# BANKRUPTCY LAW NEWSLETTER

Published by Federal Bar Association
Western District of Michigan Chapter

VOL. 4, NO. 7 MARCH, 1992

[Editor's Note: Because of the length of the announcements from the Bankruptcy Court and requests for comment on local rule changes proposed by the Local Rules Committee of the FBA Bankruptcy Section Steering Committee, there will be no lead law article in this month's issue.]

## FROM THE BANKRUPTCY COURT

### Court Policy on Service of Notices and Orders.

The proposed policy on service of notices and orders which was published in the November issue of the Bankruptcy Law Newsletter has been adopted by the court without change. Copies of the new policy will be provided without charge to the bar.

This policy does not significantly change our present procedure. The Court will continue to serve those high volume notices which must served in most cases (e.g. 341 meeting notices, discharges, no asset report notices and notices of possible distribution of dividends). However, the Court will no longer serve disclosure statements and plans in chapter 11 cases nor will it serve notices of sale - except to the buyer's list.

We are aware that there may be cases in which the policy would require attorneys or debtors to serve notices after any possibility of paying for such notices has passed. The Court may agree to serve such notices upon a showing of hardship. Emergencies will be handled on a case by case basis by the judges or clerk of the court.

Finally, when attorneys need current matrices of creditors and interested parties to serve notices, the court will provide the matrices without charge.

### PACER Has Finally Arrived.

After a very long wait, the Court has finally received the equipment and software to implement PACER. This system will allow any authorized person to dial into the system to access case information from any location outside the court.

Authorized persons will be able to dial into a modified database containing basic case information (e.g. file number, chapter, parties, general status of the case), and will be able to view the last 6 months of docket entries in the case. PACER will also provide a register of claims filed in the case. Finally, users will have access to a daily case report which will show new case filings and which will be updated each day.

Although the PACER system will not give you access to all of the information which is stored in the BANCAP database for each case, it gives rapid, accurate case information which can be retrieved 24 hours a day. And here's the best news -- for the time being it's free. The judicial council intends to impose a user fee, but at the moment the mechanics for collecting the fee have not been implemented. Unfortunately, PACER is not yet programmed to give users access to a mailing matrix for each case. We hope that this will be an enhancement which we can offer in the near future.

No exotic equipment is required to access this program. You need a personal computer with a 2400 or 1200 baud modem connected to a telephone line. If you want to print the case information you need to use the capture feature of your PC's communication software so that your printer will print as you scroll through a case.

If you have the appropriate equipment, you need to get a password from the court to authorize your entry into the system. We hope to start assigning passwords on or about April 15. If you want to participate, please call Mike Dunavin at 456-2467 after April 15. He will also be able to give you further information about the capabilities of this service and may be able to help you determine what equipment or software you need to make the link to the court.

## Trials of Bankruptcy Matters in District Court

The recent decision by the Circuit Court of Appeals for the Sixth Circuit which holds that bankruptcy courts do not have authority to hold jury trials (See the discussion of Rafoth v. Nat'l Union Fire Ins., ___ F.2nd ___ (6th Cir. 1992) in the last issue) requires this court to create a new procedure to refer jury cases to the U.S. District Court. Both courts are working on a joint procedure for facilitating this process.

Bankruptcy judges assigned to adversary proceedings involving requests for jury trials may retain such proceedings through discovery, motions for summary disposition, and the final pretrial. If, at this point, the judge finds that trial of a core matter must be by jury, or if the judge believes that a non-core matter should remain in the federal system, then the Court will send a report and recommendation to the U.S. District Court asking sua sponte for withdrawal of reference of the proceeding. If the withdrawal is ordered, the proceeding will be administratively closed by the bankruptcy court and will be completed in the district court.

Parties to bankruptcy cases or adversary proceedings may seek withdrawal of reference pursuant to 28 USC 157(d). Such motions should be filed in the bankruptcy court. This court will prepare and send to the moving party a notice (to be served on all parties on the matrix of the case) which will set the time limits for filing responses to the motion and designations of pleadings for the record. Upon expiration of the applicable time limits, the motion, responses and record will be transmitted to District Court for hearing before a district judge. It should be noted that withdrawal of reference can be of (1) an entire case or (2) a discrete adversary proceeding or (3) of only limited issues in the case, e.g. a contested matter. If withdrawal of reference is partial, the bankruptcy court will continue to exercise jurisdiction over the remaining matters.

