Marcia R. Meoli

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To: Marcia Meoli
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Federal Bar Association

Bankruptcy Section Newsletter
July 2006

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. For your records, here are the dates of newsletters for the recent past: February 2006, October 2005, June 2005, February 2005, October 2004, May 2004, January 2004, October 2003, July 2003, April 2003 and January 2003.

This is the first newsletter sent electronically for our association. Please let us know if you encounter any problems in retrieving or reading this newsletter, or if you have any other comments about it. Thank you.

In this issue

- A Conversation with the Honorable Eugene R. Wedoff
- News from the Clerk's Office
- Standing Committee on Local Rules
- Case summaries 2/14/06 to 6/23/06

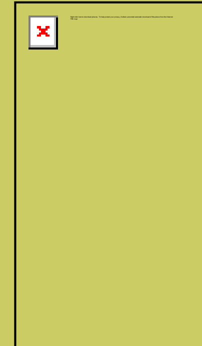
A Conversation with the Honorable Eugene R. Wedoff

May 26, 2006
Interviewer: John T. Gregg

The Honorable Eugene R. Wedoff is the Chief Judge of the United States Bankruptcy Court for the Northern District of Illinois, and was initially appointed to a fourteen year term by the Seventh Circuit Court of Appeals on September 16, 1987 and reappointed in 2001. Judge Wedoff will be speaking at the Federal Bar Association - Bankruptcy Section seminar in Gaylord, Michigan on July 28 - 30, 2006.

JTG: You've handled quite a few large Chapter 11 cases, the most recent being the United cases. But you are also a frequent speaker on consumer issues. Do you prefer one area of bankruptcy law over the other?

Judge Wedoff: No. I enjoy them equally and I think that experience in one assists the judge in understanding the other. So, for example, I look at Chapter 13 as presenting every bit the intellectual challenge that Chapter 11



Upcoming dates:

1. 18th Annual FBA Summer Seminar: August 17-19, 2006, Treetops Resort, Gaylord, Michigan

2. FBA Steering Committee meets typically on the 3rd Friday for lunch at the Pennisular Club in downtown Grand Rapids. Check in advance with President Hal Nelson @ hal@nlsg.com

Bankruptcy Section Steering Committee:

David C. Andersen
Dan E. Bylenga, Jr.
Stephen V. Carpenter
Daniel J. Casamatta
Michael W. Donovan
Daniel R. Kubiak
John T. Piggins
Lori L. Purkey
Steven L. Rayman

does and many of the concepts are the same. You cram down debt in Chapter 13 the same way you cram down debt in Chapter 11. The due process considerations are very similar. The question of whether the claims adjudication process controls the plan or vice versa, is same in both chapters. So I am very grateful that our situation in Chicago is one that lets us deal with the whole range of bankruptcy cases.

JTG: Returning to the United cases, you've received quite a bit of national recognition as the presiding judge in those cases. Do you feel uncomfortable seeing your name in the newspaper or have you adjusted to it?

Judge Wedoff: I have always wanted the focus to be on the case and not on me personally. I hope to a large extent that's been what took place. I was uncomfortable with what happened to Judge Ito in the O.J. Simpson case where the judge and his personality became a focus of attention and I really did not want that to happen in United. I hope it didn't.

JTG: I think something similar happened early on in the Delta bankruptcy cases in the Southern District of New York with Judge Beatty, which was unfortunate because it didn't seem as though she was seeking any publicity but somehow the media latched on to what was occurring in her courtroom, whether they be quirks or just character traits or just her demeanor. It seems as though they treated her unfairly and painted her in a poor light.

Judge Wedoff: I think that it was unfortunate. My thought is that judges have an obligation to make the legal proceedings understandable for the public. I'm very happy to talk to reporters off the record about the way the bankruptcy system works. I've talked to a number of people, again off the record, about the new bankruptcy law - - hoping to shift some light on what the impact of that law is. But I have not wanted to be quoted, again, because I don't want a focus on me. And I don't want anything that I say about the law to be perceived as indicating some kind of bias one way or the other. I think the best thing is to try to be as helpful as I can in getting people to understand the way the bankruptcy system works without trying to get any particular attention for myself.

JTG: In United, several of your decisions were appealed and a few of those eventually made their way to the Seventh Circuit Court of Appeals. Are you concerned when your decisions find their way to the Seventh Circuit or is this something that you just become comfortable with over time in your role as a judge and your understanding of the appellate process?

