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PROFESSIONALS AND THE BANKRUPTCY CODE–COMPENSATION OF COUNSEL FOR TRUSTEE OR DEBTOR-IN-POSSESSION

By: Jeffrey R. Hughes*

The proposition is simple: counsel employed by either a trustee or a debtor-in-possession, if approved by the bankruptcy court, is entitled to "reasonable compensation for actual, necessary services rendered . . . based on the nature, the extent, and the value of such services, the time spent on such services, and the cost of comparable services other than in a case under [the Bankruptcy Code]." 11 USC 330(a)(1). However, application of this proposition is a different matter, as evidenced by the incredible number of written decisions issued by the courts regarding compensation of attorneys from the estate. Furthermore, gleaning clear guidelines from these decisions is impossible, for each decision clearly reflects the personalities and peculiarities of that particular case. Often, what is not said in the court's opinion is more important than what is said.

Nonetheless, the cases do identify a number of common issues upon which the various courts have focused in determining the reasonableness of the compensation to be paid to an attorney from the estate. The purpose of this article is to identify and discuss some of these common issues.

In order to be compensated from the estate, the attorney is required to file with the Bankruptcy Court an application setting forth a detailed statement of the services rendered, time expended and expenses incurred and the amounts requested. Bankruptcy Rule 2016. The attorney is required to keep meticulous, contemporaneous and specific time records in order to be compensated from the estate. The courts uniformly have rejected fee applications based upon reconstructed time entries. In re Seneca Oil Co., 65 BR 902 (Bkrtcy Ct WD Okla 1986).

The courts have disallowed compensation for telephone calls, intra-office conferences, and correspondence where the application does not also include an accompanying explanation as to its subject matter. However, in preparing her application, the attorney must bear in mind her ethical obligation to keep the confidences of her client. This conflict between disclosure as part of the compensation process and the duty to maintain client confidences often arises in Chapter 11 proceedings, where the debtor-in-possession's counsel devotes a substantial amount of time to developing strategies and researching issues which, if disclosed to the debtor's creditors, might impair the debtor's ability to negotiate a favorable plan of reorganization.

There is apparently no case which specifically addresses this problem. Obviously, one solution is for the attorney to withhold requests for compensation for services which would involve disclosure of confidential matters until the estate is closed, although even at that time the client might not be willing to waive its privilege. Another possibility is to have the court review these entries in camera, although this is not a satisfactory result either unless the court is willing to disqualify itself from hearing subsequent matters upon which the confidential matters might have an adverse bearing.

The detail which some courts have required in a fee application goes far beyond what a client would expect in his attorney bill in a non-bankruptcy matter. For example, in In re Pettibone, the court stated that the attorney's application should include a narrative which contained:

- a statement explaining the significance of each activity or project;
- a statement of the effectiveness of each activity;
- a statement of what alternatives were considered by the attorney together with the method of analysis relied upon for choosing the action taken; and
- a statement of any difficult or unusual problems which arose in the case and the manner in which they were addressed.

In re Pettibone Corp., 74 BR 293, 305 (Bkrtcy Ct ND Ill 1987).

While the court in Pettibone noted that such statements were no more than any client would need to evaluate its bill, this information is usually exchanged orally in response to the client's inquiries, and not in the bill itself. Needless to say, the time required to produce a Pettibone-type narrative can be considerable. The question then is whether the attorney is entitled to be compensated for that time.

There is a substantial difference of opinion among the courts as to whether an attorney can be compensated for the time required to prepare the fee application. Some courts have held that preparation of the fee application is a cost of doing business which is of no benefit to the estate and therefore not compensable. See, e.g., In re Mansfield Tire & Rubber Co., 65 BR 446 (Bkrtcy Ct ND Ohio 1986). Other courts are willing to compensate attorneys for the time spent in preparing a fee application provided it is within reason. See, e.g., In re Pothoven, 84 BR 579 (Bkrtcy Ct SD Iowa 1988). Finally, some courts have reached a middle ground, whereby the

* Mr. Hughes is a partner in the law firm of Varnum, Riddering, Schmidt & Howlett of Grand Rapids, Lansing, and Kalamazoo, Michigan. He is a 1980 graduate of the University of Michigan Law School and practices extensively in the area of Debtor-Creditor Rights. Mr. Hughes is a frequent lecturer for various trade and professional groups.

attorney can be compensated for the time spent in preparing the fee application only to the extent it is in excess of what she would ordinarily do with respect to a non-bankruptcy client. See, e.g., In re WHET, Inc., 62 BR 770 (Bkrtcy Ct D Mass 1986). To the court's credit in Pettibone, it held that an attorney could be compensated for the time spent in preparing the detailed narrative. However, with that said, it then set an arbitrary ceiling of 3 percent of the value of the total hours spent in the main case on the services which may be spent in preparing and litigating the attorney fee application absent unusual circumstances.

