BANKRUPTCY LAW NEWSLETTER

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MICHIGAN FRAUDULENT TRANSFER ACT

By: R. Todd Redmond*

The Michigan Fraudulent Transfer Act renders certain conveyances fraudulent as to creditors. Through the Act, creditors are given an area of relief under Michigan state law that allows for additional scrutiny of transactions. Particularly if the transactions are between husband and wife.

It is well established that the courts will closely scrutinize transactions between a husband and wife when creditors are involved. Bentley v. Caille, 289 Mich. 74, 79, 286 N.W. 163 (1939); Linke v. Goodrich, 30 Mich.App. 228, 230, 186 N.W.2d 5 (1971). This is especially true if the transfer results in property that will now be held as entireties property. Entireties property is subject to the general rule that such property 'cannot be sold upon execution on a judgment rendered against either the husband or wife, because neither has any separate interest in such an estate'. Sanford v. Bertrau, 204 Mich. 244, 249, 169 N.W. 880, 882 (1918). This general rule is not without exception. Where the debtor places funds or property in an entireties estate while insolvent or the transfer would render the debtor insolvent, he or she has committed a fraud upon his or her creditors and the property may be attached and sold to satisfy liens filed against the property. M.C.L.A. Sec. 566.14; M.S.A. Sec. 26.884; McCaslin v. Schouten, 294 Mich. 180, 292 N.W. 696 (1940); Dunn v. Minnema, 323 Mich. 687, 36 N.W.2d 182 (1949); Glazer v. Beer, 343 Mich. 495, 72 N.W.2d 141 (1955).

M.C.L.A. §566.14, 15, 16, and 17 and the similar provisions of the Uniform Fraudulent Conveyances Act (UFCA) § 4, 5, 6, and 7 render fraudulent certain

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conveyances, as follows:

Sec. 14. Every conveyance made and every obligation incurred by a person who is or will be thereby rendered insolvent is fraudulent as to creditors without regard to his actual intent if the conveyance is made or the obligation is incurred without a fair consideration.

Sec. 15. Every conveyance made without fair consideration when the person making it is engaged or is about to engage in a business or transaction for which the property remaining in his hands after the conveyance is an unreasonably small capital, is fraudulent as to creditors and as to other persons who become creditors during the continuance of such business or transaction without regard to his actual intent.

Sec. 16. Every conveyance made and every obligation incurred without fair consideration when the person making the conveyance or entering into the obligation intends or believes that he will incur debts beyond his ability to pay as they mature, is fraudulent as to both present and future creditors.

Sec. 17. Every conveyance made and every obligation incurred with actual intent, as distinguished from intent presumed in law, to hinder, delay, or defraud either present or future creditors, is fraudulent as to both present and future creditors.

I note at the outset that under M.C.L.A. 566 §14, 15, and 16, a creditor is required as to the allegedly fraudulent conveyances - to prove that a debtor either was rendered insolvent (Sec. 14), was left with unreasonably small capital (Sec.15), or intended to incur debts beyond its ability to pay as they mature (Sec. 16). The actual intent of one who transfers assets to others without fair consideration is unimportant where it leaves the transferor insolvent. Farrell v. Paulus, 309 Mich. 441, 15 N.W.2d 700 (1944); M.C.L.A. Sec. 566.14; M.S.A. Sec. 26.884.

However, under M.C.L.A. §566.17, a creditor need not show that the debtor is "insolvent", instead they must show that the debtor is a person under the act; that they made a conveyance; that they did so with actual intent to hinder, delay, or defraud creditors; and that the plaintiff is a creditor under the act. M.C.L.A. §566.17; M.S.A. §26.887; Kelley v. Thomas Solvent Co., 725 F.Supp. 1446, 1452 (W.D.Mich.1988).

A creditor, under M.C.L.A. §566.17 must show actual intent to defraud. However, actual intent to defraud may be inferred from certain "badges" of fraud. Kelley, supra at 1456. As the Michigan Court of Appeals noted in Coleman-Nichols v. Tixon Corp., 513 N.W.2d 441, 203 Mich.App. 645 (1994) "[t]hese badges of fraud are not conclusive evidence, but may be strong or weak depending upon their nature and number occurring in the same case. Kelley, supra at 1456. Often recognized badges of fraud include: lack of consideration for the conveyance; a close relationship between transferor and transferee; pendency or threat of litigation; financial difficulties of the transferor; and retention of the possession, control, or benefit of the property by the transferor. " Id. at 1457.