## Attorneys Conference Room

Thanks to the generosity of several law firms and of the Federal Bar Association, the Bankruptcy Court has been able to establish and furnish an attorneys conference room in room 746. We have installed a telephone, fax machine and computer terminal with direct access to our BANCAP database. Telephone calls are limited to local calls and to long distance calls charged to a credit card or to another number. To access a local line dial 9 and the local number. The fax machine is available on the same basis. Documents may be faxed to any location if the fax is billed to a credit card or to another number. Directions for use of the fax have now been posted near the machine.

## Applications for Appointment of Professionals

The Court receives frequent complaints from attorneys who file applications for employment pursuant to BR 2014 that such applications take too much time to process. Although there are situations in which these delays are caused by the Court or the US Trustee, we also find that delays are often caused by the petitioners themselves. When applications are filed, the original should be filed with the court and a copy sent to the US Trustee. Many attorneys are improperly filing an original and a copy with the Court or are filing both documents with the US Trustee. When we get an application it goes into a file to await a response from the UST. The US Trustee's office submits a weekly report to the Court which shows the status of Applications. As soon as an application appears on the report as having been approved, the order is submitted to the appropriate judge for signature. If you fail to serve the UST you almost guarantee that approval will not come for weeks.

Mark Van Allsburg

# ANNOUNCEMENT FROM THE LOCAL RULES COMMITTEE

The recently appointed Local Rules Committee was formed with the goal of reviewing our Local Rules and practice, in order to make suggestions to the Court which might serve to reduce the amount of time spent in Court on uncontested matters. The intent of the Committee was to try and reduce the Courts's burden on motion days by eliminating uncontested matters and also to save bankruptcy estates, debtors and creditors the attendant legal fees for such appearances.

It is not the function or intent of the Committee to criticize or usurp the Court's role in developing rules which affect the practice of those attorneys who come before it. Therefore the following are merely suggestions to the Court for changes. Although the Committee has attempted to draft language which would be suitable for adoption as local rules, this was merely to provide a concrete example of the way in which the ideas underlying the proposed changes could be implemented.

If you would like to comment on the following proposals, please feel free to contact any member of the Local Rules Committee whose names appear below. If you would care to put your comments in writing, please send them to Bob Wright at Miller, Canfield, and send a copy of your comments to Mark Van Allsburg.

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

**PROPOSED NEW LOCAL RULES**
**Prepared and Submitted by**
**Federal Bar Association**
**Western District of Michigan**
**Bankruptcy Section**
**Local Rules Committee**

**RULE *A*. Motion Day Practice.**

(1) All attorneys should be present in court at the time specified in any notice of hearing and be prepared to advise the Court at the beginning of each hour's hearings whether they have a contested matter.

(2) All uncontested matters will be heard prior to contested matters, regardless of the order in which they are listed on the Court's calendar.

**RULE *7B*. Entireties Election.**

A married debtor whose spouse is not a debtor and who claims property as exempt pursuant to tenants by the entireties law, shall state whether each debt listed on schedule A-1, A-2 and A-3 is joint with the non-filing spouse or is the separate debt of the debtor. Any debt listed on schedule A-1, A-2 or A-3 which does not have the letter "s" (indicating that the debt is the sole debt of the filing spouse) placed next to the debt amount shall be deemed to be a joint debt of the debtor and the non-filing spouse for purposes of determining the allowance of the debtor's claim of exemption pursuant to state entireties law.

**RULE *7C*. Amendments Adding an Omitted Creditor.**

(1) When, 10 days or more before the commencement of the Section 341 meeting of creditors, a schedule or matrix is amended to add one or more creditors, the debtor shall serve a copy of the amendment and the statement upon the creditor(s) added, together with a copy of the notice of the Section 341 meeting of creditors, and shall also file a supplemental matrix, listing only the name(s) and address(es) of the added creditor(s).

(2) If the amendment adding a creditor is made later than 10 days before the commencement of the Section 341 meeting of creditors, then any time fixed for the filing of complaints under Sec. 523 or Sec. 727 shall automatically be extended to allow such creditor the same number of days in which to file such a complaint as it would have had if it had been properly scheduled at the outset of the case, and a notice to this effect shall accompany the copy of the Section 341 meeting of creditors' notice sent by the amending party.

