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MOTION PRACTICE IN BANKRUPTCY CASES

*By Judge James D. Gregg**

The Bankruptcy Rules require nearly all relief sought before the Bankruptcy Court be brought by a motion. B.R. 9013 states in pertinent part:

> "A request for an order, except when an application is authorized by these rules, shall be by written motion, unless made during a hearing. The motion shall state with particularity the grounds therefore, and shall set forth the relief or order sought."

B.R. 9014 states in pertinent part:

> "In a contested matter in a case under the [Bankruptcy] Code not otherwise governed by these rules, relief shall be requested by motion, and reasonable notice and opportunity for hearing shall be afforded the party against whom relief is sought."

The general rule that relief be requested by filing of a motion is superseded only when an adversary proceeding is <u>required</u> or when an application is <u>permitted</u>.

The ten categories of adversary proceedings are set forth in B.R. 7001. An adversary proceeding must be commenced by the filing of a complaint. Part VII of the Bankruptcy Rules is then applicable. Adversary proceedings must be instituted to:

(1) recover money or property [except to obtain abandonment under Section 554(b), to obtain a disposition of property under Section 725, to recover an excessive payment made to a debtor's attorney under B.R. 2017, or to obtain property from a prior custodian under B.R. 6002];

(2) determine the validity, priority, or extent of a lien or other interest in property [except for a lien avoidance under Section 522(f) as authorized by B.R. 4003(d)];

(3) obtain approval for the sale of both the interest of the estate and a co-owner in property under Section 363(h);

(4) object to or revoke a discharge;

(5) revoke an order of confirmation of a chapter 11, 12 or 13 plan;

(6) determine the dischargeability of a debt;

* *Judge James D. Gregg received his B.S. from Michigan State University in 1969, his M.A. in Education Administration from Central Michigan University in 1973, and his J.D. from Wayne State University Law School, <u>magna cum laude</u>, in 1977. He has served as United States Bankruptcy Judge for the Western District of Michigan since June 1, 1987.*

(7) obtain an injunction or other equitable relief;

(8) subordinate any allowed claim or interest except when subordination is provided in a chapter 9, 11, 12 or 13 plan;

(9) obtain a declaratory judgment relating to any of the above; and

(10) determine a claim or cause of action removed to a Bankruptcy Court under 28 U.S.C. § 1452.

Applications are permitted to be filed in accordance with various bankruptcy rules. Applications may be utilized to request relief as follows:

(1) to pay a filing fee in installments under B.R. 1006(b)(1);

(2) to appoint a creditors' committee organized before the order for relief under B.R. 2007(a);

(3) to employ a professional person under B.R. 2014(a);

(4) to enter a final decree on consummation of a chapter 11 plan under B.R. 2015(a) (6);

(5) to receive compensation for services rendered and/or reimbursement of expenses under B.R. 2016(a);

(6) for the U.S. Attorney to notify the court regarding possible <u>criminal</u> contempt under B.R. 9020(a) (2) ;

(7) to remove a civil action from a state or federal court under B.R. 9027(a); and

(8) to shorten a period of notice for a motion under S.R. 9006(d).

Certain bankruptcy rules allow a party in interest to file an "objection." For example, objections may be filed to a proof of claim, a claim of exemption, a disclosure statement, or the amount of compensation sought by a professional. When an objection is filed, a contested matter arises. Therefore, the rules applicable to contested matters under B.R. 9014 are applicable. The author believes that an "objection" is tantamount to a motion to deny requested relief sought by an applicant or a movant.

It should be noted that, under current bankruptcy rules, there are no provisions for "petitions" or "orders to show cause." As a result of former practice under the Bankruptcy Act (and possibly as a result of attorneys utilizing old forms), it is not uncommon for pleadings to be filed which do not comport with current Bankruptcy Rules. For example, sometimes a petition for order to show cause for settlement (or for a sale, contempt, etc.) is filed together with a proposed order to show cause. Such a procedure, in addition to <u>not</u> being authorized by Bankruptcy Rules, is very cumbersome. First, the attorney must prepare two pleadings (i.e., the petition and proposed order to show cause) that are normally redundant. Second, the court clerk must docket both pleadings; then the clerk must again note when the order to show cause has been signed by making a separate docket entry. Third, in many instances, the judge (as contrasted to a deputy clerk) must review and execute the order to show cause before a hearing is scheduled. Given the fact that the bankruptcy judges in this district travel to other cities, delays in scheduling hearings will necessarily occur. Finally, the volume of "bankruptcy paper" is greatly increased both for practitioners and the court.

