REPORT PREPARED FOR THE JUNE 1, 2007 COUNCIL MEETING FOR THE DEBTOR/CREDITOR RIGHTS COMMITTEE

1. Next Scheduled Meeting of the Committee

Next scheduled meeting of the Committee is September 5, 2007 at 6:00 p.m.

2. Council Approval

The Committee wants to send its NewsMag to the entire Business Law Section on the Section list serv, instead of just to the Debtor/Creditor Committee on the Committee List Serv. A copy of the April 2007 edition is attached.

3. Membership

The Committee uses its list serv and the Section's list serv to send its newsletters and information about matters of interest to bankruptcy practitioners. As a result, we receive regular requests from lawyers to be added as a member. Two new members attended the last meeting.

4. Accomplishments Toward Committee Objectives

We believe the Committee is accomplishing its goals. Our membership is active and energized.

5. Meetings and Programs

The Debtor/Creditor Rights Committee had a dinner meeting on May 9, 2007 at the Oakland County office of Honigman Miller Schwartz and Cohn LLP. Despite construction on Woodward Avenue, 14 members attended and heard Patrick Karbowski speak about the efforts of the Real Property Law Section recording committee to reach a consensus with the county registrars and Michigan Land Title Association on amending Michigan's recording statutes to deal with the practices of county registrars not entering or delaying in entering deeds by liber and page and to make the unrecorded deeds searchable. The Committee voted to support those efforts.

David Lerner reported on the status of the project on installing wireless internet access for the bankruptcy bar at the Detroit bankruptcy court.

A discussion was held on the NewsMag and requesting authority to send it out on the Section's list serv, and on the Committee providing articles for the Michigan Business Law Journal.

6. Publications

As discussed above, the Committee has launched its Newsletter. Three editions have been published. We expect the fourth edition to be published in July 2007. The Committee agreed to provide articles for the March 2008 edition of the Michigan Business Law Journal (articles due November 30, 2007). Thomas Morris agreed to be responsible for the articles and will write an overview.

7. Legislative/Judicial/Administrative Developments

The Committee hopes the Council will retain a lobbyist to help us with amending the recent Michigan exemption legislation, which legislation repeatedly has been held preempted by the Bankruptcy Code. We are currently on hold, because we do not have the expertise to be effective.

The Real Property Law Section recording committee is working on an amendment to MCL 565.24 and MCL 565.25 on recording conveyances. When finalized, the Committee will ask the Business Law Section for authority to support adoption of the amendment.

Judy B. Calton, co-chair
Judith Greenstone Miller, co-chair

April 2007

Debtor/Creditor NewsMag

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

Martin L. Fried
Laura J. Eisele
Co-Editors

Summaries of Select Published Decisions within the 6th Circuit

Sale order may be res judicata to claims that could have been raised in connection with sale but were not explicitly reserved.

***Winget v. JP Morgan Chase Bank, N.A.*, 2007 U.S. Dist. LEXIS 15968 (E.D. Mich. 2007)**

Larry Winget ("Winget"), who owned substantially all of the Venture entities, as well as other assets, guaranteed a loan from JPMorgan Chase ("Chase") to Venture under the Eighth Amendment to the credit agreement between Venture and Chase. The guaranty and pledge agreement signed by Winget provided that Chase would not pursue the guaranty and pledge agreement collateral until all reasonable efforts to collect from Venture had been exhausted. In 2005, after Venture filed for bankruptcy and was ultimately sold at auction, Chase sued Winget to enforce the guaranty and collect its deficiency claim of approximately $375 million. Winget counterclaimed, asserting that Chase had failed to preserve its collateral, had breached the pledge agreement, and was barred by unclean hands and lack of good faith. Winget was ordered to comply with Chase's audit request (count one of the Chase complaint) but Winget's counterclaims and Chase's right to a declaratory judgment would be determined in a subsequent case. In 2006, Winget filed a complaint, alleging that Chase, as well as others, failed to make all reasonable efforts to collect their collateral from the Venture entities, wrongfully exposing Winget to liability under the guaranty documents. The United States District Court for the Eastern District of Michigan (Cohn, J.), found that Winget's 2006 complaint against Chase was premature and sought an advisory opinion, because Chase had not taken any actions to enforce the pledge agreement or the guaranty. The court also found that because Winget's claims against Chase could and should have been litigated as a part of the entry of the order authorizing the sale of substantially all of the assets of Venture. Because they were not, and because Winget withdrew his objections to the sale order and did not challenge or appeal the sale order, Winget is barred by res judicata from asserting claims against Chase related to the sale of the Venture assets.

Practitioners counseling purchasers of financially troubled companies should consider creative means of structuring purchaser to avoid fraudulent transfer liability.

***Valley X-Ray Co. v. VPA, P.C.*, 2007 U.S. Dist. LEXIS 172 (E.D. Mich. 2007)**

In 2000, Valley X-Ray ("VXR") entered into an agreement to sell substantially all of its assets to Diversified Medical Group ("Diversified"). Diversified terminated the sale agreement without purchasing VXR's assets, and VXR subsequently entered into a letter agreement with VPA, P.C. ("VPA"), who agreed to pay VXR $10,000 for its assets, as well as to pay VXR's liabilities. Under the terms of the letter agreement, VPA had 90 days to refuse to consummate the sale without incurring any liability. Sometime during the 90-day period, VPA became concerned about VXR's substantial liabilities and decided that it did not want to purchase VXR's liabilities. VPA was approached by Diversified, which was still interested in the VXR assets, but concerned about the "bad blood" between it and VXR as a result of the earlier, failed transaction. Therefore, in order to permit Diversified to buy the VXR assets without VXR knowing Diversified was the purchaser, VPA and Diversified formed an acquisition entity, Valley Medical Services ("VMS"). VPA and Diversified were the sole members of VMS, and the VMS operating agreement provided that after the closing of the sale of the VXR assets, Diversified would purchase VPA's share of VMS. Diversified, through VMS, funded VMS's purchase of the VXR assets. VMS received a bill of sale for the VXR assets, for which, in total, Diversified paid $725,305.36. After VXR was filed into an involuntary bankruptcy, the VXR trustee (the "Trustee") sued VPA for return of a fraudulent conveyance. Judge Tucker of the Eastern District Bankruptcy Court held that the Trustee could not recover from VPA because VPA was not (1) the initial transferee of the transfer, (2) the entity for whose benefit the transfer was made or (3) an immediate or mediate transferee of the transfer. Judge Feikens of the District Court affirmed, finding that VMS was not an alter ego of VPA, VMS was not acting as VPA's agent at the time of purchase, and VPA was not the entity for whose benefit the transfer was made.