Another area of concern to the courts in connection with the fee application format is the "bunching" of several different activities into a single entry on an application, thereby making it difficult for the court to determine the amount spent on any specific activity within the "bunch." In re Wildman, 72 BR 700 (Bkrtcy Ct ND Ill 1987); In re Horn & Hardart Baking Co., 30 BR 938 (Bkrtcy Ct ED Pa 1983). There is no question that the court and creditors have the right to know the time spent on a specific task so that they can determine whether it was reasonable or not. Therefore, the attorney, in recording his time on his day sheets, should allocate his time among the various tasks undertaken down to the time spent on one telephone call as opposed to another. Generally, the courts have required the time to be kept in tenths of an hour. Seneca, supra.

The more controversial issue regarding "bunching" is whether the attorney will be given the opportunity to explain bunched time in her application at the hearing to approve that application. A number of courts seem to suggest that if the attorney's time is bunched in the application, then the attorney is prohibited per se from being compensated for that time, especially if a portion of the bunched time is not compensable. Pettibone, supra; Seneca, supra; In re Esar Ventures, 62 BR 204 (Bkrtcy Ct D Hawaii 1986); In re Four Star Terminals, 42 BR 419 (Bkrtcy Ct D Alaska 1984). However, this result seems to be somewhat draconian, at least where the bunching is not egregious. It would appear that the better approach would be to permit the attorney to explain individual entries at the fee hearing and, if appropriate, to deny that attorney for the time spent at the hearing or in correcting the application because of the improper bunching.

Once the fee application is filed, a hearing must be held to approve that application with at least twenty days' notice of the hearing being given to all parties in interest. The debtor, the trustee, the creditors and the United States Trustee all have standing to object to the fee application. In addition, the court itself may sua sponte challenge an application. See, e.g., In re Hamilton Hardware Co., Inc., 11 BR 326 (Bkrtcy Ct ED Mich 1981). In reviewing the application, the bankruptcy court has broad discretion in determining what constitutes a reasonable fee. In re Lawler, 807 F2d 1207 (5th Cir 1987).

The burden rests with the applicant to establish the reasonableness of the fees. In re Curtis, 70 BR 712 (Bkrtcy Ct ED Ark 1987). Some courts have held that all doubts regarding the information contained in the fee application are to be resolved against the applicant. In re Jensen-Farley Pictures, Inc., 72 BR 700 (Bkrtcy Ct D Utah 1985). However, other courts have been willing to be more flexible in the gray areas. In re Wildman, supra.

In determining the actual amount of the fees to be allowed, the courts generally have adjusted the time spent and rate charged to what is deemed to be a reasonable amount and then have further adjusted this "lodestar" upward or downward as the special circumstances of the case require. The courts often cite the following factors in making this determination:

- The time and labor required;
- The novelty and difficulty of the questions;
- The skill requisite to perform the legal service properly;
- The preclusion of other employment by the attorney due to acceptance of the case;
- The customary fee;
- Whether the fee is extra contingent;
- Time limitations imposed by the client or the circumstances;
- The amount involved and the results obtained;
- The experience, reputation and ability of the attorneys;
- The "undesirability" of the case;
- The nature and length of the professional relationship with the client; and
- Awards in similar cases.

See, e.g., In re Cusine Magazine, Inc., 61 BR 210 (Bkrtcy Ct SD NY 1986); In re Casco Bay Lines, Inc., 15 BR 747 (BAP 1st Cir 1982).

The court is not to consider conservation of the estate or economy of administration in determining the fee award. House Report No. 95-595, 95th Cong., 1 Sess. 329-30 (1977). However, the other twelve factors give ample room for considerations as to economy. Indeed, upon reading a number of cases, one if left with the strong suspicion that a number of cases in which fees have been reduced reflect the court's notion of economy rather than any concern about whether the estate was properly represented. Indeed, in one case, the court clearly reduced the amount of the fee application solely because of the size of the estate. In re Sapolin Paints, Inc., 38 BR 807 (Bkrtcy Ct ED NY 1984). While results may be an important consideration in determining the amount to be awarded, see infra, it is inappropriate to use it as the sole criterium, especially if used with the benefit of hindsight. Certainly, private clients often, but not always, ask for a reduction in fees when an unfavorable result occurs. However, the analogy is imperfect, for the amount of the reduction given, if any is given at all, is a result of negotiation. Obviously, such negotiation is non-existent in the bankruptcy context, where the court is both client and judge. Furthermore, one cannot forget that the estate's "clients," the unsecured creditors, often would not have achieved any result outside of the bankruptcy context, especially in those instances where Debtor's assets consist solely of lawsuits and other matters requiring an attorney's attention. Therefore, if the estate's attorney can accomplish any result for the creditors, he should be fully compensated for his services, assuming, of course, the time spent and rates charged are otherwise reasonable.

