BANKRUPTCY LAW NEWSLETTER

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A STATISTICAL PROFILE OF BANKRUPTCY TRENDS

[Editor's Note: The following statistical information prepared by the Administrative Office of the United States Courts was forwarded to me by Mark Van Allsburg. It was revised as of March 19, 1993 and is interesting reading.]

TOTAL BANKRUPTCY CASE FILINGS: Bankruptcy filings continued to rise during 1992. Over 970,000 bankruptcy cases were filed during 1992, the eighth consecutive year of record level filings. Total bankruptcy case filings were relatively stable between 1980 and 1984. Since 1984, however, bankruptcy filings have increased by 179%. Virtually all of the increase has come in filings of chapter 7 and chapter 13 cases. Chapter 11 case filings peaked in 1986, dropped considerably during 1987 and 1988, increased by about 36% from 1989 to 1991, and decreased by 5.6% during 1992. Chapter 12 filings have dropped substantially since 1987, but have showed a modest increase during both 1991 and 1992.

The eight-year surge in bankruptcies now appears to have abated. During 1992 the national increase in bankruptcy filings was less than three percent, the smallest increase in the last eight years, and well below the 20.6% increase recorded in 1991.

NATIONAL TOTALS

BANKRUPTCY CASE FILINGS CALENDAR YEARS 1980---1992

CALENDAR YEAR	TOTAL FILINGS	CHAPTER 7	CHAPTER 11	CHAPTER 12	CHAPTER 13	OTHER* CASES
1980	331,098	249,136	6,348	N/A	75,584	30
1981	363,817	260,664	10,041	N/A	93,139	3
1982	380,212	257,644	18,821	N/A	103,738	9
1983	348,872	234,594	20,252	N/A	94,021	5
1984	348,488	234,997	20,252	N/A	93,221	18
1985	412,431	280,986	23,374	N/A	108,059	12
1986	530,008	374,452	24,740	601	130,200	15
1987	574,849	406,761	19,901	6,078	142,065	44
1988	613,606	437,882	17,690	2,034	155,969	31
1989	679,980	476,993	18,281	1,440	183,228	38
1990	782,960	543,334	20,783	1,346	217,468	29
1991	943,987	656,460	23,989	1,495	262,006	37
1992	971,517	681,663	22,634	1,608	265,577	35
TOTAL	7,281,855	5,095,566	247,106	14,602	1,924,275	306

* Includes chapter 7 stockbroker, chapter 9, chapter 11 railroads, and Section 304 cases

-- The Bankruptcy Code of 1978 went into effect on October 1, 1979. Through December 31, 1992, there had been 7,337,878 cases commenced under the Code. This was well over the total cases filed in the previous 80 years under the Bankruptcy Act.

-- Approximately 35% of bankruptcy filings during 1992 were joint filings involving a husband and wife.

During the past eight years, total bankruptcy filings nationwide have nearly tripled. The following chart shows where the largest proportional increases in bankruptcy filings have occurred since 1984.

STATE	TOTAL CASE FILINGS		PERCENT INCREASE
	1984	1992	
NEW HAMPSHIRE	497	3,840	673%
MASSACHUSETTS	2,251	17,172	663%
FLORIDA	8,230	52,003	532%
PUERTO RICO	1,466	7,785	431%
RHODE ISLAND	713	3,711	420%
CONNECTICUT	1,852	9,472	411%
VERMONT	213	999	369%
MARYLAND	3,783	16,790	344%
ARIZONA	4,839	20,234	318%
NEW JERSEY	6,743	25,343	276%
NEW YORK	13,901	52,095	275%
NATIONAL TOTAL	348,488	971,517	179%

BANKRUPTCY FILINGS BY DECADE: Bankruptcy case filings were far higher during the 1980s than in any other decade. On a per capita basis, filings during the 1980s were about double the level of the 1970s, and nearly ten times as high as during the 1940s. Further, bankruptcy case filings during 1990, 1991, and 1992 have been about twice the annual average for the 1980s.

