtor's improper possession.

Textron Financial, Inc. v. Bash, 2019 WL 3290257 (N.D. Ohio 2019)

Subject: § 544, § 550, fraudulent transfer, recovery

Prepetition, Debtor had a $17.5 million line of credit that it drew on, paid down, and drew on again, to the total of $316 million. Trustee sought to avoid the transfers and recover the $316 million, which the creditor opposed. Noting the difference between avoidance and recovery, Court found for creditor, stating "an inequitable windfall might occur should the Court allow the Trustee to recover for each separate transfer without considering the nature and substance of the credit facility." Debtor's borrowing never exceeded the credit line and all future extensions depended on repayment.

In re Felix, 2020 WL 759540 (N.D. Ohio 2020)

Subject: compromise, claims, standing, litigation counsel

Debtors had claims pending when they filed a chapter 7 case, included as assets, that were settled during the case. The trustee filed a motion to compromise. Debtors and litigation counsel, who had not filed a proof of claim in the bankruptcy case, objected to the compromise. The bankruptcy court struck counsel's objection. Since counsel failed to file a claim, it did not have standing to object. Reviewing the matter *de novo,* district court agreed. Counsel had an equitable lien on the settlement proceeds that is not enforceable in bankruptcy. Since it did not file a proof of claim, it would not be entitled to a distribution from the estate, leaving it with no pecuniary interest in the outcome.

Smith v. U.S. Bank, N.A., 2020 WL 607638 (N.D. Ohio 2020)

Subject: staying pending appeal

Debtor sought a stay pending appeal. The bankruptcy court had reinstated his chapter 13 case and granted *in rem* relief to U.S. Bank, the entity seeking to sell his residence in a 2005 state court foreclosure case. District court denied his request for a stay. First, it concluded Debtor was unlikely to succeed on the merits. Relying on other circuit decisions and a Sixth Circuit BAP case, it opined Debtor was unlikely to show he had an absolute right to dismiss his case. US Bank was entitled to relief because there was no evidence that Debtor could pay the $800,000+ owed, plus it had demonstrated that Debtor used the bankruptcy filing to hinder/delay, entitling it to *in rem* relief. The harm to Debtor was not irreparable because he had been living in the home for over a decade without paying the mortgage. The foreclosure sale was a result of his failure to pay, not the bankruptcy court's decisions. US Bank would be harmed by stopping the sheriff sale, as would interested purchasers. The public has an interest in seeing debt paid and protecting the integrity of the bankruptcy system.

Taylor v. Deutsche Bank Nat'l Tr. Co., 2020 WL 502415 (N.D. Ohio 2020)

Subject: preclusion, Rooker Feldman, bankruptcy court jurisdiction

Plaintiff and his wife took out a mortgage in 2006, defaulted in 2007, and are still litigating issues with the mortgage company. In 2018, after an eviction order in state court, they filed a chapter 7 case and an adversary proceeding asserting six claims. Several principles in the case are notable. First, the bankruptcy court submitted proposed findings of fact and conclusions of law on the non-core claims. Second, the bankruptcy court and district court dismissed Plaintiff's count concerning the validity of the mortgage by applying collateral estoppel. Third, both courts dismissed Plaintiff's TILA claim but on different grounds. The bankruptcy court applied the Rooker-Feldman doctrine but district court rejected it, declaring Rooker-Feldman only applies when the injury arises from the state court judgment itself. It relied on preclusion for dismissal of the TILA claim. Other claims failed because (1) upon transfer of title to the mortgage company, Plaintiff could not maintain an action to quiet title; (2) Plaintiff had not lived in the home long enough to assert an claim for adverse possession under state law, and (3) Plaintiff failed to show how any of Defendant's conduct was extreme or outrageous for an intentional infliction of emotional damage claim.

District Courts - Other

Stevens v. Sharif, 2019 WL 4862171 (N.D. Ill. 2019)

Subject: standard of care, Stern objections

Facing a $655,000 judgment, Sharif filed bankruptcy, represented by Stevens. The judgment creditor filed an adversary to declare Sharif as the true owner of his mother's trust. Discovery abuse eventually led to a judgment against Sharif in the adversary. On appeal, Stevens raised a Stern objection that the bankruptcy court did not have jurisdiction to enter a final judgment. Eventually, this led to the Supreme Court decision in Wellness Int'l Network, Ltd. v. Sharif, 727 F.3d 751 (7th Cir. 2013) finding Stern challenges could be waived and parties could consent to bankruptcy court jurisdiction. Stevens later sued Sharif for unpaid legal fees and Sharif countered with a malpractice claim, in part based on Stevens' failure to timely raise the Stern issue. Although eventually concluding Stevens did not commit malpractice, the court found that failing to raise the Stern issue did violate Stevens' standard of care to Sharif. If the bankruptcy court had merely made recommendations, the district court would have reviewed those findings *de novo*. However, when it issued a final order, any factual findings are reviewed under the more stringent "clear error" standard.

Verizon Wireless Personal Commc'n v. Bateman (In re Bateman), 2019 WL 4644385 (M.D. Fla. 2019)

Subject: discharge violation, arbitration clause

Debtor moved to hold Verizon in contempt for an attempt to collect a discharged debt. Verizon wanted to arbitrate the matter per its customer agreement. Court denied arbitration, saying the dispute did not arise from the customer agreement and finding authority to enforce its own orders.

