NEW VALUE

FEDERAL BAR ASSOCIATION—BANKRUPTCY SECTION NEWSLETTER

Winter/Spring 2013

BANKRUPTCY SECTION STEERING COMMITTEE

EDITOR'S NOTE

Benjamin M. White

Welcome to the Winter/Spring 2013 edition of New Value. This issue is packed with excellent articles on Michigan's new Emergency Manager Law (Ben White), whether a debtor's fame (or "right of publicity") is an asset that can be liquidated to benefit the bankruptcy estate (Laura Genovich), private-school tuition as an expense in Chapter 13 proceedings (Matthew Pickens), news and notes from Barb Foley's office (Barb Foley), and important new case summaries and legal updates.

FBA members are encouraged to contact me (bwhite@kalawgr.com) with comments, suggestions or articles for inclusion in the newsletter. In addition, members should contact me if they wish to post announcements or other news (e.g., promotions, awards, appointments, and firm mergers) in the News & Announcements section.

Benjamin M. White, Editor

IN THIS ISSUE

New Value is published by the Federal Bar Association, Bankruptcy Section, for the Western District of Michigan.

LETTER FROM THE CHAIR

Andrew J. Gerdes

As we slowly climb out of winter and into spring, the FBA Bankruptcy Section continues to provide excellent value to its members. The Steering Committee looks forward to another excellent year in 2013.

Once again, the annual Holiday parties at the Court locations proved to be great successes. All events were well attended. As always, members are encouraged to attend all of the FBA Bankruptcy Section's events, which are a great way to meet the bankruptcy judges and your fellow practitioners in a more social setting. The experiences serve to strengthen the bonds we have with our fellow bankruptcy practitioners that make practicing in the W.D. of Michigan such an enjoyable experience.

Also, it's that time of year again when, as a section of the Western Michigan Federal Bar Association, we remind our members to renew their FBA membership if they have not done so. It's easy to renew online at https://www.westmichiganfederalbar.org/pay/. If you are not a member, we invite you to join at https://www.westmichiganfederalbar.org/FBAApp/. And don't forget to sign up for the bankruptcy section, at no additional cost.

Andrew J. Gerdes, Chairman

NEWS & ANNOUNCEMENTS

- **July 25-27, 2013** - Save the Date! - the **Western District of Michigan's 25th annual FBA Bankruptcy Seminar** will take place at Traverse City's Park Place Hotel. (See the Save the Date Notice here). *** Please Note - the FBA Bankruptcy Section is requesting pictures, memorabilia, materials, etc. from the last 25 years. Please contact Ben White or Todd Almassian at (616) 364-2100, or forward copies of such items to bwhite@kalawgr.com. ***

- **April 22, 2013** - **Bankruptcy Boot Camp**, a one-day seminar, will take place at the GVSU Eberhard Center in Grand Rapids. The seminar is designed for attorneys with less than 5 years of bankruptcy experience. Click here for more information and registration. RSVP by April 15 (Tax Day!). Space is limited, Sign up now. This is an extremely affordable seminar. Lunch is included. All of the bankruptcy judges for the Western District of Michigan will be speaking. Please contact Michelle Wilson at 616-456-2002 ext. 119 with any questions.

- **May 21, 2013** - the Turnaround Management Association (TMA) - West Michigan Chapter will host an Emergency Financial Management event at Kent Country Club. Panelists will include Tony Saunders II, Emergency Manager for Benton Harbor appointed 2/1/13; Dr. Donald B. Witherspoon, Emergency Manager for Muskegon Heights School District; Brad Coulter of O'Keefe & Associates, a licensed Emergency Financial Manager; and Hugh M. ("Buck") Davis, Jr. and Cynthia Heenan of Constitutional Litigation Associates, PC, who represent the Detroit School District in the school district's emergency-financial proceedings in Detroit. $35 for non TMA members, $20 for TMA members. More information will be posted on the TMA website.

- **Bruce W. Neckers** of Rhoades McKee, PC has agreed to serve as the Bankruptcy Court Ombudsman (See the Notice from Chief Judge James D. Gregg on page 3).

- **James R. Oppenhuizen** has been named Partner at Keller & Almassian, PLC.

