FEDERAL BAR ASSOCIATION – BANKRUPTCY SECTION NEWSLETTER

FALL 2016

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EDITOR'S NOTE

GREGORY J. GUEST

Greetings, fellow bankruptcy practitioners. I would like to take the opportunity presented by this edition of the newsletter by expressing how honored I am to accept the position as your new editor. Although I have been able to meet a great deal of you over the past few years, there are no doubt some of you whom I have not yet had the opportunity to get to know, so I will begin with a little about myself.

I graduated from The John Marshall Law School in 2013. While in law school, I held internships with the Hon. Bruce W. Black, Chief Judge of the U.S. Bankruptcy Court for the Northern District of Illinois; Brett Rodgers, Chapter 13 Trustee here in the Western District of Michigan; and the U.S. Trustee for Region 11, in Chicago. Following law school, I held the position of law clerk to the Hon. Lee M. Jackwig in the U.S. Bankruptcy Court for the Southern District of Iowa. I spent two years with Judge Jackwig and am very thankful for having had the opportunity to glean from her decades of experience on the bankruptcy bench. It was an excellent transition into private practice, and I believe it gave me the tools I need to hit the ground running in the bankruptcy world. Although I am originally from the Chicago area, I am a West Michigan native by marriage and am happy to now call Grand Rapids my home.

I also want to take this opportunity to invite our members to consider contributing to the efforts of this newsletter. I want this newsletter to reflect the issues you're facing in your respective practices, and to that end I ask that over the next few months you consider submitting 1-2 short articles or article ideas addressing notable recent developments and topics that would be valuable to the bankruptcy/insolvency practice in West Michigan. At the very least, feel free to send me an email (gguest@dickinsonwright.com) every once and awhile with a topic or issue you have been facing and for which you might appreciate a few paragraphs of insight and research. Chances are your fellow bankruptcy practitioners have faced or will face the same issue. Please also feel free to contact me if you wish to post announcements and other news (e.g., promotions, awards, appointments, law firm news) in the Announcements section of the upcoming newsletter.

I look forward to getting to know all of you over the coming months, and I thank you for the opportunity to contribute my efforts to the Bankruptcy Section of the Federal Bar Association for West Michigan.

LETTER FROM THE CHAIR
BENJAMIN M. WHITE

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

The Bankruptcy Section has had a successful 2016. Our annual seminar took place on Mackinac Island and was a huge success thanks to our committed sponsors, panelists, and attendees. Seminar Chair Barb Foley and Education Chair Chief Judge Scott W. Dales worked hard to put together an excellent slate of programming and social functions. The following recipients were awarded the Lion Award, James D. Gregg Education Award, and the Nims-Howard Civility Award, and we thank them for their outstanding service and contributions to our bar:

- Honorable Jeffrey R. Hughes received the Lion Award.
- Mary K. Viegelahn received the James D. Gregg Education Award.
- Carol Chase received the Nims-Howard Civility Award.

We also hosted the annual State of the Court lunch on October 21, 2016, in Grand Rapids. The keynote speaker was John J. Bursch, appellate and Supreme Court practitioner and former Michigan Solicitor General. Mr. Bursch presented his insightful analysis of upcoming bankruptcy cases before the U.S. Supreme Court.

As always, we will round out the year with our annual Holiday Parties in Marquette, Grand Rapids, Lansing, Kalamazoo, and Traverse City.

Thank you for making 2016 such a great year, and we look forward to an exciting 2017.

Benjamin M. White,
Chair of the FBA Bankruptcy Section

NEWS & ANNOUNCEMENTS

PROPOSED FEDERAL BANKRUPTCY RULE, FEE AND FORM CHANGES EFFECTIVE DECEMBER 1, 2016

On April 28, 2016, the Supreme Court adopted changes to the Federal Rules and Bankruptcy Procedures which are scheduled to take effect December 1, 2016. FRBP 1010, 1011, 1012, 2002, 3002.1, 7008, 7012, 7016, 9006, 9027, and 9033 are affected by these changes. An informational packet regarding the changes can be found on the Bankruptcy Court's website, at www.miwb.uscourts.gov/sites/miwb/files/RuleChanges.pdf.

Also, at its September 2016 session, the Judicial Conference approved changes to the miscellaneous fee schedule. These changes will also become effective December 1, 2016. For more details, please review the updated fee schedule on the Bankruptcy Court's website, at http://www.miwb.uscourts.gov/fee-schedule.

HOLIDAY PARTIES

Please see the attached announcement for details regarding the Bankruptcy Section's holiday parties.

RETIREMENT RECEPTION IN HONOR OF FRAN FERGUSON

After long serving as a member of the Bankruptcy Section Steering Committee and making numerous contributions as a member of the local bar, Fran Ferguson will be retiring as an attorney with the U.S. Department of Justice. Please see the attached invitation regarding a reception on December 15 in her honor.

COURT CLOSURE ON DECEMBER 23

The Bankruptcy Court will be closed for business and inaccessible on Friday, December 23, 2016. In accordance with Federal Rule of Bankruptcy Procedure 9006(a)(3), filings due on this day will be deemed timely if filed on the next regularly scheduled business day.

DEBTORS BAR OF WEST MICHIGAN 2017 WINTER SEMINAR

The Debtors Bar for the Western District of Michigan will be conducting a seminar on Monday, January 16, 2017, at the Grand Valley State University Eberhard Center in Grand Rapids, Michigan. For further information, please view the attached brochure or visit www.debtorsbar.com.

LOCAL RULES COMMITTEE

The Court has reconstituted the Local Bankruptcy Rules Committee. The Committee's task is to revise and propose rules to govern procedures that are not already addressed in the Federal Rules of Bankruptcy Procedure. Your assistance is requested to improve the Local Bankruptcy Rules. Any suggestions with regard to the drafting progress may be directed to a member of the Committee, or Katrina_Shellman@miwb.uscourts.gov. As Judge Dales indicated both in a letter to the bar earlier this year and at last month's State of the Court luncheon, the reconstitution of the Committee is not an indication that it is 'open-season' on the Bankruptcy Code provisions, Federal Rules, or court decisions that displease us. As Fed. R. Bankr. P. 9029(a) makes clear, a district's local bankruptcy rules must be consistent with but not duplicative of the Code and Federal Rules. Historically, it has been the tradition in the Western District of Michigan to maintain a relatively modest set of local rules so as to rely as heavily as possible on the Federal Rules in our respective practices. Your cooperation and assistance is greatly appreciated. All suggestions, comments, and materials should be submitted by January 31, 2017.

