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<u>Editors</u>

Phillip W. Bohl, Co-Editor
Gray, Plant, Mooty, Mooty & Bennett, P.A.
3400 City Center
33 South Sixth Street
Minneapolis, Minnesota 55402
phillip.bohl@gpmlaw.com

George H. Singer, Co-Editor
Lindquist & Vennum, P.L.L.P.
4200 IDS Center
80 South Eighth Street
Minneapolis, Minnesota 55402
gsinger@lindquist.com

Faye Knowles, Contributing Editor
Fredrickson & Byron, P.A.
4000 Pillsbury Center
200 South Sixth Street
Minneapolis, MN 55402
fknowles@fredlaw.com

IN THIS ISSUE

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In re Dial Business Forms, Inc.: Eighth Circuit BAP Holds That Priority Language in a Chapter 11 Plan "Trumps" Article 9

*David E. Runck**
*Christopher A. Camardello***
Oppenheimer Wolff & Donnelly LLP

Have you ever wondered what would happen if the provisions of a debtor's confirmed Chapter 11 plan conflicted with non-bankruptcy law? In *In re Dial Business Forms, Inc.*, 283 B.R. 537 (B.A.P. 8th Cir. 2002), the U.S. Bankruptcy Appellate Panel for the Eighth Circuit answered this very question and ruled that lien priority language in a debtor's confirmed plan controlled the rights of the debtor and all creditors existing at the time of confirmation, and preempted the normal priority rules of Article 9.

In *Dial*, the Chapter 11 debtor, Dial Business Forms, Inc., was a printing business located in Kansas City, Missouri. In 1995, Dial borrowed approximately $1.2 million from General Electric Capital Corporation who, in exchange for the loan, took a first-priority security interest against certain printing equipment. GECC recorded its interest by filing appropriate UCC-1 financing statements with the Missouri Office of the Secretary of State. Two years later, Dial ran into financial trouble and (of course—this is the *Bankruptcy Bulletin*, after all) filed for protection under Chapter 11 of the Bankruptcy Code.

The Debtor's Plan

In January of 1999, the U.S. Bankruptcy Court for the Western District of Missouri (Koger, C.J.) confirmed Dial's Chapter 11 plan. The Plan provided that Dial would pay GECC $1 million over 4 years, with interest at a rate of 10%. The confirmed Plan further provided that GECC would retain its liens against Dial's assets to secure GECC's distributions under the Plan.

With respect to general unsecured creditors (Class 3), Paragraph 3.3 of the Plan provided that the unsecured creditors would receive deferred monthly payments equal to approximately $900,000, plus interest. The Plan also granted the unsecured creditors a lien, providing that their distribution "shall be secured by a subordinated interest in all of Dial's assets." Finally, the Plan appointed a trustee, Mr. Paul D. Sinclair, to act on behalf of the unsecured creditors on a post-confirmation basis and to collect their distributions under the Plan. Following confirmation of the Plan, Dial executed a Promissory Note and Security Agreement in favor of the Trustee in the amount of $900,000. On January 19, 1999, the Trustee perfected his security interest in Dial's assets by filing UCC-1 financing statements with the Missouri Secretary of State.

GECC's Lawsuit

Approximately one year following the confirmation of Dial's Plan, GECC failed to file continuation statements with the Missouri Secretary of State and, accordingly, its UCC-1 financing statements lapsed by operation of law under Missouri's version of Article 9 (Mo. Rev. § 400.9-403). Dial subsequently defaulted on its payments to the Trustee under Paragraph 3.3 of the Plan. Shortly after Dial's default, the Trustee gave notice of his intent to foreclose on all of Dial's assets under the security agreement, including the printing equipment serving as GECC's collateral. With respect to GECC, the Trustee asserted that the lapse of GECC's financing statements caused GECC to be unperfected, and elevated the Trustee's lien to a first-priority position in GECC's collateral.

Immediately prior to the Trustee's foreclosure sale, GECC reopened Dial's bankruptcy case and sued both Dial and the Trustee by commencing an adversary proceeding in the U.S. Bankruptcy Court for the Western District of Missouri. Among other things, GECC sought in its complaint: (1) a declaration that its lien was superior to the Trustee's lien pursuant to the subordination language contained in Dial's Chapter 11 Plan; and (2) an injunction prohibiting the Trustee's proposed foreclosure sale as being contrary to the terms the Plan. The Trustee countered that the subordination language contained in the Plan was merely a recital of the current priority of the Trustee's lien at the time of confirmation, and was not meant to permanently subordinate the Trustee's lien to GECC.

After conducting a trial on the merits, the Bankruptcy Court (Federman, J.), 273 B.R. 594 (Bankr. W.D. Mo. 2002), ruled that the Trustee and GECC were bound by the terms of Dial's Plan and that, notwithstanding GECC's lapse, GECC retained its first-priority lien because the Trustee had previously agreed to subordinate his interest under the language of the Plan. As a result, the Court concluded, "as between these participants [to the Plan], no perfection was necessary." The Trustee then appealed the decision to the Bankruptcy Appellate Panel for the Eighth Circuit.

The BAP's Decision

On appeal, Judges Nancy C. Dreher and Robert J. Kressel, comprising a 2-1 majority of the Bankruptcy Appellate Panel, affirmed Judge Federman's decision over a dissenting opinion filed by Judge Barry S. Schermer. In reaching its decision, the BAP majority acknowledged that if Missouri's version of Article 9 were to control, then GECC's financing statements had lapsed and the Trustee's lien would be superior to the lien of GECC. "[W]hen the drafters of the UCC amended Article 9 in 1972, they added a sentence to section 9-403(2) that made it clear that a junior creditor who filed its financing statement before the lapse will move up in priority, even though it had actual knowledge of the prior lien." *Dial Business Forms*, 283 B.R. at 540.

Notwithstanding this fact, however, the BAP stated that in this case the specific subordination language of the Debtor's Plan controlled over the normal priority rules of Article 9:

> The bankruptcy court properly construed this plan to be unambiguous and to give function to the provision that Class 3 "*shall be* secured by a *subordinated interest* in all of Dial's assets. . . ." By its plain meaning, the subordination language contained in Paragraph 3.3(E) of the plan subordinated Class 3's lien to GECC irrespective of whether GECC's lien was properly perfected under section 400.9-403(2).

Id. at 541.

Citing the decision of *United States v. Lincoln Sav. Bank (In re Commercial Millwright Serv. Corp.)*, 245 B.R. 603 (N.D. Iowa 2000), and its own prior decision in *Consumers Realty and Dev. Co., Inc. v. Goetze (In re Consumers Realty and Dev. Co., Inc.)*, 238 B.R. 418 (8th Cir. BAP 1999), the BAP stated that under § 1141 of the Bankruptcy Code, the provisions of a confirmed Chapter 11 plan control the rights of the debtor and its creditors post-confirmation. Moreover, the BAP stated that this principle remains true whether or not the creditors have accepted the plan, and even if a different result would occur under state law:

> Because [§ 1141] explicitly provides that the provisions of a confirmed plan bind the debtor and any creditor, the terms of the plan govern. Furthermore, it is well settled that the Supremacy

> Clause dictates that when state law is contrary to federal bankruptcy law, the bankruptcy provisions prevail. If a provision of the Plan, a creature of federal law, conflicts with the law of a state and the state law frustrates the full effectiveness of federal law the state law is rendered invalid by the Supremacy Clause.

