BANKRUPTCY LAW NEWSLETTER

Published by Federal Bar Association
Western District of Michigan Chapter

VOL. 5, NO. 10 JUNE, 1993

HOTEL REVENUES AS CASH COLLATERAL IN BANKRUPTCY CASES*
Part One

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I. Introduction

An issue has been developing in Chapter 11 hotel cases regarding whether hotel revenues are cash collateral and therefore subject to requisite creditor consent, or notice and a hearing, segregation and accounting, and adequate protection. See 11 U.S.C. § 363(a), (c), (e). Section 363(a) provides, in pertinent part:

> "[C]ash collateral" means cash, negotiable instruments, documents of title, securities, deposit accounts, or other cash equivalents whenever acquired in which the estate and an entity other than the estate have an interest and includes the proceeds, products, offspring, rents, or profits of property subject to a security interest as provided in section 552(b) of this title, whether existing before or after the commencement of a case under this title.

(Emphasis added.)

Determining whether hotel revenues are cash collateral is a three-step analysis. First, the court must determine whether, under state law, hotel revenues are considered real property interests, i.e., rent, or personal property interests, i.e., accounts.[1] See Butner v. United States, 440 U.S. 48, 54-55 (1979). Second, the creditor must adequately perfect its interest under the U.C.C. or the state assignment of rents statute.[2] Third, an analysis of § 552 is necessary to determine whether the creditor's prepetition real or personal property interest extends to postpetition hotel revenues.[3]

The majority of courts have held that hotel revenues are accounts and, therefore, personal property interests subject to U.C.C. Article 9 perfection. See In re Thunderbird Inn, 151 B.R. See 224 (Bankr. D. Ariz. 1993); In re General Associated Investors Ltd. Partnership, 150 B.R. 756 (Bankr. D.

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* Editor's note: The following article is the first of two parts. In part one, Doug Lutz discusses the general issue and those cases holding that hotel revenues are personal property subject to perfection under Article 9 of the UCC. In Part Two, which will appear in the July issue of the Newsletter, Mr. Lutz will review those cases following the minority rule that hotel revenues are rents and will argue that Michigan courts should follow the minority position.

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Ariz. 1993); Greyhound Real Estate Fin. Co. v. Official Unsecured Creditors' Comm. (In re Northview Corp.), 130 B.R. 543 (B.A.P. 9th Cir. 1991); Super 8 Motels, Inc. v. M. Vickers, Ltd. (In re M. Vickers, Ltd.), 111 B.R. 332 (D. Colo. 1990); United States v. PS Hotel Corp., 404 F. Supp. 1188 (E.D. Mo. 1975); In re Punta Gorda Assocs., 137 B.R. 535 (Bankr. M.D. Fla. 1992); In re Tri-Growth Centre City, Ltd., 133 B.R. 524 (Bankr. S.D. Cal. 1991); In re Majestic Motel Assocs., 131 B.R. 523 (Bankr. D. Me. 1991); In re Nendels-Medford Joint Venture, 127 B.R. 658 (Bankr. D. Or. 1991); In re Shore Haven Motor Inn, Inc., 124 B.R. 617 (Bankr. S.D. Fla 1991); In re Corpus Christi Hotel Partners, Ltd., 133 B.R. 850 (Bankr. S.D. Tex. 1991); In re Ashoka Enters., Inc., 125 B.R. 845 (Bankr. S.D. Fla. 1990); Airport Inn Assocs., Ltd. v. Travelers Ins. Co. (In re Airport Inn Assocs., Ltd.), 132 B.R. 951 (Bankr. D. Colo. 1990); In re Oceanview/Virginia Beach Real Estate Assocs., 116 B.R. 57 (Bankr. E.D. Va. 1990); Sacramento Mansion, Ltd. v. Sacramento Sav. & Loan (In re Sacramento Mansion, Ltd.), 117 B.R. 592 (Bankr. D. Colo. 1990); Investment Hotel Properties Ltd. v. New West Fed. Sav. & Loan Ass'n (In re Investment Hotel Properties, Ltd.), 109 B.R. 990 (Bankr. D. Colo. 1990); Kearney Hotel Partners v. Richardson (In re Kearney Hotel Partners), 92 B.R. 95 (Bankr. S.D.N.Y. 1988); Victor Sav. & Loan Ass'n v. Grimm (In re Greater Atlantic & Pacific Inv. Group, Inc.), 88 B.R. 356 (Bankr. N.D. Okla. 1988); In re Ashkenazy Enters., Inc., 94 B.R. 645 (Bankr. C.D. Cal. 1986).