One of the first questions a court asks in evaluating a fee petition is what is the appropriate rate to be charged for the services rendered. Some courts have restricted the hourly rate to the rate charged by local bankruptcy counsel even where non-local counsel is involved. In re Sutherland, 17 BR 55 (Bkrtcy Ct D Vt 1981). However, most courts have recognized that non-local counsel is often required for complex cases which are "national" in scope and have allowed outside counsel to charge "national" rates. Jensen-Farley Pictures,

, supra; Seneca, supra. However, in ecent case, a court required that the etitioner establish that there was no ocal counsel with sufficient experience available to accept the representation before non-local rates would be allowed. In re Public Service Co. of New Hampshire, 86 BR 7 (Bkrtcy Ct D NH 1988).

The courts also differ on the appropriate rate to be charged by a firm for services rendered by different persons of that firm. Some courts review the rates charged by each person in the firm as to whether that rate is customary for a person of similar experience in the community. In re White Motor Credit Corp., 50 BR 885 (Bkrtcy Ct ND Ohio 1985). Other courts have determined the lodestar by using a blended rate of the various attorneys and paralegals involved in a particular case. However, these courts will look at the specific rates charged if the amount applied for exceeds the lodestar. Seneca, supra; In re STN Enterprises, Inc., 70 BR 823 (Bkrtcy Ct D Vt 1987). Obviously, the Seneca approach encourages a firm to set a blended rate at the outset of the case which is acceptable to the court.

The issue as to the appropriate delegation of duties follows directly from the issue as to the appropriate rate charged by a specific attorney. Almost every court which has addressed this question has held that attorneys have a duty to delegate responsibilities and therefore that senior attorneys will be compensated at lower rates for legal work which could have been done by attorneys or paralegals with less experience and will not be compensated at all for ministerial tasks. As so eloquently put in STN Enterprises, "a Michelangelo charging Sistine Chapel rates should not be painting a farmer's barn." Supra at 842. While reasonable in theory, some courts have made it a practice to automatically reduce a senior attorney's rates for services which it characterizes as ministerial (e.g., "routine" telephone calls and correspondence) and for legal work which it deems a junior level attorney could have handled. See, e.g., In re Ferkauf, Inc., 42 BR 852 (Bkrtcy Ct SD NY 1984). However, there are at least two reasons why such an automatic approach should not be taken. First, with respect to the delegation of legal duties, one must balance the efficiency resulting from delegation against the cost incurred as a result of that delegation. For example, it may take only an hour or two of a senior attorney's time to refresh and update her recollection of a "basic" bankruptcy issue or to draft a "routine" pleading whereas it might take a less experienced attorney a substantially greater amount of time. Indeed, the differential in rates charged is intended in part to reflect these efficiencies. Furthermore, there must be added to this cost of delegation the intra-office time required to assign this task to the junior associate or paralegal.

As for ministerial tasks such as routine telephone calls and correspondence, practioners outside of the bankruptcy context may or may not routinely charge their clients for such matters. The courts which have automatically reduced charges for ministerial duties apparently have concluded that they do not, although this determination appears to be based more upon the court's subjective perception as opposed to any actual empirical study. However, if non-bankruptcy practioners do not charge their clients for such services, then that time is included in the firm's overhead and is therefore reflected by an increased rate. The courts which have automatically disallowed fees for ministerial tasks either are not aware of this point or have chosen to ignore it, for it does not appear that any of these courts have gone back and reexamined the rate charged once it has determined that the ministerial functions are non-compensable. That is, once such a court determines that some of the functions by the professional were ministerial in nature, the court should then reexamine the billing rate to determine whether that attorney's rate is properly adjusted to reflect the fact that the court will not allow such matters to be charged on a per task basis.

A more reasonable approach to the delegation of tasks question was adopted in Seneca, where the court said:

> Several courts distinguish 'truly legal services' from 'ministerial tasks' and either disallow or reduce rates accordingly. [Citations omitted.] The Department of Energy urges us to adopt this distinction which results in different rates for telephone, settlement, office and client conferences, research, trial preparation and court appearances. Where a court chooses to delineate between ministerial and legal tasks it necessarily directs the manner in which attorneys manage their time. Such delineation would encumber daily management decisions concerning the activities attorneys will pursue. It also requires attorneys to assign personnel to tasks based on some imposed job description rather than the efficacies and urgencies of the situation. This is beyond the court's duty to assure reasonable fees. We feel it is best to leave managerial decisions to the law firms. Therefore, decisions concerning which tasks an attorney performs and involving the allocation of personnel toward the efficient and effective completion of tasks will be left to the discretion of the professional unless the allocation is egregious.

Supra at 910-911.

If the "lodestar" approach is the general framework within which courts are to determine the amount of fees to be awarded, the problem of inefficient delegation of tasks is more effectively addressed by the "egregious" standard of Seneca as opposed to the line-by-line examination and adjustment required by the other cases. However, if the concern of the courts which continue to automatically reduce rates for ministerial functions is really economy of administration, and therefore delegation is just another convenient mechanism to reduce the total fee application notwithstanding the fact that the fees are otherwise reasonable, then one can expect this approach to continue in the future.