Id. at 542 (internal citations and quotations omitted). With respect to the Trustee, the BAP reasoned that, although Article 9 normally would elevate the Trustee's lien to a senior position above GECC due to the lapse of GECC's financing statement, Article 9 was actually *preempted* by the subordination language contained in Dial's confirmed Plan and therefore did not apply. "Accordingly, to the extent GECC may have lost its position as a senior lienholder due to the lapse of its UCC-1 financing statements under Missouri Revised Statutes § 400.9-403(2), section 1141 of the Bankruptcy Code provides that the subordination language of the Plan 'trumps' conflicting state law and GECC maintains its priority position over the Trustee and Class 3." *Id.*

Judge Schermer's Dissent

In a dissenting opinion, Judge Schermer disagreed with the BAP majority's conclusion that GECC's lien remained senior to the lien of the Trustee.

Although he agreed with the majority's conclusion that Dial's confirmed Plan became a binding contract between the parties, Judge Schermer stressed the fact that property interests are created and defined by state law, not by federal bankruptcy law. As a result, he concluded, Missouri's version of Article 9 should control the parties' relationship post-confirmation. "These principles [that state law determines the priority of property rights] apply before, during, and after a bankruptcy proceeding; nothing in 11 U.S.C. § 1141 changes this result." *Id.* at 543.

In addition, Judge Schermer stated that the majority's decision encourages the existence of secret liens; may create an irreconcilable conflict in the event a future lender extends credit to the Debtor; and results in GECC receiving a windfall "merely by reason of the happenstance of bankruptcy."

Conclusion

On November 4, 2002, the Trustee appealed the BAP's decision to the U.S. Court of Appeals for the Eighth Circuit. Oral argument is expected to occur sometime in the early spring. In the meantime, counsel representing secured creditors in bankruptcy cases would be well advised to read the *Dial* decision and take its holding into account when negotiating priority language in a proposed Chapter 11 plan.

**David E. Runck is a senior associate with Oppenheimer Wolff & Donnelly LLP. From 1996 to 1998, Mr. Runck served as a judicial law clerk for the Honorable Nancy C. Dreher at the U.S. Bankruptcy Court for the District of Minnesota.*

***Christopher A. Camardello is an associate with Oppenheimer Wolff & Donnelly LLP. From 1998 to 2000, Mr. Camardello served as a judicial law clerk for the Honorable Gregory F. Kishel at the U.S. Bankruptcy Court for the District of Minnesota.*

<u>Authors' Note</u>: Oral argument in this case before the Eighth Circuit Court of Appeals has been scheduled for April 17, 2003, in St. Louis, Mo., before Judges Loken, Hansen and Riley.

SUPREME COURT REVIEW

Prepetition Settlement Does NOT Affect Nature of Debt for Purpose Dischargeability
Archer v. Warner, 2003 WL 1611437, ____ S. Ct. ____ (2003)

On March 31, 2003, the United States Supreme Court resolved the split of authority on the question of whether a prepetition settlement agreement that resolved "each and every" underlying claim in a state court lawsuit definitively changed the nature of the debt for purposes of dischargeability. The Court in *Archer v. Warner*, WL 1611437, _____ S. Ct. ____ (2003) rejected the line of authority that found the settlement of a state law tort claim created a novation that substitutes a dischargeable contract debt for an earlier tort claim that would arguably have been otherwise nondischargeable. In a 7-2 decision, the Court held that Congress intended for bankruptcy courts to conduct "the fullest possible inquiry" into the true nature of a debt for purposes of determining nondischargeability.

The facts in *Archer* are straightforward. Elliott and Carol Archer purchased a manufacturing company from the debtors for $610,000. A few months after the sale, the Archers sued the debtors in state court for fraud in connection with the sale. The parties ultimately settled the lawsuit. The settlement agreement specified that the debtors would pay the Archers approximately $300,000. The debtors paid the Archers $200,000 at the time of settlement and executed a promissory note for the remaining $100,000. All parties executed releases in connection with the settlement agreement. The releases "discharged" the debtors "from any and every right, claim, or demand" that the Archers "now have or might otherwise have" against the debtors other than those obligations arising under the promissory note and related instruments. The debtors admitted no liability or wrongdoing.

The debtors failed to make the first payment on the $100,000 promissory note. After the Archers sued for payment in state court, the debtors filed for bankruptcy relief under Chapter 7. Not deterred, the Archers commenced an adversary proceeding under § 523(a)(2)(A) seeking to have the $100,000 obligation declared nondischargeable. The Archers contended that the underlying debt was nondischargeable because it was for money obtained by "fraud." The bankruptcy court rejected the Archers' argument and ruled in favor of the debtors. The district court affirmed. A divided panel of the Court of Appeals for the Fourth Circuit affirmed the district court. The majority reasoned that the settlement agreement, promissory note and releases operated to work a "novation." This novation replaced an original potential fraud obligation with a new debt that was for money promised in a settlement contract. As such, the appellate court ruled that this obligation was dischargeable in bankruptcy. The circuits were divided on the question. *Compare In re West*, 22 F.3d 775 (7th Cir. 1994)(supporting the novation theory), *with United States v. Spicer*, 57 F.3d 1152 (D.C. Cir. 1995)(rejecting the novation theory).

Justice Breyer delivered the opinion of the Court. The Court agreed with the dissent that the settlement documents and broad language of the release "completely addressed and released each and every underlying state law claim" and "left only one relevant debt: a debt for money promised in the settlement agreement itself." However, the majority indicated that a recognition of this fact did not end the inquiry.

The critical question was whether "that same debt can *also* amount to a debt for *money obtained by fraud*, within the terms of the nondischargeability statute." The Court believed that it could.

The Court found *Brown v. Felsen,* 442 U.S. 127 (1979) to govern the outcome. The Court in *Brown* dealt with a fraud claim that was settled. The resulting debt was set forth in a stipulation and consent judgment as part of the parties' agreement. The relevant judgment-related documents did not, however, refer to fraud. The Court in *Brown* reversed the rulings of the lower courts that effectively held that the doctrine of res judicata prevented a bankruptcy court from looking behind those documents to uncover the nature of the obligation that had led to their creation. The Court, relying on the reasoning of *Brown*, opined that "'Congress intended the fullest possible inquiry' to ensure that all debts arising out of' fraud are 'excepted from discharge,' no matter what their [origin] or form." The Court, finding no significant difference between its decision in *Brown* and the matter before it, reaffirmed *Brown's* conclusion that an obligation embodied in the settlement of a fraud claim "'arises' no less 'out of' the underlying fraud than a debt embodied in a stipulation and consent decree." As such, the Court ruled that while the settlement agreement and releases may have resulted in a kind of novation, that fact did not bar the Archers from establishing that the underlying debt arose out of "false pretences, a false representation, or actual fraud" within the meaning of § 523(a)(2)(A).

Justices Thomas and Stevens dissented. The dissent believed that the Court's conclusion was not supported by the either text of the Bankruptcy Code or the settlement agreements of the parties. The critical distinction between Court's decision in *Brown* and this case was, according to the dissent, the fact that all parties to the litigation executed a blanket release: "'if it is shown that [a] note was given and received as payment or waiver of the original debt and the parties agreed that the note was to substitute a new obligation for the old, the note fully discharges the original debt, and the nondischargeability of the original debt does not affect the dischargeability of the obligation under the note."' The dissent found the release in this case to clearly demonstrate that the parties "intended to resolve conclusively not only the issue of fraud, but also any other 'right[s], claim[s], or demand[s]' related to the state-court litigation" other than the obligations under the promissory note. As such, the causal nexus between the fraud required by § 523(a)(2) and the debt in this case was severed at the time of settlement and the only debt that remained intact for bankruptcy purposes was one "obtained" by the parties' voluntary agreement.

