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Subject: FW: Federal Bar Association - Bankruptcy Section August 2007 edition.

Federal Bar Association

Bankruptcy Section Newsletter
August 2007

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: April 2007, January 2007, October 2006, 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.

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In this issue

Interview with the Honorable Jo Ann C. Stevenson, in anticipation of her retirement from the bench.

First of all, I want to say that we will miss you personally and will miss all that you have to offer to the bankruptcy law practice in Western Michigan. We are sorry you are going to retire. How did you know that it was time to go?

Thank you very much. After my last health scare I was reminded once again that life is short and it was time to move on to the

Upcoming dates:

1. 20th Annual FBA Summer Seminar: July 24-26, 2008, Boyne Highlands, Michigan.

2. Rejuvenation Party for the Honorable Jo Ann C. Stevenson will be held in the Pantlind Room, Amway Grand Hotel, Grand Rapids, Michigan on 9/28/07.

3. FBA Steering Committee meets typically on the 3rd Friday for lunch at the Peninsular Club in downtown Grand Rapids. Check in advance with President Dan

next phase. I have seen too many people stay in a job simply because they could, thereby missing out on other opportunities.

What do you think that you will miss most about being a judge?

Without question, the people! First and foremost, my staff. Also, all the wonderful friends I have made in the Bankruptcy Bar. And last, the perks, I have gotten used to everyone automatically standing when I enter a room.

What will you miss the least?

The fractious litigation over issues I considered foolish or a waste of the court's time and the client's money. I am also pleased that I will never again have to review a reaffirmation agreement.

How do you see your development as a judge over the years, and what would you wish to say to your successor as that person will take the bench and start the process of becoming a judge?

Throughout the years I have developed a love of solving problems and increased my analytical abilities. I have also become more efficient, better organized, and more technologically savvy.

I would advise my successor to be patient, listen carefully to what is said, be strong when it is required, be consistent, organized, embrace the technology and be mindful that decisions have real life consequences for clients and society - in other words, be practical. Also, avoid Black Robe Disease at all costs!

As you look back over the years on the bench, how do you see the development of bankruptcy law and the practice of it?

The changes in the law have taken away a fair amount of judicial discretion which provided the intellectual stimulation of the job. However, one constant which I hope never changes, is the standard of practice in the Bankruptcy Bar for the Western District of Michigan - that of courtesy, genuine concern for clients, and the respect for one another and the bench.

What concerns do you have, if any, regarding the quality of representation provided to litigants and what areas of practice need to be improved?

We are seeing more non- bankruptcy lawyers who do not have a grasp of the integration of the entire Bankruptcy Code. We are

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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

also seeing more and more pro se debtors, which causes concern.

Do you have any observations, concerns or advice for us who will continue to practice bankruptcy law in Western Michigan for the next number of years, particularly, perhaps about how BAPCPA will affect our practices?

I would only encourage you to become as knowledgeable as possible about BAPCPA; familiarize yourselves with the opinions regarding the issues that arise; attend bankruptcy seminars; and become computer literate so as to save time and cost to your clients.

As you prepare to leave the bench, do you feel free to comment on BAPCPA, either from the standpoint of its substantive provisions or in the manner in which it was written? Do you have any recommendations for future legislation related to bankruptcy?

No and No. Maybe later but not now.

What do you see as your proudest moment as a judge and/or highest achievement while serving on the bench?

Being the first woman to be appointed and making a success of the position. In other words, showing that the job is not gender-specific. Also, my high rate of affirmance.

Can you share with us your present plans for retirement? Will you travel more? (Another thought: how is your golf game?)

My golf game continues to be a source of embarrassment and challenge. I definitely intend to travel more, and to become involved with the Kent County Literacy Program and am hoping to be appointed to one or more Grand Rapids City Boards and/or Commissions as I have become very interested in how Grand Rapids works. I also plan on doing whatever it takes to improve my Italian.