NOTICE REGARDING NEW BANKRUPTCY COURT OMBUDSMAN

Honorable James D. Gregg
Chief Judge, United States Bankruptcy Court, Western District of Michigan

February 22, 2013: Notice Regarding Bruce W. Neckers as Court Ombudsman (The following Notice is also posted as a Memo here on the Bankruptcy Court's Website)

The bankruptcy judges are pleased to announce that Bruce W. Neckers has agreed to serve as the court's ombudsman to facilitate anonymous communications between attorneys and the three bankruptcy judges (as well as the Clerk of the Court). Mr. Neckers' contact information is:

Bruce W. Neckers, Esq.
Rhoades McKee, PC
161 Ottawa Avenue, N.W., Suite 600
Grand Rapids, MI 49503
Tele. No. (616) 233-5217
Email: bneckers@rhoadesmckee.com

Mr. Neckers has a wealth of experience. He engages in a litigation practice in many areas: corporate, business, large divorce disputes, healthcare, real estate, and employment relations. He has served as a mediator in more than 500 cases in the state and federal courts. He has been the President of the State Bar of Michigan and the Grand Rapids Bar Association.

Mr. Neckers is an extremely good listener and a great communicator. He is the ideal person for bankruptcy attorneys to pass along criticisms, suggestions and constructive comments about any judge, the judges collectively, the clerk, and the deputy clerks. Mr. Neckers will not breach any confidences and will not disclose the identities of those attorneys who use his services. After he receives information, he will communicate with the appropriate person to make the information known. As chief judge, I will periodically meet with Mr. Neckers to discuss matters that may involve the bankruptcy court as an institution.

One important comment: Mr. Neckers is *not* the person to contact when you may disagree with a judge's legal decision – that is what appellate courts are for. However, if you have any specific complaints about *procedures*, that is fair game.

The judges encourage you to contact Mr. Neckers when you think it is appropriate.

Finally, the judges again thank Jamie Geary for the many years he was the court's ombudsman. He did an excellent job and we wish him well in the future.

JDG

ARTICLES

EMERGENCIES, MANAGED

A Review of Michigan's Local Financial Stability and Choice Act, Public Act 436

Benjamin M. White
Keller & Almassian, PLC

On December 27, 2012, Governor Rick Snyder signed into law the Local Financial Stability and Choice Act (Public Act 436), also known as the "Financial Stability Act," which will become effective March 28, 2013. The Act replaced the 2011 Emergency Manager Law which Michigan voters rejected by referendum in November, 2012. State lawmakers quickly passed the Act in an effort to quell ongoing financial crises in the cities of Detroit, Benton Harbor, Flint, Highland Park, Inkster, Pontiac, and River Rouge, as well as the school districts of Highland Park and Muskegon Heights. On March 14, 2013, the governor appointed Kevyn Orr as Emergency Manager for the City of Detroit. Mr. Orr is a veteran bankruptcy attorney with Jones Day and worked on the Chrysler bankruptcy case.

The Act differs from the previous law by giving local governments and school districts ("municipalities") four options in addressing a fiscal emergency. The governor will still have the power to order a financial review of a municipality, and to declare, based on the review, that a financial emergency exists. If the governor does declare a financial emergency, the municipality must choose one of the Act's four options, each of which calls for some affirmative action – that is, doing nothing is not an option. If a municipality refuses to choose one of the four options, it will by default be placed in the mediation option.

Quick Summary of the Act

The process begins with the occurrence of any one of nineteen trigger events, including, for example, missed debt payments or a downgrade in long-term debt rating to BBB. Once a trigger event occurs, the state treasurer may conduct a "preliminary review" of a municipality's finances. If the preliminary review reveals evidence of a possible financial emergency, the governor will appoint a review team to conduct a more thorough investigation. The review team will submit a report to the governor within 60 days. If the governor determines from the review team's report that a financial emergency does in fact exist, the local government must select one of the Act's four options to address the emergency: (1) a consent agreement with the state, which will include certain actions the locality must take to address the situation; (2) appointment of an emergency manager; (3) a neutral evaluation process (mediation); or (4) a Chapter 9 bankruptcy proceeding, with prior written approval from the governor.

Full Review of the Act

The following is a step-by-step analysis of the Act's provisions.

