BANKRUPTCY CASES REVIEW

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This survey of Bankruptcy cases decided by the Bankruptcy and United States District Courts of Nebraska covers the period from January 12, 1987 to March 1, 1988. The survey proceeds in chronological order from January 1987 based upon the date the case was decided.

1. In Re William and Martha Melton (District Court Cv. 85-0-1074; affirmed Eighth Circuit No. 86-1655)

An attorney representing an unsecured creditor successfully challenged a Chapter 13 Plan filed by the debtors. As a result the debtors filed an amended Plan which provided a larger payment to all unsecured creditors. The attorney for the creditor applied for attorneys fees on the theory that he had benefited other creditors.

The Bankruptcy judge denied the application, first because § 503(b)(3)(D), which provides for payment of expenses for a creditor making a "substantial contribution" to the estate, does not apply in Chapter 13 cases.

Second, Judge Mahoney declined to follow state law precedents which allowed attorneys fees to one who creates a fund for the benefit of others. The attorney appealed.

The District Court, Judge Strom, affirmed the Bankruptcy Court. While noting that Nebraska law permits granting attorney fee's where a fund has been created, such a decision is. discretionary with the court. Applying such state law in Bankruptcy Court is also discretionary. Given the strong Congressional policy against awarding fees to creditors' attorneys, the Bankruptcy Court's decision was a reasonable exercise of it's discretion.

The Eighth Circuit Court of Appeals affirmed the District Court in a PER CURIAM opinion which limited the basis for decision to the absence of authority under §503(b)(3)(D) to award attorney fees of this sort in Chapter 13 cases. The Court stated that since such authority was lacking the Bankruptcy Court was correct in declining to refer to Nebraska law.

2. In Re Harlan Garbers (Bk85-1933).

A secured creditor obtained relief from the automatic stay in order to sell certain personal property of the debtor. Among the property listed to be sold was a 1972 truck, a titled vehicle. While the creditor had filed a financing statement covering all the debtors machinery and equipment, it had not noted it's lien on the trucks title, as required by Section 60-110 of the Nebraska Statutes.

The debtor objected to the sale, and filed a motion to avoid the claimed lien. Judge Mahoney concluded that notwithstanding the filed financing statement the creditor was unsecured on the truck, because the only way to perfect on titled vehicles is by noting the lien on the title.

3. In Re Orin Abendroth (Bk85-258).

Debtor objected to the claims of the Federal Land Bank and the Citizens Bank of Bancroft Nebraska. Land Bank held a first mortgage on debtor's real estate to secure a debt of approximately $80,000.00. Citizens held a second mortgage on the land, and also a first security interest in the debtor's personal property to secure a debt of $126,000.00.

After several hearings in Bankruptcy and State Courts, Citizens forced the sale of the real estate and personal property through replevin and foreclosure proceedings. At the real estate sale Citizens was the buyer for $26,000.00. The land was purchased by Citizens subject to the Land Bank mortgage. After application of the proceeds of sale of the real and personal property to the debt there remained due $91,000.00. Citizens claimed an unsecured debt in this amount.

Citizens sold the real estate acquired by it in the foreclosure proceeding to the Land Bank, giving the Land Bank a quit claim deed to the land. The Land Bank then resold the land to a third party for about $65,000.00. After application of the net proceeds to the debt the Land Bank claimed to hold an unsecured claim of $18,000.00.

The debtor objected to Citizens claim on the grounds that it waited too long to sell the personal property, and thus under U.C.C. 9-505(2) had elected to keep the property in full satisfaction of the debt. The Court overruled this objection, noting that most of the delay in sale of the property was caused by the debtor's actions.

The debtor objected to the Land Banks claim on the theory that the Land Bank, by acquiring title to the land without foreclosing it's mortgage, was barred from claiming any deficiency; that conveying the mortgaged land to a third party without the mortgagor's consent barred any claim for a deficiency, and that once Land Bank acquired title the mortgage "merged" with the fee.

The Court overruled these objections, finding no obstacle under state law to the Land Bank's purchase of the foreclosed real estate. Since the purchase by Citizens was confirmed by state court, the debtor ceased to hold any interest in the real estate at the time it was sold to the Land Bank. Thus, the purchase and subsequent resale by the

Land Bank occurred at a time when no duties were owed to the debtor as mortgagor.

The debtor's merger argument was also overruled. The Court found that under Nebraska law merger occurred only when the mortgagee acquiring the fee intended the interests to merge. In the absence of clear evidence of such intent the Nebraska cases state that the mortgagee will be presumed to intend that result which will be most beneficial to it's interest. Thus, the Court said, merger cannot be presumed here, since that would not be in the Land Banks best interest.

The Court did require additional hearings to determine the fair market value of the land at the time of the sale by Land Bank to the third party. The amount of any deficiency must be determined by comparison of this value to the price obtained in that sale.

4. In re George J. Porn (Bk.85-2865).

Debtor objected to creditor claim on ground that creditor had violated the truth-in-lending act. This same claim had been presented to the Federal District Court prior to bankruptcy, but the case was dismissed because the statute of limitations had run. Also, the question had been decided by a State court.

Debtor argued that because the issues had not been fully litigated in the Federal Court Res judicata did not apply. Judge Mahoney held that the usual rule in such cases is that all issues that could have been decided have been, and overruled the objection.

The Bankruptcy Court further held that there is no public policy exception to the Res judicata rule.

5. In re Howard D. Wittmuss (Bk85-2366).

One of Debtors' creditors filed an involuntary petition under Chapter 7 against debtors. Only one creditor signed the petition. Debtors attacked the petition, alleging that the debtors had more than 12 creditors as of the date of filing. Under § 303 (b)(1) three or more creditors must sign if the debtor has 12 or more creditors.

While the creditor conceded that the debtors had more than 12 secured creditors, it argued that the legislative history of § 303 demonstrated that secured creditors were not to be counted.

Judge Mahoney found nothing in the Code or the legislative history to support this argument, and dismissed the petition. He also noted that the petition misjoined the debtor and spouse, since only voluntary petitions can be jointly filed under §302. A creditor wishing to file against both spouses must allege and prove entitlement to relief against both.

6. In re Donald L. Lorenzen (Bk85-1932).

One of the Chapter 13 debtors' creditors obtained a judgement lien on debtors property within 90 days of bankruptcy. The creditor conceded that the lien would be a voidable preference under §547 unless § 547(c)(2) saved it.

§547 (c) (2) is the ordinary course of business exception. To be applicable the debt must have been made in the ordinary course, the transfer must have been made in ordinary course, and according to ordinary business terms.

Judge Mahoney agreed that the debt was created in the ordinary course, but concluded the transfer, which occurred when the judgement was entered, was not. This creditor failed to show that transfers in this manner were ordinary for both the creditor and the debtor. As a result, the judgement lien was avoidable.

The creditor sought to limit the extent of the lien avoidance to the amount set forth in §522(h). That section permits the debtor to avoid a transfer by the debtor if the trustee could have done so, but did not. However, the transfer would only be avoidable to the extent such property transferred was exempt. If the property transferred was not exempt, then the debtor could not avoid the transfer under §547.

The Court concluded that §522(h) did not limit the avoidability of this transfer because the reasons for §522(h) in a Chapter 7 case are not present in a case filed under Chapter 13. In a Chapter 13 case the trustee will rarely try to avoid liens because neither the estate nor the trustee will benefit from such action.

7. In re Papillion Lawnmower (Bk85-2888).

Debtor filed a Chapter 13 petition, which was converted to a case under Chapter 7. Debtor then sought to convert back to Chapter 13 under §706(a). That section gives all debtors the right to convert from a Chapter 7 to another Chapter, but only if the debtor did not arrive in Chapter 7 as a result of conversion from another Chapter. Judge Mahoney read §706(a) as creating a bar against multiple conversions once the case has been converted to Chapter 7.

8. In re Sport Treds, Inc. (Bk.86-2559).

Debtor in a Chapter 11 case filed a motion to assume a non-residential lease of real property. This motion was not filed either the 60 day period for assuming such leases in §365(d)(4). The creditor argued the motion was not timely filed, and that the lease could not be assumed.

Judge Mahoney concluded that §365(d)(4) could be satisfied by any unambiguous notice by the debtor to the landlord informing the landlord of the decision to assume the lease. If this is done within the 60 day period, a motion to assume need not be filed within the same period, although the Court noted that such would be the better practice.

9. In re Ronald Fritz, (Bk85-2053).

Debtor owned a one-fourth interest in real estate. He was in a land contract to purchase the remaining three-fourths. Before performing this contract, and while owning only the one-fourth interest, debtor got divorced.