DECADE	TOTAL FILINGS	U.S. POPULATION (AT END OF DECADE)	FILINGS PER 1,000 POP.
1900-1909	173,298	92,228,496	1.88
1910-1919	215,296	106,021,537	2.03
1920-1929	410,475	123,202,624	3.33
1930-1939	614,938	132,164,569	4.65
1940-1949	296,021	151,325,798	1.96
1950-1959	584,272	179,323,175	3.26
1960-1969	1,695,416	203,303,031	8.34
1970-1979	2,086,189	226,545,805	9.21
1980-1989	4,583,391	252,904,881	18.12
1990-1992	2,698,464		35.00 (EST.)

-- Case filings through 1979 are for statistical years ended June 30th; filings since 1980 reflect calendar years. Population figures reflect census totals as of April 1 of each decade.

FILINGS PER STATE: The frequency of bankruptcy filings relative to the number of households varies widely among the states. For example, during 1992 there were 20 states which had at least one bankruptcy per 100 households. Tennessee continues to have the highest incidence of bankruptcy relative to population. In contrast, in 14 states, the District

of Columbia and Puerto Rico, there was fewer than one bankruptcy filing per 150 households during 1992. The following chart shows the frequency of bankruptcy filings relative to population per state (including the District of Columbia and Puerto Rico) during 1992.

CALENDAR YEAR 1992

STATE	# OF HOUSE-HOLDS IN 1,000'S*	TOTAL CASES FILED	HOUSE-HOLDS PER CASE FILED 1992	NAT'L RANK	STATE	# OF HOUSE-HOLDS IN 1,000'S*	TOTAL CASES FILED	HOUSE-HOLDS PER CASE FILED	NAT'L RANK
TENN	1,854	39,760	47	1	ARK	891	8,253	108	27
GA	2,367	45,889	52	2	NJER	2,795	25,343	110	28
ALA	1,507	26,865	56	3	NMEX	543	4,544	119	29
NEV	466	8,047	58	4	TEXAS	6,071	50,487	120	30
CALIF	10,381	161,858	64	5	WYO	169	1,339	126	31
UTAH	537	8,197	66	6	MICH	3,419	26,999	127	32
ARIZ	1,369	20,234	68	7	NY	6,639	52,095	127	33
MISS	911	12,137	75	8	CONN	1,230	9,472	130	34
IND	2,065	27,313	76	9	MASS	2,247	17,172	131	35
ORE	1,103	13,962	79	10	NEB	602	4,229	142	36
COL	1,282	16,079	80	11	MONT	306	2,026	151	37
VA	2,292	28,464	81	12	WISC	1,822	12,041	151	38
OKLA	1,206	14,570	83	13	WVA	689	4,507	153	39
IDAHO	361	4,105	88	14	DEL	247	1,606	154	39
KY	1,380	14,478	95	15	PR	1,210	7,785	155	41
ILL	4,202	42,998	98	16	NCAR	2,517	15,018	168	42
MINN	1,648	16,775	98	17	IOWA	1,064	6,255	170	43
OHIO	4,088	41,548	98	18	SCAR	1,258	7,325	172	44
FLA	5,135	52,003	99	19	DC	250	1,445	173	45
WASH	1,872	18,898	99	20	SDAK	259	1,464	177	46
RI	378	3,711	102	21	PENN	4,496	24,839	181	47
MD	1,749	16,790	104	22	AK	189	1,039	182	48
KS	945	9,064	104	23	NDAK	241	1,258	192	49
MO	1,961	18,532	106	24	MAINE	465	2,225	209	50
LA	1,499	14,101	106	25	VT	211	999	211	51
NHAMP	411	3,840	107	26	HI	356	1,431	249	52
NAT'L	93,157	971,517	96						

*Source: 1990 Census of Population and Housing Listings

CHAPTER 7 CASES: Chapter 7 cases account for about 70% of all bankruptcy filings. Approximately 95% of these chapter 7 cases are terminated as "no asset" cases--where all property of the debtor is exempt from sale by the court-appointed trustee.

CHAPTER 11 CASES: Based on statistics compiled by the Administrative Office and information gathered in a 1989 study of more than 2,000 chapter 11 cases with confirmed plans of reorganization in 15 judicial districts, the following estimates can be made.

-- Approximately 17% of the chapter 11 cases filed prior to 1987 have been or will be confirmed: the estimated confirmation rate has risen from 13.3% of cases filed in 1982 to 22.4% of cases filed in 1986.