I was interested to see that you majored in French in college at Rutgers. I know that you were learning Italian at some point in time. Are you able to use your language skills these days?

Si, mi piace molto la lingua italiana. Tranne i 14 tempi dei verbi, l'italiano e una lingua facile de parlare e leggere. Aspetto con impazienza di avere piu tempo di studiare italiano e francese quando non devo andare lavorare.

As for my French, it came in very handy when I was stranded

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

Pro bono procedures and client retainer agreement

US District Court civility plan

New dollar amounts in bankrutpcy

Information on reporting bankrutpcy fraud

without a passport in Paris for three days in April.

I have always heard that you are a "fellow paisan" (aka Italian American). Is it appropriate to ask: what is your family name? What was your family like while growing up?

My mother's maiden name was Bonomolo. All of her family was Sicilian except possibly for one great great grandparent who was French. My biological father was Irish, but my stepfather's family was from Calabria in Italy. His name was Cacavio. My Sicilian, Irish and Calabrizi heritage made for a family life which was always challenging and boisterous.

Another Italian question: What is your favorite quote from the Godfather (any one of the three movies)?

"Leave the gun. Take the cannolis" and of course the ever-popular, "I am going to make you an offer you can't refuse" or something similar.

Finally, and this is the question that all of us have wanted to ask since the civility function in Grand Rapids years ago: What happened to "that leather dress"? (For those reading this who did not attend that event, Judge Stevenson surprised us all by appearing in a very attractive, leather dress. Sometime after that, we learned that she was seeing a wonderful new fellow, Marshall Grate, who is now her husband.)

As you will soon see, I still have it.

Thank you very much for allowing me this opportunity and for all your great years on the bench. Again, we will miss you much and have all the best wishes for your retirement. We hope to see you often, as time permits.

Thank you again. It has been an honor to serve the Bar for twenty years. I will miss all of you.

19th Annual Summer Seminar

We held the 19th Annual Summer Seminar at the Park Place Hotel in Traverse City from July 26-28, 2007. Lori Purkey, who chaired the event, reported that this seminar had the second largest attendance in history. Many new people attended probably because of the current initiative of Judge Gregg to encourage bankruptcy lawyers to attend continuing education seminars.

As usual, we started the seminar with the cocktail party on Thursday night, this year at the Top of the Park. It was a

beautiful setting with a great view of the Grand Traverse Bay at sunset. We enjoyed the opportunity to socialize with people that we see on a professional basis throughout the year and to get reacquainted with those whom we have not seen for awhile.

On Friday morning, we settled into some excellent presentations by a variety of speakers. These included 2 sessions each on chapter 13 and chapter 11 practice and specialty sessions on Non- disclosure of Assets; Electronic Discovery; Section 353 Sales, Second Lien Financing and the Arrival of Hedge Funds; Means Testing; and Lien Stripping. The chapter 13 sessions included extensive discussions of Judge Hughes' McGillis decision on the interplay and meaning of the 2005 bankruptcy amendments and the chapter 13 plan, among other issues.

On Friday afternoon, we held the official golf tournament at the Leelanau Club at Bahles Farms. This was a beautiful course about a half an hour north of Traverse City on the Leelanau Peninsula. We arrived just as it stopped raining. One of the benefits of Traverse City is that our people can participate in a number of activities nearby besides golf: shopping, biking, wine tasting, enjoying one of the parks in the area, or simply hiding out and reading. (Did you get a chance to finish the last Harry Potter book?).

The evening was on our own and some us were able to surprise Carol Chase with a dinner to thank her for her years of service as chapter 13 trustee attorney. Carol is leaving that post to go into private practice. Many attorneys, especially debtor attorneys from Grand Rapids, will have fond memories of Carol's work and civility throughout these years. Good luck Carol!

