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RETIREMENT ARRANGEMENTS & EXEMPTIONS IN BANKRUPTCY

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Purpose of Article

The purpose of this article is to review the status of current bankruptcy decisions on issues of whether a debtor's retirement arrangement is includable as part of his/her bankruptcy estate and, if so, whether and how it may be exempted. (For purposes of this article, "retirement arrangement" means pension plan, profit-sharing plan, individual retirement account (IRA), 401-K Plan and Keogh Plan (HR-10), unless otherwise specified).

Is the Retirement Arrangement Part of the Bankruptcy Estate?

The initial determination of whether the debtor's retirement arrangement is part of his/her bankruptcy estate is governed by 11 U.S.C. §541(a)(1) and §541(c)(2). Title 11 U.S.C. §541(a)(1) generally states that the filing of a bankruptcy petition creates an estate comprised of "all legal or equitable interests of the Debtor in property as of the commencement of the case." Section 541(c)(2), however, creates an exception to the general rule, stating that "a restriction on the transfer of a beneficial interest of the debtor in a trust that is enforceable under applicable non-bankruptcy law is enforceable in a case under this title" (emphasis supplied). Therefore, property of a debtor fitting within the exception is excluded from the bankruptcy estate.

In the area of retirement plans one applicable non-bankruptcy law that comes into play is ERISA (Employee Retirement Income Security Act of 1974, 29 U.S.C. §§1001 et seq.). Specifically, ERISA contains enforceable restrictions on transfer which may bring ERISA benefits within the exception of §541(c)(2).

The Sixth Circuit in In re Lucas, 924 F.2d 597 (6th Cir. 1991), cert. denied, 111 S.C. 2275 (1991), held that the antialienation provisions of ERISA, if enforceable against general creditors, constitute applicable non-bankruptcy law and are therefore enforceable against a bankruptcy trustee so as to exclude the debtor's interest from being property of the estate. However, the decision pointed out an existing split between the circuits on the issue, noting that the Ninth Circuit (In re Daniel, 771 F.2d 1352, 1360 (9th Cir. 1985), cert. denied, 475 U.S. 1016, (1986)), the Eleventh Circuit (In re Lichstrahl, 750 F.2d 1488 (11th Cir. 1985)), the Eighth Circuit (In re Graham, 726 F.2d 1268 (8th Cir. 1984)), and the Fifth Circuit (In re Goff, 706 F.2d 574 (5th Cir. 1983)), have held to the contrary. The Fourth Circuit (In re Moore, 907 F.2d 1476 (4th Cir. 1990); Shumate v. Patterson, 943 F.2d 362 (4th Cir. 1991)) has held as Lucas did. The reader is also referred to In re Idalski, 123 B.R. 222 (Bankr. E.D. Mich. 1991), a decision by Judge Spector which was issued almost simultaneously with Lucas and which came to the same result.

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Conflicting opinions notwithstanding, until the issue is addressed by the Supreme Court,[1] the Lucas decision would exclude all ERISA-qualified retirement interests from a debtor's estate.

The next concern then becomes determining what retirement arrangements are covered by ERISA. Most, if not all, employer-sponsored pension or profit-sharing plans are covered by ERISA. However, note that certain church and government plans are not covered by ERISA (29 U.S.C. §1003(b)), nor is an Individual Retirement Account (IRA) covered by ERISA (29 U.S.C. §1051(6)).

Exempting a Retirement Plan Arrangement

If it is determined that the debtor's retirement arrangement cannot be excluded from the bankruptcy estate under §541(c)(2), it is still possible to claim an exemption for the interest depending upon whether the debtor has elected the federal or state exemptions.

Federal Exemption

If the federal exemptions have been selected, the debtor's claim to an exemption of an interest in a retirement arrangement is found at §522(d)(10)(E), which exempts a debtor's right to receive:

> (E) a payment under a stock bonus, pension, profit-sharing, annuity, or similar plan or contract on account of illness, disability, death, age, or length of service, to the extent reasonably necessary for the support of the debtor and any dependent of the debtor, unless --
>
> (i) such plan or contract was established by or under the auspices of an insider that employed the debtor at the time the debtor's rights under such plan or contract arose;
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> (ii) such payment is on account of age or length of service; and
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> (iii) such plan or contract does not qualify under section 401(a), 403(a), 403(b), 408, or 409 of the Internal Revenue Code of 1954 (26 U.S.C. § 401(a), 403(b), 408, or 409).

This definition, while appearing reasonably straightforward in attempting to describe the types of plans and various attributes of retirement arrangements that are exempt, has been interpreted in a number of cases to disqualify either an IRA or Keogh plan for the following reasons:

1. The debtor has no present rights to receive payments. In re Heisey, 88 B.R. 47 (Bankr. D.N.J. 1988) (IRA); In re Clark, 711 F.2d 21 (3rd Cir. 1983) (Keogh plan);

2. I.R.A.'s are not "similar plans" because the debtor has control of the funds. In re Pauquette, 38 B.R. 170 (Bankr. D. Vt. 1984). But see the recently released decision of In re Rector, Case No. HT 91-82229 (Bankr. W.D. Mi., December 23, 1991), where Judge Laurence E. Howard held that the Michigan Department of Civil Service Deferred Compensation Program was a "similar plan"; and

3. I.R.A. benefits are not paid "on account of illness, disability, death, age, or length of service." In re Fichter, 45 B.R. 534 (Bankr. N.D. Oh. 1984).

