NEW VALUE

W.D. MI FEDERAL BAR ASSOCIATION—BANKRUPTCY SECTION NEWSLETTER

March, 2015

EDITOR'S NOTE

Benjamin M. White

Finally, a brand new, hot-off-the-pdf-maker issue of New Value, which means you can stop refreshing that inbox every 3 minutes. I know the wait has been agonizing. After all, where else can you turn for up-to-the-second news and information? some global network of servers containing limitless amounts of information and placing it at the fingertips of anyone with a computer and a connection to it? C'mon, get real. Anyway, there's a lot to cover, so let's get right to it. First, we congratulate our District's two new Bankruptcy Judges, The Honorable **James W. Boyd** and The Honorable **John T. Gregg**. We look forward to practicing before them in the coming years and thank them in advance for their service to our District and bar. Also, we welcome newly appointed Assistant U.S. Trustee for the W.D. of Michigan, **Matthew W. Cheney**, and look forward to working with him. Mr. Cheney was in private practice in Washington D.C. prior to his appointment.

Last summer the FBA Bankruptcy Section held its Annual Seminar at Boyne Highlands with great success. Thank you to all those who worked so hard to make it happen, including Seminar Chair, **Barbara P. Foley** and Educational Chair, Judge **Scott W. Dales**, as well as all the sponsors and panelists. Congratulations to 2014's Civility Award recipient, **Susan Jill Rice** (see Seminar details on pages 4-5). Thank you to **Andrew J. Gerdes** for his service as Chair of the Steering Committee for 2012-2014. The Steering Committee will continue to be in excellent hands, as new Chair, **Laura J. Genovich**, took the reins at the conclusion of the 2014 Seminar.

This issue includes a great article entitled "10 Things Tax Professionals Need to Know About Bankruptcy," (pg. 8) by guest columnist **Cathy Moran**, but don't let the title fool you, it's also a fantastic refresher for bankruptcy attorneys; and also a brief rundown of the bankruptcy cases currently pending before the U.S. Supreme Court. And a special thank you to the **volunteer law students in Judge James D. Gregg's bankruptcy course at MSU College of Law** for providing excellent case summaries. Please see the students' names and email addresses included with the case summaries. As always, members are encouraged to contact me (ben@whitelawplc.com) with comments, suggestions or articles.

IN THIS ISSUE

New Value is published by the Federal Bar Association, Bankruptcy Section, for the Western District of Michigan.

LETTER FROM THE CHAIR

Laura J. Genovich

I am honored to serve as Chair of the Western District of Michigan's FBA Bankruptcy Section and look forward to continuing the Section's service to the bar. On behalf of the Bankruptcy Section and its members, I want to express our gratitude to Andrew J. Gerdes for his two years of service as Chair of the Bankruptcy Section.

The Bankruptcy Section had a busy and successful 2014. Our annual seminar at Boyne Highlands was a huge success thanks to our dedicated sponsors, panelists, and attendees. Our Seminar Chair, Barb Foley, and our Education Chair, Chief Judge Scott W. Dales, worked hard to put together a program with the right balance of educational sessions and social functions. Susan Jill Rice was awarded the Nims-Howard Civility Award (a well-deserved honor), and we were fortunate to have Professor John Pottow, Esq., of the University of Michigan Law School as our keynote speaker. Professor Pottow argued before the Supreme Court of the United States on behalf of the trustee in EBIA v. Arkison.

We also hosted the annual State of the Court lunch on October 31, 2014, in Grand Rapids. The keynote speaker was professor, author and speaker, John U. Bacon, who presented stories and personal insights from his years of interaction with legendary University of Michigan coach Bo Schembechler. Even the Michigan State fans enjoyed his presentation.

In addition to these events, we hosted holiday parties in Traverse City, Lansing, Grand Rapids, and Kalamazoo, and held educational programs throughout the year. We also sponsored retirement celebrations for the Hon. James D. Gregg and the Hon. Jeffrey R. Hughes.

For 2015, we are looking forward to another great annual seminar and State of the Court lunch. This year's seminar will be held at Crystal Mountain on July 30 – August 1, 2015, and the State of the Court lunch will be October 23, 2015. We are planning more educational sessions and, as always, we are seeking out opportunities to support the bankruptcy bar and foster a close relationship between the bar and the bench. We welcome your ideas, so please feel free to contact me at lgenovich@fosterswift.com or (616) 726-2238 with your input and suggestions.

