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THE INDIVIDUAL NON-BUSINESS DEBTOR IN CHAPTER 11 TOIBB AND ITS EFFECT ON WINSHALL SETTLOR'S TRUST

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Very recently, the U.S. Supreme Court by an 8-1 majority decided the case of Toibb v. Radloff, 59 U.S.L.W. 4633 (U.S. June 13, 1991), which decision opens the door for individual nonbusiness debtors to file for and receive Chapter 11 relief.

The debtor in Toibb was an unemployed energy consultant who originally received Chapter 7 relief on November 18, 1986 in the Bankruptcy Court for the Eastern District of Missouri. His bankruptcy schedules included nonexempt shares in an energy consulting company as assets and included unsecured debts which exceeded the statutory Chapter 13 limits of 11 U.S.C. §109(e). When the Debtor learned that the Chapter 7 trustee was going to receive $25,000 from the sale of the energy consulting stock, the Debtor moved to convert the case to Chapter 11 and, upon conversion, proposed a plan to pay up to 100% to unsecured creditors from a portion of a $25,000 lump sum infusion by the Debtor along with a portion of any dividends he would receive from the stock for six years. In this way, Debtor would be able to keep his shares of stock free from liquidation for creditors.

The Bankruptcy Court issued an order to show cause why the Debtor's case should not be dismissed and ultimately ordered it converted to Chapter 7 or dismissed based on the inherent business requirement set forth in Wamsganz v. Boatmen's Bank of De Soto, 804 F2d. 503 (8th Cir. 1986). The District Court and Eighth Circuit affirmed the Bankruptcy Court's conversion or dismissal of the Chapter 11 proceeding on the same grounds.

The Debtor then appealed the conversion

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or dismissal of his Chapter 11 proceeding to the United States Supreme Court which granted certiorari. The Executive Office for U.S. Trustees of the Department of Justice supported the Debtor's position and the Supreme Court invited a member of its Bar to serve as amicus curiae in support of the Eighth Circuit's judgment. The Supreme Court reversed the Eighth Circuit, holding that an individual debtor may receive Chapter 11 relief and further that Chapter 11 does not contain an ongoing business requirement.

The Court's decision seems to have been narrowly decided on a strict reading of 11 U.S.C. §109(d). Section 109(d) provides in pertinent part that "(O)nly a person who may be a debtor under Chapter 7 of this title, except a stockbroker or a commodity broker, and a railroad may be a debtor under Chapter 11 of this title." The Court held that §109(d) is unambiguous and that since an individual nonbusiness debtor may receive relief under Chapter 7, such an individual may also receive Chapter 11 relief. The Court determined that a reading of the legislative history of the section was therefore unnecessary. However, the Court upheld the Bankruptcy Court's discretion to determine whether a case should be dismissed or converted to Chapter 7 for the reasons set forth in 11 U.S.C. §1112(b).

Justice Stevens in his dissenting opinion argues that §109(d) is unclear since it provides that only a person who is able to file Chapter 7 may file Chapter 11 while it does not provide that every person entitled to relief under Chapter 7 is also entitled to relief under Chapter 11. He concludes upon a reading of other provisions of the Bankruptcy Code and the legislative history that Congress intended Chapter 11 to be unavailable to individual consumer debtors.

EFFECT OF TOIBB

One might think that the Supreme Court's decision in Toibb would open the floodgates for individual nonbusiness debtors to file for protection under Chapter 11. However, fears that a multitude of such filings will occur would seem to be misplaced since a narrow reading of Toibb reveals that Toibb was only dealing with the threshold issue of whether an individual nonbusiness debtor can file a Chapter 11 petition. (Individual nonbusiness debtors may also be discouraged by the somewhat prohibitive $500.00 filing fee in Chapter 11 cases.)

Bankruptcy Judge James Barta held a hearing on the dismissal of Mr. Toibb's Chapter 11 proceeding one month after it had been converted from Chapter 7. In essence, his ruling was not that Mr. Toibb's asset and debt structure or post-petition financial operations precluded the confirmation of a feasible Chapter 11 plan but that Mr. Toibb's nonbusiness status precluded his proposing a plan at all.

The law in the Sixth Circuit on the issue of an ongoing business requirement in Chapter 11 was formerly set forth in In re Winshall Settlor's Trust, 758 F.2d 1136 (6th Cir. 1985). The Court upheld the dismissal of a Chapter 11 bankruptcy because the Debtor's only assets were contingent causes of action against a bank which foreclosed on the Debtor's real property pre-petition. It discussed the possibility of success in these causes of action and found that exiting case law did not readily support their viability.

While the Court in Winshall's found an ongoing business requirement in Chapter 11, it also provided that a court should look to whether there is a reasonable probability of a Chapter 11 plan being proposed and confirmed and whether a

debtor has assets in determining whether a Chapter 11 petition is filed in good faith. Id. at 1136. As in Toibb, the Winshall's Court upheld the Bankruptcy Court's discretion pursuant to 11 U.S.C. §1112(b)(2) to determine whether a case should be dismissed or converted to Chapter 7 because of the Debtor's inability to effectuate a plan of reorganization.

As such, even in cases of individual nonbusiness debtors, the Court can dismiss or convert the Chapter 11 proceeding if such debtor is unable to effectuate a plan. Arguably, the Court can do so if a debtor has no income or saleable assets to fund a plan and can do so if the only assets available to fund the plan are so ethereal that a plan cannot be confirmed. Even after Toibb, then, the Court on remand in Winshall Settlor's Trust could dismiss the case if it found that the untenable nature of the Debtor's cause of action evidences the inability of the Debtor to effectuate a plan and, based on the Sixth Circuit's analysis of the causes of action, the Court probably would still dismiss the case.

An interesting question could arise with an individual nonbusiness debtor (or individual business debtor, for that matter) who does have earnings, but who takes the position that his post-petition earnings are not property of the estate pursuant to 11 U.S.C. §541(a)(6). Certainly, he is entitled to file his Chapter 11 petition under Toibb. But to the extent that he does not commit his post-petition earnings to fund a plan of reorganization and to the extent that he has no other assets or income available to fund a plan, the Court should probably dismiss the case or convert it to a Chapter 7 proceeding because the Debtor is unable to effectuate a plan of reorganization.

The Court, in doing so, would simply be exercising the discretion acknowledged by the Sixth Circuit in Winshall Settlor's Trust and by the U.S. Supreme Court in Toibb.

RECENT BANKRUPTCY DECISIONS:

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

Val-Land Farms, Inc. v Third National Bank of Knoxville, 1991 W.L. 115008 (6th Circuit).

This case, authored by Circuit Court Judge Danny J. Boggs, involves a Rule 11 sanctions motion. Val-Land Farms, Maxine's Potato Service, Inc. and Adrian Gerszewski Potato Company were all potato farmers. Compton Produce was a potato broker. The plaintiffs began digging potatoes and shipping them to Compton Produce in July of 1984. Unfortunately, Compton Produce was unable to pay for the all of the potatoes it received from the plaintiffs.

