

Bankruptcy Bulletin

A Publication of the Minnesota State Bar Association Bankruptcy Section

January, 2002

Volume XVII, No. 1

Editors

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

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

IN THIS ISSUE

Introduction

Article

Security Interests in Patents:
Ninth Circuit Holds that Article 9 (Not the Patent Act) Governs Perfection

Case Law Update – The Year in Review

Legislative Update

Notices & Announcements

Local Bankruptcy Rule Amendments Effective January 1, 2002

2002 Bankruptcy Institute

Former Bankruptcy Judge Nominated

New Policy From U.S. Trustee's Office

MSBA

www.mnbar.org

INTRODUCTION

Looking Back: 2001

The Minnesota bankruptcy bench and bar was even busier during 2001. A total of 17,208 cases were filed during the first 11 months of 2001, as compared to a total of 14,057 cases filed in calendar year 2000.

The Bankruptcy Court's electronic filing program proceeded apace. 310 attorneys, paralegals and staff attended electronic filing training sessions. (The Clerk's Office declined to reveal the number of repeat trainees included in that number.) A total of 5,050 cases were filed electronically during the first 11 months. As nearly all of those cases were consumer cases, it is clear that the consumer debtor's bar is in the virtual lead. Commencing in March 2001, the Bankruptcy Court instituted a requirement that all relief from stay motions be filed electronically.

The 8th Circuit Court of Appeals, the 8th Circuit Bankruptcy Appellate Panel, and the Minnesota Bankruptcy Court each issued some interesting decisions during 2001. Certain of those decisions are described below.

The Bankruptcy Pro Bono Program honored Terri Georgen and Patti Sullivan as its 2001 Volunteers of the Year. Finally, Bankruptcy Judges Nancy Dreher and Dennis O'Brien each hired law clerks who are not subject to term limits.

Looking Forward: 2002

What will 2002 bring to the Minnesota bankruptcy bench and bar? Possibly the enactment of the long pending bankruptcy reform legislation. While prognostication with respect to that legislation has proven perilous, that legislation appears to retain a modicum of life.

Probably 2002 will see a continuation of the relatively high level of case filings. The apparently weakened state of the economy and the effects of the tragic September 11 events suggest that bankruptcy filings, both consumer and business, will continue unabated.

Certainly 2002 will bring changes to our local bankruptcy practice. Local Bankruptcy Rule amendments, described below, will take effect on January 1, 2002. Chief Bankruptcy Judge Gregory Kishel has announced that the Bankruptcy Court may implement a requirement that most or all pleadings be filed electronically in 2002. If the pending bankruptcy legislation is enacted, bankruptcy procedure, particularly consumer bankruptcy procedure, is likely to change materially. Barbara Stuart, our long-standing U.S. Trustee, has announced that she will resign that position in the near future.

Finally, the *Bankruptcy Bulletin* itself will change in 2002. While continuing to review recent decisions, the *Bulletin* will include more articles on local practice developments, specific areas of the practice, and selected substantive developments in bankruptcy law and practice. Happy New Year, one and all.

Security Interests in Patents: Ninth Circuit Holds that Article 9 (Not the Patent Act) Governs Perfection

by

*George H. Singer, Lindquist & Vennum, P.L.L.P.**

Introduction

Patents, copyrights, trademarks and other forms of intellectual property constitute “general intangibles” under Article 9 of the Uniform Commercial Code. *See* Rev. U.C.C. § 9-102(42) & cmt. d. *See also Holt v. United States*, 13 U.C.C. Rep. Serv. (Callaghan) 336, 337 (D.D.C. 1973) (finding a patent to be a general intangible). Nevertheless, the law on perfection of security interests in such forms of property is not in all respects clear or coherent. The primary source of the uncertainty emanates from the interplay between federal and state law.

There are a number of federal statutes that establish federal filing systems for perfection of transfers or assignments for various forms of intangible property—some of which possibly include security interests. *See, e.g.*, 35 U.S.C. § 261 (patents); 17 U.S.C. §§ 101-603 (copyrights); 15 U.S.C. §§ 1051-1128 (trademarks). State laws that either interfere with or are contrary to such federal laws are preempted by the Supremacy Clause of the United States Constitution. *See Hillsborough County v. Automated Med. Labs., Inc.*, 471 U.S. 707, 712 (1985). The UCC therefore contains a general “step-back” provision to make it clear that Article 9 is displaced “to the extent that . . . a statute, regulation or treaty of the United States preempts” its application. *See* Rev. U.C.C. § 9-109(c)(1). *Accord* Rev. U.C.C. § 9-311(a)(1) (providing that a financing statement is “not necessary or effective” when federal law preempts its application through an alternative scheme).

The essential question in secured transactions involving intellectual property is whether federal law or the UCC controls the perfection of security interests in such collateral. The authorities interpreting the federal framework governing intellectual property rights and applicable provisions of the UCC have not provided uniform guidance. The outcome of cases under former Article 9 has varied and depended in large part upon the construction given to the applicable federal statutes and the interpreted degree of federal preemption of state law. *See generally National Peregrine, Inc. v. Capital Fed. Sav. & Loan Ass’n (In re Peregrine Entertainment, Ltd.)*, 116 B.R. 194 (C.D. Cal. 1990); *City Bank & Trust Co. v. Otto Fabric, Inc.*, 83 B.R. 780 (D. Kan. 1988).

The Court of Appeals for the Ninth Circuit in *Cybernetic Services, Inc. v. Matsco, Inc. (In re Cybernetic Services, Inc.)*, 252 F.3d 1039 (9th Cir. 2001) appears to be the first circuit to weigh in on the issue. The Ninth Circuit ruled that a creditor’s security interest in a patent trumped the interest of a bankruptcy trustee, even though the creditor did not record its interest with the U.S. Patent and Trademark Office (the “PTO”).

Factual Background

Cybernetic Services, Inc. granted Matsco, Inc. and Matsco Financial Corporation (collectively, “Matsco”) a blanket security interest in all of its assets, including “general intangibles.” Matsco recorded its security interest with the California Secretary of State in accordance with the version of Article 9 of the California Commercial Code that was then in effect. No financing statement or any other document was filed by the creditor

with the PTO. Subsequently, the debtor was forced into an involuntary Chapter 7 liquidation proceeding. The primary asset of the bankruptcy estate was a patent on technology that the debtor developed.

Shortly after the commencement of the case, Matsco filed a motion for relief from the automatic stay in order to foreclose its security interest in the patent. The bankruptcy trustee resisted the motion, but did not dispute the fact that the description of “general intangibles” was sufficient to create a security interest in the subject patent. The trustee did, however, contend that Matsco’s failure to record its interest with the PTO rendered the estate’s right to the patent superior by virtue of the trustee’s status as a hypothetical lien creditor. *See* 11 U.S.C. § 544(a)(1). The trustee, contending that Matsco was unperfected, asserted that the Patent Act preempted Article 9’s filing requirements and required a federal filing. The court of appeals rejected the trustee’s argument and ruled in favor of Matsco.

