

DEBTOR/CREDITOR RIGHT COMMITTEE

Report Prepared for June 2006 Business Council Meeting

1. Next Schedule Meeting of the Committee

The next meeting is tentatively scheduled for August, 2006

2. Council Approval

The Committee is seeking Council approval of:

- (a) the Committee seeking Michigan Legislative approval of amendments to ensure that Michigan's recently amended exemptions are enforceable in light of recent court rulings they are unconstitutional and to correct court rulings that the amendments pre-empted other existing exemption statutes;
- (b) the Committee backstopping up to \$5000 to the Sheraton Novi for the expenses of a October 9, 2006 seminar being jointly sponsored by the Consumer Bar Association and the Bankruptcy Committee of the Eastern District of Michigan Federal Bar Association. The other sponsors will each backstop up to \$5000 of the estimated costs. The seminar is being modeled on a similar one from 2005 which was financially successful sponsored by the American Bankruptcy Institute. Because all of the Bankruptcy Judges in Michigan will participate there should be near capacity attendance and we should not have to pay anything on the backstop; and
- (c) expenses estimated at \$500 to set up the ability of the Committee newsletter to link to websites, in particular websites of various courts to access court opinions.

3. Membership

Membership is active and increasing. The Committee has a list serv to approximately 445 persons. Thirty members or their staff in the aggregate attended a series of two luncheons to provide the Eastern District of Michigan Bankruptcy Court with commentary on electronic court filing. Nineteen members attended the Committee's May 24, 2006 meeting.

4. Accomplishments Toward Committee

- Utilize the list serv to increase and energize members: the list serv has been used, we receive regular requests to be added to the list serv.
- start a newsletter: the bi-monthly newsletter is almost ready to launch. See mock-up of first edition.

- put on an annual seminar: work is progressing on a seminar scheduled for October 9, 2006.
- submit sufficient articles to fill the November 30, 2006 edition of the Michigan Business Law Journal: we have commitments for six articles for the Michigan Business Law Journal; in addition an article, on the ordinary course of business preference defense was submitted early and was published in the most recent edition.
- educate our membership and bar on ongoing issues: the seminar, newsletter, publications and educational aspects of our meetings are educating our membership.
- coordinate with other bar groups and the bankruptcy court: the Committee is coordinating with other bar groups on the October 9, 2006 seminar; all of the Michigan bankruptcy judges are expected to participate in seminars;
- advise the Bankruptcy Court on issues of interest to our Committee: our membership provided commentary on ECF procedures and the Committee has agreed to arrange meetings between ECF users and the Court staff on ECF issues;
- develop successor leadership: several members have volunteered for newly created leadership roles;
 - Jose Bartholomei, November 2006 issue of the Michigan Business Law Journal
 - Marty Fried and Laura Eisele, newsletter with assistance from Stuart Gold, Mark Shapiro, Tom Morris, Craig Schoenherr.
 - Stuart Gold, Tom Radom, Charles Schneider, Richard Fellrath, David Lerner, Paul Steinberg and Martin Fried on exemption legislation
 - Brian Trumbauer, Liaison to Chapter 11 Rules Committee of the United States Bankruptcy Court for the Eastern District of Michigan

5. Meetings and Programs

ECF Program: lunches were held on March 10, 2006 and March 23, 2006 attended by 30 members and staff in the aggregate. Commentary on the Eastern District of Michigan Bankruptcy Courts ECF rules derived from those meetings were provided to the Court. The Judges have agreed to revise the ECF procedures and had the Clerks' office discuss the issues

with the co-chairs. The Clerk's office held agreed to had ECF meetings with members and staff in Fall 2006.

- The May 24, 2006 meeting was attended by 19 members.

6. Publications

Committee members have committed to write six articles for the November 2006 edition of the Michigan Business Law Journal. Six other members have volunteered to edit the articles before they are submitted for publication.

Work is progressing on a newsletter expected to be sent to our membership by list serv bi-monthly and be posted on the Committee's page on the website.

7. Legislative / Judicial / Administrative Developments

Michigan enacted legislation effective January 3, 2005 to amend exemptions. Several opinions have been issued by Bankruptcy Judges holding them unconstitutional. Also, the newly enacted exemptions have been held to pre-exempt other exemptions not addressed in the amendments. The Committee is seeking authority to attempt amend the statutes.

