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DISMISSALS AND § 707(b) OF THE BANKRUPTCY CODE

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While there have yet to be any written opinions filed in this District, there appears to be an increased interest by the United States Bankruptcy Court for the Western District of Michigan in 11 U.S.C. 707. It has come to the attention of Bankruptcy practioners that 707(b) motions are being filed with heightened frequency by the United States Trustee as a substitute for those brought by the Bankruptcy Judges themselves. The Bankruptcy Judges appear to consider, quite properly, that the United States Trustee may be in a more practical, functional and advantageous position to effectively bring the matter to the Court's attention. In light of the fair prevalance of these dismissal motions, a general discussion of the parameters of 707 is warranted.

Section 707 authorizes dismissal of a Chapter 7 case under certain circumstances. The focus of this article is on Section 707(b) which was added to the Code by the Bankruptcy Amendments and the Federal Judgeship Act of 1984,[1] and, reflecting the expanded authority of the United States Trustee, procedurally strengthened by the Bankruptcy Judges, United States Trustees and Family Farmer Bankruptcy Act of 1986.[2] Section 707(b), as amended, provides as follows:

> After notice and a hearing, the court, on its own motion or on a motion by the United States trustee, but not at the request or suggestion of any party in interest, may dismiss a case filed by an individual debtor under this Chapter whose debts are primarily consumer debts if it finds that the granting of relief would be a substantial abuse of the provisions of this Chapter. There shall be a presumption in favor of granting the relief requested by the debtor.[3]

Section 707(b) was enacted as part of a package of consumer credit amendments. It was designed to combat perceived abuses in the use of Chapter 7 by consumer debtors who had the ability to pay but resorted to Chapter 7 to avoid their financial obligations. The Bankruptcy Code had not previously allowed a debtor's future income to determine eligibility for discharge. The Congressional intent was to preserve the historic policy of granting debtors a "fresh start" while limiting the ability of the debtor to obtain an unfair "head start" against creditors.[4]

Section 707(b) raises several important issues. First, is the section's applicability. A debtor invokes 707(b)'s jurisdiction only if his debts are "primarily consumer debts". Further, Section 707(b) provides that a court, only sua sponte or on a motion by the U.S. trustee, may dismiss a debtor's filing on grounds of substantial abuse. The second question presented is how this abuse is procedurally recognized by a court or a U.S. trustee and the concomitant result of a motion requested or suggested by a creditor or other party in interest. Finally, and perhaps most importantly, the term "substantial abuse" is not defined in the Bankruptcy Code itself but rather from a mixed bag of developing case law. The third issue concerns the proper interpretation of the term "substantive abuse."

In an exhaustive and thought provoking opinion a New Hampshire court recently conducted an extremely lengthy analysis of the history of bankruptcy law and the legislative history behind the amendments creating 707(b) and, primarily focusing on constitutional concerns, found no logical reason or explanation as to why only consumer debts were singled out.[5] Nevertheless, by its own language, Section 707(b) only applies in a Chapter 7 proceeding in which the debts are primarily consumer debts. Therefore, even if a filing of the petition is in fact a substantial abuse of the bankruptcy procedure, the case may not be dismissed under 707(b) unless this prerequisite is also satisfied.[6]

The term "primarily" has been interpreted by different courts in various ways. While the term suggests an overall ratio of consumer to non-consumer debts of greater than 50%, the debts are evaluated not only by amount, but by their relative number. Cognizant of the statutory presumption in bankruptcy of granting debtors relief and the underlying "fresh start" policy basis, the court in In re Restea,[7] found that though 53% of the applicable unsecured/secured debt was consumer debt, such debt was not principally, fundamentally or primarily consumer debt as such debts were not a substantial component of the total indebtedness. Courts, quite correctly, have adopted a flexible standard interpreting "primarily" on the basis of the particular facts and circumstances presented in each case.