One of the terms of the divorce decree awarded the debtor's wife alimony; under Nebraska law she acquired a lien on the one-fourth interest as security for payment of this alimony. The question for the Court was the extent to which the alimony judgement gave the wife a lien on the debtor's three-fourth's interest.

Judge Mahoney found that under Nebraska law the alimony judgment could attach to the debtor's equitable interest in the real estate, but it did not do so automatically. In order to attach the holder must take some additional steps. The Court concluded that the wife took such steps when she obtained the appointment of a receiver. Thus, as of the date the receiver was appointed the wife had a lien on all the debtor's interest in the real estate.

Within 90 days of the appointment of the receiver the debtor filed a bankruptcy petition. As a result, the Court held, the lien which attached at the time the receiver was appointed was avoidable under §547, the preference section. The wife kept her lien on the one-fourth interest.

10. In re Roy Nuttleman, (Bk85-1062) (CV86-0-457).

Debtor brought an action in Bankruptcy Court seeking a criminal contempt judgement against a third party. The Bankruptcy Court overruled the debtor's motion. The Debtor appealed to the District Court.

Judge Beam dismissed the appeal on the strength of his decision in Fenstermacher v. Irmer, No. 86-0-16. In that case the District Court concluded that the Bankruptcy Court lacked jurisdiction to enter citations for criminal contempt.

11. In re Arthur Heim, (Bk80-905).

Debtors filed a Chapter 11 petition in 1980. During the next 6 years they fought court battles with their secured creditors, attempting to set aside various foreclosure decrees. After these battles were finally lost creditors brought actions to dismiss the Chapter 11 case.

Judge Mahoney found that §1112(b)(l) applied, and dismissed the case. The debtors had suffered a serious negative cash flow throughout the period they were in Bankruptcy, which the Court held met the first requirement - r siii4\i) uiicL. a. <^un<-xiiu.±iiCj xuaa uiic L.&. Further, since the debtors had virtually no remaining source of income, the second requirement was met: it was highly unlikely that the debtors could confirm a plan of reorganization.

12. In re Brett Nelson, (Bk84-2540) (Cv. 85-0-572).

The debtor failed to appear for his rescheduled §341 hearing. The trustee filed an application for a determination of waiver of discharge. After a hearing the Bankruptcy Court held that the debtor had waived his discharge because of his failure to obey the Court's order to appear at the §341 hearing. Debtor appealed.

Judge Strom reversed, finding that the Bankruptcy Judge either based his result on rules repealed by the 1978 Bankruptcy Code, or on the discretion given him in §727(a)(6)(A). In either case the decision was wrong, Judge Strom held, because failure to appear at the §341 hearing is no longer a waiver of discharge, and it was an abuse of discretion to deny discharge. The Court suggested that in the future such questions be handled by adversary proceedings.

13. In re Larry Barlow, (Bk86-3499).

One of the debtors' secured creditors moved to dismiss or convert the debtors' Chapter 12 case on the ground that they were guilty of the kind of fraud set out in §§1204 and 1208. These sections generally permit such relief where the debtor has misused collateral, misrepresented financial conditions, or converted secured property.

While the evidence established that the debtors' had supplied false financial statements, and had converted secured collateral, Judge Mahoney overruled the creditor's motion. He concluded the creditor was not harmed by the false financial statements, and that the debtor had a colorable explanation for the falsity. The Court also held that most of the conversion which occurred did so because the secured creditor abruptly decided to cease providing operating funds. The debtor used money from converting the collateral for the preservation of other collateral, so the secured creditor was not harmed. Judge Mahoney thus concluded that the debtors' conduct, though not innocent, was not of the sort to warrant the severe remedy of §1208.

14. In re Tri-City Beer, (Bk86-2327).

Debtor filed it's Chapter 11 petition, and proposed to sell virtually all of it's assets to another distributing company. Two other persons objected to the proposed sale, alleging in each case that such person was prepared to pay more for the assets, and would thus yield more for the estate.

Judge Mahoney rejected these claims because in both cases the buyer would be required to satisfy certain conditions of sale which the proposed buyer had already met. Since it was far from clear that either of the objecting buyers could satisfy the conditions, which had to do with obtaining liquor permits and securing approval of the Miller Brewing Company, the Court concluded the possible estate gains from looking for a higher bid were outweighed by the risk that the proposed, qualified, bidder would go away.

15. In re Harold Schulz, (Bk85-980).

Debtor had transferred secured property to his wife prior to filing a Chapter 11 petition. The secured party brought an action to deny the debtor a discharge under §727. The Bankruptcy court found in that action that while the debtor was not innocent of wrongdoing, his actions were not sufficiently odious to warrant denial of discharge.

Subsequently the secured creditor brought this action to have it's debt determined non-dischargeability under §523(a)(6), based on the debtor's conversion of secured property. The debtor moved for a summary judgement, on the ground that the secured creditor was collaterally estopped from raising the issue of the debtor's intent.

Judge Mahoney held that although the earlier case found that the debtor acted without actual intent to defraud this creditor, collateral estoppel did not bar the creditor from raising intent issues under §523(6). That section, the

Court held, did not require actual intent to defraud; "willful and malicious" conduct would be enough to invoke the sanction.

16. In re Edwared Bruhn, (Bk85-2966).

Debtors filed a Chapter 13 petition within one year of the date they lost an unfinished house in a trust deed sale. They brought this action to declare the sale a fraudulent conveyance under §548. The house when sold brought $30,000.00. The buyer, the beneficiary of the trust deed, paid $13000.00 to finish the house. It then sold the house for $56,000.00.

Judge Mahoney found that all requirements for a fraudulent transfer had been met except the question of the adequacy of the price. (The Eighth Circuit had earlier held that foreclosure sales can be fraudulent transfers In re Hulm, 738 F.2d 323 (8th Cir. 1984). While he found that the minimum value of the house at the time of sale was $35,000-40,000.00, he believed that given the condition of the house the creditors bid was the fair equivalent of its value. Moreover, the fact that the house was sold for more than what the creditor had put in it was not a basis for applying §548, since the court was not surprised that the substantial improvements made by the creditor enhanced the house's value.

17. In re Russell Wobig, (Bk86-3615).

Debtor, whose principal business was hog feeding, proposed a Chapter 12 Plan which provided for a term payment of a creditor which held a security interest in the debtor's hog herd. Under the Plan the debtor proposed selling offspring of the existing herd as they reached the desired weight. This money would be used for normal operating expenses, and would not be paid directly to the secured party.

The secured creditor objected to the Plan, arguing that §552 gave it a security interest in pigs as they were born, and thus the debtor could not sell the collateral without the creditors permission.

Judge Mahoney found that the creditor did have a security interest in the future offspring, and that the proposed Plan did not protect the creditor's rights in the offspring. Thus, the Plan as written could not be confirmed. However, the Court also held that so long as the creditor's interest was adequately protected under familiar adequate protection rules, the debtor could propose to use

proceeds, and the Court could approve such use under §552(b).

Here, the Court suggested that adequate protection required the debtor to maintain the hog herd at an amount no less than 110% of the secured debt. If this were done the Plan would be confirmable.

Judge Mahoney also noted that the debtor proposed that the disposable income would be used to pay down the secured debt in an accelerated fashion. This, he found, was not permitted under §1225(b)(1), which requires that disposable income be applied to unsecured debt.

18. In re Sterling Franck, (Bk85-2493).

Prior to debtor's Chapter 7 filing his former wife agreed to give one of debtor's creditors a mortgage on her sole real estate as security for a loan to debtor. After the debtor filed the secured creditor obtained relief to foreclose on this real estate.

The former wife obtained relief to bring a fraud action in state court, alleging that the debtor had lied to her when she mortgaged her real estate. She brought that suit, but lost, the state court finding that the debtor had not been guilty of fraud.

She then brought this action to determine the debt to here as non-dischargable, and to deny the debtor a discharge. She also sought dismissal under §707(b), the consumer debt exception.

The Court concluded that the doctrine of collateral estoppel barred her from litigating fraud under §523 or §727. The Court also noted that no evidence existed as to any intentional wrongs done by the debtor, so no relief was appropriate even if collateral estoppel did not apply. Moreover, under §727 any alleged fraud must occur within one year from the petition, which was not the case here.

Finally, the Court refused to dismiss the case under §707, finding that the debt complained of was incurred not as consumer debt, but as business debt. Thus, that section did not apply, and no other reason existed to dismiss the debtor's petition.

