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THE ROLE OF THE STANDING CHAPTER 13 TRUSTEE IN THE VALUATION PROCESS

By: Joseph A. Chrystler*

The Standing Trustee may assume an adversarial role in the process of valuation of assets for one or several of a variety of reasons leading up to confirmation, dismissal, or conversion of a plan. The trustee must necessarily "straddle the fence" in the confirmation process in making a recommendation to the court regarding confirmation or denial thereof. An independent assessment must be made covering such areas as good faith in the filing and prosecution of the plan, sincere effort on the part of debtor by pledging all of his, her, or their disposable income for a minimum of 3 years if the plan proposes payment of less than 100 percent to all creditors, and several other confirmation standards depending upon the facts and circumstances of the case. Compliance with the Chapter 7 liquidation test must be met, there must be no unfair discrimination within a class of creditors, and the issue involved in this article, regarding the equitable modification of rights of secured creditors, other than creditors having as sole collateral the principal residence of the debtor (11 U.S.C. § 1322(b)(2)), must be reviewed, as appropriate. This laundry list is not all inclusive and can be expanded or contracted as the facts and circumstances of the individual case may dictate.

Valuation of underlying collateral for secured claims can have a material effect on the plan payments the debtor must make, the duration of the plan, and how the affected secured creditor is dealt with in the plan, and may have an impact on the eventual unsecured creditor dividend percentage. In the interest of equity, the trustee becomes a party in interest in the valuation process.

A set of simple facts applied to three different plan scenarios best illustrates the valuation impact. Debtor files a case having paid his filing fee, $200 of the $750 fee allowed his attorney, listing general unsecured debt totaling $8,500, and a debt to Ford Motor Credit Company on a 1987 Ford Taurus four-door G.L. sedan at the time of filing of $11,250 principal balance, with the debt accruing interest at the contract rate of 10.5 percent. A level trustee fee rate of 6 percent is assumed over the life of the plan.

SITUATION 1

Debtor proposes a plan to pay $300 per month to the trustee until Ford Motor Credit has been paid as a secured creditor to the extent of $7,000 plus contract interest, attorney and trustee fees are paid, and a 10 percent dividend is paid to unsecured creditors, including the undersecured portion of the Ford Motor Credit claim. Ford Motor Credit files its claim for the amount listed by the debtor, but indicates the collateral has a fair market value of $9,600. Thus, the battle lines are drawn.

SITUATION 2

Everything is the same as in Situation 1 except the debtor proposes to provide plan payments for 48 months, the so-called "base" plan.

SITUATION 3

Everything is the same as in Situation 1 except that debtor proposes to make payments of $400 per month until such time as a 100 percent plan is completed to all creditors. The trustee, using the April 1989 N.A.D.A. Official Used Car Guide and testimony of the debtor at the Section 341(a) hearing, finds that the car is equipped with an AM/FM stereo radio with tape deck, power door locks, power windows, cruise control, tilt steering wheel, a V-6 engine, and air-conditioning. Therefore, at average retail the vehicle has a value of $9,425 and an average trade-in (wholesale) value of $8,200. The car is listed in Mileage Category III, and debtor testifies the car mileage is 47,000. The high mileage table indicates a reduction in value of $875, resulting in an adjusted indicated retail value of $8,550 and wholesale of $7,325. Debtor further testifies there are no further unusual circumstances that would make the vehicle worth more or less than the published value, such as severe body damage not covered by insurance which would further diminish value, or nonfactory-added amenities that may increase value.

One of the Bankruptcy Judges in the Western District of Michigan has ruled from the bench in a case that the trustee is an interested party in the valuation process, and in the absence of written appraisal, testimony by a qualified appraiser, or testimony by the debtor, set the fair market value of a vehicle for purposes of distribution in a plan halfway between the N.A.D.A. wholesale and retail value--in the above example $7,937.50. Other authority on this issue is discussed later.

