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BANKRUPTCY SALES AND THE SUCCESSOR DOCTRINE

by Robert E. L. Wright *

With increasing frequency, the Bankruptcy Court has become the forum for significant transfers of assets by Chapter 11 debtors and Chapter 7 Trustees. A frequent issue encountered at the closing of those sales involves the doctrine of "successor liability"; usually raised by the purchaser's corporate attorneys. The initial response from the seller's bankruptcy counsel is that a sale "free and clear of liens, claims and interests" is just that: a sale free and clear of any claims held by creditors of the debtor. However, in looking at the issue more closely, it is difficult to find case law directly on point and the paucity of cases is quite remarkable. This article presents a few of those cases which favor the seller's position.

Purchasers point to the language contained in such statutes as MCLA 205.27A(1) which require the purchaser of a business "or its stock of goods" to escrow sufficient money to cover the amount of taxes, interest, and penalties as may be due and unpaid until the former owner produces a receipt from the commissioner or the commissioner's designated representative showing that they are paid, or a certificate stating that taxes are not due." If the purchaser or succeeding purchasers of a business or its stock of goods fail to comply with the escrow requirements of this subsection, the purchaser shall be personally liable for the payment of the taxes, interest, and penalties accrued and unpaid by the business of the former owner." The issue has arisen in connection with pending unfair labor practice charges filed with the National Labor Relations Board ("NLRB") and the imposition of the debtor's Michigan Employment Security Commission ("MESC") tax rate on the purchaser.

Generally, the "successor doctrine" permits the transfer of liability for past conduct of the transferor, to the transferee. Development of the doctrine in bankruptcy cases has primarily occurred in two lines of cases: those involving unfair labor charges and those involving products liability claims.

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One case, In Re New England Fish Co., 19 B.R. 323 (Bankr. W.D. Wa. 1982), held that assets of a debtor's bankruptcy estate, transferred pursuant to a purchase agreement disclaiming any successor liability, could be transferred free and clear of any Title VII employment discrimination and civil rights claims held by the debtor's employees. The court cited extensively from dicta in Nathanson v. National Labor Relations Board, 344 U.S. 25, 73 S.Ct. 80, 97 L.Ed. 23 (1952) which held that NLRB back pay awards are not entitled to priority under the old Bankruptcy Act as a "debt due the United States." The following excerpt from the Nathanson opinion has been quoted repeatedly by courts whenever the issue of priority of claims arises:

> The theme of the Bankruptcy Act is "equality of distribution" (Sampsell v. Imperial Paper Corp., 313 U.S. 215, 219; 61 S.Ct. 904, 907; 85 L.Ed. 1293); and if one claimant is to be preferred over others, the purpose should be clear from the statute. We can find in the Bankruptcy Act no warrant for giving these back pay awards any different treatment than any other wage claims enjoy.

19 B.R. 327.

The case of In Re All American of Ashburn, Inc., 56 B.R. 186 (Bankr. N.D. Ga. 1986) held that a sale of assets free and clear of all claims, precluded application of the successor doctrine against a purchaser of those assets. The court distinguished cases holding that claims which had not matured or arisen prior to the sale could not be subjected to the "free and clear of claims" language. The court examined two underlying policies which militate against successor liability in bankruptcy sales.

The court first reasoned that if a plaintiff asserts a claim grounded on successor liability after a bankruptcy sale, they would in effect receive a priority over those claims which were paid in accordance with the priorities of the Bankruptcy Code. The court found that this 'reordering of priorities' would be inconsistent with the statutory scheme enacted by Congress. The second policy consideration recognized the negative impact which successor liability claims would have on the trustee's ability to sell assets of the estate at a fair price. Both compelled the court to reject the successor liability doctrine:

> There is no suggestion of Congressional intent to apply the successor doctrine to elevate product liability claims above their status under the Bankruptcy Code. In fact, the product liability cause of action asserted by the Lamberts arises out of state law . . . whereas the civil rights claims in [New England Fish Co.] are based on statutes passed by Congress . . . . For these reasons, **the Court finds that the sale of assets to ALS free and clear of all claims precludes the application of the successor doctrine in the Lamberts' product liability suit against ALS.**