Thanks for making 2014 a great year, and we are excited for 2015.

Laura J. Genovich, Chair

NEWS & ANNOUNCEMENTS

ANNOUNCEMENTS:

We want to congratulate two of our founding members and major contributors to our district's bankruptcy bar on their respective retirements.

- **Patrick J. Mears** retired from Barnes & Thornburg this past summer. Pat served as a founding member of the W.D. Michigan's FBA Bankruptcy Section and is a former Editor of this Newsletter. More recently Pat served as Editor of the Historical Society's Stereoscope publication, and is now living in Germany. We thank Pat for his years of invaluable service to our district and bar, and we wish him the best in retirement.

- **Thomas P. Sarb** recently retired from Miller Johnson. Tom, a founding member of the W.D. Michigan's FBA Bankruptcy Section, is also a former Editor of this Newsletter. Throughout his career, Tom's efforts added immeasurable value to our organization, our district, and the bankruptcy bar in general. His example set the standard for bankruptcy practitioners in our district. We are extremely grateful for his contributions and congratulate him on his retirement.

UPCOMING EVENTS:

- The 2015 Annual FBA Bankruptcy Seminar is scheduled for **July 30 – August 1, 2015** at Crystal Mountain.

- The 2015 State of the Court Luncheon will take place **Friday, October 23, 2015**.

BANKRUPTCY NEWS:

- According to a new article in the Economist, there is evidence that bankruptcy rules for debtors are too tough, and may be hurting the economy.
- The White House Floats Bankruptcy Process for Some Student Debt.
- Lower oil prices are great at the pump, but they're wreaking havoc on the energy sector; below are the latest oil & gas related companies to file bankruptcy, and these are just the filings this month (click on the links for the stories):
    - ◊ Quicksilver Resources (Oil & Gas Drilling)
    - ◊ BPZ Resources (Oil & Gas Exploration)
    - ◊ Dune Energy (Oil & Gas Production)
    - ◊ Cal Dive International (Offshore Oil Services)

A SPECIAL THANK-YOU TO SPONSORS OF THE 2014 FBA BANKRUPTCY SECTION SEMINAR

The FBA Bankruptcy Section expresses its sincere appreciation to the 2014 FBA Bankruptcy Seminar sponsors:

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2014 FBA BANKRUPTCY SECTION SEMINAR

CHAIRS

Educational Chair: **The Honorable Scott W. Dales**
United States Bankruptcy Judge

Seminar Chair: **Barbara Foley, Esq.**
Standing Chapter 13 Trustee

KEYNOTE SPEAKER

Professor John Pottow, Esq.
University of Michigan Law School

2014 AWARD WINNERS

- Congratulations to **Susan Jill Rice** on receiving the FBA Bankruptcy Section's 2014 Nims-Howard Civility Award in recognition of her conduct, skill and advocacy that exemplifies the tradition of civility and excellence of the bench and bar of the Western District of Michigan.

PANELISTS

The FBA Bankruptcy Section extends its sincere gratitude and appreciation to the following panelists and participants:

