Marcia R. Meoli

From: Marcia R. Meoli, Editor <mmeoli@hannpersinger.com>
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To: Marcia Meoli
Subject: Federal Bar Association - Bankruptcy Section

Federal Bar Association

Bankruptcy Section Newsletter
January 2007

This newsletter is published by the Federal Bar Association, Bankruptcy Section, for the Western District of Michigan. Prepared by lawyers with busy practices, every effort is made to publish on a quarterly basis. For your records, here are the dates of newsletters for the recent past: October 2006, July 2006, February 2006, October 2005, June 2005, February 2005, October 2004, May 2004, January 2004, October 2003, July 2003, April 2003 and January 2003.

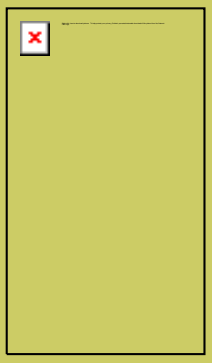
This is one of the first newsletters sent electronically for our association. Please let us know if you encounter any problems in retrieving or reading this newsletter, or if you have any other comments about it. Thank you.

In this issue

Court fees

All practicing attorneys should read a recent announcement from our court regarding attorney fees. This announcement, with minor modifications is as follows.

The Judicial Conference has approved changes to the Miscellaneous Fee Schedule which will became effective January 1, 2007. See: http://www.miwb.uscourts.gov/content/geninfo/fees .asp . The Court has recently received clarification from the Administrative Office on the exemption of the fee for filing a motion to reopen a bankruptcy proceeding. The Miscellaneous Fee Schedule currently provides that the reopening fee will not be charged for actions related to the debtor's discharge. To resolve any ambiguity on this exemption, Item 11 of the Miscellaneous Fee Schedule was amended to expressly state that the exemption from the reopening fee is applicable in two situations: (1) to permit a party to file a complaint to obtain



Upcoming dates:

1. 19th Annual FBA Summer Seminar: July 26-28 2007, The Park Place Hotel, Traverse City, Michigan

MARK YOUR CALENDARS NOW

2. FBA Steering Committee meets typically on the 3rd Friday for lunch at the Pennisular Club in downtown Grand Rapids. Check in advance with President Dan Kubiak @ DKubiak@mmbjlaw.com

Bankruptcy Section Steering Committee:

Todd A. Almassian

a determination under Rule 4007 (b), and, (2) for a creditor's violation of the terms of the discharge under 11 U.S.C. 524.

Thus, when a motion to reopen is filed to permit the filing of the debtor's certificate of completion of financial management, unless the motion requests the payment of the reopening fee in installments (not to exceed 30 days) or for a waiver in instances of hardship, the REOPENING FEE IS DUE UPON THE FILING OF THE MOTION.

Please note that, if the court determines that an attorney routinely fails to timely file the required certificates of completion of financial management course on behalf of their clients resulting in the case being closed without a discharge, the Court may, in its discretion, order the partial return of attorney fees.

Kalamazoo trustee hearing room

Since July 2005, we held 341 meetings in the basement of the federal building on Michigan Avenue in Kalamazoo. For anyone who used those facilities, you know that they were not the most convenient or attractive surroundings. The best one could say about them was that they provided some comedic relief for trustees, attorneys and clients.

In October 2006, the GSA completed construction on the new hearing rooms on the main floor of the federal building. They did a fantastic job. Not only are the hearing rooms more convenient for users, but they are well appointed. It even appears that someone has an eye for color, with the paint and carpet selections. While this may seem a rather superficial issue, what a difference it makes for those who use the rooms. Comfort is valuable, especially when one spends a number of hours at a time at work in a particular location.

I also see that someone placed photographs of federal buildings along the hallways in the federal building, which also enhance the look of the place.

Finally, I cannot resist mentioning the height- adjustable chairs placed behind the hearing tables. These are necessary for those of us who need a little height as we pound away on our laptops during the hearings.

Thank you to the GSA and the United Trustee Office for your work on this project. I understand that particular thanks should go to Fred McWain of the GSA and Dan Casamatta of the UST. If I missed someone, please let me know and I will thank them in a later issue.

