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ABANDONMENT OF ENVIRONMENTALLY-CONTAMINATED PROPERTY

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It was the classic environmental situation that confounds trustees. I was the Chapter 7 trustee of what appeared to be a simple no asset case. The only issue in the case, and the only potential asset, was the debtor's former business real property, which had been a gas station many years ago. All parties acknowledged the property had been contaminated by past gasoline spills. In fact, a former owner was funding a clean-up to State Department of Natural Resources (DNR) specifications, but it would take many months, if not years, to determine if the property was "clean".

After trying to sell the property for more than a year with absolutely no success, after experiencing vandalism at the site, having no funds to buy insurance (assuming I could insure a vacant site), and after making sure a third party was cleaning the site to DNR requirements, I filed a Notice of Right to Demand Hearing, Abandonment of Property, and Order Disallowing Secured Claims concerning the property. The secured creditor, a bank, objected to my abandonment. The Debtor explained to the judge that it objected because, quite simply, it did not want the property back. Instead, the bank argued, the trustee should keep the property and administer it.

While the judge approved my abandonment of the property, the situation illustrates one of the many difficulties faced by a Chapter 7 trustee in administering contaminated property. Usually, sale of the property is not an option. Yet, the trustee is often faced with opposition from creditors and government agencies when he or she attempts to abandon the property. This article is intended to provide an overview of a trustee's ability to abandon contaminated property.

Standards for Abandonment of Property Under Bankruptcy Code

Under Section 554 of the Bankruptcy Code, "after notice and a hearing, the trustee may abandon property of the estate that is burdensome to the estate or that is of inconsequential value and benefit to the estate." Practically, most contaminated property meets this definition. It is difficult, if not impossible, to liquidate contaminated property for the benefit of creditors. Most buyers, frankly, run the other way when they see the test wells on site, not wanting to be required to comply with environmental laws.[1] Also, if the property is administered by the trustee, the costs of safe-guarding, securing and insuring the property, as well as the legal costs incurred in dealing with the DNR, EPA, other property owners, and the Court, certainly burden the estate.

The leading decision on abandonment of contaminated property was rendered by the United States Supreme Court in 1986. In

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Midlantic National Bank v. New Jersey Department of Environmental Protection, 474 US 494, 106 S Ct 755 (1986), the Supreme Court grappled with the rights of a trustee to abandon property under the Bankruptcy Code, and the duties of a property owner, including a trustee, under CERCLA. In balancing the two federal laws, the Court held that a bankruptcy trustee may not abandon property "in contravention of a state statute or regulation that is reasonably designed to protect the public health or safety from identified hazards." In an often-cited footnote to this exception to the trustee's Section 554 abandonment power, the Court wrote:

"This exception to the abandonment power is a narrow one. It does not encompass a speculative or indeterminate future violation of such laws that may stem from abandonment. The abandonment power is not to be fettered by laws or regulations not reasonably calculated to protect the public health or safety from imminent and identifiable harm."

Further, the Court indicated that the Bankruptcy Court may not authorize a Section 554 abandonment without "formulating conditions that will adequately protect the public's health and safety."

As might be expected, Bankruptcy Courts' application of Midlantic to trustee abandonment requests have resulted in inconsistent results often dictated by fact-intensive analysis.

Strict Compliance with Midlantic

Some courts have strictly followed Midlantic by preventing a trustee from abandoning property when an immediate public health risk exists. One of the first reported cases post-Midlantic, and one of the most cited cases by other courts, is Judge Howard's application of Midlantic in In re Peerless Plating Company, 70 BR 943 (Bankr. WD Mich 1987). The debtor in Peerless operated a metal plating shop. After the Chapter 7 petition for relief was filed, the EPA undertook clean-up activities, incurring more than $130,000 in costs and legal fees. The EPA attempted to assert an administrative claim against the estate funds of approximately $110,000. The trustee objected to the classification of the claim as administrative because the clean-up costs were not actual and necessary costs of preserving the estate because the estate could have avoided the duty to clean-up the site by abandoning the property under Section 554(a) of the Bankruptcy Code. Judge Howard, in determining that the EPA's claim was administrative, also wrote that ". . . the clear impact of the Midlantic language . . . would appear to be that a trustee may not abandon a hazardous waste site unless:

