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APPLICABILITY OF AUTOMATIC STAY TO POSSESSORY ACTIONS INVOLVING SUB-LEASES AND MONTH-TO-MONTH TENANCIES

By Michael W. Puerner *

Landlords possess a unique and often unenviable position in bankruptcy. A trustee must often solicit the cooperation of a landlord to sell estate property from the leased premises. It is often not possible or appropriate, however, to compensate the landlord for the full contract rental rate, especially where the trustee has or will reject the lease pursuant to Bankruptcy Code Section 365(a).[1] Further, administrative rent claimants will not receive payment until after the sale and at times must bank on the trustee's success at surcharging against secured liens under Code Section 506(c).

Equally problematic is where a trustee does not seek to negotiate a post-petition rental arrangement, and the debtor/tenant has either stopped paying rent or has remained in possession after the expiration of the lease term. In those situations, the landlord will naturally contemplate a state court action to retake possession.

This article explains why, in most situations subject to a narrow exception, a real property lessor must seek and obtain modification of the automatic stay before commencing or consummating a possessory action in state court to retake leased premises. A recent case from Missouri, as well as established case law in this District, confirms that modification of the stay is necessary even where the debtor is a sub-lessee as opposed to the primary tenant, and where the lease has expired leaving the debtor with only a bare possessory interest in the property.

STATUTORY REFERENCE

The general issue is whether a sub-lease or month-to-month tenancy constitutes property of the estate protected by the automatic stay. Code Section 541(a)(1) defines property of the estate broadly, to include "all legal or equitable interests of the debtor in property as of the commencement of the case." Code Section 362(a) operates as a comprehensive stay against creditor actions, including "any act to obtain possession of property of the estate or of property from the estate or to exercise control over property of the estate." Section 362(a)(3).

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[1] All federal statutory references are to 11 U.S.C. § 101 et seq.

Section 362(b) provides various exceptions to the automatic stay. Pertinent here, Section 362(b)(10) excepts from the automatic stay "any act by a lessor to the debtor under a lease of nonresidential real property that has terminated by the expiration of the stated term of the lease before the commencement of or during a case under this title to obtain possession of such property." Thus, modification of the stay is not necessary if the lease involves nonresidential real property, and has expired by its own terms prior to the commencement of the case. See, e.g., In re Neville, 118 B.R. 14, 18 (Bankr. E.D., N.Y. 1990).

DEBTOR AS SUB-LESSEE

A Bankruptcy Court in Missouri has recently held that a sub-lease potentially in violation of the primary lease is a property interest sufficient to invoke the automatic stay. In re Food Barn Stores, Inc., 24 B.C.D. 1245 (Bankr W.D. Mo., October 13, 1993). Food Barn involved a Chapter 11 debtor that owned and operated a chain of supermarkets. The debtor was formed in 1988 after a leveraged buy-out of a division of Safeway Stores, Inc. ("Safeway"). Safeway had been a tenant of Victor and Helen Regnier (the "Landlord") for a number of years. The Landlord intended to build a large strip shopping center, and courted Safeway as an anchor tenant. As a result, Safeway leased 55,000 square feet for 20 years, with four five-year renewal options at the extremely attractive rate of $1.82 per square foot.

Safeway thereafter sold its Missouri-Kansas division to the debtor. Safeway sought to sub-lease a portion of the space to the debtor. According to the primary lease, however, Safeway could not sub-let without the consent of the Landlord, which consent would not be unreasonably withheld. The Landlord consented to a sub-let to the debtor only if Safeway, among other requirements, provided a substantial increase in the base rent. Safeway rejected the Landlord's effort to extract a higher rent, and sub-let the space anyway to the debtor.

