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"Related to" Proceedings in Delaware Form Basis for Venue Transfer

In *IHS Long Term Care Services, Inc. v. THCI Company, LLC*, No. 04-2830 (8th Cir., August 19, 2005), the 8th Circuit recently found that "related to" proceedings in another jurisdiction justified the transfer of venue to that jurisdiction. Debtor Integrated Health Services, Inc., and its subsidiaries ("Integrated"), filed for Chapter 11 bankruptcy in the Bankruptcy Court for the District of Delaware. While that case was pending, a dispute arose between Integrated and THCI Company, LLC ("THCI") concerning the assumption and rejection of leases for facilities owned by THCI and operated by Integrated. The litigation was resolved via court order (the "Order"), which required Integrated to assume the leases. Abe Briarwood Corp. ("Briarwood") subsequently entered into a stock purchase agreement with Integrated, whereby Integrated would form IHS Long Term Care Services, Inc. ("IHS"), and then assign to IHS all of Integrated's assets and liabilities. Briarwood subsequently refused to accept transfer of Integrated's subsidiaries. Because no master lease had been executed pursuant to the Order, further litigation ensued between Integrated and THCI. After a somewhat unfavorable decision, Integrated appealed the Delaware Bankruptcy Court order. While pending, IHS filed a complaint in Missouri. THCI moved to transfer venue of the Missouri complaint to Delaware because the issues in the Missouri complaint were "related to" the Integrated bankruptcy. The case was subsequently transferred. But, before the Delaware Court received the file, Integrated filed a notice of appeal with the Eighth Circuit.

First addressing jurisdiction to hear the appeal, the Court noted that when a case is physically transferred to another court, it divests the transferring court of jurisdiction. But, the court noted that in the Eighth Circuit, it is the physical receipt of the file that signals the end of jurisdiction in the transferor court. Because the appeal was filed before the Delaware Court received the file, the Eighth Circuit had jurisdiction to hear the appeal.

The next question was whether the Missouri District Court had jurisdiction to transfer the case before deciding its own jurisdiction. Quoting 28 U.S.C. § 1334(b) the court noted that District Courts have "jurisdiction of all proceedings arising under title 11 or arising in or related to cases under title 11." In order for related to jurisdiction to exist, there must be some nexus between the title 11 case and the civil proceeding. Here, IHS's Missouri complaint concerned the nine leases, the master lease, and the guaranties under the leases. When the action was removed, these issues were being litigated in Deleware. Therefore the Missouri complaint was related to the Integrated bankruptcy proceedings, and the Eighth Circuit found that the transfer by the Missouri District Court was not an abuse of disrection.

Without Identifiable Res, Court Cannot Impose Constructive or Resulting Trust

In *In re BMC Industries Inc.*, 328 B.R. 792 (Bankr. D. Minn. 2005), the bankruptcy court found the Plaintiffs were unable to obtain relief because they had not satisfied the elements of either a constructive or a resulting trust. Gerald Becker ("Becker") was a former employee of the Defendant Vision-Ease, Inc., a subsidiary of Debtor BMC Industries, Inc. ("BMC"). Becker and his attorney Frank Kundrat ("Kundrat"), who represented Becker in his pre-petition employment action against BMC, brought an adversary proceeding against BMC. The result of the employment action was a

settlement agreement whereby BMC agreed to pay both Becker and Kundrat a sum of money. The settlement checks were deposited at or near BMC's bankruptcy filing and were returned unpaid. Kundrat and Becker ("Plaintiffs") filed an adversary proceeding seeking a declaratory judgment that the insurance proceeds paid by Debtor's insurance company to Debtor were not property of the estate and asking for the imposition of an implied trust for their benefit. Plaintiffs argued that the Court should recognize a constructive trust claiming that BMC was unjustly enriched when it failed to pay them after having received the check from the insurance company. In the alternative, Plaintiffs argued that the Court should recognize a resulting trust.

The Court first addressed the unjust enrichment argument. To show unjust enrichment, a claimant must prove that another party knowingly received something of value to which he was not entitled, and that the circumstances are such that it would be unjust for that party to retain the benefit of the enrichment. The claimant must then trace the proceeds from the date of the unjust enrichment to the point at which relief is sought. Here, Plaintiffs were unable to demonstrate that BMC still held the funds in question or what balances even existed in the accounts in question. Because of the lack of an identifiable res, the Court found it could not impose a constructive trust.

The same flaw existed in the argument for a resulting trust. A resulting trust arises when one party makes a disposition of property under circumstances which raises a presumption that the party making the disposition does not intend the other party holding the interest in the property have the remaining beneficial interest in it. Here again, without an identifiable res, the Court could not impose a resulting trust. Therefore, Plaintiffs could not recover anything from their complaint.