Analysis

The Patent Act requires that any “assignment,” “grant” and “conveyance” be recorded in PTO to be effective against a subsequent “purchaser” or “mortgagee.” *See* 35 U.S.C. § 261. The trustee contended that this recording provision requires a holder of a security interest in a patent to record that interest with the PTO in order to be perfected as to a subsequent lien creditor. The court acknowledged that if the trustee’s interpretation of the Patent Act was correct, and if California’s version of Article 9 permitted a different method of perfection, then the Patent Act would preempt state law. If, on the other hand, the Patent Act does not cover *liens* on patents, then the filing requirements of Article 9 would not conflict with the federal recording scheme.

The court analyzed the text, context and structure of the Patent Act’s recording provisions in light of governing case law and concluded that the terms “assignment,” “grant” and “conveyance” all contemplate the transfer of an *ownership* interest only. The court observed

that Supreme Court precedent differentiated between two different categories of transfers—those that involved the patent’s title (ownership interests that are required to be recorded) and those that amounted to “mere licenses” (less than ownership interests that are not required to be recorded). A security interest in a patent, reasoned the court, was tantamount to a license and did not represent the kind of conveyance of an interest that was required to be recorded with the PTO. Similarly, the court found that the Patent Act renders unrecorded conveyances void as against only a subsequent “purchaser” or “mortgagee,” which, as a hypothetical lien creditor, the trustee was not.

The court also opined that the applicable PTO regulations supported its interpretation of the Patent Act. It observed that the regulations require all “assignments” to be recorded in the PTO and that “[o]ther documents *affecting title* to applications, patents, or registrations” were permissive filings. *Cybernetic Services*, 252 F.3d at 1056-67 (quoting 37 C.F.R. § 3.11(a)).

The Ninth Circuit in *Cybernetic Services* found no conflict between Article 9 and the Patent Act. Accordingly, the UCC was not preempted and, in the court’s view, controlled. Because Matsco filed its security interest in accordance with state law prior to the bankruptcy filing, it was properly perfected and had priority over the trustee’s claim.

Observations

The fundamental basis for the court’s opinion is in its view that the Patent Act only *requires* filings of transactions that effect a transfer of an *ownership* interest in a patent. *Contra, e.g.*, 17 U.S.C. §§ 101, 201(d)(1) (Copyright Act) (requiring a federal filing for any transfer of an interest in the work, including any “hypothecation”); 49 U.S.C. § 11301 (aircraft). Since the Patent Act did not, according to the *Cybernetic Services* court, require the filing of non-assignment interests, such as liens, state law was not preempted. The fact that the PTO, as a matter of course, accepts filings of virtually any agreement affecting title to a patent (i.e. security agreements) does not mean that all such interests

must be recorded. See *Manual of Patent Examining Procedure* § 313 (7th ed. 1998) (indicating that other documents that may be filed with the PTO include “agreements which convey a security interest. Such documents are recorded in the public interest in order to give third parties notification of equitable interests...”).

Cybernetic Services was decided under the pre-amended version of Article 9. Former Article 9's step-back (from federal law) provisions and related interpretative comments contained significant ambiguities that have contributed to much of the debate over the scope of federal preemption. See F. U.C.C. § 9-104 & cmts.; F. U.C.C. § 9-302(3) & cmts. Revised Article 9 attempts to rectify what has not been altogether apparent under the former version of the statute—Article 9 applies to the full extent permitted by the Constitution. See Rev. U.C.C. § 9-109 & cmt. 8 (“Some (erroneously) read the former section to suggest that Article 9 sometimes deferred to federal law even when federal law did not preempt Article 9. [This section] recognizes that [Article 9] defers to federal law only when and to the extent that it must—i.e. when federal law preempts it.”); Rev. U.C.C. § 9-311 & cmts. The issue of preemption is, however, determined by federal, not state, law. And reference must therefore be made to the federal scheme governing the particular property that is intended to serve as collateral. See *National Peregrine, Inc. v. Capital Fed. Sav. & Loan Ass'n (In re Peregrine Entertainment, Ltd.)*, 116 B.R. 194 (C.D. Cal. 1990)(rejecting the argument that a state filing is an acceptable method for perfecting a security interest in copyrights).

Practical Issues

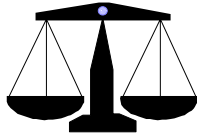
While a secured party may, at least in the Ninth Circuit, perfect a security interest in a patent (and perhaps certain other forms of general intangibles) by only filing a financing statement in accordance with the UCC, an informed creditor is nevertheless best served by making a dual filing whenever possible. In *re Transportation Design & Technology, Inc.*, 48 B.R. 635 (Bankr. C.D. Cal. 1985) (opining that

“real protection . . . requires dual filing—state and federal”). A state filing, at most, provides a creditor claiming an interest in a patent with superior rights against a subsequent lien creditor or bankruptcy trustee. If, however, the secured creditor also wishes to have priority over later voluntary assignees of title to the patent (e.g., purchasers and perhaps exclusive licensees), the secured party must also record an assignment with the PTO. Also, to the extent that a security interest in a patent takes the form of a “collateral assignment,” a federal filing would in fact appear to be required. See *Waterman v. MacKenzie*, 138 U.S. 252, 258-60 (1891). See also *Patents, Trademarks, and Copyrights*, 37 C.F.R. § 3.56 (2001) (emphasis added) (“Assignments which are made conditional on the performance of certain acts or events, such as the payment of money or other condition subsequent, if recorded in the [PTO], are regarded as absolute assignments for [PTO] purposes until cancelled with the written consent of all parties or by decree of a court of competent jurisdiction.”).

Secured creditors and counsel that represent them should remain cognizant of the fact that the federal recording system plays an important role in realm of secured transactions. Particularly, where intangible property rights, such as patents, serve as collateral.

* * * *

**George H. Singer is a partner in the Minneapolis office of Lindquist & Vennum P.L.L.P. and concentrates his practice on corporate and commercial law. Mr. Singer formerly served as an attorney on staff with the National Bankruptcy Review Commission and as a judicial law clerk to the Honorable Nancy C. Dreher, U.S. Bankruptcy Court for the District of Minnesota, and to the Honorable William A. Hill, U.S. Bankruptcy Court for the District of North Dakota.*



CASE LAW UPDATE – THE YEAR IN REVIEW

Stay Pending Appeal Essential to Prevent Appeal of Sale-Related Order from Being Rendered Moot

The Eighth Circuit and the Eighth Circuit BAP, in a trio of decisions, have emphasized the necessity of obtaining a stay pending appeal in order to prevent an appeal of a § 363 sale order or § 362 sale-related order from being rendered moot.