Given the lack of any authority to file petitions an requests for orders to show cause, and for the practi cal reasons set forth above, such a procedure shoul no longer be utilized by bankruptcy practitioners. Th only instance when an order to show cause may b appropriate is when a bankruptcy judge determines t raise a matter on his or her own initiative. <u>See</u> 1 U.S.C. § 105(a).

Summarizing, when an attorney seeks to obtai relief for a client, it should be determined whether a adversary proceeding is required or an application i permitted. In all other instances, a motion or a objection must be filed. Upon receipt of the motio or objection, the bankruptcy clerk will promptl schedule a hearing and prepare a notice of hearin Service of the motion will then be made by t bankruptcy clerk or the moving party in accordan with applicable bankruptcy rules. Unless there is a request to shorten time, or another valid reason for a bankruptcy judge to review a pleading prior to scheduling a hearing, hearings will be routinely and promptly scheduled by the bankruptcy clerk <u>without</u> a judge's involvement. No future "petitions" or proposed "orders to show cause" need or should be filed by parties in interest in the bankruptcy court.

This article represents the author's views and should not necessarily be construed to constitute the opinion of all bankruptcy judges in this District.

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.

***<u>In re Pioneer Investment Services Company,</u>* 1991 W.L. 169389 (6th Circuit (Tenn.)).** This case, authored by Circuit Judge Nathaniel R. Jones, involves an appeal denying the appellants' motion for leave to file their proofs of claim out of time. On April 12, 1989, Pioneer filed a voluntary petition for bankruptcy under Chapter 11. At the same time, it filed a list of its 20 largest unsecured creditors. On April 13, 1989, a notice for a meeting of creditors was mailed to the parties in interest, setting May 6, 1989, as the date for the creditors' meeting and also fixing August 3, 1989, as the bar date for filing proofs of claim. The appellants collectively retained legal counsel who then advised that there was no bar date in the file and that filing a proof of claim was not a matter of urgency. Therefore, on August 23, 1989, 20 days after the expiration of the bar date, the appellants filed their proofs of claim. The appellants claimed that the bar date for the filing should have been extended, as their failure to timely file was due to excusable neglect. The Bankruptcy Court denied their motion, finding no excusable neglect, and the District Court affirmed.

The Circuit Court stated that there are five factors to be considered in order to determine whether a creditor has satisfied the requirement of excusable neglect under Bankruptcy Rule 9006(b). These factors are (1) whether granting the delay will prejudice the debtor; (2) the length of the delay and its impact on efficient court administration; (3) whether the delay was beyond the reasonable control of the person whose duty it was to perform; (4) whether the creditor acted in good faith; and (5) whether clients should be penalized for their counsel's mistake or neglect. The Court found that the Bankruptcy Court inappropriately penalized the Plaintiffs for the errors of their counsel. The ultimate responsibility of filing the proof of claim rested with their legal counsel. In light of the fact that their attorney affirmatively told them that there was no urgency with regard to the filing deadline, the Court found that the partnerships in all likelihood relied on the expertise of their experienced bankruptcy counsel and paid no further heed to the matter.

The Court also found it significant that the notice containing the bar date was incorporated in a document entitled "Notice for Meeting of Creditors." The Court stated that such a designation would not have put those without extensive experience in bankruptcy on notice that the date appended to the end of the notice was intended to be the final date for filing proofs of claim. This ambiguity was exacerbated by the fact that the notice was simply and inconspicuously labeled "Bar Date" without any reference to its significance as a deadline for the filing of proofs of claim. The term "Bar Date" is also used to describe the deadline for filing objections to a debtor's discharge. With legal counsel's representations regarding the filing deadline, and the peculiar and inconspicuous placement of the bar date in a notice regarding a creditors' meeting, the Court was convinced that the Bankruptcy Court unjustifiably punished the appellants for the sins and neglect of their lawyer.