Judge Wedoff: Well, given the amount of money at stake in most of the decisions that I reached in United, I would expect the questions to go up to the Seventh Circuit. That's a contrast with consumer issues where it's very unlikely that there will be a sufficient amount at stake and the resources available to take the case up on appeal. I think that presenting genuinely disputed issues to the Seventh Circuit is a good thing so that we can get Circuit precedent and uniform application of the law. Some of the issues that have gone to the Seventh Circuit arising out of United have been very helpful in that regard. Just to give one example, the question of recharacterization of a lease as a security interest was something that I had to struggle with. We now have a fairly comprehensible rule on that subject from the Seventh Circuit, providing guidance to future courts that may have to deal with that issue in our Circuit.

JTG: You've received some notoriety for extending the exclusivity period in United for a long period of time.

Judge Wedoff: A little more than three years.

JTG: And, in fact, when you run a Google search of your name, the following quote consistently pops up and that is: "No further extensions will

Marcia R. Meoli, Editor
Harold E. Nelson, Chair
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Mary K. Viegelahn Hamlin, Past Chair
Robb Wardrop
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Click here for Seminar registration form

Quick Links...

United States Bankruptcy Court, Western District of Michigan

Local filing statistics

United States Trustee Program, including means test tables and other BACPA data

Unites States Bankruptcy Courts

Chapter 13 Trustee Brett N. Rodgers

Chapter 13 Trustee Mary K. Viegelahn Hamlin

Federal post judgment rate of interest

State Bar of Michigan

American Bankruptcy Institute

National Association of Bankruptcy Trustees

National Conference of Bankruptcy Judges

National Association of Consumer Bankruptcy Attorneys

National Association of Chapter 13 Trustees

Federal Bar Association of Western Michigan

be granted in the absence of compelling and unforeseeable circumstances." In the end, the United debtors were able to confirm their plan and it seems as if the additional period in which to exclusively file their plan was of great benefit to the debtor and perhaps [without the additional periods of exclusivity] the result in this case would not have been the same. Do you think that BAPCPA limits on exclusivity are a good thing or might this new change turn out to hurt several debtors that otherwise just need a little bit longer in order to rehabilitate and reorganize?

Judge Wedoff: Let me first say that there is no ambiguity about that provision of that section of BAPCPA. There is an 18-month absolute deadline for plan exclusivity and I'll certainly expect to be enforcing that in Chapter 11 cases that come before me. So the question you're asking really isn't one of interpretation of the current law so much as it is a question about what good bankruptcy policy. I would have to say that if I were a legislator as opposed to a judge, I would be inclined to favor more judicial discretion here. The termination of exclusivity as a non-discretionary matter has the potential for negative consequences in some cases. Standards for extending exclusivity might be more appropriate than a rigid rule.

JTG: Several judges have recently written opinions criticizing BAPCPA. What are your overall feelings toward BAPCPA, if you have any? Do you think some of the changes are a little too rigid and take away some of the judges' discretion that, in certain situations, a judge needs?

Judge Wedoff: Well, again, it's a legislative determination. If Congress has made a determination that judges ought not to have discretion in a particular area, that's going to be something that we have a duty to respect. The oath of office is to uphold the law. To a large extent, again, it throws me back into the question of legislative judgment rather than my role as a judge. That's the sort of thing that I'm a little uncomfortable dealing with. Judge [Thomas] Small from the Eastern District of North Carolina and I came up with a number of recommendations that we thought would make BAPCPA more effective and those recommendations are still on the ABI's website. So I'm on record suggesting a number of areas where the law does not take the optimal route for effectuating its purposes.

JTG: Recently, you wrote an article discussing the court's ability to find abuse under section 707 (b) (3) and your example focuses on an executive who should pass the means test.

Judge Wedoff: What I hypothesized is someone who can pass the means test, but whose actual disposable income would be substantially above the threshold that Congress has specified for abuse of Chapter 7. This raises a question of statutory interpretation, and I gave my reasons for interpreting section 707(b)(3) to allow a court to find abuse even though the means test has been passed. In other words, even where there's no presumption of abuse, nonpresumptive abuse can be found based on the debtor's actual income and expenses.

JTG: Does it bother you that BAPCPA doesn't allow you to permit an indigent person to stay in Chapter 7 when in the past you could exercise some discretion?

Judge Wedoff: I don't think that's correct. Someone who fails to meet the test and is presumed to be abusing Chapter 7, can rebut the presumption by showing that their actual income and expenses, the very sorts of things that a judge would consider in finding nonpresumptive abuse, puts them below the threshold of abuse. So I think there's a balance there.