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Applying each of the three situations to the values indicated by the debtor, creditor, and trustee (using the convention of on half wholesale plus retail) reveals the following results:[1]

SITUATION 1:	CREDITOR VALUE	DEBTOR VALUE	TRUSTEE VALUE
Attorney fee	$ 550	$ 550	$ 550
F.M.C.C. secured-- including interest	11,625	8,265	9,372
Unsecured creditors at 10%	1,015	1,275	1,181
Trustee fees	842	644	709
Total plan payments	$14,032	$10,734	$11,812
Plan completes in _____ months	47	36	40

In this situation, the only obvious benefit in having the valuation lowered is to the debtor, who will reap the benefit of a shorter plan life and less total payment.

SITUATION 2:			
Attorney fee	$ 550	$ 550	$ 550
F.M.C.C. secured-- including interest	11,666	8,507	9,646
Unsecured creditors	1,320	4,479	3,340
Trustee fees	864	864	864
Total plan payments	$14,400	$14,400	$14,400

The impact on F.M.C.C. and the unsecured creditors is sizable in this situation. At the creditor's valuation unsecured creditors will receive a 13 percent dividend, a 35 percent dividend at debtor's valuation, and a 28 percent dividend at the valuation arrived at by the trustee, over the plan life of 48 months.

SITUATION 3:			
Attorney fee	$ 550	$ 550	$ 550
F.M.C.C. secured-- including interest	12,207	8,839	10,058
Unsecured creditors	10,150	12,750	11,813
Trustee fees	1,462	1,413	1,430
Total plan payments	$24,369	$23,552	$23,851
Plan completes in _____ months	61	59	60

The major impact here is on the life of the plan and the total the debtor must pay to complete. Using the creditor valuation, the plan is not feasible in that it cannot be completed within the statutorily mandated 60-month limitation, assuming the court would find cause for extending the plan beyond 3 years. Using the debtor's valuation rather than creditor's will save the debtor $768 in interest and $49 in trustee fees over the life of the plan, a worthwhile saving from the standpoint of the debtor in his efforts at rehabilitating himself and completing the plan as expeditiously as possible. Using the trustee's valuation rather than creditor's will save the debtor $282 in interest and $17 in trustee fees, still a worthwhile saving.

The examples should illustrate the role the trustee must necessarily take, depending upon the situation, in the pre-confirmation valuation process. The interest of justice must be served, the assistance in rehabilitation of the debtor must be considered, and the secured creditor should not receive more than the fair market value of its collateral in payment of the secured portion of its claim, plus an appropriate interest factor for the debtor's use of creditor's funds over time.

The writer has developed a form (an example of which follows this article) which has the approval of his judges that is sent to the court, the secured creditor or its counsel, and the counsel for the debtor where any sort of dispute over valuation is apparent, setting forth the debtor's scheduled valuation, the creditor's claim valuation, and his independent assessment based on the applicable

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1 The writer is on the Data Concepts Chapter 13 software system and has used "Plan Calc I" in arriving at the indicated results in the three situations. The calculations presume a "working" monthly payment to the secured creditor, with the debtor's attorney and unsecured creditors receiving payments concurrent with the secured creditor. A different method of payment, depending on the priorities established by the confirmed plan, will obviously achieve somewhat different results.

.D.A. Guide and testimony. The m generally opens the line of communication between the creditor and debtor's counsel, with the trustee assuming the role of "umpire." If debtor and creditor arrive at a stipulated value at or near the value established by the trustee so that it appears the dividend rights of unsecured creditors have not been prejudiced, the trustee approves the stipulation and an order is entered by the court in harmony with the stipulation, which becomes a part of any subsequently confirmed plan. The necessity of a full-blown hearing on valuation has become an extreme rarity because of the sense of cooperation demonstrated by creditors, their counsel, and counsel for the debtors, augmented somewhat by the intervention of the trustee in attempting to achieve equity and resolve indicated disputes.

