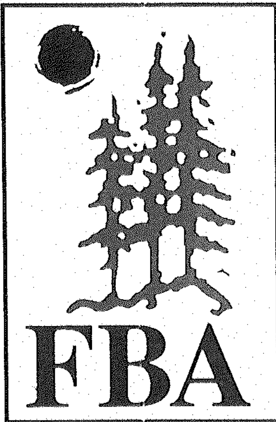

FEDERAL BAR ASSOCIATION

BANKRUPTCY SECTION NEWSLETTER
OCTOBER 2005

Inside this issue:

Implementing BAPA	1
Information on BAPA	2
Pre BAPA statistics	2
From the clerk's office	3
Summer seminar	3
News on appeals	4
Case summaries	INS

IMPORTANT DATES:

18th annual FBA Bankruptcy Seminar: August 17-19, 2006 at the TREE-TOP GOLF RESORT, near Gaylord, Michigan . THIS WILL INCLUDE EXETENSIVE COVERAGE OF BAPA.

For more information contact:

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Mary Hamlin

mhamlin@chpt13.com

October 17, 2005: Effective date for most of BAPA.

Something missing? Let us know about other dates!

IMPLEMENTING BAPA

New Rules and Official Forms

Obviously, the changes from the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 ("BAPA") were extensive. They required changes to the bankruptcy rules and official forms. The Advisory Committee on Bankruptcy Rules and the Committee on Rules of Practice and Procedure adopted Interim Bankruptcy Rules. On September 28 2005, our court adopted these Interim Rules by Administrative Order 2005-4. The Interim Rules are effective for bankruptcy cases commenced from October 17, 2005, until final rules are promulgated and effective under the regular Rules Enabling Act process, which typically is a multi year process.

The Judicial Conference adopted amended and new Official Forms. This includes the mean test forms, but many of the forms that we have used over the years changed, too. Practitioners are encouraged to read all of these forms so that you are familiar with these changes. Note also the commentary to the forms. This highlights particularly what changed, why and how.

The bench, bar, and public and may send written comments on the use of the Interim Rules and Official Forms in preparation for the ultimate publication of permanent rules and forms. Comments may be sent to:

Peter G. McCabe, Secretary
Committee on Rules of Practice and Procedure
Thurgood Marshall Federal Judiciary Building
Washington, D.C. 20544

To see the Interim Rules and Official Forms, start at: http://www.uscourts.gov/rules/interim.html .

As of the date of this printing, software providers are sending out updates for the new forms for use under BAPA.

GOVERNMENTAL INFORMATION ON BAPA

The federal United States Trustee website has necessary information which you will need to practice under BAPA. Start with http://www.usdoj.gov/ust/bapcpa . You will see information regarding:

1. Means testing. This contains the census and IRS data for use with the means test.

2. Credit Counseling and Debtor Education. The UST has now a**pproved credit counseling agencies for the Western District of Michigan.** There are 3 approved agencies as of the date of this publication:

GreenPath, Inc., 38505 Country Club Drive, Suite 210, Farmington Hills, MI 48331-3429, 800-630-6718 www.greenpath.com . This is the only agency with local offices.

Money Management International Inc., 9009 West Loop South 7th Floor, Houston, TX 77096-1719, 877-918-2227. www.moneymanagement.org .

Springboard Nonprofit Consumer Credit Management Inc., 4351 Latham Street, Riverside, CA 92501, 800-947-3752. Attorneys can register with this agency, and receive various services on line related to filing bankruptcies and getting discharges. www.credit.org .

3. State Domestic Support Enforcement Agencies. Trustees are required to provide notices to such agencies in certain cases under BAPA. This site provides lists of state agencies.

SOURCES OF INFORMATION ON BAPA

If you are still seeking to learn about BAPA, look at these sources:

1. DVD from the National Association of Chapter 13 Trustees. Includes work by Judge Keith Lundin and Chapter 13 Trustee, Hank Hildebrand. The 5 disc set costs $100. Order this through Brett Rodgers' office: 616.454.9638 or www.nactt.com/dvd_orderform.pdf.