A review of the sections of the fraudulent transfer act requires a creditor to affirmatively prove the conveyance was made with the specific intent to defraud, M.C.L.A. §566.17; M.S.A. §26.887, M.C.L.A. §566.101; M.S.A. §26.901, and M.C.L.A. §566.221; M.S.A. §26.971, or that the conveyance was made without adequate consideration, M.C.L.A. §566.14; M.S.A. §26.884, M.C.L.A. §566.15; M.S.A. §26.885,

and M.C.L.A. §566.16; M.S.A. §26.886.

The Court recognized, in Regan v. Carrigan, 194 Mich.App. 35, 38-39, 486 N.W.2d 57 (1992), that actual intent to defraud can be inferred from certain badges of fraud, stating as follows:

A grantee who receives property or money without giving fair consideration to the fraudulent grantor is subject to having the conveyance set aside and also subject to any other remedies normally available to the creditor.... The courts will closely scrutinize transactions between a husband and wife when creditors are involved. Id. at 39.

A plaintiff may present evidence of any number of badges of fraud to support an inference of actual intent to defraud. For example in Coleman-Nichols, Supra., plaintiff produced evidence of an unsecured loan of approximately $130,000 from Tixon to William Herbert. Further, it was shown that Tixon had paid William Herbert's attorneys' fees in a criminal case involving charges of fraud, apparently without consideration. Moreover, an audit of Tixon by an independent accounting firm in 1988 revealed "weaknesses" in documenting business expenses, whereby extravagant personal expenses were paid by the company. On the basis of the foregoing, plaintiff presented sufficient evidence to the Court to create a question of fact regarding defendants' intent to defraud creditors under M.C.L.A. §566.17.

The next inquiry under M.C.L.A. §566.17, then, is whether plaintiff was a "creditor" under the act. M.C.L.A. §566.11; M.S.A. §26.881 defines a "creditor" as "a person having any claim, whether matured or unmatured, liquidated or unliquidated, absolute, fixed or contingent." Shue & Voeks, Inc. v. Amenity Design & Mfg., Inc., 511 N.W.2d 700, 203 Mich.App. 124 (1993). M.C.L.A. §566.20; M.S.A. §26.890 grants a "creditor whose claim has not matured" a list of specific remedies. The rights of creditors whose claims have not matured include the right to have a Court:

(a) Restrain the defendant from disposing of his property,

(b) Appoint a receiver to take charge of the property,

(c) Set aside the conveyance or annul the obligation, or

(d) Make any order which the circumstances of the case may require. M.C.L.A. §566.20; MSA §26.890.

The Court in Churchill v. Palmer, 57 Mich.App. 210, 214, 226 N.W.2d 60 (1974), adds to the definition of a creditor under Sec. 17, noting that "[o]ne with a tort claim is a creditor from the date of the tort; any liabilities are considered as existing from the date the cause of action arose." Ashbaugh v. Sauer, 268 Mich. 467, 472, 256 N.W. 486, 487 (1934); Iden v. Huber, 259 Mich. 3, 242 N.W. 818 (1932). According to the rule set forth in Churchill, supra at 215, 226 N.W.2d 60, an action can be brought under the Section "prior to the rendering of a judgment in a preceding action."

A grantee need not personally participate in a fraudulent conveyance in order to be liable to a defrauded creditor. Regan v. Carrigan, 486 N.W.2d 57, 194 Mich.App. 35 (1992). Spencer v. Miller, 279 Mich. 194, 200, 271 N.W. 731 (1937). A grantee who receives property or money without giving fair consideration to the fraudulent grantor is subject to having the conveyance set aside and also subject to any other remedies normally available to the creditor. Kelley v. Thomas Solvent Co., 722 F.Supp. 1492, 1499 (W.D.Mich.1989). Furthermore, where a grantee has knowingly participated in a fraudulent conveyance, a defrauded creditor may have recourse directly against the grantee to the extent of the value of the property

conveyed. M.C.L.A. §566.19(1); M.S.A. §26.889(1), and M.C.L.A. §566.21; M.S.A. §26.891.

Transactions between husband and wife are often very difficult to assess since gifts or the satisfaction of moral obligations do not constitute equivalent value. M.C.L.A. §566.13; M.S.A. §26.883. Fraudulent intent may be inferred where a conveyance renders the grantor insolvent. Cross v. Wagenmaker, 329 Mich. 100, 104, 44 N.W.2d 888 (1950).