Professor John Pottow, Keynote Speaker

Hon. James W. Boyd, Bankruptcy Judge, W.D. MI

Hon. Scott W. Dales, Chief Bankruptcy Judge, W.D. MI

Hon. John T. Gregg, Bankruptcy Judge, W.D. MI

Hon. Robert J. Jonker, U.S. District Judge, W.D. MI

Hon. Daniel S. Opperman, Bankruptcy Judge, E.D MI

Hon. Walter Shapero, Bankruptcy Judge, E.D. MI

Hon. Phillip J. Shefferly, Chief Bankruptcy Judge, E.D. MI

Hon. May Ann Whipple, Bankruptcy Judge, N.D. OH

A. Todd Almassian

Paul I. Bare

James W. Batchelor

David E. Bulson

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Martin L. Rogalski

Susan Jill Rice

Patricia Joan Scott

David L. Stowe

Elizabeth M. Von Eitzen

Robert F. Wardrop, II

Michelle M. Wilson

Robert D. Wolford

Kimberly Sue Young

ARTICLES

HOLDING PATTERN: A BRIEF REVIEW OF BANKRUPTCY CASES CURRENTLY PENDING BEFORE THE U.S. SUPREME COURT

By Benjamin M. White
White Law Firm, PLC

1. Wellness International Network, Limited v. Sharif (Case No. 13-935)

• Issue: (1) whether the presence of a state property law issue in the context of a § 541 action against the Debtor (to determine whether property in the Debtor's possession on the petition date constituted property of the estate) removes the action from the Bankruptcy Court's constitutional authority to enter a final order because such action does not "stem[ ] from the bankruptcy itself"; and (2) whether Article III permits Bankruptcy Courts to exercise judicial power based on the litigants' consent, and if so, whether implied consent is sufficient.

• Summary: the general rule is that when a trustee of a state-law trust files a personal bankruptcy, the assets of the state-law trust do not become property of the bankruptcy estate. The two interrelated issues in the case are (i) does the Bankruptcy Court have jurisdiction to decide whether the Debtor owns the trust assets (thus making the assets property of the state-law trustee's bankruptcy estate) on the grounds that the trust was merely a sham and invalid; and (ii) can a third party with potential title to the subject trust assets (here, the Debtor's sister) be deemed to have impliedly consented to Bankruptcy Court jurisdiction? A sub-issue, or preliminary issue, which the Justices raised at oral argument is whether, since deciding one of the issues in the affirmative would resolve the case, the Supreme Court can answer both questions even though only one affirmative answer would be sufficient? And, if they can only answer one, which issue is more important to bankruptcy practice.?

It seems that the issue related to whether the trust assets are property of the estate is really limited in scope to state-law trust situations, since that is likely the only time where legal and equitable title is split. The consent issue, on the other hand, seems to have much broader implications, since it arguably would apply to Stern claims as well - i.e., common law claims that seek to augment the estate with third-party property. In addition, the consent issue may affect the federal magistrate system as well.

At oral argument, the Solicitor General agreed that the Bankruptcy System is just like the magistrate system, and concluded therefrom that if there is a constitutional violation, it is a waivable violation because it is a matter of subject-matter jurisdiction.

Finally, Wellness's claim is against the Debtor, not a third party, but the case would certanly affect the Debtor's sister to the extent her interest in the trust assets will expand or contract depending on the determination. Is she therefore a necessary party to the action?

2. Bank of America v. ToledoCardona (Case No. 14-163); Bank of America v. Caulkett (Case No. 13-1421)

• Issue: Whether, under § 506(d) of the Bankruptcy Code (which provides that "[t]o the extent that a lien secures a claim against the debtor that is not an allowed secured claim, such lien is void."), a chapter 7 debtor may strip off a junior mortgage entirely when the outstanding debt owed to a senior lienholder exceeds the current value of the collateral.

Summary: The two cases are identical in substance, and present a square circuit split on an important and frequently recurring issue in bankruptcy law. In *McNeal v. GMAC Mortgage, LLC*, 735 F.3d 1263

(2012), *reh'g denied* (11th Cir. 2014), the Eleventh Circuit held that a debtor may strip off a junior lien, but that holding expressly rejected decisions from the Fourth, Sixth, and Seventh Circuits.

3. Baker Botts LLP v. ASARCO LLC (Case No. 14-103)

- Issue: Whether § 330(a) of the Bankruptcy Code provides discretion to Bankruptcy Judges to award compensation for the defense of a fee application.
- Summary: Section 330(a) provides that Bankruptcy Judges may award "reasonable compensation for actual, necessary services rendered by" an attorney or other professional employed by the estate. 11 U.S.C. §330(a)(1). Prior to the award of any such compensation, attorneys and professionals must complete and file a detailed fee application, to which any interested party may object. There is no dispute that the *preparation* of such fee applications is compensable, but the Circuits are split regarding whether the *defense* of a fee application is compensable.

4. **Harris v. Viegelahn (Case No. 14-400)**

- Issue: Whether, upon a good-faith conversion from a chapter 13 to a chapter 7 (after confirmation), undistributed funds held by the chapter 13 trustee are to be refunded to the debtor or distributed to creditors. This case is noteworthy for members not only because it's a bankruptcy issue before the Supreme Court, but the Respondent is Mary Viegelahn, current Chapter 13 Trustee in the Western District of Texas in San Antonio, TX and former Chapter 13 Trustee here in the Western District of Michigan.
- Summary: This case addresses a persistent issue of confusion that has existed for some time. In its decision below, the Fifth Circuit held that the funds must be turned over to the Debtor's creditors (opinion is reported at 757 F.3d 468). In contrast, the Third Circuit has held that the funds must be returned to the Debtor upon conversion (In re Michael, 699 F.3d 305 (2012)).

