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EQUITABLE SUBORDINATION: WHEN ARE INSIDERS SENT TO THE BACK OF THE LINE?

By: Gordon J. Toering*

Equitable subordination is an equitable remedy that allows a court to subordinate the claims of a creditor whose wrongful acts have either harmed the debtor's other creditors or given the claimant an unfair advantage. Although courts are generally reluctant to grant the remedy, counsel for debtors and creditors should be familiar with the doctrine of equitable subordination because of the significant impact it can have upon both the creditor whose claim is subordinated and the other creditors in the case.

Section 510(c) of the Bankruptcy Code allows a court to equitably subordinate claims:

> (c) Notwithstanding subsections (a) and (b) of this section, after notice and a hearing, the court may-
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> (1) Under principles of equitable subordination, subordinate for purposes of distribution, all or part of an allowed claim to all or part of another allowed claim or all or part of an allowed interest to all or part of another allowed interest; or
>
> (2) Order that any lien securing such a subordinated

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claim be transferred to the estate.[2]

The Sixth Circuit has adopted the test for equitable subordination first articulated by the Fifth Circuit in the seminal case of *In re Mobile Steel*.[3] Each of the following conditions must be satisfied before a court will equitably subordinate a claim:

1. That a claimant engaged in some type of inequitable conduct;[4]

2. That the misconduct resulted in injury to other creditors or conferred an unfair advantage on the claimant; and

3. That equitable subordination would not be inconsistent with the provisions of the Bankruptcy Code.

The Insider--Non-insider Distinction

In the context of equitable subordination, courts treat an insider significantly different from a non-insider. An insider is generally an officer, director, partner, or person in control of the debtor, or a relative of one of those persons.[5] Insiders are subjected to a more rigorous standard of conduct and a different burden of proof than are non-insiders. The standard of misconduct for insiders is inequitable conduct. With respect to the burden of proof, the trustee bears the initial burden of proving unfair conduct by the insider claimant.[6] Once this burden is met, the burden shifts to the claimant, who must then prove the fairness of his or her transactions with the debtor or his or her claim will be subordinated.[7]

If the claimant is a non-insider, however, the trustee must prove that the claimant engaged in "extraordinarily inequitable conduct that offends the morals of the marketplace or shocks the conscience of the court."[8] The burden of proof always remains on the trustee; it never shifts to the non-insider claimant. Because the threshold is much higher when the claimant is a non-insider, claims of non-insiders are rarely subordinated. The balance of this article focuses on equitable subordination of insider claims because of the nearly insurmountable standard of misconduct that must be shown to subordinate the claim of a non-insider.[9]

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[2] 11 U.S.C. §510(c).

[3] *See In re Baker and Getty Financial Services, Inc.*, 974 F.2d 712 (6th Cir. 1992), adopting the test set forth in *In re Mobile Steel*, 563 F.2d 692 (5th Cir. 1977).

[4] It appears to be immaterial whether the inequitable conduct occurred pre-petition or post-petition. A district court in Pennsylvania concluded that section 510(c) did not limit the remedy of equitable subordination to pre-petition conduct. *In re Nutri/System of Florida Associates,* 178 B.R. 645 (E.D. Pa. 1995).

[5] *See* 11 U.S.C. § 101 (defining insider).

[6] *In re Auto Specialties Manufacturing Co.*, 153 B.R. 503, 508 (Bankr. W.D. Mich. 1993), *aff'd*, 1994 U.S. Dist. LEXIS 8435 (W.D. Mich.).

[7] *In re Holywell Corp., 913 F.2d 873 (11th Cir. 1990).*

[8] *Boyd v. Manufacturers National Bank of Detroit*, 1994 U.S. Dist. LEXIS 8435 (W.D. Mich.).

[9] *See, e.g., In re Baker and Getty Financial Services, Inc.*, 974 F.2d 712 (6th

Considerations in Equitable Subordination

If counsel for a creditor has reason to believe that there may be some unfair conduct by an insider of the debtor, then equitable subordination may provide a method to improve the creditor's position and result in a higher distribution to that creditor, particularly if the insider has a large claim. Accordingly, counsel for creditors should examine whether there has been inequitable conduct by the insider. One common factor in demonstrating inequitable conduct is undercapitalization. Inadequate capitalization may be established by the testimony of a skilled financial analyst that the capitalization "would definitely be insufficient to support a business the size and nature of the bankrupt in light of the circumstances existing at the time the bankrupt was capitalized."[10] Additionally, "capitalization is inadequate if, at the time when the advances were made, the bankrupt could not have borrowed a similar amount of money from an informed outside source."[11]

The task of determining whether a company is undercapitalized is difficult because no definite standard of adequate capitalization exists: an adequate level of capitalization depends on the nature of the business.[12] Thus, courts rely on case by case analysis to determine whether a company is sufficiently capitalized.

Although courts typically look to the initial capitalization to determine whether a company is undercapitalized, subsequent capitalization may be relevant as well. Inadequate subsequent capitalization often indicates initial undercapitalization.[13] Moreover, inadequate subsequent capitalization "may be further proof of inequitable conduct, such as action of gross mismanagement, self interest, and the like...."[14]

Undercapitalization alone, however, is generally insufficient to justify equitable subordination.[15] Instead, evidence of other inequitable conduct, such as fraud, spoilation, or faithless stewardship, must be demonstrated.[16] For example, equitable subordination of insider loans to an undercapitalized corporation was upheld because the insider had attempted to characterize capital contributions as loans and perfect its security interests against a debtor's assets when it became clear that the debtor could not pay its loans.[17] The policy behind requiring a "plus factor" along with undercapitalization is that insiders would be deterred from making loans to companies in financial distress if mere undercapitalization

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Cir. 1992); *In re Auto Specialties Manufacturing Co.*, 153 B.R. 503 (Bankr. W.D. Mich. 1993), *aff'd*, 1994 U.S. Dist. LEXIS 8435 (W.D. Mich.).

[10] *In the Matter of Herby's Foods Incorporated*, 2 F.3d 128, 132 (5th Cir. 1993) (quoting *Mobile Steel*, 563 F.2d at 703).

[11] *Id.*

[12] *In the Matter of Mobile Steel*, 563 F.2d at 702-03.

[13] *In re Multiponics, Inc.*, 622 F.2d 709, 717-18 (5th Cir. 1980).

[14] *Id.*

[15] *In re Herby's Foods Inc.*, 2 F.3d 128 (5th Cir. 1993).

[16] *In re Octagon Roofing*, 141 B.R. 968, 984 (Bankr.N.D.Ill. 1992), *aff'd*, 157 B.R. 852 (N.D.Ill. 1993) (citations omitted).

[17] *In re Herby's Foods Inc.*, 2 F.3d 128 (5th Cir. 1993).

would subject them to subordination. Nevertheless, some courts have stated that the combination of an insider loan and undercapitalization would allow a bankruptcy court to equitably subordinate the loan.[18]

In the context of undercapitalization, another option available to creditors is to attempt to recharacterize an insider loan as a contribution to capital. If a court will recharacterize the loan as a contribution to capital, then the insider's claim as a creditor will be disallowed.

Defending Against Equitable Subordination

One defensive tactic that may be employed to resist equitable subordination is to argue that the creditors did not suffer an injury.[19] The Sixth Circuit requires proof of injury to other creditors or advantage to the claimant to support an action of equitable subordination, as well as inequitable conduct.[20] After all, it is entirely possible that despite the best (or worst) intentions and efforts of the claimant, no one may have been injured. For example, in one case, a creditor "intentionally and vindictively" caused the debtor's utilities to be shut off, obtained a nearly identical phone number for the creditor's new competing business, copied the debtor's customer and price list, and modeled his business cards after those of the debtor.[21] Nevertheless, the court refused to subordinate the claim because it found the conduct did not cause a monetary loss to the debtor or the creditors.

In defending against equitable subordination, a claimant should challenge the amount of the actual injury to the creditors. Equitable subordination is not penal, and is thus limited to the amount of actual damage suffered by other creditors.[22]

Where a Showing of Inequitable Conduct is Not Necessary

Under some circumstances, it is not necessary to prove inequitable conduct to subordinate a claim. For example, the Sixth Circuit recently ruled that pre-petition and post-petition non-pecuniary loss tax penalties may be subordinated without a showing of government misconduct.[23] One justification for this doctrine is that the Bankruptcy Code expresses a preference for compensating actual losses as opposed to penalties. Another basis is that a creditor should not suffer for the debtor's misconduct.

The principle that claims may be subordinated in the absence of inequitable conduct based upon the status of the claim has not been limited to tax penalty claims. Another type of claim that courts have subordinated without requiring misconduct has been punitive damage claims.[24] It is clear, however, that the Sixth Circuit is unwilling to extend this principle to cases that do not

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[18] *See, e.g., In re Fabricators, Inc.*, 926 F.2d 1458, 1469 (5th Cir. 1991).

[19] Of course, the claimant would also have to rebut any allegations that it had received an unfair advantage.

[20] *In re Baker and Getty Financial Services, Inc.*, 974 F.2d 712 (6th Cir. 1992).

[21] *Id.*

[22] *In re Mobile Steel,* 563 F.2d 692, 701 (5th Cir. 1977).

[23] *In re First Truck Lines, Inc.*, 48 F.3d 210 (6th Cir. 1995).

[24] *Diasonics, Inc. v. Ingalls*, 121 B.R. 626 (Bkrtcy.N.D. Fla. 1990).

involve punitive damages.[25] Therefore, this exception to the requirement of inequitable conduct is probably limited to cases involving tax penalties or punitive damage claims.

Conclusion

In conclusion, although most courts presently only apply equitable subordination in cases of egregious misconduct,[26] the doctrine is flexible and can have a significant impact on creditors and debtors.[27] It is a remedy that counsel for creditors should consider requesting a bankruptcy court to apply if there exists evidence of an insider's unfair conduct, especially when the insider has a large claim against the debtor. Conversely, counsel advising management of financially troubled companies should remember that the doctrine may apply when management is considering undertaking some questionable conduct.