back

Content | Articles | The Law
Announcements | Committee Notes | Contact Us

Notes from the Debtor/Creditor Rights Committee

DEBTOR/CREDITOR RIGHTS COMMITTEE, MEETING NOTES OF 1/10/07

The Debtor/Creditor Rights Committee met over Chinese food on January 10, 2007, at the Southfield offices of Jaffe Raitt. Twenty-two members heard Jessica Allmand and Elias "Lee" Majoros speak on litigation to avoid refinancing mortgages, including the December 10, 2006, hearings before all of the bankruptcy judges. David Ruskin spoke about the Chapter 13 trustees' project to install wireless internet access for the Chapter 13 trustees at the Eastern District of Michigan bankruptcy court and their willingness to allow the Committee to work with them to expand the project to include the entire bankruptcy bar. David Lerner and Willard Hawley agreed to represent the Committee and work with the Chapter 13 trustees on the project

back

NEXT DEBTOR/CREDITOR RIGHTS COMMITTEE MEETING

When: May 9, 2007, 6 p.m.
Where: Honigman's Oakland County offices, 38500 Woodward, Suite 100, Bloomfield Hills

Topics:

Articles for *Michigan Business Law Journal*
Internet Access of the Eastern District of Michigan Bankruptcy Court
Correcting the Michigan Exemption Legislation
Amendments to Local Rules for the Michigan Exemption Legislation
Amending Michigan's Recording Statutes

RSVP to Judy Calton or Judy Miller if you are attending

back

WIRELESS INTERNET ACCESS FOR THE BANKRUPTCY COURT, MEETING NOTES

Will Hawley, Co-chairperson on the new sub-committee on wifeless internet access for the bankruptcy court, reported his notes of the initial meeting of that sub-committee as follows:

> The initial meeting of the chairpersons for the debtor/creditor rights section sub-committee on wireless internet access for the bankruptcy court occurred recently. Committee chairpersons Will Hawley, David Lerner and David Ruskin discussed many issues related to the project, including funding, administration, logistical issues and access speed, as well as coordination with various parties necessary for a successful implementation. While there are many issues taking the project, the sub-committee remains committed to the project and believes that successful implementation would greatly benefit practitioners in our district. Look for more information on the project in upcoming issues, and if you have questions or suggestions, contact Will Hawley at whawley@mcdonaldhopkins.com

back

HOW TO GET YOUR COPY OF *NEWSMAG*

What you're reading right now is the April 2007 issue of *NewsMag*, a publication of the Debtor/Creditor Rights Committee of the Business Law Section of the State Bar of Michigan. To receive *NewsMag* you must be a member of the Business Law Section. *NewsMag* goes out to all 450 members. To sign up for membership just call the State Bar at (800) 968-1442.

Get on the Listserv for *NewsMag*

Any questions, just contact Judy Calton or Judy Miller, Co-Chairs of the Committee.

back

HOW TO BECOME A BIG FISH

You can become a big fish in a little pond by becoming a contributing editor to *NewsMag*. It's not hard. All you have to do is write a 3 or 4 paragraph article on some topic of current interest which the general practitioner in the everyday battlefield of bankruptcy should know about. Remember our objective: a quick read for the lawyer on the run. Just crank one out and you will get a credit on the front page of *NewsMag* as a contributing editor. Your editorial comments are most welcome.

What we are looking for is cases, published and unpublished rulings of the Eastern and Western District, judges' preferences, procedures newly adopted by the U S Trustee's office, interesting cases just filed, etc.

back

HOW TO GET YOUR TWO CENTS IN - WRITE A LETTER TO THE EDITOR

Is there something you would like to say to the Bench or the Bar but never had the chance? Is there a comment you'd like to make about our bankruptcy system in a very public way? Is there an accolade or admonishment that needs to be aired?

Well, here's your chance!

This is to let you know we have added a Letters to the Editor column to *NewsMag*. By now you should have received the February 2007 issue. We reach over 450 e-mail addresses including the judges of the Eastern and Western District Bankruptcy Courts.

If you would like to put in your two cents about bankruptcy - good, bad, constructive, critical, or whatever - please send it to Letters to Editor c/o Marty Fried.

back

Content | Articles | The Law
Announcements | Committee Notes | Contact Us

Announcements

APPELLATE BAR SECTION SCHEDULES TWO

DAY BENCH BAR CONFERENCE

When: May 2 - 4
Where: St. John's Conference Center in Plymouth

Registration is now open for the 2007 Michigan Appellate Bench Bar Conference, May 2-4, 2007, at St. John's Conference Center in Plymouth. The conference features panel discussions with judges of the Michigan Court of Appeals and Supreme Court on appellate decision-making and court practices; a keynote address on oral advocacy; break-out sessions on specific practice areas; and opportunities for informal interaction with the judges and court staff. Registration, including reception, dinner, materials and two lunches, is $295. Some scholarships are available. The conference brochure and registration form are available at www.benchbar.org/

CBA PRESENTS NUTS & BOLTS SEMINAR

When: Monday, May 7, 2007, 9 a.m. to 4 p.m.
Where: Sterling Heights Inn, Sterling Heights

The Consumer Bankruptcy Association would like to announce the upcoming NUTS & BOLTS SEMINAR. Please mark the date on your calendar and plan on attending as you won't want to miss out on the fun and activities the CBA has planned for you!

