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Sent: Friday, January 18, 2008 4:46 PM
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Subject: Federal Bar Association - Bankruptcy Section

Federal Bar Association

Bankruptcy Section Newsletter
January 2008

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 2007, August 2007, April 2007, January 2007, 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.

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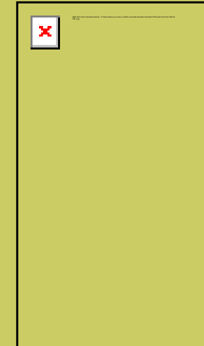
The Conflict Between 11 U.S.C. 522(c) and 1325(b), article by A. Todd Almassian

Section 1325(b) of the Bankrutpcy Code is a provision which



Upcoming dates:

1. 20th Annual FBA Summer Seminar: July 24-26, 2008, Boyne Highlands, Michigan.

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

3. Sixth Circuit Judicial Conference - May 7-10, 2008 in Chattanooga, Tennessee. See our court's

requires a debtor, in the event of a confirmation objection, to make "all" of his or her disposable income available for distribution to creditors. Comparatively, section 522 (c) is a limiting provision which operates to protect exempt property from pre-petition liability. Neither section 1325(b) nor section 522(c) is expressly limited by or subject to the other. This article will examine this conflict and the related opinions.

The legislative purpose in allowing debtors to retain property as exempt from distribution to creditors is stated in **In re Mattingly**, 42 F. Supp. 83 (W.D. Ky. 1941). "The real purpose and intent of the exemption laws...are to save for the debtor from his financial wreck a certain amount of necessary property which will enable him to keep himself and family from actual want while attempting to start a new life." **Id.** at 84.

While Congress has removed some of the bankruptcy court's discretion in determining what income is reasonably necessary for the debtor's maintenance and support, it is also "important to keep in mind that the purpose of Chapter 13 is to provide the maximum recovery to creditors." **In re Packham,** 126 B.R. 603, 610 (Bkrtcy. D. Utah, 1991)(citing S.Rep. no. 65, 98th Cong., 1st Sess. 22 (1983)). Thus, "Chapter 13 'contemplates a substantial effort by the debtor to pay his debts' which 'may require some sacrifice by the debtor.'" **Id.**

An exemption is the mechanism by which a debtor declares property "mine." This is well settled under section 522(c). However, pursuant to section 1325(b), there are circumstances within a Chapter 13 proceeding that may allow a Trustee to require "sharing" of what the debtor thought was exempt.

1. Federal Rule of Bankruptcy Procedure 4003.

A debtor may exempt property of the estate from distribution to creditors by properly filing a claim of exemption in the property. Fed. R. Bankr. P. 4003. Under Rule 4003(b), a party in interest may file an objection to a claim of exemption within thirty days after a section 341 meeting of creditors. Fed. R. Bankr. P. 4003(b). Unless a party in interest objects to a claim of exemptions within the period allotted, the property becomes exempt. See 11 U.S.C. 522(l) (2006). Once deemed exempt under section 522(l), the property may not be held "liable" for prepetition debts. See 11 U.S.C. 522(c) (2006).

2. The conflict between section 522(c) and section 1325(b).

How do we reconcile section 522(c), which provides for the exemption of certain assets from liability to prepetition creditors, with section 1325(b)(1)(B), which provides that, upon objection of a trustee or a secured creditor, a Chapter 13 debtor must place all of his disposable income into the hands of a

webstie for more information.

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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

United States Bankruptcy Courts

Chapter 13 Trustee Brett N. Rodgers

Chapter 13 Trustee Mary K. Viegelahn Hamlin

trustee for distribution over the life of a plan?

Section 522(c) provides, in relevant part "Unless the case is dismissed, property exempted under this section is not liable during or after the case for any debt of the debtor that arose, or that is determined under section 502 of this title as if such debt had arisen, before the commencement of the case..."

Section 1325(b) provides, in relevant part:

> (b)(1) If the trustee or the holder of an allowed secured claim objects to the confirmation of the plan, then the court may not approve the plan unless, as of the effective date of the plan
> . . .
> (B) The plan provides that all of the debtor's projected disposable income to be received in the three-year period beginning on the date that the first payment is due under the plan will be applied to make payments under the plan...

These sections may lead to conflict. On one hand, a Chapter 13 debtor may be able to exempt and maintain possession of his assets in exchange for surrendering future income. However, should that asset ever be sold or liquidated, the Debtor may be able to retain some "disposable" future income, which appears to conflict with section 1325(b). On the other hand, forcing a Chapter 13 debtor to surrender property explicitly made unavailable to creditors by state or Federal law seems contrary to the plain language of exemption statutes and section 522. **In re William Graham, Jr.** 258 B.R. 286 (Bkrtcy. M.D. Fla. 2001).

There has been a split of authority on whether exempt property may be treated as "disposable income" in Chapter 13 cases. In their analysis, the courts rely on a "plain language" argument and the decisions hinge on whether to rely on the "plain language" of section 522(c) or the "plain language" of section 1325(b)(2)(B).

3. The Majority View: Property exempt under section 522(c) may be treated as "disposable income" under section 1325(b)(1)(B).

The majority of courts that have addressed the exemption/disposable income issue have found that section 522(c) does not operate to render any income from exempt property which is immune from treatment as "disposable income." See **In re Tolliver,** 257 B.R. 98, 101 (Bankr. M.D. Fla. 2000) (discussing the holdings of courts standing in the majority and adopting their reasoning).

In Tolliver, the Chapter 13 trustee moved to modify debtors'

Federal post judgment rate of interest

State Bar of Michigan

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National Association of Bankruptcy Trustees

National Conference of Bankruptcy Judges

National Association of Consumer Bankruptcy Attorneys

National Association of Chapter 13 Trustees

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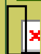
Pro bono procedures and client retainer agreement

US District Court civility plan

New dollar amounts in bankrutpcy

Information on reporting bankruptcy fraud



confirmed plan in order to provide for distribution of workers' compensation proceeds. The Bankruptcy Court held these proceeds were "disposable income" subject to distribution by the trustee. **Id.** at 101.

Debtors did not list proceeds from the worker's compensation claim as exempt property on their Schedule C, Property Claimed as Exempt; nor did they indicate on their Statement of Financial Affairs that Tolliver was a party to a worker's compensation claim. Debtors failed to amend their bankruptcy schedules to include the proceeds of the worker's compensation claim as exempt. However, the Tolliver Court did not limit its analysis to the accuracy of debtors schedules, finding that even if the debtor lists the asset as exempt, a majority of courts have concluded the proceeds from the asset can qualify as disposable income.