It is the mere fact that funds which are available to creditors are put beyond their reach, which affords the basis for relief, without any particular reference to the origin of those funds. For example look to the case of Dunn v. Minnema, supra, which was based partly upon the case of First State Bank of Millford v. Wallace, 201 Mich. 673, 679, 167 N.W. 887, 889, where the debtor, traded entireties farm property for other property in Ann Arbor which he and his wife took as tenants by the entireties. As part of the trade he had to pay an additional $4,100 which he borrowed from a third party. The court said:

"It may be argued that no part of the $4,100 cash payment was furnished by Mr. Wallace, but that it was loaned by a third party, which reduced defendant's actual equity in the property to just the value of the farm property, and that this debt was to be paid out of the income of the Ann Arbor property, which, under an extension of the doctrine of Dickey v. Converse, 117 Mich. 449, 76 N.W. 80, might be said to partake of the nature of the realty; hence that no separate personal property of Mr. Wallace would ever be invested in the land. But the fact remains that, by means of this deal, $4,100, of which Mr. Wallace presumptively would contribute one-half, will be invested in an estate by the entireties, out of the reach of Mr. Wallace's creditors. * * * Before increasing the amount of his investment in execution proof property, it is defendant's duty to pay his debts."

The Michigan Supreme Court has consistently held that during insolvency entireties estates cannot be created or enhanced at the expense of creditors and that relief may be granted without reference to any actual fraudulent intent. Dunn v. Minnema, 323 Mich. 687, 36 N.W.2d 182, 7 A.L.R.2d 1099; McCaslin v. Schouten, 294 Mich. 180, 292 N.W. 696; La Bour v. Bergin, 334 Mich. 437, 54 N.W.2d 710.

CONCLUSION

Where a transaction between husband and wife places property beyond the reach of their creditors the Michigan Fraudulent Transfers Act may afford relief. Debtors and creditors should be aware of the potential pitfalls that may arise.

GO AHEAD AND CASH THAT PAYROLL CHECK

By: Michael M. Malinowski**

Your client, Louie's Party Store, frequently cashes paychecks for its customers. One Friday afternoon about six months ago Louie cashed a $500.00 payroll check for Linda Smith, drawn by her employer Steelpaste, a local manufacturer of industrial adhesives. That same day Steelpaste had filed a Chapter 11 petition, and its bank did not honor Linda's check.

Steelpaste could not extricate itself from its sticky financial situation and converted to Chapter 7. Louie comes to you for help. You find out that there is some money in the Steelpaste estate, and it looks like priority claims will get paid. "No problem," you tell Louie. You'll file a proof of claim based on Linda's payroll check. After all, she earned those wages during the 90 days prior to Steelpaste's filing, so her wage claim should get priority status under §507(a)(3), and we are well under the $2,000.00 per person wage priority cap. You file the claim for Louie, and a little while later the Chapter 7 Trustee calls.

This is a problem. The Trustee cites §507(d), which says in part that:

> "an entity [Louie] that is subrogated to the rights of a holder of a claim specified in subsection (a)(3) [Linda Smith]...is not subrogated to the right of the holder of such claim to priority under such subsection."

In short, while Louie stands in Linda's shoes as to her right to be paid the $500.00, he doesn't get her priority status. He holds a general unsecured claim which, for practical purposes, is worthless.

Doe you have to call Louie and tell him you were wrong? Will he stop cashing payroll checks, or will he start charging a fee to do so? Has Steelpaste put you in a sticky situation? No. No problem. Despite the apparent clarity of §507(d)'s effect in this case, Louie does have Linda's priority status. He is an assignee of her bundle of rights, including her priority status, rather than a subrogee.

"Gee, this is great," you think, "but how can this be?" It depends on what Congress meant by "subrogated" in §507(d). Those few reported cases that deal with this payroll check issue conclude that Louie is not a subrogee and is therefore not impacted by §507(d).

I. GRANTING LOUIE LINDA'S WAGE PRIORITY STATUS IS GOOD POLICY

Consider what follows from denying Louie priority status. Linda and all her co-workers have more difficulty liquidating their claims. Louie does not want to cash their payroll check anymore, or he charges a fee. Linda, as the endorser of her payroll check over to Louie, will be personally liable to Louie for the $500.00, but by the time Louie comes after her she will have spent the money on frivolities such as food, clothing and shelter, and she is now out of work. The

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burden of Steelpaste's Bankruptcy will fall much more heavily upon Linda and her fellow workers, whether by increased check cashing fees, difficulty in cashing checks at retailers, or personal liability for the amounts of the bounced endorsed payroll checks. For these reasons pre-Bankruptcy Code courts accorded the same priority to claims based on assignments of paychecks as to claims of the wage earners themselves. Without a few indication of Congressional intent to change such a sound practice, the later courts which have considered this issue under the Code have not changed this policy.

