DEBTOR/CREDITOR RIGHTS COMMITTEE
REPORT PREPARED FOR THE MARCH 12, 2015 COUNCIL MEETING

1. Next Scheduled Meeting of the Committee.

The next scheduled meeting of the Committee is on April 22, 2015 at 6:00 p.m. at Honigman Miller Schwartz and Cohn LLP,

2. Council Approval.

None at this time.

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.

4. Accomplishments Toward Committee Objectives.

The Committee worked on drafting proposed official forms for use by Michigan courts in receivership cases. The Supreme Court Administrative Office is holding a public hearing on the forms on March 12, 2015.

The Committee met on January 14, 2015, with eight attending. The Committee continued its discussion of the new Uniform Voidable Transactions Act. Marla Carew joined the Committee to lead the discussion on series organizations in the new Act. The Committee decided not to take a position at this time as to whether the Michigan legislature should adopt the Uniform Act. If the Michigan legislature takes up the Act, the Committee will decide at that time whether to seek approval to take a position. The Committee also discussed the proposed amendments to the Federal Rules of Bankruptcy Procedure.

The Committee is holding a seminar on Electronically Stored Information Discovery for Bankruptcy Practitioners on May 14, 2015 with two judges and nationally recognized experts participating. See attached Save the Date flyer.

5. Meetings and Programs.

See Section 4 above.

6. Publications.

The Committee prepared the articles for a theme issue on receiverships for the March 2015 issue of the Michigan Business Law Journal.

The Committee also worked on a crowd-sourced article on Michigan Secret Liens under the leadership of Tom Morris, to be finalized and then published in a future issue of the Michigan Business Law Journal.

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 discussed at the January 14, 2015 committee meeting.

8. Miscellaneous.

Not applicable.

Judy B. Calton
Judith Greenstone Miller

Calton, Judy B.

From:	businesslaw-dcr-request@groups.michbar.org on behalf of businesslaw-dcr@groups.michbar.org
Sent:	Tuesday, February 24, 2015 3:26 PM
To:	BLS DCR Listserv (BusinessLaw-DCR@groups.michbar.org)
Subject:	[BusinessLaw-DCR] SAVE THE DATE: MAY 14, 2015
Attachments:	ATT00002.txt

On May 14, 2015, The Debtor/Creditors' Rights Committee
of the Business Law Section of the State Bar of Michigan

Will Present A Seminar On:

Electronically Stored Information Discovery For Bankruptcy Practitioners

The Speakers will include:

Magistrate Judge Michael Hluchaniuk

Bankruptcy Judge Mark A. Randon

and

Richard L. Wasserman, Venable, LLP, Baltimore, MD

Scott A. Kane, Squire Patton Boggs (US) LLP, Cincinnati, OH

and

Judith Greenstone Miller, Jaffe Raitt Heuer & Weiss, P.C.,
members of the ABA Electronic Discovery
(ESI) in Bankruptcy Working Group

plus

Tarek Ghalayini, Alix Partners

The Seminar will be on May 14, 2015 from 2:00 to 5:00 pm,

with a cocktail reception following

at the Southfield Offices of Jaffe located at
27777 Franklin Road, Suite 2500, Southfield, MI 48034

More information and reservation forms will follow soon.

Memorandum

To: Members of the Debtor/Creditor Rights Committee

From: Judy B. Calton

Re: Recent Cases

Date: January 9, 2015

In re B&P Baird Holdings, Inc., slip op. Case No. 14-1060 (6th Cir. Jan. 02, 2015). The bankruptcy court denied the chapter 7 trustee leave to amend the complaint against the defendant to add a claim of conversion in violation of MCLA §600.2919a, on grounds of *in pari delicto*. The district court affirmed. The Sixth Circuit reversed, holding that the *in pari delicto* doctrine does not apply if there is at least one innocent decision maker at the corporation. Conversion does not necessarily require intent, only that the actions are willful. The trustee properly pled in the alternative that the defendant acted innocently or with intent to commit conversion.

In re Westry, Case No. 14-1440 Slip op. (6th Cir. Dec. 30, 2014). The Chapter 7 debtor initially exempted a workers' compensation claim capped at about $10,055. Postpetition, the claim was settled for $25,000; debtor then amended her exemptions to exempt the full amount. The Chapter 7 trustee objected to the exemption amendment on the grounds of prejudice (which the Sixth Circuit characterized as prejudice to the trustee and her counsel). The Sixth Circuit found there was no prejudice to the creditors, so did not decide whether the bankruptcy court has discretion to deny a claims amendment based on prejudice.

In re BGI, Inc., 2014 WL 5462477 (2d Cir. Oct. 29, 2014). Holders of unredeemed Borders gift cards appealed bankruptcy court denials of their post-confirmation motions for leave to file untimely proofs of claim. The district court dismissed the appeals as equitably moot, and the Second Circuit affirmed. In an apparent issue of first impression for the Second Circuit, it held that the equitable mootness doctrine applies to a plan of liquidation equally as to a plan of reorganization.

Atkinson v. Ernie Haire Ford, Inc., 2014 WL 4358417 (11th Cir. 2014). An adversary proceeding noncreditor defendant is not a "person aggrieved" by a plan modification extending the time for the litigation trustee to commence actions because subjecting a party to litigation is not direct harm – the party still has all its rights to defend the adversary proceeding.

In re Positive Health Management, 769 F.3d 899 (5th Cir. 2014). This opinion addresses what a subsequent transferee of a fraudulent transfer who acted in good faith and gave value has to disgorge to the trustee. 11 U.S.C. §548(c). The defendant received $367,681.35 in payments from the debtor on account of obligations under its sole shareholder's mortgage to the defendant. The debtor, however, occupied the defendant's premises, receiving $253,333.33 in rental value.