Moore v. Automotive Fin. Corp., 2019 WL 3323328 (M.D. Ala. 2019)

Subject: § 524(a), discharge injunction

Plaintiff was a discharged debtor who had included a debt to Defendant in his bankruptcy. Post-bankruptcy, Plaintiff sought credentialing from a national company providing access to wholesale auto auctions. The credentialing was refused because Defendant had a block against Plaintiff. Defendant extracted $2,000 from Plaintiff and removed the block. Plaintiff filed an adversary complaint alleging Defendant violated the discharge injunction. The bankruptcy court dismissed the amended complaint for failure to state a claim and the district court affirmed. Under the recent Taggart v. Lorenzen decision from the Supreme Court, no violation occurs when there is "an objectively reasonable basis for concluding that the creditor's conduct might be lawful" as was the case here. Only Debtor's personal liability on the debt is extinguished in bankruptcy, the debt does not evaporate. No one is required to do business with a discharged debtor, many reasons may drive repayment of a discharged debt, and continuation of a business relationship may be contingent on payment of a discharged debt. Under these facts, Defendant's actions may have been lawful.

Touroo v. Terry (In re Touroo), 2019 WL 2590751 (E.D. Mich. 2019)

Subject: § 1307(c), § 1322(d)

Debtors confirmed a 60-month plan, made their first post-confirmation payment on August 6, 2013, and made all payments thereafter. On August 23, 2018, the Chapter 13 trustee moved to dismiss because Debtors failed to turn over their 2017 tax return and were now beyond the five year repayment period. They paid the $1,417 refund to the trustee on August 27, 2018. Because the payment was after the five year period, the court required them to either modify or seek a hardship discharge, finding no discretion to allow a payment outside the sixtieth month of the plan. It dismissed the case after finding Debtors' modification to change the first payment due date to August 31, 2013 was untenable. Debtors appealed. District Court concluded that the bankruptcy court has "discretion to allow debtors to cure a default after the end of the five-year period." Id. at *3. Section 1307(c) does not require dismissal for default. Although a court cannot confirm a plan that is longer than five years and cannot modify to pay longer than five years, there is no "express requirement" in § 1328 mandating all payments occur in the five year period.

Cheikes v. Wlodarczyk (In re Wlodarczyk), 604 B.R. 863 (S.D. Cal. 2019)

Subject: § 523(a)(2), issue preclusion

Plaintiff argued his state court judgment should be given preclusive effect in his dischargeability action. Court disagreed. First, the nondischargeability waiver in the judgment was unenforceable. Moreover, in California, stipulated judgments are generally not eligible for issue preclusion because they are not the result of litigation. The California judgment did not demonstrate that issues material to the fraud claim were considered and therefore did not bar the § 523(a)(2) action. District court also upheld the bankruptcy court's decision that Plaintiff failed to prove his § 523(a)(2) claim at trial, finding its conclusions supported by the record.

ECMC v. Metz, 2019 WL 1953119 (D. Kan. 2019)

Subject: § 523(a)(8)

Bankruptcy court discharged accrued interest on Debtor's student loan but not the principal. Both parties appealed. There was no dispute that Debtor could pay $200-$300 per month toward her loans but could not pay the full $565 per month to completely pay the loan off in twenty-five years. Upholding the bankruptcy court, the district court refused to require Debtor to participate in the income based repayment plan because she would not be "repaying" the loan. The lower payment did not cover the interest on the loan and the balance would continue to increase, leaving Debtor without a fresh start. However, district court also rejected Debtor's argument that discharge must be all or nothing.

Bankruptcy Courts for the Northern District of Ohio

Peterson v. Phares (In re Peterson), 609 B.R. 704 (Bankr. N.D. Ohio 2018) (J. Woods)

Subject: Rule 7012, dismiss, jurisdiction, breach of contract

Defendants loaned Plaintiff-Debtor $30,000 in 2013 to pay off her mortgage. Payments were $250/mo and the loan was to be repaid if Debtor sold the house. Debtor defaulted and Defendants filed two state court lawsuits requesting judgment for the balance of the loan. When Debtor filed a Chapter 13 case in 2017, Defendants filed a claim for $25,950 and claimed $2,775 as priority. Debtor filed an adversary objecting to the claim. In considering Debtor's motion for judgment on the pleadings, court found (1) Defendants' improper acceleration of the note was not a material breach and did not excuse Debtor's performance, (2) the claim amount for the total payments due was correct ("it is fundamental to bankruptcy practice that a claim filed based upon an installment contract includes unmatured amounts not yet due"), and (3) the claim was for a loan, not a deposit, and not entitled to priority under § 507(a)(7). Court *sua sponte* dismissed Debtor's other claims, related to a separate transaction, for lack of jurisdiction because they did not arise in, under or relate to the bankruptcy case.

In re Clark, 601 B.R. 621 (Bankr. N.D. Ohio 2019) (J. Koschik)

Subject: O.R.C. § 2329.66(A)(10)(c) and (e), inherited IRA funds

Debtor-wife inherited an IRA from her sister and was the named beneficiary on her sister's pension. After her sister died, Debtor-wife took the pension in a lump sum distribution, paid directly into the inherited IRA account. Debtors exempted the entire amount in the account and the trustee objected. Distinguishing between rollover distributions and rollover contributions, based in part on I.R.C. § 408(d)'s differentiation of inherited IRAs from traditional IRAs, the bankruptcy court concluded the pension distribution was not exempt under O.R.C. § 2329.66(A)(10)(c) because Debtors did not make the contributions. The inherited IRA account not exempt under O.R.C. § 2329.66(A)(10)(c) because receipt of the benefits was not dependent on Debtors' illness, disability, death, retirement or age. However, the court found the account was fully exempt under O.R.C. § 2329.66(A)(10)(e). Although the trustee argued the exemption only covered the inherited IRA portion, the court found plain language of the exemption statute included "any assets held in" the account.

Murrell v. Edsouth (In re Murrell), 605 B.R. 464 (Bankr. N.D. Ohio 2019) (J. Gustafson)

Subject: § 523(a)(8)

Court found that by adjusting the $290 - $550 spent on DirecTv, internet and phone, Debtor could make the $63-94 payments under the income contingent repayment plan while maintaining a minimal standard of living. Student loans were therefore not dischargeable.