A minority of courts have held that hotel revenues are rents subject to state real property law. See In re Everett Home Town Ltd. Partnership, 146 B.R. 453 (Bankr. D. Ariz. 1992); In re S.F. Drake Hotel Assocs., 131 B.R. 156 (Bankr. N.D. Cal. 1991) ("S.F. Drake I"), aff'd, 147 B.R. 538 (N.D. Cal. 1992) ("S.F. Drake II"); Chaussee v. Morning Star Ranch Resorts (In re Morning Star Ranch Resorts), 64 B.R. 818 (Bankr. D. Colo. 1986). See also Mid City Hotel Assocs. v. Prudential Ins. Co., (In re Mid-City Hotel Assocs.), 114 B.R. 634 (Bankr. D. Minn. 1990) (hotel revenues are not rents but are "profits").

II. Hotel Revenues as Personal Property Accounts

The courts holding that hotel revenues are personal property subject to Article 9 perfection generally rely on the common law difference between a landlord/tenant relationship and an innkeeper/guest relationship, the plain language of U.C.C. § 9-104(j), and the difference between state landlord/tenant statutes and state hotel statutes. These courts focus upon the "service" element of the transaction between a hotelier and its guest.

The most used reasoning that hotel revenues are accounts is the common law distinctions between the landlord/tenant relationship and the innkeeper/guest relationship. In a landlord/tenant relationship, the tenant is vested with an estate in property, while in the innkeeper/guest relationship, the guest is a mere licensee who acquires no interest in the underlying real property. See Majestic Motel, 131 B.R. at 526; Nendels-Medford Joint Venture, 127 B.R. at 663; Shore Haven Motor, 124 B.R. at 618; Corpus Christi Hotel, 133 B.R. at 854; Airport Inn Assocs., 132 B.R. at 954; Oceanview/Virginia Beach Real Estate Assocs., 116 B.R. at 58; Sacramento Mansion, 117 B.R. at 602-07; M. Vickers, Ltd., 111 B.R. at 336; Investment Hotel, 109 B.R. at 993; Kearney Hotel, 92 B.R. at 99; Greater Atlantic & Pacific Inv. Group, 88 B.R. at 359; Ashkenazy Enters., 94 B.R. at 647.

> A tenant is deemed to have exclusive legal possession of the demised premises and stands responsible for their care and condition. A guest, on the other hand, has merely the right to the use of the premises while the innkeeper retains his control over them, is responsible for the necessary care and attention and retains the right to access for such purposes.

Kearney Hotel, 92 B.R. at 99 (emphasis added).

In Kearney Hotel, the court held that hotel revenues are personal property, relying on both the plain meaning of U.C.C. § 9-104(j) and common law innkeeper/guest principles. 92 B.R. at 98-102. U.C.C. § 9-104(j) states, in pertinent part:

> This Article does not apply . . . to the creation or transfer of an interest in or lien on real estate, including a lease or rents thereunder;

The Kearney Hotel court reasoned that the plain language of U.C.C. § 9-104(j) clearly excludes most interests in real estate, including a lease or rents; therefore mortgages, leases and other instruments conveying an interest in real estate are excluded from Article 9. Id. at 98. "Conversely, the language gives no indication that income from the use of real estate, such as accounts receivable generated by a factory, are excluded." Id. (emphasis added). Because rents are income from the creation of an interest in real property, the statutory language "indicates that only the creation or transfer of an interest in realty and the income from that interest in realty are excluded from Article 9." Id. Consequently, because hotel guests are mere licensees who acquire no interest in the real property, the plain meaning of U.C.C. § 9-104(j) includes hotel revenues as Article 9 accounts.[4]

In addition to the common law innkeeper/guest principles, some courts have also relied on distinctions in state hotel statutes and landlord/tenant statutes in holding that hotel revenues are personal property. For example, in Ashkenazy Enters., the court recognized, under California statutes, that: (1) charges for hotel rooms are generally referred to as "rates" and not "rents"; (2) a landlord did not acquire a lien for unpaid rent but an innkeeper did acquire a lien for unpaid charges; and (3) the landlord/tenant act specifically excluded transient hotel occupants from the act. 94 B.R. at 647. See also Oceanview/Virginia Beach Real Estate Assocs., 116 B.R. at 58 (similar analysis of Virginia statutes); Kearney Hotel, 92 B.R. at 100-01 (similar analysis of Nebraska statutes).[5]

[Part Two will appear in the July Newsletter.]

