# BANKRUPTCY LAW NEWSLETTER

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[EDITOR'S NOTE: Because of the large number of announcements from the Bankruptcy Court and requests for comment with regard to proposed rules, there will be no lead article in this month's issue.]

## FROM THE BANKRUPTCY COURT

### INCREASE IN CHAPTER 11 FEES

Congress has just approved a new filing fee and U.S. Trustee quarterly fees for chapter 11 cases. The filing fee will be $600 and the quarterly fees will be a minimum of $250 per quarter for the smallest cases and $5000 per quarter for the largest. The fees will be effective on December 27, 1991.

### REORGANIZATION OF CASE FILING SYSTEM

The court will be changing the way it files pleadings in the court case files at the beginning of next year. Beginning January 1, we will be fastening all pleadings into the files and will prohibit anyone but court staff from taking the files apart. This procedure, while internal to the court, will affect the bankruptcy bar in several ways. First, we ask that filing attorneys pay attention to the requirement that the official forms be sent to us prepunched with two holes at the top of the page and that there be a sufficient space at the top of each page so that documents can easily be reviewed when fastened into the file. Second, we will begin to insist that attorneys file an original and a copy of all motions, orders and other requests for relief. This is already required by the local court rules. We will begin to file the originals of these documents in the files immediately, and will give the copy to the judge and the judge's staff for use in court. Third, court staff will begin making all copies of documents when requested in the public area of the court. We feel that these changes are necessary to improve the quality of the files.

### SALES

We have a continuing problem with the procedure which some attorneys use in selling estate property. Many attorneys are now using a notice of sale with right to object to avoid a hearing. This is fine if it is done correctly. Unfortunately we have two recurrent problems. The first is that the notices often give parties less than the 20 days required by BR 2002(a). Although the 20-day notice period can be shortened by court order, it is not uncommon for attorneys to shorten this time period without prior judicial approval. The second problem is that many attorneys send the court a notice of sale and an order approving the sale, with a cover letter which asks the judge to sign and enter the order after the notice period has run. The proper procedure is the same as that for

professional fees. You should send us a notice of sale and a proof of service showing that the notice was served on all creditors. This will be filed in the case file. Twenty-five days later, send us an affidavit stating that you received no objections to the sale and a proposed order approving the sale. This will be sent to the judge who will then sign the order.

**[Editor's Note:** The following is a proposed noticing policy which has been developed by Mark Van Allsburg, Clerk of the Bankruptcy Court for the Western District of Michigan, for the judges' consideration. Although presented to the judges at the November Court Administration Meeting, approval of the policy, or implementation of it, will not be sought for some time. Mark Van Allsburg has requested that Federal Bar Association members comment on the proposed policy, stating as follows: "I would be delighted to hear the comments of the bar in general and I would greatly appreciate insights as to how this policy would work concerning specific notices or orders which may not fit this mold well." Any comments that you have should be submitted, preferably in writing, to one of the members of the Local Rules Committee appointed by the Steering Committee of the Bankruptcy Section of the Federal Bar Association. Please see separate notice below.]

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# PROPOSED

# COURT POLICY ON SERVICE OF NOTICES AND ORDERS

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## I. INTRODUCTION

The court is now bearing a disproportionate share of the responsibility associated with serving notice of hearings and other case-related events. Because of the increasing amount of time, expense and manpower required of the clerk's office to process mail notices, it is necessary to consider alternatives to this practice.

Bankruptcy Rules 2002(a), (b), (d), (f) and (n) permit the court to direct persons other than the clerk to prepare and mail the notices enumerated in those rules. Further, beginning in FY 1986, the annual appropriations legislation for the judiciary has contained a provision directing the Administrative Office and the courts to permit and encourage the preparation and mailing of notices in bankruptcy cases by persons other than bankruptcy clerks.

In March 1986, the Judicial Conference approved guidelines implementing this statutory directive. The guidelines were amended in March 1990 to conform them with the change in the fee schedule. In addition, Title 28 U.S.C. 156(c) encourages the courts to explore alternative methods for furnishing "information to parties in cases. where the costs of such facilities or services are paid for out of the assets of the estate and are not charged to the United States."

