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11 U.S.C. §523(a)(15) DISCHARGEABILITY QUAGMIRE FOR THE 90's?

By: Robert J. Pleznac*

I. INTRODUCTION

11 U.S.C. §523(a)(15) has already been the subject of significant litigation during its short history and can be expected to generate much more as the divorce bar and the general public become increasingly aware of it. This subsection provides yet another forum for ongoing disputes between divorce litigants and, in certain situations, provides additional protection to nondebtor spouse. The standards for dischargeability in §523(a)(15) lend themselves to a particular wide variety of interpretations and are an open invitation to litigation.

Effective October 22, 1994 §523(a)(15) made debts arising out of property settlements, Judgments of Divorce and other domestic relations orders nondischargeable unless either the Debtor spouse can not afford to pay the debt or the benefit to the Debtor from discharge of the debt outweighs the detriment to the non-filing spouse. Before passage of this section the sole remedy available to the nonfiling spouse was a Complaint under §523(5) alleging that the debt, however denominated, was intended as support for the spouse or a minor child of the parties. This Section has its own interpretation intricacies. [See In Re: Calhoun, 10 BR 1402 (6th Cir CCA 1983) and In Re: Hesson, 190 BR 229 (Bankr. WD PA 1995)]. Standing alone, §523(a)(5) failed to deal with the fact that divorce courts tend to bend alimony and property division provisions in Judgments, perhaps adjusting one form of compensation because of the size of another type of award.

Relevant portions of §523(a) read as follows:

§523. Exceptions to Discharge.

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(a) A discharge under §727, 1141, 1228(a), 1228 (b), or 1328(b) of this title does not discharge an individual Debtor from any debt - -

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(15) not of the kind described in paragraph (5) that is incurred by the Debtor in the course of a divorce or separation or in connection with a separation agreement, divorce decree or other order of a Court of record, a determination made in accordance with state or territorial law by a government unit unless - -

(A) the Debtor does not have the ability to pay such debt from income or property of the Debtor not reasonably necessary to be expended for the maintenance or support of the Debtor or a dependent of the Debtor and, if the Debtor is engaged in a business, for the payment of expenditures necessary for the continuation, preservation, and operation of such business;

or (B) discharging such debt would result in a benefit to the Debtor that outweighs the detrimental consequences to a spouse, former spouse or child of the Debtor.

A Complaint under §523(a)(15) must be brought within 60 days of the date first set for the Debtor's first meeting of creditors. See BR 4007. This gives the nondebtor spouse only a brief time to consider alternatives which normally include filing his or her own Bankruptcy, making arrangements to pay the debt or bringing a Complaint under §523(a)(15) and possibly §523(a)(5).

§523(a)(15) is limited in certain notable areas. §523(a)(15) debts are discharged under 1328(a) upon the successful completion of a Chapter 13 Plan, but not under a 1328(b) "hardship discharge". In Re: Auld, 187 BR 351 (Bankr. D. Kansas 1995). This conversion to Chapter 13, when economically practical, may be an effective way to responding to a nondischargeability complaint under §523(a)(15). Conversion to Chapter 13 avoids the cost of a trial, assures application of the 1325(b)(2) disposable income standard, limits the obligation period to 3 to 5 years and requires the nonfiling spouse to share Plan proceeds with other unsecured creditors. On the other hand, a Debtor may decide to try his luck in the nondischargeability action. If he wins, the debt is discharged. If he loses, he can then file a new Chapter 13. Query whether a nonfiling spouse could ever successfully object to a single creditor Chapter 13 case on the basis of bad faith? Note that the nonfiling spouse is likely to fare somewhat better in a newly filed 13 than in 7 converted to 13 because there are likely to be fewer creditors to share Plan payments within a new case.

§523(a)(15) includes only debts arising from a domestic relations action, or domestic relations agreement, and owed to a nonfiling spouse or former spouse. Some court have held that without hold harmless language in favor of the spouse, a mere undertaking to pay a particular debt is not subject to a §523(a)(15) Complaint. Stegall v Stegall, (In Re: Stegall) 188 BR 597 (Bankr. WD MO 1995) and Belcher v Owens (In Re: Owens) 1996 WL 50177 (Bankr. ED KY). These cases cite the legislative history of §523(a)(15):

The exception applies only to debts incurred in a divorce or separation that are owed to a spouse or former spouse, and can be asserted only by the other party to the divorce or separation. If the Debtor agrees to pay marital debts that were owed to third parties, those third parties do not have standing to assert this exception, since the obligations to them were incurred prior to the divorce or separation agreement. It is only the obligation owed to the spouse or former

spouse -- an obligation to hold the spouse or former spouse harmless -- which is within the scope of this section. 140 Cong.Rec Brooks, as reprinted in 9 Bkr.L.Ed 84:16 (April 1995 Supp.). All reported decisions agree that, as appears from the clear language of the subsection, to obtain a discharge of the disputed debt Debtor defendant must prevail as to only either one of the §523(a)(15) tests: ability to pay under §523(a)(15)(A) or benefit of discharge to Debtor weighed against detriment to nondebtor spouse under §523(a)(15)(B).

It is difficult to predict how a court may choose to deal with various key issues presented by §523(a)(15). Court decisions have reached differing results as to burden of proof, both the application date and appropriate standards for measuring "ability to pay" and "benefit v detriment", what factors are included in income and expense for purposes of the ability to pay test and whether a court has the power to find a debt part nondischargeable and part dischargeable.

II. BURDEN OF PROOF

Decisions regarding the burden of proof applicable in cases under §523(a)(15) display many theories. The general rule as to burden of proof in dischargeability matters is stated in Grogan v Garner, 498 US 279, 11 S.Ct. 654, 112 L.Ed.2d 755 (1991). As to most exceptions to discharge the party objecting to discharge bears the burden of proof by a preponderance of the evidence. In considering the question of burden of proof under §523(a)(15) and deciding that upon a showing that Plaintiff has a claim under §523(a)(15) burden shifts to the Debtor, In Re: Hill, 184 BR 750 (Bankr. ND IL 1995) draws an analogy to student loan cases under §523(a)(8) and quotes Bankruptcy Judge Margaret Dee McGarity:

"Although the creditor has the burden of proof for exceptions to discharge, it appears that once an action has been filed the burden of production of evidence shifts to the Debtor to show inability to pay or to show that the benefit of the discharge to the Debtor outweighs the detriment to the creditor." [M.D. McGarity 27 Weekly News and Comment, B.C.D., Vol.27 (May 16, 1995) No.1 at A10].

Several cases follow the reasoning in Hill but find that only the burden going forward is shifted to the Debtor: In Re: Phillips, 187 BR 363 (Bankr. MD FL 1995); Silvers, 187 BR 648 (Bankr. WD MO 1995); and Florio, 187 BR 654 (Bankr. WD MO 1995).

Some Courts have put the burden of proof on the Defendant and found that §523(a)(15) creates a rebuttable presumption of nondischargeability as to property settlement debts: In Re: Becker, 185 BR 567 (Bankr. WD MO 1995); In Re: Carroll, 187 BR 197 (Bankr. SD OH 1995) and In Re: Anthony, 190 BR 423 (Bankr. MD ALA 1995).

In opposition see In Re: Butler, 186 BR 371 (Bankr. D.VT. 1995). In Butler three reasons are given for distinguishing between §523(a)(15) and §523(a)(8) and placing the burden on the Plaintiff: (1) debts under §523(a)(15) are discharged unless creditor files a Complaint within 60 days of the first date set for the first meeting of creditors and ultimately prevails; under §523(a)(8) the debt is nondischargeable unless Debtor brings suit and wins; (2) §523(a)(8) and §523(a)(15) are worded differently. "The former calls for proof of the detrimental effects of non-dischargeability, while the latter emphasizes proof of benefits and harm if there were a discharge." 186 BR at 374; and (3) §523(a)(15) and not §523(a)(8) is included with the list of subsections of §523 that require

determination by the Bankruptcy Court. In agreement is In Re: Woodworth, 187 BR 174 (Bankr. ND OH 1995).

Yet another approach is set forth in In Re: Hesson, 190 BR 229 (Bankr. WD PA 1995). Here the Court requires the Plaintiff to show that the cause of action is based on the kind of debt described in §523(a)(15). Once this is done the burden on the ability to pay issue under §523(a)(15)(A) and the Plaintiff bearing the burden as to the benefit v detriment question under §523(a)(15)(B). The Court suggests that its bifurcation of the burden of proof places the burden on the party more able to present evidence.

Most courts have held that the §523(a)(15)(A) "ability to pay" test should follow the disposable income test of 1325(b)(2) rather than the more strenuous undue hardship test of §523(a)(8), remarking that the wording of §523(a)(15) mirrors the language of 1325(b)(2)(A) and (B). See In Re: Hill, supra; In Re: Phillips, supra; In Re: Hesson, supra; In Re: Woodworth, supra; and In Re: Taylor, 1996 WL48493 (Bankr. ND IL 1996). For the minority view see In Re: Florio, supra and In Re: Comisky, supra.

