BANKRUPTCY LAW NEWSLETTER

Published by Federal Bar Association
Western District of Michigan Chapter

VOL. 4, NO. 11 JULY, 1992

[Editor's Note: This issue of the Bankruptcy Law Newsletter is dedicated to Chester C. Woolridge (1896-1992), who served this District as a Referee in Bankruptcy from 1939 to 1960. In his memory, we print edited excerpts from the Bankruptcy Court memorial held on July 6, 1992 and re-print an article from the May, 1989 edition of this Newsletter entitled "Reflections by Referee Chester C. Woolridge."]

UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF MICHIGAN
July 6, 1992

IN MEMORIAM

The Honorable Chester Carr Woolridge

PRESENT: THE HONORABLE LAURENCE E. HOWARD, CHIEF JUDGE
THE HONORABLE JAMES D. GREGG, BANKRUPTCY JUDGE
THE HONORABLE JO ANN C. STEVENSON, BANKRUPTCY JUDGE
THE HONORABLE DAVID E. NIMS, JR., BANKRUPTCY JUDGE

JUDGE HOWARD: This is the time scheduled for the Memorial Service for Chester Woolridge. I would like to personally thank all of you for coming. We have nearly a full courtroom despite such short notice. We all really appreciate it.

As you probably know, Judge Gregg spent a considerable part of his career as a lawyer before he became a judge working in the same firm that Chester Woolridge was "of counsel" to and today and at other times Jim has told all of us about the many fine experiences he had with Judge Woolridge. I thought perhaps Judge Gregg could give us the benefit of his experiences with Judge Woolridge. Judge Gregg.

JUDGE GREGG: Thank you all for coming at a very sad occasion for all of us in the Grand Rapids legal community. Many of us, including me, had the pleasure of knowing Judge Woolridge very well in his many capacities. I first met Judge Woolridge in January of 1978. At that time I had just graduated from law school and I had accepted a job at the law firm of Schmidt, Howlett, Van't Hof,

Snell & Vana. Judge Woolridge was of counsel at that firm and it became clearly apparent to me that, notwithstanding our disparity in ages, he was a special human being from whom I could learn a lot; from who I did learn great things both about law and about life in general. Judge Woolridge was a person who loved the law and he loved talking with his colleagues about the law and equity.

In 1978, as you may recall, the Bankruptcy Act was in effect repealed and the Code took effect. At that time Judge Woolridge felt a little bit lost from a legal standpoint because the law had changed so much. But he was always able to give advice involving equities and involving the practicalities of appearing in court. This morning I had cause again to read an article that was published in the Federal Bar Association Newsletter dated May 1989 at which time Judge Woolridge made a number of comments. And, if any of you have that article, you may want to reread it and it will help you remember him.

It is a very difficult time for me but I want to say that, although Judge Woolridge has now passed away, his legacy will live on with regard to all of us who knew him and respected him, and with regard to all of us who he's touched our lives and some of the advice he's given us from time to time we would be deemed well to follow. Thank you.

JUDGE HOWARD: I know many of the people in the audience had a close relationship with Judge Woolridge. I have already asked Mr. Tim Curtin to make a few remarks. And, after Tim has concluded his, if anybody else would like to make some remarks, I'm sure it would be appreciated.

MR. CURTIN: Thank you, your Honors. May it please the Court, I appreciate the opportunity to speak to the Court and address my fellow practitioners about Chester Woolridge. Chester meant a great deal to me. When I started practicing at Schmidt Howlett in 1963, I had never done any bankruptcy law. In fact, I had only been in Bankruptcy Court one time. And much of the bankruptcy law that I knew, and almost everything I knew about how to approach the Court, and what to expect from the Court, I learned from Chester Woolridge. And Chester, I thought, was the last of the great common law lawyers. If you wanted an analysis of a problem, not from a pure statutory point of view but a legal analysis by a lawyer taking it apart and examining the basic legal theories that went into whatever the concept was, Chester was your man. He remained excellent at that almost until the day he died.

I, likewise with Judge Gregg, more particularly appreciated Chester's love of life. He loved life. He enjoyed it . . . And he might have been 80 or 85 years old when I first knew him, but he was certainly much younger or much closer to me in spirit than the difference in our ages would make it appear.

It's a sad day for me because Chester is now gone. I'm going to miss him a great deal.

JUDGE HOWARD: Thank you, Tim. Mr. Sawdey.

MR. SAWDEY: Chester Woolridge was a light, the light of the lives of many of us. I had the misfortune to only practice in front of him a couple times before he retired and his place was taken by Ed Benson. I was pleased many years later when I served as Master of Ceremonies at Ed's retirement to have Chester Woolridge come and be one of the speakers.

It's sometimes said when someone lives to a ripe old age and they have a good, and healthy, life, that their passing has no tragic overtones. I disagree with that with the likes of Chester Woolridge. He was a bright light in his kindness and intelligence. He was unique. He taught many of us many things not just about the law but about life in general. And I feel sadness in his passing, and I feel there is a tinge of tragedy in it. When one has the kind of qualities that Chester Woolridge has, having those qualities leave us always has to have a tinge of tragedy. And for many people here, I share the same kind of sadness that Judge Gregg has expressed.

JUDGE HOWARD: Thank you, Bob.

