

FEDERAL BAR ASSOCIATION

BANKRUPTCY SECTION NEWSLETTER
FEBRUARY 2005

NEW STATE EXEMPTION LAW

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Governor Granholm signed House Bill No. 5763 and it was effective January 3, 2005. It makes substantial changes to the Michigan exemption statute. You may find it at www.michiganlegislature.org.

Note particularly that the state homestead exemption is now \$30,000 or, if the debtor is disabled or 65 years old or older, \$45,000. The statute states that the exemptions are available to a debtor in bankruptcy.

Because this statute was just passed, one wonders what issues may arise in using it. One question raised by a local attorney is whether any or all of these exemptions may be doubled by joint filers. Note particularly the interesting language of the homestead exemption, (n), which seems to cover the "interest of the debtor, the codebtor, if any, and the debtor's dependents". Another local attorney questions whether the statute has constitutional problems because it is limited only to those filing bankruptcy. Another question could be whether other state law exemptions statutes may be used with these, when state exemptions are chosen in a bankruptcy.

Note also the special provisions about what happens when the owner of a homestead dies leaving a spouse and no children (subsection (1)(p)), proceeds from damaged, destroyed or condemned property (subsection (3)) and provisions for retirement benefits subject to divorce decrees (l) and (m).

See page two: a comparison table for some of the more common exemptions, to the extent they can be compared. It could work as a checklist for you as you use the new exemption statute.

Thank you to Peter Teholiz, Paul Davidoff and Larry Ver Meris for their comments to the editor in recent letters about the new exemption statute.

IMPORTANT DATES:

17th annual FBA Bankruptcy Seminar: July 28, 2005 to August 30, 2005, Boyne Highlands, Michigan. Make your reservations now at the hotel. (800) GO BOYNE.

January 1, 2005: Mandatory date for attorneys to use electronic filing.

Something missing? Let us know about other dates!

COMPARISON OF MICHIGAN AND FEDERAL BANKRUPTCY EXEMPTIONS

Assets easily comparable:

Asset type	Federal 11 USC 522 (d)	Michigan MCL 600.6023a (1)
Homestead	\$18,425 (1)	\$30,000/\$45,000 Disabled or 65 (n)
Vehicles	\$2,950 (2)	2,775 (g)
Household goods	\$475/\$9850 (3)	\$450/\$3000 (c)
Jewelry	\$1,225 (4)	See (c)
"Wildcard"	\$975/9,250 (5)	None
Tools	\$1,850	\$2,000

Assets which are not easily comparable (requires detailed review):

Asset type	Federal 11 USC 522 (d)	Michigan MCL 600.6023a (1)
Retirement investments	(10)	IRA: (l) Other: (m)
Entireties	N/A	(o) MCL 557.151
Certain insurance benefits	(7)	(j)
Insurance cash value	(8)	Perhaps covered by MCL 500.2207

6th Circuit Court of Appeals

Eubanks v CBSK Financial Group, Inc., No. 02-5902, 385 F.3d 894 (6th Cir. Oct. 1, 2004). The Court held that, generally speaking, a debtor's post-petition bankruptcy claim may be precluded by judicial estoppel as a result of the debtor's failure to disclose the claim in the prior bankruptcy proceeding, and that omissions by a debtor in a disclosure statement are sufficient for a finding of judicial estoppel. However, where such omissions are mistakes or inadvertent, judicial estoppel should probably not apply. Thus, the doctrine of judicial estoppel did not apply to bar Debtor's lender-liability claim against Lender where Lender had inadvertently been left off of the Schedule B.

In re Airspect Air, Inc., Nos. 03-3303 / 03-3484, 385 F.3d 915 (6th Cir. Oct. 4, 2004). The 6th Circuit adopted the following rule for determining whether a professional's fees have been "pre-approved": "[w]hether a court 'pre-approves' a fee arrangement under § 328 should be judged by the totality of the circumstances, looking at both the application and the bankruptcy court's order. Factors in the determination may include whether the debtor's motion for appointment specifically required fee pre-approval, whether the court's order assessed the reasonableness of the fee; and whether either the order or the motion expressly invoked § 328."

