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THE BANKRUPTCY REFORM ACT OF 1994 - THE CONSUMER AMENDMENTS (WITH COMMENTARY)

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On October 22, 1994, President Clinton signed H.R. 5116 [P.L. 103-394], known as the Bankruptcy Reform Act of 1994 (the "Act"). The Act (with a few exceptions per §702 thereof) applies only to cases filed on or after that date. The Act was designed to promote more efficient case administration, address "problematic" court decisions, and to otherwise update the Bankruptcy Code. In this article, we will deal with the amendments which principally affect consumer debtors. The following article will review those amendments affecting commercial or business bankruptcies and making other administrative revisions. These articles are intended to synopsize and highlight the major changes implemented by the Act. Due to time and length constraints, not all changes can be covered and, when in doubt as to a particular change or the effect thereof, you should not consider this article to be a substitute for reading the text of the Amendment itself or otherwise consulting the revised Bankruptcy Code (hereinafter the "Code"; 11 U.S.C. §101 et seq.).

EXEMPTIONS

Arguably, the most important change to the Code from the consumer debtor's standpoint was the doubling of the fixed dollar exemptions available under Bankruptcy Code Section 522(d) as made effective by §522(b)(1). This is the first time the exemptions have been increased

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since the Code was implemented in October 1979. This change was made, your author believes, in order to make up for the ravages of inflation over the last fifteen (15) years. This is supported by the new amendment to Code §104 which states that such exemptions will hereafter be increased every three (3) years (commencing April 1, 1998) to take into account the change in the Consumer Price Index, rounded to the nearest $25. These changes will allow debtors to exempt twice the property they could have exempted previously, should the federal exemptions be chosen, thus making Chapter 7 more attractive than ever before. After the Code was enacted in 1979, we saw a tremendous increase in filings due, to a large degree, to the more liberal exemptions allowed under the Code, as opposed to those found under the Bankruptcy Act. If history is any barometer, we may see the same trend in the late 1990's, once the higher exemption limits become better known.

In light of the increased exemptions, many cases which formerly would have had assets available for creditors will become "no asset" proceedings. Thus, while Chapter 7 trustees will be entitled to greater compensation in asset cases, under §107 of the Act (amending Code §326), such calculations will be made in fewer individual cases. These increased exemptions will also affect the liquidation analysis which must be made under other chapters of the Bankruptcy Code.

Under the new exemptions, the debtors can now exempt the following amounts under §522(d):

(1) $15,000.00 in a residence.
(2) $2,400 in a motor vehicle.
(3) $8,000 in household goods (not to exceed $400 in value for any particular item).
(4) $1,000 in jewelry.
(5) $7,500.00 in any unused amount under (d)(1) together with an $800.00 "wild-card" exemption on any property.
(6) $1,500.00 in implements, professional books, or tools, of the trade of the debtor.
(8) $8,000.00 in any accrued dividend or interest under, or loan value of, any unmatured life insurance contract.
(11)(D) $15,000.00 in property traceable to or payments on account of personal bodily injury, not including actual pain and suffering or compensation for actual pecuniary loss.
The other exemptions provided under §522(d)(7)(9)(10) and (11) remain unchanged. See, Bankruptcy Reform Act, §108; amends Bankruptcy Code §522(d).

CHAPTER 13 DEBT LIMITS

The debt limits for Chapter 13 have been increased to a maximum of less than $250,000 of non-contingent, liquidated, unsecured debts and less than $750,000 of non-contingent, liquidated, secured debts, through an amendment to §109(e) of the Code. These changes will make Chapter 13 more available to regular wage-earners with larger amounts of debt who otherwise would not have qualified for Chapter 13 relief under the previous limits of $100,000 unsecured debt and $350,000 secured debt. Such increased debt limits may also result in the filing of more §707(b) substantial abuse motions for high-income individuals who choose to file for Chapter 7 relief and would now qualify for a Chapter 13, where a substantial distribution to their creditors under a wage-earner plan could be made. While one cannot force an individual into a Chapter 13 proceeding, such alternative may be compelling when faced with case dismissal, especially when such individual is truly in need of relief from creditors. See, Bankruptcy Reform Act, §108; amends Bankruptcy Code §109(e).

In light of the increase in debt

limits, Chapter 13 may now be available for many more consumers as well as small business owners who are operating or doing business under an assumed name. Previously, such individuals would have had to either file a Chapter 11 proceeding or otherwise engage in a straight liquidation. Further, Chapter 13 may now be a viable option for family farmers whose only previous bankruptcy options were to file under Chapter 12 or Chapter 11 of the Code. Given the "super discharge" available to individuals in a Chapter 13 proceeding, including fraud, which is not available under other chapters of the Code, we may see more Chapter 13 filings by farmers when such discharge is needed. Although the debt limits of a Chapter 12 still remain higher (aggregate of $1,500,000 per 11 U.S.C. §101(18)) it will be interesting to see if the Chapter 12 provisions are renewed prior to their October 1, 1998 sunset date, especially since the §109(e) Chapter 13 debt limits (and others) will continue to be adjusted for inflation every three (3) years per Code §104(b)(2).

DEBT REAFFIRMATION

A separate hearing is not mandatory in order to reaffirm a debt when an individual debtor is represented by counsel. Further, reaffirmation agreements must now advise the debtor, in clear and conspicuous language, that reaffirmation is not required, and contain a declaration or affidavit from debtor's counsel that the debtor has been fully advised of the ramifications of reaffirming a debt and any defaults thereunder. Under the pre-discharge practice, the reaffirmation agreement is simply signed by the debtor and his/her attorney, forwarded to the creditor for its approval, and filed with the Bankruptcy Court. No order is entered approving the reaffirmation. Although this does not change the pre-discharge practice in the Western District, it clears up a nationwide split on the issue as to whether pre-discharge hearings are necessary in order to approve such agreements. Where the debtor is not represented by counsel or seeks to reaffirm a debt, post-discharge, the procedure remains the same; i.e., a court hearing become necessary. See, Bankruptcy Reform Act, §103; amends Bankruptcy Code §524(c).

AVOIDANCE OF JUDICIAL LIENS

As before, the fixing of certain liens on the interest of the debtor in property may be avoided by the debtor under §522(f) to the extent that such liens impair an exemption to which the debtor would have been entitled. However, if such lien is a judicial lien which secures a debt for alimony or support, then the same is not avoidable, except to the extent that it may have been assigned to an entity other than a spouse, former spouse, or child of the Debtor. As before, the same sub-section can be utilized to avoid a non-possessory, non-purchase money security interest in household goods or furnishings, implements, tools of the trade, and professionally prescribed health aids to the extent an exemption is impaired. Since the phrase "impairs an exemption" was not defined in the Code, numerous court decisions have come down with results not intended by Congress. The amendment's intent is to provide a mathematical test to determine impairment based upon the case of In re Brantz, 106 B.R. 62 (Bankr. E.D. Pa. 1989) cited with approval by the U.S. Sup. Ct. in Owen v. Owen, 111 S. Ct. 1833 (U.S. Sup. Ct. 1991).

