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PROBLEMS TO COME WITH REAFFIRMATION AGREEMENTS

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Reaffirmation agreements run contrary to the primary goal of bankruptcy. Congress, therefore, has established very specific steps to be followed by the parties involved with the reaffirmation process. If all of the steps are not followed, then the reaffirmation agreement becomes unenforceable. In the Western District of Michigan the Bankruptcy Court waives the step of the Debtor attending a hearing on the reaffirmation, if the Debtor is represented by counsel and the procedural steps of Local Rule 20(b) are followed. Some bankruptcy courts have taken the position that the failure of the Debtor to attend a hearing on the reaffirmation makes the reaffirmation agreement unenforceable. This article will review cases on both sides of the issue of whether the waiver of the hearing set forth in 11 USC §524(d) by the Western District's Bankruptcy Rule 20(b) invalidates the reaffirmation agreements filed with the Bankruptcy Court.

The pertinent portion of Section 524 which causes some courts to determine a hearing upon the reaffirmation must still be held is 11 USC §524(d) which states:

" In a case concerning an individual, when the court has determined whether to grant or not to grant a discharge under Section 727, 1141, 1228, or 1328 of this title, the court may hold a hearing at which the Debtor shall appear in person. At any such hearing, the court shall inform the Debtor that a discharge has been granted or the reason why a discharge has not been granted. If a discharge has been granted and if the Debtor desires to make an agreement of the kind specified in subsection (c) of this section [reaffirmation agreement], then the court shall hold a hearing at which the Debtor shall appear in person and at any such hearing the court shall --

(1) inform the Debtor --

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(A) that such an agreement is not required under this title, under nonbankruptcy law, or under any agreement not made in accordance with the provisions of subsection (c) of this section; and

(B) of the legal effect and consequences of --

(i) an agreement of the kind specified in subsection (c) of this section; and

(ii) a default under such an agreement;

(2) determine whether the agreement that the Debtor desires to make complies with the requirements of sub-section (c)(6) of this section, if the consideration for such agreement is based in whole or in part on a consumer debt that is not secured by real property of the Debtor. "

The local bankruptcy court holds a hearing only under the following circumstances:

(1) The Debtor is not represented by an attorney;

(2) The Debtor or the Debtor's attorney has not complied with the requirements of paragraph (b);

(3) Despite the compliance of the Debtor and the Debtor's attorney with paragraph (b) below, the Court nonetheless desires further proofs or argument; or

(4) The reaffirmation agreement was entered into after the granting of the Debtor's discharge.

Paragraph (b) refers to language requirements which are included in the local Bankruptcy Court Form B240 which is Exhibit 6 to the local bankruptcy rules.

Section 524(d) Cases

In 1988 the United States Court of Appeals for the Fourth Circuit determined that §524 of the Bankruptcy Code requires the bankruptcy court to hold a hearing and personally admonish the Debtor concerning reaffirmation agreements, including informing the Debtor of the consequences of the agreement and that the agreement is not required under Bankruptcy Code or any other law. Arnold v. Kyrus, 851 F.2d 738 (4th Cir, 1988). While the reaffirmation agreement in Kyrus predated the 1984 and 1986 amendments to §524, the court in footnotes to the text stated that even under the 1984 and 1986 amendment to §524, the Debtor must still appear in court for admonitions that the Debtor is not required to make reaffirmations.

The Kyrus logic has been followed by some bankruptcy courts with reaffirmations entered into subsequent to the 1984 and 1986 amendments. In re: Saeger, 119 B.R. 184, 187 (Bankruptcy D. Minn. 1990); and In re: Churchill, 89 B.R. 878, 879 (Bankruptcy D. Colo. 1988); In re: Fisher, 113 B.R. 714 (Bankruptcy N.D. Okla. 1990).

In Saeger a reaffirmation agreement entered into on a second mortgage was held unenforceable due to the failure of the court to hold a hearing at which the bankruptcy court should have informed the Debtor of

is options concerning the bankruptcy agreement. A brief review of the history of §524 is given in Saeger as follows:

> " Prior to 1984, the Bankruptcy Code mandated court approval of most reaffirmation agreements. Arnold v. Kyrus, 851 F.2d 738, 740 n. 2 (4th Cir. 1988). This paternalistic court approval provision was designed to protect unwitting debtors from creditors' influence to reaffirm a dischargeable debt. Arnold at p 740 n. 2
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> The 1984 amendments to the Bankruptcy Code required the Debtor to appear in court for 'admonitions'. Arnold, at 740 n. 1. Court approval was no longer required but the statute did require the court to inform the Debtor that the Debtor was not legally obligated to make the reaffirmation agreement. Arnold, at 740 n. 1. The 1984 amendments demonstrate that Congress intended that the court continue to regulate reaffirmation agreements to protect the Debtor's interest. Arnold, at 740 n. 2.
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> In 1986, §524(d) was amended again. The amendments gave the court discretion to hold discharge hearings but still mandated hearings under §524(c). In re Oliver, 99 B.R. 73, 77 (Bkrtcy. W.D. Okla. 1989). The main thrust of the 1986 amendments was to eliminate the routine holding of hearings but to retain them when Debtors were reaffirming debts.
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> The structure and the language of §§524(c)(5) and 524(d), even after the 1986 amendments, demonstrate Congress' intent to have the court inform the Debtor of the Debtor's options with regard to reaffirmation agreements in order for those agreements to be valid and enforceable. Arnold, at p. 740.
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> If a creditor wants to be sure reaffirmation agreements are binding, the creditor must ensure that the Debtor be informed of the Debtor's options as required by §§524(c)(5) and 524(d). In re Churchill, 89 B.R. 878, 879 (Bkrtcy. D. Colo. 1988). "

In re: Saeger, supra, at 187.

In re: Churchill, supra, required a reaffirmation hearing for the agreement to be enforceable. The court bluntly said:

> " The elements of §524 are statutory and, even if some of them seem redundant, superfluous, or even a waste of time and resources, such elements are, nevertheless, required by Congress. Courts are not to rewrite the laws, but to enforce them as written. If creditors want binding reaffirmation agreements, they must ensure that their debtors appear and be advised as required by §§524(c)(5) and (d). "

In re: Churchill, at 879.

If an agreement of reaffirmation is held unenforceable, the creditor cannot pursue collection of the underlying debt. But what of monies paid to the creditor? Should a Debtor be entitled to return of monies

paid under an unenforceable reaffirmation agreement? What of the depreciation of the security?