56 B.R. 190 (Emphasis added.)

A case from our Circuit dealing with product liability claims is In Re White Motor Credit Corp., 75 B.R. 944 (Bankr. N.D. Oh. 1987). That case held that product liability claims, arising prior to confirmation of the debtor's Chapter 11 plan, were within the scope of the debtor's Chapter 11 discharge and that federal bankruptcy law would preempt any state law imposing successor liability on a purchaser of assets. The court noted that the purchase agreements specifically provided that the purchaser would not assume any liabilities of White for personal injuries or property damage because of alleged negligence,

reach of warranty or any other theory of product liability. However, despite that provision, 35 lawsuits were filed against the purchaser in 19 states.

The court first found jurisdiction to enjoin the pending lawsuits based on its inherent authority to interpret and clarify its prior orders. In considering its authority to authorize the sale of the assets free and clear of the product liability claims, the court reviewed the provision of Section 363(f) for sales "free and clear of any interest in such property of any entity other than the estate". Surprisingly, the court found that "general unsecured claimants including tort claimants, have no specific interest in a debtor's property. Therefore, Section 363 is inapplicable for sales free and clear of such claims." 75 B.R. 948. (Emphasis added.) However, without missing a beat, the court held:

> Absence of specific statutory authority to sell free and clear poses no impediment. This authority is implicit in the court's general equitable powers and in its duty to distribute debtor's [sic] assets and determine controversies thereto. Authority to conduct such sales is within the court's equitable powers when necessary to carry out the provisions of Title 11. The sale in question was in fact conducted under the equitable provisions of Section 105.
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> . . .
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> The court's power to sell free and clear is limited by its authority to affect claims. Its equitable power to sell free and clear must be interpreted consistent with its power to discharge claims under a plan of reorganization . . . A sale conducted through the court's equitable powers can provide the debtor the same degree of relief effected by a sale in a plan of reorganization and, therefore, can affect claims arising prior to confirmation.

75 B.R. 948-949 (citations omitted). Thus, based upon Section 105 and, by analogy Section 1141, the court found that a sale free and clear of liens, claims and interests would bar successor liability claims.

However, the court was not content to stop there and went on to find that Federal bankruptcy law preempts a state law imposing successor liability on purchasers of estate assets. In finding that Federal preemption was warranted, the court stated:

> The Federal purpose of final resolution and discharge of corporate debt is clearly compromised by imposing successor liability on purchasers of assets when the underlying liability has been discharged under a plan of reorganization. . . . Successor liability in these circumstances has, therefore, been pre-empted by the Bankruptcy Code.
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> The effects of successor liability in the context of a corporate reorganization preclude its imposition. The successor liability specter would chill and deleteriously affect sales of corporate assets, forcing debtors to accept less on sales to compensate for this potential liability. This negative effect on sales would only benefit product liability claimants, thereby subverting specific statutory priorities established by the Bankruptcy Code. This result precludes successor liability imposition.

75 B.R. 950-951 (citations omitted).

An indirect blow to successor liability in bankruptcy cases was dealt by the Court of Appeals in the case of NLRB v. Martin Arsham Sewing Company, 873 F.2d 884 (6th Cir. 1989). In that case, the NLRB attempted to impose liability on a corporate officer for fraudulent transfers made prior to the filing of the bankruptcy. The Sixth Circuit upheld the decision of the lower courts precluding the NLRB from avoiding the fraudulent transfers because of its inaction in the bankruptcy case, stating that the NLRB would not be allowed to make an "end run around the Bankruptcy Court's efforts to secure equality of distribution among creditors." Id at 886. Addressing the conflict between the policies of the Bankruptcy Code and those of the National Labor Relations Act, the Court stated:

> The equitable distribution principles of the Bankruptcy Code apply to the NLRB notwithstanding the Board's broad powers to effectuate the public purposes of the NLRA. . . . [T]he Board is entitled to no priority over the claims of other unsecured creditors in the distribution of the debtor's property. . . . To allow a creditor of the bankrupt to pursue his remedy against third parties on a fraudulent transfer theory would undermine the Bankruptcy Code policy of equitable distribution by allowing the creditor "to push its way to the front of the line of creditors."