The term consumer debt is defined in Section 101(7) as a "debt incurred by an individual primarily for a personal, family or household purpose".[8] The legislative history of Section 101(7) indicates that the definition was derived from various consumer protection laws.[9] Numerous cases decided under the Truth in Lending Act hold that if a credit transaction involves a "profit motive" it is outside the definition of a "consumer" credit transaction. After noting the similarities between the definitions in the Truth in Lending Act and in the Bankruptcy Code, the court in In re Almendinger,[10] adopted the profit motive definition when applying Section 707(b). While many other courts routinely use the same test,[11] consumer debt does not necessarily encompass all non-business debts. Aside from being personal, consumer debt must be voluntarily incurred primarily to achieve that personal purpose.[12]

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Every creditor feels that any bankruptcy discharge constitutes a substantial abuse. For this reason, creditors are not permitted to raise the issue, in cases involving consumer debtors. The question of substantial abuse may only be proffered by the court independently or by a motion of a U.S. Trustee. Without the restrictions nothing would preclude creditors from filing harassing motions that would increase the expense of a bankruptcy case or from seeking dismissal after losing a discharge or dischargability action.[13]

Judge Abram of the Southern District of New York in In re Edwards,[14] suggests a useful procedure for handling Section 707(b) cases. First, the court [or the U.S. Trustee] should closely review the debtor's petition and Schedule of Current Income and Expenditures. From this framework, Judge Abrams suggests: "certain petitions simply leap out as unusual." In these cases, the court should issue an Order to Show Cause why the petition should not be dismissed. To obtain additional information, the court can either hold an evidentiary hearing or ask the debtor to supply the court with a written affidavit to explain why the petition in question should not be dismissed.

While Bankruptcy Rule 1017(e) sets out a notice and hearing requirement, it does not establish any procedure for hearing the matter. Comments to 1017(e) do indicate that the debtor's failure to attend the hearing is not, in and of itself, a ground for dismissal.[15] Because 707(b) creates a presumption in favor of the debtor's receiving a discharge, the burden of moving forward with evidence of substantial abuse is on the party seeking dismissal. Courts have invited interested parties to intervene as "private attorneys general" to assume the burden of going forward. This practice allows the court to assume a neutral position as 707(b) does not clearly forbid the appearance of a trustee or creditor once the issue has been raised. Proceeding in this manner properly balances the court's dual role as both an arbitrator and adducer.[16]

Although the language of Section 707(b) would seem to indicate that the question may only be raised by the court or the U.S. Trustee,[17] the most recent legislative history demonstrates that this is not the case. Congress sought only "to preclude creditors from exercising this function."[18] Moreover, the Joint Explanatory Statement of the Committee of Conference supports the contention that Congress intended Chapter 7 trustees to assist the United States trustee in investigating fraud or abuse. In pertinent part, the committee report reads:

> The conferees anticipate that the panel trustees will work closely in conjunction with the United States Trustee to assist in the discharge of the specific authority granted under Section 707(b). This would include bringing to the United States Trustee's attention any information or evidence of fraud or abuse which may provide the basis for dismissal of a case under 707(b). The U.S. Trustee may, in his discretion, bring that information to the attention of the court. The conferees anticipate that panel trustees will frequently appear in court regarding the motions filed by the U.S. Trustee under Section 707(b), as amended. Such appearances will be in their capacity as panel trustees and not as a representative of the U.S. Trustee.[19]

Arguably, Congress was fully aware of the fact that the panel trustee is uniquely situated and is the most likely person to be able to identify those situations where a question of substantial abuse might be present. Permitting panel trustees to notify the United States Trustee of potential abuses is unlikely to lead to frivolous substantial abuse actions since the United States Trustee will serve as a buffer between the panel trustee and the court. Though contestable, apparently Section 707(b) may condition a dismissal motion on an independent and uninfluenced review by the Chapter 7 trustee who then presents his or her findings to the United States trustee's office for further action. If a different result was intended, Congress would have modified the "request" or "suggest" language in the Code.

