BANKRUPTCY LAW NEWSLETTER

Published by Federal Bar Association
Western District of Michigan Chapter

VOL. 5, NO. 7 MARCH, 1993

CERCLA LENDER LIABILITY UPDATE

By: Vicki S. Young*

In Kelley v. Tiscornia,[1] the U.S. District Court for the Western District of Michigan recently held that activities undertaken by the defendant lender while policing its loan did not rise to the level of "participating in the management" of the borrower, allowing the lender to escape liability under the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA").[2] The ruling is a victory for secured lenders. The court relied heavily on the Environmental Protection Agency's ("EPA") final rule issued on April 29, 1992 which interprets and clarifies the security interest exemption under CERCLA (the "Rule").[3] Despite the court's favorable ruling, uncertainty persists for secured lenders attempting to avoid liability for environmental clean up costs under CERCLA. The following is a brief summary of the Rule and the unresolved issues concerning CERCLA's security interest exemption.

Background. CERCLA imposes strict liability which is joint and several on current and past owners and operators of contaminated facilities, persons who arrange for treatment or disposal of hazardous substances, and persons who transport hazardous substances for treatment or disposal.[4] Specifically exempted from the definition of "owner and operator" are those "person(s), who, without participating in the management of a vessel or facility, hold indicia of ownership primarily to protect [their] security interest in the vessel or facility" (the "Security Interest Exemption").[5] Primarily in response to the Eleventh Circuit's highly criticized decision in U.S. v. Fleet Factors Corp. which indicated in dicta that a secured lender may be liable under CERCLA "if the lender participated in the financial management of the facility to a degree indicating a capacity to influence the corporation's treatment of hazardous waste,"[6] the EPA promulgated the Rule to interpret and clarify the Security Interest Exemption.

Summary of the Rule. The Rule attempts to give lenders flexibility in managing their loans without subjecting them to owner and operator liability under CERCLA. To accomplish this goal, the Rule defines certain key phrases under the Security Interest Exemption, most importantly, "participation in the management."

Under the Rule, lenders will be deemed to have participated in the management if they engage

---

* Vicki Young is an associate at the law firm of Varnum, Riddering, Schmidt & Howlett, Grand Rapids, Michigan, and a member of the firm's Commercial and Financial Services practice group. She is a 1990 graduate of Wayne State University Law School.

in actual participation in the management or operational affairs of the borrower. The "mere capacity to influence, or ability to influence, or the unexercised right to control facility operations," will not be deemed participation in the management.[7] Further, when the borrower is in possession of the facility or vessel, lenders will only be deemed to have participated in the management for two reasons. First, lenders participate in the management if they exercise decisionmaking control over the borrower's environmental compliance. Second, lenders participate in the management if they assume or manifest responsibility for the overall management of the borrower, encompassing the day-to-day decisionmaking with respect to 1) environmental compliance, or 2) all, or substantially all, of the operational[8] (as opposed to financial or administrative)[9] aspects of the borrower other than environmental compliance.[10]

The Rule specifically lists activities which lenders may undertake at the "inception of the loan" and during "policing and workout of the loan" which will not be deemed participation in the management. No act or omission at the inception of the loan will constitute evidence of participation in the management.[11] The Rule provides that lenders may choose without liability whether or not to conduct an environmental inspection of the collateral, or to require borrowers to environmentally clean up collateral prior to making loans.[12] The Rule also provides a non-exclusive list of permissible activities for lenders engaging in loan policing and workouts. While policing the loan, lenders may require borrowers to clean up the facility and comply with environmental rules and regulations, and lenders may monitor or inspect borrowers' facilities and businesses or financial conditions.[13] Lenders may also engage in workout activities such as restructuring or renegotiating loans, requesting payment of additional rent or interest, exercising forbearance rights or rights pursuant to assignments of accounts or escrow agreements, and providing specific or general financial or other advice, suggestions, counseling or guidance.[14]