19. In re Nickerson & Nickerson, Inc., (Bk85-1713).

Creditors filed an involuntary petition against the debtor, and the Court entered an order for relief against the debtor. Such an order requires that the Court find,

among other things, that the debtor was not paying debts as they came due, the "insolvency" test under §303(h)(1).

The trustee brought an action to avoid a transfer of property by the debtor to an unsecured creditor within 90 days of the petition. Judge Mahoney found that all the elements of an avoidable preference under §547 had been stablished, except insolvency. The trustee relied on the earlier finding of "insolvency" under §303, and offered no proof of the debtor's insolvency under the "balance sheet" test of §101(31)(A).

The Court concluded that the definition of insolvent in §101 must be applied to the meaning of insolvent in §547 since no proof was offered on the debtor's balance sheet, solvency, the trustee's case was dismissed.

20. In re Melvin Hubka, (Bk85-2819).

Debtor objected to the claim of the Commodity Credit Corporation on the grounds that (1) the financing statement was inadequate in that it listed the collateral as "corn", which he alleges was too vague, (2) the financing statement had his address wrong, and (3) his wife, who he stated had an interest in the secured collateral, did not sign the security agreement.

Judge Mahoney held that "corn" satisfied the requirements of 9-402 of the U.C.C., that an improper address in the financing statement invalidates the filing only if it is seriously misleading, which this was not, and that no evidence beyond the debtor's statements existed to show his wife had an ownership interest in the collateral. The debtor's objection was overruled.

21- In re Central Transfer Company, (Bk82-1704).

The debtor had previously been doing business in the same location as Central Storage Company. Though the two firms shared directors and shareholders, they were separate entities. Central Storage made an agreement with a builder to construct a building on land owned by Central Transfer. The builder thought Central Storage owned the land.

When Central Storaged defaulted on payment the builder discovered the true ownership by Central Transfer, and filed a mechanics lien under Nebraska § 52-101 (now the Nebraska Construction Lien Act). Both Central Transfer and Central Storage then filed Bankruptcy petitions. The builder filed a claim in both cases. Another creditor in Central transfer objected to the builder's claim.

Judge Mahoney sustained the objection, concluding that the only basis of a claim against Central Transfer was the mechanics lien statute, which required a showing that the owner of the land or it's agent made the contract under which the improvements were built. Since Central Transfer and Central Storage were different entities, the "owner" of the land did not make any contract with the builder. Further, no evidence existed to show that Central Storage was acting for Central Transfer, and thus it was not an agent for Central Transfer. (affirmed, U.S. Dist. Ct. Cv. no 87-0-263) (on appeal to 8th Cir.)

22. In re Kenneth Ellis, (Bk86-1136).

One of the debtors' creditor's brought an adversary complaint against them on July 22, 1986. The first proper summons was not served until November 20th, 1986. Under Rule 4(j) of the Federal Rules of Civil Procedure this service would be too late as beyond the 120 day limit. The debtors' moved to dismiss the complaint, arguing that Bankruptcy Rule 7004(f) made the service defective in Bankruptcy on the same basis as Rule 4(j).

.Judge Mahoney held that, since Rule 7004(f) does not include Rule 4(j), the 120 day limit is not an automatic ground for dismissal of adversary complaints. However, he concluded he should incorporate the 120 day limit as a matter within his discretionary power. For reasons of fairness to the plaintiff, the Court did not make the limit applicable to this case. But, since this hearing would not have been necessary had the plaintiff acted in a timely manner, Judge Mahoney ordered plaintiff to pay defendants attorney fees.

23. In re Silver Monarch Oil Co., (Bk79-0-1045) (Cv.85-0-904).

Debtor filed a Chapter 11 petition in 1979. The appellant in this appeal was retained as it's lawyer. The appellant received $9000.00 as a retainer. He represented the debtor and debtor-in-possession until 1982, when a receiver was appointed. Thereafter he provided little if any representation of the debtor.

In 1985 the receiver provided a final accounting and application for allowance of fees. Notice was given to the appellant. The appellant did not file an application for allowance of fees. The Court approved the final accounting and allowed the receiver fees.

Appellant objected to the final report on the grounds that he was denied the opportunity to make application for

attorney fees. The Bankruptcy Court overruled the objection and the appellant appealed.

Judge Strom concluded that the appellant had ample time and opportunity to file his fee application, and affirmed the Bankruptcy Court.

24. In re Theodore Frederick, (Bk87-898).

Debtor filed for relief under Chapter 12. He had currently pending a case under Chapter 13. Creditors objected to the second filing as an abuse of the Bankruptcy system.

Judge Mahoney found that neither the Bankruptcy Code nor the Rules prohibited filing two petitions under two chapters at the same time. Further, given that the Chapter 12 legislation initially prohibited conversion from other Chapters to Chapter 12, he did not think it to be an abuse to file a new petition under Chapter 12 while the Chapter 13 case was still pending.

25. In re Curt Schleusner, (Bk83-2061).

Debtors' filed a Chapter 11 petition in 1983. In 1985 the Court confirmed a liquidating plan, and appointed a liquidating agent. The debtors agreed to cooperate with the liquidating agent, and in return were to be paid for their efforts. The estate was liquidated, and the debtors were paid.

The debtors objected to the final report of the liquidating agent on the grounds that his records were inadequate to explain all receipts and expenses. The Court found that no evidence existed to support the debtors' charge that the agent misappropriated funds. Further, even though the records were poorly kept, the Court no basis for concluding that the debtors were in any way hurt by such recordkeeping.

26. In re Michael Lowe (Bk.85-1778).

Debtor filed a petition under Chapter 7, and one of his creditors objected to the dischargeability of it's debt under §523(a)(2)(B). The Court found that the debtor falsely overstated the value of inventory on various financial statements furnished to the creditor, which were relied upon by the creditor. The debt was held nondischargable.

The debtor urged that if the debt was not dischargeable it should only be so as to money advanced after the false financial statements were given to the creditor. While the Court believed this to be generally correct, here the

creditor continued to rely on the representations in re-structuring certain loans for the entire indebtedness. Thus, the entire debt was not dischargeable.

27. In re Michael Lowe, (Bk85-1778).

Debtor filed a Chapter 7 petition, and included as one of his exempt assets an annuity agreement entered into between the debtor and a former employer. The agreement provided for payment of a monthly sum for the balance of the debtor's life. It also provided that the annuity was not assignable by the debtor.

In an earlier opinion the Court found that the annuity was exempt under Nebraska §44-371, and that the trustee could not claim the benefit of the "unless assigned" language of that section, since it was not assigned to the trustee.

The debtor had, just prior to Bankruptcy, purported to assign the annuity to a creditor as security for loans. This creditor, whose debt was found to be non-dischargeable (see above), asserted a lien on the annuity. The debtor brought this action to determine the validity and extent of any lien.

The Court found that the annuity was not exempt as against the creditor, and that the creditor had a valid lien on the annuity, at least valid in Bankruptcy. Judge Mahoney rejected the debtors arguments that the nonassignability clause in the annuity made his attempted assignment invalid, thus preserving the exempt status of the annuity under Nebraska law. The Court held that the question of whether the creditor could enforce the debtor's assignment against the former employer was not relevant to decision of the application of §44-371. Since, right or wrong, the debtor did assign the annuity, it loses it's exempt status.

28. In re Delbert McKeag, (Bk87-71).

Shortly before filing his Chapter 12 petition the debtor converted non-exempt property into an exempt annuity of $138,000.00. The debtor then filed a Chapter 12 Plan providing for payment of less than all his debt, and stating nothing about what he planned to do with the income from the annuity.

Creditors objected to confirmation of the Plan, contending that the debtor acted in bad faith. Judge Mahoney concluded that conversion of non-exempt assets to exempt assets on the eve of Bankruptcy was not prohibited by the Bankruptcy Code, and thus the petition was not on that basis filed in bad faith. However, the Court found that because the Plan did not provide for any use of the annuity proceeds

to help fund the Plan, the Plan must be amended to state that the debtor is willing to apply some portion of the exempt property to the Plan. Failure to do so, the Court stated, would be bad faith. (Plan confirmed when debtors pledged to use $80,000.00 in funding plan).

29. In re Neal Haschke, (Bk87-541).

Debtors' filed a Chapter 12 petition, to which several creditors objected. In the year prior to filing the debtors did not actively farm their land, but rather rented it out on a cash rent basis. Also, during that year they sold off virtually all of their farming equipment. The creditors thus claimed that the debtors did not meet the requirements of § 101(17), which defines family farmers as those who received more than 50% of their gross income from farming operations in the previous year. The creditors further claimed that the debtors were not engaged in farming operations .