In 1982 Compton Produce borrowed $800,000 from Third National Bank in Knoxville (Third National). By 1985 Compton Produce still owed over $700,000 to Third Na-

tional. Compton Produce also had two checking accounts at Third National. One was a general checking account and the other was a chip and seed account. Minyard Compton and his wife, Imogene Compton, were also customers of Third National. They personally owed the bank about $35,000 on a variety of loans, the largest of which was the mortgage on their home.

During the course of 1984, Compton Produce's financial status grew more acute. By January of 1985, the chip and seed account was almost constantly overdrawn. At first, Third National held a very lenient attitude toward the overdrafts and covered the checks almost as a matter of course, without charging interest or NSF charges. In 1985 Robert Wrather was assigned to the Compton Produce accounts. He concluded that Compton Produce was in trouble and took immediate steps to correct the problem. Third National began returning checks and charging NSF charges. In exchange for a loan to cover what was already owed the bank, Compton Produce signed a security agreement in a number of items, including its produce inventory and accounts receivable. At the time of this agreement, Compton Produce already owed about $1,000,000 to produce growers throughout the country, in addition to what it owed to Third National. When Compton Produce did go out of business, Third National used its security interest to seize all of the covered assets, including the Compton's home.

The plaintiffs filed a complaint containing two counts. One was a cryptic hodgepodge of claims that read like a claim for common law fraud. The second count alleged that by loaning money to Compton Produce, the bank had somehow become a potato dealer. This brought the bank within the ambit of the Perishable Agricultural Commodities Act (PACA). The district judge granted a Rule 12(b) motion to dismiss on the PACA claim but denied the motion to dismiss on Count I. The parties then agreed to have the case decided by a magistrate, who granted summary judgment for Third National on the remaining claim. Third National then moved for sanctions under Rule 11 after the plaintiffs had already filed a notice of appeal.

In support of its "common law" claim, the plaintiffs maintained that Third National created an illusion of solvency by honoring checks, despite the fact that Compton Produce was not solvent. The Court stated that its task in determining if there were facts creating a triable issue was hindered by the plaintiffs' refusal to specify the nature of their claim. The complaint only indicated that Count I was a "common law" claim. In defending against the motion for summary judgment, the plaintiffs claimed that they were and always had been asserting a claim for equitable estoppel or for the imposition of a constructive trust. Then, in their reply brief they stated that their claim could also be interpreted to include a claim of fraudulent conveyance. The Court decided that it would not consider the fraudulence conveyance claim, as that claim was presented for the first time in the reply brief on appeal, but would decide whether the plaintiffs had come forward with enough evidence to present material issues on the fraud, equitable estoppel and constructive trust arguments.

To succeed on a fraud claim in a commercial situation, the plaintiff was required to show that there was an intentional or negligent misrepresentation of material fact. It therefore followed that there must be a representation of some sort before there could be a misrepresentation. Although behavior sometimes communicates at message, the Court was unconvinced that honor-

ing a check is such a message. The plaintiffs failed to distinguish between conduct that was intended to be expressive, such as flag burning, and conduct that might conceivably lead random third parties to make inferences of some sort. The Court went on to say that if writing a check was not a representation, as determined by several previous cases, then they were at a loss to see how honoring one would be either. The principal that a bank sends an open-ended message to the world about credit worthiness whenever it pays a check, despite insufficient funds in the account, or grants credit would have quite serious effects. It would mean that those most likely to need a break would be less likely to get it because banks would fear the potentially unlimited liability that might arise, should they cover a check or make a loan to a party in financial distress, and thereby make a representation of solvency to an undefined class of third parties.

Next, the Court moved to the equitable estoppel claim and disposed of it by stating that equitable estoppel did not create a cause of action under Tennessee law.

Next, the Court looked at the constructive trust issue and stated that the plaintiffs had utterly failed to demonstrate that either a resulting or constructive trust existed. It stated that even if Third National held the account in trust for the plaintiffs, it would not help them. The undisputed evidence clearly indicated that the value of the Compton Produce accounts was, at the time the accounts were closed, negative. There was therefore nothing for Third National to hold in trust.

Last, the Court looked at the dismissal of the PACA claim. The Court found that the threshold question for review was whether the Third National Bank was a potato dealer under PACA. The only action taken by Third National was loaning Compton Produce money and funding overdrafts without charging NSF charges or interest, a practice that essentially amounts to giving Compton Produce an interest free loan. The plaintiffs argued that, as Compton Produce had no money, the bank was really the purchaser of the potatoes, thus "economic reality" transformed the bank into a potato dealer. The Court stated that the plaintiffs did not allege that Third National was the invisible hand behind Compton Produce or that it was formed only for the benefit of Third National. If Compton Produce had become more profitable and was able to repay the loans, it, not Third National, would have kept the profits. Nor did the plaintiffs allege any common ownership or management that might give rise to the inference that the discreet incorporation was pretextual. The Circuit Court found that there was no error in finding that the plaintiff's PACA claim was frivolous.

When looking to the sanctions issue, the plaintiffs claimed that the magistrate lacked jurisdiction to award sanctions, as they had already filed notice of appeal. The Circuit Court stated that the District Court retains jurisdiction to entertain a motion for Rule 11 sanctions, even after the filing of the notice of appeal. The circuit court also stated that the Court did not abuse its discretion in choosing not to award sanctions on the common law claim issue. The plaintiffs' factual investigation was adequate and their legal conclusion that those facts might give rise to a cause of action was colorable.

The attorneys contended that the district court erred in failing to hold a hearing to determine the degree of involvement that local counsel had

equity of such customer's account. As a result, the McKinneys received an aggregate amount of $4,434,891.49. Combined with the previous advances, the McKinney's accounts remained unsatisfied by approximately $1,776,314.19. The trustee then sought to distribute another $4,500,000 from the customer property fund. SIPC was again allowed to participate in the distribution in the same manner to the same extent as in the initial distribution. If this money were distributed only to unsatisfied claims then the McKinneys would have been fully satisfied. But with SIPC's participation, the McKinneys would only receive 79 percent of their claims. Plaintiffs unsuccessfully contested the proposed distribution scheme and subsequently asked the court of appeals to exclude SIPC from partaking in this distribution until all of the remaining customer's claim were fully satisfied.

The issue in this case was what happens to the overpayments if customers receive more than the amount of their claims based on the aggregate of advances from SIPC and their pro rata shares of the customer property fund. Plaintiffs contended that it should be used to further reduce any customer's claims that remain unsatisfied while the SIPC argues that it should receive this excess to the extent any customer received an advance from SIPC.

