"BLAME IT ON THE RAIN" (MILLI VANILLI), "BLINDED BY THE LIGHT" (MANFRED MANN), "BORDERLINE" (MADONNA), "WALKING ON SUNSHINE" (KATRINA AND THE WAVES), "OBLIVIOUS" (AZTEC CAMERA) AND OTHER EXPLANATIONS FOR RECENT COURT DECISIONS IN COMMERCIAL AND CONSUMER CASES.

RECENT DEVELOPMENTS IN COMMERCIAL AND CONSUMER CASES

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Recent Developments in Commercial and Consumer Cases

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This article is a compilation of "selected" cases primarily from January 1, 2004 to January 1, 2005 and focuses primarily on decisions rendered pursuant to the statutory provisions contained in Title 11 of the United States Code (the "Bankruptcy Code").

I. SUPREME COURT

Formula approach to determine interest rate for cram down

Till v. SCS Credit Corp., 541 U.S. 465, 124 S. Ct. 1951, 158 L.Ed.2d 787 (2004) - The Supreme Court held that the formula approach to determine the adequate interest rate for cram down was appropriate over other approaches. The debtors filed a chapter 13 and proposed, under the cram down provision of section 1325(a)(5), to pay 9.5% per year on a secured amount, versus the 21% contract rate. The debtor arrived at the 9.5% interest rate by taking the prime interest rate and adjusting up for risk. The secured creditor objected arguing that the 21% contract rate was appropriate for cram down. Over the secured creditor's objection, the bankruptcy court confirmed the plan. The Supreme Court held that the "prime plus" formula approach was the appropriate method for calculating the cram down rate.

The formula approach

> begins by looking to the national prime rate, reported daily in the press, which reflects the financial market's estimate of the amount a commercial bank should charge a creditworthy commercial borrower to compensate for the opportunity costs of the loan, the risk of inflation, and the relatively slight risk of default. Because bankrupt debtors typically pose a greater risk of non-payment than solvent commercial borrowers, the approach then requires the Bankruptcy Court to adjust the prime rate accordingly. The appropriate size of that risk adjustment depends, of course, on such factors as the circumstances of the estate, the nature of the security, and the duration and feasibility of the reorganization plan. The Court must therefore hold a hearing at which the debtor and any creditors may present evidence about the appropriate risk adjustment. Some of this evidence will be included in the debtor's bankruptcy filings, however, so the debtor and creditors may not incur significant additional expense. Moreover, staring from a concedingly low estimate and adjusting upward places the evidentiary burden squarely on the creditors, who are likely to have readier access to any information absent from the debtor's filing. . . . Finally, many of the factors relevant to the adjustment fall squarely within the bankruptcy court's area of expertise. Thus, unlike the coerced loan, presumptive contract rate, and cost of funds approaches, the formula approach entails a straightforward, familiar, and objective inquiry, and minimizes the need for potentially costly additional evidentiary proceedings. Moreover, the resulting "prime plus" rate of interest depends only on the state of financial markets, the circumstances of the bankruptcy estate, and the characteristics of the loan, not on the creditors' circumstances or its prior interactions with the debtor. For these reasons,

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> the prime plus or formula rate best comports with the purposes of the Bankruptcy Code.

Till at 124 S. Ct. 1951, 1961-62.

The effect of *Till* is far-reaching. Although this decision was determined in the chapter 13 context, the same formula approach may be held appropriate in chapter 11 reorganizations.

Debtor forfeits rights to object under Rule 4004

Kontrick v. Ryan, 540 U.S. 443, 124 S. Ct. 906, 157 L.Ed.2d 867 (2004) – A creditor in a chapter 7 proceeding filed an untimely complaint objecting to the debtor's discharge. After the bankruptcy court ruled on the merits in favor of the creditor, the debtor objected on the basis that Rule 4004 is "jurisdictional" and that the creditor's complaint was untimely under Rule 4004. The Supreme Court held that Rule 4004 is not "jurisdictional" and that the debtor forfeits the right to rely on Rule 4004 where the debtor does not raise the time limitation before a ruling on the merits.

Rule 4004(a) states that a complaint objecting to a debtor's discharge under section 727 must be filed no later than sixty (60) days after the first date of the first meeting of creditors. This deadline may be extended for cause under Rule 4004(b). The Supreme Court addressed the issue of whether the debtor forfeited the right to assert the untimeliness of a complaint regarding discharge by failing to object until after the merits were adjudicated. The Court agreed with the Seventh Circuit and held that time bars must be raised in the answer or a responsive pleading. Therefore, the Court concluded that the debtor forfeited its right to object to the untimeliness of the complaint after the court had ruled on the merits of the case.

Attorneys fees denied post-conversion

Lamie v. United States Trustee, 540 U.S. 526, 124 S. Ct. 1023, 157 L.Ed.2d 1024 (2004) – The debtor's case was converted from a chapter 11 proceeding to a chapter 7 proceeding. The debtor's counsel applied for payment of professional fees for legal services rendered post-conversion. Upon the United States Trustee's objection, the bankruptcy court denied the payment of the legal fees. The bankruptcy court's decision was affirmed by the district court, Fourth Circuit, and ultimately by the United States Supreme Court. The Court applied the literal language of section 330(a) as required by Supreme Court precedent including *Hen House*,[1] and found that because the attorney was not employed pursuant to section 327, the attorney was not eligible for compensation under section 330. The Court pointed out that the Code does not prevent a debtor to engage legal counsel before a chapter 7 proceeding, or before the conversion to a chapter 7, and prepay for the expected legal services.[2] The Court, however, concluded that the debtor's attorney could not be paid from estate funds because the attorney was not employed pursuant to section 327 post-conversion. This opinion abrogated the following circuit opinions: *In re Ames Dept. Stores, Inc.*, 76 F.3d 66 (2d Cir. 1996), *In re Top Grade Sausage, Inc.*, 227 F.3d 123 (3d Cir. 2000), and *United States Trustee v. Garvey, Schubert & Barrer (In re Century Cleaning Services*, *Inc.)*, 195 F.3d 1053 (9th Cir. 1999).

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[1] *Hartford Underwriters Ins. Co. v. Union Planters Bank, N. A.,* 530 U.S. 1, 6, 120 S. Ct. 1942, 147 L.Ed.2d 1 (2000) ("Hen House").

[2] 11 U.S.C. § 329.

