BANKRUPTCY BAR ASSOCIATION
For The District of Maryland
Newsletter
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Fall 2001

## Letter From The President

September 11, 2001, was the darkest day in U.S. history. Many of our brother and sister lawyers were murdered by cowardly terrorists. I am incapable of putting to words my sorrow and pain. Everything else seems insignificant. Let us all pray for the families of those killed or injured. Pray for wisdom to be given to President Bush and his advisors so that they will obtain swift and appropriate justice. God bless America, we are the best and we shall overcome.

The rest of my message continues, having been written before the tragedy.

We bankruptcy attorneys have been treated to record filings in the year 2001 and I believe filings will continue at record levels. The threat of a new bankruptcy statute has for over 12 months caused many of those sitting on the fence to choose the bankruptcy road to alleviate their financial pains. As the expected layoffs and the disappearance of the "wealth effect" continues to sink into the economy, I believe it is a safe bet that more bankruptcies are coming down the pike. Based upon my experience of the early 1990s, I expect to see a much more sophisticated client walking into our doors seeking bankruptcy protection. This should lead to much more litigation, not only for debtors counsel but also for those representing the creditors. As the well healed seek bankruptcy, they also tend to push the limits of what is acceptable under the law. Once again, we can expect litigation in the area of exemptions, preferences and fraudulent conveyances. Now is certainly the time for creativity.

Student loan debt continues to crush many of the new attorneys coming into the practice. Student loan debt also is forcing more and more college graduates to look at bankruptcy as an alternative. I think the combination of large student loan debt with the availability of large sums of credit card debt to students is leading to a significant increase in bankruptcy filings by new college graduates.

Of course, the business bankruptcy attorneys will also be well fed in the near future. After the layoffs and the cutbacks, come the demise of businesses who can no longer make payroll, even for the CEO and her skeleton staff. We can hope that the pain inflicted on those who lose their jobs, their businesses, and those who make loans to them will be alleviated with an economic recovery in the near future. I, for one, doubt that a recovery will be seen until 2003 or later.

Although the Internet and stock bubbles have burst, the real estate bubble which has trailed the former has yet to pop. Once the real estate bubble bursts, foreclosures, bankruptcies and lift stays will follow.

With that said, summer is over and it is time for us to get ready to get busy. Our Courts are already clogged and choked and the challenge for our Bar Association is to make the administration of justice more efficient and fair to those in need of our services. We can do this by increasing the level of professionalism and civility amongst the members of our association.

I recently attended a speech given by Judge Peter Messitte. He stated that civility and professionalism will be the watch word for the Maryland District Court Judges and that civil conduct will be not only expected but required by all attorneys who practice in the District Court. We members of the Bankruptcy Bar Association are already leaders in this area. As President, I intend to continue our tradition of civility and to encourage an even better record of conduct for our association.

My goals for the next twelve months are to first increase the levels of civility and professionalism in our Bar Association. Second, to form an ad hoc committee to study legal fees and representation of debtors in consumer cases. John Burns, Esquire, has volunteered to chair the committee and a number of attorneys have already volunteered to serve. Anyone wishing to serve on the committee should contact John Burns.

Third, it is my goal to provide information to the association regarding the new Bankruptcy Reform Act if and when it becomes law. I expect to achieve this goal by setting up inexpensive and valuable educational programs in conjunction with MICPEL and through our lunch and breakfast meetings.

Fourth, the Bar led by Larry Coppel will form a committee to review how our Court handles "complex cases".

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# U.S. Court of Appeals for the Fourth Circuit

## State Court Default Judgement Entitled to Full, Faith and Credit in Claims Allowance Proceeding

Default judgment rendered in Hawaii was entitled to full, faith and credit during a claims allowance proceeding in the Bankruptcy Court. The test for determining whether a state court judgment will be given full, faith and credit in a federal court is a two part test. First, the federal court must determine whether the judgment is entitled to preclusive effect under state law. Second, the federal court must determine whether Congress has created an express or implied exception to full, faith and credit by passing another statute that irreconcilably conflicts with the full, faith and credit statute, 28 U.S.C.A. § 1738. The Fourth Circuit found that under the circumstances Hawaii's default judgment was entitled to preclusive effect and Congress has created no exception to Section 1738. Accordingly, the Circuit Court affirmed the District Court's judgment giving the default judgment effect.