Bullard v. Hyde Park Savings Bank (Case No. 14-116)

- Issue: Whether an order denying confirmation of a bankruptcy plan is appealable.
- Summary: There currently is a six-to-three split amongst the Circuits on this issue. Three Circuits (the Third, Fourth, and Fifth) allow debtors to appeal an order denying confirmation of their plan. Six Circuits (including the 1st Circuit in the opinion below in this case, as well as the Second, Sixth, Eighth, Ninth, and Tenth Circuits) have held that an order denying plan confirmation is not appealable. As described in *In re Lindsey*, 726 F.3d 857, 859 (6th Cir. 2013), the 6th Circuit has held that "a decision rejecting … confirmation [of a] plan is not a final order appealable under" 28 U.S.C. § 158(d)(1). The 6th Circuit explained that the debtor could not appeal unless the remaining proceedings would be "of a ministerial character." *Id.*

10 THINGS TAX PROFESSIONALS NEED TO KNOW ABOUT BANKRUPTCY

By Cathy Moran
Moran Law Group
1674 N. Shoreline Blvd. Suite 140 Mt. View C
Mt. View, California

Cathy Moran *is a bankruptcy lawyer, personal finance blogger and consumer advocate. She is a certified bankruptcy specialist, practicing at Moran Law Group in Mountain View, California. Ms. Moran has practiced bankruptcy law for 34 years, and writes extensively on bankruptcy law and practice. She shares the basics of consumer and small-business bankruptcy at BankruptcyInBrief.com, and shares views, news, and rants about bankruptcy and personal finance at BankruptcySoapbox.com. And, for good measure, at BankruptyMastery.com, Ms. Moran seeks to pass along to the coming generation of bankruptcy lawyers some of the knowledge that she has gained throughout her career as a bankruptcy lawyer.*

We are excited and very grateful to have Cathy Moran's permission to include the Article below which, as you can tell from the title, is aimed at tax professionals, but which is also a fantastic article and refresher for bankruptcy attorneys here in the heart of tax season.

Tax season approaches.

Tax preparers stand a good chance of encountering clients who either have filed bankruptcy, or who may benefit from a bankruptcy filing.

Here's my list of bankruptcy nuggets a good tax professional should have at hand.

1. **Debts discharged in bankruptcy don't trigger cancellation of debt income**- One of bankruptcy's compelling features is that thedebts cancelled by reason of the bankruptcy discharge don't get included in the debtor's income. Bankruptcy, found in Title 11, is the first exception on Form 982 to inclusion of forgiven debt in gross income.

2. **IRS and state tax entities subject to the automatic stay** A bankruptcy filing enjoins tax authorities from continuing collection action. Thus the stay terminates garnishments and prohibits levies of the debtor's assets.

3. **Bankruptcy can discharge income tax debt three years after return due** Taxes can be wiped out in bankruptcy if the return was due, including extensions, three years or more before the bankruptcy is filed; any late filed return has been on file for 2 years; and the taxes were assessed more than 240 days before the commencement of the case. More on overview of taxes in bankruptcy.

4. **Chapter 13 is a quick and certain alternative to an OIC**- A Chapter 13 plan is confirmed within weeks and binds the IRS just like any other creditor. The case discharges *for all time* the scheduled taxes, penalties and interest upon plan completion. The plan must pay the priority taxes (those tied to returns less than three years old) and the interest on the priority tax as of the filing. No new interest or penalties accrue during the pendency of the case.

5. **Tax penalties are dischargeable** Penalties associated with dischargeable taxes are dischargea-

ble; all penalties are dischargeable in Chapter 13, and penalties associated with events more than three years past are dischargeable in Chapter 7 even if the tax isn't dischargeable.

6. **Chapter 7 estate, but not 13 estate, is a separate taxpayer**- A bankruptcy estate owes the feds a return, and perhaps tax on capital gains it recognizes. Property remains property of the bankruptcy estate until the estate is closed or the property abandoned.