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Discharge of student loans does not implicate sovereign immunity

Tennessee Student Assistance Corp. v. Hood, 541 U.S. 440, 124 S. Ct. 1905, 158 L.Ed.2d 764 (2004) – A chapter 7 debtor brought an adversary proceeding to discharge student loan debt guaranteed by the State of Tennessee. The State of Tennessee filed a motion to dismiss the adversary proceeding based on lack of jurisdiction. The bankruptcy court and the Sixth Circuit held that the bankruptcy clause gave Congress the authority to abrogate state sovereign immunity in Section 106(a), and therefore, denied the State's motion to dismiss. Although the Supreme Court affirmed, the Supreme Court held that the bankruptcy court's discharge of a student loan debt does not implicate a state's eleventh amendment immunity.

Debtor may be plan participant under ERISA

Yates v. Hendon, 541 U.S. 1, 124 S. Ct. 1330, 158 L.Ed.2d 40 (2004) – A chapter 7 trustee brought an adversary proceeding to avoid a transfer to the debtor's retirement plan three weeks pre-petition. The bankruptcy court, district court and Sixth Circuit all found in favor of the trustee finding that the debtor could not repay a loan to a retirement plan where the debtor was sole shareholder and president of the corporation. The Supreme Court reversed holding that debtor could be a "participant" under an ERISA plan sponsored by his corporation so long as the plan covered more than the debtor and his wife. This opinion abrogates *Agrawal v. Paul Revere Life Ins. Co.,* 205 F.3d 297 (6th Cir. 2000); *Fugarino v. Hartford Life and Accident Ins. Co.,* 969 F.2d 178 (6th Cir. 1992); *Kwatcher v. Massachusetts Serv. Employees Pension Fund,* 879 F.2d 957 (1st Cir. 1989); *Giardono v. Jones,* 867 F.2d 409 (7th Cir. 1989); and *Peckham v. Board of Trustees of Int'l Brotherhood of Painters and Allied Trades Union,* 653 F.2d 424 (10th Cir. 1981).

Taxes against partnership good against individual partners

United States v. Galletti, 541 U.S. 114, 124 S. Ct. 1548, 158 L.Ed.2d 279 (2004) – The general partners of a partnership filed for chapter 13 protection. The IRS had properly assessed employment taxes against the partnership, but had not assessed these taxes against the individual partners until after the filing of the bankruptcy. The debtors objected to the IRS' claim stating that the 3-year statute of limitations applied to the IRS' claim. The bankruptcy court, district court and Ninth Circuit disallowed the IRS' claim. The Supreme Court reversed and remanded holding that the statute of limitations extends for collecting the debt because the IRS properly assessed the taxes on the partnership and there was no requirement to assess the taxes on the individual partners.

II. ENERGY CONTRACTS

Interplay between bankruptcy power and FERC authority; FERC loses

Mirant Corp. v. Potomac Elec. Power Co. (In re Mirant), 378 F.3d 511 (5th Cir. 2004) - The Fifth Circuit addressed the issue of whether a bankruptcy or district court may authorize rejection of an executory contract to purchase electricity or whether Congress granted the Federal Energy Regulatory Commission ("FERC") exclusive jurisdiction over power purchase agreements. The Fifth Circuit concluded that the bankruptcy courts may authorize the rejection of power purchase agreements in bankruptcy. The Fifth Circuit concluded that the bankruptcy court's authority to allow rejection of power purchase agreements did not conflict with the FERC's authority to regulate rates for the sale of power in interstate commerce. Recognizing

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that the FERC, pursuant to the Federal Power Act, has the exclusive authority to determine the reasonableness of wholesale electricity rates, the Fifth Circuit found that the bankruptcy/district court's authority under section 365 of the Bankruptcy Code allowed debtors to reject power purchase agreements so long as the rejection did not challenge the contract's filed rate. An indirect effect upon a filed rate with the FERC was not sufficient to deny the bankruptcy/district court authority to rule on a motion under section 365.

The Fifth Circuit also reversed the broad injunction issued by the bankruptcy court. The Fifth Circuit recognized the bankruptcy court's authority to issue injunctions pursuant to section 105 of the Bankruptcy Code. The Circuit found, however, that the injunction issued by the bankruptcy court was overly broad in that it prohibited the FERC from taking *any* regulatory action. Instead, the Fifth Circuit found that an injunction should only prevent the FERC from negating a debtor's rejection decisions.

Termination of swap agreement did not violate automatic stay

In re Mirant Corp., 314 B.R. 347 (Bankr. N.D. Tex. 2004) – The creditor terminated a swap agreement under sections 362(b)(17) and 560 of the Bankruptcy Code and the debtors objected to the timing of such termination. The court held that the creditor was entitled to terminate the swap agreement and that termination did not violate the automatic stay.

III. DEBTOR IN POSSESSION

No good faith with golden parachute

In re Bush Industries, Inc., 315 B.R. 292 (Bankr. W.D.N.Y. 2004) – The equity holders committee objected to confirmation on the basis that the plan of reorganization was not proposed in good faith. The court found that the debtor's plan provision providing a "golden parachute" for its principal officer was not proposed in good faith pursuant to section 1129(a)(3). Although the court recognized that officers and directors of a corporation owe fiduciary duties to their shareholders, the court further noted that the officers and directors of a debtor in bankruptcy owe primary duties to maximize returns to the creditors. The court found that the principal officer violated his fiduciary duties prior to filing for bankruptcy in negotiating a "golden parachute" deal. The court concluded that the plan was not proposed in good faith pursuant to section 1129(a)(3), and therefore, the court denied confirmation. The court reasoned that merely deleting the offending provision would not satisfy the good faith requirement under section 1129(a)(3).

Critical vendor payments not authorized

In re Kmart Corp., 359 F.3d 866 (7th Cir. 2004) – On the first day of Kmart's bankruptcy, it requested authority to pay in full its prepetition claims of all of its "critical vendors." The bankruptcy court, without conducting a full evidentiary hearing, granted the motion and entered an order allowing Kmart to pay those vendors it deemed "critical" within Kmart's business discretion. After Kmart paid over 2000 suppliers approximately $300 million, the district court reversed the bankruptcy court's order authorizing payment of critical vendors. The debtors asserted that the court had the authority to prefer the critical vendors over other creditors under the powers granted to the court under section 105 of the Code. However, the Seventh Circuit disagreed and held that the bankruptcy court did not have the authority to authorize critical vendor payments without a showing of (i) but for the immediate full payment

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to the critical vendors, the vendors would cease dealing with the debtors and, (ii) that the debtor's business would gain continued transactions to provide a residual benefit to the remaining disfavored vendors, or at least, not to prejudice the other vendors. Furthermore, the Seventh Circuit discounted the debtor's contention that the payments to critical vendors were supported by section 363(b)(1). Instead, the Seventh Circuit held that the critical vendor order was "unsound no matter how one reads § 363(b)(1)." The Circuit concluded that the critical vendor order was not necessary and the $2 billion available in post-petition financing was sufficient assurance that vendors would continue to perform according to their contracts.