The court reasoned that the statutory language in the legislative history of SIPA clearly indicates an intent to limit SIPC's exposure. It when on to say that the plaintiff's interpretation would violate SIPA's prohibition against certain customers receiving SIPC advances to satisfy their claims. The court also stated that the plaintiff's interpretation creates the result that only over the limit and prohibited customers would enjoy the benefits of and participate in distributions from the customer property fund because SIPC would always fully satisfy all customer's claims below $500,000 prior to the distribution of the customer property fund. This would eliminate all such customers from inclusion in calculations of ratable distributions from the customer property fund. Finally, the court found that even though SIPC is participating in the distribution of customer property notwithstanding that all customers claims have not been fully satisfied, the SIPC does not share on an equal basis with customers. Instead, it only recaptures overpayments made to customers after ratable distribution of assets from the customer property fund.

In re Sanders v. First National Bank and Trust Company, Great Bend, 1991 W.L. 107792 (6th Cir.) This opinion authored by Circuit Judge Boyce F. Martin Jr. involves a trustee who filed an action against a creditor bank alleging that the bank wrongfully instituted collection proceedings and forced the debtors and their corporations into bankruptcy. The trustee also alleged fraud, duress, violations of the Bank Holding Company Act and a breach of duty of good faith.

Max Sanders owned and operated several radio stations. He owned 100 percent of the stock of JACO, Inc., which in turn owned all of the stock of MetroGeneral Communications, Inc. MetroGeneral Communications, Inc. owned all of the stock of MetroGeneral of Nashville, MetroGeneral of Knoxville, and MetroGeneral of Alabama. The subsidiaries owned several radio stations in the southeastern United States. Sanders and his wife, Sherry, and all of Sander's Corporations were parties to the bankruptcy proceedings. Jane Forbes was appointed and acted as trustee for all of the parties.

By 1986, Mac, Sherry, and JACO owed First

in writing the pleading motion or paper found to violate the rule when awarding fees against both local and outside counsel. The Court stated that the signature of the attorney constituted a certificate by the signer that the signer has read the pleading motion or other paper and has made a reasonable inquiry that it is well grounded in fact and is warranted in existing law. The rule does not provide a safe harbor for lawyers who rely on representations of outside counsel.

In re Bell and Beckwith, 1991 W.L. 113631 (6th Cir.). This case authored by Circuit Judge Cornelia Kennedy involves a review of a district court decision upholding the validity of a trustee's proposed distribution scheme.

The debtor was a stock brokerage firm in Ohio managed by Edward Wolfram Jr. Over a period of 10 years, Wolfram embezzled cash and securities held by the debtor totaling more than $40 Million before he was discovered by the Securities Exchange Commission in 1983. The McKinneys held several accounts with the debtor in the 1950's. All of their accounts were cash accounts. Immediately prior to the debtors filing for bankruptcy, Mr. McKinney maintained one account with a net equity of $3,582,560.31. Mrs. McKinney maintained two accounts, one personal and one designated as payee with net equities of $3,527,289.18 and $101,356.19 respectively. The combined net equities of these accounts $7,211,205.68.

The Security Investor Protection Act (SIPA), through the Security Investor Protection Corporation (SIPC), was created to provide for a fund to be used to make it possible for the public customers in the event of financial insolvency of their broker to recover that to which they were entitled with a limitation of $500,000 for each customer.

Upon the occurrence of a triggering event, a court upon motion by SIPC may issue a protective order and appoint a trustee in order to liquidate a debtor. At that time, the amount of each customer's claim is ascertained based upon the "net equity" in a customer's account. The net equity is equal to the dollar value of each separate account less any amount owed to the debtor plus any amount repaid by the customer to the broker with the trustee's approval. Customer claims are satisfied from two sources: distributions from the customer property fund and SIPC monies. After certain property is pooled into the customer property fund in which the customers share ratably, SIPC is liable to the extent this fund is insufficient up to $500,000 per customer. Congress has required that the SIPC make prompt payment to customers. Therefore, the payments take the form of advances.

The Securities and Investor Protection Corporation (SIPC) filed an application for protective decree in the district court. Once the application was granted, plaintiffs filed claims with respect to each of their accounts. Mr. and Mrs. McKinney filed separate claims and received cash and securities totaling $499,957.50 and $499,962.50 respectively based on the net equities of their personal accounts. No advance was made for Mrs. McKinney's payee account. After pulling relevant assets into a customer property fund, the trustee received permission from the bankruptcy court to make a partial distribution from the fund. The bankruptcy court allowed the SIPC to participate in this distribution to the extent a customer was overpaid, meaning that the total moneys received by the customer and distributions from the customer property fund exceeded the net

National Bank and Trust Company ("Bank") a total of $1.2 Million from eight separate promissory notes. Mac Sanders personally guaranteed all of the obligations of Sherry Sanders and JACO and Sherry Sanders personally guaranteed all obligations of Mac Sanders. In early 1987, after several attempts to sell the stations, a representative of the Bank met with Sanders and informed him that if he wished the Bank to continue working with him, additional collateral was necessary. Sanders agreed to pledge the interest of MetroGeneral in the two $3 Million notes given to him by a subsequently defaulting purchaser, which was the only remaining valuable asset controlled by him. The security agreement provided that the Bank, by accepting the additional collateral in lieu of taking immediate action to collect the indebtedness, was not agreeing to refrain for any specific length of time from taking collection action owed to it by the debtors. The agreement also provided that Sanders and his corporations would be in default if any of the parties to the agreement filed bankruptcy and, upon default, the Bank could demand collateral.

Mac Sanders, JACO, and MetroGeneral filed for bankruptcy. Mac testified in his deposition that there had been a rumor that the Bank intended to begin legal proceedings to collect the outstanding debts. He also admitted that pressure from the federal taxing authorities precipitated his filing.

After the bankruptcy filing, the bank filed suit against Sherry Sanders in the United States District Court on her notes and written guarantees of her husband's indebtedness. The district court entered a judgment against Sherry Sanders and she filed a voluntary Chapter 7 petition. Subsequently, the bankruptcy court found that Mac had misrepresented his financial condition by $7 Million and granted the Bank a non-dischargeable judgment in the amount of $1,583,361.25. In mid 1988, the bankruptcy court entered a judgment against Sherry Sanders holding that the district court judgment against her was not dischargeable in bankruptcy.

During the pendency of the bankruptcy proceedings, the trustee filed an action against the Bank alleging it wrongfully instituted collection proceedings thus, forcing Mac Sanders, Sherry Sanders, and their corporations into bankruptcy. The district court dismissed her complaint finding that her claims were barred because they were required to be brought as compulsory counterclaims in the previous legal proceedings filed in district court against Sherry Sanders. He also found that the trustee had failed to present sufficient evidence to prove any of her claims. The trustee appealed, contending that the claims asserted on behalf of Sherry Sanders were permissive counterclaims in the previous federal actions and the judgments obtained in those actions were not a bar.