Significant amendments were made to the Bankruptcy Code effective October 17, 2005. The Committee is co-sponsoring a seminar on October 9, 2006 about the amendments after one year in effect.

AN ACT TO AMEND AND CLARIFY MICHIGAN EXEMPTIONS

1. MCL 600.6023 is amended to state the following:

(1) The following property of the debtor and the debtor's dependents shall be exempt from levy and sale under any execution:

(a) Family pictures.

(b) Arms and accoutrements required by law to be kept by a person.

(c) Wearing apparel, excluding furs.

(d) Cemeteries, tombs, and rights of burial in use as repositories for the dead of the judgment debtor's family or kept for burial of the judgment debtor.

(e) Professionally prescribed health aids.

(f) Provisions and fuel for comfortable subsistence of each householder and his or her family for 6 months.

(g) The interest, not to exceed a value of \$450.00 in each item and an aggregate value of \$3,000.00, in household goods, furniture, utensils, books, appliances, and jewelry.

(h) The interest, not to exceed \$500.00 in value, in a seat, pew, or slip occupied by the judgment debtor or the judgment debtor's family in a house or place of public worship.

(i) The interest, not to exceed \$2,000.00 in value, in crops, farm animals, and feed for the farm animals.

(j) The interest, not to exceed \$500.00 in value, in household pets.

(k) The interest, not to exceed \$2,775.00 in value, in 1 motor vehicle.

(l) The interest, not to exceed \$500.00 in value, in 1 computer and its accessories.

(m) The interest, not to exceed \$2,000.00 in value, in the tools, implements, materials, stock, apparatus, or other things to enable a person to carry on the profession, trade, occupation, or business in which the person is principally engaged.

(n) Money or other benefits paid, provided, or allowed to be paid, provided, or allowed, by a stock or mutual life, health, or casualty insurance company because of the disability due to injury or sickness of an insured person, whether the debt or liability of the insured person or beneficiary was incurred before or after the accrual of benefits under the insurance policy or contract, except that this exemption does not apply to

actions to recover for necessities contracted for after the accrual of the benefits.

(o) The interest, not exceeding \$1,000.00 in par value, in shares held by a member, who is a householder, of an association incorporated under the savings and loan act of 1980, 1980 PA 307, MCL 491.102 to 491.1202, except that this exemption does not apply to a person who has a homestead exempted under the general laws of this state.

(p) All individual retirement accounts, including Roth IRAs, or individual retirement annuities as defined in section 408 or 408a of the internal revenue code, 26 USC 408 and 408a, and the payments or distributions from those accounts or annuities. This exemption applies to the operation of the federal bankruptcy code as permitted by section 522(b)(2) of the bankruptcy code, 11 USC 522. This exemption does not apply to the amount contributed to an individual retirement account or individual retirement annuity within 120 days before the debtor files for bankruptcy. This exemption does not apply to any of the following:

(i) The portion of an individual retirement account or individual retirement annuity that is subject to an order of a court pursuant to a judgment of divorce or separate maintenance.

(ii) The portion of an individual retirement account or individual retirement annuity that is subject to an order of a court concerning child support.

(iii) The portion of an individual retirement account or individual retirement annuity that is attributable to contributions to the individual retirement account or premiums on the individual retirement annuity, including the earnings or benefits from those contributions or premiums, that, in the tax year made or paid, exceeded the deductible amount allowed under section 408 of the internal revenue code, 26 USC 408. This limitation on contributions does not apply to a rollover of a pension, profit-sharing, stock bonus plan, or other plan that is qualified under section 401 of the internal revenue code, 26 USC 401, or an annuity contract under section 403(b) of the internal revenue code, 26 USC 403.