Finally, the Rule provides guidelines which, if lenders have not previously participated in the management, will continue to protect lenders upon foreclosure of their security interest. The Rule requires lenders to sell, re-lease, or otherwise divest themselves of foreclosed property "in a reasonably expeditious manner, using whatever commercially reasonable means are relevant or appropriate with respect to the vessel or facility, taking all facts and circumstances into consideration."[15] While holding collateral, the Rule allows lenders to "sell, re-lease, liquidate, maintain business activities, wind up operations, and take measures to preserve, protect or prepare the secured asset prior to sale or other disposition."[16] Yet, to maintain the exemption, lenders must advertise or market the facility for sale within twelve months following foreclosure, and after six months, must accept written, bona fide offers to purchase collateral for fair consideration.[17] Finally, lenders will lose the Security Interest Exemption if they "arrange for disposal or treatment of a hazardous substance.[18]

Unresolved Issues. Recent decisions demonstrate how courts may still apply the Rule inconsistently. In Kelley v. Tiscornia,[19] the State of Michigan argued that the lender was liable for clean up costs under CERCLA as an operator of its borrower's contaminated sites because it allegedly controlled the borrower by assuming management of the borrower's day-to-day decisionmaking with respect to the borrower's operations. A representative of the lender served on the borrower's board for a number of years, and when the borrower experienced serious financial difficulties, the borrower, at the suggestion of the lender, replaced its existing management with an outside professional manager recommended by the lender. After applying the Rule, the court granted the lender's motion for summary disposition, holding that the lender was not liable under CERCLA. The court found that the lender was not an operator because it had not participated in the management of the borrower as defined under the Rule.

In contrast, the U.S. District Court for the Southern District of Georgia, considering the Fleet Factors case on remand, applied the Rule and denied cross-motions for summary disposition, holding that whether the defendant's pre- and post-foreclosure activities result in CERCLA liability must be decided at trial.[20] Further, the court's comments suggest that issues of concern to lenders raised in the Eleventh Circuit's earlier opinion may not be resolved. The court noted that the Rule is a "consistent extension" of the Eleventh Circuit's opinion, and merely fills in some of the blanks.

Finally, the Rule does not address a number of collateral issues. The Rule does not protect unsecured lenders, trustees and fiduciaries, although the EPA states in the preamble to the Rule that trustees are not personally liable under CERCLA merely because they hold legal title to property.[21] Further, the Rule fails to address lender liability under other federal statutes such as the Resource Conservation & Recovery Act ("RCRA") and state environmental laws, although the EPA claims that it is currently crafting a rule clarifying lender liability under RCRA. This may pose a significant problem for Michigan lenders. Although the Michigan Environmental Response Act ("MERA")[22] closely parallels CERCLA, with the exception of the provision regarding foreclosure, Michigan's Attorney General, Frank Kelley, filed a complaint challenging the substance and validity of the Rule.[23] The Rule also arguably fails to protect lenders against liability to third parties. Finally, and most importantly, the Rule does not assist lenders in disposing of contaminated collateral. Lenders fear that although the Rule allows them to sell collateral, they will have a great deal of difficulty finding purchasers. Even if lenders can find purchasers, they may have to clean up the collateral or indirectly pay for the clean up by reducing the purchase price.

Bottom line. Although the Rule is a step in the right direction, it is not a panacea. Kelley represents a victory for lenders, but the Fleet Factors decision demonstrates how courts may differ in their application of the Rule. All things considered, lenders are left, once again, hoping for legislative intervention to protect them from CERCLA liability.