Dissolved LLC can be a debtor under Chapter 11

In re Midpoint Development, LLC, 313 B.R. 486 (Bankr. W.D. Ok. 2004) – The bankruptcy court was faced with the issue of whether a dissolved limited liability company under Oklahoma law was eligible to be a debtor in a chapter 11 proceeding. Despite the lack of an explicit rule in the Bankruptcy Code, the bankruptcy court concluded, following several commentators, that limited liability companies are sufficiently analogous to corporations and therefore are eligible for chapter 11 protection. The court concluded that the dissolved LLC was still operating as a legal entity under Oklahoma LLC laws, and therefore, could serve as a chapter 11 debtor.

IV. RETENTION AND COMPENSATION OF PROFESSIONALS

Disgorgement of Fees; Disclose, Disclose, Disclose

In re Lewis, 309 B.R. 597 (Bankr. N.D. Okla. 2004) – The Chapter 13 Trustee sought review of the debtor's transactions with its attorney. The bankruptcy court found that the debtor's counsel, a seasoned bankruptcy practitioner, inappropriately accepted payment for a chapter 13 debtor and her daughter in a chapter 7 proceeding. The attorney failed to make the required disclosures under Rule 2016 and did not state (i) that he received a post-dated check from the chapter 13 debtor, (ii) that he received a cashier's check post-petition from the chapter 13 debtor, or (iii) that the funds used to pay the filing fees in both the chapter 13 and chapter 7 cases were funds from the chapter 13 debtor's post-petition cashier's check. Under the general rule that bankruptcy courts have the independent duty to review the fee arrangements between debtors and their counsel, the court, sua sponte, found that the attorney must disgorge its fees in both the chapter 13 and chapter 7 cases.

Service on attorney was sufficient under Rule 7004

Rubin v. Pringle (In re Focus Media, Inc.), 387 F.3d 1077 (9th Cir. 2004) – The Ninth Circuit concluded that a lawyer can be deemed to be the client's implied agent for purposes of service of process in adversary proceedings. The defendant was a foreign person, but participated in the underlying bankruptcy through legal counsel. Plaintiff in the adversary proceeding served the legal counsel and not the foreign person directly. The Ninth Circuit held that legal counsel could be deemed the agent for service of process standards under Rule 7004(b)(8).

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Break-up fee reduced from 30.7% to 3.2%

In re Tama Beef Packing Inc., 312 B.R. 192 (Bankr. N.D. Iowa) – An unsuccessful bidder moved for payment of an administrative expense claim for break-up fees totaling approximately 30.7% of the total purchase price. The bankruptcy court denied the application. The Bankruptcy Appellate Panel reversed and remanded to determine the reasonableness of the expenses. The bankruptcy court found that the break-up fees totaling 30.7% were excessive and allowed the unsuccessful bidder an administrative expense claim for only 3.2% of the purchase price.

Examiner denied, nothing to investigate

In re Gliatech, Inc., 305 B.R. 832 (Bankr. N.D. Ohio 2004) – The equity security holder moved for appointment of an examiner to investigate the fairness of a global settlement with a creditor. The debtor and committee opposed the request for an examiner. The bankruptcy court denied the equity security holder's motion on the basis that the examiner would only benefit the examiner and no other creditor or party. Overall, the bankruptcy court found that there was nothing to investigate.

Examiner denied under mandatory provision

In re Loral Space & Communications Ltd., 313 B.R. 577 (Bankr. S.D.N.Y. 2004) – The Ad Hoc Committee moved for the appointment of an examiner to provide an appraisal of the debtor's assets. The bankruptcy court denied the motion on the basis that there was no justification for conducting a comprehensive valuation of the debtor's going concern as a business. The Committee further moved for the mandatory appointment of an examiner under section 1104(c)(2). The court concluded that an examiner should be appointed under this provision only to conduct an "investigation." Because there was no investigation to conduct and because the Ad Hoc Committee merely wanted to value the debtor's business, the court denied the appointment of an examiner. ***The district court reversed this decision in Loral Stockholders Protective Comm. v. Loral Space & Communs., Ltd. (In re Loral Space & Communs. Ltd.), No. 04 CIV. 8645 (RPP), 2004 U.S. Dist. LEXIS 25681 (S.D.N.Y. Dec. 23, 2004), holding that section 1104(c)(2) mandates the appointment of an examiner where a party in interest moves for an examiner and the debtor has $5,000,000 of qualifying debt.***

Examiner appropriate under mandatory provision

In re UAL Corp., 307 B.R. 80 (Bankr. N.D. Ill. 2004) – The flight attendants association moved for the appointment of an examiner to investigate the debtor's decision to modify retiree benefits. The flight attendants association asserted that appointment of an examiner was mandatory under section 1104(c). The bankruptcy court held that the appointment of the examiner was mandatory. The bankruptcy court did conclude that, although the appointment of an examiner was mandatory, the bankruptcy court retains the discretion to determine the nature and scope of the investigation.

Employment of turnaround professionals nunc pro tunc not warranted

In re Fleming Companies, Inc., 305 B.R. 389 (Bankr. D. Del. 2004) –The debtor's turnaround professionals applied for employment and compensation nunc pro tunc. Upon the US Trustee's objection, the bankruptcy court denied the application because there was an actual conflict of interest. Further, there was no justification for employing or otherwise compensating

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the advisor on a nunc pro tunc basis. The turnaround advisor was not paid in the ordinary course of business in the 90 days leading up to the bankruptcy filing. Furthermore, the bankruptcy court held that there was no extraordinary circumstances that warranted the employment of the advisors nunc pro tunc.

No enhancement of professional's fees if 328 employment

In re Nucentrix Broadband Networks, Inc., 314 B.R. 574 (Bankr. N.D. Tex. 2004) – The debtor's law firm and financial advisors filed their final fee applications. The court allowed an enhancement of 10% of the law firm's fees for facilitating a plan that sold the debtor's assets for three times the stalking horse bid and allowed for 100% recovery to all creditors. Notably, the law firm was employed pursuant to section 327 of the Code. The court did not enhance the set fees of the financial advisor. The financial advisor was employed pursuant to section 328 of the Code. The court found that the facts did not allow alteration of the payment schedule under 328.

V. EXECUTORY CONTRACTS

Not required to cure non-monetary defaults

Eagle Ins. Co. v. Bankvest Capital Corp. (In re Bankvest Capital Corp.), 360 F.3d 291 (1st Cir. 2004) – The First Circuit addressed the issue of whether section 365(b)(2)(D) allows the debtor to assume an unexpired lease without first curing non-monetary defaults. The First Circuit concluded that section 365(b)(2)(D) allows a debtor to assume a lease without first curing non-monetary defaults. The First Circuit reasoned that there were two plausible interpretations of section 365(b)(2)(D) and that there is no "plain meaning" of this bankruptcy provision. Therefore, the First Circuit agreed with the Bankruptcy Appellate Panel which concluded "if the debtor wants to assume [a contract] in its business judgment, knowing that issues other than payment due may be litigated after assumption, the debtor should be allowed to do so."