To resolve dramatically opposed opinions, Congress has now defined when a lien shall be considered to impair an

exemption. Thus, if there is no equity in property above a lien which is senior to a judicial lien on a home, for example, then the entire amount of the judicial lien is avoidable. If the judicial lien is only partially secured, the entire lien can be avoided as long as the claim of exemption would otherwise cover the amount of equity over and above prior perfected liens. Finally, by focusing on the amount of the exemption and defining impaired, case law like the Sixth Circuit's decision in In re Dixon, 885 F.2d 327 (6th Cir. 1989), which held Ohio's homestead exemption only applies in execution sale situation (thus eliminating lien avoidance rights), is statutorily overruled. Elimination of a judicial lien on property that cannot be enforced through a judicial sale is now possible, supporting the ruling in In re Henderson, 18 F.3 1305 (5th Cir. 1994). Query, can certain federal tax liens that are judicially imposed against a husband's or wife's interest in entireties property now be avoided if it impairs the debtor's exemption thereon? See, Bankruptcy Reform Act, §303; amends Bankruptcy Code §522(f).

AUTOMATIC STAY

Under the previous Code provisions, if a creditor requested relief from the automatic stay provisions of the Bankruptcy Code (11 U.S.C. §362, et seq.), a preliminary hearing had to be held within thirty (30) days of the filing of the motion and a final hearing had to be commenced within thirty (30) days thereafter. Under the new Code provisions, the final hearing must be concluded within thirty (30) days of the preliminary hearing. If the final hearing is not concluded within such time, the stay will be lifted. These rules will not apply if the parties consent to an extension of the time for the final hearing or the Court finds an extension is required by compelling circumstances. According to legislative history, such a finding must be balanced with the legitimate property rights at issue. See, Bankruptcy Reform Act, §101; amends Bankruptcy Code §362(e).

In addition to the above, Code §362(b)(9) has been added as one of the exceptions to the stay. Under this provision, the automatic stay does not apply as to tax audits, the issuance of a notice of tax deficiency, a demand for tax returns, or the making of an assessment for any tax and issuance of a notice and demand for payment of such assessment. Further, tax liens which would otherwise attach to property of the estate by reason of such assessment will be able to take effect if such tax is a debt of the debtor that will not be discharged and such property is transferred out of the estate to, or otherwise revests in, the debtor. This may cover real estate tax obligations incurred post-petition. See, Bankruptcy Reform Act, §116; amends Bankruptcy Code §362(b)(9).

The automatic stay is further modified in regard to proceedings which only seek to establish paternity or otherwise establish or modify an order for alimony, maintenance, and support. Further, collection of alimony, maintenance, or support from property that is not property of the estate is not precluded. See, Bankruptcy Reform Act, §304; amends Bankruptcy Code §362(b)(2).

341 MEETINGS

At 341 Meetings (First Meetings of Creditors) in Chapter 7 proceedings, the panel trustee is now required to orally examine the debtor to ensure the debtor is aware of:

1. The potential consequences of seeking a discharge in bankruptcy including the effects on credit

history;

2. The debtor's ability to file a bankruptcy petition under a different chapter;

3. The effect of receiving a discharge of debts under title 11; and,

4. The effect of reaffirming a debt, including the debtor's knowledge of the provisions of §524(d).

While these questions may be posed in a somewhat perfunctory fashion by the trustee, debtor's counsel should always inform the debtor of the foregoing before a petition is filed. According to legislative history, the trustee is to explain the reaffirmation process, potential risks of reaffirmation, and that the debtor may choose to voluntarily repay any debt without reaffirming the same per Code §524(f). It is thought that the courts or the trustees may provide written information on these matters at the time of the 341 Meeting and the trustee may then inquire of the debtor to make sure they are aware of such information. It is unclear as to the consequences should a debtor answer "no" or "I don't know" to any of these questions, although the trustee's inquiries are intended to be solely informational and not an interrogation to be used later against the debtor. The information concerning debt reaffirmation is to be provided since, for the most part, reaffirmation hearings, with their commensurate warnings, are a thing of the past. See, Bankruptcy Reform Act, §115; amends Bankruptcy Code §341.

CHAPTER 13 MORTGAGE ARREARAGE INTEREST

Under Rake vs. Wade, 113 S.Ct. 2187 (U.S. S.Ct. 1993), a debtor was liable for interest on his mortgage arrearages that are paid to cure defaults during the course of his Chapter 13 proceeding, even if the mortgage was silent as to the payment of interest thereon. Under the new amendments, a Chapter 13 debtor no longer is required to pay interest on his mortgage arrearages unless he is otherwise required to do so by the mortgage contract or non-bankruptcy law. To the extent that the debtor had disposable income which otherwise would have been utilized to service such interest, the same should now go to unsecured or priority creditors. This amendment only applies to mortgages entered into after the effective date of the act, although it would also apply to mortgages which are refinanced after the effective date. As a result of such amendment, the Rake decision is statutorily reversed. The new amendments apply in Chapters 11, 12, and 13 of the Code. See, Bankruptcy Reform Act, §305; amends Bankruptcy Code §1123(d); §1222(d); §1322(e).

CURING MORTGAGE DEFAULTS ON PRINCIPAL RESIDENCE IN CHAPTER 13

A debtor/home-owner has until the time of the mortgage foreclosure sale to cure any defaults thereunder on his principal residence, through the filing of a chapter 13 proceeding. The debtor must stay current on his present mortgage obligation while paying the existing arrearage through the plan. While this does not change the law in the 6th Circuit, per In re Glenn, 760 F.2d 1428, (6th Cir. 1985), cert. denied, 474 U.S. 849 (1985), it rejects the opinion of the Court in In re Roach, 824 F.2d 1370 (3rd Cir. 1987) which held that a debtor had only until the time of the foreclosure judgment within which to cure any mortgage defaults. If a state provides the debtor more extensive cure rights, the debtor will continue to enjoy the benefit of such rights in

bankruptcy. See, Bankruptcy Reform Act, §301; amends Bankruptcy Code §1322(c).

CHAPTER 11 STRIPDOWN

The ruling of the U.S. Supreme Court in Nobelman vs. American Savings Bank, 113 S.Ct. 2106 (U.S. S.Ct. 1993) in a Chapter 13 setting is extended to cases filed under Chapter 11. In Nobelman, the Supreme Court held that if a debtor owes more on his mortgage than his home is currently worth, he cannot "strip down" the amount of the mortgage to the value of the home under Chapter 13. In order to make an end-run around the Nobelman decision, many home-owners were attempting to strip down the mortgage through a Chapter 11 filing. This is no longer possible. See, Bankruptcy Reform Act, §206; amends Bankruptcy Code §1123(b).

CONVERSION FROM CHAPTER 13 TO 7

In order to resolve a split as to what constitutes property of the estate when a Chapter 13 case converted to Chapter 7, the new amendments indicate that such property will consist of the property which existed at the time the original Chapter 13 petition was filed. Holdings such as Matter of Lybrook, 951 F.2d 136 (7th Cir. 1991) are rejected and the rationale of cases such as In re Bobroff, 766 F.2d 797 (3rd Cir. 1985) is adopted. Thus, if the debtor acquires property during the course of the Chapter 13 proceeding or increases the amount of equity in various assets, such as a residence, through plan payments, and before the plan is completed, the case converts to Chapter 7, the Chapter 7 trustee will not be able to realize on such new property or increased equity unless the conversion was done in bad faith, in which case property of the estate shall be determined as of the date of conversion. The amendments do not define bad faith but it could possibly encompass lottery or inheritance situations, such as Lybrook, where an inheritance was received post-filing and no disclosure thereof was made under Federal Rule of Bankruptcy Procedure 1007(h).

