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## FACING THE ISSUES®

LEGAL BRIEFS FROM THE ATTORNEYS OF MACKALL, CROUNSE &amp; MOORE, PLC

**Creditors' Corner****Service By Publication Effective in Action to Renew Judgment**

At issue in *Shamrock Development, Inc. v. Denison Smith and Dakota Turkey Farms, L.P.*, A06-1647 (Minn. App., August 21, 2007) was service on the debtor. There, Farm Credit Leasing Services Corp. leased agricultural facilities and equipment to Smith and Dakota Turkey Farms. After default, FCL obtained a judgment against the debtor and guarantors which it assigned to Shamrock. Shamrock brought a lawsuit to renew the judgment before it expired ten years from entry. The debtor appealed the finding that service on him by publication was proper. The debtor asserted service was improper because Shamrock allegedly failed to comply with state law service by publication requirements and the summons did not contain the requisite alternative dispute resolution language. The Court of Appeals held that service of the renewal lawsuit on Smith through publication was effective in light of the contents of Shamrock's affidavit and Shamrock's attempts to locate the debtor. The Court of Appeals went on to find the failure to include the requisite alternative dispute resolution in the summons was not a jurisdictional error requiring dismissal.

**Debtor Not Allowed to Take Standard Vehicle Expense Deduction When Vehicle Owned Outright; Debtor Allowed Deduction for Mortgage Payment Despite Intent to Surrender Property**

In *Fokkena v. Hartwick (In re Hartwick)*, 2007 WL 2350560 (D.Minn. Aug. 20, 2007), the issues on appeal pertained to debtor's entitlement to certain deductions under the means test. On her means test form, she deducted her mortgage payments as payments on secured collateral, although she was not making the payments and had indicated her intent to surrender the property. She also deducted the standard IRS amount for vehicle ownership expenses, although she owned her vehicle free and clear of any liens. Using these amounts, Hartwick showed a negative disposable income. The U.S. Trustee moved to dismiss Hartwick's bankruptcy case under 11 U.S.C. § 707(b) based on the presumption of abuse. The Bankruptcy Court denied the U.S. Trustee's motion to dismiss and ruled that the debtor could deduct both her mortgage payments and her vehicle ownership expenses. The U.S. Trustee appealed. The District Court affirmed that Hartwick could deduct the payments secured by her home because her payments need only be contractually due in the 60 months after her petition. But the District Court reversed the Bankruptcy Court's decision with respect to the automobile based on IRS standards and policy concerns.

**Motion for Turnover of Checks Written But Not Honored Denied**

In *Brown v. Pyatt (In re Pyatt)*, Case No. 06-3404 (8th Cir. May 23, 2007), the issue was whether the debtor was required to comply with the trustee's demand for turnover. Trustee sought the value of checks written pre-petition, not yet processed as of the petition date, and honored post-petition. The trustee argued that because the checks had not been honored as of the petition date, they were still in the debtor's possession and thus subject to turnover. The bankruptcy court agreed, the Bankruptcy Appellate Panel reversed, and the Eighth Circuit affirmed. Noting that the turnover statute fails to address turnover rights of a bankruptcy trustee, the Eighth Circuit examined pre-Bankruptcy Code case law and other Bankruptcy Code provisions. Viewing the pre-Bankruptcy Code case law in light of the fact that the trustee can pursue the payees, the Eighth Circuit found the debtor was not required to comply with the trustee's demand for turnover.



## Bank's Lien Not Defeated

Applying Iowa law, the Bankruptcy Appellate Panel for the 8th Circuit held that a bank lien was not defeated by purchasers of agricultural lime from a quarry who stored the purchased lime unsegregated at a Chapter 11 debtor's quarry. In *In re Western Limestone*, 2007 WL 793084, the court found that identification of a fungible good by reference to an undivided share in the bulk quantity did not meet the requirements of a constructive possession and thus the bank's lien was not defeated.

## Maintenance Payments Outside of Plan

Continuing the majority trend, the Bankruptcy Appellate Panel for the 9th Circuit held that the debtor may act as the disbursing agent for maintenance payments on long term residential debt under a Chapter 13 plan. In *re Lopez*, 2007 WL 2398579 found that changes to the Bankruptcy Code did not affect the debtor's right to make direct payment of the post-petition installments while treating the cures of pre-petition defaults on the same debt under the Chapter 13 plan. The Bankruptcy Code already allows the debtor to abrogate the secured creditor's right to accelerate the entire debt. The effect is that the defaults at the time of bankruptcy can be cured over the course of the plan if the post petition payments are timely made.

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