1. Case No. 5:90-CV-62 (W.D. Mich. Jan. 12, 1993).
2. 42 U.S.C. §§ 9601-9675 (West 1983).
3. 40 C.F.R. § 300.1100 (1992). The security interest exemption under CERCLA can be found at 42 U.S.C. § 9601(20)(A) (West 1983).
4. 42 U.S.C. § 9607(a) (West 1983).
5. 42 U.S.C. § 9601(20)(A) (West 1983).
6. 901 F.2d 1550, 1557 (11th Cir. 1990), reh'g den., en banc, 911 F.2d 742 (11th Cir. 1990), cert. den. 111 S. Ct. 752 (1991).
7. 40 C.F.R. § 300.1100(c)(1) (1992).
8. Defined as including "functions such as that of facility chief operating officer, or chief executive officer." 40 C.F.R. § 300.1100(c)(1) (1992).
9. Defined as including "functions such as that of credit manager, accounts payable/receivable manager, personnel manager, controller, chief financial officer, or similar functions." 40 C.F.R. § 300.1100(c)(1) (1992).
10. 40 C.F.R. § 300.1100)c)(1)(i), (ii) (1992).
11. 40 C.F.R. § 300.1100 (c)(2)(i) (1992).
12. Id.
13. 40 C.F.R. § 300.1100(c)(2)(ii)(A) (1992).
14. 40 C.F.R. § 300.1100(c)(2)(ii)(B) (1992).
15. 40 C.F.R. § 300.1100(d)(1) (1992).
16. 40 C.F.R. § 300.1100(d)(2) (1992).
17. 40 C.F.R. § 300.1100 (d)(2)(i), (ii) (1992).
18. 40 C.F.R. § 300.1100(d)(3) (1992).
19. Case No. 5:90-CV-62 (W.D. Mich. Jan. 12, 1993).
20. U.S. v. Fleet Factors Corp., No. CV687-070 (S.D. Ga. Feb. 5, 1993).
21. 57 Fed. Reg. 18343 at 18349 (1992).
22. Mich. Comp. Laws Ann. §§ 299.601-.617 (West 1992).
23. Kelley v. Environmental Protection Agency, No. 92-1312 (D.C. Circuit, complaint filed July 28, 1992).

ANNOUNCEMENT FORM THE UNITED STATES BANRUPTCY COURT FOR THE WESTERN DISTRICT OF MICHIGAN CLERK'S OFFICE

The most recent amendments to the Local Bankruptcy Rules took effect March 1, 1993. The purpose of this article is to highlight the major revisions and to underscore certain procedures required by the changes which enable the Clerk's office to process the papers they receive.

Defective Pleadings and Papers, L. Bankr. R. 4.

Some papers which previously were rejected without filing may now be struck after filing. The process to gain judicial review of any rejection or striking of papers is provided for in the Rule.

Asset Protection Report, L. Bankr. R. 7.

All chapter 7 debtors must now file an Asset Protection Report with their petitions.

Motion Practice, L. Bankr. R. 9.

This new rule outlines an optional procedure for acquiring relief under Fed. R. Bankr. P. 9013 and 9014 by notice with an opportunity to object without a hearing. In some instances a hearing may be required. (See the Rule for specific exclusions.) If a party prefers, a hearing may be requested rather than using the notice with an opportunity to object.

When utilizing the notice and opportunity to object, it is imperative that your cover letter states that you desire to proceed by notice and opportunity to object. Enclose with the cover letter the notice, proposed order and proof of service (L. Bankr. R. 9(c) (1)). Do not send any of the necessary papers separately.

Procedure for Motions for Relief from the Automatic Stay, L. Bankr. R. 10.

Relief from the automatic stay may be requested by using the procedure in L. Bankr. R. 9 for notice and opportunity to object. However, in chapter 7 cases the procedure may not be invoked until after the conclusion of the 341 meeting. Employing the notice and opportunity to object procedure is deemed to constitute a waiver by the movant of the time limitations stated in 11 U.S.C. § 362(e).

Motions for Use of Cash Collateral, L. Bankr. R. 11.

This is another completely new rule. The motion must state the adequate protection offered and the movant's position as to the value of each of the secured interests to be protected. Subsection (b) delineates the court's criteria for entering an order for use of cash collateral or to obtain credit on an expedited basis without a hearing.

Chapter 11 Cases, L. Bankr. 19.

Incorporated in this Rule are the previous rules on ballots and annual reports. Notably, semi-annual reports instead of annual reports must be filed.

In addition to the prior rules, two original paragraphs are embodied in this Rule. First, in certain instances the plan must identify the claimants and the amount of the claims within each class. Secondly, unless the court orders otherwise, debtors must petition the court for a final decree upon substantial consummation of the plan so that the case may be closed.