Attorney Compensation: Supreme Court Grants Certiorari

The United States Supreme Court granted certiorari in *Lamie v. United States Trustee*, 02-693, on March 10, 2003 to resolve the issue of whether the deletion of "debtor's attorney" from the list of eligible persons to be paid from a Chapter 7 estate in § 330 of the Bankruptcy Code precludes payment for reasonable services rendered during the proceeding. The circuits are split on this issue. *Compare In re American Steel Product, Inc.*, 197 F.3d 1354 (11th Cir. 1999); and *In re Pro-Xnax Distrib., Inc.*, 157 F.3d 414 (5th Cir. 1998), with *In re Top Grade Sausage, Inc*., 227 F.3d 123 (3d Cir. 2000); *In re Century Cleaning Servs., Inc.*, 195 F.3d 1053 (9th Cir. 1999); and *In re Ames Dep't Stores, Inc.*, 76 F.3d 66 (2d Cir. 1996). The decision below was *United States Trustee v. Equipment Servs., Inc. (In re Equipment Servs., Inc.)*, 290 F.3d 739 (4th Cir. 2002).

In *Equipment Services*, the debtor retained an attorney to prepare a Chapter 11 petition and paid the attorney a $6,000 retainer, $1,000 of which was used to pay the filing fees. The case was later converted to Chapter 7. The attorney filed an application with the court seeking approval of fees incurred in connection with services rendered post-conversion. The trustee objected, arguing that § 330 of the Bankruptcy Code made no provision for counsel of the debtor to be compensated by the Chapter 7 bankruptcy estate.

The Court of Appeals for the Fourth Circuit ruled that the debtor's attorney was *not* authorized to be paid from the bankruptcy estate for services rendered after the case was converted to a Chapter 7 proceeding. The court concluded that § 330 does not authorize a debtor's attorney to be compensated in a Chapter 7 proceeding. The plain language of the statute "plainly limits" recovery of fees to "trustees," "examiners," and "professional persons employed under section 327 and 1103." The 1994 amendments to the Bankruptcy Code removed the phrase "or the debtor's attorney" from the list of persons that may be entitled to receive compensation from the Chapter 7 estate. The court rejected the contention advanced by the debtor's attorney that the deletion was simply a "scrivener's error." The Fourth Circuit recognized that reasonable arguments could be made that the deletion was an "inadvertent error." However, the application of the plain language also supported a reasonable interpretation of the Bankruptcy Code and would not be disturbed.

* * * *

CASE LAW UPDATE

Eighth Circuit Court of Appeals Decisions

INVOLUNTARY CHAPTER 7 ORDER FOR RELIEF IS FINAL FOR APPEAL

McGinnis v. Jenkins & Associates, Inc. (In re McGinnis), 296 F.3d 730 (8th Cir. (Mo.) 2002) (per curiam).

The Eighth Circuit Court of Appeals affirms the bankruptcy court entry of the Chapter 7 order for relief, finding that claims of three of the five petitioning creditors were not the subject of a bona fide dispute. The Court does not discuss the disputes alleged by the debtor, but asks instead whether the Chapter 7 order for relief is a final, appealable order. Clearly, substantial further proceedings are required before the Chapter 7 case will be final. But the Court recognizes that, in bankruptcy, finality is a flexible concept, and holds that the order for relief is appealable. It is a final adjudication of the debtor's bankruptcy status and subjects the debtor's assets to involuntary liquidation.

PROCEEDS FROM SALE OF PROPERTY RECOVERED BY ESTATE

Sosne v. Reinert & Duree, P.C. (In re Just Brakes Corporate Systems, Inc.), 293 F.3d 1069 (8th Cir. (Mo.) 2002) (Loken, J.).

In an procedurally confusing case, the Eighth Circuit Court of Appeals reverses the district court and reinstates the bankruptcy court's judgment requiring the defendant creditors to pay the estate the net proceeds from the sale of property recovered by the creditors as a fraudulent conveyance under Missouri law where the creditors continued to pursue recovery of the sale proceeds after the commencement of the bankruptcy case. In a prior appeal, the Court upheld the bankruptcy court's ruling that the defendants violated the automatic state by continuing with the sale after the bankruptcy filing, but concluded that the Trustee's proper remedy was limited to compensatory damages and remanded for a determination of such damages. In its prior opinion, the Court observed that the value of the property was not necessarily an appropriate compensatory remedy because the trustee had not established his right to avoid the debtor's pre-petition transfer of the property. On remand, the proceedings became "seriously misdirected" based upon the parties' erroneous interpretation of the Court's prior opinion regarding the need for the trustee to establish his right to recover the property. After interpreting its prior opinion, the Court concludes that under the circumstances "the equities strongly favor placing the sale proceeds in the bankruptcy estate."

PAYMENT OF CASINO GAMBLING MARKERS AVOIDED AS PREFERENCE

Harrah's Tunica Corporation v. Meeks (In re Armstrong), 291 F.3d 517 (8th Cir. (Ark.) 2002) (Riley, J.).

Affirming the District Court, the Eighth Circuit Court of Appeals holds that casino gambling markers signed by the debtor in exchange for gambling chips constitute antecedent debt under § 547 of the Bankruptcy Code where the casino agrees to hold the markers for later presentment to the debtor's bank. The Court analogizes the markers to short term "payday loans" and concludes that while gambling markers legally operate as checks the casino's agreement to hold the markers under a "Casino Credit" arrangement results in a short-term loan and is not a contemporaneous exchange for new value.

NO "GOOD FAITH" WHEN CREDITOR IS ON NOTICE OF POSSIBLE INSOLVENCY

Meeks v. Red River Entertainment of Shreveport, P'ship (In re Armstrong), 285 F.3d 1082 (8th Cir. (Ark.) 2002) (Gibson, J.).

In this fraudulent transfer case, the Eighth Circuit Court of Appeals affirms the district court conclusion that the creditor had sufficient knowledge to put it on inquiry notice of the debtor's possible insolvency. Thus the creditor did not meet its burden of proving that it received the transfer for value and in good faith. The debtor gambled and became indebted to the casino. In the course of increasing his credit limit, the casino learned or should have learned of his probable insolvency. The debtor transferred money to pay off his markers, then was put into involuntary bankruptcy. In the trustee's fraudulent transfer action, the bankruptcy court found that the debtor had made payment with intent to hinder, defraud or delay creditors, but that the casino took the money for value and in good faith. The district court reversed and the Eighth Circuit agreed, noting that the test for good faith is an objective one-whether the transferee had sufficient knowledge to be on inquiry notice of insolvency. The facts here render the bankruptcy court's finding of good faith clearly erroneous.

UNTIMELY COMPLAINT OKAY WHEN DUE TO COURT'S ERROR

Moss v. Block (In re Moss), 289 F.3d 540 (8th Cir. (Mo.) 2002) (Riley, J.).

The Eighth Circuit Court of Appeals recognizes the bankruptcy court's authority under § 105 to validate an untimely discharge complaint where the complaint was filed within the time set by the court's order, but the order was later set aside as erroneous. Due to irregularities in the debtor's Chapter 7 case, the bankruptcy court sua sponte extended indefinitely the time for filing discharge complaints. The trustee filed such a complaint after the time set by the Bankruptcy Rules. At trial, the bankruptcy court found its prior extension of the deadline to be erroneous, but invoked § 105 to deem the complaint timely filed. The Eighth Circuit agreed that the court had and properly exercised such authority.

ATTORNEY MUST SHOW THAT CONTINGENT FEE IS "REASONABLE AND NECESSARY"

Apex Oil Co. v. Artoc Bank & Trust Ltd. (In re Apex Oil Company), 297 F.3d 712 (8th Cir. 2002) (R. S. Arnold, J.).

