Marcia R. Meoli

From: Marcia R. Meoli, Editor <mmeoli@hannpersinger.com>
Sent: Friday, October 13, 2006 12:00 PM
To: Marcia Meoli
Subject: Federal Bar Association - Bankruptcy Section

Federal Bar Association

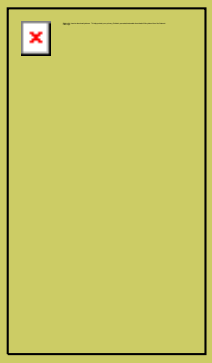
Bankruptcy Section Newsletter
October 2006

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: July 2006, 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 one of 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

18th Annual Summer Seminar @ Treetops Resort



Upcoming dates:

1. 19th Annual FBA Summer Seminar: July 26-28 2007, The Park Place Hotel, Traverse City, 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

3. Means test seminars: see article and quick link below.

Bankruptcy Section Steering Committee:

David C. Andersen
Dan E. Bylenga, Jr.
Stephen V. Carpenter
Daniel J. Casamatta
Michael W. Donovan
Daniel R. Kubiak, Chair

The bankruptcy section of the Federal Bar Association held the 18th Annual Summer Seminar at the Treetops Golf Resort in Gaylord Michigan, from August 17-19, 2006. It provided an opportunity to enjoy great food, a fun time and to learn how the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 ("BAPCPA") has changed our practice of bankruptcy law.

After the obligatory cocktail party on Thursday night (great food!), we commenced on Friday morning with introductions by Steven L. Rayman, co chair of the event. With great humor, Steve introduced our keynote speaker, the Honorable Eugene R. Wedoff, Chief Bankruptcy Judge for the Northern District Illinois by reminiscing about the time that he traveled to Chicago to appear before Judge Wedoff. Judge Wedoff was quite gracious in not gloating about that appearance by Steve or a recent appearance of our Detroit Tigers before his Chicago White Sox just prior to the seminar. (Of course, Judge Wedoff would have later had to recognize the superior talents of both appearing parties had he done so, and also that the Tigers were on their way ultimately to the playoffs!)

Judge Wedoff presented some insights into to BAPCPA (including giving us a way to pronounce it). Particularly, he reviewed the various reasons why bankruptcy practitioners are troubled by BAPCPA. Most interestingly, he challenged us to become involved in developing proposals for future changes in bankruptcy law, anticipating that, perhaps in the next few years, there might be a political climate for this.

Hal Nelson made a presentation about the pro bono program. Please look at the article in this newsletter about that program and view the quick link to the procedures and forms for it.

I attended the updates on chapter 7 and chapter 13 and learned some details about BAPCPA that will be useful for form changes and future work for clients.

After our barbeque on Friday night, we commenced again on Saturday morning. Speakers from the local US Trustee office reviewed BAPCPA issues, including the means test, production of documents (risk of dismissal), credit counseling requirements and various other issues that we all now need to address. Then, all of the judges in attendance reviewed recent case law, which allowed for some very interesting interactions.

The Honorable Jeffrey R. Hughes presented Timothy J. Curtin with the Lion of Justice award, in honor of his recent retirement. We received a gracious "thank you" from Tim, who stated:

"I was touched and honored to have received the Lion of Justice Award from the Bankruptcy Section of the FBA. The Lion now occupies a place of honor in our new home.

The Western District of Michigan is a special place, particularly if you are a bankruptcy lawyer. From the days of Judge Wooldridge in the 1940s forward, the

John T. Piggins
Lori L. Purkey
Steven L. Rayman
Marcia R. Meoli, Editor
Harold E. Nelson, Past Chair
Brett N. Rodgers
Peter A. Teholiz
Mary K. Viegelahn Hamlin
Robb Wardrop
Norm C. Witte

There are vacancies for the steering committee. If you are interested in serving, please contact Dan Kubiak at: dkubiak@mmbjlaw.com , no later than November 3, 2006.

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

United States Bankruptcy Court for the Western District of Michigan has deservedly been known for the excellence of its judges and the professionalism of its Court staff. The Court's excellence has fostered, in turn, a highly-skilled, yet collegiate, bar. I count myself tremendously fortunate to have practiced most of my professional career in front of the Bankruptcy Court fo the Western District and to have worked with such a skilled group of bankruptcy practitioners."

It is clear from anyone who had the opportunity to practice law with Tim, that the thanks go to him for his professionalism and grace. We will miss him.