Endnotes

1. This article is limited to the first step of the analysis -- whether hotel revenues should be considered "accounts" or "rents" under Michigan law.

2. For an analysis of perfection and enforcement under the Michigan assignment of rents statute, MCLA §§ 554.231-.232, see In re Mount Pleasant Ltd. Partnership, 144 B.R. 727 (Bankr. W.D. Mich. 1992)

3. Section 552(a) dictates that property acquired by the bankruptcy estate postpetition will be held free and clear of any liens created by prepetition security agreements. See Matter of Holly's, Inc., 140 B.R. 643, 677 (Bankr. W.D. Mich. 1992). Section 552(b) permits a secured creditor to retain its consensual prepetition lien rights in "proceeds, product, offspring, rents, or profits" acquired postpetition by the bankruptcy estate unless the "equities of the case" require otherwise. Therefore, if hotel revenues are accounts, the secured creditor's interest in postpetition hotel revenues are limited to the proceeds of prepetition accounts, i.e., credit card receivables; if hotel revenues are rents, the lender's prepetition lien rights will continue in postpetition hotel receipts unless the court, for equitable reasons, orders otherwise.

4. A double negative is required to conclude, under the plain meaning of U.C.C. § 9-104(j), that hotel revenues are included under Article 9. Because hotel revenues are not interests in real property, they are not excluded from Article 9 pursuant to U.C.C. § 9-104(j). Therefore, hotel revenues are included in the scope of Article 9.

5. Some of the courts holding that hotel revenues are accounts acknowledge that under certain factual situations a person's status as a normal hotel guest may be elevated from a licensee to a tenant. Factors to consider include: (1) the term of the contract between the parties; (2) length of period the room is used; (3) the character of the premises; (4) the nature of the business operated on the property; and (5) the extent of control or supervision maintained by the owner of the property over the premises. See Sacramento Mansion, 117 B.R. at 606-07; Kearney Hotel, 92 B.R. at 99. See also Oceanview/Virginia Beach Real Estate Assocs., 116 B.R. at 58 (holding that guests occupying hotel space for less than thirty days are not tenants).

RECENT BANKRUPTCY DECISIONS

The Recent Bankruptcy Decisions for the Supreme Court and Sixth Circuit are summarized by John A. Potter; the Western District of Michigan bankruptcy and district court opinions are summarized by Vicki S. Young; and the Eastern District of Michigan bankruptcy and district court decisions and relevant State of Michigan cases are summarized by Jaye M. Bergamini. Larry Ver Merris assists in the preparation of the case summaries.

Nobleman* v. *American Savings Bank, et al., 61 U.S.L.W. 4531 (U.S. S.Ct. June 1, 1993).

Pursuant to 11 U.S.C. §1322(b)(2), a Chapter 13 debtor may not reduce a mortgage lender's secured claim to the current market value of his or her principal residence under 11 U.S.C. §506(a).

In 1990, debtors Leonard and Harriet Nobleman filed a Chapter 13 petition after falling behind on their mortgage payments to American Savings Bank. The bank filed a $71,335 proof of claim. The valuation of the Noblemans' home was set at $23,500. Their plan proposed to make payments up to the $23,500 amount. They also proposed to treat the remainder of the bank's claim as unsecured, pursuant to 11 U.S.C. §506(a). The plan provided for unsecured creditors to receive nothing on their claims.

The bank and the Chapter 13 trustee objected to the plan, stating that it modified the bank's rights as a homestead mortgagee, contrary to 11 U.S.C. §1322(b)(2). The bankruptcy court agreed. Its decision was affirmed by the district court and court of appeals. In re Nobleman, 129 B.R. 98 (N.D. Tex. 1991), 968 F.2d 483 (5th Cir. 1992).

Debtors conceded that §1322(b)(2) prohibits modification of the rights of a homestead mortgagee. However, they contended that their plan proposed no such modification, since §1322(b)(2) applies only to the extent the bank holds a secured claim in their home. Further, one must look to §506(a) to determine the amount of the secured claim. And §506(a) operates such that the Bank's claim is secured only to the $23,500 value of the home. Accordingly, debtors' plan does not modify the rights of the bank.