Id. at 886-887, 888 (Emphasis added; citations omitted). In spite of this holding, some labor attorneys still maintain that the NLRB may impose liability on a purchaser for the seller's violations of the NLRA. (It is this author's hope that they will overcome their myopia and stop interfering with a duly conducted bankruptcy sale!)

One contrary opinion dealing with successor liability for taxes is a state court decision: Beegee, Inc. v. Arizona Department of Economic Security, 690 P.2d 129, 142 Az. 410 (Az. App. 1984). The bankruptcy court's failure to expressly make the sale free and clear of all liens, claims, encumbrances and interests was the Arizona courts' basis for upholding the state's claim against a successor for unpaid unemployment taxes. The order approving the sale merely referred to specific liens held by two secured creditors and failed to reference "all liens, claims, etc." Based upon the rationale of the cases cited previously, it is questionable whether the Beegee case has any application in this Circuit. If so, based upon its narrow facts it would not affect most of the sales in this district where the more expansive language is used.

A much closer question is presented by the transfer of the debtor's MESC "contribution rate" to a successor. This is the subject of a pending appeal to the Sixth Circuit in the case of In re: Wolverine Radio Co., Court of Appeals case #89-2020/2040 (appeal from E.D. Mich 1989). As the author's firm represents the Debtor/Appellant in that action, it would be inappropriate to comment further on the merits of that matter at this time. However, the issue appears to be focused on whether or not the Debtor's MESC unemployment and contribution experience rates are "claims" or "interests" within the meaning of Section 363 and the language of the order confirming the sale "free and clear of liens, claims, etc." A footnote will appear in a subsequent issue once the Sixth Circuit issues a decision.

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 Patrick E. Mears with the assistance of Larry A. Ver Merris.

McAlpine v. Comerica Bank-Detroit (In re Brown Brothers, Inc.), Case No. 1:90-CV-433 (W.D. Mich. March 13, 1991). This decision, authored by District Judge Richard Enslen, arose from an appeal by the attorney for a Chapter 7 trustee, Frank McAlpine ("McAlpine"), from an order of the Bankruptcy Court for the Western District of Michigan disallowing a portion of his attorneys' fees. The debtor, Brown Brothers, Inc. ("Debtor"), commenced a Chapter 11 case in November, 1986. At that time, Comerica Bank-Detroit ("Comerica") held liens in all of Debtor's assets, including general intangibles. In June, 1987, the Bankruptcy Court entered an order approving the terms of a cash collateral stipulation between Debtor and Comerica. The cash collateral stipulation granted to Comerica a replacement lien in Debtor's after-acquired assets and prohibited a surcharge against Comerica's collateral under Section 506(c) of the Bankruptcy Code. This stipulation also provided that Comerica retained its lien in all "recoveries or proceeds from lawsuits filed by the Debtor." Any costs associated with these lawsuits could be paid from the recoveries made only if Comerica consented to such payment.

The Debtor converted its Chapter 11 case to one under Chapter 7 in October, 1988, and Jack Wein was appointed Chapter 7 trustee (the "Trustee"). The Bankruptcy Court entered an order lifting the automatic stay for Comerica's benefit, thereby permitting Comerica to repossess and liquidate its collateral. Trustee thereafter retained McAlpine to represent him in a civil action pending against Debtor in Flint entitled United States v. Brown Brothers (the "Flint Litigation"). This action was subsequently settled by McAlpine and the Trustee pursuant to which the United States paid the Trustee the sum of $127,500. McAlpine had been retained by the Trustee under a contingency fee agreement wherein McAlpine would receive 35% of any gross recoveries plus costs in the Flint Litigation. Consequently, McAlpine filed an application seeking payment of $44,625 in attorneys' fees from the amount paid to the Trustee in that litigation. Comerica objected to this application on various grounds, including (i) McAlpine failed to keep contemporaneous time records documenting his legal services rendered to the Trustee; and (ii) the contingency fee agreement between McAlpine and the Trustee did not comport with the fee guidelines adopted by the Bankruptcy Court. Ruling on McAlpine's application, the Bankruptcy Court agreed with Comerica and denied McAlpine's request for payment under the contingency agreement. However, the Bankruptcy Court awarded McAlpine $38,000 in attorneys' fees as a surcharge under Section 506(c) of the Bankruptcy Code. This sum had been previously offered by Comerica to McAlpine as a settlement of their dispute.

