BANKRUPTCY LAW NEWSLETTER

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Western District of Michigan Chapter

November, 1998

EDITOR'S NOTES:

These are interesting times for bankruptcy practitioners in the Western District of Michigan. The number of written opinions has accelerated from the summer. The bankruptcy reform legislation has died, or at least is in winter hibernation. The bankruptcy court clerk, Mark Van Allsburg, still intends to move to Hawaii, and the process to find his successor is entering its final stages. Judge Laurence E. Howard is retiring at the end of February and a party in recognition of his long service on the bench has been finalized. This issue contains news on many of these issues.

The next issue (hopefully) will arrive before the Christmas Holidays. Cases will include a review of the Sixth Circuit decisions on Chapter 11 quarterly fees, forbearance agreements and non-dischargeability, and settlement agreements not being a waiver of future non-dischargeability actions. While I enjoy producing the Newsletter, I could use some assistance whether it is writing, suggestions, or moral support. If you are interested in helping out, please meet me on December 10, 1998 at 5:30 p.m. at the Sierra Room on 25 Ionia, SW, Grand Rapids. Thanks.

OMNIBUS APPROPRIATIONS BILL IS SIGNED CHAPTER 12 EXTENDED SIX MONTHS

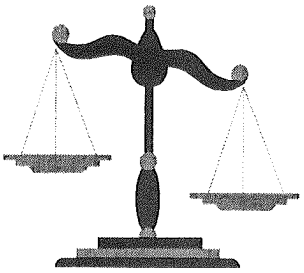
On October 21, 1998, President Clinton signed the omnibus appropriations bill (H.R. 4328). The bill extended Chapter 12 for a six month period ending April 1, 1999. The short extension is intended to prompt quick response to bankruptcy reform. The bill also added a provision providing that the automatic stay does not apply to governmental units exercising authority under the Chemical Weapons Convention.

CHICAGO MERCANTILE EXCHANGE BEGINS TRADING IN QUARTELY BANKRUPTCY INDEX

If you needed further proof of the increased popularity, awareness and interest in the bankruptcy world, on November 3, the Chicago Mercantile Exchange began trading a Quarterly Bankruptcy Index. The Index is based upon the number of new filings each quarter in the U.S. Bankruptcy Courts. The Index is designed to allow consumer lenders, banks and credit card companies to offset, hedge and manage their financial risks. The urge to comment on this is great, but will be avoided.

LOCAL BANKRUPTCY STATISTICS

CHAPTER	OCTOBER 1998	YTD - 1998
Chapter 7	705	7,108
Chapter 11	1	36
Chapter 12	0	13
Chapter 13	230	2,462
TOTALS	936	9,619



CASE NOTES

U.S. SUPREME COURT

NEW VALUE EXCEPTION TO ABSOLUTE PRIORITY RULE ARGUED AGAIN

On November 2, 1998, the U.S. Supreme Court heard arguments on the issue of whether the "new value" exception to the absolute priority rule survived passage of the Bankruptcy Code. Bank of American National Trust and Savings Assoc. v. 203 N. LaSalle Street Partnership; No. 97-1418

Review Sought in the following 3 cases.

§523 (a)(2)(A) FRAUDULENT INTENT BASED ON SUBJECTIVE INTENT - TOTALITY OF CIRCUMSTANCES

AT & T Universal Card Services, Inc. v. Rembert, 141 F.3d 277 (6th Cir. 1998). The fraudulent intent not to repay credit card debt, pursuant to §523(a)(2)(A) must be based on the debtor's subjective intent to repay the debt, based upon the "totality of circumstances" not merely the inability to repay the debt when incurred. In this case, the debt was found to be subject to the discharge based upon the debtor's use of most of the proceeds from a second mortgage to pay credit card debt, continued payments on credit cards during her gambling, and further payments after she obtained cash advances.

Review Sought.