In applying Texas law with language similar to that of the Bankruptcy Code, the Eighth Circuit Court of Appeals reduces fees payable under a contingent fee agreement because the claimant was unable to show that the fees were "reasonable and necessary". The main issue, in dispute since 1980, was whether Apex wrongfully set off invoice amounts with knowledge that Artoc's receivables were subject to a bank security interest. The Court affirmed Artoc's claim for wrongful setoff, but reduced the attorney fee award. The Court criticized contingent fee counsel for failing to keep contemporaneous time records. Claimant justified the 50% contingent fee amount by producing estimated time records, imputing an hourly rate, and applying a 2.3 multiplier. The Court questioned the accuracy of the estimated hours some 15 years after services were performed. It also rejected the hourly rate as higher than the rate actually charged by attorneys in their hourly rate engagements at the relevant time. Finally, the Court rejected the multiplier as unjustified by the complexity and risk of the case. Although the Court applies Texas law, the language of the statute is similar to that of the Bankruptcy Code and may be a good indication of how the court would analyze a contested contingent fee in bankruptcy.

"PRAGMATIC" STANDARD FROM MINNESOTA HOMESTEAD REQUIRES REMAND FOR FACTUAL DETERMINATION

Peoples' State Bank of Wells v. Stenzel (In re Stenzel), 301 F.3d 945 (8th Cir. (Minn.) 2002) (Loken, J.).

Reversing the BAP's denial of homestead exemption, the Eighth Circuit Court of Appeals remands this case for a factual determination of whether the disputed land is part of the land upon which the debtor's home is situated. Minnesota law exempts the dwelling place owned and occupied by a debtor together with the land on which it is situated. Debtor's home is located on a parcel he owns in fee; he also owns a remainder interest in another contiguous parcel in which his mother owns a life estate. He once farmed on the contiguous parcel, but had not done so for some time prior to the bankruptcy. Addressing whether he "occupied" the second parcel, the BAP had ruled that he did not, because as a mere remainder man who was not farming the parcel, he had no legally valid present right of possession. The Court of Appeals rejected this standard, noting that Minnesota has adopted a "pragmatic" standard in determining whether contiguous farmland qualifies for homestead exemption. It then posed questions for the bankruptcy court on remand, including whether the debtor and the life tenant had a legally valid contractual relationship, whether the debtor used the two parcels as one piece of land, and whether the debtor intended to occupy the two as a single farm. A strong dissent notes many problems raised by the "pragmatic" approach leading this reviewer to predict further confusion and uncertainty in Minnesota agricultural homestead law.

IRS LIEN PREVENTS SETOFF BY CREDITOR

Superpumper, Inc. v. Nerland Oil, Inc. (In re Nerland Oil, Inc.), 303 F.3d 911 (8th Cir. (ND) 2002) (McMillian, J.).

The Eighth Circuit Court of Appeals rules that a third party owing money to a debtor under a purchase agreement may not set that debt off against contract damages the debtor owes the third party, where a federal tax lien exists. Third party bought a business from the debtor on installment payments with a contract under which debtor would handle and remit credit card receivables to the third party. Prior to the sale debtor had failed to pay excise and employment taxes, those taxes had been assessed, and an unrecorded tax lien had arisen. The debtor later failed to remit the credit card receivables to the third party. Debtor and third party went through arbitration, the arbitrator granted the right to setoff, but the debtor filed Chapter 7 before the arbitration award was confirmed. In bankruptcy, the IRS asserted that it possessed a superior right in the business sale promissory note, because of its liens, so the maker of the note could not setoff against its contract damages. The bankruptcy court concluded that the IRS liens arose when the taxes were assessed, so the IRS had priority over the contract party in collecting debts from the debtor. The district court and Eighth Circuit agreed. The IRS lien attached upon assessment, which predated the business sale. The contract party's claim arising from the sale transaction and breach of contract, and that party's right to setoff on account of its claim, where inferior to the tax lien. Moreover, the amounts due under the business sale promissory note were due to the IRS, not the debtor, so the debts were not "mutual" for setoff purposes.

DEBTOR MAY AMEND TO EXEMPT ASSET HE INTENDS TO ABANDON

Kaelin v. Bassett (In re Kaelin), 308 F.3d 885 (8th Cir. 2002) (Melloy, J.).

Reversing the bankruptcy court and the BAP, the Eighth Circuit Court of Appeals holds that a debtor does not act in bad faith or to the prejudice of creditors by amending his exemptions to add an asset, where he was previously unaware of the asset. In pursuing a bad faith failure to settle suit against debtor's insurer after a large personal injury judgment against debtor, the trustee also commenced a malpractice action against debtor's insurance defense attorneys. The debtor was not previously aware of this claim and moved to claim it as exempt. The bankruptcy court denied his motion on the grounds of bad faith and prejudice to creditors, primarily because it appeared the debtor would merely abandon the malpractice claim. The BAP affirmed. On appeal, the Eighth Circuit reversed, because the lower court's findings of bad faith and prejudice to creditors were clearly erroneous. Although both are recognized exceptions to the rule favoring liberal amendment of exemption claims, neither was present in this case. A debtor may do as he wishes with exempt property, and his apparent intent to abandon it did not constitute bad faith. Nor were creditors prejudiced any more than they are by any claim of exemption. The debtor moved to exempt the asset as soon as he became aware of it. Thus, the court clearly erred in refusing to allow the debtor to amend his exemption schedule. The BAP did not reach the issue of whether the asset would, in fact, be exempt.

COMMERCIAL REASONABLENESS OF COLLATERAL DISPOSITION IS JURY QUESTION

Williams v. Regency Financial Corp., 309 F.3d 1045 (8th Cir. (Mo.) 2002) (Wollman, J.).

The Eighth Circuit Court of Appeals reverses the district court, to hold that the commercial reasonableness of a disposition of collateral following foreclosure is a fact question for the jury. In a "flipping" scheme between an auto seller (A) and a finance company (B), the lender obtained a deficiency judgment against a Chapter 13 debtor. A sold the car and financed through B. On default, B repossessed and "sold" back to A, without complying with the Missouri title transfer statute, at an agreed low price to create a deficiency. A then resold the car to a third party at a higher price, while B sued the borrower for the deficiency. In a suit by the Chapter 13 debtor-borrower, the district court ruled that the borrower could not recover a surplus judgment because the transfer of the vehicle from the finance company back to the seller was not a valid sale under Missouri law, and if there was no sale, there was no need for a determination of commercial reasonableness. The Eighth Circuit reverses, noting that under the UCC, any sort of disposition of collateral must be commercially reasonable. The requirement applies to the disposition in this case, even though it may not have been a valid sale. Moreover, whether the disposition was commercially reasonable is a question for a jury and should not have been decided by the court as a matter of law.

Eighth Circuit Bankruptcy Appellate Panel Decisions

DEBTOR MUST PROVE TIMELINESS OF APPEAL

Crofford v. Conseco Finance Serv. Corp. (In re Crofford), 277 B.R. 109 (8th Cir. BAP (Ark.) 2002) (Schermer, J.).

The Eighth Circuit BAP refuses to hear an appeal of an order declining to reopen the debtor's case and affirms denial of the motion to reconsider. After debtor's case was closed, a secured creditor commenced foreclosure in state court against the debtor's exempt property. Debtor sought to reopen the case and assert violation of the discharge injunction, but the bankruptcy court refused. The tenth day after entry of the order fell on Sunday; Monday was Christmas eve; Tuesday was Christmas; and debtor filed a motion to reconsider on Wednesday. The BAP held that the motion to reconsider was untimely because the debtor failed to prove that the bankruptcy court was not open on Monday, Christmas eve. Thus, the BAP would not hear an appeal from the original motion to reopen. However, the BAP would hear the timely-filed appeal of the lower court's order denying the debtor's motion to reconsider. The BAP then affirmed that order because the debtor failed to allege any Rule 60 grounds for relief from the order.

