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CLASSIFYING ENVIRONMENTAL CLAIMS IN BANKRUPTCY

By: Joseph E. Quandt*

In the 18 years after the enactment of the Bankruptcy Reform Act of 1978, there have been numerous bankruptcy cases in which conflicts have arisen regarding environmental contamination claims. Oddly enough, Courts have not come to any consistent position or rationale as to how environmental claims should be classified, or in some cases, if environmental claims are claims at all within the scope of the bankruptcy code. At loggerheads in this public policy debate is a fundamental disagreement as to whether or not the underlying policy considerations of the debtor's right to a fresh start overrides the public's interest in a clean environment.

In order to analyze the role of environmental contamination liability in bankruptcy, it is first necessary to give a cursory examination of a common statute under which most contamination liabilities arise. The Comprehensive Environmental Response Compensation and Liability Act (CERCLA) was enacted in the waning hours of the 96th Congress. (H.R. Rep. No. 1016, 96th Congress, Second Session, at 17-18). CERCLA establishes a scheme of joint and several, strict and retroactive liability to allocate among private parties, costs of response actions necessary to remove or remediate contaminants from the environment.

> "§107 of CERCLA provides for the liability of private persons for State and Federal clean-up costs. The fund is to be reimbursed from the private parties responsible for the damage. Indeed, CERCLA requires the federal government to encourage

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> private parties who may be responsible for poor hazardous waste facilities to undertake voluntary clean-up efforts before the Federal and State agency's move in"[2]

CERCLA established a "superfund" which would be funded by taxes on the chemical and petroleum industries. This fund would be supplemented by amounts recovered from responsible parties for contaminated sites where superfund monies were spent. The three (3) most important provisions of CERCLA from an empowerment and liability aspect are Sections 42 U.S.C.:

> * 9601 which empowers the EPA to perform removal or remedial actions at a contaminated site;
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> * 9604 which grants the EPA injunctive power to order abatements and removals to be performed by potentially responsible parties ("PRPs")[3] In addition, a PRP may also be liable for treble damages and/or natural resource damage claims[4]; and,
>
> *9607 which sets up a broad based liability scheme in which PRPs can be liable for clean-up costs, jointly and severally, and often retroactively to the date of the release of hazardous substances.

Under this section, PRPs can be liable when these three (3) elements exist.

(1) A release or threat of release of a hazardous substance occurs;

(2) From a facility;

(3) That causes response costs to be incurred by the government.

Hence, it is clear that there are several types of environmental claims which may be asserted in a bankruptcy context.

Congress intended a very broad definition of claims when it enacted the bankruptcy code, and an even broader application when it amended the code in 1988. Currently, §101(5) of the bankruptcy code defines a claim as:

> "(A) Right to payment, whether or not such right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured; or
>
> (B) Right to an equitable remedy for breach of performance if such breach gives rise to a right to payment, whether or not such right to an equitable remedy is reduced to judgment, fixed, contingent, matured, unmatured, disputed, undisputed, secured, or unsecured."[5]

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[2] The Law of Environmental Protection, 2nd edition Bonine and McGarrity; 1992.

[3] A PRP is a potentially responsible party if the PRP generated, transported or disposed of hazardous wastes which resulted in response costs.

[4] See CERCLA 42 U.S.C. 9601 as amended by the Superfund Amendment and Reauthorization Act of 1986 (SARA); Pub. L. No. 99-499.

[5] 11 U.S.C. 101(5)(A), (B).

Basically, any right to payment which arises before the debtor's petition, even if it is unknown that a claim exists, is entitled to claim status under the bankruptcy code. While it may be true that creditors should receive notice of the debtor's petition to be affected by its discharge provisions, it is a matter of little import since the debtor may reopen the case to have a prior unnoticed claim included in the bankruptcy.[6]

Environmental claims in bankruptcy become difficult to classify, or even determine if they are claims, because of their unique character. Therefore, Bankruptcy Courts have struggled with environmental claim questions such as:

* Does a claim arise when the contamination occurs or when it is discovered?

* Does a claim require status under the substantive state or federal law before it can be a claim in Bankruptcy Courts?

* What priority are environmental claims given in bankruptcy, and is there priority status linked to whether or not the contamination is discovered pre-petition or post-petition?

An analysis of evolving case law in these issues yields very little consistency.

When discussing the discovery of contamination and how it relates to the genesis of a claim, many courts begin their analysis on when the underlying substantive law or cause of action arises. This usually involves a philosophical distinction. In an environmental context, this distinction arises when one considers whether or not Congress intended an environmental claim to exist in the broad terms of Section 101 as a contingent liability, or as some cases have determined, when it becomes enforceable.

