CHAPTER 13 QUARTERLY NEWSLETTER
MARCH 2021

1. CARES ACT-POSSIBLE EXTENSION

As of March 27, 2021, the provisions in the CARES Act which allow debtors to modify the term of their plan up to 84 months will expire.

Please note that legislation has been introduced in Congress to extend various bankruptcy provisions of the CARES Act until March 2022. However, as of the date of this newsletter that legislation has not yet been passed by Congress.

Therefore, counsel should keep track of this legislation as it may be necessary to extend plans up to 84 months in the future to restore feasibility and address payment issues.

2. DISCHARGE-EVEN WITH MISSED MORTGAGE PAYMENTS

In late December 2020, Congress passed some additional bankruptcy legislation including adding 11 USC § 1328(i).

This provision is set to last for 12 months (December 2021) and allows counsel to ask the Court for a discharge even if the Debtor is not current on mortgage payments. Under this provision, the Debtor must not be more than 90 days delinquent in mortgage payments.

As Akron is a mortgage conduit jurisdiction, this will not affect most Chapter 13 plans filed in Akron. However, if the Debtor did not have to be a conduit plan as of the date of filling but subsequently became delinquent, the Court may still grant a discharge upon request of the Debtor.

Please note that this provision is discretionary. The Court has discretion to grant or not grant the request of the Debtor.

3. PLEASE DO NOT EMAIL WORD DOCUMENTS TO THE CHAPTER 13 OFFICE

Sending Word documents in emails can be problematic as viruses can be hidden in Word documents. Therefore, the Chapter 13 office has programmed its system to reject any email which has a Word document attached.

If you have previously sent a Word document to the Trustee's office and have not received a response, we would ask that you convert the Word document to a PDF and resend the document.

As a practice note, all parties should reconsider their computer security and make a decision on whether or not accepting Word documents is in their own best interest.

4. FOREBEARANCE NOTICES

Some mortgage holders have begun to file notices of forbearance on the Court's docket. The forbearance notices generally include a statement that says the debtor should consult with their counsel and local court.

In many of these cases where forbearance notices have been filed, the debtor has continued to work throughout the Covid-19 pandemic, as plan payments have continued to be received and conduit mortgage payments have continued to be made timely. In these cases, it appears that the debtor never asked for forbearance but the mortgage lender just issued them in some type of bulk fashion. The forbearance notices generally do not say how the debtor is to make up these missed payments. If the debtor takes advantage of the forbearance notice, it is not clear if the mortgage lender is going to file a supplemental proof of claim in several months or whether they will change the forbearance to a deferral and place the missed payments at the end of the loan.

It is the Trustee's position that if the debtor's plan payments have continued to be received that the conduit mortgage payments will be processed according to the plan, confirmation order, and the Court's Administrative Order 16-1. If the debtor continues to make payments and the Trustee were to stop paying on the conduit mortgage payments based on the forbearance notice, the funds would flow to other creditors, including unsecured creditors. This would not be in the debtor's best interest since the debtor filed Chapter 13 in order to save their home.

Therefore, the Trustee will take no action based on a forbearance notice filed by a mortgage lender but will continue to administer the plan pursuant to the plan's directive, the confirmation order, and the Court's Administrative orders. If counsel want the Trustee to stop paying the conduit mortgage payment based on a forbearance notice, they will have to file a motion to suspend plan payments citing which months the Trustee is not to pay the conduit mortgage payment and specifically state how those months are to be caught up.

The situation for each debtor is different but if plan payments have been received, it is in the debtor's interest to allow the plan to go forward and to not take any action regarding the forbearance notice.

5. Mortgage Payments Deferment and Loan Modifications May Not Always Be In the Debtor's Best Interest

Placing missed payments at the end of a mortgage loan may not be in the debtor's best interest especially if the mortgage loan has 15 or 20 years left on the mortgage. These missed payments being placed at the end will continue to accrue interest for the next 15-

20 years. Therefore, at the end of the mortgage loan, the debtor could find themselves owing a substantial amount more on the mortgage than they anticipated.

For example, suppose the missed payments total $20,000 and the interest on the mortgage is 5%, with a remaining term of the mortgage of twenty years. At the end of the mortgage, those missed payments which have accumulated interest for twenty years and will now require the borrower to make a $54,252 final payment to the bank to complete the mortgage.

Some banks will offer a mortgage modification. A modification is similar to a deferment, except the lender writes a new loan for both the missed payments and the entire outstanding balance of the loan. The borrower will find the monthly mortgage payment has decreased and the interest rate has been lowered. However, the term of the new mortgage can be up to forty years from the date of the modification. So, if the borrower had already paid on the mortgage for ten years, the borrower may find that the modification now requires another forty years of payments.

If the borrower is in a Chapter 13 bankruptcy, the borrower may be able to put the missed payments into the plan and extend the plan a couple of years. In the above example, the borrower will repay the lender the $20,000 (without interest) and without the need to extend the term of the mortgage.

6. PERSONAL FINANCIAL MANAGEMENT COURSE

The Chapter 13 office will continue to sponsor an on-line Personal Financial Management Course through the Trustee Education Network. Information regarding the online program is available on the Chapter 13 website at www.chapter13info.com. There is no charge to take the course online for Chapter 13 debtors who have filed in Akron, Ohio.

Please note: in a joint case, each Debtor must take the on-line course separately and use two different e-mails. The software program generates the required certificates of completion partly based on e-mails to keep track of who has taken the required course.

Please find attached to this newsletter, a flyer for the on-line course that counsel may share with their clients in Chapter 13 cases.

7. MOTIONS FOR ADJOURNMENT

Many times, parties ask the Chapter 13 office to allow a courtesy adjournment to allow counsel to finish issues which may have arisen in a case. The Chapter 13 office will continue to allow courtesy adjournments; however, said courtesy will only be for one adjournment.

If counsel need additional adjournments, it will be the responsibility of counsel to file a request with the Court to allow adjournments.

This change in procedure is being done as there are some items in cases which have been lingering for some time and need resolution sooner rather than later. It is in counsels' best interest not to file motions for adjournment but to address the underlaying issue in the case.

8. OFFICE HOURS

Until further notice, the physical Chapter 13 office will not be open to the public. This is a result of the State of Ohio continuing to show Summit County as a hot spot for COVID 19.

However, please be assured that even though the Chapter 13 staff is working remotely that the Chapter 13 office is open for business. Counsel and their clients can contact the Chapter 13 office by email. A listing of email addresses is available on the Chapter 13 website: www.chapter13info.com.

While Summit County and surrounding counties remain at a red alert level due to COVID-19, the Chapter 13 office would ask all parties to refrain from requesting any physical meetings.

The 341 meetings will continue to be conducted telephonically or by Zoom at the option of the Trustee and/or the request of the parties.

Hopefully, this situation is temporary and the office can resume being open to the public in the near future.

9. TELEPHONIC AND ZOOM 341 MEETINGS TO CONTINUE

Pursuant to directives by the United States Trustee Program, in-person 341 meetings will continue to be suspended. The meetings will remain suspended from the date of the President of the United States proclamation on declaring a national emergency concerning the novel Coronavirus disease (COVID-19) outbreak which was issued on March 13, 2020. The requirement for remote 341 meetings will continue until such time that the President terminates the declaration.

Therefore, it is expected that the Akron 341 meetings will continue to be done remotely through telephone or video appearance for the next few months.

Please note, the Trustee does have the discretion to request an in-person meeting if the Trustee deems an in-person meeting is required. However, any in-person meetings must follow appropriate health guidelines including masks and social distancing.

Unless notified differently by the Chapter 13 office, counsel appearing on behalf of clients at 341 meetings in Akron for Chapter 13 cases can expect 341 meetings to continue to be held by telephone or video appearance until further notice.

The Trustee ask that at least two days prior to the meeting that counsel supply the Chapter 13 office phone number(s) where counsel and their client can be contacted for the 341 meeting. Counsel can send that contact information to*:* aroyer@ch13akron.com.

10. CASE LAW

Hooker v. Wanigas Credit Union, 835 Fed. Appx. 110, 2021 U.S. App. LEXIS 2062, 2021 FED App. 0052N (6th Cir.), 2021 WL 244902

During the ninety-day preference period, Wanigas Credit Union, through its agent, Shek Law Offices, garnished $884.13 from the debtor's wages in satisfaction of a judgment Wanigas had against the debtor. Shek retained $452.60 of the garnished wages and sent the remaining $431.53 to Wanigas. After filing for bankruptcy the debtor sought turnover of the funds under section 547(b)(1) as a preferential transfer. Wanigas turned over only the funds it received. It argued that the portion retained by Shek was not subject to turnover because Wanigas never received the funds, and in the alternative, because the funds were subject to an attorney-charging lien. The bankruptcy court denied Wanigas's motion for summary judgment and ordered turnover of the funds. The district court granted leave to appeal and affirmed.