CREDITOR'S LIEN AVOIDED ONLY AS TO PORTION OF ANNUITY THAT IS PROPERTY OF THE ESTATE

Eastern States Life Insurance Co. v. Strauss (In re Crawford), 274 B.R. 798 (8th Cir. BAP (Mo.) 2002) (Kressel, J.).

Affirming in part and reversing in part, the BAP holds that a lien on an annuity is avoided only to the extent that the annuity is property of the estate. The Debtor received an annuity from the settlement of a personal injury lawsuit and pledged the annuity to the defendant. The defendant failed to properly perfect its lien on the annuity and the Trustee sued to avoid the lien. The bankruptcy court ruled in favor of the trustee and avoided the lien on the entire annuity. On appeal, the defendant argued that its lien on 75% of the annuity could not be avoided because the court had determined in an earlier proceeding that 75% of the annuity is exempt under 11 U.S.C. § 522 and is not property of the estate. The BAP agreed, concluding that the defendant's failure to properly perfect its lien does not affect its position regarding the debtor's 75% interest in the annuity, as opposed to the estate's 25% interest in the annuity.

MARSHALING DOCTRINE APPLIES TO TAX AUTHORITIES WITH LIENS ON HOMESTEAD

Ramette v. United States of America & Minnesota Department of Revenue (In re Bame), 279 B.R. 833 (8th Cir. BAP (Minn.) 2002) (Schermer, J.).

The Eighth Circuit BAP affirms the bankruptcy court decision that federal and state tax authorities with liens on the homestead owned by debtor's spouse must look first to that asset before sharing as unsecured creditors in distribution from the bankruptcy estate. The tax liens attached to the homestead while it was owned jointly by the debtor and his wife. He later conveyed it to her, and in settlement of the Chapter 7 trustee's fraudulent transfer action, she agreed to sell it and satisfy, among others, the tax liens. The trustee then requested that the court require the tax authorities to look first to the homestead, before receiving distribution from the estate. The BAP agreed with the bankruptcy court that marshaling can be applied to federal agencies upon case-by-case evaluation, thereby rejecting the government's argument that marshaling does not apply to them per se. The BAP noted that marshaling is an equitable doctrine, and found that the bankruptcy court had properly balanced the equities. The liens would be paid in full from sale of the homestead, and neither the delay nor the cost to the government authorities rendered marshaling inequitable.

OKAY TO REOPEN BIDDING WHERE COURT HAD NOT APPROVED SALE PROCEDURE

Brink v. Payless Cashways, Inc. (In re Payless Cashways, Inc.), 2002 WL 1807826 (8th Cir. BAP (Mo.) 2002) (Kressel, J.).

The Eighth Circuit BAP approves the bankruptcy court re-opening bidding on debtor's real property despite the first bidder's understanding that he had a "done deal". The debtor's broker advised a sealed bid process which debtor did not take to the bankruptcy court for approval. The high bidder understood that the sale remained subject to bankruptcy court approval, but in reliance on being high bidder, obtained an environmental study and purchased the furniture and fixtures on the property. At the hearing on sale, another bidder surfaced, and the bankruptcy court decided to hold an auction. The first bidder objected but outbid his competitor. He then appealed the bankruptcy court decision to re-open bidding. The BAP affirms, relying on In re Food Barn Stores, Inc., 107 F.3d 558 (8th Cir. 1997), which employs a sliding scale in determining whether to re-open bidding: the importance of estate enhancement diminishes as the bidder's reasonable expectations and the importance of finality increase. The BAP agreed with the bankruptcy court that where it had not approved the bid process and the bidder's belief that he had a "done deal" was not reasonable under the circumstances, the bankruptcy court could re-open bidding. The higher standard to re-open requiring "grossly inadequate price or fraud" applies only where there has been a judicially approved sale.

DEBTOR HELD TO COURT-APPROVED SETTLEMENT AS LAW OF THE CASE

Hartford Life & Accident Ins. Co. v. Henricksen (In re Henricksen), 277 B.R. 759 (8th Cir. BAP (Minn.) 2002) (Koger, J.).

The Eighth Circuit BAP agrees with the bankruptcy court that a debtor who fails to appeal approval of his settlement agreement with the trustee will be held to that settlement. He cannot later change his mind and refuse to perform under the agreement. The trustee objected to the debtor's claim of exemption for an annuity and an IRA. The debtor agreed to surrender the annuity and to keep the IRA, and the settlement was approved by the bankruptcy court without appeal. The debtor then claimed "coercion," refused to turn over the annuity, moved to vacate the settlement order, moved for reconsideration of the order denying that relief, and failed to appeal any order denying his requests. The trustee moved for summary judgment to enforce the settlement. The BAP affirmed the bankruptcy court's grant of summary judgment, holding that the prior orders were law of the case, by which the debtor is bound. To the extent the debtor asserts that the trustee's alleged coercion is new evidence, it is not "newly discovered" evidence within the meaning of Rule 60 to justify relief from the prior orders.

CASE DISMISSED FOR NO SHOW AT SECTION 341 MEETING WITHOUT SUFFICIENT EXCUSE

Davis v. Case (In re Davis), 275 B.R. 864 (8th Cir. BAP (Mo.) 2002) (Kressel, J.).

The Eighth Circuit BAP agrees with the bankruptcy court's dismissal of this Chapter 7 case because the debtor failed to appear at his § 341 meeting as required by the Bankruptcy Code. After his failure to appear, the bankruptcy court issued a show cause order threatening dismissal. The debtor's sister advised the bankruptcy court that he was in jail and would be out by a certain date, and requested a continuance. The bankruptcy court continued the show cause hearing. Prior to the new date, the debtor sent the bankruptcy court a note that he was still in jail. The bankruptcy court refused to continue the hearing and dismissed the case. The debtor appealed on the grounds that he did not receive notices and that he could not appear, being in prison. The BAP affirmed the dismissal, noting that the bankruptcy court sent notices to the address furnished by the debtor himself and that, at the time the case was dismissed, there was no admissible evidence that the debtor was, in fact, in prison. The debtor failed to appear at his § 341 meeting and failed to request a continuance of that meeting. He did not fulfill Bankruptcy Code requirements, and the case was properly dismissed.

SMALL BUSINESS ELECTION VOID AB INITIO

Coleman Enterprises, Inc. v. QAI, Inc. (In re Coleman Enterprises, Inc.), 275 B.R. 533 (8th Cir. BAP (Minn.) 2002) (Federman, J.).

The Eighth Circuit BAP affirms an order nullifying the debtor's small business election where the debtor's aggregate non-contingent liquidated debts (including disputed debts) exceeds $2 million. The nullification of the election, however, does not vitiate the Chapter 11 filing itself, and the case continues until the bankruptcy court makes a determination to confirm a plan of reorganization, to convert the case to a Chapter 7, or to dismiss. Further, the bankruptcy court's denial of the debtor's motion to dismiss the bankruptcy case is not a final appealable order.

REFUSAL TO RECONSIDER CHAPTER 13 DISMISSAL NOT CLEARLY ERRONEOUS

Ciralsky v. LaBarge (In re Ciralsky), 281 B.R. 915 (8th Cir. BAP (Mo.) 2002) (Dreher, J.).

The Eighth Circuit BAP concludes that the bankruptcy court did not abuse its discretion in refusing to reconsider its order dismissing this Chapter 13 case. In his motion to reconsider, the debtor merely reargued the response he had made to the Chapter 13 trustee's motion to dismiss. The debtor's case was not helped by the fact that he had asked for several continuances of his motion in the bankruptcy court, then failed to personally appear at the hearing, sending a non-attorney to request another continuance. Relying on the abuse of discretion standard, the BAP upheld the bankruptcy court's decision to let the dismissal stand.