(3) If such an amendment is sought after the Section 341 meeting of creditors has commenced, the amending party shall either make a motion and request a hearing or shall serve the creditor(s) sought to be

added with the proposed amendment and proceed pursuant to Rule *9A*. Creditor(s) added after the Section 341 meeting of creditors has commenced shall be entitled, upon request, to examine the debtor under oath, with any reasonable expense to be borne by the debtor, unless the Court orders otherwise.

**RULE *9A*. Motion Procedure Generally**

(a) Unless the Court directs otherwise upon request, a party seeking relief may obtain such relief upon motion in accordance with the procedures stated herein.

(b) The motion shall be accompanied by:

(1) NOTICE OF OBJECTION PERIOD. A notice to the respondent that the respondent has 15 days [20 days for matters covered by Bankruptcy Rule 2002(a)] after service to file and serve a response or a request for a hearing and that if a response or request is not timely filed and served, the Court may grant the motion without a hearing;

(2) PROOF OF SERVICE. A proof of service indicating the date and manner of service and the parties served; and

(3) PROPOSED ORDER. A copy of the proposed order, attached to the motion and labeled as Exhibit A.

(4) REQUEST FOR IMMEDIATE HEARING. The motion may also be accompanied by a request for immediate hearing, where a movant can demonstrate a need for a hearing date without waiting for the objection period to elapse.

(c) SERVICE BY COURT CLERK. With respect to a motion or application by a chapter 7 trustee requesting relief specified in Bankruptcy Rule 2004(a), the clerk shall serve the notice set forth in paragraph (b)(2).

(d) NO TIMELY RESPONSE. If a response is not timely served, the movant may file a certification so stating together with the proposed order and a copy of the original proof of service of the motion. If the motion was served by mail, the movant shall not file a certification of no response until the 20th day after service, [or 25th day in the case of matters covered by Bankruptcy Rule 2002(a)] in order to comply with Bankruptcy Rule 9006(f).

(e) ENTRY OF ORDERS. The Court may enter the proposed order without a hearing. If the Court decides not to enter the proposed order, the Court shall promptly schedule a hearing, with notice to the movant and such other parties as it deems necessary.

(f) TIMELY RESPONSE OR REQUEST FOR IMMEDIATE HEARING. If a response is timely filed and served, or if the movant files a request for immediate hearing, the Court shall promptly schedule a hearing on the motion, and return a notice of hearing to the movant for service upon the appropriate parties.

**RULE *11*. Motions for Use of Cash Collateral or to Obtain Credit**

(e) A motion for use of cash collateral under Section 363(c)(1) or to obtain credit under Section 364(c) or (d), shall explicitly state the adequate protection offered the creditor and shall aver the moving party's position as to the value of each of the secured interests to be protected. Appraisals and projections, to the extent pertinent, are to be summarized in the motion.

(f) If a debtor files a motion for the entry of an order approving an agreement for the use of cash collateral or to obtain credit on an expedited basis, the Court may enter the order without a hearing if:

(1) The order is approved by all creditors who may have an interest in the cash collateral to be used or credit to be extended, by the chairperson or attorney for each official committee and by the United States trustee;

(2) The order provides for the debtor to use cash collateral or to obtain credit in a maximum specified dollar amount necessary to avoid immediate and irreparable harm only until the earlier of (A) a final hearing or (B) the order becomes a final order;

(3) The order provides for a final hearing, the date and time for which shall be filled in by the Court when the order is entered;

(4) The order provides that the debtor shall, within 24 hours of its entry, serve a copy of the motion with its attachments and the order upon all parties who are required to be served under Bankruptcy Rule 4001 (d);

(5) The order provides (A) that objections to the order must be filed within 15 days from the entry of the order, except that an unsecured creditors committee may file objections within 15 days of its formation; (B) that upon the filing of an objection, the final hearing shall be held; and (C) that if no objections are timely filed, the order may become a final order; and

(6) The motion is accompanied by an affidavit or a declaration of the debtor or a principal of the debtor stating the facts upon which the debtor relies in seeking the entry of the order on an expedited basis, and the amount of money needed to avoid immediate and irreparable harm.

(g) On timely motion, the Court may enlarge or reduce the time within which an objection must be filed. In its discretion, the Court may schedule a hearing on the debtor's motion at any time, with such notice as it deems appropriate.