(q) The right or interest of a person in a pension, profit-sharing, stock bonus, or other plan that is qualified under section 401 of the internal revenue code, 26 USC 401, or an annuity contract under section 403(b) of the internal revenue code, 26 USC 403, if the plan or annuity is subject to the employee retirement income security act of 1974, Public Law 93-406, 88 Stat. 829. This exemption does not apply to any amount contributed to a pension, profit-sharing, stock bonus, or other qualified plan or a 403(b) annuity if the contribution occurs within 120 days before the debtor files for bankruptcy or a judgment is entered against the debtor. This exemption does not apply to the right or interest of a person in a pension, profit-sharing, stock bonus, or other qualified plan or a 403(b) annuity to the extent that the right or interest is subject to either of the following:

(i) An order of a court pursuant to a judgment of divorce or separate maintenance.

(ii) An order of a court concerning child support.

(r) The interest of the debtor, the co-debtor, if any, and the debtor's dependents, not to exceed, in the aggregate, \$30,000.00 in value or, if the debtor or a dependent of the

debtor at the time of the execution is 65 years of age or older or disabled, not to exceed, in the aggregate, \$45,000.00 in value, in a homestead.

(s) Property described in section 1 of 1927 PA 212, MCL 557.151, or real property, held jointly by a husband and wife as a tenancy by the entirety, except that this exemption does not apply with regard to a claim based on a joint debt of the husband and wife.

(t) If the owner of a homestead dies, leaving a surviving spouse but no children, the surviving spouse before his or her remarriage, unless the surviving spouse is the owner of a homestead in his or her own right, may exempt the homestead and the rents and profits of the homestead.

(2) An exemption under this section does not apply to a mortgage, lien, or security interest in the exempt property that is consensually given or lawfully obtained unless the lien is obtained by judgment, attachment, levy, or similar legal process in connection with a court action or proceeding against the debtor.

(3) If property that is exempt under this section is sold, damaged, destroyed, or acquired for public use, the right to receive proceeds or, if the owner receives proceeds and holds them in a manner that makes them identifiable as proceeds, the proceeds received are exempt from the property of a federal bankruptcy estate in the same manner and amount as the exempt property. An exemption under this subsection may be claimed up to 1 year after the receipt of the proceeds by the owner.

(4) On March 1, 2005 and at the end of each 3-year period after 2005, the state treasurer shall adjust each dollar amount in this section or, for each adjustment after March 1, 2005, each adjusted amount, by an amount determined by the state treasurer to reflect the cumulative change in the consumer price index for the 3-year period ending on the December 31 preceding the adjustment date and rounded to the nearest \$25.00. The state treasurer shall publish the adjusted amounts. The adjusted amounts apply to cases filed on or after April 1 following the adjustment date.

(5) As used in this section:

(a) "Consumer price index" means the consumer price index for all urban consumers in the area of Detroit-Ann Arbor-Flint, Michigan, published by the United States department of labor or, if the United States department of labor ceases publishing that index, the most similar index available.

(b) "Disabled" means unable to engage in substantial gainful activity, as defined by 42 USC 1382c(a)(3)(E), as a result of a physical or mental impairment and receiving supplemental security income under 42 USC 1382(a)(3)(A) and (C).

(c) "Proceeds" means money payable or paid as a result of 1 or more of the following:

(i) Sale of the property.

(ii) Insurance or other indemnification for damage or destruction of the property.

(iii) Compensation for the acquisition for public use of the property.

(d) "Homestead" means 1 of the following owned or being purchased under an executory contract by the debtor that the debtor or a dependent of the debtor occupies as his or her principal residence:

(i) If the land is located outside of a recorded plat, city, or village, a residential dwelling and appurtenances and the land on which they are situated, not exceeding 40 acres.

(ii) If the land is located within a recorded plat, city, or village, a residential dwelling and appurtenances and the land on which they are situated, not exceeding 1 lot or parcel.

(iii) A residential dwelling situated on land not owned by the debtor.

(iv) A condominium unit.

(v) A unit in a cooperative.

(vi) A motor home.

(vii) A boat or other watercraft.

(e) "Residential dwelling" includes, but is not limited to, a house or a manufactured or mobile home.

(6) This section does not preempt any other exemption provided by law.

2. MCL 600.5451 is deleted.

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Debtor / Creditor Newsletter

The Debtor / Creditor Rights Committee of the Business Law
Section of the State Bar of Michigan

June 2006

Written and Edited by
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In this Month's Newsletter.....