The concept of the enforceability of a claim controlling the issue of when a claim arises was possibly given its most notorious attention in the case of Avellino & Bienes v M. Frenville Co. (In Re: M. Frenville Co.)[7]. In the Frenville case, a group of banks filed suit against a C.P.A. firm that had prepared the debtor's financial statements. This C.P.A. firm in return sought indemnity from the debtor. The Third Circuit held that a pre-petition claim did not exist because the C.P.A. firm did not have a cause of action until it had an enforceable claim under state law, and the enforceability of that claim under state law did not accrue until after the petition had been filed. Despite many other circuits who have criticized this opinion, this analysis has been used in an environmental context. In the case of United States v Union Scrap Iron and Metal, (In Re: Taracorp), contaminating constituents were discovered on the debtor's facility four (4) years after confirmation of the debtor's Chapter 11 plan. The debtor sought to have the EPA's claim for response costs discharged as a pre-petition claim since the release was clearly established as existing before the confirmation of the plan. The Bankruptcy Court held that the claim did not arise pre-petition because a cause of action could not be supported, and therefore, a claim could not exist until response costs had been expended. Since response costs were not expended until after the confirmation of the plan, the claim arose post-petition and was not subject to the debtor's discharge.[8]

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[6] See 11 U.S.C. 523 and, this procedures utilization in an environmental context in the case of United States v Union Scrap Iron & Metal, (In Re: Taracorp) 123 B.R.831 (1990).

[7] 744 F.2d 332 (Third Circuit, 1984); Cert. Denied, 469 U.S. 1160 (1985).

[8] United States v Union Scrap Iron & Metal, (In Re:

This reasoning, though environmentally friendly, has two (2) major flaws. First, it ignores the broad inclusionary language used and intended by congress when congress used the words "any right to payment" to define a claim within the code.[9] Second, under this analysis, one could argue that almost any creditor could forestall the final element of a claim until after a petition was filed in order to survive dischargeability. Such manipulation of the code's discharge provisions does not appear to be within Congress's intent when enacting the code. However, the Union Scrap Court indicated a position that a right to payment did not arise pre-petition because in order to be a contingent claim on which a right to payment could accrue, the EPA was entitled to have its contingency decided by the Court after an opportunity to file a claim. In examining this contingency issue and whether or not a contingent claim is subject to discharge, the Bankruptcy Court in Union Scrap defined a dischargeable contingent claim as:

> "The debtor's legal duty to pay does not come into existence until triggered by the occurrence of a future event and such future occurrence was within the actual or presumed contemplation of the parties at the time the original relationship of the parties was created" [10]

Under this analysis, if other Bankruptcy Courts were so inclined to follow, a contingent claim subject to discharge only occurs when the release and knowledge by the regulatory agency occurs pre-petition, and that both the debtor and the regulatory agency contemplate that response costs will be incurred in the future. Other releases of hazardous substances which are not reported, or which occur post-petition, would not be dischargeable. This reasoning, though not specifically held by the Union Scrap Court would seem to accomplish the goals of both the Bankruptcy Code and the underlying policy of environmental statutes such as CERCLA. Another potential benefit of such a policy would be that an incentive would be created towards responsible reporting and prudent hazardous waste handling.

Other Courts have been reticent to a larger degree to accord environmental claims with any priority over that which is specifically provided for in the code. For example, in United States v LTV Corp., (In Re: Chateaugay Corp.), the Court reasoned that in order to prevent a manipulation of the bankruptcy process, a bankruptcy claim arises upon the debtors release of hazardous substances into the environment.[11] However, an important distinction to note in the LTV case is that the EPA had knowledge of the contamination and subsequently had the opportunity to file and litigate a proof of claim. This would indicate that the Union Scrap holding may still be persuasive in some circuits when the facts are consistent.

In other cases, Courts have borrowed, to some extent, the discovery rule from Tort law in determining whether or not the claim arises pre-petition or post-petition.[12] This reasoning appears to revolve around whether or not the regulatory agency knew or should have known about the contamination at the time of the petition. If the agency knew of the presence of the contaminants and declined to take actions until after the debtor's petition for bankruptcy, the resulting claim would be

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Taracorp) 123 B.R.831 (1990).

[9] 11 U.S.C. 101(5)(A), (B).

[10] 123 B.R. 831 at 836.

[11] 944 F.2d 997 (2nd Circuit 1991).

[12] Grady v A.H. Robbins Co., 839 F.2d 198 (4th Circuit, 1988).

discharged as a pre-petition release.[13]

Though some courts go to great extremes to narrow the applicability of claim status, the majority of courts are of the opinion that claim status should be broadened. In fact, when the Bankruptcy Reform Act was passed, the Congressional record stated that:

> "The bill contemplates that all legal obligations of the debtor, no matter how remote or contingent, will be able to be dealt with in the bankruptcy case. It permits the broadest possible relief in the Bankruptcy Court."[14]

The United States Supreme Court has revisited the issue of how broadly the term "claim" should be read, and determined that Congress intended to create a "broad rather than restrictive review of the class of obligations that qualify as a claim giving rise to a debt."[15]

When examining the cases that discuss the validity, nature and dischargeability of claims, a clear majority opinion becomes apparent.