A substantial number of courts, relying on the plain language of section 1325(b), which does not exclude or include income on the basis of its exempt or non- exempt status, have held that exempt income must be considered in a court's determination of whether the disposable income test is satisfied. **In re Schnabel,** 153 B.R. 809, 817 (Bankr. N.D. Ill. 1993); See also **Hagel v. Drummond (In re Hagel),** 184 B.R. 793, 796 (9th Cir. BAP 1995) (holding social security disability benefits subject to disposable income test); **Watters v. McRoberts (In re McRoberts)** 167 B.R. 146, 147 (S.D. Ill. 1994) (holding that a lump sum personal injury recovery disposable income); **In re Pendleton**, 225 B.R. 425, 427 (Bankr. E.D. Ark. 1998) (holding proceeds of personal injury cause of action previously claimed as exempt disposable income); **In re Hagel,** 171 B.R. 686, 689 (Bankr. D. Mont. 1994) (finding social security disability income subject to disposable income test); **In re Lush**, 213 B.R. 152, 155 (Bankr. C.D. Ill. 1997) (holding worker's compensation claim, although exempt under state law, was disposable income).

These Courts find an inherent difference between Chapter 7 and Chapter 13 that justifies subordinating a section 522(c) exemption to the section 1325(b)(1) (B) "disposable income" test. See e.g. **Schnabel**, 153 B.R. at 817 (making such a distinction). "Because the fresh start in Chapter 13 is protected by a debtor's ability to retain non-disposable income rather than exempt assets, the importance of exemptions is diminished." **Tolliver**, 257 B.R. at 100. The majority of Courts then conclude the "disposable income" requirement is not subject to section 522(c) because it does not specifically state that it is subject to section 522(c). This analysis becomes the justification of the disposable income-tilted "plain language" argument.

The Courts note the purpose of exemptions in Chapter 7 asset liquidation and in state debtor/creditor law is the protection of certain assets against forced sale. The majority of opinions go

on to argue such protection is not relevant to Chapter 13 cases, when a Chapter 13 debtor retains all assets and surrenders income. However, these courts never address section 103(a) which provides all of the provisions of Chapter 5 of the Bankruptcy Code, including section 522, apply to Chapter 13 cases and Chapter 7 cases equally. See 11 U.S.C. 103(a).

4. The Minority View: Property exempt under section 522(c) may not be treated as "disposable income" under section 1325(b)(1)(B).

The minority of courts conclude that exempt property may not factor into the "disposable income" analysis. See **In re Hunton**, 253 B.R. 580, 582 (Bankr. N.D. Ga. 2000) (citing courts standing in the minority). These Courts assert the plain language and general applicability of section 522 provides that property exempt under section 522(l) and therefore, section 522 (c) may not be treated as disposable income. These Courts hold that section 522(c) protects exempt property, regardless of form, from prepetition debts and conclude the express limitation of 522(c) cannot be ignored for purposes of defining disposable income under section 1325(b).

In In re Ferretti, 203 B.R. 796 (Bankr. S.D. Fla. 1996), a Chapter 13 debtor's personal injury attorney moved to allow distribution of automobile accident settlement proceeds. The Bankruptcy Court held that: (1) in the absence of a timely objection, the entire settlement proceeds were exempt, and (2) those proceeds were not disposable income. **Id.** at 800.

The Trustee in the Ferretti case argued that the philosophy behind a Chapter 13 is different than a Chapter 7, and that 11 U.S.C. 1306 makes the proceeds of the settlement property of the estate subject to administration by the Trustee. The Trustee suggested the Court consider not only whether the property is exempt, but even if it is exempt, whether it is disposable income as defined in 11 U.S.C. 1322 and 1325. **Id.**

Notwithstanding the minority position, most courts that have considered the issue have concluded exempt property must be factored into the disposable income test under section 1325(b).

5. Stream of Income - Freeman v. Schulman (In re Freeman), 86 F.3d 478, 481 (6th Cir.1996).

In Freeman, after confirmation of Chapter 13 plan, debtor discovered that her income tax refund, which stemmed primarily from prepetition income, would be larger than expected. Debtor moved to amend her plan to exempt the tax refund under Tennessee law.

The Court of Appeals, held that: (1) in determining whether a

tax refund is disposable income, the appropriate inquiry is whether the tax refund was projected disposable income and whether it is necessary for maintenance or support of debtor or his or her dependent regardless of state law exemptions; and (2) the refund was disposable income that had to be applied to make plan payments.

The debtors' Chapter 13 plan called for semi-monthly payments of $158.50 and payment into the plan of all income tax refunds due to the debtors for a three-year period. Debtors claimed an exemption in their bankruptcy filing in the amount of $200, the expected amount of their federal income tax refund.

Subsequent to the confirmation of their Chapter 13 plan, debtors discovered that the federal tax refund they would be receiving for 1993 was between $1200 and $1500, larger than previously anticipated. The debtors then moved to amend the approved plan to exempt the portion of the tax refund representing exempt property.

Trustee objected to the amendment on the ground that the proposed modification violated the requirement under 11 U.S.C. 1325(b) that all of the debtor's "projected disposable income" to be received during the pendency of the plan must be applied to make payments under the plan, regardless of whether it qualifies as "exempt property" under Tennessee law. The Bankruptcy Court denied the motion to amend because it found that any tax refund in excess of the originally claimed $200 was "projected disposable income" under section 1325(b)(1)(B) and therefore must be applied to the plan.

This analysis raises a number of issues. First, would the result be different if the income received post petition was not automatic, but was instead the result of the Debtor's choice to liquidate the asset? In other words, if the income to be received was not from income tax refunds, social security benefits, repayment of a loan to the debtor, or income from a non-compete agreement, would it affect the analysis? Second, what would the result be if, for instance, the debtor exempted a boat or that ever so valuable Precious Moments Collection, and then after confirmation decided to liquidate the exempt asset to go on vacation, pay for a child's college room and board for a semester, or even buy a used Corvette. Arguably, such income is not disposable income that automatically comes into the plan.

6. Capital Asset - In re Ash'Shadi, 2005 WL. 1105039 (Bankr. E.D. Mich. May 6, 2005).

Consider Judge McIvor's opinion in **In re Ash'Shadi**, 2005 WL 1105039 (Bankr. E.D. Mich. May 6, 2005). In Ash'Shadi the debtor filed a voluntary Chapter 13 petition. Debtor's assets included her one half interest in her residence. The residence

was valued at $130,000 with an outstanding mortgage of $83,300. On her Schedule C, Debtor exempted $18,000 of her interest in the residence. An Order Confirming Debtor's Plan of Reorganization was entered. The plan provided a dividend of less than a 100% to her unsecured creditors. Debtor filed a post confirmation Motion to Sell Real Property. Debtor anticipated she would net $13,937.50 from the sale and sought to retain the proceeds. The Trustee objected to the Motion, asserting that any proceeds received by Debtor from the sale of the property constitute disposable income under 11 U.S.C. 1325(b)(1)(B), and should be paid into the plan in order to increase the dividend paid to unsecured creditors. **Ash'Shadi,** 2005 WL 1105039 at 1.

