BANKRUPTCY LAW NEWSLETTER

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IS THE ENTIRETIES EXEMPTION DOOMED?

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On July 3, 1863, outside of a small town in Southeastern Pennsylvania, 15,000 Confederate troops burst out of a covering wood and headed for the entrenched Union position 1 mile away. Notwithstanding a murderous fire from the Federal forces, at least 150 Rebel soldiers reached their objective and hand-to-hand fighting ensued. Union forces, though, were too firmly fixed, and within a half an hour, the Confederate forces were thrown back with massive losses. Pickett's Charge was over, and the high water mark of the Confederacy had passed.

As reported in the August edition of the Newsletter, the well-entrenched entireties exemption under Michigan law is now under similar assault in the federal courts. It is too soon to tell whether this onslaught will end up similar to Pickett's Charge. Initial reports are not sanguine.

The starting point in this area is United States v Certain Real Property Located at 2525 Leroy Lane, 910 F2d 343 (6th Cir. 1990) ("Leroy Lane I"). In this case, Mr. and Mrs. Marks owned certain real estate by the entireties. Mr. Marks was found guilty of several counts of drug-related crimes, and his interest in the property was forfeited to the Government under federal criminal forfeiture statutes. Fortunately for Mrs. Marks, the Government agreed that she was an innocent owner under the relevant statutes, meaning that her interest had to be protected. While the case was pending, the residence was sold and the proceeds escrowed. When faced with the situation, the 6th Circuit analogized the Government's interest to a "position occupied by a judgment creditor of one spouse under Michigan law." The Court then went on to remand the case back to the District Court to determine how to manage the escrowed fund so as to protect the Government's interest, while preserving Mrs. Marks interest as an entirety tenant. The Court remarked though, that had the house not sold, Mrs. Marks would have been entitled to live in the house during the duration of the tenancy and the Government would have a lien to the extent of Mr. Marks' interest which would prevent Mrs. Marks from receiving all of the proceeds when the house sold.

This opinion of the Court of Appeals did not end the saga of the case, though, and two years later, it came before a new panel of the Court.[2] United States v Certain Real Property Located at 2525 Leroy Lane,

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[2] *Both of the Leroy Lane panels included Judge Krupansky. In Leroy Lane I, he dissented, arguing that federal criminal forfeiture statutes should not turn on State law and needed a uniform federal determination. In Leroy Lane II, he concurred, but only because of the established legal precedent of Leroy Lane I.)*

972 F2d 136 (6th Cir. 1992) ("Leroy Lane II"). Prior to the decision in Leroy Lane I, but unbeknownst to either the District Court or the Court of Appeals, Mrs. Marks had obtained a divorce from her husband. In the process, the Michigan circuit court had awarded the residence to her, free and clear of her husband's interest. Upon discovery of this fact, the Government argued that the entireties tenancy had been terminated by the divorce and therefore the Government was now a tenant in common with Mrs. Marks (requiring an equal distribution of the escrowed fund). The 6th Circuit disagreed, holding that the Government could only obtain whatever interest that Mr. Marks possessed after the entireties estate was destroyed. Since the state court had not awarded any interest in the property to Mr. Marks, the Government received nothing. However, the Court was troubled by the seeming lack of disclosure regarding the divorce, and the case was remanded to the District Court for further hearings to insure that proper disclosure of all relevant facts be given to the state court.

A major feature of the Leroy Lane cases is that they arise out of a federal forfeiture case. Under federal criminal forfeiture statutes, title to property used in the commission of a crime vests in the United States upon commission of the illegal act. Innocent parties are then given the right to assert their claims to the property. Hence, the central premise of Leroy Lane I is that the Government is the owner of the property and not merely a lienholder. In short, the Court was faced with the extremely unusual situation where one tenant in a entireties tenancy had been "transformed" into the Government (see Invasion of the Body Snatchers, an old Hollywood classic, for information on how such a transformation might occur). The granting of a lien was the Court's method of fashioning a remedy for the situation, and should not be read as a tacit recognition that lien creditors would have the same rights.[3] As such, Leroy Lane I should be limited to forfeiture cases and not extended to those involving judgment lien creditors. Indeed, Leroy Lane II at 138 admits that under Michigan law, "a judgment creditor of one spouse cannot levy against the entireties estate in [sic] satisfy a debt." Further, the result in Leroy Lane II (that state law be followed) is consistent with the Supreme Court's approach to such cases. Cf. Farrey v Sanderfoot, 500 US --, 114 LEd2d 337, 111 SCt 1825 (1991) (discussing timing of creation of judicial lien on former entireties property; deferring to state law on interpretation of same). To the extent that Leroy Lane I ever intended to extend to all judgment creditor cases, Leroy Lane II has cut back on such. See, also, In re Grosslight, 757 F2d 773 (1985).