ROLLOVER IRA NOT EXEMPT UNDER § 522(d)(10)(E)

Rousey v. Jacoway (In re Rousey), 283 B.R. 265 (8th Cir. BAP (Ark.) 2002) (Kressel, J.).

The Eighth Circuit BAP rules that debtors who rolled over their pension plan assets from a qualified plan of their former employer into IRAs could not exempt those assets where the debtors had unfettered control over the IRAs. Where debtors have discretion to withdraw funds, although subject to tax and early withdrawal penalties, the IRA does not qualify as a "similar plan or contract" to a pension or annuity, as the exemption statute requires. The Court notes that plans more likely to be found similar to a pension or annuity and therefore exempt might have (a) multiple contributions over time rather than in a lump sum, (b) contributions by multiple contributors in a work place context, (c) investments that compute payments based on life span and terminate on death rather than mere return on investment, and (d) strict limitations on control and the right to withdrawal. Acknowledging that the exemption statute specifically refers to 26 U.S.C. § 408 (which deals exclusively with IRAs), the BAP denies that this holding will disqualify all IRAs from exemption. Some types of IRAs limit the beneficiary's access and might meet the exemption requirements.

COURT MAY NOT APPROVE STIPULATION SUBJECT TO COMMITTEE OBJECTION

ReGen Capital III, Inc. v. Official Committee of Unsecured Creditors (In re Trism, Inc.), 282 B.R. 662 (8th Cir. BAP (Mo.) 2002) (Schermer, J.).

Over a strong dissent, the Eighth Circuit BAP remands the bankruptcy court's approval of a settlement while reserving the creditors' committee's right to object to a settling party's claim. After a long dispute between the debtor and a creditor, originating in a prior Chapter 11, the combatants agreed to allowance of the creditor's claim at a compromise amount and to payment from certain sale proceeds. The committee objected to any attempt to bind it to the parties' agreement. The bankruptcy court approved the settlement, but stated that the stipulation would not bind the committee. The settling creditor appealed, and the BAP agreed that the bankruptcy court should reconsider its order. The BAP held that a bankruptcy court cannot approve a settlement while at the same time sustaining an objection, because that would change an essential term of the settlement. The bankruptcy court must approve or disapprove a stipulation as presented. The dissent would have affirmed the order because the bankruptcy court did approve the stipulation as presented. The committee was not a party to the stipulation and the stipulation did not purport to bind the committee. The mere fact that the order approving the stipulation so stated did not change the terms of the stipulation.

REPLACING BOUNCED CHECKS WITH CASHIER'S CHECKS NOT CONTEMPORANEOUS OR ORDINARY COURSE

Babin v. Barry County Livestock Auction, Inc. (In re Stewart), 282 B.R. 871 (8th Cir. BAP (Ark.) 2002) (Schermer, J.).

The Eighth Circuit BAP affirms the bankruptcy court ruling that denied a preference defendant's contemporaneous exchange and ordinary course defenses, where the defendant received cashier's checks to replace the debtor's bounced checks. The debtor attended cattle auctions and paid with personal checks. Prior to the preference period, only one check had bounced and had been replaced by a cashier's check. During the preference period, four of seven checks bounced and were so replaced. The defendant contended that the debtor exchanged cashier's checks, not to replace the bounced checks, but in contemporaneous exchange for the right to participate in the next auction, and that making good prior bounced checks was in the ordinary course of business. The Court rejected both defenses. Both parties must intend a contemporaneous exchange, and here the parties clearly intended the cashier's checks to satisfy the obligations arising from the bounced checks. "New value" does not include an obligation substituted for an existing obligation. For ordinary course, the controlling factor is the consistency between preference period transactions and pre-period transactions. The increasing number of bounced checks during the preference period was not consistent with prior practice, but rather reflected the debtor's slide into bankruptcy.

INDEMNITY PROVISION IN EMPLOYMENT AGREEMENT INVALIDATED

Unsecured Creditors' Committee v. Joel Pelofsky (In re Thermadyne Holdings Corp.), 283 B.R. 749 (8^{th} Cir. BAP (Mo.) 2002) (Kressel, J.).

The Eighth Circuit BAP holds that the bankruptcy court did not abuse its discretion in refusing to approve indemnification and exculpation provisions in an employment agreement between the creditors' committee and its financial advisor. The provisions contained in the financial advisor's engagement letter required the estates to indemnify and the committee and the estates to hold harmless the financial advisor from and against any losses relating to the advisor's provision of services to the committee, other than losses resulting from the advisor's willful misconduct or gross negligence. Significantly, the Court determined that the bankruptcy court did not apply a per se rule to invalidate the indemnity provisions, but rather found that under the circumstances of the case the provisions were unreasonable. Thus, the Court reviewed the bankruptcy court's ruling under an abuse of discretion standard and concluded that bankruptcy court was within its discretion in invalidating the provisions. Also of note, the Court suggests that indemnity provisions in an employment agreement between a committee and its advisors may be treated differently from an employment agreement between a debtor and its advisors since the estate has virtually no control over the acts of the advisors in the former case.

ROOKER-FELDMAN DOCTRINE BARS CHALLENGE OF STATE COURT JUDGMENT

Car Color & Supply, Inc. v. Raffel (In re Raffel), 283 B.R. 746 (8^{th} Cir. BAP (Mo.) 2002) (Federman, J.).

Affirming the bankruptcy court, the Eighth Circuit BAP holds that the Rooker-Feldman doctrine bars the debtor from challenging a pre-petition state court default judgment entered with respect to a lawsuit in which the plaintiff alleged that the debtor fraudulently misrepresented his intent to repay a debt. The Court further holds that the doctrine of collateral estoppel bars the debtor from re-litigating issues involving the non-dischargeability of the debt.

NO RELIEF FROM AUTOMATIC STAY TO PROSECUTE CLAIM AGAINST PROFESSIONAL DISCIPLINARY COMMISSION FUND

Bergman v. Wintroub (In re Wintroub), 283 B.R. 743 (8^{th} Cir. BAP (Neb.) 2002) (Schermer, J.).

The Eighth Circuit BAP holds that the bankruptcy court did not abuse its discretion in denying a creditor's motion for relief from the automatic stay to prosecute a claim against a professional disciplinary commission fund. The Court concludes that the bankruptcy court properly weighed the relevant factors enunciated in In re Blan, 237 B.R. 737 (B.A.P. 8^{th} Cir. 1999), for determining whether stay relief should be granted and did not abuse its discretion in determining the distraction to the debtor of defending the proceeding would adversely impact his efforts to reorganize under Chapter 11.

DEBTOR ADEQUATELY JUSTIFIED INADEQUATE RECORDS

Floret, L.L.C. v. Sendecky (In re Sendecky), 283 B.R. 720 (8^{th} Cir. BAP 2002) (Federman, J.).

The Eighth Circuit BAP affirms the bankruptcy court's conclusion that plaintiffs objecting to debtor's discharge did not meet their burden of proving that the inadequacy of debtor's records warranted denial of discharge. The bankruptcy court found that debtor's financial records were not adequate.

This shifted the burden of production to the debtor to provide "justification under the circumstances." The debtor met this burden by demonstrating that he was unsophisticated, poorly educated, inexperienced in business, living with his parents, and lacking the motivation and ability to keep better records. Moreover, duplications in listing debts did not amount to a false oath, and the debtor's inability to account for his use of all loan proceeds in the business did not warrant denial of discharge. The BAP also affirmed the bankruptcy court's exercise of discretion in refusing to impose sanctions for the inadequacy of the debtor's pre-trial brief. The BAP did, however, sanction debtor's counsel $100 for including in the appellate brief an irrelevant allegation of plaintiffs' bad motives, which the BAP found unbecoming a member of the bar.