The Court responded by stating that debtors' interpretation does not adequately consider the word "rights" as contained in §1322(b)(2). The bank's claim, insofar as it exceeds the value of the home, is unsecured. Nevertheless, the "rights" the bank holds as mortgagee, as protected under §1322(b)(2), are not limited to the value of its secured claim.

The term "rights" is undefined in the Bankruptcy Code. Accordingly, property rights in debtors' assets are defined by state law. The bank's rights are necessarily reflected in its mortgage, enforceable under state law. These rights include, inter alia, the right to repayment over time at a specified rate of interest. Section 1322(b)(2) fixes on "rights," in contrast to "claims". These rights are protected from modification by §1322(b)(2).

Consequently, Chapter 13 debtors may not use §506(a) to reduce a secured claim on their home to fair market value, and treat the balance as an unsecured claim, without violating §1322(b)(2). The Court of Appeals judgment is affirmed.

Rake, et al.* v. *Wade, 61 U.S.L.W. 4571 (U.S. S. Ct. June 7, 1993).

Chapter 13 debtors' plans which propose to cure a default on an oversecured home mortgage pursuant to 11 U.S.C. §1322(b)(5) entitle the holder of the mortgage to post petition interest on arrearages under 11 U.S.C. §§506(b) and 1325(a)(5).

Petitioners and debtors, Donald and Linda Rake, Earnest and Mary Yell, and Ronnie and Rosetta Hannon, filed three separate Chapter 13 petitions in the Northern District of Oklahoma. Debtors were behind on their respective house payments. The payments were secured by mortgages on the debtors' homes. The mortgage notes were assigned tc respondent, William J. Wade. The notes allowed for a $5 charge for each missed payment, but did not

low for interest on arrearages. The value of debtors' homes exceeded the balance owing on the notes.

Debtors' Chapter 13 plans proposed to pay future payments of principal and interest and pay the arrearages without interest. Wade objected to the plans because they did not provide for his attorney fees and interest on the arrearages. The bankruptcy court overruled the objection. The district court affirmed this decision.

The court of appeals reversed. Wade v. Hannon, 968 F.2d 1036 (10th Cir. 1992). It held that §506(b), as interpreted in United States v. Ron Pair Enterprises, 489 U.S. 235 (1989), entitles an oversecured creditor to post petition interest on arrearages under a Chapter 13 plan, "even if the mortgage is silent on the subject and state law would not require interest to be paid." The Tenth Circuit relied in part on the Sixth Circuit's decision in In re Colgrove, 771 F.2d 119 (6th Cir. 1985), which rested its decision on §§506(b) and 1325(a)(5).

In its decision, the Court stated that three related provisions of the Bankruptcy Code determine whether a mortgagee is entitled to interest on home mortgage arrearages: §§506(b), 1322(b), and 1325(a)(5).

Section 506(b) gives holders of oversecured claims an unqualified right to post petition interest on arrearages until the plan's confirmation date. Section 1322(b)(2) prohibits debtors from modifying the rights of home mortgage lenders, and §1322(a)(5) allows debtors to cure any defaults on long-term debt and make payments over the life of the plan. Moreover, §1325(a)(5) provides that a plan may be confirmed if the claim holder retains the lien and the value of the property distributed under the plan, on account of such claim, is not less than the claim's present value at confirmation.

Under §506(b), Wade is entitled to preconfirmation interest on the arrearages, and such interest accrues from the petition date up until confirmation. Ron Pair, supra. Furthermore, §1322(b)(5) gives no indication that arrearages to be cured under the plan exclude interest allowed by §506(b).

Wade is also entitled to post confirmation interest under §1325(a)(5). Debtors' contention that this section only applies to secured claims modified by the plan, and under §1322(b)(2) home mortgages cannot be modified, is unsupported. Section 1325(a)(5) applies to "each allowed secured claim provided for by the plan." Debtors' plans "provide for" Wade's home mortgage claims, including payment of arrearages.

Michel v. Eagle-Picher Industries, Case No. 92-3900 (6th Cir. May 6, 1993) 61 U.S.L.W. 2693; 1993WL 147592.

A person employed prepetition and post-petition as debtor's investment banking firm may not be employed as a financial advisor for debtor's reorganization. The firm was not a disinterested person, as defined by 11 U.S.C. §101(14), under 11 U.S.C. §327(a).