On the issue of when an environmental liability becomes a claim against the estate, most courts construe the term "claim" very broadly and allow the recognition of a claim even before a cause of action may be brought on it.[16] Therefore, there is generally not a requirement that a cause of action exists under the substantive law before it may be deemed a claim in a bankruptcy context.

On the issue of dischargeability of an environmental claim, most courts hold that the nature of an environmental claim is dischargeable. [17] However, other courts have determined that dischargeability rests upon whether or not the release of contaminants occurred prepetition or postpetition. [18] Most courts have held, with some exceptions, that prepetition releases of hazardous substances are dischargeable while postconfirmation releases are not.[19]

CONCLUSION

It is rather apparent that the two (2) policies behind the Bankruptcy Reform Act and environmental regulation statutes such as CERCLA, are hopelessly at odds. Currently, the resolution of these conflicting policies rests solely within the discretion of Congress. However, Congress has not yet acted in almost 11 years since this issue initially arose. Hence, it is difficult to ascertain with any degree of certainty if Congress will act to resolve this conflict in the foreseeable future.

However, there is a way to reach a middle ground which is legally defensible and does justice to the policy considerations of both the bankruptcy code and environmental regulation statues.

The primary problem, is that strict liability in environmental regulations do not recognize the rights of an entity to obtain relief from oppressive debt, even if that debt is primarily the result of the violation of the environmental laws in question. Conversely, the Bankruptcy Reform Act does not do much

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[13] United States v LTV Corp. 944 F.2d 997 (2nd Circuit 1991).

[14] House Report No. 595 at 309 (1978)

[15] Pennsylvania Department of Public Welfare v Davenport 110 S.Ct. 2126 (1990)

[16] See In Re: Grynberg 113 B.R. 709 (1990)

[17] See: Ohio v Kovacs, 469 U.S. 274; 105 S. Ct. 705 (1985)

[18] See In Re: Peerless Plating 70 B.R. 943 (1987).

[19] See In Re: Taracorp 123 B.R. 831 (1990), in juxtaposition with In re: Dant & Russell, Inc. 1989 U.S. Dist. Lexis 18299 (1989)

to inspire sound hazardous materials management to lessen the public's risk of contamination. Hence, the following suggestions may be made:

1. Congress could enact a provision, or courts may take the position that the response costs incurred by the government would be presumptively non-dischargeable, if a debtor fails to notice an environmental regulatory agency of its bankruptcy, or if the debtor knows or has reason to know of potential contamination on one of its properties. This type of provision would accomplish two (2) objectives. First, it would compel debtor's to make accurate and timely reports of possible releases and would also result in better waste management policies if the debtor knows that only a portion of its environmental liability may be discharged. Second, early notice would give the regulatory agency the opportunity to conduct remedial studies on the sites so that an early estimate of response costs could be obtained. This also would assure an early assessment of prepetition contamination which could be delineated and separated from postpetition contamination thereby guaranteeing severability of a prepetition claim from a postpetition one. This type of process already exists in a more limited application under the Baseline Environmental Assessment ("BEA") process pursuant to Michigan's principal environmental liability statute, Part 201 of the Natural Resources and Environmental Protection Act ("NREPA), PA 451 of 1994, as amended.

2. A second suggestion, is that only prepetition contamination should be subject to discharge. Postpetition contamination should be given administrative expense priority so that cleanup can be expedited and the exacerbation of preexisting contamination can be prevented.

3. A modification of Section 523 of the Bankruptcy Code could be enacted which could explicitly provide that any contamination caused wantonly, maliciously or with reckless disregard to the public would be per se nondischarbeable. The goal of this provision is to distinguish between polluters who make conscious efforts to effectively manage their hazardous materials from those who carelessly and maliciously leave such measures to chance.

4. In Chapter 11 cases, and in Chapter 7 cases when there are unencumbered assets available for distribution, an escrow fund much like that found at rule 3020 of the Bankruptcy Code, should be established to address the environmental remediation needs at the debtor's sites of contamination. This fund should contain, to the extent possible, enough resources to address all postconfirmation expenses, and as much prepetition expenses as are found not dischargeable under any other provision.

5. Provide that only those expenses that are contemplated by both debtor and agency, are dischargeable. This will accomplish two (2) objectives. First, it will give both parties an incentive to fully delineate the extent of prepetition contamination and subsequent response costs. Second, this provision would require the debtor to shoulder the burden of addressing other on-site sources of contamination which the debtor has neglected to inform the agency about. This will minimize the amount of investigation time the agency will need to address a broad based approach to remediation at the debtor's facility.