Alexander v. Waddey & Patterson, P.C., No. 02-6532, unreported, 2004 WL 2452544 (6th Cir. Oct. 28, 2004). Debtor/Client sought damages under § 303(i) arguing that Law Firm acted in bad faith in putting Debtor/Client into involuntary bankruptcy to collect its fees. The Bankruptcy Court and the District Court denied the request. The 6th Circuit affirmed finding that "[Law Firm] could reasonably have believed that [Debtor/Client] would soon declare bankruptcy; that, by paying off his other creditors, he would exhaust his finances before reaching the bankruptcy court; and that the 90-day preference window for challenging impermissible preference payments would soon close."

Mostoller v. CWCapital, LLC, No. 03-6069, unreported, 2004 WL 2792508 (6th Cir. Dec. 6, 2004). In a breach of contract suit brought by the Trustee against Debtor's lender, the 6th Circuit held that (1) Debtor/Trustee's oral modification argument was barred by the Statute of Frauds; (2) the doctrines of waiver & estoppel cannot modify the terms of a HUD-insured loan, (3) the exchange of letters subsequent to the loan agreement did not modify it; and (4) "[t]he mere failure to declare a default at the earliest possible date is insufficient to establish an indefinite waiver of that deadline."

In re Kaufman, No. 02-6516, unreported, 2004 WL 2812666 (6th Cir. Dec. 8, 2004). After confirmation of Debtor's Chapter 11 plan, Debtor initiated an adversary proceeding requesting a declaration that his student loans were discharged upon confirmation of the Plan. Student Loan Creditors responded arguing that § 523(a)(8) mandates that, generally speaking, student loans are nondischargeable. Debtor argued that, despite § 523(a)(8), the Plan purported to discharge all unsecured claims under § 524 - including the student loan claims - and thus, the matter is *res judicata*. Bankruptcy Court rejected Debtor's argument, as did the District Court. The 6th Circuit affirmed holding that Debtor's reliance on § 524 is misplaced because § 1141 controls Chapter 11 discharges and § 1141 expressly excepts claims falling under § 523 - including student loan claims - from discharge.

District Court, Western District of Michigan

In re Fortier, No. 1:03-CV-799, 315 B.R. 829 (W.D.Mich. Oct. 13, 2004). The Court held that, in bankruptcy, "finality" is elastic, and thus, "the test to determine if an order of the bankruptcy court is final is whether the order 'finally disposes of discrete disputes within the larger case.'" Inasmuch as a Sale Order resolved Individual Debtor's ownership interest in Corporate Debtor and simultaneously resolved an outstanding corporate tax lien held by the IRS, it was "final," and thus, Ex-Wife was bound by it and *res judicata* barred her untimely proof of claim, despite her would-be priority and Individual Debtor's failure to list her on his schedule of creditors. Ex-Wife "is bound by the actions of the Trustee because she is a creditor of [Individual Debtor's] estate and in entering into a settlement agreement with the IRS and selling the [sic] property, the Trustee acted on behalf of [Ex-Wife]."

In re: Oswald, 1:04-CV-317. The district court overruled the Bankruptcy Court and held that the amendments to the Michigan Mobile Home Commission Act applied to the case even though the case was commenced prior to the passage of the amendments. The Court further held that the amendments mean that a creditor may perfect a lien in a mobile home affixed to the real estate by recording a mortgage, even if there is no affidavit of affixture and surrender of the mobile home title. This case is being appealed to the 6th Circuit.

In re: Maracle, 1:04-CV-151 (W.D. Mich. October 14, 2004). The Court overruled a Bankruptcy Court ruling that a trustee cannot avoid a mortgage, recorded along with a deed to the debtors, almost 6 weeks after it was executed. The issue was whether the transfer was a contemporaneous exchange for new value and not an antecedent debt. The court reviewed *In re: Waldschmidt v. Mid-State Homes, Inc. (In re: Pitman)* 843 F.2d 235 (6th Cir 1988), regarding when the debtor became legally obligated to pay the debt. The District Court distinguished the facts of *Pitman*.

In re: Mazur, 1:04-CV-101. The Court affirmed the Bankruptcy Court that a trustee cannot avoid a lien against a vehicle, determining that delivery of possession of the vehicle occurred when the seller assigned the title to the debtors, according to the Michigan Vehicle Code. This case involved an analysis of the Vehicle Code. While affirming the holding, the District Court disagreed with the reasoning of the Bankruptcy Court, which used the UCC to determine this issue.