## II. GENERAL RULE

Except as stated below, notices, orders and other documents will be served, where permitted (by BR 2002, or other Bankruptcy Rule or statute, or by local rule) by the parties who prepared them, or if prepared by the court, they will be served by the party for whom they were prepared.

## III. EXCEPTIONS

1. COURT - The Court will serve:

A. 341 meeting notices in chapter 7, 9 and 11 cases. The standing trustees will serve such notices for those cases to which they are assigned.

B. All notices of the filing of a no asset report, possible dividends and discharge.

C. Notices or orders which are required to be served on all creditors by the Office of the U. S. Trustee.

D. Notices of sale sent to the Buyers' List maintained by the Court.

2. EMERGENCIES OR INDIGENCE - The Judges, Clerk or designated representatives may permit any notice, order or other document to be served by the Court because:

A. The hearing or order must be handled on an expedited basis and the Court can serve the parties more quickly than the otherwise designated party.

B. The party having the burden of service is indigent and has no funds to make service of a required document.

3. NOTICES OF ABANDONMENT - A notice and/or order of abandonment will be returned to the secured creditor or trustee who requested the abandonment for service with a current copy of the mailing matrix in the case. Such abandonment will be served by the party or trustee, unless the clerk or his/her designated representative agrees that service should be made by the court. Trustees wishing the court to make service of an abandonment should send a cover letter to the court stating with specificity the basis for such request.

**IV. PRIVATE MAILING SERVICES** - The Clerk's Office maintains a list of agencies which will provide mailing services for bankruptcy clients. The Clerk's office will work with such agencies to coordinate service of notices and orders to meet the requirements of the parties and the Court.

**V. NOTICING CHARGES**

A. The Clerk will assess estates $.50 per notice pursuant to 28 USC 1930(a). (See Judicial Conference Schedule of Fees).

B. A charge of $.50 per page will be made for copying notices, orders or other documents in excess of one page which are served by the Court.

C. There shall be no charge for providing a copy of the mailing matrix which will be sent to parties required to send notice to all creditors and parties listed on the mailing matrix.

**IV. PROOFS OF SERVICE** - Any party who serves a notice, order or other document should file a proof of service which clearly states the document served (title and date signed), and the parties served with the document, the date of service, and the method of service.

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## LOCAL RULES COMMITTEE SEEKS COMMENTS

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The Bankruptcy Steering Committee has appointed a subcommittee to review our local Bankruptcy Rules and practice. The goal of the Rules Committee is to suggest changes to the court which might serve to reduce the amount of time spent in court on uncontested matters. One suggested change would be to adopt a notice and opportunity to object approach which would eliminate the need for any hearing, absent timely objection. Another suggestion is to call all uncontested matters first on motion days, ahead of contested matters which appear earlier in the schedule.

If you have a suggestion that you would like the Rules Committee to consider, please contact one of the members listed below.

Marcia Meoli
Brett Rodgers
Steven L. Rayman
Peter Teholiz
Bob Wright, Chair

Although all comments are welcome, written suggestions would be most appreciated by the committee members.

## WANTED--TOPICS FOR SHANTY CREEK 1992

The Education Committee for the 1992 Shanty Creek Seminar is soliciting suggestions for seminar topics. If you have a suggestion, please contact a member of the committee listed below to discuss it. You are also welcome to drop a short note to any of the members.

Tom Schouten Peter Teholiz
Bob Wright, Chair

## STEERING COMMITTEE MEETING MINUTES

A meeting was held on November 15, 1991 at noon at the Peninsular Club. Present: Brett Rodgers, Peter Teholiz, Thomas Sarb, Marcia Meoli, Janet Thomas, Mark VanAllsburg, Steve Rayman, Bob Wright, Judge Gregg, and Tom Schouten.

1. **1992 FBA Seminar.**

A. Speakers. Bob Wright announced on behalf of the Education Committee that the guest speaker will be Robert E. Ginsberg, Bankruptcy Judge for the Northern District of Illinois. Any person having suggestions for possible topics to be addressed by the guest speaker should address those suggestions to Bob Wright, Chair, Tom Schouten, or Peter Teholiz.