It is unlikely that we will soon see the current trend toward discharging environmental liabilities in bankruptcy abated. Since Congress has elected to remain silent, despite the requests of many courts for direction, it is unlikely that Congress will soon conclusively address the subject matter contained herein. Therefore, it is imperative that Bankruptcy Courts begin to view

environmental claim dischargeability with a wary eye to assure that it is not sending the wrong policy message to those who hold the fate of our environment in their hands.

It is often said that judges should not allow bad facts to make bad law. While this commentator agrees that it is true, that the judiciary should not allow an indefensible reasoning to be applied to come to a morally "right" decision, it is equally a mistake to allow good law to make poor public policy and put the innocent public at risk.

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: Butler v Clark (In re Clark), (Bankr. WD Mich 2/1/96) Case No. ST94-82501. Judge Stevenson, following a very fact specific analysis of each of the Plaintiffs' claims, dismissed the Plaintiffs' objections to the Debtor's discharge based upon: (1) 11 U.S.C. §523(a)(2)(A) (debts "for money, property, services or an extension, renewal or refinancing of credit, to the extent obtained by false pretense, false representation, or actual fraud ..."); (2) 11 U.S.C. §523(a)(4) (debts incurred by "fraud or defalcation while acting in a fiduciary capacity"); and (3) 11 U.S.C. §523(a)(6) (debts "for willful and malicious injury by the Debtor to another entity or to the property of another entity").

The Debtor and Defendant, Donald Clark ("Clark"), is a financial planner who is the president and organizer of many affiliated companies and investment clubs which offer financial planning services to the Christian community. The Plaintiffs invested their money through Clark. Later, the subject of an SEC investigation, Clark ceased all business activities, leaving Plaintiffs without access to liquid funds from their investments.

The Court, citing Longo v McLaren (In Re McLaren), F.3d 958, 961 (6th Cir. 1993) and Field v Mans, 116 S.Ct. 437 (1995), held that in order to deny discharge on the basis of §523(a)(2)(A), the claimant must prove: (1) "that the Debtor obtained money through a material misrepresentation that at the time the Debtor knew was false or made with gross recklessness as to its truth"; (2) that the Debtor intended to deceive; and (3) that the claimant subjectively justifiably relied on the false representation and that its reliance was the proximate cause of the loss. The Court held that Plaintiff Williams failed to prove that Clark obtained a substantial benefit from her pension plan investment, which benefit is required to support a fraud claim under Western District precedent (citing McHenry v Ward (In Re Ward), 115 BR 523, 538 (WD Mich 1990)). In addition, with respect to Williams' other investment, the Court held that she did not present evidence that Clark entered into the applicable agreements not intending to fulfill his obligations thereunder. The remaining Plaintiffs, Sexton and Mr. and Mrs. Lloyd, claimed that they relied on Clark's representations that their investments were all "completely secure, essentially riskless propositions." The Court held that the Plaintiffs did not justifiably rely on Clark's statements. The Court noted that the test in Field requires that the creditor be charged with notice of facts which could be discovered by a cursory observation. The Court noted that a cursory reading of the applicable documents showed that the contemplated investments included those that were less than fully secured and risk free. Finally, the Court also held that Sexton and the Lloyds failed to prove that Clark obtained a substantial benefit from their investments.

The Court, citing Capitol Indemnity Corp v Interstate Agency, Inc. (In Re Insterstate), 760 F.2d 121, 124 (6th Cir. 1985), held that in order to deny discharge on the basis of §523(a)(4), a claimant must prove that: (1) the property at issue is the subject of an express trust; (2) the Debtor was acting in a fiduciary capacity with respect to the property; and (3) the Debtor breached the resulting fiduciary duty by a least a "defalcation" of funds". The Court held that Plaintiff Williams failed to prove that Clark had a fiduciary duty to manage her pension plan investments. Further, with respect to Williams' second claim, the Court held that she failed to prove that her relationship with Clark was more than one of a creditor and a Debtor. Finally, with respect to Sexton and the Lloyds' claims, the Court held that Clark's actions did not rise to the level of defalcation of their funds.

Finally, the Court, citing Perkins v Scharffe, 817 F.2d 392, 394 (6th Cir. 1987), held that a "wilful and malicious injury" under §523(a)(6) is defined as "a wrongful act done intentionally, which necessarily produces harm and is without just cause or excuse." Further, the Court, speculating on the theory supporting the Plaintiffs' nondischargeability claims, held that conversion can support a §523(a)(6) action. The Court held that Williams failed to prove that Clark exercised "unauthorized and wrongful ... dominion and control over her funds." The Court also held that, with respect to Sexton and the Lloyds' claims, because they had failed to prove defalcation, the evidence presented did not support a finding of conversion, which required even more evidence of wrongdoing.