RECENT BANKRUPTCY COURT DECISIONS

Sixth Circuit and Supreme Court decisions are summarized by John Potter, Western District cases by Vicki Young and Eastern District by Jaye Bergamini.

In Re: Celotex Corporation, Petitioner v Bennie Edwards et ux, ___ U.S. _____ (April 19, 1995), United States Supreme Court Case No. 93-1504. Respondents, Bennie and Joann Edwards filed suit against Petitioner, Celotex in Texas Federal District Court, alleging asbestos-related injuries. In April of 1989, the District Court entered a $281,026 judgment in favor of the Edwards and against Celotex. To stay execution of the judgment pending appeal, Celotex posted a supersedeas bond of $294,988 with Northbrook Property and Casualty Insurance Company. As collateral for the bond, Celotex allowed Northbrook to retain money owed Celotex related to insurance coverage disputes between them. On October 12, 1990, the Fifth Circuit affirmed the District Court decision, rendering the judgment against Celotex final. Celotex filed a Chapter 11 petition that same day.

On October 17, 1990, the Bankruptcy Court augmented the automatic stay and issued an injunction pursuant to 11 U.S.C. §105(a). The §105 injunction stayed all proceedings involving Celotex "regardless of ... whether the matter is on appeal and a supersedeas bond has been posted by [Celotex]". The Edwards then filed a motion in District Court pursuant to FRCP 65.1, seeking permission to execute against the Northbrook bond. Celotex and Northbrook opposed this motion, asserting that all proceedings to enforce bonds had been enjoined by the §105 injunction. Celotex also argued that since the Edwards had filed their Rule 65.1 motion, the Bankruptcy Court had reaffirmed the §105 injunction, stating that it prohibited creditors like the Edwards from proceeding against sureties without the Bankruptcy Court's permission. Nevertheless, the District Court allowed the Edwards to execute on the Northbrook bond. Celotex appealed and the 5th Circuit affirmed,

[25] *In re Baker & Getty Financial Services, Inc.* 974 F.2d 712, 719 (6th Cir. 1992).

[26] *In re Otis & Edwards, P.C.,* 115 B.R. 900 (Bkrtcy.E.D. Mich. 1990).

[27] The doctrine has been termed a "jack of all trades" by Hon. Jo Ann C. Stevenson, *Fourteenth Annual Survey of Sixth Circuit Law: Bankruptcy,* 1993 DET. C. L. REV. 319 (Summer, 1993).

reasoning that the appellate process for which the bond was issued was now completed, Celotex no longer had a property interest in the bond and §362 no longer applied. Further, the 5th Circuit disagreed with the merits of the §105 injunction, holding that the integrity of the estate is not implicated because Debtor no longer has a present or future interest in the bond. The 5th Circuit also reasoned that the §105 injunction was unjust and unfair since the bond was posted precisely to cover the type of event which has occurred, i.e. the insolvency of the Debtor. The 5th Circuits decision was in direct conflict with the 4th Circuit case of *Willis* vs *Celotex Corp.*, 978 F.2d 146 (CA4 1992).

The Supreme Court then granted certiorari and reversed the 5th Circuit, holding that persons subject to an injunctive order issued by a court must obey such order until it is modified or reversed. A Bankruptcy Court has jurisdiction over proceedings "arising under," "arising in," or "related to" a Chapter 11 case. 28 U.S.C. §§1334(b) and 157(a). The "related to" language must be read to grant jurisdiction over proceedings involving Debtor's property or the estate. The Edwards execution on the North brook bond was "related to" the Celotex Bankruptcy. The Bankruptcy Court found that allowing the Edwards and other bonded judgment creditors to execute on the bonds would have a direct and substantial adverse effect on Celotex's ability to successfully reorganize. The Edwards should have challenged the injunction in Bankruptcy Court rather than collaterally attack the injunction in District Court.

* * * * *

<u>In Re: Trident Associates, Ltd Partnership, Debtor</u> v <u>Metropolitan Life Insurance Company,</u> Electronic Citation: 1995 FED App. 0131P (6th Cir.); File Name: 95a0131p.05, Case No. 93-2469 (May 1, 1995). On October 13, 1987, Metropolitan Life Insurance Company (Metlife) loaned $23 million to an entity called Tri Atria Company. This loan was secured by a mortgage on property called the Tri-Atria Office Center. Tri-Atria Company was the first identity that Debtor/Plaintiff, Trident Associates had. In December of 1990, all assets of Tria Atria were transferred to an entity called Beztak of Tri Atria Limited Partnership (Beztak). This transfer was conditionally approved by Metlife. Later, Beztak failed to make two property tax payments in 1990 and 1992. This failure was a default under the Metlife mortgage. On May 1, 1993, Metlife then accelerated the debt. On May 10, 1993, the Oakland County Treasurer conducted a forced sale of its tax lien interest for the 1990 taxes. Metlife purchased this lien for $314,066. On May 21, 1993, Metlife filed suit in Federal District Court in Detroit against Beztak seeking appointment of a receiver, injunctive relief, and recovery of converted funds, among other relief. A foreclosure sale of the property was also scheduled by Metlife for June 15, 1993. However, this sale was subsequently rescheduled to June 22, 1993, so that a hearing could be held on June 15, in District Court for the appointment of a receiver and injunctive relief. At this hearing, Beztak was represented by the law firm of Evans & Lubtak, of which Mr. Lubtak and Mr. Beznos, who were general partners of Beztak, were principals.

On or before June 14, 1993, an attorney from a firm other than Evans & Lubtak, prepared a Chapter 11 petition for Debtor, Trident Associates Limited Partnership. This petition was signed by the vice-president of Trident General, Inc., Debtor's general partner. On June 14, 1993, Trident General nor Debtor did not exist.

On June 15, 1993, the day of the District Court hearing, four significant events occurred: (1) Metlife notified the tenants of Tri Atria Office Center to pay their rent to Metlife; (2) At the District Court hearing, Beztak was represented by attorneys Moran and Clarkston of the Evans & Lubtak firm. The District Court denied Metlife's request and implored the parties to continue their negotiations. Metlife then advised the court of the rumors of a pending Bankruptcy filing by Beztak. Attorney Moran assured the court that he was unaware of any intention to file Bankruptcy; (3) Trident General, Debtor's general partner was incorporated. Attorney Clarkston was listed as the incorporator of Trident General; (4) Through a Certificate of Amendment of Limited Partnership, Beztak changed its name to Debtor, Trident Associates. And, Trident General became the general partner of Debtor with a 1% percent interest in the Debtor. All the other general partners became limited partners which constituted a default under the mortgage with Metlife.

On June 21, 1993, one day before the foreclosure sale, Attorney Moran filed suit in State Court in the name of Betztak to enjoin the foreclosure sale. The request for the TRO was denied because, *inter alia*, the affidavit signed by Attorney Lubtak of Evans & Lubtak, falsely claimed that Lubtak was a principal of Beztak and that Beztak was the owner of the Tri-Atria Office Center.

Before 10:00 a.m. on June 22, 1993, the day scheduled for the foreclosure sale, an attorney called the person conducting the sale and informed him that a Bankruptcy petition had been filed and the sale should not take place. The foreclosure sale took place anyway at 10:00 a.m. and Metlife was high bidder. At 10:00 a.m. Debtor's Chapter 11 Petition was filed.

On July 15, 1993, a Bankruptcy Court hearing was held on Metlife's request for relief from the automatic stay. The Bankruptcy Court found that Debtor's petition was filed in bad faith, granted Metlife's motion, and dismissed Debtor's Chapter 11 Petition. Trident Associates appealed to the District Court who affirmed the Bankruptcy Court decision.

In affirming the lower court decision, the Court found that the Bankruptcy Court did not abuse its discretion when it granted Metlife relief from that automatic stay and dismissed Debtor's Chapter 11 Petition after a finding of bad faith. The Court found that under 11 U.S.C. §362(d)(1) relief from the automatic stay may be granted "for cause" and under 11 U.S.C. §1112(b) a court may dismiss a Chapter 11 Petition "for cause." Courts have been left to define "cause" and have done so recently. *In re Laguna Associates Ltd. Partnership (Laguna Associates Ltd. Partnership v Aetna Casualty & Sur. Co.)*, 30 f.3d 734 (6th Cir. 1994). Debtor's "bad faith" can constitute "cause" under §§362(d)(1) and 1112(b). *Laguna*, id at 738. The Court noted that the factual similarity between *In re Laguna Associates*, in which this Court affirmed a finding of bad faith, and the present case is not surprising. *In re Laguna Associates* also involved a Beztak property and a scheme to avoid foreclosure involving the same Bankruptcy lawyer for Debtor. The Court then cited eight factors in *Laguna* which were present in the instant case. Those factors included: the "new debtor" syndrome; improper pre-petition conduct before other courts and unauthorized restructuring of Beztak; Debtor had no employees and was formed to shelter the former general partners of Beztak from personal liability; and, there seems no possibility of reorganizing the Debtor. The Court, after reviewing these *Laguna* factors, was unable to find any clear error nor an abuse of discretion.

* * * * *

<u>In Re: New Center Hospital</u>, 179 BR 848 (Bankr. ED Mich) 5/24/95. Petitioner IRS sought substantive consolidation of the Debtor corporation with what were alleged to be 10 different alter ego corporations, run by the same individuals who ran the Debtor. The Court reviewed extensive discovery material and granted the petitioners request for summary disposition in favor of consolidation.

The Debtor is a medical clinic which was the subject of an involuntary Bankruptcy petition. At the time of the filing, the board of directors for the Debtor consisted of three individuals, who were also the incorporators of the 10 additional corporate medical clinics. The IRS alleged that the various entities acted in disregard of standard corporate procedures, and used the assets, bank accounts and public identities of each other, with impunity, for the purpose of avoiding the claims of various creditors. The court found evidence that the Debtor had, at various times, deposited it's funds in the account of another of the clinics without consideration, for the sole purpose of avoiding the garnishment of a judgment creditor.