Following the debtor's bankruptcy, as a precautionary measure, the Landlord sought a ruling from the Bankruptcy Court that, because the sub-lease violated the primary lease with Safeway, the debtor had no valid leasehold interest that could have become property of the bankruptcy estate enjoying protection by the automatic stay. The Court disagreed, and held that the debtor had a bare possessory interest which nevertheless comprised property of the estate invoking the automatic stay:

> [D]ebtor has an interest in the premises, even if it was only a possessory interest. See Mays v. United States of America, 18 C.B.C.2d 911 (Bankr. E.D. Pa., 1988). Courts have held that rights of redemption, after completion of foreclosure, pass to the trustee (debtor-in-possession) and are property of the estate. See In re Roger Brown & Co, 196 F. 758 (8th Cir., 1912) and In re Novak, 111 F. 161 (N.D. Ia, 1901). Since debtor was occupying the premises, was paying rent, and had no pre-petition eviction proceedings concluded against it, it had at worst a possessory right to the premises which became property of the estate. 24 B.C.D. at 1246 (Emphasis added).

The Food Barn case is similar to In re 48th Street Steakhouse, Inc., 835 F.2d 427 (2d Cir., 1987), where the Court of Appeals held that a landlord's act of giving a non-bankrupt tenant notice of termination of a prime lease due to non-payment of rent violated the automatic stay in the bankruptcy case of a sub-lessee who had possession of the premises.[2]

DEBTOR AS MONTH-TO-MONTH TENANT

The core reasoning in Food Barn is similar to a decision by Judge Gregg in In re Schewe, 94 B.R. 938 (Bankr. W.D. Mich., 1989). In Schewe, the eventual Chapter 13 debtors had entered into a written lease with a term of one year to rent a mobile home lot. The lease expired according to its terms either shortly before or shortly after the debtors filed their Chapter 13 petition. After expiration of the written lease, the debtors rented the lot pursuant to an oral month-to-month lease as tenants at will.

Following confirmation of the Chapter 13 plan, the landlord served a notice to quit upon the debtors, due to the debtors' alleged failure to comply with certain mobile home park rules and regulations. Without seeking relief from the automatic stay, the landlord then filed a state court complaint for possession of the lot. The debtors advised the landlord of the pendency of the

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[2] For a detailed analysis of 48th Street Steakhouse, see Weintraub & Resnick, "Termination of Prime Lease Affecting Debtor's Sub-Lease, a Violation of the Automatic Stay," 24 U.C.C. L.J., p. 177 (1991).

bankruptcy, but the landlord proceeded to get a judgment for possession believing that the automatic stay was inapplicable.

In response, the debtors initiated an adversary proceeding for injunctive relief to prohibit the landlord from evicting them. The court issued a temporary restraining order and, after a hearing, issued a preliminary injunction. The court reasoned that the debtors' possessory right to the mobile home lot premised on a month-to-month tenancy was property of the estate sufficient to invoke the automatic stay. 94 B.R. at 942. After citing various cases and ultimately resting on public policy considerations, the court then rejected the landlord's argument that the stay was inapplicable because after confirmation all property revested in the debtors and was no longer property of the estate:

> Although other courts have reached different conclusions, this court believes the automatic stay applies in this case. This court recognizes the competing policy concerns of debtor protection and preserving property rights of creditors. Debtor rehabilitation is one major policy goal under the Bankruptcy Code. In Chapter 13 cases, the automatic stay allows a debtor the time to propose, confirm and consummate a confirmed plan involving property of the estate. If a creditor has cause to seek modification of the automatic stay, the creditor may file a motion for prompt determination by the court. The court is under strict time constraints to hear and decide motions to modify the automatic stay. 11 U.S.C. § 362(e).
>
> When a Chapter 13 case has been confirmed and a debtor retains a possessory right in real property, absent exceptional circumstances, a secured party or lessor will incur very little harm during the short delay until the Bankruptcy Court hears a motion for relief from stay. 94 B.R. at 945. (Emphasis in original).

The holding in Schewe expressly cautions landlords to seek modification of the automatic stay if the debtor has an arguable basis to assert some possessory interest which constitutes property of the estate.

RELIEF FROM STAY

Even where a leasehold interest constitutes property of the estate protected by the automatic stay, landlords may have a legitimate basis to seek relief from the stay. Code Section 362(d) provides relief from the stay in two distinct circumstances: (1) for cause, including the lack of adequate protection; or (2) where the debtor does not have equity in the property and the property is not necessary for an effective reorganization. In Food Barn, supra, the court refused to modify the automatic stay because the sub-tenant paid the rent and thereby provided adequate protection. Also, after comparing the attractive rate of rent to a fair market rental rate, the court determined that the debtor had equity in the possessory sub-leasehold interest.