The Sixth Circuit applied the logical relationship test for determining whether a claim arises out of the same transaction or occurrence. Sherry Sanders' claims were based on a written agreement in which the Bank agreed to refrain from immediate action to collect upon notes she owed. Those notes were the subject matter of the previous litigation in district court. Any claim that the Bank wrongfully took action to collect the notes should have been made at that time.

As to the second basis for review, the Court found that the district court properly dismissed the trustee's claims because she failed to present evidence sufficient to

prove them. Her first contention was that the district court erred in dismissing her claim that the Bank violated the anti-tying provision of the Bank Holding Company Act by taking new collateral in exchange for its agreement not to immediately proceed with collection efforts. In order to recover under the anti-tying provisions, a plaintiff must prove that an anti-competitive tying arrangement existed; the banking practice at issue was unusual in the banking industry; and the practice must benefit the Bank. Forbes had not alleged sufficient facts to satisfy either of the first two prongs of the test. The condition that a heavily indebted bank customer provide additional collateral in exchange for forbearance on collection on a defaulted note did not violate the Bank Holding Company Act.

Next, the trustee asserted that the Bank had no intention of honoring its promise to forebear at the time the Bank executed the security agreement, thus intentionally deceiving Mac Sanders. To prevail under this promissory fraud theory, Forbes was required to establish that the Bank made a promise of future conduct with the present intention not to perform the promise. The only proof offer to support this showing was Mac Sanders' deposition testimony with regard to his belief that the Bank would wait a long time before acting to collect his debt. Sanders also testified that he had heard a rumor that the Bank was going to take action on his debt. Sanders' testimony and the timing of the collection efforts were insufficient to establish that the Bank had made promises that it did not intend to keep.

Similarly, the Court of Appeals affirmed the district court's decision that the plaintiff failed to present evidence to create a material issue of fact on the claim of duress. Given the financial circumstances of Mac Sanders, Sherry Sanders, and their corporations at the time of the security agreement negotiations, the request for additional collateral in exchange for forbearance for immediate action was reasonable.

Lastly, the Court affirmed the district court's ruling dismissing the trustee's claim that the Bank breached its duty of good faith. No facts in the record indicated that the Bank negotiated in bad faith. In fact, the Bank took no collection action against the Sanders or their corporation prior to the bankruptcy petitions of Mac Sanders and JACO which were default conditions on the debt.

In re Big Sky Music, et al v. Banas, Case No. 1: 90-CV-201 (W.D. Mich. April 22, 1991). This opinion authored by District Court Judge Richard A. Enslen involves a motion to enjoin a judgment debtor's transfer of assets. On November 27, 1990, the United States District Court entered a judgment against Andrew L. Banas in the amount of $28,783.25. Plaintiffs had been unsuccessful in their efforts to satisfy the judgment.

On December 11, 1990, TMN Broadcasting Incorporated filed a voluntary bankruptcy petition under Chapter 11. In its statement of financial affairs TMN indicated that it carried on its business under the name of WRQT-FM and was engaged in the business of FM Radio Broadcasting. In Schedule B to its statement of all property of the debtor, TMN claimed that it had as its property an interest in a broadcasting license valued at $245,000. According to the FCC, the license for the radio station was held by Banas.

On February 15, 1991, plaintiff's counsel learned that Banas and TMN were in the process of transferring the FCC license of WRQT-FM from him to TMN. In response,

plaintiffs sought satisfaction of the judgment and filed a motion for an order restraining the defendant's transfer of assets.

The Court stated that F.R.C.P. § 69 provides that state practice and procedure governs proceedings to execute a judgment. The relevant Michigan statute provides that after a court has entered a judgment imposing money damages the judge may, upon motion, "prevent transfer of any property, money, or things . . . [or] make any order as within his discretion seems appropriate in regard to carrying out the full intent and purpose of these provisions to subject any nonexempt assets of any judgment debtor to the satisfaction of any judgment against the judgment debtor."

Banas had made no showing that any of his assets were exempt and pursuant to the authority provided under Michigan law, the judged enjoined Banas from transferring his assets, including the FCC license, until he had fully satisfied the judgment entered by the Court.

In re Crittenden, Case No. 89-05467-GE (E.D. Mich. April 5, 1991). This opinion authored by District Court Judge George E. Woods addresses the dismissal of an adversary proceeding brought under 11 U.S.C. § 523 as well as an order denying the plaintiff's motion for reconsideration for the order of dismissal.

The plaintiff's acting pro se, commenced an adversary proceeding against the debtor and the trustee seeking the determination that the debt owed to the plaintiffs was non-dischargeable under 11 U.S.C. § 523 and also sought to deny debtor a discharge under 11 U.S.C. § 727. Defendants filed a motion to dismiss the plaintiff's complaint due to the failure to state a cause of action based largely on vague and inarticulate pleadings. On May 24, 1990, Judge Graves ordered the plaintiffs to file an amended complaint stating a cause of action. An amended complaint was filed on May 29, 1990.

On June 13, 1990, defendants once again filed a motion to dismiss and a motion for summary disposition due to the failure of plaintiffs to state a claim. A proof of service was filed with the court but the plaintiffs failed to timely respond to the motion. Accordingly, on July 13, 1990, the bankruptcy court entered an order dismissing the adversary proceeding with prejudice. On July 30, 1990, plaintiff's filed a motion for reconsideration of the order of dismissal. The bankruptcy court denied the motion on August 8, 1990, due to the failure of the plaintiffs to demonstrate a palpable defect by the court or that the parties were mislead. Plaintiffs filed a notice of appeal on August 20, 1990. No further action was taken by the plaintiffs until the district court issued an order to show cause why the appeal should not be dismissed for lack of jurisdiction. Plaintiffs then timely prosecuted their appeal.

The court determined that it was without jurisdiction to consider the appeal due to the plaintiff's failure to timely file a notice of appeal within 10 days of the order of dismissal as required by Bankruptcy Rule 8002(a). The timely filing of a notice of appeal is a jurisdictional requirement. The court stated that a 10-day period for filing a notice of appeal may be extended either by operation of law due to limited circumstances set forth in Bankruptcy Rule 8002(b), or by permission of the Bankruptcy Court upon motion under Bankruptcy Rule 8002(c). The plaintiffs failed to fall within any of the limited circumstances set forth in subsection (b) and it was undisputed that plaintiffs failed to file a motion for extension of

time to appeal under subsection (c). Plaintiff's motion for reconsideration of the order of dismissal filed with the bankruptcy court did not operate to extend the time for filing an appeal under subsection (a). Accordingly, plaintiff's appeal was dismissed due to lack of jurisdiction.

In re Heyniger v. Sanom, Case No. 90-CV-73-654 (E.D. Mich. April 3, 1991). This opinion authored by Judge Lawrence P. Zatkoff involves a creditor, Sanom, who had obtained a judgment in state court against debtor, Heyniger and his wife for debts owed on professional services which had been rendered. A writ of attachment was filed with the sheriff's office and a levy was filed with the register of deeds. The writ and affidavit were originally filed against Heyniger only but the levy of execution was filed against the home which was owned by Heyniger and his wife as tenants by the entireties. The sheriff informed Sanom that he could not levy since the written affidavit were only against Heyniger and did not include his wife. The creditor then sent the sheriff a copy of the judgment against both Mr. and Mrs. Heyniger.