Michigan law allow the corporate veil to be pierced when the corporate entity has been used as a sham to avoid legal obligations. Similarly, the Bankruptcy Court has the power to pierce the veil when the proponent can show:

> 1. A substantial identity between the entities to be consolidated;
> 2. That consolidation is necessary to avoid some harm or to realize some benefit; and
> 3. If a creditor objects and demonstrates that it relied on the separate credit of one of the entities and that it will be prejudiced by the consolidation, then the Court may order the consolidation only if the benefits heavily outweigh the harm.

Judge Graves found that there was a substantial identity between the entities, that consolidation would be beneficial and would avoid harm, and that there were no significant objections to the consolidation from objecting creditors. The motion for consolidation was granted.

* * * * *

In Re: Grzywacz, Case No.94-47413-R (Bankr. ED Mich) 6/6/95. Plaintiff filed an adversary proceeding under 523(a)(4) and (6), seeking a determination of non-dischargeability for a debt owed as a result of the defendant's failure to carry workers compensation insurance.

Debtor/Defendant was an accountant who employed the Plaintiff. She suffered an injury and was granted workers compensation. The Debtors corporation did not carry insurance and so the Debtor was adjudged personally liable for the benefits due.

Plaintiff sought collection through the State Courts before the Debtor filed Bankruptcy. She then sought a determination that the debt was non-dischargeable either as a breach of the Debtor's fiduciary duty, or as a willful and malicious injury.

Judge Rhodes found that the obligation to provide workers compensation insurance was not a fiduciary responsibility. Further, since the failure to carry the insurance did not make it substantially certain that the Plaintiff would suffer an injury, the debt was not a result of willful and malicious conduct.

The Plaintiff's complaint was dismissed.

* * * * *

In Re: Hamama, Case No.94-46504-R (Bankr. ED Mich) 6/21/95. Judge Rhodes found that the Plaintiff's claim for unpaid wages and conversion of a bank account were non-dischargeable under 523(a)(6). Further, where state statute allows a multiple recovery, the multiple is also non-dischargeable.

Debtor acted as Plaintiff's employer. He failed to pay her final pay check, contrary to State law. Pursuant to MCL 408.488, where the failure to pay is flagrant, the Plaintiff is entitled to up to twice the amount of the wage, as exemplary damage.

Further, the Debtor withdrew money from the Plaintiff's checking account without authority. Under MCL 600.2919(a), an individual who suffers a conversion may recover up to three times the amount converted as exemplary damages.

The Court awarded the multiple in each instance, and held it to be non-dischargeable. However, as to the Plaintiff's claim for actual attorney fees, the Court found that there had been no evidence presented to substantiate the claim and that request for relief was denied.

STEERING COMMITTEE MINUTES

The June Steering Committee meeting was held at the Peninsular Club in Grand Rapids. In attendance were the following: Robert Wardrop, Janet Thomas, Peter Teholiz, Jeff Hughes, Dean Rietberg on behalf of Dan Casamatta, Tom Schouten, Hal Nelson, Tom Sarb, John Porter, Bob Wright, Mary Hamlin and Michael Maggio, guest.

The Committee voted to ratify action taken at the prior Committee meeting to approve the resolution in support of Bankruptcy Appellant Panel which will be presented by Bob Sawdey. Mary Hamlin gave a report regarding the 1995 Bankruptcy seminar. The Rules Committee will be chaired by Peter Teholiz.

There will be no meeting in July due to the Bankruptcy seminar. The next scheduled meeting will be August 18, 1995, at noon, at the Peninsular Club in Grand Rapids.

LOCAL BANKRUPTCY NOTICE

Enclosed are two general orders which have been approved by the Judges of this Court.

Enclosed from Mark Van Allsburg is a memo regarding the Chapter 7 filing fees.

EDITOR'S NOTEBOOK

As of July 10, 1995 there have been a number of seminar registrations received. Anyone who has not returned his/her registration should do so immediately. Anyone who did not receive the registration materials should contact Mary K. Viegelahn Hamlin at: (616) 345-5156.

LOCAL BANKRUPTCY STATICS

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 months of June of 1995. These figures are compared to those made during the same period one year ago and two years ago.

Bankruptcy Chapter	June of 1995	June of 1994	June of 1993
Chapter 7	379	378	398
Chapter 11	4	7	10
Chapter 12	3	0	1
Chapter 13	164	140	105
Totals	550	525	514

Bankruptcy Chapter	January - June of 1995	January - June of 1994	January - June of 1993
Chapter 7	1993	1796	1930
Chapter 11	33	39	51
Chapter 12	9	7	14
Chapter 13	711	665	590
§304	1	0	0
Totals	2747	2507	2585

STEERING COMMITTEE MEMBERS

Dan Casamatta (1996)	(616) 456-2002
John Grant (1997)	(616) 774-0641
Tim Hillegonds (1995)	(616) 459-6121
Mary Hamlin, Editor (1996)	(616) 345-5156
Jeff Hughes (1996)	(616) 336-6000
Pat Mears (1995)	(616) 776-7550
Hal Nelson (1997)	(616) 459-9487
Steven Rayman, Chair-elect (1995)	(616) 345-5156
Brett Rodgers (1997)	(616) 732-9000
Tom Sarb (1995)	(616) 732-9000
Bob Sawdey (1996)	(616) 459-8311
Tom Schouten (1997)	(616) 774-8121
Peter Teholiz (1995)	(517) 886-7176
Janet Thomas (1996)	(616) 726-4823
Rob Wardrop (1997)	(616) 459-1225
Bob Wright, Chair (1995)	(616) 454-8656

From the Bankruptcy Court:

The Bankruptcy Court adopted two new general orders on May 24, 1995. General Order # 9 describes the procedure for election of a trustee in a chapter 11 case, and General Order # 10 concerns small business chapter 11 cases. Both of these general orders were proposed by the Committee on Rules of Practice and Procedure of the Judicial Conference of the United States as recommended interim rules. It is intended that new national bankruptcy rules covering these procedures will be proposed and promulgated in due course -- which means in 2 or more years from now. The substance of both general orders is stated below:

GENERAL ORDER 9

May 24, 1995

ELECTION OF A TRUSTEE IN A CHAPTER 11
REORGANIZATION CASE

(a) REQUEST FOR AN ELECTION. A request to convene a meeting of creditors for the purpose of electing a trustee in a chapter 11 reorganization case shall be filed and transmitted to the United States trustee in accordance with Bankruptcy Rule 5005 within the time prescribed by § 1104(b) of the Bankruptcy Code. Pending court approval of the person elected, a person appointed trustee under § 1104(d) shall serve as trustee.

(b) MANNER OF ELECTION AND NOTICE. An election of a trustee under § 1104(b) of the Code shall be conducted in the manner provided in Bankruptcy Rules 2003(b)(3) and 2006. Notice of the meeting of creditors convened under § 1104(b) shall be given in the manner and within the time provided for notices under Bankruptcy Rule 2002(a). A proxy for the purpose of voting in the election may be solicited by a committee appointed under § 1102 of the Code and by any other party entitled to solicit a proxy under Bankruptcy Rule 2006.

(c) APPLICATION FOR APPROVAL OF APPOINTMENT AND RESOLUTION OF DISPUTES. If it is not necessary to resolve a dispute regarding the election of the trustee or if all disputes have been resolved by the court, the United States trustee shall promptly appoint the person elected to be trustee and file an application for approval of the appointment of the elected person under Bankruptcy Rule 2007.1(b), except that the application does not have to contain names of parties in interest with whom the United States trustee has consulted. If it is necessary to resolve a dispute regarding the election, the United States trustee shall promptly file a report informing the court of the dispute. If no motion for the resolution of the dispute is filed within 10 days after the date of the creditors' meeting called under § 1104(b), a person appointed by the United States trustee in accordance with § 1104(d) of the Code and approved in accordance with Bankruptcy Rule 2007.1(b) shall serve as trustee.

GENERAL ORDER 10

May 24, 1995

SMALL BUSINESS CHAPTER 11 REORGANIZATION CASES

(a) ELECTION TO BE CONSIDERED A SMALL BUSINESS IN A CHAPTER 11 REORGANIZATION CASE. In a chapter 11 reorganization case, a debtor that is a small business may elect to be considered a small business by filing a written statement of election no later than 60 days after the date of the order for relief or by a later date as the court, for cause, may fix.

(b) APPROVAL OF DISCLOSURE STATEMENT.

(1) Conditional Approval. If the debtor is a small business and has made a timely election to be considered a small business in a chapter 11 case, the court may, on application of the plan proponent, conditionally approve a disclosure statement filed in accordance with Bankruptcy Rule 3016. On or before conditional approval of the disclosure statement, the court shall

(a) fix a time within which the holders of claims and interests may accept or reject the plan;
(b) fix a time for filing objections to the disclosure statement;
(c) fix a date for the hearing on final approval of the disclosure statement to be held if a timely objection is filed; and
(d) fix a date for the hearing on confirmation.

(2) Application of Bankruptcy Rule 3017. If the disclosure statement is conditionally approved, Bankruptcy Rule 3017(a), (b), (c), and (e) do not apply. Conditional approval of the disclosure statement is considered approval of the disclosure statement for the purpose of applying Bankruptcy Rule 3017(d).

(3) Objections and Hearing on Final Approval. Notice of the time fixed for filing objections and the hearing to consider final approval of the disclosure statement shall be given in accordance with Bankruptcy Rule 2002 and may be combined with notice of the hearing on confirmation of the plan. Objections to the disclosure statement shall be filed, transmitted to the United States trustee, and served on the debtor, the trustee, any committee appointed under the Bankruptcy Code and any other entity designated by the court at any time before final approval of the disclosure statement or by an earlier date as the court may fix. If a timely objection to the disclosure statement is filed, the court shall hold a hearing to consider final approval before or combined with the hearing on confirmation of the plan.