-Editor

Standing Committee on Local Rules

After a detailed drafting process and then a comment time, our local rules were sent in final form to the Sixth Circuit Court of Appeals. Look for them to be posted on the local court website soon with an effective date in February 2007.

View the proposed local rules at the quick link on the right side of this newsletter, at the bottom.

Judicial Liason Program

David C. Andersen
Dan E. Bylenga, Jr.
Daniel J. Casamatta
Francesca W. Ferguson
Daniel R. Kubiak, Chair
John T. Piggins
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Steven L. Rayman
Marcia R. Meoli, Editor
Harold E. Nelson, Past Chair
Brett N. Rodgers
Peter A. Teholiz
Mary K. Viegelahn Hamlin
Robb Wardrop
Norm C. Witte

Quick Links...

United States Bankruptcy Court, Western District of Michigan

Local filing statistics

United States Trustee Program, including means test tables and other BACPA data

Unites States Bankruptcy Courts

Chapter 13 Trustee Brett N. Rodgers

Chapter 13 Trustee Mary K. Viegelahn Hamlin

Federal post judgment rate of interest

State Bar of Michigan

American Bankruptcy Institute

National Association of Bankruptcy Trustees

National Conference of Bankruptcy Judges

National Association of Consumer Bankruptcy Attorneys

From the court:

On January 1, 2007 the Bankruptcy Judges of the Western District of Michigan initiated a Performance Appraisal process inviting comments from all Court users, including attorneys who practice in the Western District, professionals involved in bankruptcy cases, and the general public. Accordingly, the Bankruptcy Judges selected attorney James Geary as the Bankruptcy Court's Judicial Performance Liaison. Mr. Geary accepted and agreed to take on this role as of January 1, 2007.

Attorney Geary is a highly respected attorney, a partner and board certified trial advocate in the Kalamazoo office of Howard & Howard, and former president of both the West Michigan Chapter of the Federal Bar Association, and the Kalamazoo County Trial Lawyers Association. Among other accomplishments, he was twice a member of the State Bar of Michigan's U.S. Courts Committee, both a faculty and Committee member of the Hillman Advocacy Institute and has served as a facilitative mediator, neutral evaluator, mediator and arbitrator.

Mr. Geary does not practice in the bankruptcy court and his firm will screen him from any Western District bankruptcy files it may have. Indeed, he well understands the need to hold in confidence the names of the parties with whom he speaks, filtering the information as necessary so that he can relate it to the individual Judge or Clerk in a manner that does not imply by circumstance, or in any other way, reveal a party's identity.

The goal of this new program is to solicit and convey information that will help the Bankruptcy Judges and the Clerk's Office better serve the public. We will seek your opinions and observations about the entire Bankruptcy Court experience, including, but not limited to, judicial demeanor; courtroom ambiance; treatment of attorneys and others; the efficiency of motion calendars and trials; helpfulness of the Court's web page; professionalism of staff; responsiveness of the Clerk's Office and Chambers staff to inquiries and requests for assistance; timeliness of decisions; and the overall tone of the Court. This also applies to your observations about the Clerk's office and its operations. We will want to know what you think we do well and what you think we need to improve. Your candid participation and constructive comments will be essential to the success of this process. Not the Judges nor their staff, the Clerk or anyone on the Clerk's staff, will ever inquire into the identify of the source of any comment. That information will only be disclosed if the source specifically requests or permits the disclosure. Attorney Geary will invite contact from everyone involved in the bankruptcy process by phone, in person or by e-mail. Based upon the input he receives, he will meet with each of the Judges and the clerk on a regular basis to convey suggestions and observations as to that Judge. Information that Attorney Geary transmits to any one of the Judges will not be made public in any way. Contact information: James H. Geary, Esq., Howard & Howard, Attorneys, PC, Comerica Building, Suite 800, 151 S. Rose Street Kalamazoo, Michigan 49007, 269.382.9707, Jhg@h2law.com

Recent events / announcements

1. Congratulations to Dan Kubiak, who now serves as Chair of the Steering Committee for the Bankruptcy Section, Federal Bar Association, Western District of Michigan. We also welcome two new members of the Steering Committee: Todd A. Almassian and Francesca W. Ferguson.