Determination of secured status and valuation of collateral are governed by the provisions of 11 U.S.C. § 506(a) and Bankruptcy Rule 3012. Other decisions which have accepted the retail/wholesale averaging concept are Ford Motor Credit v. Miller, 6 Bankr. Ct. Dec. (CRR) 410, 2 Collier Bankr. Cas. 2d (MB) 212 (Bankr. S.D. Cal. 1980) and In re Farrell, 15 Bankr. Ct. Dec. (CRR) 835 (Bankr. S.D. Iowa 1987). Several Courts have embraced the wholesale value approach, as in In re Cook, 38 Bankr. 870 (Bankr. D. Utah 1984) and In re Klein, 20 Bankr. 493, 9 Bankr. Ct. Dec. (CRR) 214 (Bankr. N.D. Ill. 1982). There may be as many approaches as there are courts to deal with them, inasmuch as purchase price of a recently purchased vehicle was established in In re Reynolds, 17 Bankr. 489 (Bankr N.D. Ga. 1981), percentage of cost was established in General Motors Acceptance Corp. v. Willis, 6 Bankr. 555, 6 Bankr. Ct. Dec. (CRR) 1101 (Bankr. N.D. Ill. 1980), creditor's estimated value established in In re Mendenhall, 54 Bankr. 44, 3 Bankr. L. Rep. (CCH) 70,807 (Bankr. W.D. Ark. 1985) and debtor's estimated value in In re Williams, 3 Bankr. 728, 6 Bankr. Ct. Dec. (CRR) 237 (Bankr. N. D. Ill. 1980). This list is not all inclusive, and certainly other valuation methods have been established by negotiation between the parties as well as by case law.

The trustee to achieve equity in given situations must necessarily become an active participant in the valuation process. The examples in this article give several demonstrations as to that necessity. The credibility of the trustee and his honest desire to resolve problems, together with a communicative bar, representing both debtors and secured creditors, can best serve to achieve an equitable result.

MICHIGAN'S NEW STATUTORY EXEMPTION FOR INTERESTS IN IRA AND EMPLOYEE BENEFIT PLANS

By William J. Barrett*

Michigan law governing exemptions of an individual's interests in an Individual Retirement Account ("IRA") and certain employee benefit plans was amended by the state legislature and took effect on April 19, 1989. This statutory amendment is significant both for judgment debtors in state civil lawsuits and for individuals who elect the Michigan exemptions in a bankruptcy case.**

The amendment added two new sections to the basic Michigan exemption statute, MCLA 660.6023. These sections exempt from execution certain IRA's and employee benefit plans.

A. IRA's

MCLA 660.6023(1)(k) exempts from execution a debtor's interest in:

> An individual retirement account or an individual retirement annuity as defined in Section 408 of the Internal Revenue Code and the payments or distributions from such an account on annuity. This exemption applies to the operation of the Federal Bankruptcy Code as permitted by Section 522(b)(2) of title 11 of the United States Code, 11 U.S.C. 522. This exemption does not apply to any amounts contributed to an individual retirement account or individual retirement annuity if the contribution occurs within 120 days before the debtor files for bankruptcy. This exemption does not apply to an individual retirement account or individual retirement annuity to the extent that:
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> (i) The individual retirement account or individual retirement annuity is subject to an order of a court pursuant to a judgment of divorce or separate maintenance.
>
> (ii) The individual retirement account or individual retirement annuity is subject to an order of a court concerning child support.
>
> (iii) Contributions to the individual retirement account or premiums on the individual retirement annuity, including the earnings or benefits from these contributions or premiums, exceed the tax year made or paid, the deductible amount allowable under Section 401 of the Internal Revenue Code. This limitation on contributions shall not apply to a rollover of a pension, profit-sharing, stock bonus plan, or other plan that is qualified under Section 401 of the Internal Revenue Code, or an annuity contract under Section 403(b) of the Internal Revenue Code.

This new section both broadens and narrows the protection afforded IRA's prior to its enactment. The amendment exempts a "rollover" of funds formerly held in a qualified employee plan into an IRA even though the amount rolled over might exceed the maximum deductible amount allowed under Section 408 of the Internal Revenue Code. Unlike prior legislation, however, this new provision does not exempt contributions made to an IRA within 120 days of the date on which the debtor files his bankruptcy petition.