2004 Examinations, L. Bankr. R. 21.

The intent of this Rule is to encourage parties to arrange mutually convenient dates without intervention by the court.

Service of Notices and Orders, L. Bankr. R. 22.

The court is now, in many situations, transferring the burden of service to the parties. (See Exhibit 7 for specifics.) In no asset chapter 7 cases the trustee may give a notice of abandonment to creditors or interested parties by a notice within the 341 meeting notice. That notice will state that the trustee may abandon property in the no asset estate without notice to creditors or interested parties unless a creditor or interested party files with the court a specific request to receive notices of abandonment by the date the § 341 meeting is concluded. The trustee is still required to serve a notice of abandonment on the debtor, the debtors' attorney, and the United States Trustee.

Removal of the former Reaffirmation Rule.

The court is no longer signing reaffirmation orders in most cases. A reaffirmation hearing is set only if the agreement was entered into post-discharge or if the debtor was not represented by counsel. If you desire the court to return your time stamped copies of filed reaffirmation agreements, you must provide a self-addressed stamped envelope.

Copies of the Local Bankruptcy Rules are available at the Clerk's office.

RECENT BANKRUPTCY DECISIONS

In re Century Boat Company, Case No. 91-2270 (6th Cir. February 19, 1993). This decision by the Sixth Circuit involves the priority treatment of an untimely claim in a Chapter 7 case.

The IRS was not scheduled as a creditor and did not receive notice of the case before the claims bar date passed. However, after later learning of the bankruptcy filing, the IRS waited two years to file a proof of claim. The lower courts found that the failure to file a claim promptly after receiving notice of the bankruptcy case deprived the IRS of priority distribution under §726(a)(1).

The Sixth Circuit reversed the decisions of the lower courts. According to the Sixth Circuit, a priority creditor who fails to receive notice of the bankruptcy and consequently files an untimely proof of claim is not barred from receiving priority distribution as a matter of law. At a minimum, the creditor must file its proof of claim before the trustee makes any distribution from the estate and before the bankruptcy court closes the case. Furthermore, the creditor may not receive priority distribution if the court finds bad faith on the creditor's part or undue prejudice to other creditors. Here, there was no evidence of bad faith or unreasonable delay and the trustee had not made any distribution at the time the claim was filed. Therefore, the IRS received priority distribution of its claim.

In re Green, Case No. 91-6204 (6th Cir. February 17, 1993). In this opinion, the Sixth Circuit found that the debtor had a property interest in a family trust under Kentucky law. Therefore, the trustee could pursue a fraudulent conveyance action to recover the debtor's interest in the trust.

In re Doerr, Case No. 1-92-CV-229 (W.D. Mich. January 13, 1993). In this decision by Judge Enslen, the district court affirmed the bankruptcy court's order that the creditor's conduct did not constitute a willful violation of the automatic stay.

After the debtors filed their Chapter 13 petition, the county treasurer sent a computer-generated notice that the debtors' property would be sold at a sheriff's sale if they failed to pay their delinquent property taxes. After being contacted by the debtors' attorney, the county's attorney sent a letter which informed the debtors that their property should not have been included on the list and that the debtors should ignore the notice. A year later, the debtors' property was advertised in the newspaper for a tax sale. The county again sent a letter that it would not sell the property.

The debtors then initiated an action against the county and the county treasurer, charging them with willfully violating the stay.

Under §362(h), an individual injured by any willful violation of the stay shall recover actual damages, including costs and attorneys' fees and, in appropriate circumstances, may recover punitive damages. "Willful" generally means deliberate or intentional. A creditor does not have to specifically intend to violate the automatic stay. Rather, if a creditor has knowledge of the stay, any actions undertaken on its part to collect a debt that can be considered willful conduct will violate the statute.

Here, the two computer-generated notices were sent as a result of the failure to "flag" the debtors' file. An innocent clerical error does not amount to a willful act. Therefore, the bankruptcy court was correct in finding that there was not a willful violation of the automatic stay.