-- The median time from filing to confirmation was 656 days. Nearly two-thirds of confirmations occur in the second and third years after filing.

-- More chapter 11 cases are filed in California, New York, Texas, and Florida than in any other states, but Nevada and Utah receive the most chapter 11 filings relative to the number of businesses in each state.

-- Chapter 11 filings accounted for more than 5% percent of all case filings between 1983 and 1986, but accounted for only 2.3% of case filings in 1992.

CHAPTER 13 CASES:

-- Based on 1992 filing levels, the chances of an individual or couple filing for chapter 13 during their lifetime is about one in 10.

-- Chapter 13 filings are most prevalent in Tennessee, Alabama, and Georgia, North Carolina, and Puerto Rico.

-- Chapter 13 filings are least prevalent in the New England states, North and South Dakota, Hawaii, and Iowa.

RECENT CASE SUMMARIES

The recent bankruptcy decisions for the Supreme Court and Sixth Circuit are summarized by John A. Potter; the Western District of Michigan bankruptcy and district court opinions are summarized by Vicki S. Young; and the Eastern District of Michigan bankruptcy and district court decisions and relevant State of Michigan cases are summarized by Jaye M. Bergamini. Larry Ver Merris assists in the preparation of the case summaries.

In Re: Toler (Maurice and Patricia Toler v. New Boston Development Company), Case No. 92-4067 (6th Cir. July 15, 1993) Under Federal Rule of Civil Procedure 5 and Bankruptcy Rules 7005 and 4007(c), a complaint claiming non-dischargeability of a debt under 11 U.S.C. §523(c) is deemed filed when tendered to the bankruptcy court clerk, local rules notwithstanding.

Defendants/Debtors, Maurice and Patricia Toler, filed their bankruptcy petition on July 24, 1991. The first meeting of creditors was held on September 27, 1991. On October 17, 1991, the bankruptcy court received and stamped as filed a complaint from Plaintiff, New Boston Development Company, alleging Defendants' debt non-dischargeable for fraudulent conduct under 11 U.S.C. §523(c). A week later the bankruptcy court effaced the file stamp and returned the complaint to Plaintiff for failure to comply with the local rule which requires a summons to be filed simultaneously with the complaint.

On December 9, 1991, Plaintiff resubmitted the complaint with a summons attached. Debtors then filed a motion to dismiss, claiming the complaint had not been filed within 60 days of the meeting of creditors as required under Bankruptcy Rule 4007(c). The bankruptcy court held for Debtors and the district court affirmed.

The Court of Appeals reversed, holding that filing takes place when documents are tendered to the court clerk, local rules notwithstanding. The Court of Appeals rested its decision on the language of Fed.R.Civ.P. 5. This rule provides, inter alia, that "[t]he clerk shall not refuse to accept for filing any paper presented for that purpose solely because it is not presented in proper form as required by these rules or any local rules or practices." This holding was designed to resolve a conflict in the Sixth Circuit. It also comports with the holding that local rules may not alter requirements of the Federal Rules of Civil Procedure. Wilson v. City of Zanesville, 954 F.2d 349, 352-53 (6th Cir. 1992)

In Re: Suburban Motor Freight, Inc. (Stephen K. Yoder v Ohio Bureau of Workers' Compensation), Case No. 92-3423 (6th Cir. June 29, 1993) Where a state "compels the payment" of "involuntary exactions, regardless of name," and where such payment is universally applicable

to similarly situated persons or firms, these payments are taxes for bankruptcy purposes. Accordingly, unpaid premiums due the Ohio Bureau of Workers' Compensation are entitled to priority in bankruptcy under 11 U.S.C. §507(a)(7)(E) as excise taxes.

Debtor, Suburban Motor Freight, filed bankruptcy owing premiums to Defendant, Ohio Bureau of Workers' Compensation. Defendant filed a proof of claim classifying the unpaid premiums as excise taxes under 11 U.S.C. §507. Plaintiff, Stephen Yoder, the trustee, filed an objection maintaining the premiums were fees not entitled to priority. The bankruptcy court found the premiums were entitled to priority status and the district court affirmed.