Debtor, Eagle-Picher Industries, an Ohio manufacturing company, filed a Chapter 11 petition in January of 1991. Debtor hired the Wall Street firm Goldman, Sachs & Co. to advise it during the course of the bankruptcy. The bankruptcy court, over the U.S. Trustee's objection, approved the firm's employment. The bankruptcy court reasoned that the firm was familiar with debtor's business, so its employment would be the most efficient way to proceed. The U.S. Trustee appealed to the district court, which affirmed the bankruptcy court's decision.

In its appeal of the district court order, the U.S. Trustee argued that the firm was not a disinterested party able to assist debtor in the reorganization under 11 U.S.C. §327(a).

Debtor admitted that the firm was not a disinterested person under 11 U.S.C. §101(14). Nevertheless, the debtor argued that the U.S. Trustee had to show an actual conflict of interest in order for the firm to be considered a "nondisinterested" person. A contrary conclusion would result in the

firm being disqualified merely because of its prior employment, in conflict with 11 U.S.C. §1107(b).

The U.S. Trustee responded that the firm is an investment banker that served as an underwriter for Debtor's outstanding securities. And the firm continues to serve as a marketing agent for an outstanding bond issue of the debtor. These factors go beyond a mere prior employment relationship.

The court of appeals, citing the Middleton Arms case, reasoned that 11 U.S.C. §1107(b) provides a narrow exception only to those who fail to be disinterested simply by prior employment. In re Middleton Arms Limited, 934 F.2d 723 (6th Cir. 1991). The firm in this case is not disinterested, because its relationship with debtor (i.e., former employment as debtor's investment banker and current employment as investment banker for an outstanding security) is more than mere employment.

Allard* v. *Weitzman, Case No. 92-1520 (6th Cir. May 3, 1993), 1993 U.S. App. Lexis 10050; 1993 WL 135817.

Before a party can sue a bankruptcy trustee or his or her attorney for abuse of process and malicious prosecution, the party must obtain leave of the bankruptcy court pursuant to 28 U.S.C. §959(a).

Plaintiff, David Allard, Jr., was appointed trustee in the DeLorean Motor Company case. The trustee brought a fraudulent conveyance action against defendant, Howard Weitzman, and John and Christina DeLorean. One defendant settled with the Trustee. Weitzman and the remaining defendant won at trial.

The trustee appealed the judgment. However, the appeal was dismissed as moot, because of the trustee's settlement with the one defendant.

Afterward, Weitzman sued the Trustee and his attorney in California state court for malicious prosecution and abuse of process. The trustee then filed suit in bankruptcy court to enjoin prosecution of the California suit, because Weitzman failed to obtain leave of the bankruptcy court pursuant to 28 U.S.C. §959(a).

Weitzman dismissed the trustee from the case, but not his attorney. The bankruptcy court, however, granted the trustee's motion for a preliminary injunction.

The bankruptcy court vacated the injunction after Weitzman moved for reconsideration of the preliminary injunctive order. The bankruptcy court also dismissed the trustee's case for failure to state a claim. Vacating the injunction was proper, according to the bankruptcy court, since Weitzman's claim did not threaten the assets and administration of the bankruptcy case. The district court affirmed the bankruptcy court decision.

In reversing the lower court, the court of appeals stated that Weitzman's claim was unrelated to carrying on debtor's business. Therefore, under 28 U.S.C §959(a), he was required to obtain leave of the bankruptcy court before filing suit. This requirement extends to the trustee's attorney, since he or she is functionally equivalent to a trustee, when acting at the direction of the trustee in administering the estate and preserving assets.

Additionally, the court of appeals held that the trustee's claim was improperly dismissed because: (1) a judge may not grant a FRCP 12(b)(6) motion to dismiss based on a disbelief of a complaint's factual allegations; (2) an 11 U.S.C. §105(a) injunction may be issued against an action in a non-bankruptcy court where administration of or harm to the estate is threatened; and (3) the trustee must be given an opportunity to prove his monetary damages.

Parker* v. *United States, File No. 4:92-CV-28 (W.D. Mich. May 10, 1993).

On the United States' motion to dismiss and plaintiffs' cross-motion for summary judgment, Judge Miles upheld the validity of the IRS's tax liens against the plaintiffs' property. Although the plaintiffs claimed they had never received notices of tax lien from the IRS, the court held that the IRS's proof that the notices had been mailed to the plaintiffs was sufficient and that the plaintiffs' actual receipt of the notices was not necessary.