**RULE *10A*. Applications Filed Pursuant to Bankruptcy Rule 2004**

Any person who seeks to examine a debtor pursuant to Bankruptcy Rule 2004 shall contact the debtor's attorney for the purpose of arranging a mutually convenient date, time and place before filing an application pursuant to that rule. The application shall affirmatively indicate that the proposed date, time and place for the examination have been agreed upon by all concerned. If the applicant is unable to confirm these matters with the debtor's attorney after making all reasonable efforts, an application for examination of the debtor may be filed, indicating specifically the efforts that were made, as well as the proposed date, time and place of the examination.

**RULE *15A*. Use, Sale or Lease of Property of the Estate**

(a) Use, sale or lease of property of the estate shall be effected in accordance with 11 U.S.C. Sec. 363 and Bankruptcy Rules 2002 and 6004. The notice of the sale shall include a statement that the time fixed for filing an objection or a request for a hearing is 20 days from the date the notice is served. In cases where the notice will be served upon all creditors and upon the Court's Buyer's List, the clerk shall serve the notice (unless the moving party volunteers to serve the notice); in all other cases, the seller shall serve the notice.

(b) A motion for authority to sell property free and clear of liens pursuant to Bankruptcy Rule 6004(c) may be granted without a hearing upon the following conditions:

(1) CONTENTS OF SALE NOTICE. The notice of the sale shall indicate that the sale is to be free and clear of liens and also include a statement that if no objection is filed within 15 days, the authority to sell may be granted without a hearing and that if an objection is filed and served on the movant, a notice of the hearing to consider the motion will be sent to the objecting party; and

(2) CERTIFICATION. Submission of a certification that:

(A) The notice was served on all parties as required by Bankruptcy Rule 2002(a)(2);

(B) The movant served the motion on all parties who have liens or other interests in the property to be sold (identifying each by name and address); and

(C) No objection to the sale was timely served and 25 days have elapsed since service of the notice. A copy of the notice of sale must accompany the certification and the proposed order.

**RULE *24*. Classification**

If the Chapter 11 plan classifies claims or interests, it shall identify by name, if feasible, the entities who hold a claim or equity interest within each class and the amount of each entity's claim or equity interest within each class. If the plan creates only one class of unsecured creditors, then identification of each holder of claim therein is not required.

**RULE *25*. Obtaining Approval of Disclosure Statements**

(a) The filing of a disclosure statement shall be deemed to include a motion for its approval, to which Rule 9A applies.

(b) When a disclosure statement is filed, the clerk will deliver to the proponent a form of notice which the movant shall timely serve upon all parties entitled to notice pursuant to Bankruptcy Rule 2002(b). In addition, the proponent shall serve a copy of the disclosure statement and the notice upon the United States trustee and upon the chairperson and counsel for each official committee and shall file a proof of service of each of the foregoing.

(c) Upon a certification by the movant that no objection to the approval of the disclosure statement or request for a hearing was timely served, the Court may enter an order approving the disclosure statement without a hearing.

**RULE *26*. Duties of Proponent of Plan After Approval of Disclosure Statement**

Unless otherwise ordered by the Court, upon approval of a disclosure statement in a Chapter 11 case, the proponent of the plan shall provide to the clerk, at least 30 days before the confirmation hearing, a sufficient number of copies of:

(1) the plan or a summary thereof approved by the Court;

(2) the disclosure statement approved by the Court;

(3) the order approving the disclosure statement substantially conforming to the applicable official form;

(4) a form of ballot conforming substantially to the applicable official form; and

(5) such other information as the Court may direct.

(6) Unless otherwise ordered by the Court, the clerk shall serve the confirmation packages containing the above documents.

**RULE *27*. Proofs at an Uncontested Confirmation Hearing**

At the hearing on the confirmation of a Chapter 11 plan, if no timely objection to confirmation has been filed, (or if all objections have been withdrawn) and no class of claims or equity interests has rejected the plan, upon consent of all parties present, the Court may dispense with an evidentiary hearing and, based on the lack of objection and the consents, find that each of the elements necessary for confirmation pursuant to 11 U.S.C. Sec. 1129(a) has been established.

**RULE *28*. Implementation of Sec. 521(2)**

Upon failure by the debtor to timely comply with the requirements of 11 U.S.C. Sec. 521(2) with respect to property securing consumer debts, the automatic stay imposed by Sec. 362(a) for the benefit of the debtor shall be deemed lifted as to that property without further order of the Court.

(*All proposed rule numbers are merely for suggested placement in the order of the existing local rules.)