§523(a)(4) - IS A SOLE OFFICER/DIRECTOR OF AN INSOLVENT CORPORATION IN A FICUCIARY CAPACITY FOR NON-DISCHARGEABILITY?

Peoples Bank and Trust Corporation of Hazard v. Penik (6th Cir. 1998 - 5/28/98, unpublished)

The recognition that an insolvent corporation or its director owes a "fiduciary obligation" to the corporation's creditors is not enough to establish an actual trust fund or defalcation in a fiduciary relationship.

§521(2) IS A DEBTOR REQUIRED TO REAFFIRM OR REDEEM IN ORDER TO RETAIN SECURED PROPERTY?

McClellan Federal Credit Union v. Parker, 139 F.3d 668 (decided April 2, 1998).

The Ninth Circuit previously ruled that, pursuant to §521(2), a Debtor is not precluded from retaining property and continuing to make payments under the old agreement. Reaffirmation, redemption or surrender were not the sole options. This is a Ninth Circuit case, and other Circuits and Courts, including ours, have contrary views.

SIXTH CIRCUIT
COURT OF APPEALS

§523(a)(15) DISCHARGEABILITY OF PROPERTY SETTLEMENTS

(In the September issue of the Newsletter we reviewed the case of Chmielewski from the Northern District of Indiana. Judge Stevenson advised us of this unpublished disposition from the Sixth Circuit. Thanks.)

In a divorce action, the Debtor was required to pay his former spouse one-half of the value of the marital business and one-half of the marital credit card. The former spouse brought a non-dischargeability action pursuant to §523(a)(15). The bankruptcy court found the debt to be nondischargeable and that decision was affirmed by the district court.

Section 523(a)(15) provides that divorce property settlements are generally non-dischargeable unless the debtor does not have the ability to pay the debt or discharging the debt would result in a benefit to the debtor that outweighs the detrimental consequences to the former spouse. The Sixth Circuit, using the clearly erroneous standard, reviewed and affirmed the bankruptcy court decision.

With regard to the balancing of the detriments test, the Court approved the bankruptcy court's use of the standards set forth in In re Smither, 194 B.R. 102 (Bankr. W.D. Ky 1996), which sets forth 11 factors to be considered. Since the Court upheld the bankruptcy court decision, it refused to consider whether the possibility of a partial discharge is permitted, or was warranted under these facts.

In re Patterson, 132 F3d 33, 1997 WL 745501 (6th Cir. (KY)), Decided November 24, 1997.

WESTERN DISTRICT
OF MICHIGAN

F.R.C.P. 60 - JUDGMENT FINAL DESPITE CHANGE IN LEGAL STANDARD

Plaintiff brought an action under §523(a)(6) alleging an award of statutory damages under the Federal Wiretapping Act was not subject to the discharge. The Court found the Defendant-Debtor's acts were willful and the intentional unexcused act of wiretapping constituted the "malicious" element. The decision of the Court relied on the Sixth Circuit decision of Perkins v. Scharffer, 817 F2d 392 (6th Cir. 1987). The decision was released in September 23, 1997 and no motions or appeal were filed.

On March 3, 1998, the U.S. Supreme Court decided Kawaauhau v. Geiger, 118 S.Ct. 974 (1998), which, by implication overruled Perkins. The Geiger decision provides that non-dischargeability under §523(a)(6) requires a deliberate or intentional injury, not merely a deliberate or intentional act that lends to injury.

On September 21, 1998, the Defendant filed a Motion for relief pursuant to

F.R.C.P. 60. The Defendant argued that while the Court's decision was correct when issued, Perkins is not good law and the Bankruptcy Court's decision should be set aside.

Bankruptcy Judge Jo Ann C. Stevenson found the Motion was without merit or basis. The Court indicated it could have denied the Motion based on timeliness, i.e. 60(b) - Motion must be made within a reasonable time. The Court, however, found there was no reason justifying granting the relief. No public policy was at interest, and the Court cited a Fifth Circuit case Bros, Inc. v. WE Grace Manufacturing, 320 F2d 594 (5th Cir. 1963) which stated "it is for the public interest and policy to make an end to litigation . . . [so that] . . . suits may not be immortal, while men are mortal." The Court also found support for its decision in the doctrines of "estoppel by *judgment*" *and* "*res judicata*".