***<u>In re Concrete Pumping Service, Inc.,</u>* 1991 W.L. 166135 (6th Circuit (Tenn.)).** This opinion, authored by Circuit Judge Danny J. Boggs, involved the question of whether a single creditor could force a debtor into involuntary bankruptcy under Chapter

7. In June of 1989, King Construction Company ("King") won a judgment in a state court action against the Debtor. Judy Sykora, the sole owner and president of the Debtor, allegedly lent her company quite a bit of money from 1978 until 1989, although she produced no documentation of these alleged loans. In June of 1989, Sykora allegedly entered into a security agreement with Concrete Pumping, collateralizing the debts owed her, and filed a UCC-1 financing statement. She claimed a security interest of over $115,000 in almost all of the company's assets. Before King had the opportunity to collect on its judgment, Concrete Pumping defaulted on its loan from Sykora. Consequently, she exercised her rights and forced Concrete Pumping to turn over almost all of its assets to her. Sykora now operates a company that performs the same service as Concrete Pumping and does so using most of the same equipment. Sykora paid off the creditors of Concrete Pumping out of her own pocket, except for King.

King filed a petition under Chapter 7 of the Bankruptcy Code to force Concrete Pumping into involuntary bankruptcy, and maintained that the transaction between Sykora and Concrete Pumping was an avoidable preference under the Code. Although the Bankruptcy Court did not rule on the merits of the underlying claim, it did grant the petition to place Concrete Pumping in involuntary bankruptcy. The District Court affirmed.

As reason to file an involuntary petition against Concrete Pumping, King maintained that the Debtor was generally not paying its debts as they became due. The Circuit Court stated that the bankruptcy courts seemed to have developed an almost per se rule against granting a petition for involuntary bankruptcy where there is only a single creditor. The general rule that had been developed is that the failure of a debtor to meet the liability of a single creditor does not warrant the granting of an order for relief. However, the Circuit Court stated that the Bankruptcy Code specifically allows a single claim holder to initiate involuntary bankruptcy proceedings where there are fewer than 12 claims against a debtor. Thus, the Circuit Court questioned whether the per se rule adopted by the bankruptcy courts is rooted in statutory text.

The courts that have developed a single creditor rule have also developed an exception where there is evidence of fraud, artifice, or scam. The facts in this case would strongly suggest that Sykora engaged in fraud, artifice, or scam or possibly even all three. She had loaned her company money but had failed to keep any records of the loans. At the same time that Concrete Pumping lost a judgment to King, it executed a security agreement covering all of its assets. Sykora then collected on her agreement, turned around and opened another business doing the same thing that Concrete Pumping used to do. This, the Court stated, was on its face a very suspicious sequence of events. Accordingly, even under the doctrine as it has grown up in the bankruptcy court, there was no error in granting the petition.

<u>In re Mansfield Tire and Rubber Company</u>, 1991 W.L. 163767 (6th Circuit (Ohio)). This case, authored by Circuit Judge Cornelia Kennedy, addresses the issues of whether a federal excise tax imposed under the Internal Revenue Code is an excise tax entitled to priority under §507(a)(7)(E) and whether a tax owed to the federal government may be equitably subordinated without a showing of inequitable conduct.

In 1979, Debtors, Mansfield Tire and Rubber Co., Pennsylvania Tire and Rubber Company of Mississippi, Inc., and Pennsylvania Tire Co., filed petitions for relief under Chapter 11 of the Bankruptcy Code. The United States filed a Proof of Claim, asserting an unsecured claim for the Debtors' pension excise tax liability. The assessments were made pursuant to 26 U.S.C. §4971(a) resulting from the Debtors' failure to meet minimum funding requirements for a pension plan. The United States contended that the excise tax liabilities were entitled to distributive priority under §507(a)(7). The trustees objected, stating that the claim was not entitled to priority as it constituted a penalty rather than a tax and should therefore be subordinated to the claims of general unsecured creditors. The Bankruptcy Court granted summary judgment in favor of the trustees and the District Court affirmed.

The Circuit Court stated that where the language of the Bankruptcy Code is plain, the sole function of the courts is to enforce it according to its terms. Since §4971 was an existing federal excise tax at the time the Bankruptcy Code drafters used the term "excise tax," Congress must have decided to grant priority to excise tax claims under §507(a)(7)(E) without regard to whether their purpose was primarily regulatory. Many, if not most of the excise taxes contained in the Internal Revenue Code were intended to discourage undesirable conduct.

The Court also noted that while a federal court may ultimately be called upon to decide this same question where a state or local exaction is at issue, in the present case the Court was concerned with a federal excise tax. Here, Congress has exercised its constitutional power and deemed this exaction an excise tax. State and local governments may not promote their own claims within the federal priority scheme merely by characterizing them as taxes.