I. Trigger Events and Preliminary Review

As stated above, the Act provides that the "State Financial Authority"[1] may conduct a preliminary review of a municipality's finances in the event any one of nineteen conditions occurs. The trigger events include (i) missed payroll or bond payments, (ii) failure to comply with a state-ordered deficit elimination plan, (iii) violation of the local government's debt or budgeting rules, (iv) imposition of a court-ordered tax levy, (v) being issued a long-term debt rating within or below BBB, or (vi) any other facts or circumstances indicative of probable financial stress, as determined by the state treasurer. Once a trigger event occurs, the state financial authority may give written notice to the municipality that it intends to conduct a preliminary review. The pre-

[1] For a municipal government, the term refers to the state treasurer; for a school district, it means the superintendent of public instruction.

-liminary review will likely be performed by auditors from the Michigan Department of Treasury. The preliminary review and final report must be completed within 30 days following its commencement.

II. Review Team, Declaration of Financial Emergency

If the preliminary review reveals evidence suggesting a possible financial emergency, the governor will appoint a financial review team[2], which will perform a more thorough investigation as to whether the municipality is in a state of financial emergency. The review team must submit a written report of its findings to the governor within 60 days or earlier if the governor so directs. The Act allows the governor to grant one 30-day extension of the 60-day time limit. Within 10 days of receiving the review team's report, the governor will decide whether to declare a financial emergency. If so, the municipality must choose one of the four options under the Act.

III. Four Options To Rectify A Financial Emergency

<u>Option 1 - A Consent Agreement With the State</u>

A consent agreement between a municipality and the state will include certain remedial measures that the municipality must take to rectify its financial emergency. While most provisions of a consent agreement may be negotiated, the Act mandates that any consent agreement include a provision stating that if the municipality breaches the agreement, the governor may appoint an emergency manager or force the municipality into the Act's mediation option. Additionally, nothing in the consent agreement may limit the state treasurer's ability to declare a breach of the consent agreement, in his or her sole discretion. To take effect, a consent agreement must be approved by the municipality and the state treasurer. If no consent agreement can be agreed upon within 30 days, the state treasurer will require the municipality to choose one of the other three options.

<u>Option 2 - Appointment of an Emergency Manager</u>

An emergency manager ("<u>EM</u>") will act in place of the municipal government, and will possess broad powers to rectify the financial emergency, including, among others, the powers to:

- terminate or modify existing contracts;
- borrow money;
- reject, modify, or terminate 1 or more terms of collective bargaining agreements;
- act as the local government's sole agent in collective bargaining;
- consolidate or eliminate departments;
- initiate court proceedings in the name of the local government; and
- sell, lease, convey, assign, or transfer assets, liabilities, functions, or responsibilities of the local government.

The EM will develop a financial and operating plan for the municipality. Notably, however, the Act requires that the plan provide for full payment of ongoing scheduled debt service requirements on all bonds, notes, and municipal securities. In addition to the powers listed above, the EM may issue binding orders to the local government's elected officials, employees, agents and contractors for the timely implementation of the financial and operating plan. The municipality may challenge some actions by the EM, such as asset sales or modification of union contracts, but must do so within 10 days. Once a challenge is initiated, the municipal board will have 7 days to provide an alternative action, and show that its alternative would have "substantially the same financial result" as the EM's action.

[2] The Act provides that the review team will include the State Treasurer or designee; the director of the Michigan Department of Technology, Management and Budget or designee; a nominee of the Senate majority leader; and a nominee of the speaker of the House of Representatives. Additionally, the Governor may appoint other state officials or other persons with relevant professional experience to serve on a review team.

Once appointed, the EM must submit quarterly reports to the state beginning six months after appointment. If after six months, the EM determines there is no reasonable alternative to fix the municipality's finances, he or she may recommend to the governor and state treasurer that the municipality be authorized to file a Chapter 9 bankruptcy. Such a recommendation to the governor must include either a determination that no feasible financial plan can be adopted to fix the problems, or that a plan in effect for at least 180 days cannot be implemented as written in a timely manner.

The EM will remain in place until (1) removed by the governor, (2) the financial emergency is rectified, or (3) after 18 months in office the local government votes by a 2/3 margin to remove the EM.

Option 3 - Neutral Evaluation Process (i.e., Mediation)

The mediation process is initiated by the municipality providing notice of a request for mediation via certified mail to all interested parties. If the municipality fails to provide such notice within 7 days of selecting the mediation option, the treasurer may require that the municipality proceed under the Emergency Manager option. If the municipality timely provides the notice, interested parties shall respond to the request within 10 business days. After the responses are received, the municipality and the interested parties agreeing to participate shall select a mediator through a mutually-agreed upon process. If the parties fail to agree on a mediator within 7 days after the interested parties' responses, the Act provides certain required steps the parties must take to select a mediator.[3] The Act provides that the costs of mediation shall be split 50/50 between the municipality and other interested parties, unless otherwise agreed.

