BANKRUPTCY LAW NEWSLETTER

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ANNOUNCEMENT FROM THE BANKRUPTCY COURT

[Editor's Note: Mark Van Allsburg, Clerk of the Bankruptcy Court for the Western District of Michigan, has requested that we publish General Order 5, on Filing Faxed Pleadings, which was issued by the Court on October 13, 1993. Following General Order 5, for your information, are summaries of General Orders 1, 3, and 4, which have little impact on the practitioner, and the text of General Order 2, dealing with which notices and orders can be signed by the Clerk on behalf of the Court.]

UNITED STATES BANKRUPTCY COURT FOR THE WESTERN DISTRICT OF MICHIGAN

GENERAL ORDER 5
October 13, 1993
FILING FAXED PLEADINGS

Whereas the Bankruptcy Court receives an ever increasing number of motions, pleadings and other documents by facsimile transmission, and

Whereas, the Committee Comments to Bankruptcy Rule 5005 as amended on October 1, 1993 indicate that this rule does not require Bankruptcy Courts to accept documents for filing which are received by facsimile transmission, and

Whereas the Judicial Council of the United States has adopted a policy which permits the various courts to establish policies concerning such documents,

NOW, THEREFORE, IT IS ORDERED as follows:

1. The Clerk of this Court shall not accept documents intended for filing which are transmitted to the court by facsimile transmission. Documents received in such a manner need not be docketed or filed. However they will be given to the person to whom the fax is addressed.

2. Documents received by facsimile transmission may be destroyed without filing.

3. Copies of documents transmitted to a third party and filed with this court with one or more original signatures shall be accepted and filed but may be considered defective and may be stricken pursuant to Local Rule #4.

/S/ Hon. Laurence E. Howard

/S/ Hon. James D. Gregg

At Grand Rapids, Michigan
this 13th day of October, 1993

/S/ Hon. Jo Ann C. Stevenson

GENERAL ORDER 1

Issued February 1, 1993. Authorizes promulgation of revised Local Bankruptcy Rules, effective March 1, 1993.

GENERAL ORDER 2
March 1, 1993

Whereas, the Bankruptcy Court is required to issue numerous routine, ministerial orders which require the exercise of no judicial discretion, and

Whereas, it appears to this Court that the power to sign such orders and notices can be delegated to the Clerk of the Court and specific deputy clerks,

NOW, THEREFORE, IT IS ORDERED that the Clerk of this Court, and those deputies designated by the Clerk shall have authority to sign the following notices and orders on behalf of this Court:

1. Orders for Relief.

2. Orders and Notice of Stay -- The Clerk is authorized to sign and distribute the form which is attached to this order. [Forms not attached here -- available from Clerk's Office.]

3. Orders Allowing Installment Payments of Filing Fees.

4. Interim Disbursement Orders -- Provided that such orders are previously approved by the United States Trustee and are for a sum of $500 or less.

5. Notice and Orders of Abandonment.

6. Final Decrees.

7. Orders Approving Claims (Chapter 13 cases).

8. Orders to Employer to Pay Trustee.

9. Orders Reducing Claims when requested by a creditor to reduce, disallow or withdraw that creditor's claim.

10. Orders Authorizing Debtor to Borrow Funds if previously approved by the standing trustee and if no judge is available to sign the order.

11. Writs of Garnishment, Executions and Orders to Pay.

12. Orders striking pleadings, motions or other documents intended for filing which are defective because they fail to meet requirements imposed by the Bankruptcy Code, the Federal Rules of Bankruptcy Procedure, or these local rules.

/S/
Hon. Laurence E. Howard

/S/
Hon. James D. Gregg

/S/
Hon. Jo Ann C. Stevenson

GENERAL ORDER 3

Issued February 1, 1993. Authorizes the standing Chapter 12 and Chapter 13 trustees to charge an administrative charge of $.50 per notice for each notice sent by the trustee which would otherwise ordinarily be sent by the Court.