7. **Tax attributes of the debtor pass to the bankruptcy estate** The debtor's basis, loss carry forwards, and exclusions are available to the Chapter 7 trustee, and revert to the debtor when the bankruptcy estate closes.

8. **Debtor can elect short tax year for the year bankruptcy is filed** A short year election can make tax attributes available to the debt on the return for the pre bankruptcy portion of the year. It can also quantify any tax due in the year of filing so that it is a priority claim for payment from the assets to be distributed in the bankruptcy case.

9. **Tax liens generally survive the bankruptcy case** While lien survive as a charge on the assets the debtor owned at the filing of the case, the lien does not attach to assets the debtor acquires after the case is filed. In Chapter 13, the lien need be paid only to the extent of the actual value of the assets subject to the lien.

10. **Allowable deductions may be found in payments made on debtor's behalf by Chapter 13 trustee** Chapter 13 plans often pay over time mortgage interest arrears on the debtor's home. State taxes paid through the plan or business expenses including taxes may be deductions the Chapter 13 debtor can claim.

The rules covering federal taxes in bankruptcy are found in Pub. 902. State taxes are subject to the same treatment in bankruptcy as federal taxes.

CASE SUMMARIES AND LEGAL UPDATES

The case summaries in this issue were prepared by MSU Law Students in Judge James Gregg's Bankruptcy Law class. All of the summaries are excellent, and we're very grateful for their contribution. Each contributor's email is listed with their name. Thank you to the Hon. James D. Gregg for his assistance in arranging for the voluntary services of his students.

CASE SUMMARIES

Law v. Siegel, 134 S.Ct. 1188 (2014). Summarized by **David M. Rader**, drader@email.arizona.edu

Petitioner, Stephen Law, valued his home at $363,348, claiming that $75,000 was exempt under California's homestead exemption. Law also claimed that two voluntary liens existed – 1) a note and deed of trust for $147,156.52 by Washington Mutual Bank, and 2) a note and deed of trust for $156,929.04 by Lin's Mortgage & Associates – which exceeded the home's nonexempt value, leaving no equity recoverable to Law's other creditors. Alfred Siegel was appointed trustee of the bankruptcy estate and challenged the second lien in an adversary proceeding which was both lengthy and costly (in excess of $500,000) to the trustee.

The Bankruptcy Court found the second lien to be fictitious and created by Law solely to preserve equity in the house. Siegel motioned to "surcharge" Law's $75,000 exemption in order to defray litigation expenses incurred by Siegel. The Bankruptcy Court granted Siegel's motion and surcharged Law's home exemption to pay the trustee's administrative fees. The Ninth Circuit Bankruptcy Appellate Panel and the Ninth Circuit affirmed. Law appealed and was granted cert by the Supreme Court.

The Supreme Court held that the Bankruptcy Court exceeded its authority when it sanctioned Law – via the granting of Siegel's motion – and should not have surcharged him for the administrative expenses incurred by Siegel. The Court explained that the $75,000 surcharged was not liable for the payment of any administrative expenses §522(k), including attorney's fees, see § 503(b)(2), because it was protected by the homestead exemption.

The Court also established that because no one timely objected to Law's homestead exemption that it became final before the surcharge was imposed. And, if a trustee does not timely object to an exemption that they cannot later challenge it. Taylor v. Freeland & Kronz, 503 U.S. 638, 643-44. The trustee's claim of fraudulent activity by debtor, although valid, occurred post-petition and therefore the exemption is valid. Therefore, the trustee must follow normal procedures for collecting money judgments. Finally, the Court held that ample authority exists for courts to address debtor misconduct but that the courts may not contravene express provisions of the Bankruptcy Code by ordering that the debtor's exempt property be used to pay expenses for which that property is not liable under the Code.

Clark v. Rameker, 134 S. Ct. 2242 (2014). Summarized by **Rachel Pickard**, pickardr@msu.edu

In a unanimous decision, the Supreme Court held that funds held in inherited Individual Retirement Accounts are not "retirement funds" within the meaning of 11 U.S.C.S. § 522(b)(3)(C), and thus cannot be exempted from the bankruptcy estate. To determine whether the retirement account exemption applies, § 522(b)(3)(C) and (d)(12) incorporate a two-prong test: the funds must be (1) "retirement funds" and (2) in an account that is exempt from taxation. While the lower courts agreed that inherited IRAs satisfied the second prong, there was disagreement as to the meaning of "retirement funds," which Clark resolved.