II. JUDGE AUGUSTUS HAND DID IT

The best pre-Code example of this policy in action came from Judge Augustus Hand, in In re Stultz Brothers, 226 F. 989 (S.D.N.Y. 1915). He held that a person who cashed paychecks from the employees of the Bankruptcy was not subrogated to their claims, but was rather an assignee, and was therefore entitled to assert the employees' wage priority. Judge Hand began by observing that earlier courts had ruled that taking a note does not discharge an original debt which has any privileges, and either the original debt or the note might be proved. He saw no distinction between a note and a check except in form. The person who cashed the checks in effect purchased them, and became the assignee of the employees' original claims. He concluded by noting that the Supreme Court had already held that an assignee of a wage claim stands in the shoes of the assignor and is entitled to all wage preference rights.

III. LATER COURTS HAVE FOLLOWED JUDGE HAND

The Bankruptcy Court in In re Missionary Baptist Foundation of America, Inc., 12 BR 570 (Bankr.N.D.Tex. 1981), accorded priority status to the grocery store which had cashed payroll checks which did not clear the Debtor's bank. The MBFA Court, confronted with the trustee's counter-argument based on §507(d) and subrogation, gave the question some fresh consideration. The Court noted that "subrogation" was not defined in §507(d) or elsewhere in the Bankruptcy Code, but found guidance in other uses of the word elsewhere in the Code.

§509(a) provides that an:

> "entity that is liable with the Debtor on, or that has secured, a claim of a creditor, and that pays such claim, is subrogated to the rights of such creditor to the extent of such payment."

§502(3)(1)(C) disallows claims for reimbursement or contribution of such entities to the extent they have requested subrogation under §509. The MBFA court figured that "subrogation" out to refer to the same idea in different parts of the Code, unless it is clear that a different meaning was intended in §507(d). Subrogation had a restrictive meaning in §509(a) and §502(e)(1)(C), and so should be similarly restrictive in §507(d). Since the grocery store that had cashed the paychecks was not a co-debtor, nor had it secured a creditor's claim, it was not "subrogated" to the employee's claims within the meaning of §507(d).

Judge Hand provided retrospective support for the MBFA decision. The Court reasoned that Congress was presumed to be aware of the construction of the priority provisions of the Act when it enacted the Code, and absent an explicit change, courts working with the Code should follow the construction under the Act, and grant priority to people that cash payroll checks.

The Fifth Circuit affirmed MBFA, at

667 F.2d 1244 (5th Cir. 1982), relying primarily upon Congressional inaction in light of Judge Hand's decision in Stultz Brothers, backed up by the policy reasons noted above.

More recently another Bankruptcy Court confronted with this fact pattern reached the same conclusion, but by a different route, and its analysis muddied the waters. In In re A.D.S.T., Inc., 169 BR 64 (Bankr. Idaho 1994) the Court observed that in order to avoid the effect of §507(d) the check-casher need not show that it was an assignee, but only that it was not a subrogee. This court was not convinced by the statutory analysis of §509(a), §502(e)(1)(C) and §507(d), and it did not mention the Stultz decisions. Instead, the Court looked to Idaho state law for a definition of the subrogation, and it found four necessary elements:

> (1) The payment must be made pursuant to an obligation to do so, or to protect the payor's own interest, rather than as a volunteer; (2) the payor must not be primarily liable for the debt; (3) the whole debt must be paid; and (4) the subrogation must not work an injustice upon anyone else.

Since the store which had cashed the Debtor's employees' payroll checks had not been under any obligation to do so, it had acted as a volunteer, and so it was not a subrogee.

While it is likely that the first of the four elements above also applied under Michigan law, the Stultz - MBFA analysis seems the better reasoned approach, and it has the added benefit of a more uniform, federal law approach over a patchwork of state law analyses.

It does not appear that any Courts in our District or Circuit have written on this issue. When it came up recently in a case before Judge Stevenson the Chapter 7 trustee acquiesced in favor of the check casher's priority status. While the Court did not make an explicit ruling on the issue, she did say she admired the brief, so it would appear that payroll check cashiers can step into wager earner's shoes as to their §507(a)(3) priority status, as assignees, not subrogees, of the employees' claims.

Louie has a §507(a)(3) priority claim against Steelpaste's estate. He can keep cashing Linda's paychecks without fear of getting stuck holding Steelpaste's empty bag.

RECENT BANKRUPTCY COURT DECISIONS

The Western District cases are summarized by Vicki S. Young. There were no Eastern District decisions nor any Sixth Circuit and Supreme Court decisions.

In Re: Holly's, Inc., 91-84931 (Bankr. WD Mich 12/29/95). Judge Gregg granted the Debtor's motion for an order setting aside the State of Michigan's tax lien. The State filed priority and secured claims in the Debtor's Bankruptcy case. The Debtor's Plan, confirmed by the Court, contained a provision which vested title to all of the Debtor's property in the Debtor on the effective date of the Plan, free and clear of all claims and interest. Following the confirmation, the State and the Debtor entered into a stipulation

which provided that the State's claims shall be treated as "unsecured." That stipulation was approved by the Court. Thereafter, the Debtor's secured creditor was unable to obtain title insurance insuring the priority of its mortgage on Debtor's property because of the State's outstanding tax lien. The Debtor moved for an order setting aside the tax in order to enable its secured creditor to procure the title insurance to implement its confirmed plan.