In order to qualify as a mediator under the Act, an individual must have experience and training in conflict resolution and alternative dispute resolution, and also have (i) ten years' experience in high-level business or legal experience involving bankruptcy or as a United States Bankruptcy Judge, or (ii) ten years' experience in municipal finance and one of nine other related areas specified in the Act, including Chapter 9 bankruptcy, municipal debt restructuring, or public finance.

The Act requires the mediator to inform the parties about Chapter 9 bankruptcy relative to other chapters of the Bankruptcy Code. Specifically, the mediator must highlight "the limited authority of United States bankruptcy judges in chapter 9." It should be noted, however, that the Act does not treat the mediation process and chapter 9 bankruptcy as necessarily conflicting prospects. In fact, the Act expressly provides that in the event a settlement is reached, the mediator may assist the parties in negotiating a prearranged plan of readjustment in connection with a chapter 9 filing.

The mediation process is limited to 60 days, with the option for an additional 30 days if the parties agree to such an extension, but in no event shall the process last more than 90 days. If the mediation process does not resolve all pending disputes, the municipality shall adopt a resolution recommending that it proceed under chapter 9 and submit the resolution to the governor and the state treasurer. If no such resolution is adopted within 7 days of the mediation's conclusion, the governor may appoint a person to act exclusively on the municipality's behalf in chapter 9 bankruptcy proceedings.

[3] The municipality shall provide a list of 5 qualified mediators to the participating interested parties within the 7 days. A majority of the interested parties may disqualify up to 4 names from the list within 3 business days. If more than 1 name remains, the municipality shall choose one of the remaining names.

Option 4 - Chapter 9 Bankruptcy Proceeding

A municipality may file a Chapter 9 bankruptcy proceeding if (i) it obtains the governor's written approval, and (ii) a majority of the municipality's governing body adopts a resolution declaring a financial emergency.[4] The resolution shall state that the financial condition of the municipality jeopardizes the health, safety, and welfare of the residents absent chapter 9 protection and that the municipality is or will be unable to pay its obligations within 60 days of the resolution. If the governor approves a chapter 9 filing, the municipality will be informed in writing of the approval. The governor may also place contingencies on the municipality in order to proceed with a chapter 9 filing. If the chapter 9 is not approved, the municipality shall select one of the other 3 options described above within 7 days.

End of an Emergency

The way in which a financial emergency ends under the Act depends on which of the four options is chosen. If a consent agreement is entered, the state treasurer will determine whether the consent agreement has been complied with and the financial emergency rectified. If the emergency-manager option is chosen, the emergency ends when the EM informs the governor that the situation is rectified, and the governor agrees. The mediation option will end when the parties enter a settlement agreement that could include a prepackaged chapter 9 filing, or with the municipality either filing a Chapter 9 bankruptcy or choosing one of the other three options. And finally, if bankruptcy is chosen and the governor approves the filing, the process will end when the bankruptcy proceeding ends.

[4] If the municipality has a "strong mayor," defined by the Act as a mayor with veto power, the resolution must have the mayor's approval.

FAME AS AN ASSET:

Will Casey Anthony's Chapter 7 bankruptcy case preclude future book and movie deals?

In re Casey Marie Anthony, Bankr. M.D. Fla., Case No. 8:13-bk-00922-KRM

By Laura J. (Garlinghouse) Genovich
Foster Swift

The recent Chapter 7 filing by Casey Anthony raises interesting questions about the impact of bankruptcy on public figures. Casey Anthony held the national spotlight for nearly three years after being charged with murdering her two-year-old daughter, Caylee. Anthony initially alleged that Caylee was kidnapped by her nanny, then claimed that Caylee accidentally drowned in the family pool. After a jury found her not guilty on all charges except some misdemeanors, Anthony faced a barrage of lawsuits, including claims for defamation and for reimbursement by private investigators who searched for Caylee in the months before her remains were found.

Those lawsuits ground to a halt when Anthony filed a voluntary Chapter 7 petition in the Middle District of Florida on January 25, 2013. In her bankruptcy papers, Anthony lists few assets (comprised mostly of household goods) but discloses unsecured debts of nearly $800,000, plus numerous debts of unknown amounts. The debts include the pending lawsuits against her and $500,000 in legal fees owed to her criminal defense attorney.

