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DEALING WITH ENTIRETIES PROPERTY IN BANKRUPTCY-- A TRUSTEE'S PERSPECTIVE

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1. What is entireties property?

An estate or tenancy by the entireties refers to a form of concurrent ownership enjoyed by husband and wife, where there is a unity of persons and the husband and wife are considered as being one person in the law. Way v Root, 174 Mich 418; 140 NW 577 (1913). Morgan v Cincinnati Ins Co, 411 Mich 267; 307 NW2d 53 (1981). This concept of co-ownership dates back to the common law where the unity of a husband and wife was considered separate and distinct from the husband and wife themselves, and the unity was considered one legal person. Honigman, Tenancy by Entirety in Michigan, 5 Mich State Bar Journal, 196 (1926).

2. How is a tenancy by the entireties created?

a. A tenancy by the entireties is created when a conveyance of land is made to a husband and wife. Morgan, supra, 307 NW2d 58.

b. Michigan Land Title Standards - 4th ed, Standard 6.4, states:

> "A deed or devise to two persons, who are in fact husband and wife, creates a tenancy by the entireties, unless a contrary intent is expressed in said deed or devise; but if they are not designated as husband and wife, record proof of such relationship should be required."

c. Note that when parties who are not husband and wife own lands as tenants in common, or in joint tenancy, such ownership is not converted to a tenancy by the entireties by the subsequent marriage of the title holders. See Michigan Title Standard 6.15.

3. How is a tenancy by the entireties destroyed?

a. Death of the husband or wife.

b. Divorce, which creates a tenancy in common between the former husband and wife unless the ownership thereof is otherwise determined by the decree of divorce. MCLA § 552.102; MSA § 25.132. However, if the divorce occurs post-petition it should not be able to affect the entireties character of the property as these rights are generally fixed when the bankruptcy petition is filed. See Oberlies, infra. Also, it may be argued that if the debtor receives property as a tenant in common pursuant to a property settlement or divorce decree entered within 180 days after the filing of a bankruptcy petition, then such property should be available to his general creditors and the jointly held property (entireties property) available to his joint creditors pursuant to Trickett, infra. See 11 USC § 541(a)(5).

c. A conveyance by the husband to the wife, or a conveyance by the wife to the husband, although in this latter case the wife still retains her dower rights unless they have been specifically waived in the deed from her. (Note that neither spouse, acting alone, can alienate or encumber to a third person an interest in the fee of lands held as tenants by the entireties. See Michigan Title Standards 4.11, 6.10 and 6.11.)

4. Does an entireties interest cover only real estate?

a. Although there is a split of authority in regard to this question, the majority position in Michigan is that an entireties interest only relates to real property. For example, see Matter of Jones, 31 BR 372 (Bankr ED MI, 1983), where at page 376 it is stated: "The policy of Michigan is against recognizing the existence of tenancy by the entirety interest in personalty." The one exception to this majority position is that proceeds from the sale of entireties property may retain that entireties character so long as the husband and wife express the intention and their actions show that such proceeds will be put into the acquisition of other real property to be held by them by the entireties. See In re Jackson, 92 BR 211 (US DC WD MI, 1988). In Jackson, the bankruptcy court concluded that because the debtors did not intend to use the proceeds for the purchase of an entireties property, either at the time they obtained the monies or afterwards, and because they used a portion of the monies for other purposes such as additional family expenses, business investment and other needs of the debtors as they arose, the monies could not be considered entireties property under Michigan law and therefore not exempt. Judge Enslen followed Judge Howard's opinion and entered an order affirming the bankruptcy court's opinion in full. Contrast this situation with the case called Muskegon Lumber & Fuel Co v Johnson, 338 Mich 655 (1954), where the Michigan Supreme Court held that the proceeds from the sale of entireties property were exempt from process in Michigan as to an individual creditor where the parties issued checks for the purchase of additional entireties property within 24 hours of receiving the proceeds from the sale of their first parcel of property. Also, see In re Klein, No. HG 78-00164-B-1 (Bankr WD MI, Nov. 28, 1978), holding that "In Michigan, proceeds from the sale of tenancy by the entirety and homestead property have the same exempt status as the realty if the proceeds are to be reinvested in other similar property within a reasonable period." Contra, 1 Wayne Law Review, 108 et seq. See also 60 Indiana Law Journal, 305 et seq. for general discussion of entireties property, and Justice Fitzgerald's dissent in Morgan v Cincinnati Ins Co, 411 Mich 267, 307 NW2d 53 (1981) for a discussion of the background of entireties property in Michigan.