These new amendments also provide that Chapter 13 valuations of property and secured claims shall apply in the converted case, with any secured claims being reduced to the extent paid per the Chapter 13 Plan. To whose benefit those payments to secured creditors will inure (the debtor or the Chapter 7 estate) is unclear. These provisions seemingly reject the holding of the Sixth Circuit in In re Burba ___ F.3d ___ (6th Cir. 1994) for cases filed on or after October 22, 1994. Burba held that, upon conversion from Chapter 13 to 7, the debtor could not redeem personal property under §722 by paying the balance due on the secured creditor's allowed Chapter 13 secured claim and extinguish the lien. While the new provisions, at first blush, appear to be a bonus to debtors, they are actually a double-edged sword. Consider the case of a value being established on an automobile during the Chapter 13 case and then having the transmission go out and the debtor then converting to Chapter 7. In such a scenario, if the debtor wants to keep (redeem/reaffirm) the car, he will be stuck with the higher (chapter 13) value, not the value of the vehicle in the Chapter 7 with the bad transmission. Although case dismissal and refiling may possibly solve such problems, questions of good faith (or lack thereof) may preclude such action and otherwise result in §707 problems. See, Bankruptcy Reform Act, §311; amends Bankruptcy Code §348(f).

TAX BORROWING

As many taxes are not generally dischargeable, creative debtors began taking out loans to pay their taxes and then discharging the loan indebtedness. For example, if income tax obligations were incurred within three (3) years prior to filing and paid with borrowed funds, these loans would be subject to discharge, although, had the debtor not paid the tax obligations and then filed, the taxes would not be dischargeable. Under the new amendment, such loans would, likewise, be non-dischargeable, although it is not clear if a non-dischargeability complaint would have to be filed to establish the non-dischargeable nature of the debt. This may be important as many times the creditor might not realize the use to which the loan monies were put, such as when a debtor might receive a cash advance on a credit card to pay for the same. See, Bankruptcy Reform Act, §221; amends Bankruptcy Code §523(a).

PRIORITY FOR ALIMONY AND SUPPORT OBLIGATIONS

Under revised Code §507(a)(7), a new priority has been stated for alimony and child support obligations, with no dollar limits, except to the extent they have been assigned to another entity. This change is important for liquidation analysis for Chapter 13 purposes. Before, there was a split of authority as to whether or not separately classifying a non-dischargeable debt in a Chapter 13 proceeding, such as for child support or student loans, might be improper classification. While such issue may remain for educational loans, such classification is now proper as to alimony and support. See, Bankruptcy Reform Act, §304; amends Bankruptcy Code §507(a).

WHAT STATE JUDGES NEED TO KNOW ABOUT BANKRUPTCY CASES[ii]

Bankruptcy cases create a major area of friction between state and federal courts - especially bankruptcy stays of state court lawsuits. Much of the friction arises because state trial judges lack understanding of the nature, extent, and effects of "automatic stays" under the U.S. Bankruptcy Code. The American Bankruptcy Institute is a private, nonprofit organization in Washington, D.C., devoted to education and research on bankruptcy issues. It has identified eleven questions commonly asked by state judges about bankruptcy stays and has developed answers to these questions.

The questions and answers as supplemented or developed by the Federal Judicial Center are presented below. Elaboration to some of the answers has been provided by Bankruptcy Judge Sidney B. Brooks (U.S.D.Colo.). More detailed information about bankruptcy issues can be found in the American Bankruptcy Institute's recent publication, *Bankruptcy Issues for State Trial Court Judges 1993*, developed through a grant from the State Justice Institute. Copies of this publication ($10.00 each) can be obtained from the American Bankruptcy Institute, 510 C Street N.E., Washington, DC 20002, phone: (202)543-1234. (Note: Some of the information in the publication may have been affected by recent changes in the bankruptcy laws.)

1. Question: What sort of actions, motions, and proceedings in state court are not stayed by a bankruptcy filing?

Answer: Certain actions are excluded by statute from the operation of the automatic stay. The following are common ones: most criminal actions against the debtor; alimony, maintenance, or support collection actions from property other than property of the bankruptcy estate (e.g., collections from property acquired after the debtor files a chapter 7 petition); paternity actions; and police or regulatory enforcement actions (e.g., consumer protection and environmental actions). The statutory exceptions from application of the stay appear at 11 U.S.C. §362(b).

1.Question: Could the state court judge action violate a bankruptcy stay?
Answer: Yes. While it is more likely that a party or counsel for a party would be acting contrary to the automatic stay, a state court judge could violate it in a myriad of ways, ranging from conducting a pretrial conference in a mortgage foreclosure action to a trial of a contract dispute. Essentially any act outside the bankruptcy court that moves a matter forward on a claim against a debtor or property of the estate during the pendency of a bankruptcy violates the stay. As a practical matter, however, only acts in willful violation of the stay would result in sanctions, from which state court judges would probably be immune.

There are several areas where the automatic stay does not apply, and thus a state court judge may act. See answer to Question #1.

Determining what is not

[ii] *This Article appeared in the "State--Federal Judicial Observer" a publication of the Federal Judicial Center. This comes from the Interjudicial Affairs Office of the FJC. This Article is being reprinted with the permission of the Federal Judicial Center.*

covered by the stay can be tricky. When in doubt, the state judge should refrain from going forward and advise the parties to obtain relief from the stay in the bankruptcy court. The process to do so is relatively swift and self-executing, if not opposed. It is usually treated on a relatively expedited basis.

The stay otherwise expires automatically on the closing or the dismissal of the case, or when a discharge is entered. Typically a discharge is entered about 100 days after an uncomplicated chapter 7 case is filed or at the successful conclusion of a chapter 13 plan.

Note: If a defendant files for bankruptcy shortly before the commencement of a state court action, quick relief from the stay might be obtained by the other litigants if they immediately apply to the bankruptcy court and justify prompt modifications of the stay. Bankruptcy judges are not likely to condone unfair litigations tactics, and they may wish to abstain in favor of a case being better tried in a state court.

3.Question: In a lawsuit before a state judge, three defendants are alleged to be joint tortfeasors. The state law provides for percentage apportionment of liability. One of the three defendants filed bankruptcy.
(a) Can the case proceed?
(b) Should it?
Answer: (a) Maybe. In a state that apportions liability by percentage, the case against three joint tortfeasors could proceed against two of them after the third files bankruptcy. If the state law requires that joint tortfeasors be tried together, then the case could not proceed against any of the tortfeasors unless the bankruptcy court grants relief from the stay.

(b) No. The case should not proceed until the plaintiff or a codefendant obtains relief from the automatic stay.