SAVE THE DATE – JULY 27-29, 2017

The Bankruptcy Section will be holding its annual seminar on July 27-29, 2017. Please see the attached flier for more information.

THE CONTINUING UNCERTAINTY OF "SURRENDER"

HON. JOHN T. GREGG[1]
UNITED STATES BANKRUPTCY COURT FOR THE WESTERN DISTRICT OF MICHIGAN

Undefined by the Bankruptcy Code, the term "surrender" presents many challenges to practitioners and courts alike. Most courts generally agree that "surrender" means to make property available. *See*, *e.g.*, *In re White*, 487 F.3d 199, 205 (4th Cir. 2007); *In re Pratt*, 462 F.3d 14, 18-19 (1st Cir. 2006). On its face, this definition seems straightforward and self-explanatory. However, even such a relatively simple definition can create uncertainty. Recently, two courts were asked to consider whether a debtor must relinquish defenses to a foreclosure action in state court after the debtor stated an intention to surrender real property in his or her bankruptcy case. Not surprisingly, the courts reached opposite conclusions.

A. Surrender Requires Relinquishments of Legal Rights Related to the Collateral

The first decision emanates from Florida, where the bankruptcy courts had offered differing views as to the means by which to enforce surrender, but not necessarily the effect of surrender.[2] On October 4, 2016 and consistent with the Florida bankruptcy courts, the Eleventh Circuit Court of Appeals held that when a debtor surrenders real property, the debtor also surrenders any rights and defenses related to that property. *In re Failla*, 838 F.3d 1170 (11th Cir. 2016).

In *Failla*, the debtors defaulted on their mortgage, causing the mortgagee to commence a foreclosure action in state court. Approximately two years later and while contesting the foreclosure, the debtors filed for Chapter 7. During their bankruptcy, the debtors admitted that they owned the home, that the home was collateral to secure repayment of the indebtedness, that the mortgage was valid, and that the lender was underwater. The debtors also stated their intention to surrender the home shortly after filing for bankruptcy. *See* 11 U.S.C. § 521; Fed. R. Bankr. P. 1007(b)(2).

Notwithstanding their expressed intention, the debtors continued to live in the home and actively contest the foreclosure in state court. The mortgagee filed a "motion to compel surrender" in the debtors' bankruptcy case, arguing that the debtors' continued defense of the foreclosure action was precluded by their intention to surrender the home. After the bankruptcy court granted the motion to compel and the district court affirmed, the debtors appealed to the Eleventh Circuit.

The Eleventh Circuit began by noting that upon filing for bankruptcy, a debtor must declare one of the following as part of his statement of intention: (i) the collateral is exempt, (ii) the debtor will surrender the collateral, (iii) the debtor will redeem the collateral, or (iv) the debtor will reaffirm the debt. *See* 11 U.S.C. § 521(a)(2). Noting that the debtors elected to surrender their house, the court explained that in order to determine whether the debtors satisfied their intention to surrender, it was necessary to decide (i) to whom the debtors must surrender their property, and (ii) whether surrender precludes the debtors from contesting the foreclosure action.

Answering the first question, the court concluded that surrender as used in section 521(a)(2) requires more than simply surrendering collateral to the trustee. To reach this conclusion, the court compared section 521(a)(2) with section 521(a)(4). The court noted that because section 521(a)(4) specifically refers to the surrender of property *to the trustee*, section 521(a)(2), which does not identify to whom property must be surrendered, may require surrender to persons other than the trustee. The court highlighted that Congress knew how to identify to whom property is to be surrendered. *See* 11 U.S.C. § 1325(a)(5)(C) (property surrendered to holder of secured claim); 11 U.S.C. § 521(a)(4) (property surrendered to trustee). If, after surrender to the trustee under section 521(a)(4), the trustee abandons the property back to the debtor, the court explained, section 521(a)(2) contemplates the surrender of the property *to the creditor*.

The Eleventh Circuit found further statutory support. First, the text of section 521(a)(2) refers to redemption and reaffirmation. Those terms, according to the court, involve a relationship with a creditor. As such, the court concluded that surrender likewise involves a relationship with a creditor. Second, the

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[1] Nothing contained herein should be construed as an opinion of the author or the United States Bankruptcy Court for the Western District of Michigan. This article is intended solely for informational purposes.

[2] The courts were seemingly in agreement that surrender requires a debtor to relinquish rights related to foreclosure. *See*, *e.g.*, *In re Elowitz*, 550 B.R. 603 (Bankr. S.D. Fla. 2016) (surrender requires debtor to make property available and to cease all efforts to contest foreclosure); *In re Metzler*, 530 B.R. 894 (Bankr. M.D. Fla. 2015 (surrender precludes debtor from taking overt act to prevent foreclosure). However, the courts were inconsistent with respect to the means by which to enforce surrender. *See*, *e.g.*, *In re Guerra*, 544 B.R. 707 (Bankr. M.D. Fla. 2016) (where significant time lapses between surrender and defense of foreclosure, state court should determine whether judicial estoppel applies); *In re Lapeyre*, 544 B.R. 719 (Bankr. S.D. Fla. 2016) (bankruptcy court has jurisdiction to order debtors to withdraw defenses and dismiss counterclaims in state court foreclosure after stating intention to surrender); *see also In re Kourogenis*, 539 B.R. 625 (Bankr. S.D. Fla. 2015) (laches prevented secured creditor from reopening case to compel debtor to relinquish foreclosure defenses).

court identified other sections of the Bankruptcy Code which provide a remedy to creditors, not the trustee, when a debtor violates section 521(a)(2). *See* 11 U.S.C. § 362(h) (lift of stay related to statement of intention); 11 U.S.C. § 521(d) (creditor may consider debtor in default if debtor fails to take action related to statement of intention).[3]

Having decided that section 521(a)(2) requires surrender to a creditor, the court next considered whether a surrendering debtor is precluded from continuing to contest a foreclosure action. Relying in part on Black's Law Dictionary, the court explained that surrender includes rights related to legal relationships. The court again turned to, and found support from, references to redemption and reaffirmation, both of which involve legal relationships. As an extension, the court explained, surrender should similarly be construed to involve a legal relationship. Finally, the court noted that other authorities have similarly interpreted surrender to mean the relinquishment of all rights, including possessory rights.