The IRS filed several tax liens against the plaintiffs' property. The plaintiffs filed the instant action to quiet title to such property, challenging the procedural validity of the liens, claiming the IRS failed to provide them with notice of the tax assessments and demand for payment as required under 28 U.S.C. §6303. The court held that the law only requires that IRS send the notice, noting that there is no burden on the IRS to ensure that the notice is received by the taxpayer. Further, the court rejected the plaintiffs' contention that the IRS was required to present someone with personal knowledge that the notice was sent to the plaintiffs.

United States v. Scott, File No. 1:92-CV-63 (W.D. Mich. May 21, 1993).

On defendant's motion for summary disposition, Judge Gibson held that under 28 U.S.C. §6321, the United States' tax lien for employment taxes arose when the taxpayer neglected or refused to pay its taxes after assessment, notice, and demand, rather than the date that the notice of lien was filed. Further, the court held that the United States was immune from the equitable doctrine of estoppel by laches and that the defendant failed to establish that it was entitled to a defense of estoppel by deed.

Defendants Scott and Eister entered into a buy-sell agreement for the purchase of Scott Chevrolet, an automobile dealership. When the sale fell through, Scott located a second purchaser and sold the dealership as a bulk transfer after notice to Scott Chevrolet's creditors. A portion of the sale proceeds were distributed by Scott to Eister to satisfy his obligations to Eister under the breached buy-sell agreement. The United States filed the instant action to reduce its federal tax assessments against Scott Chevrolet to judgment and to obtain a judgment against Eister for transferee liability, alleging that Scott's transfer of the proceeds to Eister constituted a fraudulent conveyance. A settlement was reached between the United States and Scott; however, defendant Eister moved for summary disposition, asserting that: (1) the proceeds from the sale were not subject to tax liens; (2) the payment of the proceeds was not a fraudulent conveyance; and (3) the United States was barred by laches or estoppel by deed from pursuing its claims.

The court granted the defendant's motion in part regarding the date on which the tax liens attached, reserving the amount of the tax lien for further determination. However, the court held that a genuine issue of material fact existed regarding the issue of whether the transfer of the proceeds was a fraudulent conveyance. Finally, the court denied the defendant's motion as to the defendant's laches and estoppel by deed defenses.

Oakland County Treasurer v. Allard **(In re Kerton Industries)**, 151 B.R. 101 (E.D. Mich. 1991).

Appeal from decision by Judge Shapero. Chapter 7 trustee sold real property of the estate for $69,000 less than the secured claims against it. The Oakland County Treasurer objected to a transfer of lien to proceeds and demanded payment at closing. The judge denied, relying in part on In re Kamstra, 51 B.R. 826 (W.D. Mich. 1985). The trustee sought an order approving distribution of proceeds that would have subordinated the tax lien to the administrative expenses of the sale pursuant to 11 U.S.C 724(b). The County Treasurer objected. Judge Shapero approved the trustee's proposed distribution. District Judge Gadola reversed. The administrative expenses proposed by the trustee were generated by the sale of the real property only. Prior to the sale there were no preexisting or outstanding administrative expenses. Therefore the sale was of no benefit to the estate, and the administrative expenses generated by the sale were not properly accorded priority over the tax lien of the County Treasurer pursuant to §§724(b).

In re Coventry Commons, Case No. 92-CO-76192-DT (E.D. Mich. 1993).

Mortgage lender Travelers Insurance appealed Judge Rhode's confirmation of the debtor's second amended plan of reorganization. Upon a motion for reconsideration, Judge Duggan of the U.S. District Court reversed his prior decision affirming confirmation.

The debtor's second amended plan treated Travelers as fully secured, but bifurcated its claim into secured and unsecured amounts and assigned it

to its own class. Travelers objected to confirmation on the grounds that it had not made an election under 11 USC §1111(b)(2) to be treated as fully secured, although it agreed that it was undersecured. The debtor argued that by treating Travelers as fully secured, it would pay more money over the life of the plan. However, the court recognized that by not making an affirmative election for §1111(b) status, Travelers might gain some tactical advantage as an unsecured creditor. The court held that only the creditor could elect §1111(b)(2) status and, absent that election, the court could not confirm a plan which foisted that status on the creditor. Since the Debtor's second amended plan failed to place the undersecured portion of the creditor's claim in the general unsecured class, the plan could not be confirmed.

In re Washtenaw/Huron Investment Corporation No. 8, Case No. 92-76851 (E.D. Mich. 1993).