2. ABI 7 session seminar archive: see www.abiworld.org .

3. FIRST ANNUAL DETROIT BANKRUPTCY CONFERENCE: Practice under the new bankruptcy law: November 11, 2005, Sheraton Novi, Novi, Michigan. See abiworld.org .

Federal Bar Association

Preliminary Statistical Information from Dan Casamatta shows:

From 1/1/05 to 4/21/05 (the date the BAPA was signed) there were 1649 filings, an average of 15/day, (averaged as 7 days per week). From 4/22/05 to 9/30/05 there were 7,605 filings, an average of 47/day. From 10/1/05 to 10/7/05 there were 1115 filings, an average of 159/day. From 10/8 to 10/12/05 there were 1588 filings, an average of 318/day. From 10/13 to 10/16 (at about 3:30 PM) there were 3337 filings, an average of 834/day.

In the four days prior to the effective date of BAPA, filings were: 10/13/05: 750; 10/14/05: 1342; 10/15/05: 852; 10/16/05 (3:30PM): 393.

FROM THE CLERK'S OFFICE

Fee increases. The adversary proceeding filing fee has already increased to $250, effective August 16, 2005. Other fee increases are effective October 17, 2005 (BAPA):

Chapter 7 filing fee: $274.00

Chapter 13 filing fee: $189.00

Chapter 11 filing fee: $1039.00

Chapter 7 reopen fee: $220.00

Chapter 13 reopen fee: $150.00

Chapter 7 deconsolidation fee: $220.00

Chapter 13 deconsolidation fee: $150.00

Court Move. The Court closed on Thursday, September 29, 2005 was ready for business in its new location of One Division N.W., Grand Rapids, Michigan on Monday, October 3, 2005. The court website has maps. The Court extended all time periods that were to expire on Thursday, September 29, 2005 or Friday, September, 30, 2005 to Monday, October 3, 2005, to the extent the Court is permitted to do so under the Bankruptcy Code and Bankruptcy Rules. See Administrative Order 2005-3, signed August 3, 2005. The court will provide information regarding the move, hearing locations and the court IP address at 1-866-588-7997 or check the website.

Practice tip: If you would like to receive ECF notices in any proceeding, simply add the case number to a list in your UTILITIES, then MAINTAIN YOUR ECF ACCOUNT, then EMAIL INORMATION. Add the case number in the box for "notices in additional cases". This will be extremely helpful for trustees, who are taken off the ECF notice list just prior to the entry of an order to convert the case, among other things.

SUMMER SEMINAR

We held the annual FBA Bankruptcy Section summer seminar at Boyne Highlands, from July 27-29, 2005. Understandably, much of the seminar was consumed by BAPA. It was a great time for lawyers and others to begin the process of learning about BAPA and see the substantial work ahead of us to prepare to practice under the new law. All of our judges attended as did other judges from across the country. Our US Trustee staff also presented along with local and visiting speakers of all kinds. Many attorneys from our district attended for the first time.

For those who could not attend, materials are still available. Contact Lori Purkey at purkey@millercanfield.com .

Our next seminar will be from August 17-19, 2006 at TREETOPS GOLF RESORT near Gaylord, Michigan. It will probably be as necessary to attend next year's seminar as this year's, because we will no doubt have learned a lot about BAPA by that time. Do not miss this event!

BANKRUPTCY SECTION
NEWSLETTER
OCTOBER 2005

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THIS NEWSLETTER

This newsletter is published by the Federal Bar Association, Bankruptcy Section, for the Western District of Michigan. Prepared by lawyers with busy practices, every effort is made to publish on a quarterly basis, but that has not always been possible.

This newsletter is sent to members of the FBA who have indicated that they wish to be members of the bankruptcy section. Membership renewals must be made in the fall of each year, by sending the renewal dues to the Grand Rapids Bar Association, which manages the mailing list. Renewal notices are sent by GRBA every fall, and the person to contact there is Debbie Kurtz debbie@grbar.org .

