

# BANKRUPTCY LAW NEWSLETTER

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## REAL PROPERTY TAX SALES: CAN BANKRUPTCY SAVE THE PROPERTY?

By: Perry G. Pastula\*

### INTRODUCTION

How does the filing of a bankruptcy proceeding affect the rights of debtors in dealing with real estate sold for nonpayment of real estate taxes prior to the filing? This article will look at the tax sale process, redemption rights, and the way the author believes bankruptcy courts may deal with real estate tax sales in the bankruptcy proceedings. As this article was being prepared, the decision of *In re Sabec*, 137 B.R. 659 (Bkrcty. W.D. Mich. 1992), was published. The *Sabec* decision, which supports this article's analysis and conclusion, is currently on appeal to the United States District Court.

### THE REAL ESTATE TAX SALE PROCESS AND REDEMPTION.

The assessment and collection of real property taxes and tax sale and redemption rights relating thereto are governed by the Michigan General Property Tax Act, MCLA 211.1-.157; MSA 7.1-.214.

Any real estate upon which taxes remain unpaid for a period of three years is subject to being sold at tax sale on the first Tuesday of every May. MCLA

211.60; MSA 7.104. The property is sold at a price equal to the amount of unpaid taxes, plus a \$10 expense charge, the county administration fee of 4 percent, and interest at the rate of 1.25 percent per month from the date the tax originally became delinquent. MCLA 211.60; MSA 7.104. A first priority lien is imposed on the property in favor of the people of the State of Michigan to secure payment of the taxes and other charges. MCLA 211.60; MSA 7.104.

Every year the state treasurer files a petition with the circuit court in the county where the property is located seeking a judgment for payment of the delinquent taxes and also providing that if the payment is not made the property will be sold to satisfy the taxes and other charges. MCLA 211.61; MSA 7.105. As soon as the petition is filed and not less than 30 days before the date fixed for the tax sale, the county treasurer must send a written notice of the tax sale to the last known owner of the property. MCLA 211.61(a); MSA 7.106. In addition, the circuit court for the county in which the delinquent tax lands are located issues an order setting a hearing on the state treasurer's petition to enter a decree to order the delinquent tax lands to be sold. MCLA 211.62; MSA 7.107. The order must be published once a week for

\* Perry G. Pastula is a member of the firm of Dunn, Schouten & Snoop, P.C. He received his B.A. from Central Michigan University in 1980 and his J.D. from Wayne State University in 1983. His practice concentrates in the areas of bankruptcy, commercial litigation, and banking law.

three weeks before the hearing, in a regularly established newspaper in the county where the petition has been filed. MCLA 211.66; MSA 7.111.

The sale of delinquent tax liens must commence at 10:00 a.m. on the first Tuesday of each May, and sales continue until so much of each delinquent tax parcel is sold sufficient to pay the taxes and other charges. MCLA 211.70; MSA 7.115. If there is no bidder for the property, the property is sold to the State of Michigan. MCLA 211.70; MSA 7.115.

The purchaser at a tax sale receives a certificate that shows the year's tax for which he has purchased, the amount of the tax, and all charges paid by him at the time of the purchase; it states that he will be entitled to a deed after the redemption period has expired and that if the sale is not confirmed the money he paid will be returned. MCLA 211.70; MSA 7.115.

After the tax sales are conducted, the county treasurer files a report of the sales with the county clerk. MCLA 211.70; MSA 7.115. Unless an objection to the report is filed within eight days after the time limit for filing the report, the sales are confirmed. MCLA 211.70; MSA 7.115.

The owner of property sold at tax sale has two redemption periods; the amount that must be paid to redeem the property is different for each one. The actual length of the second redemption period will differ depending on whether the state or a private party holds the purchaser's certificate when the first redemption period expires.

The first redemption period expires the first Tuesday of May in the year following the sale. MCLA 211.74; MSA 7.120. To redeem the property within that initial redemption period the owner must pay the amount bid at the tax sale plus interest at 1.25 percent per month from the first day of the month in which the tax sales were commenced. MCLA 211.74; MSA 7.120.