III. WHAT IS THE TEMPORAL MEASURING POINT AT WHICH A COURT SHOULD WEIGH THE CIRCUMSTANCES OF THE PARTIES?

In contrast to actions under §523(a)(5) in which Bankruptcy Courts are clearly called upon to consider the circumstances of the parties as of the date of the divorce, there is no obvious point in time at which to apply the §523(a)(15) tests. The statute and rules are silent. The courts have selected: (1) from the date the Bankruptcy was filed, In Re: Anthony, supra; (2) the time the Adversary Proceeding was filed, In Re: Hill, supra; and (3) the time of trial, In Re: Hesson, supra and In Re: Owens, supra. As stated in the Hesson opinion, the time of trial has the practical advantage of allowing a court to project ongoing ability to pay based on fresh information. Using another point in time invites the possibility that changes in the parties circumstances after filing may make the court's decision ludicrous. In Re: Becker, 185 BR 567 (Bankr. WD MO 1995) suggests rather vaguely that the time to be considered should be "the time of bankruptcy" but ultimately the court goes on to decide based on the ability to pay "at this time". In Taylor, supra, the court cited both Hill and Hesson then indicated that the more appropriate construction of §523(a)(15)(A) requires the court to consider the Debtor's future ability to pay over time, as well as his ability to pay at the time he filed the Bankruptcy petition. It seems that the Taylor approach is not far removed from the Hesson standard. Logic would seem to require that the future ability to pay, determined by evidence available at the time of trial, including past earnings and expenses, should have more weight than a merely historical study of the Debtor's past ability to pay, no matter what date in the past might be selected.

IV. MAY COURTS FIND §523(A)(15) DEBT PARTIALLY DISCHARGEABLE?

In Re: Comisky, one of the earliest reported cases dealing with §523(a)(15) divided the property settlement award owed to the non-filing spouse into dischargeable and nondischargeable portions based on the Debtor's limited ability to pay. This appears to be the only reported case to do so. The court cited three student loan cases including: Sands, 166 BR 299 (Bankr. WD MI 1994) which limited enforcement of a student loan debt. Court in other cases have taken the position that dischargeability under 523(a)(15) is an all or nothing proposition. [See In Re:

Becker, supra and In Re: Taylor, supra]. Dicta in Hesson suggest that this issue may not be entirely resolved. The facts of most cases fail to compel courts to take up this question.

V. THE §523(A)(15)(A) ABILITY TO PAY TEST

Although most decisions agree that the §523(a)(15)(A) ability to pay test is analogous to the 1325 disposable income standard, there is vast disagreement on application of this standard. Income has been imputed to Debtors based on earnings from past employment. See In Re: Anthony, supra and In Re: Florio, supra. Income and expenses of "new" spouses have been held to affect disposable income in In Re: Comisky, supra, but were ignored In Re: Carter, supra.

Legislative history gives some guidance on Congress' intent as to application of the ability to pay test.

Subsection (e) adds a new exception to discharge for some debts arising out of a divorce decree or separation agreement that are not in the nature of alimony, maintenance or support. In some instances, divorcing spouses have agreed to make payments of marital debts, holding the other spouse harmless from those debts, in exchange for a reduction in alimony payments. In other cases, spouses have agreed to lower alimony based on a larger property settlement. If such "hold harmless" and property settlement obligations are not found to be the nature of alimony, maintenance, or support, they are dischargeable under current law. The non-debtor spouse may be saddled with substantial debt and little or no alimony or support. This subsection will make such obligations nondischargeable in cases where the debtor has the ability to pay them and the detriment to the nondebtor spouse from their nonpayment outweighs the benefit to the Debtor of discharging such debts. In other words, the debt will remain dischargeable if paying the debt would reduce the Debtor's income below that necessary for the support of the Debtor and the Debtor's dependents. The committee believes that payment of support needs must take precedence over property settlement debts. 140 Cong.Rec H10752. H10770 (daily ed. Oct. 4, 1994) Statement of Chairman Brooks, as reprinted in 9 Bkr.L.Ed 84:16 (April 1995 Supp.).

In the full context of the Debtor's past, present and likely future circumstances, courts evaluate a Debtor's income, assets and the expenses of Debtor and Debtor's dependents to determine whether a Debtor can afford to pay. §523(a)(15) specifically provides that Debtor's assets shall be considered in determining ability to pay.

This is a significant difference from the disposable income test applied in 1325(b)(2). If the Debtor spouse has exempted significant assets which are not necessary to her or her dependent's support and which may be liquidated to pay the subject obligation, Debtor's ability not pay is established. Entireties real estate and 401(K) exemptions under Michigan Law come to mind as being likely to create exempt property, of considerable value, not reasonably needed to support a Debtor and his dependents. There is unlikely to be any surviving joint debt in cases in which entireties real estate has been exempted under Michigan Law (In Re: Trickett, 14 BR 85 (Bankr. WD MI 1981), therefore there should be few disputes over hold harmless agreements. However, Adversary Proceedings brought to make property settlement awards nondischargeable may raise this issue more often.

VI. THE §523(A)(15)(B) BENEFIT v DETRIMENT TEST

The debt will also be discharged if the benefit to the Debtor of discharging it

outweighs the harm to the obligee. For example, if a nondebtor spouse would suffer little detriment from the Debtor's nonpayment of an obligation required to be paid under a hold harmless agreement (perhaps because it could not be collected from the nondebtor spouse or because the nondebtor spouse could easily pay it) the obligation would be discharged. The benefits of the Debtor's discharge would be sacrificed only if there would be substantial detriment to the nondebtor spouse that outweighs the Debtor's need for a fresh start. 140 Cong.Rec H10752. H10770 (Daily Ed. Oct. 4, 1994) Statement of Chairman Brooks, as reprinted in 9 Bkr. L.Ed 84:16 (April 1995 Supp.).

Cases that are decided on the basis of the Benefit v Detriment Test fall mainly into three categories: (1) cases in which Debtor has a real need to discharge of the debt and nondebtor spouse can't pay and is a prime candidate for a no asset Bankruptcy. [See In Re: Hill, supra] in which the Court stops just short of urging the nondebtor spouse to file a Chapter 7; (2) cases in which nondebtor spouse can easily do without a property settlement payment or can easily pay a debt on which Debtor spouse had an obligation to hold nondebtor spouse harmless. [See In Re: Taylor, supra]; and (3) hard cases. Both parties can pay but will have some hardship doing so, or one or both parties can pay but will have some hardship doing so, or one or both parties have special circumstances. For example, Debtor, an only child, has disposable income but needs the money to pay for her mother's dialysis treatments which mother must have for the rest of her life. In order to pay, nondebtor spouse would have to sell the family farm and go back to the circus. What result? Court face the daunting task of weighing disaster against disaster. The Taylor court considered this statutory standard saying: "perhaps from a purely economic approach, if the nondebtor spouse is better off than the Debtor, either from comparing their respective balance sheets or income and expense statements, §523(a)(15)(B) requires the result obtained here -- the nondebtor party loses. That result could change in other cases if the evidence showed some horrible noneconomic detriment (to health, liberty, or something else of great material value to the nondebtor party) -- the statute does not define the terms "benefit to the Debtor" or "detrimental consequences" to the nondebtor.

Some "hard cases": In Re: Slover, 1996 WL 48830 (Bankr. ED OK) and In Re: Anthony, 190 BR 429 (Bankr. ND AL 1995).

VI. DIVORCE AND BANKRUPTCY PRACTICE CONCERNS

Attorneys are called upon to consider §523(a)(15) in three principal contexts: (1) when meeting with a prospective Debtor who has debt of the type described in §523(a)(15) or who may be facing a divorce that is likely to create such debt; (2) when advising a nondebtor spouse who is owed §523(a)(15) debt and has received notice of the Debtor spouse's Bankruptcy; and (3) when negotiating or drafting a Property Settlement Agreement, Judgment of Divorce or other domestic relations order:

(1) Consumer Bankruptcy attorneys will want to make sure their interview materials specifically ask if prospective Debtors are required to pay any debts pursuant to a Settlement Agreement, Judgment of Divorce or other domestic relations order. Potential Debtor clients should also be asked if they expect to divorce or separate. This question is particularly important if the potential Debtor's spouse doesn't intend to join in the Bankruptcy. If §523(a)(15) debt or potential §523(a)(15) debt is in the picture, the client must be informed of the possible discharge problems. In counseling

joint Debtors Bankruptcy attorneys face strong risk of future conflicts;

(2) Nondebtor spouses who have received notice of Debtor spouse's Bankruptcy need to consider their overall financial situation. Should a nondischargeability Complaint be filed under §523(a)(15) and possibly §523(a)(5)? Should the nondebtor spouse file Bankruptcy? Particularly if the debt is small and the nonfiling spouse is unlikely to be able to pay the debt, the nonfiling spouse may be best advised to pay the debt. The nonfiling spouse must make a prompt decision because action under §523(a)(15) must be brought no later than 60 days after the date first set for the Debtor's first meeting of creditors; and

(3) Keep §523(a)(15) in mind when drafting or negotiating a property settlement or Judgment of Divorce. In representing a likely nondebtor spouse, it would be prudent to label obligations as alimony wherever possible and to include specific "whereas" clauses with the aim of establishing that any obligations are clearly alimony or support. The whereas clauses should include specific factual information as well as language and alimony/support language in regard to debts. If the joint debt load is considerable, it could be helpful to get separate "whereas" clauses and separate hold harmless agreements for each debt, though this might not assure that a Bankruptcy Court will consider each separately.