In re Genesis Data Technologies, Inc., 245 F.3d 312 (4th Cir. March 27, 2001).

## Liens Not Addressed in Chapter 11 Plan or Confirmation Order are Extinguished

The Fourth Circuit recently held that a creditor's lien, which was not expressly preserved by either the underlying chapter 11 plan or the order confirming the plan, was extinguished by confirmation of the debtor's plan. Agreeing with the Bankruptcy Court, the court of appeals noted that any property of a debtor that is addressed by a chapter 11 plan becomes free and clear of any claims not expressly preserved.

In re Regional Building Systems, Inc., 254 F.3d 528 (4th Cir. June 29, 2001).

# U.S. District Court for the District of Maryland

## Pro Se Debtor Not Excused From Duties Imposed By the Bankruptcy Code

Pro se chapter 13 debtor appealed an Order entered by the Bankruptcy Court for the District of Maryland dismissing debtor's chapter 13 case for failure to make plan payments, file a chapter 13 plan (despite extensions granted by the court to file such plan), or attend creditors' meetings. The U.S. District Court of Maryland, Judge Harvey, held that the Bankruptcy Court's Order was not clearly erroneous and that chapter 13 debtor's pro se status did not excuse her from satisfying the duties and responsibilities imposed by the Bankruptcy Code on chapter 13 debtors.

In re Simmons, 256 B.R. 578 (D. Md. Jan. 2, 2001).

## Trustee's Motion to Withdraw Adversary Proceeding Raised Issues More Appropriately Decided by Bankruptcy Court

Senior District Judge Harvey denied the Trustee's motion to withdraw reference of an adversary proceeding and consolidate the proceeding with a larger group of adversary proceedings previously withdrawn from the Bankruptcy Court. The adversary proceeding sought declaratory judgment determining whether the debtor or the subleasee had an interest in real property. The District Court held that the adversary proceeding raised issues more appropriately decided by the Bankruptcy Court and denied the Trustee's request to withdraw the adversary proceeding. The District Court noted that when ruling upon a request for discretionary withdrawal of a case from the Bankruptcy Court, a court should consider uniformity of bankruptcy administration, forum shopping, conservation of creditor and debtor resources, expediency, and whether equitable issues are posed not requiring a jury trial but falling within the traditional equitable powers of a bankruptcy judge.

In re Equimed, Inc., 2001 WL 137333 (D. Md. Feb. 12, 2001).

# U.S. Bankruptcy Court for the District of Maryland

## Liens Perfected Prior to Debtor's Bankruptcy Filing are Not Subject to Avoidance

Prior to a debtor's filing a voluntary chapter 11 petition, secured creditor filed a financing statement perfecting creditor's interest in debtor's commercial real property. Also prior to the bankruptcy, the City of Baltimore's lien reporting system reported tax liens for unpaid personal property taxes. A year after the bankruptcy commenced, the Bankruptcy Court entered a consent order authorizing the sale of debtor's commercial real property free and clear of liens, tax claims and other interests. With the proceeds of the sale still in escrow, the secured creditor filed a complaint seeking to avoid the city's tax liens and a determination that the secured creditor was entitled to a distribution from the sale proceeds.

The Bankruptcy Court held that under the Bankruptcy Code the creditor was not eligible to avoid the tax lien. Moreover, the Court held that not even the debtor could avoid the tax lien because it was perfected and enforceable. On the issue of priority, the Bankruptcy Court held in the absence of relevant law that would otherwise prime the secured creditor's security interest, the secured creditor held priority because the city's tax lien did not arise until after the secured creditor properly perfected its security interest.

In re Gundry Glass, Inc., 257 B.R. 422 (Bankr. Md. Jan. 4, 2001).