FROM THE BANKRUPTCY COURT:

The Judicial Conference of the United States has recently accepted a proposal to tack a $15.00 surcharge onto the filing fee for a chapter 7 case and to create a new fee for (1) filing a motion for conversion of a case to chapter 7 or (2) filing a notice of conversion (by the debtor) to convert a chapter 12 or 13 case to a 7. Both of these fees were scheduled to go into effect on August 1, 1995 but I am informed that this effective date will be changed and may be October 1. The reason for this new fee is provision in the Bankruptcy Reform Act of 1994 which raised trustee compensation by $15.00 per case without providing a funding mechanism. Here is the exact wording of the changes to the fee schedule (which is incorporated into 28 U.S.C. 1930(b)):

> (8.1) Upon filing of a petition under chapter 7 of the Bankruptcy Code, the petitioner shall pay $15 to the clerk of the court for payment to the trustee serving in the case as provided in 11 U.S.C. § 330(b)(2). An applicatin to apy the fee in installments may be filed in the manner set forth in Federal Rule of Bankruptcy Procedure 1006(B).
>
> (8.2) Upon the filing of a motion to convert a case to chapter 7 of the Bankruptcy Code, the movant shall pay $15 to the clerk of court for payment to the trusteee serving in the case as provided in 11 U.S.C. § 330(b)(2). Upon the filing of a notice of conversion pursuant to section 1208(a) or section 1307(a) of the Code, $15 shall be paid to the clerk of the court for payment to the trustee serving in the chapter 7 case as provided in 11 U.S.C. § 330(b)(2). If the trustee serving in the case before the conversion is the movant, the fee shall be payable only from the estate in the superceded case and only to the extent that there is an estate realized.

The $15 fee surcharge will apply to any chapter 7 case filed on or after the effective date of this amendment and in any case converted to chapter 7 on or after that date, regardless of when the case was filed.

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NOTICE

I would like to thank all those individuals who have graciously written articles for the Newsletter. I am sure that many of you have been anxiously awaiting the arrival of the April and May Newsletter. Due to internal problems the printer delayed the April and May Newsletter. As a result of these continuous problems I have decided to use a different printer and am confident that all future Newsletters will be published on a timely basis.

BANKRUPTCY LAW NEWSLETTER

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THE BANKER'S DILEMMA -- WILL THE SUPREME COURT RESOLVE THE CONFLICT IN STRUMPF?

By: Bruce R. Grubb*

On the eve of bankruptcy filings, lenders and debtors invariably ask counsel the same question -- what happens to the money in the debtor's bank account? The debtor's continued access to funds in bank accounts may be critical to a reorganization effort, or to meet day to day living expenses. On the other hand, loan documents usually provide that the lender may set off amounts held by the bank to satisfy unpaid obligations owing by the debtor. Upon default or bankruptcy, bank accounts are often the most convenient source of repayment. The bank's control over the debtor's bank accounts also tends to elicit the debtor's full cooperation in resolving repayment arrangements.

To date, bankruptcy and appellate courts across the country have issued conflicting and inconsistent rulings as to whether a lender is entitled to freeze a debtor's bank account upon bankruptcy filing. Fortunately, the United States Supreme Court has an opportunity to provide lower courts and practitioners with clear guidance on this issue when it rules on Citizens Bank of Maryland v. Strumpf, 37 F.3d 155 (4th Cir. 1994), Cert. granted, 115 S.Ct. 1398 (1995).

THE CONFUSION

The confusion surrounding this issue stems from the inconsistent provisions of the Bankruptcy Code. Section 553 expressly provides that "...this title does not affect any right of a creditor to offset a mutual debt... that arose before the commencement of the case... (with certain exceptions). However, Section 362(a)(7) specifically stays "... the set

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off of any debt owing to the debtor that arose before the commencement of the case under this title against any claim against the debtor."

By definition, set off requires that mutual debts exist. If a lender is stayed from exercising its right of set off, and the debtor is allowed to withdraw the funds from the account post-petition, the debtor will effectively defeat and deprive the lender of its set off right. Conversely, exercise of the set off right is clearly prohibited by the automatic stay provisions.

In the past, lenders have attempted to resolve this "banker's dilemma" by freezing the debtor's account, but not fully offsetting the mutual obligations. Many courts have held that the freezing of a bank account simply preserves the status quo, and does not violate the automatic stay (for an excellent summary of the issue and relevant cases see Hillegonds and Toering, Freezing the Debtor's Bank Account and the Automatic Stay, Bankruptcy Law Newsletter, Vol. 5, No. 8 (April, 1993)). The recent trend of authority suggests that the mere act of freezing an account may violate the automatic stay.

THE BANK'S ARGUMENT

Banks justify the propriety of "freezing" an account with a number of compelling arguments. First, prohibiting the bank from refusing to allow a debtor to withdraw all funds from the account effectively forces the bank to forfeit its right of offset even though it specifically provided for in the Code.

Second, banks argue that a "freeze" does not constitute a "set off" as prohibited by Section 362, since all of the elements of a set off are not met. Generally, a set off includes:

1. A decision to set off;
2. An overt act; and
3. A record indicating that a set off has occurred.

A freeze of an account only indicates an intention to implement the first element.

Third, Section 506(a) provides that a claim that is subject to set off under Section 553 is a secured claim. Section 363(c)(2) prohibits the debtor from using cash collateral without first obtaining court approval. Since the debtor has the burden of obtaining court approval before using cash collateral, a bank's freeze of the debtor's account is arguably implicitly authorized by Section 363(c)(2).

Fourth, Section 542(b) of the Code requires any entity owing a debt to the debtor to pay that debt "except to the extent that such debt may be offset under Section 553 of this title against a claim against the debtor". Since the Code recognizes a difference between the right to a set off and the right to withhold funds, a bank, which has a right of set off should be entitled to retain the funds until its right of set off is determined.

Finally, Section 542(c) permits an entity that has neither actual notice nor knowledge of a bankruptcy filing to transfer property of the estate or pay a debt owing to the debtor. By negative implication, a bank with knowledge of a bankruptcy filing is prohibited from honoring checks drawn on the debtor's account. See, In re Hoffman, 51 B.R. 42 (Bankr. W.D. Ark. 1985); In re Williams, 61 B.R. 567 (Bankr. N.D. Tex. 1986); Air Atlanta, Inc. v. National Bank of Georgia, 81 B.R. 724 (N.D. Ga. 1987). Arguably, freezing a debtor's account is a prudent practice in all events, at least until monies can be transferred to a trustee or into Debtor-In-Possession accounts.

THE TREND

Notwithstanding these arguments, many recent cases have found that a lender's freezing of a debtor's bank account(s) violates the automatic stay. In re Patterson, 967 F.2d 505 (11th Cir. 1992) involved a freeze imposed by a credit union on a member's share draft accounts following the member's Chapter 13 filing. At the time of the Chapter 13 filing, the member was current on a $922.52 unsecured obligation owing to the credit union. The credit union froze the accounts and filed a Proof of Claim showing a reduction of the amounts held in the accounts "which will be applied at an appropriate time". The court held that the credit union did not have a valid right of set off on the date of the bankruptcy filing, since the Pattersons were current on the loan at the time of the Chapter 13 filing. Accordingly, the court suggests that the legal requirement of mutuality of obligation was not present.

The court went on to hold that even if the credit union had a valid right of set off, freezing the account would violate the automatic stay. The court viewed the unilateral, extra-judicial determination by the creditor that a set off right is valid as an act exercising control over property of the estate, in violation of Section 362(a)(3). When it denied the Pattersons access to the bank accounts, retained possession of the funds on deposit, and refused to honor checks or disburse funds at the Pattersons' request, the credit union deprived the Pattersons of any control over those funds and invested exclusive control in the credit union, in violation of Section 362(a)(3).

The court recognized the lender's dilemma of "locking the barn door after the horse has been stolen", but suggested that this dilemma is easily solved by filing an ex parte motion seeking to enjoin the debtor from dissipating the funds in the account and depositing the funds into the registry of the Bankruptcy Court. Not surprisingly, other courts have not been as impressed with the practicality or expediency of the ex parte procedure suggested in Patterson and other cases.

> If banks are unable to follow such a procedure (i.e., to impose a freeze), they either must make frantic ex parte applications.:. for relief from the stay or sit by and watch debtor dissipate funds subject to set off rights recognized in § 553. In re Carpenter, 14 B.R. 405, 407 (M.D. Tenn. 1981).

The Supreme Court's impending decision in Strumpf should provide guidance to this befuddled area of the law. Strumpf involved a bank's placing an administrative hold on a debtor's account while seeking relief from the automatic stay to exercise its set off right. The debtor owed the bank $5,068.75 on an unsecured loan as of the Chapter 13 filing date. The note was in default and the debtor had $11,279.86 in a checking account with the bank. The account was not frozen by the bank at the time of the Chapter 13 filing. After the Chapter 13 filing, pursuant to a confirmed Chapter 13 Plan, the debtor made regular plan payments and reduced the balance to $3,250.48. Nine months after the filing of the Chapter 13, the bank filed a motion for relief from the automatic stay and for set off and placed an administrative hold on debtor's checking account. The debtor immediately filed a motion to hold the bank in contempt for violating the automatic stay.

The bankruptcy judge initially granted the debtor's contempt motion, but reserved ruling on the bank's motion. In response to the court's finding of contempt, the bank removed the freeze on the account. One month later, the bankruptcy court granted the bank's motion for relief from stay and authorized it to exercise its right of set off. During that month, however, the debtor had wisely withdrawn all of its funds from the account, thereby effectively denying the bank its ability to exercise its set off rights (a classic example of the downside of the banker's dilemma).

The appellate court, while clearly recognizing and defining the "banker's dilemma", concluded that it cannot overlook the fact that the Bankruptcy Code does not authorize placing an administrative hold on a debtor's account.

> We are of the opinion that an administrative hold is tantamount to the exercise of a right of set off and thus violates the automatic stay of § 362(a)(7). [In re Strumpf, supra at 158.]

The court based its ruling in part on United States v. Reynolds, 764 F.2d 1004 (4th Cir. 1985), where that court held that a freeze by the Internal Revenue Service on a debtor's tax refund was a "set off subject to the automatic stay and that the IRS violated the stay in retaining the funds".

The Strumpf court concluded that while the banker's dilemma may allow a debtor to defeat a creditor's right of set off, the clear and unambiguous language of Section 362 produces this result.