(Continued from page 3)

Bankruptcy Court, Eastern District of Michigan

In re Parlovechio, No. 04-41796-R, 315 B.R. 694 (Bankr.E.D.Mich. Oct. 6, 2004). Relying on *Keybank Nat'l Assoc. v. Ameriquet Mortgage Co.*, 2004 WL 1057814 (Mich. App. May 11, 2004), the Bankruptcy court held that where the senior mortgage(s) have been foreclosed upon pre-petition, a junior mortgage holder's rights are not extinguished upon the expiration of the statutory redemption period, but rather, are extinguished upon the expiration of the extended redemption period provided in §108(b).

In re Tomlin, No. 04-56852, 315 B.R. 439 (Bankr.E.D.Mich. Oct. 8, 2004). The Bankruptcy Court held for the Debtor who elected his state-law exemptions and set the record straight in terms of *Lampkins'* impact in the bankruptcy context. While not directly attacking the *Lampkins* holding, the Bankruptcy Court held it inapplicable in the bankruptcy context. The Court held that "[w]hile ERISA may preempt state law, it does not supersede or invalidate federal law, including bankruptcy law." Further, "[b]ecause state exemption statutes play a significant role in enforcing and implementing a federal statutory scheme, the bankruptcy code, they are not necessarily preempted." The Court then recognized the importance of the state-law exemptions to the bankruptcy scheme and ultimately held that "[b]ecause ERISA's savings clause expressly prevents it from preempting other federal statutory schemes (in this case, the Bankruptcy Code), and the Bankruptcy Code expressly invites states to regulate exemptions, ERISA cannot be read to preempt the Michigan exemption statute in a bankruptcy proceeding."

In re 5900 Associates, LLC, No. 03-57842-R, Adv. Pro. No. 03-5334-R, 317 B.R. 332 (Bankr.E.D.Mich. Nov. 24, 2004). Trustee brought an adversary proceeding under MCL § 566.35 to recover alleged fraudulent transfers made by the Debtor to the Defendant Transferee. At the time of the transfer, Debtor had \$800,000 in assets and undisputed liabilities of \$675,000. In addition, the Trustee claimed Debtor had additional debt of ~\$166,000, and therefore, the Debtor was insolvent at the time. Transferee claims that that additional debt was for attorney's fees incurred in connection with a prior Chapter 11 and because Attorney never obtained Court approval for his fees in that case, it is unenforceable. The Court agreed with Transferee holding that §330(a) "establishes the exclusive means by which a claim for professional fees relating to a bankruptcy case is allowed and a debtor is simply not liable for professional fees for services performed on a chapter 11 case which have not been allowed by the bankruptcy court." Thus, ~\$55,000 of the ~\$166,000 owed to Attorney is unenforceable and Debtor's liability is thereby reduced by that amount rendering him solvent at the time of the purported fraudulent transfer.

In re Glazer, No. 03-72264-R, ___ B.R. ___, 2004 WL 2684062 (Bankr.E.D.Mich. Nov. 24, 2004). Trustee sought to sell Debtor's chiropractic business as a going concern. As part of the deal, Trustee wanted to include a covenant not to compete by the Debtor on the premise that the goodwill of the business is property of the estate and that requiring the debtor not to compete will maximize the value of the goodwill by several thousand dollars. The Debtor, obviously, disagrees, arguing that this is an impermissible impingement on his "fresh start." Relying on § 541, the Bankruptcy Court sided with the Debtor holding, essentially, that the debtor's post-petition earnings are excluded from property of the estate and that by attempting to restrict Debtor's ability to accumulate those earnings in a certain geographical area, the Trustee is attempting to bring the Debtor's potential post-petition earnings from that geographic area into the estate.

In re Hopkins, No. 02-62692, ___ B.R. ___, 2004 WL 2856187 (Bankr.E.D.Mich. Dec. 10, 2004). Debtors filed a Chapter 13 petition and claimed an exemption under § 522(d)(1) for the equity in their home. After the Plan was confirmed, Debtors converted the case to a Chapter 7. Although he had not objected when the case was still a Chapter 13, Trustee now objects to the § 522(d)(1) exemption on the basis that it exceeds the allowed amount by ~\$11,000. Debtors responded by asserting that the time period for objection had expired during the Chapter 13 case. The Bankruptcy Court disagreed reasoning that under § 348, conversion of a case constitutes an order for relief; §341(a) & BR 2003(a) require the Trustee to convene a creditor's meeting within 20-40 days of an order of relief in a Chapter 7; BR 4003(b) permits objection to exemptions only within 30 days of the creditor's meeting; the Trustee's objection was within the permitted time frame after the conversion; thus, the Trustee's post-conversion objection to the exemption is permitted. Thus, provided that it is timely made in accordance with the Chapter 7 timing requirements, the Trustee may object to a Debtor's claimed exemptions after the case has been converted from a Chapter 13 to a Chapter 7.