## Transfers Made With Intent to Hinder, Delay or Defraud Creditors are Avoided

The Bankruptcy Court avoided transfers made to the debtor's adult children within one year prior to the filing of the bankruptcy, while the debtor was insolvent. The debtor transferred $10,000 to each of his children within a month prior to the entrance of a judgment in excess of $3 million by the Circuit Court for Baltimore City against the debtor. Thereafter, the debtor transferred an additional $60,000 to one of his children to purchase stock of a business that was defunct and saddled with a substantial judgment. In reaching his conclusion, Judge Schneider noted that the debtor could not present a logical explanation surrounding the suspicious circumstances of the transfers, the transfers occurred after suit was brought against the debtor and in the case of the $60,000 transfer, after a substantial judgment was entered against the debtor. Based on this evidence and other facts set forth in the opinion, the Court concluded that the debtor intentionally hindered, delayed and defrauded creditors by making the transfers to his children.

In re Jacob Fraidin, 257 B.R. 437 (Bankr. D. Md. Jan. 5, 2001).


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*President's Message, continued from page 1*


Fifth, I want to set up a listserv for our members to trade ideas and information.

Lastly, I hope to increase the level of fun enjoyed by the members of the association. Towards that end, the Board of Directors has already voted to move our annual meeting from a June dinner to a luncheon before the Annual Spring Break in Annapolis. We have already booked the hotel in Annapolis for our Annual Spring Break which will begin at the luncheon on May 17, 2002. Please mark your calendars now for May 17 and 18, which should be another outstanding event.

In conclusion, I am grateful to the members of the association for electing me as President. I follow in the footsteps of an outstanding group of leaders. I will try every day to emulate their success, civility and professionalism.

Don't work too hard and have a great year. I am here to talk to anyone about any issue and hope to speak to as many members of the association as I can between now and next summer.

## Debtor Not Entitled to a Stay of an Adversary Proceeding After Returning to the United States

A debtor and his joint debtor spouse are not entitled to a stay of an adversary proceeding after the debtors returned to the United States and failed to show any evidence that the debtor's military service affected his ability to defend the action. In this case, the Court originally stayed the adversary proceeding while the joint debtors were living abroad in Korea. Thereafter, the Court requested that the debtors submit periodic status reports in an effort to determine the debtors' status and location. Upon returning to the United States, the debtors did not advise the Court of their return. After the debtors' presence in the United States was presented to the Court, the debtors submitted a brief in support of their claim that the stay of the proceeding should be continued. However, the debtors failed to present any evidence in the brief that their defense was affected by Mr. Lewis' military service. As a result, the Court denied the debtors request to continue to stay the proceeding.

In re Artie Lewis and Elizabeth Lewis, 257 B.R. 431 (Bankr. D. Md. Jan. 5, 2001).

## Debtor Personally Liable for Corporate Funds Held in Trust for Subcontractor, but Paid to Debtor Instead

A debtor is personally liable for corporate funds that were held in trust for a subcontractor. However, the joint debtor spouse was not liable because, unlike her husband, she was not an officer, director or managing agent of any of the corporations alleged to have defaulted on payments to the claimants. In this case, the debtors objected to the proof of claims of certain subcontractors who had obtained judgments against the corporation owned by the debtors. In response, the claimants demonstrated that funds earmarked for payment of the sub-contractor's claims by the debtors' corporation were diverted to loans to the debtors and other payments for the benefit of the debtors. As a result, the Court overruled the objection of Mr. McGee. However, because the claimants failed to present sufficient evidence on the issue of Mrs. McGee's control over the corporate entity, the claims were not enforceable against Mrs. McGee.

In re Robert W. McGee and Janis McGee, 258 B.R. 139 (Bankr. D. Md. Jan. 12, 2001).

## Trustee May Not Recover Landlord's Draw Down of Letter of Credit and Trustee's Payment to Cure Lease Default

The draw down of a letter of credit by a landlord after the debtor committed monetary and nonmonetary defaults under a lease was not a violation of the automatic stay. Furthermore, the Bankruptcy Court decided that payment by the trustee to cure monetary default in order to assume and assign the lease precluded the trustee from avoiding the payment as an unauthorized postpetition transfer.