The major operative provision of 707(b) is the term "substantial abuse." The Courts interpreting substantial abuse in the context of 707(b) have fashioned a variety of definitions and approaches. Some courts have applied the "ordinary and plain meaning" of substantial abuse. Others have adopted the dictionary definitions of the terms "substantial" and "abuse." Several courts have interpreted the meanings through the statute's legislative history.[20]

A review of the legislative history of the Act and the decisions of the many courts which have considered the issue agree that the principal factor to be considered in determining substantial abuse is the debtor's ability to repay the debts for which discharge is sought.[21] The rule adopted by a majority of the courts considering the issue appears that a debtor's ability to pay his debts will, standing alone, justify a 707(b) dismissal.[22]

While the Bankruptcy Court in the Western District of Michigan has not promulgated a reported decision addressing the standards it uses for determining substantial abuse, the Eastern District of Michigan has followed the standards set forth in the Kelly opinion. In two reported opinions it has held, that the primary, if not exclusive, factor to be considered in determining whether a debtor's petition constitutes a substantial abuse of the bankruptcy code under 707(b) is whether the debtor will have sufficient income to repay a meaningful part of his or her debts, within the context of either Chapter 11 or Chapter 13.[23] Judge Rhodes applied the following test:

> Thus, the Court concludes that the first issue to be addressed is the amount of the debtor's disposable income. The second issue is then whether use of this disposable income in a plan would result in repayment of a meaningful part of the debts. These judgments are obviously somewhat subjective, but can be guided by the Court's sense of equity and by balancing the effects on the various parties in interest of granting a discharge or alternatively dismissing the petition.[24]

Specifically, in the Struggs opinion, the Court found that debtor's motor home, was a luxury item and that the expenses for it were not reasonable for the debtor and his dependants. It adopted a set amount of $300.00 per month as reasonably necessary for basic personal transportation expenses, including automobile loan payments, maintenance and gasoline. The Court also summarily reduced the debtor's insurance and business use gasoline expenses by 25%.

However, it is important to remember that the language of Section 707(b) itself does not define substantial abuse in terms of the debtors ability to pay his debts through a Chapter 13 plan. While this language was expressly proposed in a prior bill it did not become law. As enacted, 707(b) makes absolutely no reference to the debtor's ability to fund a Chapter 13 plan.

The ability to fund a Chapter 13 plan should not be a dispositive determination of ability to repay. This is patently clear in cases where the debtors are ineligible for Chapter 13 relief because their noncontingent, unliquidated, unsecured debts exceed the statutory limit. In these cases, the ability to fund a Chapter 13 plan cannot be the only measure of substantial abuse.

A common thread running through most of the cases dismissed for substantial abuse is the existance of some "egregious circumstance" or evidence of bad faith or unfair advantage on the part of the debtor.[25] It is this writer's opinion that in determining whether evidence of such abuse exists, the court should examine the totality of facts and circumstances surrounding the debtors affairs and the events leading to the bankruptcy filing. The facts and circumstances which tend to aggravate or mitigate the abusiveness of the filing must also be viewed in light of the statutory presumption in favor of the relief sought by the debtor.

The facts and circumstances which motivated the filing should be considered. Other considerations in a 707(b) dismissal motion might be whether illess or other calamity prompted the filing, whether the debtor maintained an excessive lifestyle or an excessive spending pattern of obtaining of cash advances without intention to repay, the nature of the debtor's proposed budget in relation to the proportion of debt the debtor would be able to repay, and whether the debtor's schedules reasonably and accurately reflect the true financial condition. These examples are not exhaustive and each case must be examined on its own facts. In the absence of any additional facts, in an appropriate case, a finding of substantial abuse may be supported solely by the ability to repay.

Whatever interpretation is used, the Court must always be cognizant of the purpose of Chapter 7. Granting an honest debtor a "fresh start" is in everyone's best interest.