JTG: So there still is some discretion?

Judge Wedoff: Oh yes, I think there's substantial discretion. Congress has

said that if someone has disposable income of more than $167.00 a month, they're abusing Chapter 7. And, if they have income between $100 and $167 a month they're abusing Chapter 7 if that income would allow them to pay 25% or more of their unsecured debt over five years. Those are the thresholds of abuse and they are not able to be rebutted. So, I take that to be a nondiscretionary fixed rule that is actually very helpful to a court, telling us at what level of disposable income that Chapter 7 relief is not appropriate. But the court still has substantial discretion in determining what's disposable income, either in finding that the debtor has rebutted a presumption of abuse under the means test or that a moving party has established nonpresumptive abuse.

JTG: For about a three year period the Northern District of Illinois was a "hot" venue for some of the larger Chapter 11 filings and after the Kmart critical vendor decision it seems as if it's no longer a preferred venue for many of the large Chapter 11 debtors that are filing. What are your thoughts about venue? Should corporate entities be allowed to file in their choice of venue if they only have a minor connection or minimal presence?

Judge Wedoff: I think that I need to question the predicate of the question. I'm not aware of any large Chapter 11 case post-Kmart that should have been filed in Chicago and wasn't. What I want as Chief Judge of this Court is that there not to be any obstacles in the way of cases that ought to be filed here. As far as I know, there aren't any obstacles like that. If there's a case that ought to be filed here because Chicago is the center of activity, this is the major commercial center for that particular debtor, I would hope that the case would be filed here for the convenience of the parties. At the same time, I would hope courts aren't trying to compete with one another to get nationwide venue choices made. If a case has its geographical center in another city, I would not expect it to be filed in Chicago, since the convenience of the parties would be better served by the case being filed somewhere else. As far as whether there ought to be limitations on bankruptcy venues, again, that's really a legislative determination that I think has been made by Congress, and while there have been efforts made to restrict venue choices, they appear to have been unavailing.

JTG: What you hit on is related to my next question which is, Professor Lynn LoPucki has recently criticized certain districts and even gone so far as to criticize individual judges by name based on their pursuit of large Chapter 11 cases. Is any of that criticism justified?

Judge Wedoff: There's been a general reaction to Professor LoPucki's article from the bankruptcy community challenging some of the statistical conclusions that he's reached and I've not done sufficient studies to weigh in on that debate, but I will say that I'm not aware of any judge making decisions on substantive legal issues based on a desire to accumulate cases. I can speak from first- hand experience with my colleagues in Chicago, where I am very confident that's not happening. In particular, the notion that judges are failing to conduct independent inquiries into the feasibility of Chapter 11 plans--which I think is one of the major arguments [LoPucki] made--is simply not consistent with real bankruptcy practice. Judges don't have the ability to conduct independent inquiries into feasibility and that's not the way the bankruptcy system operates. We deal with a framework for consensual resolution. So when the parties come to the judge saying here's a plan that meets all the requirements for confirmation, approved by the majority of each class, and there's no objection to confirmation, no judge is going to say, well, wait a second, I want to appoint some experts of my own to look into a question of whether this is feasible. That is just not the way the system works and I don't think it's the way the system's intended to work. The judge would be delaying the process, incurring additional expense and potentially frustrating the desires of all the parties in interest.

JTG: I'm not quite sure how the judge is supposed to determine feasibility

beyond testimony and other evidence.

Judge Wedoff: That's the problem too. That would take the judge out of the role that was created for judges by the [1978 Bankruptcy Code]. We'd no longer be arbiters of dispute, but we would be something like inquisitors, gathering our own evidence and then ruling on it.

JTG: The District Court for the Western District of Michigan recently entered an order which allow appeals to be heard by the Sixth Circuit Bankruptcy Appellate Panel. The Seventh Circuit does not have a bankruptcy appellate panel, but would you like to see something similar in the Seventh Circuit and, in particular, for your district.

Judge Wedoff: I think that BAPs have worked well in the circuits where they've been used, and I think they could be a benefit in our circuit as well..

JTG: You have been a life-long Chicago White Sox fan.

Judge Wedoff: Indeed.

JTG: How gratifying was it to see the White Sox win the World Series last year?
Judge Wedoff: Let me put it to you this way, John. In 1959 when the White Sox were in the World Series, I cried when they lost. I was 9 years old and it was a real blow. I so loved that team, and I was so sad that they had lost. In 2005, when they won the World Series, the tears came to my eyes again, from incredulous delight.