In this case, the debtor leased nonresidential real estate from a landlord. An irrevocable standby letter of credit in the amount of $38,000 was posted for the benefit of the landlord, which the landlord was entitled to draw upon in the event of the debtor's default under the lease. On the Petition Date, the debtor was advised that it had committed monetary and nonmonetary defaults under the lease. After making proper demand upon the debtor, the landlord drew down the standby letter of credit. Shortly thereafter, the trustee filed a motion to sell and assign virtually all of the debtor's property, including the lease. After the sale was consummated, the trustee paid to the landlord $13,044.15, the amount required to cure the monetary default.

Nearly one year later, the trustee sought turnover of the $38,000 that was drawn down from the letter of credit as unjust enrichment and the avoidance of the $13,044.15 as an unauthorized postpetition transfer. Judge Schneider concluded that the trustee could not recover either the $38,000 drawn down under the letter of credit or the $13,044.15 paid as a cure payment to the landlord. According to Judge Schneider, "neither the letter of credit nor its proceeds were property of the debtor's estate, and therefore the trustee may not maintain the instant lawsuit to recover them." With respect to the cure payment, "the payment was not an unauthorized postpetition transfer because it was authorized by the Bankruptcy Court pursuant to 11 U.S.C. § 365."

In re Farm Fresh Supermarkets of Maryland, 257 B.R. 770 (Bankr. D. Md. Jan. 12, 2001).

## Prepetition Charging Order Rides Through Bankruptcy and is Enforceable After Discharge, Absent an Order to the Contrary

A prepetition charging order against the partnership interest of a chapter 7 debtor "rides through" the bankruptcy case as a pre-petition lien, and may be enforced after the debtor obtains his discharge, unaffected by the Code's discharge injunction.

In this case, after discharge had been granted and his case closed, a chapter 7 debtor with a partnership interest encumbered by a pre-petition charging order moved to reopen his case to determine whether his judgment creditor's post-discharge collection of his interest in partnership income violated the discharge injunction.

The Bankruptcy Court held that a charging order obtained pursuant Maryland law constitutes a lien on the debtor's interest in a partnership, and in the absence of an order to the contrary, rides through the bankruptcy, and is enforceable post-discharge.

Keeler v. Academy of American Franciscan History, Inc., et al., 257 B.R. 442 (Bankr. D. Md. Jan. 16, 2001).

## Lease Breached Prepetition Entitles Landlord to Administrative Claim for Postpetition Rent, Interest, and Counsel's Fees Incurred in Appeals Process

An administrative claim for postpetition, prerejection damages arising from the rejection of an unexpired lease of nonresidential real property includes interest and counsel fees.

In Geonex, the debtor vacated leased premises over one year prior to filing for bankruptcy protection. From the time it vacated the premises, the parties litigated the landlord's suit for breach of lease and later reached a settlement agreement. Before performance of the settlement agreement, Geonex and Vernon Graphics, Inc. (the "debtors") filed petitions for relief and the landlord filed a claim for damages and administrative rent. The Court sustained the debtors' objection to the landlord's claim and determined that the lease had been terminated prepetition. On appeal, the U.S. District Court for the District of Maryland reversed, holding that the lease had been breached, but not terminated prepetition. The Fourth Circuit affirmed the District Court's ruling.

On remand, the issue before the Bankruptcy Court was whether the landlord's administrative rent claim included interest and counsel fees incurred throughout the appeals process. The Bankruptcy Court held that it does. The broad language of the lease at issue obligated the debtors to indemnify the landlord against legal costs and charges including reasonable attorney's fees incurred in obtaining possession or enforcing the terms of the lease. Citing In re Shangri-La, Inc., 167 F.3d 843 (4th Cir. 1999), the Court noted that a trustee must assume all obligations of a defaulting debtor under a lease including payment of counsel fees. Also, under Pennsylvania law, interest from the date when performance was due is recoverable as a part of an award for contract damages at the statutory rate of 6% per annum. As a result, the landlord's administrative claim for postpetition rent, includes counsel fees incurred in the appeals process and interest from the date when performance was due.

In re Geonex Corporation, 258 B.R. 336 (Bankr. D. Md. Jan. 18, 2001).