FOOTNOTES

1. Pub. L. No. 98-353, 99 Stat. 333.
2. Pub. L. No. 99-554, 219(b).
3. Id. 11 U.S.C. 707(b). Hereinafter, all references to the Bankruptcy Code, 11 USC 101 et seq., will be made only to the section number. Likewise, references to the Bankruptcy Rules of Procedure will make reference only to the rule number.
4. Statement of Senator Hatch, 130 Cong. Rec. S8891, June 29, 1984.
5. In re Keniston, 85 B.R. 202 (Bankr.D NH 1988).
6. Matter of Booth, 868 F.2d 1052, 1055 (5th Cir. 1988) In re Bell, 65 B.R. 575, 578 (Bankr. ED MI 1986).
7. 76 B.R. 728, 734 (Bankr. D SD 1987).
8. 11 U.S.C. 101(7).
9. S.Rep. No. 989, 95th Cong., 2d Sess. 22 (1978); 4.R.Rep. No. 595, 95th Cong., lst Sess. 309 (1978), U.S. Code Cong. & Admin. News 1978, p. 5787.
10. 56 B.R. 97 (Bankr. ND OH 1985).
11. In re Struggs, 71 B.R. 96 (Bankr. ED MI 1987), In re Bell, 65 B.R. 575 (Bankr.ED MI 1986).
12. See, e.g., In re White, 49 B.R. 869 (Bankr. WD NC 1985) where the court engages in a four-step analysis explaining why personal injury debts are not consumer debts.
13. 4 Collier on Bankruptcy, 707.05 (15th Ed. 1987).
14. 50 B.R. 933 (Bankr. SD NY 1985).
15. Bankruptcy Code - Comment to 1017(e).
16. See In re Peluso, 72 B.R. 732 (Bankr. ND NY 1987), Central Nat'l Bank of Woodway - Hewitt v. Spark, 15 CBC2d 988 (W.D.Tx. 1986), In re Hamze, 57 B.R. 37 (Bankr. ED MI. 1985).
17. Indeed, the majority of the most recent reported cases on Section 707(b) motions to dismiss have been filed by the United States Trustee, though none have been brought by the United States Trustee for the E.D. Michigan. See, In re Plogert, 93 Bankr. 641 (Bankr. N.D. Ind. 1988); In re Rushing, 93 Bankr. 750 (Bankr. N.D. Fla. 1988); In re Andrus, 1988 Bankr. LEXIS 2100 (U.S. Bkrtcy. WD PA Dec. 13. 1988).
18. 132 Cong. Rec. H 89988 (Daily Ed. Oct. 2, 1986).
19. Joint Explanatory Statement of the Committee of Conference, H.R.5316 reprinted in 134 Cong. Rec. H 8999 (Daily Ed. October 2, 1986).
20. See, In re Wegner, 91 B.R.854 (Bankr. D MN 1988), Andrus supra, note 17 and the cases cited therein.
21. In re Kelly, 841 F.2d 908, 914 (9th Cir. 1988).
22. See In re Cord, 68 B.R. 5, 7 (Bankr. WD MO 1986); In re Hudson, 56 B.R. 415, 419 (Bankr. ND OH 1985); In re Edwards, 50 B.R. 933, 937 (Bankr. SD NY 1985).
23. In re Struggs, 71 B.R. 96 (Bankr. ED MI 1987), quoting Bell 56 B.R. at 641.
24. Id. at p.97 (citations omitted).
25. Wegner, at 857-58 and the cases cited therein. Remember most acts displaying bad faith have other remedies under the Code.

RECENT BANKRUPTCY DECISIONS

The following are summaries of recent decisions rendered by federal district and bankruptcy courts in Michigan that address important issues of bankruptcy law and procedure. These summaries were prepared by Patrick E. Mears with the able assistance of Larry A. VerMerris.

In re Schafer, Case No. K88-146-CA4 (W.D. Mich. January 6, 1989). In this Chapter 13 case, the debtor owned approximately 100 acres of farmland that did not constitute his principal residence and which served as collateral for a loan made by Citizens Trust & Savings Bank. The debtor defaulted on this loan and, one day prior to the mortgage foreclosure sale, he commenced a Chapter 13 case. In his plan, debtor proposed to pay the matured mortgage loan over a twenty-year period at 10% annual interest. Citizens objected to confirmation of the plan on four grounds, two of which are relevant to this opinion: (i) a matured mortgage may not be crammed down beyond the five-year limit on Chapter 13 plans contained in 11 U.S.C. 1322(c); and (ii) the debtor's plan could not be confirmed until promised amendments to the plan were filed with the court. Bankruptcy Judge Laurence Howard confirmed the plan over these objections and Citizens appealed to the District Court. On appeal, District Judge Richard Enslen reversed the decision below finding that the debtor's plan was not confirmable. Judge Enslen held that the five-year limit on plans contained in section 1322(c) of the Code prohibits debtors from extending the payment period of a "short-term secured obligation . . . beyond the five-year life of the plan." Judge Enslen then remanded the case to Judge Howard for further proceedings. In dicta, Judge Enslen declared that a bankruptcy court has discretion "to condition approval of a plan on the filing of amendments after the confirmation hearing."