The Court denied the Chapter 13 Trustee's objection to the debtor's proposed retention of the sale proceeds because the proceeds were not disposable income. **Id.** at 3. The Court stated that if the "asset in question is an anticipated stream of payments," it constitutes disposable income that must be committed to the Plan without regard to whether the asset from which the payment stream is derived is exemptible. **Id.** at 2.

The Court distinguished proceeds derived from the sale of a capital asset from a postpetition stream of income derived from a prepetition asset; therefore, a single distribution arising from the sale of Debtor's residence is different from a stream of payments derived from social security, a pension, or disability. **Id.** According to the Alsh'Shadi Court, the proceeds did not constitute disposable income, were not property of the estate, and did not need to be committed to the Plan. **Id.** at 3.

In determining the sale of a capital asset does not create 'disposable income' pursuant to 11 U.S.C. 1325, the Court began with the definition of 'disposable income.' **Id.** at 2. Disposable income under section 1325 is postpetition income received by the debtor that is "not reasonably necessary for the maintenance or support of the debtor or a dependent of the debtor." **Id.** (quoting 11 U.S.C. 1325(b) (2)).

The Court defined the nature of Debtor's prepetition homestead as a capital asset. **Id.** The Court then made the assertion that liquidating the capital asset did not alter the nature of the asset. **Id.** Since the cash received upon the sale of the property remained a capital asset, in spite of the change in form, it could not be disposable income according to the Court. **Id.** Therefore, the debtors in this case could not be compelled to modify their plan to treat the sale proceeds as disposable income to be distributed under the plan. **Id.** at 3.

Underlying the Court's determination is the very nature of chapter 13 bankruptcy. See **Id.** at 1. In order to allow debtors to retain assets, "the debtor must commit all postpetition disposable income to the payment of creditors under a chapter

13 plan for a period of three to five years." **Id.** (quoting **In re Burgie,** 239 B.R. 406, 410 (9thCir. B.A.P. 1999)). If it is the case that creditors cannot count on payment from debtors from a capital asset, then the creditors should not benefit, to the detriment of the debtor, from its sale. Each party should receive the benefit of their bargain, which entails the debtor retaining proceeds from the sale of an exempt asset when that asset is not an income stream producing asset.

Conclusion

When analyzing the inherent conflict between section 522(c) and 1325(b), a majority of courts have held exempt income must be considered in a court's determination of whether the disposable income test is satisfied. The minority of courts conclude that exempt property may not factor into the "disposable income" analysis and such property may not be treated as disposable income. Although it remains uncertain, the line may be drawn on whether the exempted asset produces a stream of income, which would likely be determined disposable income, or whether the exempted asset is a capital asset, which may be liquidated without altering the nature of the asset itself, and thus retained by the Debtor.

Article from Judge Scott Dales: new procedures

Marcia Meoli asked me to submit a short "open letter" to the bankruptcy bar concerning some new procedures and, some might say "quirks," that I have adopted with respect to some of the bread- and-butter motions and applications that make up so much of our practice. These include requests to approve stipulations and other agreements concerning the automatic stay and adequate protection, Chapter 13 plan amendments, motions to extend deadlines, and a few other requests for orders. Although they may seem perfunctory, these run-of-the-mill applications and motions implicate the "notice and opportunity" that is crucial to making the bankruptcy process run smoothly and ensuring that we all comply with the constitutional requirement of Due Process that forms the foundation of our practice.

Let me start by saying, perhaps paradoxically, that I am a little old-fashioned and a little green at the same time. I am old-fashioned in the sense that I believe a motion is a request for an order - separate from the proposed order itself -- and the request must give the court enough of a rationale to grant the relief requested. A barebones stipulation, obviously satisfactory to the subscribing parties, may not suffice as a statement of reasons in support of court approval. I am green in the sense that you shouldn't expect me to infer the reasons for the relief

just because you, as seasoned practitioners, regard the reasons as self-evident. Much of my practice before my appointment was commercial, so in many ways I am learning or re-learning the consumer-side of bankruptcy. Treat me as if I know almost nothing and we should get along just fine.

I have told many of you that I do not intend to rock the boat by unnecessarily disturbing the procedures and practices that Judge Stevenson developed during her twenty or so years on the bench. I think her chambers ran quite efficiently, and so I am striving to continue that. Yet, I must confess, that when confronted with the wide variety of applications and procedures that come across my desk, I turn first to the rule books, relying less on past practices. I know that in some ways this is disruptive; in other ways, however, it imposes on us all a renewed discipline and fidelity to the drafters' plan for helping us push a mountain of paper without trampling on the rights of interested parties. Please bear with me while I try to reconcile our mutual quest for efficiency with the imperative of Due Process.

The following paragraphs describe some of the routine issues that I have seen in the last few months, and my response to them. I am open to suggestions, so if something seems really off base, send me a letter raising the issue generally (not in a particular case) and I would be pleased to reconsider my practices. I am a work-in-progress.

F.R.B.P. 4001(d) and L.B.R. 4001-3: Stipulations Regarding the Automatic Stay, Adequate Protection, Cash Collateral, Post-Petition Credit

With respect to agreed orders relating to relief from the automatic stay, adequate protection, and the other matters listed in Rule 4001(d), I will insist on compliance with that rule and with LBR 4001-3. These rules both provide that a party seeking court approval of agreements relating to the listed matters must file a motion, and that the motion be separate from the proposed order. The purpose of these rules is two-fold.

First, they aim to inform the court of the basis for the relief requested, including, for example, "cause" for relief from stay, absence of equity, and/or the nature of the adequate protection being provided, among other information. Second, they are designed to make certain that parties with a material interest in the proposed relief have notice and an opportunity to be heard before entry of the order granting the relief. When a party simply files a barebones stipulation, unadorned with factual recitation, the court is left to speculate on whether the relief requested is appropriate and whether or to what extent, an order granting the relief will affect parties not before the court. Put a little meat on the bones and give me something to chew on.

Taking the guesswork out of motion practice will bring more predictability.