1. the environmental law in question is so onerous as to interfere with the bankruptcy adjudication itself; or

2. the environmental law in question is not reasonably designed to protect the public health or safety from identified hazards; or

3. the violation caused by abandonment would merely be speculative or indeterminate." Based upon these criteria, the Court determined, among other things, that an immediate harm existed and that abandonment could not occur.

(According to the trustee's attorney, after the decision an agreement was reached with the EPA whereby the estate paid $50,000 as an administrative claim, the EPA did not oppose a subsequent abandonment attempt, and the trustee successfully proved that the EPA was cleaning up the property, the property was secure, and no immediate public health hazard existed.)

Less Than Strict Compliance

Another leading case, the reasoning of which was rejected by Judge Howard in Peerless[2], allows abandonment with less than full compliance with environmental laws. In In re Franklin Signal Corp., 65 BR 268 (Bankr. D Minn 1986), the Court indicated that "the trustee only needs to take adequate precautionary measures to ensure that there is no imminent danger to the public as a result of abandonment," and determined that 5 factors should influence how the Court formulates conditions on abandonment on a case-by-case basis. Those 5 factors are: (1) the imminence of danger to the public health and safety, (2) the extent of probable harm, (3) the quantities and types of hazardous waste, (4) the costs necessary to bring the property into compliance with environmental laws, and (5) the amount and types of funds available to the trustee for clean-up expenses.

In Franklin Signal, the trustee attempted to abandon several drums of hazardous waste.

The Court, in applying its 5 factors, determined that Midlantic requires the trustee to (1) conduct an investigation to determine what hazardous substances burden the property, and (2) inform the appropriate state and federal agencies of the trustee's intent to abandon. The Court imposed no other conditions based upon the facts of the case, noting that prior to abandonment, the trustee had hired an environmental consultant to determine what was in the drums and to estimate the cost of clean-up. The trustee reported this information to the DNR.

Similarly, in FCX, Inc., 96 BR 49 (Bankr. ED N Car. 1989), the Bankruptcy Court was faced with an attempt by the debtor (whose Chapter 11 plan had been confirmed) to abandon the debtor's former pesticide blending facility. The debtor acknowledged CERCLA liability. Clean-up costs were estimated to be $900,000-$1,300,000. The value of the property, in uncontaminated condition, was about $700,000. While the Court found that the burial of 5 tons of pesticides presented an immediate threat to the health of those living in the area, it allowed abandonment of the property "on the condition that FCX set aside the sum of $250,000 for the payment of clean-up costs incurred by EPA or the State of North Carolina."

No Imminent and Immediate Harm Exception

Some courts have followed the Peerless reasoning but have been quite liberal in determining that an "imminent and identifiable harm" did not exist. In In re Anthony Ferrante & Sons, Inc., 119 BR 45 (Bankr. DNJ 1990), the District Court agreed with the Peerless Plating reading of Midlantic. The trustee attempted to abandon a public water supply system, no longer in use, which the residents of the township using the system had repeatedly been warned not to use. The Court determined that the abandonment does not "constitute the type of threat of 'imminent and identifiable harm' to the public health or safety contemplated in Midlantic." The Court thus allowed the trustee to abandon the water supply system. In determining the extent of harm, the Court gave great weight to the fact that the state enforcement agency waited almost eight years to attempt to enforce its own orders against the debtor.

Also, see In re Shore Company, Inc., 134 BR 572 (ED Texas 1991), in which the Court allowed the trustee to abandon a contaminated oil refinery site after finding the property did not contain an imminent and identifiable hazard which threatens the public welfare. Similarly, the Court cited the EPA's inaction and lack of evidence of environmental danger in determining that the property was not an immediate threat to public health and safety.