On appeal to the Sixth Circuit, Wanigas argued that the transfer did not meet two of the five requirements of a preferential transfer: 1) the funds were not transferred "to or for the benefit of a creditor," as required by section 547(b)(1), and 2) the transfer did not allow Wanigas to receive more than it would have received as a creditor in the debtor's bankruptcy case, as required by section 547(b)(5)(A).

As to the first argument, the court found Shek was merely a conduit, receiving the funds as an agent of Wanigas. Because agents "stand in the place of their principals," the court found the transfer to Shek was tantamount to a transfer to Wanigas and, in fact, reduced the debt by the entire amount, not just the amount actually received by Wanigas. Where the garnishment was "for" Wanigas's benefit, the manner of collection was less important.

The court found the case relied on by Wanigas, In re Sheppard, 521 B.R. 599 (Bankr. E.D. Mich. 2014), was wrongly decided. In Sheppard, the bankruptcy court held that the determination of whether a transfer was "to" or "for the benefit of" a creditor depended on the debtor's intent. Where the transfer was involuntary, as here, the Sheppard court held the determining factor was whether the funds were actually received by the creditor. The court found that section 547(b) does not support this interpretation. So long as the transfer was "for the benefit of the creditor," and was of an "interest of the debtor," it

satisfied the provision without regard to any actual intent or affirmative act on the part of the debtor to set the transfer in motion.

Wanigas's argument that it did not receive more than it would have in bankruptcy also failed. The court found the entire amount of the garnishment benefited Wanigas even though the debt was collected and partially retained by Wanigas's agent. Wanigas "received" the funds through its agent, and benefited by being able to pay its own debt to Shek in accordance with their fee agreement. Wanigas did not dispute that, as a practical matter, had it received the entire amount and then paid Shek from the funds, the entire amount would have been avoidable. The court found the method by which the same result was achieved did not affect the operation of section 547(b).

The court also disagreed that, under Michigan law, the transfer to Shek was not avoidable because the payment was made to satisfy an "attorney-charging lien." The court found that any lien Shek may have had relating to a debt owed it by Wanigas was "beside the point because Shek is Wanigas's creditor, not [the debtor's]," and an attorney's lien is generally not enforceable against a third party.

The court affirmed.

Church Joint Venture, L.P. v. Blasingame (In re Blasingame), 986 F.3d 633, 2021 U.S. App. LEXIS 2078, 2021 FED App. 0018P (6th Cir.), 69 Bankr. Ct. Dec. 179

Where the only injury resulting from bankruptcy counsel's conduct was denial of discharge, the cause of action for legal malpractice accrued post-petition and belonged to the debtors rather than the chapter 7 bankruptcy estate. Church Joint Venture, L.P. v. Blasingame, No. 19-5505 (6th Cir. Jan. 26, 2021).

The debtors filed for chapter 7 bankruptcy but were denied discharge when the court learned of undisclosed assets in the form of personal property, shell companies, family trusts, etc. The debtors filed a malpractice lawsuit against their bankruptcy attorneys in state court. When the trustee declined to bring a suit against the debtors' attorneys on behalf of the bankruptcy estate, the debtors' primary creditor, CJV, obtained derivative standing to do so. CJV moved for summary judgment on the issue of whether the cause of action belonged to the estate. The court treated the debtors' response as a cross-motion for summary judgment and granted judgment in favor of the debtors. The BAP for the Sixth Circuit affirmed. Church Joint Ventures, L.P. v. Blasingame (In re Blasingame), 597 B.R. 614 (B.A.P. 6th Cir. 2019).

On appeal, the Sixth Circuit began its analysis with the general rule that section 541 determines what interests become property of the bankruptcy estate, but state law determines the extent and nature of a debtor's interest in property. In this case, Tennessee law establishes that a legal malpractice claim requires the plaintiff to show five elements: "(1) the attorney owed a duty to the plaintiff; (2) the attorney breached that duty; (3) the plaintiff suffered damages; (4) the breach was the but for cause of the plaintiff's damages; and (5) the breach was the proximate cause of the plaintiff's damages."

The issue on appeal was when the damage element occurred and whether it was necessary that it occur pre-petition for the cause of action to become part of the estate. The bankruptcy court applied the "accrual theory" to find that the cause of action accrued when the debtors suffered the injury of being denied discharge. CJV argued that the violation accrued when the attorneys breached their duty to investigate and draft the Blasingames' petition. The court found that under Tennessee law "[a] legal malpractice claim accrues as of the date on which the negligence became irremediable." The court found that point necessarily occurred post-petition as, prior to filing their bankruptcy petition, the debtors could have chosen not to file at all.

Citing Segal v. Rochelle, 382 U.S. 375, 380 (1966), CJV argued that even if the damage occurred post-petition, it had its roots in pre-petition conduct and therefore entered the bankruptcy estate under section 541(a). That section encompasses "all legal or equitable interests of the debtor in property as of the commencement of the case" regardless of "wherever located and by whomever held."

The court held that where the only injury resulting from bankruptcy counsel's conduct was denial of discharge, the cause of action for legal malpractice accrued post-petition and belonged to the debtors rather than the chapter 7 bankruptcy estate, stating that mere pre-petition conduct is not enough to root the cause of action pre-petition. Instead there must be a pre-petition violation even if the debtor was not aware of the violation at the time. The court turned to the crux of the case: "Does the violation occur when the duty is breached or when the damage is incurred?" The court observed that Tennessee used to follow the common law rule that a malpractice cause of action accrues upon the wrongful act rather than upon the resulting injury. The Tennessee Supreme Court changed that in Teeters v. Currey, 518 S.W.2d 512, 517 (Tenn. 1974), when it held, in the medical malpractice context, that a cause of action accrues when a patient discovers the resulting injury. The Sixth Circuit has since applied Teeters in the legal malpractice context as well.

The court found, in this case, that the debtors were unaware of the attorneys' conduct until they were denied discharge. Because that event was post-petition, the cause of action did not enter the bankruptcy estate and the bankruptcy court correctly found it to be the debtors' property.

The court affirmed.

SAVE THE DATE:
WHITE-WILLIAMS SEMINAR
The Seminar will be virtual for 2021
MAY 13 – 14, 2021
Registration Form is Attached

Personal Financial Management Course

THIS COURSE IS REQUIRED TO EARN YOUR DISCHARGE !

Online Chapter 13 Bankruptcy Course
Finally Financial Freedom!

** The Trustees' Education Network (TEN) – an affiliate of the National Association of Chapter 13 Trustees – has created an online financial management course for the benefit and financial education of Chapter 13 debtors. This course is approved by the United States Trustee Program. **

THIS COURSE IS FREE!

THIS COURSE IS ABLE TO BE COMPLETED PRIOR TO YOUR 341 HEARING WITH THE TRUSTEE*

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WHAT YOU WILL NEED TO SIGN UP

- Unique Trustee Identifier Number
  - **TEN13010**
- Bankruptcy Case Number
- Your full Name "exactly" as shown on bankruptcy petition
- A valid email address (each debtor will need a separate email address)
- Your bankruptcy Schedules A/B, D, and E/F for Lesson 1 and Schedules I and J for Lesson 3.

You must complete the entire course (all lessons and quizzes) to receive a Certificate of Completion from the Trustees' Education Network. Once you complete all coursework, the Trustees' Education Network will send a Certificate of Completion to you and to your Bankruptcy Court.

***Course satisfies legal requirements for debtors' Certificate of Completion and to gain a discharge of their bankruptcy case.*

**Other course providers may charge you a fee for this course.*

Hooker v. Wanigas Credit Union, 835 Fed. Appx. 110, 2021 U.S. App. LEXIS 2062, 2021 FED App. 0052N (6th Cir.), 2021 WL 244902

Neutral
As of: March 15, 2021 8:45 PM Z

Hooker v. Wanigas Credit Union

United States Court of Appeals for the Sixth Circuit

January 26, 2021, Filed

File Name: 21a0052n.06

Case No. 20-2252

Reporter
2021 U.S. App. LEXIS 2062 *; 835 Fed. Appx. 110; 2021 FED App. 0052N (6th Cir.); 2021 WL 244902

CANDISE HOOKER, Plaintiff-Appellee, v. WANIGAS CREDIT UNION, Defendant-Appellant.