As you know, I'm currently sitting in Judge Woolridge's seat. He retired December 31st, 1960. Judge Benson served for exactly 15 years and he retired December 31st, 1976, and I was appointed shortly thereafter. And it was rather comforting to know that for a long time your two predecessors were both alive, and active, and very much a part of what was going on. I didn't know Judge Woolridge too well before I was appointed. I knew of him and knew enough to exchange pleasantries, but he had retired when I was still in law school almost 32 years ago. But I always found him to be a very gracious person, very friendly, always interested in how you were doing. And, after I was appointed, Judge Nims made it a point so that I could better become acquainted with Judge Woolridge that we would go out to eat lunch on occasion. And I think we did this about a half a dozen times. And as often happens when people have the same interests, you discuss bankruptcy or whatever your interest is. So I found those meetings to be very helpful. And, as Tim indicated, he had a sense of the common law on what was right that was very helpful. And I enjoyed his relationship, I found it to be very good and helpful.

Judge Nims was appointed to a new position in April of 1955. And Judge Nims always speaks of Chester Woolridge. In fact, at our meetings, when we try to find out why we are doing something, we ask Judge Nims and it's "Well, this is the way Chester did it." So many of the things that we do today we are doing because Chester did them. And he taught Judge Nims and Judge Nims taught me. So he's had a very, very strong effect on the Court.

And, in conclusion, I think we should have the man that knew Judge Woolridge the best, Judge Nims, who served with him for several years on the Bench, make the final remarks.

JUDGE NIMS: Thank you, Judge Howard.

I knew Judge Woolridge in several respects: first, as a practicing lawyer, I practiced before him. He was a wonderful judge to practice before, always a gentleman, always treated you with courtesy, always with some kindness. And you always knew that you were going to be heard; that when you were presenting your case, you were going to be listened to; and that he would take into consideration what you had said in making his decision. Later on, it became my privilege to work with him as a fellow Referee in Bankruptcy, we were called in those days, for the many years, well, only five years, really not long enough, that we were able to serve together.

Unlike Judge Gregg and Judge Stevenson, I was not a bankruptcy lawyer when I was appointed to the Bench. Most of my work was with insurance, protecting poor insurance companies from those guys there were always trying to get at their money, their pocketbooks. But I did a little practice in the bankruptcy field and enjoyed it very much. But much of what I ever learned about bankruptcy I learned from Judge Woolridge. And then later on I still would talk to him and have lunch with him now and then and would welcome the words of wisdom that he would pass on.

Just recently, my wife and I have had to move to a retirement home and I was very fortunate to find that one of the first persons there that I found that I knew was Judge Woolridge. He was also at the same retirement home that we were and always had a kind word to say to Sybil and to me. And we enjoyed talking to him and having that little time together at the end.

I have always had the highest regard for Judge Woolridge in every respect. He never went to law school but he was more learned in the law that most people that have gone to law school. He always had complete logic as his rule and knew exactly what he was going to say. He had a complete command of the English language. I'll always remember the word "perforce" that I learned from Judge Woolridge and I still think he is the only one I ever heard use it. But I did look it up in the dictionary and he was right. He used it correctly.

So, Judge Howard, and Judge Gregg, and Judge Stevenson, I would like to at this time move that this Court adopt the following resolution:

UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF MICHIGAN

IN MEMORIAM

The Honorable Chester Carr Woolridge

Proceedings Before the United States Bankruptcy Court For the Western District of Michigan held at the Gerald R. Ford Federal Building, United States Court House in the City of Grand Rapids, Michigan, on the 6th day of July, 1992.

PRESENT: THE HONORABLE LAURENCE E. HOWARD, CHIEF JUDGE
THE HONORABLE JAMES D. GREGG, BANKRUPTCY JUDGE
THE HONORABLE JO ANN C. STEVENSON, BANKRUPTCY JUDGE
THE HONORABLE DAVID E. NIMS, JR., BANKRUPTCY JUDGE

On July 1, 1992, this Court lost a former Judge who, more than any other, set the format for this court. Sadly, he was never technically a judge. However, he was in fact a far greater judge than many of those who followed him and by law became recognized by that title. To those of us who knew him, he was always a Judge.

Judge Woolridge was born 95 years ago in Libertyville, Illinois. He attended first through eight grades at Pierport, Michigan a small village in Manistee County on Lake Michigan. He graduated from Arcadia High School at Arcadia, Michigan, ten miles to the north, also on the shore of the big lake.

After receiving his teaching certificate Chester taught in rural schools for five years. He would walk to and from school, a four mile trek each way. For a short time he served his country in the Army during World War I. In 1920, Chester and Ruth were married and had one daughter, Naomi Woolridge Bronkema, who pursued a successful career in Interior Decorating in California before returning to Grand Rapids to be with her father. They had two grandchildren, Shelli Horsley and William H. Kuntz, Jr., and two great grandchildren, Jay D. Horsley and Naomi L. Lewis.

Chester read law under the supervision of Ben Corwin and George Norcross and in 1924, he was admitted to the bar. When Judge Corwin was asked to serve as a Bankruptcy Referee in this Court he would only do so if he could take Chester with him as law clerk, chief clerk, etc. After serving under Judge Corwin and later under Judge Charles Blair on January 17, 1939, Chester was appointed Referee in Bankruptcy. He served in this office with distinction until his retirement on December 31, 1960, when he was succeeded by the Honorable Edward H. Benson.