Unfortunately, Fischre v United States, Case No. 5:93-CV-11 (WD Mich. 4/25/94), expands the language of Leroy Lane I well beyond forfeiture statutes. Here, the United States obtained a judgment against Dr. Fischre and levied against the residence that he and his wife owned in the entireties. The Court allowed the judgment lien to stand only so as to encumber Dr. Fischre's survivorship interest in the property. In doing so, it took the situation of the Government as owner, and applied it where the Government is a mere lienholder, without any authority beyond the dicta in Leroy Lane I.[4] This is only one step short of allowing the same authority to other non-governmental judgment lienholders, essentially eviscerating the entireties tenancy under state law.

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[3]*The Government argued that, because it was an owner, it was entitled to a portion of the proceeds from the sale. However, the Court refused to do this, holding that such would not adequately protect Mrs. Marks' interest in the property.*

[4]*Fischre does not rely on any specialized federal statute which provides greater collection rights to the United States as compared to traditional creditors under state law. Thus, United States v Rodgers, 461 US 677, 76 LEd2d 236, 103 SCt 2132 (1983) is inapllicable. In Rodgers, the Supreme Court held that the United States could sell the interest of a non-debtor spouse in a homestead under Texas law, when foreclosing a federal tax lien. The reasoning, though, was based on the language of the federal tax lien statute and not on a comparison of the United States as a creditor with traditional creditors under state law. Additionally, the decision dealt with a forced sale, not the allowance of a lien. Four Justices dissented, analogizing the homestead exemption to a tenancy by the entireties and holding that no forced sale could occur. Interestingly, all of the Justices in the majority of Rodgers have retired from the Court, while three of the dissenters (Rehnquist, Stevens and O'Connor) are still active.*

This is not to say that such might not be a possible evolution of Michigan law in the future. As the Court in Leroy Lane I pointed out at 352,

> "we have found no cases which would preclude the attachment of a creditor's lien on one spouse's interest which could be satisfied to the extent of that spouse's interest upon the termination of the entireties estate."

But cf Naylor v Minock, 96 Mich 182 (1893) (mortgage given by wife on entireties estate void, even after death of husband); Rogers v Rogers, 136 Mich App 125 (1984) (discussing transfers of entireties property by will). Indeed, the Michigan Supreme Court has held that a joint tenancy with rights of survivorship is essentially a joint life estate with contingent remainders. Albro v Allen, 434 Mich 271 (1990). However, the federal court system should not be leading the charge to erase 150 years of well-established state law, without at least a hint that such a change is in the offing. This policy was most recently articulated by the Supreme Court in BFP v Resolution Trust Corp., 511 U.S. -- ,128 LEd2d 556 at 570 (1994):

> "But where the intent to override [historical state practice] is doubtful, our federal system demands deference to long established traditions of state regulation."

Fischre's departure from this standard is quite unexplainable.

Moreover, the practical implications of Fischre are large. Although the District Court is Fischre went out of its way to restrict the lien to the survivorship interest, the fact that it allowed a lien to stand against the property is sufficient to cloud title. Title companies will not insure titles under these circumstances; without such, mortgage companies will not allow refinancing or extensions . In short, even though the lien is limited to the survivorship interest of one of the entireties tenants, the tenants will have to get the lien removed in order to have any title adjustments done. The lien will essentially serve as an encumbrance on the present possessory interest in the property, meaning that a creditor who levies on the property will eventually receive some remuneration, just to allow a specific transaction to occur. Such is specifically prohibited by Michigan law, but is the unwitting result of Fischre.