The Court of Appeals affirmed the district court, choosing to follow the Fourth Circuit decision of New Neighborhoods v. West Virginia Workers' Compensation Fund, 886 F.2d 714 (4th Cir. 1989). The Court reasoned that the Ohio workers compensation system is monopolistic and mandatory and administered exclusively by the state. Private insurance is not allowed and payment of premiums by all employers to the state is compulsory.

Consequently, where a state "compels the payment" of "involuntary exactions, regardless of name," and where such payment is universally applicable to similarly situated persons or firms, these payments are taxes for bankruptcy purposes. If the State had an optional participation program, or allowed employers to purchase private insurance, it would be unfair to call state-collected premiums "taxes." Accordingly, unpaid premiums due the Ohio Bureau of Workers' Compensation are entitled to priority in bankruptcy under 11 U.S.C. §507(a)(7)(E) as excise taxes.

Eagle v. Czachowski, Case No. 1:93-CV-113 (W.D. Mich. July 6, 1993). Judge Enslen affirmed Judge Gregg's order in this case, which held that although the Debtor's ex-wife had technically violated the automatic stay, under the circumstances of this case, the Debtor was not entitled to damages for a "willful" violation of the automatic stay.

Following the Debtor's bankruptcy filing, the Debtor's ex-wife, with knowledge of the bankruptcy filing, filed a motion in state court to modify their judgment of divorce. Upon being informed of the automatic stay, the Debtor's ex-wife adjourned the hearing on her motion until after the bankruptcy proceedings terminated. The Debtor, however, filed a motion for an order holding his ex-wife in contempt for violation of the automatic stay and requesting that damages be assessed against her.

Judge Gregg held that although the Debtor's ex-wife had technically violated the automatic stay, given the circumstances, damages for contempt would not be appropriate. The Court also modified the automatic stay to allow the Debtor's ex-wife to preserve the validity of her motion to modify the divorce judgment, which would be heard following the close of the Debtor's bankruptcy proceedings.

On appeal, the Debtor argued that the Bankruptcy Court erred in not holding his ex-wife in contempt and assessing damages against her for her allegedly willful violation of the automatic stay. The Debtor asserted that the "willful" violation was evidenced by his ex-wife's filing of the motion when she was aware of the bankruptcy filing. Further, the Debtor argued that the Bankruptcy Court erred when it modified the automatic stay to preserve his ex-wife's motion to modify the divorce judgment until the close of the bankruptcy proceedings.

The District Court held that the Debtor's ex-wife had not "willfully" violated the stay because she had immediately sought an adjournment of her motion until after the close of the bankruptcy proceedings upon learning of the automatic stay. The Court noted that the Bankruptcy Court had discretion to grant relief from the automatic stay, and that the Bankruptcy Court's modification of the stay in this case was consistent with equitable and due process principles. Further, the Court noted that forcing the Debtor's ex-wife to refile the pleadings would be unduly expensive, time consuming, burdensome, and not in the best interest of justice or judicial economy. Finally, the Court noted that the ex-wife's violation of the automatic stay had not harmed the bankruptcy estate because the subject of the motion to modify the divorce judgment, i.e., the Debtor's social security checks, had been placed in trust and were protected from improper distribution to the ex-wife until the conclusion of the Debtor's bankruptcy case.

In re DeGayner, Committee of Creditors Holding Unsecured Claims v. Turner, Case No. 1:92-CV-152 (W.D. Mich. July 21, 1993). Pre-petition, the Debtor retained the Defendants as attorneys for various matters, including a certain civil action referred to as the "Loewi Action." The Defendants represented the Debtor with regard to the Loewi Action pursuant to a contingency fee agreement executed in September 1987. In January 1979, while the Loewi Action was pending, the Debtor and the Defendants executed a contract entitled "Retail Installment Transaction and Assignment of Interest" under which: (1) the Debtor assigned to the Defendants "as first priority" his interest in any judgment or settlement from the Loewi Action; (2) the parties limited the contingency fee agreement to the services

provided in the Loewi Action to judgment; and (3) the parties agreed on an hourly schedule for all other matters.