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** For an individual debtor in a bankruptcy case, his interest in an employee benefit plan will not become property of the estate only if the funds held by the plan constitute a spendthrift trust under Michigan law. 11 U.S.C. § 541(c)(2). See also In Re Watkins, 95 Bankr. 483 (W.D. Mich. 1988). An employee benefit plan settled by the debtor or

which the debtor controls (i.e., as the trustee of the plan or controlling shareholder of the employer) will normally not qualify as a spendthrift trust. In re Watkins, supra.

B. Qualified Employee Benefit Plans

MCLA 600.6023(1)(l) exempts from execution:

> The right or interest of a person in a pension, profit-sharing, stock bonus, or other plan that is qualified under Section 401 of the Internal Revenue Code, or an annuity contract under Section 403(b) of the Internal Revenue Code, which plan or annuity is subject to the Employee Retirement Income Security Act of 1974.... This exemption applies to the operation of the Federal Bankruptcy Code, as permitted by section 522(b)(2) of Title 11 of the United States Code, 11 U.S.C. 522. This exemption does not apply to any amount contributed to a pension, profit-sharing, stock bonus, or other qualified plan or a 403(b) annuity if the contribution occurs within 120 days before the debtor files for bankruptcy. This exemption does not apply to the right or interest of a person in a pension, profit-sharing, stock bonus, or other qualified plan or a 403(b) annuity to the extent that the right or interest in the plan or annuity is subject to any of the following:
>
> (i) An order of a court pursuant to a judgment of divorce or separate maintenance.
>
> (ii) An order of a court concerning child support.

This provision creates an exemption that did not exist under prior Michigan law except to the extent that plan assets were held in a spendthrift trust. The interest of a debtor in any employee plan qualified under the Internal Revenue Code, including "401(k)" plans and "Keogh" plans, are now exempt from execution. This section has particular significance for the individual engaged in a profession with an inherently high risk of professional liability, e.g. the medical

RECENT BANKRUPTCY DECISIONS

The following are summaries of recent decisions rendered by the Sixth Circuit Court of Appeals and 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. Ver Merris.

In re Smith, Case Nos. 88-1562/2083 (6th Cir. May 26, 1989). This decision involved an appeal and cross-appeal from Judge Richard Enslen's decision reported at 86 Bankr. 92 (W.D. Mich. 1988). In this case, a bank had repossessed a vehicle from the debtor and intended to sell it under Article 9 of the U.C.C. on September 19, 1986. The debtor commenced a Chapter 13 case on September 15th and, 2 days later, debtor's counsel sent copies of the bankruptcy court's restraining order to the bank and its sales agent by first-class mail. The automobile was sold in the morning of September 19, 1986, and, later that same day, the bank's sales agent received notice of the Chapter 13 filing. Three days later, the bank received the same notice.

The debtor then filed a motion with the bankruptcy court to void the sale as a violation of the automatic stay, which motion was denied by the bankruptcy court. On appeal, Judge Enslen reversed the bankruptcy court's order refusing to void the sale but affirmed that court's award of costs against the debtor. The Sixth Circuit, in an opinion authored by Justice Cornelia Kennedy, affirmed the district court's order voiding the sale but reversed the award of costs. Justice Kennedy rejected the bank's argument that the sale should not be voided since the debtor failed to promptly notify the bank of her Chapter 13 filing:

> [The debtor's] conduct is better characterized as careless than stealthy. While [debtor] probably should have used a more swift and certain method to notify Bank, her conduct does not constitute the type of willful omission or fraud condemned by [the First Circuit Court of Appeals in In re Smith Corset Shops, Inc., 696 F.2d 971 (1st Cir. 1982)].

Justice Kennedy remarked that "any equitable exception to the stay must be applied sparingly" and, since the debtor did not act in an improper manner, that exception would not be invoked here. The Sixth Circuit concluded that the foreclosure sale violated the automatic stay and the proceeds received from the sale of the automobile must be returned to the bankruptcy estate.