In the bankruptcy context, the implications are also quite important. Because the survivor of the entireties estate now holds an inchoate, but separate interest, in any case where the debtor claims an entirety exemption, the trustee will own that survivorship interest. Depending upon the Debtor's age, that interest could be rather valuable. Additionally, it might even be possible for the trustee to sell the property free and clear of the non-debtor's spouse's interest, depending on the Bankruptcy Court's interpretation of 11 U.S.C. 363(f)(5) and 363(h)(3). But see In re Youmans, 117 BR 113 (Bankr. DNJ 1990) (right of survivorship in entireties property does not survive sale). The result is a very reduced entireties exemption in the context of bankruptcy. Such is the logical extension of Fischre.

Pickett's Charge at the Battle of Gettysburg marked the turning point of the Civil War. Although the war dragged on for another year and a half, it became increasingly apparent that the Confederacy's ability to win the war had vanished outside of that Pennsylvania town. At this time, we cannot say whether the recent attack on Michigan's entireties tenancy will prove as futile as that of General George Pickett so long ago. The attack could be successful, consigning the entireties tenancy to the legal equivalent of the "Southern Lost Cause" -- a glorious, but now closed chapter in the history books.

RECENT BANKRUPTCY DECISIONS

6th Circuit and Supreme Court decisions are summarized by John Potter; Western District cases are summarized by Mary Hamlin; and Eastern District cases are summarized by Jaye Bergamini.

In re Edsel Adams and Frances T. Adams, (Barclays/American Business Credit, Inc. v Adams), 1994 FED App 0278P (6th Cir - 8/3/94). During the 1980s, Debtors, Edsel and Frances Adams owned three corporations (Adams Plywood, Inc., West Memphis Plywood Corp., and Magic City Plywood). Plaintiff, Barclays/American Business Credit, Inc. loaned Adams Plywood operating capital, secured by accounts receivable and inventory and was personally guaranteed by the Debtor.

Each time Adams Plywood made shipments on credit to a customer, a pledge report and account receivable was created. Barclays then immediately advanced cash equal to 85% of the value of the account receivable. When the account was collected, Adams Plywood was required to report the receipt of the funds to Barclays and deposit them to a "dominion account" at a Memphis, Tennessee bank, from which only Barclays could withdraw money. Barclays would then credit the withdrawn funds to the loan. Barclays also agreed to loan funds to Adams Plywood equal to 50% of the value of its inventory which secured the loan.

In the fall of 1983, Debtors' business began having financial difficulties. To pay suppliers, they began transferring inventory collateral to unsecured creditors. In December of 1993, Debtors transferred to their daughters Magic City Plywood stock and a property in Abbeville, Alabama, for no consideration. Adams Plywood was also accumulating an inventory of unsold goods which was not top quality. Consequently, sales deteriorated further. Barclays met with Edsel Adams and gave Adams Plywood until September 1, 1984 to come up with a plan for liquidating the inventory.

On August 22, 1984, Adams Plywood filed a Chapter 11 petition. Shortly before the filing, Adams Plywood deposited $150,000 of account receivable payments in its corporate bank account, instead of the Barclays' account, contrary to the loan agreement. These deposit were accomplished through a "check kiting" scheme which enabled Adams Plywood to delay reports and payments to Barclays In the two weeks following the Chapter 11 filing, Debtors also opened a new checking account with $99,000 in funds drawn from the Adams Plywood corporate account. They later withdrew $49,000 from this new account. On September 6, 1984, Barclays obtained a restraining order from the bankruptcy court prohibiting further unauthorized post-petition disbursements from these accounts. Barclays then demanded the debt be paid in full. On September 21, 1984, Barclays sued Debtors on the guarantee.

On October 9, 1984, Debtors filed a Chapter 7 bankruptcy petition. It was later discovered that on August 28, 1984, Debtor, Frances Adams, had opened another checking account in her maiden name at another bank with $12,000 taken from Debtors personal bank account. This money was used for living expenses and to pay their bankruptcy attorney at the time. Debtors also converted $10,000 of the Chapter 7 estate after filing the petition. On November 20, 1984, Debtors also filed a "Statement of Affairs" with the bankruptcy court which made numerous material misrepresentations regarding pre- and post-petition transactions. On May 11, 1985, Barclays filed an adversary action asking that the remaining debt be declared non-dischargeable and also for a money judgment.