The courts have likewise held that a trustee's attorney can be compensated only for those services rendered which are legal in nature; the attorney will not be compensated for performing the trustee's own duties. In re NRG Resources, Inc., 64 BR 643 (WD La 1986). As with other questions regarding delegation of tasks, there is a considerable gray area between pure legal and pure non-legal tasks. Obviously, this interlap is even more obscured when the trustee represents himself.

Another rate-cutting area which the courts have given attention to is travel time. The courts have uniformly denied reimbursement for travel time when the same result could have been accomplished by a telephone call or correspondence. However, the court in Pothoven, supra, has held that travel time, even if necessary, is not generally productive and therefore will be compensated at only 50 percent of the normal billing rate unless the attorney can establish that the travel time was in fact spent in connection with other matters involving the case (e.g., preparation for meetings, court appearances). See also

In re C & J Oil Co., Inc., 81 BR 398 (Bkrtcy Ct WD Va 1987). How the court in Pothoven reached this conclusion in light of the legislative statement that Section 330 is to put bankruptcy practioners on a par with other practioners is puzzling unless the court made an independent finding that other practioners in the Southern District of Iowa charged only one-half for travel time, albeit necessary and made at the client's request. One suspects that it did not make such a finding.

Duplication of time is another area of concern to the courts. Of particular interest is billing for intra-office conferences. There is no question that applications can be padded by "incessant" conferences among attorneys within the same firm. Pettibone, supra. However, some courts have adopted a rule that only one attorney who participates in an intra-office conference may be compensated regardless of the nature of the conference. In re B & W Management, Inc., 63 BR 395 (Bkrtcy Ct DC 1986). Such an approach ignores the fact that if offices of more than one attorney are to represent trustees and debtors-in-possession, some amount of communication among the attorneys in the firm is necessary if the estate is to enjoy the economies of scale of a large firm with attorneys specializing in a number of different areas. Furthermore, conferences among attorneys within the same specialty can also benefit the estate. For example, the availability of another person to critique and supplement another attorney's strategies regarding a plan of reorganization can be invaluable.

Most of the courts appear to recognize that some intra-office conferences are legitimate and therefore will allow both attorneys to be compensated provided that there is adequate disclosure in the fee application as to the nature of the discussion. In re Pettibone Corp., 74 BR 293 (Bkrtcy Ct ND Ill 1987); In re Amatex Corp., 70 BR 624 (Bkrtcy Ct ED Pa 1985). However, the disclosure of the subject matter of such conferences may result in the breach of a client's confidences. Therefore, it would seem that the better approach is to recognize that intra-office conferences are a legitimate part of the efficient administration of the estate and should be allowed provided that the amount charged for such conferences does not constitute a significant portion of the total representation. In re National Paragon Corp., 87 BR 11 (ED Pa 1988); In re Mayes, Case No. SG 85-01847 (Bkrtcy Ct WD Mich 1988). If the intra-office conferences exceed this threshold, then the court may require more explanation if the attorneys are to be compensated for the same.

In In re National Paragon, 7 BR 11 (ED Pa 1988), the district court reversed the bankruptcy court's automatic denial of full compensation for intra-office conferences. It stated that:

> [In] using such an approach, the bankruptcy court does not consider the reasonableness of the requested time or the reasonableness of the conference itself. Rather, debtor's counsel is awarded only a fraction of the fees to which it may be legitimately entitled. While I share the bankruptcy court's concern that unnecessary intra-office conferences might result in the "padding" of fee requests, such conferences, nonetheless facilitate the successful representation of a debtor in reorganization. Assuming, without any justification for doing so, that all requests for compensation for intra-office conferences are excessive is a clear abuse of discretion.

Supra at 13.

Once the court determines the rate and time which is reasonable, the court may still adjust the lodestar upwards or downwards to reflect other considerations. Of these other factors to be considered, the result achieved should be given the greatest determinative weight. In re Crawford Hardware, Inc., 82 BR 885 (Bkrtcy Ct SD Ohio 1987).

> While impressive results with little effort are to be rewarded generously, great amounts of time and energy with little result require much greater scrutiny.

Supra at 87.

With this in mind, courts have reduced otherwise reasonable fees where the size of the estate does not warrant the size of the application, notwithstanding a separate finding that the services rendered were excellent, In re Sapolin Paints, Inc., supra; see, also, In re Lopez Rodriguez, 76 BR 252 (Bkrtcy Ct D Pr 1987) (compensation to Chapter 13 debtor's attorney is based in part upon total amount to be paid under Chapter 13 plan); In re S&E Oil Co., Inc., 66 BR 6 (Bkrtcy Ct WD La 1986)(Debtor's attorneys should have known long before that debtor would not be able to reorganize and therefore fees will be reduced by 20 percent). On the other hand, courts have awarded bonuses in excess of the lodestar where the firm's performance has been exemplary. In re Baldwin United Corp., 79 BR 321 (Bkrtcy Ct SD Ohio 1987); In re Malden Mills, Inc., 42 BR 476 (Bkrtcy Ct D Mass 1984). Indeed, in at least one instance, the court has authorized a bonus solely because of the risk the committee's attorney takes of non-payment when it accepted the case. In re Powerline Oil Co., Inc., 71 BR 767 (BAP 9th Cir 1986). In Powerline, the court adjusted the committee's counsel's fees upward by 50 percent in recognition of the fact that the committee was unable to find counsel to represent it for approximately 90 days before the representation was taken and at the time of retention the law firm faced the possibility that it would have to invest hundreds of hours of time into the case without any payment whatsoever.