A very thorough opinion dealing with these objections (as they related to an IRA) which discusses and dismisses each of the objections is In re Cilek, 115 B.R. 974 (Bankr. D. Wisc. 1990).

Assuming the debtor can get beyond the three objections noted above, the test then becomes whether the retirement arrangement is reasonably necessary for the support of the debtor and any dependent of the debtor. As one would suspect, the result depends on the facts of each case. The factors to be considered by the court include "other income and exempt property of the debtor, present and anticipated," In re Taft, 10 B.R. 101 (Bankr. D. Conn. 1981), at 107; and "the debtor's age, present employment, future employment prospects and general health," In re Werner, 31 B.R. 418 (Bankr. Minn. 1983). Additional factors are listed by Judge Howard in In re Rector, above.

While the courts usually make an "all or nothing" determination, it is possible for a court to award a portion

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[1] Editor's Note: Since this article was written, the Supreme Court has granted cert. in Patterson v. Shumate, Docket No. 91-913.

of the benefits. One court indicated that "the appropriate amount to be set aside for the debtor ought to be sufficient to sustain basic needs, not related to his former status in society or the lifestyle to which he is accustomed but taking into account the special needs that a retired and elderly debtor may claim." In re Taft, supra at 107.

Some cases which have held that the facts supported the exemption include In re Cilek, supra; In re Donaghy, 11 B.R. 677 (Bankr. S.D.N.Y. 1981); and In re Suarez, 127 B.R. 73 (Bankr. S.D. Fla. 1991). Cases holding that the retirement benefits were not reasonably necessary include In re Bell, 119 B.R. 783 (Bankr. D. Mont. 1988) (Chapter 13 case); In re Velis 109 B.R. 64 (Bankr. D.N.J. 1989); and In re Kochell, 732 F.2d 564 (7th Cir. 1984).

State Exemption

Pursuant to 11 U.S.C. §522(b)(2)(A), a debtor may elect state exemptions in lieu of the exemptions set out by §522(d). The allowable exemptions for a Michigan resident are set out in M.C.L.A. §600.6023. Included in those exemptions as they relate to retirement arrangements are subsection (k) relating to Individual Retirement Accounts or Annuities and subsection (l) relating to an individual's interest in a pension, profit-sharing, stock bonus or other plan that is qualified under §401 of the Internal Revenue Code and subject to ERISA. The Michigan statute exempts the debtor's entire interest in his retirement arrangement (subject to some limits for contributions occurring within 120 days of filing). Therefore, if the bulk of the debtor's estate is in the form of an IRA or Keogh plan, care should be given to compare the amount exempt under the Michigan statute as compared to the federal exemption.

Application in Chapter 7 Cases

The application of the analysis and decisions referred to in this article in the context of a Chapter 7 bankruptcy are obvious. First, the practitioner must determine what type of retirement arrangement the debtor has. In some cases it may be necessary to actually review the documents used to create the retirement arrangement. If it is determined that the debtor's plan is an ERISA-qualified pension or profit-sharing plan, the practitioner, based upon the Lucas decision, can take the position that the retirement arrangement is not part of the bankruptcy estate. If, however, the retirement arrangement is an IRA or church or government retirement plan, it will be necessary for him/her to determine whether the I.R.A. or church or government retirement arrangement is exempt under §522(d)(10)(E) or whether the debtor should elect the exemptions allowed by state statute.

Application to Chapter 13 Plans

Although normally considered in the context of Chapter 7 cases, the issue of whether a retirement arrangement is or is not includable in the bankruptcy estate and whether it is exempt or not does have application to Chapter 13 plans. In doing a liquidation analysis to determine whether the debtor's plan satisfies §1325(a)(4) (requiring that the unsecured creditors receive through the plan at least as much as they would receive if the debtor were liquidated under Chapter 7), it would be necessary to include a retirement arrangement not otherwise excludable or exempt in the liquidation analysis.

Conclusion

There is currently a split between the circuit courts over whether ERISA qualified retirement arrangements are includable in a debtor's bankruptcy estate. The Sixth Circuit in the Lucas decision joined the Fourth Circuit in Moore and Shumate in what is considered the minority position in holding that ERISA-qualified retirement arrangements are not part of a debtor's estate. Even where a retirement arrangement is part of the estate, it may be exempt under §522(d)(10)(E) or state law exemptions. Care should be taken to determine which exemption provision will provide the greatest benefit to the debtor.

RECENT BANKRUPTCY DECISIONS

The following are summaries of recent court decisions that address important issues of bankruptcy law and procedure. These summaries were prepared by Jahel H. Nolan with the assistance of Larry Ver Merris.