Bankruptcy Court, Western District of Michigan

In re Gregory, No. 03-07456, Adv. Pro. No. 03-88634, 316 B.R. 82 (Bankr.W.D.Mich. Oct. 7, 2004). The bankruptcy estate of Chapter 7 Debtors included a manufactured home and the real property on which it sits. As security for a loan, Secured Creditor took a mortgage on the real property and "all fixtures now or hereafter a part of the property." Secured Creditor perfected its interest by recording the mortgage with the Register of Deeds, but did not file an application with the Mobile Home Commission, did not have a notation placed on the title certificate of the mobile home. Bankruptcy was filed prior to the 2003 "amendments" to the MHCA by the Michigan Legislature. In reliance on *Kroskie*, Trustee sought to avoid Secured Creditor's security interest in the mobile home, arguing that it is unperfected. Judge Hughes held that Secured Creditor was perfected, and the Trustee could not avoid its interest. Judge Hughes reasoned that Revised Article 9 prevents the Trustee from priming a secured creditor's priority in a mobile home affixed to the debtor's real estate as a fixture of that real estate collateral where that secured creditor has perfected in accordance with Michigan law for perfection on fixtures to real estate. Judge Hughes notes, however, that if the mobile home were not affixed to the real estate or the debtor did not own the real estate on which it sits, the result would be inapposite – perfection only by compliance with the MHCA – because the mobile home would, in that case, be personalty perfection of a security interest in which is governed exclusively by Article 9 which explicitly points to the MHCA as the method of perfection.

MORE CHANGES ON THE WAY BANKRUPTCY COURT WILL MOVE

Change used to be slow and rare here in West Michigan. Lately, however, in the bankruptcy practice, we have experienced many changes, mostly related to electronic filing.

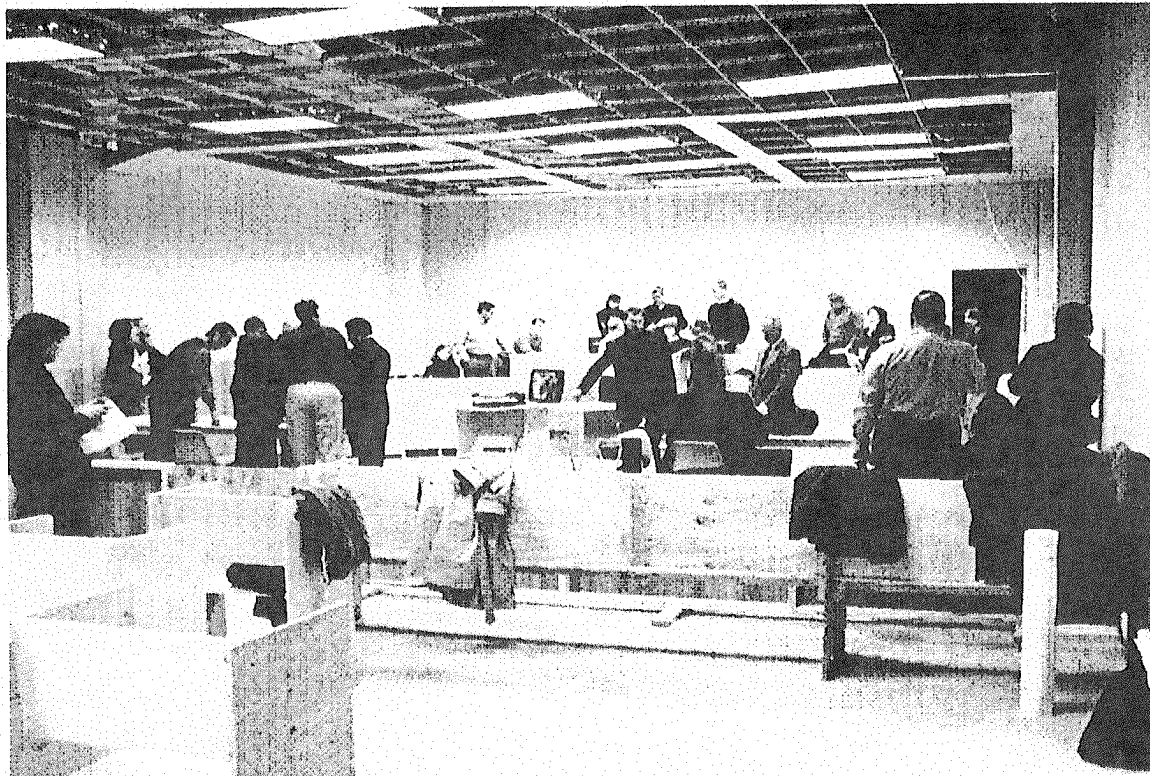
More change is on the way. The bankruptcy court and clerk's office are going to move from their present location in Grand Rapids. Apparently, the Gerald Ford Federal Building has not been large enough for both the district court and bankruptcy court for a long time. Various people have been studying numerous options to solve this problem, including Judge Hughes, who made a presentation about this issue to the FBA bankruptcy section steering committee in October 2004.