On an appeal by McAlpine, Judge Enslen affirmed the order entered below. Judge Enslen first noted that McAlpine, as the Trustee's counsel, had standing to assert a claim under Section 506(c), adopting the "majority view" on this issue. The issue next addressed by Judge Enslen was whether the 35% contingency agreement was reasonable under Section 506(c). In analyzing this issue, Judge Enslen first stated that the prohibition against surcharge contained in the cash collateral stipulation was unenforceable "in light of the congressional mandate that a trustee have the authority to use a portion of secured collateral for its preservation or proper disposal." Nevertheless, Judge Enslen declared that the requirement contained in that stipulation that Comerica approve payment of these

attorneys' fees was "a factor in determining whether a fee agreement reasonable in a claim for payment under Section 506(c)."

Judge Enslen then held that the Bankruptcy Court was correct in finding that it was unable to determine the reasonableness of McAlpine's attorneys' fees request since McAlpine failed to keep detailed and contemporaneous time records. According to Judge Enslen, this failure violated the fee guidelines adopted by the Bankruptcy Court in August, 1989. Consequently, Judge Enslen held that the court below

> . . . did not abuse its discretion in vacating the contingency agreement between McAlpine and the Trustee and in compensating McAlpine according to the amount determined by Comerica to be reasonable and offered by Comerica to settle the dispute.

Lee v. R. F. Norman Corp. (In re Lee), Case No. 90-CV-71991 (E.D. Mich. Feb. 20, 1991). This decision arises from an appeal from an order entered by Bankruptcy Judge Steven Rhodes permitting R. F. Norman Corp. ("Norman") to file a proof of claim in a Chapter 13 case after debtor's plan had been confirmed and the claims bar date had passed. Norman was the assignee of the Department of Housing and Urban Development ("HUD") which held a mortgage on real property owned by Debtor. The Debtor's matrix filed in the case did not comply with the Eastern District's Local Bankruptcy Rule 107, which required the Debtor to obtain HUD's proper address from the United States Attorney's office. Although HUD did receive notice of the Chapter 13 filing, an incorrect address for HUD was listed on the matrix. On appeal, District Judge Gerald Rosen affirmed the decision below. Judge Rosen noted that the rationale behind the local rule was to insure that the persons responsible for processing bankruptcy claims in governmental agencies receive proper and timely notice of bankruptcy filings.

The Windolph Trust v. Leitch (In re Kent Holland Die Casting & Plating, Inc.), Adversary Proceeding No. 89-0326 (Bankr. W.D. Mich. Mar. 8, 1991). This decision, rendered by Bankruptcy Judge David Nims, addresses the issue of classifying claims for cleanup of hazardous substances on estate property. The plaintiff in this adversary proceeding, The Windolph Trust (the "Trust"), owned a certain parcel of commercial realty on which was located a factory. This realty was leased to Holland Die Casting & Plating, Inc. ("Holland") pursuant to the terms of a certain lease dated December 8, 1977 (the "1977 Lease"). Paragraph 5 of the 1977 Lease required Holland to maintain the factory building in good repair during the lease term. On June 7, 1985, the Trust and the "Debtor" (viz., Holland or Kent Holland Die Casting & Plating, Inc., or both) entered into a new lease agreement (the "1985 Lease"). This lease contained a similar provision requiring Debtor to maintain the building in "good repair." Debtor remained in possession of this realty until October 16, 1985. From that date until August, 1989, Debtor occupied only a portion of the building for the storage of barrels.

From 1977 through October 1, 1985, Debtor manufactured plate die castings at this factory. In this process, Debtor used hazardous substances and discharged them into the environment via a wastewater system. Sludge that built up in this system was required to be removed in order for the system to function properly. Debtor failed to do so and, as a result, some of the contaminated water spilled across a portion of the realty owned by the Trust. After Debtor commenced a Chapter 11 case on December 7, 1983, and until October 1, 1985, Debtor operated this factory and generated additional wastewater. After Debtor's Chapter 11 case was converted to one under Chapter 7, the trustee, Douglas Leitch (the "Trustee"), did not operate the factory nor did he generate any wastewater.