In re Allied Supermarkets, Inc., Case No. 90-1826 (6th Cir. December 16, 1991). This case involves an appeal by Allied Supermarkets of the judgment of the District Court affirming an order of the Bankruptcy Court finding Allied liable for fraud and dismissing its counterclaims against Albert Semaan and Thomas Simaan for debts owed on personal guaranties.

Albert Semaan and Thomas Simaan had emigrated to the United States to begin operating a chain of grocery stores. The Debtor was plaintiffs' sole grocery

supplier. The Debtor suggested retail prices for the groceries and stated how much profit the plaintiffs would make if they used the Debtor's pricing scheme. The plaintiffs used the Debtor's pricing scheme but failed to make any money. A bank examiner looked at the plaintiffs' records and discovered that the statement of profit did not include the Debtor's charges for services, freight and labeling. Plaintiffs sued the Debtor for fraud and misrepresentations in state court, but Allied had already filed bankruptcy under Chapter 11. Plaintiffs filed a Proof of Claim and the Debtor counter-claimed for money owed for unpaid deliveries.

The Bankruptcy Court held that the Debtor's misrepresentation was material and intentional. However, before entering a final judgment the bankruptcy judge retired. Therefore, the case was reassigned to another bankruptcy judge who reviewed the trial record and dismissed the case, finding that plaintiffs had not proved intentional misrepresentation. After the District Court affirmed, plaintiffs appealed to the Court of Appeals and the case was remanded.

On remand, the case was assigned to a third bankruptcy judge who denied the Debtor's motion for new trial, holding that absent special circumstances, a successor judge may not overrule the decision of the first. He found that there were no special circumstances and upheld the first bankruptcy judge's original holding. That judge further held that the Debtor's counterclaims were unenforceable because of the Debtor's fraud. After an adverse District Court decision, the Debtor appealed to the Court of Appeals.

Allied Supermarkets argued that the original bankruptcy judge found the Debtor liable only for innocent or negligent misrepresentation, not fraud. The Appeals Court stated that because the bankruptcy judge found that: (1) the Debtor made, by implication or knowing non-disclosure, a material representation that the gross profit figures in its billing printout represented plaintiffs' profits after taking into consideration all costs; (2) that this statement was false; (3) that the Debtor knew it was false when made; (4) that it was made with the intention that the plaintiffs act upon it; (5) that the plaintiffs relied upon it; and (6) the plaintiffs suffered economic injury as a result, these findings constituted fraud under Michigan law.

The Debtor also argued that because the bankruptcy judge mentioned negligence, he did not find that the Debtor had made intentional misrepresentations. The Court of Appeals held that even though the bankruptcy judge may have found negligence in the alternative, it did not alter the fact that he found that the Debtor made an intentional misrepresentation which under Michigan law is the equivalent of fraud.

Next, the Debtor argued that the evidence was insufficient to support a finding of intentional misrepresentation. The Court disagreed. It stated that the Debtor's former credit manager testified that the Debtor told plaintiffs that if they charged the suggested retail price for the goods, they would make the gross profits that the Debtor predicted. This conduct amounted to fraud under Michigan law.

Lastly, the Debtor argued that as a matter of law fraud cannot be found because it contended that all the charges were contained in the billing and that if plaintiffs had done some simple mathematics, they would have seen that the predicted profits were wrong. In Michigan, the relationship between the parties is taken into account when determining whether fraud has occurred. The Debtor told plaintiffs that it had special expertise and if the plaintiffs followed the Debtor's system they would profit. The Debtor was a grocery expert while the plaintiffs were immigrants without specialized grocery knowledge. Therefore, the parties did not stand on equal terms.

Federal Deposit Insurance Corporation v. Associated Nursery Systems, Inc., 1991 W.L. 217680 (6th Cir. October 30, 1991). This case involves the appeal of a decision by the District Court granting the FDIC's Motion for Summary Judgment, which found Associated Nursery and its guarantor liable for payment of the full amount due on an Associated Nursery debt. Milton Turner, Frank Guinn and Ernest Lisson were shareholders of Associated Nursery. Each of them owned a one-third interest in the company. Turner secured a $1.5 million loan from United American Bank (UAB) in the fall of 1982. On October 29, 1982, the loan was closed. Guinn executed a promissory note on behalf of Associated Nursery and also executed a deed of trust and security agreement granting UAB a mortgage against Associated Nursery's real estate and a security interest in its inventory and other personal property. He also signed a guaranty.

The terms of the promissory note provided for payment in 36 monthly installments commencing November 1, 1982. On February 14, 1983, UAB declared insolvency and was closed. At that time, payments on

Associated Nursery's loan were in arrears. The FDIC was appointed receiver for UAB and entered into a purchase and assumption agreement with First Tennessee Bank (FTB) and transferred the Associated Nursery Note to FTB.