In the case of In re: Fisher, 113 B.R. 714 (Bkrtcy. N.D. Okla. 1990) a reaffirmation agreement securing a car loan was held unenforceable due to the Debtor's failure to attend the discharge hearing. The court further required the creditor to turn over to the Debtor's Chapter 13 Trustee all payments made under the unenforceable agreement. The Debtor was represented by counsel and an attorney declaration had been filed with the court.

The Eastern District of Michigan has held that a secured creditor is not obliged to refund payments made by the Debtors pursuant to an informal reaffirmation agreement. LaFave v. Ford Motor Credit Co., 9 B.R. 859 (Bkrtcy. E.D. Mich. 1981). Certainly an invalid reaffirmation is akin to an informal reaffirmation and should be given like deference.

Another judge in the Western District of Oklahoma under circumstances similar to Saeger held that the Debtor's failure to attend the discharge hearing did not violate the reaffirmation agreement. The case is In re: Sweet, 116 B.R. 283 (Bkrtcy. W.D. Okla. 1990). In a well-reasoned approach, Judge Richard L. Bohanon admits that §524 is confusing and contradictory concerning the requirement of attendance at a reaffirmation hearing. Judge Bohanon acknowledged the Kyrus case and other cases from other districts which concur with Kyrus' rationale, yet refused to follow the cases.

In Sweet, the Debtors executed a reaffirmation agreement on an auto loan, filed an attorneys declaration, but failed to attend the hearing on the reaffirmation. The Debtors made installment payments on the debt for some two years, defaulted on the car loan and then requested the court to rule the reaffirmation agreement was unenforceable. Estoppel, depreciation of the car, and abuse of the reaffirmation system were factors reviewed by the court in making its decision.

In the case of In re: Richardso 102 B.R. 254 (Bkrtcy. M.D. Fla. 198 the court held that the Bankruptc Code still required a reaffirmatio hearing to hold the reaffirmatior agreement enforceable. The Debtor, Richardson, lost in his bid to have the agreement declared invalid, however, because of estoppel. It appears that the Debtor took $3,004.50 in cash advances from a credit card within 20 days before filing bankruptcy. The bankruptcy judge utilized the estoppel concept to bar the Debtor from taking advantage of the Kyrus principle.

Conclusion

The Kyrus case should not be followed in this district as its abuse potential is great. While §524 is confusing, the bankruptcy court should apply common sense in the application of reaffirmations. Congress should review §524 and eliminate the confusion on this issue. Creditors in the future may discover they have an unenforceable agreement, however, without a hearing.

FROM THE BANKRUPTCY COURT:

NOTICE

EFFECTIVE JUNE 3, 1991, THE BANKRUPTCY COURT WILL NO LONGER RETURN A TIME STAMPED COPY OF FILED PETITIONS AND SCHEDULES UNLESS AN APPROPRIATE SIZE, SELF-ADDRESSED, STAMPED ENVELOPE IS PROVIDED.

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.

In re Zick, Case No. 90-1376 (6th Cir. May 3, 1991). This opinion authored by Sixth Circuit Judge Harry W. Wellford is based on a principal creditor's motion to dismiss a Chapter 11 bankruptcy petition under 11 U.S.C. § 707(a).

David Zick was a former employee of Industrial Insurance Services ("IIS") who signed a nonsolicitation agreement with IIS which provided that he would not take IIS's trade secrets or solicit customers of the company for himself upon termination or separation. The following year Zick left IIS and started his own company in competition and solicited its former customers. A mediation award of $600,000 was rendered to IIS on its claim. A few days later, Zick filed a Chapter 7 bankruptcy petition. IIS objected to the dischargeability of its debt under Zick's Chapter 7 petition and moved to dismiss Zick's bankruptcy alleging that it was brought in bad faith based on data in the Chapter 7 filing itself. The Bankruptcy Court granted the motion and the District Court affirmed. Zick moved for stay pending appeal in the Bankruptcy Court which was denied, and in the District Court which was also denied. This appeal from denial of dischargeability of the IIS debt ensued.

The Court determined that the word "including" as used in 11 U.S.C. § 707(a), was not meant to be a limiting word. The Court was persuaded that there was good authority for the principle that a lack of good faith is a valid basis for decision in a "for cause" dismissal by a Bankruptcy Court. Even though Chapter 7 of the Bankruptcy Code does not explicitly make good faith a requirement for voluntary liquidation petitions, good faith has evolved as a threshold requirement in all bankruptcy cases although primarily under Chapters 11 and 13.

The Court then went on to examine Zick's claim that the Bankruptcy Court abused its discretion under the circumstances of the case. The Court found particular merit in what it described as the "smell test" in Morgan Fiduciary, Ltd. v Citizens and Southern International Bank, 95 B.R. 232 (S.D. Fla. 1988). The factors relied on by the Bankruptcy Court were (i) the Debtor's manipulations which reduced the creditors in this case to one; (ii) the Debtor's failure to make significant lifestyle adjustments or efforts to repay; (iii) the fact that the petition was filed clearly in response to IIS's obtaining a mediation award; and (iv) the unfairness of the Debtor's use of Chapter 7 under the facts in this case. The Court believed that the factors noted by the Bankruptcy Court were sufficient to support its findings of bad faith.

Next, the Court considered Zick's argument that the Bankruptcy Court erred because it did not conduct a full-blown evidentiary hearing on the dismissal motion. Zick relied on Section 707(a) which states that a court may dismiss a case under this chapter only after notice and a hearing. Zick claimed that he was not given the opportunity to present his defense brought by IIS's motion to dismiss. Judge Wellford found that the Bankruptcy Court questioned Zick's counsel as to why Zick had made no effort to repay his debt to IIS which gave Zick an explicit opportunity to address this issue. He also declined the opportunity to respond through further evidence. Therefore, the Court indicated that it could not fairly be said that Zick did not have notice or an opportunity to present evidence. He also had the opportunity to present pleadings or an

affidavit in opposition and to respond to the Court through his counse Therefore, the Court held that under those circumstances, the formalities of full-blown evidentiary hearing were not required.

The Court concluded by saying that it was permissible on the record to attribute bad-faith motivation to pre-petition activities of the Defendants in a malicious breach of a non-competition agreement situation. Based on several entries on his petition, it was not an abuse of discretion to conclude that the factors found in this case amounted to a lack of good faith on the part of Zick.

