REPORT OF THE DEBTOR/CREDITOR RIGHTS COMMITTEE FOR THE JUNE 4, 2015 BUSINESS LAW COUNCIL MEETING

1. **Next Meeting:** The next scheduled meeting of the Committee is on July 15, 2015 at 5:00 p.m., at the law offices of Jaffe Raitt Heuer & Weiss, P.C.

2. **Council Approval:** The Committee is requesting authority to file an amicus in support of a motion for leave to appeal in *Casa Bell Landscaping v. Lee*, and if leave is granted, in support of Appellant's brief. In the case below, Wayne County Circuit Judge Gillis ignored new MCR 2.622 on receiverships, refused to appoint the agreed upon receiver, appointed a different receiver and refused to make any of the required findings.

3. **Membership.**

The Committee communicates regularly with its membership through its list serv, with announcements of Committee events, case law alerts, and announcements of events of interest to bankruptcy and insolvency law practitioners. This increases the Committee's profile. In addition, holding regular meetings and educational events increases the interest of the bar in becoming members. We regularly receive inquiries from bar members about joining the Committee and respond immediately to reach out to the individuals. We had our 40 at our April 21, 2015 meeting and over 70 at our May 14, 2015 seminar on Electronically Stored Information.

4. **Accomplishment Towards Committee Objectives:** The Committee held a joint meeting on April 21, 2015 with the Partnership and Limited Liability Company Committee to discuss insolvency related issues with limited liability companies. Over forty attended, and had a fruitful discussion. It appears that the local bankruptcy judges are finding in actual practice that the Bankruptcy Code preempts

some of the state law limits on enforcement of claims against limited liability companies. I believe that the Partnerships and Limited Liability Companies Committee is going to invite members of the Committee to a future meeting to discuss whether there should be some amendments to the Limited Liability Company Act relating to insolvency issues.

On May 14, 2015, the Committee held a seminar on Electronically Stored Information Discovery for Bankruptcy Practitioners with a distinguished panel included Magistrate Judge Hluchaniuk and Bankruptcy Judge Mark A. Randon, and four nationally known experts, including Co-chair Judy Miller. We had over 70 reservations. It was a great presentation with excellent materials. Based on several requests, we had the event recorded, and will be uploading it to the Section webpage.

The Committee is holding another event on July 15, 2015 at 5:00 p.m. where retired Bankruptcy Steven W. Rhodes will answer questions about the City of Detroit and municipal bankruptcies, and Professor John Pottow of the University of Michigan Law School will lead a discussion of the five bankruptcy opinions the Supreme Court is expected to issue before the end of its current session.

The Committee had a strong role in drafting the amendments to MCR 2.622 on receiverships, presented a well-received seminar in June 2014 on the receivership practice with the participation of four judges, the Committee wrote articles on receivership practice, and formed a Receivership Forms Committee, with all four judges and the Honorable Annette Berry participating, to create forms on receiverships to be adopted by the Supreme Court Administrator Office (SCAO) as official forms. They

were considered by SCAO in its March 2015 meeting, but decisions on the forms have not yet been made.

5. Meetings and Programs: See Section 4 above.

6. Publications: The Committee was responsible for the Spring 2015 issue of the Michigan Business Law Journal, which had eight articles on the new Michigan receivership rules and receivership law in general.

Tom Morris, on behalf of the Committee, is working on a crowd-sourced journal article on secret and problematic liens for publication in a future issue.

7. Methods of Monitoring Legislative/Judicial Administrative Developments and Recommended Action.

The co-chairs and other members of the Committee are participating in rewriting and updating the Local Rules for the United States Bankruptcy Court for the Eastern District of Michigan.

The Committee discusses legislative developments and case law at its meetings. Attached as an exhibit is a copy of the memorandum on recent cases distribute at the April 21, 2015 committee meeting.

8. Miscellaneous.

Not applicable.