ASSUMPTION OF LAND CONTRACTS IN CHAPTER 13

By: Peter A. Teholiz**

The decision of the 6th Circuit in In re Terrell, 892 F2d 469 (6th Cir. 1989) that a land contract is an executory contract is still causing ripples in bankruptcy practice. There are numerous unanswered questions arising out of that case.

A major question that surprisingly is not raised very often is - who is entitled to assume or reject a land contract. Section 365(a) of the Bankruptcy Code clearly answers this:

> "[T]he trustee, subject to the court's approval, may assume or reject any executory contract or unexpired lease of the debtor."

Moreover, sections 1107 and 1203 indicate that a debtor in possession under either Chapter 11 or 12 shall have the rights and powers of a trustee serving under Chapter 11. Such includes the right to assume or reject a land contract. The answer under Chapter 13 is not so clear, though.

Two sections of the Code speak to the powers of debtors under Chapter 13. First, section 1303 states that

> "Subject to any limitations on a trustee under this chapter, the debtor shall have, exclusive of the trustee, the rights and powers of a trustee under sections 363(b), 363(d), 363(e), 363(f), and 363(l), of this title."

Section 363 deals with the use, sale or lease of property of the estate, and does not authorize the assumption or rejection of land contracts, though. Second, section 1304 provides additional powers to a debtor engaged in business:

> "(a) A debtor that is self-employed and incurs trade credit in the production of income from such employment is engaged in business.
>
> (b) Unless the court orders otherwise, a debtor engaged in business may operate the business of the debtor and, subject to any limitations on a trustee under sections 363(c) and 364 of this title and to such limitations or conditions as the court prescribes, shall have, exclusive of the trustee, the rights and powers of the trustee under such section."

Section 364 deals with the obtaining of credit, though, and does not provide any authorization for a Chapter 13 debtor to assume or reject a land contract. Nor does the rest of Chapter 13. The logical conclusion from this statutory language is that a Chapter 13 debtor is not given the power to assume or reject a land contract.

This conclusion is bolstered by the decision of Judge Gregg in In re Mast, 79 BR 981 (Bankr. WD Mich 1987). In Mast, the

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issue was whether a Chapter 13 debtor had the power to initiate a preference avoidance action. The Court reviewed the applicable statutory language, including a comparison of sections 1107 and 1203, and concluded that

> "there does not exist any statutory authority for a Chapter 13 debtor to utilize avoidance powers listed in sections 544, 545, 547 and 549 of the Bankruptcy Code. If Congress intended to grant avoidance powers to a Chapter 13 debtor, it could have explicitly done so."

This same logic is equally applicable to section 365.

As with any bankruptcy issue, though, answering the initial question merely leads to additional issues. If a Chapter 13 debtor cannot assume or reject a land contract, how can assumption or rejection be accomplished? Mast offers three alternatives. First, the trustee can act unilaterally. Second, the debtor can request that the trustee act. And third, the Chapter 13 plan may propose that the debtor, on behalf of the estate and in conjunction with the trustee, take the appropriate action.[3] This is the most likely manner in which a land contract will be assumed or rejected in a Chapter 13 case.

Assumption or rejection of a land contract through a plan may not be as clear as one might think. Direct assumption or rejection by the debtor is prohibited under the statutory language referred to above, although if there is no objection, it will be binding on all parties under section 1327. See In re Chattanooga Wholesale Antiques, Inc., 930 F2d 458 (6th Cir. 1991) (Chapter 11 plan binding on all parties after confirmation, notwithstanding the fact that its provisions may not be in accordance with the Bankruptcy Code). If the land contract vendor objects, though, assumption or rejection can only be accomplished in concert with the trustee.[4] This may become important because the obligations associated with assumption devolve upon the trustee also.

Under section 365(b), the trustee may not assume an executory contract where there has been a default, unless at the time of assumption, the trustee (i) cures, or provides adequate assurance that the trustee will promptly cure the default; (ii) compensates, or provides adequate assurance that the trustee will promptly compensate the land contract seller for any actual pecuniary loss resulting from such default; and (iii) provides adequate assurance of future performance under the contract. How much of these obligations can be shouldered by the debtor under a Chapter 13 plan where an objection has been filed is still an open question.

If a debtor has the ability to cure a default at the time of assumption, he or she can easily provide the means to do so to the trustee to be in compliance with the statute. But if the cure is to take place over time, this process becomes more difficult. The statute requires adequate assurance of a prompt cure, and the mere statement by the debtor that such will occur during the course of the Chapter 13

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[3]Section 1322(a) provides that the chapter 13 plan shall , subject to section 365, provide for the assumption, rejection, or assignment of any executory contract or unexpired lease of the debtor not previously rejected.

[4]At first, it might not be clear why a land contract vendor would not want the land contract to be assumed. However, if the contract has any sizeable equity, the vendor may want to keep that for him or herself. Additionally, if the debtor has continually defaulted, the vendor may not wish to continue in the relationship, notwithstanding that all of the defaults have been eventually cured. And if the cure of a default is not going to take place at assumption, there is always a fear that it may never occur.

plan is probably not sufficient. Cases involving leases emphasize that the statute is designed to protect a landlord from being saddled with a debtor that will continue to default. See, e.g., In re Rachels Industries, Inc., 109 BR 797 (Bankr. WD Tenn 1990). Further, the statute requires a "prompt" cure, which is something more expedited than the "reasonable time" in which a mortgage arrearage can be cured under section 1322(a)(5). Indeed, cases dealing with the assumption of leases suggest that a prompt cure can not exceed 1 year except in unusual circumstances. See In re Layfayette Radio Electronics Corp., 9 BR 993 (Bankr. EDNY 1981) (prompt cure requires immediate payment); In re Lawrence, 11 BR 44 (Bankr. ND Ga 1981) (payment of arrearage in excess of one year is not a prompt cure, but payment over 10 months may be); In re Bon Ton Restaurant & Pastry Shop, Inc., 53 BR 789 (Bankr. ND Ill 1985) (payment of arrearage within 90 days is a prompt cure); In re Yokely, 99 BR 394 (Bankr. MD Tenn) (payment of arrearage over two years is not a prompt cure); Matter of World Skating Center, Inc., 100 BR 147 (Bankr. D Conn 1989) (courts "almost universally" require pecuniary defaults to be cured at or prior to the time of assumption). This time-frame to effectuate a cure may become even more critical if the default under the land contract includes a default due to the failure to pay real estate taxes. Although other provisions of Chapter 13 may allow for these real estate taxes to be paid in a more generous period, section 365 requires that they be paid in a "prompt" fashion.

The second obligation of the trustee under section 365 -- to compensate the land contract vendor for any actual damages suffered as a result of the default is probably of not great consequence, except in specific cases.[5] The final obligation -- to provide adequate assurance of future performance -- is similar to that involving the assurance of a prompt cure. The lease cases hold that the type of showing that is required will be left to a case-by-case determination, although they seem to focus on the same type of data that is used to demonstrate feasibility. See Matter of World Skating Center, Inc., 100 BR 147 (Bankr. D Conn 1989); In re Rachels Industries, Inc., 109 BR 797 (Bankr. WD Tenn 1990). However, the question remains: Who is to make this showing? If the debtor demonstrates feasibility of a Chapter 13 plan in the context of confirmation, does such satisfy the dictates of section 365 that the trustee must provide adequate assurance of a prompt cure and of future performance? If the language of section 365 is going to be given its plain effect, the trustee must participate in such a showing beyond merely agreeing with the debtor's projections. Although the debtor may actually introduce the evidence of feasibility at confirmation, the trustee must make some sort of independent review to determine whether that evidence is realistic or credible. In short, because section 365 requires the trustee to provide certain assurances, in the face of a challenge to a Chapter 13 plan by a land contract vendor, the Chapter 13 trustee must become active in the confirmation process, beyond merely allowing the debtor and the vendor to argue the issues.

The treatment of land contracts in bankruptcy cases changed dramatically after Terrell was issued. This effect is now being felt in the context of Chapter 13 cases

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[5]Although it probably authorizes a land contract vendor to claim the attorney fees that have been expended on collection efforts, notwithstanding the fact that the contract does not contain a provision for such fees.

