

**Case Law Update Supplement**  
**White Williams Bankruptcy Institute 2019**  
**Judge Russ Kendig**

**Supreme Court**

Obduskey v. McCarthy & Holthus, --- S Ct. ---, 2019 WL 1264579 (2019)

Subject: FDCPA, non-judicial foreclosure proceeding

A law firm was hired to conduct a nonjudicial foreclosure of Obduskey's Colorado home. Obduskey challenged the debt using a FDCPA procedure but law firm pursued the nonjudicial foreclosure without response. He sued under the FDCPA. District court and Tenth Circuit both found the law firm was not a debt collector, making the act inapplicable. Supreme Court affirmed in a unanimous opinion with a concurrence by Justice Sotomayor.

To be subject to the FDCPA, § 1692a(6) requires an entity to be primarily engaged in the business of collecting debt. Under § 1692f(6), a "limited purpose" definition also bootstraps entities in the business of enforcing security interests. Section 1692f(6) is not a stand-alone provision, however, an entity has to meet the definition in § 1692a(6) first. Since the law firm's primary purpose was not debt collection, it was not subject to the FDCPA. This legislative choice may have been made to avoid conflict with state law governing nonjudicial foreclosure and legislative history suggests it was a compromise between including security interest enforcers outright or excluding them in their entirety.

**Sixth Circuit Court of Appeals**

Collins v. Tenn. Dep't of Revenue (In re Faye Foods, Inc.), 2019 WL 1057965 (6<sup>th</sup> Cir. 2019) (unpublished)

Subject: tolling, postpetition levy for taxes, § 524

Debtor filed tax returns for postpetition taxes and failed to pay. Confirmed plan provided for payment of the taxes. Three years after plan's effective date, and outside the six year statute of limitations for collection of most of the amounts due, the Tennessee Department of Revenue ("DOR") levied Debtor's operating account for the amount due. The bankruptcy court, district court and Sixth Circuit all rejected DOR tolling and sanctions arguments.

Since the DOR was the entity responsible for collection the taxes, and the statute set a six year limitation on the collection of taxes, the statute applied to DOR. The tolling provision in the

statute did not protect it because there was an exclusionary provision in the same title of the Tennessee Code that excepts actions by the State. DOR could not avail itself of either equitable tolling or equitable estoppel because it delayed in pursuing payment. The taxes should have been paid around the plan's effective date, in 2012, and the DOR waited three years to act. The Sixth Circuit upheld the denial of sanctions. Since the taxes were not discharged, no violation of the discharge injunction occurred. Additionally, there was no finding that the DOR acted in bad faith, with intentional abuse, or in knowing disregard. *Id.* at \*7.

Harker v. PNC Mortgage Co. (In re Oakes), 2019 WL 1034193 (6<sup>th</sup> Cir. 2019)

Subject: § 544(a)(1), O.R.C. § 1301.401

PNC held a defective mortgage on Debtors' property because their signatures were not acknowledged by a notary public. The chapter 7 trustee moved to avoid the mortgage as a hypothetical judicial lien creditor. PNC moved for judgment on the pleadings and all three courts denied relief. Sixth Circuit concluded that although denial of a motion for judgment on the pleadings is generally not a final order, this decision fixed PNC's rights, making it final and providing the basis for subject matter jurisdiction.

PNC argued that notice of the mortgage prevented the trustee from exercising his strong arm powers in the same manner it prevents a trustee from acquiring the status of a bona fide purchaser. Court explained that notice of a mortgage does nothing to affect the priority of liens on a property. Since the mortgage was defective, it was not perfected. O.R.C. § 1301.401 does not render a defectively executed mortgage properly executed. Trustee's interest was deemed perfected as of the date of filing, giving him a superior interest in the property over PNC's defective lien. The lien was therefore avoidable.

## **Bankruptcy Appellate Panel for the Sixth Circuit**

Wohleber v. Skurko (In re Wohleber), 2019 WL 1008555 (B.A.P. 6<sup>th</sup> Cir. 2019)

Subject: § 362(k), § 362(b)(1)

Defendants are Debtor's ex-wife and her attorney. Prepetition, domestic relations court found Debtor in contempt for not paying his ex-wife a \$36,000 property settlement. Debtor filed a chapter 13 case days before the "sentencing" hearing was held. With knowledge that the bankruptcy had been filed, and after affirmatively stating that it could proceed with the contempt proceeding, the state court jailed Debtor for non-payment, with a contempt "purge" clause if he paid. When Debtor later alleged a violation of the stay, the bankruptcy court found no violation occurred because (1) Defendants did not take affirmative action to collect the debt, and (2) since the contempt was ruled on prepetition, the court was simply imposing its sanction. BAP reversed.

Because there were parallel state court and bankruptcy proceedings, Rooker-Feldman was did not apply, allowing bankruptcy court to consider the stay violation. In determining whether the continuation of the contempt proceeding was a violation of the stay, the BAP first considered whether the proceeding was criminal, and therefore fell under the § 362(b)(1) exception. Under either test it employed, BAP concluded it was a civil proceeding. The purge clause was key in finding the jail time was an attempt to collect, not punish. And nothing in the record supported a court-made exception to the stay for the court using the penalty to uphold its dignity.

Second, BAP determined the ex-wife and her counsel were culpable in failing to stop the state court action. It is a creditor's burden to prevent stay violations. Affirmative action was required to prevent the contempt hearing from becoming a means to collect the property settlement. BAP suggested that creditor should have filed a motion for relief from stay or stayed the contempt action. BAP returned the case to the bankruptcy court to consider liability.

U.S. Tommy, Inc., 2019 WL 1313821 (B.A.P. 6<sup>th</sup> Cir. 2019)

Subject: § 1112(b)

Bankruptcy court dismissed Debtor's chapter 11 case for reasons not contained in the creditor's motion to dismiss and without taking evidence. Debtor appealed. BAP affirmed dismissal. The bankruptcy court held numerous combined hearings on the use of cash collateral and the motion to dismiss over the course of several months. At the next-to-last hearing, the court informed Debtor that if it did not come to court with a purchase agreement, "then we are done." Id. at \*3. At the final hearing, after hearing arguments, the court determined the case was not progressing, and dismissed it. BAP found no abuse of discretion in the court's cause for the dismissal. It concluded Debtor had notice of the dismissal arguments that were not contained in the creditor's motion, as well sufficient notice of the hearing. Regarding an evidentiary hearing, BAP found that Debtor did "not explain how it preserved this argument below, [did] not show that Debtor ever requested an evidentiary hearing on the motion to dismiss, and [did] not cite legal authority for this argument." Id. at \*7.