4. Question: (a) a defendant in a tort suit files bankruptcy. All parties before the state judge acknowledge that the defendant is covered by insurance and that the liability of the defendant will be limited by the extent of the coverage. Does the state judge need a bankruptcy court order to proceed with the tort action while the bankruptcy case is pending?

(b) Once the discharge injunction has been entered and the bankruptcy case closed, may the plaintiff in the tort action proceed against the debtor in state court as a nominal defendant if such action is necessary to prove liability as a prerequisite to recovery from the liability insurer?
Answer: (a) Yes. Even in tort cases where a defendant is insured and liability is limited to the extent of the coverage, a party should seek an order granting relief from the automatic stay or remove any doubt about the effects of proceeding with the action. (See also answer to Question 3.)

(b) Yes. The discharge of the debtor extinguishes personal liability but does not release third persons, including insurance companies, from liability. No modification of the discharge injunction entered by the bankruptcy court is necessary, if such action is necessary to prove liability as a prerequisite to recovery from the liability insurer.

5. Question: (a) Can the bankruptcy court reexamine or undo awards of child support, alimony, or attorney fees made in a divorce action?

(b) If so, to what extent?
Answer: (a) Yes. Since support and alimony awards are generally nondischargeable, questions often arise about the characterizations or labels of those awards (as well as attorney fee awards) and their relation to property settlement obligations, which are generally

dischargeable, except to provided for in 11 U.S.C. §523(a)(15).

(b) Bankruptcy courts will not be bound by the characterizations or labels given to the debts in a state decree or settlement. Accordingly, bankruptcy courts may undo such state court awards if their characterizations are inconsistent with the parties' true intentions and dischargeability rights.

6. Question: (a) Once a party to a lawsuit before a state judge has filed bankruptcy, can one or more of the parties remove the entire lawsuit or part of it to the bankruptcy court for determination?

(b) Can the bankruptcy court remand the action back to the state judge for determination?

Answer: (a) Yes. All or part of the state court lawsuit can be removed.

(b) Yes. The bankruptcy judge will likely remand state lawsuits that are traditionally determined in state court.

7. Question: (a) What state court judgments are nondischargeable under the difference bankruptcy chapters?

(b) Can such nondischargeable judgments be collaterally attacked in the bankruptcy court?

Answer: (a) Example of final state court judgments that may be nondischargeable in a subsequent chapter 7 case of an individual debtor include the following: money judgments based on fraud, embezzlement, larceny, willful or malicious injury to the person or property of another; and money judgments for death or personal injury arising for intoxicated driving incidents. The reorganization chapters (11, 12 and 13) generally provide broader discharge opportunities than are available to chapter 7 debtors.

A creditor who desires to have his or her claim or judgment against a debtor excepted from the debtor's discharge should initiate an adversary proceeding in bankruptcy court to have the claim adjudicated. Certain adversary proceedings must be brought in bankruptcy court within a specified time. 11 U.S.C. §523(c)(1). The state court has concurrent jurisdiction to determine the discharge ability of certain debts. A creditor's failure to initiate an adversary proceeding, particularly where some type of wrongdoing is alleged (fraud, willful and malicious injury, etc.), is likely to result in a discharge of that judgment.

Note: A state court judgment that is based on specific and appropriate findings of fact and conclusions of law is more likely to be adopted by, or otherwise served to estop collaterally, the bankruptcy court when the court is presented with the issue of dischargeability of that judgment.

(b) Yes. Default judgments or issues not fully litigated in state court are subject to collateral attack in bankruptcy court, but collateral estoppel applies in bankruptcy proceedings to matters that have been fully litigated in state courts.

8. Question: If a debtor files a chapter 13 bankruptcy, can he or she discharge judgments for embezzlement, fraud, intentional torts, and driving under the influence of alcohol and drugs?

Answer: Money judgments based on driving while intoxicated are not dischargeable in chapter 13, but money judgments for embezzlement, fraud, and intentional torts are. In chapter 13 proceedings, debtors usually agree to pay creditors from future income over an extended period of time pursuant to a plan approved by the bankruptcy court. Such a debtor is not entitled to discharge until the successful completion of payments under the plan.

9. Question: Are there any circumstances

where restitution or fines in a state criminal case are dischargeable?

Answer: Fines and restitution in state criminal cases are nondischargeable in bankruptcy cases filed on or after October 22, 1994. Both fines and restitution in state criminal actions are nondischargeable in chapter 7 cases filed before October 22, 1994. Restitution is nondischargeable, but fines are dischargeable in chapter 13 cases filed before that date.

10. Question: The defendant in a collection suit in state court affirmatively alleges discharge in bankruptcy. Can the state court resolve this issue, or is the dischargeability issue only within the jurisdiction of the bankruptcy court?

Answer: Only bankruptcy courts can determine whether to grant or deny a discharge in bankruptcy, but state court judges can ascertain whether discharge has in fact been granted or denied through evidentiary methods of proof.

11. Question: A lawyer for a party calls and advises the state judge that a client has filed bankruptcy. How can this be verified?

Answer: The state judge or his or her clerk may call the bankruptcy court clerk's office, or seek access to the docket electronically if such technology is available. Phone numbers for clerks' offices appear in the ABI publication referenced above and in the "Governmental Listings" of most telephone directories under United States Government, Courts, District Court for (Name of Federal District). Bankruptcy Court, Clerk's Office. An alternative is for the state judge to require the Debtor's lawyer to file with the state court a date-stamped copy of the debtor's filed bankruptcy petition, and/or the Official Bankruptcy Form 9, "Notice of Filing Under the Bankruptcy Code, Meeting of Creditors and Fixing of Dates," after such form has been issued by the bankruptcy court.

RECENT BANKRUPTCY CENTER DECISIONS

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

In Re: Bill & Peggy Beard, M. Scott Michael, U.S. Trustee v Bill & Peggy Beard, 1995 FED App. 0024P (6th Cir.), File Name 95a0024p.06, Case No. 93-3596 (January 18, 1995). Debtors, Bill and Peggy Beard, filed a Chapter 12 petition. Debtors owed FmHA $912,530.00. This debt was secured by collateral valued at $89,788.00. The bankruptcy court, confirmed the Chapter 12 Plan which allowed Debtors to remit payments directly to FmHA, an undersecured creditor, in contrast to passing such payments to through the Chapter 12 Trustee. By doing so, Debtors were able to avoid paying the Trustee's statutory fee normally received in administering the estate. The United States Trustee appealed. The district court affirmed this decision.

In affirming the lower court decisions, the Court of Appeals found persuasive the decisions of In re Pianowski, 92 B.R. 225 (Bankr. W.D. Mich. 1988) and In re Overholt, 125 B.R. 202 (S.D. Ohio 1990), upholding direct debtor-to-creditor payments on such debts. Pianowski crafted a list of 13 non-exclusive factors that a court may consider when determining whether to allow a debtor's request to bypass the Debtor and his attendant fee. Overholt

utilized a four-part "tripartite test" in its reason. Congress constructed a scheme that envisioned the debtors would at times be able to pay their debts directly to their creditors, allowing them to bypass the trustee. 11 U.S.C. §1225(a)(5)(B)(ii). Moreover, under 11 U.S.C. §506(a) "[a]n allowed claim of a creditor secured by a lien on property in which the estate has an interest ... is a secured claim to the extent of the value of such creditor's interest in the estate's interest in such property ... and is an unsecured claim to the extent that the value of such creditor's interest ... is less than the amount of such allowed claim." Inasmuch as a Chapter 12 debtor may make direct payments to secured creditors, thereby avoiding trustee fees, we are not persuaded that debtors' payments on the secured portion of their undersecured debts should be treated differently.