Because the debtors in *Failla* were acting to preserve rights in their home through litigation in the state court, the Eleventh Circuit concluded that they had not relinquished all of their legal rights, as they were required to do. Citing to lower court decisions, the court emphasized that in order for surrender to be effective, a debtor cannot be permitted to dispute the foreclosure. "Otherwise, debtors could obtain a discharge in bankruptcy based, in part, on their sworn statement to surrender and 'enjoy possession of the collateral indefinitely while hindering and prolonging the state court process.'"

Lastly, the court addressed and rejected the debtors' argument that the following hanging paragraph in section 521(a)(2) required a different result:

> nothing in subparagraphs (A) and (B) of this paragraph shall alter the debtor's or the trustee's rights with regard to such property under this title, except as provided in section 362(h).

The Eleventh Circuit explained that the focus of the paragraph must be on the phrase "under this title." According to the court, the hanging paragraph means only that section 521(a)(2) does not impact the trustee's or the debtor's *bankruptcy rights*. It does not extend to *non-bankruptcy rights*, such as defenses to foreclosure actions involving surrendered property in state court.

In sum, the Eleventh Circuit concluded that because the debtors chose to surrender their home, they were precluded from opposing the foreclosure action.[4]

B. Surrender Does Not Impact Legal Rights Related to the Collateral

The Eleventh Circuit's decision in *Failla* resolved a split of authority in Florida while providing clarity to other bankruptcy courts. However, a mere two weeks after *Failla* was issued, the Bankruptcy Court for the District of Hawaii rekindled the issue for practitioners and bankruptcy courts outside the Eleventh Circuit. *See In re Ryan*, 2016 WL 6102312 (Bankr. D. Haw. Oct. 19, 2016). The *Ryan* court held that the concept of surrender is not nearly as broad as that adopted in *Failla*. Instead, according to the *Ryan* court, the act of surrender is nothing more than the relinquishment of the right to redeem or reaffirm.

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[3] Although sections 362(h) and 521(d) involve personal property, the court found such distinction irrelevant because section 521(a)(2) contains no such limitation.

[4] The Eleventh Circuit separately concluded that bankruptcy courts have the power to remedy a debtor's violation of his or her duties under section 521(a)(2) by ordering the debtor to withdraw affirmative defenses and dismiss counterclaims in foreclosure actions. *See* 11 U.S.C. § 105(a).

In *Ryan* the debtors granted a mortgage on their home prepetition. After the debtors filed for Chapter 7, the mortgagee moved for and received relief from the automatic stay to enforce its applicable non-bankruptcy rights. Later, the mortgagee foreclosed on the home through a non-judicial foreclosure. The debtors then commenced an action in state court for wrongful foreclosure. After the mortgagee filed a motion to dismiss in state court, the debtors reopened their bankruptcy and filed a motion seeking clarification in the nature of declaratory relief.

Similar to *Failla*, the *Ryan* court began by exploring the meaning of "surrender" as used in section 521(a)(2), including to whom the debtor must surrender the property, and what surrender requires a debtor to do. And, like the *Failla* court, the court in *Ryan* concluded that surrender in section 521(a)(2) requires more than just surrendering property to the trustee because section 521(a)(4) specifically refers to the trustee. Section 521(a)(2) does not refer to anyone in particular.

The *Ryan* court's agreement with *Failla* did not continue. The court first explained that the Eleventh Circuit's reliance on the dictionary definition was incorrect, because it did not state what right or claim was being relinquished. Instead, viewing surrender in the context of section 521(a)(2), the court concluded that the right or claim that is being relinquished upon surrender is only the right to redeem the collateral or reaffirm the debt.

The *Ryan* court also was not persuaded by the *Failla* court's analysis of the hanging paragraph in section 521(a)(2). The court noted that the reasoning in *Failla* is based on an erroneous assumption - that being that the only bankruptcy rights of a debtor in the collateral are found in the automatic stay. Instead, the court explained, a debtor may object to claims, including secured claims, by relying on rights under non-bankruptcy law. As such, the court concluded "there is no good reason to construe the [hanging paragraph] as limiting the debtor's post-bankruptcy rights and defenses."

The court reiterated that a debtor's intention surrender means only that the debtor does not intend to reaffirm the debt or redeem or exempt the property. Rather, the court viewed section 521(a)(2) as nothing more than a notice provision which has no effect on the rights of the debtor. The court explained that the Bankruptcy Code already sets forth the consequences of a failure to surrender – relief from the automatic stay. *See* 11 U.S.C. § 362(h).

Citing to section 704(a)(3), the *Ryan* court also observed that the Bankruptcy Code only grants the trustee the authority to compel a debtor to file the statement of intention. Because this power was not given to creditors, Congress was implicitly stating that a creditor has no rights (other than 362(h)) after surrender. Finally, the court rejected the implication in *Failla* that a debtor's post-discharge objection to a foreclosure is always abusive. Instead, debtors may have legitimate reasons to defend against a post-discharge foreclosure, including where property may be subject to a junior lien securing a non-dischargeable debt (*i.e.*, taxes).

In sum, the *Ryan* court was unpersuaded by *Failla* and instead held that a debtor's intention to surrender does not result in a relinquishment of rights, including any rights and defenses related to a foreclosure.[5]

C. Conclusion

[5] The court also held that debtors are entitled to a discharge regardless of whether they file a statement of intention, what they represent in the statement, and whether they take action consistent with such statement.

Failla and *Ryan* are indicative of the continued uncertainty surrounding the surrender of property, and rights associated therewith. As evident from the divergent views in those decisions, both arguments have merit. To date, however, it does not appear as if any bankruptcy court in the Sixth Circuit has addressed the issue in a published decision.

THE SEVENTH CIRCUIT "NUMBER CRUNCHES" AN "ORDINARY COURSE OF BUSINESS" PREFERENCE DEFENSE UNDER SECTION 547(C)(2)

DANIEL R. KUBIAK
MIKA MEYERS PLC

A June 2016 case from the Seventh Circuit presents a thorough analysis of the "ordinary course of business" preference defense under section 547(c)(2) and illustrates that the ordinary course of business defense may be more objective and not nearly as subjective as preference litigants generally believe.