GENERAL ORDER 4

Issued April 22, 1993. Directs the Clerk of the Court to collect a fee from all funds invested at interest in the Registry of the Court of ten percent of income earned. The collection is to be made at the time the Clerk distributes any funds from the account.

FROM THE CLERK OF THE BANKRUPTCY COURT

NEW FEES: The appropriations bill which funds the Judiciary for this fiscal year contains new filing fees for certain bankruptcy cases. The increase in the filing fees does not change the administrative fee of $30 which still applies to chapter 7 and 13 cases. These changes go into effect on November 26.

Chapter	Old Fee	New Fee	Administrative Fee
7	$120.00	$130.00	$30.00
13	$120.00	0.00	$30.00
11	$600.00*	$800.00	$ 0.00
12	NO CHANGE		
9	NO CHANGE		

* Except a railroad which is $1000.00

HOLIDAY CLOSING: The Bankruptcy Court will be closed on Friday, November 26. This day will be treated as an official holiday for purposes of calculating deadlines and bar dates.

RECENT BANKRUPTCY DECISIONS

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: McLaren, Case No. 92-3966, 1993 U.S. App. LEXIS 21776; 1993 WI 325702 (6th Cir. August 30, 1993). William Longo was the vice-president of his family's business until it sold in 1984. Longo made several million dollars from the sale. An unsophisticated investor, he turned to debtor/appellant, McLaren, a stockbroker and financial advisor, for investment advice. At first, Longo was considered investing in municipal bonds. Over time, McLaren persuaded Longo to invest in business ventures in which McLaren had an interest. These investments included limited partnerships involved in strip shopping centers and oil & gas exploration. On December 22, 1998, McLaren filed a Chapter 11 petition. On January 23, 1990, his case was converted to Chapter 7. McLaren then owed various creditors in excess of $10,000,000, including more than $868,000 to Longo. Longo then filed an adversary proceeding against McLaren, contending that he had been fraudulently induced to invest his money with McLaren. Consequently, Longo argued, these obligations were non-dischargeable debts under 11 US.C. 523(a)(2), (4) or (6) of the Bankruptcy Code.

The bankruptcy court found for Longo, ruling that: a) the debts were nondischargeable under 11 U.S.C. 523(a)(2); b) McLaren's 2004 Exam was properly admitted into evidence at trial; and c) McLaren was not entitled to a jury trial. The district court affirmed and McLaren appealed.

In affirming the lower court decisions, the Court of Appeals held that McLaren did not have a right to a jury trial since a dischargeability proceeding is equitable in nature for which a party cannot obtain a jury trial. ***Granfinanciera v. Nordberg***, 492 U.S. 33 (1989). The Court also stated that it was permissible for the 2004 transcript to be admitted at trial since McLaren's statements constituted party opponent admissions under F.R.E. 801(d)(2). Moreover, debtor was represented by counsel who actively participated at the exam; debtor's testimony was transcribed by a court reporter; debtor never moved to have the exam treated confidentially; debtor attached the exam to one of his pleadings filed in the trial court; and debtor never invoked at the exam the Fifth Amendment privilege against self-incrimination.

Finally, the Court of Appeals found that the evidence introduced at trial supported the finding that McLaren acquired the investment money from Longo through a series of misrepresentations. McLaren misrepresented his expertise and successes as to oil and gas ventures. He solicited funds supposedly for use in two shopping center ventures, when in fact the money was used for his personal finances. All of these misrepresentations were material, made with the intent to deceive, and Longo reasonably relied on them to his detriment.

In re Bell & Beckwith, Case No. 92-3676, 1993 U.S. App. Lexis 23740, 1993 WI 349416 (6th Cir. September 16, 1993). Debtor, Bell & Beckwith (B&B), was a stock broker/limited partnership in Toledo, Ohio. It filed for bankruptcy in 1983, after it discovered its managing and general partner had embezzled $47,000,000. In 1974, B&B set up a profit sharing retirement plan (the Plan). Garnishee defendant, Society Bank & Trust (Society), served as trustee of the Plan, which was approved by the IRS as an ERISA-qualified pension plan. The Plan, as required by ERISA, had an anti-alienation clause, which prevented Plan benefits from being subject to, inter alia, garnishment. Additionally, the Plan also required that contributions to it could only be made if B & B had net income from which to make contributions.