In *Wintz v. American Freightways, Inc. (In re Wintz)*, 219 F.3d 807 (8th Cir. 2000), the Eighth Circuit upheld the § 363(m) rule of finality, which effectively renders an appeal of an order approving a sale under § 363 moot in the absence of a stay pending appeal. The bankruptcy court avoided the transfers of certain properties as fraudulent transfers and approved the sales of those properties by the trustee. The avoidance of the fraudulent transfers and the approval of the sales were both appealed. The debtor requested a stay of the sale orders pending appeal, which was denied by the bankruptcy court. The sales closed during the pendency of the appeals. The Eighth Circuit held that the sales could not be overturned on appeal in the absence of a stay pending appeal.

Likewise, in *Nieters v. Sevcik (In re Rodriguez)*, 258 F. 3d 757 (8th Cir. 2001), the Eighth Circuit dismissed as moot an appeal of an order approving a trustee’s sale under § 363 on the grounds that no stay pending appeal had been obtained. The Eighth Circuit stated that the § 363(m) rule of finality “protects the finality of bankruptcy sales and the reasonable expectations of good-faith third-party purchasers [and] reflects the inability of courts to supply a remedy once property has left the bankruptcy estate.”

In *Fields v. Option One Mortgage Corp. (In re Fields)*, 266 B.R. 415 (BAP 8th Cir. 2001) (Dreher, J.), the Eighth Circuit BAP, citing, *inter alia*, *Wintz* and *Nieters*, held that an appeal of an order granting a secured creditor relief from the stay to foreclose was moot where no stay pending appeal had been obtained and the foreclosure sale had occurred during the pendency of the appeal.

Untimely Appeal Dismissed for Lack of Jurisdiction

In *Hamilton v. Lake Elmo Bank (In re Delta Engineering International, Inc.)*, 270 F.3d 584 (8th Cir. 2001), the Eighth Circuit affirmed an order of the Eighth Circuit BAP dismissing an appeal for lack of jurisdiction on the grounds that the notice of appeal had been filed more than 10 days after the entry of the order appealed from. The appellants filed a notice of appeal and a “Motion for Leave to File Notice of Appeal Out of Time” more than 10 days after the entry of the bankruptcy court’s final order. The bankruptcy court denied the motion which denial the appellants did not appeal. The Eighth Circuit BAP dismissed the underlying appeal as untimely. The Eighth Circuit affirmed, noting that the Bankruptcy Rule 8002(a) 10-day appeal period did not violate the due process clause of the Fourteenth Amendment.

NonParty Had Standing to Appeal

In *Blackwell v. Lurie (In re Popkin & Stern)*, 266 B.R. 146 (BAP 8th Cir. 2001) (Dreher, J.), the Eighth Circuit BAP held that a person who is not a party to an adversary proceeding may have standing to appeal from an order entered in the adversary proceeding if the nonparty is “aggrieved” by the order, *i.e.*, can show some

basis for arguing that the challenged action causes him a cognizable injury, citing *Yukon Energy Corp. v. Brandon Invs., Inc. (In re Yukon Energy Corp.)*, 138 F.3d 1254, 1259 (8th Cir. 1998). The Bankruptcy Court entered an order against the defendant in an adversary proceeding. Among other things, the order provided that a prior judgment against the defendant's spouse was a final, nonappealable judgment that could not be collaterally attacked by either the defendant or the spouse. While the defendant did not appeal this order, the nonparty spouse did. The Eighth Circuit BAP held that the nonparty spouse was aggrieved by the order because the Bankruptcy Court might exercise its powers to enforce the order against the nonparty spouse. The nonparty spouse therefore had standing to appeal the adversary proceeding order.

Court Declines to Reopen Chapter 11 Case Post-Confirmation to Hear Motion to Convert Because There Would be no Property of the Estate for the Trustee to Administer

In *Dworsky v. Canal Street Limited Partnership (In re Canal Street Limited Partnership)*, 269 B.R. 375 (BAP 8th Cir. 2001), the Eighth Circuit BAP affirmed an order of Chief Bankruptcy Judge Gregory F. Kishel declining to reopen a Chapter 11 case post-confirmation in order to hear a creditor's motion to convert the Chapter 11 case. Approximately 5 years after confirmation of the Chapter 11 plan, a creditor filed an application under Local Rule 5010-1 to reopen the Chapter 11 case in order to file a motion to convert the case. The Bankruptcy Court denied the application to reopen without a hearing. The Eighth Circuit BAP affirmed on the grounds that no hearing is required on an application to reopen a case and that, since the Chapter 11 plan had vested all property of the estate in the debtor upon confirmation, there would be no property of the estate for the trustee to administer if the Chapter 11 case was converted to a Chapter 7 case.

Debtor's Prepetition Payments to Attorneys for Unofficial Unsecured Creditors'

Committee Not Avoided as Preferential or Fraudulent Transfers

In *Pummill v. Greensfelder, Hemker & Gale (In re Richards & Conover Steel, Co.)*, 267 B.R. 602 (BAP 8th Cir. 2001) (Dreher, J.), the Eighth Circuit BAP held that the debtor's prepetition payments to the attorneys for a prepetition Unofficial Unsecured Creditors' Committee were not avoidable as preferential or fraudulent transfers. Prior to its bankruptcy case, the debtor began to liquidate its assets in cooperation with one of its secured creditors. During this process, certain of the unsecured creditors formed an Unofficial Unsecured Creditors' Committee ("UUCC") and retained a law firm to represent the UUCC. The debtor agreed to pay the UUCC's attorneys' fees, but understood that the members of the UUCC ultimately would be responsible for paying those fees if the debtor did not. An involuntary Chapter 7 petition was filed against the debtor by other unsecured creditors. The Chapter 7 trustee commenced an adversary proceeding against the UUCC's law firm to avoid the debtor's payments to it as preferential transfers. At trial, the law firm introduced evidence that its services were performed at the direction of and on behalf of the UUCC, not the debtor, and argued that it was not a creditor of the debtor. In response, the trustee moved to amend its complaint to assert that the payments to the UUCC's law firm were avoidable as fraudulent transfers. The Bankruptcy Court allowed the amendment and held that the payments were avoidable as fraudulent transfers because the debtor had not received reasonably equivalent value in return. On appeal, the Eighth Circuit BAP upheld the decision to allow the amendment to the complaint. However, the BAP held that the debtor had received indirect benefits from the law firm's services that constituted reasonably equivalent value and overturned the avoidance of the payments to the law firm as fraudulent transfers.