Lack of Funds Exception

The estate's lack of funds has become a factor for many courts in determining whether to permit abandonment. In the matter of Smith-Douglass, Inc., 856 F2d 12 (4th Cir. 1988), the Chapter 11 debtor moved to abandon its fertilizer plant, which was contaminated. No unencumbered assets existed as the first lien creditor apparently possessed a blanket security interest. Upon the debtor's motion, a former owner of the facility and the State of Illinois objected because the property contained violations of Illinois environmental laws. The Bankruptcy Court not only found that the violations of state environmental laws did not present any imminent harm or danger the public, but also based its abandonment on the fact that the debtor had no unencumbered assets with which to finance a clean-up. While the District Court found that the Bankruptcy Court's consideration of estate assets irrelevant, the Fourth Circuit Court of Appeals disagreed, holding that the existence of unencumbered assets should require a stricter compliance with environmental laws before permitting abandonment.

Also, see In re Better-Brite Plating, Inc., 105 BR 912 (Bankr. ED Wisc. 1989), in which the Court determined that no imminent harm or danger to the public existed, that only nominal assets existed so that a clean-up could not be funded by the estate, and allowed abandonment provided the abandonment order gave the EPA and DNR access to the site and administrative expense liens for their response costs. Similarly, see In the Matter of MCI, Inc., 151 BR 103 (Bankr. ED Mich 1992), in which the District Court in the Eastern District of Michigan found that the Bankruptcy Court properly permitted the trustee to abandon property when no imminent harm existed and

when no unencumbered assets existed to finance clean-up of the property.

Interference with Bankruptcy Adjudication

One Midlantic exception permits the trustee to abandon contaminated property if the environmental law violated is so onerous as to interfere with the bankruptcy adjudication itself, or is not reasonably designed to protect the public health and safety.

In general, Courts have found that the federal and state environmental laws are designed to protect the public health and safety. Some courts, however, have determined that compliance with the environmental law would be unreasonably onerous to the bankruptcy case administration. For instance, in Ferrante, supra, when the state tried to require the Chapter 7 trustee to operate a public water supply system, the Bankruptcy Court found that such a requirement would be a "clear interference with the adjudication of a bankruptcy". However, in Peerless dicta, the Court suggested that "such a law might be one that prohibited abandonment or the closing of case even after an estate was exhausted, . . . or one which permitted environmental authorities to completely usurp administration of the case."

Alternatives to Abandonment

In perhaps the most novel fashioning of a remedy concerning contaminated property, the Court in In re 82 Milbar Boulevard, Inc., 91 BR 213 (Bankr. WDNY 1988) rejected abandonment but instead indicated it would approve transfer of property from the trustee to the EPA pursuant to Section 725 of the Bankruptcy Code. Section 725 provides in part:

"After commencement of a case . . ., but before final distribution of property of the estate under Section 726 of this title, the trustee, after notice and a hearing, shall dispose of any property in which an entity other than the estate has an interest, such as a lien, and that has not been disposed of under another section of this title."

In Milbar, the trustee brought a motion to dismiss the case or, in the alternative, abandon the property, which consisted of contaminated commercial real estate subject to CERCLA. The Court rejected dismissal of the case because it would deny both the debtor and creditors the bankruptcy forum as an orderly forum to determine claims and distribute assets. It then turned its attention to abandonment. The Court determined that since no funds existed in the estate to fund a clean-up, and because the moving trustee had resigned, as a practical matter the Court was without the power to provide for the health, safety and welfare of the public in such an order. (The Court also noted that the environmental authorities had given no assurances that they would clean-up the property if abandoned.) The Court pointed out that upon abandonment, the property would revert to the debtor, which was not in a position to fund a clean-up.