Remand of Case not Possible where Lawsuit Not Properly Before the Bankruptcy Court

In *Anne H. Womer Benjamin v. Jason Carl Richmond, Audrey Richmond, Insurance Advisors, Inc., a Minnesota corporation, and Doe's 1 – 25, inclusive, (In Re: Nucorp, Ltd.)* Case No. 05-32762 (Bankr. D. Minn. 2005), the United States Bankruptcy Court for the District of Minnesota held that Remand was not appropriate where a law suit was not capable of being brought in federal bankruptcy court in the first place. Debtor Nucorp, Ltd., a Minnesota corporation, was a general insurance agent of Credit General Insurance Company and Credit General Indemnity Company, two insurers organized under Ohio law. The defendants, Jason and Audrey Richmond, were shareholders of the debtor. Insurance Advisors, Inc. is owned by Richmond. In January of 2001 the Credit General Companies were placed into liquidation by the Ohio Court of Common Pleas and the court appointed the plaintiff to carry out the liquidation.

The plaintiff brought an action against the debtor in Ohio asserting the debtor owed money to the liquidation estate. The debtor could not afford to defend the out of state claim and filed chapter 11. The day prior to the chapter 11 filing, the plaintiff served defendants with a lawsuit venued in Minnesota seeking to have the defendants found individually liable for client premiums allegedly due to the liquidation estate. The defendants subsequently filed notice of removal in the debtors chapter 11 case and asserted that the bankruptcy court had jurisdiction over the action pursuant to

28 U.S.C. §§ 157 and 1334 and claimed that it was entitled to remove the Minnesota State Court action to the bankruptcy court.

At oral argument the plaintiff's attorney questioned whether the suit was capable of being removed to federal court and the bankruptcy court concluded that it may not. In reviewing possible sources of authority for removal, the court analyzed 28 U.S.C. § 1452(a) which states in part:

> "A party may remove any claim or cause of action in a civil action other than a proceeding before the United State Tax Court or a civil action by a governmental unit to enforce such governmental units police or regulatory power, to the District Court for the district where such civil action is pending, if such District Court has jurisdiction of such claim or cause of action under [28 U.S.C. §] 1334 . . ."

The court found that as an action to enforce Ohio's power to regulate the insurance industry this lawsuit could not be removed under 28 U.S.C. § 1452(a). The process of liquidating an insurance company under Ohio law is an exercise of police or regulatory power and within the contemplation of 28 U.S.C. § 1452(a). As a result, this lawsuit was not capable of removal to the federal courts under color of that statute in the first instance.

The court also found that under the "forum defendant rule" of 28 U.S.C. § 1441(b) this lawsuit could not be removed. Plaintiffs argument is that 28 U.S.C. § 1441(b) denied the defendants the power to remove the state court action to federal court. The theory rests on the second sentence of that section, but to make sense of it one must review the whole provision:

> "Any civil action of which the district courts have original jurisdiction founded on a claim or right arising under the constitution, treaties or laws of the United States shall be removable without regard to the citizenship or residence of the parties. Any other such action shall be removable only if none of the parties in interest properly joined and served as defendants and is a citizen of the state in which such action is brought."

The second sentence of that section prohibits segueing into federal courts unless none of the named defendants are citizens of the state in which the federal forum is located.

In disposing of the plaintiff's motion the court found that this lawsuit was never really before the court because it wasn't capable of being brought before the court in the first place. As a technical matter, remand is not really for the dispensing because it suggests sending a lawsuit *back* to its original forum. Remand was denied only because it was not necessary in the first place.

Attorney Deemed to Have Entered His Appearance as Counsel of Record When Document Filed Through His Electronic Record System Account

In *Amy Levine v. Neal Levine, (In Re: Neal Levine)*, Case No. 04-36744 (Bankr. D. Minn. 2005), the United States Bankruptcy Court for the District of Minnesota held that when a document is filed through an electronic record system account of a registered participant, that registered participant's signature is deemed affixed to the document regardless of whether the registered participant's signature block

appears. In this case, the defendant filed through the ERS account of an attorney, a registered participant. But, the attorney's name did not appear anywhere on the document.

The Court looked to local rule to determine whether the attorney had entered his appearance. The Court stated that "the electronic filing of a document by an attorney who is an ERS registered participant in the electronic case filing system shall constitute the signature of that participant under Fed. R. Bankr. P. 9011 and LOC. R. Bankr. P. (D. Minn.) 9011-4." Therefore, since the document, an answer in this case, was filed through the registered attorney's account, and his signature was deemed affixed to the answer, having therefore signed the answer, the attorney had entered his appearance on the defendant's part for the purpose of this adversary proceeding and was deemed counsel of record.