## 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.

***United States v. Nordic Village, Inc.***, 112 S. Ct. 1011 (1992). Nordic Village, Inc. filed a petition for relief under Chapter 11 in March of 1984. About four months later, Josef Lah, an officer and shareholder of Nordic Village, drew $26,000 on the company's corporate account, $20,000 of which was applied against his individual tax liability. In December of 1984, the trustee commenced an adversary proceeding seeking to recover, among other transfers, the $20,000 Lah paid to the IRS. The bankruptcy court determined that the unauthorized post-petition transfer could be avoided under § 549(a) and recovered from the IRS under § 550(a) of the Bankruptcy Code. It entered a judgment against the IRS in the amount of $20,000, which the district court affirmed. The Sixth Circuit

also affirmed, upholding the reasoning of the lower courts and rejecting a jurisdictional defense that sovereign immunity barred the judgment entered against the government.

In reversing, the Supreme Court stated that *Hoffman v. Connecticut Department of Income Maintenance*, 492 U.S. 96 (1989), did not control this case, since the plurality and the dissent therein were evenly divided over the issue of whether § 106(c) authorized a monetary recovery against a state, and since the deciding vote of the concurrence, denying amenability to suit, rested on the Eleventh Amendment, which applies only to the states.

Next, the Court stated that waivers of the government's sovereign immunity, in order to be effective, must be "unequivocally expressed." Subsections (a) and (b) of § 106 meet this unequivocal expression requirement with respect to monetary liability. Addressing "claims," which the Code defines as "rights to payment," they plainly waive sovereign immunity with regard to monetary relief in two settings: compulsory counterclaims to governmental claims, and permissive counterclaims to governmental claims capped by a set-off limitation. In contrast to these two Code subsections, § 106(c) is susceptible to at least two plausible interpretations that do not authorize monetary relief. The Court also stated that legislative history had no bearing on this point, because the unequivocal expression of waiver must be made in statutory text.

Finally, the Court stated that Nordic Village's several alternative grounds for affirming the judgment below -- that 28 U.S.C § 1334(d)'s broad jurisdictional grant provided the necessary waiver; that a bankruptcy court's in rem jurisdiction overrides sovereign immunity; and that a waiver of sovereign immunity is supported by trust law principles -- were all unpersuasive.

***Holywell Corporation v. Smith*** 112 S.Ct. 1021 (1992). This case, authored by Justice Clarence Thomas for a unanimous court, involves the question of whether a trustee appointed to liquidate and distribute property as part of a Chapter 11 bankruptcy plan must file income tax returns and pay income tax under the Internal Revenue Code. Miami Center Limited Partnership borrowed money from the Bank of New York to develop a hotel and office building complex in Florida. It defaulted on the loan and four affiliated debtors, including Holywell and Theodore B. Gould, each filed Chapter 11 bankruptcy petitions. The estates of Gould and Holywell contain two principal assets: equity in Miami Center and cash proceeds from the post-bankruptcy sale of real estate in Washington, D.C. The bank and other creditors approved a plan of reorganization that required the debtors to give up their interest in Miami Center and the proceeds from the sale of the Washington properties. The plan provided that a trust would be declared and established of all the property of the debtors, including, but not limited to, Miami Center and the Washington proceeds, to be held and liquidated according to the terms of the plan. The plan also provided that all rights, title, and interest of the debtors were to be vested in the trustee. The plan said nothing about whether the trustee had to file income tax returns or pay any income tax due. The United States did not object to its confirmation.

Neither the corporate debtors nor the trustee filed federal income tax returns for the year ending July 31, 1985. The income for these years included the capital gains earned in the sale of Miami Center and interest earned by reinvesting the proceeds.

The trustee sought a declaratory judgment from the bankruptcy court that he had no duty to file income tax returns or pay income tax. The court declared that the trustee did not have to make any federal tax returns or pay any taxes, and the district court and the court of appeals both affirmed.

The Supreme Court stated that, first, as the assignee of all or substantially all of the property of the corporate debtors, the trustee was required to file the returns the corporate debtors would have filed had the plan not assigned their property to the trustee. Next, they considered the trustee's duty with respect to the individual debtor, Theodore Gould. The Court stated that the plan declared and established the new Miami Center liquidating trust. It then vested all of the assets of Gould's estate to Smith as the trustee. The plan did not simply substitute the trustee for Gould as the fiduciary of the estate. Rather, it created a separate and distinct trust holding the property of the estate and gave the trustee control of this property. The trustee, therefore, was not acting as the fiduciary of Gould's bankruptcy estate. Nonetheless, the Court found that the trustee was required to file a tax return. Section

6012(b)(4) of the Tax Code applies to the fiduciary of a trust as well as the fiduciary of a bankruptcy estate.

