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SOME NOTES ON *IN RE TERRELL*, by Peter A. Teholiz*

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Many bankruptcy practitioners have viewed the 6th Circuit's recent decision of In re Terrell, ____ F2d ____ (6th Cir., No. 89-1011, Dec. 21, 1989) with something akin to incredulity. Much of this may be due to the "Santa Claus syndrome": When a child first learns that there is no Santa Claus, his or her immediate reaction is to believe that Christmas is forever ruined. However, this feeling passes and, in a similar way, bankruptcy practitioners in the future will become accustomed to and accept the rule of Terrell. Moreover, Terrell is not as poorly decided as many might think.

Terrell involved the confirmation of a Chapter 12 plan of reorganization. One of the creditors was a vendor of a land contract, and the Debtors' plan proposed treatment of the land contract as a real estate mortgage, thus allowing "cram-down". The bankruptcy court approved the plan in an unreported decision. The land contract vendor appealed and the District Court affirmed the bankruptcy court's approval of the plan. Albaugh v Terrell, 93 BR 115 (ED Mich. 1988)[1] However, on further appeal, the 6th Circuit concluded that a land contract was an executory contract under 11 USC 365. Consequently, the case was reversed and remanded for further proceedings, which, no doubt, will entail a major revision to the Debtors' Chapter 12 plan.

I. THE COURT OF APPEALS WAS CORRECT IN NOT APPLYING STATE LAW IN DETERMINING WHETHER A LAND CONTRACT IS EXECUTORY.

Under Michigan law, land contracts have a unique nature that defies attempts to neatly pigeonhole them into one classification. On the one hand, there is case law holding that in a land contract, the purchaser obtains an equitable interest in the real estate, and the seller retains the title as security for payment. Tidwell v Dasher, 152 Mich App 379 (1986). Accordingly, Michigan allows for the foreclosure of land contracts, MSA 27A.3101 et seq, the specified method of foreclosing a lien on real estate. Similarly, the sellers' interest is one of personalty, not realty. Pittsfield Township v City of Saline, 103 Mich App 99 (1981). However, Michigan also recognizes the fact that the seller's interest in a land contract can be considered as realty under certain circumstances. Berar Enterprises v Harmon, 93 Mich App 1 (1979);

[1] The District Court opinion was primarily concerned with the constitutionality of Chapter 12. Indeed, the issue of a land contract as an executory contract was dealt with only in a footnote. Terrell, 93 BR at 117.

Rohrbacher v Walsh, 170 Mich 59 (1912); see Detroit & Security Trust v Kra 247 Mich 468 (1929) (criticizing the application of the doctrine of equita conversion in all cases). This is in accordance with the view that a la contract is also an executory contract which can be forfeited by the selle upon default.[2] MSA 27A.5701 et seq; Cf Darr v First Federal Savings & Loan, 426 Mich 11 (1986) (sale on a land contract is not the creation of an encumbrance so as to fall within exception to due-on-sales clause).

Indeed, a major remedy for a seller when a buyer defaults on a land contract is forfeiture, which is governed by statutes and court rules which refer to executory contracts. See, e.g., MSA 27A.5726; MSA 27A.5728, MCR 4.202. In comparison, in many states, forfeiture is no longer a remedy for a default in a land contract. See, e.g., Skendzel v Marshall, 261 Ind 226, 301 NE2d 641 (1973); Sebastian v Floyd, 585 SW2d 381 (Ky 1979); Cf In re Krantz, 96 BR 127 (Bk. Ct., SD Ohio 1988) (Under Ohio law forfeiture a remedy only if less than 20% of purchase price paid; since Debtor had paid more than 20% of purchase price, land contract was not executory). Furthermore, although forfeiture involves a redemption period similar to that for a mortgage foreclosure, the two are dissimilar: if a land contract seller does not redeem from a forfeiture, he or she is obligated to pay for the continued possession during that time, while a mortgagor is entitled to possession during the redemptive period. Cf Durda v Chembar Development Corp, 95 Mich App 700 (1980) and Ames v Maxson, 157 Mich App 75 (1987) with Smith v Mutual Benefit Life Ins Co, 362 Mich 114 (1960). In fact, forfeiture of a land contract can take place without court recognition or intervention. Emmons v Easter, 62 Mich App 226 (1975); Rothenburg v Follman, 19 Mich App 383 (1969). In short, forfeiture is a unique remedy for a land contract seller so as to negate the view that a land contract seller merely holds title as security for payment.[3]

Michigan land contract law does not have any consistent theoretical underpinnings. By avoiding close analysis of state law, the 6th Circuit avoided having to formulate a theory based on an illusory foundation of solid state law.[4]

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[2] In the past, Michigan has also recognized the theory that a seller under a land contract is a trustee for the title, Curry v Curry, 213 Mich 309 (1921) but this theory has fallen into disuse. See Detroit & Security Trust Co v Kramer, 247 Mich 468 (1929).