KAV Co. v. James DeKruyter, et al., Case No. K88-91CA4 (W.D. Mich. December 13, 1988). In a case involving complex facts, District Judge Enslen addressed issues of bankruptcy jurisdiction and procedure raised by a motion to withdraw the reference of an adversary proceeding pending before Bankruptcy Judge Howard. The moving parties argued that, since the complaint filed in the adversary proceeding asserted both core and non-core claims against the defendants and because they requested a jury trial, the withdrawal motion should be granted in the interests of judicial economy. The plaintiffs opposed the motion by arguing that, at most, the core claims should be adjudicated by the bankruptcy court and that only the non-core matters could be removed to the district court. In his decision denying the motion without prejudice, Judge Enslen first reviewed the legal and historical basis of the bankruptcy court's jurisdiction over core

and non-core matters after the 1982 Marathon Pipeline decision of the Supreme Court. Judge Enslen then declared that bankruptcy courts do "have the power and authority to conduct jury trials." Finally, Judge Enslen stated that 28 U.S.C. 157(d) requires the bankruptcy judge to first determine whether a proceeding pending in the bankruptcy court is core or noncore. Once this initial determination is made, the parties may file motions to withdraw the reference or the district judge may exercise that right sua sponte. Since this initial classification of the proceeding was not made by the bankruptcy judge, the motion to withdraw was denied and the action remanded to the bankruptcy court.

In re GMM, P.C., Cases Nos. 88-71116, 88-71117 (E.D. Mich. September 19, 1988). These two appeals from orders of the bankruptcy judge denying a Chapter 7 trustee's claims for recovery of fraudulent transfers and voidable preferences were both dismissed by Chief Judge Philip Pratt (now deceased) in two separate opinions. The principals of the Chapter 7 debtor, a law firm, were accused by the trustee of (i) fraudulently transferring certain monies to the United States Customs Service; and (ii) making preferential payments to the Internal Revenue Service. Both adversary proceedings were decided by the bankruptcy judge on the basis of stipulated facts. In both actions, the bankruptcy court dismissed the trustee's complaints since he failed to establish that the transferred monies were property of the estate. Applying to these appeals the clearly erroneous standard contained in Bankruptcy Rule 8013, Judge Pratt refused to disturb the decisions of the bankruptcy judge and affirmed the orders entered below.

In re Cybernetic Services, Inc., Case No. GL88-03083 (Bankr. W.D. Mich. January 12, 1989). In this Chapter 11 case, the corporate debtor's major asset as of the filing date was a lessee's interest in nonresidential real estate located in East Lansing, Michigan. The lease was for a fifteen-year term and had seven years remaining before it would expire. Approximately two weeks after the debtor filed its Chapter 11 petition, the lessor filed a motion for relief from the automatic stay which was thereafter answered by the debtor. The motion alleged, and the answer admitted, that the lease was the subject of a state court consent judgment permitting the lessor to obtain a writ of restitution upon the debtor's default and, as of the filing date, the debtor was in default. Although the debtor's answer requested the court to deny the lessor's motion, the debtor failed to request permission to assume the lease in that pleading. This contested matter was thereafter settled by a stipulation and order that purported to reinstate the lease as of October 1, 1988, prior to the filing date.

Some time later, the lessor filed with the bankruptcy court a motion for immediate possession of the leased premises, arguing that the debtor failed to assume the lease or to request an extension of time to assume or reject it pursuant to 11 U.S.C. 365(d)(4). On December 28, 1988, Bankruptcy Judge James Gregg held a hearing on this motion and held that the lease had been rejected by operation of 11 U.S.C. 365(d)(4). Judge Gregg concluded that the prior stipulation and order reinstating the lease did not have the effect of assuming it. At the conclusion of this hearing, Judge Gregg entered an order declaring that the lease had been rejected and that the automatic stay was lifted to permit the lessor to obtain possession of the leased premises in state court.