Township of Stambaugh v. ***Ah-Ne-Pee Dimensional Hardwood, Inc.***, Case No. 2:92-CV-81 (W.D. Mich. January 28, 1993). This opinion by Judge Quist involves the validity of a purchase money security interest and a dispute between a Township and creditors over the priority of a security interest.

Pursuant to MCLA §440.9107, "a security interest is a purchase money security interest to the extent that it is (a) taken or retained by the seller of the collateral to secure all or part of its price; or (b) taken by a person who by making advances or incurring an obligation gives value to enable the debtor to acquire rights in or the use of collateral if such value is in fact so used."

According to the district court, a purchase money security interest requires that the person claiming the purchase money security interest intended to loan money for the purchase of the exact items in which one claims the purchase money security interest. The lender must demonstrate that the money given was intended, and actually used, for the purchase of identifiable collateral. In this case, the Township did not have a purchase money security interest in the equipment acquired with the money it loaned to the borrower because the Township did not loan the money for the purchase of specific, identifiable property.

In addition, the Township did not have a purchase money security interest in the equipment purchased because it took a security interest in more than the property which was purchased with the loan money.

Kelley v. ***Tiscornia***, Case No. 5:90-CV-62 (W.D. Mich. January 12, 1993). In this case, authored by Judge McKeague, the Michigan Attorney General filed suit to hold the debtor's lender liable for clean up expenses at the AUSCO site under CERCLA and the Michigan Environmental Response Act ("MERA").

CERCLA liability attaches if each of the following elements occurs: (1) a release of a hazardous substance; (2) at a facility; (3) causing the plaintiff to incur response costs; and (4) the defendant is a "responsible party." The alleged MERA violations were analyzed through CERCLA case law.

The issue was whether the bank was a responsible party which is defined as "any person who at the time of the disposal of any hazardous substance owned or operated any facility at which such hazardous substances were disposed." In determining the bank's CERCLA liability, the court relied on the lender liability rule in 40 C.F.R. 300.1100(c)(1), which requires actual participation in management to impose lender liability and provides in part that the lender will be deemed to be participating in management if it assumes or manifests responsibility for the overall management of the enterprise encompassing day-to-day decisionmaking with respect to all, or substantially all, of the operational aspects of the enterprise, as opposed to financial or administrative aspects of the business.

The district court found that the indicia of bank participation in the management of AUSCO related to financial or administrative aspects, as opposed to operational aspects necessary for a finding of liability. The bank was not held liable as a responsible person even though bank officers served as directors of AUSCO, the bank closely monitored AUSCO's financial affairs, the bank insisted upon its approved outside management and the bank consulted regularly with AUSCO. Accordingly, the district court denied the State's motion for summary judgment, but granted the bank's motion for summary judgment.

In re Grand Traverse Development Company Limited Partnership, Case No. ST 92-83818; ***In re Grand Traverse Development Company, Inc.***, Case No. ST 92-83819; ***In re Grand Traverse Condominium Developers, Inc.***, Case No. ST 92-83820 (W.D. Mich. February 16, 1993). In this opinion, Judge Quist affirmed the bankruptcy court's order denying the debtors' motion for stay pending appeal.

The factors to consider in determining whether to stay the lift of the automatic stay pending appeal are (1) the likelihood that the parties seeking the stay will prevail on the merits of the appeal; (2) whether the movant will suffer irreparable injury unless the stay is granted; (3) whether other parties will suffer no substantial harm if the stay is granted; and (4) whether the public interest will not be harmed if the stay is granted. In addition, the court must consider how the factors should be balanced in light of the overall circumstances of the case.

The district court first found that the debtors did not have a likelihood of success on the merits of their appeal of the decision lifting the automatic stay. The district court rejected the debtors' allegations that the bankruptcy court erred procedurally, failed to give debtors a full hearing, made its decision on an inadequate record and made errors of fact and law. Instead, the bankruptcy court appropriately found that, pursuant to §362(d)(2), the debtors had no equity in the property and could not meet their burden of showing that they would be able to confirm a plan within a reasonable time and that, pursuant to §362(d)(1), lift of the stay was appropriate because of the debtors' bad faith in using the bankruptcy proceedings to delay resolution of their dispute with the creditor.