On June 18, 1986, after a lengthy trial, the bankruptcy court decided that, aside from the Magic City and Abbeville transaction, Debtors' activities were conducted with the intent to hinder or delay creditors pursuant to 11 USC 727(a)(2)(A) and (B). The bankruptcy court also denied Debtors a discharge and entered a Judgment against them for $731,367.74. The Debtors appealed. On January 30, 1992, the district court for the Western District of Tennessee, for the most part, affirmed the

bankruptcy court decision. A further appeal followed.

In their appeal, Debtors first contended that Barclays did not meet its burden of proving hindrance, delay or fraud by clear and convincing evidence under 11 USC 727(a)(2)(A) and (B). In affirming the lower court decisions, the Court of Appeals held that exceptions to discharge under Section 727 require proof only by a preponderance of the evidence. Citing, in support, Grogan v Grogan, 498 US 279, 291 (1991), as well as decisions from the 4th, 5th and 10th circuits.

Debtors also argued that the bankruptcy judge should have recused himself, pursuant to 28 USC 455, because his impartiality might reasonably have been questioned by an objective observer. Debtors had filed a complaint against their original bankruptcy attorneys with the Board of Professional Responsibility of the Tennessee Supreme Court. This complaint alleged that these attorneys had touched, intimidated, or otherwise harmed Debtor, Frances Adams, during a hearing on the Barclays matter before the bankruptcy court judge, William B. Leffler. The complaint also alleged that these attorneys "sold out" in the bankruptcy proceeding and conspired to deprive Debtors of their rights under the Bankruptcy Code. After the dischargeability trial in bankruptcy court, Debtors discovered that Judge Leffler had executed two affidavits on these attorneys' behalf for the Board of Professional Responsibility. These affidavits supported the attorneys' position contrary to the allegations in Debtors complaint to the Board.

The Court of Appeals determined that the opinions expressed in Judge Leffler's affidavits were formed from events he personally observed in the court proceeding. The affidavits did not display deep-seated favoritism towards Barclays or antagonism towards Debtors, in the slightest degree. Consequently, Judge Leffler did not abuse his discretion, under 28 USC 455 in denying Debtors' motion for recusal.

In re Gloria A. McClurkin, (Huntington National Bank v Frank Pees, Trustee), 1994 Fed App 0282P (6th Cir - 8/5/94). Plaintiff/Creditor, Huntington National Bank filed a $19,186.23 proof of claim in Debtor's Chapter 13 bankruptcy. The claim was allegedly fully secured by a second mortgage on Debtor's residence which was appraised at $138,000.00. The first mortgage on the property was for $110,512.98. Consequently, there was a $27,487.02 equity cushion in the property. Trustee objected to Huntington's claim, contending that it should be allowed only as secured in the amount of $13,687.02, with the remainder as unsecured The trustee arrived at this amount by subtracting 10% for "costs of sale" and the amount of the first mortgage claim, from the appraised value. Debtor's Chapter 13 Plan proposed to keep the house, and, therefore, Thus, the "costs of sale" are hypothetical. The bankruptcy court sustained the Trustee's objection and the district court affirmed.

The Court of Appeals reversed and remanded the lower court decisions, holding that where the Debtor proposes to retain collateral under a reorganization plan, 11 USC 506(a) does not require or permit a reduction in the creditor's secured claim to account for a hypothetical cost of sale. The Court reasoned that this holding comports with the construction given 506(a) by the Supreme Court in other contexts.

In re Emma M. Penick, Case No. ST94-81035 (Bankr. WD Mich, 8/9/94). In this case Judge Stevenson held that for purposes of redemption under 11 USC 506(a) and 722 the fair market value of collateral is determined based on what a "commercially reasonable disposition" of the collateral would yield.

The Debtor filed a motion to redeem a car which was secured by GMAC. GMAC was owed $4,465.07 and the Debtor valued the car at $800.00. GMAC disputed the Debtor's valuation and asked that the Court determine that the fair market value should be an amount between wholesale and retail prices.