The second period is for property for which the state holds the purchaser's certificate at the time of expiration of the first redemption period. This period lasts until the first Tuesday of November after the first redemption period expires. MCLA 211.131(c); MSA 7.190(1)(1). For lands purchased by the state that

have a state equalized valuation of \$1,000 or more the second redemption period is further extended until after the owners of the lands have been notified of a hearing before the Department of Treasury. MCLA 211.131(e)(1); MSA 7.190(3)(1). The hearing, held after the second redemption period expires, allows the owner to show cause why the tax sale and the deed to the state should be canceled. MCLA 211.131(e)(2); MSA 7.190(3)(2). The owner has an additional 30 days after the hearing to redeem the property by paying the amount bid at the tax sale plus interest and an additional penalty of 50 percent of the tax for which the property was sold. MCLA 211.131(e)(3); MSA 7.190(3)(3).

Anyone may purchase a state tax bid for the amount bid by the state, plus interest, at any time before April 20 of the year following the sale. MCLA 211.84; MSA 7.138. Thus, a private party can obtain a tax sale purchaser's certificate either at the original tax sale or afterward, by purchasing the state's tax bid. If a private party holds the purchaser's certificate when the first redemption period expires, he must take certain actions to acquire title and trigger the second redemption period. After the first redemption period expires, the purchaser may present the purchaser's certificate to the state treasurer, who must then provide the purchaser with a tax deed. MCLA 211.72; MSA 7.117. This tax deed conveys absolute title of the property to the purchaser. However, to start the second redemption period, the owner of the property must be given notice of his right to redeem the property by paying all sums paid at the tax sale, plus 50 percent and fees for service or the cost of publishing the notice. MCLA 211.140; MSA 7.198. Proof of this notice must be filed with the county treasurer. MCLA 211.140; MSA 7.198. If the property is an "improved residential parcel," which is simply "a parcel of land which contains a dwelling suitable for occupancy," the proof of notice must so state. MCLA 211.140a; MSA 7.198(1). An extra copy of the notice must be provided, to be forwarded to the county department of social services so that it can contact the owner to see whether he needs assistance or protection of the court. MCLA 211.140a(2); MSA 7.198(1)(2). The second redemption period begins when the proof of notice is filed with the county treasurer and runs for six months. MCLA 211.141(1), MSA 7.199(1). After the second redemption period expires, the tax sale purchaser may

seek a writ of assistance to obtain possession of the property. MCLA 211.141(2); MSA 7.199(2).

### EFFECT OF BANKRUPTCY FILING ON RIGHT TO REDEEM PROPERTY AND PAY DELINQUENT TAXES.

A simple analysis of the statutes could lead to the conclusion that in order to preserve his alternatives in paying delinquent taxes, a debtor needs to file a bankruptcy proceeding prior to the real estate tax sale held on the first Monday in May. Relying on the holding in the Sixth Circuit Court of Appeals decision in In re Glenn, 760 F.2d 1428 (6th Cir. 1985) would certainly support that conclusion. However, taking the analysis only that far would work to the detriment of debtor clients, would, in this writer's opinion, lead to an inappropriate conclusion, and would also be contrary to the recent Western District of Michigan decision in Sabec.

In Glenn, the Sixth Circuit held that the key event that limits a bankruptcy debtor's alternatives in dealing with a real estate mortgage holder is the actual mortgage foreclosure sale. The Sixth Circuit held that once the sale has been held, a Chapter 13 debtor loses the right to cure the default under the mortgage and reinstate the terms of the mortgage under 11 USC 1322(b). The Sixth Circuit also held that the automatic stay provisions of 11 USC 362(a) do not toll or extend the running of the redemption period after the sale. Additionally, Glenn held that 11 USC 105(a) cannot be used to toll the redemption period absent exceptional circumstances such as fraud, mistake, accident, or erroneous conduct. Glenn also held that 11 USC 1322(b)(3) does not allow a debtor to pay the redemption amount over the life of the Chapter 13 plan. The Glenn decision has been extended to apply to Chapter 11 debtors in the Western District of Michigan. See In re Marshall, 54 B.R. 509 (Bkrcty. W.D. Mich. 1985).