Notice: NOT RECOMMENDED FOR FULL-TEXT PUBLICATION. *SIXTH CIRCUIT RULE 28* LIMITS CITATION TO SPECIFIC SITUATIONS. PLEASE SEE *RULE 28* BEFORE CITING IN A PROCEEDING IN A COURT IN THE SIXTH CIRCUIT. IF CITED, A COPY MUST BE SERVED ON OTHER PARTIES AND THE COURT. THIS NOTICE IS TO BE PROMINENTLY DISPLAYED IF THIS DECISION IS REPRODUCED.

Prior History: [*1] ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MICHIGAN.

Wanigas Credit Union v. Hooker (In re Hooker), 2020 U.S. Dist. LEXIS 83121, 2020 WL 2393848 (E.D. Mich., May 12, 2020)

Overview
HOLDINGS: [1]-Where the credit union garnished money from the debtor's wages during the 90-day preference period before the debtor filed for bankruptcy, the unpaid balance of money that the credit union did not return to the debtor qualified as an avoidable preferential transfer under *11 U.S.C.S. § 547* because the transfer at issue was "to" a creditor as the credit union's law firm received the transfer in its capacity as the credit union's agent, and the firm only received payments made payable to the firm on behalf of the credit union; the entire transfer was "for" the credit union's benefit; and the transfer benefitted the credit union by satisfying its obligations to the firm under their fee agreement. The credit union could not sidestep avoidance simply because its agent received a transfer on its behalf and then retained a portion to satisfy the credit union's obligation to it.

Outcome
Judgment affirmed; case remanded for further proceedings in bankruptcy court.

Core Terms

transfers, garnished, law firm, preferential, proceedings, wages

Case Summary

LexisNexis® Headnotes

Bankruptcy Law > Procedural Matters > Judicial Review > Bankruptcy Appeals Procedures

Civil Procedure > Appeals > Appellate Jurisdiction > Interlocutory Orders

Bankruptcy Law > Procedural Matters > Adversary Proceedings > Judgments

Civil Procedure > Appeals > Notice of Appeal

HN1[] Judicial Review, Bankruptcy Appeals Procedures

Under *28 U.S.C.S. § 158(a)*, a party may take an appeal from an interlocutory order, like the denial of summary judgment, only with leave of the district court. The district court's jurisdiction hinges on its decision to grant or deny leave to appeal. Parties usually file a motion for leave under *Fed. R. Bankr. P. 8004*, seeking leave to appeal. But if an appellant timely files a notice of appeal under this rule but does not include a motion for leave, the district court may order the appellant to file a motion for leave, or treat the notice of appeal as a motion for leave and either grant or deny it. *Fed. R. Bankr. P. 8004(d)*.

Bankruptcy Law > ... > Judicial Review > Standards of Review > Clear Error Review

Bankruptcy Law > ... > Judicial Review > Standards of Review > De Novo Standard of Review

HN2[] Standards of Review, Clear Error Review

An appellate court reviews the bankruptcy court's decision, reviewing factual findings for clear error and legal conclusions de novo.

Bankruptcy Law > ... > Prepetition Transfers > Preferential Transfers > Evidence & Procedural Matters

HN3[] Preferential Transfers, Evidence & Procedural Matters

Under *11 U.S.C.S. § 547(b)*, a bankruptcy trustee may avoid preferential transfers - transfers of an interest of the debtor in property that satisfy the five requirements listed in *§ 547(b)*.

Business & Corporate Law > Agency Relationships > Establishment > Definitions

HN4[] Establishment, Definitions

Agents stand in the place of their principals.

Banking Law > Consumer Protection > Real Estate Settlement Procedures > Escrow Account Regulation

Business & Corporate Compliance > ... > Contracts Law > Standards of Performance > Creditors & Debtors

HN5[] Real Estate Settlement Procedures, Escrow Account Regulation

A creditor's law firm is merely a conduit so transfers are made directly "to" the creditor when they are deposited in the law firm's escrow account.

Bankruptcy Law > ... > Prepetition Transfers > Preferential Transfers > Elements

HN6[] Preferential Transfers, Elements

Because *11 U.S.C.S. § 547* focuses on the purpose and effect of the transaction, other factors, including the manner in which it is accomplished, are less important.

Bankruptcy Law > ... > Prepetition Transfers > Preferential Transfers > Elements

HN7[] Preferential Transfers, Elements

Payments to a third-party that discharged a debtor's obligation to creditors are "to or for the benefit of a creditor" within the meaning of *11 U.S.C.S. § 547(b)(1)*.

Bankruptcy Law > ... > Prepetition Transfers > Preferential Transfers > Elements

Legal Ethics > Client Relations > Attorney Fees > Fee Agreements

HN8[] Preferential Transfers, Elements

Transfers to a creditor through its law firm are preferential, including portions retained by firm under fee agreement.

Bankruptcy Law > ... > Avoidance > Fraudulent Transfers > Elements

HN9[] Fraudulent Transfers, Elements

11 U.S.C.S. § 547(b)(1) does not require a particular state of mind on the part of the debtor. The statute merely requires that a transfer of an interest of the debtor be for the benefit of the creditor. *11 U.S.C.S. § 547(b)(1)*. That language requires analyzing the reasons underlying the transfer - the purpose. But it does not require an inquiry into the debtor's subjective intent. Indeed, *11 U.S.C.S. § 547(b)* does not require that the debtor set the transfer in motion. It just requires a transfer of an interest of the debtor. And the bankruptcy code defines transfer broadly to encompass both voluntary and involuntary transfers. *11 U.S.C.S. § 101(54)*.

Business & Corporate Compliance > ... > Perfections & Priorities > Liens > Attorneys' Liens

Legal Ethics > Client Relations > Billing & Collection

HN10[] **Liens, Attorneys' Liens**

An attorney's lien is not enforceable against a third party. It is not a right intended to protect the client from his other creditors.

Business & Corporate Compliance > ... > Perfections & Priorities > Liens > Attorneys' Liens

Civil Procedure > Preliminary Considerations > Equity > Relief

HN11[] **Liens, Attorneys' Liens**

A charging lien is an equitable right entitling attorneys to fees and costs due for services secured out of the judgment or recovery in a particular suit.

Business & Corporate Compliance > ... > Perfections & Priorities > Liens > Attorneys' Liens

Legal Ethics > Client Relations > Billing & Collection

Civil Procedure > Remedies > Judgment Liens > Enforcement of Liens

HN12[] **Liens, Attorneys' Liens**

A charging lien can be enforced against third parties when the third party has notice of the lien. But that principle merely states a fundamental principle of charging liens, that when a party holds monies owing to a plaintiff, and has notice of the attorney's lien, it must recognize that lien prior to making a payment to the plaintiff.

Counsel: For CANDISE DIANE HOOKER, Plaintiff - Appellee: Brian D. Flick, The Dann Law Firm, Cleveland, OH; Matthew L. Frey, Law Office, Saginaw, MI.

For WANIGAS CREDIT UNION, Defendant - Appellant: Peter S. Shek, Shek Law Offices, Saginaw, MI.

Judges: BEFORE: CLAY, GIBBONS, and NALBANDIAN, Circuit Judges.

Opinion by: NALBANDIAN

Opinion

NALBANDIAN, Circuit Judge. Wanigas Credit Union garnished $884.13 from Candise Hooker's wages during the ninety-day preference period before Hooker filed for bankruptcy. Hooker's employer sent the money to Wanigas's law firm, Shek Law Offices, which retained $452.60 under a contingency-fee agreement between Shek and Wanigas before sending the remaining $431.53 to Wanigas.

After filing for Chapter 7 bankruptcy, Hooker demanded that Wanigas return the garnished wages as a preferential transfer under *11 U.S.C. § 547(b)(1)*. But Wanigas only returned the $431.53 it had received, so Hooker sought the remaining $452.60 in adversary proceedings in bankruptcy court. Wanigas moved for summary judgment, asserting that the unpaid balance did not qualify as an avoidable preferential transfer under *§ 547* because the money never landed in **[*2]** Wanigas's coffers and is also subject to an attorney-charging lien. The court denied the motion. Wanigas filed an interlocutory appeal in district court. The district court exercised its discretion to hear the interlocutory appeal under *28 U.S.C. § 158(a)* and affirmed.[1]

[1] *HN1*[] Under *28 U.S.C. § 158(a)*, a party may take an appeal

On appeal to this court, Wanigas argues that the lower courts erred because the transfer to Shek does not qualify as a preference under *11 U.S.C. § 547(b)(1)* and is also subject to an attorney-charging lien. On appeals like this one, we do not review the district court's decision. ***HN2***[] Rather, we review the bankruptcy court's decision, reviewing factual findings for clear error and legal conclusions *de novo*. *In re Flo-Lizer, Inc., 946 F.2d 1237, 1240 (6th Cir. 1991)*; *In re AMC Mortg. Co., Inc., 213 F.3d 917, 920 (6th Cir. 2000)*. Because the bankruptcy court correctly rejected Wanigas's arguments and denied its motion for summary judgment, we **AFFIRM** and **REMAND** for further proceedings consistent with this opinion.