NLRB v. Martin Arsham Sewing Co., Case No. 88-5432 (6th Cir. April 21, 1989). In this case, the NLRB sought to enforce a back pay award against the president of a corporate debtor after the debtor had been liquidated under Chapter 7 of the Bankruptcy Code. In 1978, the debtor, an industrial sewing company, was the subject of unfair labor practice charges issued by the NLRB arising from the debtor's constructive discharge of sixteen employees during a union-organizing campaign. After the complaint was filed but prior to a decision by the Administrative Law Judge ("ALJ"), the debtor's president, acting in his corporate capacity, executed a promissory note payable to himself evidencing prior loans made by him to the corporation. This obligation was secured by liens in all of the debtor's corporate assets. In 1979, the ALJ decided that the debtor was guilty of unfair labor practices and, in 1982, the NLRB issued an Order awarding $41,677.31 as back pay to the affected former employees. In the meantime, the president had obtained a default judgment against the debtor on its promissory note, repossessed his collateral and caused the debtor to file a voluntary Chapter 7 petition.

In April, 1982, 3 months after the debtor filed its bankruptcy petition, the president sold all of the repossessed collateral for $20,000 to a new corporation owned by him. In December, 1983, the debtor's Chapter 7 case was closed. The NLRB had been listed as an unsecured creditor on the debtor's petition and had filed a proof of claim with the bankruptcy court. In 1984, however, the NLRB's general counsel filed a motion before the Board to impose personal liability upon the president to the extent of the $20,000 purchase price for his collateral by the new corporation. The ALJ granted

motion and an order imposing personal liability was thereafter adopted by the NLRB. The Board then petitioned the Sixth Circuit for enforcement of that order.

In an opinion authored by Justice Kennedy, the Sixth Circuit denied the NLRB's petition on the ground that the NLRB could not circumvent the Bankruptcy Code's provisions for distribution of estate property on an equal basis to unsecured creditors. The NLRB's back pay award was properly classified as an unsecured claim that could only receive a ratable distribution in the debtor's Chapter 7 case. Although the NLRB characterized the secured transaction between the debtor and its president as fraudulent, this cause of action belonged to the bankruptcy estate for the benefit of all creditors, not just the NLRB. Justice Kennedy declared that:

> [t]o allow a creditor of the bankrupt to pursue his remedy against third parties on a fraudulent transfer theory would undermine the Bankruptcy Code policy of equitable distribution by allowing the creditor 'to push its way to the front of the line of creditors.' [citation omitted]. Such an action is a delayed attempt to obtain property of the estate to the exclusion of all other creditors. In the case at bar the NLRB is indirectly attempting to obtain an impermissible priority over other creditors.

United Bank of Michigan v. Production Credit Ass'n of Lansing, Case No. G 87-620 (W.D. Mich. April 26, 1989). This appeal involved a dispute over the priority of security interests in cattle and their sale proceeds owned by Chapter 7 debtors, Daniel and Mary Braska. In the Chapter 7 case, the bankruptcy trustee sold the cattle with liens attaching to the sale proceeds. Thereafter, the holders of the competing security interests commenced an adversary proceeding in bankruptcy court to determine their respective lien priorities. After a 1-day trial, Bankruptcy Judge Laurence Howard held that Lake Odessa Livestock Auction and State Bank of Caledonia ("Caledonia") held purchase-money security interests in certain of the debtors' cattle and were entitled to recover certain portions of the sale proceeds. The remaining sale proceeds were then turned over to Production Credit Association ("PCA") as the holder of a blanket lien in debtors' livestock. PCA thereafter appealed to the district court from this distribution order.