The Milbar Court acknowledged the real world problems faced by trustees in administering such property. "In recognizing a narrow exception to the abandonment power, the Supreme Court did not address how, as a practical matter, a trustee can bring a property into compliance with the applicable state and local regulations, or at a minimum, take precautions to safeguard the public, absent the funds in the estate to do so."

The Court said that as an alternative to abandonment, dismissal, or administration of the property by the trustee, it would approve an order directing conveyance pursuant to Section 725 of the Bankruptcy Code. Such an order would convey a possessory interest only to the EPA so that the EPA could clean-up the property. The Court apparently intended the EPA to clean the property so that the property could ultimately be sold by the estate, with the EPA asserting a claim as a creditor.

Milbar is one of the few published opinions in which the Court analyzes the "least worst" choice facing a trustee. Where abandonment and dismissal just did not make sense, the Court fashioned a way to transfer the property to the party with the funding and expertise to provide for a clean-up.

Conclusion

Trustees and their attorneys are faced with contaminated property on an ever-increasing basis. Dozens of cases are published each year in which the Courts attempt to determine whether a trustee should or should not abandon a contaminated property, and their interpretations of Midlantic are varied. Prior to seeking abandonment of the property, trustees

and their counsel should analyze whether an immediate harm exists to the public, whether conditions can be formulated to address the risk, and whether estate funds might be available for clean-up. The trustee is also well served to initiate contact with the Michigan DNR, which has made a concerted and positive effort to work with bankruptcy trustees. Armed with that information, they will be in a better position to anticipate what stance the environmental agencies will take and what decision the Court, certainly not unmindful of the problem faced by the trustee, will render.

For further reading and an excellent analysis of this issue, see the newsletter of the National Association of Bankruptcy Trustees, NABTALK, Volume 9, No. 3, 1993.

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[1]CERCLA (Comprehensive Environmental Response, Compensation and Liability Act), 42 USC 9601 et seq., and MERA (Michigan Environmental Response Act), MSA 13.32(1) et seq., both establish a liability scheme of joint and several liability for anyone who owns property or operates a facility after a release of contaminants. Both acts can apply to bankruptcy estates.

[2]In Footnote 1 of Peerless, the Court wrote "Not only does this Court respectfully disagree, but it does so regretfully. If the matter were one purely of bankruptcy law the Court would agree that the narrow reading given to Midlantic by Franklin Signal is more in harmony with the Bankruptcy Code. But this court cannot convince itself that such a narrow reading is consistent with the intent of Midlantic."

RECENT BANKRUPTCY DECISIONS

In re Cureton 163 BR 494 (Bankr. ED Mich 1994) Judge Spector. Chapter 13 debtor sought to cure arrearage on mortgage over period of plan with interest on the arrearage at 7 percent, which was less than half of the mortgage interest rate. Mortgagee objected to the lower interest rate, claiming that it represented an impermissible modification of the right of a holder of a claim secured only by an interest in the debtor's principal residence under 11 USC §1322(b)(2).

Judge Spector relied on In re Colegrove 771 F2d 119 (6th Cir. 1985) for its finding that the arrearage must be cured within a reasonable time, and the debtor must pay the prevailing market interest rate on similar types of secured loans at the time of allowance of the creditors claim, with the maximum limitation of such a rate to be the rate of the underlying contract.

He then analyzed the underlying contract and found that it provided for an arrearage to be cured in a lump sum. The contract did not provide for a separate or independent rate of interest for arrearage. Hence, in reviewing the debtor's chapter 13 plan, Judge Spector found that it did not modify any right of the mortgagee, and so the plan was confirmed over the objection of the mortgagee.

Bailo v Madden, 93-CV-74878 (ED Mich, 3/14/94), Judge Zatkoff. In this appeal from the Eastern District Bankruptcy Court, the Debtor challenged the lower court's ruling that a debt owed to the Defendant was non-dischargeable under 11 USC 523(a)(6). The District Court affirmed the Bankruptcy Court's decision.