[3] Forfeiture of land contracts and termination of leases are both dealt with in the same statutes. MSA 27A.5701 et seq. This finds an interesting counterpart in the Bankruptcy Code, where executory contracts and leases are both handled in section 365.

[4] Before leaving this issue, one more item should be mentioned. In Darr v First Federal Savings & Loan, 426 Mich 11 (1986), the Court made the enigmatic statement that "[a] vendee of a nonexecutory land contract is entitled to possession of the land." Id at 20 (emphasis added). One conclusion from this is that the right to possession determines whether a land contract is executory or not. Cf Spaulding v Wyckoff, 320 Mich 329 (1948) (Seller is entitled to possession of land unless land contract specifically indicates otherwise). However, in the context of the case, this statement appears to say nothing on this specific subject. It is, though, an additional factor to consider in attempting to find a unified theory for land contracts under Michigan law.

THE COURT OF APPEALS REJECTED ITS OWN PRIOR ANALYSIS OF EXECUTORY CONTRACTS.

In Terrell, the 6th Circuit basically accepted the definition of an executory contract as set forth by Professor Countryman in Executory Contracts in Bankruptcy: Part I, 57 Minn. L. Rev. 439 (1973). This is a shift from its prior analysis of this issue, however. In In re Jolly, 574 F2d 349 (6th Cir. 1978), a case decided under the Bankruptcy Act, the Court characterized the "Countryman" definition as "helpful", but specifically did not accept it. Instead, the Court developed a pragmatic, result oriented view:

> "The key, it seems, to deciphering the meaning of the executory contract rejection provisions, is to work backward, proceeding from an examination of the purposes rejection is expected to accomplish. If these objectives have already been accomplished, or if they can't be accomplished through rejection, then the contract is not executory within the meaning of the Bankruptcy Act."

Id at 351. In Leasing Service Corp v First Tennessee Bank, N.A., 826 F2d 434 (6th Cir. 1987), the Court continued to apply Jolly in determining that the executory contract provision under the Bankruptcy Act was designed to solve the problem of assumption of liabilities -- excusing or requiring future specific performance by the debtor. Under Terrell, however, this approach is gone, notwithstanding the Court's favorable citation of Jolly. Slip op. at 3. See Matter of KMMCO, Inc, 40 BR 976 (ED Mich. 1984) (deciding that Jolly was confined to its facts and that Congress had enacted Countryman definition enacting 11 USC 365).[5]

III. THE COURT OF APPEALS MAY BE TAKING A MORE CONSTRUCTIONIST APPROACH TO BANKRUPTCY LAW.

In rejecting its prior analysis of executory contracts under Jolly, the Court focused on the language of section 365 and the legislative history behind it. Slip op. at 3. More significantly, the Court addressed the policy arguments of In re Booth, 19 BR 53 (Bk. Ct., D Utah 1982) and soundly rejected them:

> "While the Booth court's policy recommendation may well be one that Congress may choose to accept, we do not believe that it is appropriate for a court to make such a decision by judicial fiat."

Slip op. at 8. Truthfully, Booth's analysis is little different from the approach taken by the Court in Jolly. The conclusion, then, is that not only has the Court rejected the result oriented procedures of Jolly, but it has done so in deference to the written language of the bankruptcy statutes. Statutory construction is in; policy considerations are out.

It is wrong to conclude that the 6th Circuit has adopted a "strict constructionist" approach to bankruptcy law from just one case. Such a conclusion is beyond the scope of this article. Yet the willingness of the Court to reject its former pragmatic approach to executory contracts signifies something.

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[5] Curiously, only three cases have used Jolly in analyzing cases under section 365, and only one of these arose in the 6th Circuit. In re Kendell Grove Joint Venture, 59 BR 407 (SD Fla. 1986); In re Murtishi, 55 BR 564 (Bk. Ct., ND Ill. 1985); In re Krantz, 96 BR 127 (Bk. Ct. SD Ohio 1988).

Perhaps it is a recognition that the Supreme Court's constructionist tilt spilled over into the area of bankruptcy law. See US v Ron Pair Enterpris Inc, 489 US ____, 109 S Ct 1026, 103 L Ed 2d 290 (1989). However, Terre should give note to practitioners that Courts in the future may be focusing o the language of the Bankruptcy Code, rather than the effects that may result from applying that language.

THE CHAPTER 13 'BASE' PLAN -- A FOE TO UNSECURED CREDITORS?

By Joseph A. Chrystler, C.P.A., Standing Chapter 13 Trustee - Kalamazoo, Michigan

A fair percentage of the debtor bar in the Western District of Michigan have their clients file what is referred to as a 'base' plan. A base plan calls for the debtor to make payments of a specified amount per pay period, with such payments made for a set duration of sixty months or less. For example, a plan could provide for payments of $75 per week for 48 months (208 weeks), which would create a base 'pot' for payment of administration expenses and creditors of $15,600. The size of the 'pot' doesn't change (with certain extremely limited exceptions), and after payment of the fees to the attorney for the debtor and the trustee, and payment of the secured and priority tax creditors as specified in the plan or a parallel stipulation and order, what is left of the 'pot' is divided pro rata among unsecured creditors with filed and allowed claims.