In regard to the equitable subordination issue, the Court stated that under existing law a claim is generally subordinated only if the holder of such claim is guilty of inequitable conduct, or the claim itself is of a status susceptible to subordination, such as a penalty. The Court had already rejected this premise by holding that §4971 liabilities were not penalties but taxes. Congress has set out specific and comprehensive priorities for payment of claims in §507 and did not intend to give bankruptcy courts in §510(c) the power to disregard the priorities whenever the bankruptcy court's view of general equity differed from the statutory scheme. Consequently, the Court declined to extend equitable subordination under §510(c) to include subordination of federal tax claims in the absence of some inequitable conduct on the part of the government, because claims for federal taxes were not claims of a type which were otherwise susceptible to subordination.

***In re Century Boat Company*, Case No. 1:91-CV-458 (W.D. Mich. August 7, 1991).** This case, authored by Chief District Judge Benjamin F. Gibson, involves an appeal from a bankruptcy court order sustaining Century Boat Company's ("Century Boat") objection to a proof of claim filed by the IRS for unpaid federal taxes.

On December 15, 1986, three creditors of Century Boat filed a petition for involuntary bankruptcy. The notice of the first meeting of creditors and bar date was docketed on April 29, 1987. The United States was not listed as a creditor and did not receive a copy of the April 29, 1987, notice. The bar date order required that claims be filed against the estate by August 27, 1987. The IRS was first notified of the petition on December 2, 1987. The IRS was served with the April 29, 1987, notice of first meeting of creditors on April 26, 1988. The IRS filed its first claim against the estate on March 23, 1990. The claim was subsequently amended on or about February 21, 1991.

The Court stated that the IRS first filed its claim over 22 months from the time the Bankruptcy Court determined that it had received notice of Century Boat's bankruptcy. Therefore, although the appellant did not receive timely notice, it also did not promptly file its claim upon receiving actual notice. The appellant could have filed a "protective" proof of claim to protect its interest at the time it learned of the bankruptcy which then later could have been amended.

The IRS asserted that even if it did not promptly file its proof of claim, United States v. Cardinal Mine Supply, Inc., 916 F.2d 1087 (6th Cir. 1990) stands for the proposition that a priority claimholder need not comply with the Rule 3002(c) time limit. Even with a liberal reading of the Court's holding in Cardinal Mine, a rational construction is that there must be some equity involved in extending the limitation. Creditors cannot simply delay for the sake of delay. Therefore, absent some valid reason, Cardinal Mine would not permit the Court to ignore the time requirements contained in the Code. The IRS did not promptly file its claim and, accordingly, the District Court affirmed the Bankruptcy Court's decision.

***Madison National Bank v. Chiapelli*, Case No. 91-70942 (E.D. Mich. August 23, 1991).** This case, authored by Judge Avern Cohn, involves an appeal of a motion to lift the automatic stay. Madison National Bank ("Madison") sought relief from the form of the order entered by the Bankruptcy Court, stating that it had erroneously entered an order that went beyond merely denying the motion. The order extinguished the mortgage on a homestead property of the Chiapellis and discharged Madison's lien on the property.

The Chiapellis obtained a loan from Madison in the amount of $164,000. They executed two separate mortgages on two parcels of real estate for a total of $328,000 as security. The Chiapellis defaulted on the loan and Madison initiated foreclosure proceedings on both mortgages. At the sheriff's sale, the commercial parcel was sold to Madison for $165,752.05 and a residential parcel was sold to Madison for $165,752.05. At the time of the sale, the Chiapellis were indebted to Madison in the amount of $165,758.07. The statutory redemption period expired on September 16, 1990, and the Chiapellis filed a joint Chapter 7 petition on September 10, 1990. They listed the homestead parcel as exempt. Madison filed its motion for relief from the automatic stay as to both parcels on September 20, 1990. The Chiapellis opposed the motion for the residential parcel.

The Court found that while the Bankruptcy Court decided that the Chiapellis had equity in the property necessitating a denial of Madison' motion, it made no specific findings as to Madison's lien on the parcel or as to the extent of the equity that it asserted existed. Furthermore, the Bankruptcy Court denied without prejudice Madison's motion to lift stay. The District Court stated that the words "without prejudice" as used in a judgment ordinarily import the contemplation of further proceedings. When they appear in an order or decree, it shows that the judicial act is not intended to be res judicata of the merits of the controversy. That course was reversed by the entry of an order that required much more detailed findings of fact than the Bankruptcy Court made. Thus, entering the order was clear error.