However, in Schewe, supra, the court found that the landlord had cause to modify the stay and retake possession. The court reasoned that, under Michigan law (MCL 554.134), either the debtors or the landlord could terminate the tenancy by giving one month's notice to the other party. The court refused to create new debtor's rights, and concluded that "when a debtor-lessee and a lessor have entered into a tenancy at will relationship, and the landlord desires to terminate the tenancy under applicable state law, 'cause' exists to modify the stay to permit the lessor to exercise its rights." 94 B.R. at 950.

CONCLUSION

In summary, a sub-lease or month-to-month tenancy constitutes property of the estate invoking the automatic stay, unless it is a nonresidential lease that has expired by its own terms. Rather than marching straight into state court, landlords should pursue a modification of the stay, which the Bankruptcy Court may grant if under state law the debtor has no continuing right to possess the property.

RECENT BANKRUPTCY DECISIONS

The Recent Bankruptcy Decisions for the Supreme Court and Sixth Circuit are summarized by John A. Potter; and the Western District of Michigan bankruptcy and district court opinions are summarized this month by Maureen A. Potter, who is filling in for Vicki S.

Young, who is on maternity leave. Larry Ver Merris assists in the preparation of the case summaries.

In Re Embry (Boatman's Bank of Tennessee v. Embry), Case No. 93-5397 (6th Cir. December 3, 1993). Defendant/Debtor, William L. Embry, filed a Chapter 11 bankruptcy petition in the Western District of Tennessee in March of 1989. This case was converted to a Chapter 7 case in November of 1989. On May 22, 1989, Plaintiff filed a complaint with the Bankruptcy Court seeking to have Defendant's debt declared nondischargeable. The debt was a $64,000 cash advance obtained from the Bank allegedly to settle Defendant's pending divorce. Two days after obtaining the loan, Defendant lost all of the money as part of a $343,000 wager in Las Vegas. On January 7, 1991, the Bankruptcy Court entered judgment in favor of the Bank, holding the debt nondischargeable under 11 U.S.C. §523(a)(2)(A) and (C). On September 4, 1992, the United States District Court for the Western District of Tennessee affirmed.

On February 4, 1993, the Bank garnished Defendant's personal bank account, which was not property of the estate. The following day, Defendant filed a motion to quash the garnishment, arguing that it violated the automatic stay. On February 25, 1993, the District Court denied Defendant's motion, holding that the automatic stay terminated when the Bankruptcy Court entered its order holding the debt nondischargeable. Defendant/Debtor then appealed the order denying his motion to quash the garnishment.

The Court of Appeals, in affirming the District Court decision, adopted the reasoning of the Ninth Circuit Bankruptcy Panel in In Re Watson, 78 B.R. 232 (Bankr. 9th Cir. 1987). The Ninth Circuit's opinion noted that 11 U.S.C. §523(a) excepts certain debts from the general discharge of 11 U.S.C. §727(a). See 11 U.S.C. §727(b). Because the general discharge has no effect on these nondischargeable debts, requiring the creditor to wait until the general discharge under §727(a) gives the debtor "the opportunity to delay and/or hinder the creditor from executing upon post-petition property, which is not property of the bankruptcy estate, for no valid reason." Id. at 234. Accordingly, the automatic stay provisions of section 362 do not preclude the execution of a judgment, which has been held by the Bankruptcy Court to be nondischargeable, upon debtor's non-estate property. See also In re Merchant, 958 F.2d 738, 741-42 (6th Cir. 1992), suggesting this holding.

The Court of Appeals also noted its disagreement with courts holding that execution of a nondischargeability judgment violates the automatic stay. Nondischargeable debts listed in section 362(b) are not automatically stayed by the filing of a bankruptcy petition. The burden is on the debtor or trustee to affirmatively seek injunctive relief from the enforcement of these debts. See In re Tauscher, 7 B.R. 918, 920 (Bankr. E.D. Wis. 1981). In contrast, debts such as Defendant's that are nondischargeable under section 523(a), are subject to the automatic stay. They are only presumed nondischargeable. Plaintiff could only collect on this debt after obtaining a Bankruptcy Court order holding the debt nondischargeable. Once this is obtained, the automatic stay does not preclude execution of the judgment against debtor's non-estate property.