As Judge Stevenson explained (and perhaps warned practitioners who might be tempted to try the same procedure in similar situations), "The prudent course would have been for counsel to file a timely appeal and ask the United States District Court to stay its proceedings until the United States Supreme Court decided Geiger".

In re Stanton Eugene Bigham, Case No. SM 96-90639, Sandra Kaye DeWitt v. Stanton Eugene Bigham, Adv. Proc. No. 96-99006, Decided October 16, 1998 - Honorable Jo Ann C. Stevenson.

MCLA 440.1201(37) TRUE LEASE OR LEASE INTENDED AS SECURITY.

In the case of Brian D. Dunn, Judge Stevenson analyzed the factors and standards applicable for determining whether a lease agreement is a true lease or disguised security agreement. The Court found the lease in question was a true lease since the terms:

a. specified that at the end of the term, the equipment could be purchased or the lease renewed for fair market value, not nominal or no consideration.

b. provided that the lessee may renew or purchase (but was not required), and

c. the equipment appeared to have economic value beyond the term of the lease.

The Court also analyzed the factors that would create a security interest. Finally, the Court considered an argument that a claim and delivery action forfeited the lessor's right to possession and ownership, and left the lessor with an unsecured claim and no property. The Court rejected this argument and allowed the lessor a claim for the amount of the judgment less funds received through re-leasing or a sale of the equipment.

In re Brian Dunn, Case No. SL 98-03510, Decided October 23, 1998, Honorable Jo Ann C. Stevenson.

EASTERN DISTRICT OF MICHIGAN

ATTORNEYS FEES - SECTION 330 - CHAPTER 13 CASES.

The Chapter 13 Trustee objected to fee applications filed by the same law firm in a number of Chapter 13 cases. Rather than recite the facts, the following issues in this case decided by the Honorable Steven W. Rhodes, are note-worthy:

1. Billing in Tenth's of an Hour. The Trustee objected to applications which were billed in increments of a hundredth of an hour, rather than tenths of an hour mandated by the Local Rules. The basis of the objection was the Trustee's contention that these applications were more difficult to review. The Court denied this objection, since this procedure resulted in bills that more accurately reflected the actual time spent.

2. Billing for Clerical v. Legal Assistant Tasks. The Court found it was proper for legal assistants to bill for the preparation of schedules, preparation and printing of documents, corrections to schedules, and phone calls to remind of appointments. Tasks related to verifying the debtor's address and filing, calendaring and docketing dates are clerical in nature and not compensable.

3. Initial Consultation with Clients. The Court's previous decision in In re Pinkins, 213 B.R. 818 (1997) required an attorney to meet with the client at the initial consultation, before delegating tasks to non-lawyers. In the cases at issue here, the Court found that the attorney had only minimal contact with the client at the initial consultation, and there was usually no further contact until the §341 hearing. The Court determined the overall quality of attorney service was reduced, and accordingly reduced the requested fees by 15%.

4. Preparation of Fee Applications. The Court held that "absent exceptional circumstances, fees for the preparation of fee applications should be limited to 5% of the total fees requested."

5. Employee Compensation - Improper Fee Sharing. The law firm had a compensation system for legal assistants that conducted initial consultations. The system was based on the total number of cases the firm filed weekly. The Court, after reviewing the Michigan Rules of Professional Conduct and case law regarding compensation sharing found this compensation system improper. The Court, however, declined to reduce the fees sought.

