

**DEBTOR/CREDITOR RIGHTS COMMITTEE**  
**REPORT PREPARED FOR THE DECEMBER 6, 2014 COUNCIL MEETING**

**1. 2014-2015 Budget Request and Anticipated Use of Funds.**

The Committee is requesting a budget of \$5,000.00. The Committee anticipates meeting expenses for 3 to 4 meetings, primarily for food, and costs in sponsoring a seminar on Electronically Stored Information for Bankruptcy Practitioners.

**2. Use of Budgeted Funds During 2013-2014.**

The Committee held four meetings, and had meeting expenses for the meetings, primarily for food. The Committee co-sponsored a reception for new Bankruptcy Judge Mark Randon in May 2014.

The Committee also held a seminar on the newly revised Court rules on receiverships on June 10, 2014 at the MSU Educational Center in Troy. The seminar ended up generating approximately \$3,000.00 more in revenue than costs, but we had to front costs.

**3. Next Scheduled Meeting of the Committee.**

The next scheduled meeting of the Committee is on January 14, 2015 at 6:00 p.m. at the offices of Honigman Miller Schwartz and Cohn LLP, 29400 Woodward Avenue, Suite 101, Bloomfield Hills, MI.

**4. Council Approval.**

The U.S. Trustee (EOUST) has proposed a new rule in the Federal Register to require the monthly operating reports filed by Chapter 11 debtors to be in a data-enabled "smart form" so the EOUST can better analyze the information provided. The deadline for public comment is January 9, 2015. The co-chairs are concerned about the technological tasks lawyers and debtors will incur in trying to comply. We intend to survey the Committee's membership, and if the membership agrees, will want to comment along the lines that the rule should not be in force unless and until the EOUST creates a data-enabled form with all of the programming contained in the PDF and instructions on how to save it with data retained which is available for download. If so, the Committee will need Council approval for such public comment.

Proposed revisions in the Federal Rules of Bankruptcy Procedure and Official Forms are out for public comment, with the comments due by February 17, 2015. The Committee will discuss the proposed rules at its

January 14, 2015 meeting. If it wants to comment, the Committee will need council approval timely for the February 17, 2015 deadline.

**5. Membership.**

The Committee receives regular indications from attorneys of interest to join and one of the co-chairs immediately reaches out. We believe that the activities of the Committee, such as regular meetings, educational events, and co-sponsoring the Bankruptcy Judge Randon reception and its Tribute Dinner for retiring Bankruptcy Judge Rhodes increases the profile of the Committee and interest in the Committee.

**6. Accomplishments Toward Committee Objectives.**

The Committee has been active in new law issues – material role in drafting the recent changes in the Michigan Court Rules on receiverships, conducting a seminar on the same; discussing secret liens at meetings; reviewing and discussing the new Uniform Avoidable Transfers Act, discussing amendments to the Federal Rules of Bankruptcy Procedure and Official Forms; and discussing recent case law at each meeting.

**7. Meetings and Programs.**

The Committee met on November 5, 2014, with sixteen attending. The Committee discussed the articles it is preparing for the Michigan Business Law Journal; the amendments to the Federal Rules of Bankruptcy Procedure and Official Forms taking effect on December 1, 2014, and the new Uniform Avoidable Transfers Act. We also discussed recent cases of interest. A copy of the memorandum on recent cases discussed at the meeting is attached.

The next Committee meeting is on January 14, 2015. We plan to continue our discussion of the Uniform Avoidable Transfers Act and discuss the proposed amendments to the Federal Rules of Bankruptcy Procedure and official forms, for which public comment is due by February 17, 2015.

**8. Publications.**

The Committee is responsible for the March 31, 2015 edition of the Michigan Business Law Journal. We are preparing a theme issue on Michigan Receivership Law and new MCR 2.622, with the following articles:

Introduction

Appointment of a Receiver

Payment of a Receiver

Receiver Qualifications

Receivership Orders

Receivership Duties Practice and Timeline

Judges' Panel

Receivership Forms

The Committee, under the leadership of Tom Morris, has also been crowdsourcing an article on secret and problematic liens. Over six different members of the Committee contributed to this article.

It is possible that the material from the Committee may be more voluminous than one edition of the Journal can hold. If so, some articles may go in a subsequent edition.

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

The Committee members monitor new law, rules, cases and other matters of interest to provide them to the co-chairs to share with the Committee. The Legislative Review provided to the Council and a memorandum on recent cases of interest are also shared at the meetings and discussed.

As a bar group active in insolvency related issues, the Committee is often asked to participate in judicial and administrative developments, such as assisting in the drafting of the proposed amendments to the receivership rules. The co-chairs are currently involved in drafting new amendments to the local rules for the Eastern District of Michigan, hopefully to be adopted in 2015. Also, the co-chairs individually and through bar groups monitor new developments to discuss at our meetings or in list serv alerts.

**10. Miscellaneous.**

N/A.