If you have suggestions, articles or information for upcoming newsletters, please send these to the editor, Marcia R. Meoli, at mmeoli@ameritech.net .

For your records, here are the dates of newsletters for the recent past: June 2005, February 2005, October 2004, May 2004, January 2004, October 2003, July 2003, April 2003 and January 2003. Thank you, Marcia R. Meoli, Editor. mmeoli@ameritech.net .

NEWS!!! BANKRUPTCY APPELLATE PANEL.. Effective October 1, 2005, the Bankruptcy Appellate Panel of the Sixth Circuit is authorized to hear and determine appeals from our court. Adm Ord 5-098

BANKRUPTCY CASES FROM JUNE 1, 2005 THROUGH SEPTEMBER 2005

Sixth Circuit Cases

In re Cain, __ F.3d __, 2005 WL 2240969 (6th Cir., Sep. 16, 2005) – twelve days after foreclosure sale of debtors' principal residence, at which mortgagee purchased the property, debtors sought Chapter 13 relief and filed plan in which they sought to cure the mortgage default. The Sixth Circuit, affirming the bankruptcy court's and district court's conclusions on the issue, ruled that the plain language of 11 USC § 1322(c)(1) designates a foreclosure sale as the event that terminates a Chapter 13 debtor's right to cure a home mortgage default, despite the fact that the state-law redemption period had not yet expired.

In re National Century Financial Enterprises, Inc., __ F.3d __, 2005 WL 2206780 (6th Cir., Sep. 13, 2005) – bankruptcy court granted Chapter 11 debtor's motion to enforce automatic stay by preventing creditor from pursuing state court action to obtain possession of funds in debtors' accounts. The Sixth Circuit affirmed, holding that the motion to enforce the automatic stay was within the "core" jurisdiction of the bankruptcy court, and thus, the creditor's state court action against third-party bank to obtain possession, on a constructive trust theory, of money in debtor's accounts was subject to the stay as those funds were included in the bankruptcy estate.

In re Triple S Restaurants, Inc., __ F.3d __, 2005 WL 2076636 (6th Cir., Aug. 30, 2005) – trustee brought adversary proceeding to set aside alleged fraudulent transfer of life insurance policy, which occurred shortly before debtor filed for bankruptcy, and the bankruptcy court set aside the transfer. The Sixth Circuit affirmed the bankruptcy court's application of 11 UCS § 548(a) and shifting of the burden of proof to the debtor, noting the "badges of fraud" attending the transaction (lawyer for failing business was stepson of founder and main beneficiary of the transfer) justified requiring debtor to show that the transfer did not harm unsecured creditors.

In re American HomePatient, Inc., __ F.3d __, 2005 WL 1949548 (6th Cir., Aug. 16, 2005) – Chapter 11 creditors appealed confirmation of a reorganization plan, and debtor moved to dismiss the appeal as equitably moot. The district court, having denied the motion, affirmed the bankruptcy court's ruling. The Sixth Circuit ruled the appeal was not moot, adopting the Fifth Circuit test regarding equitable mootness: (1) whether a stay has been obtained; (2) whether the plan has been "substantially consummated"; and (3) whether the relief requested would affect either the rights of parties not before the court or the success of the plan. The Sixth Circuit also affirmed the selected cram down rate, which the creditors had argued was improper under *Till* because it was set under the coerced loan theory. The Sixth Circuit, however, declined to "blindly adopt" *Till's* endorsement of the formula approach for Chapter 13 cases in the Chapter 11 context. Instead, the Sixth Circuit stated that it will apply the market rate in Chapter 11 cases, where there exists an efficient market. If no such market exists, it will apply the formula approach. Because the bankruptcy court carefully selected what it believed would be the appropriate rate based on the evidence, the Sixth Circuit concurred in the result reached by both lower courts on this issue.

