

## **Bankruptcy Bulletin**

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### **IN THIS ISSUE**

**Debtor Received Adequate Notice Of Motion For Relief From the Automatic Stay Despite Debtor's Continuance of all Other Motions**

**Confirmation of Reorganization Plan Discharges Debt Arising Prior to Confirmation**

**Eighth Circuit BAP Denies Debtor's Appeal for Failing to Meet the Components of the 'Exigent Circumstances' Exception to Debt Counseling.**

**Clear and Convincing Standard Must Be Met By Debtor to Continue Automatic Stay in Second Case Pending Within a Year**

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## MESSAGE FROM THE PRO BONO COMMITTEE

The Pro Bono Committee wants to remind section members that the 8<sup>th</sup> Circuit pro bono site is up and running. The address is: [www.bankruptcyprobono.org](http://www.bankruptcyprobono.org). The site includes a link to our section's pro bono site which provides sample pleadings and other resources for volunteer attorneys.

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### **Debtor Received Adequate Notice Of Motion For Relief From the Automatic Stay Despite Debtor's Continuance of all Other Motions**

In *Harris v. The Boyd G. Montgomery Testamentary Trust (In re Harris)*, No. 05-6050EA (B.A.P. 8th Cir., February 15, 2006) the BAP upheld a bankruptcy court's determination that adequate notice of a motion for relief from the automatic stay had been given to the Debtor.

This case is a cautionary tale for counsel who are involved in numerous motions during the early stages of a bankruptcy case. Johnny Harris (the "Debtor") leased non-residential real property from the Boyd G. Montgomery Testamentary Trust (the "Trust"). After the Debtor filed its Chapter 13 case, the Trust moved for relief from the automatic stay, and a hearing date was set for September 1, 2005. Around the same time, three other motions were filed against the Debtor, which were all set for hearing on August 15, 2005.

At the August 15, 2005 hearing, the Debtor's new attorney announced that he was just recently retained by the Debtor and requested a continuance to September 15, 2005 before taking up the three motions. The bankruptcy court granted the continuance, and the three motions were continued to September 15, 2005. However, Debtor's c \_\_\_\_\_ did not address the Trust's

motion for relief from the automatic stay scheduled for September 1, 2005.

On September 1, 2005, the attorney for the Trust appeared at the lift stay hearing, but neither the Debtor nor the Debtor's counsel appeared. The bankruptcy court determined that notice of the hearing was adequate, and the Trust's attorney stated that someone from the Trust had spoken to the Debtor about the lift stay motion. The bankruptcy court granted the Trust's lift stay motion, and the Debtor appealed the decision based upon inadequate notice.

The BAP affirmed the bankruptcy court's decision stating that the Debtor had received adequate notice of the pending motion. The Court stated that nothing that occurred at the August 15, 2005 hearing changed the fact that another hearing involving a different moving party was to take place on September 1, 2005. The Court recognized that while the Debtor and/or his counsel may have subjectively believe that *all* of the motions pending in the case were continued to September 15, 2005, the record showed that no one discussed the timing or scheduling of the lift stay motion at the August 15, 2005 hearing.

### **Confirmation of Reorganization Plan Discharges Debt Arising Prior to Confirmation**

In *International Paper Company v. MCI WorldCom Network Services, Inc.*,

*F.3d* (8th Cir., March 6, 2006), the Eighth Circuit Court of Appeals rejected a claim by International Paper Company (“IP”) that MCI’s installation, maintenance and use of fiber optic cable was a continuing trespass and therefore under 11 U.S.C. § 1141(d)(1)(A) was not discharged as a debt that arose before the date of plan confirmation. This was an appeal from a judgment of the District Court for the Western District of Arkansas granting summary judgment in favor of MCI on IP’s complaint alleging state law claims of trespass, slander of title and unjust enrichment.