Because shopping center lease, debtor could not assume and assign lease in contravention of lease assignment provision

Trak Auto Corp. v. West Town Center, LLC (In re Trak Auto Corp.), 367 F.3d 237 (4th Cir. 2004) – The Fourth Circuit considered the conflict between section 365(f)(1) allowing a debtor to assign a lease notwithstanding a restrictive lease provision, and section 365(b)(3)(C) requiring a debtor-tenant to assign its shopping center lease subject to a restrictive lease provision. The Fourth Circuit held that section 365(b)(3)(C), being the more specific provision, controls and does not allow the debtor to assign a shopping center lease in contravention of a restrictive lease provision. After reviewing the legislative history, the Fourth Circuit concluded that the more specific provision of section 365(b)(3)(C) requiring a debtor to assign a lease subject to any provision restricting the use of the premises controlled over the more general provision of 365(f), which generally allows the debtor to assign a lease.

Patent licenses may be assignable over objection of licensor

In *Catapult Entertainment*,[3] the Ninth Circuit held that a debtor in possession could not assume patent licenses over the licensor's objections. The debtor attempted to assume patent licenses as part of its plan, however, the licensor objected. The Ninth Circuit concluded that

[3] *Pearlman v. Catapult Entertainment, Inc. (In re Catapult Entertainment, Inc.)*, 165 F.3d 747 (9th Cir. 1999).

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under section 365(c), the debtor could not assign nonexclusive patent licenses that the licensor objected to assumption under section 365(c)(1)(B).

A decision by an appellate court in California suggests that *Catapult Entertainment* may be subject to criticism. In *Superbrace, Inc. v. Tidwell*, 124 Cal.App.4th 388 (Cal. App. 4th Dist. 2004), the California appellate court held that California state law allowed the assignment of patent licenses regardless of contrary federal common law. Following a California Supreme Court decision,[4] the appellate court concluded that patent license rights under state law were not personal and therefore assignable.

Right of First Refusal not an Ipso Facto Clause

Northrop Grumman Technical Servs. v. The Shaw Group, Inc. (In re The IT Group, Inc.), 302 B.R. 483 (D. Del. 2003) – After filing for bankruptcy protection, the debtors attempted to transfer property to a co-member of a limited liability company pursuant to a provision in the operating agreement of the limited liability company. The court concluded that the default provision transferring the property was an ipso facto clause and unenforceable under section 365(e)(1) of the Code. The court further held, however, that the right of first refusal clause under the agreement was not an ipso facto clause and was enforceable notwithstanding the fact that the debtor was in bankruptcy.

VI. VALUATION

Value of property under 363(f)(3) governed by face amount approach

Criimi Mae Servs. L.P. v. WDH Howell, LLC (In re WDH Howell, LLC), 298 B.R. 527 (D.N.J. 2003) – The district court held that the debtor-in-possession could not sell property for less than the face value of the secured liens. The debtor-in-possession attempted to sell property for approximately $8 million when the property had liens securing approximately $12 million. The court evaluated the two methods of assessing "value" pursuant to section 363(f)(3) – (1) the "face amount" of the claim secured by the lien; and (2) the economic value or fair market value of the property. The district court concluded that the debtor-in-possession could not sell property free and clear of all liens under section 363(f)(3) unless the sales price of the property exceeds the aggregate value of all liens on the property. The court concluded that Congress intended to utilize the "face amount" approach in evaluating value.

Returned stale cookies will not reduce new value

Gonzales v. Nabisco Division of Kraft Foods, Inc. (In re Furr's Supermarkets, Inc.), 317 B.R. 423 (B.A.P. 10th Cir. 2004) - The case of the "stale cookies." A chain of grocery stores filed for chapter 11 protection. The Court converted the case to chapter 7. During the preference period, Nabisco (a supplier of the Debtor) in addition to providing new goods, accepted returns from the Debtor that were no longer saleable (e.g. stale cookies). Nabisco then credited the amount of the returned products against the newly delivered products. Assessing the value of the stale cookies proved contentious. The chapter 7 trustee argued that the face value of the credited amount should be deducted from the "new value" amount. Nabisco disagreed saying that at the time the goods were delivered they had value, but when they were returned, the goods had no value. The bankruptcy court agreed with Nabisco finding that the returned goods had no value

[4] *Farmland Irrigation Co. v. Dopplmaier*, 308 P.2d 732 (Cal. 1957).

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at the time they were returned, and therefore, did not deplete the Debtor's estate. The court concluded that the returned product had invoice value at the time of delivery, but there was no basis to find that the returned products had value at the time of return. The Bankruptcy Appellate Panel affirmed the bankruptcy court's ruling.

Valuation of secured creditor's collateral determined at time of the filing of the petition?

Chase Manhattan Bank USA NA v. Stembridge (In re Stembridge), No. 03-11143, 2004 U.S. App. LEXIS 26457 (5th Cir. Dec., 2004) – A creditor, holding a perfected security interest in a vehicle owned by a chapter 13 debtor, objected to the bankruptcy court's valuation of the vehicle. The bankruptcy court held that the creditor was entitled to the greater of the two amounts – either the replacement value calculated at the time of confirmation or the "trade value"/foreclosure value as determined at the date that adequate protection was first provided. The Fifth Circuit reversed and held that under a cram-down plan, the value of the collateral should be determined at the time of the filing of the petition and the value should be based on the replacement value less any adequate protection payments already made.

VII. FILING REQUIREMENTS

Bankruptcy Petition not filed in good faith

NMSBPCSLDHB, L.P. v. Integrated Telecom Express, Inc. (In re Integrated Telecom Express, Inc.), 384 F.3d 108 (3d Cir. 2004) – Integrated Telecom filed for chapter 11 bankruptcy protection listing $104.5 million in cash and $1.5 million in other assets. The landlord of Integrated Telecom's commercial leased space filed a proof of claim at the discounted value of $26 million with $430,000 in miscellaneous liabilities. Integrated Telecom was "highly solvent and cash rich" at the time of the bankruptcy filing. The landlord then filed a motion to dismiss for lack of good faith. The bankruptcy court and district court denied the landlord's motion to dismiss. However, the Third Circuit overruled the lower courts' findings, holding that the debtor filed without good faith. The Third Circuit recognized that Integrated Telecom was out of business, however, it further found that Integrated Telecom's petition could not maximize the value of the bankruptcy estate. Furthermore, the Circuit found that even though Integrated Telecom had been unsuccessful in applying a profitable business model, it must further show that the bankruptcy estate would benefit from the reorganization or liquidation process. Integrated Telecom could not prove these factors, and therefore, the Third Circuit concluded that the debtor had not met its burden to prove that it had filed in good faith.