Glenn had the effect of overruling the decision of the Bankruptcy Court for the Western District of Michigan in In re Thompson, 17 B.R. 748(Bkrcty. W.D. Mich. 1982). In Thompson, the bankruptcy court held that as long as the Chapter 13 petition was filed before the mortgage foreclosure redemption period expired, the debtors could cure the defaults under their mortgages. However, if the redemption period expired before the filing of the bankruptcy proceedings, the

bankruptcy court would lose all jurisdiction to provide the debtors any relief. Thompson at 753. Glenn also overruled Western District Judge Noel P. Fox's decision in In re Bennett, 29 B.R. 380 (W.D. Mich. 1981). Judge Fox had held that a Chapter 13 debtor could cure a default under a mortgage as long as the bankruptcy petition was filed before the redemption period expired.

Although the Glenn decision has put an end to the question of whether the filing of a bankruptcy petition after a mortgage foreclosure sale will provide additional alternatives to debtors, the effect of a bankruptcy filing after entry of a land contract forfeiture judgment is still subject to some uncertainty. Judge Arthur J. Spector's decision in In re Carr, 52 B.R. 250 (Bkrcty. E.D.Mich. 1985) provides the starting point for analysis of land contract forfeiture proceedings and is helpful in analyzing the treatment in bankruptcy of property sold at real estate tax sales. In Carr, Judge Spector held that as long as a debtor files a bankruptcy proceeding prior to expiration of the redemption period after entry of a land contract forfeiture judgment, the debtor may cure defaults under the land contract in a Chapter 13 proceeding, and the automatic stay imposed by 11 USC 362(a) tolls the expiration of the land contract forfeiture redemption period. Both Judge James D. Gregg, in In re Cooper, 98 B.R. 294 (Bkrcty. W.D.Mich. 1989), and Judge Lawrence E. Howard, in In re Miller, 90 B.R. 865 (Bkrcty. W.D. Mich. 1988), have cited Judge Spector's decision in Carr in their analyses in those cases without criticism. However, neither Cooper, nor Miller specifically dealt with the issues presented in Carr. The Carr decision disagreed with the earlier decision of Judge Harvey D. Walker in In re Owens, 27 B.R. 946 (Bkrcty. E.D.Mich. 1983). Judge Walker held that the filing of a bankruptcy proceeding during the running of a land contract forfeiture redemption period did not toll that redemption period, but that the debtor did have the right under 11 USC 108(a) to extend the redemption period an additional 60 days from the filing of the bankruptcy petition. In Carr, Judge Spector distinguished Glenn by focusing on the situation in which there is a fundamental change in the relationship between the parties in a land contract forfeiture proceeding, as opposed to a mortgage foreclosure. After the mortgage foreclosure sale the contract between the mortgagor and mortgagee is extinguished, and the rights of the parties after the sale are "cemented by the state law consequences of

sale." Carr at 259. In the land contract forfeiture process, the rights of the parties are not irrevocably transformed until the redemption period has expired. See also Gillam v. Samuels, 32 B.R. 393 (E.D. Mich. 1983).

In reaching his decision in Carr, Judge Spector noted that the Sixth Circuit's decision in Glenn was admittedly a "pragmatic result and represented a compromise between the competing interests of the debtor and mortgage holders." The six reasons the Glenn court stated for reaching its decision were analyzed in the Carr decision as they applied to land contract forfeiture proceedings. See Glenn at 1435-136; Carr at 257-158. Those six reasons should be analyzed as they apply to real estate tax sales. In that context, the key date, this writer believes, is the beginning of the running of the second redemption period. That conclusion is supported by the recent Western District of Michigan Bankruptcy Court's decision in Sabec.

First, the critical date picked in mortgage foreclosure proceedings and land contract forfeiture proceedings were compromises between two extremes. In real estate tax sale matters the dates that could be picked include: (1) the date of the tax sale; (2) the expiration of the one year redemption period after the tax sale; (3) the date the tax deed is delivered to the tax sale purchaser; (4) commencement of the second redemption period, after the tax sale purchaser gives and files proof of notice to the owner of the right to redeem, or automatically where title has vested in the state; (5) issuance of a writ of assistance under the real estate tax sale statute to put the tax sale purchaser into possession of the property. Using expiration of the commencement of the second redemption period is a compromise, just as the Glenn court's choice of the time for the mortgage foreclosure sale and the Carr court's decision to use the expiration of the 90-day redemption period in the land contract forfeiture proceeding were compromises.