It was a great seminar and all of the presenters and others should be thanked and congratulated for it. Steve Rayman was correct when he particularly recognized Lori Purkey, who did substantial work and who took the least amount of credit. See photographs below taken at the seminar.

-Editor

Means test changes: upcoming seminars

Effective for cases filed on and after October 1, 2006, the Census Bureau, IRA Data and Administrative Expense Multipliers, used in the means tests, changed again. The main software suppliers provide updates for their programs which will integrate these changes. You should make any updates to your systems to be certain that you are using the correct tables, depending upon the date of filing for a particular case.

View the tables, starting at:

http://www.usdoj.gov/ust/eo/bapcpa/200 61001/meanstesting.htm .

As part of its ongoing Civil Enforcement Initiative, the Office of the United States Trustee, together with the Chapter 7 and 13 trustees for the Western District of Michigan, will present free training workshops on how to prepare the "Means Test" Form B22A.

For more information and a copy of the registration form, please review the flier at: http://www.miwb.uscourts.gov/content/cmecf/PDF/U ST_Workshop_06.pdf .

Standing Committee on Local Rules

The Committee on Local Rules has completed a review and revision of the Local Bankruptcy Rules. Those proposed revised Rules are now available at the court website. The Court solicits comments from the general public and the bar. The deadline for comments on the proposed local rules is October 18, 2006. Your comments should be sent to The Hon. Jo Ann C. Stevenson, United States Bankruptcy Court, One Division Avenue, North, Grand Rapids, Michigan 49503.

View the proposed local rules at:

http://www.miwb.uscourts.gov/content/services/rule s/proposedRules_Aug2006.pdf

FBA bankruptcy pro bono program

National Association of Chapter 13 Trustees

Federal Bar Association of Western Michigan

Pro bono procedures and client retainer agreement

Means test seminars

The bankruptcy section of the FBA has a program to provide pro bono services in bankrutpcy cases. If you are interested in serving in this capacity, please review the FBA Pro Bono Procedures and Client Retainer Agreement at:

http://www.miwb.uscourts.gov/content/cmecf/PDF/C
lient_Retainer_Agreement.pdf.

Recent events/announcements

It is with great regret that we announce that Judge Jo Ann C. Stevenson will retire in the Fall of 2007. Judge Stevenson has served as a bankruptcy judge since 1987. In 2005, she was elevated to the position of chief judge for our court. Much more will be said about Judge Stevenson over the next year as we prepare for her retirement, but one certainty is that we will miss her greatly, both on the bench and for her numerous contributions to the bar over the years.

News from the clerk's office:

1. The court recently upgraded its Electronic Case Filing (ECF) system to version 3.1. As a result of this new ECF version, attorneys will need to upgrade their bankruptcy software programs by October 16, 2006. Older versions of petition software will not work with version 3.1. Likewise, any bankruptcy software modified for version 3.1 cannot be used with the current ECF version of 3.0. If you are unable to upgrade your bankruptcy software by October 16, you may still electronically file cases as instructed in your initial training class.

2. The Judicial Conference has approved an amendment to Interim Bankruptcy Rule 1007. The amendment provides debtors a 15-day grace period within which to file a certificate showing completion of a credit counseling course. In addition, the Judicial Conference has also approved proposed revisions to several Official Forms. These changes include Official Form 1, which implements the proposed amendment to Interim Rule 1007. The proposed amendments to the Official Forms may be viewed at www.uscourts.gov/bankform. The effective date of the revised Official Forms is October 1, 2006.

3. Please also note that the Judicial Conference has approved proposed amendments to some Official Forms. Official forms can be view from the court's website at: http://www.uscourts.gov/bankform .

Chapter 13 Issues

Both chapter 13 trustees have new forms with which to sign up for internet access to their case management software. Please review their websites to get the forms for this:

Mary Hamlin: http://www.13network.com/trustees/kal/kalhome.as p

Brett Rodgers: http://www.rodgersch13.com

If you wish to print from Mr. Rodger's website, you must have a compatible printer (with terminal services and the capability of working with a network system). Multifunction or bubble jet printers will not work. Contact that office for more information.

In addition, Ms. Hamlin now has a model plan for practice under BAPCPA, also available at her website.