I.

HN3[] Under *11 U.S.C. § 547(b)*, a bankruptcy "trustee may . . . avoid" preferential transfers—"transfer[s] of an interest of the debtor in property" that satisfy the five requirements listed in *§ 547(b)*. Wanigas argues that the bankruptcy and district courts erred because the $452.60 transfer to Shek does not satisfy two of the requirements: 1) that the transfer be "to or for the benefit of **[*3]** a creditor," and 2) that the transfer "enables [the] creditor to receive more than [it] would receive" as a creditor in bankruptcy proceedings. *Id.* Her arguments fail for three reasons.

First, the transfer at issue was "to" a creditor under *11 U.S.C. § 547(b)* because Shek received the $884.13 transfer in its capacity as Wanigas's agent. ***HN4***[] Agents stand in the place of their principals. *See Restatement (Third) of Agency § 1.01* (AM. L. INST. 2006); *Capuzzi v. Fisher, 470 Mich. 399, 684 N.W.2d 677, 679 (Mich. 2004)* ("[T]he agent stands in the shoes of the principal."). And Shek acted as Wanigas's agent when it garnished Hooker's wages. It was Wanigas, not Shek, that obtained a default judgment against Hooker. And Shek only filed the Writ of Periodic Garnishment to collect on that judgment and received payments made payable to the law firm *on behalf of Wanigas*. Had that not been the case, the payments would not have decreased the amount Hooker owed to Wanigas, her judgment creditor—a fact Wanigas does not dispute. Shek was merely the conduit through which Hooker's employer transferred money to Shek's principal, Wanigas; the transfer was "to" a creditor. *See Kirschenbaum v. Leeds Morelli & Brown P.C.(In re Robert Plan of N.Y. Corp.), 456 B.R. 150, 156 (Bankr. E.D.N.Y. 2011)* (holding that ***HN5***[] a creditor's law firm was merely a "conduit" so transfers were made directly "to" the creditor when they were deposited in the law firm's **[*4]** escrow account); *cf. Fitch v. Kentucky-Tennessee Light Power Co., 136 F.2d 12, 16 (6th Cir. 1943)* ("Payment . . . to an agent for the benefit of his principal, is the same as payment to the principal.").

Second, the entire $884.13 transfer was also "for" Wanigas's benefit. For is "a function word to indicate purpose." *For*, MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/for. ***HN6***[] And because "*[s]ection 547* focuses on the purpose and effect of the transaction," other factors, including the "manner in which it is accomplished,"are less important. *Matter of Darke, 18 B.R. 510, 513 (Bankr. E.D. Mich. 1982)* (citation omitted). Although the garnishment writ directed Hooker's employer to send the garnished wages to Wanigas's attorney rather than Wanigas, the purpose of the transfer was clearly not to benefit Wanigas's law firm; it was to satisfy Wanigas's judgment against Hooker. And because payment to Shek discharged Hooker's debt to Wanigas, the payment was for Wanigas's benefit under *11 U.S.C. § 547(b)*. *See In re C-L Cartage Co., Inc., 899 F.2d 1490, 1493 (6th Cir. 1990)* (holding that ***HN7***[] payments to a third-party that discharged a debtor's obligation to creditors were "'to or for the benefit of a creditor' within the meaning of *section 547(b)(1)*").

It is irrelevant that Shek retained a portion of the funds under its agreement with Wanigas. No matter where the money was ultimately deposited, the transfer's purpose **[*5]** was to satisfy Wanigas's judgment against Hooker. So it was a transfer "for" Wanigas's benefit. *In re Spinnaker Indus., Inc., 328 B.R. 755, 764-65 (Bankr. S.D. Ohio 2005)* (ruling that because a creditor's law firm "accepted the check for the benefit of" the creditor when it received money for its client, the transfer was preferential even though the attorneys retained a portion of the payment in fees); *see In re Robert Plan, 456 B.R. at 156* (holding that ***HN8***[] transfers to a creditor through its law firm were preferential, including

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from an interlocutory order, like the denial of summary judgment, only "with leave of the [district] court." The district court's jurisdiction hinges on its decision to grant or deny leave to appeal. *See id.* Parties usually file a "motion for leave" under *Fed. R. Bankr. P. 8004*, seeking leave to appeal. But "[i]f an appellant timely files a notice of appeal under this rule but does not include a motion for leave, the district court . . . may order the appellant to file a motion for leave, or treat the notice of appeal as a motion for leave and either grant or deny it." *Id. 8004(d)*.

Wanigas did not file a motion for leave to appeal the interlocutory order in district court. Rather, it simply filed a notice of appeal. But the district court did not "treat the notice of appeal as a motion for leave." *Id.* Rather, it treated the bankruptcy court's order as a final order when it concluded it had jurisdiction over the matter because "[f]inal orders of a bankruptcy court are appealable to a federal district court under *28 U.S.C. § 158(a)*." (R. 8, PageID 129.) Because this technicality affected jurisdiction, we dismissed the case and remanded for the district court to determine whether to grant or withhold its consent under *28 U.S.C. § 158(a)*. The district court granted leave to appeal, curing the jurisdictional defect and paving the way for this panel to now address the merits.

portions retained by firm under fee agreement).

Wanigas tries to avoid this conclusion by reading a debtor-intent requirement into the word "for" under *§ 547(b)(1)*. Under its reading, the "for the benefit of the creditor" language only applies to cases in which a debtor subjectively intends to benefit a creditor. And because Shek garnished Hooker's wages, Hooker could not have possibly intended anything. It finds support for its argument in *In re Sheppard, 521 B.R. 599 (Bankr. E.D. Mich. 2014)*, which held that "[i]n order for a transfer to be 'for the benefit of' a particular creditor within the meaning of *§ 547(b)(1)*, the Debtor must have intended the transfer to benefit that creditor." *Id. at 603*. Because an involuntary transfer requires no debtor intent, *Sheppard* also held that the only involuntary transfers recoverable as preferences were those **[*6]** actually received by the creditor under the word "to"; the "for the benefit" language was off the table. *Id.*

The *Sheppard* rule is inconsistent with the statute. ***HN9***[↑] *Section 547(b)(1)* does not require a particular state of mind on the part of the debtor. The statute merely requires that a "transfer of an interest of the debtor" be "for the benefit of the creditor." *11 U.S.C. § 547(b)(1)*. That language requires analyzing the reasons underlying the transfer—the purpose. But it does not require an inquiry into the debtor's subjective intent. Indeed, *section 547(b)* does not require that the debtor set the transfer in motion. It just requires a "transfer of an interest of the debtor." *Id.* And the bankruptcy code defines "transfer" broadly to encompass both voluntary and involuntary transfers. *11 U.S.C. § 101(54)*. So Wanigas's argument fails under the statute. The transfer here was a transfer "for the benefit of a creditor" under *section 547(b)*.

Third, we are unpersuaded by Wanigas's assertion that Hooker is not entitled to the remaining $452.60 because transferring that amount to Shek did not "enable a creditor to receive more than the creditor would receive" in bankruptcy proceedings. Wanigas's argument on this point is simple. It claims that it never received the $452.60 retained **[*7]** by Shek, so the transfer benefited Shek, not Wanigas. But this argument fails to appreciate that the entire $884.13 was transferred "to and for the benefit" of Wanigas when Shek garnished the funds on Wanigas's behalf. It received the money through its agent. And to/for discussion aside, the transfer, moreover, benefitted Wanigas by satisfying its obligations to Shek under their fee agreement, which required payment upon collection.[2]

Wanigas cannot sidestep avoidance simply because its agent received a transfer on Wanigas's behalf and then retained a portion in satisfaction of Wanigas's obligation to it. As Wanigas itself acknowledged at oral argument, if it had received the unreturned balance directly from Hooker and then paid Shek, the entire $884.13 would be avoidable, meaning that Wanigas would have been required to return the whole amount to the bankruptcy trustee. The only difference here is that Wanigas directed its agent to divide its funds to satisfy its debts before forwarding the balance to Wanigas. The bankruptcy code does not allow creditors to avoid its sweep so easily. Wanigas's argument fails.

II.