The issue presented by the Debtor's motion was whether the State retained a valid and enforceable post confirmation tax lien on the reorganized Debtor's property. The Debtor argued that the lien was not specifically provided for in the Debtor's confirmed plan, and therefore, the lien was extinguished when the Plan was confirmed by the Court. Further, the Debtor argued that the State voluntarily relinquished its lien when it entered into a post confirmation stipulation which specified that the State's claim would be "unsecured". The State argued that the confirmed Plan contemplated the continuation of the pre-petition tax liens against the Debtor's property. The State also argued that in the Stipulation the State was simply agreeing to a reclassification of its rights in the Bankruptcy case, but that the State did not agree to relinquish its rights to enforce its tax liens after confirmation.

The Court held that the State's claims did not clearly fit within any of the classification of claim under the Plan, nor did the Plan specifically address the State's tax liens against the Debtor's property. Therefore, the Plan in itself was ambiguous with respect to the treatment of the State's claims and its tax lien. However, the Court held that the subsequent stipulation between the Debtor and the State clarified the status of the State's tax liens. The stipulation specifically provided that the State's claims would be treated as unsecured claims, and therefore, the State waived any liens it may have held to secure its pre-petition tax claims. The Court held that the ambiguous Plan provisions were clarified by the parties in the subsequent unambiguous stipulation and Court Order.

* * * * *

In Re Mann, 95-83446 (Bankr. WD Mich 12/20/95). Judge Stevenson overruled the Chapter 7 Trustee's objection to the Debtor's claimed exemption of her interest in certain real property pursuant to 11 U.S.C. §522(d)(5). Pre-petition, the Debtor and her husband sold a parcel of real property on a land contract. The land contract specifically provided below the Debtor's signature "I GIVE UP ALL RIGHTS TO SAID PROPERTY." All payments under the land contract were to be made to the Debtor's husband who is now estranged. On the Debtor's Bankruptcy schedules, she listed the real property sold on land contract, with her interest in the same valued at $7,500.00. The Debtor also stated that she claimed no interest in the real property or the proceeds to the land contract. However, the Debtor exempted her $7,500.00 interest in the property pursuant to 11 U.S.C. §522(d)(5). The trustee objected to the exemption.

At the hearing in this matter, the trustee admitted that he intended to challenge the propriety of the Debtor's transfer of the real property to her husband and that procedurally, it was unusual to first challenge the Debtor's exemption. However, the trustee argued that he filed the objection to the exemption in order to preserve his right to object to the exemption at a later date. The Court held that because the trustee had timely filed his objection to the exemption, the objection would be preserved.

The Debtor argued that the land contract payments made pre-petition to her husband were avoidable insider transfers.

Further, the Debtor argued that she had not relinquished her interest in the real property because the language in the land contract which provided for such relinquishment was below her signature and therefore, did not satisfy the statute of frauds. Finally, the Debtor argued that although she transferred her right to receive the proceeds under the land contract, she retained her one-half interest in the legal title to the property. For each of these reasons, the Debtor argued that her husband had no interest in her one-half share of the land contract payments, and the Debtor should be permitted to exempt any funds recovered by the estate pursuant to 11 U.S.C. §522(d)95). In opposition, the trustee argued that because the Debtor claimed no interest in the real property, she could not claim an exemption in the same. Further, the trustee argued that the Debtor, by her behavior and statements, "ratified" the transfer of her interest in the real property to her husband, waiving her right to claim an exemption in the same.

The Court held that the trustee failed to carry his burden to prove that the Debtor had improperly claimed an exemption. The Court noted that the Debtor's exemption rights are determined as of the date of the Bankruptcy filing, citing Lasich v Wickstron, 113 BR 339 (Bankr. WD Mich 1990). However, the Court also held that in the exemption context, it is the fact of the property ownership on the day the petition filed, not the Debtor's intent, which controls. Furthermore, the Court noted that the Debtor claimed an interest in the real property as of the date of filing, notwithstanding the land contract language and her prior statements. Therefore, the Court held that the trustee failed to adequately address the ownership issues concerning the real property. The Court noted that if the Debtor had no interest in the property at the time she filed her Bankruptcy, then necessarily she cannot claim an exemption. However, if the Debtor had an interest in the property at the time she filed, depending on the legal effects of her subsequent behavior, the Debtor may or may not be entitled to exempt her interest under 11 U.S.C. §522(d)(5).