CONCLUSION

While any ruling from the Supreme Court in Strumpf will be better than the current state of uncertainty in the law, the Strumpf decision should be reversed. The appellate court pays inadequate lip service to the effect of its ruling on the lender's statutory set off right. Ultimately, the Supreme Court must determine whether the broad sweeping language of Section 362(a)(3) can "swallow whole many provisions in the Code that protect creditors", including the right of set off. The Supreme Court should strike a balance in favor of creating a mechanism for the preservation and protection of the creditor's set off right. The creditor's right of set off could easily and fairly be preserved by recognizing a lender's right to freeze accounts, while imposing upon the lender an affirmative duty to seek judicial determination of its set off rights within a reasonable period of time.

In the meantime, Michigan practitioners representing lenders can take some comfort in the fact that Michigan bankruptcy courts have been relatively accepting of the administrative freeze. As recently as 1992, a freeze was held not to violate Sections 362(a)(3), (4), (5), (6), or (7), In re Briggs, 143 B.R. 438 (Bankr. E.D. Mich. 1992); In re Lee, 40 B.R. 123 (Bankr. E.D. Mich. 1984).

In the final analysis, until the United States Supreme Court gives specific guidance on this issue, the only alternatives available to banks concerned about the likely loss of set off rights is to seek an ex parte order restraining transfer of funds, or to risk violation of the stay by unilaterally freezing debtor's bank accounts. If a freeze is imposed, the lender is well advised to seek a judicial determination of its rights to either exercise its set off rights, or to continue holding the funds, at the earliest possible time.

RECENT BANKRUPTCY COURT DECISIONS

Western District cases by Vicki Young and Eastern District by Jaye Bergamini. There were no Sixth Circuit and Supreme Court decisions this month.

In Re: Gammo, Inc. dba Redford Mart Case No. 94-51725 (Bankr. ED Mich) 4/28/95. The debtor sought sanctions against the Michigan Bureau of State Lottery for violation of the automatic stay, based upon the Bureau's post-filing revocation of the debtor's license to operate a lottery machine on it's premises. Judge Rhodes denied the motion and held that the Bureau did not violate the automatic stay.

The debtor was granted a license in 1987. Payments to the Bureau were to be remitted monthly. The debtor defaulted on the monthly remittance 5 times in one year. It was placed on probation, and told that one more delinquency would result in immediate suspension of it's license. The debtor filed for chapter 11 protection and it's bank account was frozen without it's knowledge. The automatic remittance scheduled to go to the Bureau was not paid and the license was suspended.

Debtor argued that the suspension violated §362(a)(1), which stays commencement or continuation of an action or proceeding which could have been commenced prior to filing. The Court found that the suspension was triggered by post-petition events, and therefore could not have been commenced prior to filing, under the terms of the debtor's probation.

Debtor also argued that the Bureau violated §362(a)(3), which provides a stay of "any act to obtain possession of property of the estate or of property from the estate or to exercise control over property of the estate." The issue was whether the license was property of the estate.

The Michigan Court of Appeals held that the lottery license creates only an agency relationship, revokable at the will of either party. Bukhtia v Bureau of State Lottery 190 Mich App 323, 329 (1991).

Judge Rhodes concluded that the debtor had no enforceable property interest in the lottery license, and therefore §362(a)(3) did not apply.

* * *

In Re: Robert Stewart Alderton, Case No. 93-50194-R (Bankr. ED Mich) 3/8/95. In a very interesting and timely case, Judge Rhodes reviewed the status of the debtors interest in property held by entireties, where the debtors spouse dies during the pendency of the case.

Debtor filed a petition under chapter 7 on 9/21/93. He declared his personal residence exempt because it was held in tenancy by the entireties. His wife died 12/7/93. The estate was closed 1/27/94.

Creditor Four Seasons was initially omitted from the creditors matrix and was not aware of the filing. The debtor filed a petition to reopen in order to add Four Seasons. The petition was granted. The debtor amended his schedules on 9/23/94. Four Seasons was given 60 days to file a complaint objecting to discharge (note: should probably read "dischargeability"). On 11/21/94, Four Seasons filed an objection to the debtor's claim of exemption in the residence and asked the trustee to administer it as estate property.

The Court addressed the following issues:

1. Under FRBP 4003(b) the objection to the exemption was not timely. The creditor claimed that the 60 days to object to discharge also governed objections to exemptions, which is erroneous. Objections to discharge are governed by FRBP 4004(a).

2. §541(a)(5)(A), which includes in property of the estate, interests acquired by

the debtor as a result of bequest, devise or inheritance, does not apply. Under Michigan law, estates by the entirety are based on the theory that upon the death of one of the tenants, the joint property becomes the property of the survivor, not by descent, distribution or transfer, but by right of survivorship.

The motion of the creditor, to administer the property as property of the estate, was denied.

Query: what would the result have been, if the creditor had claimed that the debtor had not exempt his right of survivorship, which was inchoate at the time of filing, but subject to levy under the doctrine most recently affirmed in Craft v United States (WD MI) 1:93-CV-306 (issued 9/12/94).

* * *

In Re: Aguirre, Case No. 174 BR 233 (Bankr. ED Mich). Judge Spector denied confirmation of a chapter 13, which followed a chapter 7. The debtors owned a truck and a van, financed by the same credit union. In the chapter 7, they sought to reaffirm the truck but surrender the van. The credit union declined the reaffirmation and, faced with the repossession of both vehicles, the debtors filed a chapter 13.

Their proposed plan provided for payment for the van. (The truck was repossessed.) Since they had just filed a chapter 7, there were no other debts to be administered.

The credit union objected to confirmation, claiming a lack of good faith. The court found that there had been no change of circumstances between the filing of the 7 and the 13. The court further observed that the proposed plan was to last only 19 months, (sufficient to pay off the van), and the debtors had the ability at the time they filed their chapter 7, to make some meaningful repayment to their (then) unsecured creditors.

The court denied confirmation and dismissed the chapter 13 case. (The court makes no mention in it's opinion, of whether it would, on it's own motion, act on it's observations concerning the debtor's ability to make payment at the time the chapter 7 was filed, pursuant to §707(b).)

* * *

In Re: Newberry Square, Inc., Case No. 175 BR 910 (Bankr. ED Mich). Debtor was the owner of a shopping center with retail and service tenants. It's mortgage contained an assignment of rents as part of the collateral.

Prior to the debtor's filing of chapter 11, the mortgagee RTC gave notice to the debtor's tenants that it was exercising it's security interest in the rents and so demanded that the tenants pay the rent directly to RTC.

The debtor filed an emergency motion for use of cash collateral. RTC argued that, in keeping with In Re: Mount Pleasant Ltd. Partnership 144 BR 727 (Bcy WD MI 1992), since it had given notice of default in advance of the filing, the rents were no longer property of the estate.

Judge Shapero concluded that the result of *Mount Pleasant* was incorrect. Reviewing cases from Missouri, Indiana, Maryland and Virginia, the Court held that the debtors interest in the rents constituted cash collateral of the estate, which could only be extinguished by foreclosure of the property according to state law.

The Court also relied on language from In Re: Whiting Pools 462 US 198 wherein the Supreme Court stated that if the tax levy or seizure transferred "ownership" of the seized property, then §542 involving turnover of property of the estate may not apply. However, since the levy in *Whiting Pools* only gave the creditor custody and control of the property, and the creditor was always obligated to return any surplus in value of the collateral to the debtor, the property seized remained property of the estate subject to turnover.

Accordingly, the rents remained property of the estate, subject to the restrictions of a cash collateral order. The rents were to be applied first to operating expenses to protect the property, and then any surplus was subject to the security interest of RTC.

* * *

In Re: Kozadinos, Case No. 94-CV-71201-DT (Bankr. ED Mich). 3/8/95. First of America ("Bank") foreclosed the mortgage on the debtor's residence 3/26/93. The redemption period expired 9/26/93. On 10/4/93 the Bank filed a district court action to terminate the debtor's tenancy. A consent judgment for possession was entered 11/4/93. On 1/28/94 the debtor filed chapter 11, one day before the writ of restitution was to be executed. The Bank filed a motion to determine that the property was not property of the estate, and not subject to the automatic stay. The debtor objected and the bankruptcy court set a hearing for 3/17/94.

On 3/16/94, the debtor filed an ex parte motion to adjourn, claiming that he was ill. Debtor did not appear on 3/17, but his counsel did, and the court denied the request for the adjournment. The hearing was held.

The debtor objected to the foreclosure sale, saying that the sale constituted a fraudulent conveyance because the home was worth $385,000 and the bank bought the house for $97,578.94. (The debtor had raised no objection to the foreclosure sale during the eviction proceedings in state court.) The bankruptcy court found that the debtor had purchased the house for $88,000 in 1988, and had stated it's value to be $112,568 on the mortgage application dated 4/23/90. Further, the house was appraised in April 1994 at $96,000. The bankruptcy court concluded that the bank had given reasonably equivalent value and no fraudulent conveyance had occurred.

The debtor appealed. The district court held that the standard of review for findings of fact was "clear error." Applying that standard, the district court affirmed the finding of the bankruptcy court and dismissed the appeal.

The debtor also claimed that the bankruptcy court's failure to adjourn the hearing was a denial of due process. Since the district court found that the sale was valid and therefore the property was not part of the estate, the debtor's presence at the hearing was a moot point.

* * *

In Re: Northern Penn Transfers, Inc. vs Cadillac Plastics & Chemical Co., Case No. 94-CV-73450-DT (Bankr. ED Mich) 2/28/95. The Plaintiff, a bankrupt common carrier company, sued the Defendant shipper for $7,000 of undercharges of freight fees between 1989 and 1992. The Defendant sought a stay of action and asked the court to refer the matter to the Interstate Commerce Commission.

The Defendant claimed that the attempt to collect underpaid fees following an audit of the shipping invoices for the period in question was an unreasonable practice subject to scrutiny by the ICC. The Plaintiff resisted the referral, claiming that bankrupt carriers were not subject to the ICC review process.