Section 330 further provides that the trustee's or debtor-in-possession's attorney can recover from the estate her actual necessary expenses. The courts differ as to what may be reimbursed as an expense and what should be included as part of the attorney's overhead. There are decisions going both ways with respect to secretarial overtime, long-distance telephone, word processing, computer research time, and postage.

In denying reimbursement for such expenses, some courts have relied upon the cost-accounting concept of overhead, which consists of fixed costs which cannot be allocated to any specific product or task. In re Wildman, supra. However, cost-accounting principles would permit charging as a direct expense against a file such items as long-distance telephone charges and computer time over the subscription fee. As such, it appears that the courts which have denied reimbursement for such expenses are driven more by what they feel is appropriate as opposed to what cost accounting principles will permit. Again, what is lacking in these decisions is the recognition that overhead is necessarily included in the rate structure and that the ability to charge expenses separately may result in a lower rate being charged. Therefore, if the court decides that it is inappropriate to seek reimbursement for such "overhead," it is incumbent upon it to then reexamine its determination as to the rate to ensure that that overhead is properly reflected as part of the rate.

GENERAL ORDER ON REAFFIRMATION AGREEMENTS ADOPTED BY BANKRUPTCY COURT

On November 25, 1988, the four bankruptcy judges in this district adopted a new general order entitled "Procedures to Approve Proposed Reaffirmation Agreements Under 11 U.S.C. 524(c) and (d)." This Order states that, beginning on December 1, 1988, the bankruptcy court will no longer conduct hearings to consider approving reaffirmation agreements provided that the following conditions are met:

1. Prior to the granting of the general discharge, the creditor and the debtor must have executed an original reaffirmation agreement or a court-approved summary thereof.
2. The reaffirmation agreement must contain a "clear and conspicuous statement" of the debtor's rescission rights under 11 U.S.C. 523(c)(4).
3. The original agreement or summary must be filed with the court along with a declaration or affidavit of the debtor's attorney containing information specified in 11 U.S.C. 523(c)(3).
4. The proposed order approving the agreement along with service copies must be filed with the court.

If the foregoing conditions are satisfied the bankruptcy judge administering the case may enter the order approving the agreement on an ex parte basis or may schedule a hearing on the agreement if he or she has questions on the transaction. The order describes the circumstances under which the court will schedule these hearings and also addresses the procedure whereby the date of the entry of the discharge order may be adjourned.

RECENT BANKRUPTCY DECISIONS

The following are summaries of recent decisions rendered by federal district and bankruptcy courts in Michigan that address important issues of bankruptcy law and procedure. These summaries were prepared by Patrick E. Mears with the able assistance of Larry A. VerMerris.

Eugene Albaugh v. William D. Terrell, et ux., Case No. 87-CV-10277-BC (E.D. Mich. November 15, 1988). In this Chapter 12 case, District Judge James Churchill upheld the provisions of 11 U.S.C. 1225(a)(5) against a constitutional challenge. The debtors, husband and wife, had filed a plan bifurcating a land contract vendor's claim into a secured claim for the realty's appraised value and an unsecured claim for the estimated deficiency. The plan then crammed down the secured claim pursuant to 11 U.S.C. 1225(a)(5)(B). The vendor objected to confirmation of the plan which was nevertheless confirmed over those objections. On appeal to the district court, the vendor claimed that 11 U.S.C. 1225(a)(5) violated his substantive due process rights protected by the Fifth Amendment. In his opinion, Judge Churchill reviewed a series of Supreme Court decisions defining the constitutional protections afforded secured creditors in bankruptcy cases and concluded that the cram down powers granted to a debtor in 11 U.S.C. 1225(a)(5) did not violate the secured creditor's rights. In footnote 4 of his decision, Judge Churchill adopted Bankruptcy Judge Spector's analysis in In re Britton, 43 Bankr. 605 (Bankr. E.D. Mich. 1984), classifying a land contract vendor as a lienholder and not as a party to an executory contract with the debtor-vendee.

In re Michigan Master Health Plan, 90 Bankr. 274 (E.D. Mich. 1985). This decision was rendered by District Judge Avern Cohn in February, 1985, but was not reported until just recently. On appeal from a decision by Bankruptcy Judge Ray Reynolds Graves dismissing an involuntary Chapter 7 petition filed against a Michigan health maintenance organization for lack of subject matter jurisdiction, Judge Cohn reversed that decision. Judge Cohn adopted verbatim the written opinion of the then-Commissioner of Insurance for the State of Michigan that an HMO was not an insurance company under Michigan law. Therefore, the HMO was not exempt from being liquidated under the Bankruptcy Code.