On August 8, 1984, the FDIC re-purchased some of the assets of FTB, including the Associated Nursery note. The loan payment history on the Associated Nursery note indicated that a payment of $450,000 was made on March 29, 1988. The $450,000 payment was negotiated with the FDIC by Turner in exchange for its release of liens on collateral securing the Associated Nursery note. On May 26, 1989, the FDIC brought suit against Guinn and Associated Nursery to recover amounts due on the $1.5 million Associated Nursery loan. Guinn filed a Motion for Summary Judgment and the FDIC filed a cross-motion.

The Court, basing its decision on the language in the continuing guaranty agreement signed by Guinn, found that when the $450,000 partial payment on the Associated Nursery note was made the statue of limitations contained in 28 U.S.C. § 2415(a) began running anew against both Associated Nursery and Guinn as the guarantor. Accordingly, the District Court granted the FDIC's Motion for Summary Judgment against both defendants. Guinn appealed.

The Sixth Circuit held that a partial payment on a promissory note restarted the running of the statue of limitations applicable to the FDIC's cause of action against the guarantor in light of the express terms of the broadly-worded guaranty agreement. Further, the release of collateral securing the note did not discharge the guarantor from liability, as the agreement provided that the creditor could release collateral without giving notice or securing the guarantor's consent.

In re Matz, Case No. 1:91-CV-822 (W.D. Mich. December 13, 1991). This case, authored by Judge Benjamin F. Gibson, involves the appeal from a Bankruptcy Court order that discharged the Debtor's credit card debt. Anna Matz received a letter from Chevy Chase Federal Savings Bank inviting her to apply for a Visa Gold Card or a Gold Master Card. The letter stated that she received the offer because she was an individual with proven financial success. The letter invited her to accept the bank's invitation by completing the enclosed authorization form. Matz completed the form by listing her salary as $40,000, even though she only earned $14,700 in wages and received $5,200 in child support payments. Matz had planned on opening a gift shop so she included her projected earnings as part of her yearly income.

Her gift shop was unsuccessful and she was laid off from her other job and therefore had to file for bankruptcy. The Bankruptcy Court found that Matz did not intentionally misrepresent her income. She claimed that she did not realize that she was filling out a financial statement. The form that Matz filled out was not labeled as a financial statement. It asked for Matz' salary without any instructions as to what the figure could or could not encompass. The Court found that considering the ambiguity of the form, the Debtor's inclusion of the anticipated income from the gift shop did not evidence an intent to commit fraud.

Chevy Chase then argued that the bankruptcy judge should have disqualified himself. A judge must disqualify himself if the judge's impartiality might be questioned. The judge in the Bankruptcy Court had another bankruptcy judge determine whether he was biased. That judge held he was not. By asking the other judge to make this determination, the judge showed that he was not prejudiced.

Cipriano v. Tocco, 772 F. Supp. 344 (E.D. Mich. June 12, 1991). This case involves a Motion for Reconsideration of a District Court order and opinion. In its order and opinion, the Court held that the Ciprianos properly recorded a security interest in the Toccos' interest as vendees in a land contract whereby the Toccos purchased property in Farmington Hills, Michigan, from some former owners. The Toccos assigned their vendees' interest in a land contract to the Ciprianos as security for the approximately $180,000 antecedent indebtedness owed by them to the Ciprianos. The assignment was intended by the parties as an assignment for security purposes only as opposed to an absolute assignment.

The Ciprianos never recorded the assignment with the Oakland County Register of Deeds. Instead, they recorded a self-executed "Affidavit of Interest" in which they stated that the Toccos had assigned their vendees' interest in a land contract to the Ciprianos. The Oakland County Register of Deeds accepted this affidavit and recorded it in the "miscellaneous records book." The Register of Deeds also indexed the affidavit in the tract index referring to the Farmington Hills property itself but did not index the affidavit in the grantor/grantee index.

Before the IRS conducted a tax sale to Frank Ioli, the IRS agent conducting the sale inspected the Oakland County Register of Deeds' records but searched only the grantor/grantee index. As a result of the Register of Deeds' failure to index the affidavit in the grantor/grantee index, the IRS failed to uncover the Affidavit of Interest before conducting the tax sale. However, after the IRS conducted the tax sale and was notified that the Ciprianos claimed an interest in the Farmington Hills property, the IRS searched the tract index which disclosed the recorded Affidavit of Interest. Mr. Ioli never conducted a title search or obtained a title insurance policy prior to purchasing the Farmington Hills property, despite explicit warnings in the notices sent by the IRS to prospective purchasers that they should conduct their own title investigations.

The basis for Mr. Ioli's Motion for Reconsideration was that the Court improperly applied the provisions of 26 U.S.C. § 6323(h)(1)(A)(B). Specifically, Mr. Ioli argued that the Court incorrectly held that the Ciprianos' interest was properly perfected against subsequent judgment lien creditors under Michigan law; and that the Court improperly applied federal as opposed to Michigan law to determine that the Ciprianos had parted with money or money's worth at the time that they received the security interest from the Toccos.