The debtor attempted to dissolve the writ and levy of execution in state court, however, the district judge denied the motion and set aside the judgment, but did not specifically deny the writ of execution. Sanom contended that the district court's refusal to set aside the judgment in essence upheld the validity of the writ of execution and the levy of that execution. The state court judge's opinion denying the motion to dissolve the writ and levy was issued on May 15, 1990. The debtor filed bankruptcy on May 7, 1990.

The debtor filed for the state exemption of $3,500 as to the entireties property. On September 27, 1990, Bankruptcy Judge Ray Reynolds Graves heard a motion to avoid the lien. He ruled that the lien was valid and held jointly against both Mr. and Mrs. Heyniger. He also ruled that the motion to avoid the lien had been improperly filed and should have been commenced as an adversary proceeding. He also concluded that only the trustee could avoid the creditor's lien and therefore the debtor had no standing. On appeal, the debtor attempted to amend his petitions in the bankruptcy proceeding and also attempted to add his wife as a debtor.

Heyniger contended that he was entitled to have the creditor's judgment lien avoided because the creditor had failed to object to the debtor's claim of exemption. The court concluded the creditor had no reason to object to the debtor's claim of exemption since the debtor had claimed the state exemption of $3,500. After the bankruptcy judge made this ruling, the debtor attempted to amend this bankruptcy petition to add a federal exemption of $15,000. Accordingly, the court agreed with the creditor's argument that the issue is now properly before Judge Graves and therefore, could not be considered on appeal.

Likewise, the debtor's claim to a right to amend his schedules and exemptions was also not properly brought before the bankruptcy judge. This attempt had taken place during the pendency of the appeal. Whether the federal exemption was proper and whether the proposed amendments to his bankruptcy petition were appropriate were questions properly within discretion of the bankruptcy court. Accordingly, the district court would not exercise its appellate jurisdiction over matters not previously placed before the bankruptcy judge.

In addition, The district court affirmed the bankruptcy judge's ruling that the debtor did not have standing to avoid the creditor's

lien due to the fact that the debtor had filed an exemption of $3,500 in his original petition. Section 522 of the Bankruptcy Code only allows limited avoiding power to the extent that the debtor could have exempted property. Accordingly, the bankruptcy judge correctly concluded that the debtor had no standing to avoid the creditor's lien. The trustee did not need to avoid any liens since there was sufficient equity to satisfy the debtor's exemption as well as satisfy other outstanding liens on the property.

The court also stated that the bankruptcy judge was correct in stating that the debtor must pursue any attempt to avoid the lien through an adversary proceeding. In addition, the district court affirmed the bankruptcy court's conclusion that the lien was a valid lien held by the creditor jointly against both Mr. and Mrs. Heyniger. A judicial lien was clearly filed and registered with the Oakland County Register of Deeds in March of 1990. The judgment upon which it was based named both parties. Accordingly, the court concluded that the proper procedures were satisfied and the sheriff's office correctly executed on the writ of attachment.

In re Mark Moralez, Case No. 90-20869-R (Bkrtcy. E.D. Mich. June 25, 1991). This case, authored by Judge Steven W. Rhodes, involves a motion to lift stay to allow a former spouse to file a non-dischargeability action under 11 U.S.C. § 523(a)(5) in state court. The parties' divorce judgment required the debtor to assume certain joint marital debts and Mrs. Moralez preferred to litigate the dischargeability of those obligations in the state court where the judgment was entered. The debtor opposed the motion contending that the Bankruptcy Court was in the best position to interpret and apply section 523(a)(5). The Bankruptcy Court granted the motion and issued a memorandum opinion supplementing the decision given in open court on that day.

The Court stated that there was cause to lift the stay for several reasons, relying primarily on the three step test used In re Calhoun, 715 F.2d 1103 (6th Cir. 1983). The first prong was whether the state court or the parties intended to create an obligation to provide support. The second prong was whether the assumption obligation had the effect of providing necessary support, and the last prong was whether the amount of support represented by the assumption obligation was manifestly reasonable under traditional concepts of support.

Judge Rhodes concluded that the state court which had imposed the assumption obligation in the first place was as able, if not better able, to address each of the three tests. First, the state court knew its own intent. Second, the fact finding processes necessary to determine the effect of the assumption were essentially the same in the state court as in the Bankruptcy Court. The Court reasoned that in fact the state court may have already examined the issue when it fixed the assumption obligation in the first place. Lastly, the state court was in a much better position to determine whether the amount of the assumption obligation was reasonable under traditional concepts of support because this matter was entirely within its expertise.

The Court went on to say that the debtor would not be harmed by litigating the dischargeability claim in state court because the state court's expertise and prior handling of the parties' divorce action would be less costly to litigate in state court. Thus, the balance of harm weighs in favor of allowing Mrs. Moralez to proceed

with her claim in state court. The Court also stated that nothing suggested that litigating this non-dischargeability issue in state court would have any effect on the administration of the debtor's bankruptcy estate because the issue was essentially a private issue between the debtor and his former spouse.

Lastly, the Court ruled that under 11 U.S.C. § 362(c)(2) the stay of judicial proceedings involving the debtor continues until the case is closed or dismissed or until the discharge is entered, whichever is earliest. Therefore, Mrs. Moralez could proceed with her non-dischargeability action in state court after the stay expires by law. Thus, denial of the motion to lift stay would only mean that she would have to wait the short time for the stay to expire in order to bring her non-dischargeability claim in state court. The Court found that there was no reason to require her to wait.

In re Doors and More, Inc., Case No. 90-20155-R (Bkrtcy. E.D. Mich. June 6, 1991). This opinion, authored by Judge Steven W. Rhodes, addresses a motion for reconsideration of a case formerly reported in April's Bankruptcy Newsletter. In his motion, attorney J. Michael Hill requested that the Court reconsider its previous order denying the application to approve his employment as attorney for the debtor.

At the hearing, it was disclosed that Hill had appropriated to his own use the $4,000 retainer fee that had been paid to him by the debtor. With the bankruptcy petition, Hill had filed a statement of attorney compensation, which stated that prior to the filing of the disclosure statement, the debtor had paid him $4,000 plus a $500 filing fee. The statement went on to say that the debtor had agreed to pay "$125 per hour 32 hours work." Although this disclosure could be interpreted in a number of ways, at the hearing Hill indicated that he intended his fee to be $4,000 for any and all work, up to 32 hours, then $125 per hour for work after the first 32 hours. The Court concluded that Hill's conduct in appropriating the retainer fee to his own use was highly improper under both the Bankruptcy Code and Michigan law. The Court also concluded that his conduct alone constituted grounds to deny the application to approve his employment.