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In Re: Williams v Hoerner; (WD Mich 2/9/96) Case No.: 1:95:CV:721. In a previous opinion, Judge Enslen affirmed Judge Gregg's decision holding that the Debtors in this case could not exempt their workers' compensation proceeding and certain traceable assets purchased with such proceeds under 11 U.S.C. §522(d)(11)(D). Williams v Hoerner, Case No. 1:95:CV:467 (WDMich 9/28/95). After the Bankruptcy Court's initial ruling, but before the District Court's ruling on the Debtors' appeal, the Debtors filed an amended schedule which claimed the workers' compensation proceeds and all traceable assets as exempt under 11 U.S.C. §522(d)(11)(E). The Trustee objected to the Debtors' amended exemptions, and Judge Gregg sustained that objection. Judge Enslen again denied the Debtors' appeal, relying upon its previous ruling that §522(d)(10) applies to workers' compensation awards, whereas §522(d)(11) applies to compensation based upon tort liability.

CASES OF INTEREST

Enclosed from Larry A. VerMerris is a copy of the Michigan Court of Appeals' decision in Flickinger v Boren, et al., as summarized in the February 26, 1996 edition of the Michigan Lawyers Weekly. While this is not a bankruptcy case, per se, it does deal with certain ethical issues related to the Debtor's failure to report a post-petition inheritance to the Bankruptcy Court and trustee and his attorney's possible legal malpractice in regard to making such reporting.

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In Re: Charles & Terry Seal, Case No.: GK 93-80366. This is a Chapter 13 where the Debtors sued a small car lot dealer for actual and punitive damages and attorney fees for failure to turn over a car title pursuant to

Michigan law and Orders of the Court.

A Bench Decision was issued on February 16, 1996 by The Honorable James D. Gregg. Various interesting consumer issues were discussed: the granting of attorney fees for the Debtors; the granting of "lost time" damages to the Debtor for attending the various Court proceedings; the granting of punitive damages for malicious harassment and violation of the automatic stay; the finding that the creditors' claim is unsecured because neither the Debtor signed a security agreement or was the security interest perfected; the Court ordered the Secretary of State of the State of Michigan to issue a "clean" free and clear vehicle title to the Debtors; and the Chapter 13 Trustee being able to set off the amounts awarded to the Debtors from the debt owing this unsecured creditor.

This summary was submitted by Roger J. Bus.

STEERING COMMITTEE MINUTES

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

EDITOR'S NOTEBOOK

In the last Newsletter an error was made - Michael M. Malinowski is a partner with Dunn, Schouten & Snoap of Grand Rapids, Michigan.

LOCAL BANKRUPTCY NOTICE

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

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Enclosed from The Honorable James D. Gregg is information regarding two seminars to be held this summer in the western district of Michigan.

The Eighth Annual Bankruptcy Section Seminar which will be held on August 9-11, 1996 in Boyne Highlands Resort, Harbor Spring, Michigan. The information enclosed is relating to the topics and the composition of the educational panels. Brett Rodgers, Pat Mears and Judge Gregg wished to give all members of the FBA advanced notice of their seminar.

Also, enclosed is information regarding the American Bankruptcy Institute workshop that will take place this spring.

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Enclosed from Christian G. Krupp, II is a notice for the bankruptcy seminar scheduled for April 11, 1996 which is presented by the Grand Rapids Bar Association CLE Committee.

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

Bankruptcy Chapter	February of 1996	February of 1995	February of 1994
Chapter 7	515	367	351
Chapter 11	8	5	7
Chapter 12	0	2	2
Chapter 13	214	135	123
Totals	737	509	483

Bankruptcy Chapter	January - February of 1996	January - February of 1995	January - February of 1994
Chapter 7	925	678	629
Chapter 11	17	12	13
Chapter 12	1	6	2
Chapter 13	405	237	233
§304	0	0	0
Totals	1348	933	877

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Peter Teholiz	(517) 886-7176
Janet Thomas	(616) 726-4823
Rob Wardrop	(616) 459-1225
Bob Wright, Chair	(616) 454-8656

FROM THE COURT:

1. **Marquette construction project:** From June 1 to August 30, the elevator in the Post Office and Courthouse in Marquette will be under repair and will not be in service. Therefore, persons having handicaps which will prevent them from climbing stairs may be denied access to hearings and first meetings. We ask for the assistance of the bar in helping us to identify problems before they arise. If you, your clients, or other parties in interest need assistance from the court or from the Office of the US Trustee in order to appear before the court, please notify us of the anticipated problems in advance so that we can take whatever action is necessary to solve the problem.

Call **Colleen Treder** at (906) 226-2117 for problems relating to court appearances or access to the Clerk's office.

Call **James Boyd** for problems relating to first meetings which are scheduled to be held in court facilities in Marquette (616) 941-3446 and call **Dan Casamatta** (616) 456-2002 for problems which might arise from meetings scheduled in court facilities with a member of the Office of the U.S. Trustee.