In Re: Chattanooga Wholesale Antiques Incorporated, Case Nos. 89-6416 and 89-6417 (6th Cir. April 10, 1991). This opinion authored by Senior Circuit Judge Pierce Lively involves a Chapter 7 Trustee's right to recover preferential and unauthorized payments made by the Debtor in Possession under Chapter 11 prior to conversion of the case to a Chapter 7 proceeding.

Chattanooga Wholesale Antiques Incorporated ("Debtor") filed its petition in bankruptcy under Chapter 11 on October 7, 1982 and continued to operate the business as Debtor-in-Possession. When the Chapter 11 petition was filed, the Debtor's Schedule A-3 indicated an unsecured debt to the bank in the amount of $72,000. The debt was not listed as disputed, contingent or unliquidated. It stemmed from two promissory notes that were personally guaranteed by the president of the Debtor corporation. The notes were listed as "purchase inventory continuing guarantee - operating funds" of the Debtor as security.

Less than 90 days prior to the petition, the Debtor issued two checks to the bank totalling $10,571. Fourteen days after the petition was filed, the Debtor issued a third check to the bank in the amount of $4,061.

The Debtor and the bank later entered into a stipulation authorizing the use of cash collateral and adequate protection, which stated that the bank held valid security interests in the Debtor's cash collateral to secure an outstanding obligation to the bank of $75,490. The Stipulation permitted the Debtor to use its pre-petition cash account and all cash generated by the Debtor during post-petition operation of the Debtor's business. In return, the bank received a valid and enforceable first lien and security interest in the Debtor's inventory. The stipulation was approved by the Bankruptcy Court and an order was entered implementing the agreement.

Later, the Debtor filed its Plan of Reorganization. Although the bank had never perfected its inventory lien, Article III of the plan listed the bank as a secured creditor with a security interest in inventory. The Debtor's plan was noticed out to all creditors and the Bankruptcy Court determined that the plan had been accepted and entered an Order of Confirmation. Payments to the bank continued under the confirmed plan until conversion of the case to Chapter 7. These post-confirmation payments totalled $30,600. The bank filed its proof of claim on September 1, 1983, more than five months after the bar date established in the confirmed plan.

Following conversion of the case to Chapter 7, the Trustee initiated an adversary proceeding against the bank claiming the bank's security interests and the Debtor's inventory had not been perfected and was therefore subject to the Trustee's avoidance powers in the Chapter 7 proceeding. The Bankruptcy Court ruled in the Trustee's favor.

Immediately thereafter, the Trustee filed another action in Bankruptcy Court seeking to recover all pre- and post-petition payments to the bank under 11 U.S.C. §§547(b) and 549(a). The Bankruptcy Court ruled that the pre-petition payments could be avoided as preferential transfers under Section 547(b) and the District Court affirmed the Bankruptcy Court's ruling. The Bankruptcy Court

also determined that the $4,061 post-petition pre-confirmation payment was unauthorized and could be recovered by the Trustee. The District Court reversed the Bankruptcy Court's ruling. The bank appealed both decisions. The Bankruptcy Court also found that the $30,600 in post-confirmation payments were authorized and could not be recovered. The District Court affirmed the Bankruptcy Court's ruling and the Trustee appealed that decision.

Examining the issue of whether the Trustee could avoid transfers which occurred after confirmation of the Debtor's plan, the Court noted that under Section 1141(b), "The confirmation of a plan vests all of the property of the estate in the Debtor." Thus, at the time the monthly payments were made to the bank the property of the estate had been revested in the Debtor as Debtor-in-Possession and was no longer "property of the estate." Therefore, Section 549(a) which expressly applies only to the property of the estate does not apply to the situation enumerated here. Since all of the Debtor's property revested, the Court found that the Trustee could not avoid any transfers which occurred after confirmation of the Debtor's plan. The Court went on to say that even if the Order of Confirmation did not revest the property in the Debtor, the Trustee's arguments for nullifying the specific provision of the confirmed plan dealing with the bank's claim, would be unavailing. The mischaracterization of the bank's debt in the plan should have been raised at the confirmation hearing. The same was true of the Trustee's contention that the bank failed to file its claim before the cut-off date.

The Court then analyzed the question of whether the Trustee could recover the post-confirmation payments to the bank by attacking the propriety of the confirmed plan. The Court noted that Section 1141(a) lists the categories of parties who were bound by the terms of a confirmed plan. The effect of confirmation under the plain language of this section is to bind all parties to the terms of reorganization. The Court stated that the parties most affected by the plan, the unsecured creditors, accepted the plan. Confirmation of a plan of reorganization by the Bankruptcy Court has the effect of a judgment by the District Court and res judicata principals bar relitigation of any issues raised or that could have been raised in the confirmation proceedings.

The Court then addressed the issue of whether the Trustee was entitled to recover the post-confirmation payments under Section 502(j) which states that before a case is closed, the claim that has been allowed may be reconsidered for cause and reallowed or disallowed. The Court found that when property revested in the Debtor, the binding effect of the confirmation order as provided in Section 1141(a) would be rendered meaningless if the Trustee could recapture payments made pursuant to the order. Section 502(j) was not intended to provide an avenue of fact on the finality of a binding order of confirmation.

Finally, the Court addressed the issue of the $4,061 payment to the bank after the filing of the bankruptcy petition but before the confirmation of the plan of reorganization. The Court found that the Trustee satisfied the three requirements of Section 549(a) for avoiding this transfer: (1) the transfer involved property of the estate, as it occurred before confirmation of the plan revested the estate property in the Debtor; (2) the transfer occurred after commencement of the case; and (3) the transfer was not authorized by any provision of the Bankruptcy Code or by the Court.

In re Zwagerman, Case No. 1:90-CV-736 (W.D. Mich. April 4, 1991). This opinion by District Court Judge Robert Holmes Bell involved consolidated appeals from a decision of the Bankruptcy Court in an action arising out of the bankruptcy of Gordon and Joan Zwagerman, d/b/a Zwagerman Farms ("Debtors").

The Trustee and Comerica Bank-Detroit ("Comerica") appealed the Bankruptcy Court's decision that at the time the Debtor's filed their bankruptcy petition

all cattle in the Debtor's possession belonged to David Bradley, d/b/a/ the R River Company and were not subject to the security interest of Comerica as t cattle were not part of the bankruptcy estate. The Trustee also appealed th Bankruptcy Court's determination that Zwagerman's payments to Bradley during th period commencing 90 days prior to the date of the filing of the petition were not subject to avoidance as preferential transfers.