Bankruptcy Petition not filed in good faith

In re Liberate Technologies, 314 B.R. 206 (Bankr. N.D. Cal. 2004) – The bankruptcy court held that the debtor did not file the bankruptcy petition in good faith. The Court found that the debtor was "very solvent, very liquid, and can sell its assets as a going concern outside of bankruptcy." The court held that the bankruptcy would not rehabilitate the debtor's business.

VIII. PROPERTY OF THE ESTATE

Second auction may be appropriate

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Corporate Assets, Inc. v. Paloian, 368 F.3d 761 (7th Cir. 2004) – The debtor scheduled an auction for the sale of assets. Prior to the auction, the debtor removed a substantive provision from the proposed asset purchase agreement that increased the value of bids. Some bidders were notified of the revision prior to the auction, while others learned of the revision at the auction. The highest bidder was selected. The next day, another qualified bidder proposed an amount greater than the highest bidder due to the revisions to the asset purchase agreement. The debtor then proceeded to the sale hearing and requested a continuance and a second auction in light of the new bid. The bankruptcy court granted the continuance and authorized a second auction. At the second auction, the original bidder eventually placed the highest bid, which was 15% greater than the original winning bid. The purchaser appealed trying to institute the first auction bid price. The Seventh Circuit affirmed the bankruptcy court's finding that the second auction was in the best interest of the estate and the estate's creditors. The Seventh Circuit declined to impose a hard and fast rule as to the authority of bankruptcy courts to authorize subsequent auctions when bid deadlines have passed. Because the court had not already approved the sale from the first auction, and because all of the qualified bidders did not receive pertinent information until the day of the first auction, the Seventh Circuit reasoned that the bankruptcy court was acting within its authority to approve a second auction.

Contaminated property may be abandoned because of quasi-estoppel

In re Guterl Special Steel Corp., 316 B.R. 843 (Bankr. W.D. Pa. 2004) – The United States Economic Development Administration ("EDA") objected to the Chapter 7 trustee's motion to abandon contaminated real estate and the trustee's motion to pay professional fees related to the contaminated real estate. The bankruptcy court held that the EDA was estopped under the doctrine of "quasi-estoppel" from objecting to the abandonment of the property. The court defined quasi-estoppel as the preclusion of one party from asserting, to another's prejudice, a position that is inconsistent with a previously-held position. The bankruptcy court equated the equitable doctrine of quasi-estoppel to the maxim that "one cannot blow both hot and cold." The EDA originally relied on the trustee and its counsel to negotiate with federal agencies to clean up the contaminated site and then sell the site to a third party. When the trustee's efforts proved futile, the EDA then objected to the trustee's efforts and objected to the payment of their professional fees. The court invoked the doctrine of quasi-estoppel finding that the EDA could not first rely on the trustee's efforts, and when the trustee was unsuccessful, then demand it be stripped of compensation.

The bankruptcy court also addressed the trustee's motion to abandon the property and held that the *Midlantic*[5] exception did not apply, therefore finding that the trustee could abandon the contaminated property under section 554. The bankruptcy court concluded that where there is no imminent threat to the public or safety, a trustee may abandon property pursuant to section 554(a) even though abandonment would not be granted under state laws or regulations designed to protect the public health or safety.

Constructive trust was not imposed on federal income tax refund

Superintendent of Ins. v. Ochs (In re First Central Fin. Corp.), 377 F.3d 209 (2d Cir. 2004) – The Second Circuit concluded that a constructive trust could not be imposed on a federal income tax refund being held by the bankruptcy trustee. A written agreement existed between

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[5] *Midlantic Nat'l Bank v. New Jersey Dept. of Environ. Protection*, 474 U.S. 494, 106 S. Ct. 755, 88 L.Ed.2d 859 (1986).

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the liquidator of the estate and the debtor/trustee, which governed how taxes were to be allocated. The court held that the trustee was not unjustly enriched by maintaining the federal income tax refund, and therefore, the court did not impose a constructive trust.

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IX. JURISDICTION & VENUE

Bankruptcy Court has jurisdiction to disallow personal injury claim on purely legal grounds

In re UAL Corp., 310 B.R. 373 (Bankr. N.D. Ill. 2004) – the bankruptcy court held that it had jurisdiction to disallow, on legal grounds, a personal injury tort claim asserted against the debtor. The claimants filed a claim for $6 million based on the debtor airline's disinsection (a/k/a insect extermination) on its aircraft. The debtor objected to the claim and argued that it should be disallowed. The claimants questioned whether the bankruptcy court had jurisdiction to rule on the debtor's claim objection. The court found that the debtor's objection did not fall within the personal injury exception to the core bankruptcy jurisdiction conferred by 28 U.S.C. §157(b)(2)(B). The claim was disallowed.

Motion to transfer venue denied

HLI Creditor Trust v. Keller Rigging Construction, Inc. (In re Hayes Lemmerz Int'l Inc.), 312 B.R. 44 (Bankr. D. Del. 2004) – The plaintiffs brought an adversary proceeding in the bankruptcy court where the bankruptcy court was pending to avoid preferential transfers. The defendants sought a transfer of venue to the Northern District of Ohio. The bankruptcy court denied the motion to transfer venue because (i) the plaintiff chose the forum of the bankruptcy court in Delaware, (ii) the location of performance of the underlying contract was irrelevant, (iii) discovery could be conducted anywhere, (iv) the witnesses would still be available although not under subpoena power, and (v) it would be judicially inefficient to transfer a one day trial to an Ohio court that was unfamiliar with the facts of the cases.

X. LANDLORD/TENANT

Letter of credit acts as security deposit under §502(b)(6)

Redback Networks, Inc. v. Mayan Networks Corp. (In re Mayan Networks Corp.), 306 B.R. 295 (B.A.P. 9th Cir. 2004) – The Ninth Circuit Bankruptcy Appellate Panel reviewed whether a claim by a landlord should take into account any security that has been recovered. The court reviewed the legislative history of section 502(b)(6) and determined that security deposits count toward the total claim of the landlord. After holding that security deposits apply to the cap under section 502(b)(6) thereby reducing the unsecured claim that a landlord may have against the estate, the court then addressed whether a letter of credit should be considered a security deposit for 502(b)(6) purposes. Applying the facts of the case, the Appellate Panel held that a letter of credit was a form of a security deposit and therefore should have the same effect as a cash security deposit under section 502(b)(6). The court found that the "only effective difference between the letter of credit and the cash security deposit was the location of the funds."