CASES OF INTEREST

Enclosed from Larry A. VerMerris is a copy of the American Bankruptcy Institute Court Bulletin of March 29, 1996 concerning a recent decision of the U.S. Supreme Court in Seminole Tribe of Florida v Florida et al. decided on March 27, 1996. While this is not a Bankruptcy case, per se, it does deal with Article I and III powers and, in the Bankruptcy context, appears to put into doubt the continued viability of §106 and §505 of the Bankruptcy Code as amended by way of the 1994 Bankruptcy Amendments.

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Enclosed from Larry A. VerMerris is a copy of the Michigan Court of Appeals decision in Beaty v Hertzberg & Golden, P.C., __ Mich.App. ____; 543 NW2d 5 (Mich. CA 1995). This decision deals with liability of a Trustee and the Trustee's law firm.

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Enclosed from Larry A. VerMerris are three Orders recently entered by the U.S. Bankruptcy Court for the Eastern District of Michigan.

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Enclosed from Larry A. VerMerris is a copy of the Bankruptcy Court Order from the Eastern District of Michigan relating to the procedures governing jury trials in that Court.

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Enclosed from Larry A. VerMerris is a copy of an article which appeared in the March 11, 1996 edition of Lawyers Weekly-USA discussing a new statute recently enacted which extends, until such time as a Chapter 11 Plan is substantially consummated, the time within which quarterly fees must be paid to the Office of the U.S. Trustee.

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In Re: Judy Parlier, Case No.: SK 95-84165, Adversary No.: 96-8011. This is a Chapter 7 where the Battle Creek Consumers Power Employees Credit Union sued the Debtor, Judy Parlier, for debt owed to Battle Creek Consumers Power Employees Credit Union for a prior adjudged nondischargeable debt in a prior Chapter 7. The Credit Union filed an Adversary Proceeding asking for Declaratory Judgment. A Bench Decision was issued whereby the Credit Union was entitled to a Declaratory Judgment that, as a matter of law, the debt owed by the Debtor to the Credit Union has already been determined to be nondischargeable in the prior Chapter 7, remains excepted from discharge, pursuant to the provisions of 11 U.S.C. §523(b), in this and all subsequent cases filed by the Debtor without need of relitigation.

This summary was summarized by Stephen L. Langeland.

STEERING COMMITTEE MINUTES

There was no March meeting. A meeting was held on April 19, 1996 at noon at the Peninsular Club in Grand Rapids. The next scheduled meeting will be May 17, 1996.

LOCAL BANKRUPTCY NOTICE

Enclosed from Mark VanAllsburg is a memo from the Court and the Court Motion Calendar for April - June.

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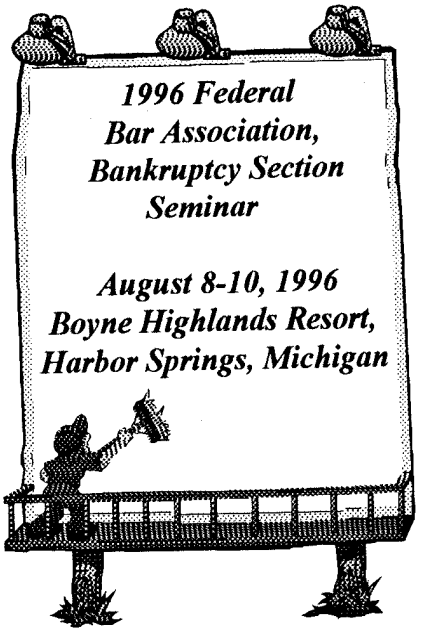
Enclosed from Brett Rodgers is a flier regarding the 1996 Federal Bar Association, Bankruptcy Section seminar which is scheduled for August 8-10, 1996 at Boyne Highlands Resort, Harbor Springs, Michigan.



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 March of 1996. These figures are compared to those made during the same period one year ago and two years ago.

Bankruptcy Chapter	March of 1996	March of 1995	March of 1994
Chapter 7	555	444	455
Chapter 11	6	7	9
Chapter 12	0	0	0
Chapter 13	216	160	157
Totals	777	611	621

Bankruptcy Chapter	January - March of 1996	January - March of 1995	January - March of 1994
Chapter 7	1480	1122	1084
Chapter 11	23	19	22
Chapter 12	1	6	2
Chapter 13	621	397	390
§304	0	0	0
Totals	2125	1544	1498

FROM THE COURT:

Staff news: Lena Jones (case administrator for Judge Stevenson) and her husband Jim had a baby boy(Jospeh) on March 24 and Kathy Chambers (case administrator for Judge Howard) and her husband Greg had a baby girl (Sarah) on March 25. Both parents and babies are doing well and Lena and Kathy will be back to work at the end of May. Jule McQueen (case administrator for Judge Stevenson) has left the court to become a full-time mother and she has just been replaced by Mary Ann Kovacs who comes to us from the IRS Special Procedures Office which is scheduled to close in the near future. Judy Pleasants, whose voice you hear most often answering our main telephone line, will be working part time closing asset cases.

Pacer fees reduced: Those of you who use PACER on a regular basis will be delighted to know that the per minute fee has been reduced from 75 cents to 60 cents. PACER has proved to be so popular that the government was making too much money -- so they decided to reduce the fees rather than the deficit.

Court security: Security has become a concern of increasing importance to the courts in the past year -- for obvious reasons. Security experts point out that attorneys are likely to know if a disruptive or violent individual is likely appear in court. The judges and court staff would be very grateful if you would warn court staff well in advance of situations which need special security arrangements. The U.S. Marshal can provide additional courtroom security if they are aware of the potential for disruptive behavior.

COURT MOTION CALENDAR FOR APRIL - JUNE

	Monday	Tuesday	Wednesday	Thursday	Friday
APRIL	1 SG	2 GG	3	4 GK	5
	8	9 SK	10	11 ST	12
	15 SM	16 SM GG HG	17 COURT ADMIN MTG	18 GK HL	19 HK
	22	23 GL	24	25 GT	26 GT
	29	30 HG	1	2	3 HK
MAY	6	7 SG GG	8 HM	9 HM GK ST	10 HM
	13	14 GL SK HG	15	16 GT	17 GT HK
	20	21 GG	22	23 GK	24 HL
	27 MEMORIAL DAY	28	29	30	31
JUNE	3	4 GG HG	5 COURT ADMIN. MT.	6 GK SG	7 HK
	10 SK	11	12	13	14
	17	18 GG SM	19 SM	20 GK ST	21 HL
	24	25 GL HG	26 HK	27 GT	28 GT

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AMERICAN BANKRUPTCY INSTITUTE

SUPREME COURT BULLETIN

Vol. VII, No. 1 • March 29, 1996

Justices Curb Suits Against States in Federal Court
1994 Bankruptcy Amendments on Sovereign Immunity Likely Invalid

The Supreme Court issued its decision in the case of *Seminole Tribe of Florida v. Florida et al.*, No. 94-12, on March 27, 1996. While the particular issue concerned the Indian Gaming Regulatory Act, the decision turned on whether Congress could use its Article I powers to overcome the states' right of sovereign immunity as exemplified by the Eleventh Amendment. The decision of the majority (Rehnquist, Scalia, Thomas, O'Connor, and Kennedy) was flat and unequivocal—it may not.

Union Gas Overruled

The court had no difficulty in concluding that Congress plainly did mean to abrogate state immunity in this instance but then turned to whether Congress had the constitutional authority to do so. The majority accepted the state's invitation to reconsider and overrule *Pennsylvania v. Union Gas Co.*, 491 U.S. 1 (1989), which had previously held that Congress did have such authority in the context of the Interstate Commerce Clause. The majority concluded that *Union Gas* had little precedential value in that it was a sharply divided decision, with no majority rationale for its holding. More importantly, the Court concluded, the decision in *Union Gas* "deviated sharply from our established jurisprudence and essentially eviscerated our decision in *Hans* [*v. Louisiana*, 134 U.S. 1 (1890)]." In the majority's view, it was "well established" that the Eleventh Amendment embodied a view of the inherent constitutional limitation on the scope of federal court jurisdiction under Article III. As such, they held, Congress may not, by statute, expand the scope of that jurisdiction, even where it acts pursuant to its powers under Article I. In the majority's view, they were simply returning the law to what it was before *Union Gas*. The dissents, of course, differ strongly and at length.

Limits on Congressional Power

In holding that Congress could not abrogate immunity using its Article I powers, the court distinguished Congress' powers under the Fourteenth Amendment. In *Fitzpatrick v. Bitzer*, 427 U.S. 445 (1976), the Court had upheld Congress' right to abrogate immunity under the Fourteenth Amendment, noting that in light of its history and language, it plainly was meant to be a limitation on state sovereignty and (through Section 5) was intended to authorize Congress to effect such limitations by future statutes. The majority viewed Congress' authority under that Amendment as being wholly different from the situation with respect to its Article I powers.