Since 1969 the Debtors operated a farm where they fattened hogs and cattle and sold them for slaughter. Beginning in November of 1981 until the filing of their Chapter 7 bankruptcy petition on December 30, 1985, the Debtors engaged in a practice known as custom feeding. The Red River Company would furnish cattle under fattening agreements and Zwagerman would feed the cattle until they weighed approximately 1100 lbs., after which time Zwagerman would sell the cattle as Bradley's agent at an agreed upon price. Upon sale, the proceeds were to be delivered to Bradley, and Zwagerman would be paid for the poundage the cattle gained after delivery.

When Bradley's first shipment came to the Zwagermans, there were other cattle on the farm belonging to Zwagerman. There were no marks to differentiate between the cattle. Periodically during the next four years, the Zwagermans purchased some cattle from others, including Bradley.

In 1983, Comerica refinanced a loan to Zwagerman and extended further credit on the assumption that Zwagerman was the owner of all the cattle on his farm despite the fact that one of the earnings worksheets showed Custom Cattle as an entry separate from cattle.

From November 1981 to December 1985, Bradley shipped over 8,204 cattle to Zwagerman under fattening agreements. Payments to Bradley slowed down and by December of 1985, he was applying payments to invoices 14 months old.

Upon the filing of the bankruptcy petition, the Trustee took possession of the cattle, sold them and deposited the proceeds of approximately $288,000 in an account to be distributed when the competing claims were resolved. Debtors had made a total of $261,882.84 in payments to Bradley by checks dated in the 90-day preference period.

The Bankruptcy Court found that the relationship between the Debtors and Bradley was one of bailment and that Bradley retained title to the cattle. Also, since the cows were not delivered to Zwagerman for sale, the Court held that UCC § 2-326(iii) did not apply and Bradley was entitled to the proceeds of the cattle.

The District Court first addressed the bailment versus consignment issue. It found that before goods could be deemed on sale or return under UCC § 2-326(iii), three elements must be satisfied: (i) the goods are delivered for sale; (ii) the person maintains a place of business at which he deals in good of the kind involved; and (iii) the person deals under a name other than the name of the person making delivery. The Court stated that by its terms this section applies only if the goods were delivered for sale. Since the Bankruptcy Judge found that the delivery in the instant case was not for sale, the District Court stated that it was bound by that factual determination unless found to be clearly erroneous. The Court went on to say that while the question was a close one, the factual finding that the delivery was not for sale was not clearly erroneous and therefore it would not be upset on appeal.

Looking to the preferential transfer issue, the Court found that in order for a preference to occur, the transfer must be of an interest of the Debtor in property. In light of the Court's earlier determination that the money paid

never belonged to Zwagerman, the transfer did not involve property belonging to the Debtors and thus there was no preference.

Alternatively, the District Court agreed with the Bankruptcy Court's holding that payments were made in the ordinary course of business under 11 U.S.C. § 547(c)(2).

In Re: Pica Systems Incorporated, 124 B.R. 30 (E.D. Mich. 1991). This opinion written by District Judge Avern Cohn addresses an appeal of an order of the Bankruptcy Court denying nunc pro tunc appointment of counsel for Debtor and disallowing fees.

On January 12, 1989, the Petition for Relief under Chapter 11 of the Bankruptcy Code was filed on behalf of Pica. The list of creditors which accompanied the petition described Shapack as being owed $12,170. The U.S. Trustee's Office was served with two applications for an order authorizing employment of Jerome D. Frank ("Frank") as counsel for the Debtor and James T. Ellis ("Ellis") as co-counsel. Accompanying the applications were affidavits of disinterest on behalf of Frank and Ellis. At that time, Frank was a member of Shapack and Ellis was of counsel to Shapack. Later, the Trustee's Office told Frank that his application would not be approved unless the affidavits of disinterest were supplemented as to any connections either Frank or Ellis may have had with Pica, its creditors, or any other parties in interest in the case and unless all pre-petition fees were unequivocally waived or subordinated. Frank agreed to supplement the papers but no supplementary documents were ever received.

Frank subsequently left Shapack and joined Seyburn, Kahn, Ginn, Bess, Howard & Harnisch. He submitted orders substituting counsel and withdrawing as counsel in each case pending before the Bankruptcy Court in which he was counsel of record including Pica. Later an order was entered substituting Frank as counsel for Pica and allowing Shapack to withdraw. The Trustee's Office was not served with a copy of the Order of Substitution. Neither Frank nor Shapack was ever approved by the Bankruptcy Court as counsel for Pica. Almost one year later, an order confirming a plan of reorganization of Pica was entered. Frank served the Trustee's Office with a first and final fee application which included both Frank's and Ellis's fees. Upon review, the Trustee's Office ascertained that no orders authorizing employment of either attorney had ever been entered.

On July 3, 1990, Frank filed an application for an order authorizing employment of counsel nunc pro tunc with the Bankruptcy Court. A hearing was held at which Frank indicated that he and Ellis had performed extensive work for Pica and that inequity would result from a denial of fees. Frank further explained that the supplemental documentation requested by the Trustee's office was never prepared nor was an order for employment entered because, in the process of moving his offices from Shapack to Seyburn, the matter had escaped Frank's attention, and the deficiency had never been brought to his attention.

The Court entered an order denying Frank's motion for nunc pro tunc appointment and disallowed the fees. Frank appealed claiming the Bankruptcy Court abused its discretion by applying an incorrect legal standard where excusable neglect exists and there is no prejudice to the estate.

The Court found that retroactive approval should not be granted merely because approval of counsel would have been given if timely requested. The District Court next stated that when considering an application for nunc pro tunc approval of employment, the Bankruptcy Court must determine that approval would have been granted pursuant to Section 327(a); that the applicant must be disinterested; and that the services rendered were necessary under the circumstances. The Bankruptcy Court must also consider equitable factors which

include whether the applicant or some other person has the responsibility f applying for approval; whether the appellant was under time pressure to beg service without approval; the amount of delay after the applicant learned tha the initial approval had not been granted; the extent to which compensation t the applicant would prejudice innocent third parties; and the individual facts and circumstances of each case.

The District Court found that the Bankruptcy Court did not err when it denied nunc pro tunc appointment because there was a question as to whether Frank's and Ellis' applications would have been granted prior approval because Shapack was a creditor of PICA and was not a "disinterested" person within the meaning of Section 101(13)(A). In addition, Shapack could have cured the defect by waiver or subordination of any pre-petition fees.