Case summaries

Sixth Circuit Cases

In re Cook, 457 F.3d 561 (6th Cir., Aug. 9 2006) --- - Bankruptcy trustee brought an action against assignee (Bank One) of a mortgage and promissory note, claiming that Bank One did not have a perfected security interest in the property that was superior to his interest as a judicial lien creditor. The bankruptcy court and district court ruled against the trustee, holding that Bank One had a superior, perfected interest and that it did not violate the automatic stay by recording its interest after the bankruptcy petition had been filed. The Sixth Circuit affirmed. In its holding, the Sixth Circuit noted that Bank One had actual possession of the promissory note and that it did not need to record the mortgage to be perfected; the fact that the prior holder of the mortgage had recorded was constructive notice of the lien and any transfer of the mortgage did not affect its enforceability. The Sixth Circuit also agreed with the lower courts in holding that Bank One did not violate the automatic stay by attempting to perfect its interest after the filing of the bankruptcy petition because the mortgage was not the property of the debtor.

In re Dow Corning Corp., 456 F.3d 668 (6th Cir., July 26, 2006) ---- Unsecured creditors of a solvent debtor sought interest at the contract rate applicable to defaults as well as post-petition attorney fees, costs and expenses. The Sixth Circuit first stated that the proper standard of review for decisions interpreting a reorganization plan is an abuse of discretion standard. It went on to hold that although the phrase "at the applicable contract rate" was ambiguous, the unsecured creditors had not met their burden of proving that the bankruptcy court abused its discretion in its interpreting such language to mean interest at a non-default, fixed rate. However, the Sixth Circuit agreed with the unsecured creditors in holding that when a debtor is solvent, absent compelling equitable considerations, creditor's rights should be enforced pursuant to the contract; to do otherwise would violate the fair and equitable standard which must be met in order to approve a reorganization plan. Therefore the Sixth Circuit remanded this issue to the lower courts to take into consideration the equities of the case and determine if the default interest rate was appropriate. Finally, the Sixth Circuit held that the unsecured creditors could recover attorney fees, costs and expenses from the estate of a solvent debtor, if the terms of their contract and applicable non-bankruptcy law permitted them to do so.

In re Lowenbraun, 453 F.3d 314 (6th Cir. July 6, 2006) ---- A Chapter 7 debtor's estranged wife sued trustee's counsel in state court, alleging libel, slander, abuse of process and outrageous conduct for counsel's statements to a newspaper and in his Contempt Motion. The Sixth Circuit affirmed the bankruptcy and district courts in holding that estranged wife's claims were within the "core" jurisdiction of the bankruptcy court, and were therefore properly removed from state court. Such claims would not have risen but for the bankruptcy proceeding. In addition, the Sixth Circuit held that the trustee's counsel was entitled to absolute immunity for his statements in the Contempt Motion, and also entitled to immunity for his statements made to a newspaper concerning the bankruptcy case. The Sixth Circuit noted that there was no evidence of bad faith in counsel's extrajudicial statements.

Bankruptcy Appellate Panel Cases

In re Curry, 347 B.R. 596 (6th Cir. BAP, Aug. 10, 2006) ---- Creditor holding perfected security interest in Chapter 13 debtor's motor vehicle, which it had lawfully repossessed before the bankruptcy petition was filed, moved to terminate the automatic stay so it could sell the vehicle. Creditor also objected to the confirmation of the proposed reorganization plan based on the plan's "cramdown" of its secured claim. The Bankruptcy Court denied creditor's

motion to terminate the automatic stay and overruled its objection to the plan. The Bankruptcy Appellate Panel affirmed, holding that because the vehicle had not yet been sold or otherwise disposed of, the property remained part of the bankruptcy estate. Therefore the automatic stay applied to prevent the creditor from selling the vehicle. In addition, the Court held that the debtor was not required to pay the full redemption value of the vehicle in order to adequately protect the creditor; paying the creditor the value of the collateral was adequate protection.

District Court of Western Michigan Cases

In re Wallace, 347 B.R. 626 (WD Mich. 2006) ---- Chapter 7 debtor claimed homestead exemption pursuant to a Michigan exemption statute which was applicable only to bankruptcy debtors. The Bankruptcy Court held that the bankruptcy-specific exemption enacted by the Michigan legislature was unconstitutional. The Court stated that Congress did not give the states the power to create customized bankruptcy exemptions pursuant to Section 522(b)(2) of the Bankruptcy Code. The Court based its decision on the exclusive nature of Bankruptcy law; states cannot interfere with or complement the Bankruptcy Act. The Court noted that the scope of Section 522(b)(2)'s available exemptions under state law is limited to only those exemptions that are generally permitted under that state's debt enforcement laws.