Saturday included two more sessions on chapter 13 and two on chapter 7 practice. We also reviewed real estate avoidance actions and collection issues with respect to non-dischargeable debts. We met as a full body and that is where we are able to fully recognize Lori Purkey for her hard work on the seminar, this year and in the recent past years. It was clear that credit was overdue, when, after her name was announced, the whole room stood up and applauded. Lori then presented awards for golf and a special recognition for David Scalici, who is retiring as Judge Gregg's calendar clerk, after many years of working at the clerk's office.

Our last event was "The Judges Speak", where we listened to the judges in attendance as they reviewed important new cases in our jurisdiction. Each case provided valuable insights into our developing practice of law. This year, one could not avoid feeling a little sad, however, seeing Judge Stevenson there in her capacity as one of our sitting judges for the last time. She seemed understandably more relaxed than usual, and that led to some great and fun comments, but we know that this means

that we will miss her valuable contributions in the future.

This made the summer seminar possibly one of passages and recognition. In the last year or so, we have seen the retirement of a number of people and have a huge retirement ahead of us. We are seeing the effects of the 2005 amendments to the bankruptcy code and starting to realize some the long-term effects that it will have on our practice. We recognize the people still here, working in our bar to learn and educate and to improve the way we practice bankruptcy law.

Retirement of chapter 7 trustee James Hoerner

James Hoerner retired recently after many years of service on the panel of chapter 7 trustees.

Jim was born in Fort Wayne, Indiana in 1919. He attended the University of Michigan, originally majoring in engineering. He and his late wife Mary moved to Grand Rapids in the early 1950's.

This was after Jim served most honorably in the Army during World War II. Like many WWII veterans, Jim was always modest about his war record. After some digging, however, one can find tremendous accomplishments. He became a company commander at age 23, just out of officer's candidate school. He landed during an invasion on Utah Beach the day after D-Day. He is the only officer in his landing group to survive. His company continued under the command of General George Patton across France, Belgium, Luxembourg, southern Germany and then Czechoslovakia. In one battle, they lost all but 18 out of 135 soldier's, and, again, of course, Jim survived. For that, he won the British Military Cross and the French Croix de Guerre.

Jim was also awarded three Purple Hearts, a Bronze Star with Oak Leaf Cluster and the Silver Star with two Oak Leaf Clusters. He was admitted to the Infantry Hall of Fame. In April of this year, the French Government bestowed the French Legion of Honor upon Jim.

After the armistice in 1945, Jim stayed with the occupying troops in Germany and then remained in the Army reserve. He was recalled back to duty in 1961 to serve with the Berlin Airlift. He served in the Army reserve until 1977, retiring with the rank of Brigadier General.

Jim came to Grand Rapids in the 1950's to run a business. He began serving on the chapter 7 trustee panel regularly in the late 1980's and served in that capacity until Spring of this year, handling countless cases over the years.

We will miss Jim. He was always amiable and prepared in his work as trustee. It is not known for certain, but he may have set the record for the shortest 341 meeting of all time. That, of course, was prior to the amendments to the bankruptcy code in 2005. It also probably had something to do with the fact that he had seen many cases before, and knew what he was looking for. There was never any doubt as to his integrity as a professional.

We wish Jim all the best in this retirement. Thanks to Jim's daughter, Anne Rossi for her help in providing information for this article.

From the clerk of the court

1. **Court Rotation Announcement.** As many of you already know, the Sixth Circuit has designated Scott Dales to replace Judge Stevenson as the third bankruptcy judge in this district. However, M. Dales cannot actually be appointed until his background checks are completed.

The three-year rotation for the Lansing, Marquette and Traverse City courts ends this December. Ordinarily, Judge Gregg would have assumed responsibility for the Marquette calendar and I would have assumed responsibility for the Lansing calendar beginning next year. However, Judge Gregg and I have decided that the Lansing assignment will give Mr. Dales the best opportunity to familiarize himself with the court and its procedures. Therefore, Judge Gregg will continue with the Traverse City calendar and I will continue with the Marquette calendar for the time being.

