AMERICAN BANKRUPTCY INSTITUTE

2018 Central States Bankruptcy Workshop

25 Years of Central States

Hon. Donald R. Cassling
U.S. Bankruptcy Court (N.D. Ill.); Chicago

Hon. Susan V. Kelley
U.S. Bankruptcy Court (E.D. Wis.); Milwaukee

Hon. Michael E. Ridgway
U.S. Bankruptcy Court (D. Minn.); Minneapolis

Hon. Phillip J. Shefferly
U.S. Bankruptcy Court (E.D. Mich.); Detroit

2018

Judges Reflect: 25 Years of Central States

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Bankruptcy Judge for the
United States Bankruptcy Court,
Northern District of Illinois
Chicago, Illinois

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Chief Bankruptcy Judge for the
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Eastern District of Wisconsin
Milwaukee, Wisconsin

Hon. Michael E. Ridgway,
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United States Bankruptcy Court,
District of Minnesota
Minneapolis, Minnesota

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Eastern District of Michigan
Detroit, Michigan

It would be impossible in one plenary session to fairly discuss all of the "key opinions" that have been issued during the 25 years in which the ABI Central States conference has been held. This panel of four bankruptcy judges – from Illinois, Wisconsin, Minnesota, and Michigan – will discuss a few key opinions issued during this period that are of particular interest to bankruptcy judges, attorneys, and other bankruptcy professionals. Some of these opinions were selected because they greatly affect the way that bankruptcy judges decide the cases assigned to them. Others were selected because of their importance in practice for commercial or consumer bankruptcy attorneys. Still others were selected because they may invite more litigation over questions they left open or because they illustrate unresolved conflicts in the law. Some of them are well known, but others have gotten less attention.

The following is a short blurb of the cases that this panel may discuss, not necessarily in the order they will be discussed, but just listed by the court and year decided.

Supreme Court decisions

Marrama v. Citizens Bank of Massachusetts, 549 U.S. 365 (2007) (holding that § 105(a) was "surely adequate to authorize an immediate denial of a motion to convert filed under § 706 in lieu of a conversion order that merely postpones the allowance of equivalent relief and may provide a debtor with an opportunity to take action prejudicial to creditors").

Ashcroft v. Iqbal, 556 U.S. 662 (2009) and Bell Atlantic Corp. v. Twombly, 550 U.S. 544 (2007) (To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face, meaning that the plaintiff

must plead factual content above the speculative level that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged. The plaintiff must do more than plead labels and conclusions, or a formulaic recitation of the elements of a cause of action, or naked assertions devoid of further factual enhancement. Where a complaint pleads facts that are 'merely consistent with' a defendant's liability, it stops short of the line between possibility and plausibility of entitlement to relief.).

United Student Aid Funds, Inc. v. Espinosa, 559 U.S. 260 (2010) ("[T]he Bankruptcy Rules require a party seeking to determine the dischargeability of a student loan debt to commence an adversary proceeding by serving a summons and complaint on affected creditors." However, the failure to commence an adversary proceeding through use of a "self-executing" Chapter 13 plan does not violate a creditor's due process rights if the creditor "received *actual* notice of the filing and contents of [the] plan." Furthermore, bankruptcy courts have an obligation, even absent objections, to ensure that Chapter 13 plans comply with the requirements for confirmation.).

Stern v. Marshall, 564 U.S. 462 (2011) (finding that Congress' inclusion of a counterclaim by the estate against persons filing claims against the estate under § 157(b)(2)(C) as a core proceeding is unconstitutional).

Hall v. United States, 566 U.S. 506 (2012) (Federal income tax liability from the sale of Chapter 12 farm assets was not "incurred by the estate" under the meaning of that phrase in § 503(b).).

Law v. Siegel, __ U.S. __, 134 S. Ct. 1188, 1194 (2014) (In exercising its statutory authority, "a bankruptcy court may not contravene specific statutory provisions." Section 105(a) cannot save the bankruptcy court's contravention of § 522(k) when it surcharged exempt assets.).

Executive Benefits Ins. Agency v. Arkison, __ U.S. __, 134 S. Ct. 2165 (2014) (When Stern prohibits a bankruptcy from entering a final judgment on a bankruptcy-related claim, the court may nevertheless issue proposed findings of fact and conclusions of law to be reviewed *de novo* by the district court.).

Harris v. Viegelahn, __ U.S. __, 135 S. Ct. 1829 (2015) (Absent bad faith or other cause, post-confirmation undistributed plan payments held by a Chapter 13 trustee upon conversion to Chapter 7 are not property of the Chapter 7 estate and must be returned to the debtor.).

Wellness International Network, Ltd. v. Sharif, __ U.S. __, 135 S. Ct. 1932 (2015) (A bankruptcy court may adjudicate a non-core claim that is otherwise constitutionally required to be adjudicated by an Article III court when the parties knowingly and voluntarily consent to adjudication by the bankruptcy judge.).

Czyzewski v. Jevic Holding Corp., __ U.S. __, 137 S. Ct. 973 (2017) (narrowing "structured dismissals" in ruling that § 349(b) does not give a bankruptcy court power to approve a distribution scheme upon dismissal of a Chapter 11 case that deviates from the Code's priority rules without the consent of the affected parties).