Thank you to John Gregg for preparing this article.

News from the Clerk's Office

1. Attorney Training on use of Courtroom Technology/Evidence Presentation.
The Bankruptcy Court for the Western District of Michigan is offering training to familiarize attorneys who practice in this district on the use courtroom technology as it relates to evidence presentation (use of overhead projector, document camera, white board/smart board, document annotation systems, evidence monitors, use of personal laptops, etc.). Two sessions are being offered: July 17 and July 24, commencing at 10:00 a.m. The length of class is expected to last approximately 45 mins.-1 hour. Training will be conducted in Judge Stevenson's Grand Rapids Courtroom (One Division Ave., NW, 2nd Floor, Courtroom A)

We strongly recommend that attorneys, who are not familiar with this type technology and who anticipate the possible need to utilize these devices, attend one of these two sessions. Please note that it is not necessary to register for this training. Any questions, please contact Patrice Nichol at: (616) 456-2013.

2. CM/ECF Upgrade to Version 3.0.

Due to a major upgrade to Version 3.0, the Court's Electronic Case Filing (CM/ECF) will be unavailable commencing at 6:30 a.m. on Monday, June 26, 2006, until the upgrade is completed. Administrative Order 2006-1 was signed on June 6, 2006, allowing for the extension of time for pleadings or documents due June 26, 2006. Administrative Order 2006-1 is available for inspection on our website: www.miwb.uscourts.gov by way of the Court Forms & Rules link .

3. New Reaffirmation Agreement Form.

Please be aware that a new reaffirmation agreement form (B 240-miwb) must now to be submitted for filing in all cases assigned to the Hon. Jo Ann C. Stevenson. This new local form can be found on our website: www.miwb.uscourts.gov by way of the Court Forms & Rules link.

Thank you to Patrice Nichol for preparing this article.

Standing Committee on Local Rules

The Standing Committee on Local Rules of the U.S. Bankruptcy Court for the Western District of Michigan has met several times and is working on drafts of new local rules due to BAPCPA and refining our practice under ECF.

All local rules are being reviewed. Many will be changed. Some significant changes under consideration deal with the following topics: signing/uploading/preserving original signatures, furnishing tax returns and payment advice information to trustees and creditors, motion practice including motions for lift of stay and for continuation or entry of stay orders under 362, adequate protection orders, procedure where an eviction has been ordered, furnishing domestic support information (name, address and telephone number of recipient to trustee), and procedures for pro hac vice admission and for emergency motions, and other topics.

Members of the committee include:

Judge Jo Ann Stevenson, Chair, and the following: David Andersen, Rose Bareham, Don Bays, Dan Casamatta, Scott Dales, Lisa Gocha, Mary Hamlin, Dan LaVille, Hal Nelson, Jahel Nolan, Brett Rodgers, Martin Rogalski, Ronald Schuknect, and several court personnel.

The committee is planning to circulate drafted proposals for changes this summer. Some or all may be in draft form for discussion at the FBA Bankruptcy Section Seminar at the Treetops Resort in Gaylord, August 17-19.

Thank you to David Anderson and Judge Stevenson for preparing and contributing to this article.

Case summaries 2/14/06 to 6/23/06

United States Supreme Court

Marshall v. Marshall, 126 S.Ct. 1735 (U.S. May 1, 2006) - a widow (Smith) brought an adversary proceeding in her Chapter 11 case to recover for her stepson's (Pierce's) alleged tortious interference with her expectancy of an inheritance or gift from her deceased husband. The bankruptcy court entered judgment for Smith on her counterclaim after a trial on the merits. Pierce filed a post-trial motion to dismiss for lack of jurisdiction, which the court denied holding that it had jurisdiction to adjudicate rights in probate property as long as its final judgment does not interfere with the state court's possession of the estate property. On appeal, the district court held that the probate exception to federal jurisdiction did not apply to Smith's counterclaim because federal jurisdiction did not interfere with the probate proceedings. The district court, reviewing the matter de novo, then awarded Smith approximately $89,000,000 in damages. The Ninth Circuit, on appeal, reversed the district court, and held that the probate exception barred federal jurisdiction. Because the Texas probate court held it had exclusive

jurisdiction over all of Smith's claims, the Ninth Circuit concluded that this stripped the federal court of jurisdiction in the matter. The Supreme Court held that the Ninth Circuit had no authority to extend the probate exception and that the district court property asserted jurisdiction over Smith's counterclaim against Pierce. The Court explained that the probate exception reserves to state probate courts the administration of an estate, thereby precluding federal courts from disposing of property within the custody of the probate court. Smith's counterclaim only sought an in personam judgment against Pierce, not an in rem judgment over a res that was subject to the probate court's jurisdiction. The Court then remanded the question of whether the counterclaim was a "core" proceeding under 28 U.S.C. 157.