Next, the district court stated that the debtors' claim that they will suffer irreparable harm by losing the property to foreclosure had some merit in light of the property's unique nature. However, the debtors had meaningful state law remedies in that they retained their redemption rights and claims against the creditor in state court that could result in money damages.

The district court then noted that the greatest harm that could come to others and the public interest from the proceedings was closure of the resort. However, the resort was in more danger of closing due to the debtors' cash shortage than if the resort was in the control of the creditor, which repeatedly stated its intent to continue operations.

After it balanced the factors in light of the overall circumstances, the district court held that the bankruptcy court correctly denied the debtors' motion to stay the order lifting the automatic stay.

In re Barton, Case No. GG 90-83741 (Bankr. W.D. Mich. March 2, 1993). This opinion, authored by Judge Gregg, involves the issues of whether the debtors timely filed an objection to a claim and whether the Internal Revenue Service properly filed an amendment to a claim or untimely filed a new claim.

The debtors' Chapter 13 schedules listed the IRS as an unsecured priority creditor for delinquent taxes. The claims bar date was February 11, 1991. On December 5, 1990, the IRS filed a 100% penalty claim against the debtors for failure to withhold employment taxes in their prior business. On November 21, 1991, the IRS filed an amendment to the proof of claim for failure to withhold taxes, failure to pay FUTA taxes and a

100% penalty for failure to withhold employment taxes. On December 17, 1991, the bankruptcy court entered an order allowing the IRS's additional claim. The order gave the debtors 30 days to file a motion to modify the order or to modify the plan. If no such application or modification was filed, the order was to become final. On January 10, 1992, the debtors filed a motion for additional time to file application for modification of the order. The court granted the motion at the hearing on February 11, 1992 to allow the debtors time to verify the additional claim's accuracy. The order authorizing additional time gave the debtors until April 14, 1992 to file a pleading regarding the IRS's additional claim and also scheduled a status conference for April 14, 1992. On April 14, 1992, the status conference was continued to May 19, 1992. The debtors filed an objection to allowance of the IRS's additional claim on April 27, 1992.

The IRS argued that the adversary proceeding was moot because the debtors' objection was filed after April 14, 1992, and, therefore, was late. According to the court, the order allowing claim was a conditional order which provided that the IRS's claim was allowed unless some type of objection was filed within 30 days. The court stated that the status conference and the extension of time continued to coexist and found that the order allowing claim continued to be conditional until May 19, 1992. Therefore, the order allowing claim never became final and the debtors' objection of April 27, 1992 was timely filed.

The court next addressed the issue of whether the IRS's additional claim was timely filed. When a claimant originally files a timely proof of claim, an untimely additional claim is allowed if it is an amendment. However, the untimely additional claim is disallowed if it is a new claim. In a tax claim context, an attempt by the IRS to add a new type of tax after the bar date is generally disallowed as an untimely new claim. However, if the additional claim adds additional quarters of tax or similar types of taxes, it should be allowed as an amendment.

The court stated that the additional claim for the 100% penalty was the identical tax as claimed in the IRS's original claim except for the addition of subsequent quarters. Therefore, the additional 100% penalty claim was an amendment to the timely filed original claim. In addition, the additional claims for FUTA and withholding were similar to the original IRS claim since they were employment taxes. Therefore, these claims were an amendment to the original claim.

After balancing the equities, the court determined that the amendment should be allowed. The only factor weighing in the debtors' favor was the IRS's failure to timely file for an extension of the bar date. However, the debtors' reluctance to fully assist the IRS in determining their tax liability and failure to file returns were more intolerable than the IRS's failure to request an extension of the bar date. Accordingly, the IRS's amendment was allowable.