On appeal, District Judge Benjamin Gibson reversed the bankruptcy court's order as it related to the distribution of sale proceeds between Caledonia and PCA. Judge Gibson found that the bankruptcy court had erroneously applied UCC § 9-315(2) to determine the respective shares of these two creditors in a "mass" of "commingled goods." This UCC provision prescribes a method of distribution when "more than one security interest attaches to the product or mass." The bankruptcy court distributed these sale proceeds between PCA and Caledonia by applying the statutory "ratio that the cost of the goods to which each interest originally attached bears to the cost of the total product of the mass." Judge Gibson held that this provision of the UCC did not apply since only one creditor's lien, the blanket lien held by PCA, attached to this mass. Caledonia's purchase-money lien attached only to specific cows and not to all of the debtors' cows. Judge Gibson concluded as follows:

> In this case, the Court finds no equitable circumstances which dictate the application of Section 9315(2). Caledonia seeks to share priority with a creditor with a prior blanket lien. Caledonia was at all times aware of the scope of PCA's security interest. However, once Caledonia lost track of its cows, PCA could not know which cows belonged to Caledonia. PCA, as a creditor with a prior blanket lien, should not have its share reduced simply because Caledonia did not keep track of its own cows. Caledonia should bear the risk of failing to identify its own cows.

Borock v. Iafrate, Case No. 88-CV-71090-DT (E.D. Mich. April 26, 1989). This adversary proceeding alleging fraudulent conveyances and breaches of fiduciary duty was commenced by the trustee in the Chapter 7 case of O.E.M., Inc., after conversion of its case from Chapter 11 in 1986. In his complaint, the trustee alleged that the debtor's transfer of certain production and tooling contracts to a related corporation in return for other, similar contracts was not made in exchange for reasonably equivalent value and was accomplished while O.E.M. was insolvent. Five days before trial, the trustee served upon four of the "insider" defendants a subpoena duces tecum containing a broad and vaguely worded request for production of documents at trial. These defendants thereupon filed a motion for a protective order which was granted by Bankruptcy Judge Ray Reynolds Graves.

At trial, Judge Graves granted the defendants' motion for a directed verdict at the close of the trustee's proofs. The trustee thereupon appealed to the district court from the order dismissing his complaint. On appeal, District Judge Lawrence Zatkoff affirmed the bankruptcy judge's dismissal of the trustee's claims of fraudulent conveyance and breach of fiduciary duty. Judge Zatkoff noted that there was ample support in the record for Judge Graves' finding that O.E.M. received reasonably equivalent value from this exchange of contracts. With respect to the alleged breach of fiduciary duty by insiders, Judge Zatkoff remarked that the value of any corporate opportunity diverted to the related corporation was negligible. Finally, Judge Zatkoff held that Judge Graves did not abuse his discretion in quashing the trustee's subpoena by remarking that, "simply stated, plaintiff failed adequately to prepare prior to trial."

In re PHM Credit Corporation, Case No. 89-70219 (E.D. Mich. April 19, 1989). In this Chapter 11 case, the Detroit law firm of Honigman, Miller, Schwartz and Cohn ("Honigman") filed with the Bankruptcy Court in the Eastern District of Michigan an application to represent the debtor. In its application, Honigman disclosed that one of its partners served on the board of directors for the debtor's parent company and that another one of its partners served as the parent's secretary. These two partners also owned stock of the parent, although their combined holdings amounted to less than 1 percent of

the total. Honigman also held a prepetition claim of $10,000 against the debtor but agreed to waive that claim in the Chapter 11 case.

The Office of the United States Trustee objected to Honigman's application, arguing that because of the foregoing facts, Honigman was not a "disinterested person" as required by 11 U.S.C. § 327(a). After a hearing was held on this objection, Bankruptcy Judge Steven Rhodes granted Honigman's application subject to the following conditions. First, the partner who was corporate secretary of the parent was required to resign that position. Second, the partner on the parent's board of directors was directed to recuse himself from any board discussions regarding the debtor. Third, the Assistant United States Trustee was permitted to review the minutes of the meetings of the parent's board of directors to monitor compliance with the court's order. Fourth, Honigman was required to notify the Court and other parties of any additional conflicts of interest which might arise in the future. Finally, the court reserved its power to review and approve Honigman's fee requests. After Judge Rhodes denied the U.S. Trustee's motion for reconsideration of this order, the U.S. Trustee filed its motion for leave to appeal to the district court.