Howard Delivery Service, Inc. v. Zurich American Ins. Co., 126 S.Ct. 2105 (U.S. June 15, 2006) - insurance company filed unsecured claim against debtor-employer's Chapter 11 estate to recover unpaid premiums for worker's compensation coverage, and sought priority claim under section 507(a) (5) based upon unpaid premiums' status as "contributions to an employee benefit plan." The bankruptcy court denied priority status, reasoning that overdue premiums fall outside the scope of section 507(a)(5) since they are not bargained-for benefits given instead of wage increases. The district court affirmed on the same basis; the Fourth Circuit reversed. The Supreme Court held that the claim for premiums fell outside the scope of section 507(a)(5) and was more akin to liability insurance premiums than to contributions made for fringe benefits which are part of a pay package. The Court noted that Congress did not enlarge section 507(a) (4) to include fringe benefits, but rather created a new priority, section 507(a)(5), one step below the wages priority. Looking to the essential character of workers' compensation programs, the Court concluded that it was better characterized as insurance than compensation, noting that: (1) it provides something for both employees and employers, (2) it shields the insured enterprise, not the employees, and (3) workers compensation is required by most states, while fringe benefits are not.

Published Sixth Circuit Court of Appeals

In re John Richard Homes Building Co., LLC, 439 F.3d 248 (6th Cir. Mar. 1, 2006) - builder requested compensatory and punitive damages following order dismissing involuntary Chapter 7 petition. The bankruptcy court granted the request, finding that the petition was filed in bad faith, and the petitioning creditor appealed; the district court affirmed. On appeal the Sixth Circuit affirmed the award of over $6,000,000. After noting the language of 11 U.S.C. 301(i), the Sixth Circuit began its review of the record to conclude if the lower court's finding was erroneous in finding bad faith. The Court concluded from the evidence that the creditor filed the petition to intimidate the builder into a settlement and, when that proved unsuccessful, to destroy his business. The Court then examined each of the bankruptcy court's seven specific findings in support of its bad faith determination: (1) that the creditor should have known that his claim was disputed; (2) that the creditor knew that the petition would harm the builder and intended that harm; (3) that the creditor's attorney threatened the builder with criminal prosecution; (4) that the creditor could not explain the amount claimed in the petition; (5) that the creditor threatened other creditors; (6) that the creditor's "reliance-on-counsel" defense was not persuasive; and (7) that the creditor did not act out of concern for other creditors. In light of the overwhelming evidence of bad faith, the Sixth Circuit concluded that the finding of bad faith was not erroneous.

In re Oswalt, 444 F.3d 524 (6th Cir. April 20, 2006) - Chapter 7 trustee brought adversary proceeding against mortgagee, seeking to avoid a security interest in the debtor's mobile home and the real property to which it was affixed alleging that the security interest was not properly perfected under Michigan law. The bankruptcy court ruled that an amendment to Michigan's

Mobile Home Commission Act was a new law that did not apply retroactively to the bankruptcy proceedings and denied the mortgagee's motion for summary disposition; the mortgage filed an interlocutory appeal. On Appeal, the district court reversed and granted summary judgment to the mortgagee. The Sixth Circuit affirmed the grant of summary judgment to the mortgagee, ruling that the security interest was properly perfected under the amendment. The Court reasoned that the amendment was not a new law: it merely clarified existing law regarding the procedure for perfecting security interests in affixed mobile homes.

In re Eagle-Picher Industries, Inc., 447 F.3d 461 (6th Cir. May 5, 2006) - reorganized Chapter 11 debtor moved to enforce its confirmed plan against creditor, who sought to pursue pre-confirmation $20 million lawsuit against debtor, and the bankruptcy court granted the debtor's motion to stay the lawsuit. The district court reversed, reasoning that the claims in the lawsuit arose from the debtor's core business and were liabilities incurred in the ordinary course of business. The Sixth Circuit affirmed, noting that under the Sixth Circuit's test in In re Sunarhauserman, Inc., 126 F.3d 811 (6th Cir. 1997), for whether a debt qualifies as an actual and necessary administrative expense: (1) did it arise from a transaction with the bankruptcy estate? and (2) did it directly and substantially benefit the estate? - and under other precedents the creditor's claims satisfied the definition as long as they arose from post-petition transactions. The Court then concluded that the reorganization plan, which allowed certain administrative-expense claims to be filed after the confirmation, included the claims asserted in the lawsuit, which represented liabilities incurred in the ordinary course of business.