Green v. Hocking, 1993 WL 435231 (6th Cir. October 29, 1993). In November of 1986, Plaintiff, Lynn Green, used a VISA card to purchase a keyboard at Highland Appliance. VISA refused to accept the card and Highland assigned the debt to Lee Corporation. In June of 1991, Defendant Thomas Hocking, Lee Corporation's attorney, filed suit in state court against Green. Over the past five years, Hocking has filed as many as 2000 collection suits for creditors. The complaint alleged that Green owed Lee $304.83. This amount reflects the cost of the keyboard plus interest at 18%. Hocking later amended the complaint stating that Green only owed $239.56, which reflected a reduced interest rate of 5%.

After the parties settled this complaint, Green sued in federal court, alleging that Hocking violated the Fair Debt Collection Practices Act (FDCPA), 15 U.S.C. §§1601 et seq. Green brought a motion for summary disposition which Hocking opposed. The district court dismissed the case. The court held that Hocking, by confining his activities to those of a legal nature, was immune from liability under the FDCPA. Green then appealed.

The Court of Appeals affirmed the District Court decision, finding that the actions of an attorney while conducting litigation are not covered by the FDCPA. In support of its reasoning, the Court cited the legislative history of the FDCPA. "The act only regulates the conduct of debt collectors, it does not prevent creditors, through their attorneys, from pursuing any legal remedies available to them." 132 Cong. Rec. HI 0,031 (1986). See also Statements of General Policy or Interpretation[:] Staff Commentary on the Fair Debt Collection Practices Act, 53 Fed. Reg. 50,097, 50,100 (1988).

Highlands Cooperative Ass'n, Inc. v. The St. Paul Fire and Marine Ins. Co., Case No. 1:92-CV-799

BANKRUPTCY COURT CALENDAR OF MOTION DAYS IN 1994

The following is a copy of the Calendar of Motion Days for 1994 for the United States Bankruptcy Court for the Western District of Michigan. This is a tentative list which can and will be changed by the judges from time to time to accommodate unanticipated events.

	MONDAY	TUESDAY	WEDNESDAY	THURSDAY	FRIDAY	SAT/SUN
JANUARY	17 MARTIN L. KING, JR. DAY HOLIDAY	18 HG	19 HM	20 ST HM	21 HM	22 23
	24 SG	25 GG	26 SL	27 GK	28 HK	29 30
	31 SK	1 HG	2 CA	3 GL HT	4 HT	5 6
FEBRUARY	7	8 GG	9	10 GK	11	12 LINCOLN'S BIRTHDAY 13
	14 VALENTINE'S DAY GM SG	15 GM	16 ASH WEDNESDAY GM SL	17 GM	18 GM ST	19 20
	21 WASHINGTON - LINCOLN DAY HOLIDAY	22 WASHINGTON'S BIRTHDAY GG HG	23	24 GK	25 HK	26 27
	28	1	2	3 GL HT	4 HT	5 6
MARCH	7	8	9 SK	10	11	12 13
	14 SG	15 HG GG	16 CA	17 ST. PATRICK'S DAY GK ST	18 HK	19 20
	21 SK	22	23 SL HM	24 HM	25 HM	26 PASSOVER begins at sundown 27 PASSOVER PALM SUNDAY
	28	29 HG GG	30	31 GK	1 GOOD FRIDAY HK	2 3 EASTER SUNDAY DAYLIGHT SAVING TIME begins
APRIL	4	5	6 SG	7 GL HT	8 HT	9 10
	11	12 HG GG	13 GK	14 ST	15 HK ST	16 17
	18 SK GM	19 GM	20 SL GM	21 GM	22 SG GM	23 24
	25	26 GG	27 PROFESSIONAL SECRETARIES DAY®	28 GK	29	30 1
MAY	2	3 HG	4	5 GL	6 HK	7 8 MOTHER'S DAY
	9	10 GG	11 SK	12 GK HT	13 HT	14 15
	16 HK SG	17 HG	18 HM	19 HM ST	20 HM	21 ARMED FORCES DAY 22
	23 VICTORIA DAY (CANADA)	24 GG	25 SL	26 GK	27	28 29
	30 MEMORIAL DAY HOLIDAY	31 HG	1 CA	2 GL	3 HK	4 5
JUNE	6 SG	7 GG	8	9 GK HT	10 HT	11 12
	13 SK GM	14 FLAG DAY HG GM	15 GM	16 ST GM	17 ST GM HK	18 19 FATHER'S DAY
	20	21 GG	22 SL	23 GK	24 ST-JEAN (QUÉBEC)	25 26
	27 SG	28 HG	29	30 GL		