The court found that the ICC was the proper forum for review of the audit, and referred the matter as the Defendant had requested.

* * *

In Re: Grand Slam USA, Inc., Case No. 94-CV-74016-DT (Bankr. ED Mich). The debtor filed chapter 11, with assets encumbered by personal property tax liens in the amount of $7,115.30. 11 months later, the case was converted to chapter 7. The chapter 11 case had outstanding administrative expenses for the US Trustee ($1,000) and the State of Michigan ($14,243).

On conversion, Oakland County filed for lift of stay to liquidate the assets and pay the taxes. The State of Michigan objected. The chapter 7 trustee filed a motion to allow sale free and clear, with liens to transfer to the proceeds. Bankruptcy Judge Shapero denied both motions. The trustee and the State of Michigan appealed.

The appeal was framed as concerning the relationship between §363(f)(5), which allows the trustee to sell property free and clear of the lien of an entity, if "such entity could be compelled, in a legal or equitable proceeding, to accept a money satisfaction of such interest", and §724(b), which allows the subordination of unavoidable tax liens to claims under §507(a)(1)-(7), and for payment of certain junior liens, from property which secures the unavoidable lien.

The trustee and State claim that §724 has the effect of extinguishing Oakland County's lien, and authorizes the trustee to sell free and clear of lien, with the lien to follow the proceeds. Oakland County claims that §724 merely establishes the priority order of payment, without extinguishing the lien.

The court found that the language of §363(f)(5) which speaks of compelling a lien holder to accept a money satisfaction does not require a satisfaction in full. Thus, lien holders can be compelled to accept less than full satisfaction, if a "legal or equitable proceeding" exists which would force the lien holder to accept less that payment in full.

The court then analyzed the distribution priority of Oakland County under §724. First to be paid from the property securing the lien, in the estate in question, were the administrative expenses of the trustee and the State of Michigan. Thus, to the extent the property is worth less than the sum of the administrative expenses and the lien of Oakland County, Oakland County would receive less than the face value of it's lien on sale of the property. But is the order of priority established under §724 a "legal proceeding" within the meaning of §363?

The bankruptcy court held that the subordination order of §724 was not a legal proceeding within the meaning of §363. The district found the bankruptcy court's position to be too rigid; it would take the teeth out of the intent of Congress, expressed in §724, that the administrative expenses of the estate be paid from otherwise encumbered property. §724 was held to be analogous to the cram down provisions of §1129.

The district court vacated the judgment of the bankruptcy court and remanded for proceedings consistent with the ruling.

* * *

In Re: Whitfield v Ford Motor Company, Case No. 94-CV-70563-DT (Bankr. ED Mich). Plaintiff was general manager of a Ford dealership in Wisconsin, with certain options to purchase. In 1992 he was terminated as general manager and the dealership was also terminated. Plaintiff filed bankruptcy in March 1993. His statements of affair did not list any chose in action against Ford, as a asset. He received his discharge, and the case was closed.

The Plaintiff filed suit against Ford claiming breach of contract. Ford brought a motion for summary disposition alleging that the Plaintiff lacked standing to sue. It claimed that the right of action belonged to the former bankruptcy trustee. The trustee, upon hearing of the suit, reopened the estate to administer the property, and moved to intervene. The Defendants responded to the motion for intervention by stating that since the Plaintiff had no original standing, there was no proper suit in which the trustee could intervene. However, the Defendant does acknowledge that the trustee could bring an independent action.

Ford also claimed that the Plaintiff was judicially estopped from prosecuting his suit, because he did not schedule the claim.

The court held that the Plaintiff lacked standing, and therefore there was no case in which the trustee could intervene. The standing question resolved, the court did not address the matter of judicial estoppel.

* * *

In Re: Mannor, Case No. 175 BR 639 (Bankr. ED Mich). Debtor filed a chapter 13 4/20/94. Eight days before he filed, a judgment for $41,383 was entered against him in favor of Great Lakes Exterior, by the Oakland County Circuit Court. On his schedule F, the debtor declared Great Lakes to be a creditor, without admitting to any liability.

Great Lakes objected to confirmation of the 13, claiming that the debtor was over the (then) $100,000 unsecured debt limit of §109(e).

The debtor disputed the liability to Great Lakes, claiming that the money was really owed by his corporation. He further alleged that at the time he filed, he was unaware of the judgment and he personally believed that he owed nothing to the creditor. Relying on *In re: Pearson 773 F2d. 751 (6th Cir.)* the debtor argued that the bankruptcy court was required to accept the debtors schedules as filed, as long as the schedules were filed in good faith.

Judge Spector held that the Oakland County Circuit Court judgment was res judicata on the issue of liability. He then examined the standard set by *Pearson*. *Pearson* involved an unliquidated claim, which at it's highest estimated amount would have rendered the debtors ineligible for chapter 13. The 6th Circuit held that the amount claimed in good faith by the debtor controls unless it appears to a legal certainty that the amount is incorrect.

Judge Spector opined that *Pearson* is frequently misinterpreted as requiring that the court not engage in an inquiry as to whether the unsecured debts exceed the limit, but rather inquire as to the debtors good faith belief in the amount stated. Instead, where there is uncontroverted evidence of the liquidated balance due, as in this case of res judicata, the good faith belief of the debtor is of no consequence. Since the amount is not subject to challenge, the debtor was clearly ineligible for chapter 13 relief, and the case was dismissed.

* * *

In Re: McClarty v Gunenau, et al, Case No. 176 BR 788 (Bankr. ED Mich). Trustee McClarty sued Defendant attorneys for malpractice. The attorneys had represented the chapter 7 debtor Fortney in a pre-petition automobile tort case, and a judgment in excess of policy limits had been entered. The trustee sought to recover damages equal to the excess. The Defendants moved to preclude the trustee from recovering excess damages, on the theory that the trustee stood in the shoes of the debtor, and she, having been discharged from the excess amount as debt, had not suffered the damages claimed, even though her estate was liable.

The Court granted the motion and precluded the trustee from seeking any damages for the excess judgment. It reasoned that one of the elements of the tort of malpractice was proof of actual damages sustained, and since the debtor had been discharged, she was not damaged by the excess judgment.

It was acknowledged that the debtor's estate still had liability. But the court noted that another element of malpractice was an attorney/client relationship and the duty that relationship engenders. The attorney Defendants had no relationship, and therefore no duty to the estate, which did not inherit the debtors relationship. Therefore, the estate could not prove a critical element of the malpractice claim.

The court acknowledged that the only remedy would be to dismiss the bankruptcy and to have the debtor proceed against the attorneys without the protection of the bankruptcy court, in order to resolve the issues. It saw no other solution to the problem.

* * *

In Re: Helmick vs Smith, Case No. 1:95-CV-11 (Bankr. WD Mich) 4/26/95. Judge Gibson affirmed the Bankruptcy Court's determination that certain debts which the Debtors owed to the Appeallants, James and Florence Helmick, are dischargeable pursuant to 11 U.S.C. §727.

The Court noted the discharge is to be liberally granted, and therefore, a discharge should not be denied to a Debtor unless the creditor establishes by a preponderance of the evidence the facts relating to the claim of non-dischargeability. Further, once the Bankruptcy Court has an opportunity to make a factual determination, such determination should not be set aside unless it is clearly erroneous in light of the Bankruptcy Court's unique opportunity to judge the credibility of witnesses in reaching its decision.

In this case, the Bankruptcy Court, after hearing testimony, held that the creditors had not established by a preponderance of the evidence that certain financial statements made by the Debtors were made with intent to deceive their creditors. Furthermore, the Bankruptcy Court held that the creditors failed to prove that certain damage done to a truck which was loaned to the Debtors was due to wilful and malicious conduct as opposed to normal use. For these reasons, the Bankruptcy Court held that the obligations the Debtors owed to the Helmicks were dischargeable. The District Court affirmed the Bankruptcy Court's decision.

* * *

In Re: Gantos, Inc., Case No. SG 93-85478 (Bankr. WD Mich) 5/11/95. In this case, Judge Stevenson ruled on the Debtor's objections to two of its former landlords' claims for lease rejection damages pursuant to 11 U.S.C. §502(b)(2).

The Debtor objected to Northwest Associates' claim for the return of a construction allowance in the amount of $232,534.25 which it claimed in addition to its claim for damages relating to the lease rejection. The lease between the Debtor and Northwest provided that if the Debtor terminated the lease prior to the expiration of the sixth lease year, Northwest would be entitled to collect the unamortized portion of the construction allowance from the Debtor, in addition to all of its other rights and remedies. The Debtor argued that because the lease was rejected prior to the expiration of the sixth lease year, the construction allowance damages arose out of the termination of the lease and are therefore subject to 11 U.S.C. §502(b)(6). The Court agreed with the Debtor, holding that the amount recoverable by Northwest was governed by 11 U.S.C. §502(b)(6), and because the construction allowance did not constitute "rent reserved", it is not recoverable.

The Debtor also objected to Equitable Life Assurance Society of United States' claim for a portion of its rental payments which, by agreement with the Debtor, it deferred for payment until the year 2000. In addition, the Debtor objected to Equitable's administrative claim for post-petition, pre-rejection attorneys fees under 11 U.S.C. §365(d)(3). With respect to the deferred rent claim, the Court held that Equitable was entitled to recover its claim under 11 U.S.C. §502(b)(6). Citing In Re: Vause, 886 F.2d 794 (6th Cir. 1989), the Court noted that rent which had accrued and was "owing" although not payable, is rent "due" under §502(b)(6). Because the deferred rent was "owing" at the time of the Bankruptcy filing, although deferred, such rent was "due" under 11 U.S.C. §502(b)(6)(A). With respect to the claim for attorneys fees, the Court held that although such fees were a component of Equitable's total rejection claim, the fees were not "rent reserved" under §502(b)(6)(A). Furthermore, the Court held that Equitable did not meet its burden of proof with respect to its claim of administrative priority under §365(d)(3) because it failed to raise allegations that the Debtor had not fully performed under the lease during the post-petition period and it failed to specify what post-petition, pre-rejection services were provided.