Judge Woolridge was an outstanding jurist he could get to a problem without detours and his decisions from the bench were always perfectly organized, clear, concise and always in perfect English. He always had full control of the court-room. He was the complete gentleman and treated attorneys, debtors and others who came before him with courtesy and understanding. No party came away from his court feeling that he been deprived of his or her day in court. He was proud to be a lawyer and delighted in his friendships with his colleagues among the bar and this respect was returned as indicated by the fact that while sitting as a judge, he was elected President of the Grand Rapids Bar Association. He enjoyed working out complicated solutions for Chapter X and XI cases and was proud of the high percentage of successes he had in saving failing businesses. At his 90th Birthday anniversary celebration, Judge Nims stated that, except for the prestige that Chester brought to the court, he would not have accepted the offer to

join the court and gave Chester credit for having taught him most of what he knew about bankruptcy. Judge Gregg was fortunate to have been a young lawyer in the bankruptcy division of a large law firm at the time when Judge Woolridge was "of counsel" to that firm and also gives credit to Chester for his advice and guidance over many years.

Chester will be missed but he will live on in the many innovations of his that still continue in the court and the standing and reputation of this court for which he is entitled to much credit.

It is fitting that this court order as follows:

1. That through the balance of this and next week, the flags of this court will be draped in black as a symbol of our recognition of what Judge Woolridge has contributed to this court.

2. This court expresses to Chester's daughter, Naomi and his Grandchildren and Great-grandchildren our sympathy for their loss but also express our gratefulness for all he has meant to this court.

3. That a copy of this memorandum be sent to Mrs. Naomi Woodridge Bronkema and the family of Judge Woolridge.

Laurence E. Howard Chief Bankruptcy Judge
James D. Gregg Bankruptcy Judge
Jo Ann C. Stevenson Bankruptcy Judge
David E. Nims, Jr. Bankruptcy Judge

REFLECTIONS BY REFEREE CHESTER C. WOOLRIDGE

[Reprinted from the May, 1989 Bankruptcy Law Newsletter]

Chester C. Woolridge served as a United States Bankruptcy Referee for the Western District of Michigan for 25 1/2 years. He was a bankruptcy judge during the good years and the bad--including the Great Depression. The below constitutes an informal interview with him conducted by Bankruptcy Judge Gregg's secretary, Linda Lane.

Question: Please tell us about your early formative years.

I was born in Libertyville, Illinois, in 1896, but my early years were spent in the small town of Pierport on Lake Michigan in Manistee County. I attended grades 1-8 in Pierport. My father was a carpenter by trade, but during the slow months he farmed our land. We had the usual farm animals and chores as did other families at that time. In those days, not everyone had the chance to attend high school. Only those who did well on a state test could attend high school. I went to Arcadia High School and upon completion was given the opportunity to take a teaching preparatory course toward a career in teaching, and that's what I did. My mother taught the 5th and 6th grades, as well as the teaching preparatory course; and I can tell you, when I was taking the teacher's preparatory, I didn't get any soft course just because she was the teacher.

I taught in the rural schools for approximately 5 years, with a brief interruption for service in the Army. I served a 6-month term in Battle Creek and then in Ohio. My rank was private. In 1920, while teaching, I married my wife, Ruth. I had no mode of transportation other than foot to get me back and forth to teach school. It was a 4-mile walk daily.

Question: What caused you to first become interested in the law profession?

As a teenager, I was introduced to a prosecuting attorney from southwestern Iowa. He came to our little house in Pierport with his family, and he wanted fresh milk and sometimes buttermilk and

always unsalted butter and so forth. I would go over practically every morning and deliver whatever he wanted. One day he asked me, "Chester, what are you going to do when you grow up?" I said, "I don't know that I really know. I thought at one time the ministry, but I have abandoned that. I thought, well, I could farm, but I have abandoned that. The thing that I like to do is debate. I was one of the leaders of the two teams in Arcadia High School, and I loved it." He said, "Well, tell you what I will do. When I go back to my office, I will take out a complete case for you." (Iowa was what they called a "case law state." Everything was done on a case-by case basis with no common law.) He sent me a great bundle of stuff and the next year he said, "How did you like it?" I said, "I was fascinated by it." Well, he said, "Strive for it."

Question: How did you obtain your legal education?

The law provided in those days that you could avoid going to college as such by declaring your intention in writing with the Supreme Court of Michigan. There wasn't any Michigan Court of Appeals then at all. I immediately sought a sponsor to whom I would be indentured for 4 years before taking and passing the Bar Examination in September, 1924. The sponsor I chose was the firm of Corwin & Norcross. George Norcross also became an attorney using this "sponsorship" procedure. He was a deputy register down at Grand Haven in the Probate Court, and he came to Grand Rapids and registered to study law to become a practicing attorney. I spent most of my time in the public library (law firms didn't have their own libraries in those days) running down cases and analyzing them and so forth; it was just wonderful training, just wonderful. I do have, I think, quite an analytical mind.

Question: How did you become a bankruptcy referee?

Well, there was a big boom down in Florida--a real estate boom. Benn Corwin was a real estate expert and he went down there and stayed to enjoy that boom and left George Norcross and me up here. After Benn Corwin left, District Judge Raymond was willing to appoint Charles Blair to the bankruptcy referee position. Charles Blair, a Harvard graduate, had an excellent background. Blair said, "Yes, I will take the job, if Chester will come with me." And I did. My duties were varied--law clerk, researcher, bailiff, etc. We worked together for about 10 years. After that period, Blair was tiring and Judge Raymond appointed me in his stead on January 17, 1939.

Question: What were your duties and responsibilities as bankruptcy referee?