B. Workshop Topics. Possible workshop topics were also discussed. Again, anyone having suggestions for workshop topics should contact a member of the Education Committee: Bob Wright, Chair, Peter Teholiz or Tom Schouten.

2. Attorneys' Lounge. A fax machine has been installed in the bankruptcy attorneys' lounge on the seventh floor of the Federal Building in Grand Rapids. Procedures for billing the costs were discussed. A motion was made that the Federal Bar Association: a) obtain a phone line in its name for the fax machine; b) undertake ultimate responsibility for monthly charges; and c) bill attorneys for use of the fax machine $1.00 for the first page and $.50 per page thereafter on outgoing faxes. The motion was seconded and passed.

3. Local Bankruptcy Rules. A motion was made that the Steering Committee form an ad hoc subcommittee to review the Local Bankruptcy Rules for the Western District of Michigan and draft suggestions, if any, for amendments to those rules. The motion was seconded and passed. A committee consisting of Brett Rodgers, Marcia Meoli, Robert Wright, chair, Peter Teholiz, and Steve Rayman was formed. Any attorneys having comments with regard to possible amendments to the local court rules should submit those comments to a member of the committee.

## 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 Larry Ver Merris.

***Vulcan Coals, Inc v. Howard***, Case No. 90-5643 (6th Cir. October 18, 1991). This opinion, authored by Circuit Judge Harry W. Wellford, involved a judgment of non-dischargeability for a loan guaranty made by Laurence Howard, Jr. in the total amount of $250,000. The Bankruptcy Court granted Howard's motion for summary judgment with respect to the first $150,000 of the total loan in dispute, finding that Vulcan Coals had failed to produce any proof of fraudulent activity on the part of Howard concerning the initial loan of $150,000. The Court also held that Vulcan Coals had failed to allege a cause of action under 11 U.S.C. § 523(a)(6).

Since 1976, Howard was the chairman of the board of Norton Coal Corporation. At the time of the filing of his 1987 bankruptcy petition, he was the president, chairman of the board and sole shareholder of Norton Coal. In the fall of 1984, Vulcan loaned Norton Land Corporation, a subsidiary of Norton Coal, $150,000, secured by a note personally guaranteed by Howard and accompanied by a mortgage on five tracts of land owned by Norton Land. At the insistence of Howard and Norton Coal, the mortgage was not recorded until January 10, 1986. On June 12, 1985, Norton Land conveyed the property to the American Energy Corporation of Georgetown Grand Cayman, British West Indies, for $500,000. The sale was made without Vulcan's consent or knowledge and Vulcan was never repaid its $150,000 from the proceeds of the sale. In the fall of 1985, Vulcan, without knowing that Norton Land had made the aforementioned conveyance, made a further loan of $100,000 to Norton Land and the original promissory note and mortgage were amended to reflect the indebtedness. In 1987 Howard filed bankruptcy.

The Circuit Court stated that the intentional tort of conversion meets the requirements of § 523(a)(6) for non-dischargeability when it is alleged that the Debtor intentionally transferred property to one who is not entitled to it without the authorization or approval of the one entitled to the property. The Court held that the complaint sufficiently alleged a cause of action under § 523(a)(6) because plaintiff adequately alleged a theory of conversion, although it did not specifically use that word. It was alleged that Howard participated in the sales to third parties of the mortgaged property in violation of the terms of the instruments and all without notice to the creditors. The complaint sufficiently averred that Howard did a wrongful act intentionally which necessarily produced harm and was without cause or excuse. Therefore, the Court held that plaintiff alleged a willful, malicious injury under § 523(a)(6).

***In re Rebel Coal Company, Inc***, Case No. 90-6125 (6th Cir. September 23, 1991). This opinion, authored by Judge Cornelia Kennedy, involves the issue of whether the bankruptcy estate's claim that the United States received a preference under 11 U.S.C. §547(b) is a compulsory counterclaim to the United States' claim for civil fines under the Mine Safety Act.