The facts of *The Unsecured Creditors Committee of Sparrer Sausage Company, Inc. v. Jason's Foods, Inc.*, 826 F3d 388 (7th Cir. 2016) are straightforward. During the 90 day preference period, the Debtor paid Jason's Foods, Inc. roughly $587,000. The Bankruptcy Court agreed with Jason's Foods, Inc. that a portion of the payments were made in the ordinary course of business, but held that the timing of certain other payments departed too drastically from the companies' past practice to be considered ordinary. The Court imposed preference liability for 11 invoices that the Court determined were paid either too early or too late – specifically, invoices paid within 14, 29, 31, 37, and 38 days of issuance. The Seventh Circuit reversed, finding that the payments within 14, 29, and 31 days to be "ordinary".

The first step in formulating an "ordinary course of business" defense under section 547(c)(2) is to establish the norm that existed prior to the preference period, referred to by the Seventh Circuit as "the baseline payment practice". This pre-preference period should reflect a timeframe when the Debtor was financially healthy, before the onset of any financial distress. In some cases, this may exclude payments made before the start of the preference period if the Debtor's financial difficulties have already substantially altered its dealings with its creditors. In other cases, it is appropriate to consider the entire pre-preference period.

In this case, the parties stipulated to the historical period, which encompassed all 235 invoices that the Debtor paid before the preference period. The Debtor paid these invoices within 8 to 49 days, with an average invoice age of almost 25 days after the time of payment. The Bankruptcy Judge disregarded this stipulation and considered only 168 invoices, which were paid within 8 to 38 days, with an average invoice age of 22 days.

The Seventh Circuit found no "clear error" in the Bankruptcy Court's decision to consider only the 168 invoices, but did determine that the Court erred in adding only 6 days on both sides of the 22 day average. Subtracting 6 days and adding 6 days to the 22 day average resulted in a 16 to 28 day baseline range. However, that baseline only encompassed 64% of the invoices paid during the historical period. The Seventh Circuit added two days to either end of the range, creating a 14 to 30 day baseline, to capture 88% of the invoices paid during the historical period.

The second step of the analysis is to then compare the historical baseline against the payments made during the 90 day preference period. The Debtor paid 9 of the 11 invoices within 14, 29, and 31 days of issuance. Because these payments fell either within or "just outside" the 14 to 30 day range in which the Debtor paid the vast majority of invoices during the historical period, the Seventh Circuit concluded that those invoices qualified for the section 547(c)(2) "ordinary course of business" defense.

The *Jason's Foods, Inc.* case is a template for any preference defendant seeking to prove a section 547(c)(2) "ordinary course of business" defense. It supports the following:

1. Establish a historical period prior to the 90 day preference period that establishes the payment practices between the parties, before the onset of any financial distress.

2. Using the so-called "average – lateness method", establish the average invoice age upon payment for the historical period.

3. Next, establish the range of days for the historical period, adding and subtracting days to the average invoice age to capture a large percentage of the pre-preference period payments.

4. Then, determine if any of the preference period payments fall within that same range of days. Any that do arguably are not avoidable under section 547(c)(2).

5. After excluding those preference payments that fall within the historical period range of days, determine if the outliers qualify for other defenses under section 547(c), such as the "new value" defense of section 547(c)(4). *See* Judge Stevenson's decision in *In re Check Reporting Services, Inc.*, 140 BR 425 (W.D. Mich Bky Ct. 1992). It includes helpful illustrations on the application of such new value defense.

The *Jason's Foods, Inc.* decision provides preference defendants with an excellent roadmap for formulating a precise, objective argument for "ordinary course of business" defenses to preference liabilities. It is worth a look.

THE FLEXIBLE FINALITY STANDARD IN BANKRUPTCY APPEALS

GREGORY J. GUEST
DICKINSON WRIGHT PLLC

Upon a reflection of the topics the Bankruptcy Section has considered and discussed over this past calendar year, one might repeatedly contemplate the intersection of bankruptcy and appellate law. The keynote address at the annual seminar on Mackinac Island this past summer, for example, was entitled "The Supreme Experience" and was given by a panel consisting of Mary K. Viegelahn, Chapter 12 & 13 Trustee in the Western District of Texas; John Bursch, of Bursch Law PLLC; and Jeff A. Moyer, Panel Trustee in the Western District of Michigan. The panel captivated attendees with a detailed discussion of their respective experiences in cases before the Supreme Court. John Bursch later joined the Bankruptcy Section also for the annual State of the Court luncheon, at which he again discussed his many experiences in cases before the Supreme Court and covered some of the issues and themes the public should expect to hear about in the current Supreme Court term. In light of the Bankruptcy Section's recent discussions, therefore, it may be appropriate to review an important concept at the intersection of bankruptcy and appellate law – that of the flexible finality standard.

Finality under Section 158 of the Judicial Code

The relevant analysis finds its source in title 28 of the U.S. Code. Section 158 of title 28 governs bankruptcy appeals. Although much of section 158 replicates similar language governing ordinary civil appeals, there is one area in particular — regarding the finality of orders — in which section 158 differs, and the text has been construed to reflect this difference. In nonbankruptcy litigation, it has long been

established that an order is final where it ends the litigation on the merits, leaving nothing but the execution of judgment.[1] However, since bankruptcy litigation often entails protracted and discrete disputes resolved within the context of a single bankruptcy case, issues of finality in bankruptcy appeals are typically resolved on the basis of practical considerations rather than a mechanical adherence to technical rules.[2] This consideration is typically referred to as the "flexible finality standard".[3]

In recent past, the Sixth Circuit issued a number of opinions addressing and applying the flexible finality standard. The Sixth Circuit issued two opinions in August of 2013 which at first glance appear to provide conflicting interpretations of the standard. In *Lindsey v. Pinnacle National Bank, et. al. (In re Lindsey)*,[4] the Court issued an opinion dismissing an individual debtor's appeal from the district court after both the district and the bankruptcy courts rejected confirmation of his chapter 11 reorganization plan.[5] The very next week, the Court issued an opinion in *Huntington Nat'l Bank v. Richardson (In re Cyberco Holdings, Inc.)*,[6] affirming a BAP order dismissing an appeal from the bankruptcy court, which had denied motions for substantive consolidation of two corporate bankruptcies.[7] Upon close examination, it becomes clear that the opinions are consistent and indeed provide helpful guidance regarding finality in the context of bankruptcy appeals.