5. If Michigan exemptions are claimed under 11 USC § 522(b)(2), and an exemption is claimed in entireties property, is there any other exemption which may be claimed by the husband or wife debtor?

a. Yes, the Michigan Constitution of 1963, Article X, § 3, provides:

> Homestead and personalty, exemption from process. Sec. 3. A homestead in the amount of not less than $3,500 and personal property of every resident of this state in the amount of not less than $750, as defined by law, shall be exempt from forced sale on execution or other process of any court. Such exemptions

shall not extend to any lien thereon excluded from exemption by law.

b. In addition, MCLA § 600.6023; MSA § 27A.6023(8) provides as follows:

(8) A homestead of not exceeding 40 acres of land and the dwelling house and appurtenances thereon, and not included in any recorded town plat, city, or village, or, instead, and at the option of the owner, a quantity of land not exceeding in amount 1 lot, being within a recorded town plat, city, or village, and the dwelling house and appurtenances thereon, owned and occupied by any resident of this state, not exceeding in value $3,500.00. This exemption extends to any person owning and occupying any house on land not his or her own and which such person claims as a homestead. But this exemption does not apply to any mortgage on the homestead, lawfully obtained, except that such mortgage is not valid without the signature of a married judgment debtor's spouse unless:

(a) The mortgage is given to secure the payment of the purchase money or a portion thereof; or

(b) The mortgage is recorded in the office of the register of deeds of the county wherein the property is located, for a period of 25 years, and no notice of a claim of invalidity is filed in such office during the 25 years following the recording of the mortgage.

c. Note that in order to claim a homestead exemption the individuals must be using that realty as their home. Further, a size limit of 40 acres is imposed. Finally, it should be remembered that the above stated provisions regarding the homestead exemption did not make such homestead exemption a personal and independent right which may be claimed by all residents of this state who are husband and wife. Owners of homestead as tenants by entirety may not, upon filing separate voluntary petitions in bankruptcy, each be allowed exemption in amount of $3,500 but instead are limited to single homestead exemption. In re Davis, 329 F Supp 1067 (US Dist Ct ED MI, 1971).

6. May entireties property be sold by a trustee where both the husband and wife file a joint bankruptcy petition and the federal exemptions are claimed under 11 USC § 522(d)?

a. Yes, under 11 USC § 541, all the debtor's property is brought into the bankruptcy estate. Case law specifically establishes that this provision brings entireties property into the bankruptcy estate. See Chippenham Hospital v Bondurant, 716 F2d 1057, 1058 (4th Cir, 1983); Napotnik v Equibank & Parkvale Savings Association, 679 F2d 316, 318 (3d Cir, 1982); In re Trickett, 5 CBC2d 85, 14 Bankr 85, 88-89 (Bankr WD MI, 1981); In re Ford, 1 CBC2d 840, 3 Bankr 559, 564-71 (Bankr D MD, 1980) (en banc), aff'd on the opinion of the bankruptcy court sub nom. Greenblatt v Ford, 638 F2d 14 (3 CBC2d 549) (4th Cir, 1981).

b. If not specifically exempted, the debtors' interest in entireties property may be sold pursuant to 11 USC § 363(h)-(j). If the debtors choose the federal exemptions and each decides to exempt up to $7,500 in such real property used as a residence, they will be allowed to exempt $15,000 [$15,800 if they use their "wild card" exemption under 522(d) (5)] and upon payment of such exemption amount they will have no further interest in this property. The same may then be sold for the satisfaction of all creditors of the debtors with no differentiation being made between creditors who hold or may be able to obtain joint judgments and those who simply have a claim against one debtor or the other.

7. What is the procedure when, in Michigan, only one party (either a husband or wife) files bankruptcy and claims the federal exemptions?

Pursuant to § 363(h)-(j) . . . "The trustee may sell both the estate's interest, under sub-section (b) or (c) of this section, and the interest of any co-owner in property in which the debtor had, at the commencement of the case, an undivided interest as a tenant in common, joint tenant, or tenant by the entirety, only if --." In this situation the non-debtor spouse may purchase such property at the price at which such sale is to be consummated. 11 USC 363(i). If the non-debtor spouse does not purchase such property, then "The trustee shall distribute to the debtor's spouse or the co-owners of such property, as the case may be, and to the estate, the proceeds of such sale, less the costs and expenses, not including any compensation of the trustee, of such sale, according to the interest of such spouse or co-owners, and of the estate." 11 USC 363(j).