Master Lease concerning numerous locations is severable

In re FFP Operating Partners, LP, No. 03-90171-BJH-11, 2004 WL 3007079 (Bankr. N.D. Tex. Aug. 12, 2004) – The debtor attempted to sever and reject ten convenience store locations from a Master Lease covering 20+ locations. The landlord opposed the severance and rejection, asserting that the Master Lease was not severable under Texas state law and therefore assumption or rejection must occur for all locations, not specific locations under the Master

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Lease. The bankruptcy court found that the Master Lease was severable under Texas state law and allowed the debtor to reject the ten convenience store locations.

"Lease" determined by state law, not federal law

HSBC Bank USA v. United Air Lines, Inc., 317 B.R. 335 (N.D. Ill. 2004) – United Air Lines, Inc. entered into a long-term airport lease. United sublet, for a nominal fee, a portion of the lease to the California Statewide Communities Development Authority ("CSCDA") in exchange for tax-exempt revenue bonds. The CSCDA then leased back the property to United under the same conditions. After filing for bankruptcy protection, United sought declaratory judgment that certain payment obligations related to airport were not obligations arising under a "lease" under section 365. HSBC Bank, the assignee of the CSCDA lease, moved for summary judgment to determine whether the "leases" were true leases as opposed to financing instruments. The district court held that California state law must be applied to determine whether the leases were true leases.[6] Federal law is inappropriate to determine whether a document is a "lease" because the Bankruptcy Code does not define a "lease." Because the legislative history of section 365 suggests that a true lease depends on the circumstances of each case, it is consistent with the legislative history to utilize state law in determining whether a lease is a true lease or financing instrument. The bankruptcy court held this was a disguised financing arrangement. The district court reversed and held it was a true lease. As a result, if upheld on appeal, the debtor cannot treat the obligation as undersecured debt in a plan and must make all postpetition rental payments until it decides to assume or reject.

XI. CLAIMS

Class claim allowed and class claim disallowed

In re Noble Arnold Craft and Junell Elaine Craft, No. 03-48703-DML-11, 2005 Bankr. LEXIS 93 (Bankr. N.D. Tex. Jan. 26, 2005) – The court held that the class claim should be allowed because the class was certified before bankruptcy by a federal district court.

In re Mirant Corporation, et al., No. 03-46590-DML-11, 2005 Bankr. LEXIS 93 (Bankr. N.D. Tex. Jan. 26, 2005) – The Court held that the class claim must be stricken. The court reasoned that the court may exercise its sound discretion in determining whether or not to make Rule 7023 applicable. In this case, "it would prejudice Mirant and its creditors to delay the plan process and claim objection process to conduct a Rule 7023 hearing."

Debts incurred by willful & malicious conduct are non-dischargeable

Ridley v. Holt (In re Holt), 310 B.R. 675 (Bankr. N.D. Tex. 2004) – The debtor was accused in Arkansas state court of committing assault, battery, sexual assault, false imprisonment and outrage of a 14-year-old girl. The family of the alleged victim filed an adversary proceeding objecting to the discharge under section 532(a)(6) of the damages associated with these torts. The court found that in order to be non-dischargeable, the debtor had to act intentionally to injure a person without excuse or just cause. The court fully reviewed the salacious nature of the claims and held that the plaintiffs had established by a preponderance of the evidence that a sexual assault had taken place. Therefore, the court held that the debtor had willfully and

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[6] The district court applied the Supreme Court's holding in *Butner v. United States*, 440 U.S. 48, 54 (1979), and the premise that Congress has left the determination of property rights of the bankruptcy estate to state law.

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wantonly engaged in extreme and outrageous conduct (by state law standards) and the damages associated with these torts were non-dischargeable under section 523(a)(6).

Creditors substantially contributed to the chapter 11 case

Cellular 101, Inc. v. Channel Communications, Inc. (In re Cellular 101, Inc.), 377 F.3d 1092 (9th Cir. 2004) - Two creditors filed for payment of administrative expense claims under section 503(b) for professional fees and costs. The bankruptcy court concluded, and the Ninth Circuit affirmed, that the creditors should be awarded the administrative claim because they substantially contributed to the reorganization by submitting the confirmed plan of reorganization which resulted in the payment of 100% to creditors.

Use of cash collateral appropriate to pay professionals

Security Leasing Partners, LP v. ProAlert, LLC (In re ProAlert, LLC), 314 B.R. 436 (B.A.P. 9th Cir. 2004) – The debtor moved to pay professional fees pursuant to the cash collateral order. A secured creditor objected on the basis of whether the fees were subject to surcharge under section 506(c). The bankruptcy court granted the cash collateral order and the debtor paid the professional fees. The Ninth Circuit Bankruptcy Appellate Panel held that the court was not required to first determine whether fees were subject to surcharge under 506(c) before authorizing their payment. The Panel concluded that the relationship between sections 363 and 506(c) allowed the debtor to use cash collateral to pay professional fees if the secured creditor is adequately protected.

A single transaction can be in the ordinary course of business

USOP Liquidating LLC v. Service Supply, Ltd. (In re US Office Products Co.), 315 B.R. 37 (Bankr. D. Del. 2004) – The liquidating trustee filed an adversary proceeding alleging a preferential transfer from the debtors to a creditor. The sole dispute was whether a single payment was outside of the ordinary course under section 547(c)(2). The work was performed by the creditor and the debtor was invoiced, however, the debtor refused to pay the invoice until further work was performed. After several months, the creditor redid some of the work and the debtor paid the invoice in full, but within 90 days of the bankruptcy filing. Although there was only one transaction between the debtor and the creditor, the court found that this constituted "ordinary course" under section 547(c)(2) because the payment was sent within 20 days of the work being completed, and that the transfer did not violate the "spirit, intent or letter of § 547."

Recoupment against rejection claim denied

Sacramento Municipal Utility Dist. V. Mirant Americas Energy Marketing, L.P. (In re Mirant Corp.), 318 B.R. 377 (Bankr. N.D. Tex. 2004) – The debtor continued to perform under a Master Agreement and delivered gas to the plaintiff. Several months into the bankruptcy proceeding, the debtor moved to reject the Master Agreement. Creditor subsequently filed a proof of claim for approximately $2 million. Creditor argued to be able to recoup from amounts due to the debtor. The bankruptcy court concluded that the creditor could not recoup the postpetition amounts payable to the debtor against a prepetition rejection claim.