It is possible that no further change will be made to the rotation until another 3 years have passed. However, no final decision will be made until Mr. Dales has been appointed and the three of us have had an opportunity to talk.

- Judge Jeffrey R. Hughes

2. **Applications to Pay Filing Fees in Installments.** The Judges of this court have determined that applications to pay filing fees in installments must indicate an installment schedule of four equal monthly installments, not to exceed 120 days from the date of filing. In addition, pursuant to LBR 1006(b), any unpaid filing fees from a prior bankruptcy proceeding will result in the denial of the application to pay filing fees in installments. Accordingly, please conform future applications to such a payment schedule to avoid a delay/denial of debtors' installment fee applications.

Recent events/announcements

1. Carol J. Chase is leaving in her position as attorney for the Chapter 13 trustee after many years in working in such position. Carol will continue in the practice of bankruptcy law in the Grand Rapids area.

2. David Scalici is retiring as Judge Gregg's law clerk after many years of work for our court. There is a recognition event for David on Thursday, September 13, 2007 from 2:00 p.m. to 4:00 p.m. at the Bankruptcy Court in Grand Rapids. Stop by to see David and others from the clerk's staff during this time.

Summaries of recent cases

2007 BANKRUPTCY CASES: April 1 - July 31, 2007

Published 6th Circuit Cases

In re Bucci, -- F.3d. --, 2007 WL 1891736 (6th Cir. (Ohio) 2007) - This case involved an adversary proceeding in a Chapter 7 case to determine the dischargeability of debt for unpaid employer contributions. The debtor was the president and sole shareholder of a company which was contractually obligated to make monthly contributions to employee benefit funds. Debtor failed to make contributions for over a year. Various funds filed adversary proceedings seeking a declaration that the debt could not be discharge because debtor's failure to contribute was a "defalcation while acting in a fiduciary capacity" under 11 U.S.C. § 523(a)(4). The bankruptcy court held that § 523(a) (4) did not apply because there was no evidence that the debtor acted as a fiduciary of the money; the district court affirmed, rejecting the funds' argument that debtor's status as a fiduciary under ERISA made him a fiduciary under §523(a)(4). The Sixth Circuit affirmed the lower court's decision, first noting that it construes "fiduciary capacity" under §523(a)(4) more narrowly than the term is used elsewhere and applies it to express or technical trusts. A statute can create a trust for purposes of § 523(a)(4) if it defines the trust res and imposes duties on the trustee, which duties exist prior to any act of wrongdoing. Sixth Circuit precedent requires that the necessary trust relationship exist prior to the act creating the debt and without reference to it. The Funds alleged Debtor was an ERISA fiduciary because he exercised control over plan assets by failing to make the contractually required contributions. Thus, the act that created the debt and the act that allegedly made debtor a fiduciary were one and the same. The fact that the debtor only had a contractual obligation to contribute was insufficient for a defalcation claim under §523(a)(4). Affirmed.

In re Barrett, 487 F.3d 353 (6th Cir. (B.A.P.) 2007) - Chapter

7 debtor diagnosed with a medical condition brought an adversary proceeding to obtain a "undue hardship" discharge of more than $94,000 in student loan debt. The Bankruptcy Court for the Northern District of Ohio discharged the debt, and the Bankruptcy Appellate Panel affirmed. In order to discharge student loans under § 523(a)(8) a debtor must prove (1) inability to maintain minimal standard of living if forced to repay the debt; (2) the situation is likely to continue for a significant portion of the repayment period; and (3) good faith efforts to repay the debt. The Sixth Circuit ruled that the Debtor did not have to submit expert medical evidence in order to prove how his medical condition would impair his future ability to work. The uncontroverted evidence (Debtor's testimony about his many health problems, a corroborating medical letter, and his tax returns) satisfied the second element. As a final matter, the creditor argued that Debtor failed to show a good faith effort to repay the debt because he failed to enroll in an Income Contingent Repayment Program. The Court ruled that the Debtor demonstrated sufficient good faith to satisfy the third prong where he declined to enroll in the ICRP due to the tax consequences, made repeated efforts to work, and provided annual financial information to his creditors. Affirmed.