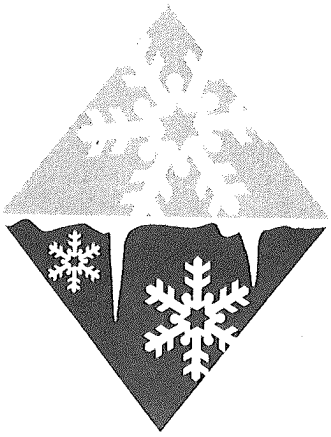
In re Pecolia Bass, Case No. 97-52772-R, Decided October 30, 1998, Honorable Steven W. Rhodes.

OTHER BANKRUPTCY COURTS

§365(b)(1) - SIX MONTHS REASONABLE TIME TO CURE AUTOMOBILE LEASE DEFAULT IN A CHAPTER 13 CASE.

In re Reed, _____,
Bank. W.D. Kentucky, 9/29/98

The debtor had proposed to cure a vehicle lease arrearage over an 18 month period. Judge Dickinson held that six months was the maximum permissible cure period. While the Court indicated that the Court must make its decision on a case-by-case basis, a six month cure period was a reasonable baseline to be used in Chapter 13 Plans.



Holiday reception honoring Mark Van Allsburg to be held on Tuesday, December 15, 1998 from 4:30 pm to 6:30 pm at the Peninsular Club - 4th floor. All attorneys, the Federal Bar Association and friends are welcome and encouraged to attend.

Judge Howard Announces Retirement

(As seen in October 1998 issue of *Conference News*, page 6)

Laurence E. Howard, Bankruptcy Judge for the Western District of Michigan, recently announced his retirement effective on February 28, 1999. Larry was first appointed to the bench in January 1976. He was reappointed to his current 14-year term in October 1986. Upon retirement, he will have served as a bankruptcy judge for more than 23 years.

Larry received a Bachelor of Science degree from University of Notre Dame in 1958, after service in the United States Army from 1954 to 1956. He subsequently earned his Juris Doctor degree from the University of Notre Dame Law School in 1961. As you might expect, he is an avid Notre Dame sports fan and has had season football tickets for 35 years.

Judge Howard has served as an Assistant City Attorney for Grand Rapids, Michigan, and was in private practice until he assumed his responsibilities as a bankruptcy judge. He ran for Congress, as a Democrat, in 1968 against Gerald R. Ford (Do you remember him?). Although Larry put up a vigorous campaign, the results were the same as when other Democrat "sacrificial lambs" ran against Jerry Ford.

Larry and his wife, Marilyn, first attended an NCBJ Annual Meeting in Quebec City, Canada in 1977. They have attended almost all of the NCBJ conferences until very recently. Many of you have had the pleasure of visiting and socializing with them for more than 20 years. Judge Howard has served the NCBJ as a member of the Finance and Legislation Committees.

This August, Larry and Marilyn celebrated their 40th wedding anniversary with their families and many friends. (They have four children and sixteen grandchildren.) Many guests traveled great distances to attend this event. A wonderful time was had by all.

During the forthcoming retirement, Larry and Marilyn plan on spending summers in Grand Rapids, Michigan, and winter months at their condominium at Marco Island, Florida. Commuting to and from Michigan will take place via their new bright red Corvette. Who said retirement is boring?

The Federal Bar Association-Bankruptcy Section (Western Michigan) will be sponsoring a goodbye dinner (and roast) on Friday, February 26, 1999, at the Egypt Valley Country Club, in Ada, Michigan, to recognize Judge Howard's many achievements and years of service. If you may be interested in attending this event, please telephone Jim Gregg at (616) 456-2264 to be added to the mailing list. If you get a chance, you may wish to either telephone or write Larry Howard before he leaves the bench.

Larry and Marilyn Howard

HONORABLE LAURENCE E. HOWARD'S RETIREMENT PARTY

MARK YOUR CALENDARS

FEBRUARY 26, 1999 - FRIDAY
6:30 P.M.
EGYPT VALLEY COUNTRY CLUB
7333 KNAPP N.E.
ADA, MICHIGAN

After twenty-three years of dedicated service as bankruptcy Judge, the Honorable Laurence E. Howard has decided to retire from the bench. Join us to help send him off with our support and gratitude.

