

DEBTOR/CREDITOR RIGHTS COMMITTEE

Report Prepared for the September 2006 Business Council Meeting

1. NEXT SCHEDULED MEETING OF THE COMMITTEE

None is scheduled at this time.

2. COUNCIL APPROVAL

None sought at this time.

3. MEMBERSHIP

Membership is active and increasing.

4. ACCOMPLISHMENT TOWARD COMMITTEE GOALS

- Utilize the list serve to increase and energize members
The committee list serv is approximately 450 persons

- Start a Newsletter
We had wide participation in drafting the newsletter.

The first edition of the newsletter was posted on the Committee's webpage on the Section's website and served on the section list serv. See attached. 815 section members opened the e-mail.

- Submit sufficient articles to fill the November 30, 2006 edition of the Michigan Business Law Journal.

The following six articles were submitted:

-Brave New World: New Chapter 15 and Cross-Border Insolvencies – Jose Bartolomei, Bracewell & Giuliani (formerly of Miller, Canfield).

-Michigan Toolmakers' and Moldbuilders' Liens: Practical Consideration – Will Hawley, McDonald Hopkins

-Not Business As Usual: Initial Business Bankruptcy Lessons Under the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 – Laura Eisley and John Simon, Foley & Lardner

-Mortgage Avoidance in Michigan's Bankruptcy Courts – Susanna C. Brennan, Clark Hill

-Landlord Tenant Issues Under the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (BAPCPA)- Debra Beth Pevos, Sullivan Ward, Asher & Patton, P.C.

-Much Ado About Nothing (Or Not Very Much): The New Reclamation and Administrative Expense Claims Under BAPCPA, Deborah Kovsky-Apap, Pepper, Hamilton

- 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 co-sponsoring a seminar on October 9, 2006 at which Congressman John Conyers and eight Bankruptcy Judges are speaking.
- Advise the Bankruptcy Court on issues of interest to our committee.
At the request of the Eastern District of Michigan Bankruptcy Court we held two meetings of members and our staff on ECF procedures, made recommendations, and the ECF procedures were modified.

The Co-chairs are serving on a Committee (with Judy Calton as Reporter) advising the Eastern District of Michigan Bankruptcy Court on a major rewrite of the local rules in light of the amendments to the Bankruptcy Code and ECF.
- Develop successor leadership
The above activities have energized our membership, several of which are taking leadership roles.

5. MEETINGS AND PROGRAM

As discussed above, the Committee is a co-sponsor of *BAPCPA: One Year Later/A Columbus Day Seminar*, to be held October 9, 2006 at the Sheraton Novi Hotel. We expect a capacity attendance of over 400.

6. PUBLICATIONS

As discussed above, the Committee has launched its Newsletter and submitted six articles for the November 2006 Michigan Business Law Journal.

7. LEGISLATIVE/JUDICIAL/ADMINISTRATIVE DEVELOPMENTS

As approved by the Council, the Committee, working with Steven Rayman, is working with State Representative Alexander Lipsey on amending the recent Michigan exemption legislation, which legislation has been repeatedly held preempted by the Bankruptcy Code.

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Marty Fried
Laura J. Eisele
Co-Editors

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Information Designed for the Michigan Practitioner of Debtor/Creditor Law

In this Issue of *NewsMag*

BAPCPA

- Comfort orders denied & granted
- Debtor request for stay extension
- Utility deposits - court has no discretion
- Procedure where case closed but no discharge for failure to file cert of completion of financial management course

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- Update on Mortgage Avoidance Adversary Proceedings in Michigan
By: Brendan G. Best and Gina M. Capua

DEBTOR ESTOPPED FROM PURSUING UNSCHEDULED CLAIM

- Bankruptcy court dismissed case against defendant

STATE

- Judgment against garnishee for false disclosure
- When is debtor a necessary party in fraudulent conveyance action

SEMINARS - DETROIT

- Second Annual Walter Shapiro Bankruptcy Symposium - 09/07/06
- BAPCPA: One Year Later - 10/09/06

Links

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Articles Welcome

The Debtor/Creditor Rights Committee presents articles of interest to the Michigan practitioner including a brief synopsis of Michigan BAPCPA cases, both bankruptcy and non-bankruptcy Michigan Creditor Rights decisions, announcements from the Judge's Corner, and Committee News.