In re Nichols, 440 F.3d 850 (6th Cir. Jun. 19, 2006) - bankruptcy court approved modified Chapter 13 plan over the objection of purchase-money motor vehicle lender, which sought to repossess vehicle, and the lender appealed. The issue before the Court was whether the court should allow modification of the plan after confirmation, or instead allow the creditor to repossess its security because under the modified plan the security's value would fall faster than the creditor receives payments. The debtor ceased making payments to the trustee, and the debtor filed a motion to lift the stay in order to repossess a truck. The bankruptcy judge ordered that that the debtor either pay the arrearage or file a motion to modify its Plan. The debtor chose the latter option. The Sixth Circuit began its analysis with section 1325's division of an allowed claim into the "allowed secure claim" and the "allowed unsecured claim." The Court began by looking to Memphis Bank & Trust Co. v. Whitman, 692 F.2d 427 (6th Cir. 1982), where the Circuit recognized that section 1325 requires a creditor to make a new loan in the amount of the value of the collateral rather than repossess it., but it allows the creditor to collect interest on the loan. The Court then held that the Memphis Bank procedure should be applied in both an original plan and any modifications: (1) determine the present value of the collateral under the secured claim; (2) determine the amount allowable to the creditor by virtue of the debtor's default, e.g., unpaid principal, finance charges, etc.; (3) subtract the amount in step 1 from the amount in step 2 to determine the unsecured claim; (4) determine the interest rate to apply to the secured claim, and add the interest to be paid to the secured claim; (5) determine how much of the "allowed unsecured claim" the debtor should pay, provided it is not less than the value thee creditor would receive in straight bankruptcy; (6) determine if the proposed plan is reasonable and in good faith; and (7) confirm, deny, or suggest modifications to the plan. The Court then applied this procedure to the facts of the case and determined that at the time of the modification the creditor was completely secured. After finding that an equity cushion existed in the truck, the Sixth Circuit affirmed the district court's judgment to affirm the modification.

Bankruptcy Appellate Panel, Sixth Circuit

In re Marketing and Creative Solutions, Inc., 338 B.R. 300 (6th Cir BAP, Feb. 15, 2006) - bankruptcy court entered order granting relief on involuntary Chapter 7 petition, and debtor appealed on the basis that the court erroneously ruled that the claims were not subject to a "bona fide dispute." The Panel affirmed, holding that the claims asserted by the creditor-television stations against the putative debtor for advertisements which the debtor had caused to be run on behalf of a client were not subject to any bona fide dispute under section 303 (h)(1). There was no genuine issue fact regarding the debtor's liability, and there was no meritorious contention regarding the law applicable to the undisputed facts. The debtor argued that it was an agent for its client, a disclosed principal, and could not be held liable for advertising placed its behalf. The Panel first concluded that the debtor manifested an intent to bind itself when the debtor acknowledged the debt and made payments for invoices sent directly to it. The Panel also noted the industry custom of television stations holding advertising agencies liable for the purchase of air time unless the advertiser submits a notice of nonliability.

In re Ravenswood Apartments, Ltd., 338 B.R. 307 (6th Cir. BAP, Feb. 17, 2006) - motion filed to compel Chapter 11 debtor to make payments under land installment contract and to assume or reject the contract within a set timeframe. The bankruptcy court denied the motion on the grounds that the contract was no longer executory under section 365 (a). The Bankruptcy Appellate Panel reversed the bankruptcy court's judgment. First, the Panel held that land installment contracts governed by Ohio common law are "executory contracts" under the "Countryman definition" employed by the Sixth Circuit in In re Terrell, 892 F.2d 469 (6th Cir. 1989). The debtor next argued that Ohio law, Ohio Rev. Code Ann. 5313.01-10, altered the contract so that it was no longer executory. The Panel rejected this argument, concluding that the contract was executory under Terrell, given (a) the existence of a future obligation to convey legal title to the debtor upon full payment of the purchase price and (b) the fact that a default by debtor would relieve the land installment contract vendor of its obligation.