Second, the commencement of the second redemption period is a "measurable identifiable event of importance in the relationship of the parties." Glenn at 1435. Just as the land contract forfeiture redemption period is easily measurable, the second redemption period commences on a specific date.

Third, the event that triggers change of ownership is important. In the mortgage foreclosure process the mortgage sale effects a change of ownership. In the land contract forfeiture process expiration of the redemption period triggers the change of ownership. Similarly, in real estate tax sales, until service and recording of the notice start the second redemption running, a grantee under a state tax deed acquires no title to the premises. United States v. Varani, 780 F.2d. 1296 (6th Cir. 1986). If the state is the purchaser at the tax sale, it receives a deed to the property, title becomes absolute by virtue of nonredemption within the first redemption period, and the second redemption period automatically commences. MCLA 211.67(a); 7.112(1)(1).

Fourth, the Glenn decision noted that the mortgage foreclosure sale "normally comes only after considerable notice giving the debtor opportunity to take action by seeking alternative financing or by negotiating to cure the default or by taking advantage of the benefit of Chapter 13." Glenn at 1435-436. In Carr, Judge Spector noted that expiration of the land contract forfeiture redemption period was considerable notice, sufficient to give the debtor an opportunity to take remedial action. In the tax sale process the actual tax sale does not take place until the taxes are delinquent for three years. Thus, it could be argued that the date of the tax sale provides sufficient notice. However, when the other reasons are considered, especially the fact that ownership does not change until after the second redemption period commences, using the commencement of the second redemption period is "considerable notice" without being too excessive.

Fifth, to use any later date "largely obliterates the protection Congress intended for mortgagees of private homes as distinguished from other secured lenders." Glenn at 1436. This factor is not applicable here, since statutorily imposed liens for payment of real estate taxes are not consensual liens entitled to the benefits of 11 USC 1322(b)(2). Sabec at 667-68.

Sixth, "using any later date would bring the very serious danger that bidding at the sale itself, which could be arranged so as to yield the most attractive price, will be chilled; potential bidders may be discouraged if they cannot ascertain when, if ever, their interest will become finalized." Glenn at 1436. Although using the commencement of the second

redemption period may chill bidding at real estate tax sales, since the bidder is running the risk that the owner may file a bankruptcy proceeding, using that date will give tax sale purchasers the benefit of knowing that once that second redemption period commences, the owner's filing of the bankruptcy proceedings will not affect the interest they have in the property as a result of the tax sale purchase.

This writer's conclusion that the key date in preserving a debtor's rights under the Bankruptcy Code and dealing with real estate sold at tax sale is the commencement of the second redemption period is contrary to the conclusion reached in In re Cooke, 127 B.R. 784 (Bkrcty. W.D.N.C. 1991). In Cooke the bankruptcy court held that the filing of a bankruptcy proceeding after property had been sold by the Internal Revenue Service to enforce its federal tax lien did not stay the running of the redemption period. Under the Internal Revenue Code, the taxpayer has 180 days beginning with the date of the sale to redeem real property sold. 26 USC 6337(b)(1). The Cooke court declined to follow Judge Spector's reasoning in Carr, which held that 11 USC 362(a) suspended the running of the land contract forfeiture redemption period. Instead, the Cooke court held that the redemption period was not stayed, and therefore the Chapter 13 debtor could not extend the time for making payments to redeem the property sold at tax sale. The court also determined that the automatic stay would not be violated by the tax sale purchaser's exchange of the purchaser's certificate received at the tax sale for the deed after the redemption period expires and the taxpayer fails to timely redeem the property. This writer believes that the reasoning of the Cooke court was erroneous and that 11 USC 362(a) should be read broadly enough to prohibit the exchange of a tax sale purchaser's certificate for a deed. This "act" should be considered to have been stayed, since it effectuates a transfer of all of the taxpayer's right, title, and interest in the real property. 26 USC 6339(b)(2).

The tax sale process under the Internal Revenue Code is sufficiently analogous to the statutory procedure established in Michigan for sale of property for delinquent real estate taxes to warrant treating both processes the same under the Bankruptcy Code. However, when the Cooke decision is analyzed in light of the Sixth Circuit's decision in Glenn and Judge Spector's analysis of land contract forfeiture proceed-

ings in Carr, it seems clear that it should not be followed in our courts either in the context of real estate tax sales or in that of federal tax lien foreclosure sales.