8. What is the procedure when, in Michigan, only one party (either a husband or wife) files bankruptcy and claims the Michigan exemptions?

a. This is where we get into what is known as the "Trickett" procedure. This name comes from a case decided by Judge Nims known as In re Trickett, 14 BR 85, 5 CBC2d 85 (Bankr WD MI, 1981), aff'd No. K 81-379 (WD Mich, 1982). In Trickett, an unsecured creditor filed a complaint against the trustee, the debtor, and his wife for a stay of discharge and relief from stay so as to enable it to proceed in a state court against the debtor and his wife for a joint judgment as to reach real estate held by them as tenants by the entireties. The bank's claim was based on an unsecured promissory note executed and delivered to the bank by Trickett and his wife. Mr. Trickett had filed a voluntary petition claiming as exempt all property owned with his wife as tenants by the entireties. Recall that at common law the individual creditors of neither the husband nor the wife could reach entireties property by judicial process, nor could either spouse transfer any interest in the property. See Albinak v Kuhn, 149 F2d 108 (6th Cir, 1945); Cole v Cardoza, 44 F2d 1337, 1343 (6th Cir, 1971); Farrell v Paulus, 309 Mich 441, 15 NW2d 700 (1944); American State Trust Co of Detroit v Rosenthal, 255 Mich 157, 237 NW 534 (1931). In that case, Judge Nims concluded that entireties property comes into the bankruptcy estate by operation of 11 USC § 541 and may be claimed as exempt as to joint creditors who, under Michigan law, could have obtained a joint judgment and satisfied the judgment out of entireties property only to the extent of the $3,500 homestead exemption. Judge Nims went on to recite that under the Bankruptcy Act it was necessary to follow the somewhat clumsy procedure of granting relief to those joint creditors who filed complaints for relief from stay and a stay of discharge so that action could be taken in the state courts to establish that they had a joint debt and to preclude discharge of the same. The judge goes on to conclude that such an inadequate device is no longer necessary, citing 28 USC § 1471(a)-(c), (e). Judge Nims then goes on to recite that under 11 USC § 726(b), all creditors of each class shall be treated equally and that only joint creditors should be able to share in such entireties property. The judge also indicates that it should no longer be the case that only those joint creditors who apply for a lift of stay be entitled to proceed against entireties property, as was the case under the Bankruptcy Act of 1898, but that, instead, this court will exercise its jurisdiction over the entireties property and administer the entireties property for the equal benefit of all joint creditors. The court then goes on to recite a proposed procedure to be followed in administering the entireties property which is reprinted below from 5 CBC2d 92 and 93:

"Trustee will distribute proceeds from sales as follows:

(a) Lienholders including taxes on the property.

(b) Expenses and cost of sale, not including any compensation of the trustee. 11 U.S.C. Sec. 363(j).

(c) Debtor's spouse, unless waived.

(d) Expenses of administration - only for administration on "joint claims - to include:

(1) Trustee's fees based on handling of debtors interest only.

(2) Attorney for trustee fees, if necessary.

(3) Appraisers fees, if necessary.

(4) Accountant fees, if necessary.

(5) Realtor fees, if necessary.

(6) Reasonable attorneys fees and costs to Plaintiffs in this proceeding.

(7) Other expenses as necessary.

(e) Joint claims.

(f) Surplus to debtor."

The above distribution scheme is somewhat skewed in that, I believe, "(e) Joint claims" should be paid third. Also, I would think quite a few of the "(d)" expenses would fit under "b."

b. It should be noted that the above procedure differs dramatically from the way entireties property was treated under the Bankruptcy Act of 1898, as amended. There, § 70(a)(5) removed entireties property from the reach of the trustee since it could not be transferred by the individual debtor nor levied on by the debtor's individual creditors. In re Walter, 2 BR 600 (Bankr WD MI, 1980); Harris v Manufacturers National Bank, 457 F2d 631 (CA 6, 1972); cert. den. 409 US 885. As indicated above, joint creditors had to obtain a stay of the discharge and relief from stay so they could proceed to take a joint judgment in state court. If this procedure was not followed and the debtor was granted a discharge, their claim against the non-debtor spouse and their right to proceed against entireties property would be lost. In re Black, 14 CBC 481 (Bankr WD Mich, 1977) and Harris, supra.