From my practice representing creditors, I have come to believe that the automatic stay protects not only the debtor and the estate, but also other creditors. Sometimes it seemed that the bankruptcy filing was a welcome relief to my creditor clients because it automatically stopped the proverbial race to the courthouse with its attendant costs and risks. That is why I tend not to approve skeletal stipulations or so- called "stipulated motions" if I can't determine from the stipulation itself whether other parties have an interest. I will not comb through the debtor's schedules or elsewhere in the docket to ferret out whether another entity claims an interest. The proponents of the stipulation should give the court that information, after reasonable investigation as contemplated in Rule 9011.

Recognizing, however, the routine nature of many stay relief requests, and not desiring to place undue burdens on practitioners, I am willing to approve stipulations (or, technically speaking, I am willing to grant motions for approval of agreed relief) if the proponent of the relief puts all interested parties on notice of the request for relief and gives them an opportunity to object, or if the stipulation itself confirms that all interested parties have indicated assent by signing. It would be helpful to me if the stipulation contains recitals explaining the basis for granting the relief, and in this way functions as a motion.

With respect to notice, and limiting notice, it is true that the court has considerable authority under Rule 2002 (m), Rule 9007, and 11 U.S.C. 102 to regulate notice. Yet, the court must have a basis for exercising its discretion. I start with the presumption, codified in Rule 9003, that we must refrain from ex parte communications. In addition, I note that some rules, including Rule 4001, specify the entities that must receive notice, and include the catchall phrase, "and such entities as the court may direct." With respect to motions to approve agreements regarding the automatic stay, adequate protection, cash collateral, or post-petition borrowing, our court by local rule has directed that particular entities receive notice of the proposed approval, depending upon whether the case is one under Chapter 7, 11, 12, or 13.

For example, in Chapter 7 cases, the motion to approve the agreement must be served on the parties to the agreement, the Chapter 7 trustee, and "any entity which claims an interest in the subject property." LBR 4001-3(d)(1). To this list we must add the entities entitled to notice under Rule 4001(d)(1) (e.g., committees and their agents). Every "stipulated order" or "stipulated motion" should apprise these entities of the request for relief.

Because notice plays the central role in bankruptcy practice, I will not assume that I can depart from the rules governing notice unless the proponent of the departure assures me that I have authority to depart, and that good reasons exist for doing so.

Chapter 13 Plan Amendments

I routinely see proposed amendments to confirmed Chapter 13 plans. Many times, the proponent of the amendment simply files it, without seeking court approval. I think this creates confusion about which version of the Plan applies, and encourage practitioners to avoid it.

We must be careful to distinguish between pre- confirmation plan amendments (governed by 11 U.S.C. 1323) and post-confirmation amendments (governed by 11 U.S.C. 1329 and Rule 3015(g)). As one might expect, it is far easier to modify a proposed plan - Section 1323(b) tells us, "[a]fter the debtor files a modification under this section, the plan as modified becomes the plan." By local rule, the debtor shall serve the amendment and the notice of the date for confirmation upon the trustee and all creditors or parties in interest who may be adversely affected. LBR 3015(e). This is because the confirmation hearing supplies the opportunity to object. Simple enough.

In contrast, post-confirmation plan modification is more onerous, presumably given the res judicata effect of a confirmed plan. First, the reasons for post- confirmation modification are more limited than pre- confirmation amendments. See 11 U.S.C. 1329(a). Second, as with pre-confirmation amendments, the "plan as modified becomes the plan" but the Code then adds this important procedural wrinkle: "unless, after notice and a hearing, such modification is disapproved."

To implement this notice requirement, Rule 3015(g) provides that a request to modify a plan under 11 U.S.C. 1329 shall identify the modification's proponent, and shall be filed together with the proposed modification. In addition, the proponent of a post-confirmation amendment must "give the debtor, the trustee, and all creditors not less than 20 days notice by mail of the time fixed for filing objections, and if an objection is filed, the hearing to consider the proposed modification, unless the court orders otherwise with respect to creditors who are not affected by the proposed modification." Our local rule seems to have relaxed somewhat the service requirement by delegating to the parties the responsibility for determining who is and who is not adversely affected by the modification. See LBR 3015 (f). I admit that I am a little uncomfortable with that delegation, and have not always deferred to the parties' view of the impact of the amendment on other parties if I cannot determine right away that the amendment has no negative effect. In those cases,

I have asked the proponent of the amendment - usually the debtor or the trustee - to serve all creditors and in that way, let the creditors decide if the amendment adversely affects them.

In other words, I am not inclined to presume or infer that the amendment has no adverse affect. Consider, for example, a plan amendment that substantially increases the debtor's monthly payment. How could creditors complain? Yet, it is possible that a substantial payment increase made to appease an obstreperous creditor or trustee might render the plan no longer feasible. We must keep in mind that amendments must meet most of the confirmation standards in Chapter 13, including, for example, feasibility. See 11 U.S.C. 1329(b) & 1325(a)(6). Though the hypothetical may seem technical, and though I might soften my view after more experience, for now I am more comfortable sanitizing most amendments with the notice and opportunity to object that Section 1329 and Rule 3015(g) presumptively require, unless the plan amendment gives me ample reason to determine for myself that it will have no adverse effect, and that I may therefore limit notice. A little sunshine goes a long way in insulating orders from collateral attack.

What this means, in practice, is that the recital portion of the plan amendment should attempt to explain how the amendment affects the parties in interest, and how the amendment complies with Section 1329(b) and the other provisions incorporated therein. If you want me to "order otherwise" with respect to service, give me a good explanation and I will consider it; otherwise, plan on giving notice to all creditors and other entities as listed in Rule 3015(g).

Section 365(p)(2): Debtors' Assumption of Personal Property Leases

Section 365(p) says that if a trustee rejects a lease of personal property, or does not timely assume it under Section 365(d), then the leased property is "no longer property of the estate" and the automatic stay is "terminated," presumably with respect to the lease and the leased property. 11 U.S.C. 365(p)(1). The phrase "no longer property of the estate" suggests that the leased property itself, as opposed to the debtor's rights under the lease, is within the property of the estate initially. I freely admit having some difficulty understanding how that could be, given that a lessor under a true lease retains title to the goods, but at least I can say that, after rejection of the lease, the leased property is not within the estate.