Pursuant to 11 USC 722, a Debtor can redeem certain personal property from the lien(s) securing a consumer debt(s) if the property is exempted or has been abandoned, by paying the secured creditor the amount of the allowed secured claim.

Under 11 USC 506(a), a claim is secured to the extent of the value of the collateral. 506(a) further states "such value shall be determined in light of the purpose of the valuation and of the proposed disposition or sue of such property..." The Court found that "determining this purpose is essential to ascertaining a fair price..." In a redemption situation a determination of value is on a case-by-case basis and the Court must balance the interests of the Debtor and the creditor.

The Court, citing In re Water, 122 BR 298 (Bankr. WD Tex) 1990, examined the different approaches to valuation: (1) the lesser of the secured claim or fair market value of the collateral; (2) liquidation value; and (3) the value yielded by a commercially reasonable disposition of the property. The Court agreed with the Waters decision and found that the "reasonable commercial disposition" is the preferred standard for determining valuation.

In this case, the Court held that the "blue book" wholesale fair market price of the car ($2,600.00) was the appropriate price for redemption purposes because wholesale price excludes overhead and sales commissions (i.e. the net amount a creditor would receive following repossession and disposition).

In re Gateway North Estates, (ED Mich, Judge Gadola, decided 7/6/94) On an appeal from an order by Eastern District of Michigan Bankruptcy Judge Graves granting lift of stay to a mortgagee, Judge Gadola overturned the lifting of the stay and remanded the case back to the bankruptcy court for an evidentiary hearing.

The Debtor, a corporation whose only assets consisted of three parcels of land, originally filed a chapter 11 in the face of a foreclosure action. That filing was dismissed on grounds of bad faith in January 1993. The Debtor subsequently filed chapter 7.

Two mortgagee creditors moved for lift of stay as to one of the three pieces of estate property, alleging a failure on the part of the Debtor to pay according to the terms of the $600,000 secured debt. The District Court's opinion notes that the property was worth $3,840,000, that the Debtor had made no quarterly payments for a year and was unable to make monthly payments.

At the same time the creditors moved for lift of stay, the Court considered the trustee's motion to sell the property free and clear of liens. At the hearing held in January of 1994, the Bankruptcy Court denied the trustee's motion to sell, and instead granted the Debtor until July of 1994 to attempt to sell the property. Despite having granted the Debtor an extension until July to sell the property, Judge Graves granted the creditors' motion for lift of stay. The Debtor appealed.

Judge Gadola found that the motion for lift of stay should have been decided under 11 USC §362(d)(2), not (d)(1). The District Court found that the motion was "with respect to a stay of an act against property" pursuant to (d)(2); therefore, according to the Court "adequate protection is not an issue, rather the primary issue is whether the Debtor maintains an equity interest in the property."

The bankruptcy court made no findings of fact. The moving creditors made no offer of proof apart from the default. There was no evidence offered by any party as to the value of the property apart from the assertion of the Debtor.

Judge Gadola found that the creditors had failed to carry their burden of proof and that the court had abused its discretion by lifting the stay without an evidentiary hearing. The Debtor's appeal was granted and the case was remanded to the bankruptcy court for a hearing on the issue of the value of the property, the balance of the creditors' claim and the Debtor's equity in the property.

Travelers Insurance Company v River Oaks Ltd. Pts., In re River Oaks Ltd. Pts., 166 BR 94 (ED Mich 1994), Judge Duggan, on appeal from Bankruptcy Judge Shapero. Plaintiff Travelers Insurance Company appealed an order of the Bankruptcy Court allowing the Debtor to use Travelers cash collateral for payment of its expert witness fees, expended in opposition to Travelers' motion for turnover of the cash collateral and other ongoing disputes between the Debtor and Travelers.

Travelers was a properly perfected mortgagee with a security interest in the rents generated by the property of the Debtor, consisting of a 424 unit apartment complex. The parties reached an agreement for use of the cash collateral that called for the submission of line item budgets subject to the approval of Travelers. Use of the cash collateral was permitted for ordinary or necessary costs and expenses of supporting and maintaining the property. In the event of a dispute over any proposed expenditure, the parties were to have recourse to the Court.