c. After the above procedure was enunciated by Judge Nims, the Sixth Circuit had occasion to decide a case titled In re Grosslight, 12 CBC2d 525, 757 F2d 773 (CA 6, 1985), where, again, just the husband filed bankruptcy and chose the state exemptions. In that case the debtor and his wife had executed a promissory note in favor of a bank and the bank then filed an adversary proceeding in bankruptcy court asking the court to lift the automatic stay and allow it to proceed with its lawsuit which was then pending in the state court wherein it hoped to reach Mrs. Grosslight's individual property and the Grosslights' entireties property. There, the court indicated that the proper procedure was to file an objection to the claim of exemptions pursuant to Bankruptcy Rule 4003(b). While the bank did not comply with this procedure, the court treated the adversary proceeding as an objection to the claim of exemptions which, being filed within 24 days of the debtor's petition, was deemed to be timely filed. The court went on to state that in appropriate cases the bankruptcy court may lift the automatic stay to allow the creditor to proceed against the entireties property in state court pursuant to 11 USC § 362(d). In continuing, the court said, "We see no reason for such a procedure here, when judicial economy would be better served by a single proceeding in a bankruptcy court." Prior to making the aforesaid statement, the court had cited, on at least two occasions, the Trickett opinion which, as indicated above, indicated that the bankruptcy court had jurisdiction over entireties property and could dispose of the same for the benefit of joint creditors. Since the Trickett opinion has not been overruled by Grosslight or any other opinion known to this author, we believe that the same is still valid and the procedures recited in Judge Nims, opinion to still be good law.

d. The procedure then to be followed in a Trickett situation is as follows:

(1) If joint creditors are named in the debtor's petition, then you must file an objection to the debtor's claim of exemptions within 30 days of the 341 meeting per Bankruptcy Rule 4003(b), claiming the debtor's real property is not exempt as to such joint creditors. Remember that "unless a party in interest objects, the property claimed as exempt on such list is exempt." 11 USC § 522(1).

(2) If joint creditors are not scheduled, then you should file a motion under Rule 4003(b) to extend the time to object to the debtor's exemptions within said 30-day time period so that you have the opportunity to do a "joint claims" notice to all creditors. In light of the comments in Trickett, a joint claims notice should also be done even if the debtor has scheduled certain joint creditors so as to give all creditors who have a joint claim the opportunity to participate in a distribution of proceeds of entireties property.

(3) Have a hearing on and have entered, hopefully, an "Order re Filing of Joint Claims."

(4) If joint claims are then filed, the debtor, the debtor's spouse and the trustee will have a given time period (120 days from the date of the joint claims order per Trickett), from a certain date within which to object to such joint claims. If no objection is filed, then such joint claims are allowed as joint claims against the debtor and the non-debtor spouse. If objections are filed, then a trial on the same will be scheduled.

(5) Assuming that joint claims are filed and are not objected to, or any objections thereto are not sustained, then the jointly held property will be sold for the benefit of joint creditors and distributed pursuant to the Trickett distribution scheme as modified above. However, keep in mind the following problems which you may encounter before reaching this point:

(a) The debtor may voluntarily pay off all joint creditors out of his post-petition income or his exemptions, or the non-debtor spouse may pay off the same, thus eliminating the need for a sale of the entireties property as such property can only be sold for the benefit of joint creditors. (Here see Oberlies, infra.) Remember that there is nothing which precludes a debtor from voluntarily repaying any debts which he so chooses to pay.

(b) The debtor may reaffirm all debts to joint creditors which essentially makes a sale of the entireties property unnecessary. Keep in mind that under Bankruptcy Code § 506(d) all properly filed liens against property of the debtor flow through the bankruptcy case unaffected by the proceedings themselves and remain valid liens against the debtor's property.

(c) The amount of joint debt may be quite small and it may seem somewhat impractical to have to sell a $100,000 house to satisfy a few hundred dollars, worth of joint debts.

(6) If the 30-day time period for objecting to the debtor's claim of exemptions has passed, file an "exemption by

declaration" objection. See In re Bennett, 36 BR 893 (Bankr WD KY, 1984). However, even this may be to no avail, at least in regard to entireties property in light of the following "We do not mean by this to endorse 'exemption by declaration'; there must be a good-faith statutory basis for exemption, and in that respect we fully approve In re Bennett, 36 B.R. 893, 895 (Bankr. W.D.Ky.1984). But where the validity of an exemption is uncertain under existing law, or where, as in Grosslight, it is the special character of the creditor that prevents the exemption, the creditor cannot rest on his rights in the face of Rule 4003(b)." Dembs, at 780.