2. **Hints for helping the court's intake clerks:** Our case statistics indicate that for the last few months we are 30% ahead of the same time period for last year. This is causing a real problem with processing of new cases. You can give us a hand by asking your bankruptcy assistants to do the following when submitting new cases:

a. Collate and staple the petition and schedules together, making sure that the petition page is on top of the package. Make sure that the debtor(s) and attorney have signed the second page of the petition in the correct spaces.

b. Do not staple the matrix and verification to the petition and schedules. These should be left loose as should orders for relief, motions, etc.

c. Punch two holes in the top of these forms (as required in the **instructions** to the official forms).

d. Send a self-addressed, stamped envelope to return copies of petitions, orders of relief, and other documents. It would save you money and us time if you would only request a time-stamped copy of the two page petition. We do not separately time-stamp the schedules in any case so why do we need to copy and mail an entire package of materials back to you?

We thank you for any assistance which you can give us!

Court Motion Calendar for April and May

	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	10 HM
	13	14 GL SK HG	15	16 GT	17 GT HK
	20	21 GG	22	23 ST GK	24 ST HL
	27 MEMORIAL DAY	28	29	30	31

Eighth Annual Bankruptcy Section Seminar

Mark your calendars now! The Eighth Annual FBA Bankruptcy Seminar will take place on August 9-11, 1996, at the Boyne Highlands Resort, Harbor Springs, Michigan. The program is entitled "East Meets West" and will include experienced practitioners and eight federal judges as panelists. Registration forms will be mailed to you in the next thirty days or so.

The planning of the educational program is nearly completed. Topics have been selected to give attendees a wide choice of options among the areas of consumer law, commercial law, and/or practical workshops. Certain topics in the program have been designed to benefit bankruptcy paralegals; you may wish to consider encouraging their attendance. The tentative program and speakers are listed below.

Friday, August 9, 1996:

"Keeping The Ship Afloat--Duties And Responsibilities Of Debtors-In-Possession, Creditors' Committees And Their Counsel After Filing And Before Chapter 11 Plan Confirmation"

Patrick Mears, Moderator
Hon. Steven Rhodes, U.S. Bankruptcy Judge (E.D. Mich.)
William Brandt, Chicago
Ronald Rose, Detroit

"Nondischargeability Wars"

Steven Rayman, Moderator
Hon. Ray Reynolds Graves, U.S. Bankruptcy Judge (E.D. Mich.)
David Conklin, Grand Rapids
Julie Canner, Troy

Workshop: "Basics Of Handling A Bankruptcy Case--What The Clerk Expects"

Mark Van Allsburg, Bankruptcy Clerk, Western District of Michigan
Sheila Tighe, Bankruptcy Clerk, Eastern District of Michigan

"Keeping The Ship Afloat (Part II)--Creditors' Committee's Involvement In The Case And Adversary Proceedings"

James Engbers, Moderator
Keith Shapiro, Chicago
Sheryl Toby, Detroit
Robert Sawdey, Grand Rapids

"Taxes And Sales In Chapter 7 Cases"
Denise Twinney, Moderator
William Napieralski, Grand Rapids
Robert Mollhagen, Bloomfield Hills

Workshop: "Chapter 13 Plan Preparation"
Carol Chase, Moderator
Janet Thomas, Muskegon
John Lange, Southfield
David VanZyl, Grand Rapids

"Creative Chapter 13 Business Cases--The Old Small Chapter 11"
Brett Rodgers, Moderator
Hon. Laurence E. Howard, U.S. Bankruptcy Judge (W.D. Mich.)
Hon. Arthur J. Spector, U.S. Bankruptcy Judge (E.D. Mich.)
Stewart Gold, Southfield
Steven Carpenter, Grand Rapids

"Valuations Of Businesses In Chapter 11"
James Frakie, Moderator
Jeffrey Johnston, Bloomfield Hills
Edward Dupke, Grand Rapids
Scott Miedema, Grand Rapids

Workshop: "Personal Liability--A Chapter 7 Trustee's Dilemma"
David Allard, Moderator
James Boyd, Traverse City
Daniel Casamatta, Grand Rapids

Workshop: "Litigating Relief From Stay Motions"
Michael Khoury, Moderator
Hon. Walter Shapero, U.S. Bankruptcy Judge (E.D. Mich.)
Professor Anne Burr, Detroit College of Law
Jeffrey Moyer, Grand Rapids

Saturday, August 10, 1996:

"The Business Of The Bankruptcy Review Commission"
Hon. Robert Ginsberg, U.S. Bankruptcy Judge (N.D. Ill.), Vice-Chair of Bankruptcy Review Commission

"Effective Bankruptcy Appeals"
John Piggins, Moderator
Hon. Robert Holmes Bell, U.S. District Court Judge (W.D. Mich.)