The Court went on to say that it was satisfied that the Bankruptcy Court could consider defenses and counterclaims in the context of a motion for relief from the stay as long as such consideration should not be considered an adjudication on the merits. There was no indication in the transcript of the January 10, 1991, hearing that the Bankruptcy Court ruled on the Chiapellis' defense that contested the validity of the creditor's lien, even though it was raised. The Bankruptcy Court entered the order despite the fact that it had not ruled on the Chiapellis' defense at the previous hearing. As a result, the District Court was faced with the appeal of an order that had no support in the record before it. Therefore, the District Court remanded the case back to the Bankruptcy Court for sufficient explanation of the form of the order.

Venettis v. United States of America, Case No. 90-CV70944-DT (E.D. Mich. July 3, 1991). This opinion, authored by Judge Lawrence P. Zatkoff, involves a motion for reconsideration. On May 9, 1985, an involuntary bankruptcy proceeding was filed against The THA Corporation ("THA"). The IRS filed a proof of claim for prepetition employment taxes in the amount of $163,473.85. The Debtor corporation paid $104,143.64 to the IRS. Venettis was the president of THA and was assessed a 100% penalty for willful failure to collect, account for and pay withheld FICA and income taxes due from THA Corporation. Venettis brought suit claiming a refund and contested the amount of his liability. He claimed that the IRS wrongfully classified the payments from THA's Chapter 7 bankruptcy estate as involuntary payments. The determination that the payments were involuntary allowed the IRS to first apply the payments to non-trust fund liabilities instead of trust fund liabilities, thus holding Venettis liable on the trust fund taxes.

In its opinion and order, the Court concluded that payments made to the IRS by a court appointed Chapter 7 trustee were involuntary since judicial action was sufficient to make a debtor's payment involuntary. Despite overwhelming authority indicating that the IRS correctly classified the payments as involuntary, the Court was willing to make an equitable analysis of the totality of the circumstances in the case. In In re Ducharmes & Co., 852 F.2d 194 (6th Cir. 1988), the Sixth Circuit held that payments made to the IRS on prepetition tax liabilities by a Chapter 11 debtor should be considered involuntary payments. As a result, such payments need not be allocated to first pay trust fund liabilities. In the present case, the payments were made through a Chapter 7 bankruptcy estate as opposed to a Chapter 11 plan of reorganization. Since it appeared that the Sixth Circuit had not considered in Ducharmes the equity argument raised by Plaintiff, the District Court vacated its opinion and order and granted the motion for reconsideration.

Paul Oliver and William Oliver v. Van Johnson, Case No. 90-CV-72584-DT (E.D. Mich. June 18, 1991). This opinion, authored by Judge Robert E. DeMascio, involves the appeal from two bankruptcy court orders. The first order enjoined the execution of an outstanding federal fugitive warrant and a State of Wyoming warrant for the arrest of Paul Oliver, a discharged bankruptcy Debtor, and his brother, William Oliver. From 1982 to November of 1989, Paul Oliver owned and operated a restaurant in Wyoming. On December 1, 1987, the First State Bank of Lyman made a loan to him in the amount of \$100,233.19. Paul executed a promissory note, a mortgage and gave a security interest in all of the restaurant equipment. Paul later moved to Michigan with all the equipment, without the bank's knowledge or approval. The unlawful removal of secured property is a felony in Wyoming. A warrant was issued on February 6, 1990. Pursuant to a Wyoming search warrant, the restaurant equipment was seized as well as certain non-business property belonging to William Oliver. On February 28, 1990, Paul filed Chapter 7 in the Eastern District of Michigan. The debt due the bank was listed on the bankruptcy schedules but the restaurant equipment was not listed as collateral. Paul denied that anyone held, seized or repossessed property in which he had an interest. The Bankruptcy Court entered an Order of Discharge on June 12, 1990.

On June 18, 1990, the United States District Court for Wyoming issued a federal criminal warrant for Paul's arrest for unlawful flight in interstate commerce to avoid prosecution. Paul and William both filed a verified complaint seeking to enjoin criminal prosecution and recover assets wrongfully seized. They requested a temporary restraining order to restrain the FBI from arresting Paul, a preliminary and permanent injunction enjoining the Defendants and their attorneys from proceeding with any legal action, an order permanently quashing the federal fugitive warrant, and damages. The Bankruptcy Court entered an ex parte Temporary Restraining Order and an Order to Show Cause which effectively prevented the arrest and return of the Plaintiff to Wyoming on the federal warrant.