Debtor's Interest in Ex-Spouse's IRA Not Exempt as Employee Benefit

In *Anderson v. Seaver (In re Anderson)*, 269 B.R. 27 (BAP 8th Cir. 2001) (Kroger, J.), the Eighth Circuit BAP held that an interest in the debtor's ex-spouse's IRA awarded to the debtor under a divorce decree could not be claimed exempt as an employee benefit under Minn. Stat. § 550.37 subd. 24(a). Prior to their divorce, the debtor and his ex-spouse were engaged in a joint farming operation. Each funded his or her separate IRA from the income of the farming operation. Upon their divorce, the debtor was awarded a partial interest in his ex-spouse's IRA under the divorce decree. The debtor then filed a Chapter 7 case and claimed both his own IRA and the interest in his ex-spouse's IRA exempt as employee benefits. Chief Bankruptcy Judge Gregory F. Kishel upheld the trustee's objection to the debtor's exemption of his interest in the ex-spouse's IRA. Relying upon *Deretich v. City of St. Francis*, 128 F.3d 1209 (8th Cir. 1997), the Eighth Circuit BAP affirmed and held that, because the debtor had received his interest in the ex-spouse's IRA under the divorce decree, rather than through his own employment, that interest did not constitute an employee benefit that could be claimed exempt under § 550.37 subd. 24(a).

For Priority Purposes, Federal Tax is “Assessed” When it is Recorded as Taxpayer’s Liability in IRS Records

In *de Jesus v. U.S.A. (In re de Jesus)*, 268 B.R. 185 (Bankr. D. Minn. 2001), Chief Bankruptcy Judge Gregory F. Kishel held that, for purposes of determining a federal tax claim's priority under § 507(a)(8)(ii), the tax is “assessed” at the time the IRS records its determination of the taxpayer's liability in its own records. The debtor failed to file a personal income tax return for 1989. In 1993, the debtor filed a Chapter 7 case and received his discharge. The debtor then filed his 1989 tax return in November 1993. On May 30, 1994, the IRS recorded the debtor's 1989 tax liability. On June 24, 1994, the debtor filed a Chapter 13 case and obtained confirmation of his plan. At the conclusion of the debtor's plan, a dispute arose as to whether the IRS's claim for the 1989 tax liability was entitled to priority. The Bankruptcy Court held that, under 26 U.S.C. § 6202–6203, a federal tax

is “assessed” at the time the IRS records its determination of the taxpayer's liability in its own records. Consequently, the debtor's 1989 tax liability was “assessed” within 240 days prior to his Chapter 13 petition and the resultant claim was entitled to priority under § 507(a)(8)(ii).

Bankruptcy Court Lacks Jurisdiction to Determine Claim

The Eighth Circuit Bankruptcy Appellate Panel decision reviewed below was affirmed by the Eighth Circuit Court of Appeals in *McAlpin v. Educational Credit Management Corp.*, No. 01-2798 (Eighth Cir., Jan. 28, 2002). In *Educational Credit Management Corp. v. McAlpin (In re McAlpin)*, 263 B.R. 881 (BAP 8th Cir. 2001), the Eighth Circuit BAP ruled that a bankruptcy court lacked jurisdiction to resolve a claim and grant related relief in a Chapter 13 case where the discharge had been entered.

The Chapter 13 debtor in *McAlpin* confirmed a plan of reorganization that did not provide for payment of debts owed to the Educational Credit Management Corporation (ECMC) on behalf of the debtor's student loans. Five years later, after the debtor completed his payments under the plan and received a discharge, the debtor filed an objection to the amount asserted in the ECMC's proof of claim. The Bankruptcy Court held a hearing on the claim objection and entered an order disallowing a portion of the ECMC's claim. Approximately six months later, the debtor reopened his bankruptcy case and filed an adversary proceeding seeking to enjoin the ECMC from attempting to collect the disallowed portion of its debt. After conducting a trial, the Bankruptcy Court entered an order enforcing its prior order and enjoining the ECMC from collecting the disallowed portion of its claim.

On appeal, the BAP reversed, holding that the Bankruptcy Court lacked jurisdiction to determine the amount of the ECMC's claim or to grant injunctive relief. Because the claim objection was brought *after* the completion of the debtor's Chapter 13 plan, the BAP stated, the bankruptcy estate no longer existed and the debtor had already been granted a Chapter 13

discharge. As a result, the BAP held, although the debtor's objection may have impacted his personal liability to ECMC because the student loan claim was nondischargeable, it did not impact the administration of the debtor's bankruptcy estate and the court lacked "related to" jurisdiction to determine the amount of the claim.

District Court Interprets Minnesota Consumer Fraud Act

In *Meyer v. Dygert*, 156 F. Supp. 2d 1081 (D. Minn. 2001) (Davis, J.), the District Court Interpreted the scope of the Minnesota Consumer Fraud Act.

Purchasers of corporation's junior mortgage notes in *Meyer v. Dygert* sued wife and son of the corporation's promoter, alleging violations of federal and state statutes and Minnesota common law in connection with alleged misrepresentations regarding securities and transfers of property to avoid payment of guarantees. Defendants moved for summary judgment. The District Court, Davis, J., held that: (1) notes were "merchandise" covered by Minnesota Consumer Fraud Act (the "Act"); (2) there were fact issues regarding liability of wife and son under the Act; (3) there was no partnership liability on part of son, who was in a law partnership with father, arising from father's use of partnership letterhead on some letters to purchasers; (4) there were fact issues regarding son's liability for common law fraud; (5) there was no liability under § 10(b) or state counterpart; (6) there was no conversion of purchasers' interests in guarantees, to extent assets of promoter were transferred to wife prior to issuance of guarantees; (7) there were fact issues regarding liability of wife under theory of unjust enrichment; and (8) failure to provide required affidavit of expert on question of whether applicable standard of care was violated precluded malpractice action against son. The District Court stated that notes, secured by junior mortgages of corporation, were "merchandise" within coverage of the Act, prohibiting fraud in connection with sale of any "merchandise." The District Court also opined that liability under the Act *does not* require

showing of intentional representation. The Act was intended to be broader than common law fraud.

Ex Parte Relief from Automatic Stay Appropriate under Settlement Agreement

In *Belland v. Wells Fargo Home Mortgage, Inc. (In re Belland)*, 261 B.R. 224 (BAP 8th Cir. 2001) (Schermer, J.), the Eighth Circuit BAP interpreted the propriety of a drop dead provision.

An order was entered granting mortgagee's motion for relief from stay, based upon stipulated order, after debtor failed to cure postpetition mortgage defaults. The Bankruptcy Court denied debtor's motion to reconsider. Debtor appealed. The BAP, held that bankruptcy's court's granting of creditor's motion for relief from stay, and its denial of debtor's motion to reconsider, would not be disturbed on appeal, where debtor failed to specify any basis for reversing the Bankruptcy Court in her appellate brief, and the BAP failed to discern any such basis from its review of the record.