If a debtor falls behind in his plan payments in a plan with the only debts being unsecured creditor claims, it is a no-harm, no-foul situation, except that creditor payments are a bit delayed, because the plan duration is simply lengthened to complete the 'base'. This assumes debtor counsel does not have additional fees allowed for his or her efforts in keeping the plan alive while the debtor is faced with motions to dismiss the case for falling behind in his payments, and that the trustee fees remain at a constant percentage over the life of the plan.

Given the facts as set forth above, debtor proposes to pay $75 per week for 48 months, attorney for debtor is allowed a fee of $1,000, trustee fees are allowed at 6%, Easy Pickin' Finance Company has an allowed secured claim of $8,500 on an automobile to be paid with interest at 18%, and unsecured creditors have filed and allowed claims totaling $15,000, if the debtor makes all of his payments into the plan on time the resulting dividend to unsecured creditors will be 14.65%, computed as follows:

'Pot'	$15,600
Fees to attorney for debtor	(1,000)
Fees to trustee	(883)
Easy Pickin' Finance - $8,500 @18%, paid out over 42 months at $274.25 per month	(11,519)
Remaining funds available for unsecured creditors	$ 2,198

Resulting in a dividend to unsecured creditors of 14.65%
($2,198 divided by allowed unsecured claims of $15,000)

Assume the same set of facts as above, but further assume debtor is unable to sustain payments of $75 per week and in fact averages only $60 per week over the life of the plan, causing the plan to take 260 weeks (a full five years) mplete the base payments required of $15,600. Obviously the payments to Pickin' will be decelerated, and it will take 53 months to pay off the car her than 42 months had the debtor made full payments on time. The results ould now be altered as follows:

'Pot'	$15,600
Fees to attorney for debtor	(1,000)
Fees to trustee	(883)
Easy Pickin' Finance - $8,500 @18% over 53 months requires a monthly payment of $233.63	(12,382)
Remaining funds available for unsecured creditors	$1,335

Resulting in a dividend to unsecured creditors of 8.90% ($1,335 divided by allowed unsecured claims of $15,000)

The eventuality that debtor was unable to maintain payments at the $75 per week level throughout the plan, as he had bargained when he filed the case, caused the dividend to unsecured creditors to be reduced by 5.75%, and effectively resulted in the unsecured creditors financing the purchase of the debtor's automobile to the extent of the additional interest paid of $863. While this scenario may not be overly alarming in one case, were a similar result to spread to half of the 'base' plans handled by just the Kalamazoo trustee, the overall resulting loss to unsecured creditors would be enormous, and this trustee would estimate that to some degree more than half of his debtors fall behind in their payments at some time during the life of their plans.

Now let us consider an even worse scenario, one that actually occurred in January of 1990, which led to the revision of my attitude regarding the treatment of a so-called 'base' plan for purposes of administration of a Chapter 13 case. Danny and Debbie Debtor called my office, knowing they had finally substantially completed their base payments, asking for a payoff on their plan, which had been proposed as follows:

Plan payments of $707 bi-weekly for 36 months (all disposable income)	$55,146
Fees to attorney for debtor	(1,000)
Fees to trustee	(3,121)
Hard Rock Mortgage Company - 37 on-going mortgage payments of $683 monthly (includes payment during 30-day period before debtor's first plan payment became due)	(25,271)
Mortgage pre-petition arrears - $2,732 @ 10.5% over 30 months	(3,118)
Umpteenth National Bank on new car - $13,500 @ 11% over 30 months	(15,503)
Maligned Savings & Loan on old car - $840 @ 11% over 30 months	(964)
Remaining funds available for unsecured creditors	$ 6,169
Divided by unsecured creditors with filed claims or at scheduled amounts for unfiled claims at date of confirmation	$23,189
Indicated dividend for unsecured creditors	26.60%

At the bar date for filing claims, unsecured creditors with scheduled debt of $2,630 did not file claims. The 'pot' for unsecured creditors remained the same at $6,169, but creditors who did file claims received a small windfall, and were now entitled to a dividend of 30.01% at no additional cost to the debtors.