In February, 1984, Debtor received notice from the U.S. Environmental Protection Agency ("EPA") that the realty was contaminated with hazardous

ıbstances. The EPA then initiated an administrative action against Debtor to dentify wastes, monitor the groundwater, and to obtain other relief. When Debtor ceased business operations in October, 1985, there remained on the property 120 55-gallon drums containing hazardous substances. The EPA determined that these barrels created an imminent danger to the public and compelled the Trust to test the barrels for a determination of their contents.

In February, 1986, the Michigan Department of Natural Resources ("DNR") notified the Trust that the factory was contaminated, focusing upon the tanks and lagoons holding wastewater and the pits inside the factory building. The DNR also cited the barrels mentioned above. The Trust thereafter disposed of the drums at a cost in excess of $50,000. These barrels had never been abandoned by the Trustee nor had the Trustee entered into an agreement with the Trust for their storage or removal. The Trustee also never took any action to clean up the site.

In February, 1988, the EPA commenced an action against the Trust to compel the cleanup of the site. The DNR intervened as a plaintiff in that action. At the time this opinion was written, this litigation was in the discovery phase. The cost to clean up the site has been estimated at $600,000.

In the Debtors' jointly administered Chapter 7 cases, the Trust filed a request for payment of the following administration expenses: (i) rent from March 1, 1986, forward for the items of personal property stored at the site in an amount not less than $25,000; (ii) cleanup expenses in an amount not less than $350,000 arising from the dumping of waste on the site since December 7, 1983; and (iii) cleanup expenses for the removal of contaminated personal property in an amount not less than $35,000. The Trustee and the Trust stipulated as to the foregoing facts and requested the Bankruptcy Court to determine the estate's liability for these claims. Issues regarding the amount of the claims would be tried later. Prior to this decision being issued, the Trust and the Trustee settled the claim for rent.

In his opinion, Judge Nims first noted that the stated bases for the Trust's administrative expense claims were (i) federal environmental laws; (ii) contract obligations not to commit waste; and (iii) negligence. After discussing in detail recent decisions addressing the interplay of federal environmental and bankruptcy laws, Judge Nims concluded that the Trust was entitled to a Chapter 7 administrative expense claim for the $50,000 cost to remove the barrels never abandoned by the Trustee. With respect to the Trust's other claims for contribution to the cleanup expenses, Judge Nims declared that those claims were contingent and, therefore, were disallowed under section 502(e)(1)(B) of the Bankruptcy Code.

Judge Nims then addressed the Trust's argument that its claims were entitled to administrative expense status based upon the contractual obligation to keep the property free from waste. The opinion noted that Debtor's confirmed Chapter 11 plan assumed the 1977 Lease which obligated Debtor to maintain the premises in a clean and healthy condition. The 1985 Lease contained a similar provision. The Trust argued that, since the Debtor breached these lease provisions, the Trust is entitled to an administrative expense claim for the cleanup costs arising from that breach. Judge Nims rejected this argument, stating that any such claims arising from a breach during the Chapter 7 phase of this case prior to the Trustee's return of the site to the Trust were limited to the rental value of the premises. This rent claim had been settled by the parties, however. Any cleanup costs associated with the generation of waste while the case was in Chapter 11 would be treated as Chapter 11 administrative expense claims and any claims arising from prepetition contamination were classified as general unsecured claims.

Finally, Judge Nims found that the Debtor was negligent in failing to remo sludge and in failing to remove the barrels of waste from the site. Claim arising from these omissions are entitled to Chapter 11 administrative expense priority. Since the stipulated facts were unclear as to any negligence by the Trustee, this issue was reserved for later determination along with the issue of the amount of the Trust's claim.