At the show cause hearing, the Bankruptcy Court ordered that the TRO continue without date and extended its reach to all those acting in concert with the named Defendants. The United States District Court for Wyoming ordered that the flight warrant be served despite the Bankruptcy Court's TRO, finding that neither the Constitution nor federal law conferred jurisdiction upon bankruptcy judges to enjoin service of federal criminal process.

The District Court stated that the Bankruptcy Court did not have subject matter jurisdiction to issue either of the two orders. Paul was discharged on June 12, 1990, six weeks before he applied for a TRO. William had never appeared before the Bankruptcy Court. Therefore, the Court could find no case arising out of Title 11 to which the restraining order could relate, even assuming the criminal proceedings were instituted for restitution of a discharged debt.

Bankruptcy courts are inherently civil and equitable in nature and it would strain common sense to perceive them as arbitrators of criminal matters. The criminal proceedings were directed solely to the Debtor's conduct in wrongfully removing secured collateral and it would be pure speculation to think that the secured creditor was seeking restitution of its debt. While his Chapter 7 bankruptcy petition was pending, the Debtor never asked the Bankruptcy Court to stay the criminal proceedings. Therefore, the Court was not inclined to give him a second opportunity once the Chapter 7 proceedings had terminated.

The Court also stated that while they were aware that 11 U.S.C. §105 is often mentioned as a source of equitable power for bankruptcy courts to enjoin criminal proceedings, that section is a substantive law provision and not an independent grant of jurisdiction.

Finally, the Court stated that the Bankruptcy Judge erred by failing to make findings of fact to justify the extension of the TRO beyond the 20 days. Paul and William Oliver did not present evidence to establish any of the four elements necessary to justify granting injunctive relief.

***Troy Plastics v. North Hills II*, 129 B.R. 473 (E.D. Mich. 1991).** This case, authored by District Judge Patrick J. Duggan, involves the debtor's appeal from an order confirming a trustee. The creditors moved to dismiss the appeal primarily on the grounds of lack of standing and lack of finality of the order.

The Court stated that in order to have standing, the appellee must be an aggrieved party, meaning persons with a financial stake in the Bankruptcy Court's order. The Court stated that a litigant qualified as a person aggrieved if the order diminished his property, increased his burdens, or impaired his rights. Ordinarily, a debtor is not considered an aggrieved party under this standard. An exception permits debtors to have standing to appeal bankruptcy court orders if one of two conditions are present. First, if a successful appeal by the debtor would create an estate that had assets in excess of liabilities and second, if an appeal was taken from orders that affect the terms, conditions and extent of the debtor's discharge. The Court stated that based on Troy Plastics' failure to show that it was a party aggrieved by the confirmation of the election of the trustee, the motion to dismiss was granted.

The Court also concluded that the appeal must be dismissed since the order confirming the election of the trustee was not a final order which may be appealable to the Court as of right. An order which would not otherwise be final may be appealable if it is a collateral order. The Court found that the appointment of a bankruptcy trustee was an interlocutory order and not appealable under the collateral order doctrine because denial of the immediate review would not irreparably harm the appellant since the issue could be raised on appeal from the final plan of reorganization.

***In the Matter of Lansing Clarion Limited Partnership*, Case No. 91-83658 (Bkrtcy. W.D. Mich. October 11, 1991).** This opinion, authored by Judge James D. Gregg, involves a lease between Long Development Inc. ("LDI") and Lansing Clarion as lessee regarding a convention center. The lease was a triple net lease with a term of approximately 30 years, commencing on June 24, 1984, and expiring on December 31, 2015. There was a promissory note between FCA American Mortgage Company ("FCA") and LDI, which called for a payment of $60,074 per month. The lease payment was $60,103 per month. New West Federal Savings and Loan Association ("New West") became the successor in interest to FCA and held an assignment of rents and leases from LDI respecting the lease.