To get to the point where the plan would become fully funded from standpoint of the 'base' being fulfilled, it took the debtors 42 months inst of the bargained-for 36. Because the residential mortgage was an ongoing deb we continued to make payments on it, to the extent that 32 payments were mad in the 42-month period. The actual results of the case, as it stands at present, are as follows:

'Pot' - no change from original proposal	$55,146
Fees to attorney for debtor	(1,000)
Fees to trustee	(3,121)
Hard Rock - 43 payments of $683 each	(29,369)
Mortgage arrears - $2,732 @ 10.5%, now over 36 mos.	(3,197)
Umpteenth - $13,500 @ 11%, now over 36 months	(15,911)
Maligned - $840 @ 11%, now over 36 months	(990)
Remaining funds available for unsecured creditors	$ 1,558
Divided by filed and allowed unsecured claims	20,559
Indicated actual dividend for unsecured creditors	7.58%

The dividend computed for unsecured creditors at the claims bar date had been increased to 30.01% at no additional cost to the debtors, by fellow creditors failing to file claims. However, through no fault whatsoever of the creditors, their dividend has now been cut to 7.58%, a reduction in the dollar amount of their dividend by $4,611, completely because the debtors did not keep their end of the bargain they made when they filed their plan, to make regular timely payments of $707 every two weeks for three years. The trustee has paid additional house payments of $4,098, and other secured creditors with interest-bearing obligations have been paid $513 more than they would have been entitled to in interest had the debtors made their payments timely. This is a completely inequitable result in favor of the debtors and at the expense of unsecured creditors, and should not be allowed to become the final result, in the opinion of this trustee. Therefore, I have taken the liberty of restoring the dividend to unsecured creditors to the 30.01% level and have informed debtors' counsel that his clients will have to continue to pay until that level of unsecured dividend is achieved.

In an effort to determine how a 'base' plan was originally conceived, myself being a neophyte trustee with only eight years time in grade, I contacted who I consider to be the best Chapter 13 historian, trustee Leigh Tenney of Little Rock, Arkansas. Mr. Tenney is exceeded in years of service as a Chapter 13 trustee by only Keith Oberhansly of Tacoma, Washington, and is a charter member of our national Chapter 13 trustee organization which is this year celebrating its twenty-fifth anniversary. To the best of the recollection of Mr. Tenney, the 'base' plan may have been the brainchild of attorney Claude Rice of Kansas City, a noted bankruptcy attorney for many years, and the former owner of Electronic Processing, Inc. computer service organization that serviced the vast majority of Chapter 13 trustees throughout the country for many years. The 'base' plan seemed to lend itself well to the software applications of the E.P.I. system, and for many years E.P.I. was the 'only game in town', and thus the 'base' plan was adopted in many areas of the country as another type of plan that could be filed. The 'base' plan became even more popular with the amendments of 1984 to the Bankruptcy Code, which added 11 U.S.C. 1325(b)(1)(B) in an effort to appease creditors who had been lamenting since the Code was adopted that it was overwhelmingly slanted in favor of the debtor, which addition now gives the trustee or the holder of an allowed unsecured claim the opportunity to object to any plan that does not propose to provide all disposable income of the debtor to the trustee for plan payments during the three-year period beginning on the date the first plan payment becomes due. Fortunately this minimum three-year plan has not caught on with any broad appeal in the Western District of Michigan, but there are apparently sections of the country that have adopted this as the bare minimum confirmation standard ding best effort, especially when taken in light of 11 U.S.C. 1322(c) h indicates the Court must find cause for extending payments in any plan yond three years. This trustee has always felt that the sincere motivation f the debtor to pay more than a nominal dividend to his unsecured creditors presents cause, but, unfortunately, this is not the holding of Courts in other areas.

The trustees in the Western District of Michigan are members of a vastly expanding network of trustees who now use the Data Concepts computer applications system. There is software available in this system that allows a trustee to perform a plan calculation both on an actual and on a 'what if' basis, and compute within a fraction of one percentage point the unsecured creditor dividend under any given set of circumstances, after the time for filing claims has expired and all claims to be paid under the plan have been defined. Therefore, it would be very easy to transform any 'base' plan into a percentage plan and be accurate within a fraction of one percentage point.

The debtor could conceivably argue against fixing a percentage for unsecured creditors on the basis that the cause of his falling behind in his payments was out of his control, such as temporary layoff, illness, unanticipated expenses incurred in the reasonable support of himself and his family, complete loss of job or other, and therefore he should not be held accountable and penalized by having to increase the 'pot'. However, absent the Chapter 13 forum the delayed payments by the debtor to his secured creditors would also have caused the total payments necessary to liquidate a secured debt with interest to increase, and while the delay may be a valid excuse for lengthening the plan, even beyond the so-called sixty-month limit, which in the opinion of this trustee is a standard only at the time of confirmation, this would not seem to be a valid reason to take money from the pockets of unsecured creditors, who were entitled to know their treatment at the time of confirmation, and reallocate it to additional interest and mortgage payments due secured creditors as a result of the plan payment delays.

In conclusion, this trustee is seriously considering converting all the 'base' plans under his administration to percentage plans under the set of guidelines outlined above. Any change of this nature will be fully explained on a case-by-case basis in a letter to counsel for the debtor, to which will be attached a detailed computation of the various aspects of the confirmed plan and how the percentage was established.