Wanigas also argues that it should not have to return the missing $452.60 **[*8]** because that amount was subject to a valid attorney's charging lien[3] under Michigan law that attached before the preference period. But the existence of a lien against Shek's client's recovery from Hooker is beside the point because Shek is Wanigas's creditor, not Hooker's. ***HN10***[↑] Except in circumstances not applicable here, "an attorney's lien is not enforceable against a third party."[4] *Doxtader v. Sivertsen, 183 Mich. App. 812, 455 N.W.2d 437, 439 (Mich. App. 1990)*. "It is not a right intended to protect the client from his other creditors . . . ." *Kysor Indus. Corp. v. D.M. Liquidating Co., 11 Mich. App. 438, 161 N.W.2d 452, 456 (Mich. App. 1968)*.

Further, *§ 547(b)* turns back the clock on preferential transfers like the one here, so assuming Hooker prevails on remand, Wanigas never recovered anything from Hooker. Because attorney-charging liens attach to the "funds or a money judgment" "*recovered*," *George v. Sandor M. Gelman, P.C.,*

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[2] Shek collected on behalf of Wanigas, so Wanigas owed Shek. It is true, of course, that barring some unforeseen development on remand, the bankruptcy court will likely order Wanigas to return the remaining $452.60 collected. At that point, this fees benefit will no longer exist. But unwinding the collection may also erase Wanigas's obligation to Shek, so Wanigas may have a claim against Shek. That matter, however, is not before us today. And regardless, Wanigas received the funds when Hooker's employer transferred them to Wanigas's agent.

[3] ***HN11***[↑] A charging lien is an equitable right entitling attorneys to "fees and costs due for services secured out of the judgment or recovery in a particular suit." *George v. Sandor M. Gelman, P.C., 201 Mich. App. 474, 506 N.W.2d 583, 584 (Mich. App. 1993)*.

[4] ***HN12***[↑] "[A] charging lien can be enforced against third parties when the third party has notice of the lien. But that principle merely states a fundamental principle of charging liens, that when a party holds monies owing to a plaintiff, and has notice of the attorney's lien, it must recognize that lien prior to making a payment to the plaintiff." *Estate of Tams v. Auto Club Ins. Ass'n, No. 332558, 2018 Mich. App. LEXIS 28, 2018 WL 340923, at *3 (Mich. Ct. App. Jan. 9, 2018)* (Murray, P.J., concurring) (citation omitted).

201 Mich. App. 474, 506 N.W.2d 583, 585 (Mich. App. 1993) (emphasis added), *§ 547(b)* avoidance here renders the lien meaningless at this stage (Wanigas may recover something as a bankruptcy creditor). In the end, Wanigas never recovered if Hooker avoids the transfer. Consequently, the lower court did not err in determining that Shek's charging lien does not entitle Wanigas to summary judgment.

III.

The bankruptcy court did not err when it denied Wanigas's motion for summary judgment. Wanigas fails **[*9]** to show that the transfer to Shek on behalf of Wanigas was not a transfer "to or for the benefit of a creditor," and Shek's charging lien is irrelevant. We **AFFIRM** and **REMAND** for further proceedings in bankruptcy court.

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Church Joint Venture, L.P. v. Blasingame (In re Blasingame), 986 F.3d 633, 2021 U.S. App. LEXIS 2078, 2021 FED App. 0018P (6th Cir.), 69 Bankr. Ct. Dec. 179

Church Joint Venture, L.P. v. Blasingame (In re Blasingame)

United States Court of Appeals for the Sixth Circuit

October 8, 2020, Argued; January 26, 2021, Decided; January 26, 2021, Filed

File Name: 21a0018p.06

No. 19-5505

Reporter
2021 U.S. App. LEXIS 2078 *; 2021 FED App. 0018P (6th Cir.) **; 986 F.3d 633; 69 Bankr. Ct. Dec. 179

IN RE: EARL BENARD BLASINGAME; MARGARET GOOCH BLASINGAME, Debtors.CHURCH JOINT VENTURE, L.P., on Behalf of Chapter 7 Trustee, Plaintiff-Appellant, v. EARL BENARD BLASINGAME; MARGARET GOOCH BLASINGAME; MARTIN A. GRUSIN; MAG MANAGEMENT CORPORATION, dba JG Law Firm; TOMMY L. FULLEN; LAW OFFICE OF TOMMY L. FULLEN, Defendants-Appellees.

Prior History: [*1] Appeal from the Bankruptcy Appellate Panel of the Sixth Circuit; No. 18-8017—Daniel S. Opperman, Jessica E. Price Smith, and Tracey N. Wise, Bankruptcy Appellate Panel Judges.

United States Bankruptcy Court for the Western District of Tennessee at Memphis; Nos. 2:08-bk-28289; 2:14-ap-00429—Jennie D. Latta, Judge.

Church Joint Ventures, L.P. v. Blasingame (In re Blasingame), 597 B.R. 614, 2019 Bankr. LEXIS 1219 (B.A.P. 6th Cir., Apr. 5, 2019)

Overview
HOLDINGS: [1]-The bankruptcy appellate panel's decision affirming the bankruptcy court's order granting the Chapter 7 debtors' cross-motion for summary judgment was affirmed since the malpractice claims did not accrue until the debtors suffered an injury, and they arose post-petition; at the time of the debtors' filing, the malpractice claims were not a legal interest under Tennessee law such that they could be considered as property of the bankruptcy estate under federal law.

Outcome
Decision affirmed.

Core Terms

malpractice claim, bankruptcy court, accrued, bankrupt estate, malpractice, damages, bankruptcy petition, post-petition, pre-petition, summary judgment, rooted, property of the estate, fail to disclose, cause of action, prior to filing

Case Summary

LexisNexis® Headnotes

Bankruptcy Law > ... > Judicial Review > Standards of Review > De Novo Standard of Review

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Appropriateness

Civil Procedure > Appeals > Summary Judgment Review > Standards of Review

Civil Procedure > Judgments > Summary Judgment > Burdens of Proof

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Genuine Disputes

HN1[] Standards of Review, De Novo Standard of Review

An appellate court reviews a bankruptcy court's grant of summary judgment de novo. Granting summary judgment is appropriate where the moving party has carried its burden of showing that the pleadings, depositions, answers to interrogatories, admissions and affidavits in the record, construed favorably to the nonmoving party, do not raise a genuine issue of material fact for trial. *Fed. R. Civ. P. 56(a)*.

Bankruptcy Law > ... > Judicial Review > Standards of Review > De Novo Standard of Review

HN2[] Standards of Review, De Novo Standard of Review

An appellate court reviews a bankruptcy court's conclusions of law de novo.

Bankruptcy Law > Individuals With Regular Income > Estate Property

HN3[] Individuals With Regular Income, Estate Property

11 U.S.C.S. § 541(a) provides that, barring a few exceptions not relevant here, all legal or equitable interests of the debtor in property as of the commencement of the case are property of the bankruptcy estate. *11 U.S.C.S. § 541 (a)(1)*. Every conceivable interest of the debtor, future, nonpossessory, contingent, speculative, and derivative, is within the reach of *§ 541*. While *§ 541* dictates what interests are property of the estate pursuant to federal bankruptcy law, the nature and extent of the property rights are determined by the underlying state substantive law. Unless some federal interest requires a different result, there is no reason why such interest should be analyzed differently simply because an interested party is involved in a bankruptcy proceeding.

Torts > Malpractice & Professional Liability > Attorneys

HN4[] Malpractice & Professional Liability, Attorneys

To make out a prima facie claim of legal malpractice under Tennessee law, a plaintiff must show the existence of five elements: (1) the attorney owed a duty to the plaintiff, (2) the attorney breached that duty, (3) the plaintiff suffered damages, (4) the breach was the but for cause of the plaintiff's damages, and (5) the breach was the proximate cause of the plaintiff's damages.

Governments > Legislation > Statute of Limitations > Time Limitations

Torts > Malpractice & Professional Liability > Attorneys

HN5[] Statute of Limitations, Time Limitations

A legal malpractice claim accrues as of the date on which the negligence became irremediable.

Torts > Malpractice & Professional Liability > Attorneys

HN6[] Malpractice & Professional Liability, Attorneys

Mere conduct is insufficient to root a legal malpractice claim in the past; a pre-petition violation is required. Second, all causes of action that could have been brought pre-petition are property of the bankruptcy estate, whether or not the debtors knew of the cause of action when they filed the petition.

Governments > Legislation > Statute of Limitations > Time Limitations

Torts > ... > Statute of Limitations > Tolling > Discovery Rule

HN7[] Statute of Limitations, Time Limitations

The Tennessee Supreme Court has overruled the traditional common law malpractice rule, finding that a cause of action accrues when the patient discovers or should have discovered the resulting injury.