The United States obtained a judgment against Rebel Coal for $21,526, which represented a small part of the civil fines imposed under the Mine Safety Act. Pursuant to the judgment, the government garnished $17,500 from Rebel Coal shortly before it declared bankruptcy on June 22, 1984. The Bankruptcy Court found that the garnishment constituted an avoidable preference and that the United States had waived sovereign immunity under § 106(a).

Section 106(a) provides that a governmental unit waives sovereign immunity with respect to any claim against it that is property of the estate and that arose out of the same transaction or occurrence out of which such governmental unit's claims arose. Therefore, § 106(a) is applicable only if the trustee's claim to void a preference is a compulsory counterclaim to the government's proof of claim filed against the bankruptcy estate.

The Court determined that Rebel Coal's preference claim and the government's claim for funds owed were not sufficiently related for the purposes of establishing a compulsory counterclaim. The claim to amounts due from a bankruptcy estate for penalties under the Mine Safety Act and the claim to void preferential transfers do not involve similar issues and facts as required under Maddox v. Kentucky Finance Company, Inc., 736 F.2d 380 (6th Cir. 1984.) The fact that a preference is a consequence of assessed penalties fails to establish the relationship necessary to waive immunity.

In addition, different issues of fact and law would be raised in pleading Rebel Coal's and the government's claims. A review of the government's claim revealed only evidence of mine safety violation assessments; no judgments were attached to the claim. The litigation of the preference claim looked only at the issue of preferential payments. Proof that a preferential transfer occurred did nothing to refute or affirm the government's demand for unpaid civil

penalties. Accordingly, the Court held that the United States had not waived sovereign immunity under § 106(a).

***The Cain Partnership Ltd. v. Pioneer Investment Services Co.***, Case No. 90-15766/6578 (6th Cir. September 18, 1991). This case, authored by Judge Cornelia Kennedy, involves a party's consent to the Bankruptcy Court's jurisdiction over a non-core proceeding. On April 12, 1989, Pioneer Investment Services Company filed bankruptcy. Among its assets was a lease of 95.5 acres of non-residential real property. Cain Partnership was one of the lessors of this property. Cain claimed that the Debtor had breached the lease before it filed for bankruptcy and consequently sought to repossess the property by having the automatic stay lifted. The Bankruptcy Court refused to lift the stay and the District Court affirmed. Cain then appealed to the Sixth Circuit.

Throughout the progress of the case, Cain never contested the Bankruptcy Court's jurisdiction over the lease. However, after the appeal was filed in the Sixth Circuit, Cain claimed that the dispute over the lease was a non-core proceeding and that the Bankruptcy Court lacked jurisdiction over the issue. The Sixth Circuit ruled that the dispute over the lease was properly categorized as a non-core proceeding because it would have been decided in state court had it not been for the bankruptcy. Ordinarily, bankruptcy courts do not have jurisdiction over such non-core proceedings except when the parties consent to adjudication by the Bankruptcy Court.

The Court was satisfied that Cain consented to the adjudication in the Bankruptcy Court due to its silence on the jurisdictional issue before both the Bankruptcy and the District Courts. It construed the silence as implied consent to the jurisdiction of the Bankruptcy Court to hear and determine the non-core but related proceeding.

The Court then upheld the District Court's ruling that the lease was not terminated prior to the filing of the Debtor's bankruptcy petition because the partnership took no action to terminate the lease.

***In re Wymer***, Case No. 1:91-CV-578 (E.D. Mich. September 25, 1991). This case, authored by Judge Benjamin F. Gibson, involves the appeal of a case previously reported in the May, 1991 Bankruptcy Law Newsletter involving the issue of non-dischargeability under 11 U.S.C. § 523(a)(2).

The District Court affirmed the Bankruptcy Court's holding that the Debtors did not intend to deceive the creditor nor were they reckless in the representations made on the credit application. Please see the May Newsletter for a more complete discussion.