"More Than One Century Of Bankruptcy Tales To Be Told"

Hon. Laurence Howard, Moderator
Robert Sawdey, Grand Rapids
Barbara Rom, Detroit
Timothy Curtin, Grand Rapids
Susan Cook, Bay City

"The Most Important Bankruptcy Decisions From 1995-1996"

Hon. James Gregg, Moderator
Hon. Robert Ginsberg, U.S. Bankruptcy Judge (E.D. Mich.)
Hon. Ray Reynolds Graves, U.S. Bankruptcy Judge (E.D. Mich.)
Hon. Steven Rhodes, U.S. Bankruptcy Judge (E.D. Mich.)
Hon. Walter Shapero, U.S. Bankruptcy Judge (E.D. Mich.)
Hon. Arthur Spector, U.S. Bankruptcy Judge (E.D. Mich.)

Included in the registration fee will be written educational materials in a semi-official FBA seminar bag, the opening night reception, a continental breakfast on Friday, and a buffet breakfast on Saturday. Optional events include the speakers' barbeque dinner on Friday night and a golf outing at the Donald Ross Memorial Course, on Friday afternoon. The Harbor Springs-Petoskey area also features many other recreational activities such as boating, fishing, canoeing, tennis, bicycling, shopping, and general touring.

The FBA has reserved a limited number of rooms at the Boyne Highlands Resort at reduced convention rates. In addition, there are many other hotels, motels, and bed and breakfasts near the seminar site, in the Harbor Springs-Petoskey area.

We look forward to your attendance at the FBA seminar this summer!

AMERICAN BANKRUPTCY INSTITUTE

As many of you are aware, the American Bankruptcy Institute holds a "Central States Bankruptcy Workshop" at the Grand Traverse Resort, Acme, Michigan, each year. This year's seminar will take place on May 30-June 2, 1996. The educational program will feature small group workshops for experienced bankruptcy attorneys on various topics, including bankruptcy litigation, confirmation battles, consumer bankruptcy developments, and a fees and ethics discussion. For the past two years, I have attended the ABI and have learned much at the small group discussions.

The ABI is a "class organization". It is open to all persons interested in bankruptcy. The ABI has fully cooperated with the FBA-Western Chapter so there will be no conflict or competition between our annual seminar and its workshop. If you want to attend two quality seminars in northern Michigan this summer, you might wish to consider the Central States Bankruptcy Workshop in addition to our annual bankruptcy seminar.

BANKRUPTCY SEMINAR

Presented By the Grand Rapids Bar Association CLE Committee

April 11, 1996 • 1-5:00 p.m.
L.V. Eberhard Center,* 301 West Fulton, Grand Rapids

Basic Chapter 7 & 13 Cases
- •When to file Chapter 7
- •How do you calculate a plan?
- •When to file Chapter 13
- •Attorney fees (getting paid)

Carol J. Chase, *Chapter 12 & 13 Staff Attorney*

Converting Cases
- •Chapter 7 to 13
- •Discussion of factual hypothetical
- • Chapter 13 to 7

Brett N. Rodgers, *Chapter 12 & 13 Trustee*

SPECIAL DISCHARGE ISSUES:

Adversarial Proceedings
- •Process and Procedure
- •Burden of Proof
- •Motions for Summary Disposition
- •Discovery, Attorney Fees

Divorce Debts
- •Child Support
- •Alimony

Christian G. Krupp, *Krupp Law Offices*

Federal, State & Local Taxes
- •How, When, Process

Student Loans
- • How, When, Recent Cases

William Napieralski, *Attorney and CPA, Napieralski & Walsh*

Please register me for the **Bankruptcy** CLE Seminar being held on Thursday, April 11, 1996.

Name: _____ Phone: _____

Firm: _____

Address: _____

Fee enclosed:___ $60 ___ $50 for attorneys in their first five years of practice
(make checks payable to Grand Rapids Bar Association)

Mail registration form to: Grand Rapids Bar Association
200 Monroe NW, Suite 300
Grand Rapids, MI 49503

or call Debbie Kurtz at the Bar Association at 454-5550 (fax 454-7681)

* The L.V. Eberhard Center is accessible for people with disabilities. If you have any questions or concerns, please contact the Bar Association.

K'S OPINIONS

Michigan Supreme Court's ruling in *Michigan Millers Mutual Ins. Co. v. Bronson Plating Co.*

On remand, the trial court reversed the previous decision, "finding that plaintiffs' 'complaints' to the Wayne County Air Pollution Control Division [WCAPCD] constituted 'claims' made against defendant Nutmeg Insurance Company's insured, Chem-Met Services, during the policy period."

In case nos. 139216 and 154659, this court concludes "that the claims were neither actually nor arguably within the scope of the insurance policies; therefore, the garnishee defendants Planet Insurance Company and National Union Fire Insurance had no duty to defend or indemnify." Defendants were entitled to summary disposition.