Underlying Facts in *Lindsey* and *Cyberco*

In *Lindsey*, the bankruptcy court granted summary judgment in favor of three secured creditors that opposed the individual debtor's chapter 11 plan on the grounds that it violated the absolute priority rule.[8] The district court affirmed the bankruptcy court's decision without oral argument and dismissed the debtor's appeal.[9] The debtor appealed to the Sixth Circuit, seeking a review of the district court order affirming the bankruptcy court's decision.[10] The court ultimately dismissed the appeal on the grounds that it lacked jurisdiction under 28 U.S.C. § 158.[11]

In *Cyberco*, the trustees of two related corporate bankruptcy estates each brought avoidance actions against one of the debtors' lenders under the theory that the lender was the recipient of preferential transfers related to the companies' indebtedness.[12] The lender in turn sought to have the two bankruptcies substantively consolidated, filing motions in both cases.[13] The bankruptcy court held that the lender lacked standing to make such a motion and denied relief in both bankruptcy cases.[14] The lender then filed a notice of appeal and, alternatively, a motion for leave to appeal.[15] The BAP denied the motion and held that the order denying substantive consolidation was not a final order and thus was not appealable under section 158(a)(1), also suggesting that an order granting substantive consolidation could hypothetically be a final, appealable order.[16] The lender then filed a notice of appeal of the BAP's order.[17]

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1 *Catlin v. U.S.*, 324 U.S. 229, 233 (1945); *Inge v. Rock Financial Corp.*, 281 F.3d 613, 618 (6th Cir. 2002).

2 *In re Saca Local Dev. Corp.*, 711 F.2d 441, 444 (1st Cir. 1983); *In re Penn Traffic Co.*, 466 F.3d 75, 77 (2d Cir. 2006); *McDow v. Dudley*, 662 F.3d 284, 287 (4th Cir. 2011); *In re Millers Cove Energy Co. Inc.*, 128 F.3d 449, 451 (6th Cir. 1997); *In re Comdisco Inc.*, 538 F.3d 647, 651 (7th Cir. 2008).

3 See, e.g., *Mort Ranta v. Gorman*, 721 F.3d 241, 256-57 (4th Cir. 2013) (FABER, J., dissenting).

4 *Lindsey v. Pinnacle Nat'l Bank et. al. (In re Lindsey)*, 726 F.3d 857 (6th Cir. 2013).

5 *Id*.

6 *Huntington Nat'l Bank v. Richardson (In re Cyberco Holdings, Inc.)*, 734 F.3d 432 (6th Cir. 2013).

7 *Id*. at 433-34.

8 *In re Lindsey*, 453 B.R. 886, 905 (Bankr. E.D. Tenn. 2011).

9 *In re Lindsey*, No. 3:11-CV-00445, 2012 WL 4854718 (E.D. Tenn. Oct. 11, 2012).

10 *Lindsey*, 726 F.3d at 857-58.

11 *Id*. at 858.

12 *In re Cyberco Holdings Inc.*, 431 B.R. 404, 406-08 (Bankr. W.D. Mich. 2010) (Hughes, J.).

13 *Id*. at 407.

14 *Id*. at 434.

15 *Id*. at 436.

16 *Id*.

The Sixth Circuit essentially made two rulings. The first was that the the BAP's order constituted a final order (i.e., the court of appeals had jurisdiction under 28 U.S.C. § 158(d)(1)).[18] The second affirmed the BAP order, ruling that the bankruptcy court's orders denying substantive consolidation were not final orders.[19]

Application and Treatment of the Flexible Finality Standard

In *Lindsey*, the Court began its legal reasoning with a reference to a variation on the general rule of finality.[20] Under this variation, an order remanding a case to the bankruptcy court is only final if the remand is "ministerial" in character.[21] In such a case, a party that faces a non-final order would be required to obtain a section 1292(b) certification from the district court or seek a review of the order from the court of appeals via section 158(d)(2).[22] "Final judgments, orders and decrees under [section] 158(d)(1), we have insisted, must indeed be final, largely mirroring our understanding of finality under [section] 1291."[23] Since the same word ("final") is used in the language of both sections 158(d) and 1291, the same meaning would be given in both.[24] Far more than a few ministerial tasks remained in *Lindsey*, including the confirmation of a new proposed plan, and thus the district court order denying plan confirmation was not a final order, so the court of appeals did not have jurisdiction under section 158(d)(1).[25]

Although the Court in *Lindsey* did not acknowledge the flexible finality standard in this application, it addressed it later when commenting on *Mort Ranta v. Gorman*, a decision from the Fourth Circuit that applied the flexible finality standard to an order denying confirmation of a chapter 13 plan.[26] The *Lindsey* Court responded by citing to U.S. Supreme Court precedent focusing on the text of the statute: "[T]he key question is what the statute says about jurisdiction, not what the area regulated by Congress may demand."[27]

The Court proposed that sections 158, 1291 and 1292 together provide ample flexibility to bankruptcy litigants: "In the companion section to [section] 158(d)(1), Congress gave parties and [the] courts flexibility to certify issues for appeal if doing so would help settle a novel legal question, resolve conflicting decisions or 'materially advance the progress of the case.'"[28] The court also noted the ability to obtain appellate review by the district court or BAP under section 158(a)(3), which does not require any certification.[29] "There is, in short, flexibility aplenty in this area."[30]

In later determining whether the *Cyberco* orders were final, however, the Sixth Circuit immediately cited to the flexible finality standard and proceeded to deliberate over whether it would require the classification of an order denying substantive consolidation as final rather than interlocutory.[31] The lender in *Cyberco* argued that the motions for substantive consolidation created a separate, discrete proceeding.[32]

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17 *Id.*
18 *Cyberco*, 734 F.3d at 433-34.
19 *Id.*
20 *Lindsey*, 726 F.3d at 859.
21 *Id.*, citing *Settembre v. Fidelity & Guaranty Life Ins. Co.*, 552 F.3d 438, 442 (6th Cir. 2009).
22 *Lindsey*, 726 F.3d at 859.
23 *Id.*, quoting *Settembre*, 552 F.3d at 441.
24 *Lindsey*, 726 F.3d at 859.
25 *Id.*
26 *Id.* at 859-60, citing *Mort Ranta v. Gorman*, 721 F.3d 241 (4th Cir. 2013).
27 *Lindsey*, 726 F.3d at 860, citing *Conn. Nat'l. Bank v. Germain*, 503 U.S. 249, 253-254 ("[C] ourts must presume that a legislature says in a statute what it means and means in a statute what it says there.").
28 *Lindsey*, 726 F.3d at 860.
29 *Id.*
30 *Id.*
31 *Cyberco*, 734 F.3d at 436-37.
32 *Id.* at 437-38.