THE CELEBRATION WILL INCLUDE:

Cocktails 6:30 PM-7:30 PM
Dinner
Masters of Ceremony-Humor Allowed

Registration forms will be available early January 1999.

For more information or comments contact:

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STEERING COMMITTEE MINUTES

1. Membership. We conducted an election after some discussion of the various people who had indicated an interest and other matters including diversity and geographic balance. .Elected to the Committee were Tom Sarb, Steve Grow, Mary Hamlin and David Andersen.

2. Two Minute Drill. With respect to the "two minute" drill, the general consensus was that a letter should go to all three judges simply indicating the lawyers' concern about the need for a two minute drill at almost all hours of each motion day. With input from Eric Richards (Judge Gregg's former law clerk) and Jeff Moyer (also Judge Gregg's former law clerk) and others, the general consensus was that all we could ask the judges to do is consider some form of the two minute drill. An effort to suggest procedures was thought to be out of our realm and would tend to elicit criticism rather than address the real issue that we want to bring to the judges. Peter Teholiz was requested to send some form of letter to all three judges pointing out everyone's concerns regarding holding contested matters while there are still uncontested matters to be resolved during a given docket period.

3. Mark Van Allsburg Reception/Holiday Gathering. We are going to have a holiday gathering, which will honor Mark Van Allsburg, on Tuesday, December 15, 1998, on the fourth floor of the Peninsular Club. The gathering will be from 4:30 p.m. to 6:30 p.m. There will be a cash

bar. Robb Wardrop, Peter Teholiz and Bob Wright will work on determining the extent of the punch and snacks to be provided. Eric Richards is going to work on publicity and a going away gift for Mark.

4. Judge Howard's Retirement Party. Judge Howard's retirement party is scheduled for February 26, 1998 at Egypt Valley Country Club. Tim Curtin and Brett Rodgers gave a report on the current status of preparations.

5. Pro Bono Issues. Robb Wardrop reported about Mary Hamlin acting as contact person for pro bono projects. There was a short discussion on pro bono issues and the problems that can arise.

6. Proposed Bankruptcy Rules. Hal Nelson gave a report on the proposal to amend the Federal Rules of Procedure and also the Bankruptcy Rules. Hal had prepared a handout that identified some of the more important rule changes that were contained in the proposed amended Federal Rules of Civil Procedure. There was also a discussion of the changes that were proposed to the Bankruptcy Rules. Hal reported that the local FBA, which is acting on a more national scale with respect to the Federal Rules of Civil Procedure, was not taking any action with respect to the Bankruptcy Rules. It was pointed out that our committee has a local rules committee consisting of Peter Teholiz, David Andersen and Bob Wright. Members of the Federal Bar should be encouraged to make any comments on the proposed Bankruptcy Rules specifically to one of the committee members. Any comments with respect to the Federal Rules of Civil Procedure should be made to Hal Nelson.

7. Proposed Local Rule 1007.4. The Steering Committee also conducted a rather lengthy discussion of the new proposed Local Bankruptcy Rule 1007.4. The general consensus was that something should be done about this issue as soon as possible by way of local rule. Attorneys are going to request the judges to propose a rule that can be commented on by the members of the bar.

8. Status of Search for New Bankruptcy Judge. It was reported that the search committee had narrowed the field to 10 individuals. Interviews by the committee were being conducted last week. It is believed that the committee will make a recommendation of 3, 4, or 5 individuals to fill the judge position by the middle of December. Those in the know are still predicting that it will be July/August before the new judge is actually ready to take a seat on the bench.

9. Status of Search for New Clerk of the Court. It was reported that a large number of applications had been received to replace Mark Van Allsburg as Clerk of the Court. That number has been trimmed down by the Bankruptcy Judges to a number less than 15. Personal interviews are being conducted.

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