Next, the Court said that both Frank and Ellis bore the responsibility of applying for approval. As a bankruptcy professional of counsel to Shapack, Frank must have been familiar with the requirements of Section 327(a) and Section 101(13)(A).

Finally, upon review of all the facts and circumstances of the case the Court found there was no error in applying the "exceptional circumstances" test in denying nunc pro tunc approval of counsel and fees. It stated that when experienced legal professionals continue legal services without approval of the Bankruptcy Court they run the risk of disapproval of their final application for retroactive appointment and fees. If they are allowed to make up the deficiency in their applications without showing circumstances that are exceptional and something more than simple neglect, the deterrent purposes of Section 327(a) would be viscerated and professionals would be encouraged to emulate the laxity displayed by Frank and Ellis in the hope of being saved by equity.

In re Seifert v. Selby, 125 BR 174 (E.D. Mich. 1989). This opinion authored by District Court Judge James P. Churchill addresses the issue of whether property which is exempted from a Chapter 7 estate revests in the Debtor even when the value of the Debtor's interest in exempted property exceeds the statutory exemption amount.

The Seiferts ("Debtors") filed Chapter 7 on December 1, 1987. Debtors listed a land contract vendee interest in 6.4 acres of real property. They indicated that the fair market value of the land was $22,500 and that the balance due on the land contract was $16,000. Also on their schedules the Debtors claimed as exempt $6,500 in equity associated with their land contract vendee interest.

A creditors' meeting was held on January 5, 1988. Two weeks later, Debtors filed an Amended Schedule which recounted Debtors' intention to forego certain personal property exemptions in order to protect any additional equity up to $8,350 that the Debtors may have had in the land contract vendee interest. No one objected to this exemption.

On April 14, 1988, the Trustee filed a Notice of Intent to Sell and an Application for Approval. At the hearing, the Bankruptcy Court ruled that the property could be sold. The sale proceeds were to be allocated first to pay the land contract or vendor's interest, then to satisfy Debtors' claimed exemption with the excess going to the creditors. An order authorizing the sale of the property for $26,000 was filed on August 11, 1988. The closing was stayed for 30 days to allow Debtors to file the appeal.

The Debtors objected to the entry of the Order asserting that their interests in the property was claimed as exempt and that no objections to the exemption were filed. They also contended that the land was no longer property of the bankruptcy estate and consequently the Trustee lacked the authority to sell the property.

The Court found that properly exempted property reverts to the Debtor. Parties in interest may object to claimed exemptions within 30 days of the creditors' meeting or the filing of any amendment to the list of exempt property. Unless a party in interest timely objects, property claimed as exempt by the debtor is exempt. The Court found the issue to be to what extent exempt property subject to a security interest reverts to the debtor and to what extent it remains property of the bankruptcy estate. The Court found that the concept of exempt property was designed to let the Debtor retain a few basic essentials for a fresh start. If after claiming property as exempt, a debtor has only the equivalent of a lien in the amount of the claimed exemption the debtor would not be guaranteed the use and enjoyment of "a few basic essentials" necessary for this fresh start. The Court concluded that this approach was consistent with other cases which hold that exempt property, including its insured value, reverts to the Debtor.

In re Erfourth, Adv. Pro. No. 90-8290 (Bkrtcy. W.D. Mich. May 1, 1991). This decision authored by Bankruptcy Judge Laurence E. Howard, addresses the issue of dischargeability of a Debtor's obligation to the 7th Probate Court for the County of Charlevoix pursuant to 11 U.S.C. 523(a)(5).

The Debtors are the parents of a son, Douglas Benjamin Erfourth. Throughout his childhood, Douglas was charged with various criminal offenses. As a result of these charges, Douglas spent his childhood alternately in a group home and his parents' home. The Debtors were ordered to pay $10 per month to the Court for costs and were put on notice that they would be held responsible for the cost of counseling services, as well.

In 1989, after being arrested for additional crimes, the Juvenile Court entered an order which provided that the reimbursement costs were to be increased to $20 per month per parent, effective September 1, 1989. Since Douglas was 5 months away from his 18th birthday, and was also facing pending criminal charges in the Circuit Court, the Court entered a second order in September of 1989 where the Court terminated jurisdiction and reserved the right to collect reimbursement costs from the Debtors. The order also stated that the Debtors' reimbursement payment was to be increased to $400 per month effective November 1, 1989. In January of 1990, the Debtors filed Chapter 7. On February 8, 1990, the Juvenile Court entered an order for reimbursement. The Debtors owed the court system $14,600. The Juvenile Court filed a complaint to determine dischargeability on July 26, 1990.

Looking to In Re Calhoun, 715 F.2d 1103 (6th Cir. 1983), the Bankruptcy Court stated that the initial question was whether those support obligations not payable directly to the former spouse were nondischargeable under Section 523(a)(5). In resolving this matter, the Sixth Circuit held that payments in the nature of support need not be made directly to the spouse or dependent to be nondischargeable. Therefore, Judge Howard found that if the Debtors owed a debt to their son, the fact that actual payment on the debt was to be made to the Juvenile Court was irrelevant. The Bankruptcy Court then found that while Douglas had the right to pursue his parents for support pursuant to MCLA § 722.3(2), the Juvenile Court did not unless a valid assignment existed.

Pursuant to Section 523(a)(5)(A), a support debt cannot be assigned to a third party unless the assignee is either the federal government, the state government or a political subdivision of the state. The Juvenile Court obviously fit into this category of assignee, but the Court found there was no valid assignment. Absent such an assignment, the obligation was only a third-party debt which was intended by Congress to be discharged in order to give the Debtors their fresh start.

In the Matter of Wymer, Adv. Pro. No. 90-8176 (Bkrtcy. W.D. Michigan. Apr 30, 1991). This opinion authored by Judge David E. Nims addresses the issue nondischargeability under 11 USC § 523(a)(2).

Donald L. Wymer received a letter from Chevy Chase Federal Savings Bank stating that he had a pre-approved credit limit of $5,000 on one of the bank's VISA or MasterCard credit cards. Along with the letter was a form entitled "Request Certificate for VISA Gold or Gold MasterCard Privileges." Among other questions on the credit card form regarding employment was an entry requesting the Debtor's salary. Since 1981, Wymer had been a partner and a stockholder of Wymer Auto and Truck having a 1/3 interest in Wymer, together with his father and brother. Around 1987, Wymer acquired the location where Wyco now operates and Wymer took charge of this operation. In 1989, Donald left Wymer and took over the location at Wyco as a sole proprietorship. In preparing the form, the Wymers tried to determine from past history what income the new entity would generate. Although he planned on taking a salary, Wymer never actually received one, taking only what was needed for necessities.

