Marcia R. Meoli

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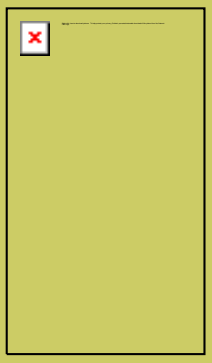
Federal Bar Association

Bankruptcy Section Newsletter
March 2009

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: October 2008, July 2008, April, 2008, January 2008, October 2007, August 2007, 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.

To view this email in its best format (green and tan background, with the tree logo at the top), we suggest that you set your internet software to "HTML" view. On versions of INTERNET EXPLORER, click "tools" then "options" then "environment". Under the "views" tab, click "default read view" and set to "HTML", instead of "plain text".

In this issue



Upcoming dates:

1. 21st Annual FBA Summer Seminar: July 23-25, 2009, Crystal Mountain, Michigan. See link below for the resort brochure, to view recreational activities, lodging options and other choices you could make to prepare for the seminar.

2. FBA Steering Committee will meet the 3rd Friday of each month for lunch at the University Club in downtown Grand Rapids. Check in advance with Chair A. Todd Almassian @

Pending legislation

As this newsletter is sent, a tremendous number of bills are proposed or pending before Congress to deal with the nation's economic crises. The website for the AMERICAN BANKRUPTCY INSTITUTE shows over 20 pending bills, dealing with many issues, including foreclosures, credit cards

and pensions. It is difficult to know how much effort to spend to learn about such efforts until bills actually become laws, unless one is intending to write a committee or legislator or otherwise become active in the legislative process.

Already, the FBA Bankruptcy Section Steering Committee is discussing ways to provide continuing education to you after legislation becomes law. Look forward to our summer seminar or special educational opportunities later this year and into next year.

From the clerk of the court / procedural changes

1. In December 2008, some of the official forms changed. The chapter 7 means test form addresses a temporary exclusion from that test for reservists and members of the National Guard who are called to active duty after September 11, 2001 for at least 90 days. See our local Administrative Order No. 2008-5. This adopted Interim Bankruptcy Rule 1007-I.

There is a change to the form used to search bankruptcy records. There are changes related to notices to debtors regarding any changes to their addresses and notices for joint debtors living at the same address. There is a new form for chapter 13 debtors for certifications regarding domestic support obligations. There are changes to present forms: Exhibit D regarding credit counseling, the debtor's Statement of Intention, the notice of Chapter 11 Bankruptcy Case and the Proof of Claim form. There are some new forms for use in chapter 11 cases.

Information about these changes may be found at the court website: http://www.uscourts.gov/bankform/index.html . Software providers generally provide updates to forms. Be certain that your software is updated.

2. Judge assignments changed. Commencing January 1, 2009, the following rotation schedule will commence:

-Judge Gregg will assume all cases assigned to Marquette

-Judge Dales will assume all cases assigned to Traverse City and cases previously assigned to Judge Hughes in Kalamazoo

-Judge Hughes will assume all cases assigned to Lansing

(With limited exceptions, the newly-assigned judge to the various locations will take over the caseload of the former judge).

3. Implementation of Rule changes. Congress has taken no

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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

United States Bankruptcy Courts

Chapter 13 Trustee Brett N. Rodgers

Chapter 13 Trustee Mary K. Viegelahn Hamlin

action on the amendments to the Federal Rules of Bankruptcy, Civil, and Criminal Procedure, approved by the Supreme Court on April 23, 2008. Accordingly, the following amendments to the rules will take effect on December 1, 2008: Bankruptcy Rules 1005, 1006, 1007, 1009, 1010, 1011, 1015, 1017, 1019, 1020, 2002, 2003, 2007.1, 2015, 3002, 3003, 3016, 3017.1, 3019, 4002, 4003, 4004, 4006, 4007, 4008, 5001, 5003, 6004, 7012, 7022, 7023.1, 8001, 8003, 9006, 9009, and 9024, and new Bankruptcy Rules 1021, 2007.2, 2015.1, 2015.2, 2015.3, 5008, and 6011;

-Supplemental Rule C(6)(a); and

-Criminal Rules 1, 12.1, 17, 18, 32, 41, 45, 60, and 61. The above Bankruptcy Rules amendments and new rules implement the changes to the Bankruptcy Code made by the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. No. 109-08, and, with the exception of Interim Rule 5012 (Communication of and Cooperation with Foreign Courts and Foreign Representatives), supercede the Interim Rules generally adopted by the courts as local rules in October 2005.