The debtor thereafter appealed from this order to the district court and concurrently filed with the bankruptcy court a motion for a stay pending appeal pursuant to Bankruptcy Rules 7062 and 8005. In his opinion denying this motion, Judge Gregg restated the four standards that must be satisfied by the moving party on such a motion:

1. A likelihood that the parties seeking the stay will prevail on the merits of the appeal;
2. The movants will suffer irreparable injury unless the stay is granted;
3. Other parties will suffer no substantial harm if the stay is granted; and
4. The public interest will not be harmed if the stay is granted.

Judge Gregg found that the debtor failed to establish that (i) it would prevail on the merits of the appeal; (ii) it would suffer irreparable harm if the motion was denied; and (iii) other parties would suffer no substantial harm if the motion was granted.

In re Schewe, Case No. GK86-01228, Adversary Proceeding No. 88-0303 (Bankr. W.D. Mich. January 12, 1989). In this Chapter 13 case, the debtors, husband and wife, rented a mobile home lot from a company named Fairview Estates. The written, one-year lease expired "shortly before or shortly after" the Chapter 13 filing date and no new written lease was executed. Consequently, debtors occupied their lot as month-to-month tenants at will. In their Chapter 13 Schedules, debtors failed to list the landlord as a creditor and, consequently, it received no official notice of the pendency of the Chapter 13 case. The debtors' plan was thereafter confirmed in the Summer of 1986.

Approximately two years later while the Chapter 13 case was still pending, the landlord served the debtors with a notice to quit requesting termination of their tenancy. One month later, the landlord, acting through its manager, filed a complaint for possession of the lot in state court. When this complaint was filed, neither the landlord nor its manager knew that the debtors' Chapter 13 case was pending. After the complaint was filed, however, the manager was informed of the Chapter 13 case. Nevertheless, the landlord continued to prosecute the state court action upon its attorney's advice that the automatic stay did not prohibit this action. On July 1, 1988, the state court entered a judgment for possession providing that a writ of restitution would issue within 10 days. Prior to the expiration of this period, the debtors commenced an adversary proceeding against the landlord and its manager in bankruptcy court requesting that the issuance of the writ be enjoined. Thereafter, a temporary restraining order and another order were entered prohibiting the debtor's eviction pending a hearing on a motion for relief from the automatic stay subsequently filed by the landlord. The debtor's adversary proceeding and the landlord's contested matter were thereafter consolidated for trial which was conducted in December, 1988, before Bankruptcy Judge Gregg.

In his decision granting the landlord's motion for relief from the automatic stay, Judge Gregg first found that, in Chapter 13 cases, the stay continues to protect a debtor's possessory interest in residential realty after the plan is confirmed even with respect to a postpetition claim. Judge Gregg reviewed in detail the divergent case law on this issue and concluded that the stay should apply under these circumstances in order to aid the debtors' rehabilitation efforts. Consequently, Judge Gregg declared that the judgment of possession entered by the state court was void. However, Judge Gregg declined to impose contempt or other sanctions upon the landlord and its manager for violating the automatic stay since they acted pursuant to counsel's advice and because no evidence of injury was presented by debtors. Finally, Judge Gregg denied the debtor's demand for injunctive relief

.d granted the landlord's motion for .elief from the stay. Judge Gregg found that, as tenants at will, the debtors could be evicted upon one-month's notice under Michigan law. The debtors' state-law rights in property could not be expanded by the Bankruptcy Code nor could the bankruptcy court rewrite the lease. Since the landlord desired to terminate the tenancy at will, sufficient "cause" existed to award relief from the stay under 11 U.S.C. 362(d)(1). However, Judge Gregg did not find that extraordinary circumstances existed which would justify granting relief from the stay on a retroactive basis.