In Re: Time Construction, Inc.; 8300 Newburgh Rd Partnership, et al v Time Construction, Inc., 43 F3d1041; 1995 WL 4008; 1995 U.S. App. LEXIS 423 (6th Cir. Jan. 9, 1995). Plaintiff, 8300 Newburgh Rd. Partnership (NRP), entered into an agreement with Debtor/Defendant, Time Construction (Time), to construct a condominium/apartment project in Westland, Michigan. NRP removed Time from the project and a dispute arose as to money owed Time for partial performance under the contract. Pursuant to the contract, Time demanded arbitration, naming as respondents NRP and seven of its partners. Pasquale Carnacchi was Time's sole shareholder and one of NRP's partners. The case went to the arbitration panel. On the morning of the fourth day of the arbitration hearing, NRP requested an adjournment, claiming a partner, Edio DeCiantis, was in the hospital and unable to testify. NRP renewed its motion for an adjournment later that day, and the panel agreed to adjourn to the following morning, with the promise from NRP's counsel that he would find out what DeCiantis suffered from.

The following morning, NRP's counsel appeared with a photograph of DeCiantis in a hospital room, but failed to state what his illness was. NRP's counsel also failed to call Vincent Mancuso, another NRP partner, to testify about DeCiantis' condition who had visited him in the hospital. Nor did NRP's counsel present evidence for DeCiantis' doctor. Nevertheless, NRP's counsel moved for another adjournment. NRP's counsel fought the hearing at every turn. The panel grew exasperated with the delays of NRP that had occurred since the case was first submitted to arbitration some 2 1/2 years earlier. It ultimately asked for closing arguments and briefs. Not surprisingly, since NRP did not present a case, the panel awarded Time $1,474,644.33 in damages against NRP and its partners. NRP subsequently filed a complaint against Time and Carnacchi in state court seeking to vacate the arbitration award and to compel an accounting.

On March 18, 1991, Carnacchi and his wife filed a bankruptcy petition. The Trustee then sought to remove the state court action to the Carnacchi bankruptcy proceeding. Time also subsequently filed a bankruptcy petition. The state court matter was eventually removed to the Time bankruptcy court proceeding pursuant to the stipulation of the parties. The Time trustee moved for summary disposition and it's motion was granted, effectively affirming the arbitration award in Time's favor. NRP and its partners then appealed the bankruptcy court decision to district court. Several months after filing its appeal to district court, NRP moved to dismiss based on lack of subject matter jurisdiction. The district court

affirmed the bankruptcy court decision, concluding that it had jurisdiction because the arbitration award was a Time asset which directly affected the assets available in the Carnacchi bankruptcy. And, the parties had stipulated to the transfer of the state court case to the Time bankruptcy proceeding. NRP then appealed the district court decision on grounds of lack of subject matter jurisdiction. Alternatively, it asked that the arbitration award be vacated because of the panel's refusal to postpone the hearing in light of DeCiantis' absence.

The Court of Appeals affirmed, stating that the bankruptcy court had jurisdiction over the state court action to vacate the arbitration award. It was the largest asset of the bankruptcy company and indirectly, the largest asset of the Carnacchi estate. Accordingly, under 28 U.S.C. §1334(b), the arbitration matter is at least "related to" the bankruptcy.

In affirming the lower court decisions, the Court of Appeals cited the Michigan Court Rule allowing for the state court to vacate an arbitrator's award if there is an abuse of discretion. MCR 3.602(J)(1)(d). The arbitrators did not commit reversible error in refusing to adjourn the hearing. It was not an abuse of discretion for the panel to refuse to postpone the hearing due to DeCiantis' illness. NRP did not present sufficient medical evidence to inform the panel of DeCiantis' condition or how long his condition would require the hearings to be postponed. Additionally, other partners were present at the hearing, including the managing partner. NRP had expended its goodwill by numerous delays throughout the arbitration proceeding. It should not be able to create reversible error by its own failure to prosecute its case.

In Re: Federated Department Stores, Inc.; M. Scott Michael, U.S. Trustee v Shearson Lehman, Inc., et al, 1995 FED App. 0020P, File Name 95A0029p.06, Case No.s 93-3745/4186 (6th Cir. 1/17/95). On January 15, 1990, Debtor/Defendant Federated Department Stores filed 66 separate Chapter 11 reorganization cases in the U.S. Bankruptcy Court for the Southern District of Ohio. On February 6, 1990, Federated entered into a retention agreement with Defendant, Shearson-Lehman, to provide "financial advisory services" to Federated during the pendency of the Chapter 11 case in exchange for a fee of $250,000.00. On March 6, 1990, Federated asked the bankruptcy court for approval of its agreement with Shearson-Lehman. The Trustee objected on the grounds that Shearson-Lehman was not a "disinterested person" as required by 11 U.S.C. §327(a). This objection was based on Shearson-Lehman's numerous holdings of Federated securities over which it had discretionary trading authority and other financial connections with the Debtor.

Federated argued that a denial of the application would unjustly disadvantage it by denying Debtor the services of the most uniquely qualified financial advisor and unduly burden the estate with unnecessary expense and cause significant delay in the reorganization process. Moreover, numerous other investment banking firms had previously represented Debtor, such that it may effectively be precluded from engaging a major investment banking firm it assist in its reorganization. Despite the Trustee's reliance on unambiguous language of the Code, the bankruptcy court approved Federated's application and in issuing a retention order, held that equitable principles and need for an effective reorganization warranted a departure from the strict

language of the statute.

On May 31, 1990, the Trustee appealed the bankruptcy court decision to the district court. The district court, however did not resolve the appeal for almost three years after the reorganization. One reason for the delayed district court decision was because it, *sua sponte*, stayed the Appeal pending the Court of Appeals decision in In re: Middleton Arms, Ltd. Partnership, 934 F.2d 723 (6th Cir. 1991). In Middleton Arms, the Sixth Circuit affirmed a Tennessee district court decision reversing a bankruptcy court's approval of an appointment under §327(a) because the real estate broker hired by the Debtor was not a disinterested person and the bankruptcy court's equitable powers could not be used to evade the plain and disqualifying language of the very same statute. In the interim, Shearson-Lehman continued to provide services to Federated and applied for and received compensation on eight different occasions. All the while, the Trustee maintained its standing objection that Shearson-Lehman was not statutorily qualified to serve as Debtor's financial advisor and, therefore, not eligible for compensation from the estate. The bankruptcy court overruled these objections and the Trustee again appealed. On January 10, 1992, the bankruptcy court confirmed Federated's reorganization plan. Federated later filed a motion to dismiss as moot, the Trustee's appeals, since the reorganization was complete, the district court could not provide the Trustee the relief requested. On April 12, 1993, the district court agreed and dismissed the appeal.