***In re Holden***, Case No. 89-CV-73381 and 89-CV-73392 (E.D. Mich. September 24, 1991). This opinion, authored by Judge Lawrence P. Zatkoff, involves the appeal of a decision of a Bankruptcy Court order regarding the sale of a partnership and stock. The Debtors were exclusive owners of the Andover Group Partnership, which obtained a loan for approximately $2.5 million from Ronald Aprahamian to purchase stock. The stock secured the loan and was the partnership's principal asset. The Debtors defaulted and when Aprahamian started foreclosure, they filed bankruptcy. The stock started to decline in value. The Bankruptcy Court made an oral ruling lifting the automatic stay so that the stock's value could be maximized. Instead of immediately selling the stock, Aprahamian sold the partnership to himself. He then bought the stock in a private sale for a price below market value. The Debtors objected to the stock sale.

The Bankruptcy Court ruled that the sale of the partnership be rescinded for two reasons: first, in granting Aprahamian a lien on the stock, the Court intended that Aprahamian sell the stock before attempting to sell the partnership; and second, Aprahamian disseminated confusing information on the issue of whether his lien on the stock would survive the sale of the partnership. The Court also ruled that the stock was not sold in a commercially reasonable manner and appointed a trustee to sell the stock.

The District Court stated that the Bankruptcy Court did not abuse its discretion by rescinding the

sale of the partnership. The District Court also ruled that the Bankruptcy Court did not abuse its discretion in rescinding the private sale of stock.

***In the Matter of Kerton Industrial***, Case No. 90-71965 (E.D. Mich. September 13, 1991). This opinion, authored by Judge Paul V. Gadola, involves an appeal which rises out of the sale of real property by the trustee. The property was encumbered by a tax lien and by two consensual liens totalling over $194,000. The property was ultimately sold for $115,000. The issue in this case was whether, under the circumstances, § 724(b) authorized the subordination of tax liens to administrative expenses incurred as a result of the sale.

The case was filed as a Chapter 11 and a little over four months later was converted to a Chapter 7. Prior to institution of the sale, there were no outstanding or pre-existing Chapter 11 administrative claimants. The taxing authority opposed subordination of its claim on two grounds: (1) that § 724(b) applied only to personal property; and (2) that subordination under § 724(b) required a benefit to the estate, which was lacking in this case. The Court found that where there are no outstanding pre-existing administrative expenses, the sale of real property which results in payment of administrative expenses associated only with its sale is not of any benefit to the estate.

Pursuant to § 724(b), the trustee may pay administrative claims to the extent of tax liens, subordinating the tax liens to the extent of the administrative claims. By paying priority administrative claims out of property that is otherwise without value to the estate, § 724(b) relieves the remainder of the estate of the burden of paying those priority claims. A sale which pays only expenses incurred as a result of the sale does not benefit the estate whatsoever. All of the cases that the Court examined authorizing the sale of property pursuant to § 724(b) were based on the implicit assumption that the estate would benefit. The Court found no cases that explicitly authorized the sale of property pursuant to § 724(b) under circumstances which provided no benefit to the estate. Accordingly, the Court held that by negative implication, benefit to the estate is a sine qua non of proper subordination under §724(b) and that in the present case, the § 724(b) subordination was improper.

***In re Moses v. Allard***, 1991 W.L. 166298 (E.D. Mich). This case, authored by Judge Gerald E. Rosen, addresses the question of whether or not a debtor may assert a Fifth Amendment privilege at a Section 341 Creditors' Meeting.

The Debtor was an international designer. There was a warrant for her arrest in Switzerland. The Debtor filed for bankruptcy under Chapter 11 and at the creditors' meeting refused to testify about any foreign transactions and assets for fear of incriminating herself. The trustee brought an action to compel the Debtor to testify. The Court stated that the Fifth Amendment could be invoked when there was a reasonable fear of foreign prosecution. The five factors necessary to determine whether the fear of prosection is reasonable are: (1) whether there is potential for foreign prosecution; (2) what foreign charges could be filed; (3) whether prosecution would be aided by the testimony; (4) whether these charges would allow the foreign jurisdiction to seek extradition; and (5) whether this testimony would be disclosed to the foreign government. The Court ruled that the Debtor had not satisfied any of these factors. The Debtor also argued that if she was compelled to testify, her right to travel abroad would be prohibited. However, the right the travel abroad was not a fundamental right. Therefore, the Court ruled that the Debtor was compelled to testify at the creditors' meeting.