Creditor's Conduct Did Not Violate Discharge Injunction, Reaffirmation Rules, or the Automatic Stay

Debtors in *Dubois v. Ford Motor Credit Company*, 2001 WL 290353 (D. Minn.) (Magnuson, J.), *aff'd*, 2002 WL54557 (Eighth Cir. January 16, 2002), leased a pickup truck that was financed by Ford Motor Credit Company ("FMCC"). Debtors made monthly payments to FMCC. Debtors then filed a petition for bankruptcy under Chapter 7. Debtors submitted a payment on the lease to FMCC *after* they filed for bankruptcy. Thereafter, FMCC sent a letter to Debtor's bankruptcy counsel that sought to determine whether Debtors planned to keep their vehicle and continue to make payments or whether Debtors planned to surrender the vehicle. Debtor's counsel returned the letter to FMCC indicating that Debtors would continue to make payments. Debtors received their discharge. Debtors continued to pay on the lease until they

entered into another vehicle lease and paid a lump sum to satisfy their obligation under the initial lease. Four years after receiving FMCC's letter, Plaintiffs brought this suit alleging that: (1) the letter was an invalid reaffirmation agreement and thus violated 11 U.S.C. § 524(c); (2) FMCC's acceptance and solicitation of Plaintiffs' payments after discharge violated the discharge injunction of 11 U.S.C. § 524(a); (3) the letter violated the automatic stay provision of the Bankruptcy Code, 11 U.S.C. § 362; and (4) FMCC's conduct constituted "unfair and unconscionable means to collect discharged debt" and therefore violated the FDCPA. The Court held that Plaintiffs failed to state any claims upon which relief can be granted. The Court found, therefore, under Fed. R. Civ. P. 12(b)(6), Plaintiffs' claims must be dismissed.

U.S. Trustee Did Not Waive Sovereign Immunity

In re Charges of Unprofessional Conduct Against 99-37, 249 F.3d 821 (8th Cir. 2001), the Eighth Circuit Court of Appeals found that United States Trustee does not waive its sovereign immunity by reporting, what she believed to be, professional misconduct.

Bankruptcy Court held evidentiary hearing and found that attorney intentionally mischaracterized a prepetition payment from the debtors so that the payment would not appear to be a preferential transfer. The United States Trustee forwarded the Bankruptcy Court's findings to the Minnesota Office of Lawyers Professional Responsibility indicating that she was referring the matter for "possible attorney misconduct." In the disciplinary proceeding, debtor's attorney was permitted to depose the Trustee's staff attorney who had the most knowledge regarding the facts. The debtor's attorney then sought to depose the Trustee, and when the Trustee did not appear, sought to compel her to do so and hold her in contempt. The Eighth Circuit held that the Trustee's role is to protect public interest and to serve as a "bankruptcy watchdog[] to prevent fraud, dishonesty, and overreaching in the bankruptcy arena." It was in this role that the Trustee referred the matter for possible disciplinary

proceedings. The court held that such referral does not constitute a waiver of sovereign immunity.

Bankruptcy Appellate Panel Interprets Section 523(a)(6)

In *Johnson v. Fors (In re Fors)*, 259 B.R. 131 (BAP 8th Cir. 2001) (Koger, J.), the Eighth Circuit BAP indicated that the (a)(6) formulation triggers intentional torts that generally require the actor intent "the consequences of an act" not simply "the act itself."

The Bankruptcy Court held that damages caused by a chiropractor's sexual abuse of patient are nondischargeable as a "willful and malicious injury" under § 523(a)(6) of the Bankruptcy Code. The Eighth Circuit BAP affirmed, holding that the Bankruptcy Court's finding that the parties' relationship was not consensual was not clearly erroneous and that the Bankruptcy Court used the proper legal standard in determining that the injury was both "willful" and "malicious." The Debtor engaged in an intentional and deliberate course of action that was certain or almost certain to cause harm.

Debtor Bears Burden of Proof under Section 523(a)(15)

The Eighth Circuit BAP in *Fellner v. Fellner (In re Fellner)*, 256 B.R. 898 (BAP 8th Cir. 2001) (Koger, J.), reviewed § 523(a)(15) and found property settlement obligation nondischargeable.

The Bankruptcy Court held that a Chapter 7 debtor's obligation to pay credit card debt under a divorce decree was nondischargeable under § 523(a)(15), and the Eighth Circuit BAP affirmed. The Eighth Circuit BAP held that the credit card debt was in the nature of a "property settlement" rather than a debt for alimony, maintenance, and support and that the debtor failed to satisfy his burden of showing that either of the two exceptions contained in § 523(a)(15) apply.

"Willful" Evasion of Tax Debt Nondischargeable

The appellate courts in *May v. Missouri Dep't of Revenue (In re May)*, 251 B.R. 714 (BAP 8th Cir. 2000) (Scott, J.), *aff'd*, 2001 WL 238077 (8th Cir. 2001), found requisite *mens rea* to render tax obligation nondischargeable.

Chapter 7 debtor sought a declaration that tax debts were not excepted from discharge under § 523(a)(1)(C) of the Bankruptcy Code. The Bankruptcy Court found that the debtor was aware of his duty to pay taxes, had the ability to pay taxes, and willfully attempted to avoid paying the tax. As a result, the Court found the debt to be nondischargeable under § 523(a)(1)(C). On appeal, both the BAP and the Eighth Circuit affirmed, holding that the evidence “overwhelmingly” supported the Bankruptcy Court’s conclusion that the tax debts were nondischargeable.

Bankruptcy Court Discharged HEAL Obligation

In *Solar v. United States of America (In re Solar)*, 261 B.R. 444 (Bankr. D. Minn. 2001) (Kressel, J.), the Bankruptcy Court found certain educational loans to be dischargeable under the “unconscionability” standard of the HEAL Program and the “undue hardship” provision of the Bankruptcy Code.

Debtor, 40-year-old dentist, incurred substantial student debt and was making a diligent effort to repay loans procured under the Higher Education Assistance Loan (“HEAL”) Program. She rented a room, lived very frugally, and suffered from a back condition. Bankruptcy Court held that under 42 U.S.C. § 292f(g) (HEAL), it would be “unconscionable” not to discharge one of the two loans subject to this provision. The court applied a totality of the circumstance test in reaching its determination, including an examination of the debtor’s income, earning ability, health, education background, age, and accumulated wealth. The court determined that the third loan, a non-HEAL loan, should be discharged pursuant to 11 U.S.C. § 523(a)(8), as it would impose an undue hardship on the debtor.

Eighth Circuit BAP Interprets “Undue Hardship” under Section 523(a)(8)

In *Ford v. Student Loan Guarantee Foundation (In re Ford)*, 269 B.R. 673 (BAP 8th Cir. 2001) (Korger, J.), the Eighth Circuit BAP applied a “totality of the circumstances” test under § 523(a)(8) and found a student loan debt to be dischargeable. The test for “undue hardship” focused the court’s analysis on the following factors: (1) the debtor’s past, current and reasonably reliable future financial resources; (2) the reasonably necessary living expenses of the debtor and his or her dependents; and (3) any other relevant facts. The evidence showed that the 62-year old single woman that suffered from arthritis which was a disability that impaired her ability to work warranted the discharge of approximately \$74,000 of student loan debt. The BAP did not, in this case, find material the fact the debtor did not pursue a forbearance or deferment option. Similarly, the fact the student loan lender proposed a contingent repayment plan was not determinable.