The Court of Appeals reversed the district court's ruling on mootness, since the court still could grant relief of reversing the bankruptcy court's approval of Shearson-Lehman's agreement with Federated and ordering the return of payments made by the estate. The district court erred in concluding that the bankruptcy court has discretion to compensate a professional under §330(a), if such professionals original appointment violated §327(a). Additionally, there is no basis for Shearson-Lehman's claim that equity requires dismissal of the appeal. From the outset, Shearson-Lehman knew the Trustee objected to its appointment. It elected to continue to provide services to the estate, knowing that the bankruptcy court's order would be reviewed denovo on appeal and subject to reversal.

The Court of Appeals also noted that Harper v Virginia Dept of Taxation, 113 S.Ct. 2510 (1993) requires retroactive application of new decisions to all cases still subject to direct review. Since the Court of Appeals decided Middleton Arms and In re Eagle-Picher Industries, 999 F.2d 969 (6th Cir. 1993) while direct review of the bankruptcy court's orders were proceeding, Middleton Arms and Eagle Picher must be given retroactive effect. Accordingly, the Trustee's objection to Shearson-Lehman's appointment was valid and should have been sustained. The law was clear and consistent after June 6, 1991 with the holding of Middleton Arms. Consequently, the Court of Appeals reversed the bankruptcy court's retention order.

The Court of Appeals stated the decision to grant compensation is governed by §330(a) and §328(c). These sections clearly require a valid professional appointment under §327(a). Shearson-Lehmans appointment was not valid. Nevertheless, denying all compensation to Shearson-Lehman would not be equitable. Until Middleton Arms was decided, there was no definitive appellate decision as to Shearson-Lehmans qualifications to serve Debtor despite its interested status. The Court then allowed Shearson-Lehman to retain the compensation it receive up to June

6, 1991, the date of the Middleton Arms decision. All fees and costs subsequent to this date were ordered to be refunded to Debtor.

In Re: Embrace Systems Corporation, d/b/a Embrace Technology Systems, Inc., Case No.: GG 94-84766 (Bankr. WD Mich) 2/16/95. In this case the Debtor sought to transfer certain technology, customers and marketing information pursuant to an Amended License Agreement to Eco-Fibre Corporation which was an insider. The transfer would have been outside the ordinary course of the Debtor's operation. The Debtor and Eco entered into a pre-petition License Agreement whereby the Debtor was to transfer certain assets to Eco. The Debtor filed a Motion to Assume Executory Contract and then filed an Amended Motion to Assume Amended License Agreement or Alternative Relief ("Amended Motion"). Guardian Fiberglass expressed interest in making an offer to purchase the Debtor's assets, including those which the Debtor sought to transfer to Eco. One of the contingencies contained in Guardian's offer was that it wanted to observe a demonstration of the technology it desired to purchase. The Debtor initially consented to the demonstration but then later cancelled. Therefore Guardian was denied an opportunity to make an informed decision whether to submit a bid for the assets.

The initial question the Court was asked to address was whether Guardian had standing to object to the Debtor's Amended Motion. Sometime after the filing of the Chapter 11 petition a creditor assigned its claim to Guardian. 11 U.S.C. §1109(b) provides that "a party in interest, including ... a creditor" can be heard on any issue in a case. Judge Gregg went on to further note that "the Code does not distinguish between creditors existing at the time of a bankruptcy case filing and those that attain creditor status post-petition". In fact, Bankruptcy Rule 3001(e) contemplates the purchase of creditors claims. Judge Gregg held that Guardian, as a purchaser of a claim had standing to object to the Debtor's Amended Motion. The Court then shifted the burden to the Debtor to demonstrate by a preponderance of the evidence that Guardian had objected to the Motion in bad faith. While the Code does not define "good faith" Judge Gregg found that "a creditor acting in its own self-interest does not necessitate a finding of bad faith". The Court went on to make the analogy that in a Chapter 11 where a creditor votes to reject the plan "bad faith" may be shown when the creditor seeks to coerce payments of more than it fair share from the estate, or exhibits an improper ulterior motive such as malice, strikes, blackmail, or purposely seeking to destroy the Debtor to advance a competing business". In the present case the Court found that no facts supported finding of a bad faith by Guardian in filing its Objection to the Debtor's Amended Motion.

The Debtor's Amended Motion sought to assume a pre-petition executory contract, identified as an Amended Exclusive Worldwide License Agreement, pursuant to §365 of the Bankruptcy Code. The Amended License entered into between the Debtor and Eco was significantly different than the original License Agreement entered into pre-petition. The question is does §365 apply if the Amended License Agreement is not an executory contract. Additional facts are that the Amended License Agreement created no contractual relationship between the parties at the time approval by the Court was sought as it had not been signed by either the Debtor or Eco, it was not dated, nor had it been approved by the Debtor's board of

directors. Apparently the parties were seeking to obtain the advanced Court approval prior to actually entering into the Agreement. §365 pertains to the assumption of executory contracts which already exists as of the petition date not to post-petition contracts. It does not govern the standards by which a Debtor may enter into a new contracts post-petition. Therefore, Judge Gregg held that §365 was not applicable to this matter.

The Court, pursuant to §363 of the Code, addressed the use, sale or lease of the property of the Debtor and estate. The Court first determined whether or not the Amended License Agreement was a sale pursuant to §363. The Court found that this transaction amounted to the sale of certain assets of the Debtor to Eco. The Court looked not to the terminology contained in the Amended License Agreement but rather what was the substance of the transaction. The Court found: (1) the Debtor intended to liquidate the remaining assets; (2) the length of the license was for a term of 50 years; and (3) the scope of the parties rights, including Eco's right to sell the assets identified in the Amended License Agreement.

The Court then considered its discretion in determining whether a private sale pursuant to §363 should be approved. The Court found that Eco's offer was unfair and that the sale as proposed was not in the estate's best interest. The Court also scrutinized the fact that Eco, as a prospective buyer, was an insider. The sale was arranged by the Debtor's president who had an interest in Eco. The Court further found that Eco had no feasibility to make the initial down-payment of $50,000.00 and the Court further gave no creditability to Eco's business projections or its ability to adequately capitalize itself. The Court found no harm to the creditors of this estate if the Amended License Agreement was not approved. The Court went on to find that the Debtor had not met the standard for a sale outside of the ordinary course of business and outside a plan as sets forth in Stephens Indus., Inc. v McClung, 789 F2d 386, 390 (6th Cir. 1986). The Debtor did not demonstrate a sound business purpose for the approval of the Amended License Agreement when in essence the Debtor was selling a major portion of its assets outside of a plan of reorganization.

Lastly, the Court found that Eco, as the purchaser, did not act in "good faith". The Court found that collusion existed between the Debtor, Debtor's president and Eco. The Court also found that evidence existed that there was an attempt to take advantage of prospective bidders and that there existed evidence of material nondisclosure and perhaps solid fraud.