The District Court held that, for the purposes of determining whether the assignees' interest was properly perfected against subsequent judgment lien creditors, one must look to Michigan law. The Michigan Supreme Court has long held that the miscellaneous record book is the appropriate place to record exceptional instruments offered for records such as bills of sales of timber, land contracts, deeds of cemetery lots, leases of buildings, and other kinds of papers. Therefore, the Affidavit of Interest was properly recorded in the miscellaneous record book rather than in the deeds record book.

The Court held that even though the affidavit was not indexed in strict compliance with the Michigan Marketable Record Title Act, the tax sale purchaser would have discovered that interest had he conducted a prudent search.

Lastly, the Court ruled that the assignees had parted with money or money's worth at the time they received the assignment of the purchasers' interest, thus satisfying the requirements of the Internal Revenue Code definition of "security interest" for purposes of determining priority under the Code. There was no need to consult local law to determine whether past consideration could support the security interest, as only a contemporaneous exchange was involved.

In the Matter of Remes Glass, Inc., Case No. 89-02790 (Bankr. W.D. Mich. January 14, 1992). This opinion, authored by Judge David E. Nims, Jr., involves the respective rights of a secured creditor, a purchaser of all the assets of a Debtor, the proceeds of the sale of the Debtor and the rights to the corporate name of the Debtor. For many years, Remes carried on a retail and wholesale automobile parts business in Grand Rapids. Henderson had been carrying on a like business in the Detroit area. In 1988, Henderson became interested in expanding to the Grand Rapids area and entered into an agreement whereby it would purchase the assets of Remes. However, after some investigation it was discovered that Remes' operating capital was gone, there were payrolls to meet and the back taxes owed the Internal Revenue Service were approaching $100,000. A possible loan was discussed, but was postponed.

Anson E. Moore, Jr. had been employed by Henderson since December of 1973. He entered into the employment of Remes in December of 1988 as its President. A Henderson employee was also put on as the Chairman of the Board of Remes, while Bill Remes remained on the Board of Directors. On January 20, 1989, Henderson loaned $200,000 to Remes. The Debtor executed and delivered a Promissory Note and Security Agreement secured by all of its intangibles. Old Kent Bank had a previously perfected security interest in all assets of the Debtor. On July 11, 1989, Remes entered a Consent Judgment in the Circuit Court for the County of Kent, admitting it was also indebted to Old Kent Bank and that Old Kent held valid perfected and first-priority security interests and liens in essentially all of Remes' intangible and tangible property. It was further stated that Henderson held valid perfected and secondary priority security interests and liens in the collateral. Judgment was entered in favor of Henderson in the amount of $252,209.86 plus interest, costs and attorney fees.

The Circuit Court ordered the collateral to be sold at a private sale. There was one objection which was overruled. There was an indication that some creditors were considering the filing of an involuntary petition in bankruptcy. After returning from the hearing, Moore told the bookkeeper to draw out all of the money in the bank account and pay it to Old Kent. She wrote a check to Old Kent and received a bank money order made payable to Old Kent in the sum of $18,000.

On that same day, an involuntary petition for relief was filed against the Debtor. When the $18,000 was tendered to Old Kent, it was refused as Old Kent then had knowledge of the bankruptcy and the automatic stay. On July 31, 1991, after a hearing at which no objection was made, the Bankruptcy Court granted a motion by Old Kent for relief from stay and the original sale ordered by the State Court took place. The assets of the Debtor were purchased by HGGR for $410,000, which was paid to Old Kent. In compliance with the order of the State Court, Old Kent retained $392,068.05, which paid its secured claim in full and paid the balance of $17,931.95 to Henderson. On August 1, 1989, Old Kent signed and delivered to HGGR a bill of sale which conveyed pursuant to the consent judgment basically all of the assets of the Debtor.

The first issue before the Court was whether Henderson or the Trustee was entitled to hold the $18,000 bank money order purchased by Remes and made payable to Old Kent. The Court held that Old Kent's liability to Old Kent never became fixed because Old Kent never became a holder of the check and, thus, the check only represented the bank's debt to Remes. The check, it was determined, was subject to the security interest of Henderson, the same as any other account.

The next issue to be decided by the Court was that of the problem of the possible preferential transfer because of the so-called "floating lien." Henderson had a security interest in essentially all of the assets left in the hands of Remes at the time of filing. The security interest had been perfected. However, Henderson was extensively under-collateralized. Therefore, where payments were made to Henderson within the 90 day period prior to the filing of the Bankruptcy Petition, it is assumed that the payments were credited toward the unsecured portion of the debt since this course of action would comport with standard business practice. Consequently, it can be concluded that Henderson received greater payment on its unsecured claim than other unsecured creditors and that the transaction satisfies the requirements of Section 547(b)(5).

In addition, under the improvement in position test of Section 547(c)(5), Remes owed Henderson $256,259.86. The value of all of its collateral equaled roughly $215,000. Henderson had not proved its right to prevail under Section 547(c). However, the Court did allow a motion to amend to be filed by Henderson in that it appeared that Henderson and the Court were not aware of the problems involved until the date of trial. The improvement in position test of Section 547(c)(5), which dealt with the floating lien problems, is one of the more complicated concepts in bankruptcy law. In addition, there was no evidence of value at the date 90 days before the date of filing. The Court granted the reopening of the trial for the limited purpose of establishing proofs on valuation and in accordance with the provisions of Section 547(c)(5).