Undue Hardship for Student Loan Obligation Not Met Where Debtor Has Excess Income

In *Parker v. Student Loan Guarantee Foundation of Arkansas (In re Parker)*, No. 05-6018 (BAP 8th Cir. 2005), the Eighth Circuit BAP held that the debtor's student loan debt was nondischargeable because she failed to establish that requiring her to repay her student loan debt would impose an undue hardship. The debtor is a fifty-one year old woman without any dependants. She graduated in 1991 with a degree in art education. She had a student loan balance of $25,000 at the time of graduation. Although she actively sought employment as a teacher after graduation, it was not until 1999 that she found a teaching position. From 1991 to 1999, the debtor was unable to pay her student loan debt. The debtor repeatedly sought and received forbearances and deferments from her student loan lender. In 2000, the debtor broke her back, but she has recovered and her injuries did not limit her ability to work at the time she filed for bankruptcy. When the debtor filed for bankruptcy, her unpaid medical bills accounted for $927, which was less than 1% of her total unsecured debt (approximately $97,000). At the time of her bankruptcy filing, the debtor was working as art education teacher earning $23,000, which was subsequently raised to $30,000 the following year (2004). The debtor did not work in the summer when there was no school, but instead, she took care of her two grandchildren for her daughter. The Bankruptcy found that $100 should be attributed to the debtor's income because she would work in the summers, but simply chooses not to do so.

The debtor's loan balance had increased to approximately $69,000 at the time of trial. The debtor's student loan payments prior to bankruptcy was $564 per month. The debtor could reduce her monthly student loan payment by enrolling in the William D. Ford Loan Consolidation Program. Under the Ford Program, the debtor can select from a number of repayment plans. One of the plans in the Ford Program is the Income Contingent Repayment Plan ("ICRP"). The ICRP takes into account the debtor's ability to pay and the outstanding loan amount to determine an appropriate payment amount. The debtor's ICRP payment for her $69,000 outstanding student loan balance would have been $136 per month based on her income. Any unpaid balance after twenty-five years would be forgiven. The Bankruptcy Court found that the Debtor would have $150 in excess income each month if the $564 original student loan payment was taken out of her monthly expenses. Despite finding that the debtor had excess income from

which she could afford her ICRP payments, the Bankruptcy Court discharged the debtor's student loan debt as creating an undue hardship. The student loan lender (guarantee agency) appealed the decision.

In the Eight Circuit, a determination of undue hardship is evaluated based upon the totality of the circumstances with special attention to (1) the debtor's past, current, and reasonably reliable future resources; (2) the reasonable necessary living expenses of the debtor and any dependants; and (3) any other relevant factors or unique circumstances. The Eighth Circuit BAP held that the debtor has not met her burden of proof to establishing that it would be an undue hardship for her to repay her student loan debt. The Court found several factors that weighed against the debtor's claim of undue hardship. First, the Court noted that the debtor did not maximize her income as she is required to in the Eighth Circuit before student loans can be discharged. Significant to the Court's finding was that the debtor took care of her grandchildren without pay, when she could find a job for the summer months when school is out. Second, the Court found significant that the debtor's excess income would allow her to repay her student loans under the ICRP in the Ford Program. Third, the Court found that the debtor's medical problems did not limit her earning capability, and was not a major contributing factor in forcing the debtor to file for bankruptcy. Fourth, the Court noted that the $69,000 in loans which started out to be $25,000 was a significant debt amount, however, the Court felt that the lender should not be punished simply because the debt had increased over the years due to their leniency in allowing the debtor to receive deferments and forbearances. Finally, the Court did recognized that it may be difficult for the debtor to repay her student loan debt, however, under the fact of her case, she could not satisfy the undue hardship standard.