The Court agreed with the creditors' claim that the cash rent could not be counted as farm income, since the debtors, were not exposed to any farming risks to earn the rent. However, the Court did conclude that the money received from the sale of farm machinery was farm income. As a result, the debtors did receive more than 50% of the prior years income from farming.

Judge Mahoney nonetheless dismissed the case, finding that the debtors were not engaged in farming operation as required in Chapter 12. The only relationship to any of the activities set out in §101(20) as qualified farming operations the debtors had was the storage and marketing of prior years grain. This, the Court said, was not farming.

30. In re Stephanie Hernandez, (Bk85-157).

Debtor filed her Chapter 7 petition, listing as one of her debts an educational loan. The creditor to whom she owed this debt filed an action to determine the dischargeability of the debt. Such debts are not dischargeable under §523(a)(8), unless the Court finds that under §523(a)(8)(B) excepting such debt would work an undue hardship on the debtor.

Because the evidence established that the debtor was not making a salary sufficient to pay minimal living expenses, and because even that employment was temporory, Judge Mahoney found an undue hardship existed. The debtors prospects appeared bleak, and she would very likely have to go back on welfare, the Court found. Under those facts the debt should not be excepted.

31. In re Eldon Wichmann, (Bk87-521).

The Chapter 12 debtor proposed a Plan of Reorganization which provided for payment of a secured creditor over a term of years at 10 per cent interest. The creditor objected, and a hearing was held to determine the proper interest rate the debtor should pay to the creditor.

Judge Mahoney concluded that what is needed in this area is a method of calculating "market rate" interest without resort in each case to expert testimony. He thus adopted the following method to calculate that rate: first, one finds the term of repayment proposed by the debtor. This is done by calculating the average amount of the creditor's claim outstanding during the total proposed term. This amount is then stated as a percentage of the total claim. This percentage is then applied to the total proposed term to obtain the term for purposes of determining interest. (EX: Debtor proposes paying $10,000.00 in ten payments over 10 years. The average outstanding principal, calculated by adding the principal outstanding in each year and dividing by 10, is $5500.00. The percentage outstanding is thus 55% The term of repayment is adjusted to 55% of 10 years, or 5.5 years.)

Once the term has been adjusted the interest for a "riskless" return, such as a treasury bond, is found. To this rate is added a factor based on the risk of non-payment presented by this debtor. The result is the market rate. The Court concluded that in most Chapter 12 cases an increase of 2 per cent will adequately compensate a creditor for this risk.

32. In re Carl Nelson, (Bk83-2087) (Cv 86-0-835).

The Bankruptcy Court appointed a trustee to administer the debtor's Chapter 11 estate. The Bankruptcy Court found that the debtor had attempted to transfer estate property out of the estate without Court approval, necessitating the appointment of a trustee.

On appeal the District Court found that the evidence supported the Bankruptcy Court's decision. In a companion appeal the District Court affirmed the Bankruptcy Court's refusal to find a secured creditor in contempt of the §362 stay. The Bankruptcy Court gave the creditor relief, and the debtor appealed, but did not ask for a stay during the appeal. During the appeal the creditor proceeded in state courts. The appeal was successful and the stay reinstated. However, the District Court found that the creditor's actions during the appeal were proper. The automatic stay is not automatic during an appeal. (Cv 86-0-1023).

33. In re Harvey Mahloch, (Bk82-670) (Cv 86-0-263).

Debtor entered into a land contract with seller. The terms of the agreement required seller to deliver a deed to an escrow agent, who was to hold the deed until the buyer paid the full purchase price. This the seller did, but by mistake the deed was recorded at once.

After paying part of the purchase price debtor filed a Chapter 11 petition, treating seller as a secured creditor. The land was subsequently sold in a confirmed Plan. The trustee objected to seller's claim to the proceeds from that sale on the ground that the trustee, in his status of BFP in §544 (a)(3), cut off any interest the seller had in the land or its proceeds.

The Bankruptcy Court found against the trustee, and the trustee appealed. Judge Strom affirmed, finding that under Nebraska law the trustee would not have the status of a BFP. Since §544 incorporates state law, the trustee lacked BFP status under that section. The Court noted that even though the deed was recorded, causing a potential problem for those who search the record, the escrow document was also recorded, and any person seeing that document would at least have reason to question whether the deed was properly filed.

34. In re Lewandowski, (Bk86-887) (Cv. 87-0-410).

Debtors' moved to dismiss their Chapter 12 petition so that they might refile under Chapter 12. A creditor appealed the Bankruptcy Court's order dismissing the case.

Judge Strom concluded that the order of dismissal was not an appealable order, finding §305 the applicable section under which the case was dismissed. That section states that dismissals under it are non-appealable.

35. In re Robert Barger, (Bk 86-1022) (Cv. 87-0-336).

A creditor obtained approval of a Disclosure statement in Debtor's Chapter 11 case. Debtor appealed from the Order granting approval.

Judge Beam dismissed the appeal, finding that the Order appealed from was interlocutory, and the appeal not proper.

36. In re Robert Ladehoff, (Bk85-2351).

Debtors filed a Chapter 7 petition as individuals. All their assets were liquidated, including a company owned by

the debtors. As individuals, the debtors accumulated seven thousand dollars worth of "capital credits" from a telephone company. These credits were included in the estate.

The trustee moved for an order requiring the company to pay these credits to the trustee. It was the company policy to pay credits to individuals upon such individuals death, and to corporations upon bankruptcy. However here, the company refused to pay because the individuals were the patrons who earned the credit, not their business company. Since the individuals had not died, no reason existed for a payout.

The Court agreed, holding that no corporation was in bankruptcy, and thus no corporation was bankrupt. Just because the debtors business was liquidated does not mean the company policy to payout on bankruptcy of a corporation is triggered. The individuals were still alive, and could still be patrons of the company. The Court did note, however, the credits were still property of the estate, which the trustee could sell, hold to maturity (the debtors' death?), or abandon.

37. In re Henry Lauck, (Bk87-1315).

Debtor sought to partition farm land into two tracts, paying creditor cash for the "homestead" tract, and terming the balance out over a period of years. The creditor objected to the Chapter 12 Plan filed by the debtor which included this partition.

Although the parties argued the case as though the recent Nebraska Farm Homestead Protection Act (L.B. 3, 89th Legislature, 3rd Special Session) was controlling, Judge Mahoney declined the opportunity to be the first court to construe that law. Instead he found that under §1206 and 1222(b)(2) the debtor was entitled to partition. Those sections permit the debtor to sell property free and clear of liens, and modify the rights of secured creditors. Since no damage to the creditor's rights in the remaining land would be caused by the cash sale of the "homestead" land, the Plan was confirmed.

38. In re LLoyd Olson, Bk86-307).

Debtor stored grain on his farm after giving the CCC a security interest in the grain to secure a loan. Various other persons known to the debtor had access to the grain. The debtor discovered that some of the grain was missing, and filed a report claiming a loss by theft. It was the policy of the CCC to not hold the farmer responsible for such losses if the farmer could show that the loss was in

fact caused by theft, and occurred without the negligence of the farmer. The CCC filed a claim in the nature of a shortage claim, charging that the debtor was responsible for the loss.

The Court found that the debtor did not steal the grain, but found that he had not shown that his negligence was not the cause of the loss. The debtor knew that a number of third persons had access to the grain, and yet failed to monitor the use of the bins. Since the debtor was trying to prove that some other third party stole the grain, the Court said that under Nebraska law he must refute all other possible theories explaining the loss. The debtor failed to refute the theory that a person having access to the grain stole the missing grain, and thus the claim was allowed.

39. In re Lowell Behnke, (Bk86-284) (Cv 86-0-279 & 358).

Debtors' filed a Chapter 13 Plan, which was objected to by two creditors. Their objections were sustained, and the debtor were given time to amend. They did, and the creditors renewed their objections. Prior to the hearing on the objections the debtors' attorney withdrew from the case. When the hearing was held the debtors did not appear and the objections were sustained. The Court gave the debtors additional time to file an Amended Plan, or else the case would be dismissed. The debtors did not file a Plan, and the case was dismissed.

Less than 90 days from dismissal the debtors filed a Chapter 11 petition. The creditors objected, arguing that §109(f)(1) prevented the debtors from refiling within 180 days of the date their Chapter 13 case was dismissed.