STEERING COMMITTEE MEETING MINUTES

A meeting of the Steering Committee of the Bankruptcy Section of the Federal Bar Association for the Western District of Michigan was held on March 18, 1993 in conjunction with a special mid-year meeting of the Section. Members of the Steering Committee present were: Denise Twinney, Tom Sarb, Peter Teholiz, Tom Schouten, Gordon Toering (for Tim Hillegonds), Joe Ammar (for Jim Engbers), Pat Mears, Janet Thomas, Brett Rodgers, John Arndts (for Bob Wright), and Bob Sawdey. Also present were a number of members of the Bankruptcy Section, their guests, and special guest speaker, William A. Brandt, Jr. of Development Specialists, Inc. A brief business meeting was held prior to lunch and Mr. Brandt's presentation.

1. Education Program for 1993 Seminar. Tom Schouten reported that the Educational

Committee had narrowed the program for the seminar to the following topics:

(a) Out-of-Court Negotiations with Secured Lenders. This will be a panel discussion by Jerry Harvey of NBD Bank, Larry D'Haem of First of America Bank, and Steve George of Old Kent Bank.

(b) Ethical Considerations.

(c) Current Developments in Chapter 7 and Chapter 13.

(d) Current Developments in Chapter 11.

(e) Sixth Circuit Revisited.

(f) Open Forum.

As previously noted, Professor Lawrence P. King of New York University Law School will be the keynote speaker.

2. Recreational Arrangements for 1993 Seminar. Denise Twinney reported that there will be a welcoming cocktail party scheduled on Thursday evening, July 29, 1993. Tentative plans include a sunset cruise (or for those prone to sea-sickness, carriage rides around the island) on Friday evening. In addition, bicycles will be reserved for the convenience of seminar attendees and their families. Although the Grand Hotel golf course is booked for a weekend tournament, golfing will be available at another nine-hole course on the island.

3. 1994 Seminar Location. Janet Thomas reported that the 1994 Seminar Location Committee is gathering information about possible sites and will have a report for the Steering Committee at its April meeting.

4. Steering Committee Liability Policy. Brett Rodgers reported that he had reviewed the general liability policy of the Federal Bar Association for the Western District of Michigan. That liability policy covers the Federal Bar Association and Bankruptcy Group's Steering Committee for events sponsored by the Steering Committee, wherever located, so long as there is no cash bar and the complimentary bar is staffed by members of the association.

5. Judge Nims' Portrait. Brett Rodgers unveiled the portrait of Judge Nims that has been obtained for hanging in the Bankruptcy Court. Arrangements will be announced at a later date for a hanging ceremony.

6. Bob Sawdey then introduced the guest speaker, William A. Brandt, Jr., and president chief executive officer of Development Specialists, Inc. Development Specialists, Inc. provides management consulting services in the areas of reorganization, bankruptcy, turnaround management and business workouts.

7. Presentation by William A. Brandt, Jr. Bill Brandt first discussed the reorganization and insolvency workout business and his 20 years in insolvency consulting. Mr. Brandt noted that some businesses are simply better off liquidated. The goal should always be to achieve a maximum return for the various constituencies. One should take a look at the outset to determine what the parties would get if the towel was thrown in immediately and the assets liquidated. One also has to ask oneself where the business is going. For instance, is the company in a business which has no future, such as the eight-track tape business.

Mr. Brandt then discussed the future of the bankruptcy/workout business. He noted that the days of the mega case are over. In his discussions with counsel all over the country, the most likely case now is the middle market or family-owned business. Over the next five to six years, that will be the principal type of case that will be seen by the bankruptcy courts. However, this type of case doesn't need the turnaround people and bankruptcy professionals that are demanded in the larger cases. The leveraged buyout cases have simply run their course. There also is increasing competition in the turnaround business. Cases have become more national in scope. Even the Autodie case, on which

Bill Brandt's firm worked, did not include local practitioners at the outset. Mr. Brandt indicated that his firm is not a typical national firm in that it has local staffing and still needs local participation by bankruptcy professionals. Mr. Brandt noted that the U.S. Trustee system tends to be more of a regional system than a nation-wide system in that there are no unified national policies.

One problem noted by Bill Brandt is the increasing amount of priority claims that are arising in cases. He also noted that bankruptcy practitioners help deal with risks. Mr. Brandt stated that lenders in the current environment are less likely to take a risk. If you remove the risk from the system, there is a decline in need for bankruptcy practitioners.