In re Mayville Feed & Grain, Inc., 123 Bankr. 245 (Bankr. E.D. Mich. 1991). In April, 1986, Mayville Feed & Grain, Inc. (the "Debtor") commenced a case under Chapter 7 of the Bankruptcy Code with the United States Bankruptcy Court for the Eastern District of Michigan. A claims bar date of August 4, 1986, was fixed in this case. On September 19, 1986, the State of Michigan filed a proof of priority unsecured claim in the sum of $6,999.70. On October 24, 1986, the Michigan Employment Security Commission ("MESC") filed a proof of priority unsecured claim in the amount of $2,465.59. Neither the State nor the MESC were listed on the matrix filed in the case. The Chapter 7 trustee objected to these claims since they were filed after the bar date. Neither the State nor the MESC appeared at the hearing on these objections.

In his decision overruling the trustee's objection and allowing these claims, Bankruptcy Judge Arthur Spector assumed that neither the State nor the MESC received notice of the bankruptcy filing in time to file a proof of claim before the bar date passed. Relying upon the Sixth Circuit's recent decision in United States v. Cardinal Mine Supply, 916 F.2d 1087 (6th Cir. 1990), Judge Spector allowed these claims.

In re Idalski, 123 Bankr. 222 (Bankr. E.D. Mich. 1991). In an extensively researched opinion, Bankruptcy Judge Arthur Spector denied the motion of the Chapter 7 trustee to compel two debtors, husband and wife, to turn over $5,166.23, which represented "the total voluntary pre-petition payments, with interest, paid by Stephanie Idalski [one of the Debtors] to the Genesee County Employees Retirement System." This sum was paid over to Ms. Idalski when she terminated her employment post-bankruptcy. Judge Spector held that the anti-alienation provisions contained in Ms. Idalski's ERISA-qualified plan constituted "applicable nonbankruptcy law" within the meaning of section 541(c)(2) of the Bankruptcy Code. Thus, her interest in that plan was held to fall outside the category of "property of the estate."

In re Dennis L. Alden and Kathy L. Alden, 123 Bankr. 563 (Bankr. E.D. Mich. 1991). This opinion by Bankruptcy Judge Arthur Spector addressed the issue of whether Union Federal Savings Bank was entitled to payment of its unsecured claim for attorneys' fees incurred prepetition for the commencement of mortgage foreclosure proceedings on a debtor's home.

On December 28, 1989, Union Federal Savings Bank ("Bank") initiated mortgage foreclosure proceedings against the Aldens' home. The Aldens ("Debtors") filed a joint bankruptcy petition under Chapter 13 on January 18, 1990, thereby staying the Bank's action. The Bank then timely filed a proof of claim in the total amount of $735.60--$235.60 for foreclosure costs and $500 for attorneys' fees. The Debtors objected to this claim.

The Bank eventually conceded that $100 of the attorneys' fees were not allowable under 11 U.S.C. 506(b) and that the remaining $635.60 was allowable, if at all, only as an unsecured claim. In response, the Debtors conceded that the foreclosure costs of $235.60 were recoverable by the Bank pursuant to the terms of the mortgage agreement. Nevertheless, the parties could not agree to the allowableness of the remaining $400 of the prepetition attorneys' fees.

In his detailed analysis, Judge Spector first examined the so-called American Rule regarding attorneys' fees in foreclosure proceedings. This rule states

at, absent a statutory provision or a contractual stipulation, the Court annot award attorneys' fees against the mortgagor in favor of the mortgagee. The Court then observed that the mortgage agreement contained a provision that allowed the Bank to retain from the proceeds of the foreclosure attorneys' fees provided for by statute. M.C.L.A. § 600.2431 provides that attorneys' fees may be included in the amount bid upon in the foreclosure sale as part of the expenses of such sale. The statute also provides that (i) for all sums of $1,000 or less bid at the sale, the allowable attorneys' fees would be $25; (ii) for sums over $1,000 but under $5,000, the attorneys' fees would be $50; and (iii) for all sums of $5,000 or more, the attorneys' fees would be $75. However, if payment is made after foreclosure proceedings are commenced but before the sale, only one-half of the attorneys' fees will be allowed.

The Bank argued that this statute did not control for the following reasons:

1. A federal regulation under the National Housing Act ("NHA"), 12 U.S.C. 1701 et. seq., entitled the Bank to recover fees in excess of the amount specified by M.C.L.A. § 600.2431.