The Bankruptcy Court found that §109 applied only to willful failures to obey a Court order, and that here the debtors' failure arose out of ignorance of bankruptcy rules. The creditors motion to vacate the stay under §362(d)(1) was overruled. They appealed.

Judge Strom affirmed, concluding that §109 required a showing that the debtors acted either intentionally or with "plain indifference" to the Court order. He did not believe the Bankruptcy Court was clearly erroneous in finding the absence of such a showing.

40. In re Ann Foos, (Bk86-2407) (Cv. 86-0-1049).

Debtor filed her Chapter 11 petition pro se, and did not obtain counsel until November. In December a secured creditor filed for relief from the automatic stay. The

Bankruptcy Court found that the debtor had no equity in the property, but the property, farm land, was necessary to an effective reorganization. The creditor appealed.

Judge Beam found that "necessary to an effective reorganization" required the debtor to prove that the property was necessary and that a reorganization was in some sense feasible. Since the debtor was a farmer who had been farming this land for years the Court concluded that the land was necessary. However, the "effective" question was more difficult. Since the debtor had not yet filed any schedules or Plan, it was impossible to speculate on the prospects for reorganization. But, the Court said, when relief is requested early in a case the debtor will frequently be unable to demonstrate the probability that a reorganization can be accomplished. In such cases all the debtor need show is that reorganization is a "realistic possibility". Later in the case, the Court noted, the burden may well be higher.

Since the debtor proved that the farm had significant income in past years, the Court believed she had proved the land was necessary to an effective reorganization, and dismissed the appeal.

41. In re Carl Anderson, Inc., (Bk86-1900).

The Court approved certain administrative expenses and attorney fees, but ordered they not be paid until the conclusion of the case when it could be determined if pro-rated payment would be necessary. The attorney asked for reconsideration of the order, stating that one of the debtor's secured creditors had agreed to provide money for payment of attorney fees, but not other administrative expenses. Under those circumstances no reason existed to require the attorney to wait until the case was closed.

Judge Mahoney agreed, finding that under the circumstances the attorney should not have to "finance the administration of liquidation or reorganization cases."

42. In re Kurt Blankemeyer, (Bk85-2490) (Cv. 86-0-752).

Debtors' filed a Chapter 11 Plan which provided for payment of an undersecured creditor's unsecured claim over a 20 year period without interest. The creditor objected to confirmation of the Plan, contending it would not receive property of a value as of the date of the Plan equal to the allowed amount of its claim. The Bankruptcy Court agreed, and refused to confirm the Plan. The debtors' appealed.

The District Court affirmed, holding that under §1129 (b)(2)(B)(i) the debtor must either provide payment to the unsecured creditor of an amount equal to the present value of the creditor's claim, or satisfy the "absolute priority" provision. The debtors made no attempt to satisfy the absolute priority rule, the Court found. (Under the recent 8th Circuit decision in In re Ahlers, 794 F.2d 388 (8th Cir. 1986), cert, granted 107 S.Ct. 3227(1987), a debtor may keep property without paying all unsecured claims so long as the debtor contributes something of value to the estate equal to the property kept.) Since the failure to pay interest on the deferred amount clearly made the amount to be received of less value than the amount of the claim, the Plan could not be confirmed. The Court thus affirmed the Bankruptcy Court.

43. In re William Schmitt, (Bk87-1278).

Debtor filed a Chapter 12 Plan which proposed a term payment of an oversecured creditor's claim, but failed to provide for payment of interest at the contract rate. The creditor objected to confirmation of the Plan.

Judge Mahoney concluded that an oversecured creditor is entitled to interest and costs under §506(b) until the effective date of the Plan. In an earlier case, In re Brandow, 85-1064, Judge Mahoney held that the effective date of the Plan for undersecured creditors was the date the petition was filed. However, to permit §506 to work the Court concluded some date other than the petition date must be the effective date of the Plan for oversecured creditors. This is because the oversecured creditor is entitled to contract rate interest under §506, until the effective date of the Plan. See In re Lenz, 74 B.R. 413 (Bkcy. C.D. 111. 1987).

The Court found that the correct "effective" date for oversecured creditors was the date the Chapter 12 Plan was confirmed. After that date all secured creditors' receive the same treatment: they are entitled to interest based on a discount rate adequate to give the creditor the present value of its secured claim. As the Court had decided in In re Wichman (see above), the discount rate was calculated without regard to the contract rate. As a result, the Court confirmed the Plan, with an amendment to change the interest to contract rate from date of Petition to date of Confirmation.

44. In re Cepel, (Bk86-2673).

Debtor and his former wife purchased a house, and as part of the purchase each signed a promissory note

obligating themselves to pay the note amount to the holder. They then got divorced, with the debtor keeping the house. As part of the divorce decree the debtor agreed to pay the note, and hold his former wife harmless.

The debtor filed a Chapter 7 petition, listing the above note as one of his debts. At the time he did so the note was in default and the creditor had obtained judgement against the debtor and has former spouse. The former wife objected to the discharge of this debt, arguing that the debt was excepted from discharge under §523(a)(5). That section excepts debts incurred for support or alimony.

Judge Mahoney concluded that the debtor's assumption of this debt was not intended as a support obligation, but merely as a part of the property settlement. As such, the section was inapplicable.

45. In re Bruce Slagle, (Bk86-730).

Debtors, husband and wife, filed a Chapter 13 petition. They claimed that all property was owned jointly, although much of their property was used as security for loans made only to the husband. In their Plan they claimed an unencumbered 1/2 interest in the wife in certain personal property in which the husband had given a creditor a security interest. The creditor objected.

The Court found that the couple did in fact plan that all their property would be owned jointly. They held all titled property jointly, both took an active part in decisions concerning the property, and both shared the responsibility for managing the family farm. Thus, even though the husband acted individually in encumbering the property, his wife had an interest in the encumbered property.

The Court held, however, that even though the wife had an interest in the property, the husband had the power to encumber it. Judge Mahoney held that under U.C.C. 9-112 a debtor may acquire rights in collateral, and thus encumber it, by authorization of the actual owner. Thus, although the wife did not sign the security documents as is normally required of the "debtor", she give her husband authority to sign on her behalf. The Court noted that not every husband-wife relationship creates a reciprocal agency simply because of the relationship. Each case presents a factual question on that issue. Here, the Court said, the active knowledge and participation of the wife in the financial affairs of the couple's farm operation showed she knew and approved of her husbands actions.

46. In re Frank Pechar, (Bk86-2786).

Debtor filed a Chapter 7 petition after a judgement was entered against him in an action arising out of his negligent operation of a motor vehicle. At the time of the accident the debtor did not have liability insurance, and could not otherwise satisfy the Nebraska Financial Responsibility Statutes (60-507 RRS Neb.).

The judgement creditor moved to have the debt determined to be not dischargeable under §523(a)(6). That section excepts from discharge "willful and malicious" injury to another.

The Court found that the section applied, and the debt was not dischargeable. Judge Mahoney believed that the debtor's conscious, intentional, willful decision to drive a car without the means to compensate any person he might harm was the kind of injury covered by §523(a)(6). The Court based this conclusion on the decision in In re Long, 774 F.2d 875 (8th Cir. 1985), which defined willful to include acts taken with the knowledge that injury was "substantially certain" to occur.

47. In re Willow Grove Partnership, (Bk87-696).

The debtor filed a Chapter 12 Plan which proposed changing their lien of an oversecured creditor. The creditor had a security interest in personal property and a real estate mortgage, with provisions in each cross-collateralizing the obligations. There appeared to be substantial equity in the debtors property.

The Plan proposed cancelling the cross-collateral provisions, instead allocating part of the over-all debt to each kind of property. The purpose of this was to free up some of the equity in the debtor's property so that it might obtain operating funds from a lender and give the lender a first position in the personal property.

The creditor objected, arguing that under §1225(a)(5)(B)(i) the nature of its lien cannot be changed in Bankruptcy. Judge Mahoney agreed, citing 5 Collier, 15th Edition, Section 1325.06. However, citing his decision in In re Wobig, 73 B.R. 292 (Bk. D. Neb. 1987), Judge Mahoney also noted that a secured creditor should be entitled to a lien only in property up to the amount of the secured claim. Under §552(b), the Court said, the debtor could ask for a release of some of the collateral from the security agreement so that reorganization would be possible.

47. In re Kenton Thompson, (Bk86-2706).

Debtors borrowed money using their home equity as collateral. They then used this money to purchase an annuity. Shortly after purchasing this annuity they filed their Chapter 7 petition, claiming the annuity as exempt, as it was under then state law. The lender objected to the exemption, claiming it was obtained with fraudulent intent.