In re Thickstun Bros. Equipment Co., Inc., -- B.R. -- , 2006 WL 1506712 (6th Cir. BAP, Jun. 2, 2006) - Chapter 11 debtor moved for the entry of an order interpreting provisions of its confirmed plan and determining the preclusive effect of its failure to object to creditor's claim in bankruptcy to state court litigation. The bankruptcy court dismissed for lack of subject matter jurisdiction, and the debtor appealed. The Panel first noted the two distinct types of relief sought by the debtor: (1) that the bankruptcy court determine that its failure to object to a claim was not entitled to preclusive effect in state court litigation; and (2) that the bankruptcy court interpret the Plan and Disclosure Statement as preserving its right to challenge the claim in the bankruptcy case, regardless of not filing a formal objection to the claim. The Panel affirmed the court's conclusion that it lacked jurisdiction to enter the first type of order. The Panel then concluded that the court had jurisdiction over the second claim for relief under 28 U.S.C. 1334 and the terms of the Plan. The court had jurisdiction over the second matter as it "related to" the underlying bankruptcy case: because 28 U.S.C. 1334 granted the court subject matter jurisdiction over bankruptcy claims, it retained post-confirmation jurisdiction to interpret provisions of the confirmed plan.

In re Lombardo, -- B.R. --, 2006 WL 1579867 (6th Cir. BAP, Jun. 9, 2006) - intended beneficiary of will prepared by Chapter 7 debtor-attorney filed adversary complaint, arguing that her pending malpractice claim against debtor was nondischargeable under section 523(a)(6) as a willful and malicious injury. The bankruptcy court ruled that the beneficiary failed to prove that the debtor had acted willfully and maliciously in preparing the will. The beneficiary died, and her estate filed an amended proof of claim, to which debtor objected on the grounds of res judicata. The bankruptcy court found the claim to be barred, and the estate appealed. On remand, the bankruptcy court sustained the objection and disallowed the claim on the

basis that there was no sustainable claim under state law due to the lack of privity between the claimant and debtor. The Panel held that the claimant was not in privity with the testator under Ohio law because her interest in the testator's estate was contingent, not vested; thus, she did not have standing to sue the debtor.

United States Bankrutpcy Court, Western District of Michigan

In re Albion Health Services, 339 B.R. 171 (Bank.W.D.Mich., Mar. 16, 2006) - the court, Judge Hughes, held that Chapter 7 debtor's obligation as a nonprofitemployer to reimburse the state for any unemployment benefits the Michigan Unemployment Compensation Fund paid to debtor's former employees was not a "tax" under section 507(a)(8). The Court noted that even if thee obligation was a tax, the Bankruptcy Code does not give priority to all taxes: section 508(a)(8) is limited to income taxes, property taxes, taxes withheld by the debtor, employment taxes, excise taxes and customs duties. The state argued that that it was seeking an "excise tax" "on a transaction" because it was taxing payments made by the Fund to the debtor's employees. The court concluded that this was not a taxable event, noting (a) the debtor was not a party to the "transaction", (b) the legislature did not identify the transaction as a taxable event, and (c) the supposed "tax" was the same amount as the transaction supposedly being taxed.

In re Lucre, Inc., 339 B.R. 648 (Bank.W.D.Mich., Mar. 20, 2006) - telecommunications provider that had provided Chapter 11 debtor with access to its network under executory prepetition agreement moved for relief from stay so that it could seek to terminate preliminary pre-petition state-court injunctions compelling it to continue to provide debtor with access to its network, despite default under the agreement. The Court, Judge Hughes, held that (1) filing of bankruptcy case did not give the debtor, as debtor-in-possession, the right to compel performance by another party to an executory contract where the debtor had no prepetition right to do so; and (2) the telecommunications provider had cause to modify the stay in order to seek to dispose of the injunctions. The Court noted that the debtor agreed that the agreement was an "executory contract" and that the debtor had clearly breached the agreement prior to filing its Chapter 11. The estate could have no greater rights under the agreement than the debtor, which the debtor had breached pre- petition. The Court concluded that the provider was within its contractual rights to stop performance on the agreement did not violate the automatic stay, nor did it impair the debtor's rights as a debtor-in-possession. Had it not been for the pre-petition injunctions, the automatic stay would not even be an obstacle for the provider to address.