The Debtor submitted a budget with a line item of $15,000 for accounting and legal expenses, to which Travelers objected. The expense proved to be for the payment of expert witness fees in support of the Debtor's objection to the motions filed by Travelers. The Bankruptcy Court approved the payment. Travelers appealed.

The District Court found that the Debtor had not met its burden of proof on the issue of the adequate protection of Travelers' interest in the rents. Nevertheless, the District Court held that the Bankruptcy Court could, without a determination of the adequate protection of Travelers, authorize the use of the cash collateral for the payment of administrative type expenses if the secured creditor "caused" the expenditure of funds, pursuant to 11 USC §506(c). In so ruling, the District Court relied on In re Trim-X, 695 F2d 296 (7th Cir. 1982)

The case was remanded to the Bankruptcy Court for a specific determination as to whether Travelers "caused" the Debtor to incur the disputed charges. Upon the filing of specific findings of fact by the Bankruptcy Court, the District Court will review the decision of the Bankruptcy Court to allow the payment of the costs, applying the appropriate standard of review.

McClarty v Gudenau, 166 BR 101 (ED Mich 1994), Magistrate Judge Pepe. Plaintiff McClarty was the trustee in bankruptcy for Debtor Fortney. On behalf of the estate, the trustee sued the Defendant for legal malpractice based on his prior representation of the Debtor. In the course of suit discovery, the trustee served the Defendant with a request for production of documents. Defendant counsel refused to produce, absent authorization of the Debtor, the former client. Trustee moved for an order to compel production of the documents.

The Court found that the privilege of communication between the defendant attorney and the Debtor did not automatically pass to the trustee upon the Debtor's filing of bankruptcy. Because the Trustee did not have the right to assert the privilege, the he could not waive it and thereby compel the production of the privileged documents.

The Court expressed the certainty that the Debtor would be willing to cooperate with the trustee, but denied the trustee's motion to compel production of the documents.

In re Schuster, (Frantz v Schuster), 92-01507-G,A/P 92-0362, (Bankr. ED Mich), Judge Graves, issued 8/16/94. Judge Graves found that a default judgment issued against a Debtor in a state court proceeding constituted sufficient grounds to deny dischargeability of the debt under 11 USC § 523(a)(6). The Court granted to the Plaintiff to pursue collection of the non-dischargeable debt.

The Debtor was convicted of criminal sexual conduct in the Ingham County Circuit Court in April of 1991. Frantz was the victim of the assault. At the time of the crime, Frantz was a 14 year old student and family friend of the Debtor, who was a superintendent of schools where Frantz attended classes. The Debtor got Franz drunk, assaulted him and threatened him with severe retribution if he revealed the crime. Frantz was not the Debtor's only victim, and he was encouraged to come forward and testify against the Debtor after other children revealed their assaults.

After the Debtor was convicted of the criminal charges, Frantz sued him in state court for fraud, assault and intentional infliction of emotional distress. The Debtor was initially represented by counsel in the tort action, but after his counsel withdrew from the case, the Debtor failed to appear for a settlement conference. The state court judge entered a default and set the case for a

bench trial. The Debtor again failed to appear on the date of trial and a default judgment was entered against him, after the Franz presented proofs in the case. The judgment of the state court specifically found the Debtor's actions against the Franz to have been intentional and wanton. The Debtor did not move to set aside the default, nor did he appeal the judgment rendered against him.

Judge Graves found that the Debtor's actions adequately met the definition of a willful and malicious injury, under §523(a)(6). Moreover, the Debtor's failure to appear and defend at trial did not prevent the issues from being actually litigated, since the state court did hear proofs from the Plaintiff. Since the Debtor had notice of the court proceeding, his failure to appear was a voluntary act and will not prevent the litigation of the issues at bar, nor does his default prevent the application of collateral estoppel.

Judge Graves found the Debtor to be collaterally estopped from denying the preclusive effect of the state court judgment. The Court stated that collateral estoppel applies where: (1) the same ultimate issues underlying the first action are involved in the second action, (2) the parties had a full opportunity to litigate the issues in the former action, and (3) where there is materiality of estoppel whereby both litigants are bound by the judgment rendered in the first suit.

The Court granted the Plaintiff's motion for lift of stay, upon finding the debt to be non-dischargeable.