The Court held that it was not exempt. While it is not fraudulent in itself to convert non-exempt to exempt assets on the eve of Bankruptcy, Judge Mahoney said, the intent of the debtor at the time of the conversion must be examined. If the debtor actually intended to defraud his creditors, rather that merely take advantage of his exemptions, the Bankruptcy Code permits the Court to disallow the exemption. Here, the Court found, the conversion was done as a way to protect the debtor's home equity, and only after seeking legal advice. Further, this all occurred after the debtors had lost their business and knew they were in bad financial shape. This, the Court thought, went beyond just taking advantage of exemptions.

48. In re Douglas Crouse, (Bk86-3206).

Debtor proposed a Chapter 11 Plan which provided that one of his creditors be paid by assignment to that creditor of certain contracts in which the debtor was seller. These contracts provided for payment of a sum of money in installments, with interest. The creditor objected, contending that the face amount of the installment obligation should be discounted to reflect the risk associated with payment in the future. The debtor argued that the discount rate calculated under Wichmann (see above) would be less than the actual interest rate in the contracts assigned, making the contracts more valuable than their face amount.

Judge Mahoney concluded that the Wichmann test for computing discount rate is not applicable when the debtors are not the obligers. However, the Court found that the contracts each had an interest rate which reflected the risk in the contract, and overruled the objection.

49. In re Eldon Wichmann, (Bk87-5210.

Debtors filed a Chapter 12 Plan. Creditors objected, contending that an earlier discharge in a Chapter 7 case rendered debtors ineligible for Chapter 12 relief.

Judge Mahoney found nothing in Chapter 12 which supported the creditors contention, and likened the case to one under Chapter 13. In such cases a prior Bankruptcy is not a bar to subsequent Chapter 13 relief.

50. In re Charles Altic, (Bk86-2654).

Debtors filed as Chapter 7 petition. One of their creditors filed an action to determine the dischargability of a debt. On the eve of a decision in this action the debtors converted to Chapter 13. They filed a Plan providing for nominal payment to unsecured creditors, including the objecting creditor.

The creditor objected to the Plan as being filed in bad faith. The Court disagreed, relying on the recent decision in In re Zellner, (Slip op. 8th Cir. Sept. 3 1987). That case held that the mere fact that a debt would not be dischargeable under Chapter 7 does not mean it would be nondischargeable in Chapter 13. The 8th Circuit found that if the Plan was in good faith even a student loan, nondischargeable in a 7, could be discharged in a 13. Judge Mahoney thus concluded that so long as the conversion from the 7 to the 13 was in good faith the debt could be discharged. Since it appeared that the debtors were acting on the advice of their lawyer, who was making a proper, tactical decision, the Court found the Plan to be in good faith.

51. In re Douglas Percival, (Bk86-758).

Creditors objected to debtors discharge under §727(a)(2), (3), and (5). The Court found that the debtors had filed materially false financial statements with creditors, had fraudulently converted property, and failed to explain the disappearance of estate property. Further, the Court found that the debtors intentionally destroyed their records to hinder their creditors. All these actions, the Court held, were undertaken with the specific intent to defraud the debtors creditors. As a result, the debtors were denied a discharge.

52. In re Jon Neiman Trust, (Bk87-2073).

The debtor, a trust set up by Jon Neiman, filed a Chapter 11 petition. A creditor moved to dismiss the case on the ground that the trust was not a business trust, and thus not eligible to file a Chapter 11 case.

Judge Mahoney held that the test was whether the trust was organized to conduct business, or was merely authorized to do so as an incidental activity. (See In re Hays Trust, 65 B.R. 665 (BK. Neb. 1986). Here, the court concluded that the primary purpose of the trust was to protect the trust res for the benefit of the truster's children. Not being a business trust, it was ineligible for Chapter 11 relief.

53. In re Alfred Smith (Bk87-966)

Debtors filed their Chapter 12 Plan, providing for full payment of a claim for a "forfeited" loan due the CCC. The CCC did not object to the confirmation. The CCC filed a motion for relief in order to "set off" amounts owed it by the debtor against payments due the debtor under current program. More than 30 days passed between the time the motion was filed and the time it was filed. The debtors plan was confirmed while this motion was pending.

Judge Mahoney concluded that whatever right to set off the CCC had, including rights acquired under § 352 (E), that rights must be exercised to be retained. Since the CCC did nothing to affect a set-off after the 30 day period elapsed, and merely stood by and let the debtor's plan be confirmed, it lost its set-off rights.

54. In re Melvin Hubka, (Bk85-2819)

Debtor appealed a decision of the Bankruptcy court, filing his notice of appeal on time. The debtor did not, however, designate the record, as required by Bankruptcy Rule 800 6. The U.S. Attorney moved in the Bankruptcy Court to dismiss the appeal.

Judge Minahan concluded that once a notice of appeal has been filed under Bankruptcy Rule 8001 the bankruptcy court loses the power to dismiss the appeal, and the appeals court takes jurisdiction of the case for such purposes.

55. In re Reinhold Schwartz, (Bk85-2354).

Various creditors claimed priority in 1985 crops grown on their parcels of land farmed by the debtors. Two creditors based their priority on §§ 52-1101 and 59-901 of the Nebraska Statutes. (These statutes gave one supplying products to a farmer which are used in crop production a lien on the resulting crops.) One creditor, creditor 3, claimed a lien pursuant to a filed financing statement and security agreement. A fourth creditor claimed priority based on a security agreement and financing statement filed after the documents filed by creditor 3, and just prior to debtors' filing their Chapter 11 petition. This creditor continued to advance money to the debtors after they filed.

Various objections to priority were made by various creditors. The court found as follows: creditors one and two held valid liens under the Nebraska lien statutes. While these creditors did not seek to foreclose their liens in the required time, this was due to the debtors filing bankruptcy and the resulting automatic stay. However, these liens were

inferior to the security interest of creditor three which was prior to these liens, at least with respect to some of the debtors real estate.

Creditor three held a valid first lien on certain parts of the debtors crop. However, in its financing statement describing other parts of debtors real estate upon which crops were to be grown, the creditor described the real estate as the "Robert Brown farm, Scottsbluff, Nebraska". This description, the court held, did not satisfy the requirements of U.C.C. 9-402. Thus, the security interest claimed under these documents was not perfected.

Creditor four was thus given priority over creditor 3 as to crops grown on the parcel of land inadequately described on creditor 3's documents. However, this priority went only to funds advanced prior to bankruptcy. As to those advanced after bankruptcy the court held that § 364 required authority for incurring secured debt, and the debtor did not get that authority.

Finally, the statutory liens held by creditors one and two were found not to be preferential transfers under § 547 (e)(6) because they were not avoidable under § 545. Further, the creditor urging that these statutory liens were preferences lacked standing to do so, since only the debtor or a trustee could involke the preference section.

56. In re Thomas Brown, (Bk87-869) (Cv. 87-0-580).

Debtors filed their Chapter 13 plan, providing for payment of the claim of the IRS. The plan stated that the first payments would be credited first to interest on bank taxes. The IRS objected to the plan. The Bankruptcy Court overruled the objection and approved the plan. The IRS appealed.

The District Court affirmed. While conceding that the IRS was correct in arguing that "involuntary" payments could not be allocated by taxpayer, the Court found these payments were not involuntary. Involuntary payments usually come about as the result of collection action such as levy or judicial action taken by the IRS. Here, though judicial action was involved, it was not in the nature of collection. The court hold that payments were not "involuntary" simply because proposed in a Chapter 13 Plan.

"Voluntary" or "involuntary" should be determined on a case-by-case basis, Judge Strom held, looking at the debtors motives and pre-bankruptcy actions. Here, the debtor was trying to preserve interest deductions which would help fund the plan, and not merely stalling the IRS.

57. In re Roeder Land & Cattle Co., (Bk87-1141).

Debtor mistakenly but in good faith filed for relief under Chapter 12. Upon discovering that it was ineligible for Chapter 12 it moved to convert to Chapter 11. Creditors moved to dismiss the case.

Judge Minahan concluded that under § 120 8 the only possible conversion was to Chapter 7, and that congress meant to exclude conversion to another reorganization chapter. The case was thus dismissed. (See also In re Block, (Bk87-2445).