Fiduciary Duty Requires Creation of An Express Trust

In *Jafarpour v. Shahrokhi (In re Jafarpour)*, 260 B.R.702 (BAP 8th Cir. 2001) (Hill, J.), the Eighth Circuit BAP examined the standards for nondischargeability under 11 U.S.C. § 523(a)(4) and (a)(6).

The Bankruptcy Court held that a cab owner’s liability for a cab driver’s personal injuries were not nondischargeable on the basis of a breach of fiduciary duty under § 523(a)(4) or on the basis of a willful and malicious injury under § 523(a)(6). A cab driver’s personal injurious went unpaid because the cab owner breached his lease with the driver in that he did not maintain insurance on the vehicle. The BAP affirmed, holding that the lease agreement between the taxi driver and owner did not impose an express or technical trust giving rise to a fiduciary relationship and that a deliberate and intentional failure to maintain insurance did not directly or necessarily lead to the cab driver’s personal injury.

Circumstances Warranted Denial of Discharge under Section 727(a)

In *Associated Bank v. Wales (In re Wales)*, unpublished (Bankr. D. Minn. 2001) (Dreher, J.), the Bankruptcy Court found that the Chapter 7 debtor's failure to disclose insider transfers between himself and related corporate Chapter 7 debtor on bankruptcy schedules, with the intent to defraud creditors warranted denial of discharge under § 727(a)(7). In addition, debtor's conversion of bank's collateral for personal use rendered debtor's liability to bank nondischargeable under § 523(a)(6).

Exemptions Are Determined As of Date Filing, Not Date of Conversion

The Eighth Circuit Court of Appeals in *In re Alexander*, 236 F.3d 431 (8th Cir. 2001) (per curiam), considered the impact of case conversion on exemptions.

The Bankruptcy Court denied a Chapter 13 debtor's homestead exemption and converted the case to Chapter 7. In Chapter 7, the debtor argued that he was entitled to the homestead exemption because the property was his residence on the date the case was converted, even though he did not reside on the property on the date of the filing of the petition. The Bankruptcy Court held that, under § 348(f), exemptions are determined as of the date of the filing of the petition, rather than the date of conversion, and denied the exemption. The Eighth Circuit affirmed, holding that Congress' enactment of § 348(f) overruled its prior decision in *In re Lindberg*, 735 F.2d 1087 (8th Cir. 1984).

“Right” to Possession of Property Necessary for Homestead Exemption

The Eighth Circuit BAP in *In re Stenzel*, 259 B.R. 141 (BAP 8th Cir. 2001) (Schermer, J.), ruled that a Chapter 7 debtor is not entitled to homestead exemption for reversionary interest in parcel of real property adjacent to the debtor's homestead. Although the debtor may have actually occupied the adjacent property, he is not entitled to claim the homestead exemption

unless he is legally entitled to possess the property.

Right to Receive Payments under Annuity Contract Was Exempt

The Eighth Circuit BAP *In re Andersen*, 259 B.R. 687 (BAP 8th Cir. 2001) (Scott, J.), considered the scope of an exemption.

The Bankruptcy Court denied Chapter 7 debtor's exemption of the debtor's right to receive future payments under an annuity contract. On appeal, the BAP reversed, holding that the annuity contract was a contract to provide retirement benefits “on account of the debtor's age,” rather than merely an investment or savings device.

Contours of Homestead Exemption Statute Interpreted

In *Baumann v. Chaska Building Center, Inc.*, 621 N.W.2d 795 (Minn. Ct. App. 2001) (Holtan, J.), the Minnesota Court of Appeals interpreted the Minnesota homestead-exemption statute, Minn. Stat. § 510.02, to exempt \$200,000 of the debtor's equity in the property, rather than merely \$200,000 of the market value of the property.

Alimony Payments Not Property of the Estate

The Chapter 7 debtor in *In re Jeter*, 257 B.R. 907 (BAP 8th Cir. 2001) (Dreher, J.), received alimony payments during the 180 days after the filing of her bankruptcy petition. The trustee brought a motion for turnover, and the Bankruptcy Court denied the trustee's motion. The BAP affirmed and held that, unlike property settlements, postpetition alimony payments received by the debtor are not property of the estate under § 541(a)(5)(B).

Contempt Not Proper Remedy for Violating Automatic Stay; Date of Transfer Considered

The Bankruptcy Court in *James v. Planters Bank (In re James)*, 257 B.R. 673 (BAP 8th Cir. 2001) (Kressel, J.), granted in part and denied in part Chapter 7 debtors' complaint to recover certain prepetition wage garnishments as

avoidable preferences and denied debtors' request to hold the garnishment creditor in contempt for violation of the automatic stay. The Eighth Circuit BAP affirmed, holding that the "transfer" date for purposes of § 547(b) was the date upon which the garnishment lien attached (i.e., the date the debtor earned his wages) and not the date the check was issued to or received by the creditor. In addition, the Eighth Circuit BAP held that contempt is not the proper remedy for a violation of the automatic stay.

Statute of Limitations For Bringing Avoidance Actions Examined

In *Lee v. National Home Centers, Inc. (In re Bodenstein)*, 253 B.R. 46 (BAP 8th Cir. 2000) (Schermer, J.), the Eighth Circuit BAP analyzed § 546. In *Lee*, the Chapter 13 debtors' bankruptcy case was converted to Chapter 7. After conversion, and more than two years after the petition date, the Chapter 7 trustee brought an action to avoid certain prebankruptcy payments made by the debtors as preferential transfers. The Bankruptcy Court, and the BAP on appeal, held that the trustee's action was time-barred under § 546(a) and that the statute of limitations was not equitably tolled during the pendency of the debtors' Chapter 13 case.

Interplay Between Impact of Avoidance and Exemptions Examined

The court in *Kaler v. Overboe (In re Arzt)*, 252 B.R. 138 (BAP 8th Cir. 2000) (Federman, J.), examined the impact of avoidance of transfers of an interest in exempt property.

Prior to the filing of their bankruptcy petition, Chapter 7 debtors granted two mortgages against their homestead to secure certain preexisting debts. After the debtors filed their Chapter 7 petition, however, the Chapter 7 trustee sought to avoid the mortgages as preferential transfers and sought to attach the debtors' resulting equity in the homestead for the benefit of the bankruptcy estate. Although the transferees conceded that the transfers were preferential, they argued that the transfers could not be avoided because the homestead is exempt

property and therefore not reachable by the debtors' creditors. The Bankruptcy Court ruled in favor of the trustee, and the Eighth Circuit BAP affirmed. In reaching its conclusion, the Eighth Circuit BAP ruled that once the transfers were avoided by the trustee, the transferred property became property of the estate under § 551 of the Bankruptcy Code and the debtor was not able to exempt any new equity created by the avoided transfer under § 522(f).