***In re Auto Specialty Manufacturing Co.***, Case No. SK 88-03095 (Bkrtcy. W.D. Mich. October 31, 1991). This opinion, authored by Judge Jo Ann C. Stevenson, involves the untimely objection to a report and recommendation forwarded to the District Court.

The Court stated that Bankruptcy Rule 9033(b) requires that objections be filed within ten days of service of the report and recommendation. It also stated that the bankruptcy judge may, for cause, extend the time for filing objections for a period not to exceed 20 days from the expiration of

the time otherwise proscribed by the rule. A request to extend the time must be made before the time for filing objections expires. The exception to this is that a request made not more than 20 days after the expiration of the time for filing objections may be granted upon a showing of excusable neglect.

Ausco's counsel claimed that the deadline was missed because a member of the firm's clerical staff computed the deadline date pursuant to the wrong rule. The Court stated that counsel's misreading of the applicable rule may show neglect but the neglect was not excusable.

Even though the Court determined that Bankruptcy Rule 9006(b) did not govern, it addressed the five factors of In re Dix, 95 B.R. 134 (Bkrtcy. 9th Cir. 1988), which was cited with approval in Pioneer Investment Services, Case No. 90-6339 (6th Cir. September 6, 1991) as a guide to the proper interpretation of Rule 9006(b)'s excusable neglect standard. These five factors were: whether granting the delay would prejudice the debtor; the length of the delay and its impact on efficient court administration; whether the delay was beyond the reasonable control of the person whose duty it was to perform; whether the creditor acted in good faith; and whether clients should be penalized for their counsel's mistake or neglect.

The Court found an absence of any unusual or extraordinary circumstances which would justify invocation of the excusable neglect doctrine. The trustee's counsel was familiar with the report and recommendation process. The Court stated that when attorneys practice in the Bankruptcy Court they are charged with the knowledge of the Federal Rules of Bankruptcy Procedure and the local rules of the court. They are also responsible for ascertaining that all members of their firm who work on the file are also made aware of the applicable rules, especially when the rules are as important as those which set deadlines.

***In re Sinclair-Ganos***, Case No. SG 89-03736 (Bkrtcy. W.D. Mich. October 6, 1991). This opinion, authored by Judge David E. Nims, Jr., involves the non-dischargeability of a debt under 11 U.S.C. § 523(a)(8). At the trial the Court found that the total indebtedness on the student loans in question was $32,677.84 and that excepting the debt from discharge would not impose an undue hardship on the Debtor or her dependents.

The Debtor obtained her loans from a credit union for a period extending from October 26, 1982, through May 5, 1986, to finance both her undergraduate education and her J.D. degree. The loans were guaranteed by the Michigan Higher Education Assistance Authority. Upon default, the loans were to be assigned to the Michigan Higher Education Assistance Authority, but on March 29, 1989, a document entitled "Assignment of a Student Promissory Note" assigned the loans without warranty to the credit union. The credit union apparently relied on its past loan history with the Debtor and did not take the steps necessary to collect on the guaranty. This resulted in the credit union's loss of rights under the warranty.

The Debtor filed her bankruptcy petition on October 11, 1989. The Court found that since the loan was not guaranteed on the date of filing, the debt owed to the credit union was not excepted from discharge based on the argument that it was an educational loan guaranteed by a governmental unit.

In addition, the loan did not fall under the exceptions stated in § 523(a)(8) because the credit union was not a non-profit institution. It is a lending institution which competes with a bank. Therefore there was no apparent reason to give a credit union a more favorable position in proceedings determining the dischargeability of student loans.