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Administrative Claims denied

In re Nat'l Steel Corp., 316 B.R. 287 (Bankr. N.D. Ill. 2004) – The debtor refused to ship any more product to the creditor without increased payment. The creditor alleged this was a breach of the underlying agreement with the debtor. The creditor filed a motion for administrative expenses alleging breach of contract, and that the prices the debtor demanded were higher than what was required under the contract. The creditor sought an administrative claim for the amount it alleged it overpaid for the product, the finance charges it incurred to make the payments, the interest under the contract, and attorneys fees and costs. The court held that the creditor was not entitled to an administrative claim for the alleged overpaid amount because the creditor did not incur any actual, necessary costs and expenses with the purchase of the product at the increased price. The court also denied the administrative claim for the finance charges, attorneys' fees and costs finding that the creditor incurred these costs at its own expense in acting on its own behalf.

Joint and several claims by PBGC are temporarily disallowed for voting purposes in Enron reorganization

Pension Benefit Guaranty Corp. v. Enron Corp., No. 04 Civ. 5499 (HB), 2004 WL 2434928 (S.D.N.Y. Nov. 1, 2004) – The district court affirmed the bankruptcy court's denial of PBGC's motion for ballot correction or temporary allowance for voting purposes. The court's voting procedure order stated that if one proof of claim asserted the same claim against multiple debtors, then the claim would be allowed for voting purposes only against the debtor as docketed in the claims agent's database. The PBGC filed fifteen proofs of claim in each of the 180 of the debtor's cases in the Enron bankruptcies. The claims asserted joint and several liability for obligations owed to the PBGC. The court reasoned that the PBGC has no predicate for asserting joint and several liability for voting purposes against each of the 180 debtors' chapter 11 plans because PBGC's joint and several liability was not ripe. PBGC therefore was limited to vote fifteen claims and only against Enron.

No deepening insolvency claim for prolonging an insolvent corporation's life

Kittay v. Atlantic Bank of New York, et al. (In re Global Services Group LLC), 316 B.R. 451 (Bankr. S.D.N.Y. 2004) – Trustee of limited liability company's chapter 7 estate brought adversary proceeding against bank that had loaned money to company and company's principals on deepening insolvency theory. The bankruptcy court granted the bank's motion to dismiss and held that mere fact that bank may have made poor loan, which prolonged debtor's existence and enabled it to slide more deeply into insolvency, did not render bank liable in tort to trustee.

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Reclamation Claimant denied Administrative Claim

Yenkin-Majestic Paint Corp. v. Wheeling-Pittsburgh Steel Corp. (In re Pittsburgh-Canfield Corp.), 309 B.R. 277 (B.A.P. 6th Cir. 2004) – A group of creditors filed timely reclamation demands. The debtors sought DIP financing which was approved and gave DIP lender superpriority lien position. The Debtor then filed a motion requesting the court to find reclamation claims not entitled to administrative expense status. The reclamation claimants objected. The bankruptcy court held that the reclamation claimants had no greater rights under bankruptcy law as they did under state law and their rights were limited to recovery of goods not yet sold. As such, the claimants had no rights under state law, and therefore, no rights to an administrative priority. The Sixth Circuit Bankruptcy Appellate Panel agreed with the bankruptcy court and found that the claimants were not entitled to a lien or administrative expense status due to the superpriority position of the post-petition lender.

IRS is required to consider offer in compromise

Internal Revenue Service v. Holmes, 309 B.R. 824 (M.D. Ga. 2004) – The debtor owed significant federal income taxes and the debtor proposed to pay a compromised amount of the taxes over 60 months. The IRS refused to consider the debtor's offer in compromise. The bankruptcy court, on motion by the debtor, ordered the IRS to consider the offer in compromise. The district court affirmed finding that the bankruptcy court had the authority under section 105 of the Code to order the IRS to consider the offer in compromise. The district court further concluded that the bankruptcy court did not order the IRS to *accept* the offer in compromise, it merely requested the IRS to *consider* the offer in compromise, and therefore the bankruptcy court's order did not violate the Anti-Injunction Act.

IRS is required to process and consider offer in compromise; applies *Holmes*

In re Peterson, 317 B.R. 532 (Bankr. D. Neb. 2004) – A chapter 13 debtor proposed an offer in compromise to the IRS. The IRS objected to the offer in compromise and the bankruptcy court found that the IRS' policy to refuse to consider offers in compromise from bankrupt debtors was discriminatory and frustrated the Bankruptcy Code. The bankruptcy court required the IRS to process and consider the debtor's offer in compromise as the IRS would consider an offer from a non-bankrupt debtor.

XII. SUBORDINATION

Rule of Explicitness no longer valid

HSBC Bank USA v. Branch (In re Bank of New England Corp.), 364 F.3d 355 (1st Cir. 2004) – the chapter 7 trustee moved to make a distribution to junior bondholders. The senior bondholders objected based on the theory that they should first be paid post-petition accrued interest. The court analyzed whether the doctrine of the "Rule of Explicitness" applied. The Rule of Explicitness required that a subordination agreement clearly show that the interest stops on the date of the bankruptcy petition. The bankruptcy court concluded that the Rule of Explicitness has no application in the bankruptcy process and section 510, in applying applicable state law, relates to the proper subordination of indebtedness. The First Circuit then remanded to the bankruptcy court to review the subordination provisions at hand to determine, in their ambiguity, whether they provided for the priority payment of post-petition interest.

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XIII. INJUNCTIONS

Channeling injunction cannot be extended to protect third parties

In re Combustion Engineering, Inc., 391 F.3d 190 (3rd Cir. 2004) – The Third Circuit held that the bankruptcy court's equitable powers could not be used to extend channeling injunction to independent asbestos-related claims against affiliates.

§ 304 Injunction warranted

Hoffman v. Bullmore (In re Nat'l Warranty Ins. Risk Retention Group), 384 F.3d 959 (8th Cir. 2004) – The debtor filed for bankruptcy in the Cayman Islands. The liquidators filed an action seeking an injunction under section 304 against any of the assets in the Cayman Island liquidation. A Nebraska bankruptcy court applied the six factors under section 304(c) and granted injunctive relief. These factors include: (1) just treatment of all holders of claims against or interests in such estate; (2) protection of claim holders in the United States against prejudice and inconvenience in processing of claims in such foreign proceeding; (3) prevention of preferential or fraudulent dispositions of property of such estate; (4) distribution of proceeds of such estate substantially in accordance with the order prescribed by this title; (5) comity; and (6) if appropriate, the provision of an opportunity for a fresh start for the individual that such a foreign proceeding concerns. In affirming the bankruptcy court's ruling, the Eight Circuit reasoned that the purpose of a section 304 injunction and the automatic stay were to prevent "a chaotic and uncontrolled scramble of the debtor's estate."