Debtor was the Defendant's wrestling coach. Debtor's wife had a disagreement with her ex-husband regarding some furniture he was supposed to turn over to her. The Debtor went to the house of his wife's ex-husband to get the furniture. He took some members of his wrestling team with him, including the Defendant Madden. When the ex-husband got upset about removal of the furniture, the Debtor wrestled him into submission and the team carted off the furniture. However, the ex-husband filed a police report and all concerned were charged with unarmed robbery. The Defendant Madden, a minor, was allowed to plead under Youth Training Act.

He then sued the Debtor, claiming that the Debtor had misrepresented the nature and propriety of his plans to recover the furniture. When the Debtor failed to file an answer to the complaint in Circuit Court, a default was entered against him for $152,177.45. The Debtor subsequently filed bankruptcy and sought determination of the dischargeability of the judgment.

Bankruptcy Judge Graves, in ruling on the issue of the Debtor's intent, held that he "chose to take Mr. Madden with him rather than someone who was more mature, whom he would not have to explain this to, and left him in the

dark, willfully, as to what he was getting involved in, and what the consequences of it would be."

Under Michigan law, an action for fraud requires: (1) false material representation by defendant; (2) Defendant's knowledge that the representation was false when it was made or recklessness in making the representation without any knowledge of the truth and as a positive assertion; (3) Defendant's making a representation with intention that it be acted upon by Plaintiff; and (4) Plaintiff's action thereupon and resulting injury. In addition, fraud has been held to require an intentional perversion or concealment of the truth, and reliance thereon.

The District Court did not find the Bankruptcy Court's determination of the issue of intent to be clearly erroneous and it therefore affirmed the lower court. The debt was declared non-dischargeable.

In re Big Rapids Mall Associates, 93-40071, (Bankr. ED Mich, 2/15/94) Judge Rhodes. On March 26, 1993, the Court annulled the stay and dismissed the Debtor's single asset chapter 11 filing for bad faith, having found that it was filed for the sole purpose of avoiding a foreclosure sale. The mortgagee sought sanctions under FRCP 11, against the Debtor, two of the Debtor's shareholders and counsel for the Debtor, in the amount of $107,754.21 for costs and attorney fees.

The shareholders had, prior to the filing of the petition, filed suit in state court seeking to enjoin the sale of the property, alleging that they were the owners of the property by assignment. However, on filing its petition under chapter 11, the Debtor claimed ownership of the property. The mortgagee alleged that the Debtor falsely claimed ownership of the property in order to protect the credit of one of the shareholders, who was involved in a lucrative business transaction in Wisconsin.

The attorneys for the Debtor requested an evidentiary hearing to present proofs that they had made reasonable inquiry into the facts of the case before filing the petition. The Court denied the request on the grounds that the parties had previously been afforded adequate notice of the sanction motion and were given ample opportunity to respond by brief and oral argument. Further, the Court had held an extensive hearing on the bad faith issue during which all the pertinent testimony regarding the origins of the petition were fully explored.

The Court found that the pleadings submitted by the parties contained misrepresentations in order to improperly and abusively delay and hinder the creditor. The Court also found, with respect to the attorneys, that reasonable counsel with their experience knew or should have known that an effective reorganization would not be possible and that the underlying purpose of filing the petition was not to seek the protection that chapter 11 was enacted to provide.

Applying the four factor test of Danvers v Danvers, 959 F2d 601 (6th Cir. 1992) to determine the amount of the sanctions to be imposed, the Court awarded $25,000 against the parties, jointly and severally. (Note: The Court was "shocked" by the claim that the fees of the mortgagee were in excess of $100,000. Said Judge Rhodes, "This amount is so exorbitant that it makes calculating a reasonable amount for compensation virtually impossible. The Court concludes that Mutual Trust failed to fulfill its duty to mitigate damages by failing to maintain any reasonable control over its litigation expenses.")