***The Bankruptcy Bar Association notes the untimely passing of Michael J. Goergen, Esquire***, who left us far too young. Part of Mike's diverse practice included lift stay litigation focusing on the Greenbelt Bankruptcy Court. Mike was a consummate professional and civil gentleman. Mike's paperwork was always first rate, he was always on time for Court, and he always proposed consent orders with his copy of lift stay papers served on counsel.

His sisters and brothers of the Bar will miss him and their condolences go out to his wife and children.

## Bad Faith Filings and Other Allegations of Misconduct Must be Filed in Bankruptcy Court

A lessor who failed to object to the rejection of a lease by the bankrupt lessee was precluded by the doctrines of waiver, res judicata and collateral estoppel from seeking damages against insiders of the lessee in a later state court proceeding.

Transcolor Corporation had a ten year lease of nonresidential real property and equipment, and a licensing agreement with Winterland Concessions Company. One year after the lease was executed, Winterland filed for chapter 11 protection in California. During it's bankruptcy case, Winterland rejected the lease. In 1998, Winterland's chapter 11 plan was confirmed. Transcolor failed to object to the rejection of the lease and did not file a claim for damages resulting from lease rejection in the Winterland bankruptcy case. Instead, Transcolor filed suit for damages in Maryland state court against insiders of Winterland. Transcolor alleged, among other things, that Winterland's insiders wrongfully caused Winterland to file bankruptcy and reject the Transcolor lease. Later, Transcolor filed its own chapter 11 case in Maryland.

Citing Koffman v. Osteoimplant Technology, Inc., 182 B.R. 115 (D. Md. 1995), the Bankruptcy Court noted that state law tort claims for bad faith filing of involuntary bankruptcy petitions are federally preempted and should be raised in the bankruptcy case itself. Likewise, as against debtors in a voluntary case, complaints regarding alleged misconduct in connection with the bankruptcy filing are to be raised, if at all, in the debtor's bankruptcy case and not in state court. Such claims are core matters over which state courts have no power to rule.

Having failed to object to the rejection of its lease in the Winterland bankruptcy case. Transcolor was precluded from pursuing its claims against Winterland's insiders after confirmation of the Winterland's chapter 11 plan.

In re Transcolor Corporation, 258 B.R. 149 (Bankr. D. Md. Jan. 19, 2001).

## Damage Arising from Violations of the Freedom of Access to Clinic Entrances Act are Nondischargeable

Judgment debts arising from violation of the Freedom of Access to Clinic Entrances Act (FACE) are nondischargeable where debtors were found to have willfully and maliciously targeted physicians for injury or death.

In Treshman, two individuals filed for chapter 7 protection after being found liable to several plaintiffs for punitive and compensatory damages of over $8.5 million plus interest and costs as a result of their liability for FACE violations arising from numerous acts targeting abortionists and abortion clinics for violent attack. Noting that the trial court had specifically held that the debtors acted with malice, with the specific intent of threatening others, and with reckless disregard of the rights of those they targeted, the Bankruptcy Court held that the debt was nondischargeable under Section 523(a) of the Bankruptcy Code.

In re Treshman, 258 B.R. 613 (Bankr. D. Md. Jan. 25, 2001).

## Workers Compensation Provider's Postpetition Refund of Debtor's Overpayments Does Not Entitle Provider to New Value Defense

The liquidating trustee brought a preference action to recover an estimated premium payment made by the debtor to a workers compensation coverage provider.

The provider asserted a new value defense created by its postpetition refund of debtor's overpayments. The Bankruptcy Court held that the refund did not qualify as new value. Finding that the transfer satisfied the requirements of a preferential transfer under section 547(b) of the Bankruptcy Code, the Bankruptcy Court granted summary judgment in favor of the trustee.

In re George Transfer, Inc., 259 B.R. 89 (Bankr. D. Md. Jan. 31, 2001).