Recognizing, correctly, that Chapter 7 debtors often value their leased property more than trustees do, Congress gave debtors an opportunity to assume rejected leases using a simple notice procedure. See 11 U.S.C. 365(p)(2). In a nutshell, the debtor sends written notice to the lessor that the debtor desires to

assume the lease. In response, the lessor may notify the debtor that it is willing to have the lease assumed by the debtor, and may attach conditions to that assumption, such as a cure of monetary or non- monetary defaults. Within 30 days after the lessor notifies the debtor that the lessor is willing to permit the assumption, the debtor then notifies the lessor, again in writing, that "liability under the lease will be assumed by the debtor and not by the estate." Id. 365 (p)(2)(B). Several lessors have filed stipulated motions or applications asking me to confirm that their debtors have assumed their leases.

However, it seems to me that the process should be effected entirely by the parties. This makes sense because the statute lacks any reference to court approval and, indeed, subparagraph (p)(2)(C) makes the discharge injunction and the automatic stay automatically inapplicable to a lessor's notification and cure negotiations. Moreover, after rejection, the property is not property of the estate, so the transaction is by then a private affair between the debtor and the lessor, not involving the creditors of the Chapter 7 estate. Abjuring court approval is also consistent with the goal of minimizing expense for the parties. Motions add expense.

I am also reluctant to embellish the effect of an assumption under Section 365(p) with pronouncements about reaffirmation under Section 524, as some lessors have sought through their proposed orders. Because the statute does not link the two concepts, I am not inclined to do so even if the effects of assumption and reaffirmation seem analogous.

Because there appears to be no role for the court in the process, I have been advising parties that I do not intend to act upon their requests to confirm the assumption under Section 365(p). Certainly I am open to another interpretation of the statute if, for example, someone makes a motion supported by legal authority, or if circumstances reveal an actual case or controversy about the effect of the exchanged notices. For now, in the absence of briefs or actual controversy, I rely simply on my reading of the statute.

Default Judgments

In the last three months, I think I have denied more motions for default judgment than I have granted. This hesitation on my part stems principally from two sources. For openers, the late U.S. District Judge Con. G. Cholakis - the first judge I clerked for - was a stickler about service of process in the default setting, and he pounded his concerns into my head. He felt, as I now do, that courts must be especially careful when granting relief by default to make sure that the plaintiff has scrupulously complied with the rules governing service of process because, by definition, the defendant is not around to provide a check on

service. Proper service of process is crucial because it is the formal way in which the court obtains personal jurisdiction over the defendant, and I will be strict about it. Moreover, plaintiffs concerned about avoiding collateral attack on their default judgments ought to share this view. And, because Rule 7004 authorizes service on most defendants by ordinary first class mail, this requirement is hardly onerous, though some pitfalls remain.

For example, trustees who represent themselves as plaintiffs should not serve the summons and complaint themselves because Rule 7004(a) renders service ineffective unless the person effecting service is "not a party." Another pitfall: service on an insured depository institution requires special handling, typically certified mail addressed to an officer of the institution. See Fed. R. Bankr. P. 7004(h).

In addition to service issues under Rule 7004, Rule 7055 incorporates the prohibition against entering default judgments against infants or incompetents. Motions for default judgment should affirmatively state that the defendant is not an infant or incompetent, subject again to the reasonable investigation required by Rule 9011.

Please note an additional prerequisite to the entry of default judgments: the Soldiers and Sailors Civil Relief Act, 50 U.S.C. App. 521. This federal law by its terms applies to "all" civil proceedings in which a defendant does not make an appearance. The statute, which is somewhat buried in an appendix to Title 50 of the United States Code, provides in relevant part as follows:

> In any action or proceeding covered by this section, the court, before entering judgment for the plaintiff, shall require the plaintiff to file with the court an affidavit--
> (A) stating whether or not the defendant is in military service and showing necessary facts to support the affidavit; or
> (B) if the plaintiff is unable to determine whether or not the defendant is in military service, stating that the plaintiff is unable to determine whether or not the defendant is in military service.

50 U.S.C. App. 521(b)(1). The affidavit requirement may be met by a statement, declaration, verification, or certificate, in writing, subscribed and certified or declared to be true under penalty of perjury. See id. 521(b)(4); see also 28 U.S.C. 1746 (allowing statements made under penalty of perjury in lieu of affidavit). I have also taken testimony from the plaintiff at a hearing on the motion for default judgment. Finally, when the court cannot

determine the defendant's military status, the statute authorizes the court to require a bond or "issue such orders or enter such judgments as the court determines necessary to protect the rights of the defendant under this Act."

The Department of Defense maintains a website to assist practitioners in determining whether a defendant is in the military service. You can visit https://www.dmdc.osd.mil/scra/owa/home, but you will need either a social security number or the month and year of birth for the defendant. Of course, this website is not the exclusive source of information concerning a defendant's military service, and the affidavit may be premised on information and belief obtained from other sources.

Although the Soldiers and Sailors Civil Relief Act applies in times of war and peace, it strikes me that we owe it to the members of our armed services now more than ever to observe scrupulously the requirements of the statute.

One more thing about judgments by default: I follow the statement, set forth in Rule 54(c), made applicable to adversary proceedings and contested matters by Rule 7054 and Rule 9014, that default judgments should "not differ in kind from, or exceed in amount, what is demanded in the pleadings." See Fed. R. Civ. P. 54(c). Therefore, be sure to include in your complaint a demand for all the relief you want, in case the defendant fails to answer and you need to move for judgment by default. If your motion for default judgment seeks relief beyond the complaint, you can expect me to deny the motion.

For example, in avoidance actions, if a trustee wants to recover a money judgment in addition to avoiding a transfer, the complaint should clearly ask for both types of relief. Relief under 11 U.S.C. 550 does not automatically follow avoidance under, say, 11 U.S.C. 544, 547 or 548, as avoidance and recovery are separate forms of relief. See Taunt v Hurtado (In re Hurtado), 342 F.3d 528, 532 (6th Cir. 2003) (avoidance and recovery must be kept analytically separate).

Finally, here is one more quirk I have about default judgments, again premised on my reading the Federal Rules of Civil Procedure. Rule 8 requires "a short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2). This usually means allegations of fact (rather than mere conclusions of law). Rule 8(b)(6) says that failure to deny an allegation (other than an allegation concerning amount of damages), constitutes an admission. So, when I review motions for default judgment, I look to see whether the well-pleaded factual allegations - which I treat as being conclusively established for purposes of the motion - justify the demand for relief prayed for in the complaint. See Fed. R. Civ. Pro. 8(a)(3)

(requiring prayer for relief) and Fed. R. Civ. P. 54(c) (limiting nature and amount of default judgment to that prayed for in the complaint). In other words, the defendant's failure to answer, without more, will not justify relief if the allegations in the complaint do not support a judgment granting the relief.