Finally, the Court ruled that the United States did not excuse the trustee from his duties of filing an income tax return and paying income taxes by failing to object to the plan. The United States was not seeking from the trustee any taxes that became due prior to his appointment. The Court stated that even if § 1141(a) binds creditors of corporate and individual debtors with respect to claims that arose before confirmation, the Court could not see how it could bind the United States or any other creditor with respect to post-confirmation claims.

***In re Fred Hawes Organization, Inc.***, Case No. 91-3089 (6th Cir. Feb. 21, 1992). This case, authored by Judge Gerald E. Rosen, sitting by designation, is an appeal from the district court's judgment affirming a bankruptcy court's decision that preferential payments in the amount of $21,760.31 made to Basic Distribution Corporation ("Basic") did not fall within the ordinary course of business exception under § 547(c)(2).

Debtor, Fred Hawes Organization, Inc. ("FHO"), established a trade credit open account with Basic on November 5, 1985. Credit terms were net 30 days. FHO purchased goods on credit from Basic and charged them to its accounts. FHO made few significant payments on any of the accounts until March of 1986, when it paid $5,864.04 on March 5, and $15,896.28 on March 28.

On May 14, 1986, FHO filed a voluntary petition under Chapter 7. The trustee filed an adversary proceeding against Basic, seeking recovery of $21,760.31. In its decision, the bankruptcy court held that the trustee could avoid the preferential payments and that Basic had not met its burden of demonstrating that these payments were within the ordinary course of business exception.

The court of appeals stated that there was no dispute that FHO's debts to Basic were incurred in the ordinary course of business as required by subsection (A) of § 547(c)(2). The primary dispute concerned the last two requirements, those of subsections (B) and (C). The court stated that apparently some courts had ignored the distinction between § 547(c)(2)(B) and (C), concluding that both were satisfied so long as the late payments were consistent with the course of dealings between the debtor and the creditor. The court went on to say that, while it had not in earlier decisions expressly established that the requirements of each subsection had to be fulfilled in order for the creditor to receive the benefit of the exception, it did so now.

In using the conjunctive "and" between subsections (B) and (C) with "and", Congress clearly intended to establish separate, discrete, and independent requirements a creditor would have to fulfill to prevent avoidance. The two subsections of § 547(c)(2) comprise a subjective and objective component. The subjective prong requires proof that the debt and its payment are ordinary in relation to other business dealings between that creditor and that debtor. The objective prong requires proof that the payment is ordinary in relation to the standards prevailing in the relevant industry. The court stated that in respect to subsection (B), the late payment of a debt has been considered particularly important in determining whether the payment is ordinary. A late payment would be considered ordinary only upon a showing that late payments were the normal course of business between the parties. The court decided that both the bankruptcy court and the district court had fallen prey to Basic's erroneous argument that, absent a long course of business between the parties, the court should look to industry standards to determine whether a given payment was ordinary. However, even though the lower courts had erroneously adopted this argument, they had both reached the correct conclusion. Because of lack of probative evidence regarding industry standards, the bankruptcy court correctly determined that the express agreement was the most informative evidence left to consider.

Next, the court stated that Basic had failed to sustain its burden of demonstrating that the lower courts erroneously avoided the March payments from FHO to Basic. It stated that even had Basic satisfied the requirements of subsection (B) of § 547(c)(2), the transfer did not satisfy the ordinary business term's prong of § 547(c)(2)(C). Basic contended that the bankruptcy court erred in interpreting the requirements of § 547(c)(2)(C). Industry standard, according to Basic, should have been determined according to ordinary practices between Basic and its many electrical subcontractors, rather than in the industry as a

whole. The Court stated that Basic's analysis of the state of the law was simply incorrect. Courts do not look only at the manner in which one particular creditor interacted with other similarly situated debtors, but rather analyze whether the particular transaction questioned comports with the standard conduct of business within the industry. The bankruptcy court held that the disputed transfers were not made according to industry standards, and the court of appeals agreed.