The trustee, Patrick McGraw, initiated adversary proceedings against the general partners and obtained judgments against them. McGraw then attempted to garnish their individual interests in the Plan. Society objected to the garnishment on grounds that the anti-alienation provisions in the Plan exempted it from garnishment. The bankruptcy court agreed, stating that ERISA shielded the partner's assets in the Plan from Garnishment. McGraw appealed and the district court reversed, holding that he should have the opportunity to prove that the contributions to the Plan were invalid as preferences or invalid because they were not supported by net income.

On appeal, Society argued that the Supreme Court has drawn a bright line rule concerning the alienability of pension plan benefits: they may not be alienated either voluntarily or involuntarily, inside or outside of bankruptcy, or for equitable reasons.

In re Dewberry, Case No. HG 93-80051 (Bankr. W.D. Mich. September 21, 1993). The plaintiff in this case challenged the United States assessment under 26 U.S.C. § 6672 of a 100% penalty against him as a responsible person for willful failure to collect, account for and turn-over withholding taxes on behalf of a corporation for which he was an officer, director and 50% shareholder. Plaintiff challenged the procedure by which the IRS assessed the penalty against him and sought to invalidate the assessment entirely. Judge Howard denied Plaintiff's motion for summary judgment, but granted Plaintiff's motion insofar as it sought an abatement of the interest.

Plaintiff objected to the penalty assessment on the basis that 1) he was not sent proper notice and demand as required under 26 U.S.C. § 6303; 2) the notice was not made within the statute of limitations; and 3) the IRS violated its own internal procedures in making the assessment against him.

26 U.S.C. § 6303 requires the IRS, within sixty days after the assessment, to send notice and demand for payment to the taxpayer. The Court noted that courts generally liberally find that an assessment has been made properly. Technical defects are ignored if the taxpayer is not prejudiced. The Court held that the IRS did not have to produce the original assessment and demand notice. Further, the Court held that even if the actual notice was not received by the taxpayer, it would be sufficient if the notice had been sent to the taxpayer's last known address. The Court concluded that Plaintiff received proper notice and demand and that such notice was properly sent within the three year statute of limitations. The Court also held that internal procedures for the IRS are "directory" and not mandatory. Therefore, the IRS' failure to follow such internal procedures would not be a reason to invalidate the assessment entirely.

In re Marcellus Wood and Trucking, Inc., Case No. GK 91-86182 (Bankr. W.D. Mich. September 22, 1993). The debtor, Marcellus Wood and Trucking, Inc., filed an adversary proceeding against the Michigan Employment Security Commission seeking a redetermination of the debtor's tax liability to the MESC pursuant to 11 U.S.C. § 505. Judge Gregg granted the MESC's motion for summary judgment holding that 11 U.S.C. § 505(a)(2)(A) prevents the Court from determining the debtor's tax liability. The Court further held that even if the Court were not precluded from making such determination, the Court would decline to exercise its discretion under 11 U.S.C. § 505(a)(1).

The Court reviewed the requirements of 11 U.S.C. § 505(a)(2)(A), noting that the Court may not review the debtor's tax liability if there has been a contest and adjudication of the debtor's tax liability by a judicial or administrative tribunal of competent jurisdiction before the commencement of the debtor's bankruptcy case. This case turned on whether the debtor's tax liability was "contested and adjudicated."

The debtor failed to timely file a review request regarding its contribution rate determination. Under Michigan law, a taxpayer may untimely request a redetermination of the determination only "for good cause." The debtor requested a redetermination, but the MESC denied the debtor's request. The debtor timely requested a referee hearing, at which testimony was given under oath. The referee held that the debtor did not show good cause for the late request. The referee's decision was upheld by the MESC Board of Review. Thereafter, the debtor filed an untimely application to reopen and review the Board of Review's opinion, which the Board denied.