Questions? Contact Karen Evangelista.

back

IWIRC FEATURES LYNN TILTON

When: Wednesday, May 16, 5:30 p.m.
Where: Bodman offices at Ford Field

Lynn Tilton is the founder and CEO of Patriarch Partners, LLC. Patriarch Partners is an investment fund based in New York and Charlotte, North Carolina. Patriarch provides portfolio management services to 8 leveraged funds and a private equity fund, which funds own and manage a diverse portfolio of international companies and credit facilities with an aggregate asset value of approximately $4.5 billion including equity ownership positions (majority and minority) in more than 60 companies.

back

BUSINESS LAW INSTITUTE ANNUAL SEMINAR

When: Saturday, June 1-2, 2007
Where: Mountain Grand Lodge & Spa, Boyne Falls

The annual seminar is sponsored by the Business Law Council of the State Bar of Michigan. Presentations include Global Business: Meeting International Compliance Requirements and Expectations, How to Build Your Practice, Case Law and Legislative Updates, Business Outlook for Michigan, Understanding Insurance Coverage and both a Mergers & Acquisitions breakout and an "in a nutshell" break-out track.

Register for the Seminar

back

ABI CENTRAL STATES WORKSHOP

When: June 14 - 17, 2007
Where: Grand Traverse Resort and Spa

Now in it's fourteenth year, the annual Central States Bankruptcy Workshop brings together America's preeminent insolvency professionals for four days of intense learning and fun. Bring the whole family and enjoy the best Michigan has to offer.

Register for the Workshop

back

MICHIGAN BUSINESS LAW JOURNAL SEEKS ARTICLES

Call for longer articles. The March 2008 edition of the *Michigan Business Law Journal* will feature articles on bankruptcy law and other debtor-creditor topics. The Debtor/Creditor Rights Committee is responsible for compiling and submitting articles for this edition. Thomas R. Morris of Silverman & Morris, P.L.L.C. is serving as the edition editor. If you have a topic of interest on which you would like to write an article (and it is too long to be accommodated by the *NewsMag*), or if you are willing to review articles written by others, please contact Tom by e-mail at Morris@SilvermanMorris.com, or attend the committee meeting on Wednesday, May 9 (see announcement above).

back

ADMINISTRATIVE OFFICE ANNOUNCES CHANGES IN CERTAIN DOLLAR AMOUNTS

The Administrative Office of the United States Courts announced the automatic adjustment of certain dollar amounts to go into effect for cases filed on or after April 1, 2007.

View the List

back

LETTERS TO THE EDITOR

"Nicely done"
- Mike Khoury

"Feb Newsletter- Nice Job!"
- Drew Paterson

"This is great! Debtor/Creditor*NewsMag*"
- Byron Otto Kuxhaus

"your magazine is wonderful"
- Karen Evangelista

IT'S YOUR TURN!

Is there something you would like to say to the Bench or the Bar but never had the chance? Is there a comment you'd like to make about our bankruptcy system in a very public way? Is there an accolade or admonishment that needs to be aired?

Well, here's your chance!

This is to let you know we have added a Letters to the Editor column to *NewsMag*. By now you should have received the February 2007 issue. We reach over 450 e-mail addresses including the judges of the Eastern and Western District Bankruptcy Courts.

If you would like to put in your two cents about bankruptcy - good, bad, constructive, critical, or whatever - please send it to Letters to Editor c/o marty@gbfllaw.com.

back

SEYMOUR SEZ - Wise Words of a Wry and Whimsical Wit

Our own homegrown philosopher-lawyer, Seymour Markowitz, has been busy in the courtrooms keeping both bench and bar on their toes. Over the years, Seymour has made many observations worth sharing with the lawyer in the battlefield of everyday bankruptcy practice as well as in the battlefield of everyday life. Each issue of *NewsMag* will present a few words from Seymour to help us get through it all. Read on -

Idle hands are the Devil's tools;
an idle mind is the Devil's workshop;
an idle bankruptcy attorney is the Devil's associate.
- Seymour

Content | Articles | The Law
Announcements | Committee Notes | Contact Us

April 2007

Martin L. Fried
Laura J. Eisele
Co-Editors

Debtor/Creditor NewsMag
A publication of the Debtor/Creditor Rights Committee of the Business Law Section of the State Bar of Michigan

ARTICLES

Content | Articles | The Law
Announcements | Committee Notes | Contact Us

Articles of Interest for the Practitioner of Debtor/Creditor Law

- - - a Quick Read for the Lawyer on the Run

PASSING MEANS TEST DOES NOT PRECLUDE DISMISSAL FOR EXCESS INCOME

By: Laura J. Eisele

In *In re Zaporski*, Case no. 06-51617, Bankr. E.D. March 29, 2007, Judge Shefferly resolved some hotly disputed issues arising from BAPCPA, including the proper calculation of the means test under amended form B22A, and whether a chapter 7 case can be dismissed under section 707(b) absent a statutory presumption of abuse under the means test. In *Zaporski*, the United States Trustee (the "UST") moved to dismiss the debtor's chapter 7 case under both sections 707(a) and (b). The UST alleged that the debtor improperly calculated the means test under amended form B22A, and if properly calculated, a presumption of abuse would exist. Alternatively, the UST argued that based on the totality of circumstances, the case should be dismissed for abuse. The UST did not argue, and the Court did not find, that the debtor acted in bad faith or was dishonest.