In re Glance, 487 F.3d 317 (6th Cir. (Mich.) 2007) - Chapter 13 trustee moved to dismiss a case on the grounds that debtor's secured debt exceeded the $922,975 cap in § 109(e). The Bankruptcy Court for the Eastern District granted the motion to dismiss, and the District Court affirmed. The question for the Sixth Circuit was whether a security interest in debtor's property is a "noncontingent, liquidated, secured debt" under § 109(e). Debtor listed two houses among his assets which he owned jointly with his non-filing wife. His wife alone signed the promissory notes, but Debtor signed the mortgages, totaling $1,113,000 at the time of his petition. The Sixth Circuit held that (1) the mortgages were debts attributable to the debtor (2) which were liquidated, (3) secured and (4) noncontingent. First, the meanings of "debt" and "claim" are coextensive, and the Supreme Court applied the definition of "claim" to a mortgage lien in Johnson v. Home State Bank, 501 U.S. 78, 111 S.Ct. 2150, 115 L.Ed.2d 66 (1991) (noting that bankruptcy extinguishes only one means of enforcing a claim - an in personam action - while leaving untouched in rem proceedings). While the debtor had no personal liability on the notes, he had in rem liability on the mortgage liens. Second, the mortgage liens were liquidated debts since the amounts due were readily ascertainable. Third, there was no dispute that the mortgages were secured. Finally, the mortgages were noncontingent. All the events giving rise to liability for the mortgage debt occurred prior to debtor's petition. The creditors secured their claims to the properties when the debtor signed the mortgages. Therefore, the bankruptcy court properly dismissed debtor's petition where the sum of the debts on the houses at the time of the petition

exceeded the limit in § 109(e). Affirmed.

In re DSC, Ltd., 486 F.3d 940 (6th Cir. (Mich.) 2007) - The Bankruptcy Court for the Eastern District of Michigan dismissed an involuntary petition because there were not three petitioning creditors. The bankruptcy court held a trial and determined that two of four petitioning creditors were not qualified under § 303(b)(1) because their claims were disputed. The Court further refused to allow a fifth creditor to join the involuntary petition after the Court's deadline had passed. The District Court affirmed, as did the Sixth Circuit. § 303(b)(1) requires three creditors who hold claims that are not contingent or subject to bona fide dispute as to liability or amount in order to commence involuntary proceedings. The bankruptcy court concluded that two creditors did not have noncontingent, undisputed claims. The Sixth Circuit next held that the putative debtor's post- dismissal settlement with the creditor that unsuccessfully attempted to join the involuntary petition did not moot the appeal. The putative debtor could not show that the creditors could not obtain relief if they succeeded on appeal. Finally, the bankruptcy court did not err in imposing a joinder deadline. The petitioning creditors never objected to the joinder deadline and even participated in its creation. Furthermore, while § 303(c) provides a right of joinder before the case is dismissed or relief is ordered, this statute merely provides an outside time limit in which creditors must join. Rule 1003(b) of the Federal Rules of Bankruptcy Procedure provided the court with authority for such deadlines ("reasonable opportunity for other creditors to join"), Fed.R.Bank.P. 1013(a) requires the court to expedite involuntary proceedings, and § 303(c) does not prohibit the court from setting an earlier deadline. Affirmed.