In re Superior Metal Shredders, Inc., (Rosenberg v Remes), Case No. 1:93-CV-658 (WD Mich, March 23, 1994). Judge McKee dismissed this appeal as untimely. After the original trustee mistakenly filed a no asset report and notice of abandonment in this case, the new trustee, Mr. Remes, filed a motion to set aside the notice of abandonment. The appellant, the sole shareholder of the debtor, did not object to the trustee's motion. Judge Howard entered an order setting aside the notice of abandonment on June 3, 1993. The appellant filed a petition to rescind the order on June 22, 1993, and Judge Howard denied the petition on July 23, 1993. This appeal followed. The trustee moved to dismiss the appeal on the grounds that the appellant failed to timely object to the petition to set aside the abandonment and to timely appeal

the bankruptcy court's order authorizing the set aside.

The Court noted that FRBP 9023 provides that FRCP 59 controls issues regarding motions for amendment of judgments. Rule 59 provides that motions must be served within the ten days after the entry of the judgment. The appellant failed to serve his petition to rescind the bankruptcy court's order within ten days of its entry. Because FRBP 9006(b)(2) precludes any time enlargement for actions taken under Rule 9023, appellant's petition was untimely. The court also reviewed a decision by Judge Enslen, In re Superior Metal Shredder, Inc., File No. K85-458 (WD Mich. November 7, 1985), which held that an untimely objection to an order to set aside allowed the order to become final, and, therefore, an appeal which followed would also be untimely. Following Judge Enslen's opinion in Superior Metal, the Court dismissed the appeal because the appellant failed to timely appeal or move to amend the bankruptcy court's order.

Sands v United Student Aid Funds, Inc., Case No. GK 92-8694 (Bankr. WD Mich March 31, 1994). Judge Gregg held that although the Debtor showed current financial hardship coupled with serious health problems, his student loans could not be discharged on the basis of undue hardship. The Debtor owed over $68,000 in student loans on the date he filed his bankruptcy petition. The Debtor filed several adversary proceedings seeking discharge of his student loans on the basis of undue hardship under 11 USC § 523(a)(8)(B).

The court noted that neither the Bankruptcy Code nor the legislative history of § 523 defines "undue hardship". The court engaged in an exhaustive analysis of the relevant case law and adopted the three-part test for undue hardship articulated in Brunner v New York State Higher Education Services Corp., 831 F2d 395 (2d Cir 1987). Under the Brunner test, the court must consider: (1) the Debtor's expenses and income to determine if repayment of the student loans would preclude the Debtor from maintaining a minimal standard of living; (2) any additional, exceptional circumstances that suggest that the Debtor's current inability to repay his loans would continue "for a significant portion of the repayment period" and (3) the Debtor's good faith efforts to repay his student loans.

In this case, the court noted that the Debtor's current income level precluded him from making even minimal monthly payments toward his outstanding student loans. However, the Debtor did not satisfy the first prong of the Brunner test, because he failed to show by a preponderance of the evidence that he had maximized his financial resources. The Debtor had not consistently and diligently looked for work until just prior to the trial. The court held that the overall record revealed an absence of the level of diligence required of a debtor seeking a discharge of his student loans. Further, the Debtor failed the second prong of the Brunner test because he presented only uncorroborated testimony regarding his medical problems up to the date of trial. The record did not establish any permanent and continuing disability substantiated by medical testimony. Finally, in determining the Debtor's good faith, the court examined the Debtor's student loan payment history and the Debtor's efforts to negotiate deferments with the student loan agencies. The court noted that the Debtor had not made payments toward his student loans, but had made several efforts to negotiate deferments of his two loan payments, satisfying the third prong of the Brunner test.

The Court held that because the Debtor failed the first two prongs of the Brunner test, his student loans could not be discharged for undue hardship. However, the court noted that even when student loans are not dischargeable, the court can fashion alternative remedies for the Debtor, including mandating payment schedules for the Debtor to follow, discharging only a portion of the total student indebtedness and providing deferments of student loan payments. Therefore, court deferred the Debtor's repayment of the student loans for one year.