On appeal, District Judge John Feikens declared that the U.S. Trustee's appeal was from an interlocutory order and, therefore, he had discretion to grant leave to appeal under 28 U.S.C. § 158(a). Judge Feikens found that this order did not "fall within the collateral order exception to the finality doctrine" under Cohen v. Beneficial Industrial Loan Corp., 337 U.S. 541 (1949). Under this doctrine, an otherwise interlocutory order will be treated as final if it:

> 1. finally determines rights collateral to and separable from the main proceeding;
>
> 2. presents a serious and unsettled question; and
>
> 3. is effectively unreviewable on appeal from final judgment such that denial of immediate review will harm the appellant irreparably.

Judge Feikens found that the U.S. Trustee failed to satisfy the third element of the Cohen rule--that the denial of review will irreparably harm the U.S. Trustee. Judge Feikens remarked that, since Judge Rhodes could disqualify Honigman, he could also "take the more moderate steps embodied in his curative order." These steps avoided any irreparable harm which might have arisen from any appearance of impropriety resulting from Honigman's retention.

Finally, Judge Feikens refused to hear this appeal from the interlocutory order in question. Since 28 U.S.C. § 158(a) contains no guidelines governing the exercise of his discretion to hear such an appeal, Judge Feikens applied the four tests developed by the Sixth Circuit under a similar statute, 28 U.S.C. § 1292(b), governing appeals to that Court. These four tests are as follows:

> 1. the question involved must be one of "law";
>
> 2. it must be controlling;
>
> 3. there must be substantial ground for "difference of opinion" about it; and
>
> 4. an immediate appeal must materially advance the ultimate termination of the litigation.

Judge Feikens held that the U.S. Trustee had failed to meet the second and fourth elements of this standard. He also noted that if he were to hear the appeal, he would "cause considerable delay and increased expense" since the debtor would be required to hire new counsel and educate him concerning the facts of a complex Chapter 11 case.

In re Shoup's Food Service, Inc., 96 Bankr. 767 (Bankr. W.D. Mich. 1988). In this Chapter 11 case, the Internal Revenue Service objected to confirmation of the debtor's plan which allocated payments on federal taxes first to tax trust fund liabilities. Bankruptcy Judge David E. Nims sustained the IRS' objection on the basis of In re DuCharmes & Co., 852 F.2d 194 (6th Cir. 1988).

Duvoisin v. Kennerly, Montgomery, Howard & Finley, Case No. 3-85-0718 (Bankr. E.D. Tenn. May 9, 1989). This decision was rendered by Bankruptcy Judge Steven Rhodes sitting by assignment on the Bankruptcy Court for the Eastern District of Tennessee. The Chapter 11 trustee of Southern Industrial Banking Corporation commenced an adversary proceeding against a law firm and its partners for recovery of alleged fraudulent conveyances and voidable preferences. In the first part of his opinion, Judge Rhodes reviewed a complex set of facts adduced at trial and concluded that the debtor had made fraudulent conveyances and preferential transfers prior to bankruptcy. However, the defendants disclaimed liability on the theory that the law firm was a mere escrow agent and, therefore, should not be held liable as an initial transferee on equitable grounds under section 550 of the Bankruptcy Code. Judge Rhodes stated the general rule that a trustee cannot recover under 11 U.S.C. § 550(a) "if the defendant establishes that in the transactions at issue, it acted as a conduit and in good faith." In determining the question of good faith, the following factors should be considered:

> (a) Were the challenged transactions within the ordinary course of defendant's business?
>
> (b) What was the nature and extent of defendant's relationship with the debtor.
>
> (c) What did the defendant know or what should it have known about the effect of the transactions on the debtor and its creditors?
>
> (i) Were the transactions in the ordinary course of debtor's business?
>
> (ii) What information was available to the defendant concerning the debtor's insolvency?
>
> (d) Did the defendant violate any legal or professional ethical duties in the transaction at issue?
>
> (e) Did the defendant improperly retain any of the property or otherwise benefit from the transaction?
>
> (f) Did the defendant participate in the transaction with an honest and innocent intention?