In re Imperial Tile and Carpet, Inc., Case No. HK 88-0338, Adversary Proceeding No. 88-214 (Bankr. W.D. Mich. Dec. 2, 1988). In this case, the Chapter 11 debtor commenced an adversary proceeding to recover a preference against an insurance fund that received contributions from the debtor under its collective bargaining agreement with its employees. The insurance fund filed a motion for summary judgment, alleging that the funds received by it were impressed with a trust under the Builders Trust Fund Act, MCLA 570.151, et seq. and, therefore, were never property of the estate. Although the funds could not be traced from the building owner to the contractor/debtor and then to the insurance fund, this failure of tracing did not preclude summary judgment. After reviewing the Sixth Circuit's decision in Selby v. Ford Motor Co., 590 F.2d 642 (6th Cir. 1979), Bankruptcy Judge Laurence Howard granted the summary judgment motion concluding that "trust funds need only be traceable when they are in the custody of the estate as of filing ..., but that strict tracing is not necessary when the transfers have been completed prepetition."

In re Miller, 90 Bankr. 865 (Bankr. W.D. Mich. 1988). In this Chapter 13 case, the debtors, husband and wife, proposed a plan providing for the cure of an alleged arrearage under a land contract for the purchase of residential real estate. The land contract vendors objected to confirmation of the plan and moved for relief from the automatic stay. At the hearing, Bankruptcy Judge Laurence Howard concluded that the debtors had abandoned the land contract by surrendering the original document to the vendors and otherwise acting as if they held no ownership interest in the realty. By accepting rent from the debtors on a subsequent lease of this realty, the vendors were held not to have waived the debtors' default under and their abandonment of the land contract. Judge Howard declared that the debtors lacked any rights under the land contract when they filed their Chapter 13 petition and only occupied the premises under an oral month to month lease. Judge Howard therefore sustained the vendors' objection to confirmation of the plan and granted relief from the automatic stay to permit the vendors to serve an eviction notice on the debtors.

In re Parker, 90 Bankr. 857 (Bankr. W.D. Mich. 1988). In Parker, the Chapter 12 debtors commenced an adversary proceeding against a secured creditor, a bank, seeking to vacate an earlier order of the bankruptcy court granting the bank a replacement lien on debtor's crops to be planted and harvested during 1987. The debtors' complaint was premised upon Rule 60(b) of the Federal Rules of Civil Procedure, made applicable to bankruptcy cases and proceedings by Bankruptcy Rule 9024. At trial, the evidence established that at the time the replacement lien was granted to the bank, debtors believed that bank did not hold a valid security interest in certain ASCS payments due them. Debtors sought to use the proceeds of the ASCS payments to finance the planting of their 1987 crops. Neither debtors nor their attorney raised this issue until seven months after the order granting the replacement lien was entered. Based on these facts, Judge Howard held that the prior order granting the replacement lien would not be vacated under FRCP 60(b). This rule was not intended to relieve debtors or their counsel from the consequences of

unwise decisions deliberately taken. Judge Howard also found that, since federal regulations prohibiting the granting of liens in ASCS payments, 12 CFR 770.4(b)(1) and (2), had not become effective as of the date the debtors signed the bank's security agreement, those regulations would not be applied retroactively to avoid the bank's security interest in the ASCS payments and the replacement lien.

In re United Trucking, Inc., 91 Bankr. 30 (Bankr. E.D. Mich. 1988). In this Chapter 7 case, the trustee of a bankrupt trucking company commenced an adversary proceeding to collect alleged freight undercharges due from a shipper. The statute of limitations period for these claims is fixed at three years after the claim accrues. 49 U.S.C. 11706(a). The shipment in question was made by the debtor while it was a debtor in possession in Chapter 11 and more than three years before the Trustee filed his complaint. In his opinion dismissing his complaint, Bankruptcy Judge Steven Rhodes held that, since the claim arose post-petition, the applicable statute of limitations could not be extended by 11 U.S.C. 108(a). That provision applies only to claims held by a debtor that arise prior to bankruptcy.

In re Ingle, 91 Bankr. 27 (Bankr. E.D. Mich. 1988). In this decision, Bankruptcy Judge Rhodes held that secured creditors in Chapter 13 cases are entitled to receive regular monthly adequate protection payments prior to confirmation of the plan. Those payments were required to be made to creditors through the trustee's office.

In re Bridge, 90 Bankr. 839 (Bankr. E.D. Mich. 1988). In another decision authored by Judge Rhodes, he ordered that $670,000 in Canadian Treasury Bills seized from the husband of a Chapter 7 debtor by customs agents be turned over to the trustee for administration in the bankruptcy case. Judge Rhodes found that these instruments were the proceeds of a fraudulent conveyance made by the debtor prior to bankruptcy. In his opinion, Judge Rhodes engages in an extensive review of fraudulent conveyance law.