It follows that if the orders denying the substantive consolidation concluded that proceeding, then it should be considered "final" for the purposes of section 158.[33]

The Court, however, distinguished orders granting motions for substantive consolidation from orders denying substantive consolidation.[34] Under the court's theory, the motions are indeed viewed as a discrete, contested matter — a "judicial unit" separate from the bankruptcy.[35] But for the purposes of finality, the matter would not be considered concluded unless the bankruptcy court granted the motions.[36] Accordingly, the court held that the bankruptcy court's orders were not final orders, and affirmed the BAP's order.[37]

Reconciling *Lindsey* and *Cyberco*

The difference between these two cases does not lie in an arbitrary choice to reject the flexible finality standard one day and apply it the next. In *Cyberco*, the Sixth Circuit was required to decide two questions — the more substantive of which was whether the orders denying substantive consolidation were final orders for the purpose of section 158(a)(1). [38] First, however, it was necessary to determine whether the Court of Appeals itself had jurisdiction to hear the appeal, and thus the Court was required to determine whether the order by the BAP was itself a final order under section 158(d)(1).[39]

The trustee, who opposed substantive consolidation, argued that the BAP order effectively remanded the case to the bankruptcy court to continue the proceeding, leading to the conclusion that it was not a final order under section 158(d)(1) and thus that the Sixth Circuit did not have the jurisdiction to hear the case.[40] The court clarified, however, that there was no remand: The BAP's order had determined that the BAP simply did not have jurisdiction to hear the case.[41]

The BAP's order "fully resolved the appellate proceedings by deciding the jurisdictional question and left nothing for the bankruptcy court to do."[42] Accordingly, the BAP's order was a final order, and the court of appeals could hear the appeal under section 158(d)(1). This understanding is thus completely consistent with *Lindsey*, in which the district court *did* remand the case, and for more than mere ministerial tasks.[43] The difference in the two cases thus originates from the difference in the orders entered by the intermediate court in each respective case. In *Lindsey*, the order had the clear effect of a remand because further proceedings were required regarding a reorganization plan. In *Cyberco*, there were no proceedings left regarding substantive consolidation.

Conclusion

The applicability of the flexible finality standard first of all depends on whether the determination of finality is being made under subsection (a)(1) or (d)(1) of section 158. If it is made under subsection (d)(1), the determination then depends on whether the order in question includes a remand to the bankruptcy court. In other words, where an order by the district court or BAP resolves a contested matter, the question of whether it is "final" depends on whether it remands the matter to the bankruptcy court.

33 *Id.*
34 *Id.* at 438-40.
35 *Id.* at 440.
36 *Id.* at 438-40.
37 *Id.* 440-41.
38 *Id.* at 433-34.
39 *Id.*
40 *Id.* at 436-37.
41 *Id.* at 437.
42 *Id.*
43 *Lindsey*, 726 F.3d at 858-59.

Where the order remands the matter to the bankruptcy court, the question then turns to whether the remand was merely for the completion of "ministerial" tasks by the bankruptcy court.

In all other instances, i.e., for orders that do not remand and for orders that fall under section 158(a)(1), the flexible finality standard applies with little constraint. To this effect, in the author's opinion, there is a difference between a section 158(a)(1) finality determination and a section 158(d)(1) finality determination. Although "finality" means the same under both subsections, a section 158(d)(1) finality determination must take into account the existence and nature of a remand to the bankruptcy court within the order being evaluated.

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AGENDA

7:45-8:45 **REGISTRATION / CONTINENTAL BREAKFAST**

8:45-9:00 **OPENING REMARKS** (Kim Young-DBWM President)

9:00-10:00 **ISSUES IN CONSUMER BANKRUPTCY APPEALS**
Deference to bankruptcy court findings in student loan adversaries; surrender of underwater property; effect of security interests in escrow accounts on non-modifiability under 1322(b)(2)—the BAP issue; and applicable exemption law if the debtor hasn't lived in the forum. (Hon. Eugene Wedoff)

10:00-10:10 **BREAK**

10:10-12:00 **FIND A TREASURE TROVE OF CONSUMER LAW VIOLATIONS IN YOUR BANKRUPTCY TREASURE CHEST: MORTGAGE SERVICER ABUSE, FAIR DEBT COLLECTION PRACTICES ACT, FAIR CREDIT REPORTING ACT**

(PART 1) Mortgage servicer abuse, Regulation X, TILLA, & RESPA Debtor remedies; how to spot the issues, proof, how to bring the claim and collect. (Marc Dann & Brian Flick)

(PART 2) FDCPA, FCRA, TCPA, Parallel Michigan Occupational Code and Michigan Regulation of Collection Practices Act; Debtor remedies: How to spot the issues, obtain proof, bring the claim & collect. (Ted Westbrook & Tom Hubbard)

12:00-12:45 **LUNCH**

12:45-1:45 **HELPING DEBTORS WITH STUDENT LOANS IN AND OUT OF BANKRUPTCY & THE WASHINGTON FRONT** (Ed Boltz)

1:45-2:30 **SERVICE AND NOTICING** (Jay Jump)

2:30-2:40 **BREAK**

2:40-3:40 **BANKRUPTCY AND FAMILY LAW ISSUES**
(Hon. Margaret Dee McGarity, Hon. Amy McDowell, and Michelle Bass, Esq.)

3:40-3:50 **BREAK**

3:50-4:50 **VIEWS FROM THE BENCH: TOP 10 MISTAKES OF DEBTORS COUNSEL**
(Hon. James W. Boyd, Hon. John T. Gregg, Hon. Scott W. Dales, Hon. Margaret Dee McGarity)

4:50 **CLOSING REMARKS**

5:00 **NETWORKING SOCIAL**

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2017 SEMINAR FACULTY

HON. EUGENE R. WEDOFF

Eugene R. Wedoff is the president-elect of the American Bankruptcy Institute. He served as a bankruptcy judge in the Northern District of Illinois (in Chicago) from 1987 to 2015 and as chief judge from 2002–2007. He presided over the Chapter 11 reorganization of United Air Lines. He was a member of the Advisory Committee on Bankruptcy Rules from 2004-2014 and served as its chair after 2010. Judge Wedoff was the president of the National Conference of Bankruptcy Judges in 2013 and 2014. He also served as a member of the NCBJ's Board of Governors, as its secretary, and as chair of its education committee. He is a fellow of the American College of Bankruptcy and a member of the National Bankruptcy Conference.