In re: Addison Community Hospital Authority, Case No.: 92-02336-R (Bankr. ED Mich) 12/27/94. The debtor, Addison, is a community hospital authority which filed a voluntary chapter 9 petition in February 1992. An unincorporated group of parties known collectively as Concerned Citizens for Addison Community Hospital Authority filed a motion to intervene in the chapter 9 proceeding pursuant to FRBP 2018. Their reason for intervention was to oppose the chapter 9 plan submitted by Addison, as non-conforming with the purpose of the hospital, which was organized under and subject to the Joint Hospital Authority Act of Michigan. Their concerns were, that their taxes might be affected by the reorganization, and that people living within the service area of Addison might be affected if the hospital was converted from one organized under the Act, to a private profit making entity.

Addison opposed the motion to intervene, as did SurgiCon, a secured creditor that had a contractual agreement with Addison for operation of the hospital.

Judge Rhodes discussed three issues germane to a motion to intervene.

1. Did the Citizens have a statutory right to be heard under 11 USC §1109?

2. Did the Citizens have a right to intervene under FRBP 2018?

3. Are the members of Citizens "special tax payers" pursuant to 11 USC §943, and therefore entitled to intervene as a matter of right?

§1109 provides for intervention by a party in interest. Since creditors are parties in interest, those members of Citizens who are creditors of the estate have an automatic statutory right to be heard and need not seek permissive intervention under FRBP 2018. However, the court concluded that those members of Citizens who were not creditors could not use §1109 to intervene. Where a party is merely interested in the outcome of the matter and does not have a direct legal interest in the chapter 9 proceeding, that party is not a party in interest. Judge Rhodes stated that the court should not be so liberal in granting applications to be heard as to overburden the debt readjustment process.

Non-creditors may have a right to intervene under FRBP 2018, subject to the court's sound discretion and a showing of cause. Citizens asserts that it has good cause to intervene because the purpose of a municipal hospital may be evaded under the plan. However, the court found that §943, §1126, §1128 and §1129 provide that the Court may confirm a plan only if it is satisfied that the plan is fair, equitable and feasible and does not discriminate unfairly in favor of any creditor or class of creditors, and that the provisions of chapter 9 are complied with (including observance of state law). Accordingly, the court found that the fears of the non-creditors, that the plan would be used to thwart the statutory purpose of the hospital, were unfounded in that the Court had the requisite oversight to attend to it's concerns. Further, those members of the group who are creditors have the ability to represent the group interest.

Finally, "special taxpayer status" under §943 only allows special tax payers to object to confirmation, not to intervene.

The court denied the petition of the Citizens, as a group, for intervention.

In re: Cipparone, Case No.: 93-43158 (Bankr. ED Mich) 2/27/94. Judge Rhodes held that the "new value" exception to the absolute priority rule, as set forth in In re: US Truck, 800 F.2d 581 (6th Cir. 1986) is inapplicable, where the proposed contribution comes from the debtors themselves, rather than from an outside source.

In re: US Truck held that the stockholders of a corporate debtor could, consistent with §1129(b)(2)(B)(ii), retain their shareholder interest by making a contribution to the reorganized debtor that is both substantial and essential.

In the chapter 11 case at bar, the debtors are individuals. The husband worked for wages and the wife, who was unemployed, in 1991 purchased 2 TCBY frozen yogurt stores. As part of the purchase agreement, the debtors personally

guaranteed the note to the seller for the purchase. The business closed in 1992. The seller then comprised 90% in amount of the unsecured creditors class, and was able to reject the first plan.

The debtors moved to cram down under §1129(b). They proposed to pay $46,000 from future wages and tax refunds over a 6 year period, in return for retaining of $38,000 of assets. The debtors assert that this infusion of capitol into the plan constitutes "new value" as an exception to the absolute priority rule under §1129.

Few cases have addressed the concept of new value coming from individual debtors, rather than from an outside source to a corporate debtor. When the equity holders of a corporation offer new value, it comes from a source other than the corporate resources. And when the corporation pays future income to creditors, that income is considered a natural and necessary source of plan funding, not "truly extraordinary contributions from totally new outside source unrelated to the debtors day to day earnings." In re: Harmon, 1414 BR 878 (Bcy ED PA 1992).

The court concluded that the debtors proposal to dedicate future wages and tax returns did not allow them to invoke cram down under §1129(b)(2)(B)(ii) because the plan would violate the absolute priority rule. Confirmation was denied.

In re: Trident Associated Ltd. Partnership, Case No.: 93-46907-G (Bankr. ED Mich) 12/29/94. Creditor/mortgagee MetLife foreclosed a mortgage by publication. The sale began 9 minutes before the debtor filed for relief under chapter 11. MetLife moved for lift of stay, claiming that it had completed foreclosure pre-bankruptcy.

The court lifted the stay, based on the bad faith of the debtor. The court found that the debtor had undertaken a systematic and methodical plunge into bankruptcy. On 6/14/93, a chapter 11 petition was prepared and signed by the representative of Trident General, Inc, which purported to be the debtors general partner. However, Trident General, Inc. was not incorporated until 6/15/93, which is also the date that the certificate of amendment of limited partnership was filed, changing the general partner. Further, the debtor admitted that it knew the permission of MetLife was required before the partnership could be changed. Finally, when MetLife sought the appointment of a receiver prior to the sale, the debtor assured the trial court that it would not file bankruptcy, as part of it's argument against the appointment.

The sale was scheduled to take place 6/22/93 at 10:00 am. Despite the debtors "unsubstantiated and inaccurate declarations (made) in a desperate attempt to deceive court officials to prevent the sale, the sale concluded at 10:05, 4 minutes before the chapter 11 petition was filed.

The Court found the debtor had no equity in the asset, lacked a realistic possibility of successful reorganization, had breached the terms of the security agreement with MetLife, and had blatantly acted outside the agreement in bad faith. The stay was lifted.

In re: Maislin Industries, US, Inc., et al, Case No.: 83-03161 Gold v AJ Hollander Co. A/P 83-0076 Judge Rhodes issued 1/19/95. In July 1989, the Court referred the adversary proceeding between trustee Gold and AJ Hollander Co. to the Interstate Commerce Commission for determination as to whether the assessment of rates claimed by the plaintiff trustee constituted an unreasonable practice or

whether the rates themselves were unreasonable in violation of 49 USC §10701(a). Now, the defendant seeks an amendment of the referral to include issued raised by the Negotiated Rates Act (NRA) of 1993.

Although carriers file their rates with the ICC, it was not uncommon for a carrier to negotiate a lower rate with a shipper. The US Supreme Court held, in In re: Maislin Indust. US, Inc. v Primary Steel, 497 US 116 (1990) that the Interstate Commerce Act forbids such secret negotiations and collection of lower rates. Thus, bankruptcy trustees were filing many suits to collect the published rates, over and above the "secret" rates. In response to those suits, in 1993 Congress passed the NRA, which set forth a mechanism to settle filed rate disputes according to a statutory formula.

The trustee objected to amending the referral order to include issues raised by the NRA. He claimed that the NRA was unconstitutional. The US Attorney General intervened, and supported the defendant's position that the NRA was constitutional.

The trustee asserted four other justifications for not amending the referral order.

1. §9 of the NRA provides that the NRA shall not limit or otherwise affect application of §541(a) or §704 of the Code. If the NRA's dispute resolution formula were applied, the estate would be limited to a maximum of 20% of it's claim, and it might possibly lose it's entire claim if the ICC were to find the rates to be unreasonable. Thus the property of the estate would be reduced and the duty of the trustee to marshall and collect the assets of the estate would be compromised.