Mickowski v. Visi-Trak Worldwide, LLC, 415 F.3d 501 (6th Cir., Jul. 13, 2005) – Plaintiff obtained judgment against Visi-Trak Corporation (VTC), which subsequently filed for Chapter 11 bankruptcy. After the bankruptcy court discharged VTC's liability on the judgment, Visi-Trak Worldwide (VTW) bought VTC's assets. The bankruptcy court then revoked VTC's reorganization plan, and plaintiff filed suit in district court seeking to hold VTW liable for the unpaid judgment. The Sixth Circuit affirmed the district court's ruling that the debt had been discharged, holding that VTW's answer notified plaintiff that it would rely on the bankruptcy proceedings as a defense. The Sixth Circuit next ruled that bankruptcy court had not vacated its order confirming the plan and discharging VTC, as plaintiff argued, because the bankruptcy

court had not complied with the procedural revocation requirements (*e.g.*, language revoked only the second amended plan, not the confirmation order; the bankruptcy court did not follow the revocation requirements under Rules 7001(4) and (5) of the Federal Bankruptcy Procedures Act; the motion to vacate had not been served upon all creditors as required by Rule 4006; there was no finding of fraud regarding the confirmation order as required by 11 USC § 1144 to revoke such order). The Sixth Circuit thus ruled that VTW was VTC's successor and could invoke as a defense the complete discharge of the judgment in bankruptcy. The Sixth Circuit, addressing plaintiff's successor-in-interest argument, applied Ohio's "mere continuation" test, not the federal common law "substantial continuity" test, because there was no showing of a significant conflict between federal policy and the use of state law to justify application of federal common law. Thus, plaintiff failed to establish any basis to hold VTW liable as successor (no continuation of VTC's corporate entity or common ownership of the two entities), even if VTW could not have relied on the order confirming VTC's bankruptcy as a defense.

In American HomePatient, Inc., 414 F.3d 614 (6th Cir., Jul. 11, 2005) – Debtor entered credit agreement with secured lender, part of which was a "warrant agreement" which would allow warrant holders to purchase shares of debtor's common stock for $0.01/share. Debtor subsequently filed for Chapter 11 bankruptcy. The confirmed plan authorized debtors to reject executory contracts and debtors filed a motion to reject the agreement and to quantify the amount of any resulting damages. Lender objected, arguing that the agreement was not an executory contract subject to rejection. The Bankruptcy Court overruled the objection and set damages, using § 365(g)(1) and § 502(g) of the Bankruptcy Code to set the rejection date as the day immediately prior to the filing of the bankruptcy petition. The Sixth Circuit, affirming the lower court's holding on the issue, stated that according to the statutory language, damages are fixed as of the time of the deemed breach, which is immediately before the date of the filing of the petition and not at the time when an executory contract is rejected, as lender had argued. The Sixth Circuit also stated that contract rejection damages are determined by the Bankruptcy Code, not state law, because the Code leaves no gap to be filled by state law.

In re Made in Detroit, Inc., 414 F.3d 576 (6th Cir., Jul. 1, 2005) – The Bankruptcy Court confirmed creditors' plan to liquidate, which provided for sale of debtor's riverfront property to the Trust for Public Land (TPL) to settle all claims, finding that the plan was feasible and in the creditors' best interest, despite debtor's argument that it severely undervalued the property. The district court dismissed the debtor's appeal, ruling that the claims were statutorily moot under 11 USC § 363(m) and that TPL was a good-faith purchaser. The Sixth Circuit affirmed, concluding that the TPL was a good-faith purchaser – and thus protected by 11 USC §363 (m) – because the TPL's purchase was in good-faith and for value. The Bankruptcy Court specified in the order that the terms of the sale were fair and reasonable, negotiated at arms length, in good faith, and in the best interest of the estate; the debtor failed to prove fraud or collusion between TPL and the seller or other bidders, or that TPL's actions were an attempt to take unfair advantage of other bidders. Additionally, the Bankruptcy Court found the offer price to be fair and reasonable, which satisfied the "value" requirement.