* * *

In Re: Williams, Case No. GG 95-80794 (Bankr. WD Mich) 5/5/95. Judge Gregg partially sustained Trustee James Horner's objection to certain exemptions claimed by the Debtors in their Chapter 7 case.

The Trustee objected to Debtor James William's claimed exemption of $17,963.64 in cash which he received as a worker's compensation award, as well as certain personal property which he had purchased with the same. The Trustee argued that although worker's compensation benefits are exempt under §522(d)(10)(C), only the "right to receive" worker's compensation benefits may be exempt, and not the property that is traceable to those benefits. The Debtor argued that because the compensation was awarded "on account of personal bodily injury", the assets were exempt under 11 U.S.C. §522(d)(11)(D). The Court, after considering the legislative history comparing 11 U.S.C. §522(d)(10)(C) and 11 U.S.C. §522(d)(11)(D) and (E), sustained the Trustee's objection. The Court noted that both legislative history and case law clearly indicate that the exemption under 11 U.S.C. §522(d)(11) only applies to compensation received in the nature of tort liability, whereas worker's compensation benefits are treated under 11 U.S.C. §522(d)(10)(C) as payment in lieu of future earnings. The Court held that the Bankruptcy Code does not provide an exemption for assets traceable to the worker's compensation awards and, therefore, the Debtors' assets could not be exempt.

The Trustee also objected to the claimed exception of $10,000.00 owed to Debtor Renee Williams for "alimony and support". The Trustee argued that 11 U.S.C. §522(d)(10)(D) requires a showing that such exemption is "reasonablely necessary for the support of the Debtor and any dependent of the Debtor...". Noting that the Uniform Exemptions Act defines "reasonably and necessary", as requiring the Court to "direct its attention to the individual's needs and responsibilities", the Court detailed ten factors which it must consider in making this determination. However, the Court held that an evidentiary hearing would be necessary before a ruling would be issued with respect to the Trustee's objection.

Finally, the Trustee objected to the Debtors' claimed exemption of $8,230.00 in household furnishings and $3,000.00 in computer equipment under 11 U.S.C. §522(d)(3). The Trustee, noting that the household goods exemptions under 11 U.S.C. §522(d)(3) is limited to a total of $8,000.00, argued that the Debtors could not claim the excess $230.00 as exempt. Further, the Trustee noted that the household goods exemption is limited to items worth less than $400.00, and therefore, argued that the Debtors could not exempt the computer equipment, valued at $3,000.00. The Court held that 11 U.S.C. §522(d)(3) clearly provides that the Debtors may not exempt an interest in household furnishings that exceed $400.00 in value in any particular item, and therefore, the Debtors' exemption of the computer could not be fully allowed. However, the Court also held that each Debtor was entitled to a separate exemption in a joint bankruptcy case, and therefore, each Debtor could exempt up to $8,000.00 in household furnishings under 11 U.S.C. §522(d)(3).

The Court granted the Debtors to leave to amend their exemptions based upon the Court's ruling.

STEERING COMMITTEE MINUTES

The May Steering Committee meeting was held at the Peninsular Club in Grand Rapids. Peter Teholiz, Steve Rayman, Mary Hamlin, Tom Sarb, Dean Rietberg on behalf of Dan Casamatta, Robert Wright and as a guest Michael Maggio were present. Steve Rayman provided a brief update on the 1995 Bankruptcy Seminar. Bob Wright provided an update on the 1996 Bankruptcy Seminar with respect to reserving the Grand Traverse Resort as the site. In the event the Resort was not available alternative locations were discussed. Bob Wright also presented a resolution prepared by Bob Sawdey regarding the Committee's support for the Bankruptcy Appellant Panel. The resolution was approved and Bob Sawdey will present this to the Judges at the annual Judges Conference. The next Steering Committee meeting will be June 16, 1995, at noon, at the Peninsular Club in Grand Rapids.

LOCAL BANKRUPTCY NOTICE

Enclosed from Judge Gregg is a post-petition Judgment interest rate chart.

Enclosed from Mark Van Allsburg is an item concerning Local Court Rules. Please note that any suggestions should be sent to: Mark Van Allsburg, Local Rules Committee, Bankruptcy Court, P.O. Box 3310, Grand Rapids, Michigan 49501 by July 31, 1995.

Enclosed from Mark Van Allsburg is a Judicial Caseload Profile.

EDITOR'S NOTEBOOK

In the *Notice from Federal Bar Association* in the April edition of the Newsletter, it stated that Chief Judge Gibson was retiring. This was an error. Judge Gibson handed over Chief Judgeship to Judge Enslen but he is still presiding as a U.S. District Judge.

As the April Newsletter was printed the curriculum vitae of the author of the lead article, Samuel R. Maizel, was omitted. Samuel R. Maizel's article was entitled *Status and Rights of the Parties to the Post-Petition, Pre-Rejection/Assumption Executory Contract.*

Samuel R. Maizel is a trial attorney with the Commercial Litigation Branch of the U.S. Department of Justice in Washington, D.C., where he concentrates on Bankruptcy and Government Contract Law. He is a graduate of the United States Military Academy at West Point and the George Washington University Law School. The views expressed in this article are entirely the views of the author and do not represent any official policy of the U.S. Department of Justice.

We would like to thank Mr. Maizel for his article which I am sure the readers found very informative..

I wish to thank all of those individuals who have written articles or have agreed to write articles. It is not always an easy task. I am always looking for articles and anyone interested in submitting an article is encouraged to contact me.

1995 BANKRUPTCY SEMINAR

There will be modification in the topic for the panel consisting of Judge Martin, Karen Gross & Dan Casamatta. The topic has been expanded and will know be Ethics & Evidence rather than Ethics in Chapter 11. The panel members feel that this will benefit all bankruptcy attorneys and not just those specializing in Chapter 11 issues.

LOCAL BANKRUPTCY STATICS

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 months of May of 1995. These figures are compared to those made during the same period one year ago and two years ago.

Bankruptcy Chapter	May of 1995	May of 1994	May of 1993
Chapter 7	481	334	329
Chapter 11	10	10	9
Chapter 12	0	5	5
Chapter 13	150	135	119
Totals	641	484	462

Bankruptcy Chapter	January - May of 1995	January - May of 1994	January - May of 1993
Chapter 7	1614	1418	1532
Chapter 11	29	32	41
Chapter 12	6	7	13
Chapter 13	547	525	485
§304	1	0	0
Totals	2197	1982	2071

STEERING COMMITTEE MEMBERS

Dan Casamatta (1996)	(616) 456-2002
John Grant (1997)	(616) 774-0641
Tim Hillegonds (1995)	(616) 459-6121
Jeff Hughes (1996)	(616) 336-6000
Pat Mears (1995)	(616) 776-7550
Hal Nelson (1997)	(616) 459-9487
Steven Rayman, Chair-elect (1995)	(616) 345-5156
Brett Rodgers (1997)	(616) 732-9000
Tom Sarb (1995)	(616) 732-9000
Bob Sawdey (1996)	(616) 459-8311
Tom Schouten (1997)	(616) 774-8121
Peter Teholiz (1995)	(517) 886-7176
Janet Thomas (1996)	(616) 726-4823
Rob Wardrop (1997)	(616) 459-1225
Bob Wright, Chair (1995)	(616) 454-8656
Mary Hamlin, Editor (1996)	(616) 345-5156