Counsel: ARGUED: Carrie R. McNair, AKERLY LAW PLLC, Coppell, Texas, for Appellant.

Michael P. Coury, GLANKLER BROWN, PLLC, Memphis, Tennessee, for Appellees Earl and Margaret.

Blasingame. ON BRIEF: Carrie R. McNair, Bruce W. Akerly, AKERLY LAW PLLC, Coppell, Texas, for Appellant.

Michael P. Coury, GLANKLER BROWN, PLLC, Memphis, Tennessee, for Appellees Earl and Margaret Blasingame.

Judges: Before: SUHRHEINRICH, DONALD, and MURPHY, Circuit Judges.

Opinion by: BERNICE BOUIE DONALD

Opinion

[2]** BERNICE BOUIE DONALD, Circuit Judge. Church Joint Venture, L.P. ("CJV") appeals the Bankruptcy Appellate Panel's ("BAP") order affirming the bankruptcy court's grant of summary judgment to Earl Bernard Blasingame and Margaret Gooch Blasingame (collectively "the Blasingames"). The bankruptcy court determined that a malpractice claim against the attorneys assisting the Blasingames in their bankruptcy filing is property of the **[*2]** Blasingames, and not the bankruptcy estate. We AFFIRM.

I. BACKGROUND

In July 2008, the Blasingames met with Martin A. Grusin and Tommy L. Fullen (collectively the "filing attorneys") to discuss the mounting pressure of their financial situation. Grusin was familiar with the Blasingames' finances prior to their bankruptcy conversations and suggested Fullen, a bankruptcy attorney, to assist in their bankruptcy filing. The Blasingames signed engagement agreements with both Grusin and Fullen. ***Church Joint Ventures, L.P. v. Blasingame (In re Blasingame)***, *597 B.R. 614, 616-17 (B.A.P. 6th Cir. 2019)*.

The Blasingames filed their Chapter 7 bankruptcy petition on August 15, 2008, in the United States Bankruptcy Court for the Western District of Tennessee. Fullen signed the petition as the attorney of record. *In re Blasingame, 559 B.R. 692, 695 (B.A.P. 6th Cir. 2016)*. Edward L. Montedonico ("the Trustee") was appointed as Trustee in the case. *Id. at 696*. Fullen constructed the bankruptcy schedules, pulling most of the Blasingames' financial information from Grusin.

> In their bankruptcy petition, [the Blasingames] claimed less than $6,000 in assets. In fact, as the bankruptcy court later found, the Blasingames failed to disclose millions of dollars in assets that they controlled through a complex web of family trusts, shell companies, and shifting "clearing accounts." **[*3]** They failed to disclose the life estate they held in their $1.7 million homestead, title to which was held by **[**3]** the Blasingame Family Residence Generation Skipping Trust. They failed to disclose approximately $1.2 million in household goods. They claimed two 1985 Mercedes-Benz vehicles worth $1,100, but failed to disclose their control of a 2008 Mercedes-Benz vehicle belonging to the G.F. Corporation, of which Margaret Blasingame is the president, and for which the sole shareholder is the Blasingame Family Business Investment Trust. They likewise failed to disclose their use of a vehicle belonging to Flozone Services, Inc., a company wholly owned by the Blasingames' daughter, and of which Benard Blasingame is the CEO. And they managed their liquid assets in unusual ways: Margaret Blasingame, a schoolteacher, routinely deposited her paycheck into a bank account belonging to her son; the Blasingames' bookkeeper shifted money between this and other "clearing accounts," each of which went undisclosed.
>
> *Church Joint Venture, L.P. v. Blasingame (In re Blasingame), 651 F. App'x 386, 387 (6th Cir. 2016)*.

On February 22, 2011, the bankruptcy court granted the Trustee's motion for summary judgment, denying the Blasingames' discharge. The bankruptcy court denied the Blasingames' discharge on **[*4]** the basis that "[t]he petition, schedules, and statement of financial affairs, as initially filed, did not disclose Debtors' interests in several trusts and corporations, certain household goods, multiple annuities, property held for others, several bank accounts and several liabilities, and an assignment to [] Grusin." *In re Blasingame, 559 B.R. at 695* (abbreviations removed). On July 19, 2011, the bankruptcy court disqualified the filing attorneys from further representation of the Blasingames. Although the Blasingames' new counsel was able to obtain relief from the summary judgment order, their discharge was once again denied on January 15, 2015, following a trial. On appeal, the BAP affirmed the denial. *In re Blasingame, 559 B.R. at 701*.

As a result of the filing attorneys' mishandling of the Blasingames' bankruptcy filing and the Trustee's belief that the estate lacked the resources to pursue a malpractice claim against them itself, creditor CJV [1] obtained derivative

[1] CJV holds 95% of the bankruptcy estate's unsecured claims. *In re*

DH Capital Mgmt., Inc., 736 F.3d 455, 461 (6th Cir. 2013) (alteration in original) (quoting *Azbill v. Kendrick (In re Azbill), No. 06-8074, 2008 Bankr. LEXIS 527, at *19-20 (B.A.P. 6th Cir. Mar. 11, 2008)*). While *§ 541* dictates what interests are property of the estate pursuant to federal bankruptcy law, the "nature and extent of [the] property rights . . . are determined by the 'underlying [state] substantive law.'" *Id.* (quoting *Raleigh v. Ill. Dep't of Rev., 530 U.S. 15, 20, 120 S. Ct. 1951, 147 L. Ed. 2d 13 (2000)*). "Unless some federal interest requires a different result, there is no reason why such interest should be analyzed differently simply because an interested party is involved in a bankruptcy proceeding." *Butner v. United States, 440 U.S. 48, 55, 99 S. Ct. 914, 59 L. Ed. 2d 136 (1979)*.

HN4[↑] To make out a prima facie claim of legal malpractice under Tennessee law, a plaintiff must show the existence of five elements: (1) the attorney owed a duty to the plaintiff; (2) the attorney breached that duty; (3) the plaintiff suffered damages; (4) the **[*9]** breach was the but for cause of the plaintiff's damages; and (5) the breach was the proximate cause of the plaintiff's damages. *Gibson v. Trant, 58 S.W.3d 103, 108 (Tenn. 2001)*.

To analyze the nature and extent of the rights in the legal malpractice claims, we must determine which elements of the claims were satisfied as of the commencement of the bankruptcy filing. CJV contends, and the Blasingames do not dispute, that the filing attorneys owed the Blasingames duties with respect to the process of filing for bankruptcy and that the filing attorneys breached those duties when they failed to properly investigate and draft the Blasingames' schedules and statement of financial affairs prior to filing the Blasingames' bankruptcy petition.

The parties do, of course, dispute whether the damages element was met pre-petition, [3] or, alternatively, whether that is a requirement at all. The Blasingames assert that both the Trustee's malpractice complaint and their own malpractice complaint filed against the filing attorneys allege that the sole damages caused by the filing attorneys' breach was the denial of the Blasingames' discharge, which is undisputedly a post-petition event. Appellee's Br. at 8-9. CJV, on the other hand, points to two possible **[*10]** events which damaged the Blasingames pre-petition: first, the advice to file for bankruptcy in the first place because bankruptcy may not **[**7]** have been the Blasingames' best option; and second, the negligent construction of their bankruptcy petition. Appellant's Br. at 25.

[3] Only the damages element remains because the causation elements are contingent on, and can be satisfied simultaneously with, the existence of damages.

HN5[↑] A legal malpractice claim accrues as of the date on which the negligence became irremediable. *Ameraccount Club, Inc. v. Hill, 617 S.W.2d 876, 879 (Tenn. 1981)* (citing *Biberstine v. Woodworth, 406 Mich. 275, 278 N.W.2d 41, 42 (Mich. 1979)* (holding that an attorney's negligent failure to properly schedule a client's debt in a petition for bankruptcy became a viable malpractice claim at the time of discharge because the petition was amendable up until that point)). With respect to each asserted breach, the ultimate damage came once the filing attorneys filed the bankruptcy petition, and not prior to the commencement of the bankruptcy case because, until that time, the Blasingames need not have continued on the path towards filing for bankruptcy at all.

In the alternative, however, CJV points to the real crux of the issue: whether, even assuming that all damages occurred post-petition, the filing attorneys' underlying pre-petition conduct causes the claim to be "sufficiently rooted in the [debtor's] pre-bankruptcy past" as to make it property of the estate. **[*11]** Appellant's Br. at 26-31 (quoting *Segal v. Rochelle, 382 U.S. 375, 380, 86 S. Ct. 511, 15 L. Ed. 2d 428 (1966)*). This language has a long and disputed history.