The debate is basically historical and, in its essence, may be reduced to how one views the events leading to the Eleventh Amendment. In *Chisholm v. Georgia*, 2 Dall. 419 (1793) the Court read Article III literally so as to allow an individual to force a state into federal court in a diversity case. That decision issued on Feb. 18, 1793; the very next day a resolution to overturn the case was introduced in the House and the following day, in the Senate. Congress adjourned on schedule on March 4, but upon their return in December 1793, the matter was rapidly reintroduced, passed with virtually no debate by March 1794, and ratified shortly thereafter as the Eleventh Amendment. The majority of the Court, from *Hans* onward, has always viewed that sequence as indicating that the

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Prepared by Karen Cordry, National Association of Attorneys General, Washington, D.C. The views expressed here are those of the author and do not necessarily represent the view of the NAAG or any of its individual members.

states were shocked and angered by the suggestion that Article III was a grant of positive authority that would allow them to be brought to court involuntarily. The states believed that Article III should be read to implicitly incorporate a retained state immunity from suit and to merely authorize the federal courts to hear a case if the state appears voluntarily. The Eleventh Amendment, then, was passed to symbolize and restate that concept of retained immunity but, *Hans* held, did not express the sum total of that immunity. It was merely emblematic, not definitive of the scope of immunity.

The Practical Result

The result now is that Congress may not authorize a private entity to bring suit against a state in federal court. The federal government may still sue the states in federal court and it may be able to condition rights granted to a state upon its willingness to waive its immunity. Private individuals may also be able to sue the state in state court on a federal question. The doctrine of *Ex Parte Young*, 209 U.S. 123 (1908) is also still valid, and allows state officials to be sued to force them to bring the state into future compliance with federal law. And, finally, monetary contempt sanctions may be imposed directly on a state in the course of a *Young*-type suit. (See *Hutto v. Finney*, 437 U.S. 678 (1978)). Thus, in many areas of the law, the decision is a good deal less earth-shaking than many commentators will undoubtedly depict it.

Bankruptcy Provisions in Doubt

It is likely, though, to have a significant impact on the 1994 bankruptcy amendments. The breadth of the Court's holding makes it unlikely that new §106(a) can survive. Indeed, the Court in its footnote 16 accepted with equanimity the prospect that bankruptcy cases might be affectd. The net result, presumably, will be to return to the situation post-*Hoffman* and *Nordic Village*, in which the states could not be sued with respect to pre-petition preferential or fraudulent transfers. The decision also throws serious doubt on whether §505 is constitutional in the absence of a claim filed by the taxing authority. On the other hand, post-petition, the automatic stay will still be applicable and will probably be found to limit actions the state may take during the case. In addition, §§106(b) and (c), to the extent that they provide for conditional waivers of immunity, may survive. However, in light of the Court's strong affirmance of the principle of state immunity, these provisions should be read narrowly and applied only where there can be said to be a true waiver by the state's own actions. The only way to avoid *Seminole's* impact would appear to be the approach used in *In re Southern Foods, Inc.*, 190 B.R. 419 (Bankr. E.D. Okla. 1995), where the court used the Fourteenth Amendment's Privileges and Immunities Clause to abrogate the state's immunity. While it avoids this problem, it is quite a stretch, constitutionally speaking, and it is unclear whether any other court will use the same approach.

AMERICAN BANKRUPTCY INSTITUTE
44 Canal Center Plaza, Suite 404
Alexandria, VA 22314

ORDER

UNITED STATES BANKRUPTCY COURT

EASTERN DISTRICT OF MICHIGAN

IN THE MATTER OF THE ADMINISTRATION OF THE UNITED STATES BANKRUPTCY COURT FOR THE EASTERN DISTRICT OF MICHIGAN

Effective November 13, 1995

Administrative Order Number 95–05

ORDER REGARDING IMPLEMENTATION OF THE BANKRUPTCY NOTICING CENTER

The Bankruptcy Court for the Eastern District of Michigan will be utilizing the "Bankruptcy Noticing Center" (BNC) on November 13, 1995. The BNC is a contractor provided automated noticing system that has the capacity to retrieve bankruptcy notice data from courts nationwide, and using economy of scale, print and mail notices for a lower cost than can be accomplished by local courts. In order to insure that required notices are electronically transmitted as expeditiously as possible, certain notices and packages currently mailed by the Court will now be the responsibility of the debtor, moving party or trustee. After consultation with the Clerk of the Court and in the best interest of the administration of this Court,

IT IS ORDERED THAT the following notices be mailed or transmitted to the BNC by the Clerk of the Court:

(1) Notice of commencement of case and meeting of creditors in Chapter 7, 11, 12 and 13 cases

(2) Notice of discharge of debtor in Chapter 7, 12 and 13 cases

(3) Notice of dismissal of cases in Chapter 7, 11, 12 and 13 cases

(4) Notice of motion to dismiss or convert in Chapter 11 cases filed by the United States Trustee

(5) Notice of confirmation of Chapter 11 and Chapter 12 plans

(6) Notice of the date fixed for filing claims

(7) Notice of summary of the final account in Chapter 7 cases

(8) Notice of application for final compensation of trustee and other professionals in Chapter 7 cases

(9) Other notices as the Court may direct

IT IS FURTHER ORDERED THAT the following notices or packages be mailed or caused to be mailed by the debtor, moving party or trustee, where applicable:

(1) Notice of application for compensation of professional persons

(2) Notice of hearing on confirmation of a Chapter 11 plan

(3) Chapter 11 disclosure statement, plan and order approving the disclosure statement and ballot

(4) Notice of hearing on confirmation of Chapter 12 plan (on a form provided by the Clerk of the Court)

(5) Chapter 12 plan

(6) Chapter 13 plan

(7) Notice of application to compromise or settle a controversy

(8) Notice of proposed use, sale or lease of property

(9) Notice of dismissal of 11 U.S.C. Section 727 complaint

(10) Other notices as the Court may direct

IT IS FURTHER ORDERED THAT the party responsible for the mailing of the notice file with the court as promptly as possible a Certificate of Service which shall set forth to whom notice has been given.

This order shall take effect on November 13, 1995.

STEVEN W. RHODES
Chief, United States Bankruptcy Judge
RAY REYNOLDS GRAVES
ARTHUR J. SPECTOR
WALTER SHAPERO
United States Bankruptcy Judges

Dated: October 31st, 1995

ORDER

UNITED STATES BANKRUPTCY COURT

EASTERN DISTRICT OF MICHIGAN

IN THE MATTER OF THE ADMINISTRATION OF THE UNITED STATES BANKRUPTCY COURT FOR THE EASTERN DISTRICT OF MICHIGAN

Effective January 5, 1996

Administrative Order Number 95–10

AMENDED ORDER ASSESSING FEES FOR MOTIONS TO DISMISS IN CHAPTER 11 AND CHAPTER 13 CASES

It is well-established that cause for dismissal under 11 U.S.C. § 1112(b) and § 1307(c) is also cause for conversion under chapter 7. It is also well-established that a request for dismissal under either of these sections gives the court the option of instead converting the case to chapter 7. Therefore, for purposes of 28 U.S.C. § 1930(b), Appendix 8.2,

IT IS ORDERED that the Clerk assess the $15.00 fee for motions to dismiss chapter 11 and chapter 13 cases in which the $15.00 fee would have been assessed if the motion had specifically requested conversion to chapter 7.

IT IS FURTHER ORDERED that this order shall be effective on January 5, 1996.

STEVEN W. RHODES
Chief Judge

Dated: December 18th, 1995

NOTICE: Court rules and related materials supplied by the courts are included. Since all rules and amendments may not have been supplied, the clerk of the appropriate court should be consulted to determine the current rules.

Pub. Note: This material was received by West Publishing Company on February 29, 1996.

ORDER

UNITED STATES BANKRUPTCY COURT

EASTERN DISTRICT OF MICHIGAN

IN THE MATTER OF THE ADMINISTRATION OF THE UNITED STATES BANKRUPTCY COURT FOR THE EASTERN DISTRICT OF MICHIGAN

Effective June 5, 1995

Administrative Order Number 95–02

ORDER DIRECTING DEBTOR TO FILE A DECLARATION REGARDING THE USE OF A BANKRUPTCY PETITION PREPARER

The Voluntary Petition, an official form prescribed by the Judicial Conference of the United States, has been revised pursuant to the Bankruptcy Reform Act of 1994. The revision includes the requirement of a bankruptcy petition preparer to declare that the preparer has, for compensation, prepared the petition for the debtor. The amended form does not, however, require the debtor to declare the use of a bankruptcy petition preparer.