In re Auto Specialists Manufacturing, Manufacturers National Bank v Auto Specialists Manufacturing Company, Case No. 90-1966, 1994 FED App. 0084P (6th Cir., March 15, 1994). On October 3, 1988, Debtor/Defendant filed a Chapter 11 bankruptcy petition. Plaintiff, Manufacturers National Bank ("Bank") had a $4

Million secured claim against Debtor. Later, Debtor negotiated a lending agreement with Fidelcor Business Credit Corporation ("FBC") whereby it would acquire a first position lien on Debtor's assets. The Bank gave up its first position lien to FBC, in exchange for an adequate protection agreement which provided for a fund requiring Debtor to contribute, *inter alia*, $50,000 to "cover additional costs" which may be added to the Bank's indebtedness in the future through protection of the Bank's secured claims.

In early 1989, the Bank requested Debtor to make the $50,000 payment. Debtor filed suit against the Bank alleging fraud, breach of contract, and seeking equitable subordination of the Bank's claims to those of all other creditors. The Bank then asked the bankruptcy court to enforce the agreement, stating that it was entitled to have the $50,000 paid into the fund in order to cover anticipated attorneys fees in a successful defense of Debtor's suit.

The bankruptcy court concluded that any attorneys fees incurred by the Bank in defending Debtor's suit were not covered under the loan agreement and 11 USC 506(b). The bankruptcy court reasoned that the language of the underlying loan documents were unambiguous as allowing the Bank its collection costs, including reasonable attorneys fees. However, the Court also reasoned that the documents were ambiguous regarding collection of attorneys fees incurred by the Bank within the context of the adequate protection agreement. Moreover, Debtor was not disputing the Bank's ultimate right to collect on the contract in the adversary proceeding. Consequently, the bankruptcy court concluded that the parties did not intend for the loan agreement to cover attorney's fees incurred by the Bank. The district court affirmed the bankruptcy court's opinion.

Under the "clearly erroneous" standard, the Court of Appeals reversed the bankruptcy court. "When attorney's fees are provided for in the underlying agreement and when the creditor is over secured, allowance of attorney's fees is mandatory." In re Dalessio, 74 BR 721, 723 (9th Cir BAP 1987). The attorney's fees were provided for in the loan agreement and the Bank is an oversecured creditor. The bankruptcy court may exercise its discretion in determining the exact amount of the fee award, according to the reasonableness of the Bank's request under Section 506(b). The court, however, cannot deny recovery altogether.

Kaypekian v Allied Mortgage Association, Case No. 138382 (Mich Ct of App, December 2, 1993). Plaintiff, Jirair Kaypekian, was the holder of a $140,000 second mortgage on a parcel of property. Defendant, Allied Mortgaged Association was the holder of a $143,000 first mortgage on the property. Defendant, Gold Corporation was the holder of a third mortgage on the property. Gold, sold its interest to Allied. When Allied foreclosed, the foreclosure notice advertised the amount due and owing as $260,534--the sum of the first and third mortgages. Allied successfully bid $265,787 at the foreclosure sale.

On May 3, 1990, Plaintiff sough an order enjoining the running of the 30-day redemption period and sought to have the foreclosure sale set aside. Plaintiff claimed that he should have been allowed redeem for $143,000 (the amount of the first mortgage) plus interest. Plaintiff argued that the amount listed in the notice of foreclosure before the sale was intended to deny Plaintiff his status as the second mortgage.

On July 25, 1990, the trial court extended the redemption period in an order stating that a temporary restraining order "shall continue in full force and effect until ten (10) days after the issuance of the Court's written opinion or until further order the Court."