* * * * *

Enclosed from Larry A. VerMerris is a copy of the Michigan Court of Appeals' decision in In Re Industrial Machinery and Equipment Company v Lapeer County Bank & Trust Company, 540 NW2d 781 (Mich CA 1995). It deals with the issues of perfection which Bankruptcy practioneers find helpful. This case is apparently one of first impression in the State of Michigan in regard to the filing of financing statements under a trade name.

STEERING COMMITTEE MINUTES

A meeting of the Steering Committee Minutes took place on Friday, January 19, 1996 at the Peninsular Club in Grand Rapids. The meeting was chaired by Bob Wright. The following members were either present or had previous commitments and had notified the Committee that they would be unable to attend: Steve Rayman, Tom Sarb, Brett Rodgers, Mike Donovan (for John Grant), Bob Wright (chair), Tom Schouten, Tim Hillegonds, Peter Teholiz, Janet Thomas and Rob Wardrop. The whereabouts of the other

Committee members was unknown. The following matters were discussed:

1. Brett Rodgers gave a detailed report regarding the seminar scheduled for Boyle Highlands. All topics and panel moderators have been picked. As previously stated, the general format will be East Meets West with Judges from both the Eastern District and Western District planning to attend the seminar. About 140 rooms have been reserved, ranging in price from $112.00 to the fanciest of the suites at $173.00. All moderators are to make final plans regarding their panels and report back to Brett, Pat Mears or Jim Gregg by February 15, 1996.

2. Bob Wright discussed the possibility of having an elementary Bankruptcy seminar. There was concern about "overtaxing" possible panel members (if you can believe that) because of the fact that some people might be asked to speak twice (at the elementary Bankruptcy seminar and at our main seminar). Many Committee members were worried about this. Bob solved the problem by asking Brett for a list of all of the members who were scheduled to speak at the summer seminar. He will ask other members of our section (who are not scheduled to speak) to work on the introductory seminar. Since no one was picked to head it up, anyone interest in working on it should probably contact Bob Wright.

There was no February meeting. The next meeting will be held on March 15, 1996 at noon at the Peninsular Club in Grand Rapids.

EDITOR'S NOTEBOOK

We have been receiving numerous complaints that some of you are not receiving the Newsletter every month. We are updating the matrix to hopefully solve this problem. Enclosed is a form to fill out and send back to my office if there are any changes with either your name or address. Thank you for all of your assistance in this matter.

LOCAL BANKRUPTCY NOTICE

Enclosed from Mark VanAllsburg is a memo regarding credit card payments and Traverse City Courtroom. Also enclosed is the Court Motion Calendar for March and April.

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

Bankruptcy Chapter	January of 1996	January of 1995	January of 1994
Chapter 7	410	311	278
Chapter 11	9	7	6
Chapter 12	1	4	0
Chapter 13	191	102	110
Totals	611	424	394

STEERING COMMITTEE MEMBERS

Dan Casamatta	(616) 456-2002
John Grant	(616) 732-5000
Tim Hillegonds	(616) 752-2132
Mary Hamlin, Editor	(616) 345-5156
Jeff Hughes	(616) 336-6000
Pat Mears	(616) 776-7550
Hal Nelson	(616) 459-9487
Steven Rayman, Chair-elect	(616) 345-5156
Brett Rodgers	(616) 732-9000
Tom Sarb	(616) 459-8311
Bob Sawdey	(616) 774-8121
Tom Schouten	(616) 538-6380
Peter Teholiz	(517) 886-7176
Janet Thomas	(616) 726-4823
Rob Wardrop	(616) 459-1225
Bob Wright, Chair	(616) 454-8656

FROM THE COURT:

Credit Card Payments. The Bankruptcy Court is now able to accept credit card payment for filing fees, copies and other services. You may now use your VISA© or MASTERCARD© to pay for filing fees or court costs. This will avoid the necessity of pre-paying fees for those attorneys who do not have a credit account with the court and will make payment of monthly charges more convenient for those attorneys who do maintain such accounts.

You have several payment options: First, you may file an authorization which will permit the bankruptcy court to charge fees and court costs against a specified credit card. This will permit the court to charge the account based on a written request from an employee of the firm. Second, you can send a written request to charge specific fees or services to a credit card using a court authorization form for that request. Third, you may appear at the court and pay in person using the card. In this instance, only the person whose name appears on the card will be able to use it.

Attroneys wishing to start using a credit card for payments to the court should request the forms from the court by calling 456-2693. Ask for the credit card package.