This Court has determined that the debtor should be required to fill out, sign and file a declaration regarding the use of a bankruptcy petition preparer to properly enforce the provisions of 11 U.S.C. § 110. Accordingly, in the best interest of the administration of this Court,

IT IS ORDERED that in a case where the debtor has indicated that the debtor is not represented by an attorney, the debtor shall file with the Clerk of the Court a "Declaration Under Penalty of Perjury for Debtor(s) Without An Attorney" form as prescribed by this Court. The declaration form shall be filed within 15 days from the date of the filing of the voluntary petition.

ORDER

This order is effective for all cases filed on or after June 5, 1995.

STEVEN W. RHODES
Chief, United States Bankruptcy Judge
RAY REYNOLDS GRAVES
ARTHUR J. SPECTOR
WALTER SHAPERO
United States Bankruptcy Judges

Dated: May 19th, 1995

and only the medical care, of an individual injured in an automobile accident. We disagree. First, while defendant does cite the numerous cases indicating that § 3107 provides for the medical care of injured persons, defendant cites no cases that state that § 3107 is limited to only medical care. Rather, those cases stand only for the proposition that § 3107 includes payment of medical expenses. They do not address the question whether § 3107 has broader applicability.

Defendant further suggests that we look elsewhere in the no-fault act to see that it is replete with references to medical care and, therefore, that the purpose of the no-fault act must be to address the need for medical care and nothing more. This argument is without merit. Clearly a primary focus of the no-fault act is to ensure the payment for medical care. This is reasonable because that is likely the most common expense arising out of a motor vehicle accident, with the exception of, perhaps, collision damage itself. Defendant, however, need look no further than § 3107(1)(c) to see that the no-fault act encompasses payment of expenses beyond just medical expenses, inasmuch as § 3107(1)(c) provides for the payment of replacement services that an injured person would have performed for himself. Thus, the no-fault act is not limited strictly to the payment of medical expenses.

In short, § 3107(1)(a) provides for the payment of expenses incurred for the reasonably necessary services for an injured person's care. It is clear to us that if a person is so seriously injured in an automobile accident that it is necessary to appoint a guardian and conservator for that person, the services performed by the guardian and conservator are reasonably necessary to provide for the person's care. Therefore, they are allowable expenses under § 3107.

Affirmed. Plaintiff may tax costs.

Lavora BEATY, Individually and as Personal Representative of the Estate of Thomas Beaty, Jr., Deceased, Plaintiff-Appellant,

v.

HERTZBERG & GOLDEN, P.C., Robert S. Hertzberg, and Judith Greenstone-Miller, Defendants-Appellees.

Docket Nos. 152740, 155375.

Court of Appeals of Michigan.

Submitted Jan. 5, 1995, at Detroit.

Decided Nov. 3, 1995, at 9:00 a.m.

Released for Publication Jan. 23, 1996.

Wife of corporation's deceased shareholder, individually and as personal representative of shareholder's estate, brought action against corporation's Chapter 11 bankruptcy trustee, trustee's law firm, and attorney in firm, alleging breach of contract, breach of fiduciary duty, negligence, and equitable subrogation as result of their failure to recover proceeds of life insurance policies of which wife and corporation were beneficiaries. The Oakland Circuit Court, Steven N. Andrews, J., entered orders granting partial summary disposition for defendants on equitable subrogation count, and granting summary disposition for defendants on remaining counts. Wife appealed. The Court of Appeals, Hood, J., held that: (1) trustee's attorney owed no fiduciary duty to wife or shareholder's estate; (2) trustee's attorney owed no duty to wife that would allow her to prevail on claims of breach of third-party beneficiary contract and assumption of duty; and (3) wife stated claim for equitable subrogation on grounds that trustee's personal interest would be affected by bringing legal malpractice action against law firm of which trustee was member.

Affirmed in part, reversed in part, and remanded.

Jansen, P.J., filed opinion concurring in part and dissenting in part.

1. Attorney and Client ⇐26

Chapter 11 trustee's attorney owed no fiduciary duty and assumed no duty to wife

of debtor's deceased shareholder or to shareholder's estate, but, instead, trustee entered into contract with law firm for benefit of bankruptcy estate, and, thus, wife, individually and as personal representative of shareholder's estate, failed to state claim against trustee's attorney for breach of fiduciary duty based on failure to recover proceeds of life insurance policies of which wife and debtor were beneficiaries.

2. Attorney and Client ⇐26

Generally, attorney for bankruptcy trustee does not owe fiduciary duty to debtor's shareholder.

3. Attorney and Client ⇐26

Attorney is ordinarily liable in negligence only to client.

4. Attorney and Client ⇐26

Essential purpose of general rule against legal malpractice liability to third parties is to prevent conflicts from derailing attorney's unswerving duty of loyalty of representation to client.

5. Attorney and Client ⇐26

Requiring bankruptcy trustee's attorney to honor fiduciary duty to creditors and debtor's shareholders would necessarily result in conflict of interest and, thus, trustee's attorney does not owe fiduciary duty to creditors and shareholders.

6. Attorney and Client ⇐26

Chapter 11 trustee's attorney did not owe duty to wife of debtor's deceased shareholder with regard to recovery of proceeds of life insurance policies on which wife and debtor were beneficiaries, but, instead, duty was owed for benefit of bankruptcy estate, and, thus, attorney could not be held liable to wife on claims of breach of third-party beneficiary contract and assumption of duty; trustee pursued claim against insurance company for benefit of bankruptcy estate, not for specific benefit of wife. Bankr.Code, 11 U.S.C.A. § 327(a); M.C.L.A. § 600.1405.

7. Bankruptcy ⇐3030

Relationship between trustee and trustee's attorney is one that advances best interest of bankruptcy estate. Bankr.Code, 11 U.S.C.A. § 327(a).

8. Bankruptcy ⇐3009

Trustee's actions must be calculated to bring direct benefit to estate, not to individual shareholders or creditors.

9. Bankruptcy ⇐3009

Advancing best interest of individual creditor or debtor is contrary to trustee's primary duty to estate.

10. Bankruptcy ⇐3009

Trustee cannot enter into attorney-client contract for benefit of individual creditor, shareholder of debtor, or nonparty. Bankr. Code, 11 U.S.C.A. § 327(a).

11. Subrogation ⇐1

"Equitable subrogation" is legal fiction through which person who pays debt for which another is primarily responsible is substituted or subrogated to all rights and remedies of the other.

See publication Words and Phrases for other judicial constructions and definitions.

12. Subrogation ⇐1

Subrogation is flexible and elastic equitable doctrine and hence the mere fact that doctrine of subrogation has not been previously invoked in particular situation is not prima facie bar to its applicability.

13. Subrogation ⇐1

Subrogation is not available to mere volunteer.

14. Bankruptcy ⇐3009

Trustee's duty is to maximize or maintain value of estate for benefit of those who hold interests in it.

15. Bankruptcy ⇐3030

Duties of bankruptcy trustee's attorney are equivalent to those of trustee.

16. Bankruptcy ⇐3030

Bankruptcy trustee's attorney's duty to advise trustee requires active concern for interests of estate and its beneficiaries.

17. Bankruptcy ⇐3501

Purpose of Chapter 11 reorganization is to rehabilitate debtor so that creditors may receive going concern value of assets of estate.

18. Bankruptcy ⇐2154.1

Chapter 11 trustee was proper party to bring malpractice action against trustee's attorney, since trustee entered into relationship for benefit of estate. Bankr.Code, 11 U.S.C.A. § 323.

19. Bankruptcy ⇐3011

Trustee may be liable for intentional or negligent breach of fiduciary duty when trustee fails to pursue malpractice action against trustee's law firm.

20. Bankruptcy ⇐3009

While trustee has discretion to pursue some matters, trustee must be diligent in looking into wrongful actions by third parties that directly affect estate.

21. Bankruptcy ⇐2154.1

Chapter 11 trustee's personal interests were affected regardless of his choice to pursue or refrain from pursuing legal malpractice action against his law firm for firm's representation of trustee, and, thus, debtor's shareholder should be allowed to stand in trustee's shoes to maintain malpractice action against trustee's attorney for benefit of estate.

22. Bankruptcy ⇐2154.1
Subrogation ⇐10(1)

Wife of Chapter 11 debtor's deceased shareholder stated claim for equitable subrogation based on Chapter 11 trustee's attorney's alleged malpractice in failing to recover proceeds of life insurance policies of which wife and debtor were beneficiaries, where trustee was member of law firm hired to represent trustee.

Powers, Hallowell & Nickolai by Karl A. Nickolai and Dennis N. Powers, Highland, for plaintiff.

Miller, Canfield, Paddock & Stone by Gilbert E. Gove, Michael H. Traison, and Steven A. Roach, Detroit, for defendants.

Before JANSEN, P.J., and MICHAEL J. KELLY and HOOD, JJ.

HOOD, Judge.