In re Mayville Feed & Grain, Inc., Case No. 86-09192, Adversary Proceeding 86-9119 (Bankr. E.D. Mich. January 19, 1989). This opinion, authored by Bankruptcy Judge Arthur Spector, explores the intricacies of the Michigan Grain Dealers Act, M.C.L.A. 285.69, and its interplay with the priority scheme in the Bankruptcy Code, 11 U.S.C. 507(a). In April, 1986, the debtor, a grain elevator, commenced a Chapter 7 case and a few days later, the Chapter 7 trustee sold all stored grain for $65,927.63. The trustee, acting pursuant to Michigan law and 11 U.S.C. 557, then distributed $19,090.91 to all farmers holding valid warehouse receipts issued to them by the debtor. Later, the trustee filed a motion with the bankruptcy court requesting permission to distribute the remaining proceeds on a pro rata basis to other farmers who had delivered grain to the debtor as fifth priority claimants. 11 U.S.C. 507(a)(5)(A). Certain of these farmers objected to this motion and later commenced an adversary proceeding against the debtor, the State of Michigan and the company that issued bonds to cover losses suffered by farmers delivering grain to the debtor.

This decision involved a complicated set of facts and distinguished two prior decisions construing the Michigan Grain Storage Act authored by previous bankruptcy judges sitting in the Northern Division of the Eastern District of Michigan. In re Biniecki Bros., 38 Bankr. 519 (Bankr. E.D. Mich. 1984) (Bernstein, B.J.) and In re Durand Milling Co., 9 Bankr. 669 (Bankr. E.D. Mich. 1981)(Bobier, B.J.). In summary, Judge Spector held that, since the plaintiffs failed to obtain warehouse receipts from the debtor prior to its bankruptcy, they held only unsecured claims entitled to the priority set forth in 11 U.S.C. 507(a)(5)(A). The plaintiffs argued that their grain was held by the debtor as a bailee; this argument was dismissed as contrary to the statutory priorities contained in the Michigan Grain Dealers Act. Nevertheless, Judge Spector permitted certain of the plaintiffs to recover under the bonds issued by the defendant bonding company. The court rejected the argument advanced by that defendant and the State of Michigan that the bonds, issued pursuant to state statute, were designed to protect only holders of warehouse receipts. However, since the trustee had not yet distributed the remainder of the sale proceeds to all holders of fifth priority claims, Judge Spector postponed the entry of a judgment against the bonding company until the amount of its liability to the plaintiffs could be determined.

MARK VAN ALLSBURG SELECTED AS BANKRUPTCY COURT CLERK

The Assistant United States Trustee for the Western District of Michigan, Mark VanAllsburg, has been selected as the new Clerk of the Bankruptcy Court for the Western District to replace Richard Jackson. Mark will assume his new position on April 10, 1989. Because of this move, the position of Assistant United States Attorney will be vacant.

STEERING COMMITTEE ACTIONS

On February 15, 1989, the Steering Committee of the Bankruptcy Section conducted its regular monthly meeting. The following are the minutes of that meeting as prepared by Patrick Mears:

1. PRESENT: Honorable James D. Gregg, Honorable JoAnn C. Stevenson, Conrad Morganstern (U.S. Trustee for Region IX), Mark VanAllsburg, Raymond Johnson, Ted Baehler, Brett Rodgers, Ben Kleiman, Timothy Curtin, Jeffrey Hughes, James Engbers, James Frakie, Larry VerMerris, John Piggins, Michael Donovan, Coleen Olsen, Peter Teholiz, Steven Carpenter, Steven Waugh and Patrick Mears
2. Brett Rogers reported that three individuals recently joined the Bankruptcy Law Section of the Federal Bar Association: Denise Twinney, William Azkoul and Robert Heikkinen.
3. Brett Rodgers informed the assemblage that the Executive Committee of the Federal Bar Association has tentatively concluded that the Association can realize up to $1,000 in non-profit income without losing its exemption. A formal opinion will be delivered to Brett at a later date.
4. The retouched photographs of the four former bankruptcy judges will soon be ready for installation in Room 758 of the Federal Building. Judge Gregg expressed his desire that the Bankruptcy Section organize a ceremony for the hanging of these pictures.
5. Joseph Mansfield, a Lansing attorney, has written to Brett Rodgers requesting that the Bankruptcy Court establish a "window" in Lansing and Kalamazoo where bankruptcy petitions could be filed.
6. A draft of the new local bankruptcy rules is being reviewed by the four bankruptcy judges in this district. In mid-March, the judges will meet to discuss this draft in detail. If the draft is approved, it will thereafter be circulated for public comment.
7. Conrad Morganstern, the United States Trustee for Region IX, congratulated Mark VanAllsburg upon his being offered the position of Clerk of the Bankruptcy Court. Mr. Morganstern called Mark an "outstanding" Assistant United States Trustee.
8. The next Steering Committee noon luncheon will be held at the Peninsular Club on March 31, 1989.