In re FirstEnergy Solutions Corp., 606 B.R. 720 (Bankr. N.D. Ohio 2019) (J. Koschik)

Subject: § 1123(b)(6), disclosure statement, nonconsensual third party releases

Court denied approval of the debtors' disclosure statement, finding the nonconsensual third party release was too broad. To start, whether the release made the plan "patently unconfirmable" was a legal issue invoking review similar to a 12(b)(6) motion to dismiss, appropriate for consideration at the disclosure stage of the case. "Non-consensual third party releases of nondebtors are the exception, not the rule" and treatment varies among circuits. Some circuits do not permit the permanent release of nondebtor third parties through a plan, finding such authorization beyond a bankruptcy court's powers, while others will permit releases if the affected nondebtors accept the plan terms. Circuit courts, as a whole, "either reject [the releases] absolutely or approve[] them reluctantly."

In the Sixth Circuit, approval of third-party releases is guided by seven considerations: "(1) the identity of the interest between the debtor and the third-party, usually an indemnity relationship, such that a suit against the non-debtor is, in essence, a suit against the debtor or will deplete the assets of the estate; (2) the non-debtor has contributed substantial assets to the reorganization; (3) the injunction is essential to reorganization, namely the reorganization hinges on the debtor being free from indirect suits against parties who would have indemnity or contribution claims against the debtor; (4) the impacted class, or classes, has overwhelmingly voted to accept the plan; (5) the plan provides a mechanism to pay for all or substantially all of the class or classes affected by the injunction; (6) the plan provides an opportunity for those claimants who choose not to settle to recover in full; and (7) the bankruptcy court made a record of specific factual findings that support its conclusion." Class Five Nevada Claimants v. Dow Corning Corp. (In re Dow Corning Corp.), 280 F.3d 648, 658 (6^{th} Cir. 2002).

The release was problematic in several regards. Many of the released claims did not involve any potential for indemnity by Debtors, but released claims held strictly against non-debtor third parties. And it covered periods of time where Debtors were not in control of the properties or assets, relieving Debtors' corporate predecessors. Also, there was no fund created for payment of the released claims nor provision for creditors who did not consent.

In re Allied Consolidated Industries, Inc., 602 B.R. 645 (Bankr. N.D. Ohio 2019) (J. Gustafson)

Subject: § 505, O.R.C. § 5739.02(B)(42)(g), § 5741.02(C)(2), manufacturing exemption

State of Ohio filed a tax claim, primarily for use taxes on Debtor's scrap operations. The trustee objected, arguing that Debtor was entitled to a manufacturing exemption. The court considered the "point of commitment" of the materials to the manufacturing process, as well as the equipment used in the process, to determine whether the exemption applied. Court concluded that manufacturing began, and the exemption applied, when Debtor first started dismantling offsite structures or began processing semi-broken down materials at its Youngstown plant and continued through creation of a marketable scrap product. Equipment used in this process was also protected from the use tax.

In re Zimpher, 609 B.R. 712 (Bankr. N.D. Ohio 2019) (J. Gustafson)

Subject: § 726(a)(3), § 502(e), § 509

Very unusual facts. Debtors filed a Chapter 7 case and it was closed as a no-asset case. They later reopened to add an asset, resulting in issuance of a claims bar date. Trustee paid the filed claims and filed a final report. Subsequently, one creditor returned funds to the trustee because Debtors paid the claim after it was filed. Trustee then sent a notice of the surplus funds to creditors and gave them 30 days to file a claim. Chase filed a claim on day 31. Debtors argued the surplus funds should be refunded to them and the bankruptcy court disagreed. Debtors were not entitled to contribution or reimbursement under sections 502(e) and 509 because no other parties were liable on the claim. The refund was property of the estate, subject to distribution under § 726. Late-filed claims have priority over refunds to a debtor and the trustee's informal 30 day claims deadline could not alter the Code's distribution scheme.

Lowery v. Iftiu (In re Iftiu), 608 B.R. 677 (Bankr. N.D. Ohio 2019) (J. Gustafson)

Subject: § 523(a)(2), (4) and (6), Ohio Business Opportunity Purchasers Protection Act ("OBOPPA")

Plaintiffs entered into a prepetition agreement with Debtor for a yogurt franchise, agreeing to pay $135,000. They paid $80,000 down, plus some monthly payments on the balance, and spent money for required signage before the business closed. At trial, the court found Debtor made numerous misrepresentations, constituting fraud, and declared the debt nondischargeable. At the time of the agreement with Plaintiffs, Debtor was in negotiations to buy the yogurt store from a third party, he did not own the store. The agreement alleged a transfer of assets from Debtor's LLC to Plaintiffs but there was no proof that his LLC ever owned the assets. He also misrepresented the absence of liens against the assets. Although he alleged he was not making anything on the deal, there was a $60,000 difference between his purchase price from the third party and the $135,000 price he charged Plaintiffs. The court declined to rule on Plaintiffs' claim under the OBOPPA, finding it raised a novel issue better left to state court. It dismissed that claim without prejudice.

McDermott v. McDonald (In re McDonald), 614 B.R. 801 (Bankr. N.D. Ohio 2020) (J. Koschik)

Subject: § 727(a)(4)(A) and § 727(a)(5)

Debtor was a former loan officer and bank president. In 2010, he borrowed $165,000 from a bank client without the bank's knowledge, later defaulting. He also used another bank client's identity for a $225,000 line of credit, unbeknownst to the client or bank, in early 2011. When he filed for bankruptcy in 2015, the UST sought to deny his discharge for making a false oath/statement about what happened to the monies and failing to explain the loss of the $390,000 in assets. Court denied summary judgment under § 727(a)(4)(A), finding Debtor's intent in making a false oath/statement was a question of fact. It granted the motion under § 727(a)(5). Even though the funds were taken several years before Debtor's bankruptcy filing, the amount was substantial and related to the estate. Debtor's inability to explain what happened to the proceeds of the loan and line of credit warranted denial of discharge.