Judy B. Calton
Judith Greenstone Miller

Memorandum

To: The Debtor/Creditor Rights Committee

From: Judy B. Calton

Re: Recent Cases

Date: April 17, 2015

That Supplier Provided Services of Value Insufficient to Defeat Ponzi Scheme Clawback Claim

Janvy v. Golf Channel, Inc., 780 F.3d 641 (5th Cir. 2015). Stanford International Bank, Ltd. operated a multi-billion dollar Ponzi scheme for nearly two decades. Stanford sponsored a PGA event and advertised on the Golf Channel. The receiver sued to clawback the payments to the Golf Channel under Texas' Uniform Fraudulent Transfer Act. The TV network relied on the affirmative defense that it received the payments in good faith and for reasonably equivalent value – the market value of the advertising. The District Court granted the TV network summary judgment, finding it was like an innocent trade creditor. The Eleventh Circuit reversed, holding the TV network provided no value from the viewpoint of Stanford's creditors. There is no trade creditor exception to Ponzi scheme clawbacks.

Original Jurisdiction's Choice of Law Rules Govern Transferred Case

In re Dow Corning Corp., 2015 WL 716299 (6th Cir. Feb. 20, 2015). Plaintiff sued Dow Corning in federal court in North Carolina for injuries from her breast implants. Her case was transferred to Michigan as related to Dow Corning's bankruptcy. Ultimately, summary judgment of dismissal was granted on the grounds the claim was barred by Michigan's statute of limitations. The Sixth Circuit reversed, holding that a change of venue does not change the applicable state law. A fact question existed as to whether the claim was time barred under North Carolina choice of law, which would have applied North Carolina law.

Denial of Derivative Standing to Challenge DIP Lender's Prepetition Lien Affirmed

In re Optim Energy, LLC, slip op. Case No. 14-10262-BLS (D. DE March 13, 2015). The debtor had a prepetition unsecured $1 billion working capital loan, guaranteed by insiders. The insiders had a secured reimbursement agreement with the debtor. There was a prepetition default, the insiders paid on their guaranty, triggering the reimbursement liability. When the debtor filed Chapter 11, the insiders made a DIP Loan. The DIP Loan validated the insiders' secured claim unless objected to within a challenge period. The debtor's largest unsecured creditor filed a motion for derivative standing to challenge the secured claim, attaching a proposed complaint for recharacterization and equitable subordination. The Bankruptcy Court

denied derivative standing and the District Court affirmed, finding the proposed complaint did not adequately plead either claim.

Must Use U.S. Marshalls To Execute on Bankruptcy Judgment

In re Valdivia, slip op. Case No. 14-14429 (E.D. Mich. March 3, 2015). Judge Tucker's opinion in *In re Valdivia*, 2014 WL 5100090 (Bankr. E.D. MI Oct. 10, 2014) that writs of execution of a bankruptcy judgment must be served by the U.S. Marshall's office, not state court officers, was affirmed by District Judge O'Meara.

No Conspiracy To Commit Fraudulent Transfer

Sheehan v. Saoud, 2015 WL 40094 (N.D. W. Va. 2015). A dermatologist who was convicted of Medicare fraud transferred his practice, which became a chapter 7 debtor. The trustee of the practice's estate sued to avoid fraudulent transfers under West Virginia law and for conspiracy to violate West Virginia's Uniform Fraudulent Transfer Act. Deciding a fraudulent transfer claim sounds in contract, not tort, the District Court held there can be no conspiracy.

Individual's Chapter 11 Earnings Are Property of the Estate Upon Conversion

In re Meier, slip op. Bankr. No. 4-bk-10105 (Bankr. N.D. IL April 3, 2015). When an individual converted his Chapter 11 case to a Chapter 7 case, he had $98,000 in his debtor-in-possession checking account. The Bankruptcy Court held those funds were property of the estate, relying on U.S.C. §1115(a)(2). The Court observed that 11 U.S.C. §348(f) applied only in Chapter 13 cases.