In accordance with 28 U.S.C. § 2074(a) and the April 23, 2008, orders of the Supreme Court, they will govern all proceedings commenced on or after December 1, 2008, and "insofar as just and practicable" all proceedings then pending. The text of the amended rules and extensive supporting documentation can be found at http://www.uscourts.gov/rules/supct0408.html .

Recent events/changes

1. Elizabeth Salata, attorney for chapter 13 trustee Brett Rodgers, gave birth the triplets on October 6, 2008: a girl, Isabelle and two boys, Sawyer and Noah. Everyone is home and doing well. Elizabeth planned to be back in the office on January 12, 2009. Congratulations to Elizabeth.

2. Lori Purkey opened her own law practice, Purkey & Associates, P.L.C., 2251 E. Paris Ave., SE. Suite B, Grand Rapids, MI 49546 616-940-0553 Fax 616-940- 0554 Purkey@purkeyandassociates.com . She will concentrate on a creditor practice is ably assisted by former bankruptcy trustee, Rose Bareham.

3. The FBA Bankruptcy Section sponsored receptions for our Judges in December and January. Judge Gregg, Judge Hughes, and Judge Dales each wrote to the FBA and expressed their appreciation for the events which were held in Traverse City, Marquette, and Lansing. Special thanks to Jim Boyd, Darrell Dettmann, Norm Witte, and Andy Gerdes for their efforts in organizing the events.

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

New dollar amounts in bankrutpcy

Information on reporting bankrutpcy fraud

Crystal Mountain Resort brochure

If you have information regarding any professional award, achievement or other event regarding a member of our bar or other person involved in our practice, or regarding you, please let us know. Please supply sufficient information for us to report it, or to find the information to do so. You may email it to the editor, address below. Thank you.

Summaries of recent cases

Thank you to Dan Bylenga for his wonderful work in drafting these summaries.

Bankruptcy Cases: September 25 - December 31, 2008

6th Circuit

In re Sanders, 551 F.3d 397 (6th Cir. (Mich) 2008) - Is the start of the 4-year look-back period in § 1328(f) the filing date of a previous Chapter 7 petition or the discharge date? § 1328(f) prohibits a discharge if a debtor has received a discharge in the 4-year period before the Chapter 13 order for relief. Debtor filed Chapter 13 more than 4 years after he filed Chapter 7 but less than 4 years after discharge. The Bankruptcy Court confirmed the Chapter 13 plan but denied the discharge due to the timing of the Chapter 7 discharge. The District Court reversed, ruling that the date of filing controlled, not the date of discharge, and the Chapter 13 trustee appealed. The Sixth Circuit affirmed, holding that § 1328(f) sets a date-of-filing trigger. Because the debtor filed his chapter 7 petition more than four years before initiating this chapter 13 proceeding, the Code permits the discharge. Affirmed.

LPP Mort., Ltd v. Brinley, 547 F.3d 643 (6th Cir. (Ky.) 2008) - Consolidated appeal involving judgment liens. Debtors moved to avoid judgment liens, which bankruptcy court avoided in part. On appeal, the district court avoided the liens entirely. The Sixth Circuit affirmed in part in one case and affirmed in the other. The Bankruptcy Court then reopened the case and granted creditor's motion to preserve unencumbered equity in property for the estate's benefit, and the debtors appealed. The district court affirmed, as did the Sixth Circuit. The Court first held that the creditor had standing to file motions to preserve avoided judicial liens for the estate's benefit. The premature closing of estates and technical abandonment of the properties caused the creditor a concrete injury. Revoking the abandonment to preserve the liens for the benefit of the estate would redress this injury, since the creditor would receive funds from the sale of the properties (after paying senior lienholders and the debtor's exemption). The Court next held that Fed.R.Civ.P. 60(b) governs whether technical abandonment of

property included in bankruptcy estate is revocable. Finally, the Court held that revocation of the technical abandonment of the real properties to preserve the unencumbered equity for the benefit of the estate was proper under Fed.R.Civ.P. 60(b), subsections (5) and (6), based on equity and the windfall to the debtors and junior lienholders if there were no revocation.

6th Circuit B.A.P.