Traverse City Courtroom. The bankruptcy court is in the process of designing and building a courtroom in Traverse City. This new facility will be located at Logan's Landing West on N. Airport Road in the building now occupied by the Internal Revenue Service. We anticipate construction to begin within the next 60 days and we hope to start using the courtroom by early summer.

Court Motion Calendar for March and April:

	Monday	Tuesday	Wednesday	Thursday	Friday
					1 HK
MARCH	4	5 SG	6	7	8 HL
	11 SK	12 HG	13	14	15 HK
	18	19 GG	20 HM	21 ST GK HM	22 ST HM
	25	26 GL HG	27	28 GT	29 GT HK
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			

This calendar is subject to change at any time.

INDUSTRIAL MACHINERY & EQUIPMENT COMPANY, INC., Plaintiff-Appellee/Cross-Appellant,

v.

LAPEER COUNTY BANK & TRUST COMPANY, Defendant-Appellant/Cross-Appellee.

Docket No. 153410.

Court of Appeals of Michigan.

Submitted May 10, 1995, at Lansing.

Decided Oct. 6, 1995, at 9:00 a.m.

Released for Publication Dec. 18, 1995.

Creditor brought action for claim delivery and conversion in the Circuit Court, Lapeer County, and filed motion for summary judgment. The Circuit Court, Martin E. Clements, J., granted plaintiff's motion in part, and both sides appealed. The Court of Appeals held that: (1) filing of financing statement in debtor's trade rather than its legal name was not sufficient to perfect plaintiff's security interest, and (2) plaintiff's perfected purchase money interest lapsed upon plaintiff's failure to file timely continuation statement.

Affirmed in part, reversed in part and remanded.

1. Appeal and Error ⇐893(1)

Court of Appeals reviews trial court's grant of summary disposition de novo.

2. Secured Transactions ⇐92.1

Filing of financing statement in debtor's trade rather than in its legal name was not sufficient to perfect creditor's security interest, given dissimilarity between the two names (i.e. "Koehler Machine, Inc." and "KMI, Inc.").

3. Secured Transactions ⇐92.1

Creditor's error in financing statement, in identifying debtor by its trade rather than its legal name, had to be regarded as "seriously misleading," though trade name was formed by using first letters from debtor's legal name; accordingly, financing statement was not effective, pursuant to Michigan statute providing for effectiveness of financing statement which contains minor errors that are not seriously misleading. M.C.L.A. § 440.9402(8).

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

4. Secured Transactions ⇐98, 146

To maintain perfection of its purchase money security interest, creditor had to timely file a continuation statement; purchase money interest lost its priority vis-a-vis other perfected security interest once perfection lapsed due to lack of continuation statement. M.C.L.A. §§ 440.9301(1), 440.9403(2).

O'Reilly, Rancilio, Nitz, Andrews & Turnbull, P.C. by Bert T. Ross and Richard M. Mitchell, Sterling Heights, for plaintiff.

Taylor, Carter, Butterfield, Riseman, Clark & Howell, P.C. by Steven Jarvis, Lapeer, for defendant.

Before HOEKSTRA, P.J., and WAHLS, and BUTH,* JJ.

PER CURIAM.

Defendant appeals as of right an order of the Lapeer Circuit Court granting plaintiff's motion for summary disposition pursuant to MCR 2.116(C)(10), declaring plaintiff's security interest in a Mori Seiki CNC machining center (MV-JR) to be superior to defendant's interest, and awarding plaintiff the proceeds from the sale of MV-JR. Plaintiff cross appeals an earlier order granting defendant's motion for summary disposition, declaring defendant's security interest in another machining center (MH-40) to be superior, and awarding defendant the proceeds from the sale of that machine. We affirm in part, reverse in part, and remand.

* George S. Buth, 17th Judicial Circuit Judge, sitting on Court of Appeals by assignment pursuant

This case arises out of a priority battle between two secured creditors regarding the disposition of two machining centers purchased by Koehler Machine, Inc. (debtor) before it went out of business. Defendant's security interest resulted from the making of several loans to the debtor, while plaintiff's purchase money security interest arose from financing the sale of the machinery to the debtor. However, plaintiff did not fully comply with the filing and continuation requirements of the Uniform Commercial Code (UCC). Specifically, plaintiff's filing statement covering MV-JR identified the debtor by its trade name "KMI, Inc." rather than its legal name "Koehler Machine, Inc.," and no continuation statement covering MH-40 was ever filed. The trial court, following cross-motions for summary disposition, awarded MV-JR to plaintiff and MH-40 to defendant.