RELIEF FROM STAY OKAY TO LIQUIDATE CLAIM IN STATE COURT

Loudon v. Amogio Foods, Inc. (In re Loudon), 284 B.R. 106 (8th Cir. BAP 2002) (Dreher, J.).

The Eighth Circuit BAP examines when relief from the automatic stay is appropriate to allow a determination of liability and damage in state court, and affirms the bankruptcy court's decision to grant relief. The debtor's state court co-defendant sought relief from stay to bring a cross-claim against the debtor. The bankruptcy court balanced the potential prejudice to the debtor against the hardship to the other state court parties and determined that judicial economy would be served by allowing the state court to determine liability and damages. Relief was limited, and did not allow enforcement of any judgment. Reviewing for abuse of discretion, the BAP set out the factors courts should consider and affirmed.

COURT MAY DISMISS IMPROPERLY VENUED CASE SUA SPONTE BUT MUST GIVE NOTICE AND HEARING

Wilson v. Reed (In re Wilson), 284 B.R. 109 (8th Cir. BAP 2002) (Kressel, J.).

The Eighth Circuit BAP rules that the bankruptcy court should have granted the debtor relief from the court's sua sponte order dismissing her case filed in the wrong judicial district. Bankruptcy Rule 1014(a)(2) provides for dismissal or transfer of a case filed in the wrong district on motion of a party and after notice and hearing. The debtor argued that the bankruptcy court did not have authority to dismiss sua sponte and should have given her notice and the opportunity to be heard. The BAP held that § 105(a) gives the bankruptcy court authority to act sua sponte to enforce court rules or prevent an abuse of process. However, such action requires notice and a hearing to allow the debtor an opportunity to present evidence that venue was proper or to convince the court to exercise its discretion and keep the case.

REPEAT MOTION TO VACATE ORDER DOES NOT TOLL APPEAL FROM ORDER MERITS

Snyder v. LaBarge (In re Snyder), 285 B.R. 400 (8th Cir. BAP 2002) (Federman, J.).

The Eighth Circuit BAP dismisses as untimely the debtor's appeal of an order denying confirmation of his Chapter 13 plan, dismissing the case, and barring another filing for 180 days. The substantive order was entered March 1, and on March 11 the debtor timely filed a motion to vacate, which was denied on May 31. The debtor then had ten days to appeal in order to preserve the underlying merits of the March 1 order. Instead, he filed another motion to vacate the March 1 order. The BAP held that the second motion to vacate did not toll the appeal period and debtor could no longer appeal the merits of the March 1 order. The BAP did consider the debtor's appeal of the second refusal to vacate and, applying the abuse of discretion standard, affirmed the bankruptcy court's decision.

IRS LIEN INCLUDES DISCHARGEABLE TAX PENALTIES

Harker v. United States (In re Harker), 286 B.R. 84 (8th Cir. BAP 2002) (Federman, J.).

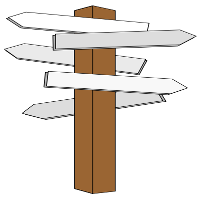
In a factually complex tax dispute which resulted in bankruptcy filings, the Eighth Circuit BAP refuses to hear several issues and affirms the bankruptcy court on several others. The district court, acting as an appellate court, had remanded back to the bankruptcy court the determination of the debtor's tax liability, including proper interest accrual and application of lien proceeds. Several issues the debtor raised on appeal, which related back to matters litigated before the remand, were beyond the scope of remand, and the BAP refuses to consider them. As to the tax liability issues, the BAP holds that the debtor is collaterally estopped from relitigating the base tax amount, because the tax court determined it before the debtor's bankruptcy filing. Applying the clearly erroneous standard, the BAP affirms the bankruptcy court's interest calculation. It also rejects the debtor's argument that the proceeds from foreclosure on his real property should have been applied to nondischargeable taxes, and not to dischargeable penalties. The BAP notes that the IRS may determine how to apply an involuntary payment and that the tax lien secured all debt, without regard to its dischargeability.

FILING DOES NOT TOLL IOWA TAX SALE REDEMPTION

Tax 58 v. Froehle (In re Froehle), 286 B.R. 94 (8th Cir. BAP 2002) (Koger, J.).

Relying on ***Johnson v. First Nat'l Bank of Montevideo***, 719 F.2d 270 (8th Cir. 1983), the Eighth Circuit BAP reverses the bankruptcy court order denying relief from stay to a creditor holding a tax sale certificate on debtor's homestead. The creditor purchased the tax certificate for unpaid taxes and gave the debtor notice of her statutory right to redeem. Instead of redeeming, she filed Chapter 13. The issue before the BAP is whether the filing tolled the tax redemption period. The Eighth Circuit has determined in *Johnson* that a statutory redemption period is not tolled, and the stay does not apply, where only the running of time and no affirmative action is required to divest a debtor of a property interest. In this case, the bankruptcy court distinguished *Johnson*, finding that the Iowa statute requires the creditor to return the tax certificate, pay a fee, and obtain a deed. The BAP disagreed that these requirements distinguish the case from *Johnson*. Once the notice of right of redemption is served, the rights of the parties are fixed and a bankruptcy filing does not toll the running of the redemption period.

LEGISLATIVE UPDATE



by
*Mark C. Halverson**
MSBA Bankruptcy Section
Legislative Coordinator

House Passes Bankruptcy Bill

On March 19, 2003, the U.S. House of Representatives passed, for the seventh time in recent years, an omnibus bankruptcy reform measure. The bipartisan vote was 315-113, with 90 Democrats supporting the bill.

While not only a bankruptcy issue, "asbestos reform legislation" is a hot topic in Washington. Sen. Christopher Dodd (D-Conn.) plans to convene a "summit" for business leaders, organized labor, consumer groups and other stakeholders in the asbestos litigation debate as a way to help defendant companies coalesce around a single legislative approach. The idea is of course to limit, or at least manage, these companies exposure to the myriad of health related claims emanating from exposure to asbestos in the workplace and public areas.

On the state level, the legislature is largely focused on trying to save the State from a budget-crisis bankruptcy. No word of legislation affecting bankruptcy practice has surfaced yet.

Respectfully Submitted,

Mark Halverson
MSBA Bankruptcy Section Legislative Coordinator

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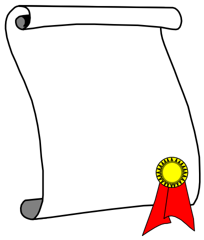
**Mark C. Halverson currently practices in Mankato, Minnesota at the Halverson Law Office, and is Board Certified in Business Bankruptcy Law by the A.B.C.*



NOTICES & ANNOUNCEMENTS

MEMORANDUM FROM THE U.S. BANKRUPTCY COURT TO ERS REGISTERED ATTORNEYS

Dear Bankruptcy Attorney,

We want to update you regarding the status of electronic filing in the district. We currently have 571 certified electronic filers and have received over 95,000 electronic motions, documents, and cases since electronic filing commenced in 1999. The court is pleased with the response to electronic filing, which has not only made case and document filing easier, but has enhanced access to court information. As part of this effort we request your assistance in maintaining the integrity of our records.

1. We ask that you submit documents only on your own behalf. We can certify other attorneys in your office to file electronic documents as well. We ask that either you or the person who files your documents teach the attorney or the attorney's assistant the correct filing procedure. The attorney can receive a log-in and password if you, as a certified ERS filer, submit the attorney's name, bar identification number, address, telephone, and email address to Liz Meissner at:

U.S. Bankruptcy Court
200 Warren E. Burger Federal Building
316 N. Robert Street
St. Paul, Minnesota 55101

If the attorney or staff would like training, our court web site, www.mnb.uscourts.gov lists training dates at the courthouse in Minneapolis (see site map). There is also an option to file practice documents to the court's training database. Instructions and test documents can be accessed through "How to become an ERS registered participant" on the court's home page.