In 2010, Heidi Clark-Heffron and her husband filed for chapter 7 bankruptcy. Clark-Heffron sought to exempt roughly $300,000 held in an IRA account she inherited from her mother in 2001. The chapter 7 trustee objected to the exemption.

The phrase "retirement funds" is not defined in the Bankruptcy Code, so the Court analyzed the plain or ordinary meaning of the word to determine whether inherited IRAs qualified as "retirement funds." In concluding that inherited IRAs are not objectively set aside for retirement purposes, the Supreme Court looked at three legal characteristics that distinguished inherited IRAs from traditional IRAs. First of all, the holder of an inherited IRA account is not allowed to invest money in the account. This starkly contrasts with the purpose of traditional IRAs,

which is to provide taxpayers with incentives to regularly contribute money to the account to save for retirement. Secondly, holders of inherited IRAs are required to withdraw money from the account, regardless of age or proximity to retirement. Lastly, inherited IRAs do not operate like traditional IRAs because an individual may withdraw funds from an inherited IRA at any time without paying a tax penalty.

The Court further held that this interpretation is consistent with the purpose of the Bankruptcy Code's exemption provisions. Traditional IRAs are exempt to provide incentives for debtors to save for retirement, and the limitations and tax penalties placed on traditional IRAs "ensure that debtors who hold such accounts (but have not yet reached retirement age) do not enjoy a cash windfall by virtue of the exemption." Clark v. Rameker, 134 S.Ct. 2242, 2247 (2014). In contrast, inherited IRAs do not have these limitations, and the debtor would be entitled to the funds immediately and with no tax penalties. This is contrary to the purpose of the Bankruptcy Code exemption provisions, which is to provide a "fresh start" to the debtor.

Finally, the Court disposed of petitioner's principal argument that § 523(b)(3)(C) and (d)(12) do not specify that the retirement funds at issue must have been retirement funds accumulated by the debtor. The "ordinary usage" of the statutory reference to "retirement funds" necessarily refers to funds set aside for retirement by that person, "not that they were set aside for that person at some prior date by an entirely different person." Clark, 134 S. Ct. at 2248. To interpret the term "retirement fund" to mean anything else would render that part of the statute superfluous, which is contrary to traditional rules of statutory interpretation.

In sum, funds held in inherited IRAs are not "retirement funds" within the meaning of § 523(b)(3)(C). The Court examined the plain meaning of the term "retirement funds" and concluded that it would be contrary to the purpose of the Bankruptcy Code to include inherited IRAs in the definition.

***In re Syncora Guarantee Inc., 757 F. 3d 511 (6th Cir. 2014)*.**

Summarized by **Brad Stauber**, stauberbm@gmail.com

Syncora Guarantee Inc. and Syncora Capital Assurance Inc. (hereinafter jointly "Syncora") petitioned the Sixth Circuit for a writ of mandamus to direct the United States District Court for the Eastern District of Michigan to adjudicate their appeal of an August 28, 2013 decision made by the United States Bankruptcy Court for the Eastern District of Michigan. The Sixth Circuit granted Syncora's writ of mandamus and ordered the district court to adjudicate Syncora's appeal no later than July 14, 2014. The court believed mandamus was justified in order "to protect [the] court's future appellate jurisdiction and to ensure that the district court's stay order [did] not deprive Syncora of a meaningful opportunity to obtain timely review of the bankruptcy court's decision."

This dispute arose out of a complex agreement between Syncora and the city of Detroit. Syncora agreed to insure some of the city's obligations from debt instruments it issued and the execution of interest-rate swaps. When Detroit's credit was downgraded in 2009, the city was forced to enter collateral agreements with swap counterparties to avoid financial collapse. Under the collateral agreements, the city's monthly casino tax revenue would be placed into an account at U.S. Bank and the funds would be withheld until the city deposited its monthly swap obligation payments into a separate account.