Published Bankruptcy Appellate Panel Cases

In re Forbes, -- B.R. -- (6th Cir.BAP, 2007) - § 544(b) action in which the Chapter 7 trustee brought an adversary proceeding to avoid a loan from debtor's ex-husband to debtor's sister as a fraudulent conveyance under California law and to avoid the purchase of Kentucky property as a perpetuation of the fraudulent transfer. Debtor and her ex- husband each held a 50% ownership interest in a business. There was an offer to purchase the business and a $300,000 refundable deposit. The business was not sold, but the money was never returned. Debtor's ex- husband, at debtor's request, lent her sister $157,000 to purchase property in California so debtor could live there. Debtor's sister eventually sold the property and used the proceeds to purchase property in Kentucky for debtor. The bankruptcy court ruled that the loan to debtor's sister to buy debtor a house was a fraudulent transfer of debtor's portion of the $300,000 deposit; the transfer of the sale proceeds to purchase Kentucky property was fraudulent; and Debtor's sister held the properties on behalf of the debtor. Multiple "badges of

fraud" existed which indicated that the "loan" was Debtor's property. The Bankruptcy Appellate Panel affirmed, holding that the court did not err. Despite the lack of any documentary evidence, there was ample evidence that the parties were scheming to shelter assets from creditors. The funds used to purchase the California property were traceable to the sale proceeds and subsequent purchase of Kentucky property, which was property of the estate. The Panel further held that the trustee had standing to pursue the fraudulent conveyance claim. The appellant argued that the trustee could not prevail under § 544(b) because there was no creditor holding an unsecured claim allowable under § 502 since a California court had previously rejected the creditor's fraudulent transfer claims. The Panel concluded that the California court's order had no preclusive effect because there were questions (1) whether it violated the automatic stay since the court entered its order after Debtor filed her petition, and (2) whether it was final, since an appeal was pending. Affirmed.

In re Morgeson, -- B.R. -- (6th Cir.BAP, 2007) - Chapter 7 trustee filed adversary complaint to determine validity of a mortgage on debtors' property and to avoid a creditor's mortgage on debtor-wife's one-half interest in the property. The Ohio bankruptcy court entered summary judgment for the trustee finding that the mortgage only extended to the debtor-husband's one-half interest in the property, and the creditor appealed. The creditor argued that the certificate of title was conclusive over the underlying mortgage document, which debtor-wife signed as "spouse, signing only to release her dower interest", because the act of registering and memorializing the mortgage created the property interest, not the document itself. The Panel rejected this argument, noting that under Ohio law a certificate of title cannot reflect an encumbrance greater than that which the mortgage provides. Ohio law does not permit a mortgage company to extend its interest in property beyond that which the mortgage contains, so the mortgage determines the creditor's actual interest. Because the language in the mortgage only reflected debtor- wife's intent to release her dower interest, the creditor only had an interest only in debtor-husband's one-half interest in the property. Affirmed.

In re Fox, -- B.R. -- (6th Cir.BAP, 2007) - Creditor brought adversary proceedings against Chapter 7 debtor seeking (1) to hold debtor personally liable for debt owed to creditor by debtor's company, and (2) a determination that the debt was nondischargeable under §§ 523(a)(4) or (a)(6). The bankruptcy court entered judgment for the debtor, concluding that there was no fiduciary relationship between the parties and, thus, no defalcation. First, the agreement between debtor's corporation and the creditor did not create an express trust. Therefore, there was no fiduciary relationship as required by § 523(a)(4) in order to sustain a defalcation claim. Second, the debt did not fall

within the embezzlement discharge exception where debtor did not act with intent to defraud the creditor where he acted openly, despite failing to hold creditor's funds in a segregated account, and where debtor used creditor's funds to keep his business afloat. Finally, the debtor's operation of his business was negligent at most, and any resulting debt did not fall within the willful and malicious injury exception under § 523(a)(6). Affirmed.