A single-asset Chapter 11 was filed to avoid the foreclosure sale of the property by the valid secured creditor. In response to the motion of the mortgage lender, who had foreclosed shortly after the bankruptcy filing because the debtor failed to give it notice of the filing, Judge Rhodes found that the debtor filed chapter 11 in bad faith. The debtor appealed the bankruptcy court's decision to annul the automatic stay retroactive to the filing. (The original decision was summarized in the January 1993 Newsletter)

Judge Edmunds of the U.S. District Court affirmed the decision to annul rather than lift the stay. The court stated "(I)n determining whether a debtor filed a bankruptcy petition in bad faith, a court should consider factors which demonstrate an intent to abuse the bankruptcy process or which demonstrate that the bankruptcy petition was filed to frustrate the efforts of secured creditors to enforce their rights. A bad faith finding may be made only in egregious circumstances based on conduct akin to fraud, misconduct, or gross negligence."

Taking into account the relationship between the management company and the debtor, an interest free, non-recourse loan between the seller and the debtor, the purchase price of the property, the debtor's voluntary assumption of the seller's debts, the failure to pro-rate taxes at the sale, and the generally incestuous relationship between the seller and the debtor, the district court agreed with the bankruptcy court that the facts of the case warranted a finding of bad faith.

In re Copeland, Case No. SL 91-86479; **In re Rapp**, Case No. SL 92-82175 (Bankr. W.D. Mich. May 26, 1993).

Judge Stevenson issued this consolidated supplemental opinion to explain the court's methodology in reviewing fee applications under the requirement of 11 U.S.C. §330(a) that the court award "reasonable compensation for actual and necessary work."

The fee applicant was the same in each case. In Copeland, a Chapter 13 case, the firm requested a total of $1,840 in attorney's fees, of which $970 were allowed. In Rapp, also a Chapter 13 case, the firm requested a total of $1,659.78 in attorney's fees, of which $1,200 were allowed. In each case, the court made global adjustments to the firm's fees because the fee applications failed to comply with several paragraphs of the Western District of Michigan's "Memorandum Regarding Allowance of Compensation and Reimbursement of Expenses for Court-Appointed Professionals" dated August 2, 1989 (attached as Exhibit 8 to the March 1, 1993 Local Bankruptcy Rules). The firm has appealed the court's disallowance of its fees.

The court noted that the Sixth Circuit has held that the lodestar method must be used to determine whether fees requested are reasonable. In re Boddy, 950 F.2d 334 (6th Cir. 1991). In addition, the court cited the twelve factors, listed in Johnson v. Georgia Highway Express, Inc., 488 F.2d 714, 717-19 (5th Cir. 1974), which should be considered with the lodestar method in determining what is reasonable compensation. The court noted that the applicant bears the burden of showing that the fees requested are reasonable. In both cases, the firm failed to carry its burden by failing to meet the requirements of the Fee Guidelines Memo, thereby making it

ossible for the court to make the lodestar omputation with any precision.

In re Delex Management, Case No. GM 93-90004 (W.D. Mich. June 2, 1993).

Judge Gregg held that the automatic stay does not toll the running of a land contract forfeiture judgment redemption period (declining to follow In re Carr, 52 B.R. 250 (Bankr. E.D. Mich. 1985)), and therefore, cause existed for the court to grant the bank-vendor relief from the automatic stay to obtain a writ of restitution to evict the debtor-vendee.

Pre-petition, the debtor breached the terms of its land contract with the bank. The bank sent the debtor a forfeiture notice, filed a complaint for possession after land contract and obtained a judgment against the debtor. The judgment provided that the debtor must cure the land contract breach within 90 days or an order of eviction would be issued. Seven days after the entry of the judgment, the debtor filed its Chapter 11 case. Thereafter, the debtor allowed the 90-day redemption period to expire without curing the breach.

The court, noting that the assumption or rejection of a land contract is governed by 11 U.S.C. §365, held that the debtor's rights under the land contract were those which existed as of the bankruptcy case filing date. Because the Debtor failed to cure the land contract breach following its receipt of the notice of forfeiture and the bank obtained its judgment of possession after land contract forfeiture, the 90-day redemption period was not tolled by the debtor's bankruptcy filing. The debtor's failure to cure the breach within the redemption period extinguished its rights under the land contract.

The court noted that in some cases 11 U.S.C. §108(b) may extend a state statutory redemption period. However, in this case, §108(b) did not help the debtor, because the 60 day extension provided in §108(b) expired before the expiration of the state statutory 90-day redemption period.