In *Segal*, the debtors and their business partnership filed their bankruptcy petitions in 1961. *382 U.S. at 376*. The following year, the trustee of the bankruptcy estate obtained loss-carryback tax refunds for losses the partnership suffered during 1961 (prior to filing their petitions). *Id.* These losses were carried back to 1959 and 1960 to offset net income on which the debtors had already paid taxes. *Id.* The Supreme Court held that the "loss-carryback refund claim . . . [was] sufficiently rooted in the prebankruptcy past and so little entangled with the [debtors'] ability to make an unencumbered fresh start that it should be regarded as 'property' under § 70a(5) [of the Bankruptcy Act]." *Id. at 380*.

Segal was based on § 70a(5) of the 1898 Bankruptcy Act, which vested to the trustee of the bankruptcy estate "property which prior to the filing of the petition [the debtor] could by any means have transferred or which might have been levied upon and sold under judicial process against [the debtor]." As noted above, the current Bankruptcy Code, enacted in 1978 by § 101 of **[**8]** the Bankruptcy Reform Act, includes a different provision regarding the property **[*12]** of the estate—"all legal or equitable interests of the debtor in property as of the commencement of the case" regardless of "wherever located and by whomever held." *11 U.S.C. § 541(a)*. Although some circuits have held that the language in *§ 541* codified *Segal*'s specific holding by making the location of the claim at issue irrelevant, [4] other circuits have

[4] *See Chartschlaa v. Nationwide Mut. Ins. Co., 538 F.3d 116, 122*

standing from the bankruptcy court to file a malpractice claim against the filing attorneys on behalf of the estate. *In re Blasingame, 651 F. App'x at 387-88*. CJV, in the bankruptcy court, and the Blasingames, in Tennessee state court, filed malpractice complaints against the filing attorneys, both alleging that the filing **[*5]** attorneys' **[**4]** negligence resulted in the denial of the Blasingames' discharge. During this time, the Blasingames also attempted to settle the malpractice claim with the filing attorneys for $1 million and later $1.25 million. *Id.* The bankruptcy court denied the Blasingames' motion to approve the settlement because of the overwhelming likelihood that the claim would be successful on the merits. *Id. at 388*. The Blasingames appealed the denial, but the BAP dismissed their appeal for lack of jurisdiction, holding that the bankruptcy court's order was not a final, appealable order. *Id.* The Blasingames further appealed the dismissal, and a panel of this Court similarly dismissed the appeal for lack of jurisdiction. *Id. at 389*.

On January 2, 2018, CJV filed a motion for summary judgment, asserting that the malpractice claims against the filing attorneys are property of the bankruptcy estate, not the Blasingames. The Blasingames responded to the motion, and the bankruptcy court treated the response as a cross-motion for summary judgment, seeking a declaration that the malpractice claims were property of the Blasingames. Applying Tennessee law to determine when the legal malpractice claims accrued, the bankruptcy **[*6]** court denied CJV's motion for summary judgment and granted the Blasingames' cross-motion for summary judgment. The bankruptcy court determined that the claims arose post-petition and were therefore the property of the Blasingames.

CJV appealed to the BAP. A panel of the BAP unanimously affirmed the bankruptcy court's order. *CJV, 597 B.R. at 616*. The panel, relying on this Court's unpublished decision in *Underhill v. Huntington National Bank (In re Underhill), 579 F. App'x 480 (6th Cir. 2014)*, [2] held that the malpractice claims arose post-petition and were thus property of the Blasingames because the only injury—denial of the Blasingames' discharges—occurred post-petition. *CJV, 597 B.R. at 619*. CJV now appeals the BAP's decision affirming the bankruptcy court's order.

II. ANALYSIS

Although this Court has frequently encountered the general question posed here—whether contested claims are property of the debtor or the bankruptcy estate—the context of a **[**5]** legal malpractice claim against the debtors' filing attorneys seems to be an issue of first impression for this Court. The bankruptcy court applied the "accrual theory," determining that, because the malpractice claims did not accrue until the Blasingames suffered an injury, they arose post-petition, and are therefore property of the Blasingames. As **[*7]** explained by the bankruptcy court:

> The [Blasingames] are correct. There can be no more personal damage in connection with a bankruptcy case than the loss of a debtor's discharge. [CJV] has alleged no other damage that accrued to the bankruptcy estate, and has alleged no damage that accrued to the [Blasingames] prior to the filing of their bankruptcy petition. Neither of the complaints describes a cause of action that could have been pursued by the [Blasingames] prior to the filing of their bankruptcy petition.

*Church Joint Venture v. Blasingame (In re Blasingame), No. 08-28289-L, 2018 Bankr. LEXIS 1781, at *17 (W.D. Tenn. May 9, 2018)*.

HN1[↑] We review a bankruptcy court's grant of summary judgment *de novo*. *Trost v. Trost, 735 F. App'x 875, 877 (6th Cir. 2018)*. "Granting summary judgment is appropriate '[w]here the moving party has carried its burden of showing that the pleadings, depositions, answers to interrogatories, admissions and affidavits in the record, construed favorably to the nonmoving party, do not raise a genuine issue of material fact for trial.'" *Meade v. Pension Appeals & Review Comm., 966 F.2d 190, 192-93 (6th Cir. 1992)* (alteration in original) (quoting *Gutierrez v. Lynch, 826 F.2d 1534, 1536 (6th Cir. 1987)*); *Fed. R. Civ. P. 56(a)*.

All parties agree that summary judgment was proper to determine this issue because there are no genuine issues of material fact. *CJV, 597 B.R. at 617*. Their disagreement lies exclusively in the legal determination of the ownership **[*8]** of the malpractice claims. ***HN2***[↑] We review the bankruptcy court's conclusions of law *de novo*. *Zingale v. Rabin (In re Zingale), 693 F.3d 704, 707 (6th Cir. 2012)*. "The BAP's decision is not binding on this [C]ourt." *Id.*

HN3[↑] *Section 541(a) of the Bankruptcy Code* provides that, barring a few exceptions not relevant here, "all legal or equitable interests of the debtor in property as of the commencement of the case" are property of the bankruptcy estate. *11 U.S.C. § 541 (a)(1)*. "[E]very conceivable interest of the debtor, future, nonpossessory, contingent, speculative, and derivative, is within the **[**6]** reach of *§ 541*." *Tyler v.*

Blasingame, 651 F. App'x at 388.

[2] The BAP improperly found that "*Underhill* controls and binds the bankruptcy court and [the BAP]." *CJV, 597 B.R. at 619*. Because *Underhill* is an unpublished decision of this Court, it is not binding authority.

questioned whether the "rooted in the past" concept survived the Bankruptcy Code's enactment. [5] This Court has favorably recited *Segal*, albeit sparingly. *See e.g.*, *Lawrence v. Commonwealth of Ky. Transp. Cabinet (In re Shelbyville Rd. Shoppes, LLC), 775 F.3d 789, 796 (6th Cir. 2015)* (applying *Segal*'s "sufficiently rooted" test to determine whether a deposit was property of the bankruptcy estate).

There is little agreement, both inter-and intra-circuit, on how courts should apply the *Segal* test when dealing with a claim for legal malpractice against the filing attorneys:

> Some courts have applied the test expansively, including contingent and unripe claims as property of the estate. *See, e.g.*, *Mueller, No. 06-8053, 2007 Bankr. Lexis 1523, at *8 (B.A.P. 6th Cir. May 10, 2007)* (holding that a legal-malpractice claim became part of estate at the time of negligence, not when damages are incurred). Others have treated the test as equivalent to the determination of when the cause of action accrues under the substantive law. **[*13]** *See, e.g.*, *Witko v. Menotte (In re Witko), 374 F.3d 1040, 1044 (11th Cir. 2004)* (holding that a legal-malpractice claim was not part of the estate since harm from the attorney's pre-petition failures did not occur until after filing the petition).

[9]** *Tyler, 736 F.3d at 462*. In *Tyler*, we declined to answer the question before this Court now: "whether a cause of action, one or more of whose elements have not been satisfied at time of the petition, may become pre-petition property." *Id. at 463*.

Prior holdings have, however, provided some insights into the boundaries at play. *Id. at 462*. ***HN6***[↑] First, mere conduct is insufficient to root a claim in the past; a pre-petition violation is required. Second, all causes of action that could have been brought pre-petition are property of the estate, whether or not the debtors knew of the cause of action when they filed the petition. *Id.* Although the second instruction is not relevant here because a malpractice claim could not have been brought until the Blasingames suffered damages—the denial of their discharge—the first instruction guides our inquiry. Unfortunately, it does so only through another question: Does the "violation" occur when the duty is breached or when the damage is incurred? Unlike in *Tyler*, in which the property at issue was an action under the **[*14]** Fair Debt Collection Practices Act, it is not so clear here when the malpractice violation occurred. *Id. at 463-64*. We must look to Tennessee law to determine when acts constituting malpractice become a violation.