Because we trustees in Western Michigan pride ourselves on the fact that we communicate well within our foursome, and try to be as uniform in our practice as possible, this may not be implemented until it has been thoroughly discussed with my colleagues with, hopefully, a joint resolution of the obvious problem, either as detailed above, or in some other hybrid method that effectively addresses the problem.

The following are summaries of recent court decisions that address important issues of bankruptcy law and procedure. These summaries were prepared by Patrick E. Mears with the assistance of Larry A. Ver Merris.

Larson v. Boroff, Case Nos. 89-1176, 89-1216 (6th Cir. Jan. 30, 1990). In this decision marked "Not Recommended for Full Text Publication," the Sixth Circuit Court of Appeals construed the scope of nondischargeable alimony and support obligations under 11 U.S.C. § 523(a)(5). The Sixth Circuit affirmed the decisions of the Bankruptcy Court (per Judge Laurence Howard) and the District Court holding that an obligation of a husband to hold his wife harmless from a debt owed to a commercial bank contained in a divorce agreement "was to provide support in the nature of alimony" and therefore nondischargeable in the husband's Chapter 7 case. The Sixth Circuit also affirmed the lower courts' holding that the husband's obligation to repay his wife for attorneys' fees incurred by her in defending against the bank's collection action in state court was a dischargeable debt since to order otherwise would impede the husband's "fresh start."

Deal v. Michigan Dairy Herd Improvement Association, Inc., Case No. 1:89-CV-932 (W.D. Mich. Feb. 14, 1990). In this appeal, District Judge Benjamin Gibson affirmed the decision of Bankruptcy Judge James Gregg awarding the debtors, Scott and Julie Deal, $15,444.34 in damages caused by a mastitis epidemic that affected the debtor's herd of dairy cows. Judge Gregg's decision below is discussed in the July, 1989 issue of the Newsletter. In his opinion, Judge Gibson discusses the elements of negligence and comparative negligence under Michigan law.

Leitch v. The Lievense Ins. Agency, Inc., Case No. 1:89-CV-1011 (W.D. Mich. Feb. 13, 1990). This appeal arises from the bankruptcy case of In re Kent-Holland Die Casting & Plating, Inc., Case Nos. NG 83-03069 and 83-03070, which was commenced under Chapter 11 on December 7, 1983, and converted to Chapter 7 on July 16, 1986. The interim Chapter 7 trustee was appointed also on July 16, 1986, and a permanent trustee was appointed on September 3, 1986.

On June 30, 1988, the permanent trustee commenced an adversary proceeding against Lievense Insurance Agency, Inc. ("Lievense") to recover alleged preferences. Against Lievense, this action was timely commenced since the Complaint was filed with the Bankruptcy Court within two years of the trustee's appointment pursuant to 11 U.S.C. § 546(a)(1). On June 5, 1989, the trustee amended his complaint to add Aetna Casualty & Surety Co. ("Aetna") as an additional defendant. Aetna thereupon filed a motion for summary judgment, asserting that the trustee's claim against Aetna was time-barred under 11 U.S.C. § 546(a)(1). This motion was granted by Bankruptcy Judge Nims and the trustee thereupon appealed to the federal district court.

On appeal, District Judge Gibson affirmed the Bankruptcy Court's dismissal of the trustee's claim against Aetna. Judge Gibson rejected the trustee's argument that Federal Rule 15(c), made applicable in adversary proceedings by Bankruptcy Rule 7015, allowed the trustee's claim against Aetna to "relate back" to the time the trustee commenced his action against Lievense. According to Judge Gibson, Rule 15(c) was intended to permit a party who mistakenly sues a wrong party to amend his complaint to sue the correct one. Rule 15(c) does not apply "to situations where a party seeks to add an additional party to the action."

Holquist v. Gemmens, Case No. G 89-40520 (W.D. Mich. Oct. 9, 1989). In 1969, James and June Holquist ("Debtors") purchased a business for the manufacture and sale of dental wax along with Gary and Patricia Gemmens ("Gemmens") as their partners. In July, 1979, the Gemmens bought out the Debtors' interests in this business. In the agreement for the sale of the business, Debtors entered into a fifteen-year covenant not to compete with the Gemmens in the same business. On June 30, 1988, Debtors commenced an action in Kent County Circuit Court for a declaratory judgment that the non-compete covenant was unenforceable (the "State Court Action"). The Gemmens filed a counterclaim against Debtors for damages and injunctive relief in that same action.

On March 9, 1989, Debtors commenced a Chapter 7 case, thereby staying the State Court Action. One month later, the Chapter 7 trustee filed a no asset report, which was thereafter endorsed by the United States Trustee. On June 7, 1989, the Debtors filed for removal of the State Court Action to the federal district court. This removal application was objected to by the Gemmens, who argued that the State Court Action did not "arise in, arise under or relate to" the Federal Bankruptcy Code within the meaning of the bankruptcy jurisdictional statute, 11 U.S.C. § 1334(b).