Payments on Secured Obligation Not Preferential

Trustee of Chapter 11 debtor in *Iannacone v. New Holland Credit Co. (In re Organic Conversion Corp.)*, 259 B.R. 350 (Bankr. D. Minn. 2001) (Kishel, J.), commenced adversary proceeding to avoid creditor's security interest in certain collateral, and to recover payments made to the secured creditor under § 547 and § 549 of the Bankruptcy Code. The Bankruptcy Court found that the creditor's collateral constituted a "mobile good" under Article 9 of the Uniform Commercial Code and that the creditor's security interest was properly perfected. The court held that, as a result, the debtor's payments to the creditor could not be avoided under § 547 or § 549.

Valuation Examined

Chapter 11 debtors In *Northwest Village Ltd. Partnership v. Franke (In re Westpointe, L.P.)*, 241 F.3d 1005 (8th Cir.), cert. denied, 122 S. Ct. 395 (2001), objected to a plan proposed by a secured creditor on the grounds that the plan undervalued the debtors' assets and improperly extinguished the debtors' equity interests. The Bankruptcy Court overruled the debtors' objection and confirmed the plan. On appeal, the BAP affirmed, holding that the plan's valuation method—which incorporated the anticipated future profits of the debtors into the debtors' present going concern value—was an appropriate valuation method. In addition, the BAP held that the secured creditor's non-recourse loan was to be treated as full recourse under § 1111(a) of the Bankruptcy Code and that the secured creditor's claim against the

debtors should not be reduced to the fair market value of its collateral.

Eighth Circuit Examines Feasibility

The Eighth Circuit in *In re Danny Thomas Properties II*, 241 F.3d 959 (8th Cir. 2001) (Arnold, J.), examined plan feasibility.

The Bankruptcy Court denied confirmation of Chapter 11 debtors' plan on feasibility grounds, and the district court affirmed. On appeal, the Eighth Circuit held that the debtors' inclusion of a "drop dead" provision in their plan, whereby they consented to foreclosure proceedings in the event of default, did not make the plan feasible as a matter of law.

Eighth Circuit BAP Examines Impact of Balloon Payment on Feasibility

The Eighth Circuit BAP in *In re Wagner*, 259 B.R. 694 (BAP 8th Cir. 2001) (Schermer, J.), ruled that a Chapter 13 plan that proposed to pay a balloon payment of \$20,000 in third year was feasible under § 1325(a)(6) where evidence showed that debtor's father was willing and able to assist debtor in making balloon payment.

Eighth Circuit BAP Affirms Order Requiring Disgorgement of Attorneys' Fees

The Eighth Circuit BAP in *In re Zepecki*, 258 B.R. 719 (BAP 8th Cir. 2001) (Schermer, J.), examined the debtor's transactions with attorneys.

The Bankruptcy Court ordered a nonbankruptcy attorney for Chapter 7 debtor to disgorge to the estate \$32,840 in legal fees received by the attorney for pre- and postpetition services under § 329 of the Bankruptcy Code. On appeal, the BAP upheld the Bankruptcy Court's factual finding that the attorney's services were excessive and that they were (1) rendered "in contemplation of" the debtor's bankruptcy case; and (2) designed to remove property from the bankruptcy estate. Accordingly, the Eighth Circuit BAP affirmed the Bankruptcy Court's order requiring the attorney to disgorge a portion of his fees to the estate under § 329.

Eighth Circuit BAP Examines Doctrine of Collateral Estoppel

The Eighth Circuit BAP in *Siemer v. Nangle (In re Nangle)*, 257 B.R. 276 (BAP 8th Cir. 2001) (Kressel, J.), examined the applicability of the collateral estoppel doctrine on a state court judgment and order.

In *Nangle* the creditor obtained a prepetition state court judgment against Chapter 7 debtor for debtor's violation of the Illinois Consumer Fraud Act. In addition, the state court held debtor in contempt of court and ordered debtor to pay a compensatory fine of \$40,723.32. After debtor filed for Chapter 7 bankruptcy, the Bankruptcy Court held both debts to be nondischargeable under § 523(a)(6) as a matter of law under the doctrine of collateral estoppel. On appeal, the BAP affirmed in part and reversed in part, holding that the Consumer Fraud Act judgment was nondischargeable under the doctrine of collateral estoppel but that the contempt order was not a "final order" and should not have been given collateral estoppel effect.

Creditor's Right of Setoff Trumps Debtor's Right to Exemption

The Bankruptcy Court in *Ramirez v. Minnesota Dept. of Revenue (In re Ramirez)*, 266 B.R.441 (Bankr. D. Minn. 2001) (Dreher, J.), held that the Minnesota Department of Revenue's right to set off a tax refund against an earlier tax liability was preserved even though debtor filed his return postpetition, and the earlier tax liability was discharged because the tax year ended prepetition. In addition, the court held that the right to setoff under § 553 does not yield to a debtor's right to exempt assets under § 522.

Bankruptcy Court Examines Counters of Reclamation

The Bankruptcy Court in *In re Hartz Foods, Inc.*, 264 B.R. 33 (Bankr. D. Minn. 2001) (O'Brien, J.), held that where a creditor-vendor had a right to reclamation under the Uniform Commercial Code, § 546 of the Code did not require the reclaiming seller to file an adversary

action after its demand. The Court also held that where another creditor has a secured position in the goods that is superior to the reclaiming seller's rights, the creditor who seeks reclamation can only receive a priority claim in assets that are subject to his right of reclamation. Therefore, if an undersecured creditor forecloses on the goods to be reclaimed and uses the entire proceeds to pay down a secured debt, the seller's reclamation right is extinguished. However, if the secured creditor with superior rights is oversecured, the reclaiming seller retains a priority interest in any remaining goods or surplus proceeds from the secured creditor's foreclosure sale or may have a right to actual reclamation.

status because debtor's debts on the date of petition exceeded the \$2,000,000 threshold of § 101(51C) and because the debtor failed to timely use the fast track as structured.

* * * *

Bankruptcy Court Compels Taxing Authorities to Marshal Assets

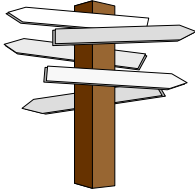
The Bankruptcy Court in *Ramette v. United States (In re Bame)*, 271 B.R. 354 (Bankr. D. Minn. 2001) (Dreher, J.), required federal and state taxing authorities to marshal in order to preserve assets for benefit of unsecured creditors. In *Bame*, both the federal and state revenue departments had liens on residential property owned by Chapter 7 debtor's wife.

The Bankruptcy Court found it equitable and appropriate in this case to require the taxing authorities to satisfy their tax claims against the estate by first proceeding against the property subject to their liens. The court reasoned that the marshalling doctrine is more broadly applied in bankruptcy cases in order to ensure an equitable distribution of assets to creditors.