XIV. BURDEN OF PROOF

Burden of proof of need for trustee must be clear and convincing

Official Committee of Asbestos Claimants v. G-I Holdings, Inc. (In re G-I Holdings, Inc.), 385 F.3d 313 (3d Cir. 2004) – The Committee, representing persons asserting asbestos torts claims against the Debtor, filed a motion with the bankruptcy court to appoint a chapter 11 trustee. The Committee asserted that appointment of a trustee was determined on a "preponderance of the evidence" basis. The bankruptcy and district courts held that the Committee's burden of persuasion required clear and convincing evidence of the need for a trustee under section 1104(a). The Third Circuit affirmed the lower courts' rulings finding that the party seeking appointment of a trustee bears the burden of persuasion by clear and convincing evidence.

XV. SUBSTANTIVE CONSOLIDATION AND STANDING

Substantive Consolidation to Pursue State Court Action

Gray v. O'Neill Properties Group, L.P. (In re Dehon, Inc.), Nos. 02-41045, 04-04286, 2004 WL 2181669 (Bankr. D. Mass. Sept. 24, 2004) – The Debtor wholly owned stock in several other entities, however, only the debtor filed for bankruptcy protection. Pre-petition, one of the Debtor's affiliates sold real estate to O'Neill Properties for an amount the Plan Administrator contended was not fair consideration. The proceeds of the sale were not considered assets of the Debtor's estate. Two years following the petition date, the Plan

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Administrator filed a motion to consolidate the Debtor and its affiliates *nunc pro tunc* in order to proceed under the statute of limitations against the Debtor for a fraudulent transfer under the Massachusetts Uniform Fraudulent Transfer Act ("UFTA"). The bankruptcy court held substantive consolidation could be established at trial, and if established, could lead to the Plan Administrator's prosecution of the pre-petition transfer under the UFTA.

Fox follows Hen House

United Phosphorus, Ltd. v. Fox (In re Fox), 305 B.R. 912 (10th Cir. 2004) – A creditor in a chapter 11 bankruptcy filed an adversary proceeding to avoid an allegedly fraudulent transfer from the debtor to his wife. The debtor refused to sue his wife to avoid the transfer and therefore the creditor brought the complaint as a derivative suit. The bankruptcy court dismissed the complaint on the basis that under section 548 of the Bankruptcy Code, only a trustee could sue to avoid a fraudulent transfer. The Tenth Circuit weighed the Supreme Court's decision in *Hen House*[7] against the Third Circuit's holding in *Cybergenics*,[8] which allowed a creditor to pursue a fraudulent transfer action when the trustee did not act. The Tenth Circuit agreed with the rationale provided under *Hen House* and held that the creditor did not have standing to bring a derivative action under section 548. The Tenth Circuit reasoned that creditors had other remedies available under the Bankruptcy Code, such as moving for the appointment of a trustee, dismissal or conversion. The Tenth Circuit found that Congress drafted the Bankruptcy Code to allow trustees the exclusive authority to act at certain times, and for other times, creditors or parties in interests are authorized to act. Therefore, the Tenth Circuit held that a trustee has exclusive authority to bring an avoidance action.

IRS had standing as intervenor to assert avoidance actions

Osherow v. Porras (In re Porras), 312 B.R. 81 (W.D. Tex. 2004) – The chapter 7 trustee and the IRS together sought summary judgment avoiding under the Texas fraudulent transfer statutes, the transfer of three properties. In the alternative, the trustee sought a ruling that two of the properties were property of the estate because the debtor exerted complete dominion and control over the property. The debtors challenged the IRS' standing to bring the avoidance causes of action against the debtor. The bankruptcy court held that the IRS, as intervenor, did have standing to pursue the causes of action because the IRS was the only creditor to gain anything substantial from the proceedings. The court concluded that the IRS had standing, either as a claimholder or as intervenor with respect to all claims asserted.

XVI. AUTOMATIC STAY VIOLATION; BANKRUPTCY CRIMES

Mental Anguish damages are recoverable under section 362

Dawson v. Washington Mutual Bank. F.A. (In re Dawson), 390 F.3d 1139 (9th Cir. 2004) – The Ninth Circuit found that recovery for mental anguish falls within the damages under section 362(h) for violating the automatic stay. The Circuit concluded that by limiting the damages under section 362(h) to individuals, and excluding corporations, Congress intended to redress harms "that are unique to human beings" such as emotional distress.

[7] *Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A.*, 530 U.S. 1, 120 S. Ct. 1942 (2000) ("Hen House").
[8] *Official Committee of Unsecured Creditors of Cybergenics Corp. ex rel. Cybergenics Corp. v. Chinery*, 330 F.3d 548 (3d Cir. 2003).

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The Circuit held that in order to recover "actual damages" by a willful violation of the automatic stay under section 362(h), the plaintiff must meet the following standard: "(1) suffer significant harm, (2) clearly establish the significant harm, and (3) demonstrate a causal connection between that significant harm and the violation of the automatic stay (as distinct, for instance, from the anxiety and pressures inherent in the bankruptcy process)." The Circuit reversed and remanded for reconsideration of these standards.

Debtor concealed by changing locks on 3 houses

United States v. Wagner, 382 F.3d 598 (6th Cir. 2004) – The defendant filed a chapter 11 petition, which was converted to a chapter 7 on motion by the United States Trustee. The chapter 7 trustee attempted to sell the debtor's property, including numerous homes debtor owned as a real estate developer. Among committing other fraudulent and criminal practices (such as falsifying documents filed with the bankruptcy court), the debtor changed the locks on three "smart houses" (houses designed with fully automated and computer systems) which the trustee had put up for sale. The bankruptcy court, district court and Sixth Circuit held that the debtor "concealed" estate assets under 18 U.S.C. § 152(1). The Sixth Circuit concluded, that whether "concealed" was construed narrowly under § 152 or broadly, the debtor's conduct was sufficient to convict the debtor under the statute because he intended to delay and/or obstruct the chapter 7 trustee from liquidating the estate.

XVII. PREEMPTION

Bankruptcy Code preempts estate assignment law

Sherwood Partners, Inc. v. Lycos, Inc., No. 03-55247, 2005 WL 74090 (9th Cir. Jan., 12, 2005) – the Ninth Circuit held that the Bankruptcy Code preempts estate statute that gives an assignee selected by the debtor the power to void preferential transfers by an unsecured creditor. The debtor paid Lycos a million dollars cash. Shortly thereafter, the debtor initiated an assignment for the benefit of creditors naming an assignee as prescribed by the California statute. The assignee brought an action under the California statute against Lycos for its preferential receipt of the million dollars. The California statute is essentially the same as Section 547(b) of the Bankruptcy Code. Action was brought in state court, but Lycos removed the case to federal district court on the grounds of diversity. Lycos defended on the basis that the Bankruptcy Code preempts the California statute. The district court granted summary judgment in favor of the assignee. The Ninth Circuit reversed and held that the Bankruptcy Code preempts the California provision.

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