The first argument made by the UST was that in calculating its expenses under amended form B22A, the debtor should not have included ownership and operational costs for two vehicles since the vehicles were owned free and clear of liens and the debtor only used one car. The UST instead argued that only the debtor's actual expenses should be included in calculating the means test. Judge Shefferly disagreed, holding that "the IRS Local Standards are fixed allowances, and not caps on a debtor's actual expenses, and therefore permit a debtor to take a reduction for an ownership expense of a vehicle even if the debtor owns the vehicle free and clear and has no actual payments for the vehicle." Judge Shefferly reached the same conclusion for operating expenses, and thus denied the motion to dismiss based on a presumption of abuse under the means test.

The second argument made by the UST was that even if the debtor is within the means test, the court could dismiss based on a totality of circumstances. Judge Shefferly rejected the argument made by the debtor that the totality of circumstances test is inapplicable where there is no presumption of abuse. "Just because there is no statutory presumption of abuse does not somehow create a safe harbor for a debtor." Judge Shefferly considered

whether the debtor had the ability to pay his creditors and determined that in a chapter 13 case, with no belt tightening or life style changes, the debtor could make a substantial distribution to unsecured creditors. Judge Shefferly also considered that debtor was in a stable job, had a substantial retirement nest egg, had the ability to make continued contributions to his retirement account and had above median income. As such, Judge Shefferly granted the UST's motion to dismiss under section 707(b)(3)(B), based on the totality of circumstances.

CAN 910 CREDITORS REJOICE IN HANGING PARAGRAPH'S RECENT INTERPRETATIONS?

By: Charles J. Schneider with contributions by Jeffrey Sieving

Amongst the many infirmities of BAPCPA, the "hanging paragraph" of 11 USC §1325(a)(9) has ripened into divergent interpretations from the local bench leaving chapter 13 creditor attorneys rejoicing and debtor attorneys scratching their heads. The "hanging paragraph" presents the question: can a chapter 13 debtor surrender collateral consisting of a vehicle in full satisfaction of a creditor's secured claim or does the secured motor vehicle lender have a right to file an unsecured claim if the surrender results in a deficiency.

The "hanging paragraph" provides that "...section 506 shall not apply to a claim described in that paragraph if the creditor has a purchase money security interest securing the debt that is the subject of the claim, the debt was incurred within the 910 day preceding the date of the filing of the petition, and the collateral for that debt consists of a motor vehicle..."

The majority of courts across the nation have interpreted the "hanging paragraph" as allowing the debtor to surrender the vehicle in full satisfaction of the debt. Judge Rhodes has held, with the majority, that a debtor could surrender a vehicle in full satisfaction of a creditor's claim. *In re Evans*, 349 BR 498 (Bankr.E.D.Mich. 2006). He states that the "hanging paragraph" is clearly unambiguous in its application to 910 creditors. The plain language of §1325(a)(9) makes it clear that section 11 USC § 506 does not apply to 910 creditor claims. A 910 creditor is deemed fully secured regardless of whether a debtor decides to retain the vehicle and make payments over time in accordance with 11 USC §1325(a)(5)(B) or if the debtor decides to surrender the vehicle complying with 11 USC §1325(a)(5).

Michigan is unique in that there are two recent opinions upholding the minority's position. See *In re Particka*, 2006 WL 3350198 (Bankr.E.D.Mich.) and *In re Hoffman*, 2006 WL 3813775 (Bankr.E.D.Mich.). In these subsequent cases, Judge Shefferly and Judge Tucker, in their respective opinions, conclude that a 910 creditor can have a deficiency claim after surrender of a vehicle. The cases distinguish their position based on an analysis of §506's applicability to §1325(a)(5). Accordingly, §506 only applies to claims relating to §1325(a)(5)(B) and not §1325(a)(5)(C). When a debtor decides to retain the vehicle, §506 is used to determine the value of the secured claim. The effect of the "hanging paragraph" bars the debtor only from paying the "cram down" value. The court states that §506 had never applied to §1325(a)(5)(C) because the "estate does not have an interest in the property securing the claim". Inasmuch as the estate no longer retains an interest in the vehicle, the creditor is allowed to pursue a deficiency claim under state law.

The inability of the local bench to rule uniformly on this issue is a testament to BAPCPA and the continuing difficulty judges and attorneys will have interpreting it. What should a chapter 13 debtor's attorney do? Debtor's attorneys should be composing an unsecured base plan (sometimes called a pot plan) rather than a percentage plan. By composing an unsecured base plan, a potential deficiency claimant has potentially no impact upon a chapter 13 plan. The deficiency claimant would just take a pro rata share imposing smaller shares on other unsecured claimants. This was a better practice prior to BAPCPA and remains the same today as it minimizes the impact that any claim can have upon the plan when the scheduled claim is understated.

back

COURTS VOID DEBT RELIEF AGENCY SECTIONS OF BAPCPA

By: Richard Fellrath

We all know that the credit card industry has a very powerful lobby. How else could they get around the 25% State criminal usury laws? So when they engineered changes in the Bankruptcy Code, naturally they attacked their perceived nemeses, the bankruptcy attorney. They did this by passing three sections of the Bankruptcy Code aimed at attorneys (or so they thought). The sections involved, 526, 7, & 8, generally require written contracts place duties on the debtor's attorney to investigate the debtor's finances, restrict advertising, and prohibit advice given to clients regarding incurring debt. There are civil and criminal penalties for violations of the sections by *debt relief agencies*.

So what is a *debt relief agency* (DRA)? For the purpose of this discussion, a DRA is one who gives assistance to an *assisted person,* 11 USC Sec 101(12)(a). An *assisted person* is defined as a person whose debts consist primarily of consumer debts and whose nonexempt property is less than $150,000.