2. The regulation was expressly incorporated into the agreement between the parties due to the existence of a legend stating that the form used was in connection with mortgages insured under the NHA and in accordance with the regulations for the programs under that act.

3. Even if not expressly incorporated, the regulations must be deemed by implication to constitute part of the agreement.

Judge Spector rejected each of these arguments stating that the section of the regulation referred to by the Bank related to the collection of consensual attorneys' fees. When referring to nonconsensual attorneys' fees, the regulation specifically states that certain kinds of attorneys' fees may be recovered where permitted by the security instrument. Thus, because the agreement only contemplated the payment of attorneys' fees allowed by statute and Michigan law establishes a statutory maximum for nonconsensual fees, the reasonable and customary fees permitted by the regulation could not exceed that amount.

The Court also ruled that there was nothing in the agreement that would indicate that the terms of the mortgage would be in accordance with the regulations for those programs enacted under the NHA. Consequently, there were no provisions that would have put Debtors on notice that they were agreeing to terms outside the four corners of the instrument itself.

The Court additionally decided that the regulation was not meant to preempt state law for two reasons. First, there was no evidence of congressional or administrative intent to displace state law. This conclusion was further supported by the fact that Congress expressly preempted state law with respect to other matters covered by the NHA. Judge Spector also found no conflict existed between the regulation and the statute.

The final issue decided by the Court was whether the regulation constituted "applicable law" for purposes of 11 U.S.C. 502(b). The Court first noted that the statute, by its terms, appeared to be referring to such "applicable law" as would render a claim for these fees unenforceable, in whole or in part. Furthermore, the Court was convinced that the regulation was not designed as a mechanism for salvaging an otherwise invalid claim for attorneys' fees. Since foreclosure proceedings had not been concluded due to the Chapter 13 filing, the Bank was only entitled to $37.50 in attorneys' fees or half of the allowable statutory amount.

CORRECTIONS

Although the summary of In re Winkler which appeared in the February, 1991 Newsletter is correct, the Office of the U.S. Trustee has alerted me to a few facts of which you should take note:

1. First of all, the U.S. Trustee's Office has appealed the Winkler decision to the United States District Court for the Eastern District of Michigan. The matter is pending in the District Court under Case No. 91-CV-70383-DT and is assigned to Judge Bernard A. Friedman.

2. The decision of Bankruptcy Judge Graves, although stayed by his subsequent Order of January 24, 1991, would probably be limited in scope to practice in the Bankruptcy Court for the Eastern District of Michigan as Judge Graves' ruling was grounded, in part, on Eastern District of Michigan Local Rule 2.08.

3. The appeal made by the Office of the U.S. Trustee will address the apparent conflict between Eastern District of Michigan Local Rule 2.08 and Bankruptcy Rule X-1008(c) as well as Judge Graves' decision that the U.S. Trustee was a "person" under the Bankruptcy Code.

The above-stated information is provided for clarity purposes only. Neither this Newsletter nor its editor take any position regarding Judge Graves' decision or the merits of the pending appeal.

Larry A. Ver Merris

STEERING COMMITTEE MEETING MINUTES:

A meeting was held on March 15, 1991 at noon at the Peninsular Club.

1. Brett Rodgers indicated that a total of $1,310.00 had been collected to date toward furnishing the attorney lounge on the 7th floor of the Federal Building. Other pledges are expected to be received shortly. If you have previously made a pledge toward this worthy project, please forward your pledged amount to Mr. Rodgers. If you have not yet made a pledge, please consider doing so.

2. Discussion was had regarding the August 15 - 17 Seminar at Shanty Creek. The course agenda and speakers have been established. For entertainment, Jim Engbers indicated that the golf course at Schuss Mountain has been reserved for the afternoon of Friday, August 16, 1991. More information will follow in a later Newsletter concerning making reservations for the Seminar, accommodations, and signing up for other leisure activities.

3. Brett Rodgers reported that the Bankruptcy Section will be sponsoring a Judges Reception at the Sixth Circuit Conference which is scheduled to be held in the Traverse City area on June 11, 1991.

4. Your editor has received approval to utilize a different printer and format assuming a product of similar quality can be produced.