Judy B. Calton, Co-Chair

Judith Greenstone Miller, Co-Chair

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## *Memorandum*

**To:** Members of the Debtor/Creditor Rights Committee

**From:** Judy B. Calton

**Re:** Recent Cases

**Date:** November 4, 2014

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*United States v. Robinson*, 764 F.3d 554 (6<sup>th</sup> Cir. 2014). Prepetition, the debtor pleaded guilty to mail fraud and other crimes, and was ordered to pay criminal restitution. The United States brought an adversary proceeding to determine the automatic stay did not apply to its attempts to collect the restitution. The Sixth Circuit held that under 11 U.S.C. §362(b)(1), the government was not stayed from collecting restitution from property of the debtor which was not property of the estate, but property of the estate is subject to the stay. The government, however, can collect restitution from estate property under 18 U.S.C. §3613, which authorizes the government to collect a judgment imposing a fine notwithstanding any other Federal law.

*In re Purdy*, 763 F.3d 513 (6<sup>th</sup> Cir. 2014). The issue in this case was whether a lease of dairy cows was a true lease or a disguised security agreement. The Sixth Circuit held the agreement to be a true lease. The Court reasoned the lease did not exceed the economic life of the cattle because the lease was not of individual cattle, but instead of a herd of cattle, allowing culling and replacement. The debtor also retained a meaningful reversionary interest in the cattle under the lease.

*In re Railworks Corporation*, 760 F.3d 398 (4<sup>th</sup> Cir. 2014). The litigation trustee sought to avoid as a preference insurance premium payments made to CPG, a general underwriter/insurance agent. CPG collected premiums, placed them in a trust account, deducted its commissions and paid over the remainder to the insurance company. The trustee asserted CPG was the entity for whose benefit the transfer was made, because CPG had contingent liability for the debtors payments, and the initial transferee. The First Circuit found that CPG as a mere conduit, could not also be a party for whose benefit the transfer was made, and therefore had no liability.

*In re Town Centers Development Co.*, 2014 WL 4248019 (E.D. Mich Aug. 19, 2014) (Cook, J.). Under LBR 3014-1, a nonrecourse lender has to file its election under 11 U.S.C. §1111(b) seven days before the date of the confirmation hearing. The lender filed its election after the hearing commenced, but seven days before the hearing concluded. The bankruptcy court held the election late and the District Court confirmed.

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*In re McInerney*, 516 B.R. 171 (Bankr. E.D. MI 2014). The trustee initially sought to settle litigation for \$250,000. Judge Tucker denied approval. The Debtor argued the claim could be worth almost \$15 million, the trustee asserted that provable damages would be \$5.3 million at most. The Trustee then sought to settle the claim for \$1 million, and the Debtor and several parties objected. The court approved the settlement. A large part of the court's reasoning was that the debtor, a necessary witness to prove the claim, is not likely to be a credible witness.

*Charles L. Wells, III v. THB American, LLC*, Adv. Pro No. 10-6123 slip op. (Bankr. E.D. Mich. October 17, 2014). In a lengthy opinion on numerous issues, Judge Tucker holds that in a fraudulent transfer action, the Court cannot decide the issue of reasonably equivalent value by looking in isolation at one transaction if that one transaction is an integral party of a larger transaction. The value to the transferee has to be evaluated in light of the entire transaction. Judge Tucker also concluded that Michigan's mere continuation exception to the rule of nonliability for corporate successors who acquire a predecessor through the purchase of assets continues to apply even outside the products liability context.

*In re Lenny's Copy Center & More LLC*, 2014 WL 3569744 (Bankr. E.D. MI 2014). Osipov Bigelman represented the Chapter 7 debtor, and also represented the members of the debtor defending a preference action. Judge Tucker held there was a disqualifying conflict of interest, even though the Chapter 7 debtor is a distinct entity from the Trustee, because the debtor and its attorney each have a fiduciary duty to act in the best interest of the estate.

*In re Buffet Partners, L.P.*, 2014 WL 3755804 (Bankr. N.D. Tex. July 28, 2014). After the sale of substantially all of the debtor's assets, the court entered a structured dismissal order over the objection of the U.S. Trustee that the case should be converted to Chapter 7. The court found authority for a structured dismissal in 11 U.S.C. §§1112(b) and 105(a).

*In re Trump Entertainment Resorts, Inc.*, Case No. 14-12103-KG slip op. (Bankr. D. Del. October 20, 2014). The Taj Mahal Casino sought to reject its collective bargaining agreement, which had expired by its own terms postpetition, but before the rejection motion was filed. Recognizing a split in authority, the court held it had jurisdiction to order rejection after the expiration, because under federal law, certain aspects of the agreement remain in effect notwithstanding the rejection.

*Official Committee of Unsecured Creditors of Motors Liquidation Company v. JPMorgan Chase Bank, N.A.*, C.A. No. 13-2187-GK slip op. (Del. Sup. Ct. Oct. 17, 2014). The Second Circuit had certified the question to the Delaware Supreme Court of whether a secured lender must intend to terminate the security interest listed on a UCC-3 or is it enough that the secured lender review and approve the filing of the UCC-3. The Delaware Supreme Court held that parties are entitled to rely in good faith on the plain terms of authorized public filings.