LOCAL BANKRUPTCY STATISTICS

The following is a summary of the number of bankruptcy cases commenced in the United States Bankruptcy Court for the Western District of Michigan during the period from January 1, 1989, to January 31, 1989. These filings are compared to those made during that same period one year ago.

	1/1/89	1/1/88
Chapter 7	233	183
Chapter 11	14	10
Chapter 12	1	4
Chapter 13	115	111

BANKRUPTCIES FILED IN THE WESTERN DISTRICT OF MICHIGAN FOR 1988

	Ch. 7	Ch. 13	Ch. 11	Ch. 12	Husband/Wife	Business	Non-Business
Jan.	183	111	10	4	125	44	264
Feb.	244	95	11	3	157	54	299
March	294	125	9	2	191	55	375
April	264	81	7	2	145	54	300
May	230	83	7	4	131	70	254
June	212	72	13	2	126	60	239
July	200	102	3	2	136	62	245
Aug.	244	121	1	6	146	48	324
Sept.	246	80	7	2	130	71	264
Oct.	245	109	7	4	150	63	302
Nov.	243	123	3	2	145	68	303
Dec.	231	113	6	0	156	79	271
	2,836	1,215	84	33	1,738	728	3,440

EDITOR'S NOTEBOOK

On January 13, 1989, Maurice Root, the Acting Bankruptcy Clerk, sent a notice to all persons receiving slip opinions from the bankruptcy court in this District that, as of February 1st, the court will begin charging $30.00 per year for this service. Those persons wishing to receive these opinions must send a $30.00 check to the Bankruptcy Court, Seventh Floor, Federal Building, P.O. Box 3310, Grand Rapids, Michigan 49501 along with a letter stating this request. Certain persons will continue to receive these slip opinions free of charge--case reporting services, judges, trustees and designated representatives of bar associations and sections thereof.

The 1988 issue of the Annual Survey of Bankruptcy Law published by Callaghan & Company contains an article entitled "Debtors-Out-of-Control: A Look at Chapter 11's Check and Balance System" co-authored by Timothy Curtin of Varnum, Riddering, Schmidt & Howlett, Karen Gross, an Associate Professor of Law at New York Law School, and Albert Togut of the New York City Law firm of Togut, Segal & Segal. This article is based on the results of a survey of bankruptcy judges, lawyers and trustees conducted by a special Task Force of the American Bar Association's subcommittee on Chapter 11. These results indicate that many players in the bankruptcy system believe that Chapter 11 is being abused. According to the authors, a significant number of survey respondents believe that "Chapter 11 is then being utilized--in a discrete class of cases--as an alternative to liquidating under Chapter 7, not because the approach yields a greater distribution to creditors but because it accords owners/managers a longer time period within which to receive compensation." To correct this problem, the authors tentatively suggest that the Bankruptcy Code be amended as follows. First, section 1121 should permit a debtor to retain its exclusive period to file a plan even though a trustee has been appointed in the Chapter 11 case. Second, section 521 could be amended to require debtors in possession to elect in writing within a specific period whether they will liquidate or reorganize their businesses. Third, section 1104 should permit the appointment of a trustee when a debtor in possession elects to reorganize but later begins to liquidate. Copies of this article may be obtained from Timothy Curtin upon request.

Patrick E. Mears