***In re Check Reporting Services, Inc.***, Case No. SL 89-00270 (Bkrtcy. W.D. Mich. November 13, 1991). This opinion, authored by Judge Jo Ann C. Stevenson, involved a motion for summary judgment on an action to recover preferential payments. On January 24, 1989, an involuntary Chapter 11 petition was filed against Check Reporting Services ("CRS"). On March 1, 1989, a Chapter 11 trustee was appointed. On February 28, 1991, the trustee filed a two-count complaint against approximately 1,000 defendants. Count I sought certific

tion of the action as a class action pursuant to Federal Rules of Bankruptcy Procedure 7023(b)(1)(3). In addition, the necessary elements of a § 547 preference were pled. Count II sought to recover preferential payments from each defendant individually. Count I of the trustee's motion was denied in an opinion delivered from the bench. In the order, it was provided that the trustee would have until May 3, 1991 to file amended complaints against each defendant.

In compliance with the order, the trustee filed two separate amended complaints against defendants Fingerle Lumber and Fingerle-Hollister-Wood Lumber Co. on April 30, 1991, and one against Briarwood Ford on May 2, 1991. The gravamen of the three defendants' motions for summary disposition was that the individual preference actions were commenced after the two-year statute of limitations had run under 11 U.S.C. § 546(a).

The Court stated that the last day the trustee could have timely filed his complaint in compliance with the two-year statute of limitation was March 1, 1991. The trustee had filed the complaint on February 28, 1991. Although both sides vigorously discussed tolling, the Court stated that tolling, equitable or otherwise, was not at issue since the original complaint was timely filed and named these defendants individually, with Count II seeking relief against them in their individual capacity.

The original timely filed complaint named the defendants in their individual capacities. The Court noted that although a suit filed as a class action may not meet the requirements of FRCP 23, the suit is not subject to dismissal if it also states a claim for relief against named defendants individually. As the amended complaint simply restated the allegations of Count II asserted in the original complaint, in compliance with 7015(c) the amended complaints relate back to the original February 28, 1991, filing date.

Counsel also claimed that defendants were prejudiced because the 1,000 plus defendants were not given notice of the April 3, 1991, hearing on the trustee's motion to certify the class. The Court stated that the crux of the defendants' lack of notice assertion related to having missed an earlier opportunity to argue that the lawsuit should be dismissed due to the misjoinder of the defendants. The Court ruled that it could not have dismissed the complaint solely because of the misjoinder of defendants because FRCP 7021 specifically prohibits dismissal based solely on the misjoinder of parties. Accordingly, the defendants' motions for summary judgment were denied.

***In re Adams***, Case No. 91-81940 (Bkrtcy. W.D. Mich. October 28, 1991). This opinion, authored by Judge Laurence E. Howard, involves the removal of a case from a Tribal Court to the Bankruptcy Court under 28 U.S.C. § 1452(a). The Chapter 7 trustee removed the Debtor's breach of contract action from the Tribal Court to the Bankruptcy Court pursuant to 28 U.S.C. § 1452.

The Court found that removal from a Tribal Court to a Bankruptcy Court is allowed under § 1452(a), despite the lack of specific reference to Tribal Courts. However, the Court ruled that there were strong comity considerations which compelled it to allow the Tribal Court the opportunity to adjudicate the Debtor's claims and therefore found that abstention was required under § 1334(c)(2).

***In re Tucker Freight Lines, Inc.***, Case No. 83-02391 (Bkrtcy. W.D. Mich. October 25, 1991). This case, authored by Judge Laurence E. Howard, involves the breach of a contract between the Debtor and Central Transport. Central Transport successfully bid for the Debtor's interstate operating authority at an auction sale.

Central Transport invoked an option provided under the purchase agreement and withdrew its offer to purchase the interstate authority. In response to Central Transport's action, the trustee commenced an adversary proceeding seeking injunctive relief and damages against the defendants for breach of contract.

The Court found that the defendants were in breach of contract when they attempted to withdraw

from the purchase agreement since they did not exercise their option right within a reasonable time.

***In the Matter of Butterfield Limited Partnership***, 131 B.R. 67 (Bkrtcy. E.D. Mich. 1990). This case, authored by Judge Walter Shapero, involves the filing of an application seeking to employ Honigman, Miller, Schwartz and Cohn as attorneys for the Debtor in a Chapter 11 proceeding.