Applying these tests to the facts adduced at trial, Judge Rhodes concluded that the defendant law firm

> . . . did not act with an honest and innocent intent in connection with the escrow account, but rather with intent to deceive not only [the debtor] and its creditors but also the parties involved [with certain acquisitions made by debtor prior to its collapse].

Consequently, Judge Rhodes held that the law firm and its partners were liable to the trustee for the return of fraudulent conveyances in the sum of $5,814,000 and preferences in the amount of $8,049,486.20.

EERING COMMITTEE MEETING MINUTES

A meeting was held on May 19, 1989, at noon at the Peninsular Club. Present was a large group in honor of our guest, the Honorable Joseph G. Scoville, United States Magistrate serving in the Western District of Michigan.

1. The Honorable Joseph G. Scoville stated that he supports the establishment of a Bankruptcy Appellate Panel in the Sixth Circuit.

2. The members of the Steering Committee of the Federal Bar Association's Bankruptcy Section were invited to discuss with the Bankruptcy Judges their comments on the proposed local bankruptcy rules and fee guidelines at a meeting scheduled to take place on the Seventh Floor of the Federal Building in Grand Rapids at 9 a.m. on June 1, 1989.

3. The portraits of retired Bankruptcy Judges/Referees for this judicial district are finished and are being framed. Robert Sawdey and James Engbers will make arrangements for an appropriate hanging ceremony.

4. Jeffrey Hughes reported the following proposed topics for the Bankruptcy Seminar to be held at Shanty Creek from August 24-26, 1989:

   a. Rules of Procedure and Evidence
   b. Interest on Bankruptcy Claims
   c. A U.C.C. Topic
   d. Environmental Considerations in Bankruptcy Cases
   e. Chapter 13 Panel of Trustees--Questions and Answers
   f. Discharge and the Fresh Start--A Comparison of the Various Chapters of the Code
   g. Recent Case Developments in the Sixth Circuit

5. For readers in the Lansing and Kalamazoo area, Joseph Mansfield is still attempting to secure the creation of filing windows in Lansing and Kalamazoo.

6. The next Steering Committee luncheon will be held at the Peninsular Club on Friday, June 23, 1989, at noon.

RELOCATION OF KALAMAZOO BANKRUPTCY COURTROOM

All bankruptcy proceedings scheduled to be heard in Kalamazoo, Michigan, on or after June 15, 1989, will be held at the new bankruptcy courtroom notwithstanding any notice of hearing which may have been sent previously. The Bankruptcy Court is moving to 123 South Westnedge (corner of Academy and Westnedge) on that date.

This notice does not apply to section 341 creditors meetings which will continue to be held in the Post Office Building.

Mark Van Allsburg, Clerk

EDITOR'S NOTEBOOK

On June 1, 1989, the four bankruptcy judges in this district, their law clerks, and the new Bankruptcy Court Clerk, Mark VanAllsburg, met with a representative group of bankruptcy lawyers from West Michigan to discuss the proposed new local bankruptcy rules and fee guidelines. The primary topic of discussion at this meeting was the fee guidelines which have generated a great amount of controversy in the bankruptcy community. The judges took the comments that were made under advisement and remarked that certain revisions to the rules and fee guidelines may be made prior to their release for public comment. For additional information, interested persons should contact the Chairperson of the FBA Bankruptcy Section's Rules Committee, Robert W. Sawdey, at (616) 774-8121.

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 May 31, 1989. These filings are compared to those made during that same period one year ago.

	1/1/89-5/31/89	1/1/88-5/31/88
Chapter 7	1,390	1,215
Chapter 11	45	44
Chapter 12	4	15
Chapter 13	581	495