In June of 2013, Syncora notified U.S. Bank that an "event of default" had occurred and that the bank should not release the casino tax revenues to the city. Despite the city's objection, U.S. Bank refused to release those revenues to the city. The city then brought suit in the Wayne County Circuit Court to obtain declaratory relief. The court granted the city's ex parte motion for a temporary restraining order that required U.S. Bank to release the funds. Syncora then removed the case to the United States District Court for the Eastern District of Michigan. One week later, the city filed for Chapter 9 bankruptcy protection and the case was removed to the bankruptcy court. The bankruptcy court held that Syncora had no right to trap the casino tax revenues because those taxes were considered property of the city and thus protected by the automatic stay. On September 10, 2013, Syncora timely appealed the decision to the U.S. District Court for the Eastern District of Michigan. In December 2013, the bankruptcy court held that the city was eligible to seek protection under Chapter 9 of the Bankruptcy Code. The bankruptcy court later certified its decision for direct appeal to the Sixth Circuit. On February 21, 2014, the Sixth Circuit granted several petitions for direct appeal from the bankruptcy court's decision regarding the city's eligibility to be a debtor under Chapter 9 of the Bankruptcy Code. On April 4, 2014, the district court sua sponte entered an order staying Syncora's appeal in that court pending the outcome of the Sixth Circuit's review of the city's bank-

ruptcy eligibility. One month later, the district court denied Syncora's motion for reconsideration of the stay order. Syncora filed its petition for a writ of mandamus on June 10, 2014. The Sixth Circuit granted Syncora's writ of mandamus and ordered the district court to adjudicate their appeal. The issue on appeal is whether certain tax revenues that constitute a significant source of the city's funding were correctly deemed to be property of the bankruptcy estate.

Granting mandamus relief is an extraordinary remedy—but under the facts of this case the Sixth Circuit held that the relief was justified.

Judge Stranch authored a brief concurring opinion in which she emphasized that governing case law obligated the court to protect its future appellate jurisdiction and ensure that the district court's stay order does not deprive Syncora of a meaningful opportunity for appellate review of the bankruptcy court's decision. It was further emphasized that the court's decision was made to assure preservation of orderly appellate review, and was distinct from a decision related to each party's alleged facts or the merits of their respective arguments.

In re Warner, 514 BR 532 (Bankr. W.D. Mich., 2014). Summarized by **Jordan Sayfie**, sayfiej@gmail.com

After Debtor was laid off from his job, he decided to pursue his dream of becoming a clinical psychologist. After a four year program of study and a residency for two years, Debtor had accumulated $432,592.70 in student loan debt. In order to service his student loans, Debtor was looking at payments of approximately $2,500 per month. Debtor, working as a clinical psychologist and working to pursue a private clinical practice made an annual salary of $48,657.00. The debtor rented an apartment, drove a high-mileage vehicle, and lived on a modest allowance. After paying his monthly expenses, it was determined that the Debtor had approximately $31.00 left over each month with which he could pay his loans. On his loan obligations the Debtor's mother had paid $18,255.00, and Debtor, himself, had paid $379.00. Debtor asked the Court to discharge his private student loan obligations, relying on the standard presented in the Second Circuit opinion of Brunner v. New York State Higher Educ. Serv. Corp., 831 F.2d 395, 396 (2d Cir. 1987).

The test applied under the Brunner case requires the satisfaction of three prongs. The first prong concerns the debtor's present inability to pay. The Court found that this prong was satisfied looking to the Debtor's very modest living expenses and relatively low income in its determination. The second prong of the Brunner analysis looks to the persistence of the Debtor's financial situation during the repayment period. Circumstances considered under this prong include circumstances beyond the debtor's control such as "illness, disability, lack of useable skills." The Court determined that the Debtor did not satisfy this prong because he was in good mental and physical health, and also pointed to the fact that his annual salary was likely to almost double in the near future. The third prong the debtor must satisfy is a showing of a good faith attempt to repay his loan obligations. In considering this prong, the Court did take into account Debtor's mother's payments of $18,255.00. Instead the Court only looked at Debtor's own attempts to repay the loans, and determined that a mere $379.00 payment did not constitute a good faith effort. Additionally, the Court pointed to the fact that the debtor had received a $6,000 tax refund and did not commit a single penny to his loan obligations.

Although the first prong of the Brunner analysis was satisfied, the Debtor in this case failed to satisfy the second and final prongs. Therefore, the Court denied Debtor's request to discharge the student loan obligations, despite the significant loan amount and the burden it might place on the Debtor.