In re Production Plating, Inc., 90 Bankr. 277 (Bankr. E.D. Mich. 1988). In August, 1984, the debtor commenced a Chapter 11 case and in 1986 its plan was confirmed by the Detroit Bankruptcy Court. The plan contained language tracking the provisions of 11 U.S.C. 1141(d)(1)(A), declaring that upon the entry of the confirmation order, all prepetition debts would be discharged. Two months prior to the Chapter 11 filing, one of the debtor's employees died as a result of work-related injuries. Other parties were alleged to have been jointly responsible with the debtor for this injury and death. The employee's personal representative and the employee's widow thereafter settled their worker's compensation claims with the debtor's insurance carrier. This settlement was effected prior to the date the debtor's plan was confirmed. In December, 1986, the Michigan Supreme Court held in Beauchamp v. Dow Chemical Company, 427 Mich. 1 (1986), that an injured employee may assert claims for intentional torts against his employer along with recovering benefits under Michigan's worker's compensation statute. In May, 1987, the personal representative and the widow joined the reorganized debtor as a defendant in a civil action for damages then pending in Wayne County Circuit Court against the alleged joint tortfeasors. The debtor thereafter filed a motion with the bankruptcy court to reopen the Chapter 11 case and to obtain an order declaring that the intentional tort claims of the personal representative and widow as well as the contribution claims of the joint tortfeasors were discharged by the confirmed Chapter 11 plan.

In his opinion, Bankruptcy Judge Graves rejected the argument that the claims asserted in the state court action arose in December, 1986, when the Beauchamp decision was announced. Judge Graves held that these claims arose when the tortious act was committed--prior to the Chapter 11 filing. Since the personal representative and widow had knowledge of the pendency of the Chapter 11 case in time to file a proof of claim, their intentional tort claims were held to have been discharged upon the entry of the confirmation order. Judge Graves also held that the claims for contribution and reimbursement held by the joint tortfeasors were also discharged by that order. These parties also had notice and knowledge of the pendency of the Chapter 11 case. In his decision, Judge Graves refused to follow the Third Circuit's decision in In re Frenville, 774 F.2d 332 (3rd Cir. 1984), which held that contribution claims asserted against a debtor post-bankruptcy arose post-petition and were therefore not subject to the automatic stay.

In re Larry R. Adam, et ux., Case No. 88-09282 (Bankr. E.D. Mich. November 18, 1988). This Chapter 12 case addressed three issues raised by a secured creditor in its objection to confirmation of the debtors' plan. The first issue concerned the classification under Article 9 of the Uniform Commercial Code of certain corn stored by the debtors at a grain elevator. This grain had not been grown by the debtors; it was purchased by them to feed their livestock. The secured creditor, a bank, argued that this corn was properly classified as "farm products" under section 9-109(3) of the UCC and was therefore subject to the bank's perfected security interest in that property. If the debtors' interest in this corn constituted inventory or a document (the corn being evidenced by a warehouse receipt), then that collateral would not be subject to the bank's perfected lien. After reviewing a number of cases addressing this issue including In re Walkington, 62 Bankr. 989 (Bankr. W.D. Mich. 1986) (Howard, B.J.), Judge Spector held that the corn could not be deemed "farm products" since the debtors did not have possession of it as required by UCC 9-109(3). Therefore, the debtors were not required to pay the value of this corn to the bank under 11 U.S.C. 1225(a)(5).

The second issue also involved the provisions of 11 U.S.C. 1225(a)(5). The plan segregated the bank's claims into two classes: (i) a claim for $117,362.30 secured by realty; and (ii) a claim for $84,000.00 secured by farm equipment. The plan provided that the first claim would be amortized over 15 years with interest at 11% per annum. The second claim would be paid over 9 years with interest at the same rate. The bank argued that the nine-year amortization period for the second claim was too long since the farm machinery was expected to depreciate in value at a rapid pace. This objection, although characterized by Judge Spector as theoretically sound, was overruled. He noted that the debtors would increase the bank's equity in the machinery when they paid prior lienors in April, 1989. In addition, debtors covenanted to repair and replace the aging farm equipment throughout the amortization period.

On the third issue, that of the plan's feasibility, Judge Spector agreed with the bank's argument that the debtors had not satisfied their burden of proving that they could perform their plan obligations. In reviewing the debtor's testimony, Judge Spector noted that the plan was premised upon an increase in the factory price of sugar beets, one of the debtors' crops. However, debtors presented no evidence that such an increase was likely to occur. Debtors also failed to rebut the testimony of the bank's expert witness concerning "other flaws in [their] projections of farm income." Consequently, Judge Spector denied confirmation of the Chapter 12 plan.