W.D. Michigan Bankruptcy Cases

In re McGillis, -- B.R. -- (Bkrtcy.W.D.Mich. 2007) - Chapter 13 debtors, "above-median- income" debtors, drew objections of the Trustee, who argued that (1) they were not committing all of their disposable income to their unsecured creditors as required by § 1325(b), and (2) they did not propose the plan in good faith given the discrepancy between the debtors' proposed plan ($140.00/month) and what they could afford to pay. The Bankruptcy Court, Judge Hughes, denied confirmation, holding that IRS guidelines were not conclusive in determining the expense component of the debtors' projected disposable income and that the debtors could not include expenses for a timeshare and second mortgage. The Court first concluded that only the amount accurately set forth as a debtor's currently monthly income in line 14 of Form B22C is relevant in calculating the income component of the § 1325(b) disposable income calculation, rejecting the Trustee's argument that the Court should also look to Schedules I and J. Under BAPCPA's definition of "current monthly income" courts can only use a debtor's average historical earnings to calculate the income component of § 1325(b). The Court next addressed the calculation of the expense component under § 1325(b). The debtors argued that their disposable income was only $140.00, as opposed to the $1,537.00 if they could only deduct their Schedule J expenses, since § 1325(b)(3) requires consideration of § 707(b)(2)(A) and (B). Debtors' § 707(b)(2) expenses were higher than their Schedule J expenses because they included debts which they did not intend to pay. The Trustee argued that debtors should not be able to deduct loan payments they do not intend to make when calculating their expenses. The Court agreed with the Trustee, concluding that the amounts claimed as expenses under § 1325(b)(3) must in fact be expended in order to be expenditures that are reasonably necessary for debtors' future support. The Court next concluded that § 1325(b), as amended, did not include a temporal aspect; it only requires a mathematical equation which includes the time period and the disposable income. Hence, the Court agreed with the debtors' argument that they only had to pay into the plan the product of their disposable income and the time period. Finally, the Court concluded that a debtor's ability to fund a plan remains a key part in determining if the plan was proposed in good faith. § 1325(a) (3) requires debtors to satisfy the court that they are

making an honest effort to repay creditors through the proposed plan. The Debtors grossly overstated the expense component in the § 1325 (b) calculation by including expenses for debts which they did not intend to pay upon confirmation of the plan. The Court denied confirmation on this basis but allowed the Debtors a chance to file an amended plan.

In re Seek Wilderness, Ltd., -- B.R. -- (Bkrtcy.W.D.Mich. 2007) - Chapter 7 Trustee filed a motion for summary judgment seeking the Court to compel Debtor's attorney to disgorge a pre-petition retainer in order to facilitate equal distributions among Chapter 11 administrative claimants. Debtor paid its attorney a $7,500 retainer prior to filing a Chapter 11 petition, $4,800 of which was for pre-petition fees, and all of which the attorney had in his trust account. The attorney incurred post-petition fees of $4,320 and requested the difference to be allowed as a Chapter 11 administrative expense under § 503(b)(1). The Trustee opposed this request and argued that the attorney had to disgorge a portion of what he had received to equalize what he would receive with what other unpaid Chapter 11 administrative claimants would receive. Judge Hughes denied the Trustee's motion as it pertained to the $4,800 pre-petition fees, which could not be an administrative claim. The attorney enjoyed the status as a secured claimant regarding his pre-petition fees. The Court next addressed the remaining $2,700 (which the attorney had not yet earned when the case commenced) and concluded that the attorney had to disgorge this amount unless he could prove that the debtor-in- possession had properly permitted him - either pursuant to a court order or in the ordinary course of business - to apply this unused portion of the pre-petition retainer as a new post-petition retainer. Even if the attorney prevailed on his argument that the $2,700 post- petition retainer was properly authorized, he would still have to return some portion of this amount for re-distribution pursuant to § 726 (b) and Specker Motor Sales v. Eisen, 393 F.3d 659 (6th Cir.2004) (Chapter 11 administrative claimants had to disgorge fees where there were unpaid Chapter11 administrative claimants at the close of a Chapter 7 case).

Thanks to Dan Bylenga for the preparation of these summaries.

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