2. Judge Stevenson was pleased to see that approximately 20 lawyers volunteered to participate in the bankruptcy pro bono program for the Western District of Michigan. Thanks to Hal Nelson who spearheaded this

National Association of Chapter 13 Trustees

Federal Bar Association of Western Michigan

Pro bono procedures and client retainer agreement

Proposed local rules

US District Court civility plan

program, the others who helped and those who volunteered. If you have not volunteered yet, please consider this valuable program. For more information, click the quick link on the right side of this page.

We want to recognize the professional achievements of the people with whom we work. If you know of a professional award, achievement or other event regarding a member of our bar or other person involved in our practice, or regarding you, please let us know. Please supply sufficient information for us to report it, or to find the information to do so. You may email it to the editor, address below. Thank you.

Bankruptcy Civility Initiative

The FBA Bankruptcy Steering Committee is considering a Bankruptcy Civility Initiative:

The U.S. District Court for the Western District of Michigan Civility Plan is available on their web site. Many think it is a good idea to review this Civility Plan, think of how it can be applied to our practices and interactions and promote a Civility Initiative for the Bankruptcy Bar. The Bankruptcy Steering Committee appointed a Bankruptcy Civility Initiative subcommittee consisting of David Andersen, Dan Bylenga, Michael Maggio and Steve Rayman. The Civility Plan adopted by the District Court is available in their web site at

http://www.miwd.uscourts.gov/ATTORNEY/civility_pl an.htm

or go to Quick Link on the right side of this newsletter. The Steering Committee is expected to consider further promotion and support of civility in bankruptcy practice.

Thank you to David Andersen for his contribution of this information.

Case summaries

BANKRUPTCY CASES FROM OCTOBER 1, 2006, THROUGH DECEMBER 13, 2006

Published Sixth Circuit Decisions

Hughes v. Sanders, --- F.3d ---, 2006 WL 3257485 (6th Cir., Nov. 13, 2006) – judgment creditor obtained default judgment against Chapter 7 debtor in legal malpractice case and brought action seeking declaration that the default judgment was nondischargeable under 11 U.S.C. § 523(a)(7). The Sixth Circuit affirmed the trial court's ruling that the punitive default judgment, entered by the trial court after debtor's multiple violations of court orders, was not a "fine, penalty, or forfeiture payable to and for the benefit of a governmental unit" where it was payable to the judgment creditor Court.

In re 5900 Associates, Inc., 468 F.3d 326 (6th Cir., Nov. 7, 2006) – Chapter 7 trustee brought adversary proceeding to set aside alleged fraudulent transfer under M.C.L. § 566.35; transferee argued that debtor was not (a) insolvent at time of transfer, or (b) rendered insolvent by the transfer. The Bankruptcy Court granted the transferee's motion for judgment of dismissal, and the district court affirmed. Debtor's solvency turned on enforceability of claim for attorney's fees from a prior dismissed bankruptcy case, in which attorney never submitted fee application under 11 U.S.C. § 330 but obtained promissory note from debtor after the dismissal. The Sixth Circuit concluded

that a bankruptcy court retains jurisdiction to approve fees under 11 U.S.C. § 330 even after the underlying case is dismissed and that a private agreement between a debtor and its attorney cannot abrogate the court's duty to review fees. Therefore, because the attorney in the dismissed action failed to seek approval for his fees under 11 U.S.C. § 330, his fees are unenforceable, despite the attempt to use a promissory note to recover the fees. Thus, there was no fraudulent transfer under M.C.L. § 566.35 where debtor was solvent at the time of the transfer and was not rendered insolvent thereby.

In re Bergman, 467 F.3d 536 (6th Cir., Oct. 27, 2006) – trustee sought declaration that insurer who paid medical expenses for debtors prior to their Chapter 7 petition was a general unsecured creditor. The district court granted summary judgment for the insured, and trustee appealed. The issue before the Sixth Circuit was whether the insured, via a subrogation clause in its insurance policy with the debtors, acquired a pre-petition property interest thereby excluding the funds from the bankruptcy estate. The Court ruled that subrogation rights conferred by a contract are not affected by the Bankruptcy Code or by bankruptcy proceedings. 11 U.S.C. § 541(a)(1) defines the property of a debtor's estate as "all legal or equitable interests of the debtor in property at the outset of the case." The insurer had a property right in payments to the debtors, pursuant to the subrogation agreement, which right immediately vested in the insurer. As such, any money the debtors recovered up to the amount paid by the insurer was the insurer's property and was not property of the estate under § 541 of the Bankruptcy Code.