Tennessee used to follow the traditional common law rule that a claim accrues upon the wrongful act, not when damages are incurred. *Albert v. Sherman, 167 Tenn. 133, 67 S.W.2d 140, 141 (Tenn. 1934)*. ***HN7***[↑] But the Tennessee Supreme Court overruled the traditional common law rule, finding that a "cause of action accrues . . . when the patient discovers . . . or should have discovered the resulting injury." *Teeters v. Currey, 518 S.W.2d 512, 517 (Tenn. 1974)* (applying the rule in the context of a medical malpractice claim); *see Smith v. Tenn. Nat'l Guard, 551 S.W.3d 702, 709-10 (Tenn. 2018)* (reaffirming *Teeters* and explaining that its holding has since been applied to many other types of claims); *Redwing v. Catholic Bishop for Diocese of Memphis, 363 S.W.3d 436, 458 (Tenn. 2012)*. Although not in the bankruptcy context, we have applied *Teeters* to malpractice claims against attorneys as well. For example, in *Woodruff v. Tomlin*, this Court held that, with respect to plaintiffs' malpractice claims against attorneys hired to pursue their claims for damages resulting from personal injuries, "no cause of action accrued until after the plaintiffs discovered or could have reasonably discovered the malpractice and until after the judgment . . . had become final." **[*15]** *511 F.2d 1019, 1021 (6th Cir. 1975)*.

[10]** True enough, it is not of great consequence when, under Tennessee law, the malpractice claims became actionable because federal law determines when a property interest becomes part of the bankruptcy estate. *In re Underhill, 579 F. App'x 480, 484 (6th Cir. 2014)* (Donald, J., dissenting); *In re Terwilliger's Catering Plus, Inc., 911 F.2d 1168, 1172 (6th Cir. 1990)*. Thus, while it remains difficult to determine whether, if ever, an unaccrued claim can be "sufficiently rooted" in a debtor's past, it is clear that at the very least there must be some awareness of the claim in order for it to exist as a legal interest and be properly included in

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(2d Cir. 2008) (applying *Segal*'s "sufficiently rooted" test); *Beaman v. Shearin (In re Shearin), 224 F.3d 346, 351 (4th Cir. 2000)* (affirming the bankruptcy court's use of *Segal*'s "sufficiently rooted" test); *In re Barowsky, 946 F.2d 1516, 1518-19 (10th Cir. 1991)* (finding that Congress affirmatively adopted *Segal*'s analysis of property); *In re Ryerson, 739 F.2d 1423, 1426 (9th Cir. 1984)* ("The Code follows *Segal* insofar as it includes after-acquired property 'sufficiently rooted in the prebankruptcy past' but eliminates the requirement that it not be entangled with the debtor's ability to make a fresh start.").

[5] *See Bracewell v. Kelley (In re Bracewell), 454 F.3d 1234, 1242 (11th Cir. 2006)* ("The *Segal* decision told us how to define property under the old bankruptcy code, before it was amended in 1978 to include an explicit definition of property. We will not attribute to the Supreme Court an intent to construe legislative language that it had not seen and which would not even exist for another dozen years."); *Burgess v. Sikes (In re Burgess), 438 F.3d 493, 498 (5th Cir. 2006)* ("*Segal*'s 'sufficiently rooted' test did not survive the enactment of the Bankruptcy Code."); *Drewes v. Vote (In re Vote), 276 F.3d 1024, 1026 (8th Cir. 2002)* (finding that applying the "sufficiently rooted" test to the claim at hand would broaden the scope of ***§ 541*** beyond claims which exist at the commencement of the case).

the debtor's bankruptcy petition. *See* *In re Underhill, 579 F. App'x at 484* (Donald, J., dissenting) (contending that the debtors' tortious interference claim was part of the bankruptcy estate despite the fact that the claim had not accrued under state law because violative conduct occurred prior to the petition and the debtors *were aware of it* prior to the petition). Tennessee courts have likewise applied this same reasoning to their accrual rule, seeking to ameliorate the unjust results caused by treating a claim as accrued prior to a plaintiff's knowledge of the injury. *Smith, 551 S.W.3d at 709-10*.

Applying that test here, the malpractice cause of action could not have become a legal interest under Tennessee law until after the judgment **[*16]** denying the Blasingames' discharge was entered because the Blasingames were unaware of the filing attorneys' conduct, which allegedly constituted malpractice. This result is in accord with our Court's previous guidance. Here, the malpractice claims could not be more entangled with the Blasingames' ability to make a fresh start because they directly resulted in the denial of their discharge. Thus, at the time of the Blasingames' filing, the malpractice claims were not a legal interest under Tennessee law such that they could be considered as property of the bankruptcy estate under federal law.

In the alternative, CJV contends that, if this Court finds that even some of the malpractice claims arose pre-petition, "the Bankruptcy Court should have considered splitting the claims into two separate and distinct causes of action — one in the pre-petition period and one in the post-petition period." Appellant's Br. at 39. Because, as determined above, any legal interest in the malpractice claims arose post-petition, there is no need to divide them. Furthermore, CJV fails to offer any case law which endorses their proposal in the context of determining whether a property interest arose pre-or **[*17]** post-petition.

[**11] III. CONCLUSION

For the foregoing reasons, we AFFIRM the BAP's holding.

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White-Williams Seminar
May 13-14, 2021

akron bar association

The 25th Annual White-Williams Bankruptcy Institute

Thurs., May 13, 2021 9 am – 12:25 pm & Fri., May 14, 2021 9am – 12:25 pm

Live Interactive Webinar

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STARK COUNTY BAR ASSOCIATION

Day 1: Thursday, May 13, 2021

9 am	**Welcome** Anthony J. DeGirolamo, Esq., Chair, Bankruptcy Committee, Stark County Bar Association Joseph A. Ferrise, Esq. Chair, Bankruptcy & Commercial Law Section Akron Bar Association Webinar Instructions: Bar Staff
9:10 am – 10:10 am	**Case Law Update** Hon. John P. Gustafson, US Bankruptcy Court, Northern District of Ohio
10:10 am – 10:40 am	**What to Expect When the United States Trustee is Investigating Section 727 Causes of Action** Scott Belhorn, Esq., Trial Attorney, USDOJ, Office of the US Trustee Cathy Lowman, Esq. Bankruptcy Analyst, USDOJ, Office of the US Trustee
10:40 am – 10:55 am	**Break**
10:55 am – 11:40 am	**Reaffirming or Assuming Vehicle Leases** Debra Booher, Esq., Debra Booher and Associates Co., LPA Amie Jones, Chief Lending Officer, CSE Federal Credit Union Anthony J. DeGirolamo, Attorney at Law, Chapter 7 Trustee
11:40 am – 12:25 pm	**State of Ohio Update** Alison L. Archer, Associate Attorney General, Office of the Ohio Attorney General Cory Steinmetz, Assistant Attorney General, Office of the Ohio Attorney General
12:25 pm	**Adjourn**

Day 2: Friday, May 14, 2021

9 am	**Welcome** Anthony J. DeGirolamo, Esq., Chair, Bankruptcy Committee, Stark County Bar Association Joseph A. Ferrise, Esq. Chair, Bankruptcy & Commercial Law Section Akron Bar Association Webinar Instructions: Bar Staff
9:10 am – 9:55 am	**Statutory Update** Joseph A. Ferrise, Esq., Office of the Chapter 13 Trustee, Akron Michelle Jackson-Limas, Esq., Office of the Chapter 13 Trustee, Canton
9:55 am – 10:40 am	**Technology Talk** Marc P. Gertz, Esq., Chapter 7 Trustee Gertz & Rosen, Ltd. Julie K. Zurn, Esq., Chapter 7 Trustee Brouse McDowell
10:40 am – 10:55 am	**Break**
10:55 am – 11:25 am	**View from the Bench – A Conversation with Judge Tiiara N. A. Patton** Hon. Alan M. Koschik U.S. Bankruptcy Court, Northern District of Ohio Hon. Tiiara N.A. Patton U.S. Bankruptcy Court, Northern District of Ohio
11:25 am – 12:25 pm	**Ethics & Professionalism: The Impact of the Pandemic on Mental Health & Addiction** Dr. Jason McGlothlin, Associate Professor at Kent State University
12:25 pm	**Adjourn**

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