The Court held that the debtor had vigorously but unsuccessfully challenged the MESC's determination of its tax liability. At the referee hearing, the debtor had an opportunity to present "newly discovered material facts" or "additional or corrected information." Further, the debtor could have appealed the Board of Review's decision to the Supreme Court. The Court held that although the debtor failed to invoke appropriate state remedies in a timely fashion, its pursuit was considered a challenge of the assessment. Therefore, under 11 U.S.C. § 505(a)(2)(A), the Court was precluded from determining the Debtor's tax liability to the MESC.

In dicta, the Court noted that even if the merits of the debtor's claim were not considered in its tax liability challenge, the Court could still decline to redetermine the MESC's determination of the debtor's tax liability. Under 11 U.S.C. § 505(a)(1), the Court has the discretion to redetermine the debtor's tax liability. The Court noted that the policy of § 505 is to protect the estate from tax liabilities that the debtor negligently or indifferently fails to challenge. In this case, the only beneficiary of the Court's redetermination of the debtor's tax liability would be the debtor's principals and shareholders, rather than the estate. Because there was no benefit to the estate, the

Court could decline to redetermine the tax liability under 11 U.S.C. § 505.

In re Copeland, Case No. 1:93-CV-422 (W.D. Mich. September 10, 1993). Judge Quist dismissed an appeal by debtor's counsel regarding Judge Stevenson's rejection of its supplemental application for interim fee compensation for lack of jurisdiction. In In re Copeland, Case No. SL 91-86479, Slip Op. (Bankr. W.D. Mich. June 2, 1993), Judge Stevenson explained the Court's methodology in reviewing fee applications under the requirement of 11 U.S.C. § 330(a) that the Court award "reasonable compensation for actual and necessary work." The bankruptcy court denied debtor's counsel's application for an additional $370.00 in interim compensation based on its ruling that the debtor's counsel failed to comply with the Fee Guidelines Memorandum and application of the lode star method of calculation as set forth in the case of In re Boddy, 950 F.2d 334 (6th Cir. 1991).

The U.S. Trustee argued that the District Court lacked jurisdiction because the order was a denial of interim compensation and, therefore, interlocutory. The Chapter 13 is still pending, the appellant remains debtor's counsel, and the appellant may seek additional fees at a later date. The District Court noted that under 28 U.S.C. § 158(a), the Court's jurisdiction depends on "finality" of the bankruptcy court's decision. Citing Boddy, the Court noted that interim awards of compensation under 11 U.S.C. § 330 and 331 are generally interlocutory. However, an order may be considered final "where the order conclusively determine[s] the entire section 330 compensation to be paid to the attorneys," or where the order of interim fees is "no longer subject to modification by the bankruptcy court." The Court held that the order was not final because debtor's counsel was still working on behalf of the bankruptcy estate, could seek additional fees at the post-confirmation stage and the fee order could be reviewed on appeal following a final judgment. Therefore, the Court held that it lacked jurisdiction to review the appeal.

The Court rejected debtor's counsel's argument that, at minimum, the fee order is final with regard to compensability of time spent preparing fee applications. The Court noted that although paragraph 11 of the Western District of Michigan Bankruptcy Judges' "Memorandum Regarding Allowance of Compensation and Reimbursement of Expenses for Court-Appointed Professionals" allows for compensation for "reasonable time spent in preparing an application for compensation," preparing fee applications does not benefit the estate, but only the attorney requesting the fees. The Court held that where the case is a routine consumer case, time spent preparing the fee applications is unreasonable within the meaning of the fee memo.