In Docket No. 152740, plaintiff appeals as of right from a May 11, 1992, order of the Oakland Circuit Court granting defendants partial summary disposition with respect to count VI (equitable subrogation) of plaintiff's second amended complaint. In Docket No. 155375, plaintiff appeals as of right from an August 4, 1992, order granting defendants summary disposition with respect to the remaining counts in plaintiff's second amended complaint. We affirm in part and reverse in part.

This is ostensibly a legal malpractice case. Plaintiff's late husband, Thomas Beaty, Jr., was the majority shareholder of B & K Hydraulic Company. In June 1986, creditors forced B & K Hydraulic into involuntary bankruptcy, which was later converted to a Chapter 11 reorganization. Defendant Robert Hertzberg was the bankruptcy trustee for B & K Hydraulic. Hertzberg employed the law firm of Hertzberg & Golden, P.C., with the court's approval, to represent Hertzberg in the sale of certain property under the reorganization plan. Defendant Judith Greenstone-Miller is an attorney employed by Hertzberg & Golden.

Thomas Beaty died in January 1988. He had previously purchased two life insurance policies with a face amount of $1 million each. One policy listed plaintiff as the beneficiary and the second policy listed B & K Hydraulic as the beneficiary. Shortly after Thomas' death, plaintiff and Hertzberg submitted claims to Loyal American Life Insurance for payment on the policies. Loyal American denied the claims because Thomas Beaty had failed to pay his monthly installments in November 1987.

Hertzberg, as the trustee for B & K Hydraulic, in an action in federal court, moved for summary judgment to recover the proceeds of the policy on which B & K Hydraulic was the beneficiary. The insurance company also moved for summary judgment. The insurance company's motion was granted

while the trustee's motion was denied. The trustee appealed the decision unsuccessfully. Plaintiff then filed this suit in the Oakland Circuit Court against defendants for their failure to recover the life insurance policy proceeds. Plaintiff alleged breach of contract, breach of fiduciary duty, various counts of negligence (privity, assumption of duty, intended beneficiary), and equitable subrogation. Defendants moved for summary disposition and the trial court ultimately granted summary disposition of all the claims in plaintiff's complaint.

[1] First, we must determine whether the bankruptcy trustee's attorney has a fiduciary duty to, may assume a duty to, or may enter into a contract for, the benefit of a shareholder or creditor of, or nonparty to, the bankruptcy estate. Plaintiff asserts that she is suing Hertzberg only in his role as attorney for the trustee. We hold that the trustee's attorney owed no duty and assumed no duty to plaintiff or Beaty's estate and that the trustee entered into the contract with his law firm for the benefit of the bankruptcy estate. Thus, the trial court did not err in ruling that plaintiff failed to state a claim against the attorney for the trustee.

[2] Like the trial court, we follow *In re Wolf & Vine, Inc.*, 118 B.R. 761 (C.D.Cal. 1990). In *Wolf & Vine*, the court held that while the applicable law holds that a trustee owes a fiduciary duty to the creditors, it does not follow that the attorneys for the trustee also owe this same duty. Therefore, generally, the attorney for the trustee does not owe a fiduciary duty to the shareholder.

[3–5] Further, an attorney is ordinarily liable in negligence only to the client. *Atlanta Int'l Ins. Co. v. Bell*, 438 Mich. 512, 518, 475 N.W.2d 294 (1991). However, the defense of lack of privity in certain professional malpractice cases has been eliminated and a rule of liability to foreseeable relying third parties has been adopted. *Id.* at 518–519, 475 N.W.2d 294; *Mieras v. DeBona*, 204 Mich.App. 703, 708, 516 N.W.2d 154 (1994). The essential purpose of the general rule against malpractice liability to third parties is to prevent conflicts from derailing the attorney's unswerving duty of loyalty of representation to the client. *Atlanta Int'l Ins. Co.*, at 519, 475 N.W.2d 294. To require a trustee's attorney to honor a fiduciary duty to the creditors and shareholders would necessarily result in a conflict of interest. See *Friedman v. Dozorc*, 412 Mich. 1, 23–25, 312 N.W.2d 585 (1981).

Thus, because a conflict of interest would result if a fiduciary duty was imposed on a trustee's attorney with respect to the creditors and shareholders, we decline to extend a fiduciary duty to the trustee's attorney under these circumstances. *Mieras, supra* at 708, 516 N.W.2d 154. Accordingly, the trial court did not err in granting defendants' motion for summary disposition of the breach of fiduciary duty claim because Hertzberg, as the trustee's attorney, did not owe plaintiff a fiduciary duty as a matter of law. MCR 2.116(C)(8).

[6–9] With regard to plaintiff's claims of breach of a third-party beneficiary contract and assumption of duty, neither plaintiff nor Beaty's estate is a third-party beneficiary, nor could the trustee or trustee's attorney assume a duty to them. M.C.L. § 600.1405; M.S.A. § 27A.1405. The relationship between the trustee and the trustee's attorney is one that advances the best interest of the bankruptcy estate. 11 USC 327(a). The trustee's actions must be calculated to bring direct benefit to the bankruptcy estate, and not to individual shareholders or creditors. *In re Washington Group, Inc.*, 476 F.Supp. 246, 250 (M.D.N.C.1979). The trustee is only empowered to act for the benefit of the bankruptcy estate. Advancing the best interests of an individual creditor, or the debtor, is contrary to the trustee's primary duty to the bankruptcy estate. *In re Gallagher*, 70 B.R. 288, 290 (S.D.Tex.1987).

[10] Thus, it is apparent that a trustee cannot enter into an attorney-client contract for the benefit of an individual creditor or shareholder or a nonparty. The trustee could only enter into a contract for the benefit of the bankruptcy estate. Here, the trustee pursued the claim against Loyal American for the benefit of the bankruptcy estate, not for the specific benefit of plaintiff. Accordingly, the trial court did not err in granting

Moreover, the interest the shareholder is pursuing is the same as the trustee's: wrongful action that affects the property of the estate. *Id.* at 523, 475 N.W.2d 294. Allowing the shareholder to maintain a cause of action against the trustee's attorney does not increase the scope of the attorney's duty or the amount of liability beyond that which the trustee could claim as damages to the estate. See *Commercial Union Ins. Co., supra* at 118–119, 393 N.W.2d 479. While such a result may discourage a trustee from hiring his own firm, allowing the shareholder to enforce the trustee's fiduciary duty to the estate will encourage the trustee's diligence in pursuing third-party actions on behalf of the estate through his own firm. *Id.* at 119, 393 N.W.2d 479. Thus, as the representative of the Beaty estate, plaintiff has stated a claim upon which relief can be granted.

Affirmed in part, reversed in part, and remanded for further proceedings consistent with this opinion.

MICHAEL J. KELLY, J., concurred.

JANSEN, Presiding Judge (*concurring in part and dissenting in part*).

I respectfully dissent from the majority's decision to reverse the grant of summary disposition regarding the equitable subrogation claim. Unlike the majority, I do not believe that plaintiff has stated a claim based on equitable subrogation. I agree with the majority that the remainder of plaintiff's claims for breach of fiduciary duty, breach of contract, and negligence should be dismissed for the reasons set forth in the majority's opinion. Therefore, I would affirm the trial court's decision to grant summary disposition in defendants' favor in its entirety.

Equitable subrogation is a legal fiction through which a person who pays a debt for which another is primarily responsible is substituted or subrogated to all the rights and remedies of the other. *Commercial Union Ins. Co. v. Medical Protective Co.*, 426 Mich. 109, 117, 393 N.W.2d 479 (1986). In other words, equitable subrogation permits one party to stand in the shoes of another. *Atlanta Int'l Ins. Co. v. Bell*, 438 Mich. 512, 521–522, 475 N.W.2d 294 (1991). However, the subrogee acquires no greater rights than those possessed by the subrogor, and the subrogee may not be a mere volunteer. *Commercial Union Ins. Co., supra*, p. 117, 393 N.W.2d 479.

The doctrine of equitable subrogation has been applied to permit excess insurers to sue primary insurers as equitable subrogees of the insured in some circumstances. *Id.*, p. 112, 393 N.W.2d 479. It has also been applied to prevent the inequitable assumption of liability by one insurer when a second insurer also has a legal obligation to the insured. *Auto Club Ins. Ass'n v. New York Life Ins. Co.*, 440 Mich. 126, 485 N.W.2d 695 (1992). Under this doctrine, an insurance company has been permitted to bring a legal malpractice claim against an attorney it had retained for its insured. *Atlanta Int'l Ins. Co., supra.*

In the present case, I find that the trial court correctly held that plaintiff, individually, cannot maintain an action under the doctrine of equitable subrogation because she volunteered payment and petitioned the bankruptcy court to compel the trustee to accept the payment. Plaintiff was not obligated to pay the other creditors herself. As a volunteer, equitable subrogation is not available to plaintiff. *Commercial Union Ins. Co., supra.* Accordingly, the trial court did not err in holding that plaintiff failed to state a claim for equitable subrogation. MCR 2.116(C)(8).