Other Bankruptcy Courts

In re Malinowski, 2019 WL 1504392 (Bankr. N.D. Ill. 2019)

Subject: special provisions, Rule 9009(a), national form plan

At a creditor's urging, Debtor added special provisions to his plan regarding treatment of the creditor's claim. Court refused to confirm the plan with the requested language. Creditor wanted a statement reinforcing the interest and late charge provisions, which court found unnecessary because the debtor was obligated to pay the debt and the plan did not propose any change to the terms of the contract. The court also rejected creditor's request for lien retention language because it created rights above and beyond those provided for by the Code. Since the debt was not a long-term debt, it was dischargeable, and demanding nondischargeability was therefore counter to the Code. Creditor also wanted language that said its claim remained intact even if relief from stay was granted, which was directly opposed to provisions in section 3.1 of the plan stating payments will cease and the claim will be treated as unsecured upon relief from stay. Court found this provision was an impermissible alteration of the form plan under Rule 9009. Court also refused to allow the $550 attorney fee requested by creditor because its objection to confirmation was not supported by the Code or Rules.

In re Hazlett, 2019 WL 1567751 (Bankr. D. Utah 2019)

Subject: "no money down" chapter 7, bifurcated fee agreement

On UST's motion for sanctions, the court analyzed propriety of a bifurcated fee agreement where Debtor paid $0 down prepetition, then signed a postpetition agreement to pay $2,400 over ten months. There was no concern about the quality of the services, Debtor's case was unremarkable and timely discharged. Court allowed the fee arrangement, finding sufficient disclosures and no ethical violations. It acknowledged how difficult it is for a cash-strapped debtor who cannot afford prepetition filing fees and retainers generally required to file bankruptcy. It outlined several guiding principles, including:

- Such agreements must be in the client's best interest, not counsel's;
- All fees and charges must be reasonable;
- All fees must be fully disclosed;
- If a client elects to proceed *pro se* or with other counsel, filing counsel must immediately comply with local rules on substitution and withdrawal;
- The attorney must provide appropriate and adequate disclosures, options and explanations; and
- The client must give informed consent.

In other thoughts, the court distinguished unbundling services from bifurcation, refusing to change its position on the former. Although it declined to sanction counsel for using a factoring service, BK Billing, in selling the receivable for $1,800, it discouraged use of the same unless counsel fully complied with a state ethics opinion which requires a client's fully informed, written consent, including non-dischargeability of the fees; making the same financial offer to the client to be paid by the factoring company; and advising that if a dispute between the client and factoring company arises, the lawyer cannot represent client. It further refused to sanction counsel's use of Adobe Sign to obtain Debtor's signature on certain documents. While preferring holographic signatures, court said pending any change to the local rule, it would consider issues involving e-signatures case-by-case.

<u>Feldman v. People First Fed. Credit Un. (In re White)</u>, 2019 WL 2067360 (Bankr. E.D. Penn. 2019)

Subject: § 549, § 541(c)(2), earmarking

Minutes before filing Chapter 7, Debtor received nearly $46,000 from a 401(k) hardship withdrawal. She gave it to her attorney to pay to stop her home's foreclosure, which he paid to the mortgagee after the case was filed. The trustee commenced an adversary seeking to recover the payment as an avoidable postpetition transfer under § 549(a). Court rejected mortgagee's argument that the funds were earmarked and therefore did not constitute property of the estate. Once withdrawn, the funds were non-exempt property of the Debtor, and thereby part of the estate. The funds came from Debtor's 401(k) account, not a new lender, defeating the earmarking defense, entitling the trustee to recover the transfer.

<u>Gavin/Solmonese LLC, Liquidation Tr. for the Citadel Creditors' Grantor Tr. v. Citadel Energy Partners, LLC (In re Citadel Watford City Disposal Partners, LP)</u>, 603 B.R. 897 (Bankr. D. Del. 2019)

Subject: derivative standing

Looking at Delaware, Wyoming and North Dakota law, Delaware bankruptcy court concluded that the liquidation trustee did not have standing to pursue an action for breach of fiduciary duty. The action was originally filed by the creditors' committee, and later assigned to the liquidation trustee, who substituted in as plaintiff. Court found that the committee did not have standing to pursue the action because it was not a partner of a limited partnership or a member of a limited liability company at the time it was filed, as required by state law.

Napolitano v. Rumbin (In re Rumbin), 2019 WL 3890317 (Bankr. D. Conn. 2019)

Subject: § 109(e), Chapter 13 eligibility, previously discharged mortgage liens

Court had to consider how to value mortgage liens previously discharged in a Chapter 7 case for the purposes of Chapter 13 eligibility. The Chapter 13 trustee sought dismissal, arguing Debtors exceeded the secured debt limit. There is no dispute that a claim exists, because the lien holder has recourse against the property. Court found that a § 506(a) valuation is required. Any portion of the lien that is secured will count toward the debt limit. However, unsecured portions will not count toward the unsecured limit because Debtors did not have any personal liability on the claims.

In re Morrison, 2019 WL 4732375 (Bankr. E.D.N.C. 2019)

Subject: § 1322(b)(1), discrimination, separately classified unsecured claim

Debtor, the cosigner on a student loan debt with her daughter, separately classified the student loan to be paid in full through her Chapter 13 plan while other unsecured claims were paid approximately thirteen percent (13%). The trustee objected and the court sustained the objection. The daughter was a full-time student, the loan was in deferment and no payments were due. Daughter was the primary obligor and prepayment would result in a windfall to her, through reduction of the $8,000 in interest that would accrue and elimination of the principal balance, to the detriment of Debtor's other unsecured creditors.