***In the Matter of Sabec***, Case No. 91-80772 (W.D. Mich. February 25, 1992). This case, authored by Judge James D. Gregg, involved the question of whether a debtor may cure unpaid tax obligations owed to a tax deed claimant and pay that claim under a Chapter 13 plan, thereby retaining residential real property. Marianne Sabec filed a Chapter 13 voluntary petition on February 12, 1991. She was the fee title holder of real property used as her residence. She resides with her husband who had Lou Gehrig's disease. The mortgage on her property had been fully paid and there was substantial equity. The Debtor proposed to pay her creditors 100 percent distribution over a minimum of 36 months or up to a maximum of 60 months if her plan was confirmed.

The Debtor had failed to pay her real property taxes for many years. Because of this, prior tax sales had occurred under the Michigan tax statutes. Blackhawk, Inc. purchased rights in the property at the tax sales but agreed orally with the Debtor that she could make monthly payments instead of being evicted. The Debtor testified that she had made these payments to Blackhawk since the agreement.

When the Debtor failed to pay the 1984 property taxes, the tax sale lien was purchased by Alpha of Lansing, Michigan. The Debtor testified that she had fully paid Alpha regarding its rights relating to the unpaid 1984 taxes.

Then on May 3, 1988, Edward Chvala purchased her property at a tax sale for $1,403.56. He received a county treasurer's certificate of purchase. In June of 1989, he received a tax deed from the state treasurer regarding the Debtor's property. It covered the nonpayment of taxes for 1985 and was issued pursuant to the prior certificate. The tax deed was recorded on June 26, 1989.

After the issuance of the tax deed, Chvala prepared a "Notice by Persons Claiming Title Under Tax Deed" which stated that sale had been lawfully made of the property for unpaid taxes and that the undersigned had title thereto. It also stated that the Debtor could buy back her property any time within six months after the service of the notice by paying all sums paid upon the purchase, together with 50 percent additional and the fees of the sheriff for the service or cost of publication of the notice.

Chvala served the Sabecs on March 6, 1990, and the notice and return of personal service was filed on March 12, 1990, with the Muskegon County treasurer. On September 24, 1990, the county treasurer issued the certification that the notice was filed and served. The notice and the return of personal service was recorded with the Muskegon County Register of Deeds on September 24, 1990. After the Debtor received the notice, she sent a letter to Chvala requesting him to accept monthly payments. On or about January 2, 1991, Chvala served a Notice to Quit on the Debtor and her husband. On February 4, 1991, Chvala filed a complaint and obtained issuance of a summons to evict the Debtor. The hearing on the eviction was scheduled for February 13, 1991, but the Debtor filed bankruptcy on February 12, 1991.

The Court stated that Chvala had purchased the real property at the tax sale in which he received certificates of sale which entitled him to receive title to the property upon expiration of the first redemption period relating to the property. Upon presentation of the certificate of purchase to the state treasurer after the expiration of the first redemption period, the state treasurer issues a tax deed to the tax sale purchaser. After a tax deed is issued, it may be recorded at the register of deeds in the county where the real property is located. A person entitled to redeem, the real property from the tax deed is given six months to redeem after the filing of the return of service upon the county treasurer or, in this case, until September 11, 1990. The return of service must demonstrate that proper and effective service has occurred. The notice of the tax sale must also meet specific requirements and be served upon specific people. Until a proper notice is served with strict compliance to the statute, the owner is under no legal obligation to redeem, and the failure of the tax purchaser to give due and proper notice would defeat his tax title.

The Court found that Chvala failed to provide a copy of the notice to the county treasurer as mandated by the tax act. This failure invalidated the filing and rendered it null and void. Because of Chvala's failure to provide an additional copy of the notice, he did not strictly comply with the tax act, and the second redemption period had not expired. In fact, it had not even commenced. Therefore, he held no valid indefeasible title to the property, and the Debtor possessed a right to redeem. Until Chvala strictly complied with the tax act, the Debtor has no legal obligation to redeem. The automatic stay prohibited Chvala from refiling the notice and the return of service, including the requisite copy with the county treasurer. Until the automatic stay was modified, Chvala remained barred from enforcing his tax lien, and the second redemption period did not commence.

**In re Schultz,** 134 B.R. 604 (Bkrtcy. E.D. Mich. September 30, 1991). This case, authored by Judge Steven W. Rhodes, involved a motion for an order compelling the Debtor to appear for examination pursuant to Rule 2004 of the Federal Rules of Bankruptcy Procedure.