In case no. 144827, "the 'claims made' policy issued by garnishee defendant Nutmeg Insurance Company to Chem-Met Services provided coverage where a written claim for damages from bodily injury or property damage was first made against the insured during the policy period. Here, neither plaintiffs' citizen complaints to the WCAPC Division nor the violation notices that resulted upon verification of certain of these complaints constituted 'claims,' because they did not seek 'damages,' as that term was defined under the policy."

Bronson Plating is distinguishable because "the citizen complaints did not trigger Nutmeg Insurance Company's duty to defend a 'suit,' nor did they invoke an extensive administrative process as in a CERCLA action."

Therefore, "we reinstate the trial court's original decision which granted summary disposition in favor of garnishee defendants Nutmeg Insurance Company and Hartford Insurance Company."

We also find that the trial court properly granted defendant-Planet Insurance Company reasonable attorney fees and costs under MCR 2.114(d)(2) and MCR 2.625(E).

Affirmed in part and reversed in part.

Bennett, et al. v. Chem-Met Services, Inc., et al. (Lawyers Weekly No. **23177** - 6 pages) (per curiam) (Kavanagh, J., former Court of Appeals judge, sitting by assignment and Andrews, J., sitting by assignment) (White, J., concurring in part and dissenting in part, would find that defendants Nutmeg Insurance and Hartford Insurance have a duty to defend and indemnify because plaintiffs sought damages for bodily injury and made their claims during the policy period.).

Summary by MLC.

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Insurance - Policy Interpretation

Where the insured sought coverage from plaintiff-insurance company for paint splatters on the brickwork, walkways and shrubs of the insured's building, the trial court improperly determined that the policy excluded coverage.

In the underlying suit, the insured sued a paint contractor for dripping paint on the insured's property. The insurance company filed this declaratory action, seeking a ruling that coverage was precluded by certain policy exclusions. The trial court granted the insurance company summary disposition. We reverse.

The trial court properly found that accidental property damage had occurred within the meaning of the policy. However it erroneously applied an exclusion that precluded coverage for property damage to a "particular part of real property on which you or any contractors ... are performing operations, if the 'property damage' arises out of those operations."

The paint contractor was working on the building. It was not working on the brickwork, shrubs or walkways. Therefore, those items are not the "particular part of the real property" upon which the contractor was working. The exclusion does not preclude coverage.

Reversed and remanded so the trial court can address plaintiff-insurance company's arguments that other exclusionary clauses apply.

Citizens Ins. Co. of America v. Thomas Sebold & Assoc. (Lawyers Weekly No. **23191** - 2 pages) (per curiam) (McDonald and Smolenski, JJ., and Sindt, J., sitting by assignment).

Summary by EW.

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Legal Malpractice - Continuing Representation

Where defendant-attorney reported a former bankruptcy client's fraudulent conduct to the bankruptcy trustee, defendant did not commit legal malpractice because 1) the attorney had been dismissed by plaintiff more than two years before the legal malpractice action and 2) defendant was acting as an officer of the court when he reported plaintiff's conduct.

Defendant represented plaintiff in a bankruptcy. The bankruptcy was filed May 2, 1988. The bankruptcy was discharged in August 1988. In July 1988, plaintiff's mother died, leaving a large estate. Defendant learned of plaintiff's inheritance in November 1988 and told plaintiff that he had to disclose the inheritance to the bankruptcy court. Plaintiff failed to do so. In the spring of 1989, defendant learned that plaintiff was to use the inheritance as collateral. In the spring of 1989, defendant contacted the probate attorney and told him not to distribute the assets to plaintiff. He sent a copy of the letter to plaintiff. Plaintiff contacted defendant. During that conversation, defendant told plaintiff that plaintiff had to inform the bankruptcy trustee about the inheritance. Plaintiff discharged defendant. In May 1989, defendant sent the bankruptcy trustee a letter, telling him about the inheritance.

In May 1991, plaintiff sued defendant for legal malpractice. The circuit court granted defendant summary disposition. We affirm.

The May letter to the bankruptcy attorney did not amount to continued legal services. Plaintiff had already discharged defendant as his attorney.

"Under *Biberstine v. Woodworth*, where the basis for a bankruptcy action is an attorney's failure to schedule a debt (or an asset) in a petition for personal bankruptcy, the statute of limitations begins to run when the plaintiff is discharged in bankruptcy."

When defendant sent the letter to the bankruptcy trustee, he was acting as an officer of the court. "That letter cannot reasonably be construed as ongoing legal representation of plaintiff, especially where plaintiff expressly stated that he did not want [defendant's] legal services. Two years having expired, the circuit court did not err in granting summary disposition...."

Affirmed.

Flickinger v. Boren, et al. (Lawyers Weekly No. **23181** - 2 pages) (per curiam) (Murphy and Corrigan, JJ., and Houk, J., sitting by assignment).

Summary by KMP.

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(Continued on Page 18A)

EXPERT WITNESS

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: _____

Western Michigan Chapter of the
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