The Court cited numerous bankruptcy decisions, which held that a pre-petition retainer fee, paid to the debtor's attorney, remains property of the estate and must be held in the attorney-client trust account until the Court awards compensation to the attorney under 11 U.S.C. §§ 330 or 331. Under Michigan law, the Court relied on the Michigan Rules of Professional Conduct, and several informal opinions by the Michigan State Bar Ethic Committee, which stated that a lawyer must hold property of clients or third persons separate from the lawyer's own property. These funds must be deposited in an interest bearing account maintained in the state in which the law office is situated. Even though a lawyer may require advanced payment of a fee, he is obliged to return any unused portion. Also, upon termination of representation, the lawyer must refund any advance payment of a fee that has not been earned. This is true even when an attorney charges a nonrefundable retainer.

In re Lynne C. Rochkind, Case No. 90-04916-R (Bkrtcy. E.D. Mich. June 6, 1991). This opinion, also authored by Judge Steven W. Rhodes, concerns a motion to lift stay in order to commence foreclosure proceedings on a second mortgage held on the debtor's residence.

Mr. Lippitt and Mr. Rochkind were both

practicing attorneys and partners in their own law firm. In September of 1985, Mr. Lippitt was appointed as a Circuit Judge on the Oakland County Circuit Court. At that time, they entered into an agreement regarding the payment of fees to be earned in the future in pending cases in their office.

Thereafter, Mr. Rochkind paid Mr. Lippitt substantial sums of money for fees owing. However, as of February of 1987, Mr. Rochkind owed Mr. Lippitt $75,000, which he could not pay.

When addressing the debtor's contention that she received nothing of value in exchange for signing the note because she had not previously been liable to Mr. Lippitt, the Court stated that Michigan law made it clear that obligations jointly undertaken by married persons do not require separate consideration to the estate of each. Therefore, the Court concluded that the note and mortgage were enforceable.

The Court then addressed the issue of whether the note and mortgage were not enforceable due to duress. Mr. and Mrs. Rochkind testified that they signed the note and mortgage because Mr. Lippitt, while an Oakland County Circuit Judge, was abusive and profane toward them and threatened to use the power and influence of his judicial position to deprive Mr. Rochkind of his ability to provide for his family. Conversely, Mr. Lippitt and Mr. Gettleson, Mr. Lippitt's attorney, testified that Mr. Lippitt made no such threatening statements or remarks, at least not until well after the note and mortgage were signed, and that there was no duress or coercion. Based largely on the demeanor of the witnesses, the Court concluded that Mr. and Mrs. Rochkind most likely testified to the truth concerning the nature and timing of Mr. Lippitt's threats. Accordingly, the Court concluded that Mrs. Rochkind signed the note and mortgage because Mr. Lippitt abused them and threatened their livelihood in the ways that they testified.

The Court went on to say that Mr. Lippitt's conduct was wrongful if not unlawful. To threaten to use the power of public office to ruin another for personal gain violates several provisions of the Michigan Code of Judicial Conduct, including Cannons 1, 2, 3 and 5, and may also be a criminal violation under MCLA § 750.213.

Finally, the Court stated that Mr. Lippitt's wrongful conduct caused Mrs. Rochkind to sign the note and mortgage. His abusive conduct toward her plainly convinced her that his threats were not idle threats and, based on both Mr. Lippitt's office and her husband's position, Mr. Lippitt could very well carry out his threats. Therefore, Mrs. Rochkind was deprived of her free will and was left with no choice but to assume this obligation and to pledge her home as security. The motion to lift stay was denied.

STEERING COMMITTEE MEETING MINUTES:

A meeting was held on July 19, 1991 at noon at the Peninsular Club.

1. Brett Rodgers distributed a list of persons who have registered for the Shanty Creek Seminar. It appears that registrations are running ahead of last year.

   Also distributed was a list of those parties who have contributed to the Attorneys Lounge in the Federal Building. As the ownership of all of the furniture in the Lounge will remain with the person or firm who has purchased the same, Mark Van Allsburg agreed to make a master list of each piece of furniture contributed and its donor, as well as tagging each piece of furniture with the owner's name.

   Additional items needed for the Attorneys Lounge were also discussed. Mark Van Allsburg indicated that a sofa was needed to round out the furniture, and it was also agreed that it would be very helpful to have a plain paper fax machine.

2. Tim Curtin then discussed the possibility of establishing a liaison committee with the State Bar of Michigan Creditors' Rights Committee to keep various groups apprised of what the Bankruptcy Steering Committee is doing and to possibly coordinate activities between our Committee and the State Bar Creditors' Rights Committee.

3. Discussion was then had concerning the Shanty Creek Seminar to be held on August 16 and 17. It was agreed that the Seminar materials would not be mailed to registrants as in years past, as many of the registrants do not read the materials beforehand and quite often forget to bring the materials with them to the Seminar. As a result, materials will be handed out at the time of the Seminar. Keep in mind that most of the Seminars offered are of a "workshop" nature, which are intended to be a general discussion of the subject matter and not a lecture, with an interplay (questions/answers) with those in attendance.

   If you have not yet registered for the Seminar, we would suggest that you do so as soon as possible. Also, please do not forget the recreational activities which are offered in the afternoons.

4. No meeting time was set for the next Steering Committee meeting in light of the upcoming Shanty Creek Seminar. Unless Steering Committee members hear from Brett Rodgers, it is presumed that the next Steering Committee meeting will be held on the third Friday in September, that being September 20, 1991, at noon at the Peninsular Club.

Larry A. Ver Merris

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, 1991 through June 30, 1991. These filings are compared to those made during the same period one year ago, and two years ago.

	1/1/91 - 6/30/91	1/1/90-6/30/90	1/1/89-6/30/89
Chapter 7	2,575	2,017	1,695
Chapter 11	84	74	54
Chapter 12	8	9	5
Chapter 13	880	821	604
Totals	3,547	2,921	2,358

According to the Wall Street Journal of June 14, 1991, personal bankruptcy filings have increased from 297,885 in 1985 to 660,796 in 1990. Of the personal bankruptcy filings last year, 468,171 were under Chapter 7; 2,116 were under Chapter 11; and 190,509 were under Chapter 13.

ANNOUNCEMENTS:

Please note, **EFFECTIVE AUGUST 1, 1991**, the offices of Raymond B. Johnson and Brett N. Rodgers will have a new location.

RAYMOND B. JOHNSON, TRUSTEE
1122 LEONARD, N.E.
GRAND RAPIDS, MI 49503

BRETT N. RODGERS, TRUSTEE
1122 LEONARD, N.E.
GRAND RAPIDS, MI 49503

NEW PHONE NUMBER: (616) 732-9000
FAX: (616) 732-9005

EDITOR'S NOTEBOOK:

On May 13, 1991, the U.S. Supreme Court granted cert In re ZZZZ Best Co (CA 9 Cal), 921 F2d 968 (1990), in which the Ninth Circuit held that payments on an eight-month revolving credit agreement were recoverable as preferential transfers, and were not protected by the "ordinary course of business" exception to the preference section. The grant of cert is reported in Union Bank v Wolas, 114 L Ed 2d 97 (US S Ct, 1991).