We welcome short articles on any topic relating to creditors rights. We know you're busy - we're all busy. That's why we like articles which don't take long to read and don't take long to write. A paragraph or two is just fine. You'll get a byline and we'll get content.

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Decisions from the Eastern and Western Districts of Michigan and the Sixth Circuit BAP and Court of Appeals

Debtor Estopped From Pursuing Unscheduled Claim

Debtor failed to disclose in Chapter 7 schedules a wrongful discharge action that she commenced pre-petition. The defendants in the wrongful discharge action moved for summary judgment on the basis of judicial estoppel, among others. The bankruptcy court granted the motion for summary judgment on the basis of judicial estoppel based on the debtor's failure to disclose the action in her bankruptcy case. The court noted that "the purpose of judicial estoppel is to prevent litigants from compromising the judicial system through dishonest gamesmanship." The court found that the debtor in the adversary proceeding acted in bad faith and thus judicial estoppel was warranted. In re Johnson, __ B.R. __, 2006 WL 2052068 (07/14/06 Bankr WD Mich).

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 - Bankr ED Mich).

Comfort Order Denied

Chapter 7 creditor secured by a vehicle requested an order confirming that the automatic stay has 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 - Bankr ED Mich).

Comfort Order Denied

Chapter 7 creditor secured by mortgage requested an order confirming that the stay has 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 noted further that Local Rule 4001-6(d) does not contemplate such an order. In re Coleman, #06-43396 - tjt (04/21/06 - Bankr 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 - Bankr 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 - Bankr ED Mich).

Procedure Where Case Closed But No Discharge for Failure to File Statement of Completion of Personal Financial Management Course

The debtor's chapter 7 case had been closed but no discharge issued because the debtor failed to file a statement of completion of personal financial management course. The court held that "If the Debtor wishes to obtain a discharge, it will be necessary for the Debtor to file a motion to reopen this bankruptcy case in accordance with Guideline 3, accompanied by the statement required by § 727(a)(11) of the Bankruptcy Code, and Bankruptcy Rule 1007(b)(7) and (c), evidencing the Debtor's completion of a course in personal financial management pursuant to § 111 of the Bankruptcy Code." In re Smiley, #06-89741 - pjs (04/12/06 - Bankr ED Mich).

Comfort Order Denied

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 - Bankr ED Mich).

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 Bankr WD Mich).

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Michigan State Decisions

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Articles of Interest for the Practitioner of Debtor/Creditor Law

Update on Mortgage Avoidance Adversary Proceedings in Michigan

By: Brendan G. Best and Gina M. Capua, Dykema Gossett, PLLC

The failure of many of Michigan's Registers of Deeds to comply with Michigan's recording acts has recently been the subject of intense interest and litigation as a result of the high number of mortgages subject to avoidance actions by bankruptcy trustees who, upon conducting an investigation of a debtor's assets, are finding mortgages (typically arising from refinancings) that are either unrecorded or date stamped with a liber and page number within the 90 day preference period and not within certain safe harbors as provided in the Bankruptcy Code (post-BAPCPA, the safe harbor period is now 30 days for all transactions; in bankruptcy cases commenced prior to BAPCPA, the safe harbor is 20 days for purchase money mortgages and 10 days for refinancings).