In re Vanderpol, 606 B.R. 425 (Bankr. D. Col. 2019)

Subject: Rule 3002(c)(6), omitted creditor, late claim

Debtor failed to list American Express ("AmEx") on his creditor matrix. AmEx filed a claim one month after the bar date and moved to extend the bar date under Rule 3002(c)(6) to deem the claim timely. The Chapter 13 trustee opposed the motion. Literally, the rule suggests that relief is limited to situations where the entire matrix is filed late, not a case where a creditor is inadvertently omitted from the matrix. After looking at legislative history and finding that a literal interpretation would render the rule virtually meaningless, the court read the rule "to apply whenever the debtor fails to timely file a *full and complete* Creditor Matrix."

Yip v. Google, LLC (In re Student Aid Ctr., Inc.), 608 B.R. 583 (Bankr. S.D. Fla. 2019)

Subject: § 550, subsequent transferee, avoided transfer

Google was the subsequent transferee of a transfer that had been declared avoidable in an action against the original transferees, two by default judgment and one against a pro se litigant. Google argued the trustee had to prove avoidability of the transfer in his action to recover the transfer from it. Court disagreed. Recovery and avoidability are distinct, trustee only needs to prove avoidability if it was not previously determined. Google's due process rights were not impinged by its lack of participation in the previous action because it could still raise defenses to recovery.

In re Schemelia, 607 B.R. 455 (Bankr. D. N.J. 2019)

Subject: Rule 9011

Counsel filed a Chapter 13 case and listed Debtor's ownership of property which had sold at a foreclosure sale. The redemption period had expired, the transfer to the new owner was recorded and a writ of possession had issued, yet counsel proposed a plan to retain the property, proposing payments insufficient to cure and maintain even if retention of the property was possible. Creditor moved for sanctions and court granted, finding counsel had failed to conduct a reasonable inquiry of the facts prior to filing. Although the creditor did not comply with the "safe harbor" provision in Rule 9011, the court had the inherent ability to impose sanctions regardless.

In re DiStefano, 611 B.R. 100 (Bankr. W.D. Mich. 2019)

Subject: standard of review for discharge violations

Creditor sold a surrendered car and, after discharge, sent a demand letter for the deficiency balance. Debtor sought contempt against the creditor. Court evaluated a creditor's alleged violation of the discharge injunction in light of the Supreme Court's Taggart v. Lorenzen decision. Before Taggart, the review standard was akin to strict liability. After Taggart, court considers whether there is "no fair ground of doubt" that the creditor's action violated the discharge and no "objectively reasonable basis for concluding" the action is permissible.

The court found the demand letter violated the discharge injunction in its attempt to collect a discharged debt. However, the creditor may have reasonably understood that its disclaimer sufficiently insulated it from contempt liability. Combined with the fact the creditor sent only one letter and also sent it to debtor's counsel, "fair grounds" existed that the creditor may have thought its action would not violate the discharge order.

In re Anderson, 607 B.R. 133 (Bankr. D. Mass. 2019)

Subject: § 365(p), assumption of vehicle lease in Chapter 7

Debtor wanted to assume his lease and notified the creditor per § 365(p). Creditor required Debtor to reaffirm the debt, which Debtor argued was unnecessary. The court discussed the interplay between assumption and reaffirmation. After looking at the different timing elements and separate statutory provisions for both, it concluded reaffirmation and assumption are two separate species and reaffirmation of a lease is not warranted. To dodge the sticky question of whether assumption of the lease creates an obligation that survives discharge, the bankruptcy court suggested the following procedural mechanism: a debtor's Statement of Intention should indicate the debtor's intent to assume the lease and the debtor should notify the creditor per the statute. If the parties reach an agreement, a party should file a motion to approve the assumption with language that declares it a postpetition debt.

Swafford v. King (In re Swafford), 604 B.R. 46 (Bankr. N.D. Iowa 2019)

Subject: § 523(a)(8)

Court employed the "totality of the circumstances" test to determine whether Debtors' student loans imposed an undue hardship. Three key factors drive the review: "(1) the debtor's past, present, and reasonably reliable future financial resources; (2) the debtor's reasonable and necessary living expenses; and (3) any other relevant facts and circumstances." Id. at 49 (citation omitted). Court found that Debtors could repay three of the smallest loans but discharged the remaining five loans as an undue hardship. (The 8th Circuit does not allow for partial discharge of a loan, the loan is either dischargeable or it is not.)

Nitcher v. Educ. Credit Mgmt. Corp. (In re Nitcher), 606 B.R. 67 (Bankr. D. Oregon 2019)

Subject: § 523(a)(8)

Debtor, a 38 year old single criminal defense attorney in a small firm, sought dischargeability of three private student loans totaling $52,000. (Note: Debtor previously settled her nondischargeability claim against ECMC which held nearly $200,000 in loans, stipulating to nondischargeability and participation in the income contingent repayment plan at $479/mo.) She earned approximately $64,000 per year. She lived in a one bedroom condo, drove a 2012 car, and had no retirement or savings. Schedule I indicated her expenses exceeded her income by $474/mo. Although the court found two expenses excessive, a $120/mo premium on a life insurance policy to benefit her mother and $350/mo in transportation expenses, it concluded that if she had to repay the loans (at $970+/mo), she would not be able to maintain a minimal standard of living. The court also found her state of affairs likely to persist, relying heavily on Debtor's testimony concerning her lack of experience in civil matters and the current job market. Finally, the court determined Debtor had made good faith efforts to repay the debt. It cited more than $18,000 paid to this creditor, as well as significant amounts to other student loan creditors, a 401(k) cash out to pay off a state student loan and interception of federal refunds during periods of default. Court noted that no income contingent payment plan was available with this creditor. In the end, the court concluded that $150/mo of the excessive expenses could be used to repay this creditor and discharged all but $16,500 of the debt ($150 x 110 months, the repayment term remaining on one of the loans).