The new bankruptcy court will be located at 1 Division, the corner of Fulton and Division. For those who just saw the film, *Polar Express*, this is the site of the old Herpolshimer's department store, which is shown in the film, and which I hear about from long time residents who once shopped there. So it has a history. Presently, the Michigan Secretary of State has an office in the ground floor, and the bankruptcy court entrance is right next to that office.

The plan is to have 52,000 square feet in multiple stories. Judge Hughes showed us some building plans. The new area will be wired for the latest technology. We are working on an attorney area in the new courtroom. The bankruptcy bar will need to provide furnishings and equipment, for this room. The steering committee is working on this. If you have any ideas, please contact any member of the steering committee.

We held a moot court proceeding on January 10, 2005 with the judges, members of the bar and the clerk's office to assist the architects and builders in determining the layout of the courtrooms. See photograph below from Fred McWain of the GSA. You can see that all the judges and their staff assisted in this process. When I arrived during the lunch hour, I watched as Judge Hughes reviewed various details of the courtroom set up. Gail Beach was able to sit at a table to see what would be a good arrangement for her court reporting work. By the time I had to leave, they were still working. It appeared that substantial time has been taken to ensure that the courtroom will be user friendly for all.

Completion date is uncertain but the hope is for sometime in middle to late 2005.



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WORKSHOPS ON HOW TO PREPARE BANKRUPTCY SCHEDULES.

The Office of the US Trustee, along with the chapter 7 and 13 trustee are again offering free workshops on preparing bankruptcy schedules and other aspects of practicing bankruptcy law for debtors. All attorneys and their staff who are involved in the preparation of bankruptcy papers for debtors should consider attending a workshop. It will help you greatly to keep current on the new requirement for document production. There is an ongoing Civil Enforcement Initiative to improve the practice of bankruptcy law and, if you are practicing bankruptcy law and do not meet the duties required of debtors and their attorney, you and your clients could be subject to enforcement action. Look for further information about these workshops.

FROM THE CLERK'S OFFICE

Judge Stevenson has just been appointed chief judge of the Bankruptcy Court for our district, replacing Judge Gregg, who has served admirably in that capacity for the past number of years. Thank you to Judge Gregg for all of your work and leadership in this role. We look forward to Judge Stevenson's tenure, which commences March 1, 2005 through March 1, 2009.

ECF is now mandatory.

See the new miscellaneous fee schedule, effective January 1, 2005, at the court website.

The court posted Guidelines for Attorney Fees & Court Appointed Professionals. This was done in response to continued objections to applications for the allowance of compensation and reimbursement of expenses. See the court website NEWS section.

We are sorry to hear that Sandy Crouch, calendar clerk to Judge Hughes, is retiring. A reception was scheduled for January 28, 2005 to honor Sandy. Thank you Sandy for being so great to work with over the years. Happy retirement!

STATISTICS COURT WEBSITE STATISTICS ON THE NUMBER OF CASES FILED THROUGH 11/10/04:					
2004:	CHAPTER 7: 12,515	CHAPTER 13: 3052	CHAPTER 11: 43	CHAPTER 12: 1	TOTAL: 15611
2003:	CHAPTER 7: 13,076	CHAPTER 13:	CHAPTER 11: 57	CHAPTER 12: 5	TOTAL: 16,900