58. In re C.R. Druse, SR. Ltd. (Bk87-346).

Debtor acquired land prior to Bankruptcy which had previously been valued in a decedents estate as "special use" property under IRC § 2032A. This land had been transferred to debtors transferees' by means other than decedents will, so that under IRC § 2034 and 2042 the property was included in the decedents estate for estate tax purposes. These transferees' transferred the property to the debtor, which gave creditors mortgages on the land.

After the debtor gave these mortgages the IRS filed notice of estate tax lien. [An automatic lien was acquired under IRC § 6324(a) on January 14, 1977, the date of the decedents death. This lien is good for 10 years. The IRS also claimed lien status under IRC § 6 321, the general lien statute]. Shortly thereafter debtor filed for relief under Chapter 12.

Debtors Chapter 12 Plan provided for extinguishment of IRS liens. The IRS objected to confirmation.

The court held that any lien acquired by the IRS under IRC § 6324 was lost when the land was sold and subsequently encumbered, as provided in IRC § 6324(a)(2). Further, since the IRS also claimed a lien under IRC § 6324(b) for additional estate tax due caused by the failure of the property to be used for the "special purpose" election, by the terms of IRC f 6324(b) the § 6324(a) lien was lost. Thus, the only lien held by the IRS was under § 6324(b), which first arose after the mortgages were given. That lien was thus junior to the mortgages. [The IRC failed to give required notices under IRC § 6321, and thus acquired no lien under that section].

Debtor proposed that this lien be extinguished, because the senior liens were greater than the value of the property. The IRS objected, claiming that it was entitled to keep its' secured status even if no value existed now,

because as payments of prior secured claims were made, the IRS lien would acquire value.

Judge Mahoney concluded that under § 506 the status of the IRS claim as secured or unsecured is fixed as of the date the claim is determined. A secured creditor may not share in appreciation of the property value. Thus, once the property has been valued the IRS's lien will be void except as to the value of that lien on that date.

Finally, the IRS objected to payment terms under the Plan. The Plan proposed payment over a term greater than that permitted under IRC payment provisions. The Court held that § 1222(b)(2) permits the debtor to modify the rights of secured creditors, and no reason existed to exempt the IRS from this category.

59. In re Jay Yost, (Bk83-1266)

Debtor filed a Chapter 7 petition, which the trustee concluded was a "no-asset" case. Later, the trustee discovered assets. He thus sent notices to creditors giving a bar date 90 days hence. One creditor filed its proof of claim 93 days later, to which the trustee objected as not timely filed.

The creditor argued that the 90 day period was enlarged by Rule 9006(f), which provides a three day saving period when the mails are used for notice. The trustee argued that 900b(b)(3) takes precedence over 9006(f), and that rule does not permit "enlargement" of time periods in cases such as this.

Judge Mahoney rejected that argument, noting that Rule 9006(f) was not an "enlargement" rule at all, and thus not subject to 9006(b)(3). 9006(f), he said, merely tells us what 90 days means when the mails are used. It means 93 days.

[60]- In re S.I.D. 65, (Bk85-756) (Cv. 86-0-1031)

The debtor filed for relief under Chapter 9. It then sought permission to classify bondholders and warrantholders differently, paying bondholders first. The Bankruptcy Court found that such classification was proper, and the warrantholders' appealed.

Judge Strom affirmed, finding that § 1122 permits classification of unsecured claims in separate classes if the claims entitle their holders to substantially different rights. Here, the court found, under Nebraska law the bondholders were entitled to the tax the S.I.D. property without limit to secure repayment. Warrantholders, however, could only tax in an amount equal to taxes imposed on

similar property. Thus, the court reasoned, bondholders' were preferred under Nebraska law, and could be classified separately for that reason.

61. In re Keith Beethe, (Bk84-1161)

Debtor filed a Chapter 11 petition, claiming certain real estate as exempt under the Nebraska Homestead exemption. Subsequently, this real estate was lost through relief and foreclosure. The debtor then converted to a Chapter 7 case, listing as exempt personal property in lieu of a homestead exemption. A creditor objected.

Judge Mahoney concluded that the date of conversion from Chapter 11 to Chapter 7 was the date to determine property of the estate and exemptions. Since on that date the land was no longer property of the estate, the debtor had no homestead to exempt, and came within the exemption provisions of R.R.S. § 25-1552. The new exemptions were allowed.

62. In re Lonnie Wilkins, (Bk87-2161).

Debtor filed for relief under Chapter 12. Bank claimed a security interest in debtors cattle. Shortly after filing debtor sold the cattle, in ordinary course, to a buyer, who then contracted with debtor to feed the cattle. The bank objected and sought to overturn the sale.

Judge Mahoney found .that the sale was in ordinary course and the price obtained fair, and refused to overturn the sale. He noted that a creditor is not entitled to force the debtor to feed and care for the cattle solely for the creditors benefit. So long as the sale was normal and at market rates, the Chapter 12 debtor is free to make this kind of decision.

63. In re Junior Nachtigal, (Bk86-1122).

Debtors filed a Chapter 13 petition, which they converted to Chapter 7. This case was dismissed because the debtors failed to appear at the § 341 meeting. A secured creditor moved to revoke the dismissal order, and was given relief from the stay. Foreclosure and replevin actions were commenced.

The debtors then filed a Chapter 12 petition. The bank moved to dismiss, which was sustained. The court concluded that the only purpose for filing the Chapter 12 petition was to reinvoke the § 362 automatic stay, and that under § 105(e) the proper way to prevent this abuse of process was to dismiss the case.

64. In re Dale Snover (Bk84-1867)

Debtor filed a Chapter 11 petition, which was subsequently converted to a Chapter 7 case. After such conversion, and more than 180 days after first filing the Chapter 11 petition, debtor inherited property from a relative. The trustee moved to include this property in the estate, claiming that under § 541(a)(5)(A) it was estate property because the debtor inherited it within 180 days of converting to Chapter 7.

The court, citing the case of Koch v. Myrvold, 784 f.2d 862 (8th cir. 1986), held that the 180 day period begins running when the Chapter 11 order for relief is entered. § 348(a) provides that a conversion from Chapter 11 to 7 does not affect a change in the date of filing of the petition. Since § 541(a)(5)(A) states that the 180 days runs from the date of filing the petition, that date must be the date the original Chapter 11 case was filed.

65. In re Larry Lehl, (Bk86-1606).

Bank argued that it held a perfected security interest, by virtue of its "contract rights" language in the security agreement, in CCC certificate issued to the debtor post-petition but applied for pre-petition. Debtor argued that Title 7, Part 770 of the code of federal regulations pre-empted state law and invalidated Bank's security interest in the CCC certificates.

Judge Mahoney agreed with the debtors, finding that section 770.4 CFR was intended to create certificates which could not be encumbered under state law. The court distinguished In re Sunberg, 729 f.2d 561 (8th cir. 1984) which had held § 770.6 CFR did not preempt state law liens on PIK certificates. Sunberg interpreted § 770.6, which was deleted prior to the "new" 770.4. Further, § 770.6 did not refer to "commodity certificates", which were specifically included in § 770.4. Thus, the court said, Sunberg is not relevant.

66. In re Laverne Kemp, (Bk87-1191).

Creditor obtained judgement lien on debtors homestead at a time when homestead exemption was $6,500.00. After legislature changed amount to $10,000.00 debtor filed a Chapter 13 petition, claiming a homestead exemption of $10,000.00. Creditor objected.

Judge Mahoney held that § 522(b) states that the debtor may exempt any property exempt under law "... applicable on the date of the filing of the petition."

68. In re George Anest, (Bk87-1218).

Debtors owned unencumbered land which they gifted to their children more than one year prior to filing a Chapter 12 petition. At all relevant times the debtors were indebted to bank, but their children were not.

After the debtor filed their petition, and without relief from the stay, the bank brought a fraudulent conveyance action against the children in Nebraska state court. The debtor moved for contempt against the bank, claiming it violated § 362(a)(b).

Judge Mahoney agreed, rejecting the banks arguments that, since the property was not property of the estate, the debtors were not involved in the state suit, and thus § 362 was in applicable. The court observed that if this was so, why was the bank proceeding against this property? The children were not its' debtors. The only claim which the bank could be asserting, the court found, was the claim against the debtors. All attempts to collect on the claim are stayed by § 362.

The bank was ordered to pay debtor attorney fees' and costs in both bankruptcy court and state court.

68. In re James Sock, (Bk87-326) .

Bank brought a § 506 motion for determination of secured Status, asserting also that it had a security interest in certain property allegedly purchased with proceeds from secured collateral. Debtors objected, claiming that this was an action to determine validity of a lien, and Rule 7001 required on adversary proceeding he instituted.