The co-applicant Valerie Coats, who later married Wymer, disclosed that she had an annual salary of $10,400. Having left Wymer Auto & Truck to work with her husband at Wyco, it was understood that she would continue to draw the same salary doing the same work. However, she received no salary and like Wymer took from Wyco what she required to get by.

The Debtors' income tax returns for 1989 indicated that they had an income of $17,346. In 1988, Donald's income was $16,378.60, and Valerie's was $7,921.32. The Wymer's received the credit card in the latter part of June 1989, along with some blank checks. They used the card and advances mostly to pay business expenses. All minimum payments called for by the bank were met. Slowly, the business began to fail and on January 18, 1990, they filed for bankruptcy under Chapter 7.

The Court stated that the Wymers did not make any false representations or engage in actual fraud with intent to deceive. They made an honest effort to furnish the information requested, but the form was anything but clear and no instructions were given on how to fill it out. Following the reasoning in Manufacturers Hanover Trust Company v Ward (In re Ward, 857 F.2d 1082 (6th Cir. 1988), the Court found that when a bank issues a pre-approved credit card, it takes a voluntary and calculated risk that payment will not be received.

The Court also found that the Bank did not reasonably rely on the information furnished by the Wymers. Instead, it relied on the excellent credit report it claimed to have received or elected to take a risk rather than pay any expense to verify the information which it deemed so important.

In the Matter of Pal Nissan, Inc., Adv. Pro. No. 89-0028 (Bkrtcy. W.D. Mich. April 29, 1991). This opinion authored by Judge James D. Gregg, looks at whether a certain adversary proceeding is a core proceeding, a non-core related proceeding, or a non-core non-related proceeding.

The Debtor, Pal Nissan, Inc., filed a voluntary Chapter 11 case on June 20, 1989. Transamerica Automotive Finance Corporation ("Transamerica") instituted an adversary proceeding against the various principals, directors, or shareholders of the Debtor ("Defendants") on July 25, 1989. Transamerica sought damages in the amount of $531,706 against the Defendants for their alleged failure to remit the proceeds from sales inventory. Transamerica asserted these "out of trust" sales conducted by the Debtor by and through the Defendants caused a substantial pre-petition diminution of its collateral which secured repayment of the Debtor's obligation to it.

Transamerica's complaint was comprised of three counts. The first was designated as "Judgment Against Shareholders"; the second was "Judgment Against Schutte"; and the third count was designated as "Request to Determine Debt to be Nondischargeable." The Plaintiff asserted that Counts I and II were non-core related proceedings, and that Count III was a core proceeding.

The Defendants sought a dismissal of the adversary proceeding and Rule 11 Sanctions against Transamerica for filing an unfounded cause of action. The Defendants also asserted that no jurisdiction existed in the Bankruptcy Court regarding any of the counts.

When first addressing the issue of whether jurisdiction existed regarding Transamerica's causes of action against the Defendants, who were alleged to have converted property subject to Transamerica's security interests, the Court found that it must be determined whether the outcome of the proceeding could have any conceivable effect on the administration of the bankruptcy estate or to the contrary whether the adversary was so extremely tenuous that jurisdiction did not exist. The Court held that subject matter jurisdiction existed respecting Transamerica's causes of action against the Defendants based on the asserted conversion of Transamerica's collateral. Judge Gregg said that this holding was consonant with Congress' intent that the bankruptcy courts be given broad jurisdiction under the bankruptcy laws.

The Court also found that Count II of the complaint contained allegations which were essentially identical with respect to another individual defendant, thus the Court's ruling was the same in Count II as in Count I.

Next, the Court looked at whether jurisdiction existed regarding the Plaintiff's cause of action for declaratory judgment requesting that any judgment obtained against Defendants would be nondischargeable in a future bankruptcy case. The Court found that as none of the Defendants had yet filed a bankruptcy petition, they were not Debtors before any Bankruptcy Court at the present time. Therefore, the Plaintiff's declaratory action did not relate to the dischargeability of any debt of an existing Debtor and could not be a core proceeding. Judge Gregg went on to say that the Court did not have jurisdiction to determine whether a debt, if any, owed by one or more of the Defendants to the Plaintiff would be nondischargeable in some different future bankruptcy case.

Finally, the Court addressed the Defendants' request for Rule 11 sanctions and found that the adversary proceeding appeared to be well grounded in fact, was warranted based on existing law, and was not interposed for any improper purpose such as to delay, harass, or needlessly increase the cost of litigation. Thus, the Court declined to impose any sanctions against the Plaintiff.

In re Atlas Commercial Floors, Inc., 125 BR 185 (Bkrtcy. E.D. Mich. 1991). This opinion authored by Judge Arthur J. Spector involves a distribution of funds from a bankruptcy estate which is governed under 11 U.S.C. §724(b).

The Debtor's estate contained $9,274.63 available for final distribution. These funds were subject to an unavoidable tax lien held by the Michigan Employment Security Commission (MESC) in the amount of $2,564. In addition, there were administrative claims against the estate which totalled approximately $5,126.50 and a §507(a)(4) claim of $2,250 held by the Michigan Carpenter's Fringe Benefit Fund.

The parties agreed that §724(b) was relevant for purposes of determining how the funds would be distributed. However, they disagreed as to how such a distribution would actually be made.

The Court found that pursuant to §724(b)(2), an amount equal to the MESC tax lien would be applied toward payment of §507(a)(1) claims. Next, pursuant to §724(b)(5), the MESC's lien would be paid in full. Last, pursuant to §724(b)(6) and §726, the balance of the §507(a)(1) claims would be paid leaving the balance for payment to the Michigan Carpenter's Fringe Benefit Fund for a portion of their §507(a)(4) claim. In making this determination, the Court reasoned that §724(b)(2) expressly limits the amount distributable to §507(a) claimants to the amount of such allowed tax claim that is secured by such tax lien. Thus it was clear to the Court that administrative and priority claimants could prime a tax lien holder under §724(b)(2) only to the extent of the tax lien. If the sum of administrative and priority claims exceed the amount of the tax lien, the excess amount is relegated to §724(b)(6) status and paid in accordance with §726.