On May 28, 1991, the U.S. Supreme Court agreed to review In re Holywell Corp (CA 11 Fla), 911 F2d 1539 (1990), where the Eleventh Circuit held that a liquidating trustee appointed under a Chapter 11 plan was not required by statute or the terms of the plan to file federal tax returns and pay income taxes on the sale of pre-confirmation and post-confirmation properties. The grant of cert is reported in Holywell Corp v Smith (1991 US), Docket Nos. 90-1361, 90-1484.

The U.S. Supreme Court on May 13, 1991 denied cert in the Ben Cooper case, previously discussed in this Newsletter, concerning jury trials in Bankruptcy Court. After previously granting cert in Ben Cooper, the U.S. Supreme Court remanded the case to the Second Circuit Court of Appeals so that the Second Circuit might make a determination of its jurisdiction over the case. The Second Circuit reinstated its decision and, subsequent thereto, reapplication for certiorari was made to the U.S. Supreme Court so as to resolve the question of whether bankruptcy courts can validly conduct jury trials in core proceedings. With cert being denied, there is a split among the circuits concerning such issue.

On May 28, 1991, the U.S. Supreme Court also denied cert in Pan Am Corp v Section 1110 Parties (1991, US), Docket No. 90-1530, concerning the availability of the protections afforded by §1110 of the Bankruptcy Code to sale-leaseback situations on airline leasing. The Supreme Court's refusal to grant cert has let stand the Second Circuit's affirmance in In re Pan American Corp, 929 F2d 109 (1991), of the underlying District Court decision upholding the Bankruptcy Judge's ruling that §1110 applies to both acquisition and non-acquisition sale-leasebacks and also to lease extensions and renewals.

Larry A. Ver Merris

FROM THE BANKRUPTCY COURT:

Practice Pointers

Proofs of Service -- When this Court sends you a notice or order for service on all creditors, it will be very helpful if you could instruct your staff to watch for the following problems which we have found to be common:

First, you must refer to the document which was served in the proof of service. Too many proofs of service state that the "attached document" was served on all creditors. The document is often not attached and we have no idea what the proof of service is trying to prove. The best practice would be to use the exact title of the document which was served and refer to the date of the document.

Second, you should always use an updated matrix for service on all creditors. We find that attorneys who represent debtors often serve the matrix which they originally filed with the case as the list of all creditors and parties in interest without adding the parties who filed appearances, or proofs of claim, etc. We can generate a current matrix for you on our computer. These may be requested by calling 456-2248 and we charge you only a modest 50 cents per page for the service.

Third, you should always attach a copy of the matrix which you used to your proof of service to show exactly whom you served. We often receive a proof of service which simply states that all parties on the matrix were served on a certain date. But what matrix are we talking about? (See the paragraph above.)

Filing an Appearance -- Attorneys who wish to appear in a case should file a formal appearance with a request to be added to the mailing matrix of the case. If you file a pleading in a bankruptcy case you will not automatically be added to the matrix and may not receive any further notice of matters in that case.

Attorneys and other interested parties who simply wish to be added to the mailing matrix may do so by sending a letter to the court and stating this request.

JOSEPH A. CHRYSTLER

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Standing Chapter 12 and Chapter 13 Trustee/Bankruptcy Cases

July 18, 1991

TO THE CREDITOR AND DEBTOR BAR REGULARLY PRACTICING IN THE KALAMAZOO DIVISION OF THE UNITED STATES BANKRUPTCY COURT FOR THE WESTERN DISTRICT OF MICHIGAN

SUBJECT: NEW RULES EFFECTIVE AUGUST 1, 1991 REQUIRING SECURED CREDITORS TO FILE CLAIMS, AND A DEFINED POLICY OF THIS TRUSTEE REQUIRING THE NECESSARY LEVEL OF PARTICIPATION OF A SECURED CREDITOR IN THE CHAPTER 13 CONFIRMATION PROCESS

This Chapter 13 Standing Trustee has constantly wrestled with the issue of what exactly is "prima facie" on a secured creditor's claim. Certainly if it is accompanied by all of the attachments required by Rule 3001, the claim amount will be prima facie. Also the covered collateral should be prima facie in that it would be supported by documents attached to the claim. From here on, however, other claim aspects become clouded. If a creditor requests interest at the contract rate, and a copy of the contract is attached, is this prima facie? What if debtor has proposed in the plan a lesser rate which is at or very near a current "market" rate? I must take the position that the creditor must object to the plan, if it deems it appropriate, because the opportunity to modify the contract is well grounded in 11 U.S.C. 1322(b)(2) for other than a debt secured solely by an interest in real property that is debtor's principal residence. What if debtor proposes no interest? The Trustee certainly has standing, and perhaps an obligation, to object, but solely on the possibility of "bad faith", and certainly not to protect the potentially aggrieved creditor that may be sitting on its hands and doing nothing on its own to protect its interest. The Trustee is not charged with the responsibility of protecting the interest of any one creditor or group of creditors. His duties end, as far as the confirmation process goes, with his recommendation to the Bankruptcy Judge taking into consideration all of the standards imposed by 11 U.S.C. 1325 in the big picture context of maintaining the integrity of the system as a whole. In short, don't let any debtor keep and pay for in his plan his 1991 Lamborghini auto unless he is proposing full payment to all his creditors, because this is just the sort of situation that gives the system a black eye. Would the result seem as egregious were the collateral a new 700 series BMW? A new Lincoln Continental? A new Chevrolet Lumina? As the perceived lifestyle of the debtor diminishes, so obviously does the concern on the part of the Trustee regarding damage to the integrity of the system.

Someone has espoused the theory that unless you are the lead animal in a team of sled dogs, the scenery (and perhaps the aroma) never changes. Therefore, with the impending changes to the Bankruptcy Rules it appears the timing is right for some policy adaptations regarding treatment of secured creditors in Chapter 13 cases. The new Rules took effect August 1, 1991, and mandate that a secured creditor MUST file a proof of claim prior to the claims bar date of a plan to participate in distributions. This revisits the Rules applying to the

1898 Act, as amended, which was strangely omitted from the Rules pertaining t the 1978 Code. There is also the 30-day window period after the claims bar date for the debtor (or the Trustee) to file claims, but this begs the questions as to whether the creditor itself can then amend the debtor-filed claim, and within what reasonable period, and whether, in the absence of an amended claim, the debtor-filed claim, plus the order confirming the plan, requires the creditor to release its lien once the confirmed plan terms have been fully complied with.