In re Rector, Case No. 91-82229 (Bankr. W.D. Mich. December 23, 1991). This opinion, authored by Judge Laurence E. Howard, involves the question of whether funds held in a state-established deferred compensation program are exempt under 11 U.S.C. § 522(d)(10)(E). On April 22, 1991, Ms. Rector filed a voluntary Chapter 7 bankruptcy petition. She was laid off from her job as a child care worker with the State of Michigan. As a state employee, she was eligible to participate in the Michigan Department of Civil Service Deferred Compensation Program. This program was established under Section 457 of the Internal Revenue Code. The deferred compensation plan only allowed payment upon certain enumerated conditions. The conditions were retirement, disability, death, separation or extreme hardship. Separation and extreme hardship were the only enumerated reasons for payment that differed between the plan and 11 U.S.C. § 522(d)(10)(E).

Under §522(d)(10)(E), funds from the deferred compensation plan are exempt if the plan is a stock bonus, pension, profit sharing, annuity or similar plan with payment only for enumerated reasons. Also, any payment under the plan must be reasonably necessary for the Debtor's support and maintenance.

The Court found no reasons to deny the Debtor's deferred compensation plan exempt status based on the occurrence of payment on separation and found that payment based upon permanent separation is akin to future earnings. Therefore, the Court found that the funds in the deferred compensation plan were exempt to the extent that they were reasonably necessary for the Debtor's support.

In the Matter of Great Northern Forest Products, Inc., Case No. 89-04489 (Bankr. W.D. Mich. December 20, 1991). In the interest of space, this case, decided by Judge James D. Gregg, will not be summarized in full due to its great length. However, it involves four major issues: (1) Does a landlord hold a valid lien on personal property stored on its real property and, if so, is the lien avoidable? (2) Is the Debtor responsible to

remedy alleged pollution on the landlord's real property under New Jersey and federal environmental laws? (3) Are any of the landlord's asserted unpaid rents, use and possession charges or environmental clean-up costs entitled to administrative priority pursuant to 11 U.S.C. §§ 503(b)(1)(A) and 507(a)(1)? (4) May any rents, use and possession charges or environmental clean-up costs be recovered by the landlord from the proceeds of the sale of the secured creditor's personal property collateral pursuant to Section 506(c)?

In re Miel, Case No. 91-82225 (Bankr. W.D. Mich. December 5, 1991). This opinion, authored by Judge Laurence E. Howard, involves the turnover of tax refunds held by the IRS and a Motion for Contempt. Debtor filed a Chapter 7 Bankruptcy Petition on April 19, 1991. The IRS was listed as an unsecured creditor without priority, possessing a claim for income tax deficiencies for 1986 and 1987. Due to the incomplete listing of its address on the creditors' matrix, the IRS did not receive notice of the Debtor's bankruptcy and therefore was not aware of the existence of the automatic stay until June 19, 1991. Subsequent to filing her Chapter 7 Petition, the Debtor timely filed her federal income tax return for 1990. The income tax return reflected a $911 refund due to the Debtor from the IRS. On June 10, 1991, the IRS set off all of Debtor's $911 refund against her outstanding 1986 federal income tax liability. The Debtor was discharged on August 13, 1991. On August 20, 1991, the Debtor filed an amended Schedule B to her Bankruptcy Petition, clarifying that she was claiming the $911 tax refund as exempt property under Section 522(d)(5). The original bankruptcy filing alleged this exemption only generally and did not contain the statutory reference. The IRS admitted that it applied the $911 tax refund check in violation of the automatic stay, but because it was unaware of the Bankruptcy, should not be held in contempt. The Court agreed. The IRS then sought to lift the stay nunc pro tunc in order to set off the tax refund, in that it had no objection to the Debtor's exemption but asserted that its right of setoff superseded any right the Debtor may possess in the refund. The Court stated that the fact that the IRS was not aware of the Debtor's filing did not save their setoff on June 10, 1991, from violating Section 362(a). By violating the stay, the setoff of the Debtor's refund was rendered void. The IRS clearly violated the automatic stay by exercising its right of setoff.

As to the IRS' request to lift the stay nunc pro tunc and set off the tax refund, the Court stated that in direct conflict with the right to setoff under Section 553 is Section 552(c), which protects exempt property from liability for any debt that arose before the commencement of the case. The only exceptions are if the debt is a non-dischargeable tax debt under Section 523(a)(1) or if the debt is secured by a tax lien. There was no evidence that the IRS ever filed the proper notice for tax lien on the 1986 tax liability. In addition, the IRS disputed the Debtor's listing of the 1986 liability as an unsecured claim in her Bankruptcy Schedules.