In re Family Pharmacy, Inc., 605 B.R. 900 (Bankr. W.D. Mo. 2019)

Subject: § 363, default interest

Following an auction that rendered it an oversecured creditor, Bank sought an 18% default interest on its claim. Court denied, finding that imposition of the default rate would be an unenforceable penalty under Missouri law. Regardless of the amount of the default, or the size of the underlying loan, once the Bank declared a default, the default rate applied to the outstanding balance on all loans and was not connected to any computation of actual harm. Even if it was wrong in finding the default provision unenforceable, the bankruptcy court had the ability to deny the default rate on equitable grounds. Debtor was current on payments to the

Bank through the date of filing. Although it did not make postpetition payments, Bank had been involved in negotiating the cash collateral orders, with DIP funding provided by undersecured third lien creditor, which did not provide for any payments to the Bank. Bank's request for $440,000 in default interest came only after it appeared the auction would be more successful than initially anticipated, leaving funds to pay Bank and the second lien holder in full with funds remaining ($550,000) for the third lien holder. If it collected the $440,000 in default interest, it would essentially penalize the third lien holder who had provided the DIP funding.

In re Weatherspoon, 605 B.R. 472 (Bankr. S.D. Ohio 2019)

Subject: O.R.C. §§ 2329.66(A)(12)(b) and (c), dependency

Debtor claimed exemptions in asbestos trust payments he received on behalf of his deceased father. A creditor objected, arguing Debtor was not a dependent. Bankruptcy court agreed with creditor. Court concluded that "[u]nder Ohio law, an individual is a dependent of another person if he relies on the other person for support in the form of the necessities of life such as food and shelter or the money used to purchase those necessities. Support also may take the form of necessary services that reduce the expenses the dependent must incur to hire someone else to perform the services." Court found Debtor's claims that he relied on his father for support prior to his father's death incredible. While Debtor claimed his father had worked for him for free in his convenience store, the record showed Debtor's father had not been to the store in the four or five months prior to his death, plus Debtor had paid employees during that time. His claim that he relied on his father's gift of a car for transportation was belied by the fact that he claimed a business expense for his own personal vehicle. While Debtor contended his father provided child care and/or cash for it, Debtor's testimony that he was able to have his son with him at the convenience store, plus his father's financial inability to make the cash payments Debtor claimed, caused the court to reject Debtor's argument. Additionally, Debtor had testified at the 341 meeting that he was not a dependent of his father, claiming dependency only after the creditor objected to his exemption in the asbestos trust payments.

In re Andrews, 605 B.R. 491 (Bankr. S.D. Ohio 2019)

Subject: § 547, O.R.C. § 2329.66(A)(13)(b), wage exemption in garnished wages

Trustee recovered prepetition garnishment of Debtor's wages as a preference and Debtor claimed the 75% wage exemption in the funds recovered. Trustee objected to the exemption and court sustained his objection. The garnished wages were the 25% of Debtor's wages that were not exempt. Debtor can only exempt property recovered by the trustee to the extent he could exempt it if it had never been transferred.

BMW Bank of North America v. Davis-Brown (In re Davis-Brown), 610 B.R. 641 (Bankr. E.D. Cal. 2019)

Subject: Rule 7055, § 523(a)(2)(B)

Plaintiff-Bank lent Debtor, a 54 year old with an annual salary of $26,400, $46,000 on a trade-up from a 2013 BMW to a 2014 BMW. The loan included an $11,000 balloon payment at the end of the 60 month term. The credit application, completed by the dealer, referenced rent of $200/mo (in San Francisco) and $1,400/mo in social security. No assets or debts were listed in the credit application. Although the Bank obtained a credit report that showed an additional $400+ vehicle payment and accounts in collection, the loan was approved. Debtor paid for two months, then the car was totaled in an accident. Insurance company declined coverage because an unauthorized party was driving. When Debtor filed Chapter 7, Bank wanted the debt held nondischargeable.

Although Debtor failed to respond, court refused to grant default judgment. Bank had not proved that it relied on the credit application because of the contradictory information in the credit report. In order to rely on the information in the application, The Bank had to undertake some inquiry to verify its accuracy, especially since Bank had the credit report in hand. Court said Bank likely relied on the timely payment history of the previous loan. The unexpected loss of the vehicle created doubt as to whether the credit application was the proximate cause of Bank's loss. Finally, Bank ignored the dealer's involvement in the process, choosing to blame Debtor directly when the dealer had clearly manipulated information to create the "correct" debt to income ratio and to create a payment supported by the financial information in the application.

In re AAGS Holdings LLC, 608 B.R. 373 (Bankr. S.D.N.Y. 2019)

Subject: § 108(b), § 1112(b)

Debtor had a prepetition contract to purchase real estate with a "time is of the essence" clause. Closing was set for 10:00 a.m. on September 21, 2019. When Debtor was not able to close, it filed a Chapter 11 petition at 10:16 a.m. The seller cried bad faith and moved to dismiss. Court found that the contract did not terminate automatically, the seller was contractually required to provide notice of termination. It also determined that the "Closing Date" in the contract was the general day, not the specific day and time. Since Debtor could have still performed and closed on that day, the purchase agreement was not breached as of the bankruptcy filing, and § 108(b) extended the closing date 60 days. Court did not find cause for dismissal in Debtor's use of the bankruptcy proceeding to buy time, noting that Debtor's financer had asked for an adjournment of the closing prepetition. The confirmation hearing was "imminent" and would be determinative of Debtor's ability to reorganize or not. The bankruptcy court denied the motion to dismiss and relief from stay.