In his decision denying the Debtors' removal application, District Judge Richard Enslen first held that the State Court Action did not "relate to" the Debtors' Chapter 7 case. Since the Debtors' estate was fully administered at the time the removal application was filed, the outcome of that action could not "have any effect upon administration of the estate or the bankruptcy proceeding." Judge Enslen then held that the State Court Action did not "arise under" or "arise in" a bankruptcy case since the construction or application of bankruptcy law would not be involved in that action.

Pacific Mutual Life Insurance Co. v. Allard, Case No. 89-CV-72071 (E.D. Mich. Feb. 20, 1990). This appeal arises from the bankruptcy case of In re DeLorean Motor Co. commenced in the Detroit Bankruptcy Court. As of the date on which DeLorean commenced its Chapter 11 case, Pacific Mutual Life Ins. Co. ("Pacific Mutual") was leasing commercial real estate in California to DeLorean. Five months later, Pacific Mutual commenced an adversary proceeding in Bankruptcy Court requesting relief from the automatic stay in order to retake the leased premises. In its Complaint, Pacific Mutual made no claim for administrative rent. In March, 1983, Pacific Mutual and DeLorean entered into a consent judgment wherein the automatic stay was lifted to permit Pacific Mutual to repossess the leased premises. No mention of administrative rent was made in the consent judgment.

On June 3, 1983, Pacific Mutual filed a priority proof of claim for administrative rent due Pacific Mutual arising from DeLorean's occupancy and use of the premises during the bankruptcy case. DeLorean's bankruptcy trustee objected to this claim and a hearing was thereafter conducted by the Bankruptcy Court on this objection. At this hearing, Pacific Mutual's counsel mistakenly advised the Court that Pacific Mutual had asserted a claim for administrative rent in the adversary proceeding. On June 26, 1989, at the conclusion of this hearing, the Bankruptcy Court entered an order disallowing Pacific Mutual's claim for administrative rent on res judicata grounds. Pacific Mutual then appealed to the District Court which, per District Judge George Woods, reversed the Bankruptcy Court and remanded the matter to that Court for a hearing on the issue of administrative rent.

In his opinion, Judge Woods noted that res judicata did not apply to bar Pacific Mutual's claim since it had not been asserted or decided on the proceedings below. Judge Woods noted that the doctrine of res judicata should be imposed "only after a careful inquiry" has been made. Judge Woods also stated that Pacific Mutual counsel's mistaken remark that the claim had made in the adversary proceeding probably led the bankruptcy Court astray its analysis.

In re Zick, Case No. 89-5091 (E.D. Mich. Feb. 21, 1990). In this case, the debtor, an individual, filed a Chapter 7 petition with the Detroit Bankruptcy Court nine days after a consent judgment of $600,000 was entered against him and his wholly-owned corporation by the Oakland County Circuit Court. In the debtor's schedules, he listed three secured and seven unsecured creditors and indicated that he wished to reaffirm all of these debts other than the $600,000 obligation. Before the consent judgment was entered, debtor transferred assets of his wholly-owned corporation to himself with the purpose of excluding all post-petition earnings generated by those assets from the bankruptcy estate. The Bankruptcy Court, per Judge Ray Reynolds Graves, dismissed the debtor's Chapter 7 petition under 11 U.S.C. § 707(a) as having been filed in bad faith. On appeal, District Judge Woods affirmed the lower court's decision.

In re Karen L. Santana, Case No. SK 89-02040 (Bankr. W.D. Mich. Feb. 16, 1990). This decision, rendered by Bankruptcy Judge Jo Ann Stevenson, construes the scope of section 109(g)(2) of the Bankruptcy Code, which prohibits an individual debtor (or family farmer) from commencing a second bankruptcy case within 180 days from the voluntary dismissal of his first case when that voluntary dismissal was obtained "following the filing of" a motion for relief from the automatic stay.

On November 25, 1988, the debtor, Karen Santana ("Debtor"), filed a Chapter 13 petition. On January 4, 1989, Ford Motor Credit Corporation ("FMCC") filed a motion for relief from the automatic stay in that case. In March, 1989, FMCC and Debtor entered into an adequate protection stipulation which was approved by the Bankruptcy Court. On May 27, 1989, Debtor voluntarily dismissed her Chapter 13 case and, five days later, filed another Chapter 13 petition. In October, 1989, Debtor surrendered her automobile to FMCC so that it could foreclose on its lien in the vehicle.

On November 7, 1989, Sturgis Enterprises ("Sturgis") objected to confirmation of Debtor's Chapter 13 plan and moved to dismiss her case under 11 U.S.C. § 109(g). Sturgis relied on the fact that Debtor had voluntarily dismissed her first Chapter 13 case after FMCC had filed a motion for relief from the stay, even though that motion had been settled prior to the dismissal.