During the pendency of the Loewi action, the Debtor borrowed money from several creditors in exchange for notes secured by assignments of interest in the Loewi action judgment and assigned his interest in such judgment in exchange for forbearance from a number of his judgment creditors. The Debtor did not disclose his assignment of the judgment to the Defendants. It was also alleged that the Defendants negotiated these settlements.

When the Debtor received his judgment in the Loewi Action, he disbursed approximately 61% of the judgment money to the Defendants and retained a portion of the judgment to reimburse himself for expenses. Thereafter, with the assistance of the Defendants, the Debtor offered to divide the excess money (equalling only approximately one-half of the total amounts due to his creditors) among his remaining creditors. Within one year following the Debtors' first payment to the Defendants, the Debtor filed for relief under Chapter 11.

The Debtor's Unsecured Creditors' Committee brought this adversary proceeding to avoid the payments which the Debtor made to the Defendants. The Committee alleged that: (1) the payments were preferential transfers under 11 U.S.C. § 547(b); (2) the payments were fraudulent conveyances under the Bankruptcy Code and Michigan law; (3) to the extent Defendants had a valid lien on the judgment, the lien should be equitably subordinated pursuant to 11 U.S.C. § 510; (4) the agreement between the Defendants and the Debtor, which purported to be an agreement under Michigan's Retail Installment Sales Act, MCLA §§ 445.851.873, was void under that act; and (5) a portion of the Debtor's payments to the Defendants constituted usurious interest.

On the Defendants' motion for summary disposition, Judge Gibson thoroughly analyzed each of the Committee's counts against the Defendants under the facts of this case. The Court held that genuine issues of material fact existed with regard to each of the Committee's allegations, with the exception of the Committee's allegation that the agreement between the Debtor and the Defendants was void because it was not covered by the Michigan Retail Installment Sales Act.

The Court specifically discussed attorneys' charging and retaining liens under Michigan common law and the validity of the agreement between the Debtor and the Defendants under the Michigan Code of Professional Responsibility. The Court noted that a non-possessory charging lien, which is a lien upon the judgment in a particular suit, arises at judgment unless the parties have made an agreement to the contrary, such as a contingency fee agreement. However, the Court also noted that charging liens are only valid against third parties who have actual knowledge of the lien or who should have inquired whether a lien existed. Further, the Court noted that a possessory retaining lien arises on possession of the client's property, and that the Defendants' transfer of the judgment payments to their trust account may have constituted a preferential transfer. The Court also questioned whether the agreement between the Debtor and the Defendants was valid because the agreement may have granted the Defendants a proprietary interest in the Loewi Action, which is prohibited under the Michigan Code of Professional Responsibility.

The Court also specifically discussed the test to be applied to determine whether a lien should be equitably subordinated under 11 U.S.C. § 510. The Court noted that the Defendants must have engaged in inequitable conduct which caused injury to the Debtor's creditors. Further, the Court noted that the application of the "inequitable conduct" test depends on whether the Defendants were insiders.

The Court reviewed Michigan's Retail Installment Sales Act and held that the act specifically excludes contracts for legal services. However, the Court held that the agreement between the Debtor and the Defendants was not void, because it was not covered by the act.

Finally, the Court specifically discussed the test to be applied to determine whether a contract is a time-price differential contract and therefore, excepted from the Michigan usury statute. The Court noted that under a time-price differential contract, the buyer must have a choice between paying a cash price or paying an added charge for purchasing on credit.

In re Thelen, Thelen v. Cushion, Case No. GL 92-86570 (Bankr. W.D. Mich. July 23, 1993). Judge Gregg held that the notice requirement under Michigan's statute on execution sales, MCLA § 600.6031, as applied to the facts of this case, did not deprive the Debtor of his due process of law under the United States Constitution.

Pre-petition, the Debtor's ex-wife obtained a default judgment against the Debtor in a lawsuit she filed seeking a monetary judgment against the Debtor based on a divorce judgment. Thereafter, the Debtor's ex-wife sold shares of the Debtor's stock at an execution sale to satisfy the judgment. The Debtor filed his voluntary petition for relief under Chapter 11 of the Bankruptcy Code within three months after the date of the sale. Thereafter, the Debtor filed this adversary proceeding seeking to set aside the

execution sale, alleging that the sale constituted a preferential and/or fraudulent transfer and that his ex-wife's failure to provide the Debtor notice prior to the execution sale violated the due process clause of the 14th Amendment of the United States Constitution.