Dischargeability of Debts

If Anthony obtains a discharge, many of those debts – including her legal fees and other costs arising out of her nationally televised murder trial – will be wiped away. The dischargeability of the defamation claims is more questionable, as Florida's bankruptcy courts have recognized that defamatory statements can be a "willful and malicious injury" – and thus excluded from discharge[1] – if the debtor knew the statements were false.[2] The plaintiffs in the defamation actions would be required to file lawsuits in bankruptcy court to determine whether the debts are nondischargeable.

"Right of Publicity" as Property of the Estate

Some may question the fairness of Anthony's bankruptcy filing, as it is conceivable that she could discharge her significant debts and then immediately pursue a book or movie deal worth millions. Indeed, her status as a public figure may be her most valuable asset. But is the potential value of her fame (or, as courts describe it, the "right of publicity") property of the bankruptcy estate that the trustee can use to pay creditors? Is fame an asset?

In Chapter 7 bankruptcy cases, a trustee liquidates the debtor's non-exempt property to pay creditors. Few courts have addressed the question of whether a public figure's "right of publicity" – including such intangibles as name recognition, likeness, and life story – is an asset that can be liquidated for the benefit of creditors. One California state court, in litigation against O.J. Simpson, rejected the notion that an individual's right of publicity can be assigned for the benefit of his creditors.[3] And though case law is sparse, some legal scholars argue that allowing the right of publicity to be treated as a bankruptcy asset raises constitutional concerns about involuntary servitude.[4] If the right of publicity were an asset in her bankruptcy, could the trustee

See footnotes at the end of the article.

compel Anthony to make public appearances, with the proceeds going to her creditors? Could she be forced to cooperate in publishing her life story? No courts have yet gone so far. If fame is an asset, bankruptcy courts also will have to grapple with whether future use of that fame arises out of pre-bankruptcy property (which can be used to pay creditors) or whether it is post-petition property (which is safe from creditors). Certainly, if Anthony had written a book before her bankruptcy filing, the proceeds of that book would be property of the bankruptcy estate. But if she tells her life story after the bankruptcy, would her profits be traceable to pre-bankruptcy property (i.e., her fame – or infamy – which arose before the bankruptcy), or are they treated like post-petition job earnings, which would not be reachable by the Chapter 7 trustee?[5] Case law offers no clear answer to these questions, and it is too early to know whether the bankruptcy court handling Anthony's case will address them. But it remains possible that Casey Anthony could walk away from her debts and then try to profit from her public notoriety, without having to pay a penny to her creditors – assuming, of course, that the world will pay to hear her story.

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[1] 11 U.S.C. § 523(a)(6).

[2] *In re Durrance*, 84 B.R. 238 (Bankr. M.D. Fla. 1988).

[3] *Goldman v. Simpson*, No. SC03-6340, slip op. at 12 (Cal. Super. Ct., Oct. 31, 2006).

[4] Rothman, Jennifer E., *The Inalienable Right of Publicity*, Georgetown Law Journal, 101 GeoLJ 185 (Nov 2012).

[5] See Jacoby, Melissa B., *Foreclosing on Fame: Exploring the Uncharted Boundaries of the Right of Publicity*, New York University Law Review, 77 NYU L Rev 1322 (Nov 2002).

"Page 13" is dedicated to Chapter 13 bankruptcy practice and issues. The columns are contributed by the offices of Barbara P. Foley and Brett N. Rodgers, the Chapter 13 Trustees for the Western District of Michigan.

"NECESSARY AND REASONABLE" POETS SOCIETY

Private School Tuition in Chapter 13 Proceedings

Matthew Pickens
Office of Chapter 13 Trustee Brett Rodgers
February 2013 Bar Candidate

A common issue in Chapter 13 proceedings is whether private school tuition qualifies as a necessary and reasonable expense of the Debtor. As further explained below, in order for such an expense to be deemed necessary and reasonable, and therefore allowable, a compelling interest for the expense must exist. Whether a compelling interest exists depends on a number of factors.