The first and thus far the most expansive response to this law was a decision from the Chief Judge for the Southern District of Georgia. On the date the law came into effect, he ruled that the attorneys practicing in his court are not DRAs as long as they act as attorneys and do not have separate commercial enterprises in the bankruptcy field. In *In re Attorneys at law and Debt Relief Agencies,* 332 BR 66 (Bankr, SD, GA, 2005), the Judge reasoned that DRAs are persons who provide bankruptcy assistance. Attorneys are not mentioned but *provide legal representation* is. This term specifically excludes attorneys. He gets around that part of the definition which includes *legal representation* by determining that this refers to non attorney representation. He also notes a provision that advice that a party can represent himself does not apply to an attorney. Finally, he notes that the statute recognizes that states regulate attorneys within their borders (Sec 526(d)(2)) and if there is to be a preemption by the federal government it must be clearly set out. The U.S. Trustee appealed this decision to the District Court, (*In re Attorneys at Law*, 353 BR 318 (SD, GA, 2006) which followed a trend in appeals and found that there was no case or controversy and declined to get into the controversy which it described as a *rats nest.*

Attorneys in the Middle District of Georgia then attempted to get a ruling that the statute did not apply to lawyers in *In re McCartney,* 336 BR 588 (Bankr MD, GA, 2006). The Georgia District Court said that there was no threat of enforcement of the law and thus no case or controversy. A similar result occurred in the Eastern District of Pennsylvania where the case was dismissed for want of a case and controversy since there was no actual injury and the District Court stated it would not give adversory opinions (*Geisenberger v Gonzales*, 346 BR 678 (ED PA, 2006).

In *Susan B. Hersh v. U.S.,* 347 BR 19 (ND TX, 2006), the Court again dismissed for no controversy but made some findings of fact. First, the Court held that Attorneys are debt relief agencies and that the requirement for written notice was valid. The attorney had no standing to raise the 5th Amendment on behalf of her clients. However, the Court found that Section 526(a)(4)'s restrictions on legal advice (could not counsel obtaining further debt) were in violation of the first amendment. *Olson v. Gonzales,* 30 BR 906 (D OR, 2006) followed *Hersh* The District Court found that attorneys are DRAs; the advertising restrictions were approved, and found that no definition of exempt property did not require a finding of vagueness. The failure to allege that advice was given to those with incomes under $150,000 required dismissal since there was no threat of enforcement. However, like the Court in *Hersh,* found that Section 526(a)(4) violated the first amendment as it restricted advice which an attorney could fairly be expected to give clients concerning obtaining a car or refinancing which debts would be reaffirmed. In *Zelotes v. Martini,* 352 BR 17 (D CN, 2006) the District Court denied a motion to dismiss by the U. S. Trustee finding that the attorney had standing because he was a DRA.

The Minnesota District Court again followed *Hersh* in finding that section 526(a)(4) was in

violation of the First Amendment but also found that the advertising sections of the Act were also in violation of that amendment (Sections 526(a)(4) and (b)(2)) and that the term Debt Relief Agency itself was misleading. Finally the Court found that the *debt relief agency* provisions did not apply to attorneys and denied the government's motion to dismiss *Milavetz,Gallop, & Milavetz P.A.v. U. S.* , (2006 U.S. Dist LEXIS 88785) (D MN. Dec 7, 2006)

Locally Judge Rhodes in an unwritten bench opinion in *In re Szekeres,* (case No 06-41315) (Oct 13, 2006) ruled that a person with an un-exempted residence worth $150,000 or more (without deduction for mortgages) is not an *assisted person* and therefore the attorney representing him or her is not a DRA.

There are no Court of Appeals decisions on attorney DRAs but, unless one is practicing in the Southern District of Georgia or the District of Minnesota, it appears that the attorneys representing parties with under $150,000 in assets may be DRAs. On the other hand Section 526(a)(4) is probably constitutionally invalid - this seems to be the state of the law at least until the next Court decision.

back

TIMING OF PAYMENTS UNDER BAPCPA'S SECTION 503(b)(9)

By: Deborah Kovsky-Apap

The Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 ("BAPCPA") created a new category of administrative expense claim for creditors who sell goods to debtors within 20 days before the bankruptcy petition. Specifically, 11 U.S.C. § 503(b)(9) provides administrative expense status for "the value of any goods received by the debtor within 20 days before the date of commencement of a case under this title in which the goods have been sold to the debtor in the ordinary course of such debtor's business."

Much of the wrangling in the courts over the new 20-day administrative claims has been about the timing of the payments. Must the debtor pay the claims immediately? In the ordinary course of business, according to applicable credit terms? May payment be delayed until the effective date of a confirmed plan? Two recent decisions by courts in the Third Circuit appear to be among the first opinions issued on these questions.

In *In re Global Home Products LLC*, No. 06-10340, 2006 WL 3791955 (Bankr. D. Del. Dec. 21, 2006), a creditor moved for allowance and immediate payment of its § 503(b)(9) claim. The court, noting that the timing of payment of administrative expense claims is left to the discretion of the courts, analyzed the creditor's request under a three-prong test: "(1) the prejudice to the debtors, (2) hardship to claimant, and (3) potential detriment to other creditors." *Id.* at *4. At an evidentiary hearing, the debtor presented uncontroverted evidence that it would be prejudiced by immediate payment for a variety of reasons, including the lack of sufficient funds, the fact that the DIP financing agreement prohibited the debtor from paying any debts not in the post-petition budget and the concern that immediate payment of one 20-day administrative claim would trigger an avalanche of similar demands. The creditor, on the other hand, presented no evidence of hardship. *Id.* at *4-5. The court, finding that the prejudice to the debtor clearly outweighed the hardship to the claimant, denied the creditor's motion to the extent that it sought immediate payment. *Id.* at *5.