STEERING COMMITTEE MINUTES

A meeting of the Steering Committee of the Bankruptcy Section of the Federal Bar Association of the Western District of Michigan was held on October 29, 1993 at the Peninsular Club. Present: Denise Twinney, Peter Teholiz, Brett Rodgers, Dan Casamatta, Pat Mears, Steve Rayman, Tim Hillegonds, Tom Schouten, Jeff Hughes, and Tom Sarb. Also present were Judge Gregg, his law clerk, Anne Lawton, and Clerk of the Court, Mark VanAllsburg.

1. Introduction. Judge Gregg introduced his law clerk, Anne Lawton, who taught business law at the University of Michigan for three years. Judge Gregg announced that Ms. Lawton would be teaching an advanced bankruptcy class at Cooley Law School with him in 1993-1994.

2. Educational Program for the 1994 Bankruptcy Section Seminar at Traverse City Park Place Hotel on July 21-23. Steve Rayman, chairperson for the education program for the 1994 Bankruptcy Seminar, discussed possible speakers for the 1994 seminar. He also discussed a possible change in format under which there might be breakout sessions allowing direct participation by smaller groups of lawyers. For instance, Judge Gregg has volunteered to lead or sit on a panel in a breakout session discussing a topic such as claims or non-dischargeable debts. The attorneys participating in the breakout session would be assigned approximately five cases to read in preparation for discussion at the meeting. Judge Gregg also indicated that, based upon the fact that the annual seminar has an excellent reputation throughout the country based upon the reports of prior years' speakers, it would not be difficult to attract first-rate judges and lawyers as speakers.

Following discussion, the Steering Committee authorized Steve Rayman to proceed with extending invitations to speak to John Logan, Chief United States Trustee for the United States, Sally Neely of Sidley & Austin of Los Angeles, California, Judge John Schwartz,

Chief Judge for the United States Bankruptcy Court for the Northern District of Illinois, and Judge David T. Stosberg of the United States Bankruptcy Court for the Western District of Kentucky. Steve will further pursue setting up panels and breakout sessions which the invited speakers would lead together with attorneys from the Western District of Michigan.

3. ABA Brown Bag Programs. Pat Mears discussed the recent recommendation of the American Bar Association that low-cost "brown bag" lunch programs be sponsored at the local level at which interested attorneys could meet for approximately 1 1/2 hours over lunch to discuss specific topics. The Committee authorized Pat Mears to pursue the establishment of brown bag programs.

4. Litigation Workshop. Brett Rodgers discussed the possibility of having a program in early Spring, 1994, on litigation skills for bankruptcy attorneys that would be a short form of the NITA or University of Michigan Advocacy Programs. The consensus of the Committee was that Brett Rodgers should pursue investigation of the costs and interest in establishing such a program.

5. Old Business. Peter Teholiz reported that he had investigated the need for certification of the annual seminar for continuing legal education credits. At this point, there appears to be no real need for such certification because both Michigan and Illinois, the two most likely sources for attending attorneys, do not require continuing legal education credits. Although Michigan requires CLE for younger attorneys, they are on specific topics and do not deal with practice areas. However, for future reference, it will be important to maintain a file of program materials and brochures from prior years in the event that Michigan moves to require CLE credits.

6. New Business. Judge Gregg indicated that he is considering publishing a request in the Newsletter for submission of comments to either the Newsletter editor or the president of the Steering Committee, regarding making his motion day more efficient. The comments would then be passed on to him on a confidential basis. He is also considering putting together a questionnaire seeking input regarding his performance as a judge as he approaches the mid-term of his appointment, to be handled on a like basis.

COMMENTS AND SUGGESTIONS REQUESTED FOR BANKRUPTCY SEMINAR

The Bankruptcy Steering Committee requests that all members of the Bankruptcy Section submit their comments with regard to the 1993 seminar and their suggestions for the educational program for the 1994 seminar, which will take place on July 21 - 23 at the Park Place Hotel in Traverse City. Comments and suggestions should be submitted to Steve Rayman of Rayman & Hamlin at 303 North Rose Street; Ste. 440; Kalamazoo, Michigan 49007. Please reserve these dates on your calendar.