Well, they were really the same as the duties of a district judge, within the bankruptcy statute. As a referee, I conducted court business in an office I maintained in the Michigan Trust Building. I was responsible for my own staff, equipment, etc. I paid the office expenses, including salaries, from my own pocket. In those days, referees were given the filing fee and then were paid on a commission basis. When the filings were up, we did well; when they were down, well, I would have to use my own money to continue operations. We operated in this fashion until 1947, when the laws were changed to include us as part of the U.S. court system.

I would handle a typical business reorganization a bit different than the judges do today. First I would give notice to all the scheduled creditors and bring the case on for hearing. I would listen to everybody talk--and everybody did talk as a rule--and when they got through I would take a deep breath and say, "Well I think we can reorganize this." Then we would get the debtor to file a plan of reorganization and go back and vote on it with respect to those creditors who had provable claims and had proved them. If payments were made on schedule, a discharge was granted and the business would then go on as usual; if payments were not made, I would issue a show cause notice and, if necessary, liquidate the estate.

If my memory serves me correctly, I would say we had 1,100 filings a year when I took the bench. That's quite a few. Most of them were what I called "potboilers." I could take care of two of

them at 10 a.m., two at 11 a.m., two at 2 p.m., and two of them at 3 p.m. Most of the cases were no asset cases. I would analyze the insurance policies and if they were payable to the wife or the family, or both, they were exempt. If they were payable to the estate, however, then I would make an order giving him or her 30 days within which to pay the cash surrender value; otherwise, I would send it in to the company, cancel the policy, and take the money for its cash value.

Question: Who did you work with at the court when you were a referee?

During my tenure, the district court judges were Judge Raymond W. Starr, Judge Wallace Kent, and Judge Noel P. Fox. Prior to his appointment as district judge, Judge Starr was the Attorney General for the State of Michigan and a Justice of the Michigan Supreme Court. He loved being a judge. He said the finest job that the Federal Government has to offer is the district judgeship.

The clerk of the district court, Howard Ziel, was also my clerk; so there was no new relationship there. The District Court and Bankruptcy Court were one court. And I had a wonderful relationship with them. At first, court was held only in Grand Rapids. Lansing was added in 1954, and Kalamazoo in 1955. When Dave Nims was appointed in 1955, he took the Kalamazoo and Lansing cases and I would take the Grand Rapids calendar. When he was on vacation, I would handle all the cases, and vice versa.

Question: What were the Bankruptcy Court facilities at that time?

There almost weren't any. In 1947, they gave us the storage rooms on the fourth floor of the old Federal Building for our offices and courtroom. We had a main office where the public would file cases, a clerk's office, and one judge's office. When Judge Nims joined us, there was no office for him; so they cleaned out another small room which had no windows under the eaves. We attempted to have air-conditioning installed, but they told us we didn't have enough air circulation to accommodate it. You can imagine how hot it got up there in the summer months. The courtroom had a huge post right in the middle of it, and when it was time to hold court, I would have to ask the court reporter if anyone was present, because I could not see around the post. Every time it rained we had to put some pots down to catch the leaks, and it was a distressing situation. And they seemed to think they couldn't do anything. I knew what to do about it--all they had to do was to get up there with some hot tar. But they never did. In the courtroom we had a table and chairs for the plaintiff and the defendant, so forth. They were just "pickup" facilities until I invested my own money and had prepared a nice table and chairs for counsel, and one for the reporter too. Our library consisted of only one set of books--Collier on Bankruptcy, and then later Remington on Bankruptcy (now Lawyers Co-op). I had no personal secretary, but had the clerks in the front office do my typing, etc. The reporter we had was Wallace Webster. When I would get through a motion day and needed to prepare an opinion, I would dictate the whole thing to Webster. That man's work would come back on my desk in a couple of days and you could almost hear me breathe in the opinion because it was so accurate. I conducted all my own first meetings of creditors, did the final auditing, and closed my files. We did not have calendar clerks, audit clerks, or law clerks to help us.

I made all the decisions of every kind and there was a 10-day period when creditors could object to orders and "review" them. They didn't say "appeal." And if the judge upheld me, then we could go to the Circuit Court of Appeals which we did once or twice.

Question: How and what were you paid as a referee?

While I was a referee, I was paid under the folio order--by how many one hundred-word orders I signed. And I had to keep a book on that. After we moved to the old Federal Building, one of my responsibilities was handling the court budget. There were several occasions when, at the end of the year, I had money left over. I returned the money to Washington and they didn't know what to do about

it. They wanted me to buy a huge computing machine, and I told them all I really needed was a simple adding machine.

Question: What was the effect of the depression upon the economy and the Bankruptcy Court?

You never saw an economy go into such shambles. Nobody had any money; nobody wanted to buy anything. Everybody had a warehouse full of wonderfully fine stuff; nobody wanted it. An illustration--Berkey & Gay of Grand Rapids made the finest dining room furniture in the world for years. And when the depression came, they filed for bankruptcy and asked me for authority to give receivers certificates to raise money. When I asked them what they were going to do with the money, they said they were going to manufacture more furniture. I said, "My friend, you've got furniture running out of your eyes now and nobody wants to buy it." I would not give them authority. We had a hearing on Berkey & Gay as to whether or not we would close it and liquidate it and I ordered they be liquidated. And then we had an auction sale and that beautiful dining room furniture just went for next to nothing--the people didn't have any money. People were trying to find a way out of this thing to survive, but there wasn't any way out because the buyers weren't there. The depression overloaded the Bankruptcy Court's workload immediately. The amount of cases during the depression doubled, but I had to let some of my staff go because there was not enough money. I used to cart the files home nights to work on cases that "went to briefs."