The first issue before the Court was whether New West had standing to bring a motion for an order requiring the Debtor to perform post-petition obligations under an unexpired lease of non-residential real property. The Court found that standing exists if a party can demonstrate that it had an actual or threatened injury resulting from the conduct of the opposing party; the injury can be traced to the challenged action; and the injury was likely to be redressed by a favorable decision by the Court. Judge Gregg found that New West's interest was a Fifth Amendment Property Right, which was entitled to constitutional protection. A determination of whether the lease was a true lease or a financing arrangement would affect New West's rights to collect currently unpaid rents and future rents. New West could suffer a current injury or a threatened future injury which was traceable to Lansing Clarion's performance obligations under the asserted lease and a favorable decision by the Court would redress any injury or threatened injury which could occur to New West concerning the LDI rent assignment. Therefore, the Court found that New West had standing.

The next issue before the Court was whether the testimony of Gordon L. Long, an insider to both LDI and Lansing Clarion, should be excluded under the parol evidence rule. The Court said that there is an exception to the applicability of the parol evidence rule which states that extrinsic evidence is admissible to prove the existence of ambiguity or to indicate the actual intent of the parties where ambiguity may exist in the lease. The Court found that there appeared to be some ambiguity within the lease itself and therefore it would consider Mr. Long's testimony notwithstanding the parol evidence issue.

The third issue before the Court was whether the lease agreement between Lansing Clarion and LDI was a true lease or a financing arrangement. The Court stated that in Long's testimony he stated that Lansing Clarion could have obtained one large loan with respect to the hotel property and the LDI convention center, but chose not to because it desired to obtain a lower interest rate on the separate hotel bond financing. Notwithstanding the economic structure of the two transactions, Lansing Clarion then requested the Court to determine the transactions were a single transaction. The Court found this request to be inconsistent with Lansing Clarion's prior actions to obtain a reduced interest rate on the financing of the purchase of its hotel property. Long also stated that the lease payments made by Lansing Clarion to LDI were deducted as a lease expense on Lansing Clarion's income tax returns and the lease was not listed as a capital expenditure. This strongly suggested that Long and Lansing Clarion each viewed the transaction as a true lease. The Court supported its decision with the legislative history of §502(b)(6), which states that when trying to determine whether a document is a true lease or a financing agreement, the Court must consider four factors. First was the economic substance of the transaction and not the locus of title, the form of the transaction, or the fact the transaction was denominated a lease; second, if rental payments were in substance the payment of principal and interest on a secured loan or sale; next, whether the lessee had the option to purchase for no additional consideration or nominal consideration; and last, whether the lessee assumes and discharges substantially all risks and obligations ordinary attributed to ownership of the property. The Court found that because the rental payments continued long after the mortgage was satisfied, they were not in payment of principal and interest on a secured loan; the required purchase price constituted additional consideration and was more than nominal; and LDI was required to assume many of the risks and obligations of the ownership under the lease. Applying the §502 factors, the Court concluded that the economic substance of the transaction mandated the lease a true lease.

<u>In re Fishell</u>, Case No. SL90-85144 (Bktrcy. W.D. Mich. October 4, 1991). This case, authored by Judge David E. Nims, Jr., addresses the issue of jury trials. The action in this case was originally filed by the Debtors in Eaton County Circuit Court on April 27, 1989. The Debtors then filed a Chapter 11 bankruptcy petition on November 16, 1990, and on January 16, 1991, they filed an application for removal of the action to the Bankruptcy Court. In the first amended complaint, the Plaintiffs stated that the action was a non-core proceeding under 28 U.S.C. §157(c) and did not consent to the entry of final orders or judgments by the bankruptcy judge. However, the Plaintiffs filed a demand for jury trial and would consent to the entry of final orders or judgments by the bankruptcy judge on all matters submitted to a jury.

28 U.S.C. §157(c) provides for either the bankruptcy judge to submit proposed findings of fact and conclusions of law to the District Court in non-core related matters or for the parties to consent to the bankruptcy judge making final determinations. The Court stated that the Debtors had not selected one of these modes but were attempting to use both. At trial this would create a morass. Therefore, the Court decided that it would submit proposed findings of fact and conclusions of law to the District Court. As long as the Debtors withheld their consent to having the bankruptcy judge enter any final order or judgment, the Plaintiff's jury trial request was vitiated. Absent unconditional consent by both parties for the Court to hold a jury trial and enter final orders or judgment, the Bankruptcy Court lacked jurisdiction to hold a jury trial.

STEERING COMMITTEE MEETING MINUTES

A meeting was held on October 18, 1991, at noon at the Peninsula Club. Present: Brett Rodgers, Peter Teholiz, Patrick Mears, Kevin Conroy (accompanying Patrick Mears), Thomas DeMeester (for Robert Sawdey), Thomas Sarb and Marcia Meoli.