Many courts have addressed this issue. Pre-BAPCPA, the courts were split on the reasonableness of private school tuition; the focus then being on the creditors' rights versus the needs of the debtors' and the debtors' dependants. Post BAPCPA, the courts remain split, but the focus has now shifted to the facts of each case, and to the reasonableness and necessity in maintaining debtors' and debtors' dependants basic needs. *In re Crim*, 445 B.R. 868 (Bankr. M.D. Tenn. 2011). The court in *Crim* held that $500 tuition cost for chronically ill child was reasonable and necessary.

The court reasoned that the debtors had taken all possible measures to ensure that unsecured creditors would receive as much as the debtors could afford to repay. Furthermore, the debtors' testimony that the requested transfer to another public school was denied, eliminating the option of attending public school. Because of this, the expense of private school tuition for their chronically ill daughter was deemed necessary and reasonable. *Id.*

The United States Bankruptcy Court for the Eastern District of Michigan also addressed this issue. *In re Golematis*, No. 11-52238, 2012 WL 3583154, (Bankr. E.D. Mich. Aug. 17, 2012). In *Golematis*, the debtors filed for relief under Chapter 7. The US Trustee moved to dismiss the case on the grounds that some of the debtors' proposed monthly expenses were excessive, including a $1,000 per month expense for private school tuition for the debtors' two children. After the US Trustee filed its motion, the debtors reduced their monthly expenses, including a reduction to the monthly tuition expense from $1,000 to just under $300. Nevertheless, the court held that these expenses were unnecessary expenses.

The court reasoned that while the debtors' reduction in their monthly expenses was commendable, such efforts did not have the effect of making the monthly tuition expense "necessary." "Private school tuition payments are reasonably necessary expenses when some compelling circumstance exists. A compelling circumstance exists if a child has a particular educational need that requires private schooling, or if the public school alternative would be academically inadequate." Id. at *3 (citations omitted). The court went further and stated "[m]ere preference for private schooling is not sufficient." Id. Moreover, tuition expenses may be deemed reasonably necessary where debtors forego other necessary expenses, such as health insurance. Id. at *4. The court concluded that the debtors' insistence on private schooling was "ideological rather than educational." Id.

Some other examples of instances where private school tuition was deemed reasonable include: "*In re Burgos*, 248 B.R. 446 (Bankr.M.D.Fla.2000) (paying as much to unsecured creditors as expense of tuition, always attended parochial school, strong religious beliefs, debtors retained no real estate); *In re Nicola*, 244 B.R. 795 (Bankr.N.D.Ill.2000) (some evidence of inadequate local schools and long term attendance of debtor's children at private school); *In re Bottelberghe*, 253 B.R. 256, 264 (Bankr.D.Minn.2000) (allowing relatively small amount of $246 as reasonable and necessary for tuition for parochial school); *In re Webb*, 262 B.R. 685

(Bankr.E.D.Tex.2001) (special needs child); *In re Villegas*, 2004 WL 3623504, at *1 (Bankr.D.Utah Oct.5, 2004) (finding long-standing attendance and fact that private school kept children away from drugs and alcohol made private school tuition reasonable)." *Golematis*, at 872.

In sum, each case will be addressed ad hoc with some inconsistency. The reasonableness and necessity of private school expenses are determined based on a compelling interest. This compelling interest can be shown by specific educational needs of the child, if the public school is academically insufficient, or by foregoing other necessary expenses. However, it appears that a mere preference for private school alone is insufficient.

NEWS AND NOTES FROM THE OFFICE OF BARBARA FOLEY, CHAPTER 13 TRUSTEE

Barbara P. Foley
Chapter 13 Trustee, Kalamazoo, Michigan

My office has three big projects to tackle this year. Each project will impact the Debtor attorney practice in some way.

1. EPay for Debtors: The E-Pay process will allow Debtors to initiate an ACH withdrawal from their account and pay directly to the chapter 13 trustee account. This process is different from the periodic ACH payment process set up for specific days. The E-Pay will allow the Debtors, by access through the Chapter 13 Trustee website, to initiate a payment directly from the Debtors' Bank account to the Trustee bank. The withdrawal from the Debtors' account will occur the day after the Debtors initiate the action. The payment will post to the Debtor's chapter 13 case within the next two days. I see this as a convenience for the debtor for payment of tax refunds, other disposable income, lump sum payments or to make a catch up payment in the event of regular payment disruption. While this process is not ideally suited for the regular plan payment, it can be used for this purpose as well. I plan to have this process in place by May 1, 2013. More information on this soon.