- - - - decisions of the Bankruptcy and District Courts of the Eastern and Western Districts of Michigan summarized from rulings posted on their websites and other bankruptcy issues of interest.

LOCAL NEWS

Judge Tucker will be asked to rule on the constitutionality of Michigan's "bankruptcy specific" exemption statute, MCL 600.5451. The Trustee objected to the Debtor's exemption of \$300,000 of life insurance on the basis that MCL 600.5451 is the sole source of exemptions for Michigan residents electing state exemptions and there is no exemption for insurance in MCL 600.5451. The Debtor contends that reading would render MCL 600.5451 unconstitutional. The hearing is May 24, 2006. In re McCarty, #05-89515

Judge Tucker has ruled that Michigan's homestead exemption MCL 600.5451(l)(n) is unconstitutional. The matter is under appeal and is scheduled for argument June 7, 2006. In re Vinson, #05-55599, In re Silver #05-55604.

Judge Shefferly has ruled that spouses filing jointly are only entitled to a single homestead exemption for a total of \$30,000 under MCL 600.5451(l)(n). In re Lindstrom, #05-53847.

EASTERN DISTRICT

Comfort Order Granted

Chapter 13 creditor secured by mortgage requested an order confirming that automatic stay had been terminated pursuant to §362(c)(3)(A) where the debtor had one chapter 13 case dismissed within the previous year. The court ruled that this result was required by § 362(j), which states that on request of a party in interest, the Court shall issue an order "under subsection (c)" that the automatic stay has been terminated. That language on its face appears to cover both the one, and, the more than one previous case situations, both of which are "under subsection (c)". In re Waldron, #06-20323 - ws (05/05/06 - ED Mich).

Comfort Order Denied

Chapter 7 creditor secured by a vehicle requested an order confirming that the automatic stay had been terminated as to that creditor under §521(a)(6). The court denied the request holding that §521(a)(6) of the Bankruptcy Code, as amended by BAPCPA, does not authorize a party to request, nor does it direct the Bankruptcy Court to enter, an order "confirming" the status of the automatic stay in the circumstances of § 521(a)(6). Similar to the request made by the Creditor in In re Sanders under § 365(p)(1), the creditor's request in this case, made under §521(a)(6), is simply not made under one of the two specific instances in which BAPCPA permits a party to request a comfort order "confirming" the status of the stay. In re Woods, # 06-40458 - pjs. (04/27/06 - ED Mich).

Comfort Order Denied

Chapter 7 creditor secured by mortgage requested an order confirming that the stay had been terminated under §362(c)(3)(A). The court denied the request holding that for cases where §362(4)(A)(i) applies, §362(4)(A)(ii) provides that "on request of a party in interest, the court shall promptly enter an order confirming that no stay is in effect." However, for cases where §362(c)(3)(A) applies, there is no similar provision under the Bankruptcy Code which requires the court to enter an order confirming that the stay has terminated, and the court declined to file such an order. The court

NATIONAL NEWS

The Connecticut Bar Association and the National Association of Consumer Bankruptcy Attorneys filed a federal suit for a ruling that attorneys are not Debt Relief Agencies. For some interesting reading, check it out at www.nacba.org.

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noted further that Local Rule 4001-6(d) does not contemplate such an order. In re Coleman, #06-43396 - tjt (04/21/06 - ED Mich).

Debtor's Request to Impose Stay Denied

Chapter 13 debtors, in their second chapter 13 case filed within one year, brought motion to impose the automatic stay pursuant to §362(c)(4)(A). The court denied the motion holding that the court does not have authority to impose a stay once it has been terminated pursuant to §362(c)(3)(A). In re Frye, #06-42416 - tjt (04/20/06 - ED Mich).

Debtor's Request to Extend Stay Denied

Chapter 13 debtors, in their second chapter 13 case filed within one year, brought motion to extend automatic stay beyond 30 days pursuant to §362(c)(3)(B). The court denied the motion noting that the statute has a 30-day hearing deadline. L.B.R. 4001-6(a) (E.D.M.) requires that a motion to extend the stay be filed and served within 7 days after the bankruptcy petition is filed, and that:

Immediately after filing the motion [to extend the stay], the movant shall obtain a hearing date from the judge's courtroom deputy clerk, who will cause notice of the hearing to be served on parties in interest.