In *In re Bookbinders' Restaurant Inc.*, No. 06-12302, 2006 WL 3858020 (Bankr. E.D. Pa. Dec. 28, 2006), the 20-day administrative expense claimant claimed that it was entitled to immediate payment as a matter of law. The creditor argued that § 503(b)(9) requires a chapter 11 debtor to treat 20-day administrative expenses in the same manner as administrative expenses arising from the post-petition delivery of goods and services; since the debtor in that case had been paying its post-petition trade debt in the ordinary course, it

was likewise required to pay the 20-day administrative expenses. The court flatly rejected this argument. *Id.* at *1, *5. Instead, the court adopted the same three-factor test used in *Global Home Products*, and found that an evidentiary hearing would be required to determine whether to compel immediate payment of the allowed § 503(b)(9) claim or defer payment to a later stage in the case. *Id.* at *1.

These decisions suggest that while it may be possible to obtain immediate payment of a 20-day administrative expense claim, the creditor will be required to jump through additional hoops and incur greater expenses than those involved in simply filing a motion. At a minimum, a 20-day administrative claimant must be prepared to demonstrate, at an evidentiary hearing, that it will suffer unusual hardship in the absence of immediate payment. Moreover, a savvy administrative expense claimant will seek a carve-out for § 503(b)(9) claims in the DIP facility, so that if the court, in its discretion, compels immediate payment, the debtor will be able to do so.

back

Content | Articles | The Law
Announcements | Committee Notes | Contact Us

(ANOTHER) ARTICLE ON ELECTRONIC DISCOVERY AMENDMENTS – Don't Ignore This One!

By: Brandan Best

The Federal Rules of Civil Procedure, generally incorporated by the Federal Rules of Bankruptcy Procedure, were recently amended, effective December 1, 2006, in part to specifically address the rights and duties of litigants with respect to "electronically stored information" (otherwise known as "ESI") (described in Rule 34(a) in part as "data or data compilations stored in any medium from which information can be obtained"). These amendments will have the effect of forcing many bankruptcy attorneys to re-examine how they approach, and respond to, document requests, interrogatories, and other areas of discovery. Attorneys should re-read the discovery rules as they come up in their practice and note any new requirements or issues created by references to ESI. Although the amendments are only three months old, there has been a substantial amount of written analysis regarding them, which attorneys will no doubt resort to as questions regarding the application of the amendments to specific cases begin to arise. However, here are a few of the changes that all attorneys may need to confront at the outset of any litigation:

> ***FRBP 7026(f) Conference and Report.*** While the model form on the bankruptcy court's website for the Eastern District of Michigan has not yet been updated to reflect the changes, parties must now include in their Rule 26(f) report, generated after the Rule 26(f) conference, "any issues relating to discovery of [ESI] including the form or forms in which it should be produced." This will require attorneys to think through, and discuss with the client (and/or the client's IT department) how their ESI is maintained, what ESI might be relevant to the matter at hand, and any other ESI-related issues that may arise during the litigation.
>
> ***FRBP 7026(a) Disclosures.*** Rule 26(a) requires parties to voluntarily provide initial disclosures within 14 days after the Rule 26(f) conference. Parties typically either agree to provide all the 26(a) disclosures by a date certain in their Rule 26(f) report, or modify the requirements of Rule 26(a), identifying which of the requirements the parties deem necessary in that particular litigation. Unless otherwise agreed to by the parties or directed by the court, parties must now provide (along with the usual list of

individuals, location of documents and "tangible things," computation of damages, and any insurance contracts) either a copy of, or a description by category and location of, all ESI that the party may use to support its claims or defenses. Again, these changes require attorneys to thoroughly explore with the client all ESI-related issues relevant in the case, keeping in mind that Rule 37(c)(1) provides that a party that fails to identify information in its initial disclosure "without substantial justification" will not be permitted to use that evidence at trial unless the "failure is harmless."

FRBP 7026(b)(2) Limitations. Rule 26(b)(2)(B) states that a "party need not provide discovery of [ESI] from sources that the party identifies as not reasonably accessible because of undue burden or cost." Attorneys will likely have to become familiar with what is "not reasonably accessible," from both practical knowledge and experience and available case law (*see, e.g., Zubulake v. UBS Warburg LLC*, 217 F.R.D. 309 (S.D.N.Y. 2003) (holding that question of "inaccessibility" is tied to the cost of production of the information at issue); *Manual for Complex Litigation* (4th Ed., Federal Judicial Center 2004)).

There are many other issues raised by the amendments to the rules that are important for bankruptcy attorneys to understand, including provisions relating to document requests under Rule 34, document retention issues, and attorney client privilege issues. Suffice it to say that, as with BAPCPA and the Bankruptcy Code, attorneys are advised to re-examine everything they previously took for granted in the FRBP relating to document discovery.

back

BANKRUPTCY JUDGES DECIDE MORTGAGE RECORDING DATE DESPITE NO "ENTRY BOOK"

By: Stuart Gold

After the Michigan Supreme Court declined to accept the Bankruptcy Court's request for an advisory opinion on the question: When, if ever, a mortgage in Michigan is recorded when the Registers of Deeds fail to keep "entry books," as required by Michigan statute? - the Judges of the Eastern District of Michigan Bankruptcy Court decided to consider this question, *en banc*. They received briefs from trustees and various mortgage companies--the parties in five pending cases, and amicus briefs from the Michigan Land Title Association, the Michigan Association of Registers of Deeds, the State Bar Real Property Law Section, and the Registers of Deeds from Wayne and Oakland County. They heard oral argument on December 11, 2006.