MARC DANN

Former Ohio Attorney General, Marc Dann, has been fighting for homeowners, consumers and small businesses since he began his private practice in 1990. Mr. Dann has represented thousands of consumers and brought dozens of class action cases on behalf of consumers both in private practice and as Ohio's Attorney General. As a member of the Ohio Senate from 2003 through 2006, he co-sponsored comprehensive predatory lending law that was among the best in the nation. He also introduced bills and amendments to strengthen protection for Ohio consumers extending the reach of the Ohio Consumer Sales Practices Act and the Federal Telephone Solicitation Act.

BRIAN FLICK

Brian Flick is the managing attorney of the Cincinnati Office of The Dann Law Firm. Brian's practice is focused in Consumer Law primarily in the areas of Consumer Bankruptcy, Foreclosure Defense, Bankruptcy Litigation, Mortgage Servicing Litigation under RESPA/TILA, and Consumer Litigation. He practices in the Southern District of Ohio, Northern District of Ohio, Eastern District of Kentucky, Western District of Tennessee, Northern District of Illinois, Eastern District of Tennessee as well as throughout the State of Ohio and the State of Kentucky. He is an active member of the Cincinnati Bar Association, the Kentucky Bar Association, and the National Association of Consumer Bankruptcy Attorneys where he serves as a legislative liaison.

THEODORE J. WESTBROOK

Theodore J. Westbrook is the principal of Westbrook Law PLLC, a Grand Rapids-based consumer advocacy, class action and lender liability practice. Formerly a partner with respected, boutique trial firm Drew, Cooper & Anding, Mr. Westbrook is experienced in complex litigation, including appearing as counsel for the Trustee in the landmark Western District of Michigan case Meoli v. Huntington National Bank (In re Teleservices, Inc.), resulting in a judgment against the bank worth over $80 million. Mr. Westbrook's practice focuses on class actions and individual consumer actions under the Fair Debt Collection Practices Act, Fair Credit Reporting Act, Real Estate Settlement Procedures Act and Telephone Consumer Protection Act. Mr. Westbrook has also developed unique experience litigating against national and regional banks and other financial institutions in various contexts, and is the co-author of Banks Bona Fide: A Good-Faith Approach to Lender Liability, 33 Michigan Bus. L.J. 29 (2013).

THOMAS V. HUBBARD

Thomas Hubbard graduated summa cum laude from Michigan State University College of Law in 1999. After working as a research attorney for the Michigan Court of Appeals, Mr. Hubbard joined Drew, Cooper & Anding in 2001 and was named partner in 2007. Tom specializes in area s of complex commercial litigation and consumer protection. He has practiced in the Federal Courts in the Eastern and Western District of Michigan, has appeared before the Michigan Court of Appeals and the Sixth Circuit Court of Appeals. He has been on brief in the Michigan Supreme Court and Federal Appellate Court.

ED BOLTZ

Ed Boltz is the President of the National Association Of Consumer Bankrupty Attorneys. He received his B.A. from Washington University in St. Louis in 1993 and his J.D. from George Washington University in 1996. He is a member of the North Carolina State Bar, where he has been certified as a specialist in consumer bankruptcy law. He is admitted to practice before the Districts Courts in both the Eastern and Middle Districts of North Carolina. Edward C. Boltz is a member of the Law Offices of John T. Orcutt, P.C., where he has managed the firm's office in Durham, North Carolina since 1998, representing clients in not only Chapter 13 and Chapter 7 bankruptcies, but also in related consumer rights litigation, including fighting abusive mortgage practices.

JAY S. JUMP

Jay S. Jump received his undergraduate degrees at the University of Arizona in 1994. He attended Gonzaga School of Law and received his J.D. in 1998. He is a member in good standing of the Washington State Bar and is admitted to both the Eastern and Western Districts of Washington. Mr. Jump has spent nearly 20 years practicing bankruptcy in Washington State and manages the Northwest Bankruptcy Listserv for Consumer Debtor Attorneys. Mr. Jump is a long time member of the National Association of Consumer Bankruptcy Attorneys. The Jump Law Group was formed in 2001 and has focused on representing consumers and small businesses in bankruptcy court. His company www.certificateofservice.com has a clientele of over 2500 law firms and government agencies.

MARGARET DEE MCGARITY

Margaret Dee McGarity was a United States Bankruptcy Judge for the Eastern District of Wisconsin from her first appointment in 1987, until her retirement in 2016. She served as Chief Judge from 2003 to 2010. She is a Phi Beta Kappa graduate of Emory University, Atlanta, Georgia, and a graduate of the University of Wisconsin Law School. Judge McGarity was in private practice before her appointment, concentrating primarily in the areas of bankruptcy, family law and marital property, and she served on the panel of Chapter 7 trustees. She is a co-author of Marital Property Law in Wisconsin, published by the State Bar of Wisconsin, a co-author of Collier Family Law and the Bankruptcy Code, published by Matthew Bender/LexisNexis, and a contributing author of Collier on Bankruptcy, also published by LexisNexis.

HON. AMY MCDOWELL

Judge McDowell attended Michigan State University, and acquired a Bachelor of Arts in Communications in March of 1990. Following her BA in Communications, Judge McDowell attended Valparaiso University School of Law and earned her law degree in May of 1994. Judge McDowell currently serves as Circuit Judge for Barry County, originally appointed by Michigan Governor Rick Synder, in June of 2011, following the retirement of Judge James Fisher and was subsequently elected in 2012. Judge McDowell was re-elected to a six year term in 2014. Judge McDowell was an attorney in Barry County, Michigan for over 17 years and held a private practice for 10 years, with her last practice being with McPhillips and McDowell.

MICHELLE H. BASS

Michelle H. Bass is an attorney with the law firm of Gold, Lange & Majoros, P.C., where she focuses her practice on consumer bankruptcy restructuring. She received a B.A. degree from the University of Michigan with an honors concentration in contemporary American history. She earned a J.D. degree from the University of Detroit Mercy School of Law in 2007, where she was an active member in the school's chapter of the American Inns of Court. She served as president of the Women's Law Caucus, and received the Excellence for the Future award in the upper level Entertainment Law Seminar. She is a member of the State Bar of Michigan, and the Federal Bar for the Eastern and Western Districts of Michigan, and the United States Court of Appeals for the Sixth Circuit. Ms. Bass has been recognized as a Michigan Super Lawyer Rising Star for 2014, 2015, and 2016.