2. Electronic Fund Transfers (EFT): The EFT process allows me to pay money out electronically to creditors and to debtor attorneys. The benefit to me as trustee is the reduction in cost of printing and mailing the checks, as well as shortening the time for running checks. The benefit to the creditor and to the debtor attorney is that the funds may reach the accounts of the creditors' or attorneys' accounts up to 7days sooner. I plan to have the EFT for attorney fees in place by June 2013. Please contact me if you are interested in signing up for this payment process.

3. Document upload process: We are investigating other options for uploading documents needed for chapter 13 cases to the chapter 13 office. I am particularly interested in a process that will allow both the attorney office and my staff to verify that all documents transmitted to my office have been attached to and identified in the correct chapter 13 cases. I expect to implement this new upload process by September 2013.

It is our goal to assist the Debtors and Debtors' Attorneys in the efficient processing of the chapter 13 cases. I am anxious to hear from you regarding your ideas or concerns.

CASE SUMMARIES AND LEGAL UPDATES

Thanks to James R. Oppenhuizen of Keller & Almassian, PLC for his assistance in preparing the Case Summaries.

Case Summaries

State Bank of Florence v. Miller (In re Miller), 2013 U.S. App. LEXIS 2582 (6th Cir. Feb. 5, 2013) (Unpublished).

Debtor owned property in Michigan and Wisconsin. In 2006, the Debtor entered a promissory note with the State Bank of Florence (the "Bank"), secured by a mortgage on the Debtor's Wisconsin property which provided that it also secured all of the Debtor's obligations, debts, and liabilities then existing or arising later. In 2007, the Debtor entered a second promissory note with the Bank, pledging the Michigan property as collateral. In 2008, the Debtor defaulted on his loan payments, and the Bank instituted judicial foreclosure proceedings in Wisconsin and foreclosure-by-advertisement (non-judicial) in Michigan. The Debtor did not defend or object to either foreclosure proceeding. On July 15, 2008, the Bank obtained a judgment in Wisconsin for $407,914.04. At the Michigan Sheriff's sale on August 9, 2008, the Bank purchased the property with a credit bid for the entire amount owed by the Debtor. The Debtor had 1 year to redeem. Five days before the Michigan redemption period expired, and before the Wisconsin foreclosure sale occurred, the Debtor filed a Chapter 13 bankruptcy proceeding in the W.D. of Michigan. When the Michigan redemption period expired, the Bank moved for relief from the automatic stay to pursue its Wisconsin foreclosure.

The Bankruptcy Court determined that the Bank's credit bid at the Michigan sheriff's sale for the full debt amount had extinguished the debt to the Bank, and therefore the Bank no longer had a debt to enforce in Wisconsin state court. *See In re Miller*, 442 B.R. 621 (Bankr. W.D. Mich. 2011)(Hon. James D. Gregg). The 6th Circuit Appellate Panel affirmed. The 6th Circuit Court of Appeals affirmed as well, holding that the Michigan foreclosure sale had extinguished the debt to the Bank, precluding the Bank's enforcement of the Wisconsin judgment.

First Place Bank v. Casino Concepts By Design, 2013 Mich. App. LEXIS 160 (Jan. 29, 2013)(Unpublished).

Debtor failed to list a $415,000.00 debt in bankruptcy schedules in a no-asset Chapter 7 case. Post-discharge, the unlisted creditor sued the debtor in state court to collect the debt. The state trial court decided the debt was not discharged in the bankruptcy because the debt was not listed. The Michigan Court of Appeals affirmed, holding, in contravention of 6th Circuit precedent that was non-binding on the state court, that non-listed debts are not discharged in bankruptcy, even in a no-asset bankruptcy, where the creditor did not receive notice or have actual knowledge of the bankruptcy case in time to permit the creditor to timely file a proof of claim. *Compare In re Madaj*, 149 F.3d 467 (6th Cir. 1998).