1994

MONDAY	TUESDAY	WEDNESDAY	THURSDAY	FRIDAY	SAT/SUN
				1 CANADA DAY (CANADA) HK	2 3
4 INDEPENDENCE DAY HOLIDAY	5 GG	6	7 GK	8	9 10
11 SK	12 HG	13 CA	14 GL	15 HT	16 17
18 SG	19 GG	20 HK	21 GK ST	22	23 24
25	26 HG	27 SL HM	28 HM	29 HM	30 31
1 SK	2 GG	3	4 GK HT	5 HT	6 7
8 SG	9 HG	10	11 GL	12 HK	13 14
15	16 GG	17	18 GK ST	19 ST	20 21
22 SK GM	23 HG GM	24 SL GM	25 GM	26 HK GM	27 28
29 SG	30 GG	31	1 GK HT	2 HT	3 4
5 LABOR DAY HOLIDAY ROSH HASHANAH begins at sundown	6 ROSH HASHANAH HG	7 CA	8 GL	9 HK	10 11
12 SK	13 GG	14 YOM KIPPUR begins at sundown HM	15 YOM KIPPUR GK HM ST	16 HM	17 18
19 SG	20 HG	21 SL	22	23 HK	24 25
26	27 GG	28	29 GK HT	30 HT	1 2
3 SK GL	4 HG	5	6	7 HK	8 9
10 COLUMBUS DAY (CANADA) THANKSGIVING (CANADA)	11 GG	12 COLUMBUS DAY	13 GK ST	14 ST	15 16
17 SG GM	18 GM	19 SL GM	20 GM	21 GM	22 23
24 UNITED NATIONS DAY SK	25 GG HG	26	27 GK	28 HK	29 30 DAYLIGHT SAVING TIME ends
31 HALLOWEEN	1 GG	2	3 GK HT	4 HT	5 6
7 SG	8 ELECTION DAY HG	9 CA	10 GL	11 VETERANS DAY REMEMBRANCE DAY HOLIDAY (CANADA)	12 13
14 SK	15 GG	16 HM	17 GK HM ST	18 HM	19 20
21	22 HG	23 SL HK	24 THANKSGIVING DAY HOLIDAY	25	26 27 HANUKKAH begins at sundown
28 HANUKKAH	29 GG SG	30	1 GK HT	2 HT	3 4
5 SK	6 HG	7	8 GL	9 HK	10 11
12	13 GG	14	15 GK ST	16 ST	17 18
19 GM SG	20 GM HG	21 GM SL HK	22 GM	23 GM	24 31
26 BOXING DAY (CANADA)	27 GG	28	29 GK	30	25 CHRISTMAS DAY
MONDAY	TUESDAY	WEDNESDAY	THURSDAY	FRIDAY	SAT/SUN

JULY AUGUST SEPTEMBER OCTOBER NOVEMBER DECEMBER

(W.D. Mich. Nov. 18, 1993). This case involves the proper forum for the determination of an attorney's charging lien.

The Bankruptcy Court entered an Order approving a Chapter 11 debtor's request to employ an attorney. As part of the Order, the Bankruptcy Court directed that the attorney was to receive fees from the estate for services rendered on behalf of the debtor. The attorney filed a complaint on behalf of the debtor in Federal District Court. Subsequently, the debtor assigned its interest in the action to Highlands Cooperative Association, Inc. ("Highlands").