## CONCLUSION

In dealing with delinquent real estate taxes, the key date for maximizing the alternatives for debtors under the Bankruptcy Code should be the commencement of the second redemption period after the tax sale has been conducted. However, because of the amount of time that passes between the date the taxes become delinquent and the tax sale (at least three years), our courts may take the position that the tax sale date is sufficient time for the debtor to use his rights under the Bankruptcy Code. This is possible when consideration is given to the fact that the Sabec decision was clearly a compromise of competing interests. The cautious practitioner will advise the filing of a bankruptcy proceeding prior to the holding of the tax sale. This is so even though Judge Gregg's decision in Sabec, which is currently on appeal, supports the conclusion reached in this article.

Even where the tax sale is conducted before the bankruptcy is filed, Michigan's statute provides debtors with an opportunity to redeem the property within not only the initial redemption period, but also a second one. Ideally, either rights provided under the Bankruptcy Code or the state statutory redemption rights will afford bankruptcy clients sufficient opportunity to preserve their interests in their real estate even after a real estate tax sale has been held.

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## RECENT BANKRUPTCY DECISIONS

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The following are summaries of recent Court decisions that address important issues of bankruptcy law and procedure. These summaries were prepared by Joseph M. Ammar with the assistance of Larry Ver Merris.

In re Ledford, In re Skiles, Case Nos. 91-5594/5649 (6th Cir. July 31, 1992). This case involves the dischargeability of bank debt incurred by a partnership to build a condominium project, coming to the

harsh conclusion that the fraud of one partner can be imputed to an innocent general partner. After the bank had advanced the loan proceeds in reliance on several contracts for the purchase of individual condominium units, it turned out that one of the general partners had fraudulently misrepresented to the bank the character of the contracts. After the partnership defaulted on its loans, the two general partners filed for bankruptcy. While one of the partners managed the partnership's business, the other general partner was not involved in day-to-day operations and did not know of the fraud.

The Sixth Circuit first held that even though there is no explicit reasonableness requirement in §523(a)(2)(A), the bank satisfied the Sixth Circuit's prior requirement that reliance on the representation must be reasonable. The Sixth Circuit stated that whether a creditor's reliance is reasonable is a factual determination made in light of the totality of the circumstances. In finding that the bank acted reasonably in relying on the contracts, the Sixth Circuit examined the following circumstances: (1) whether the creditor had a close personal relationship or friendship with the debtor; (2) whether there had been previous business dealings with the debtor that gave rise to a relationship of trust; (3) whether the debt was incurred for personal or commercial reasons; (4) whether there were any "red flags" that would have alerted an ordinarily prudent lender to the possibility that the representations relied upon were not accurate; and (5) whether even minimal investigation would have revealed the inaccuracy of the debtor's representations.

The Sixth Circuit next held that for purposes of §523(a)(2)(A), the fraud of one partner can be imputed to another partner who had no actual knowledge of it. The Sixth Circuit reasoned that one partner perpetrated his fraud in the ordinary course of the partnership's business. In addition, the partner unaware of the fraud shared in the fraud's monetary benefits. The Sixth Circuit noted that the loan proceeds were not directed for personal use. Rather, the funds were used for partnership purposes and financed a project from which the innocent partner stood to profit.

*In re Komives*, Case No. GL 92-80398 (Bankr. W.D. Mich. August 5, 1992). In this unpublished opinion, Judge Gregg determined the balance and amount necessary to cure a land contract entered into between the Chapter 13 debtor and the objecting creditor. A determination of the land contract balance

and arrearages was necessary as a prerequisite to determine whether the debtor's plan was confirmable.

In determining the land contract balance and arrearages, the court first relied on the general rule that prepayment of principal on a land contract is prohibited unless the contract expressly provides to the contrary or there is a waiver by the creditor. The court noted that the land contract's express language authorized the debtor to pay more than the stated monthly payment amount. However, by paying more than the minimum monthly payment in a preceding month, the purchaser is not relieved of the duty to pay the requisite monthly payment for the next month. Any excess monthly payment is applied to reduce the land contract's principal balance. When excess payments are made, because the principal balance is reduced more rapidly, the total amount of interest paid and the length of the duration of the land contract are each reduced.