The Court only considered the Debtor's due process claim in this opinion. The Debtor argued that Michigan's statute on execution sales does not satisfy the requirements of due process because the statute only requires that notice of the execution sale be posted rather than personally served. The Debtor asserted that under the due process clause of the United States Constitution, he was entitled to receive personal notice of the sale.

The Court reviewed MCLA § 600.6031 and held that the statute's requirement of posting notice satisfies the requirements of due process. Further, citing Endicott-Johnson Corp. v. Encyclopedia Press. Inc., 266 U.S. 285 (1924), the Court noted that personal notice of post-judgment executions against property is not required. The Court also noted that the Sixth Circuit in Agg v. Flanagan, 855 F.2d 336 (6th Cir. 1988) held that Endicott remains good law. Finally, the Court distinguished the cases cited by the Debtor in support of his position and held that personal notice may be required for execution sales of potentially exempt personal property, but under Michigan law, the Debtor's property which was sold at the execution sale was not exempt property.

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, 1993 through July 31, 1993. These filings are compared to those made during the same period one year ago and two years ago.

	1/1/93- 7/31/93	1/1/92- 7/31/92	1/1/91- 7/31/91
Chapter 7	2,747	3,292	3,039
Chapter 11	66	77	99
Chapter 12	22	17	12
Chapter 13	842	952	1,028
	3,677	4,338	4,178

EDITOR'S NOTEBOOK

The October 1, 1993 expiration date of Chapter 12 has been extended until October 1, 1998 under P.L. 103-65, which President Clinton signed on August 6, 1993. In addition to the sunset provision extension, P.L. 103-65 amends §1221 regarding the filing of Chapter 12 Plans. Under the prior version of § 1221, the 90-day period in which the Chapter 12 Debtor must file a Plan could only be extended upon a finding by the Court that the extension was "substantially justified." The new amendment deletes the "substantially justified" language and now allows the Bankruptcy Court to extend the 90-day period if "the need for an extension is attributable to circumstances for which the Debtor should not justly be held accountable."

On August 10, 1993, President Clinton signed the budget reconciliation bill (HR 2264). Despite substantial lobbying against the provision, the final version of the budget legislation repealed the stock-for-debt exception in the Internal Revenue Code for cases filed after December 31, 1994 unless the transfer occurs in a bankruptcy case filed by December 31, 1993.

On August 1, 1993, certain amendments to the Federal Rules of Bankruptcy Procedure took effect. Rules 1010, 1013, 1017, 2002, 2003, 2005, 3009, 3015, 3018, 3019,

3020, 5005, 6002, 6006, 6007, 9002, and 9019 were all amended, and a new Bankruptcy Rule 9036 was added. Bankruptcy Rule 2003 was amended, to extend the time for holding the creditors' meeting in a Chapter 13 by ten days. Further, Bankruptcy Rule 5005 was amended to prohibit a clerk from refusing to accept for filing any paper presented for the purpose of filing solely because it was not presented in the proper form. In addition, the rules were amended to allow procedures for granting an order without a hearing, in the absence of a request for a hearing, on a motion relating to the assumption, rejection, or assignment of executory contracts (B.R. 6006) or abandonment of estate property (B.R. 6007), and on compromises and settlements (B.R. 9019). Finally, Bankruptcy Rule 9036 was added to provide for electronic transmission of notice in certain instances where the party requests such notice in writing.

In an important case decided outside the Sixth Circuit, the Ninth Circuit has ruled that the "new value" exception to the absolute priority rule survived the enactment of the Bankruptcy Reform Act of 1978. In re Bonner Mall Partnership, 1993 W.L. 288507 (9th. Cir. 1993).

Thomas P. Sarb

EDITOR NEEDED

This issue marks the completion of my second year as editor of the Newsletter. If you might be interested in succeeding me please call me (no obligation!) at (616) 459-8311 to discuss it. The editing takes a few hours each month, but keeps you on top of what's happening in the bankruptcy world in the Western District. All inquiries welcome!

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