....

"It follows that there can be no post-discharge efforts to reach exempted property." Dembs, at 781.

9. Are the procedures as set forth above the same in the Eastern District of Michigan?

Yes, it appears that they are pursuant to the recent opinion of the Bankruptcy Court for the Eastern District of Michigan in In re John A Oberlies, decided by Judge Spector on December 21, 1988. There, the debtor scheduled three joint debts, claimed the Michigan homestead exemption of $3,500, and also claimed that the balance of the real property owned in tenancy by the entireties was exempt from execution by a creditor of only one of the spouses. See General Electric Co v Levine, 50 Mich App 733, 213 NW2d 811 (1973). There, the trustee timely objected to the debtor's claim of exemption, noting the three joint debts wherein proofs of claim were filed. The debtor's response was that he had negotiated settlements with each of the joint creditors which resulted in releases by them of the guaranty his wife had given regarding such indebtedness and, therefore, there are no longer any joint claims upon which the trustee can rely to defeat the claim of exemption. The trustee argued that since the joint claims were in existence as of the time the bankruptcy was filed, the post-petition releases by the joint creditors were ineffective to defeat his claim to administer the joint assets. Note that the supposed releases had been obtained post-filing. The court indicated that the general rule is that all rights are defined at the moment the bankruptcy petition is filed and post-petition conduct of the various parties, with limited exceptions, is ineffective to alter the rights of the estate. See Mason v Kish, AP No. 86-7596 (Bankr ED MI unreported, September 23, 1987). Also see Northern Acres, Inc v Hillman State Bank, 52 BR 641 (Bankr ED MI, 1985). Accordingly, the court upheld the trustee's objection to the debtor's claim of exemption with respect to the entireties property to the extent of the joint claims existing at the commencement of this case. (The same argument could be advanced in regard to the reaffirmation process, which is all post-petition.) The court went on to note, however, that sustaining the trustee's objection did not end the dispute as, unless the trustee is given the right to administer the entireties property and then distribute the property to the appropriate creditors, he has won a hollow victory. The trustee argues that the joint property should be allowed to be distributed to all creditors, pro rata, since there is no provision in the Bankruptcy Code for administering a separate estate within the context of the overall bankruptcy case for the benefit of joint creditors. The court, however, rejected such argument and repeatedly cited to Trickett, supra. The court also noted that Grosslight made the bankruptcy estate the preferred vehicle for selling and distributing entireties property. The court, in rejecting the trustee's arguments, then found support for the "two-estate" model; i.e., joint claims being administered separately within the context of the entire bankruptcy estate. The court held that the fact that the trustee is the person who performs the physical acts of administration gives the other creditors of the bankruptcy estate who lack the substantive rights of a joint creditor no claim to the proceeds. The court went on to hold that the Trickett case offers satisfactory procedures for insuring equitable distribution of specific assets without enlarging the pool of beneficiaries and that there is no good reason to depart from such an existing model for two-estate bankruptcy administration. The court concluded by saying that the trustee may administer the joint assets only for the benefit of joint creditors. The court also noted that joint creditors may waive their right to payment from the sale of such assets. See In re Dembs, supra. Finally, the court stated that each of the joint creditors has filed a proof of claim in which joint liability is clearly established and that since no objection to any of such claims was filed, they are deemed to be properly filed proofs of claim and therefore allowed under 11 USC § 502(a). The trustee was then fully justified in assuming that these joint creditors still asserted their joint claims and wished to accept their pro rata shares of the proceeds from the sale of the joint assets. Accordingly, the trustee's objection to the debtor's claim of exemption as to the joint assets was sustained.

10. Current issues regarding entireties property.

a. Can only joint creditors object to the debtor's claim of exemptions, or is the trustee also allowed to object?

b. What if, within the 30-day objection period set forth in Bankruptcy Rule 4003(b), only one joint creditor objects to the debtor's exemptions and the trustee also does not object; assuming that there are several joint creditors and the sole objecting joint creditor's objection is upheld, will the joint property be sold only for the benefit of that one joint creditor?

c. What if the trustee does a "joint claims" notice but does not object to the debtor's claim of exemptions or seek an extension of time to object within the 30-day time limitation imposed by Bankruptcy Rule 4003(b)? If joint claims are subsequently filed, does the trustee have any right to sell the entireties property?

d. Can the debtor's attorney be compensated for his work in assisting the trustee in administering entireties property out of such property?

e. Does the trustee have any obligation to review claims to see if they are of a joint nature?

f. To the extent that a trustee has unpaid fees and expenses through liquidation of entireties property, are these expenses properly chargeable against the general estate?

g. If the debtor has a land contract vendor's interest, which is essentially an interest in personalty, would the Michigan entireties exemption apply to the same?