CONCLUSION

Central to each of these concerns is my desire to ensure that parties with an interest in the many matters that come before me have notice and a meaningful opportunity to be heard before I enter an order that will affect their rights and responsibilities. Though I have sensed some frustration, especially about my stingy attitude towards default judgments, I think that ensuring adequate notice protects not only the intended-defendant or other party-in-interest, but also the proponent of the relief. Notice allows the creditors or other parties-in-interest to protect themselves from the court's judgments, but it also allows the proponent of the relief to protect the court's judgments from creditors or other parties-in-interest. The cost of giving notice is the price we pay for orders - and order itself -- in a system that honors Due Process. It is also cheap insurance against collateral attack.

A "thank you" from retired Judge Jo Ann C. Stevenson

Judge Stevenson wrote our chair, Dan Kubiak, a great letter after the various events for her retirement this past Fall. Here it is:

My thanks and gratitude to the FBA Bankruptcy Section may be a bit tardy but no less heartfelt. I am still basking from the glow of that evening which was absolutely wonderful in every way and far more than I ever expected or probably deserved. I am so grateful to everyone and each entity who had a part in the planning, attended the event and/or contributed financially.

I must tell you that my daughter-in-law Alison relayed to me what we all agreed was my mother's best comment that night. Her words went something like "Gee, usually no one says such nice things about a person until after they are dead!" And she's probably right.

I very much appreciated my "hanging" and the reception afterward. I was delighted by the occasion, especially the cellist. I am, of course reminded that not many people get to comment on their own "hanging" after the event.

Receiving the "Bankruptcy Lion" award was an unexpected and grateful honor. It is now sitting in a place of prominence in my home.

The personal GPS was an ingenious gift. Everyone must know how

"geographically challenged" I am. Marshall has figured it out and will soon share his knowledge with me - most likely an interesting session upon which I probably will not report. Hopefully, I will do better at that than Marshall and I have done at our ballroom dancing lessons.

It has been an honor and a joy to work for and with the members of the FBA over my twenty-year tenure on the Bench. While I don't miss the work, I do certainly miss the people.

With gratitude and appreciation, I remain
Very truly yours,

Jo Ann C. Stevenson

From the clerk of the court/procedural changes

1. The IRS's National Standards for Allowable Living Expenses and Local Standards for Transportation and Housing and Utilities Expenses have been updated. The revised standards will apply to cases filed on or after January 1, 2008. These are available on the United States Trustee website (see link on the right side of this newsletter). Most bankruptcy software programs provide updates. Be certain that you have updated your systems to use the new amounts.

The changes to the IRS standards include different requirements for living expenses and transportation expenses. These line items are now split into 2 sections on the form. Again, many software suppliers provide updates to take care of these changes, but you should review the new forms to understand how they differ from what you have been using.

2. The Federal Rules of Bankruptcy Procedure were amended effective December 1, 2007. Topics in the amendments include: dismissal and transfer of cases (FRBP 1014); relief from the automatic stay and the use of cash collateral (FRBP 4001); relief immediately following the commencement of the case (FRBP 6003); executory contracts and unexpired leases (FRBP 6006); corporate ownership statement (FRBP 7007.1) and constitutional challenges to statutes (FRBP 9005.1).

Furthermore, new Rule 9037 was created, effective December 1, 2007. This implements the E- Government Act of 2002 which requires that personal information, such as social-security numbers, taxpayer-identification numbers, birth dates, the names of minors and financial account numbers be redacted from the documents filed electronically with the bankruptcy court. The rule provides what information regarding these items may be placed in documents and exceptions to the privacy requirements, as well as some other matters. While this is

consistent with our practice now and present Judicial Conference policy, you should read this rule to be certain that you are complying with it.

3. In February 2008, Judge Gregg will commence hearings on motions for the approval of attorney fees to be paid out of bankruptcy estates for attorneys who have not attended bankruptcy education programs during 2007. This is consistent with his stated policy announced before. (See October 2007 newsletter.) Judges Hughes and Dales will also refer such motions to Judge Gregg to hear in certain cases. Hearings on these motions will be set in special calenders by the court. See our right hand column regarding information about our summer seminar this July in Boyne Highlands.

Recent events/announcements

We mourn the passing of a retired longtime bankrutpcy attorney and father of 2 actively practicing bankrutpcy attorneys:

David Davidoff, age 88, of Kalamazoo, passed away on Sunday, November 25, 2007 at his home in Kalamazoo, Michigan. He was born in New York City on November 7, 1919, the son of Herman and Anna (Peterson) Davidoff. He attended high school and C.C.N.Y. in New York and received his A.B. degree from the University of Michigan in 1940 and his J.D. degree from the University of Michigan Law School in 1942. He became a member of the New York Bar in 1942 and practiced briefly in New York before entering service in the U.S. Army in January, 1943 where he served until February, 1946. On June 10, 1943, he married Celia Halpert of Kalamazoo at Fort Ontario, Oswego, New York. He became a member of the Michigan Bar in 1946 and practiced in Kalamazoo from 1946 until his retirement in 1987, with the law firm of Stanley, Stanley & Davidoff, which later became Stanley, Davidoff, Long & Gray, P.C. He was actively involved in the following organizations: David served as President of the Kalamazoo County Bar Association from 1966 to 1967. He also served as Chair of the Ceremonies Committee of the Kalamazoo County Bar Association for over a half century; the Michigan Bar Association; American Bar Association; Fellow of the Michigan State Bar Foundation; Commercial Law League of America; Secretary of S.C.O.R.E; Board Member of March of Dimes; Past President and Trustee of the Congregation of Moses; Past President of the Kalamazoo B'Nai Brith Lodge; Hadassah Associate; Kalamazoo B.P.O.E. and the American Contract Bridge League. In 2006, David was honored by the Kalamazoo County Bar Association with the establishment of the David Davidoff Award for exemplary lifetime service to the Kalamazoo County Bar Association. He was an excellent bridge

player and an enthusiastic sports fan, particularly of the University of Michigan's Big Blue teams. He was generous, had a good sense of humor, and he loved and was devoted to his family and friends, especially his good friend Roger Allen. Preceding him in death are his parents and his sister, Adele Klein of Chicago. Surviving are his wife, Celia; three children, Paul (Judith) Davidoff of Kalamazoo, Jane (Robert) Rogers of Bay City and Robert (Denise) Davidoff of Portage; six grandchildren, Jason, Andrea, and Nathan Davidoff, Alex (Cristina) Rogers, Adam (Kelly) Rogers and Erin Rogers; one great-grandchild, Daniel Rogers and several nieces and nephews. Donations honoring David may be made to the Congregation of Moses, March of Dimes, or a charity of your choice.

(Above was derived from the announcement in the newspaper.)