United States v. Kurlemann, 2013 U.S. App. LEXIS 2955 (6th Cir. Feb. 13, 2013)

Debtor homebuilder engaged in fraudulent straw-man loans to keep his luxury homebuilding business afloat. In one such transaction, the Debtor sold a lot to his associate (who would obtain the loan) with an oral agreement that the associate would sell, and the Debtor would purchase, the lot back within one year. The Debtor filed a Chapter 7 bankruptcy proceeding and failed to disclose the oral option agreement in his pleadings. Federal prosecutors filed a number of charges against the Debtor related to the fraudulent transactions, including committing bankruptcy fraud under 18 U.S.C. § 157. The District Court sentenced the Debtor to concurrent 24-month sentences, one for false-statements and one for bankruptcy fraud, and ordered him to pay $1.1 million in restitution. On appeal, the Debtor argued that the option was worthless and not enforceable under the statute of frauds. The 6th Circuit Court of Appeals affirmed the conviction for bankruptcy fraud. Quoting *United States v. Van Allen*, 524 F.3d 814, 822 (7th Cir. 2008), the Court stated that "[d]ebtors in bankruptcy have a duty to disclose all 'property of the estate,' including 'all legal and equitable interests of the debtor in property,' 11 U.S.C. § 541(a)(1), (a)(6), an obligation that applies even if the debtors 'believe their assets are worthless or are unavailable to the bankruptcy estate.'"

In re DeGroot, 484 B.R. 311, (6th Cir. B.A.P. 2012).

The BAP affirmed The bankruptcy court' order deeming a partially administered asset abandoned to Debtor's ex-wife, under a highly fact based analysis. Debtor and his ex-spouse were divorced in 2002, and Debtor filed bankruptcy in 2005. When Debtor's chapter 7 proceeding was filed, his ex-wife owed him$38,000 under the judgment of divorce, but no payments were required. Debtor was very delinquent on his child support payments to his ex-wife. Debtor failed to list the $38,000 account receivable on his schedules, but did disclose it to the Trustee at or before the section 341(a) meeting of creditors. Debtor and his ex-wife entered into an agreement which purportedly terminated Debtor's right to payment, and obligation to pay child support, without the Trustee's consent. Despite his knowledge of the proposed agreement between the Debtor and his ex-spouse, the Trustee took no steps to stop the transaction and did not even respond to letters from Debtor's counsel asking for the Trustee's position on the transaction. The Trustee took steps to preserve the asset, and recorded a lien against Debtor's ex-wife's home as permitted in the judgment of divorce. The Trustee also issued his form one and notice to creditors to file claims. However, the Trustee did not inform Debtor's ex-wife of the lien or the Trustee's intent to collect the receivable. The Trustee then issued a no-asset report certifying that all assets were administered, and that no other assets existed, causing the Court to close the case. Ms. DeGroot was surprised to find that the Trustee held a lien against her home when she tried to refinance in late 2010. The bankruptcy court determined that section 554(c) and (d) permitted the Court to order assets abandoned notwithstanding the general rule that unscheduled and unadministered assets remain property of the estate after the case is closed even if the Trustee knew of the assets. On the equities and citing among other justifications, judicial estoppel, the bankruptcy court ordered the asset abandoned to Ms. DeGroot.

The BAP affirmed the bankruptcy court's decision without reaching the question of whether the bankruptcy court's use of judicial estoppel was correct or appropriate. In affirming, the BAP determined that the bankruptcy court correctly read and interpreted section 554(c) and (d), which state that "Unless the court orders otherwise" the general rule as set forth above applies. This clearly gives the bankruptcy court the authority to order an asset abandoned notwithstanding the general rule concerning the estate's interest in unscheduled and unadministered assets. Because the bankruptcy court's use of discretion was fact based, the BAP determined that it would test the outcome on an abuse of discretion standard. The BAP determined that on the facts in the record, and the equitable considerations stemming from the facts, regardless of whether judicial estoppel applied, the bankruptcy court did not abuse its discretion in deeming the receivable abandoned to Ms. DeGroot. The case is currently on appeal to the Sixth Circuit, so stay tuned for further developments.

Other Notable Cases:

The 10th Circuit recently held in *Dill Oil Co., LLC v. Stephens (In re Stephens)*, 704 F.3d 1279, 2013 U.S. App. LEXIS 1011 (10th Cir. 2013) that the absolute priority rule *does* apply to individual Ch. 11 cases.

Legal Updates

- Increase in certain dollar amounts in the Bankruptcy Code per 104(a), click here to see the notice from the Federal Register.
- According to data released by the Administrative Office of the U.S. Courts, the number of businesses and individuals that sought bankruptcy protection fell to 1,221,091 in 2012, down 13 percent from 2011.
- The 6th Circuit's opinion in *In re Schafer* affirming the constitutionality of Michigan's bankruptcy-specific exemption statute will stand. On February 19, 2013, the US Supreme Court entered an order denying certiorari. US Supreme Court case number is 12-643.