In re Zgonina, 2019 WL 6170776 (Bankr. C.D. Ill. 2019)

Subject: § 707(b), medical bills, consumer debt

Debtor filed petition stating the bulk of her debt (student loans and medical bills) were not primarily consumer or business debt, meaning she was not required to complete the presumption of abuse form. Court agreed with UST that medical debts are consumer debts. It distinguished medical debt from tax debt on the basis that tax debt is levied for a public purpose, not for a direct benefit to the payor. Although a debtor's medical debt may be incurred involuntarily, the services are a direct personal benefit, falling squarely in the definition of consumer debt as "incurred . . . primarily for a personal, family, or household purpose."

In re Sijan, 611 B.R. 850 (Bankr. S.D. Ohio 2020)

Subject: §707(b), medical debt, consumer debt

Debtor went to ER and was ultimately admitted to the hospital for six weeks for a severe case of pneumonia. He later filed bankruptcy and included $324,000 in medical debt. Court concluded the medical debt was not consumer debt because it was not voluntarily incurred, stating "the Debtor did not intend to have a near death experience and be subjected to six weeks of medical treatment after vising the emergency room." Id. at *5.

Schmidt v. AAF Players, LLC (In re Legendary Field Exhibitions, LLC), 2020 WL 211409 (Bankr. W.D. Tex. 2020)

Subject: jury demand

Plaintiffs demanded a jury trial in their prepetition action involving a multitude of claims, including breach of contract, failure to pay wages under California statute, and fraud. Through removal, transfer and referral, the case ended up before the bankruptcy court. Plaintiffs filed a proof of claim with language reserving their right to a jury trial. Bankruptcy court struck the jury demand. Although a party is entitled to a jury when a legal issue involving a private right is involved, and a mixture of legal and equitable issues in a case does not destroy that right, filing a proof of claim in the bankruptcy case results in a waiver of the right to a jury trial. A claim asserts a right to assets of the bankruptcy estate and the right to a distribution of those assets is a public right created by Congress in an equitable proceeding. The court was not bound by the language in the proof of claim and had to follow the applicable Supreme Court decisions.

In re Chieftan Steel, LLC, 2019 WL 1225716 (Bankr. W.D. Ky. 2019)

Subject: cash collateral order, carve-out, payment of professional fees

Cash collateral order provided a $40,000 per month carve-out for payment of professional fees as funds allowed. Funds did not always allow and, following conversion to Chapter 7, professionals moved to compel Bank to pay the balances. Limiting Licking River Mining, LLC v. Nixon Peabody LLP (In re Licking River Mining, LLC), 911 F.3d 806 (6th Cir. 2018) to its specific facts, the court reviewed the cash collateral orders and the amended plan, determining that Debtor was liable for payment of the fees, not Bank.

UMB Bank, N.A. v. Sun Capital Partners V, LP (In re LSC Wind Down, LLC), 610 B.R. 779 (Bankr. D. Del. 2020)

Subject: § 544(b), § 546, fraudulent transfer, statute of limitations

In 2019, the liquidating trust from 2017 bankruptcy case attempted to recover a 2011 transfer from Defendants, who moved to dismiss the action as time-barred. Florida law provides a four year window to recover known transfers and a one year "savings" clause based on a reasonable-discovery-of-the-transfer rule. Court denied the motion to dismiss. Plaintiff adequately pled facts demonstrating that at least one creditor could have avoided the transfer within the state law statute of limitations as of the petition date. Section 546 provides a two-year window for a trustee to bring the recovery action under §544, making the complaint timely.

In re Carr, 613 B.R. 427 (Bankr. E.D. Ky. 2020)

Subject: Chapter 7 fees, dual contract

Court approved a law firm's practice of using a dual contract in representing Chapter 7 debtors. Under the first contract, clients paid $300 to have a skeletal Chapter 7 petition filed and representation terminated upon filing. Clients then had the option to retain the firm for postpetition services, look for other counsel, or enter into a second contract for postpetition representation. Most clients chose the latter, agreeing to pay approximately $100/mo for a year. Court found all the attorney-client disclosures were adequate and did not violate the bankruptcy code or counsel's ethical duties.

Trevino v. HSBC Mortg. Serv. (In re Trevino), 615 B.R. 108 (Bankr. S.D. Tex. 2020)

Subject: Inaccurate Rule 3002.1 statement, FDCPA, § 105(a), abuse of process, sanctions

Mortgage company filed a 3002.1 statement that wrongly requested payment of 2010 real estate taxes which had been refunded to it. Court said the creditor failed to exercise due diligence in filing the sworn statement and took issue with the creditor's failure to withdraw the notice. Even though the record demonstrated the creditor did not intend to collect the taxes, and that per Rule 3006, the creditor could not unilaterally withdraw the notice after Debtors filed their adversary proceeding, it found the inaccurate statement was an abuse of the bankruptcy process and violated § 1692(f) of the FDCPA. (It also found a breach of contract but the claim failed for Debtors' lack of proof of damages.) Court awarded $9,000 in punitive damages, $1,000 in statutory damages for the FDCPA violation, and reasonable attorney's fees and costs to be determined.

NOTE: Debtors' plan did not provide for payment of real estate taxes. Taxing authority filed a claim, which the Trustee intended to pay. Court seemed repelled by the trustee's payment of the nonscheduled real estate tax claim.