In re Hake, 398 B.R. 892 (6th Cir. BAP 2008) - Is a show cause order against an attorney who is admitted pro hac vice moot once the attorney agrees to withdraw his admission? The Court issued an order to show cause why it should not revoke an attorney's admission pro hac vice due to misconduct and violation of a pre-trial order. Creditor's attorney moved to withdraw the order as moot and filed a motion to recuse, which the Bankruptcy Court denied. The Bankruptcy Court then revoked the attorney's pro hac vice admission, and creditor's attorney appealed. The Panel held that, assuming that an attorney can voluntarily withdraw pro hac vice admission, a motion to withdraw did not moot the issues in Show Cause Order and the attorney could not so easily avoid the court's exercise of its authority to control its bar. The Court did not abuse its discretion in denying the motion to recuse and in revoking the pro hac vice admission. The attorney's conduct was unprofessional and disrespectful and showed deliberate disdain for the court, and there was nothing in the record to support the recusal arguments. Affirmed.

In re Anderson, 397 B.R. 363 (6th Cir. BAP 2008) - Is incarceration a disability that merits waiver of credit counseling requirements? Inmate filed Chapter 7 petition and moved for waiver of credit counseling requirement. The Bankruptcy Court denied the motion but granted a request for extension of time. The Court then dismissed the case for lack of a pre-petition credit counseling certificate, and the inmate appealed. The Panel affirmed the Court's ruling that incarceration does not amount to a disability to qualify for a waiver under § 109(h)(4), noting Congressional intent and case law on point. The Panel also ruled that the Court did not err in granting an extension of less than 15 days, noting the Court has discretion in extending deadlines. Finally, the Court did not err in failing to order the Department of Corrections to allow the inmate to make a telephone call or have Internet access. There was nothing showing that the inmate ever made such a request. Affirmed.

In re Meadows, 396 B.R. 485 (6th Cir. BAP 2008) - Does a creditor willfully violate the automatic stay when, after receiving notice of bankruptcy, it keeps funds that it received from the post-petition cashing of a pre-petition post-dated check and conditions return of the funds? Payday lender, after receiving notice of bankruptcy, refused to unconditionally return funds

that it received after cashing a prepetition postdated check. The Bankruptcy Court found a violation of the stay, despite § 363(b)(11), and ordered the lender to return the funds and pay attorney fees. Lender appealed. The Panel reversed. It first held that estate's interest in the funds transferred to the lender and the funds stopped being property of the estate once the pre-petition check was honored. Regardless of whether the transfer was authorized, there was a transfer. The transfer could be challenged under § 549, but if estate property transferred without authorization remains property of the estate, as the debtor argued, then certain provisions, including § 541 (a)(3) become superfluous. Second, the lender did not violate the automatic stay by keeping the funds. § 362(b)(11) exempts from the stay "the presentment of a negotiable instrument and the giving of notice of and protesting dishonor of such an instrument." Finally, the unauthorized transfer was subject to avoidance under § 549. Reversed and remanded.

In re Cassim, 395 B.R. 907 (6th Cir. BAP 2008) - Is Chapter 13 debtor's "undue hardship" adversary proceeding to determine dischargeability of student loans constitutionally ripe before completion of payments under the plan? Debtor filed adversary proceeding to determine that payment of student loan would be an undue hardship and dischargeable, and creditor moved to dismiss on ripeness grounds, arguing that dischargeability would not be ripe until the debtor received a discharge. The Bankruptcy Court denied the motion, finding that there was undue hardship to merit discharge, and creditor appealed. The Panel first noted that under Rule 4007, nothing prohibited debtor from filing an adversary proceeding to discharge student loans before completing her plan. The creditor argued that the case was constitutionally unripe, based on the contingency of a discharge rather than any contingency regarding the facts surrounding the hardship claim. The Panel disagreed, holding that the contingency of a discharge does not mean that the case is constitutionally unripe. First, there was a substantial controversy between the parties when the debtor filed her chapter 13 petition. Second, the controversy was sufficiently immediate to justify a review before the entry of a discharge. Affirmed.