The District Court ordered a substitution of counsel, substituting Highlands' counsel as attorneys for the debtor's counsel and discharging the debtor's attorney. Highlands then requested that the District Court discharge the debtor attorney's charging lien and determine his fees.

The District Court held that, pursuant to the Bankruptcy Court's Order and applicable bankruptcy law, the Bankruptcy Court was the proper forum for approving or modifying fee arrangements with the debtor's attorney. As such, Judge Gibson held that the District Court was not the proper forum for Highlands' request and denied Highlands' motion without prejudice, directing Highlands to refile its request in the United States Bankruptcy Court.

In re Walter J. Lawrence, Case No. 1:92-CV-384 (W.D. Mich. Nov. 18, 1993). This case involves the issue of whether or not bankruptcy courts have criminal contempt powers.

The United States Bankruptcy Court cited a bankruptcy debtor for criminal contempt after the debtor failed to pay various sanctions, filed multiple bankruptcy petitions and continually harassed the courts. The debtor filed an objection to the Order in the United States District Court.

The District Court acknowledged that the circuits are split on the statutory basis for the Bankruptcy Court's criminal contempt jurisdiction, and that the Sixth Circuit has not ruled on the issue. However, the Court relied on the fact that the Sixth Circuit has decided that no implied grant of criminal contempt power exists where Congress has not explicitly granted it. Congress has not explicitly provided jurisdiction for a bankruptcy court's contempt powers. Accordingly, Judge Gibson held that the Bankruptcy Court did not have jurisdiction to conduct the criminal contempt hearing and reversed the Bankruptcy Court's Order.

Northwestern Mortgage Co. v. Lake Charlevoix Cove Limited Partnership, et al., Case No. 1:93-CV-667 (W.D. Mich. Nov. 15, 1993). This case involves the unauthorized representation of a debtor by a non-attorney.

The debtor in this case is a general partnership of which one of the partners (Moon) was formerly an attorney. Moon has been an inactive member of the State Bar of Michigan since 1990. After Moon signed a motion objecting to a Bankruptcy Court order, Judge Stevenson dismissed the entire bankruptcy case as a "bad faith filing." In her Order, Judge Stevenson cited several examples of bad faith, including the debtor's improper attempt at pro per representation. Moon then signed and filed an appeal on behalf of the debtor.

On appeal, Judge Bell explained that individual debtors do have the right to proceed pro se in bankruptcy cases. However, artificial entities, including corporations and partnerships, must be represented by licensed attorneys. Judge Bell concluded that Moon violated Fed. R. Civ. P. 11 by filing an appeal on behalf of the debtor, and issued monetary sanctions against Moon.

In re Michigan-Wisconsin Transportation Company, Michigan Terminal Company and Michconsin, Inc., Case Nos. ST 91-83338, ST 91-84604, ST 91-84603 (Bankr. W.D. Mich., Dec. 9, 1993). This case addresses the treatment of a claim filed for amounts owing pursuant to a collective bargaining agreement subject to the Railway Labor Act.

The Transportation Communications International Union, C&O System Board ("TCU"), as the exclusive bargaining representative for the debtors' clerical and related employees, filed a claim for wages and related pay owed pursuant to a collective bargaining agreement under the Railway Labor Act. TCU argued, among other things, that the claim was entitled to priority under § 507(a)(1) as an administrative expense. To support its argument, TCU cited § 1167 which prohibits the court or the trustee from changing wages established pursuant to an agreement of the type involved in this case. TCU argued that § 1167 was intended to afford railway collective bargaining agreements as great or greater protection as afforded to collective bargaining agreements generally under § 1113. TCU went on to argue that § 1113 requires a trustee to make all payments under a collective bargaining agreement until it is rejected, notwithstanding the limitations imposed upon the payment of administrative expenses.

The court held that pre-petition claims of employees are accorded specific but limited priority under § 507(a)(3). The court concluded that Congress did not intend employees protected by collective bargaining agreements subject to § 1167 to have broader rights such that their claim would be considered an administrative expense pursuant to § 507(a)(1).