In re Moses, 89-05640-G, (Bankr. ED Mich), Judge Graves, issued 7/21/94. On remand from the District Court, Judge Graves withdrew a prior ruling dismissing the Debtor's chapter 7 case with prejudice, and instead dismissed it without prejudice. The chapter 7 case was commenced in August 1989 as an involuntary proceeding, and was subsequently converted to one under chapter 11 in September 1989. A trustee was appointed in December 1989. The case was converted back to chapter 7 in September 1990. In the course of the proceedings, the Debtor asserted her 5th amendment protection against self incrimination, due to a fear of foreign prosecution. Judge Graves ordered the Debtor to answer questions about her foreign assets. The Debtor appealed. The District Court reversed the bankruptcy court and upheld the Debtor's right to invoke the 5th amendment in response to questions concerning her foreign assets in August 1991. The Debtor continued to refuse to answer questions.

Creditor Michigan National Bank filed a motion to dismiss the case and the trustee filed a complaint to deny discharge, alleging that without the testimony of the Debtor concerning certain foreign assets, he could not effectively administer the estate.

After a hearing, Judge Graves denied MNB's motion to dismiss. MNB appealed. The District Court reversed, based upon the trustee's inability to effectively administer the assets of the estate without the cooperation of the Debtor, and remanded the case to the Bankruptcy Court. Moses v Allard, 779 FSupp 857 (ED Mich 1991).

Faced with the dismissal of her chapter 7 petition, the Debtor lost her fear of foreign prosecution and agreed to answer any remaining questions, without asserting any additional privileges. The matter of dismissal was adjourned pending the completion of the 2004 exam. However, at the 2004 exam, the Debtor again declined to answer questions regarding certain assets, this time claiming that she was constrained by a confidentiality clause in her contract of employment. The Debtor sought a protective order. Upon review of the request for a protective order, in conjunction with MNB's motion to dismiss, the Court dismissed the case with prejudice.

The Court's opinion recites a litany of charges against the Debtor, who was the owner of a company doing business in foreign countries, which allegedly was owed tens of millions of dollars in accounts receivable. The delay tactics employed by the Debtor over a period of 5 years denied the trustee any ability to marshall or collect assets of the estate, in spite of non-exempt assets in excess of $450,000, listed on her schedules.

The Debtor argued that her legitimate assertion of her 5th amendment privilege, upheld by the District Court, was not evidence of bad faith, in

spite of the fact that she, in the opinion of the Bankruptcy Court, "cavalierly" waived it in the face of imminent dismissal. Further, although the claims against the estate exceeded $80,000,000 and the trustee was unable to discover, let alone administer, the assets of the estate, the Debtor asserted that her good faith application for a protective order on the grounds of confidentiality by contract, weighs against dismissal with prejudice.

The factors to be considered in determining whether a dismissal will be with or without prejudice include (1) the cause for the dismissal itself, and (2) the good faith of the Debtor. The Court observed that at no time did the Debtor commit contempt of court, but rather defended her legal positions assiduously.

A dismissal with prejudice forecloses discharge and therefor must only be entered with the clearest proof of a substantial level of bad faith. Cases cited by Judge Graves in which dismissal was entered with prejudice demonstrate a pattern of contumacious delay and mendacity. After a painstaking review of all the facts in the case, the Court found that a dismissal with prejudice, as previously ordered, was inappropriate, and so dismissed without prejudice.

EDITOR'S NOTEBOOK

My congratulations to the new members of the Steering Committee and my thanks for past contributions to those persons who opted not to stand for re-election this year. The Steering Committee works only through the efforts of a great many people, and those that take the time to get involved in the activities of the Committee are to be commended.

I am still searching for a brave soul to take over the editorship of the Newsletter. It can be one of the most rewarding jobs that you've ever volunteered for, as well as keeping you on the cutting edge of new bankruptcy cases. Moreover, the editor of the Newsletter gets an automatic seat on the steering committee. If anyone is interested, please contact me.

As reported in the Minutes portion of the Newsletter, the Committee videotaped the seminar this year for sale to its members. If anyone is interested in purchasing a copy, they should contact Steve Rayman at 616-345-5156. The price for the videotape, along with a copy of the seminar materials is $100.00, while the price for the videotape alone is $75.00. There are only about 50 copies of the written materials left.