5. The next Steering Committee meeting will be held on April 19, 1991 at noon in the Gold Room 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 February 28, 1991. These filings are compared to those made during the same period one year ago, and two years ago.

	1/1/91 - 2/28/91	1/1/90-2/28/90	1/1/89-2/28/89
Chapter 7	851	586	489
Chapter 11	31	18	22
Chapter 12	2	0	1
Chapter 13	316	269	221
Totals	1,200	873	733

FROM THE BANKRUTPCY COURT:

NOTICE

ON AND AFTER MAY 1, THE BANKRUPTCY COURT WILL BE OPEN FROM 8:00 AM TO 4:30 PM. PLEADINGS LEFT AT THE COURT AFTER 4:30 PM WILL BE STAMPED AND FILED ON THE NEXT BUSINESS DAY.

PRACTICE POINTER

Many law firms send staff members to the court carrying orders and other pleadings with instructions to take these documents directly to a judge's office for execution. The court is well aware that emergencies occur which require such expedited treatment, but absent such an emergency, this is a practice which we would like to discourage. In order to insure that documents are docketed, processed and routed to the proper person, it is important to file them with the clerk's office. Should an emergency arise, the person who brings the pleading to the court should be instructed to take the document first to the clerk's office where it will be time stamped, then to the judge's office for execution. If this procedure is not followed, it is possible (indeed likely) that a document will be delivered, executed and then filed on a later date. This could create serious questions about when the document should be entered.

PROCEDURE MEMORANDUM
REOPENING CLOSED BANKRUTPCY CASES

Debtors and other parties in interest often seek to reopen bankruptcy cases after they have been administratively closed by the court. This is often done to add creditors, to seek approval of reaffirmation agreements, or to disburse newly discovered assets in a case. Once closed, the only pleadings which will be accepted and docketed in that case will be the petition to reopen the case and any contemporaneously filed documents. Here is the procedure for reopening a case.

FEE -- 28 USC 1930(a) requires the court to collect a filing fee equal to the fee for filing a new case in that chapter. Therefore, the fee for reopening a chapter 7 or 13 case is $120.00, $200.00 for a chapter 12 or $500.00 for a chapter 11 case. However the fee can be waived if the reopening is to "correct an administrative error or for actions related to the debtor's discharge."

The judges will decide when to waive the fee. When a petition to reopen a case is received by the court, it will immediately be sent to docketing. If a fee is sent to the court, it will be returned with a copy of this memorandum. Once docketed the petition will be sent to the appropriate judge. If the judge feels that the petition establishs good cause for reopening the case without further notice to parties in interest, he will sign an ex parte order (which will be supplied by his secretary) reopening the case and either waiving the fee or requiring that the fee be paid. If the judge feels a hearing is necessary, the petition will be sent to his/her calendar clerk.

Copies of those orders which require payment of the reopening fee will be sent to the financial deputy of the court. The financial deputy will notify the clerk of any cases in which a fee for reopening a case is not paid.

DOCKETING --A petition to reopen a closed case will be immediately docketed in the case, together with any other pleadings filed (e.g., reaffirmation agreement, motion to amend creditor list, etc.) contemporaneously. Documents which are filed prior to a hearing on a petition to reopen or order will also be docketed.

HEARING -- Calendar clerks will schedule hearings on motions to reopen closed cases only when the assigned judge does not sign an ex parte order reopening the case or when the judge deems such a hearing to be necessary. Notice of such hearing shall be given to the debtor, attorney for the debtor, trustee (if any), US Trustee, and any creditors affected by this action.

ORDERING CLOSED FILES FROM ARCHIVES IN CHICAGO -- If a case is closed and the case file has already been sent for storage in the Chicago archives, the moving party shall contact the court to order the file and shall pay any necessary fee (currently $25.00). The calendar clerk will determine, after consultation with the judge assigned to the case, whether it is possible to schedule a hearing to reopen a case before the case file has been returned to this Court.

RECLOSING THE CASE -- Cases which are opened for limited purposes should be closed as soon as soon as practicable after that purpose is met. The closing/audit clerks shall develop a system for monitoring reopened cases to ensure that they are closed quickly.

(NOTICE)