2. Please update your personal mailing and email information on the web. After logging in, select # 4, "change password/user values" on the left panel. Please also send a copy of any changes in your personal information to:

Pam Berhow
301 U.S. Courthouse
300 South Fourth Street
Minneapolis, Minnesota 55415

3. We have added a new technical FAQ section on our home page. Please check this for technical filing assistance. It includes solutions to many of the most frequent technical problems, especially with Internet Explorer and scanners.

4. The recently approved Instructions on Filing a Chapter 11 Case are available on the court's web site. Click on the hyperlink on the home page.

Thank you for your support of the ERS.

* * * *

NEW CHAPTER 11 FILING INSTRUCTIONS

The Bankruptcy Judges for the District of Minnesota have adopted a set of Instructions for Filing a Chapter 11 Case ("Instructions"). These Instructions may be accessed using a link from the first page of the Bankruptcy Court's web site at http://www.mnb.uscourts.gov.

The Instructions, which apply to all Chapter 11 cases filed in the District of Minnesota, "are designed to supplement the Fed. R. Bankr. P. and the Local Rules of this court and to answer questions commonly asked in Chapter 11 cases."

The debtor's counsel is encouraged to contact the U.S. Trustee's Office in advance of filing a Chapter 11 case to discuss "applications to retain professionals, first day orders and other matters needing immediate attention in the case." A form of Notice of Intention to Seek Relief on an Expedited Basis is provided for use with motions for first day orders and the method for scheduling the hearing for first day orders is described.

The debtor's counsel may obtain a regular hearing date (e.g., a day and time each month) for hearing all motions in the Chapter 11 case. For hearings at which more than five motions and applications are scheduled, the debtor's counsel will serve and update an agenda describing the status of the various matters. Out of town counsel and parties may appear telephonically in many instances.

The Instructions describe regularly scheduled professional fee application and payment processes that may be requested. Finally, the Instructions identify certain types of provisions that may appear in cash collateral and debtor in possession financing agreements that are to be brought to the attention of the court and the parties in interest.

CHAPTER 7 PANEL TRUSTEE POSITION

The Office of the United States Trustee is seeking resumes from persons wishing to be considered for appointment to the panel of trustees who administer cases filed under Chapter 7 of the Bankruptcy Code. The appointment is for cases filed in the United States Bankruptcy Court for the **District of Minnesota, Sixth Division**. Chapter 7 trustees receive compensation and reimbursement for expenses in each case in which they serve, pursuant to court order under 11 U.S.C. § 330 and § 326. Please note this is not a salaried position.

The minimum qualifications for appointment are set forth in Title 28 of the Code of Federal Regulations at Part 58. To be eligible for appointment, an applicant must possess strong administrative, financial and interpersonal skills. Fiduciary experience or familiarity with the bankruptcy area is desirable but not mandatory. A successful applicant will be required to undergo a background check, and must qualify to be bonded. Although Chapter 7 trustees are not federal employees, appointments are made consistent with federal Equal Opportunity policies, which prohibit discrimination in employment.

Forward resumes to the **Office of the United States Trustee**, **Attn: Robert Raschke, Assistant U.S. Trustee, 300 S. 4th Street, Rm 1015, Minneapolis, MN 55415**. All resumes should be postmarked on or before **April 30th, 2003.**

* * * *

U.S. District Court
E-Mail and Fax Noticing Program

Introduction

The United States District Court for the District of Minnesota has implemented an automated system that allows the Clerk's Office to transmit copies of orders, judgments, and other notices generated by the Court, to attorneys of record by e-mail or facsimile in civil cases. Participation in this program will insure the efficient receipt of signed orders and judgments in a case for which you are an attorney of record. If you are interested in participating in this program, please read the information below.

How Does the Program Work?

There are two options available for attorneys who decide to participate. Attorneys can authorize the Clerk of Court to either e-mail or fax copies of orders, judgments and notices entered in civil cases directly to the attorney's e-mail or fax number instead of mailing a copy. Attorneys may only choose one noticing option (e-mail, fax, or mail). If attorneys choose to sign up for e-mail noticing, a primary and two secondary e-mail addresses (if you choose) will receive all of the notices.

The Clerk's Office maintains an electronic notice report confirming receipt by parties. <u>If the Clerk is unable to confirm receipt of the electronic notice, notice by mail will occur the next business day</u>.

How Do I Sign Up?

Fax Noticing

Attorneys who would like to participate in the fax noticing program should complete the registration form below and fax or mail it back to the St. Paul Clerk's Office at the address provided. It is imperative that you complete the entire form and have a dedicated fax line available. We cannot use a fax line that is shared with a phone line. Depending on the volume of responses, your request may take some time to input and verify. After the information has been processed by the court, you will receive a fax notification that your request has been processed and that your next notice will be sent via fax noticing.

If you already participate in the fax noticing program and you wish to remain in that program, <u>there is no need to do anything further</u>. If you wish to receive notices by e-mail instead of fax, please complete the form linked below.

E-Mail Noticing

Attorneys who would like to participate in the e-mail noticing program should complete the registration form below and fax or mail it back to the U.S. District Court. It is imperative that you complete all of the blanks on the form and to include your e-mail address. You may also provide up to two (2) secondary e-mail addresses, for an administrative assistant or paralegal, who will receive the same notices as the attorney of record. This secondary e-mail will insure that notices are reviewed and are received even when the attorney is out of the office. Depending on the volume of responses, your request may take some time to input and verify. After the information has been processed by the court, you will receive an e-mail notification that your request has been processed and that your next notice will be sent via e-mail noticing.

Making Changes

Pursuant to Local Rule 83.5(a) it is the responsibility of attorneys to promptly notify the Clerk of Court in writing of any change in your name, mailing address, law firm affiliation and telephone number. If at any time your fax number or email address changes, you must notify the Clerk's Office of this change as soon as possible. Untimely communication of this information to the Clerk's Office may result in a delay of receiving pertinent information on your case. Forms for updating this information can be found on the forms link, located on the U. S. District Court's web page. (www.mnd.uscourts.gov).

Sign-up

Please open the form and complete it on-line. When finished, print the form and sign it. You may also print the form and complete it by hand. Please be sure and read the entire form. Your signature is very important. Without your signature we cannot process your request. Once completed, fax the form to the U.S. District Court of Minnesota at 651-848-1125 or send it via the mail to: 700 Federal Building, 316 North Robert Street, St. Paul, MN 55101.

* * * *

2002-2003 Bankruptcy Section Counsel

Michael S. Dove, *Section Chair*
Gislason & Hunter, LLP
2700 S. Broadway
New Ulm, MN 56073-0458
mdove@gislason.com

Terri A. Georgen, *Section Vice Chair*
7900 International Drive, #200
Bloomington, MN 55425
tgeorgen@georgenlaw.com

Stephen J. Creasey, *Section Secretary*
United States Bankruptcy Court
U.S. Courthouse, Suite 7W
300 South Fourth Street
Minneapolis, MN 55415
Steve_Creasey@mnb.uscourts.gov

Nauni Jo Manty, *Section Treasurer*
Blackwell, Igbanugo, Engen & Saffold, P.A.
3601 West 76th Street, #250
Minneapolis, MN 55435
nmanty@blackwell-law.com

Steven W. Meyer, *Section Past Chair*
Oppenheimer Wolff & Donnelly
45 S. Seventh Street, #3400
Minneapolis, MN 55402-1609
smeyer@oppenheimer.com

Mark C. Halverson, *Section Legislative Coordinator*
Halverson Law Office
201 N. Broad Street, #301
Mankato, MN 56002-3544
halanlaw@halverson.com