On October 2, 1990, the trial court issued its written opinion and determined that Allied attempted to "turn the squeeze play" on Plaintiff's status as second mortgagee and granted his motion to set aside the sale. The court found that the correct amount due to Defendant from Plaintiff in order for Plaintiff to redeem from the foreclosure sale was the amount due on the first mortgage plus accrued interest and foreclosure costs. On October 19, 1990, Allied moved to dismiss on the basis that the redemption period had expired on October 12, 1990. Plaintiff responded, asserting that the redemption period had not expired and that a judicial determination of the amount Plaintiff must tender to Defendant was needed. Plaintiff

also stated that he and Allied's attorney had verbally agreed to extend the redemption period. The court then determined that the redemption period had expired on October 12, 1990. Plaintiff appealed, arguing that the court should have held an evidentiary hearing on the issue of whether the period of redemption was extended.

The Court of Appeals reversed the trial court, finding that a verbal extension of a redemption period is enforceable. Macklen v Warren Construction Co., 343 Mich 334 (1955). The record did not show whether an agreement was reached. Accordingly, the trial court erred in not holding an evidentiary hearing on the issue.

EDITOR'S NOTEBOOK

Another issue goes to press. And Yours Truly has very little to report. Either I'm getting quite good at this or else I'm really bad and I just don't know it. I would like to think that it's the former.

The people who have been doing the case summaries -- Jaye Bergamini, Vicki Young and John Potter -- have been doing so for over a year now. Although they have all expressed some desire to remain on the job (after a varying amount of cajoling, pleading and threatening), the Newsletter can always use additional volunteers. If anyone is interested in serving as a case summarizer, please let me know and we will put you to work. And, as always, articles for the Newsletter are extremely welcome. Heck, we've even printed a rather deranged article entitled "Alice in Bankruptcy Court".

I've heard rumors that the Bonner Mall Partnership case has been settled. If so, it will deprive the Supreme Court of the opportunity to determine whether the new value exception to the absolute priority rule in Chapter 11 cases is still applicable. Stay tuned for more information.

Legal Definition -- Pro Forma: What amateur athletes sign after using up their college eligibility.

Peter A. Teholiz, Editor

STEERING COMMITTEE MINUTES

A meeting of the steering committee of the Federal Bar Association of the Western District of Michigan was held on April 15, 1994 at the Peninsular Club in Grand Rapids. Turnout was light, perhaps due to the fact that many of the members were probably still hard at work calculating their taxes. Nonetheless, the following people were in attendance: Peter Teholiz, Brett Rodgers, Pat Mears, Tom Sarb, Bob Wright, Dean Rietberg and Mike Maggio (for Dan Casamatta).

1. 1994 Seminar. Pat Mears reported that Steve Rayman had indicated to him that all of the speakers and topics had been set.

2. Asset-Based Lending Panel Discussion. Pat Mears reported that a mailing had been sent to all members of the section regarding the panel discussion scheduled for May 5, regarding asset-based lending. This panel discussion is being sponsored by various lending institutions.

3. IRAs and 401(k) Plans. Peter Teholiz reported that Judge Spector had released his decision in Evenson, holding that an IRA was not exempt under federal exemptions (see summary in March/April issue). A general discussion followed regarding exemptions in IRAs. Later, a general discussion was held about the treatment of loans from 401(k) plans in chapter 13 cases.

4. May Meeting. The next meeting of the Steering Committee is scheduled for Friday, May 20, 1994 at the Peninsular Club in Grand Rapids.

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 through March 31, 1994. These filings are compared to those made during the same period one year ago and two years ago.

Bankruptcy Chapter	January 1 - March 31, 1994	Percent Increase (Decrease)	January 1 - March 31, 1993	Percent Increase (Decrease)	January 1 - March 31, 1992
Chapter 7	1,084	(8.4%)	1,183	(21.5%)	1,508
Chapter 11	22	(31.2%)	32	14.3%	28
Chapter 12	2	(75%)	8	60%	5
Chapter 13	390	6.6%	366	(16.6%)	439
	1,498	(5.7%)	1,589	(19.7%)	1,980

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