In re Hill Forest Products, Inc., Case No. 86-09663 (Bankr. E.D. Mich. November 18, 1988). In a relatively brief opinion, Bankruptcy Judge Spector held that a creditor holding liens in a Chapter 7 debtor's tangible personal property was entitled under applicable state law to conduct a UCC Article 9 foreclosure sale of that property on the debtor's premises. Although the mortgagee objected to this sale, Judge Spector dismissed that objection on the ground that the mortgagee failed to establish that its collateral would be harmed by the conduct of that auction.

TEERING COMMITTEE ACTIONS

On December 5, 1988, the Steering Committee of the Bankruptcy Section conducted its regular monthly meeting. The following are the minutes of that meeting as prepared by Brett Rodgers:

1. Present: Brett Rodgers, Judge Gregg, Judge Stevenson, Bob Sawdey, Tim Curtin, Pat Mears, John Bolenbaugh, Colleen Olson, and Ted Baehler.
2. Judge Stevenson and her law clerk will discuss the possibility of organizing her Bankruptcy and District Court index of Michigan cases so it can be offered at the Spring Seminar.
3. Judge Gregg indicated it costs the bankruptcy court clerk's office approximately $10,000 per year to supply copies of our Bankruptcy Judges' opinions to those on the opinion list. As a result, the clerk's office will probably start to charge users for this service.
4. Quotes for the retired Bankruptcy Judges photographs were obtained by Linda Lane. The favored quote will be reduced to a proposal and submitted for approval to the executive committee for the Federal Bar Association.
5. Judge Stevenson reported that the Judges are very close to finishing the proposed local rules and will be submitting them to the Steering Committee for review.
6. It was decided that the Bankruptcy Appellate Panel Committee would prepare a short and simple survey for the Newsletter to determine interest in a 6th Circuit B.A.P. The Committee will also keep the District Judges and Chief Circuit Court of Appeals Judge Engel apprised of their progress.
7. Brett Rodgers contacted Jonathan Green, chairman of the Debtor-Creditor Law Committee for the State Bar of Michigan, regarding the Bankruptcy Section's planned Spring Seminar. He was interested in exploring the possibility of making the Spring Seminar a joint, state-wide venture.
8. Colleen Olson presented a proposal to have the Shanty Creek Resort, in Bellaire, Michigan host the Spring Seminar. This proposal was voted on favorably by the Committee. The seminar will be scheduled for two days. The dates May 18-21, 1989, (Thursday through Sunday) have tentatively been reserved for the seminar.
9. The next Steering Committee noon luncheon will be at the Penn Club on January 13, 1989.

EDITOR'S NOTEBOOK

On October 18, 1988, section 365 of the Bankruptcy Code was amended when President Reagan signed into law the Intellectual Property Bankruptcy Protection Act, Public Law 100-506. This law overrules the Fourth Circuit's decision in Lubrizol Enterprises, Inc. v. Richmond Metal Finishers, Inc., 756 F.2d 1043 (4th Cir. 1985), cert. denied, 475 U.S. 1075 (1986), which held that a technical licensing agreement is an executory contract that may be rejected under 11 U.S.C. 365. This new law adds new subsection (n) to section 365 defining the rights of a licensee of "intellectual property" when a licensing agreement is rejected by the debtor-licensor (or its trustee). In general, the licensee may either (a) elect to treat the rejected contract as terminated; or (b) decide to retain its rights under the contract and continue making royalty payments. If the licensee elects to continue the contract, the debtor/trustee may not interfere with the licensee's exercise of its rights under the contract and must continue to provide to the licensee the intellectual property that is the subject of the contract.

Acting pursuant to Bankruptcy Rule 9009, the Judicial Conference of the United States and the Director of the Administrative Office of the United States Courts have recently promulgated a Bankruptcy Forms Manual for use by the courts and the public. Volume II of this Manual has been prepared to assist the general public; those forms and the instructions for their use were reproduced by West Publishing Company in its October 25, 1988, paperbound issue of the Bankruptcy Reporter. The new forms include a simplified reaffirmation agreement, various conversion and discharge orders and an order for hearing on disclosure statements.

By letter adressed to me and dated November 16, 1988, Kalynne Brookens, Judge Stevenson's law clerk, commented upon the summary of the Shreve Steel Erection decision contained in the last issue of the Newsletter:

The publication incorrectly refers to Judge Stevenson as the author of the opinion. Although the case is presently assigned to Judge Stevenson, the opinion was written by Judge Nims. The explanation for this is that Judge Nims had taken the matter under advisement before the case was reassigned to Judge Stevenson.

Patrick E. Mears

LOCAL BANKRUPTCY STATISTICS

The following is a summary of the number of bankruptcy cases commenced in the United States Bankruptcy Court for the Western District of Michigan during the period from January 1, 1988, to November 30, 1988. These filings are compared to those made during that same period one year ago.

	1/1/88 to 11/30/88	1/1/87 to 11/30/87
Chapter 7	2,531	2,251
Chapter 11	78	85
Chapter 12	33	80
Chapter 13	1,102	1,191