Judge Minahan agreed, holding that the predominant issues in the bank's motion went to existence and validity of the claimed lien, and not its value. § 506 is concerned mainly with value, and the motion practice permitted by Rule 3012 is limited to value issues.

69. In re Van O'Rourke, (Bk87-2259).

Debtors filed a Chapter 13 petition. The debtors' mother filed a claim for $100,000, alleging that debtor misappropriated that amount in a breach of fiduciary obligation. (Debtor was conservator for mother). Debtor disputed this claim, and mother moved to dismiss, claiming that the disputed debt pushed the debtor over the $100,00 debt limit of § 109(e).

Judge Mahoney agreed that not every disputed debt is per force a contingent debt, and excluded from computing the $100,000 debt limit. However, he agreed with the debtor that a breach of fiduciary obligation is similar to an unresolved tort action, which is usually considered a contingent, unliquidated debt. The mother's claim should not be considered in computing the 109(e) limit.

70. In re Kicken, (Bk87-2100).

Before filing their Chapter 12 petition debtors reached an agreement with a secured creditor concerning the sale by the creditor of certain property replivined by the creditor. The debtor said the credit failed to comply with the notice provisions of the U.C.C., relying on Allis-Chalmers v. Haumont, 220 Neb. 509, 371 N.W.2d 97 (1985), and as a result no deficiency judgement could be obtained by this creditor.

The creditor claimed that debtor waived any defense based on lack of notice when the agreement was reached see U.C.C. 9-504(e), and that the creditor was free to -pursue the debtor for the deficiency which resulted from the sale.

Judge Mahoney concluded that the agreement reached between the parties, while not expressly mutually releasing all parties from claims related to the dispute, nonetheless was intended by both sides to finally end the dispute. Thus, the bank gave up any claim it may have for a deficiency, and the debtor's gave up any claim they had under the U.C.C. for lack of proper notice.

71. In re Commonwealth Electric Co., Inc, (Bk87-2456).

The United States sought relief from the automatic stay or a determination that the exception of § 362(b)(4) was applicable. The U.S. wished to join the debtor in a suit for damages based on alleged violations of the False Claims Act, 31 U.S.C. § 3729-33. It argued that § 362(b)(4) applied to that action, and that the automatic stay was not applicable.

Judge Mahoney held that § 362(b)(4) excepted only governmental actions which were injunctive in nature, designed to enable governmental units to protect public health and welfare when a debtor files bankruptcy. Merely seeking money damages, as the U.S. was doing here, is not enough, the court said. Some enforcement of police or regulatory power must be coupled with the claim for damages. The was not present here, so the court found § 362(b) (4) not applicable.

72. In re Tobin Rach, Inc., (Bk87-2102).

Debtor, a corporation, filed for relief under Chapter 12. A creditor moved to dismiss the petition, claiming the debtor was not eligible under § 101(17).

Judge Mahoney found that leasing out the debtors' land on a crop share basis was a farming operation. However, because 50% of the stock in the debtor was owned by another corporation, Leo Tobin Farms, Inc., the court concluded that more than 50% of the stock in the debtor was not held by one family or relative of one family, as required by § 101(17). "Family" or "relatives" must be human, the court said. Since Leo Tobin Farms, Inc. was a real entity, and not human, the test was not met, and the case must be dismissed.

73. In re David Fulton, (Bk87-574).

After obtaining confirmation of the debtors' Chapter 12 Plan, the debtor's attorney was ordered to file a fee application, setting forth the work done and hourly charge. The attorney did so, but failed to itemize his time, stating that he did the case on a "flat rate" of $2,000.00, which was paid prior to filing the petition.

Judge Minahan concluded that while Rule 2016 does not require filing a fee application where not additional compensation is sought, Rule 2017 permits the court to review compensation paid pre-petition. Thus, the attorney was required to file a fee application under Rule 2017.

The court found the application filed too vague and indefinite, and ordered attorney to reconstruct the time and services.

74. In re Leo Tobin Farms, Inc., (Bk85-2806).

Debtor sought to avoid a mortgage on real estate given more than one year prior to bankruptcy. Debtor contended that § 544(b) permits it avoid the transfer because it violated the Nebraska Fraudulent Conveyance Act, § 36-604 Neb. Rev. Stat. (Reissue 1984). The Mortgages argued that the mortgage was given for fair consideration, and did not render the debtor insolvent.

Judge Mahoney concluded that the debtor was insolvent after the transfer, using a balance sheet, asset approach. Further, the court found that the only consideration given by the mortgage was a 4 1/2 month forebearance on foreclosing another mortgage held on other land in which the debtor had an interest. No new money was given at the time the mortgage was acquired. Since the mortgaged property was

worth around $600,000.00, the court concluded that the value of the forebearance was disproportionately small compared to that value, and thus the conveyance was fraudulent.

The court found that under the Nebraska statute it had several options in fashioning the appropriate relief, including voiding the entire transfer. The court asked for additional briefs on this issue.

75. In re James Kopecky, (Bk87-2833).

Debtor and his parents became joint obligors on a note to bank. Both the debtor and his parents gave the bank trust deeds on real estate owned by each separately. All the loan money went to debtor. Subsequently bank obtained a second mortgage on debtors real estate to secure additional loans.

After debtor filed his Chapter 7 petition bank sought to foreclose the mortgage on the parents real estate. The parents objected, contending that under the "Two funds" marshalling rule the bank had two funds to look to, while the parents had only one. Thus, the parents argued, the bank should be required to foreclose first against the debtor's land.

The court concluded that the marshalling doctrine was not applicable here because, even assuming the parents were creditors of the debtor, they were also debtors of the bank. Only creditors can invoke the equitable doctrine of marshalling.

76. In re Junior Nachtigal, (Bk86-1122)

Debtor claimed various property as exempt, including a homestead exemption in real estate owned by the husband, and personal property under the "in-lieu-of-homestead" exemption of § 25-1552 of the Nebraska statutes. A creditor objected on two grounds: first, the couple should not be permitted to claim both the homestead and the "in-lieu-of" homestead exemptions, and second each debtor should not be permitted to exempt property under the "equipment and tools" exemption when only one debtor used such tools.

Judge Minahan concluded that each debtor was entitled to the exemptions under state law. Since the husband claimed the homestead exemption the wife could claim the "in-lieu-of" homestead exemption of $2,500.00. Further, the "equipment and tools" exemption is available to each debtor, whether or not each person actually uses the exempt property. § 25-155 6 states that the exemption is for such property used "by the debtor or his family". The court thus overruled the banks objections.

77. In re Van O'Rourke (Bk87-2259)

Debtor filed a Chapter 13 Plan providing for virtually no payment of scheduled unsecured creditors. One of these creditors was the conservator of debtor's mother. She claimed that the debtor misappropriated funds of the mother prior to bankruptcy, in breach of the debtors fiduciary obligations to the mother. This creditor objected to the plan on basically two grounds; the mother's debt was nondischargeable, and the Plan does not pay as much as a Chapter 7 liquidation.

Judge Mahoney concluded that the objections should be overruled. The court found that even if the debtors were found to have breached a fiduciary obligation to the mother, which arguably would be nondischargeable under § 523(a)(4), that section does not apply in a Chapter 13 case. Rather, the plan must be filed in "bad faith." See Education Assistance Corp v. Zellner, 827 F2d 1227 (8th Cir. 1987). The court found that because the debtors disclosed the debt to the mother, and did not try to hide assets and cooperated with the Bankruptcy Court, that the plan was filed in good faith under Zellner.

The court also found that the creditor was receiving as much as would he received in a Chapter 7 case. The creditor argued that if this were a Chapter 7 case the debt would be nondischargeable, and the creditor would retain the right to pursue the debtors. That right would be gone in the Chapter 13 Plan. The court, relying on Zellner, rejected this analysis. All that is required is a determination of the value of property which would be liquidated in a Chapter 7 case. The right to pursue the debtor is not property.

78. In re John Zaliauskas, (Bk87-385).

Debtors listed the IRS as a creditor based on claims for personal income tax. The IRS claimed priority for some of those taxes under § 507 (a) (7) (A) (ii) , as having been assessed within 240 days of bankruptcy.

The court found no priority. Section 50 7 does give priority for the taxes assessed within 240 days of filing, plus any time plus 30 days during which an offer of compromise made after assessment was pending. Here, the debtor made an offer to compromise before the tax was assessed. The IRS waited more than 240 days to reject that offer. Once they did, the debtors filed their petition. Under these circumstances the priority does not exist, and the taxes are unsecured.