Trustee Unable to Recoup Settlement Proceeds Owed to Debtor's Managing Member

At issue in *Judy DeBold v. E. Rebecca Case (In re Tri-River Trading, LLC),* Case No. 04-6075EM, (B.A.P. 8th Cir. 2005) was whether Debtor Tri-River Trading, LLC, ("Debtor") was entitled to certain settlement proceeds out of a case involving claims of Debtor and its managing member, Judy DeBold ("DeBold"). Jersey Grain Company ("Jersey Grain") and DeBold formed Debtor to engage in the business of trading river barge traffic. Jersey Grain and DeBold were each 50% owners. Phil Thorton ("Thorton"), the general manager of Jersey Grain, agreed to use Debtor for all of its barge needs. Within a year after commencing business, Thorton made sexual advances towards DeBold, which she rebuffed. Thereafter, Jersey Grain ceased doing business with Debtor. Unable to survive without Jersey Grain's business, DeBold closed Debtors doors and unwound the company's future commitments, which cost Debtor about $877,000. Shortly thereafter, DeBold and Debtor commenced suit against Jersey Grain, Thorton, and Hugh Moore, Jr., Jersey Grain's President. Some of the claims were Debtor's, some were DeBold's, and some were on behald of both plaintiffs. On the day of trial, the defendants paid $800,000 to settle the case. The checks paid in settlement were made out to DeBold, Debtor, and their attorney's firm, as joint payees. After the settlement, Debtor's creditors filed an involuntary bankruptcy petition and an order for relief issued. DeBold signed Debtor's schedules, which listed $67,000 in net settlement proceeds as an asset of the bankruptcy estate. When

Trustee refused to agree with DeBold's contention as to her share of the settlement proceeds, DeBold commenced this declaratory judgment action in Bankruptcy Court. DeBold testified that she had agreed to settle for $800,000 based on a split of 1/8 to Debtor and 7/8 to her because, based on what she had learned during discovery, she had come to believe that Debtor's claims were weak, and that her claims were strong.

The Bankruptcy Court independently assessed the settlement value of each of the State Court claims. The Bankruptcy Court determined that Debtor had proven its case for damages, and that DeBold had failed to meet her burden of proof. The Bankruptcy Court then awarded all of the settlement proceeds to Debtor.

The B.A.P. first addressed the respective ownership rights of settlement proceeds between Debtor and DeBold. The B.A.P. stated that the issue of ownership rights was a question of whether the settlement proceeds were property of Debtor's bankruptcy estate. In other words, if DeBold owned 7/8 of the settlement proceeds, then that 7/8 interest was not property of the estate and the Bankruptcy Court had no authority to make it property of the estate. The B.A.P determined that DeBold did not have the authority to allocate the settlement proceeds and that the allocation issue was properly before the Bankruptcy Court. But the B.A.P then stated that such a determination did not mean that DeBold relinquished her right to the settlement proceeds. The B.A.P. then applied Missouri state law to DeBold's and Debtor's state court claims, and determined that DeBold was entitled to the 7/8 interest in the gross settlement sum with Tri-River entitled to the remainder.

BANKRUPTCY SECTION DONATIONS IN MEMORY OF WILLIAM KAMPF

The Bankruptcy Section gave two donations in memory of Bill Kampf for his service and dedication to the Twin Cities legal community. $250 was donated to Legal Aid of Minneapolis, and $250 was donated to Legal Aid of St. Paul.

BANKRUPTCY COURT'S OCTOBER SCHEDULE

Deadlines for filing under existing law: The Bankruptcy Abuse Prevention and Consumer Protection is effective Monday, October 17, 2005. Therefore, the deadline to file in paper or on diskette is **Friday, October 14th by 5 p.m.** The deadline to file electronically is **Sunday, October 16th at 11:59 p.m.**

Clerk's Office Hours on October 15 and 16: Minneapolis Clerk's office personnel will be available to assist callers with electronic filing problems on **Saturday, October 15 from 8:00 a.m. to 3:00 p.m.** and on **Sunday, October 16 from 1:00 p.m. to 6:00 p.m.** An emergency number will be posted on the court's website for use by attorneys encountering electronic filing problems between 6:00 p.m. and 11:59 p.m. on Sunday, October 16. Attorneys are urged to complete their filings before 6:00 p.m. on Sunday to avoid any last minute problems.

Case Search Function to be Deactivated: To ensure proper functionality of the ERS system over the weekend of October 15 and 16, when the court anticipates receiving a large volume of filings, the "case research" function will be deactivated. ERS registered attorneys can search the court record using the "case filing" option, after entering their log in and password.

Conversion to CM/ECF begins at 12:01 a.m. on October 17: The ERS case filing system will be shut down at 12:01 a.m. on Monday, October 17, marking the beginning of the court's conversion to CM/ECF. The court anticipates the conversion will take approximately nine days; CM/ECF is expected to be operational on Thursday, October 27.

Filings between October 17 and 27: During the nine day period during which the court will convert its database and images from ERS to CM/ECF, filings can be made on diskette or CD/ROM, via e-mail after receiving permission from the clerk's office or, as a last resort, in paper. As much as possible, attorneys are encouraged to submit filings prior to October 17 and to avoid making any but emergency filings during the conversion period.

CM/ECF Test Filings: Attorneys are further encouraged to complete their test filings required for CM/ECF registration as soon as possible. The CM/ECF training database, to which attorneys submit test filings, will be operational during the conversion period for this purpose.