CORRECTIONS:

Due to an error in the printing process, the summary of the Sixth Circuit's Decision in In re Bell & Beckwith which appeared in the November edition did not include most of the last paragraph of the summary submitted by John Potter. Also, the summary of In re Copeland in the October edition contained language which stated that the District Court ruled on the merits on the issue of compensability of time spent preparing fee applications in a routine consumer Chapter 13 case. It did not. The following are the summaries as they should have appeared:

In re Bell & Beckwith, Case No. 92-3676, 1993 U.S. App. Lexis 23740, 1993 WI 349416 (6th Cir. September 16, 1993). Debtor, Bell & Beckwith (B&B), was a stock broker/limited partnership in Toledo, Ohio. It filed for bankruptcy in 1983, after it discovered its managing and general partner had embezzled $47,000,000. In 1974, B&B set up a profit sharing retirement plan (the Plan). Garnishee defendant, Society Bank & Trust (Society), served as trustee of the Plan, which was approved by the IRS as an ERISA-qualified pension plan. The Plan, as required by ERISA, had an anti-alienation clause, which prevented Plan benefits from being subject to, inter alia, garnishment. Additionally, the Plan also required that contributions to it could only be made if B & B had net income from which to make contributions.

The trustee, Patrick McGraw, initiated adversary proceedings against the general partners and obtained judgments against them. McGraw then attempted to garnish their individual interests in the Plan. Society objected to the garnishment on grounds that the anti-alienation provisions in the Plan exempted it from garnishment. The Bankruptcy Court agreed, stating that ERISA shielded the partner's assets in the Plan from Garnishment. McGraw appealed and the district court reversed, holding that he should have the opportunity to prove that the contributions to the Plan were invalid as preferences or invalid because they were not supported by net income.

On appeal, Society argued that the Supreme Co has drawn a bright line rule concerning the alienability pension plan benefits: they may not be alienated eit voluntarily or involuntarily, inside or outside of bankru cy, or for equitable reasons. Guidry v Sheet Me Workers Pension Fund, 493 U.S. 365 (1990); Patters v Shumate, ____ U.S. ____, 112 S.Ct. 2242 (1992). T Court of Appeals, however, stated that in neither Guid nor Patterson was the propriety of pension contributi at issue. The Court agreed with McGraw's analysis t any contributions made on behalf of the partner violation of the Plan would be void ab initio. And, sir they were void, they never became part of the Plan a so were not being alienated within the contemplation ERISA's anti-alienation provisions. The district co decision was affirmed.

In re Copeland, Case No. 1:93-CV-422 (W. Mich. September 10, 1993). Judge Quist dismissed appeal by debtor's counsel regarding Judge Stevenson rejection of its supplemental application for interim f compensation for lack of jurisdiction. In In re Copelan Case No. SL 91-86479, Slip Op. (Bankr. W.D. Mic June 2, 1993), Judge Stevenson explained the Court methodology in reviewing fee applications under t requirement of 11 U.S.C. § 330(a) that the Court awa "reasonable compensation for actual and necessary work The bankruptcy Court denied debtor's counsel's applic tion for an additional $370.00 in interim compensati based on its ruling that the debtor's counsel failed comply with the Fee Guidelines Memorandum a application of the lode star method of calculation as s forth in the case of In re Boddy, 950 F.2d 334 (6th C 1991).

The U.S. Trustee argued that the District Cou lacked jurisdiction because the order was a denial interim compensation and, therefore, interlocutory. Th Chapter 13 is still pending, the appellant remains debtor counsel, and the appellant may seek additional fees at later date. The District Court noted that under 28 U.S.(§ 158(a), the Court's jurisdiction depends on "finality" the bankruptcy court's decision. Citing Boddy, the Cou noted that interim awards of compensation under U.S.C. § 330 and 331 are generally interlocutor However, an order may be considered final "where th order conclusively determine[s] the entire section 33 compensation to be paid to the attorneys," or where th order of interim fees is "no longer subject to modificatio by the bankruptcy court." The Court held that the ord was not final because debtor's counsel was still workin

on behalf of the bankruptcy estate, could seek additional fees at the post-confirmation stage and the fee order could be reviewed on appeal following a final judgment. Therefore, the Court held that it lacked jurisdiction to review the appeal.