Finally, Mr. Brandt discussed the pre-packaged Chapter 11, noting that they are principally tax-driven. It is hard to do out-of-court workouts because of the loan forgiveness provisions of the Internal Revenue Code. This problem and other tax problems are one reason for filing a pre-packaged Chapter 11.

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 February 28, 1993. These filings are compared to those made during the same period one year ago and two years ago.

	Feb. '93	Feb. '92	Feb. '91
Chapter 7	691	949	851
Chapter 11	21	21	31
Chapter 12	6	5	2
Chapter 13	222	310	316
	940	1,285	1,200

EDITOR'S NOTEBOOK

You will recall that Ms. Linda Slotsema, an aide to Congressman Paul Henry, presented a report to the Bankruptcy Steering Committee regarding the current status of bankruptcy legislation (see the January, 1993 edition of the Bankruptcy Law Newsletter). The American Bankruptcy Institute reports in its legislative bulletin that the Bankruptcy Amendments Act of 1993 (S.540) was introduced in the Senate on March 10, 1993 by Senators Heflin, Grassley and ten others. The bill would make the most significant changes to the Bankruptcy Law since the 1978 passage of the Code.

The 1993 Act would provide increased compensation for trustees, increase the eligibility limits for Chapter 13 to $1 million for aggregate debt, double the dollar amounts for exemptions under §522, extend the sunset date for Chapter 12 from October 1, 1993 to October 1, 1998, and treat minimum funding contributions to employee pension plans that accrue on or after the case is filed as administrative expenses. Among the commercial proposals are the creation of a new Chapter 10 pilot program for small business debtors with debts of $2.5 million or less, a limitation of the automatic stay protection in single asset real estate cases, the protection of security interests in post-petition rents from hotels, enhancements of protections given to interests in pension plans in

bankruptcy, a reversal of the Deprizio rule, and an extension of the right of a seller to reclaim goods to 30 days.

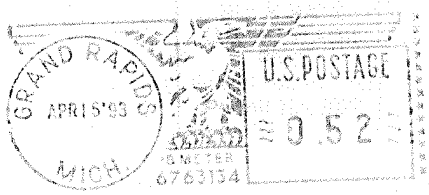
Among the consumer bankruptcy proposals are provisions to prevent stripping down of mortgages in Chapter 13 and to define household goods for purposes of §522. Finally, the concept of compensation for professional fees would be based on "comparable" services, but would include such factors as benefits derived from the services, the size of the estate, and the amount of funds available for distribution to secured and unsecured creditors. Finally, the bill would appoint a Bankruptcy Review Commission to investigate and revise the Bankruptcy Code as a whole.

One of the issues that frequently arises in a bankruptcy case is the priority of liabilities of the debtor for cleanup of offsite waste disposal sites. A recent non-bankruptcy case decided by Judge Rosen of the United States District Court for the Eastern District of Michigan in the case of City Environmental, Inc. v. U.S. Chemical Company, et al., (Lawyers Weekly No. Ed-7850) may shed some light on this issue. In the City Environmental case, the issue was whether or not a purchaser of assets was liable for the cleanup of toxic waste disposed of offsite by the seller. After finding that the transaction was an arms length asset purchase for fair consideration, Judge Rosen held that the purchaser (who operated the division at the same site with the same employees and same customers as the seller) was not liable for the offsite disposal costs. That logic would suggest that the debtor-in-possession or trustee, although perhaps liable on a pre-petition basis for such offsite clean up costs, would not be liable for an administrative expense for such clean up costs.

By Thomas P. Sarb

Western Michigan Chapter of the
Federal Bar Association
250 Monroe Avenue, Suite 800
Grand Rapids, MI 49503

X X X GRAND RAPIDS MI 2119 041593 X



PEM

PETER A TEHOLIZ
HUBBARD FOX THOMAS WHITE & BENGTSON
5801 W MICHIGAN AVE
P O BOX 80857
LANSING MI 48908-0857

48908-0857