[1] The party moving for summary disposition pursuant to MCR 2.116(C)(10) is entitled to judgment as a matter of law only if there is no genuine issue of any material fact. *Bourne v. Farmers Ins. Exchange*, 449 Mich. 193, 197, 534 N.W.2d 491 (1995). We review a trial court's grant of summary disposition de novo. *Michigan Mutual Ins Co. v. Dowell*, 204 Mich.App. 81, 85–86, 514 N.W.2d 185 (1994). Here, we conclude that the trial court's grant of summary disposition to defendant regarding MH–40 was appropriate, but that the trial court should not have granted plaintiff's motion for summary disposition regarding MV–JR. Rather, the trial court should have granted defendant's motion for summary disposition regarding MV–JR, because defendant had a superior security interest in that machine also.

to Const. 1963, Art. 6, Sec. 23, as amended 1968.

[2] Turning first to MV–JR, the trial court determined that plaintiff's financing statement, which contained only the debtor's trade name and not its legal name, was sufficient to perfect plaintiff's interest in the machining center. We disagree. This Court has previously recognized that the debtor's name is an important item in the financing statement and in the filing system. *Continental Oil Co. v. Citizens Trust & Savings Bank*, 57 Mich.App. 1, 225 N.W.2d 209 (1974), aff'd 397 Mich. 203, 244 N.W.2d 243 (1976). Although other jurisdictions have addressed this exact issue, this appears to be an issue of first impression in Michigan. We choose to follow the majority of other jurisdictions that have considered this issue and hold that plaintiff's filing under the debtor's trade name was insufficient. See *In re Wardcorp, Inc.*, 133 Bankr. 210, 216 (S.D.Ind. 1990). See also *In re Seventeen South Garment Co., Inc.*, 145 Bankr. 511 (E.D.N.C., 1992); *In re Pretzer*, 100 Bankr. 879 (N.D.Ohio, 1989); *Pearson v. Salina Coffee House, Inc.*, 831 F.2d 1531 (C.A.10, 1987); *Greg Restaurant Equipment & Supplies, Inc. v. Valway*, 144 Vt. 59, 472 A.2d 1241 (1984); anno: *Sufficiency of designation of debtor or secured party in security agreement or financing statement under UCC § 9–402*, 99 A.L.R.3d 478.

M.C.L. § 440.9402(7); M.S.A. § 19.9402(7) provides, in pertinent part:

> A financing statement sufficiently shows the name of the debtor if it includes the individual, partnership, or corporate name of the debtor, whether or not it adds other trade names or the names of partners.

The Uniform Commercial Code Comment to this section lists the purpose of this subsection as follows:

> Subsection (7) undertakes to deal with some of the problems as to who is the debtor. In the case of individuals, it contemplates filing only in the individual name, not in a trade name. In the case of partnerships it contemplates filing in the partnership name, not in the names of any of the partners, and not in any other trade names. Trade names are deemed to be too uncertain and too likely not to be known to the secured party or persons searching the record, to form the basis for a filing system....

[3] Although M.C.L. § 440.9402(8); M.S.A. § 19.9402(8) provides for the effectiveness of a financing statement that contains minor errors that are not seriously misleading, that provision cannot save the instant filing because the misstatement of the debtor's name was a major defect that was seriously misleading given the dissimilarity between the two names. A person searching the filings for "Koehler Machine, Inc.," the debtor's legal name, would not have discovered a filing under "KMI, Inc.," a trade name apparently used interchangeably with, and not in place of, the legal name. Cf. *In re Glasco, Inc.*, 642 F.2d 793 (C.A.5, 1981). We believe that the trial court should have granted defendant's motion, not plaintiff's motion, for summary disposition regarding MV–JR.

[4] With regard to MH–40, we conclude that the trial court's grant of summary disposition in defendant's favor was proper where plaintiff's perfected purchase money security interest lapsed when plaintiff failed to file a continuation statement as required by M.C.L. § 440.9403(2); M.S.A. § 19.9403(2). Defendant's perfected security interest took priority when plaintiff's lapsed. M.C.L. § 440.9301(1); M.S.A. § 19.9301(1). Plaintiff provides no authority for its position that once it had properly perfected its purchase money security interest it did not have to file continuation statements as required by M.C.L. § 440.9403(2); M.S.A. § 19.9403(2), and at least one other jurisdiction has held otherwise. See *In re Williams*, 82 Bankr. 430 (N.D.Miss., 1988). Additionally, unlike plaintiff's interpretation of the UCC, our interpretation supports the harmoniousness and consistency of the enactment as a whole. *Weems v. Chrysler Corp.*, 448 Mich. 679, 700, 533 N.W.2d 287 (1995). We conclude that the trial court's grant of summary disposition with respect to MH–40 was proper.

Affirmed in part, reversed in part, and remanded for entry of judgment in favor of defendant. We do not retain jurisdiction.

ISSUE SUMMARY

NAME OF CASE: _____

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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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