STEERING COMMITTEE MEETING MINUTES

A meeting of the Steering Committee of the Bankruptcy Section of the Federal Bar Association for the Western District of Michigan was held on June 18, 1993 at the Peninsular Club. Present: Pat Mears, Kathy Hanenburg (for Tim Hillegonds), Tom Sarb, Bob Wright, Marcia Meoli, and Mark Van Allsburg.

1. 1993 Seminar.

A. Education Program. All speakers should get their materials to Brett Rodgers as soon as possible so that the course materials can be timely prepared. Pat Mears reported that Professor King will be speaking on the proposed bankruptcy legislation currently pending in Congress. He will also participate in the Sixth Circuit Review program.

B. Recreational Arrangements. Pat Mears reported in Denise Twinney's absence that Denise has received reservations so far for 35 adults and 15 children for the sunset cruise. Those persons who have registered for the seminar but not yet registered for the cruise will be contacted to check on their interest.

2. 1994 Seminar Site. Kathy Hanenburg reported for Tim Hillegonds that the Committee, subject to confirmation of sufficient space availability, was recommending the Sugar Loaf Resort as the site for the 1994 seminar, with the Park Place as a backup location. Any Steering Committee member not present at the June meeting who has a comment on the 1994 site should notify Pat Mears before the annual seminar.

3. Next Meeting. There will be no meeting of the Steering Committee in July or August. The next meeting with be September 17, 1993, 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 May 31, 1993. These filings are compared to those made during the same period one year ago and two years ago.

	1/1/93-5/31/93	1/1/92-5/31/92	1/1/91-5/31/91
Chapter 7	2,008	2,408	2,222
Chapter 11	49	49	74
Chapter 12	17	11	7
Chapter 13	618	702	747
	2,692	3,170	3,050

GOLF ON MACKINAC ISLAND

There will be no formal golf event this year in conjunction with the annual seminar, but tee-off times are available on Friday, July 30, from 12:30 p.m. to 2:30 p.m. at Wawashkamo Golf Club, which is located on British Landing Road, less than two miles from the Village of Mackinac Island. This is a 9 hole historic "Scottish" course. Greens fees are $20 for 9 holes. Pull carts, power carts and rental clubs are available. If you plan to play, please let Jim Engbers know in advance so tee-off times can be reserved. (616) 459-8311.

REMINDER OF SUMMER SEMINAR

The 1993 Summer Seminar of the Bankruptcy Section of the Western District of Michigan Chapter of the Federal Bar Association will take place on Mackinac Island on July 29-31, 1993. Information may be obtained from the office of Steven L. Rayman, phone: (616) 345-5156.

SUNSET CRUISE AT THE SEMINAR

All seminar attendees and their families are invited to join the FBA Bankruptcy Steering Committee aboard one of the Arnold Line's boats for a SUNSET CRUISE. While the departure time is flexible, we'd like to depart the island around 7:45 and cruise up to the Mackinac Bridge to catch the sunset and return around 9:45 p.m. The cost of the cruise depends on the number of people aboard!

Arnold's has also provided us with coupons for free overnight parking and discounted transportation to the Island.

Call Denise Twinney at (616) 774-0641 to make your SUNSET CRUISE reservations and she'll send you the coupons and schedule for the ferry service.

EDITORS NOTEBOOK

The Supreme Court has granted certiorari in another case involving important issues of bankruptcy law. This time, the issue is whether a foreclosure sale of real property can subsequently be set aside as a fraudulent transfer under §548 of the Bankruptcy Code. On May 24, 1993, the Supreme Court granted certiorari in B.F.P. vs. Resolution Trust Corp., Docket No. 92-1370. In the case below, In re B.F.P., 974 F.2d 1144 (9th Cir. 1992), the Ninth Circuit agreed with the Sixth Circuit's ruling in In re Winshall Settlor's Trust, 752 F.2d 1136 (6th Cir. 1985), that the price received at a non-collusive, regularly conducted foreclosure sale irrefutably establishes "reasonably equivalent value" within the meaning of §548. The ruling in these two cases is in conflict with the ruling of the Fifth Circuit in the case of Durrett v. Washington National Insurance Co., 621 F.2d 201 (5th Cir. 1980), that a foreclosure sale that brought only 57.7 percent of the fair market value of the property was not a "reasonably equivalent value."

By Thomas P. Sarb