Because several of the above issues are presently pending before the local bankruptcy court, this author does not believe it would be appropriate, at this juncture, to speculate about the outcome of the same.

ECENT BANKRUPTCY DECISIONS

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

United States v. Ron Pair Enterprises, Inc., [Current] Bankr. L. Rep. (CCH) 72,575 (1989). The United States Supreme Court, in a 5-4 vote, reversed the Sixth Circuit's decision in In re Ron Pair Enterprises, Inc., 828 F.2d 367 (1987) and held that holders of nonconsensual liens who are oversecured are entitled to recover post-petition interest on their claims pursuant to 11 U.S.C. 506(b). The underlying Chapter 11 case was commenced in the Bankruptcy Court for the Eastern District of Michigan in 1984. The debtor was represented by the now-dissolved Detroit law firm of Hertzberg, Jacob & Winegarden, P.C. and proposed a plan providing for full payment of a federal tax lien except for post-petition interest. The Internal Revenue Service objected to confirmation of the plan but the Bankruptcy Court overruled the objection. On appeal, the District Court reversed the Bankruptcy Court, holding that section 506(b)'s plain language entitled the IRS to post-petition interest. The debtor then appealed to the Sixth Circuit which reversed the District Court. In this court, the debtor's position was argued by JoAnn Stevenson, who had not yet been appointed Bankruptcy Judge in this district. In fact, Judge Stevenson and her husband co-authored in 1987 an article on the precise issue involved in this appeal. Stevenson & Consalus, Taxing Authorities, Section 506(b) and the "Curious Comma," 61 Am Bankr. L. J. 275 (1987).

The majority opinion of the Supreme Court, authored by Justice Blackmun, declared that a plain reading of section 506(b) mandated awards of postpetition interest on claims secured by nonconsensual liens when the value of the collateral securing those liens is greater than the amount of the claim. Justice Blackmun stated that this result does not conflict with congressional intent, other Bankruptcy Code sections, or with any state or federal policies. Justice Blackmun rejected the debtor's argument that, since "pre-Code practice drew a distinction between consensual and nonconsensual liens for the purpose of entitlement to postpetition interest" and since Congress failed to repudiate this distinction in enacting the Code in 1978, then that distinction should continue to be enforced.

The Court's dissent, authored by Justice O'Connor, rejected the majority's conclusion that the language of section 506(b) is "clear and unambiguous." Justice O'Connor stated that this language could be read to limit recovery of post-petition interest only to holders of consensual liens, i.e., those liens created by agreement and not by operation of law. Justice O'Connor then argued that, notwithstanding this ambiguity, the pre-Code bankruptcy practice of disallowing postpetition interest on nonconsensual liens should not be deemed to have been abrogated by the passage of the Code. Justice O'Connor cited the Court's prior decision in Midlantic National Bank v. New Jersey Dept. of Environmental Protection, 474 U.S. 494 (1986) for the proposition that congressional intent to change pre-Code law should not be inferred by the courts. "Because there is no evidence whatsoever that section 506(b) was meant to allow post-petition interest on nonconsensual liens, it should not be assumed that Congress 'silently abrogated' the pre-Code law."

In re Meadows, Case Nos. K88-116 and K88-117 (W.D. Mich. Feb. 9, 1989). The debtors, husband and wife, purchased on credit terms pre-cut building materials from Miles Homes to construct a house. This debt was secured by a mortgage lien on the realty on which the house would be constructed. Before the house was completed, the debtors resided in a mobile home located on that realty. During the time the house was being built, the debtors defaulted on their secured obligations to Miles Homes. Thereafter, debtors commenced a Chapter 13 case and proposed to modify Miles Homes' secured claim in contravention of section 1322(b)(2) of the Code. The Bankruptcy Court, through Judge Nims, denied confirmation of the plan on the ground that it could not modify a claim secured only by a lien in debtors' principal residence.

After confirmation was denied, debtors converted their case to one under Chapter 11. Miles Homes then filed a motion seeking relief from the automatic stay for permission to foreclose on its mortgage lien. In November, 1987, the bankruptcy court granted Miles Homes' motion for relief from the stay. Thereafter, the bankruptcy court denied confirmation of debtors' Chapter 11 plan on the ground that it was not proposed in good faith.