The court denied the motion because the debtors filed their motion well beyond the seven day deadline so it was impossible under those circumstances to schedule and complete a hearing on debtors' motion to extend the stay within the required 30-day period. In re Frye, #06-42416 - tjt (04/20/06 - ED Mich).

Debtor Permitted to Reopen Case to File Statement of Completion of Personal Financial Management Course

The debtor's chapter 7 case had been closed but no discharge had been issued because the debtor failed to file a statement of completion of personal financial management course. The court held that the debtor may obtain her discharge by reopening the case and complying with §727(a)(11), §111, Fed. R. Bankr. P. 1007(b)(7) and (c), and Guideline 3 of the Guidelines Relating to BAPCPA 2005 adopted by the Bankruptcy Court for the Eastern District of Michigan. In re Smiley, #06-89741 - pjs (04/12/06 - ED Mich).

Credit Counseling Applies to Family Farmers

Chapter 12 debtor asserted that credit counseling is not an eligibility requirement for a family farmer under §109(h) because the language of §109(h) does not contain the words "family farmer". The court ruled that since the debtor was an individual, there must be compliance with the credit counseling requirements. In re Bodegain, #06-43044 - sr (04/11/06 - ED Mich) (not for publication).

Comfort Order Denied

Visit the Debtor / Creditor Rights website at
www.michbar.org/business/debtor-creditor.cfm.

Page designed by
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Chapter 7 creditor secured by a vehicle requested an order confirming that the automatic stay had been terminated with respect to the creditor and the vehicle under 365(p). The court denied the request holding that although BAPCPA created two specific instances (sections 362(c)(4)(A) and 362(j)) where parties in interest are permitted to request, and the court is directed to enter, an order "confirming" the status of the automatic stay, neither of those provisions pertain to the circumstances set forth in § 365(p)(1). That section of the Bankruptcy Code independently and "automatically" terminates the stay, without further process and without resort to any other section of the Bankruptcy Code, if the circumstances set forth in that provision are present. No court order is required by that provision to effectuate it nor does it require resort to any other provision of the Bankruptcy Code to effectuate it. In re Sanders, #06-40096 - pjs (04/06/06 - ED Mich).

Debtor's Request to Extend Stay Denied

Chapter 13 debtors, in their second chapter 13 case filed within one year, brought motion to extend automatic stay beyond 30 days pursuant to §362(c)(3)(B). The motion was denied because the court may only extend the stay if there has been notice and a hearing completed within 30 days after the filing of the debtor's petition. L.B.R. 4001-6(a) requires the motion to be filed within seven days after the date of the debtor's petition. Further, that local rule requires the moving party to obtain a hearing date from the judge's courtroom deputy clerk to enable the court to provide notice of the hearing to all parties in interest in sufficient time to conclude the hearing before 30 days have expired after the date of the debtor's petition. The debtor's motion in this case was not filed within seven days after the petition was filed but instead was filed 21 days after the petition. In re Thomas, #06-40107 - pjs (02/02/06 ED Mich)

WESTERN DISTRICT

Utility Adequate Assurance Section Leaves Court with no Discretion to Approve Adequate Assurance Proposal but Only to Modify Adequate Assurance after Agreement.

Chapter 11 debtor filed motion to provide adequate assurance of future performance to several utility companies per §366(c). The court confirmed that it does not have authority to continue the injunction to prohibit a utility company from terminating service beyond the 30 days after filing the petition. "However, subsection (c) does not give me that discretion, for it clearly requires as a condition to continuing the injunction either the utility's acceptance of the adequate assurance offered by the Chapter 11 trustee or debtor in possession or the Chapter 11 trustee's or debtor in possession's acceptance of the adequate assurance offered by the utility. Granted, subsection (c) (3) does give the trustee or debtor in possession the right to have the adequate assurance payment modified by the court. However, that right arises only after the adequate assurance payment has been agreed upon by the parties. The trustee or debtor in possession has no recourse to modify the adequate assurance payment the utility is demanding until the trustee or debtor in possession actually accepts what the utility proposes. " In re Lucre, Inc, #05-21723 - jrh (11/09/05 WD Mich).