An Action to Compel Shareholder Meeting Not Barred By Stay

In re SS Body Armor 1 Inc., slip op. Case No. 10-11255 (Bankr. D. Del April 1, 2015). The current board of the chapter 11 debtor supported a global settlement and a plan. A shareholder brought an action in Delaware Chancery Court to compel a shareholder meeting to elect a new board. The debtor argued the automatic stay barred the action to compel. The Bankruptcy Court held that the automatic stay is inapplicable to the exercise of a shareholder's right to compel a meeting to elect a new board of directors. A debtor can enjoin a shareholder meeting for "clear abuse" if the debtor follows correct procedures and can establish grounds for the injunction.

Court Cannot Disband Committee

In re Caesars Entertainment Operating Co., Inc., slip op. No. 15B1145 (Bankr. N.D. IL March 9, 2015). The U.S. Trustee appointed a noteholders' committee in addition to an unsecured creditors' committee. The debtors moved to disband the noteholders committee because intercreditor agreements prevented the committee members from performing many of their duties and increased costs. The Bankruptcy Court denied the motion, finding that 1986

amendments to the Bankruptcy Code relating to the U.S. Trustee program denied the court the power to disband a committee.

California Statute Prohibiting Municipalities from Rejecting Certain Contracts Invalid

In re City of Stockton, 526 B.R. 35 (Bankr. E.D. Ca. 2015). CalPERS managed Stockton's pension plans under contracts with the City. California law forbids rejection or modification of a CalPERS contract in a chapter 9 case. If CalPERS is terminated as the manager, state law gives CalPERS a lien on municipal asset for the difference between the accumulated plan assets and plan liabilities. The City's plan did not reject or modify its agreements with CalPERS. Nevertheless, in ruling on the one dissident bondholder's objection to the plan, the Bankruptcy Court held that these statutory provisions were not part of the state's exercise of municipal political or governmental outside the control of the Bankruptcy Court under 11 U.S.C. §903, but merely govern financial relations between the state and municipalities. The contracts could be rejected and the statutory lien avoided under 11 U.S.C. §545(2).

Attorney's Fees In Chapter 13 Cases Limited

In re Clinkscale, 525 B.R. 399 (Bankr. W.D. MI 2015). Sitting *en banc*, the Western District of Michigan bankruptcy judges established certain standards for Chapter 13 fee applications:

(a) it is improper to charge attorney time to prepare a monthly case status review, as not representing appropriate staffing or charging decisions;

(b) an attorney cannot charge for uploading electronic filings; and

(c) The appropriateness of having an attorney charge for monitoring a case should be decided on a case by case basis (and was not satisfied on the record).

Don't Cite Overruled Cases

Sufi v. City of Detroit, No. 312.53 (Mich. App. Feb. 17, 2015) (unpublished). The City of Detroit appealed by right a denial of summary disposition. Apparently, the City cited in its brief a case on the standard for summary judgment under the 1963 court rules – which had been superseded by the 1985 court rules and actually reversed. (Also, apparently WestlawNext did not indicate the opinion was overruled). The Court of Appeals noted

> yet still today we frequently receive briefs that contain this outdated, overruled, and obviously inapplicable standard. Appellate counsel need either to update their brief banks or their legal research methods to avoid citing to these summary judgment standards that were long ago set aside by the 1985 Court Rules that

> established a more intricate and different summary disposition standard.

slip op. p. 4 n4. That was a mild rebuke. Despite the improper citation, the trial court's order was vacated and the case remanded for a determination of the dismissal motion on its merits.

Single Business Tax Liability Cannot Be Discharged

Henderson v. Dept. of Treasury, 307 Mich. App. 1 (2014). Petitioner filed a personal chapter 11 and was discharged from bankruptcy in 2011. After that, he was assessed with corporate officer responsibility for the Michigan Single Business Tax ("**SBT**") of a limited liability company of which he had been an officer. The Michigan Tax Tribunal found, and the Michigan Court of Appeals affirmed, that the SBT liability was an excise tax under 11 U.S.C. §507(a)(8), which could not be discharged in bankruptcy.