On February 27, 2007, the first decisions to come out of that *en banc* hearing were rendered in the pending adversary proceedings. The first was Judge Phillip J. Shefferly's 34-page opinion *In re Schmiel (Stuart A. Gold v. Interstate Financial Corporation)* AP# 04-0423. In summary, Judge Shefferly agreed with the trustee that despite the lack of the statutorily required entry books, a mortgage is recorded at the time that the mortgage is received by the county register of deeds for recording provided, that it is in recordable form when received **and** the statutorily required fee is paid when the mortgage is delivered for record. Judge Shefferly specifically rejected any notion that a later payment of the recording fee could relate back to the date that a mortgage was left with the Register of Deeds, for recording purposes. However, he did express concern, in a lengthy footnote, about reports that some register of deeds offices have refused to accept recording fees when a document is left for record. In those cases, it appears that the fee is paid after the register of deeds has received the document and deemed it to be in recordable form and has otherwise met the statutory requirements for recordation. In those limited cases, Judge Shefferly opined that the mortgagee should not be penalized, if true. The court thereafter concluded that summary judgment could not be granted for either party in the *Schmiel* case because there remained an issue of fact concerning when the recording fee was in fact paid.

Later the same day, Judge Thomas J. Tucker issued his Opinion Regarding the Question

Certified to the Michigan Supreme Court *In re Earlie L. Nelson (Gold v Nations Finance Corporation)*, AP # 05-05311, indicating in that he "fully agree[s] with the reasoning and holdings in that [Judge Shefferly's] opinion, and therefore adopt them in this case."

back

SUPREME COURT RULES CHAPTER 7 DEBTOR'S RIGHT TO CONVERT TO CHAPTER 13 IS NOT ABSOLUTE

By: Charles J. Schneider with contributions by Jeffery Sieving

The United States Supreme Court held in a 5-4 decision that a Chapter 7 debtor who acted in bad faith by making a number of misleading or inaccurate statements and concealed a principal asset in his bankruptcy schedules forfeited his right to proceed under Chapter 13. This affirmed the decision of the First Circuit Court of Appeals in *In re Marrama*, 430 F.3d 474 (C.A.1 2005). Chapter 7 debtors do not have an absolute right to convert their cases to Chapter 13.The Court primarily considered two provisions of the Bankruptcy Code, subsections (a) and (d) of 11 U.S.C.A. § 706 relevant in determining what Justice Stevens, writing for the court, termed a "procedural anomaly."

Relying on a Senate Committee Report, the debtor had contended that § 706(a) created an unqualified right of conversion as that report stated that "...§ 706(a) "gives the debtor the one-time absolute right of conversion," It further noted that "[t]he policy of the provision is that the debtor should always be given the opportunity to repay his debts."

The Court, however, found the report's reference to an "absolute right" of conversion to be "more equivocal than petitioner suggests." The statement that a debtor should "always" have the right to proceed under Chapter 13 is inconsistent with the earlier recognition that it is only a one-time right that does not survive a previous conversion to, or filing under. "More importantly, the broad description of the right as 'absolute' fails to give full effect to the express limitation in subsection (d)," which expressly conditioned the debtor's right to convert on his ability to qualify as a "debtor" under Chapter 13. The court further relied on § 1307(c), which states that a Chapter 13 proceeding may be either dismissed or converted to a Chapter 7 proceeding "for cause". Justice Stevens explains that although there is no specific mention of pre-petition bad-faith conduct as a cause of dismissal, bankruptcy courts routinely treat dismissal for such conduct as implicitly authorized by the "for cause" language.

Writing in dissent, Justice Alito opined that the majority's imposition of a condition on the debtor's conversion right – namely, a bankruptcy judge's finding of good faith – was inconsistent with the Bankruptcy Code. He states that there was nothing in the Code suggesting that a bankruptcy judge has the discretion to override a debtor's exercise of the § 706(a) conversion right on a ground not set out in the Code.

It has been this author's experience that some bankruptcy judges have granted ex-parte requests by Debtors for conversion. Once the court entered the order to convert would a chapter 7 Trustee file a motion for reconsideration to set aside the order based on the Debtor's alleged "bad faith". This appears to be a reasonable procedure giving a Debtor an opportunity to propose a plan of repayment that would purge his "bad faith" by offering creditors more than liquidation by the chapter 7 Trustee. This was a point recognized by the dissent. By virtue of the majority's opinion bankruptcy judges may feel compelled to permit conversion only after notice and opportunity. Such a procedure would inhibit the Debtor from presenting such a plan and place too much emphasis on the "bad faith" and not on the totality of the circumstances.

back

SUPREME COURT ALLOWS CONTRACTED ATTORNEY FEES FOR LITIGATING BANKRUPTCY ISSUES

By: Willard Hawley

On March 20, 2007, the United States Supreme Court issued its decision in *Traveler's Casualty Company of America v Pacific Gas & Electric Company,* 2007 U.S. Lexis 3566; dealing with the allowance of contractual attorney's fees in bankruptcy.

The case came before the court upon a writ of certiorari from the Ninth Circuit to resolve a split among circuits as to the so-called "Fobian Rule." The underlying case involved Traveler's request for allowance of an unsecured claim for its attorney's fees which were claimed pursuant to a contractual right of indemnity. The Bankruptcy Court rejected Traveler's claim for attorney fees, relying on *In re Fobian*, 951 F.2d 1149 (CA9 1991), which held that, "where the litigated issues involve not basic, contract enforcement questions, but issues peculiar to federal bankruptcy law, attorney's fees will not be awarded absent bad faith or harassment *id. at 1153.* Following affirmation of the decision by both the District Court and the United States Court of Appeals for the Ninth Circuit, the Supreme Court granted a writ of certiorari to resolve the conflict between the Fourth and Ninth Circuits.