2. The NRA does not apply to pending claims, but only to prospective claims. Because the new prohibition applies to conduct which was previously lawful, there is a presumption of prospective application rebuttable only by explicit language to the contrary.

3. Retroactive application would violate the Equal Protection Clause of the Constitution, because the NRA singles out a class of persons and subjects them retroactively to different treatment from all others who possess identical rights. Further, the imposition of a cutoff date for collection efforts is a readjustment of property rights without compensation, and is in essence an unlawful taking.

4. The NRA violates the separation of powers doctrine under the Constitution, in that it Congress usurped the power of the judiciary by asserting the power to annul a judgment of the courts.

After a long discussion of the history of the NRA, and it's application in matters of bankruptcy, Judge Rhodes held:

1. That §9 of the NRA does not violate the anti-forfeiture provision of §541(c)(1) because it is not conditioned upon the financial position of the carrier.

2. The NRA specifically applies to charges rendered before 9/30/90, including claims in that period presently before the Court.

3. The NRA is constitutional, the trustee having failed to show how it is arbitrary and irrational.

4. Enactment of the NRA did not violate the separation of powers doctrine. Congress is free to enact legislation to overturn a court ruling, other than one turning on an interpretation of a constitutional provision.

EDITOR'S NOTEBOOK

The registration for the Annual Bankruptcy Seminar will be submitted with the April edition of the Newsletter. Anyone having topics of interest for the seminar should contact either myself or Steve Rayman at (616) 345-5156.

STEERING COMMITTEE MINUTES

There was no Steering Committee in February.

The next Steering Committee meeting will be held on March 17, 1995 and will be held at the Peninsular Club in Grand Rapids.

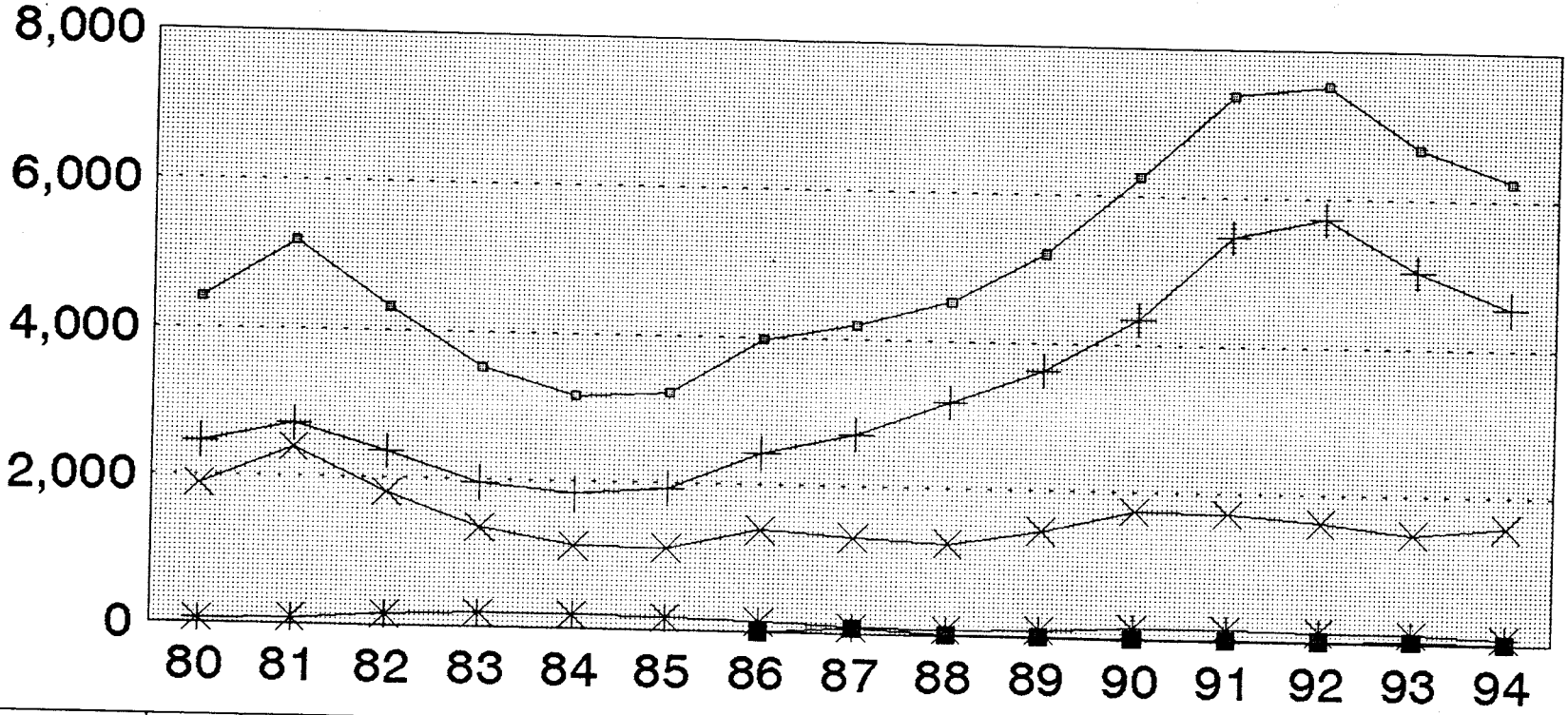
LOCAL BANKRUPTCY NOTICE

Effective January 5, 1995 the Federal Judgment Rate for money judgments has increased to 7.34 percent (7.34%). This has been the highest rate since July 1, 1992.

Attached is a Base Case Filings Chart which has been provided by Mark VanAllsburg.

U.S. Bankruptcy Court

Western District of Michigan



	80	81	82	83	84	85	86	87	88	89	90	91	92	93	94
Total Filings	4,413	5,182	4,311	3,515	3,151	3,218	3,968	4,184	4,527	5,194	6,252	7,382	7,518	6,683	6,244
Chapt. 7	2,459	2,706	2,350	1,957	1,829	1,919	2,423	2,697	3,168	3,619	4,330	5,468	5,734	5,027	4,550
Chapt. 11	68	90	157	199	189	176	141	92	83	106	163	166	138	134	84
Chapt. 12							10	83	18	15	20	25	26	36	22
Chapt 13	1,886	2,386	1,804	1,359	1,133	1,123	1,393	1,311	1,258	1,454	1,739	1,723	1,620	1,485	1,588

Base Case Filings

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

Bankruptcy Chapter	January of 1995	January of 1994	January of 1993
Chapter 7	311	278	331
Chapter 11	7	6	10
Chapter 12	4	0	5
Chapter 13	102	110	116
Totals	424	394	462

Bankruptcy Chapter	February of 1995	February of 1994	February of 1993
Chapter 7	367	351	380
Chapter 11	5	7	11
Chapter 12	2	2	1
Chapter 13	135	123	106
§304	1	0	0
Totals	510	483	498

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Tim Hillegonds (1995)	(616) 459-6121
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Brett Rodgers (1997)	(616) 732-9000
Tom Sarb (1995)	(616) 732-9000
Bob Sawdey (1996)	(616) 459-8311
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