The Court rejected both the surcharge and marshaling arguments presented by the Michigan Carpenter's Fringe Benefit Fund stating that they lacked standing to bring a surcharge claim and have failed to allege that the MESC directly or quantifiably benefitted from or consented to the expenses incurred by the estate.

As to the equitable doctrine of marshaling, the Court stated that in order for it to apply here, there would have to be two distinct funds from which administrative expenses could be paid. Since there was only one fund from which competing claims are to be paid, in this case that doctrine is inapplicable. Moreover, the Court stated it is generally held that the remedy of marshaling is unavailable to a creditor who holds an unsecured claim.

Lastly, the Michigan Carpenter's Fringe Benefit Fund failed to prove that the MESC, which would bear the cost of the distribution scheme the benefit funds advocated, could recover the balance of its claim from other funds. Therefore, the marshaling doctrine should not be invoked, or to do so would operate to the detriment of the other creditors.

In re Colvin, 125 B.R. 182 (Bkrtcy. E.D. Mich. 1991). This opinion authored by Judge Arthur J. Spector involved a Debtor who sought an order to compel the Chapter 13 Trustee to refund to him $5,609.31 which he claimed the Trustee unlawfully obtained from the Debtor's employer and paid to unsecured creditors.

The Debtor filed a Chapter 13 petition on May 5, 1987. An Amended Chapter 13 Plan was filed and confirmed on September 30, 1987. The Plan provided that the future earnings of the Debtor were to be submitted to the supervision and control of the Trustee and the Debtor's employer was to pay the Trustee the sum of $149.49 out of the Debtor's gross weekly pay. The only reference to the duration of the plan was that over the course of 156 weeks those unsecured creditors filing claims would be paid 42% of the allowed amounts.

In March of 1990, the Debtor's employer, General Motors, paid a gross amount of $40,000 in return for the Debtor's voluntary termination of employment. The Debtor received a check from General Motors in the net amount of $6,000 less than he anticipated. He inquired of his employer regarding this discrepancy and learned that $6,757.02 was paid to the Chapter 13 Trustee per the Trustee's request. The Trustee acknowledged that he received that sum and disbursed the funds to creditors holding allowed unsecured claims thereby paying them 100% of their claims. The Debtor filed an objection arguing that the Trustee acted improperly and that the Debtor had been harmed.

The Court stated that it had no trouble finding for the Debtor on the question of whether the Trustee's action was improper. The Debtor's funding of the plan was explicitly and exclusively defined as payments of $149.49 per week

from his wage earnings. This meant not only that the Debtor had the duty to pay that amount to the Trustee each week, but the right not to pay more.

The more problematic issue before the Court was whether the Debtor was harmed by the Trustee's unauthorized action. The Debtor claimed that he was harmed to the extent that the Trustee's payments to unsecured creditors exceeded the 42% figure specified in the plan. The Trustee responded that notwithstanding the language of the Plan, it was in essence a 100% plan. In order to determine at what point or under what circumstances the Plan would be deemed completed, the Court looked to Local Bankruptcy Rule 204. It states that a plan must contain in addition to the requirements of 11 U.S.C. § 1322(a), a provision defining the nature of the plan as being either a plan for the payment of a certain sum of money over a specified period of time, or a plan providing creditors with payment of a specified percentage of their claims. The Debtor's Plan did not conform with the local rules in this respect which caused the Trustee to inquire as to the nature of the Plan at the confirmation hearing. In response, the Debtor's counsel stated that due to the failure of several creditors to file timely proofs of claim, the Plan's terms would allow sufficient funds to accumulate to enable the Trustee to pay all allowed unsecured claims in full. Due to the Debtor's concession that the Plan would be deemed successfully completed only upon payment of 100% to allowed unsecured claims, the Court concluded that the Debtor would appear to be unharmed by the Trustee's action.

The Court then addressed the Debtor's argument that had not the Trustee unilaterally hastened completion of the plan, he would have filed a modified plan to reduce his obligation to unsecured creditors based on the loss of his job, the decrease in his income, and the lost health insurance benefits which would increase his expenses. The Court said that to the extent the Debtor would have been successful in modifying the plan, he would have indeed been harmed. However, the Court could not determine with any degree of confidence whether such a modification would have been approved. The Court invited the Debtor to submit a proposed modification of the plan and upon objection to same would schedule a hearing. Depending on the outcome of the hearing, the Debtor's objection would either be rendered moot or the Trustee would be obligated to reimburse the Debtor to the extent of any funds received by the Trustee in excess of the amount authorized under the terms of the modified plan.

In re Walker, In re D'Agostino, 125 B.R. 177 (Bkrtcy. E.D. Mich. 1990). This opinion by Judge Arthur J. Spector involved consolidated adversary proceedings where the issue was whether a creditor may be considered as "listed" or "scheduled" for purposes of 11 U.S.C. § 523(a)(3) notwithstanding the fact that the Debtor's matrices and schedules list the creditors at an incorrect address.

Both Walker and D'Agostino ("Debtors") filed their voluntary petitions for relief under Chapter 7 on August 5, 1988. The deadline for filing complaints to determine dischargeability under Section 523(a)(2), (4) or (6) was November 7, 1988. The clerk sent a notice to creditors in each case stating that there were no assets and instructing creditors not to file proofs of claim until otherwise notified to do so. No subsequent notices were sent in either case. The Debtors received their discharges on November 8, 1988.

On April 18, 1989, Oxford Video ("Plaintiff") filed an adversary proceeding against each of the Debtors alleging that the debt owed to it and scheduled by the Debtors was nondischargeable under 11 U.S.C. § 523(a)(3), (4) and (6). The Debtors moved for dismissal on the ground the complaints were filed outside the time limits set by Bankruptcy Rule 4007(c). Debtors also claimed that as the debt had been listed at the inception of each case the Plaintiff had no cause of action under § 523(a)(3). At that time it was discovered that the Debtors' Schedules A-3 and the mailing matrices did not accurately state the Plaintiff's

address. Consequently, the Debtors' motion was denied and proofs were receive The Court stated that in order for the Plaintiff to prevail in this case, th Court must conclude that the debts were nondischargeable under § 523(a)(2), (4 or (6); that the debts were not listed or scheduled; and that the Plaintiff did not have notice or knowledge of the bankruptcy cases in time to seek a determination of dischargeability within the specified time frame.