Question: Could you tell us about a few of your memorable cases?

Ivory soap says it is 99 44/100th percent pure. And these three cases have to do with the balance of the so-called "not so pure."

The first case involves a successful butcher on the south end of Grand Rapids. Ed Benson was attorney for the trustee. Upon close examination of the bankrupt's (under the old Bankruptcy Act, a "debtor" was denominated a "bankrupt") assets, the trustee discovered four equal deposits in Old Ken Bank under the butcher's four sons' names. I migh add that the boys didn't know that they had th accounts. I issued a show cause, the bank turne over the money, and the creditors received paymen on their claims.

The second case involved a woman attorne in town whose tenacity is one of her main character istics. She filed a bankruptcy petition on behalf o a woman in Grand Rapids who had normal exemp tions--homestead, etc. I noticed the statement o affairs showed a place of business in the Canadia Soo. I demanded a deed to the Canadian property this was refused. A show cause on turnover wa issued and the U.S. Marshall was to put the bankrup in jail when she came to Grand Rapids because sh would not turn the deed over to the court. Jus before Christmas that year, Judge Starr called m and stated that he did not want to put the bankrup in jail over Christmas and that he would jail he after Christmas. And I said to him, "Well, Judge, o course, this is something that is kind of a punish ment. You can wipe it out if you want to." He said "I don't want to do that. I will put her in afte Christmas." After the bankrupt received the notice she turned over the property and the jail term wa not necessary.

The third case was probably one of my mos interesting. It involved a sausage maker on Stockin Avenue whose sole product was kielbasa sausage All of a sudden this man filed for liquidation i bankruptcy. There was no apparent reason for hi doing so. His only assets consisted of butche equipment. A final meeting was held and a reason able dividend to creditors was paid. About a yea and a half later, Sigmund Zamorowski, who was th attorney in the first case, called and asked to see me During our conversation he disclosed that the forme bankrupt sausage maker had a falling out with good friend, with whom the bankrupt had exchange confidences. In his anger, the friend betrayed th debtor and told Mr. Zamorowski that the bankrup had hidden assets under a cement floor in the cella of his old business establishment. The Trustee Frank Dean, discovered some relatively new cemer in a small area, tapped it with a hammer and disco

ered several two-quart mason jars stuffed with a large amount of currency. I reopened the case, reappointed the trustee whoever he was, and reappointed Zamorowski. After we had counted the money--and there was a lot of money--they filed a first and final report on the reopened case and I allowed the trustee a generous finder's fee and Zamorowski a generous creation of estate fee which I could do of course. I called a final meeting on the reopened estate, and when the smoke all cleared away, I paid all the creditors who had not been paid in full in the first estate in full; and since there was money left over, I had no alternative except to turn it over to the deceitful bankrupt.

Lastly, there is the "fish story." I won't recount it here because it has been told many times before. [Editor's note: See Federal Bar Association Bankruptcy Newsletter, January, 1989, for Harold Sawyer's retelling of the "fish story" in "Bankruptcy Practice in the 'Olden Days'"].

Question: Are there any particular bankruptcy attorneys that you especially respected?

The best bankruptcy trustee and attorney in Lansing was C. LaVerne Roberts, a man who was completely blind. And I don't know who coached him, but he would stand right there and he would make just as plain a presentation as anyone could make. And I loved him.

Question: What do you do with your spare time?

I go up to my cottage in Newaygo almost every weekend to swim and relax. I enjoy the home repair work involved with the cottage. I just treat it as a retreat where I can get rid of the annoyances and pressures of telephone and people coming in the door here at the office. [Editor's note: Judge Woolridge has served in an "of counsel" capacity for many years at Varnum, Riddering, Schmidt & Howlett, and one of its predecessor firms.]

Question: What advice do you have for current judges and bankruptcy practitioners?

First of all, when I was a referee, I would send the schedules back to the attorney and tell the attorney I was not about to spend my time on plans that would not work. I am quite sure the current judges feel the same way. My advice to bankruptcy practitioners would be to suggest an attorney take the time to completely assess a debtor's situation to determine if he is able to viably reorganize under a Chapter 11, 12, or 13 plan. Many reorganization cases are not viable and should probably be in liquidation. And when the attorney gets done adding up all of the debtor's expenses, is there any money left for him to pay creditors? If there is not, they should not file for a reorganization proceeding.

My advice to current judges is: Make plain ordinary decisions not only based upon the statute but also on the basis of common sense.

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 Joseph M. Ammar with the assistance of Larry VerMerris.

Pioneer Investment Services Company v. Brunswick Associates Ltd. Partnership, Docket No. 91-1695, ___ S. Ct. ___, 1992 WL 89425 (1992). The Supreme Court has granted certiorari in the case of In re Pioneer Investment Services Company, 943 F.2d 673 (6th Cir. 1992). In the case below, the Sixth Circuit found that the claimants had established "excusable neglect" which would allow them to file an untimely proof of claim in a Chapter 11 case. The Sixth Circuit made this ruling based on the fact that the bar date notice was not clear and conspicuous and that the creditors should not be punished for the failure of their lawyer to determine the proper filing date.