To determine the amount of the recovery, the amount received by the transferee of a fraudulent transfer must be netted against the value given by the transferee – here the net amount was $114,348.02.

U.S. Bank N.A. v. Verizon Communications, Inc., 761 F.3d 409 (5th Cir. 2014). If an adversary proceeding defendant in a fraudulent transfer action does not have a jury trial right because the defendant filed a proof of claim, the litigation trustee similarly does not have a jury trial right.

In re Old Carco LLC, 2014 WL6790781 (S.D.N.Y. December 1, 2014). The assets of Old Chrysler were sold to New Chrysler free and clear of interests. Michigan, Indiana and Illinois asserted, however, that New Chrysler was subject to Old Chrysler's experience rating for unemployment insurance tax purposes. New Chrysler sought to enforce the sale order; the bankruptcy court determined it did not have jurisdiction in light of the Tax Injunction Act, 28 U.S.C. §1341. On appeal, the District Court reversed, holding the bankruptcy court had jurisdiction to interpret and enforce its own prior order. The governmental agencies were barred from collaterally attacking the sale order as invalid, which had been entered on notice to them. The case was remanded to the bankruptcy court to decide, however, whether the holding of *In re Wolverine Radio*, 930 F.2d 1132 (6th Cir. 1991), that an experience rating is not an interest subject to 11 U.S.C. §363(f), should apply.

In re Semcrude, L.P., 2014 WL 495302 (D. Del. Sept. 30, 2014). The Chapter 11 litigation trustee sued to avoid prepetition equity distributions as fraudulent transfers because they left the debtor with unreasonably small capital. The bankruptcy court dismissed the unreasonably small capital count and the district court affirmed. Unreasonably small capital encompasses financial difficulties such as an inability to generate enough cash flow to sustain operations. The availability of credit after the distribution can negate a finding of unreasonably small capital.

In re Headlee Management Corp., 519 B.R. 452 (Bankr. S.D.N.Y. 2014). The Chapter 7 trustee found there were insufficient funds to pay both Chapter 7 administrative expenses and outstanding Chapter 11 administrative expenses. Accordingly, the Chapter 7 trustee sought pro rata disgorgement of interim fees paid to the Chapter 11 professionals. The bankruptcy court, disagreeing with *In re Specker Motor Sales Co.*, 393 F.3d 659 (6th Cir. 2004), held that the bankruptcy court has no authority to order disgorgement because it is not provided as a remedy under 11 U.S.C. §726(b).

In re Crumbs Bake Shop, Inc., 14-24287-MBK slip op. (Bankr. D.N.J. November 3, 2014). In possibly an advisory opinion, the free and clear purchaser of the debtor's assets sought a determination that the sale under 11 U.S.C. §363(f) cut off the licensee's rights under 11 U.S.C. §365(n) to use the trademarks. The issue arose because the definition of intellectual property in 11 U.S.C. §101(35A) does not mention trademarks. The bankruptcy court held that the failure of licensees to object to the sale was not consent to a cutoff of their §365(n) rights due

to lack of notice – having to dig through the Asset Purchase Agreement and schedules was difficult and unclear, and therefore did not serve as notice. The bankruptcy court held that, in the absence of consent, nothing in §363(f) overrides rights granted licensees under §365(n).

In re Valdivia, 2014 WL 5100090 (Bankr. E.D. MI Oct. 10, 2014). The Bankruptcy Court issued a default judgment against the defendant. Plaintiff's counsel, Thomas Budzynski, sought a writ of execution directed to state court officers, instead of or in addition to the U.S. Marshalls. Judge Tucker denied the request, concluding only the U.S. Marshall's Service can serve and execute on a writ of garnishment issued by the Bankruptcy Court. To use a state court officer, plaintiff would have to domesticate the judgment in state court.

In re Dewey & LeBoeuf LLP, 518 B.R. 766 (Bankr. S.D.N.Y. 2014). The liquidating trustee of the debtor law firm sought to recover compensation to former partners as fraudulent transfers. The law firm was a registered limited liability partnership (LLP) under New York law. The Bankruptcy Court dismissed the claims under 11 U.S.C. §548(b), because that statute section applies by its terms to "partnership debtors." The Bankruptcy Court held that the LLP was a corporation, not a partnership for purposes of that section.

In re Gaulden, 2014 WL 5823277 (Bankr. W.D. MI Nov. 20, 2014). The Chapter 7 debtor's schedules were inaccurate or confusing because of scheduling expenses paid by his nonfiling spouse. Despite being told repeatedly by the trustee of the need to amend or supplement his schedules, the debtor failed to do so. A creditor moved to dismiss the case under 11 U.S.C. §707(a) for unreasonable delay and the case was dismissed. Nevertheless, Judge Gregg found that the debtor's scheduling as creditors those who are not truly his creditors, but listed only "for notice purposes" and failure to amend such schedules did not support a finding of unreasonable delay. The Judge stated a better practice would be to list each creditor at $0.00 and "for notice purposes only."

In re Sheppard, 2014 WL 6611661 (Bankr. E.D. Mich. Nov. 6, 2014). The Chapter 13 debtor was garnished prepetition. During the preference period, $676.98 was withheld from her wages. Only $596.98 was turned over to the judgment creditor; $80 was a garnishment fee charged by the employer. Judge Tucker held the $80 could not be avoided from the creditor because the creditor did not receive it and the debtor did not intend it to be for the benefit of the creditor. (The debtor had no intent with respect to the charge). Nevertheless, the creditor could not use the 11 U.S.C. §547(c)(8) defense for the $596.98 because the entire $676.98 was affected by the transfer.