In denying Sturgis' motion to dismiss, Judge Stevenson noted that a literal application of the statutory language of 11 U.S.C. § 109(g)(2) would produce an absurd result. Under these circumstances, Debtor was not abusing the bankruptcy system by multiple filings, which is the abuse section 109(g)(2) seeks to curb. In addition, Sturgis was found not to have been prejudiced by the voluntary dismissal and subsequent refiling. In a footnote, however, Judge Stevenson stated that she did not "decide whether 109(g)(2) only applies if voluntary dismissal occurs while a motion for relief from stay is pending."

In re Lindell Drop Forge Co., Case No. GL 89-04254 (Bankr. W.D. Mich. Feb. 21, 1990). This opinion, authored by Bankruptcy Judge Gregg, involves a dispute concerning the election of a permanent trustee at the meeting of creditors in a Chapter 7 case. This opinion discusses the intricate voting requirements set forth in 11 U.S.C. § 702 and Bankruptcy Rule 2003 and the judicial gloss placed upon them. Due to its complexity, this decision will not be summarized in this issue. However, copies of this decision may be obtained from the Bankruptcy Court Clerk in Grand Rapids.

.EERING COMMITTEE MEETING MINUTES

A meeting was held on February 23, 1990 at noon at the Peninsular Club.

1. A brief discussion was had regarding the status of BAP in this Circuit. Apparently the Sixth Circuit Judicial Conference is meeting around March 20, 1990 to consider this topic in light of the Federal Court Committee's recommendation that BAP be adopted in every Circuit.

2. An extensive discussion was had regarding the Bankruptcy Seminar to be held at Shanty Creek. The format of the Seminar will be to have 7 small group discussions on the morning of Friday, August 24 from which you will be able to choose to attend up to 3 discussion groups. The topics will include lender liability, IRS 100% penalty, Chapter 13 issues, Chapter 7 issues, bankruptcy appeals, toxic waste, and cash collateral. On Saturday, August 25, the keynote speaker will be J. J. White from the University of Michigan Law School. Thereafter, there will be a panel discussion of recent Sixth Circuit cases of interest and the Seminar will conclude with a mock trial. For those participating in the foregoing workshops, please note that all of the materials are due in the hands of Robert W. Sawdey or Ellen G. Ritteman by no later than July 15, 1990.

3. I indicated to the Steering Committee members present that I was in the process of attempting to obtain a bulk mailing permit for the local Federal Bar Association or the Bankruptcy Section thereof, as use of the Grand Rapids Bar Association bulk mailing permit was not permissible. Once I obtain the requisite documents from the local FBA Chapter, we should be able to mail the <u>Newsletter</u> out at a cost of 16.7¢ per envelope, which will be a substantial cost savings. As we would hope to have this bulk mailing permit in place for the mailing of next month's <u>Newsletter</u>, we would request that all persons who have indicated that they would write a lead article for the <u>Newsletter</u> to have the same to me by no later than the 15th of each month, as the use of the bulk mailing permit may cause a 2 or 3 day delay in the delivery of the <u>Newsletter</u>.

4. The next Steering Committee meeting will be held at the Peninsular Club on Friday, March 23, 1990 at noon.

EDITOR'S NOTEBOOK

1. In last month's <u>Newsletter</u> I indicated in the "Editor's Notebook" that the State Attorney General's office has taken the position in regard to the Homeowner's Construction Lien Recovery Fund that the statutory requirement to make "reasonable collection efforts" includes advocating before the Bankruptcy Court the nondischargeability of a debt where the debtor may be in breach of the trust imposed by the Builders Trust Fund Act. Since that time we were advised that there presently is a case pending in the Michigan Court of Appeals titled <u>Abode</u> v <u>Webster</u> which deals with this precise issue. Once we learn the outcome of this case, we will attempt to report the same in a future <u>Newsletter</u>.

2. We understand that the Bankruptcy Court may be changing its form not regarding hearings on the allowance of fees and expenses of professional which was included as "Exhibit 4" to the Local Bankruptcy Rules which became effective February 1, 1990. The changes being made include a recitation that "The application or petition is on file in the Clerk's Office located in Grand Rapids, Michigan for public scrutiny from 8:00 a.m. to 5:00 p.m. Monday through Friday." The modified notice also indicates that parties have 20 days from "the date of service of this notice" in which to file a written objection, as opposed to the language which it replaced, to wit: "20 days from the date of this notice". Finally, in the bottom left-hand corner the notice now recites "Date notice served" as opposed to "Date of notice". While previous notices which may have been served without this modifying language will suffice, we believe that future notices should be modified as indicated above.

3. On December 19, 1989 new Administrative Rules were promulgated in regard to utility deposits for new customers. Briefly, the first rule prohibits an electric utility from requiring a deposit from a new customer as a condition of receiving service unless the customer exhibits an unsatisfactory record of bill payment within the first 6 months after service is commenced. See R 460.3901. The second rule permits a gas utility to require a deposit from a new customer if service will be rendered for less than 12 months, the customer has existing bad debt with any company regulated by the Public Service Commission, or the customer does not have an established credit rating or has an unfavorable credit rating with a credit reporting agency. See R 460.2083. Perhaps these provisions might come into play when negotiating a security deposit for a Chapter 11 debtor-in-possession or operating trustee under §366 of the Bankruptcy Code.