52-WEEK T-BILL RATE TABLE OF CHANGES

DATE OF AUCTION	EQUIVALENT COUPON ISSUE YIELD	DATE OF AUCTION	EQUIVALENT COUPON ISSUE YIELD	DATE OF AUCTION	EQUIVALENT COUPON ISSUE YIELD	DATE OF AUCTION	EQUIVALENT COUPON ISSUE YIELD	DATE OF AUCTION	EQUIVALENT COUPON ISSUE YIELD	DATE OF AUCTION	EQUIVALENT COUPON ISSUE YIELD
12/11/74	7.07%	08/16/78	8.50%	04/15/82	14.30%	12/19/85	7.57%	08/24/89	8.27%	04/30/93	3.25%
01/08/75	6.80%	09/13/78	8.59%	05/13/82	13.64%	01/16/86	7.85%	09/21/89	8.19%	05/27/93	3.54%
02/05/75	5.61%	10/12/78	8.95%	06/10/82	13.61%	02/13/86	7.71%	10/19/89	7.90%	06/24/93	3.54%
03/05/75	5.99%	11/08/78	10.17%	07/08/82	13.79%	03/13/86	7.06%	11/16/89	7.69%	07/22/93	3.58%
04/02/75	6.92%	12/06/78	10.17%	08/05/82	12.41%	04/10/86	6.31%	12/14/89	7.66%	08/19/93	3.43%
04/30/75	6.84%	01/03/79	10.51%	09/02/82	11.32%	05/13/86	6.56%	01/11/90	7.74%	09/16/93	3.40%
05/28/75	6.17%	01/31/79	10.21%	09/30/82	10.41%	06/05/86	7.03%	02/13/90	7.97%	10/14/93	3.38%
06/24/75	6.72%	02/28/79	10.40%	10/28/82	9.29%	07/08/86	6.35%	03/08/90	8.36%	11/16/93	3.57%
07/24/75	7.27%	04/04/79	10.09%	11/24/82	9.07%	07/31/86	6.18%	04/05/90	8.32%	12/09/93	3.61%
08/20/75	7.89%	04/25/79	10.10%	12/23/82	8.75%	08/28/86	5.63%	05/03/90	8.70%	01/06/94	3.67%
09/17/75	7.90%	05/23/79	10.01%	01/20/83	8.65%	09/25/86	5.79%	05/31/90	8.24%	02/03/94	3.74%
10/15/75	7.07%	06/20/79	9.63%	02/17/83	8.99%	10/23/86	5.75%	06/28/90	8.09%	03/03/94	4.22%
11/13/75	6.40%	07/18/79	9.70%	03/17/83	9.16%	11/20/86	5.77%	07/26/90	7.88%	03/31/94	4.51%
12/10/75	6.88%	08/15/79	10.05%	04/14/83	8.98%	12/23/86	5.93%	08/23/90	7.95%	04/28/94	5.02%
01/07/76	5.92%	09/12/79	10.88%	05/12/83	8.72%	01/15/87	5.75%	09/20/90	7.78%	05/26/94	5.28%
02/04/76	5.92%	10/10/79	12.83%	06/09/83	9.59%	02/12/87	6.09%	10/26/90	7.51%	06/23/94	5.31%
03/03/76	6.39%	11/07/79	13.18%	07/07/83	10.25%	03/12/87	6.04%	11/15/90	7.28%	07/21/94	5.49%
03/31/76	6.13%	12/05/79	11.98%	08/09/83	10.74%	04/09/87	6.30%	12/13/90	7.02%	08/18/94	5.67%
04/29/76	5.98%	01/02/80	12.25%	09/01/83	10.58%	05/12/87	7.02%	01/10/91	6.62%	09/15/94	5.69%
05/26/76	6.72%	01/30/80	12.45%	09/29/83	9.98%	06/04/87	7.00%	02/12/91	6.21%	10/13/94	6.06%
06/23/76	6.47%	02/27/80	15.28%	11/01/83	9.86%	07/02/87	6.64%	03/07/91	6.46%	11/10/94	6.48%
07/21/76	6.25%	03/26/80	16.46%	11/23/83	9.93%	08/04/87	6.98%	04/04/91	6.26%	12/08/94	7.22%
08/18/76	5.97%	04/23/80	11.49%	12/22/83	10.10%	09/01/87	7.22%	05/02/91	6.07%	01/05/95	7.34%
09/15/76	5.89%	05/21/80	9.02%	01/19/84	9.87%	09/30/87	7.88%	05/30/91	6.09%	02/02/95	7.03%
10/13/76	5.41%	06/18/80	8.05%	02/16/84	10.11%	10/22/87	6.90%	06/27/91	6.39%	03/02/95	6.57%
11/09/76	5.49%	07/16/80	8.25%	03/15/84	10.60%	11/19/87	6.93%	07/25/91	6.26%	03/30/95	6.41%
12/08/76	4.95%	08/13/80	9.75%	04/12/84	10.81%	12/17/87	7.22%	08/22/91	5.68%	04/27/95	6.28%
01/05/77	4.97%	09/10/80	10.93%	05/15/84	11.74%	01/14/88	7.14%	09/19/91	5.57%		
02/02/77	5.65%	10/08/80	12.33%	06/07/84	12.08%	02/11/88	6.59%	10/17/91	5.42%		
03/02/77	5.52%	10/30/80	13.67%	07/10/84	12.17%	03/10/88	6.71%	11/14/91	4.98%		
03/30/77	5.44%	11/26/80	14.97%	08/02/84	11.93%	04/07/88	7.01%	12/12/91	4.41%		
04/27/77	5.45%	12/23/80	13.49%	08/30/84	11.98%	05/05/88	7.20%	01/09/92	4.02%		
05/25/77	5.71%	01/22/81	14.68%	09/27/84	11.36%	06/02/88	7.59%	02/06/92	4.21%		
06/22/77	5.72%	02/19/81	14.39%	10/25/84	10.33%	06/30/88	7.54%	03/05/92	4.58%		
07/20/77	5.98%	03/19/81	12.76%	11/27/84	9.50%	07/28/88	7.95%	04/02/92	4.55%		
08/17/77	6.49%	04/16/81	14.63%	12/20/84	9.08%	08/25/88	8.32%	04/30/92	4.40%		
09/14/77	6.55%	05/14/81	16.70%	01/17/85	9.09%	09/22/88	8.04%	05/28/92	4.26%		
10/12/77	7.07%	06/11/81	14.82%	02/14/85	9.17%	10/20/88	8.15%	06/25/92	4.11%		
11/09/77	6.98%	07/09/81	15.57%	03/14/85	10.08%	11/17/88	8.55%	07/23/92	3.51%		
12/07/77	6.98%	08/07/81	16.60%	04/11/85	9.15%	12/15/88	9.20%	08/20/92	3.41%		
01/04/78	6.99%	09/03/81	17.26%	05/14/85	8.57%	01/12/89	9.16%	09/17/92	3.13%		
02/01/78	7.29%	10/01/81	16.65%	06/06/85	7.70%	02/15/89	9.32%	10/15/92	3.24%		
03/01/78	7.34%	10/29/81	14.84%	07/09/85	7.60%	03/09/89	9.43%	11/17/92	3.76%		
03/29/78	7.36%	11/25/81	11.58%	08/01/85	8.18%	04/06/89	9.51%	12/10/92	3.72%		
04/26/78	7.58%	12/23/81	14.02%	08/29/85	7.91%	05/04/89	9.15%	01/07/93	3.67%		
05/24/78	7.97%	01/21/82	14.82%	09/26/85	7.87%	06/01/89	8.85%	02/04/93	3.45%		
06/21/78	8.27%	02/18/82	14.87%	10/24/85	8.08%	06/29/89	8.16%	03/04/93	3.21%		
07/19/78	8.43%	03/18/82	14.03%	11/26/85	7.87%	07/27/89	7.75%	04/06/93	3.37%		

United States Bankruptcy Court
WESTERN DISTRICT OF MICHIGAN
OFFICE OF THE CLERK
GERALD R. FORD FEDERAL BUILDING
P.O. BOX 3310
GRAND RAPIDS, MICHIGAN 49501

MARK VAN ALLSBURG
CLERK
(616) 456-2693
(FTS) 372-2693

MARQUETTE OFFICE
(906) 226-2117

FROM THE COURT

The Bankruptcy Court has begun the process of amending the local bankruptcy rules which were issued on March 1, 1993. The primary impetus for the current revision is the change to Bankruptcy Rule 9026 which will become effective on December 1, 1995. This rule will require all local bankruptcy rules to be numbered using a uniform numbering system prescribed by the Judicial Conference. The Judicial Conference is expected to issue such a numbering system in the near future. In addition, this court has issued 10 general orders, some of which will now be incorporated into the local rules.

As part of this process, the court is soliciting comments from the bankruptcy bar and from other interested parties on further amendments, changes or additions to the local rules. We would welcome and will consider any comments and suggestions which might improve bankruptcy practice before this court. Such suggestions should be sent to: Mark Van Allsburg, Local Rules Committee, Bankruptcy Court, PO Box 3310, Grand Rapids, MI 49501 by July 31.

UNITED STATES BANKRUPTCY COURTS – JUDICIAL CASELOAD PROFILE

MICHIGAN WESTERN.....			TWELVE MONTH PERIOD ENDED DECEMBER 31						NUMERICAL STANDING WITHIN	
			1994	1993	1992	1991	1990	1989	CIRCUIT	NATIO
OVERALL CASELOAD STATISTICS	Filings	Total	6,347	6,683	7,518	7,382	6,252	5,195	8	51
		Business	475	572	665	627	803	833		
		Non-Business	5,872	6,111	6,853	6,755	5,449	4,362		
	Terminations		6,096	7,093	7,749	7,125	5,619	3,955		
	Pending		8,243	8,177	8,592	8,818	8,557	7,987		
	Percent Change In Total Filings -- Current Year		Over Last Year....	-5.0					5	56
			Over Previous Years....		-15.6	-14.0	1.5	22.2	3	36
	Number of Judgeships		3.0	3.0	3.0	3.0	3.0	3.0		
	Vacant Judgeship Months		0.0	0.0	0.0	0.0	0.0	0.0		
ACTIONS PER JUDGESHIP	Filings		2,116	2,228	2,506	2,461	2,084	1,732	8	55
	Terminations		2,032	2,364	2,583	2,375	1,873	1,318		
	Pending cases		2,748	2,726	2,864	2,939	2,852	2,662		
FILINGS PER CHAPTER	Chapter 7	Total	4,586	5,027	5,734	5,468	4,330	3,619	6	43
		Business	247	303	352	319	469	531		
		Non-Business	4,339	4,724	5,382	5,149	3,861	3,088		
	Chapter 11	Total	98	134	138	166	163	106	4	36
		Business	96	130	132	161	151	105		
		Non-Business	2	4	6	5	12	1		
	Chapter 12	Total	21	36	26	25	20	15	1	13
	Chapter 13	Total	1,642	1,485	1,620	1,723	1,739	1,455	7	48
		Business	111	102	155	122	163	182		
		Non-Business	1,531	1,383	1,465	1,601	1,576	1,273		
TYPE OF CASE	Voluntary		6,337	6,668	7,513	7,369	6,234	5,181		
	Involuntary		10	15	5	13	18	14		
MEDIAN TIMES (MONTHS)	Chapter 7		4.5	4.8	5.0	5.3	8.1	6.4	3	45
	Chapter 11		58.4	51.3	48.8	89.3	58.2	37.1	9	88
	Chapter 12		39.6	57.3	56.5	44.6	36.4	-	3	16
	Chapter 13		38.6	38.8	37.1	37.3	34.6	38.1	6	67

BUSINESS BANKRUPTCY FILINGS -- CALENDAR YEAR

FORM OF ORGANIZATION	1994	1993	1992	1991	1990	1989
Individual	330	380	471	388	420	476
Corporation, Publicly Held	8	5	3	7	7	13
Partnership	12	13	12	21	29	45
Corporation, Closely Held	124	173	178	193	200	163
Municipality	0	0	0	3	0	0
Other	1	1	1	15	147	136

BUSINESS BANKRUPTCY FILINGS -- CALENDAR YEAR 1994

TYPE OF INDUSTRY	TOTAL	CHAP 7	CHAP 11	CHAP 12	CHAP 13
Farming	38	11	3	21	3
Professional	29	13	4	0	12
Retail/Wholesale	111	54	26	0	31
Transportation	14	9	1	0	4
Manufacturer/Mining	23	12	9	0	2
Construction	50	32	8	0	10
Real Estate	11	4	6	0	1
Railroad	0	0	0	0	0
Stock/Commodity Broker	0	0	0	0	0
Other	199	112	39	0	48

Western Michigan Chapter of the
Federal Bar Association
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