Bankruptcy Court Reviews Bankruptcy Code's "Small Business" Provisions

The Bankruptcy Court in *In re Coleman Enterprises, Inc. & Cyber Corp., Inc.*, 266 B.R. 423 (Bankr. D. Minn. 2001) (Kishel, J.), held that where a Chapter 11 debtor elected to be treated as a small business under § 1121(e) of the Code, a creditor had standing to move the Court to remove the Chapter 11 case from fast track small business reorganization. Further, the court granted the creditor's motion, finding that cause existed to abrogate debtor's small business

LEGISLATIVE UPDATE



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

Legislative Report, January 18, 2002:

With both the state legislature and U.S. Congress in recess recently, the news is that there is no real news. In Washington, the bankruptcy bill remains stalled in conference. The Conference Committee has met only once and has no forthcoming meetings currently scheduled. The Committee staff is said to be steadfastly working on a report identifying the numerous areas of divergence between the House and Senate versions of the legislation.

Interestingly, I am told that at least a couple very influential members of the conference committee intend to attempt to revisit in conference several provisions of the legislation that the two bills currently agree upon in hopes of making a "better bill." This would, of course, presumably protract the conference process even more.

Even though nothing much seems to be happening that would suggest the Conference Committee will agree on a bill anytime soon, the official word is that the proponents of the legislation are hopeful that it will pass sometime

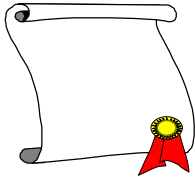
this session--which will likely continue until at least next fall.

In the meantime, there has been a reluctance to "break out" particular provisions of the bill (including again expired Chapter 12), lest that be taken as a sign hope that the main bill will pass has been abandoned. There may be an attempt to tack a Chapter 12 extension on the pending "Farm Bill" which will be a major priority when Congress returns.

While not resulting in legislation yet, the Enron bankruptcy in conjunction with several other current and potential major bankruptcies has focused more attention on bankruptcy law. It seems likely that at some point--particularly since major bankruptcy legislation is in any event pending already--this will impact the Bankruptcy Code.

* * * *

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



NOTICES & ANNOUNCEMENTS

Local Bankruptcy Rule Amendments Effective January 1, 2002

The most recent amendments to the Local Bankruptcy Rules became effective on *January 1, 2002*. A blacklined version of the Local Rules, showing the effects of the amendments, is available on the Bankruptcy Court's web site at <http://www.mnb.uscourts.gov/>. The following is a summary of some of those amendments:

Motion Practice. While the Local Rules will retain the two different timelines for moving and responsive papers, depending upon whether the moving papers are served more or less than 24 days (if by mail or 21 days if by delivery) before the hearing date, the timeline will change for moving papers that are served less than 24 days before the hearing date. Under amended Local Rule 9006-1, moving papers must be served not less than 14 days (previously 10 days) by mail, or not less than 10 days (previously 7 days) by delivery, before the hearing. Responsive papers must be served 7 days (previously 3 days) by mail, or 3 days (previously 24 hours) by delivery, before the hearing. If the moving papers are served less than 14 days prior to the hearing, no reply papers to the responsive papers may be filed.

Discovery. Local Rule 7026-1, which made the disclosure requirements of F.R.C.P. 26(a)(1), (a)(2), (a)(3) and (f) inapplicable to motions and adversary proceedings, will be eliminated. Those disclosure requirements apparently will be applicable henceforth.

Employment of Professionals. Applications to employ professionals will be filed with the Bankruptcy Court and served, rather than submitted directly to the U.S. Trustee's Office. The U.S. Trustee then will file its report and recommendation within 5 days. If the U.S. Trustee does not recommend employment of the professional, the applicant must schedule and notice a hearing on the application.

Chapter 11 Cases. New Local Rule 3017-1 establishes a procedure for obtaining conditional approval of disclosure statements in a small business Chapter 11 cases. New Local Rule 3002-2(c) establishes a procedure for filing Chapter 11, 12 or 13 administrative expense claims following conversion of the case to a Chapter 7 case.

Chapter 13 Cases. The Minneapolis Bankruptcy Court has been eliminated as an alternative venue for Divisions 5 and 6 Chapter 13 cases, except for Stearns County Chapter 13 cases, under amended Local Rule 1002-1. The amounts of compensation (for both pre- and post-confirmation services) that may be obtained by Chapter 13 debtor's attorneys through the "short form" procedure will be increased by the amendments to Local Rule 2016-1(d).

The foregoing is a summary of only some of the Local Rule amendments. The reader should review all of the amendments that have may be now applicable to his or her practice.

* * * *

2002 Bankruptcy Institute

Mark your calendars! September 26 and 27, 2002 are the dates currently scheduled for the 2002 Bankruptcy Institute. The Bankruptcy Section is looking for 2 Section members to serve as "At Large" members on the Bankruptcy Institute Planning Committee. One position will be for a term of 2 years. The other position will be for a term of 3 years. Here's your opportunity to participate and develop the Bankruptcy Institute CLE. If interested, please contact Michael Dove, 2002 Bankruptcy Institute Chair, via e-mail at Mdove@gislason.com or call at (507) 354-3111. Apply and bring your new, innovative ideas to the Planning Committee.

The Planning Committee is also seeking your input for topics you want to have discussed at the 2002 Bankruptcy Institute. Again, please e-mail or call topic suggestions to Mike Dove. The Planning Committee seeks and needs your input. Please take this opportunity to volunteer.

* * * *

Nominations of Former Bankruptcy Judge Advance in Senate

Former Bankruptcy Judge, Michael J. Melloy (District Court Judge, N.D. Iowa), had a confirmation hearing before the Senate Judiciary Committee recently for a position on the U.S. Court of Appeals for the Eighth Circuit. The next step for this nomination is a vote by the full committee, which could occur in the near future.

* * * *

Notice To Debtors and Attorneys

Effective March 1, 2002, all individual debtors must provide picture identification and proof of Social Security Number to the Trustee at the § 341 Meeting of Creditors

Proof of identity may include:

- driver's license
- government ID
- state picture ID
- student ID
- U.S. passport
- military ID
- resident alien card

Proof of social security number may include:

- social security card
- pay stub
- W-2 Form
- Internal Revenue Service form 1099
- Social Security Administration (SSA) report
- other government-produced document which has the social security number

If the debtor does not have the required identification, the first meeting **WILL BE** continued to the Trustee's next calendar date to allow the debtor to produce the required identification.

Failure to provide the required identification may result in the case being dismissed.

The U.S. Trustee's Office appreciates your cooperation in implementing this new policy. If you have any questions, please contact Assistant United States Trustee Robert B. Raschke at (612) 664-5500.

* * * *

2001-2002 Bankruptcy Section Council

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

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

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

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

Dorraine A. Larison, *Section Past Chair*
Hall & Byers PA
1010 St. Germain W. #600
Saint Cloud, MN 56301-0966
dlarison@cloudnet.com

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