In re Ruehle, 412 F.3d 679 (6th Cir., Jun. 23, 2005) – Debtor's Chapter 13 plan, confirmed in 1998, contained language stating that confirmation of the plan would constitute a finding that excepting her education loans from discharge would be an undue hardship. Debtor received a discharge in 2001. Student loan creditor moved to vacate the "undue hardship" discharge as void for lack of due process. The Bankruptcy Court granted the motion, finding that the discharge order was void because the debtor had failed, as required by law, to initiate an adversary hearing and establish "undue hardship." Debtor appealed, arguing that the need for finality trumps due process rights. The Sixth Circuit affirmed, noting that neither case on which debtor relied

addressed the issue of due process underlying the notice and adversary hearing requirements in Federal Rule of Bankruptcy Procedure 7001(6) and 11 U.S.C. § 523(a)(8). The Sixth Circuit adopted the reasoning and holding set forth in *Banks v. Sallie Mae Servicing Corp. (In re Banks)*, 299 F.3d 296 (4th Cir. 2002), and *Hanson v. Educ. Credit Mgmt. Corp. (In re Hanson)*, 397 F.3d 482 (7th Cir. 2005), to conclude that such a purported "discharge by declaration" of student loan debt is invalid, void, and subject to being set aside upon a Rule 60(b)(4) motion.

In re Tirch, 409 F.3d 677 (6th Cir., Jun. 3, 2005) – Chapter 7 debtor brought adversary proceeding seeking to discharge student loan debt, and the Bankruptcy Court granted partial discharge. On appeal, the Sixth Circuit reversed, holding that the debtor had failed to meet all three elements required for a partial discharge of student loan debt. Although the debtor had shown that she could not maintain, based on current income and expenses, a minimal standard of living for herself and dependents if forced to repay the loan, she could not show that the state of affairs is likely to continue for a good portion of the repayment period of the student loans or that she had made good faith efforts to repay the loans. The Sixth Circuit first noted that debtor presented insufficient evidence that her physical and psychological conditions kept her from returning to work, or that such conditions would "persist for a significant portion of the repayment period." The Sixth Circuit also noted that the debtor's decision not to take advantage of an income contingent repayment plan (ICR), although not a *per se* indication of a lack of good faith, was probative of her intent to repay the loans

District Court of Western Michigan Cases

In re Quinn, 327 B.R. 818 (WD Mich. 2005) – Chapter 7 debtor asserted that his interest in his TIAA annuity of TIAA-CREF retirement plan, obtained through his employment with state university, was either excluded from property of the bankruptcy estate pursuant to § 541(c)(2) of the Bankruptcy Code or exempt from creditors' claims under 522(d)(10)(E) of the Bankruptcy Code. The bankruptcy court bifurcated the issues and concluded that the TIAA annuity was not excluded under § 541(c)(2), reasoning that the debtor's relationship with the TIAA annuity was merely contractual, and not a trust relationship annuity for purposes of § 541(c)(2). The District Court, Judge Quist presiding, reversed, first concluding that the TIAA annuity contained transfer restrictions "also enforceable under applicable nonbankruptcy law" for purposes of § 541(c)(2) under the reasoning of *Patterson v. Shumate*, 504 U.S. 753, 112 S.Ct. 2242, 119 L.Ed.2d 519 (1992) (anti-alienation provision in "ERISA-qualified pension plan" was a restriction on transfer under "applicable nonbankruptcy law" for purposes of § 541(c)(2) where such restriction was required by both ERISA and the Internal Revenue Code; "applicable nonbankruptcy law" is not limited to state law of spendthrift trusts). The District Court noted that the TIAA annuity both restricts access to benefits and contains an anti-alienation provision, which restrictions are enforceable under Michigan statutes. The District Court then turned to the Bankruptcy Court's ruling that the TIAA annuity is not a trust because the debtor's interest in the annuity is simply contractual. The District Court, avoiding the literal interpretation of the term "trust", took a functional approach and ruled that the TIAA annuity is excluded by § 541(c)(2) because it is "functionally indistinguishable" from a trust. In so doing, the court noted that this broader approach to § 541(c)(2) was in keeping with the policy expressed in *Patterson:* it makes no sense to preclude creditors from using bankruptcy against private-sector employees to gain access to protected retirement funds while allowing creditors to do so against public-sector employees.