Larry A. Ver Merris

FROM THE OFFICE OF THE U.S. TRUSTEE

The United States Trustee will conduct a seminar for Chapter 7 trustees on March 23, 1990 at 10:00 a.m. The seminar will include presentations on federal tax issues affecting Chapter 7 estates and identification and resolution of environmental problems. Attorneys who represent or wish to represent Chapter 7 trustees may attend the seminar but need not arrive until 10:30 a.m. Advance reservations are required due to space limitations. Please call (616) 456-2002.

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, 1990 through February 28, 1990. These filings are compared to those made during the same period one year ago.

	1990	1989
Chapter 7	586	489
Chapter 11	18	22
Chapter 12	0	1
Chapter 13	269	221

FROM THE BANKRUPTCY COURT:

RE: ORDER AND NOTICE OF STAY FORMS

By general order of the Bankruptcy Court which was signed on February 1, the Clerk of the Court was given authority to sign various ministerial orders for the judges. One of the designated orders was the "Order and Notice of Stay". The general order authorizes the Clerk to sign only the forms which have been approved by the Court. Two approved forms (for Chapter 7 and 13) are attached to this Newsletter.

The attached forms have been approved and will be signed by the Clerk's office when presented. If this form is used, such orders can and will be signed and returned immediately to the filing attorney. If these forms are not used and a variant is presented to the Court, the forms will be sent to the judges for signature. However, some judges have indicated that they expect all attorneys to use the court-approved forms in all cases. Needless to say, this form may be copied into word-processing programs, and if the format is changed but the wording identical, it will be treated as the approved form.

Mark Van Allsburg

UNITED STATES BANKRUPTCY COURT
FOR THE WESTERN DISTRICT OF MICHIGAN

In Re:

Case No. ______________

Debtor(s)
______________________________/

ORDER AND NOTICE OF STAY

ALL CREDITORS and interested persons are hereby notified that the above noted debtor(s) has filed a petition for relief under Chapter 7 of the Bankruptcy Code and is entitled to the protection of the Automatic Stay provisions of Section 362.

IT IS ORDERED that, pursuant to Section 362 of the Bankruptcy Code, from the time and date of the filing of this case, all persons, their agents, employees and attorneys are hereby stayed and restrained from commencing or continuing any suits, and from levying any attachments, garnishments or other executions upon earnings or wages, and from repossessing property (or selling property repossessed) in the possession or under the control of the Debtor or in which the Debtor has any interest; and all such persons are further stayed and restrained from molesting, harassing or disturbing the Debtor or his employer or other persons on account of any debt or claim, or with respect to any property which the Debtor has submitted to the exclusive jurisdiction of this Court, unless and until permission and leave of the Court be first obtained.

This order does not in any way modify the provisions of 11 USC 362. You should consult this statute to determine applicable exceptions.

A copy of this order will be returned to the Debtor for service on appropriate creditors and interested parties. The Debtor shall file a proof of service listing all persons served with this order.

Case filed: ____________

____
Bankruptcy Judge

By______________________________
Deputy Clerk

UNITED STATES BANKRUPTCY COURT
FOR THE WESTERN DISTRICT OF MICHIGAN

In Re:

Case No. ________________

Debtor(s)

________________________________/

ORDER AND NOTICE OF STAY

ALL CREDITORS and interested persons are hereby notified that the above noted debtor(s) has filed a petition for relief under Chapter 13 of the Bankruptcy Code and is entitled to the protection of the Automatic Stay provisions of Section 362.

IT IS ORDERED that, pursuant to Section 362 of the Bankruptcy Code, from the time and date of the filing of this case, all persons, their agents, employees and attorneys are hereby stayed and restrained from commencing or continuing any suits, and from levying any attachments, garnishments or other executions upon earnings or wages, and from repossessing property (or selling property repossessed) in the possession or under the control of the Debtor or in which the Debtor has any interest; and all such persons are further stayed and restrained from molesting, harassing or disturbing the Debtor or his employer or other persons on account of any debt or claim, or with respect to any property which the Debtor has submitted to the exclusive jurisdiction of this Court, unless and until permission and leave of the Court be first obtained.

ALL CREDITORS and interested persons are further notified that §1301 of the Bankruptcy Code prohibits certain actions by creditors to collect consumer debts from persons who are jointly liable with the debtor(s) or who have secured the debt. Questions about the extent of the automatic or codebtor stay should be addressed to competent bankruptcy counsel.

This order does not in any way modify the provisions of 11 USC 362. You should consult this statute to determine applicable exceptions.

A copy of this order will be returned to the Debtor for service on appropriate creditors and interested parties. The Debtor shall file a proof of service listing all persons served with this order.

Case filed: ____________

____
Bankruptcy Judge

By______________________________
Deputy Clerk