In re Bli Farms, 465 F.3d 654 (6th Cir., Oct. 13, 2006) – Ms. Bli's individual bankruptcy petition was dismissed for failure to file a plan, and a creditor foreclosed on her real property. Ms. Bli argued that these events deprived her of due process in adversary proceedings and lost. She then appealed to the district court, which affirmed the bankruptcy court. Ms. Bli did not file a motion for rehearing or a notice of appeal after the district court's order, but instead filed a motion under Fed. R. Civ. P. 60(b) in the district court some four months later. The district court denied the motion on its merits, and Ms. Bli appealed. The Sixth Circuit held that the district court lacked jurisdiction to hear the Rule 60 (b) motion. A party can seek review of orders of a district court sitting as an appellate court in bankruptcy proceedings only by filing a motion under Bankruptcy Rule 8015 or by timely appealing to the proper Court of Appeals. Bankruptcy Rule 9024, which renders Rule 60 applicable to bankruptcy proceedings, does not apply to a district court sitting as an appellate court. Since the motion was a nullity, the notice of appeal therefrom was also a nullity. The district court lost jurisdiction when Ms. Bli failed to file a timely motion for rehearing, and the Sixth Circuit never acquired jurisdiction where there was no timely notice of appeal. Thus, the Sixth Circuit dismissed the appeal for lack of jurisdiction.

Bankruptcy Appellate Panel Cases

In re Raynard, --- B.R. --- (6th Cir. BAP, Oct. 25, 2006) – debtors appealed from order denying confirmation of proposed Chapter 13 plan and dismissing case. The bankruptcy court ruled the plan unfairly discriminated between creditors and failed to meet the best interest of creditors test. The Bankruptcy Appellate Panel reversed and remanded, holding (1) that plan did not discriminate between joint and individual unsecured creditors; (2) that it satisfied the best interests of the creditors tests; and (3) that dismissal was an abuse of discretion. The debtors, dairy farmers who own a farm and residence as tenants by the entireties, filed a joint Chapter 13 plan which the court denied three times. The bankruptcy court opined that it would be in the best interest of the creditors if the case was converted to Chapter 7, but it was not permitted with the debtors' consent since they were farmers under 11 U.S.C. § 1307(e). Debtors argued that their unsecured individual creditors in a hypothetical Chapter 7 distribution would receive nothing because only joint creditors can reach entireties property under Michigan law. As such, debtors argued that their plan could properly discriminate between joint

creditors and individual creditors since individual creditors were not entitled to be paid from the property. The bankruptcy court erred when it limited the language "to the extent that" in § 522(b)(2)(B) to a dollar amount, and, in effect, read the statute to provide an exemption only to the extent of the amount not needed to satisfy joint claims. The bankruptcy court failed to realize that entireties property is fully exempt from the claims of individual creditors under all circumstances. The debtors' second amended plan appeared capable of confirmation and did not unfairly discriminate between classes of creditors.

In re United Producers, Inc., --- B.R. --- (6th Cir. BAP, Oct. 6, 2006) – appellants appealed from bankruptcy court confirmation of joint Chapter 11 plan over objections that plan was not proposed in good faith, not feasible, and unfair. Appellants appealed orders but did not seek stays thereof. The Debtors moved to dismiss the appeal as equitably moot since the plan had been substantially consummated and that reversal of the orders would adversely affect third parties not before the court. The Appellate Panel held that the appeal had to be dismissed as equitably moot where the implementation of the plan had not been stayed pending appeal, where debtors had substantially consummated their plans, and where innocent third parties had relied on implementation of the plan. The bankruptcy court noted that debtors had continued business operations and provided services to approximately 68,000 third parties. Reversal of the confirmation would leave debtors with no way to pay these third parties, especially where debtors' daily sales volume is approximately $3 million and $9 million in checks is outstanding at any given time.