The Debtor was a limited partnership, the general partner of which was Anthony S. Brown Development Company (ASB), whose sole shareholder was Anthony S. Brown. The business of the Debtor was the construction, ownership and operation of an office building in which the limited partner was the principal tenant. The managing agent for the building was ASB Asset Management, Inc., a corporation in which Anthony S. Brown was the sole and controlling shareholder. Honigman, Miller represented ASB as well as ASB Asset Management, Anthony S. Brown, and certain other unsecured trade creditors either generally or specifically on other matters that were unrelated to the bankruptcy.

In its application, Honigman, Miller indicated that it would not represent ASB, ASB Management or Anthony S. Brown or any of its other clients who might be unsecured creditors in any matter having to do with the bankruptcy.

The Court stated that the situation in the present case was not one where there was an actual existing conflict or adverse interest such as would exist if Honigman, Miller were simultaneously representing both the Debtor and the general partner in matters related to the bankruptcy. The specific undertaking of Honigman, Miller not to represent the general partner or related entities or individuals in matters related to the bankruptcy did not cure the problem because the problem was the apparent continuing representation by Honigman, Miller of those individuals and entities simultaneously in matters unrelated to the bankruptcy. The Court stated that the very least that it could do was to create a situation where Debtor's counsel was able to take the actions required of it under the rules of professional responsibility and bankruptcy law free of and wholly unfettered by any concerns about its relationship with the general partner or associated persons. Accordingly, the Court denied the application to employ Honigman, Miller.

***Lopez v. Lopez***, Case No. 118787 (Mich. App. October 8, 1991). On June 16, 1987, Plaintiff filed a complaint for divorce. On April 22, 1988, Defendant filed bankruptcy under Chapter 13. Plaintiff failed to appear for the June 30, 1988, trial, which was rescheduled for December 29, 1988. On January 18, 1989, plaintiff moved to set aside the property settlement portion of the judgment, alleging that the Trial Court's actions violated the automatic stay. On May 8, 1989, the Trial Court denied the plaintiff's motion, finding that the stay of proceedings are for the benefit of the Debtor who had the right to proceed in the divorce action if he so chose.

The Michigan Court of Appeals stated that the purpose of the automatic stay provision is to protect both debtors and creditors. However, the automatic stay is not intended to be used as a weapon by creditors to the detriment of the estate. The automatic stay is for the benefit of the Debtor and if it chooses to ignore stay violations, other parties cannot use such violations to their advantage. If the Debtor and trustee choose not to invoke the protection of § 362, no other party may attack acts in violation of the stay.

## 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 (Lower Peninsula) during the period from January 1, 1991 through October 31, 1991. These filings are compared to those made during the same period one year ago and two years ago.

| | 1/1/91 - 09/30/91 | 1/1/90 - 10/31/90 | 1/1/89 - 10/31/89 |
|---|---|---|---|
| Chapter 7 | 4,257 | 3,324 | 2,777 |
| Chapter 11 | 134 | 119 | 79 |
| Chapter 12 | 21 | 15 | 15 |
| Chapter 13 | 1,446 | 1,419 | 1,060 |
| | 5,858 | 4,877 | 3,931 |

## EDITOR'S NOTEBOOK

The Federal Bar Association, Detroit chapter, has announced that the Practice Manual for the United States District Courts - Eastern District of Michigan - 1991 Edition is now available. The Practice Manual summarizes the pretrial and trial preferences and procedures of the judges of the Eastern District, including district judges, bankruptcy judges and magistrates. Order forms for the manual, which costs $45, are available from Kristen Mahecha at (313) 225-7000, extension 7627.

In a significant case from outside of the Sixth Circuit, the Wall Street Journal on Friday, November 22, 1991, noted that the Fifth U.S. Circuit Court of Appeals, in the case of In Re Greystone III Joint Venture, held that there is no "new value" exception to the absolute priority rule under the U.S. Bankruptcy Code. The Greystone case marks the first time a Court of Appeals panel has ruled on this issue since the adoption of the Bankruptcy Code. In the case, the court refused to allow the debtor partnership to retain an interest in the real estate project where it attempted to cram down a reduced value on the secured creditor while failing to pay the secured creditor's unsecured claim in full.

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