Ohio Public Employees Deferred Compensation Program v. Sicherman, Docket No. 91-1527, ___ S.Ct. ___, 1992 WL 6818 (1992). In this case, the Supreme Court granted certiorari, vacated the judgment of the Sixth Circuit, and remanded the case to the Sixth Circuit for reconsideration in light of the Supreme Court's decision in Patterson v. Shumate, which held that the Debtor's beneficial interest in a trust is not property of the estate under §541(c)(2) if the trust is subject to transfer restrictions that are enforceable under "applicable, nonbankruptcy law." (For a summary of Patterson, see the June, 1992 edition of this Newsletter.) The instant case deals with a Debtor's interest in the Ohio Public Employees Deferred Compensation Program.

In re Convenient Food Mart, Inc., Case No. 91-6201 (6th Cir. June 30, 1992). In this case, the Sixth Circuit held that a tenancy at sufferance is a possessory interest in real property within the scope of the bankruptcy estate under § 541.

The debtor's nonresidential real property lease expired on October 31, 1989. Following expiration, the debtor remained in possession pursuant to Kentucky's one-year holdover statute. In June, 1990, the debtor filed a Chapter 11 petition. The statutory holdover period expired in October, 1990. In December, 1990, the lessor obtained relief from stay.

The debtor argued that the bankruptcy court was without jurisdiction to order it to surrender the leased premises because the expired lease was not part of the bankruptcy estate. The Sixth Circuit rejected the debtor's argument, finding that a tenancy at sufferance is a possessory interest in real property within the scope of the estate in bankruptcy under § 541.

In re Michigan Lithographing Co., Case No. 1:92-CV-151 (W.D. Mich. July 9, 1992). In this decision by Judge Hillman, the district court affirmed the bankruptcy court's decision that the Trustee had constructive notice of a general contractor's interest in the debtor's property that was the subject of a construction lien and, therefore, the Trustee did not have the status of a bona fide purchaser.

The general contractor recorded a claim of lien with the register of deeds, but did not record a notice of lis pendens. The general contractor and the Trustee filed cross-motions for summary judgment, each asserting a priority interest in the property.

Section 544(a)(3) gives a trustee the powers of a bona fide purchaser of the property from the debtor if, at the time the bankruptcy is commenced, a hypothetical buyer could have attained BFP status. Under Michigan law, a BFP is one who purchases property without notice, actual or constructive, of the outstanding rights of others. BFP status enables the trustee to avoid claims against the debtor by third parties if the trustee could hypothetically have been a BFP as to those parties.

The district court rejected the Trustee's claim that a notice of lis pendens is the exclusive method by which a prospective purchaser might gain constructive notice of a construction lienor's interest. Instead, the district court agreed with the bankruptcy court's position that the recorded notice of the lien, despite the absence of a recorded notice of lis pendens, provided constructive notice of the general contractor's interest in the property. As a result of this notice, the Trustee was not accorded the rights of a BFP with respect to the property. Therefore, the bankruptcy court's order granting the general contractor's motion for summary judgment and denying the Trustee's motion for summary judgment, was affirmed.

Ide v. Leighty, Case No. 1:91:CV:971 (W.D. Mich. June 1, 1992). This case, authored by Judge Enslen, involves the dismissal of the United States of America as a party defendant in a land contract forfeiture action.

Federal tax liens had attached to the plaintiff/vendor's property. The government argued that the doctrine of sovereign immunity precludes actions seeking to forfeit interests existing by virtue of a federal tax lien. The district court noted that in actions that affect property on which the government

has a lien, the government has waived its immunity and consented to be named as a party only in those actions specified in 28 U.S.C. § 2410. Since a land contract forfeiture action is not included in that provision, the government was immune from suit. Accordingly, the government was dismissed as a party defendant.

[Note, however, that in the case of In re Vereyken, Case No. 91-1174 (6th Cir. May 21, 1992), decided 9 days earlier and summarized in the June, 1992 Bankruptcy Law Newsletter, the Sixth Circuit in an action to quiet title (which is a type of action specified in 28 U.S.C. § 2410) set aside a federal tax lien in a similar factual situation.]

In re Moses, Case No. 91-77127 (E.D. Mich. June 10, 1992). This decision, authored by Judge Rosen, involves the ability of a bankruptcy court to dismiss a Chapter 7 case for cause when a debtor refuses to provide necessary information on the basis of the debtor's validly invoked privilege against self-incrimination.

The district court held that if a debtor's refusal to testify renders a trustee unable to perform the trustee's duties under the Bankruptcy Code, a court may dismiss the case for cause under § 707(a), even though the refusal to testify is based on a valid assertion of the privilege against self-incrimination. The district court remanded the case to the bankruptcy court for a factual determination as to whether the information withheld by the debtor pursuant to her Fifth Amendment privilege prevented the trustee from performing his duties. If so, the bankruptcy court had the authority to dismiss the case without prejudice under § 707(a).

Green v. Hocking, Case No. 91-74422 (E.D. Mich. May 15, 1992). In this decision by Judge Cohn, the district court held that an attorney who regularly files legal actions for the purpose of collecting debts on behalf of a client is not a "debt collector" within the meaning of the Fair Debt Collection Practices Act ("Act"), 15 U.S.C. § 1692a(6). Therefore, the defendant/attorney was not liable under the Act for misstating the amount owed to his client in a collection complaint.

In re Moss, Case No. ST 91-85696 (Bankr. W.D. Mich. July 23, 1992). This opinion by Judge Stevenson involves the issue of whether the debtors could exempt their interest in two individual retirement annuities under § 522(d)(10)(E). Under an individual retirement annuity, the proceeds are used to purchase a single premium annuity when the holder reaches retirement age.