In re Burrell, 339 B.R. 664 (Bank.W.D.Mich., Mar. 23, 2006) - Chapter 13 debtor moved for order allowing an additional 15 days to file credit counseling certification. The Court, Judge Stevenson, held that (1) impending foreclosure sale of the debtor's home was the type of "exigent circumstance" that might permit debtor to waive the BAPCPA's counseling requirement, but (2) the debtor's certification that she had requested, but was unable to acquire, counseling prior to filing her petition did not satisfy the statutory prerequisite for temporary waiver of the BAPCPA's counseling requirement. The debtor failed to state that she was unable to obtain counseling during the 5-day period beginning on the date on which she made the request, which did not meet the requirement for the exemption under ? 109(h)(3)(A)(iii). This failure meant that the certification could not be satisfactory to the court. Additionally, the debtor failed to receive counseling before her 341 meeting, some 35 days after filing her petition. Given the lack of a certification verifying receipt of counseling prior to filing or of certification in compliance with section 109(h) (3), the debtor was not eligible to be a debtor under the Bankruptcy Code.

In re Mars, 340 B.R. 844 (Bank.W.D.Mich., Mar. 28, 2006) - Chapter 7 trustee moved to dismiss debtors' case as a substantial abuse of Chapter 7's

provisions reasoning that the debtors were capable of funding a Chapter 13 plan. The Court, Judge Hughes, denied the motion, holding that even if the debtors could have proposed a Chapter 13 plan which would pay $5,000 more to unsecured creditors, the case could not be dismissed under the "substantial abuse" provision as it existed pre- BAPCPA. First, the Court could consider factors beyond the ability to confirm a Chapter 13 plan in determining if a debtor needs Chapter 7 relief. Second, a debtor's income would have to substantially exceed the statutory budget imposed by section 707(b) to constitute "substantial abuse." Lastly, in determining a debtor's fair share of future earnings the court should employ "a similarly situated person in the community" standard rather than simply consider the debtor's proposals.

In re Basch, 341 B.R. 615 (Bank.W.D.Mich., Apr. 12, 2006) - Chapter 7 claimed exemption for four parcels of property owned by debtor and his non- debtor wife as tenancies by the entirety, and the trustee objected, arguing that the Michigan exemption provision relied upon by the debtor had been declared unconstitutional in In re Raynard, 327 B.R. 623 (Bank.W.D.Mich. 2005). Both debtor and trustee directed the Court to a second entireties property exemption, MCL 600.6023a, as a basis for the exemption. The Court, Judge Gregg, first noted that Michigan follows the standard approach to entireties property: each tenant is vested with title and neither can act independently of the other. The Court noted that filing a petition does not sever the tenancy, but if the debtor's interest is not specifically exempted, that interest could be sold under 11 USC 363(h)-(j). If the statutory conditions are met and the property is sold, then the tenancy would be severed and the proceeds of the sale would be split between the bankruptcy estate and the co-owners under section 363(j). The Court turned to Michigan's bankruptcy exemption statute, MCL 600.5451(1)(o), which one judge had held unconstitutional, and reasoned that the statute was subject to constitutional interpretations. The Court further reasoned that the debtor could amend his exemption to claim the property under Michigan's general entireties exemption statute, MCL 600.6023a. The Court concluded that it was unnecessary for it to decide the constitutional issue raised by the trustee, since it would not be an issue if the debtor amended his exemption claim.

In re Broucek, 341 B.R. 623 (Bank.W.D.Mich., Apr. 17, 2006) - Chapter 7 trustee objected to proof of claim filed by bank in case filed debtor after his Ponzi scheme collapsed. The bank argued that the debtor was liable for overdraft charges under the Account Rules and under the UCC, because each time he endorsed an investor's check, "he represented and warranted that the check was not subject to any claim or defense in recoupment." The Court, Judge Stevenson, disallowed the secured claim for the amount of overdraft charges, noting that the debtor, in depositing official checks from "investors" in his Ponzi scheme, warranted only that the official checks were not subject to the defense or claim of recoupment by the financial institutions which had acted as the drawer, the issuer of funds, and the payor on the funds. This warranty was not false and did not subject the depositor to liability under Michigan law. The Court next concluded that the bank's practice of issuing official checks to the "investors" before the debtor's checks had cleared was a "final payment" which required the payor bank to bear the risk of loss. Last, the Court ruled that the bank was not entitled to postpetition attorney fees as an unsecured creditor. To the extent that the bank had a pre-petition claim for fees and costs not related to its defense of claims filed by the "investors", the Court allowed the bank's unsecured claim for attorney's fees and costs.

Thank you to Dan Bylenga for preparing these summaries.

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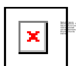

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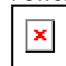

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