1. 1992 FBA Seminar.

A. Speakers. Bob Mollhagen and the Education Committee will continue their work in pursuing a keynote speaker for the seminar.

B. Hotel Accommodations. The FBA now has a signed contract with the Park Place Hotel that will provide 90 guaranteed rooms. Arrangements for overflow accommodations are being made with the Grand Traverse Resort and the Grand Beach Resort Hotel.

2. Attorney's Lounge. Arrangements are being made to complete the furnishing of the attorney's lounge.

3. Next Meeting. The next meeting of the Steering Committee will be held at the Peninsula Club on Friday, November 15, at 12:00 noon.

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 September 30, 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 - 9/30/90	1/1/89 - 9/30/89
Chapter 7	3,774	2,965	2,475
Chapter 11	123	107	71
Chapter 12	21	14	13
Chapter 13	1,283	1,249	934
Totals	5,201	4,335	3,493

EDITOR'S NOTEBOOK

Congratulations to Jeffrey S. Battershall of Warner, Norcross & Judd upon his receipt at the National Conference of Bankruptcy Judges of the 1991 Editor's Prize for Special Excellence from the editors of the American Bankruptcy Law Journal. Jeff received the award for his article "Commercial Leases in Section 365 of the Bankruptcy Code," which appeared in Volume 64 of the Journal in Fall, 1990. Excerpts of Jeff's article previously appeared in Volume 2, No. 11 of the Bankruptcy Law Newsletter.

Received too late to include in this month's summary of current cases are two decisions of the Sixth Circuit. The first deals with consent to Bankruptcy Court jurisdiction of "non-core" matters. The Cain Partnership, Ltd. v. Pioneer Investment Services Co., et al. (Lawyers Weekly No. CA-1904 - 11 pages) (Kennedy J.). In the second case, the Sixth Circuit ruled that the government's proof of claim based on civil fines imposed for mine safety violations did not waive the sovereign immunity defense to a debtor's preference claim under § 106(a). In re Rebel Coal Co., Inc., 1991 W.L. 183810. More extended summaries of these two cases will appear in the next edition of the Newsletter.

In other cases of note, the Supreme Court has agreed to review the question of appellate jurisdiction over interlocutory bankruptcy appeals in Connecticut Natl. Bank v Germain (Docket No. 90-1791), 1991 W.L. 95208. The Supreme Court declined to review the decision of the Michigan Court of Appeals in Byerlein v. Shipp, 451 N.W. 2d 565, appeal denied (unpublished). In the Byerlein case, the Michigan Court of Appeals held that a mortgagee who purchased at a judicial sale took subject to a federal tax lien where the IRS was not given notice or joined as a party to the mortgage foreclosure proceedings. The Court of Appeals also ruled, however, that a subsequent tax auction did not extinguish the mortgagee's lien if the mortgagee did not intend that the lien merge with the fee upon purchase.

By Thomas P. Sarb

ANNOUNCEMENT

UNITED STATES BANKRUPTCY COURT
Western District of Michigan

Procedure for Submitting Creditors on Floppy Disk

In order to facilitate the creditor submission process and forest conservation efforts, the court will now accept creditor matrices on floppy disk in cases with 200 or more creditors. The original matrix must be submitted on paper, however, copies of the matrix will not be required. The floppy disks will be returned to the filer upon request.

The matrix must be submitted as either a WordPerfect 5.0 file or as an ASCII text file. Either 5¼" or 3½" floppy disks may be used. These disks may be single, double or high density. The disk submitted should contain only the matrix file and should be labeled with the name(s) of the debtor(s). Although the same format that is used with hard copy submissions still applies, a few modifications are necessary. Any account numbers that accompany creditor address information should be placed on a line directly below the creditor name and directly above the creditor address. The zip code must be on the last line with the city and state information except in the case of a foreign address. Only one blank line consisting of a carriage return should separate creditors. No hard page separators should be used. Margins should be set at 1 (one) inch from the edge of the paper and tabs should not be used.

Any questions regarding matrix submission on floppy disks should be directed to Michael Dunavin, the Systems Administrator for the Bankruptcy Court at (616) 456-2467.

Western Michigan Chapter of the
Federal Bar Association
250 Monroe Avenue, Suite 800
Grand Rapids, MI 49503

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