The debtors appealed to the district court from the bankruptcy court's orders (i) denying confirmation of the Chapter 13 plan; (ii) lifting the automatic stay; and (iii) denying confirmation of the Chapter 11 plan. The debtors also sought from the district court a stay pending appeal from the order lifting the stay.

With respect to the appeal from the order lifting the stay, District Judge Benjamin Gibson declared that he could reverse that order only upon a finding that the bankruptcy court abused its discretion. Judge Gibson concluded that no such abuse could be found in the record. Judge Gibson agreed with Judge Nims' findings that there was no equity in the realty and that the realty was not necessary to an effective reorganization, citing the Supreme Court's decision in United Savings Ass'n v. Timbers of Inwood Forest, Ltd., 108 S.Ct. 626 (1988).

Judge Gibson also affirmed the bankruptcy court's order denying confirmation of the Chapter 13 plan. Judge Gibson rejected the debtor's argument that, since Miles Homes' lien attached to their mobile home, Miles Homes' claim was not secured "only by a security interest in real property that is the debtor's principal residence" within the meaning of 11 U.S.C. 1322(b). Since the Chapter 13 plan impermissably attempted to modify this claim, the plan could not be confirmed.

Finally, Judge Gibson affirmed the bankruptcy court's denial of confirmation of debtors' Chapter 11 plan. Judge Gibson noted that the bankruptcy judge is "in the best position to judge the good faith of a proposed plan." The test of good faith under 11 U.S.C. 1129(a)(2) is "whether there is a reasonable likelihood that the plan will achieve a result consistent with" the Bankruptcy Code. Since the filing of a plan to delay a foreclosure is evidence of the debtors' bad faith, the bankruptcy court's decision was not clearly erroneous and was affirmed.

In re Arrene Properties Corp., Case No. G 87-900 (W.D. Mich. Jan. 30, 1989). In this case, the debtor leased certain real property from the City of Grand Rapids. Under the lease, the debtor was obligated to pay all ad valorem property taxes assessed against this property. After the debtor became the subject of a bankruptcy case, the City filed a proof of claim for these unpaid taxes. The bankruptcy trustee thereafter abandoned the lease and objected to this claim. At the hearing on this objection, the bankruptcy court disallowed this claim under section 502(b)(3) of the Bankruptcy Code. This section requires disallowance of claims for taxes assessed against property of the estate when the amount of the claim "exceeds the value of the interest of the estate in such property." Since the trustee abandoned the debtor's leasehold interest, it had no value and the tax claim was disallowed. On appeal, District Judge Gibson affirmed the order of the bankruptcy court disallowing the City's claim. Judge Gibson found that section 502(b)(3) applied to justify disallowance of the City's claim in its entirety. The City's claim could not even be allowed as a general unsecured claim.

In re Surowitz, 94 Bankr. 438 (E.D. Mich. 1988). In this Chapter 7 case, the trustee commenced an adversary proceeding against the debtors, husband and wife, for a determination that their interest in an action for the wrongful death of their daughter was property of the estate. The bankruptcy court

granted summary judgment in favor of the trustee on the ground that, since the wrongful death claim accrued 179 days after debtors filed their Chapter 7 petition, this claim became property of the estate under section 541(a)(5)(A) of the Bankruptcy Code. That section provides that any property to which a debtor becomes entitled by "bequest, devise or inheritance" within 180 days of the filing of his petition becomes property of the estate. On appeal, District Judge Avern Cohn reversed the bankruptcy court's decision and remanded the case to that court for a determination of what portion of any wrongful death award would be property of the estate.

In his decision, Judge Cohn first noted that what constitutes an "inheritance" under 11 U.S.C. 541(a)(5)(A) depends upon state law. A claim for wrongful death was unknown at common law and is a creation of statute. The relevant Michigan statutes authorize recovery of damages for wrongful death by the decedent's estate and by the decedent's survivors. The decedent's estate is entitled to recover medical and other expenses caused by the death as well as his pain and suffering. The survivors, however, are entitled to recover damages for loss of financial support, society and companionship. According to Judge Cohn, the bankruptcy court erred in not distinguishing between these two distinct types of claims. Under Michigan law, only the portion of a wrongful death award that accrued to the decedent's estate can be classified as an inheritance. The portion of the award payable directly to the survivors cannot be so considered and is therefore not an estate asset.