Western District of Michigan Bankruptcy Court Cases

In re Hunt, --- B.R. --- (Bankr.W.D.Mich., Oct. 31, 2006) (Chief Judge Stevenson) – entity which supplied materials to HHCC, a business that constructed modular housing, brought adversary proceedings to except debt from discharge in Chapter 7 case filed by HHCC's principals as debt for debtors' fraud or defalcation while acting in fiduciary capacity under 11 U.S.C. § 523(a)(4). Entity argued that HHCC was a contractor and that the Michigan Builders Contract Fund Act (MBCFA) applied to debtors and rendered them guilty of defalcation where a supplier is not paid. The Court ruled that HHCC was not a contractor under the MBCFA and had no trust obligations to its material suppliers under the act. A contractor performs a service by making improvements to real property, while HHCC produces a good – modular unit housing. Thus, the supplier had nothing more than an unsecured claim in the HHCC bankruptcy proceedings for non-payment of a contract.

In re Quality Stores, Inc., --- B.R. --- (Bankr.W.D.Mich., Oct. 26, 2006) (Judge Gregg) – Chapter 11 debtors brought adversary proceedings under § 544(b) to recover payments previously made to corporate debtor's shareholders in connection with leveraged buyout of debtor's stock, and defendants countered that transfers were exempt as "settlement payments" under § 546(e). The Court looked to the definition of "settlement payment" in § 741(8): "a preliminary settlement payment, a partial settlement payment, an interim settlement payment, a settlement payment on account, a final settlement payment or any other similar payment commonly used in the securities trade." The Court adopted the Tenth Circuit's broad definition, which extended "settlement payment" to transfers of consideration made in connection with an LBO – and ruled that the payments at issue were "settlement payments" under § 546(e).

In re Fisher, --- B.R. --- (Bankr.W.D.Mich., Oct. 4, 2006) (Chief Judge Stevenson) – Chapter 7 debtor brought adversary proceeding (a) to set aside prepetition tax foreclosure on constructive fraudulent transfer theory; and (b) to recover for county treasurer's alleged violation of the automatic stay by proceeding with the sale of debtor's property for delinquent taxes. The

debtor argued that the foreclosure sale of the property violated the stay and was a fraudulent conveyance where the property was worth $68,000 but sold for less than $2,000. The Court concluded (1) that the tax foreclosure sale price could not be cause for setting aside the transfer if the Treasurer followed Michigan's procedural requirements; and (2) that the debtor lost her interest in the property once the redemption period expired, so the sale of the property thereafter, even though debtor had filed for bankruptcy, did not violate the automatic stay.

In re Delia, --- B.R. --- (Bankr.W.D.Mich., Oct. 3, 2006) (Chief Judge Stevenson) – bar brought adversary proceedings to except from discharge an indemnity obligation arising out of Chapter 7 debtor's allegedly unlawful operation of a motor vehicle while under the influence. Debtor caused a car accident in which two people were seriously injured, and the victims obtained a $50,000 judgment against the bar, and the bar obtained a judgment of $50,000 against the debtor. The Court noted that the language of 11 U.S.C. § 523(a)(9) made it clear that bankruptcy does not discharge a person from any debt arising from the operation of a motor vehicle while intoxicated. As such, the Court concluded that the debtor could not discharge the debt, which is in keeping with the policy of holding an intoxicated person fully responsible for the decision to operate a motor vehicle.

In re Van Stelle, --- B.R. --- (Bankr.W.D.Mich., Oct. 4, 2006) (Judge Hughes) – whether Chapter 13 debtors may, post confirmation, compel a secured creditor to accept substitute collateral for the property that secured the creditor's claim under terms of Debtor's confirmed plan instead of receiving insurance proceeds. Debtors moved for permission to use insurance proceeds to buy replacement vehicle after being involved in an accident, which vehicle would be used as substitute collateral for the creditor. The Court held that Section 1329 did not provide authority for the debtors to compel a secured creditor to give up its lien rights in the insurance proceeds so that they could use that money to purchase a new car. The Court further held that the insurance proceeds were not property of the estate post-confirmation. As such, sections 1303 and 363, which govern use, sale, or lease of estate property, did not provide any authority to substitute the secured creditor's collateral.

Thank you to Dan Bylenga for his work on these case summaries.

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