After IP appealed to the Eighth Circuit, MCI filed for bankruptcy, and MCI moved to dismiss the appeal. The Court of Appeals found that under 11 U.S.C. § 1141(d)(1)(A), MCI’s confirmation of its reorganization plan “discharges the debtor from any debt that arose before the date of such confirmation.” Further, the court noted that “Debt” means liability on a claim, and claim includes “a right to payment, whether or not such right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured.” IP conceded that MCI’s installation, maintenance and use of fiber optic cable before the plan confirmation date were discharged in bankruptcy, but argued that it has post-confirmation claims based on a continuing trespass theory. The Court held in favor of MCI finding that, assuming IP had a trespass claim under Arkansas law, the claim accrued prior to the bankruptcy filing when MCI installed the fiber optic cable and marked its route with conspicuous posts and sign that gave MCI notice of the cable presence. Therefore, IP’s claim, if any, was discharged in bankruptcy.

**Eighth Circuit BAP Denies Debtor’s Appeal for Failing to Meet the**

### **Components of the ‘Exigent Circumstances’ Exception to Debt Counseling.**

In *In re Dixon*, No. 05-6059EM (B.A.P. 8th Cir. February 17, 2006) the BAP affirmed the bankruptcy court’s decision that the debtor was not eligible to be a debtor under the bankruptcy code and affirmed the dismissal of his bankruptcy case. The debtor filed for chapter 13 relief on November 10, 2005 in an attempt to stop a pending foreclosure action on his residence. Because he did not receive the necessary credit briefing required under §109(h)(1), the debtor filed a Certification Requesting Waiver of Debt Counseling by Individual Debtor along with his petition. The document attested that the debtor’s “real estate, residence and homestead was scheduled for foreclosure at 12:00 p.m., November 10, 2005...” and that he “did not contact an attorney...until approximately 6:30 p.m., November 9, 2005.” The debtor also attested that he was advised of the requirement of obtaining debt counseling prior to filing a petition for bankruptcy relief. The debtor further attested that “it would be two weeks before they could provide me with the debt counseling on the phone and that it would be twenty-four hours before they could provide me with the counseling by internet.” Because he did not have a computer or internet access, the debtor stated that it was “impossible” for him to complete the debt counseling prior to filing bankruptcy.

Under §109(h)(1), “all individual debtors must receive an appropriate briefing during the 180 days preceding the date of filing.” One exception to this general rule is found under 11 U.S.C. §109(h)(3)(A) which provides that the briefing requirement does not apply if the debtor submits a certification: (I) describing the exigent circumstances that merit a waiver of the

requirements of paragraph (1); (ii) stating the inability to obtain briefing within five days of a request; and (iii) the certification is satisfactory to the court. The bankruptcy court recognized two substantive components of 11 U.S.C. §109(h)(3)(A)(I) which states that there must be exigent circumstances and that those circumstances merit a waiver of the briefing requirement. The bankruptcy court found that the circumstances in which the debtor found himself may have been exigent. However, the bankruptcy court found that under Missouri law the debtor was provided at least 20 days notice of the foreclosure action. Given the length of the Foreclosure notice, the bankruptcy court held that the circumstances did not merit a waiver of the pre-bankruptcy briefing requirement. Finding that a review of court decisions based on similar facts have resulted in the same conclusion, the BAP held that the bankruptcy court did not abuse its discretion.

**Clear and convincing standard must be met by debtor to continue automatic stay in second case pending within a year**

In *In re Kurtzahn*, Case No. 05-90815 (Bankr. D. Minn., January 31, 2006), the Bankruptcy Court denied a motion to continue the automatic stay past the initial 30 days after the petition date. Under the provisions of Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, if a debtor has been a debtor in a previous case during the last year that was subsequently dismissed, a rebuttable presumption arises under §362(c)(3)(c) that the current case was not filed in good faith under §362(c)(3)(B). The presumption may be rebutted by the debtor only by clear and convincing evidence to the contrary. The debtor must file this motion and have a hearing on it within the first 30 days of the case.

The court used the previously developed good faith jurisprudence of the Eighth Circuit to frame the proper inquiry for analysis. The court found the ultimate issue to be whether the debtor's plan was feasible. In this case, the debtor's repeated delinquencies on her mobile home loan in the past, the debtor's age, and the debtor's husband's variable income, were all factors that led the court to conclude that the debtor could not overcome the presumption.