In re LeGrand, 612 B.R. 604 (Bankr. E.D. Cal. 2020)

Subject: § 362(k)(1), postpetition garnishment, violation of discharge injunction, contempt

Creditor attempted a prepetition wage garnishment but an existing support order appropriated all available funds. Debtor filed bankruptcy and the creditor failed to release the garnishment. Postpetition, Debtor had overtime earnings that left sufficient funds for the garnishment and the employer deducted from multiple pays immediately prior to and after Debtor's discharge. Debtor sought damages for contempt. Because the violation of the discharge injunction began with the same conduct that violated the stay, the court found Debtor was not limited to civil contempt for the discharge injunction but could seek the broader relief available under § 362(k)(1). Court awarded almost $10,000 in actual damages and $25,000 in punitive damages.

Giuliano v. Schnabel (In re DSI Renal Holdings, LLC), 2020 WL 550987 (Bankr. D. Del. 2020)

Subject: § 550(a), fraudulent transfer, recovery, capping

Trustee sought over $700m in fraudulent transfer action. Defendants moved to limit the amount recoverable to $170m, the total of filed claims. Court granted as to the fraudulent transfer claims but denied as to the breach of fiduciary duty, aiding and abetting breach of fiduciary duty and corporate waste claims. Per § 550, trustee can recover "for the benefit of the estate." Court concluded that bankruptcy is not intended to enlarge a debtor's interest in assets and that the debtor is not the intended beneficiary of avoidance actions, creditors are. Court therefore capped the trustee's recovery to the total claim amount.

In re Progressive Solutions, Inc., 2020 WL 975464 (Bankr. C.D. Cal. 2020)

Subject: Small Business Reorganization Act ("SBRA"), "conversion," Rule 1009

A debtor in a pending Chapter 11 case moved to amend its voluntary petition to be redesignated as an SBRA debtor and to confirm its amended plan which it alleged complied with the SBRA. Court found no provisions in the SBRA that limited its application to existing cases. Court also found no vested rights that would be affected by the redesignation. Although it recognized procedural issues, including the need to adjust the time frames for things like the initial debtor interview and 341 meeting, it deemed these hurdles, not impasses, because there was nothing to prohibit extension of applicable deadlines. It did, however, find the motion to amend unnecessary under Rule 1009 because a debtor has the right to amend "as a matter of course at any time before the case is closed." The court did not want to set a precedent of requiring motions for leave to amend and therefore denied the motion to amend the voluntary petition. The motion to confirm the amended plan was also denied as premature because the debtor had not (yet) been designated an SBRA debtor.

In re Gresham, 2020 WL 1170712 (Bankr. E.D. Mich. 2020)

Subject: HAVEN Act, plan modification

In August 2019, Congress amended the Code with the HAVEN Act (Honoring American Veterans in Extreme Need, Pub. Law No. 116-52) to exclude VA payments made "in connection with a disability, combat-related injury or disability, or death of a member of the uniformed services." Debtor filed a chapter 13 case in 2018, including her VA disability benefits in her CMI, and confirmed a plan paying 100% to unsecured creditors. In October 2019, she sought to modify the plan, excluding the disability payments, to reduce the payment and the unsecured dividend. Trustee argued she could not now exclude the benefits. Court disagreed. HAVEN Act could not be applied retroactively but could be applied from the date of enactment forward and could be used as a basis to seek plan modification. The change in the law was not known or anticipated at confirmation.

Gould v. BOKF, N.A. (In re FDV Artfolio, LLC), 2020 WL 1844614 (Bankr. W.D. Okla. 2020)

Subject: § 542, cashier's check

Trustee moved for turnover of a cashier's check that had been issued to the payee but subject to a stop payment order by the bank. Question was whether the check was property of the estate or the payee. When a normal check is not cashed, it remains property of the estate, and the court found similarly.

In re Arnold, 2020 WL 2462525 (Bankr. E.D. Mich. 2020)

Subject: § 1326(a)(2), disbursement of preconfirmation payments prior to conversion

Debtor filed a chapter 13 case and prior to confirmation, moved to convert it to chapter 7. Before filing the motion to convert, counsel filed a fee application seeking payment. Trustee objected, arguing he could only refund monies to Debtor under the Supreme Court's Harris v. Viegelahn decision. 575 U.S. 510 (2015). The court distinguished Harris. It was a postconfirmation case and did not consider § 1326(a)(2) which directly governs this situation: "if a plan is not confirmed ... the trustee shall return any such payments ... to the debtor, after deducting any unpaid claim allowed under section 503(b)." Court ordered trustee to pay counsel and return the balance of the funds to the debtor.

In re Ventura, 615 B.R. 1 (Bankr. E.D.N.Y. 2020)

Subject: SBRA

Chapter 11 Debtor, a bed and breakfast owner, filed a chapter 11 case in October 2018. Her proposal to cramdown the mortgage was problematic because she used the real estate as a residence, leaving her unable to modify the mortgage under 11 U.S.C. § 1123(b)(5). Mortgagee proposed a plan to auction the premises and pay all other creditors in full through a carve out. Fifteen months after filing chapter 11, and before the confirmation hearing on mortgagee's plan, Debtor moved to amend her petition to proceed as a small business debtor under subchapter V.

Mortgagee and the UST objected. Court granted motion. It found no barriers to applying the SBRA to a pending case. It also concluded that the amendment would not impede any vested rights of the mortgagee, noting that a previous discharge left it able to proceed only against the property, not debtor individually, and no plan had been confirmed.

One element of meeting the definition of "small business debtor" requires 50% or more of the debt to result from business or commercial activity. Mortgagee argued that since the mortgage was on Debtor's residence, it was a consumer debt. Court disagreed, said Debtor's intent was controlling and it was clear she purchased the property with the intent of profiting from it as a guest house. Although Debtor had listed her debts as primarily consumer, the court found she was not judicially estopped from claiming the debts as business debts. She had very clearly indicated the business activity in multiple ways in her schedules, had not identified the property as a single family home, and there had been no reliance on the "consumer" designation. Finally, it found that Debtor could utilize § 1190(3), a new SBRA provision that allows modifications to a residential mortgage in certain situations.