In re HNRC Dissolution Co., 396 B.R. 461 (6th Cir. BAP 2008) - Does prorated postpetition portion of ERISA withdrawal liability directly and substantially benefit the estate to warrant administrative priority? Multiemployer pension plan sought allowance, as administrative expense, of ERISA withdrawal liability arising upon debtors' withdrawal from plan, almost two years after filing Chapter 11. The Bankruptcy Court rejected the allowance claim, and the Pension appealed. The Panel affirmed, holding that the withdrawal liability claim was not payable upon a priority basis as an administrative expense. The Plan failed to establish, as a matter of law, that its

withdrawal liability claim "directly and substantially" benefited the estate. The Plan failed to establish that its withdrawal liability claim directly related to work performed by the debtors' employees postpetition. The amount of withdrawal liability to be assessed against a withdrawing employer always depends on outside factors that are not directly related to postpetition work of a debtor's employees, such as the return on the investment of the pension funds. The Panel further held that the claim is not entitled to administrative priority under the Reading v. Brown exception, because the claim does not stem from tort damages or intentional misconduct on the part of the debtors. Affirmed.

In re Thomas, 395 B.R. 914 (6th Cir. BAP 2008) - Can above-median income Chapter 13 debtors claim secured debt expense deductions for collateral that they intend to surrender? Chapter 13 trustee objected to confirmation of above-median income debtors' proposed plans as not satisfying the "projected disposable income" requirement where debtors included secured debt deductions for collateral that they intended to surrender. The Bankruptcy Court overruled the objections, and the trustee appealed. The Panel held that the "means test" is a mechanical test that is applied the same in Chapter 7 and Chapter 13 cases in calculating disposable income. As such, Chapter 13 debtors can deduct payments for collateral that they intend to surrender when determining disposable income under § 1325(b)(2). Disposable income must then be compared with projected disposable income, as reflected in the debtor's income and expenses as of the effective date of the plan, as § 1325(b)(1)(B) requires. The court must take into account changes in the debtors' income and expenses when calculating projected disposable income. If a trustee or unsecured creditor objects to the plan, the court may not confirm the plan if it finds that the debtor's schedules or other credible evidence require recalculating disposable income. Affirmed in part and reversed in part to address the objections in light of the opinion.

In re Zwosta, 395 B.R. 378 (6th Cir. BAP 2008) - Does payment of delinquent taxes from proceeds of corporation's receivables in which creditor has a perfected security interest amount to a nondischargeable willful and malicious injury to creditor's property? Creditor with blanket security interest in corporate assets filed nondischargeability complaints against debtor-corporate officers in their Chapter 7 cases, claiming willful and malicious injury to property by using receivables to pay federal taxes. The debtors claimed that the funds with which they paid the IRS were held in trust and were not corporate funds. The bankruptcy courts denied debtors' motions for summary judgment and granted summary judgment in favor of creditor, and the debtors appealed. While the bankruptcy court correctly ruled that the creditor had an interest in the funds paid to the IRS, it did not address if the creditor's property interest was injured and if the injury was willful and malicious. The

Panel first held that denial of the debtors' motions was proper because the creditor had a senior property interest in the funds paid to the IRS. The court should have denied the creditor's motions, however, since there were genuine issues of fact regarding injury to the creditor's property and whether the injury was willful and malicious. Vacated and remanded.

In re Petro, 395 B.R. 369 (6th Cir. BAP 2008) - Is "projected disposable income" for above-median- income debtor based on mechanical application of § 1325(b)(1) and (2)? Did debtor propose plan in good faith under § 1325(a)(3). Chapter 13 trustee objected to confirmation of above-median-income Chapter 13 debtor on "projected disposable income" and "good faith" grounds. The Bankruptcy Court overruled the objection, concluding that "projected disposable income" is simply "disposable income" as calculated over 6-month period before petition date projected forward. The Panel reversed and remanded the Court's decision, noting that Court's mechanical application of the statute ignores the policy behind amendments to the Bankruptcy Code and failed to take into account the debtor's actual ability to contribute to the plan. "Projected disposable income" is forward-looking concept that requires the Court to consider debtor's future and past finances to determine compliance with the "projected disposable income" requirement. Reversed and remanded.