If you have information regarding any 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.

Summaries of recent cases

BANKRUPTCY CASES: September 27-December 20, 2007

Published Sixth Circuit Opinions

In re Southern Air Transport Inc., --- F.3d ----, 2007 WL 4355168 (6th Cir.2007) - Chapter 11 trustee filed preferential transfer action against creditor who claimed interest in aircraft, who argued alternatively that (a) it was a fully secured creditor at the time of payment; or (b) it was a contemporaneous exchange for new value. The bankruptcy court ruled for trustee, and the district court affirmed, both courts focusing on the creditor's failure to perfect its security interest, an artisan's lien on aircraft, by filing notice of its lien with the Federal Aviation Administration. The Sixth Circuit reversed, ruling that the trustee failed to meet the burden to prove the elements necessary to establish that the payment was preferential and thus avoidable under Section 547(b). First, the Court noted that the applicable state-law lien required possession of the aircraft, not filing of an instrument, to have a perfected security interest and enjoy priority. As such, the failure to file a something with the FAA did invalidate the lien. The Court next ruled that the creditor was a fully secured creditor. The debtor's right to exclusive possession of leased aircraft was property of the estate under Section 541(a)(1). The creditor's lien, perfected by possession, encumbered the estates assets. North Carolina law indicated that the creditor, who had possession of the aircraft,

had priority over perfected and unperfected security interests, including the debtor's possessory interest in the aircraft as lessee and the titleholder's interest. The trustee could not establish that the payment was more than the creditor would have received under a hypothetical Chapter 7 liquidation, since it had a valid lien.

In re Curry, --- F.3d ----, 2007 WL 4302135 (6th Cir.2007) - Creditor appealed from judgment of the Sixth Circuit Bankruptcy Appellate Panel which affirmed the bankruptcy's order denying the creditor's motion to lift the automatic stay so that it could sell the debtor's repossessed vehicle. The creditor argued, as it did below in the lower courts, that its pre-petition seizure of the vehicle limited the debtor's rights to those available under state law and prevented the debtor from modifying the creditor's claim. The Court of Appeals affirmed for the reasons stated by the BAP in Tidewater Finance Co. v. Curry (In re Curry), 347 B.R. 596 (6th Cir. BAP2006), stating that it would be duplicative to issue a full written opinion.[1]

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[1] The BAP reasoned thus: (1) under Ohio law, debtor retained ownership of the vehicle despite the repossession. Thus, the vehicle is property of the estate and subject to turnover to debtor, if debtor provides adequate protection through a plan which pays creditor the value of its collateral; (2) the proposed plan properly addressed creditor's allowed secure claim; (3) therefore, creditor's request to lift the stay to sell the vehicle was improper.

Thompson v. Greenwood, --- F.3d ----, 2007 WL 3286743 (6th Cir.2007) - Consolidated appeal involving Chapter 11 petitions that Mississippi residents filed in Tennessee for convenience. The debtors conceded that venue was not "technically proper" but argued, in part on statutory construction, that bankruptcy judges had inherent authority to retain the cases. The trustee moved to transfer/dismiss, arguing that the venue statutes, specifically 26 U.S.C. 1406, left the judge no discretion and required either dismissal or transfer. The Court of Appeals held that a bankruptcy court could not retain an improperly venued case over a timely objection by an interested party. The Court first noted that 28 U.S.C. 1408 governed venue in chapter 11 cases and required debtors to file in the district in which their domicile or resident was located.[2] The Court next noted that 28 U.S.C. 1406 required either dismissal or transfer of improperly venued cases. The debtors argued that Section 1406 did not apply to bankruptcy cases because Section 1412 was more specific and permitted the judge to transfer a case under Chapter 11 to another district in the

interest of justice or for the convenience of the parties, leaving the judge the discretion to retain cases. The Court rejected this argument, commenting that debtors' interpretation assumed that Section 1412 applied to properly and improperly venued cases, and that such interpretation would contravene parts of Section 1408. Thus, the Court held that (1) the venue requirements of Section 1408 are mandatory, (2) Section 1412 applies only to properly venued bankruptcy cases, (3) Section 1406 applies to cases filed in improper venue.

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[2]Section 1408 provides, in relevant part: "[A] case under title 11 may be commenced in the district court for the district ... in which the domicile, residence, principal place of business in the United States ... of the person or entity that is the subject of such case have been located for the [180] days immediately preceding such commencement."

Published Sixth Circuit Bankruptcy Appellate Panel Opinions

In re Anderson, --- B.R. ----, 2007 WL 3274181 (6th Cir. BAP2007) - Chapter 7 trustee appealed from order disapproving settlement reached with defendants who co-owned real property with debtors on the basis that the estate had no interest in the property since it never objected to the debtors' exemption. Debtors claimed as exempt an undivided one-half interest in a cabin, which cabin they believed had a value of about $30,000. The trustee did not object to the $15,000 exemption. The trustee later obtained an appraisal of $60,000 and filed adversary proceeding against the co-owners to compel sale. The trustee reached a settlement with the co-owners and moved for approval. The Court denied the motion, noting the trustee's failure to object to the exemption. The Panel first ruled that the bankruptcy court erred by applying a "fiduciary" standard to the settlement agreement instead of a "fair and equitable standard." This notwithstanding, the Panel next ruled that the cabin was not property of the estate. The debtors' claimed exemption removed it from the bankruptcy estate property under 11 U.S.C. 522(b). Absent a timely objection to the claimed exemption, the cabin left the estate and returned to the debtors. 11 U.S.C. 522(l). Under Taylor v. Freeland & Kronz, 503 U.S. 638, 112 S.Ct. 1644, 118 L.Ed.2d 280 (1992), when a debtor makes an unambiguous manifestation of intent to seek an unlimited exemption in property, the property is exempt in its entirety even if its actual value exceeds statutory limits. The debtors argued, and the Panel agreed, that scheduling an exemption with identical market and exemption values evidenced such intent, while the trustee argued that it did not:

the debtors should have listed the market value as "unknown" and the exempted value as "100%". The Panel rejected this argument, noting that the debtors properly completed Schedule C. The Panel stated that listing an exemption "in an amount sufficient to exempt all of the available. . . value in the property" generally indicates the intent to exempt the property in full. This is consistent with the fact that the party objecting to an exemption bears the burden of proof. It further enforces the 30-day objection period: if a trustee is uncertain about an objection, per Taylor, the trustee can seek a hearing on the issue or request an extension of time to object.