Section 522(d)(10)(E) describes as exempt "a payment under a stock bonus, pension, profit sharing, annuity, or similar plan or contract on account of illness, disability, death, age, or length of service, to the extent reasonably necessary for the support of the debtor and any dependent of the debtor."

The court first acknowledged that an individual retirement annuity is the functional equivalent of an individual retirement account for purposes of §522(d)(10)(E). However, the court refused to simply conclude that an individual retirement annuity is an annuity and therefore exempt. Rather, it like an individual retirement account, must be examined as a "similar plan or contract" under §522(d)(10)(E). The court also stated that the debtor's ability to control the fund was a key issue in determining whether the payments are truly "on account of illness, disability, death, age, or length of service," or are available to the debtor on demand.

The court found that the individual retirement annuities were available on demand even though significant withdrawal penalties would be incurred. Therefore, the debtors' exemption was disallowed. The court noted that the debtors could have obtained an exemption if an annuity had been purchased, or if they had selected the Michigan exemptions which explicitly exempt IRAs.

In re Dinsmore, Case No. HK 90-85251 (Bankr. W.D. Mich. June 26, 1992). This decision by Judge Howard involves the confirmation of a Chapter 13 plan.

The bank loaned working capital to the debtor's former business. The debtor personally guaranteed the corporate debt and as additional security granted the bank a second mortgage on his

residence and on commercial property. The bank was also the first mortgagee on the debtor's residence. The treatment of the first mortgage was not disputed. The commercial property was foreclosed upon post-petition by another bank which was the first mortgagee on that property.

The debtor's plan proposed a cramdown of the bank's claim. The debtor calculated the value of the bank's secured claim by deducting potential closing costs and commissions, real estate taxes and the first mortgage pay-off from the $76,000 value of the residential property. On the value of the secured claim, the debtor proposed to pay the bank a floating rate of interest equal to the bank's internal prime rate plus 2% with a fifteen year amortization and a balloon payment in ten years. The plan capped the amount which the interest rate could rise at 2% in any one year and 6% over the life of the plan. The balance of the bank's claim was to be paid as a general unsecured claim.

The court first found that the plan violated § 1322(c), which provides in part that a plan may not provide payments over a period that is longer than five years.

The court next held that the plan did not propose an impermissible modification under §1322(b)(2). Section 1322(b)(2) provides that a plan may "modify the rights of holders of secured claims, other than a claim secured only by a security interest in real property that is the debtor's principal residence." The bank argued that since the commercial property was sold prior to confirmation, it became a creditor secured only by the debtor's principal residence pursuant to §1322(b)(2). The court rejected the bank's argument, finding that, as of the petition date, the bank possessed a valid security interest in property other than the debtor's principal residence. The bank was a commercial lender who by virtue of post-petition events became secured only by the debtor's residence. The treatment of the bank's claim was not prohibited under §1322(b)(2). Therefore, the debtor could modify the bank's claim.

The court then held that the Supreme Court's recent decision in *Dewsnup* (which prohibited a Chapter 7 debtor from "stripping down" a creditor's lien on real property to the value of the collateral) did not preclude bifurcation and modification of the bank's claim. When a creditor is secured by collateral other than the debtor's principal residence, §1322(b)(2) and §1325(a)(5)(B) expressly permit the bifurcation and modification of the creditor's claim in a plan. Therefore, the bank possessed an allowed secured claim only up to the value of its interest in the collateral as set forth in §506(a).

The court next held that the debtor could not deduct hypothetical costs of sale from the fair market value of the property in computing the bank's allowed secured claim, but that the amount of real estate taxes and the value of the first mortgage should be deducted from the fair market value in computing the allowed secured claim. Valuing the bank's secured claim did not contemplate a forced sale of the property. When the debtor chooses to retain and use property, a creditor should not have its claim reduced to liquidation value. Costs of sale are a hypothetical computation that should be considered only when disposition of the property is contemplated. However, even though the property was retained by the debtor, the real estate taxes and first mortgage impaired the bank's interest in the property. These were actual encumbrances which should be deducted from the fair market value in computing the allowed secured claim.

The final issue was the proper interest rate to be applied to the payment of the bank's allowed secured claim. The proposed rate was based on a fifteen year amortization and a ten year balloon payment. Since the court decided that the bank was to be paid within the §1322(c) time frame, the debtor was given an opportunity to work out an agreement on the interest rate to be paid under the new terms. If an agreement could not be reached, the court would determine the interest rate when the amount owed to the bank under the second mortgage was determined.

In re Barker-Fowler Electric Co., Case No. 90-80360 (Bankr. W.D. Mich. June 30, 1992). This case decision, authored by Judge Gregg, involves the issue of whether a court, pursuant to §362(d) or §105, should amend or alter a previously entered

judgment annulling the automatic stay to instead retroactively modify the stay to a date certain; and therefore, commence the running of the §108(c) time extension for a second time to preserve the statute of limitations in a state court personal injury suit.

A personal injury claimant requested the court to narrow its previous order annulling the automatic stay to instead retroactively modify the stay to a date certain. If the court granted the request, the §108(c)(2) thirty-day extension of the statute of limitations would commence on a different date, preserving a personal injury suit which was filed within that time period.

The court found that under extremely limited circumstances a court may retroactively modify the stay under §362(d) to a date certain beyond the filing of the petition. However, under the facts of this case, such retroactive modification of the stay was not justified to override §108(c)'s express language.