HON. SCOTT W. DALES

Hon. Scott W. Dales is the chief judge for the United States Bankruptcy Court, Western District of Michigan. He was appointed as a bankruptcy judge in October 2007. On October 1, 2013, Judge Dales became Chief Judge of the court, succeeding Judge James D. Gregg. Judge Dales graduated from the University of Michigan with his Bachelors degree. Initially, he served as a legislative analyst for the Federal Home Loan Mortgage Corporation (Freddie Mac) and attended law school. As a member of National City's insolvency practice group, he worked primarily with distressed commercial transactions, including National City's aircraft lease portfolio and troubled automotive supplier loans. Judge Dales is an author of several articles on bankruptcy-related issues. Featured ICLE Contributions: Create a Security Interest to Secure an Obligation (How-To Kit) & Michigan Security Interests in Personal Property.

HON. JAMES W. BOYD

Hon. James W. Boyd is a bankruptcy judge for the United States Bankruptcy Court, Western District of Michigan, He is a graduate of Michigan State University and Thomas M. Cooley Law School. He has represented debtors and creditors through his Traverse City law firm, Kuhn, Darling, Boyd & Quandt. Judge Boyd was appointed as a trustee for the U.S. Bankruptcy Court In Travers City for chapter 7 and 11 cases and served in that capacity for 25 years, handling thousands of personal and business bankruptcy cases.

HON. JOHN T. GREGG

Hon. John T. Gregg is a judge for the United States Bankruptcy Court, Western District of Michigan. He was sworn into office in July 2014. He earned his undergraduate degree from the University of Michigan and his J.D. from DePaul University Law School in 2002. Prior to his appointment, he was a partner at the Barnes & Thornburgh. Judge Gregg focused his practice on corporate restructuring, bankruptcy, and insolvency law. A frequent writer and speaker on bankruptcy issues, he wrote and co-edited numerous articles and treatises, including "Collier Guide to Chapter 11: Auto Suppliers" (Matthew Bender), "Interrupted! Understanding Bankruptcy's Effects on Manufacturing Supply Chains" (ABI), "Strategies for Secured Creditors" (ALI/CLE), and "Issues for Suppliers and Customers of Financially Troubled Auto Suppliers" (ABI).

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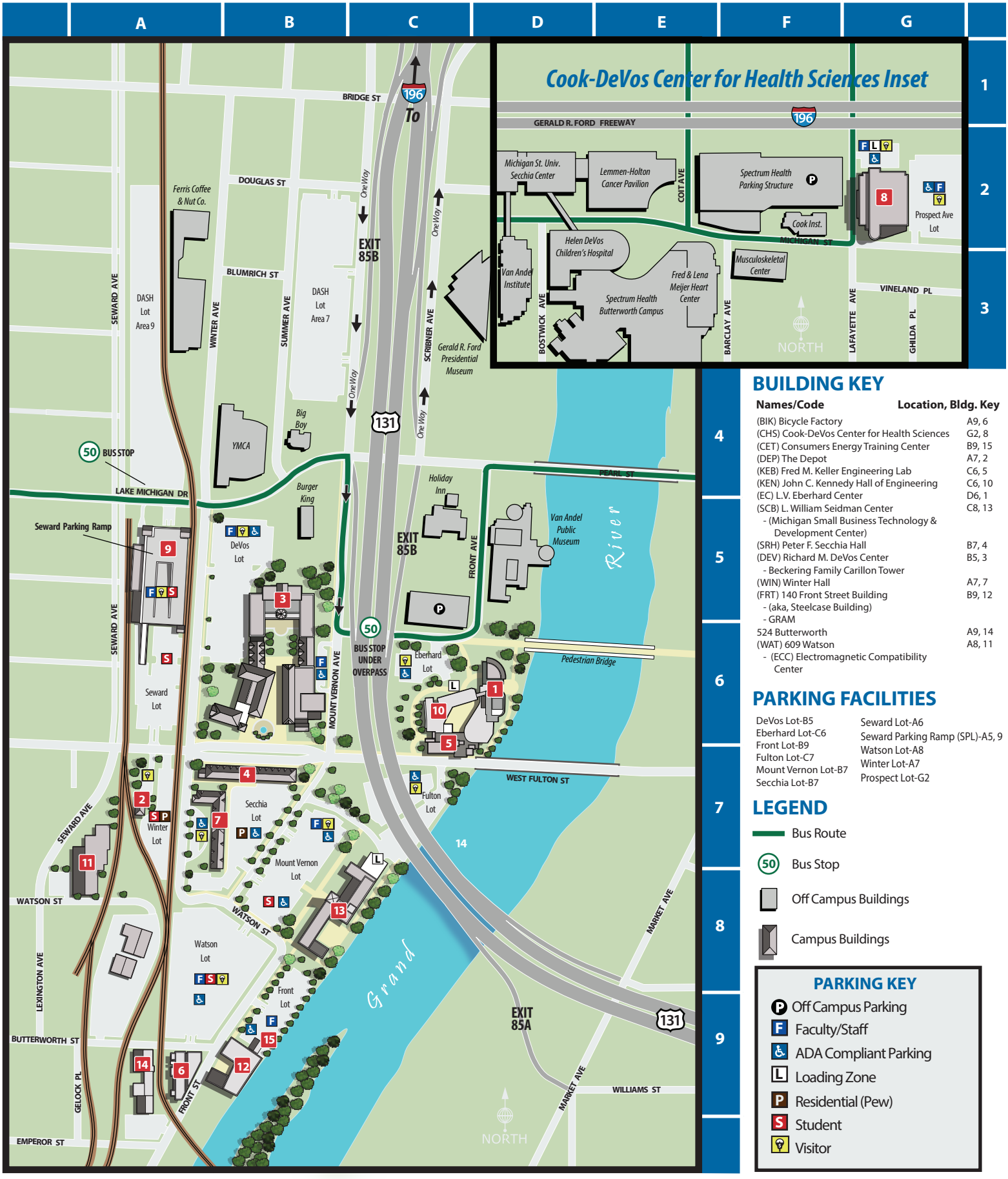

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