This Trustee has further wrestled with the issue of collateral valuation in a Chapter 13 plan. Certainly the creditor's claim cannot be prima facie regarding valuation suggested on the claim form filed. It is likely the creditor, which, in the case of a vehicle, is generally a bank, credit union or financing arm of an automobile manufacturer, has never seen the collateral it is attempting to value. Therefore, when the debtor proposes in the filed plan to pay the creditor as secured to the extent of $2,000 on a 1985 Buick Skylark, with the balance of the $15,000 claim allowed as unsecured, in the absence of an objection by the creditor, and assuming all other confirmation standards are met, the plan should be confirmed, right? My answer is yes, since it appears the debtor has made a real effort to value the collateral at or very near the current market. What, however, of the situation where the collateral is an undamaged 1990 Pontiac Bonneville SSE, and the debtor values it at $2,000 and the creditor has not filed an objection? Again, as in the interest rate situation, the Trustee has standing, and perhaps an obligation, to object on the basis of "bad faith", and not on the basis of assisting the creditor which has not chosen to help itself. The "fresh start" theory for debtors is well grounded in Congressional intent, statute and case law, and every debtor is entitled to this if all confirmation standards are met; however, it should not be expanded to give debtors a "head start" at the risk of impairing the perception of the system as it is viewed in terms of attempting to achieve a fair measure of equity to all parties.

With lantern in hand, still in search of the "perfect plan", this Trustee will expect, from debtors and creditors alike, the following minimum efforts effective on and after September 1, 1991:

1. For all secured claims debtors must set forth their best estimates of the fair market value of covered collateral in the plan proposed. This will be included in the creditor notice and, if the Trustee feels the valuation is reasonable, in the absence of objection by the affected creditor, and assuming all other confirmation standards have been reasonably met, confirmation will be recommended, subject only to the Trustee perceived standards regarding fair market interest as set forth in 2, below.

2. For all secured claims debtors must set forth an interest rate proposed to be paid. The interest rate can range anywhere from zero to infinity, depending on debtor's perception of "fair market". Suggested plan language is as follows: "Ford Motor Credit Company will be paid as a secured creditor on the 1985 Mercury Topaz to the extent of the first $2,000 of its claim, with the balance to be paid along with other general unsecured creditors. Interest will be paid on the secured portion of the claim at _____% or the contract rate, whichever rate shall be the lower." This Trustee does not want to suggest any rate as being "acceptable", but may be put in the position of having to object to confirmation, again solely on the "bad faith" argument, if the rate does not reasonably approach his perception of a fair market rate.

3. The notice of the filing of the case, setting the first meeting, confirmation hearing and other related matters, to which is attached suggested claim forms, and which is mailed by the Trustee to all creditors and interested parties indicated on the matrix provided by the debtor, will contain enough information on how the debtor proposes to treat each secured creditor to afford the secured creditor enough information to formulate any objection to confirmation if deemed necessary. If necessary to achieve clarity, a letter will be sent to each secured creditor by the Trustee, with a copy to the Court and debtor's counsel, setting forth any additional information necessary to give the creditor adequate information upon which to base its decision as to whether or not to object to confirmation. A copy of this proposed supplemental letter is attached. If the secured creditor does not timely file an objection to confirmation of a plan in which it feels its treatment is not equitable, in the absence of objections the Trustee may have, or concerns the Court may have independently, the plan will be confirmed, and the order of confirmation, which refers to the plan filed, together with any pre-confirmation amendments thereto, should be res judicata regarding issues such as valuation and interest rate.

A case may be filed with a debtor listing Ford Motor Credit as a creditor, with an address in Okemos. Even though the Trustee is 100% sure the file will end up in Dearborn, from where the claim will emanate, he is duty-bound to notice FMCC with its Okemos address. With only a maximum of 40 days allowed from case filing to 341(a) hearing date, and the opportunity to confirm a plan generally as little as ten days after the 341(a) hearing, the creditor will generally have to improve its diligence with respect to claim filing and objections to confirmation to better assure proper treatment. Attorneys representing creditors must exert new efforts to educate clients that time really is of the essence, even more so under the new Rules. The Standing Trustee is not required to, cannot, and will not step into the shoes of the potentially maligned secured creditor only for the purpose of achieving perceived equity for that creditor. However, if the Trustee perceives that debtor is attempting to achieve unfair advantage of the system as a whole, it is extremely likely that the Trustee can, and will, lodge a "bad faith" objection to confirmation.

The time is right. The new Rules took effect August 1, 1991. Debtors should be required to better clarify their intentions regarding treatment of secured creditors, and once the intentions are known to the creditor, it is charged with a responsibility of objecting to confirmation, if deemed necessary. Comments with respect to this policy statement are invited and welcomed. The intended date of full implementation as written (or amended based on logical concerns expressed) is September 1, 1991, although the Rules may mandate compliance in one or more of the areas discussed effective August 1.

Respectfully submitted,

S/Joseph A. Chrystler

Standing Chapter 13 Trustee
Western District of Michigan -
Kalamazoo Division

906 East Cork Street
Kalamazoo, Michigan 49001
Telephone: (616) 343-0305
Fax No.: (616) 343-5915

JOSEPH A. CHRYSTLER

Standing Chapter 12 and Chapter 13 Trustee/Bankruptcy Cases

Date: _____

TO: Secured Creditor - _____

SUPPLEMENTARY NOTICE REGARDING PROPOSED TREATMENT IN CHAPTER 13 PLAN

Debtor(s): _____

Case Number: _____

This letter is being sent as a supplement to the "NOTICE RE: MEETING OF CREDITORS, CONFIRMATION HEARING, AND OTHER RELEVANT MATTERS" that you should have previously received in the captioned Chapter 13 case. The purpose is to further clarify the treatment proposed by the debtor(s) with respect to their alleged debt with you and the underlying collateral.

The schedules and plan filed by the debtor(s) indicates the collateral for the debt is _____,
_____,
and it is proposed the claim be paid as secured to the extent of $_____, with the balance of the claim, if any, treated as a general, non-priority, unsecured claim. The plan further proposes to pay interest on the secured portion of the claim in the manner as set forth below:

( ) _____% or the contract rate, whichever shall be the lesser

( ) Other - _____

Notice is hereby given that you have an affirmative obligation to object to the proposed treatment if you are not in agreement with it. Regulations with respect to the timing and service of objections are to be found in Paragraph III of the "NOTICE RE: MEETING OF CREDITORS, CONFIRMATION HEARING, AND OTHER RELEVANT MATTERS". Your failure to timely object to confirmation could result in the plan being confirmed with treatment of your claim as set forth above. The Court could conceivably, but is not required to, fail to confirm the plan if the proposed treatment of your claim appears overwhelmingly inequitable and/or the Trustee could object to confirmation on the same basis, but this objection would be on a "lack of good faith" basis rather than as acting to assist the potentially aggrieved secured creditor which has failed to act on its own behalf.

Very truly yours,

Standing Chapter 13 Trustee
Western District of Michigan -
Kalamazoo Division