In re Toti, Case No. 88-05085 (Bankr. E.D. Mich. May 22, 1992). This decision by Judge Shapero involves the dischargeability of federal income taxes under §523(a)(1)(C) and the Internal Revenue Service's sovereign immunity with respect to an action for violation of the automatic stay.

The debtor was convicted of willfully failing to file federal income tax returns pursuant to 26 U.S.C. §7203. Following his conviction, the debtor filed his delinquent tax returns but did not pay the tax liabilities. The debtor fell behind on his payments to the IRS for the delinquent taxes and filed a Chapter 7 petition. The debtor then filed an adversary proceeding to determine the dischargeability of the tax obligation for unpaid federal income taxes. The debtor also sought damages against the IRS for violation of the automatic stay because of its post-petition levy against the debtor's pension income.

Section 523(a)(1)(C) excepts from discharge any debt for a tax with respect to which the debtor made a fraudulent return or willfully attempted in any manner to defeat or evade the tax.

The court found that, although the debtor failed to pay income taxes, the IRS did not present any evidence to indicate that the debtor willfully attempted to evade or defeat payment of income taxes. Therefore, §523(a)(1)(C) was not satisfied and the debtor was entitled to receive a discharge of certain tax obligations.

The court next found that the IRS violated the automatic stay when it seized post-petition pension income. However, based on the Supreme Court's decision in Nordic Village, the debtor's requested monetary relief from the IRS for violation of the stay was denied.

In re Khullar, 139 B.R. 428 (Bankr E.D. Mich. 1992). In this decision, authored by Judge Graves, the plaintiff sued the debtor pre-petition in state court for the conversion of medical insurance payments. After a trial, in which the debtor failed to testify, the plaintiff obtained a state court judgment. The debtor subsequently filed a bankruptcy petition and the plaintiff objected to the discharge of the debt pursuant to §523(a)(2), (4) and (6).

The court found that collateral estoppel applied. Therefore, the plaintiff was granted summary judgment in the nondischargeability action.

McIntyre v. Ernew, Inc., Case No. 125582 (Mich. App. June 17, 1992). In this unpublished opinion, the Michigan Court of Appeals affirmed the circuit court's order granting the plaintiffs summary judgment against the defendant/guarantor in an action to enforce a promissory note.

The defendant/guarantor first claimed that the promissory note was void because the interest rate was in excess of the interest rate allowed by the criminal usury statute. The court rejected this argument since MCLA 450.1275 allows a corporation to agree in writing to pay an interest rate greater than the legal rate of interest. Therefore, the usury defense was prohibited.

The court also rejected the defendant/guarantor's arguments that the claim was barred by the doctrine of laches and that the

defendant/guarantor was released from his obligation under the note because the plaintiff extended the note's date without the defendant/guarantor's consent. The laches doctrine was unavailable because the defendant/guarantor encouraged the plaintiffs' forbearance against the corporate debtor. The extension of time for payment was not a valid contract because it was not supported by consideration. Therefore, the defendant/guarantor was not released from liability.

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, 1992 through June 30, 1992. These filings are compared to those made during the same period one year ago and two years ago.

	1/1/92-6/30/92	1/1/91-6/30/91	1/1/90-6/30/90
Chapter 7	2,858	2,575	2,017
Chapter 11	63	84	74
Chapter 12	14	8	9
Chapter 13	829	880	821
	3,764	3,547	2,921

RETIREMENT DINNER FOR HONORABLE DAVID E. NIMS, JR.

After a long and distinguished career on the bankruptcy bench, Judge David E. Nims, Jr. will be retiring on September 30, 1992. On that day, a retirement dinner will be held in his honor at Egypt Valley Country Club, 7333 Knapp, N.E., Ada, Michigan. A reception will be held at 6:30 p.m. Dinner will be at 7:30 p.m. The ticket price will be $40 per person.

All attorneys, spouses, and friends are cordially invited to attend. This promises to be a most enjoyable and memorable event, so please mark your calendars accordingly.

Also, please RSVP this invitation by sending your check payable to Timothy J. Curtin to him at 171 Monroe Avenue, Suite 800, Grand Rapids, Michigan 49503, no later than September 1, 1992. Directions to the country club are available upon request.

AD HOC COMMITTEE FOR
JUDGE NIMS' RETIREMENT

EDITOR'S NOTEBOOK

This issue is a tribute to the Honorable Chester Woolridge, who served the United States Bankruptcy Court for the Western District of Michigan with distinction as a referee in bankruptcy for many years. It is interesting to note that, as Judge Nims retires after many years of distinguished

service as a judge of this court, Judge Nims attributes much of the tradition of this court, for civility, hard work, and dedication to the law, to "Judge" Woolridge. It is important for all of us as we move forward in our careers to look back and see from where we have come. Such consideration also emphasizes the importance of being vigilant to assure that these traditions continue among the bench and bar of this court.

In a case of note from another circuit, in what appears to be a case of first impression at the court of appeals level, the 11th Circuit has held that "cross-collateralization" of pre-petition debt with unencumbered property of the Bankruptcy estate as part of a post-petition financing agreement is not authorized by the Code nor within the Bankruptcy Court's equitable power. Shapiro v. Saybrook Mfg. Co. (In re Saybrook Mfg. Co.), No. 91-8542, 61 U.S.L.W. 2019 (11th Cir. June 25, 1992). The Eleventh Circuit held that §364 does not authorize the granting of liens to secure pre-petition loans. Further, the court held that such cross-collateralization was directly contrary to the Code's priority scheme.

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