Among the causes of the high number of unrecorded or late-recorded mortgages are the lengthy backlogs at the county Register of Deeds offices combined with the failure of many counties to maintain "entry books" at their register of deeds offices. This failure to maintain entry books "noting . . . the day, hour, and minute of receipt" of mortgages at the recording office is in derogation of Michigan's recording statutes. See MCLA §565.25. Wayne County has been under orders from the Michigan Supreme Court since June 2004 to remedy this major problem. See *Central Ceiling & Partition, Inc., v. Dept. Commerce*, 470 Mich. 877 (2004). Recently, Wayne County was also named as a defendant in an action alleging that the Register of Deeds has violated numerous federal and state laws by failing to act in accordance with the recording statutes. See *First American Title Insurance Company, et al, v. Bernard J. Youngblood*, Case No. 2:06-cv-12061 (Wayne County Circuit Court, filed May 4, 2006).

To date, several Michigan bankruptcy judges have produced written opinions on this issue. In *Tibble v. Consumers Credit Union (In re: Koshar)* (Judge Hughes), 334 B.R. 889 (Bankr. W.D. Mich. 2005), the mortgage at issue was alleged to have been sent within the applicable safeharbor period but not stamped with a liber and page number until twenty-eight days after closing, and the Kalamazoo Register of Deeds admitted that it does not maintain the required entry book. The court held that the date the mortgage was delivered and accepted by the county is the date an instrument is perfected, pursuant to Michigan's race-notice recording statutes, and held that issues of fact existed as to the actual date of receipt of the mortgage by the Register of Deeds). In *Gold v. Interstate Financial Corp. (In re: Schmiel)*, Adversary Proceeding No. 04-04023 (Bankr. E.D. Mich., July 7, 2005) (unpublished) (Judge Shefferly), the mortgage was presented to the Oakland County Register of Deeds within the safe harbor period but stamped with a liber and page number ninety-six days after closing. The court held that Michigan statutes provide that the mortgage is recorded at the time so noted in an entry book, and holding that issues of fact existed with respect to both whether the Oakland County Register of Deeds maintained an entry book and when the mortgage was validly presented and received by the Register of Deeds, e.g. whether the mortgage complied with Michigan's recording statutes and was accepted by the Register of Deeds for recording when presented.

With every bankruptcy judge in the Eastern District of Michigan facing this issue in multiple cases, the Michigan Supreme Court recently certified the following question to the Michigan Supreme Court: "When a County Register of Deeds Does Not Maintain an 'Entry Book' As Identified in MCL 565.24 and 565.25, When, If Ever, Is A Mortgage Deemed 'Recorded'?" See Supreme Court Case No. 130966, *In re Certified Question - Gold v. Interstate*, (filed April 19, 2006). If the Court decides to answer the question, which it may decline to do, a decision is not expected until October 2007 or later.

While this issue may fade away in the coming months or years, as a combined result of the

increase of the safe harbor period in BAPCPA and the current effort to force Registers of Deeds to maintain entry books, in the near-term attorneys and courts alike will continue to struggle with this elusive and costly problem.

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Announcements from the Debtor/Creditor Rights Committee

2nd Annual Walter Shapiro Bankruptcy Symposium

Featuring Professor Margaret Howard of Washington & Lee University School of Law.

Date::

Thursday, September 7, 2006

Time:

6:00 p.m. cocktails, 7:00 p.m. dinner

Location::

Westin Hotel
1500 Town Center
Southfield, MI
(248) 827-4000

BAPCPA: One Year Later, A Columbus Day Seminar

Date:

October 9, 2006

Time:

8:00 a.m. registration through 4:45 p.m.
Breakfast and lunch will be included, closing reception to follow.

Location:

Sheraton Detroit Novi
21111 Haggerty Road
Novi, Michigan
(248) 349-4000

Speakers::

Will include Bankruptcy Judges Jeffrey H. Hughes, Marci B. McIvor, Steven W. Rhodes, Walter Shapero, Phillip J. Shefferly, Thomas J. Tucker, Eugene Wedoff, and incoming Bankruptcy Judge Daniel S. Opperman.

Topics:

Will include both consumer and business issues in breakout sessions.

Register Online:

Go to www.fbamich.org
Select "Events & Activities"
In left margin, click "Columbus Day Seminar".

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