Circuit Court decisions

Oyler v. Educational Credit Management Corp. (In re Oyler), 397 F.3d 382, 385 (6th Cir. 2005) (adopting the test from Brunner v. New York State Higher Educ. Serv. Corp., 831 F.2d 395 (2d Cir. 1987), requiring a debtor to prove "(1) that the debtor cannot maintain, based on current income and expenses, a 'minimal' standard of living for herself and her dependents if forced to repay the loans; (2) that additional circumstances exist indicating that this state of affairs is likely to persist for a significant portion of the repayment period of the student loans; and (3) that the debtor has made good faith efforts to repay the loans" to establish an undue hardship sufficient to discharge student loans under § 523(a)(8)).

Thompson v. General Motors Acceptance Corp. LLC, 566 F.3d 699 (7th Cir. 2009) (A creditor who lawfully repossesses a vehicle pre-petition must immediately return the vehicle to the debtor after the debtor files for Chapter 13, even if the debtor fails to show the creditor's interest is adequately protected. Retaining possession is an improper exercise of control over the vehicle, which violates § 362(a)(3). Section 542(a) and United States v. Whiting Pools, Inc., 462 U.S. 198 (1983) compel immediate turnover of a seized asset.).

White v. Wyndham Vacation Ownership, Inc., 617 F.3d 472 (6th Cir. 2010) (courts look at the following three factors in determining whether judicial estoppel applies: (1) the opponent took a contrary position under oath in a prior proceeding; (2) the prior position was accepted by the court; and (3) whether the conduct amounts to nothing more than mistake or inadvertence).

Dahlin v. Lyondell Chemical Co., 881 F.3d 599 (8th Cir. 2018) (The bankruptcy court erred in finding that the debtor gave insufficient notice of the bankruptcy to a creditor who, post-confirmation, pursued a pre-petition personal injury/wrongful death claim. The level of notice required depends on whether the creditor is known or unknown. Known creditors must be provided with actual written notice of the bankruptcy and claims bar date, but notification by publication is generally sufficient for unknown creditors. The claim had been discharged.).

In re Connolly North America, LLC, 802 F.3d 810 (6th Cir. 2015) (reversing district court and bankruptcy court, allowed administrative expense for a creditor who makes a substantial contribution in a Chapter 7 case: stressing that use of the word "including" in § 503 gives bankruptcy courts discretion to evaluate administrative expense requests on a case-by-case basis, weighing the facts and the benefit conferred on the estate and creditors, yet also noting that administrative expense claims should be strictly construed because they reduce the fund available for creditors and other claimants).

BAP decisions

Roberts Broadcasting Co. v. DeWoskin (In re Roberts Broadcasting Co.), 568 B.R. 310 (B.A.P. 8th Cir. 2017) (The debtors filed a malpractice claim after their Chapter 11 cases had been closed and all creditors paid in full. The matter was removed by the defendants from state court to federal district court, which referred it to the bankruptcy court, which in turn abstained and remanded under 28 U.S.C. § 1334(c)(1). The B.A.P. affirmed, finding no abuse of discretion and noting that there would be no effect on the administration of the estate because all creditors had been paid in full so any recovery would benefit the owners, not creditors.).

Zahn Law Firm, P.A. v. Baker (In re Baker), 577 B.R. 308 (B.A.P. 8th Cir. 2017) (After filing for Chapter 13, the debtor removed a breach of contract case against him that had been pending in state court for a year. The B.A.P. affirmed the equitable remand, finding no abuse of discretion and noting that the factors for equitable remand under 28 U.S.C. § 1452(b) are "virtually identical" to the factors for permissive abstention under 28 U.S.C. § 1334(c)(1).).

District Court and Bankruptcy Court decisions

In re Avila, 566 B.R. 558 (Bankr. N.D. Ill. 2017) (The city impounded the debtor's car for unpaid parking tickets. The debtor promptly filed Chapter 13 and demanded return under Thompson. The city moved for a declaration that its retention did not violate the stay based on the municipal code giving the city a possessory lien on impounded vehicles. The court granted the motion, holding that retention of the car did not violate the stay, distinguishing Thompson as addressing a consensual lien that did not depend on the lien holder retaining possession.).

City of Chicago v. Marshall, 281 F. Supp. 3d 702 (N.D. Ill. 2017), *appeal pending*, case no. 17-3630 (Dec. 27, 2017) (Chapter 13 debtors were liable for post-petition parking or traffic violations of the city code. The city sought payment as priority administrative expenses under § 503(b)(1)(A). When a post-petition creditor was an involuntary creditor or a victim of the bankruptcy estate's negligence, courts use a different test for § 503(b) expenses, where the expense must arise out of a transaction with the estate and fundamental fairness must weigh in favor of granting priority administrative status. In this case, the city met first prong because the Chapter 13 plans did not revest property of the estate in the debtors, but not second.).

In re Pratola, 578 B.R. 414 (Bankr. N.D. Ill. 2017) (although finding a Chapter 13 debtor's student loan debt of over $500,000 exceeded the eligibility limit under § 109(e), the court denied the Chapter 13 trustee's motion to dismiss for ineligibility, finding that Congress did not intend to bar debtors with large amounts of educational debt from Chapter 13 and the debt limit fails to account for the changing nature and increasing amount of educational debt).