I would also find that the trial court properly ruled that the Beaty estate cannot maintain an action under the doctrine of equitable subrogation. As the trial court noted, the creditors and the trustee do not share merged interests in the management of the bankruptcy estate. I agree with the majority that the trustee's fiduciary duty is owed to the bankruptcy estate and its best interests, not to the individual creditors or shareholders of the estate. Further, the creditors do not share any ties to the trustee's attorney. Thus, I do not believe that Beaty's estate should be able to "stand in the shoes" of the trustee to enforce the trustee's fiduciary duty owed to the bankruptcy estate. The two parties, Beaty's estate and the bankruptcy estate, simply do not share the same inter-

ests. Compare *Atlanta Int'l Ins. Co., supra*, pp. 521–524, 475 N.W.2d 294, with *Auto Club Ins. Ass'n, supra*, pp. 132–138, 485 N.W.2d 695.

Further, I find the majority's opinion to be inherently contradictory. The majority holds that the trustee's attorney has a duty to the bankruptcy estate and that the duty does not extend to the creditors or shareholders. Specifically, the majority holds that the trustee's attorney owed no duty and assumed no duty to plaintiff or Beaty's estate. Yet the majority allows plaintiff, as the representative of the Beaty estate, to stand in the shoes of the trustee to maintain a cause of action against the trustee's attorney. If the trustee's attorney does not owe a duty to the creditors or shareholders and does not owe a fiduciary duty to plaintiff or Beaty's estate, I fail to see how plaintiff (a shareholder) has stated a claim under the doctrine of equitable subrogation.

The mere fact that the trustee's attorney was from the same law firm as the trustee should not be the deciding factor in this case. The trustee owes a fiduciary duty to the bankruptcy estate and the duties of the trustee's attorney are essentially the same. Thus, I do not believe that plaintiff should be allowed to stand in the shoes of the trustee to bring a claim against the trustee's attorney with respect to the Beaty estate only. If plaintiff was pursuing a claim on behalf of the bankruptcy estate, then such an action might be permissible because the trustee's attorney does owe a duty to the entire bankruptcy estate. However, that is not the case here where plaintiff is pursuing a claim solely on behalf of the Beaty estate.

Accordingly, I conclude that the trial court did not err in granting summary disposition in defendants' favor of all the claims in plaintiff's complaint. I would affirm.

In re SCHNELL.

Docket No. 184509.

Court of Appeals of Michigan.

Submitted Oct. 3, 1995, at Lansing.

Decided Nov. 17, 1995, at 9:05 a.m.

Released for Publication Jan. 23, 1996.

Following notice of hearing for termination of parental rights in conjunction with adoption, father petitioned for custody of daughter. The Probate Court, Midland County, Donna T. Morris, J., terminated father's parental rights and father appealed. The Court of Appeals, Smolenski, J., held that father's payments of child support pursuant to court-ordered withholding of income constituted support of his daughter for purposes of statute determining manner in which parental rights may be terminated.

Reversed and remanded.

1. Infants ⇐155

Withholding of putative father's income for child support pursuant to court order constituted payment of "support" to father's daughter for purpose of statute which requires special procedure for terminating parental rights of putative father who "has provided support" to mother or child during 90 days before notice of termination of parental rights hearing. M.C.L.A. § 710.39(2).

See publication Words and Phrases for other judicial constructions and definitions.

2. Statutes ⇐181(1)

Primary goal of judicial interpretation of statutes is to ascertain and give effect to intent of legislature.

3. Statutes ⇐181(2), 184

Statutory language should be construed reasonably, keeping in mind purpose of act.

4. Constitutional Law ⇐70.1(2)

Nothing will be read into statute that is not within manifest intention of legislature as gathered from act itself.

Appointments

On order of the Court, pursuant to MCR 9.110,

CALMEZE H. DUDLEY, M.D., of West Bloomfield, is appointed as a lay member of the Attorney Discipline Board replacing Paul Dean Newman for the remainder of a term ending September 30, 1997.

On order of the Court, pursuant to MCR 8.108(G)(2)(a), the following appointment is made to the Court Reporting and Recording Board of Review: John J. Cipriani, attorney, is appointed to replace Andrea Andrews Larkin for the remainder of a term ending March 31, 1998.

***

Bankruptcy Court Orders

NOTICE TO THE UNITED STATES TRUSTEE, PANEL TRUSTEES AND BANKRUPTCY PRACTITIONERS

Pursuant to an administrative order entered on February 7, 1996, the United States District Court for the Eastern District of Michigan specially designated all bankruptcy judges of the district to conduct jury trials, with the express consent of all parties, if the right to a jury trial applies in any proceeding that may be heard by a bankruptcy judge. The designation applies to all bankruptcy cases filed on or after October 22, 1994, and shall remain in effect for two years from the date of the administrative order, unless extended by subsequent administrative order or local rules.

The Bankruptcy Court has adopted the following procedures governing the jury cases, pursuant to **Administrative Order 96-03;**

A. APPLICABILITY OF CERTAIN FEDERAL RULES OF CIVIL PROCEDURE.

Effective as to cases or proceedings filed after the date hereof, Rules 38, 39, 47-51 and 81(c) Fed. R. Civ. P. apply in such cases and proceedings, except that a demand made under Rule 38(b) Fed. R. Civ. P. shall be filed with the Bankruptcy Clerk. As to cases or proceedings previously filed, a demand for jury trial shall be filed by such time as the Court may fix in such case or proceeding.

B. CONSENT TO HAVE TRIAL CONDUCTED BY BANKRUPTCY JUDGE.

The parties may consent to have a jury trial conducted by a bankruptcy judge under 28 U.S.C. []157(e) by jointly or separately filing a statement of consent no later than the initial conference conducted pursuant to Rule 7016, Fed. R. Bankr. P., or such other time as the Court may fix in a particular case or proceeding.

Sheila M. Tighe, Clerk of Court
United States Bankruptcy Court

Miscellaneous Orders

Hobby v. Farmers Ins. Exchange. SC: 104688; COA: 164581; LC: 92-29324. Application for leave dismissed by stipulation.

Leave Denied

People v. Draheim. SC: 101910; COA: 136090; LC: 90-060849-FC.

People v. Premen. SC: 103952; COA: 152049; LC: 91-003744. The opinion of the Court of Appeals [reported at 210 Mich. App. 211 (1995)] shall have no precedential force or effect.

People v. Hess. SC: 104762; COA: 170778; LC: 93-009092

Michigan Court of Appeals

Criminal Law

Confrontation Right - Inadequate Translation

Where the complainant's interpreter did not translate every question and answer, defendant was denied his right to confront the witness against him.

Defendant appeals his first-degree criminal sexual conduct conviction, arguing that he was denied his right to confront the complainant due to inadequate interpretation of the complainant's testimony. The complainant, who was from Thailand, testified through an interpreter. Defendant claims the trial court should have granted his motion for a mistrial. We agree.

The interpreter did not translate each and every question and answer. Instead, the interpreter had a conversation with the complainant which was not literally translated. The interpreter also directly responded to

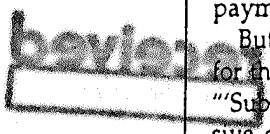
Chapter 11 Debtors Pay More to Trustees

Chapter 11 debtors will have to pay more money to the U.S. Trustees' Office under a bill that has been signed into law.

The new law extends the time during which a debtor is required to pay quarterly fees, which can range from $250 to $5,000 depending on the size of the estate.

Before the change, debtors had to pay until (1) the reorganization plan was confirmed or (2) the case was converted or dismissed. Now, debtors must pay until the judge enters a final decree in the case.

The magnitude of the change will vary from case to case, lawyers say. Bankruptcy judges generally enter a final decree when the reorganization plan is "substantially consummated," which in many courts is when the first payment is made under the plan.



But Martha Davis, general counsel for the U.S. Trustees' Office, notes that, "'Substantially consummated' is an elusive concept," and, "Courts differ on when they will enter a final decree."

In some cases, debtors could wind up paying fees for "several years" after their plan is confirmed, says Max Moses, executive director of the Commercial Law League of America.

The change will apply to all pending Chapter 11 cases. However, the Trustees' Office will only apply it beginning in the first quarter of 1996, so a debtor who had stopped paying under the old rules won't owe any back fees.

The change doesn't affect fees paid to private trustees.

The new law was a tiny provision in H.R. 2076, the "continuing resolution" that ended the latest government shutdown.

NAME AND ADDRESS AS IT CURRENTLY APPEARS ON THE MATRIX:

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CORRECTION OF NAME AND/OR ADDRESS:

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Please return to:
Rayman & Hamlin
Attn.: Jo Ella Heath
303 North Rose Street, Suite 440
Kalamazoo, MI 49007

ISSUE SUMMARY

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CHAPTER: _____

RELIEF SOUGHT: _____

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ISSUE: _____

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BENCH DECISION: _____

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REPORT SUBMITTED BY: _____

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