Bankruptcy Appellate Panel Cases

In re Hertzel, __ B.R. __, 2005 WL 2076641 (6th Cir. BAP, Aug. 30, 2005) – Chapter 7 debtor, a 35-year-old single woman suffering from multiple sclerosis (MS), filed pro se adversary

complaint to determine the dischargeability of her student loan debt, and the Bankruptcy Court discharged the debt finding that the debtor met the three parts of the *Brunner* test. The Court affirmed and held that bankruptcy court did not err in its application of the *Brunner* test or in taking judicial notice of the nature and effect of MS on debtor's ability to work in the future. The bankruptcy court found that the debtor could not maintain a minimal standard of living if forced to repay her student loans; took judicial notice of the progressive nature of MS and the effect that it could have on the debtor's future ability to earn a living, for purposes of the second prong, to which notice creditor did not request be heard on the issue; and ruled that the debtor met the good-faith prong by seeking to consolidate her loans and not manipulating the tax refund process, noting that attempts at repayment alone are not dispositive of the good faith prong .

In re Gasel Transp. Lines, Inc., 326 B.R. 683 (6th Cir. BAP, Jun. 9, 2005) – Chapter 11 creditor sought allowance of administrative expense for debtor's post-petition use of tractors in which creditor had a security interest; the bankruptcy court rejected the claim concluding that there was no post-petition transaction with the debtor, but rather a pre-petition contractual relationship. The Bankruptcy Appellate Panel affirmed, finding there was no post-petition transaction with the bankruptcy estate that induced the creditor to allow the debtor to retain the collateral during the period for which creditor sought such a claim as required under §§ 503(a) and (b).

Western District of Michigan Bankruptcy Cases

In re Nartron Corporation, __ B.R. __, 2005 WL 2126364 (Bank.W.D.Mich., Aug. 26, 2005) – judgment creditor filed motion to appoint Chapter 11 trustee for debtor, alleging, *inter alia*, failure to comply with bankruptcy record requirements, acting without court approval, and failing to act for the benefit of the estate; debtor argued the creditor was seeking appointment of a trustee out of revenge and retaliation. The Court ruled that the debtor's conduct, along with the parties' long and acrimonious relationship, constituted "cause" under 11 USC § 1104(a) to merit the appointment of a Chapter 11 trustee, who would have joint duties with debtor's current management and whose powers would be limited to financial management, expenditure of estate assets, ongoing payments to insiders, pursuit of estate claims against insiders or third parties, resolution of creditor's pre-petition unliquidated claim, and the filing of a disclosure statement and plan of reorganization.

In re Raynard, 327 B.R. 623 (Bank.W.D.Mich., Jul. 15, 2005) – married debtors sought confirmation of amended Chapter 13 plan that discriminated between joint creditors and individual creditors by offering a 100% dividend to joint creditors opposed to the much smaller one offered to individual creditors, reasoning that the "best interests" test required this because the non-exempt portion of the debtors' interest in the entireties property would be administered for the exclusive benefit of joint creditors were the case administered as a Chapter 7 case. The Bankruptcy Court, Judge Hughes sitting, denied the confirmation and ruled (1) the non-exempt portion of entireties property claimed as exempt under the entireties exemption is to be administered by a trustee for the benefit of all creditors, not just joint creditors; (2) the Michigan statute providing an exemption for interests in entireties property except with regard to claims based on joint debt conflicts with the Bankruptcy Code and is unconstitutional under the Supremacy Clause; and (3) that the plan unfairly discriminated between the creditors.

Thank you to Dan E. Bylenga, for his excellent and extensive work on these summaries.