In re Cocanougher, --- B.R. ----, 2007 WL 3355491 (6th Cir.BAP 2007) - Chapter 7 trustee brought adversary proceeding to avoid mortgages based on alleged documentary defects that failed to put trustee on notice of the mortgages. The bankruptcy court ruled that notary clauses in both mortgages were defective under Kentucky law, that assignments of the mortgages were defective under Kentucky law, and that the trustee could avoid the mortgages for lack of notice. The Panel affirmed, holding that the mortgages and assignments were defective. The trustee is considered a bona fide purchaser of the property and can avoid liens that are avoidable under state law. 11 U.S.C. 544. Kentucky law, Ky.Rev.Stat. 382.270, provided that a mortgage would not be valid against a bona fide purchaser until it was properly acknowledged. Kentucky Revised Statute 423.130 requires a notary to certify that (a) the acknowledging party appeared and acknowledged the execution of the instrument, and (b) the acknowledging party was known to the notary or had sufficient evidence of identity. The Panel noted that under Kentucky and Sixth Circuit case law, In re Vance, 99 F.App'x 25 (6th Cir.2004); State Street Bank & Trust Co. v. Heck's Inc., 963 S.W.2d 626 (Ky.1998), the recordation of an unrecordable instrument does not constitute constructive knowledge. The acknowledgements did not name the mortgagors as required and it was not enough that the debtors' names were directly above the notary clause. Therefore, the mortgages were defective and could be avoided. Next, the Panel ruled that the mortgage assignments were defective and could not provide constructive or inquiry notice. Kentucky law requires assignments to include (1) the date of notes assigned, (2) a description of the notes, (3) the name and address of the assignee, and (4) the deed book and page number of the recorded mortgage. The assignments did not provide dates of the notes or descriptions and therefore were defective. Since they were defective they could not be recorded, and could give no constructive notice. The Panel refused to hear on appeal whether the amendment of Section 382.270 following the bankruptcy court's decision was retroactive.

In re Trujillo, --- B.R. ----, 2007 WL 3355498 (6th Cir.BAP 2007) - Chapter 13 trustee brought adversary proceeding to

avoid mortgage based on alleged defect in certificate of acknowledgement. It was undisputed that the debtor actually signed the mortgage and that his name appeared in al least two places therein, but the certificate of acknowledgement did identify or name the Debtor. The trustee moved for summary judgment, arguing that under Kentucky law, Ky.Rev.Stat. 382.270, the recorded mortgage did not provide constructive notice. One day before the Court entered its order granting the trustee's motion, the statute was amended. Following the court's order, the creditors filed a motion to amend the order, arguing that the amendment should be applied retroactively. The Court denied the motion, and the creditors appealed. The Panel concluded that the certificate was defective under Kentucky law since it did not identify or name the debtor within its four corners, looking to In re Vance, 99 F.App'x 25 (6th Cir.2004), and State Street Bank & Trust Co. v. Heck's Inc., 963 S.W.2d 626 (Ky.1998). As a result, the recorded mortgage could not put subsequent bona fide purchasers on constructive notice, and the trustee could avoid the mortgage. The Panel rejected the creditors' argument that the acknowledgment and recording statutes only required substantial compliance when the person acknowledging the instrument is the person named in the instrument, noting that such an argument rendered one statute superfluous and undermined the holding in Vance. The Panel next held that the amendments did not apply retroactively. First, the Panel ruled that the federal Supremacy Clause precluded retroactive application since, under federal law, the trustee's rights as a bona fide purchaser were fixed at the commencement of the bankruptcy case. 11 U.S.C. 544(a)(3). Second, the amendment did not indicate that it was retroactive, and Kentucky law expressly provides that statutes are not retroactive unless they expressly state so. Third, Kentucky case law indicates that a statutory amendment should not be applied retroactively where it will impair a vested right, and the trustee's rights vested upon commencement of the bankruptcy case

W.D. Michigan Bankruptcy Cases

In re Tyler, --- B.R. ----, 2007 WL 4357159 (Bkrtcy.W.D.Mich. 2007) (Judge Gregg) - Chapter 7 trustee brought preference action to recover prepetition payment Debtor made to state court as restitution for violating the Michigan Builders' Trust Fund Act, which payment passed to subcontractor as partial satisfaction of judgment. The Court held there was no question that this was an avoidable preferential transfer under Section 547(b). The debtor's payment to the state court was a "transfer of an interest of the debtor in property." Although the debtor made the payment to the state court, the creditor ultimately received the funds, so the payment was for the benefit of a creditor. The payment was on account of antecedent debt. The payment was made within 90 days of the bankruptcy petition, so the creditor could not rebut the

presumption of insolvency. The transfer permitted the creditor to receive more than it would have had in a Chapter 7 case, as there were allowed claims in excess of $280,000. The Court rejected the creditor's argument that criminal restitution is excepted from avoidance, noting that the bankruptcy statutes specifically except certain nondischargeable debts, e.g., domestic support obligations, from avoidance as preferential transfers, but not restitution payments. Therefore, the Court held that the trustee could avoid and recover the restitution payment.

In re Feringa, 376 B.R. 614 (Bkrtcy.W.D.Mich. 2007) (Judge Hughes) - Chapter 7 trustee brought an adversary proceeding to avoid a mortgage lien on the debtors' residence as a preferential transfer. The creditor moved to dismiss or for summary judgment, arguing that the trustee lacked standing and that the trustee's claim had been abandoned when the bankruptcy estate was previously closed. The creditor submitted its mortgage four days before the debtors filed for bankruptcy. The Chapter 7 trustee did not attempt to avoid the mortgage, although apparently intending to do so, but filed a report that the estate had been fully administered. The Court entered an order that closed the Chapter 7 case, which the trustee moved to set aside. After the Court set aside the closure argument, the trustee commenced the claim against the debtor. The creditor argued that the trustee was no longer an interested party when the order discharged him from his duties. First, the Court concluded that the trustee had standing, noting that he had an interest in pursuing the avoidance action and likely would be reappointed as trustee if the court set aside the closure order, since he was most familiar with the case. Second, the Court ruled that the creditor could not challenge the setting aside of the closure order to defeat the avoidance action. The creditor had a fully secured claim and had other arguments against the avoidance action. Third, the Court ruled that the statute barring trustee from bringing an avoidance action after the case was closed or dismissed, 11 U.S.C. 546(a)(2), did not apply since the court vacated its dismissal order; it did not re-open the case. Finally, the court ruled that the trustee had not abandoned the avoidance claim. The Court noted that the avoidance action was not property of the estate since it was a statutory power to recover property.

Thank you to Dan Bylenga for the preparation of these case summaries.

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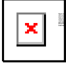
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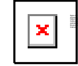

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