The Supreme Court held that there is simply no support for the *Fobian* rule in federal bankruptcy law. Absent an exception in §502(b) the claim would be allowed. The court further found that given the broad permissive scope of §502(b)(1), as well as the Courts prior recognition that, "the character of [a contractual] obligation to pay attorney's fees presents no obstacle to enforcing it in bankruptcy" the *Fobian* rule could not stand. The Court held that the Bankruptcy Code does not disallow contract-based claims for attorney's solely because they were incurred litigating issues of bankruptcy law. The judgment was vacated and the case remanded.

back

BRITNEY SPEARS FACING BANKRUPTCY?

By: Anonymous Blogger

A "Guest Attorney" sent the following article to The Bankruptcy Blog sponsored byTotal Bankruptcy.
Click this line to check it out.

Is this for real ?????
Who knows.

After spending $21 million in the past two years, rumors are flying that pop idol Britney Spears is facing bankruptcy. She is currently in a California substance abuse treatment facility. Apparently, she has already spent two-thirds of her $32 million fortune and is "scared to death" of the financial situation that faces her when she leaves treatment. A family friend is quoted as saying, "She has to concentrate on staying sober, but she can't do that if she has to worry about going broke - which is exactly what she thinks will happen." I know what you're thinking. I too, wish could worry about going broke with $12 million instead of the $8.32 I have in my pocket.

back

SHORT TAKES - BANKRUPTCY MATTERS WORTHY OF

NOTE

By: Martin L. Fried

The Supreme Court Explains Disallowance of Unenforceable Claims.

The recent Supreme Court decision of *Travelers Casualty & Surety Co. of America v Pacific Gas & Electric Co*, 549 US --- (2007) will probably be cited most often because of the allowance of bankruptcy related attorney fees BUT the Court also sheds some needed light on disallowance of unenforceable claims per 502(b)(1) - "any defense to a claim that is available outside of the bankruptcy context is also available in bankruptcy." That should be enough to keep an aggressive creditor from making up causes of action to assert in dischargeability proceedings. Query: Does the res judicata effect of a state court judgment based on contract preclude the same creditor from objecting to discharge by now claiming he also had a fraud claim?

Legal - Is It?
Debtor Claims Eastern District Bankruptcy Case Management Order Exceeds Authority by Dismissal for Failure to File Completed Chapter 13 Confirmation Hearing Statement.

In the Eastern District case of *In re Delmar Sharp*, 06-13151, an aggressive debtor sought on appeal to strike paragraph 3 of the Case Management Order from "this and all other cases". That paragraph provides for dismissal without a hearing for failure to file the Chapter 13 Confirmation Hearing Statement. The debtor argued that dismissal without a hearing violates the bankruptcy code. Unfortunately, we don't learn the answer since the District Court dismissed the appeal as moot, but is the debtor on to something?

Legal - it's not!
FTC Busts "Reduce Debt Now" Scheme

If you listen to the radio, you heard it. If you're a bankruptcy practitioner, you wonder. Every 15 minutes, an assuring but enthusiastic voice announces that he has a "secret method the credit card companies don't want you to know about" which allows him to settle your debts for 50% on the dollar. Problem is, it's a scam, at least according to the FTC. Click here to read more from ConsumerAffairs.Com

Everything You Ever Wanted to Know about the Federal "right to receive" exemption

In an exhaustive 18-page analysis, Western District Judge Jeffrey Hughes explains the differences between the "right to receive" exemption paragraphs. *In re Sanchez*, --- BR --, 2007 WL 445959.

Everything You Ever Wanted to Know About Dividing Up a Tax Refund

A Connecticut bankruptcy judge has tackled the thorny issue of dividing up a post-petition tax refund between the Estate and the non-filing spouse where both spouses had income and withholding, and the Petition was filed during the tax year in question. It's worth saving because sooner or later, you're going to need it. *In re Edwards*, --- BR ---, 2007 WL 419650.

Hanging Paragraph Dilemma

Did you know there are 108 published decisions interpreting the Hanging Paragraph section? What does that tell you about clarity in drafting?

Content | Articles | The Law
Announcements | Committee Notes | Contact Us

April 2007

Martin L. Fried
Laura J. Eisele
Co-Editors

Debtor/Creditor NewsMag

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

CONTENT

Information Designed for the Michigan Practitioner of Debtor/Creditor Law

- - - a Quick Read for the Lawyer on the Run

In this Issue of *NewsMag*

September 2006 Issue of *NewsMag*

February 2007 issue of *NewsMag*

LINKS

Eastern District Bankruptcy Court
Western District Bankruptcy Court
Sixth Circuit Court of Appeals
PACER - All Courts

State Bar of Michigan
State Bar Member Directory
Business Law Section
Debtor / Creditor Rights Committee

Co-Editors of *NewsMag*

Martin L. Fried
Goldstein Bershad
Fried & Lieberman, PC
4000 Town Center, Ste 1200
Southfield, MI 48075
(248) 355-5300 (tel)
(248) 355-4644 (fax)
Marty@gbfllaw.com

Laura J. Eisele
Kerr, Russell
and Weber, PLC
Detroit Center, Ste 2500
500 Woodward Ave
Detroit, MI 48226-3427
(313) 961-0200 (tel)
(313) 961-0388 (fax)
lje@krwlaw.com

Co-Chairs of Debtor/Creditor Rights Committee

Judy B. Calton
Honigman Miller
Schwartz & Cohn, LLP
660 Woodward Ave.
Detroit, MI 48226
(313) 465-7344 (tel)
(313) 465- 7345 (fax)
jcalton@honigman.com

Judith Greenstone Miller
Jaffe, Raitt,
Heuer & Weiss, PC
27777 Franklin Rd, Ste 2500
Southfield, MI 48034
(248) 727-1429 (tel)
(248) 351-3082 (fax)
jmiller@jaffelaw.com

Content | Articles | The Law
Announcements | Committee Notes | Contact Us