The Court also rejected debtor's counsel's argument that, at minimum, the fee order is final with regard to compensability of time spent preparing fee applications.

STEERING COMMITTEE MINUTES

No meeting of the Steering Committee of the Bankruptcy Section of the Federal Bar Association of the Western District of Michigan was held in December. The next meeting will take place on Friday, January 21 at 12:00 noon at the Peninsular Club.

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, 1993 through November 30, 1993. These filings are compared to those made during the same period one year ago and two years ago.

	1/1/93-11/30/93	1/1/92-11/30/92	1/1/91-11/30/91
Chapter 7	4,227	4,980	4,641
Chapter 11	110	123	142
Chapter 12	31	23	23
Chapter 13	1,355	1,468	1,569
	5,723	6,594	6,375

EDITOR'S NOTEBOOK

As most of you know, certain amendments to the Federal Rules of Civil Procedure took effect on December 1, 1993. The most significant of these amendments is to Rule 26, regarding discovery. New Rule 26 requires, without any discovery request, automatic disclosure to all opponents of information "relevant to disputed facts alleged with particularity in the pleadings." Since Rule 26 is incorporated in adversary proceedings in bankruptcy under Bankruptcy Rule 7026 and, under Bankruptcy Rule 9014, is incorporated in all contested proceedings, the rule change will have significant impact on bankruptcy litigation. Although the United States District Court for the Western District of Michigan entered an order on December 17, 1993 deferring implementation of the amendment to Rule 26 until further order of the court, that order was based upon possible interference with the district court's differentiated case management pilot program. In any event, the order of the district court does not defer implementation of new Rule 26 as it applies in bankruptcy proceedings.

There is an excellent article in the American Bankruptcy Institute Journal for October, 1993 on the new discovery rule. Critics of amended Rule 26 have identified several pitfalls. First, some parties are likely to engage in over-disclosure, thereby burdening adversaries with useless information or risking the disclosure of privileged or proprietary information. Second, some may under-disclose, thereby risking the severe penalties of amended rule 37, such as exclusion of information that should have been disclosed or default judgment. Third, the disclosure rule could damage attorney/client relationships. Clients may not wish to cooperate as fully with their lawyers if they know that their counsel must disclose to the adversary what the lawyer has learned in his

investigation, whether it helps or harms the client. As noted in the American Bankruptcy Institute Journal article, "the more thorough counsel is and the more information he uncovers, the greater the potential disclosure he must make -- perhaps contrary to his client's interest." Finally, it is difficult to see how the new rule will be applied in contested proceedings, which are often on a very fast track.

As this issue of the Newsletter goes to print, the Bankruptcy Court for the Western District of Michigan has indicated that the judges will be reviewing the issue at the court's next court administration meeting of whether or not to opt out (as is permitted under Rule 26) in whole or in part. In the meantime, any attorney who believes the application of new Rule 26 may have a major impact on an adversary proceeding or contested matter in which the attorney is involved, should contact the individual judge by letter (with copies to all parties) as to whether that particular judge intends to apply new Rule 26 in that proceeding. Finally, lawyers who practice before the Bankruptcy Court who have strong feelings one way or the other on this issue should address any comments they might have to Chief Judge Laurence E. Howard as soon as possible.

A farewell is in order to Ben DeGroot, who is retiring after more than 40 years of practice and moving from Grand Rapids. Ben obtained both his bachelors and law degree from the University of Michigan, and for many years has been a leading bankruptcy lawyer in this area. He is a past president and member of the Board of Governors of the Commercial Law League of America and a past member of the Executive Counsel of the Corporation, Finance and Business Law Section of the State Bar of Michigan. We wish Ben the best in his retirement.

This is my last issue as editor of the Bankruptcy Law Newsletter. It will now be in the capable hands of Peter Teholiz. I thank all of you for the opportunity to have been of service and I thank all of those writers who have contributed articles. In particular, I would like to express my gratitude to the case summary preparers during my term as editor; Jahel Nolan, Joe Ammar, Larry Ver Merris, John Potter, Jaye Bergamini, and Vicki Young, for their assistance in keeping this Newsletter a valuable tool for the bankruptcy practitioner in the Western District of Michigan.

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