The Court concluded that the IRS' claim for the 1986 income tax deficiency was unsecured. Under Section 523(a)(1), an income tax deficiency is non-dischargeable if, and only if, the IRS' claim against the Debtor for the deficiency was for a taxable year ending on or before the date of the filing of the Petition for which her return was last due, including extensions, after three years before the date of filing the Petition. In this case, the claim that the IRS was seeking to offset was for a 1986 income tax. The claim falls outside the period required for non-dischargeability. Therefore, the Court held that the IRS possessed a dischargeable unsecured claim for delinquent income tax for the year of 1986. The Court concluded that Section 522(c) prevails over Section 553 and held that the IRS should return the exempt portion of the refund to the Debtor.

In re Coventry Commons Associates, Case No. 91-07585-R (Bankr. E.D. Mich. September 23, 1991). This case, decided by Judge Stephen W. Rhodes, involves a Debtor's motion for determination of the status of rents and the use of cash collateral on an interim and final basis. On February 4, 1988, the Nelson/Ross partnership executed a mortgage note, a mortgage and security agreement, and an assignment of rents and leases in favor of Travelers Insurance Company. On January 1, 1991, Coventry Commons Associates became successor in interest to the Nelson/Ross partnership. The Debtor defaulted on the loan and later filed for relief under Chapter 11. It sought by way of motion to determine the status of rent.

The Court stated that MCLA §§554.231 and 554.232 governed the assignment of rent. Although the secured creditor sent a notice of default to the Debtor, it failed to record the notice or send a copy of the notice to the Debtor's tenants as required by MCLA §554.231. Since the secured creditor, Travelers, had failed to comply with the statute, it did not have a presently enforceable interest in receiving the rent. The secured creditor had only an inchoate interest in receiving the current rents which was an interest in the right to receive the rent from

a future undetermined time. However, the Court stated that in order to assure that the secured creditor's right to receive future rents was adequately protected, the Debtor was to maintain the property and pay the expenses of the property.

The Court also disagreed with the holding in Matter of PMG Properties, 55 B.R. 864 (Bankr. E.D. Mich. 1985) for several reasons. First, it stated that the PMG decision was inconsistent with several Michigan Supreme Court decisions such as Security Trust Co. v. Sloman, 252 Mich. 266, 233 N.W. 216 (1930) and Giblin v. Detroit Trust Co., 270 Mich. 293, 258 N.W. 635 (1935).

In addition, the Court noted that the decision does not consider the changes in the parties' rights resulting from the bankruptcy filing. Lastly, the Court said that even the PMG case itself found that the debtor had an interest in the rents because Judge Brody assumed that the mortgagee would use the rents to preserve the mortgaged premises and reduce the mortgage debt. Therefore, it was hard to find a basis for this assumption if the rents were the exclusive property of the mortgagee and the debtor had no interest in them. Presumably, if the rents were the exclusive property of the mortgagee, it could do with them as it wished.

In re Gilead Baptist Church of Taylor, Case No. 88-05919 (Bankr. E.D. Mich. December 20, 1991). This opinion, authored by Judge Steven W. Rhodes, involves a remand from the District Court with instructions to reconsider the Bankruptcy Court's previous denial of the sixth fee application filed by the Debtor's attorney and the fifth fee application filed by the attorney for the unsecured creditors' committee. The District Court ordered that these applications should be reconsidered using the lodestar approach.

The Court stated that the starting point of lodestar analysis is multiplying the number of hours reasonably expended on the case by a reasonable hourly rate. This computation can then be adjusted after considering factors that are not taken into account in determining the hours reasonably expended and the reasonable hourly rate. After the lodestar is determined, it may be increased or reduced by reference to factors which have not already been taken into account in computing the lodestar and which are shown to warrant the adjustment by the party proposing it. The lodestar can also be adjusted to reflect the quality of representation.

In viewing the specific facts of the case, the Court found that the hourly rates charged by the attorneys for the Debtor were $140 to $185. The hourly rates charged by the attorneys for the unsecured creditors' committee were $155 to $160. No one objected to the hourly rates and they were entirely consistent with rates charged by other Chapter 11 attorneys with similar experience. Accordingly, the Court found that these hourly rates were reasonable.

In the fee applications, the attorney for the Debtor sought compensation for 107.4 hours and the attorney for the unsecured creditors' committee sought compensation for 41.7 hours. The fee applications also sought awards for fees previously requested but not awarded. The Court found that the hours of service entered by these attorneys and their time records were reasonable.

An additional factor that caused concern with the Court and which the lodestar calculation did not take into account was whether the total fees requested bore some reasonable relation to the size of the case and the benefits conferred on the estate by the services. The most obvious factors are the Debtor's assets, liabilities, income and expenses. In a Chapter 11 case where the liabilities are paid by the Debtor's future income, the Court determined that it should also take into account the Debtor's future income in considering the size of the fee award. Accordingly, if the Court granted these fee applications in full the total professional cost in the case would be $537,950.67. These fees were incurred in a 23-month period. Thus, the professional fees averaged approximately $23,000 per month during the case.