In re Welch, 347 B.R. 247 (WD Mich. 2006) ---- Trustee moved to dismiss a Chapter 7 case under Section 707(b) for "substantial abuse" of the provisions of Chapter 7. The Bankruptcy Court held that it could not dismiss because it did not find debtor's decision to seek Chapter 7 relief to be substantially abusive. The Court analyzed whether the debtor's non-filing spouse's income should be considered for purposes of determining the debtor's disposable income. The Court decided to not include the non-filing spouse's income in the calculation of the debtor's disposable income, but also noted that the non-filing spouse's income may still be taken into consideration as part of the "totality of the circumstances." The Court stated that although there are instances where the non- filing spouse's income should be considered in determining whether the debtor's Chapter 7 petition is abusive, this was not such a case. Looking strictly at the debtor's disposable income, the Court could not conclude that her petition was substantially abusive.

In re Hart, 347 B.R. 635 (WD Mich. 2006) ---- An adversary proceeding was brought to the Bankruptcy Court to determine if a debt arising from an automobile accident between a motorcyclist and Chapter 7 debtor should be excepted from discharge. The Court held that the debt should not be discharged, because the accident was one of personal injury caused by the debtor's operation of a motor vehicle while the debtor was under the influence of alcohol. Although the debtor was never arrested or charged with unlawful operation of a vehicle while intoxicated, and his alcohol level was below the legal limit, the Court noted that the Michigan statute defined "operating while intoxicated" to mean not only operating above a certain limit, but also to mean simply that the person is operating a vehicle while under the influence of alcohol. Because the debtor was under the influence of alcohol when he hit the motorcyclist, the Court denied discharge of that debt in the bankruptcy proceeding.

In re Johnson, 345 B.R. 816 (WD Mich. 2006) ---- Debtor brought prepetition wrongful discharge action against former employer, but when she subsequently filed for bankruptcy, she failed to disclose the pending lawsuit as an asset. Later, after the bankruptcy case was closed, the defendants learned of her bankruptcy filing and failure to include the claim as an asset. The bankruptcy case was reopened, and the Bankruptcy Court held that the doctrine of judicial estoppel barred debtor from pursuing her wrongful discharge claim. The Court stated that the debtor knowingly and without legal justification failed to disclose the cause of action in her bankruptcy proceeding and therefore could not claim that her failure to disclose was inadvertent or simply a mistake. The Court also refused to place any weight on the fact that the debtor's attorney advised her not to disclose

the wrongful termination claim; a litigant is bound by the errors and omissions of his or her attorney.

In re St. Joseph Cleaners, Inc., 346 B.R. 430 (2006) ---- The Chapter 7 trustee moved to compel a law firm that had represented debtor when case was previously proceeding as a Chapter 11 case to disgorge fee payment it had received in order to ensure a pro rata distribution among Chapter 11 administrative claimants. The Bankruptcy Court held that the Chapter 7 trustee did not have the authority to "reel back" the fee payments to the law firm because such fee payment was a final payment made pursuant to a confirmed Chapter 11 plan. The Court emphasized that the payment was made pursuant to a confirmed plan, and that six years had passed since the payment had been made.

In re Slocombe, 344 B.R. 529 (2006) ---- The Chapter 7 trustee filed an adversary complaint, objecting to the discharge of the debtor on the basis that debtor knowingly and fraudulently withheld documents from the trustee. The Bankruptcy Court held that even though the relevant documents were in the possession of a third party, debtor was responsible for the nondisclosure. The Court reasoned that there was no agreement between the third party and the debtor regarding the documents, that failing to tell the trustee the location of such records was tantamount to physical control, and that debtor did not have the unilateral right to determine the value of such documents. The Court also held that debtor acted knowingly and fraudulently, or at least with reckless indifference, in withholding the information. The Court noted that debtor himself was a bankruptcy attorney who should know the procedures and disclosure requirements and that debtor continually refused to provide information throughout the proceeding. These facts and circumstances, according to the Court, were enough to conclude that debtor's actions were made knowingly and fraudulently.

Thank you to Dan Bylenga for preparing these case summaries.

Summer Seminar Photo: Judge Hughes with Tim and Colleen Curtin

Summer Seminar Photo: An impressive group

Summer Seminar Photo: Someone to look up to

email: mmeoli@hannpersinger.com

Forward email

Federal Bar Association - Bankruptcy Section | Marcia R. Meoli, Editor | HANN PERSINGER, PC | 503 Century Lane | Holland | MI | 49423