With respect to the first issue, the Court found that the Defendants intentionally commingled the video tape rental receipts with their own funds without just cause or excuse and with the knowledge that their action was "substantially certain to result in harm" to the Plaintiff. Therefore, the Court concluded that the Debtors' debt to the Plaintiff was a type which would ordinarily be non-dischargeable under §523(a)(6).

When looking at the next element essential to a determination of non-dischargeability, the Court stated that the law clearly requires that a debtor set forth the address of his creditors in his schedules and matrices and the failure to state the correct address may result in a determination that the debt had not been scheduled. However, the fact that the Plaintiff's address was incorrectly stated did not mandate the conclusion that the debt was not duly scheduled. So long as an inaccuracy in the listed address did not so seriously defeat the objective of providing notice to the creditor, the debt would then be deemed properly scheduled. The Court concluded that a creditor has been duly scheduled and listed if the address provided by the Debtor is sufficiently accurate to permit delivery by the United States Postal Service to the appropriate party. Where a creditor challenges the accuracy of the listed address, the burden of proof is on said creditor to establish that the address provided by the debtor was so incorrect as to fall short of this threshold. If the creditor was able to show that the address was inadequate, the burden then shifts to the debtor to show that notwithstanding the incorrect address, the creditor had timely notice or actual knowledge of the case. The

Court concluded that the Plaintiff failed to establish that the error in listing its address was so serious as to thwart delivery by the Postal Service. The only evidence which the Plaintiff submitted was the testimony of its president to the effect that the Plaintiff never received the notices in question. However, she conceded that during the period when the notices would have most likely been delivered, she was frequently out of town. The president also acknowledged that she received both notices of discharge which were mailed to the same incorrect address that the Clerk had used in mailing the original notices of bankruptcy. The Court stated that this strongly suggested that the address on the matrix was sufficient. The fact that neither file reflected the return of the incorrectly addressed envelope was further support that the defective address proved to be no impediment to delivery. The Court therefore held that the debts at issue were duly scheduled in both bankruptcies and entered a judgment in favor of the Debtors.

STEERING COMMITTEE MEETING MINUTES:

A meeting was held on May 17, 1991 at noon at the Peninsular Club.

1. Brett Rodgers gave a report concerning the status of the Attorney Lounge on the 7th floor of the Federal Building. At the present time, it is uncertain as to whether or not we will be able to obtain matching funds from the local Federal Bar Association. However, Mark Van Allsburg reported that we have spent approximately $2,600 so far on furniture for the Lounge, which should be set up by the end of May, 1991. Special thanks is extended to the following parties who have contributed monies and/or items toward this worthy project:

Raymond B. Johnson
Lou Lint
John Raven
Brett N. Rodgers
Clary, Nantz, Wood, Hoffius, Rankin & Cooper
Day, Sawdey & Flaggert
Dunn, Schouten & Snoap
Hubbard & Fox
Miller, Johnson, Snell & Cummiskey
Rhoades, McKee & Boer
Varnum, Riddering, Schmidt & Howlett

As further funds become available, other equipment and furniture will be purchased.

2. Brett Rodgers also reported on the Sixth Circuit Judicial Conference which will be held in Traverse City on June 12, 1991. It is anticipated that a few Steering Committee members will be in attendance at the reception, which is being sponsored by the local Federal Bar Association.

3. A letter from Timothy Curtin was circulated concerning the establishment of formal liaisons with other commercial law and creditors' rights groups within the State of Michigan. It was moved and seconded to have Mr. Curtin follow up with these various groups and other Committee members will help out as needed.

4. Patrick E. Mears gave a brief report concerning the progress on the Third Annual Shanty Creek Seminar. If you have not already made reservations, we would suggest that you do so as soon as possible. If you need a reservation form for either the seminar or hotel accommodations, call Carrie at (616) 957-3550.

5. Under new business, the selection of three new Steering Committee members was brought up but tabled until at least the next meeting. Any person interested in serving on the Steering Committee should make such a request to me in writing as soon as possible. New Steering Committee members who are elected will serve for a period of 3 years.

6. The next Steering Committee meeting will be held on June 21, 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 April 30, 1991. These filings are compared to those made during the same period one year ago, and two years ago.

	1/1/91 - 4/30/91	1/1/90-4/30/90	1/1/89-4/30/89
Chapter 7	1,776	1,337	1,110
Chapter 11	63	41	42
Chapter 12	3	6	4
Chapter 13	608	536	469
Totals	2,450	1,920	1,625

ANNOUNCEMENTS:

EFFECTIVE JULY 26, 1991, THE OFFICE OF RAYMOND B. JOHNSON AND BRETT N. RODGERS, CHAPTER 13 TRUSTEES, WILL BE MOVING.

THE NEW ADDRESS AND PHONE NUMBER ARE:

1122 LEONARD ST., N.E.
GRAND RAPIDS, MI 49503

(616) 732-9000 (PHONE)
(616) 732-9005 (FAX)

EDITOR'S NOTEBOOK:

In an unanimous decision issued on May 23, 1991, the U.S. Supreme Court in the case of Farrey v. Sanderfoot held that a debtor may not avoid a lien, under Bankruptcy Code §522(f)(1), on homestead property that had been granted by a Wisconsin divorce court to the debtor's ex-wife to secure her portion of a property settlement.

On the same day, in another property dispute between a divorced couple, the U.S. Supreme Court, by an 8-1 vote, reversed the Eleventh U.S. Circuit Court of Appeals in the case of Owen v. Owen. There the court held that §522(f)(1) avoidance of judicial liens operates even though Florida defines exempt property so as to specifically exclude property encumbered by judicial liens. In the Owen case, the Florida divorce court in 1976 awarded Helen Owen a judgment of $158,000 against her ex-husband, Dwight Owen, which judgment entitled her to a lien against any home that Dwight Owen might acquire in the future, even though he did not own any home at the time the divorce judgment was entered. Thereafter, he purchased a condominium in Sarasota, Florida in 1984 and the State of Florida apparently amended its state constitution in 1985 so as to exempt a home owned by a single person from judicial liens. In 1986, Dwight Owen filed bankruptcy and contended that his condominium was exempt from his former wife's lien. The bankruptcy court ruled against Dwight Owen, which decision was upheld by the Eleventh Circuit Court but, ultimately, reversed by the U.S. Supreme Court.

It is hoped that summaries of these very recent cases will appear in next month's Newsletter.

Larry A. Ver Merris