*In re Kirkish*, Case No. HM 91-90370 (Bankr. W.D. Mich. August 19, 1992). This decision by Judge Howard involves the issue of whether a non-student parent who is a co-maker on his child's educational loan may be discharged despite the statutory prerequisites otherwise imposed on students under §523(a)(8).

The debtor contended that the exception to discharge does not encompass parents who co-sign their children's educational loan. Although the court noted that the literal language of §523(a)(8) does not appear to limit itself to the student debtor only, the court agreed with the debtor that a parent/co-maker of student loan debt may be discharged. The court reasoned that legislative history suggests that Congress was motivated by the idea that students who receive the benefit of educational loans should not be able to use the bankruptcy laws to avoid the responsibility of repayment. Throughout the legislative history, reference is continually made to potential abuse by student debtors and at no point does the legislative history refer to this debt being nondischargeable as against co-makers on the debt. According to the court, the parent/co-maker generally has many other debt obligations besides being liable on a student loan. The co-maker does not have the same motivations as a student fresh out of college with nothing to lose but student debt. Therefore, it is unlikely that a parent/co-maker will want, or be able, to exact the same sort of abuses on the educational system as a student recently finished with college.

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## RETIREMENT DINNER FOR HONORABLE DAVID E. NIMS, JR.

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After a long and distinguished career on the bankruptcy bench, Judge David E. Nims, Jr. will be retiring on September 30, 1992. On that day, a retirement dinner will be held in his honor at Egypt Valley Country Club, 7333 Knapp, N.E., Ada, Michigan. A reception will be held at 6:30 p.m. Dinner will be at 7:30 p.m. The ticket price will be \$40 per person.

All attorneys, spouses, and friends are cordially invited to attend. This promises to be a most enjoyable and memorable event, so please mark your calendars accordingly.

Also, please RSVP this invitation by sending your check payable to Timothy J. Curtin to him at 171 Monroe Avenue, Suite 800, Grand Rapids, Michigan 49503, as soon as possible. Directions to the country club are available upon request.

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## LOCAL BANKRUPTCY STATISTICS

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The following is a summary of the number of bankruptcy cases commenced in the United States Bankruptcy Court for the Western District of Michigan (Lower Peninsula) during the period from January 1, 1992 through July 31, 1992. These filings are compared to those made during the same period one year ago and two years ago.

	<u>1/1/92-7/31/92</u>	<u>1/1/91-7/31/91</u>	<u>1/1/90-7/31/90</u>
Chapter 7	3,292	3,039	2,292
Chapter 11	77	99	92
Chapter 12	17	12	12
Chapter 13	<u>952</u>	<u>1,028</u>	<u>981</u>
	4,338	4,178	3,377

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### REQUEST FOR FEEDBACK ON BANKRUPTCY SEMINAR

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In an effort to improve the quality of the annual Bankruptcy Seminar, the Bankruptcy Steering Committee is seeking comments from local practitioners concerning the most recent seminar held at The Park Place in Traverse City. Please send any comments, criticisms, suggestions or loose change to Bob Wright at Miller, Canfield, Paddock and Stone, 1200 Campau Square Plaza, 99 Monroe Avenue, N.W., Grand Rapids, Michigan 49503.

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### ASSIGNMENT OF JUDGE NIMS'S CASES

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The Bankruptcy Court has announced that, following Judge Nims's retirement, it intends to reassign his cases as follows:

Case Nos. <u>Ending With</u>	<u>Judge</u>
1, 2, 3	Gregg
4, 5, 6	Stevenson
7, 8, 9, 0	Howard

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## **EDITOR'S NOTEBOOK**

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Enclosed with this issue of the Bankruptcy Law Newsletter is a mailing from the Bankruptcy Court containing a proposed revision of the Local Bankruptcy Rules for the Western District of Michigan, as well as a summary of the major proposed changes. Comments on the proposed Amended Rules are due on or before October 31, 1992. Please take the time to review the

Rule changes and submit your comments to Mark Van Allsburg, Clerk of the Court.

This issue marks the end of my first year as editor of the Newsletter. I would like to personally extend my thanks to all those who have written lead articles for the Newsletter this past year and to extend particular thanks to Jahel Nolen and her successor, Joe Ammar, assisted by Larry Ver Merris, for preparing the Recent Bankruptcy Decisions.

Thomas P. Sarb