Counsel for the creditors contacted the Debtor's counsel on February 20, 1991, regarding a Rule 2004 examination. The Debtor's counsel responded that he wanted time to determine what position to take on the request. Creditors' counsel called again on March 4, 1991, and left a message. Debtor's counsel returned the call and said that he would not agree to any further examination. Creditors' counsel filed the motion on March 6, 1991.

The creditors contended that a further examination of the Debtor was necessary to determine whether there were grounds to pursue claims of nondischargeability under 11 U.S.C. § 523(a)(2). They also requested an extension of time to file their dischargeability complaints pursuant to Rule 4007(c). Looking to Rule 2004(a), the Court stated that the language would suggest that the Court should exercise its discretion in determining whether to grant the motion. In exercising its discretion, the Court concluded that it should balance the legitimate interests of all concerned. The Debtor had an interest in the prompt resolution of all discharge issues, which, as evidenced by Rules 4004(a) and 4007(c), provides for a 60-day time limit for creditors to file objections to discharge under § 727(a) and dischargeability complaints under § 523(a)(2)(4)(6). On the other hand, the creditors also had an interest in having a full opportunity to examine the Debtor before deciding whether to pursue claims of nondischargeability.

The Court concluded that it was appropriate to order the Debtor to appear for further examination. It appeared likely that there was enough time between February 20, when the request for the examination was first made, and March 11, when the time to file a complaint would expire, to pursue an examination and decide whether to file a complaint. However, the Creditor's inability to examine the Debtor and file a complaint by the deadline was due in part to the failure of the Debtor's attorney to respond to the request before March 4, 1991. Under the circumstances, the Court concluded that the creditor showed some minimal degree of diligence in attempting to investigate and file before the deadline and that therefore on balance the motion for examination under Rule 2004 should be granted. The Court also concluded that the creditors had marginally established cause to extend the deadline to file a discharge complaint pursuant to Rule 4007(c).

## STEERING COMMITTEE MEETING MINUTES

A meeting was held on March 20, 1992 at noon at the Peninsular Club. Present: Mark Van Allsburg, Patrick Mears, Kevin Conroy, Robert Mollhagen, Steven Rayman, Janet Thomas, Thomas

1. 1992 Bankruptcy Seminar (at Park Place Hotel). Robert Wright announced that planning for the educational program continues. A motion was made that the Bankruptcy Section of the Federal Bar Association contract with the Grand Traverse Resort for up to 17 additional rooms for seminar overflow from the Park Place. The motion was seconded and passed.

2. Local Rules Committee. The Steering Committee recommended that the proposal of the Local Rules Committee to the Bankruptcy Judges with regard to possible amendments to the Local Bankruptcy Rules be published in the next issue of the Bankruptcy Law Newsletter for comment.

3. Next Meeting. The next meeting of the Steering Committee will take place at the Peninsular Club on Friday, April 17, 1992 at 12:00 noon.

## EDITOR'S NOTEBOOK

The Supreme Court issued two bankruptcy related decisions just before this issue of the Bankruptcy Law Newsletter went to print. In the decision having the widest impact, the Supreme Court on March 25, 1992 resolved the split in the Circuit Courts by deciding that a transfer occurs for purposes of applying the 90-day preference period when a debtor's check to a creditor is honored by the debtor's bank, not when the creditor received the check. Barnhill v Johnson, 60 U.S.L.W. 4264 (1992). The Sixth Circuit had previously ruled that the crucial time was when the check was delivered. In re Belknap, 909 F. 2d 879 (6th Cir. 1990). In the other recently decided case, the Supreme Court reversed the Second Circuit and held that the Second Circuit had appellate jurisdiction to review a district court's affirmance of a bankruptcy court interlocutory order denying a creditor's request to strike a Chapter 7 Trustee's jury demand. Connecticut National Bank v Germain, 60 U.S.L.W. 4222 (1992). Both of these decisions will be reviewed in the Recent Bankruptcy Decisions column in next month's issue of the Bankruptcy Law Newsletter.

By Thomas P. Sarb

## 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 February 28, 1992. These filings are compared to those made during the same period one year ago and two years ago.

| | Feb. '92 | Feb. '91 | Feb. '90 |
|---|---|---|---|
| Chapter 7 | 949 | 851 | 586 |
| Chapter 11 | 21 | 31 | 18 |
| Chapter 12 | 5 | 2 | 0 |
| Chapter 13 | 310 | 316 | 269 |
| | 1,285 | 1,200 | 873 |

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



THOMAS SARB

800 CALDER PLAZA BUILDING
GRAND RAPIDS, MI 49503