Legal definition -- acquit: What you say when you've finished your last hand of poker.

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 August 19, 1994 at the Peninsular Club in Grand Rapids. Attending were: Steve Rayman, Pat Mears, Peter Teholiz, John Piggins (for Bob Sawdey), Dean Reitburg (for Dan Casamatta), Tim Hillegonds, Tom Sarb, Denise Twinney and Janet Martin. Denise also brought several proxies for the selection of the new committee members.

1. Committee Chair. This meeting marks the first for Bob Wright as the new Chair of the steering committee. Unfortunately, he was absent and the meeting was chaired by Steve Rayman. In addition, Steve takes over as the Chair-Elect (not to be confused with the position of Vice-Chair, which Steve cannot fill, having no recognizable vices). The Committee's great thanks and appreciation go to Pat Mears, the retiring Chair.

2. Committee Positions. The Committee reviewed the people who had evidenced a desire to serve on the committee. Although only five positions were available, there were nine applicants, three of whom were incumbents. After expressing extreme pleasure in the number of qualified candidates, the Committee selected the

following persons for a three-year term: Brett Rodgers, Tom Schouten, John Grant, Hal Nelson, and Rob Wardrop. The Committee congratulates those persons selected, as well as thanking those persons who expressed an interest in serving on the committee.

3. 1994 Seminar. Steve Rayman gave a report on the just-concluded 1994 seminar held in Traverse City on July 21-23. He indicated that all of the income and expense figures were not yet collected and that he had no indication of whether the seminar had showed a profit as of yet. This was the first year that the seminar had been videotaped, resulting in an additional new expense for the seminar. Steve indicated that he hoped to have final figures for the seminar at the next meeting, but he also indicated that he thought that the price for the seminar should be raised next year, perhaps to $150.00 for members of the Western District Federal Bar, and $175.00 for non-members.

Steve also reported that he was making arrangements to have the videotapes available for copying and purchase. After a short discussion, the committee decided that a copy of the videotape and the written seminar material would be made available for sale at a price of $100.00, while a copy of the videotape, alone, would be sold for $75.00.

4. 1995 Seminar. Steve Rayman gave a report on the 1995 seminar. Tentatively, it is planned for July 27-29 at the Lakeview Hotel on Mackinac Island, and he volunteered himself and Mary Hamlin to once again help with the organization, indicating that Bob Wright had already offered a willingness to work on the educational programs and coordinate the written materials. He also reported that Pat Mears and Judge Gregg had indicated a desire to organize the 1996 seminar.

If anyone is interested in working on the 1995 (or 1996) seminar, please contact Steve Rayman, Bob Wright, or anyone else on the Steering Committee.

Peter Teholiz reported that with the demise of the present MCLE program run by the State Bar and the probability that a mandatory continuing legal education program for all lawyers will be adopted by the State Bar, getting the seminar accredited again becomes possible. Peter indicated that he would follow up on this project, once a formal plan had been finalized by the State Bar.

5. Grand Rapids Bar Seminars. Pat Mears reported that the Grand Rapids Bar Association had decided to offer two seminars on bankruptcy this year. The first, in November is scheduled to be about basic bankruptcy, while the second, in April, is to be on an advanced bankruptcy topic. Tim Hillegonds indicated that he would find out whether the Bar Association would be interested in co-sponsoring the second seminar with our section.

6. Next Meeting. The next scheduled meeting of the steering committee is scheduled for Friday, September 16, 1993, at 12:00 noon 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 January 31, 1994. These filings are compared to those made during the same period one year ago and two years ago.

Bankruptcy Chapter	January 1 - July 31, 1994	Percent Increase (Decrease)	January 1 - July 31, 1993	Percent Increase (Decrease)	January 1 - July 31, 1992
Chapter 7	2461	(10.4%)	2747	(16.5%)	3292
Chapter 11	53	(19.7%)	66	(14.3%)	77
Chapter 12	11	(50.0%)	22	29.4%	17
Chapter 13	921	9.4%	842	(11.5%)	952
	3446	(6.3%)	3677	(15.2%)	4338

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