In re Advanced Professional Home Health Care, Inc. 94 Bankr. 95 (E.D. Mich. 1988). The debtor, a home provider of Medicare services, commenced a Chapter 11 case in November, 1986. At that time, debtor was a party to a provider agreement with the U.S. Department of Health and Human Services wherein debtor would be reimbursed for services rendered to persons under Medicare. After the debtor commenced its Chapter 11 case, the Department filed with the Detroit bankruptcy court a motion for an order directing the debtor to assume or reject the provider agreement. Thereafter, the debtor filed its own motion to assume that agreement. In the meantime, the Department and Blue Cross and Blue Shield of Michigan withheld from post-petition partial interim payments to the debtor certain monies that allegedly represented overpayments made prepetition. This withholding was justified by the Department under the doctrine of recoupment. The debtor then commenced an adversary proceeding against the Department and others to recover these overpayments on the theory that they represented setoffs in violation of the automatic stay. After trial, the bankruptcy court entered judgment against the Department for the amount of the withheld overpayments, interest accruing on them, costs and attorney fees.

On appeal to the District Court, Judge Avern Cohn reversed the decision of the bankruptcy court and remanded the case to that court with instructions to dismiss the adversary proceeding. In his decision, Judge Cohn found that the provider agreement was assumed by the debtor and, as a result of this assumption, the Department was entitled to recoup these overpayments. Judge Cohn also found that the award of attorneys' fees was an abuse of the bankruptcy court's discretion.

In re Watervliet Paper Co., Case No. SK 88-03257 (Bankr. W.D. Mich. February 17, 1989). In this Chapter 11 case, the United States Trustee objected to a Grand Rapids law firm's application for appointment as debtor's counsel on the ground that the firm held a prepetition unsecured claim for $27,272.42 against the debtor. The United States Trustee argued that, on account of this claim, the law firm was not a "disinterested person" and therefore could not be retained as debtor's counsel under 11 U.S.C. 327(a). Bankruptcy Judge JoAnn Stevenson literally construed the language of 11 U.S.C. 101(13)(A) which defines the term "disinterested person" to exclude a person that is a "creditor," i.e., the holder of a prepetition claim against the debtor. Citing Bankruptcy Judge Arthur Spector's decision in In re Gray, 64 Bankr. 505 (Bankr. E.D. Mich. 1986), and decisions from other states, Judge Stevenson denied the law firm's application for employment. Judge Stevenson recognized the "practical effects" of her decision--that the debtor "may be deprived of the expert legal guidance of a firm in the best position to guide it through the mine fields of negotiating and consummating a Chapter 11 plan." However, she remarked that the Code's language is "clear and unambiguous on this point." She concluded by stating that if the firm agreed to waive its prepetition claim, the disinterestedness requirement would be satisfied and the application could then be granted.

In re Crawford, Case No. SG 85-01493 (Bankr. W.D. Mich. July 27, 1988). In this Chapter 11 case, the debtors, husband and wife, were purchasing a parcel of realty on land contract terms at the time they filed their bankruptcy petition. The debtors proposed a plan that provided for continuing payments to the land contract vendors after confirmation with the remaining balance becoming due four years later. In October, 1987, the bankruptcy court confirmed this plan. After confirmation, debtors defaulted on their payment obligations and the surviving land contract vendor filed a motion for relief from the automatic stay. At the hearing on the motion, Bankruptcy Judge Stevenson found that the automatic stay terminated upon the plan's confirmation pursuant to 11 U.S.C. 362(c). Consequently, the vendor was permitted to pursue her state law collection remedies against the debtors and the realty.

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, 1989, to February 28, 1989. These filings are compared to those made during that same period one year ago.

	1/1/89-2/28/89	1/1/88-2/28/88
Chapter 7	489	427
Chapter 11	22	21
Chapter 12	1	7
Chapter 13	221	206

EDITOR'S NOTEBOOK

According to preliminary estimates published by Dun & Bradstreet, the number of bankruptcy cases involving businesses dropped nationwide for the second year in a row. This report states that, in 1988, the number of business bankruptcies decreased by 5% from the prior year. According to Dun & Bradstreet, this decline is the best improvement in the past ten years. Dun & Bradstreet also reported that in 1988, agricultural failures decreased by 30% from the year before. Joseph Duncan, Dun & Bradstreet's chief economist, has attributed the decrease in business failures to a corresponding decrease in "entrepreneurial startups . . .. Now that we're seeing a slowdown in new business startups, we're seeing fewer business failures."

Patrick E. Mears