## Mutual Debts Must Arise Prepetition for Debtor to Exercise Set Off

Debtor maintained a share account with bank and held a credit card issued by same bank. Bank had a consensual lien on debtor's deposit accounts at bank. At the time debtor filed a voluntary petition under chapter 13, debtor's share account at bank had a zero balance and debtor's credit card balance totaled more than $4,600. A day after filing the bankruptcy petition, debtor deposited nearly $18,000,000 in debtor's share account at the bank. Afterwards, the bank notified debtor that he was in default on the unpaid credit card balance and placed an administrative hold on debtor's share account. Bank filed a motion to vacate the automatic stay, alleging that it was entitled to place an administrative hold on debtor's share account in the amount of the unpaid credit card balance pursuant to the Supreme Court's holding in Citizens Bank of Maryland v. Strumpf, 516 U.S. 16 (1995). The United States Bankruptcy Court for the District of Maryland, found that Strumpf was factually similar to the present case, except, the bank placed an administrative hold upon post-petition funds rather than upon pre-petition assets. Since debtor deposited funds in his share account after the bankruptcy petition was filed, those funds were not estate property, and not subject to the automatic stay. The right to set off, discussed in Section 553 of the Bankruptcy Code, provides for creditor to set off a mutual debt owing by such creditor to the debtor that arose pre-petition. Since the debt in this case (deposit of funds in share account) arose post-petition, there was no mutuality of debt, and therefore no right of bank to setoff by placing an administrative hold on debtor's share account.

In re Harris, 260 B.R. 753 (Bankr. D. Md. Mar. 30, 2001).

## Lease Obligations to Pay Rent Arises on Date Rent is Due, Not Invoice Date

On the trustee's motion for partial summary judgment, the Bankruptcy Court concluded that lease obligations to pay rent arose on due date, not invoice date. Accordingly, Section 365(d)(10) of the Bankruptcy Code did not bar a personal property lessor from asserting an administrative claim to recover lease rental charges that constituted actual, necessary costs and expenses of preserving the estate. The court declined to award the trustee summary judgment and stated that the lessor will have an opportunity to prove at trial that it is entitled to an administrative claim under section 503(b)(1)(A) for personal property lease payments that became due during the 59 days after the petition date.

In re Furley's Transport, Inc., 263 B.R. 733 (Bankr. Md. June 13, 2001).

## Bankruptcy Court's Power to Enter Necessary and Proper Orders Permits Court to Toll Statute of Limitations Set Forth Under Section 507(a)(8)

Debtors filed a voluntary petition under chapter 13 in September 2000. The Internal Revenue Service ("IRS") subsequently filed an unsecured priority claim under 11 U.S.C. §507(a)(8) for unpaid 1995 and 1996 federal income taxes. The IRS argued that the three-year priority period provided under 11 U.S.C. §507(a)(8) was tolled because the debtors had filed a prior chapter 13 case in 1997 which stayed the IRS' collection efforts pursuant to the automatic stay rule. The Bankruptcy Court adopted the majority view tolling the time periods set forth in 11 U.S.C. §507(a)(8). The Bankruptcy Court agreed with the Tenth Circuit's analysis that the exercise of the court's equitable powers to enter any "necessary or appropriate" orders, as provided by 11 U.S.C. §105(a), under the circumstances of the case, permitted the Bankruptcy Court to toll the three-year statutory period.

In re Fiels, 260 B.R. 362 (Bankr. Md. Apr. 3, 2001).

## 2001-2002 BANKRUPTCY BAR ASSOCIATION MEETING DATES AND LOCATION

*GREENBELT CHAPTER*

| Date | Location |
|---|---|
| September 26, 2001 | |
| October 25, 2001 | |
| November 29, 2001 | |
| December | Unknown—joint holiday party |
| January 25, 2002 | |
| February 22, 2002 | |
| March 22, 2002 | |
| April 25, 2002 | |

*PLEASE NOTE:*
*Greenbelt's NEW location for all meetings listed is:*

**Sheraton College Park Hotel**
**4095 Powder Mill Road**
**Beltsville, MD 20705**

*BALTIMORE CHAPTER*

| Date | Location |
|---|---|
| September 26, 2001 | Hyatt |
| October 17 | Whiteford Taylor |
| November 14 | Ober Kaler |
| December 19 | Unknown whether there will be a lunch until BBA decides on party plans |
| January 16 | Venable Baetjer |
| February 20 | Gordon Feinblatt |
| March 30 | Tydings & Rosenberg |
| April 17 | Unknown—TBA |
| May 15 | Unknown—TBA |


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