In re Wingerter, 394 B.R. 859 (6th Cir. BAP 2008) - Did assignee of alleged debt of Chapter 7 debtor violate Rule 9011 when it filed a proof of claim? Did the Court err in stating its view generally that filing a proof of claim without reviewing the originating documents fails to satisfy Rule 9011's reasonable inquiry duty when the debtor did not schedule the obligation and purchase of the claim is not accompanied by reliable representations of validity? Creditor filed incomplete and incorrect Form 10 and failed to attach copies of original documents, and the debtors objected to the claim. The Bankruptcy Court, after finding that the assignee had violated Rule 9011, ruled that the time and effort that the assignee's senior management spent attending "show cause" hearings was enough of a sanction. The Panel first ruled that the Court's decision mooted any appeal of the decision since the Panel could not fashion any relief when the only sanction was to attend show cause hearings. The Panel next ruled that it could not reverse the Court's order regarding future filings of proofs of claims. This portion of the order addressed hypothetical future situations. As such, the appeal seeks an advisory opinion. Appeal dismissed.

Western District Of Michigan

In re Thomasma, 399 B.R. 20 (Bkrtcy.W.D.Mich.2009) (Judge Hughes) - Can a debtor amend schedules thirteen months after

originally filing them to include tax refunds that should have been included in original schedules? Chapter 7 trustee objected to debtor's claimed exemption of tax refunds that debtor failed to include in original schedules but disclosed in amended schedules thirteen months later, arguing that the debtor is time-barred. Judge Hughes rejected the trustee's argument and held that the exemption would not be denied solely on the basis that the debtor failed to disclose the anticipated refunds in the original schedules. Nothing in Rules 1007, 1009 and 4003 prohibits such conduct, and there is recourse if a debtor fails to accurately complete schedules, including dismissal and revocation of discharge. The trustee can continue objections to the claimed exemptions on the basis of bad faith and concealment.

In re Weeks, --- B.R. ----, 2009 WL 223905 (Bkrtcy.W.D.Mich.2009) (Judge Hughes) - Is bank that allegedly violates the discharge injunction entitled to summary judgment? Post-discharge, bank consolidated line of credit and term loan into new term note. Discharged Chapter 7 debtor signed post-petition guaranties, promising to pay all indebtedness owed no matter when incurred. Debtor brought adversary proceeding against bank, seeking damages for alleged violations of the discharge injunction, and bank moved for summary disposition. Judge Hughes denied the motion. The Court first rejected the proposition that discharge of guaranty obligations goes so far as to include yet to be incurred debts of the principal obligor. The Debtor chose not to revoke his guaranties post-petition, which required him to honor those promises for obligor's future debt. But because the bank never made a new loan, the discharge barred the bank's post-petition efforts to obtain repayment of pre-petition debt. The bank failed to establish under Rule 7056 that dismissal is proper. In fact, the Court concluded that the debtor's liability for pre-petition debt was subject to the discharge and that the bank failed to comply with § 524 (e) by trying to keep the debtor liable for this debt. As such, the debtor can proceed against the bank to recover damages for its alleged post-petition efforts to enforce its guaranties to the extent that the efforts pertained to discharged debt. Motion denied.

In re Smith, 396 B.R. 214 (Bkrtcy.W.D.Mich.2009) (Judge Hughes) - Chapter 13 trustee objected to confirmation of plan, disputing size of the debtor's household. The debtors' adult daughter and her child live with the debtors. Their son has a room in the home, and their other daughter, who is in college, lives at home in the summer. The trustee argues that the debtor's household is only the debtors, while the debtors contend that the household includes at least their daughter and grandchild. The Bankruptcy Court, giving the word its plain meaning, defined the term "household," when used to determine the "applicable commitment period" of a Chapter 13 plan, to refer broadly to all persons, related or not, who reside in

the same housing unit as the debtor. No order issued.

In re Engman, 395 B.R. 610 (Bkrtcy.W.D.Mich.2009) (Judge Hughes) - Supplementary opinion to explain Court's reasoning for adopting certain standards in a scheduling order. Chapter 7 trustee moved for (1) approval of proposed settlements with lienholders and co-owners of property in which the estate has an interest and (2) authority to distribute settlement amounts to these parties. The Chapter 7 debtor and one creditor objected to the motion. After stating that the trustee could have tried to secure the necessary authority by simply serving notice on the creditors, hoping that nobody would object, Judge Hughes stated that the Court must determine if the distributions are (1) in the estate's best interest, and (2) consistent with trustee's fiduciary responsibilities to estate. Judge Hughes also stated that the trustee should have filed a motion under § 725, which deals with disposition of encumbered assets, rather than moving for settlement approval under Rule 9019(a).

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