In 1989, the Debtor's average gross income from operations was $62,000 per month, which was entirely used in operations. In fact, the Debtor incurred a net loss of $15,000 for the year. The Debtor projected a net cash flow of roughly $4,000 per month in 1990, increasing to $10,000 in 1995. These net cash flow amounts established that the total professional fees in the case were far out of proportion to the size of the case. The accumulation of $23,000 per month in average professional fees during the Chapter 11 case is anywhere from two to six times the Debtor's projected monthly net cash flow. The Court determined that no further fees were justified.

NOTICE OF FREE SEMINAR

The Office of the U.S. Trustee will sponsor a seminar entitled "Ch. 7 or Ch. 13 - That Is the Question" on March 18, 1992 from 1:00 p.m. to 5:00 p.m. at the Office of the U.S. Trustee, 190 Monroe Avenue, N.W., Suite 200, Grand Rapids, Michigan.

The seminar is being presented free of charge and is directed to new attorneys or to those who would like to learn how to properly file and successfully complete a Chapter 13 bankruptcy case.

Featured speakers will be Thomas Van Meter, practicing attorney, and the Chapter 13 Trustees for the Western District of Michigan. Seminar participants will receive nuts and bolts information about Chapter 13 practice, including (but not limited to) client interviewing techniques; procedures for completing a budget, schedules and plan; and attorney compensation in Chapter 13.

For reservations, please call Joan Waldmiller, Secretary, Office of the U.S. Trustee, in Grand Rapids at (616) 456-2002.

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 (Lower Peninsula) during the period from January 1, 1991 through December 31, 1991. These filings are compared to those made during the same period one year ago and two years ago.

	1/1/91-12/31/91	Percent Increase (Decrease) Over 1990	1/1/90-12/31/90	1/1/89-12/31/89
Chapter 7	5,027	25.7%	3,999	3,289
Chapter 11	153	(0.6%)	154	98
Chapter 12	24	33.3%	18	17
Chapter 13	1,699	(1.0%)	1,717	1,420
	6,903	17.2%	5,888	4,824

NOTICE FROM THE BANKRUPTCY COURT

If you wish to remain on the Bankruptcy Court Slip Opinion Mailing Matrix for the year February, 1992 through February, 1993, a charge of $30.00 will be assessed. This charge will defer the costs of copying and mailing slip opinions. If an attorney or other individual desires to remain on the opinion mailing list, please complete the attached form, enclose a check in the amount of $30.00 made payable to: Clerk, United States Bankruptcy Court, and mail it to:

Clerk, U.S. Bankruptcy Court
ATTN: Mark Van Allsburg
P.O. Box 3310
Grand Rapids, MI 49501

Anyone who has not remitted $30.00 by March 1, 1992 will be deleted from the mailing list. Of course, if a person does not wish to receive copies of all slip opinions of cases decided by the Court, a given opinion may be requested from the Court at the regular charge of $.50 per page.

If you have any questions regarding the above, please contact Mark Van Allsburg, Clerk, at (616) 456-2693.

SLIP OPINION REQUEST FORM

Please send me copies of all slip opinions rendered by the United States Bankruptcy Court for the Western District of Michigan during the 1992 calendar year. My name, mailing address, and business telephone number are printed or typed below as follows:

NAME _____

ADDRESS _____

_____

_____

_____

TELEPHONE ( ) _____

I have enclosed a check in the amount of $30.00 made payable to the Clerk, United States Bankruptcy Court, to defer the costs of copying and mailing the opinions from February 1, 1992 to February 1, 1993.

Dated: _____ _____

Signature

EDITOR'S NOTEBOOK

In a case decided too late to include in this month's summary of current cases, the U.S. Supreme Court issued its opinion in In re Dewsnup, 60 L.W. 4111 (January 15, 1992), in which the Court held that §506(d) does not allow a Chapter 7 Debtor to "strip down" a lender's lien to the judicially determined value of the collateral by using §506(a). A more complete review of Dewsnup will appear in next month's Recent Bankruptcy Decisions.

In another important case, as noted in the lead article in this month's issue, the Supreme Court granted cert. in Patterson v. Shumate, Docket No. 91-913, to review the Fourth Circuit's decision that a debtor's ERISA-qualified pension plan, which contained an ERISA-imposed non-alienation provision, was excluded from property of the estate by §541(c)(2).

Finally, please note that effective December 1, 1991, the following new bankruptcy forms are to be used:

1. Subpoena for Rule 2004 Examination;
2. Subpoena in an Adversary Proceeding; and
3. Subpoena in a Case under the Bankruptcy Code.

In addition, the following forms were also revised effective June 1, 1991:

1. Certificate of Commencement of Case;
2. Certificate of Retention of Debtor-in-Possession;
3. Summons to Debtor in an involuntary case;
4. Order for Relief in an Involuntary Case;
5. Notice of Filing of Final Account of Trustee; and
6. Final Decree.

Copies of these new forms appear in the West Bankruptcy Reporter Advance Sheet dated January 8, 1992.

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