ARTICLES SOLICITED

We generally attempt to run a lead article in each monthly Newsletter on a topic of current interest. Anyone who is interested in submitting an article for the Newsletter should contact Tom Sarb at (616) 459-8311.

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 September 30, 1993. These filings are compared to those made during the same period one year ago and two years ago.

	1/1/93- 9/30/93	1/1/92- 9/30/92	1/1/91- 9/30/91
Chapter 7	3,497	4,087	3,774
Chapter 11	84	98	123
Chapter 12	29	21	21
Chapter 13	1,096	1,211	1,283
	4,706	5,417	5,201

ANNOUNCEMENT FROM MICHCON

[Editor's Note: MichCon requested that we run the following announcement. The Court, of course, is the final arbiter of how much of a deposit is necessary to provide a utility with adequate assurance under §366.]

Michigan Consolidated Gas Company reminds Bankruptcy attorneys that Section 336 of the Bankruptcy Code requires the Debtor to provide adequate assurance of payment in the form of a security deposit, in order to provide new or continued gas service to a Debtor. The deposit must be paid within 20 days of the entry of the Order for Relief for continued gas use and within 20 days of the request for new service. MichCon requires three times the average monthly usage as adequate assurance for gas service. Refer to Section 366 of the Code if you have any questions.

EDITOR'S NOTEBOOK

Congratulations are in order to Vicki Young, who prepares the Recent Bankruptcy Decisions summaries for the Western District of Michigan, and her husband Neal, upon the birth of their daughter, Helen Ann, on October 17, 1993. In service above and beyond the call of duty, Vicki, in addition to producing a beautiful daughter, also managed to produce this month's current case summaries.

In important cases decided outside of Michigan and this Circuit, two more courts of appeal have joined with the Sixth, Seventh, and Tenth Circuits in applying the one year preference period to a transfer to an outside creditor when the transfer benefits an insider guarantor. In re Southmark Corp., 993 F.2d 117 (5th Cir. 1993) and In re Suffola, Inc., 2 F.3d 977 (9th Cir. 1993). Southmark is interesting in that, despite assuming that Deprizio applied, the court found that the payment there was analogous to the debtor's payment to the IRS in Deprizio and, therefore, was not avoidable although it benefited the insider. In Southmark, the debtor had guaranteed the indebtedness of its wholly-owned subsidiary to First Nationwide Bank (FNB). When some of the subsidiary's notes went into default, Southmark made a significant payment to FNB, approximately seven months before filing its bankruptcy. Although the payment benefited its subsidiary, the Fifth Circuit found that the subsidiary had no contingent claim against its parent company in connection with the debt to FNB and, thus, the transfer to FNB did not benefit the subsidiary "as creditor" under §547(b)(1). The Fifth Circuit further held that Southmark could not rely upon an unrelated debt owing to its subsidiary to avoid the transfer as an insider preference.

There have been two more cases that suggest that a purchaser of assets from a debtor may not in fact take those assets "free and clear" of claims, particularly product liability claims relating to those assets. In one, the bankruptcy court ruled that the purchaser of assets

could not bring an action in the bankruptcy court relying upon its "arising under, or related to" jurisdiction to enjoin product liability actions brought against it on a successor liability theory. In re Cary Metal Products, Inc., 1993 WL 342347 (Bankr. N.D. Ill. 1993). In another case, the purchaser of a Chapter 11 debtor's assets was held to have failed to show "other cause" under §350(b) that would warrant the reopening of the case to seek an injunction against product liability actions against it. In re Yoder Company, 1993 WL 347800 (Bankr. N.D. Oh. 1993).

Finally, I am pleased to announce that Peter Teholiz has graciously volunteered to take over as editor of the Newsletter, effective with the January, 1994 edition. On behalf of the Bankruptcy Section of the FBA, I thank him for undertaking this obligation and assuring the continuation of this Newsletter, which is a hallmark of our chapter.

Thomas P. Sarb

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