The Cramdown

The Newsletter of the Tampa Bay Bankruptcy Bar Association
Editor-in-Chief, Larry Foyle, Esq.

Spring 2007

PRESIDENT'S MESSAGE

by Herb Donica, Esq.
Donica Law Firm, P.A.

We are having a busy year and time seems to be flying by faster than I realized. By the time you get this issue of the Cramdown our website should be fully operational. Check it out: www.brokenbench.org. All of our programs are listed in the online calendar. Soon, each of you will be asked to activate your membership profiles. Greg McCoskey and Elena Ketchum have done a great job in bringing us into the electronic age.

On January 30, 2007, we held an all-day seminar. This event represents a significant landmark in our Association's presence in the legal community for two reasons. First, our guest speaker was the Honorable Jeffrey Hopkins, Bankruptcy Judge for the Southern District of Ohio. Judge Hopkins is also the President of the National Conference of Bankruptcy Judges. As a speaker, he is in high demand because of this position and also because of his ability to speak to lawyers about diversity and professionalism. He delivered an inspirational talk over lunch and also gave a multimedia presentation about diversity and minority advancement. As a result of Judge Hopkins' visit, we have also established a working relationship with the George Edgecomb Bar Association. Several members of GEBA attended Judge Hopkins' lunch presentation and reception and we are now discussing other avenues of cooperation.

Our Consumer Section Chairperson, Kelley Petry, has continued to chair the monthly brown bag lunch seminars. She is also organizing our efforts to address an increase of the "presumptively reasonable fee" for Chapter 13 cases. She has worked closely with the judges and our judicial liaison committee to generate a format for our judges to consider the appropriate fees to be awarded in Chapter 13 cases. We will be circulating more information about this program in the next few weeks.

The Community Relations Committee, headed by Ed Whitson, has been busy working on its project funded by the Florida Bar Foundation. The multimedia presentation aimed at educating the public as to their rights under BAPCPA will be completed in June.

If you have any suggestions or recommendations regarding the Association's programs, please feel free to contact me or any Board member.

Herb Donica 813-878-9790 • herb@donicalaw.com

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The *Cramdown* can be accessed via the Internet at www.flmb.uscourts.gov and www.brokenbench.org

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Joint Check Agreements in Florida Bankruptcy Cases

by Edward Peterson, Esq.
Stichter, Riedel, Blain & Prosser, P.A.

Since the 1920s, Florida's climate and many natural attractions have led to rapid population growth, which in turn has fueled the construction of new residential, retail, and office buildings. Frequently, this has resulted in a "boom and bust" cycle as interest rates have risen and supply has outpaced demand for the new buildings. It has been more than a decade since Florida has experienced a major downturn in construction activity, and many are speculating that the first area of the Florida economy that will falter is the construction industry. Joint checks are used rather commonly in the construction industry to ensure that funds paid to a general contractor are actually transmitted to a supplier (the "Supplier")[1] with possible lien claims. Consequently, this article explores the legal issues surrounding the use of joint checks in a construction setting and the issues that may arise in a bankruptcy context, including recovery of voidable preferences.

If money is due under a construction contract (or subcontract) at the time a contractor (the "Contractor") files for bankruptcy, the Contractor (or more likely, the chapter 7 trustee in the case of a chapter 7 filing or conversion to chapter 7) may demand that the owner (the "Owner") pay the money directly to the Contractor or trustee, and not by joint check to the unpaid Supplier, irrespective of any joint check agreement. Moreover, if a Contractor has made a payment by joint check within ninety days of the bankruptcy filing, the Contractor or trustee, as the case may be, may be able to recover the payment as a preference under Section 547 of the Bankruptcy Code. How well a joint check agreement stands up to these challenges will depend, in large part, upon how well the agreement was drafted.

JOINT CHECK PAYMENTS AS AVOIDABLE PREFERENCES:

Under the Bankruptcy Code, certain payments made to (or for the benefit of) a Contractor's creditors may subsequently be recovered by the trustee as an avoidable "preference." In order for such a payment to be a "preference," several conditions must be satisfied. Among those conditions is the requirement that the Contractor must have had an "interest" in the money paid.

The bankruptcy trustee may argue that, because the Contractor was a joint payee on the joint check, the Contractor had the requisite "interest" in the check proceeds and the payment to the Supplier was a preference. The Suppliers, on the other hand, will respond that the joint payee status of the Contractor is not sufficient to give the Contractor an "interest" in the funds. Under certain circumstances, the trustees or debtors have been successful in recovering payments made to Suppliers pursuant to joint checks, especially where courts determine that the Owner or Contractor did not have an independent obligation to pay the Supplier. *See e.g. Code Elec. v. Crampton*, 197 B.R. 807, 808-09 (Bankr. E.D. N.C. 1996); *In re Underground Storage Tank Tech. Serv. Group*, 212 B.R. 574, 579-81 (Bankr. E.D. Mich. 1997) (indicating that a payment on a joint check from the Contractor to the Supplier and its subcontractor might become the Supplier's property if the Contractor owed no independent obligation to the Supplier's subcontractor.).

Some courts, however, including the Bankruptcy Court for the Middle District of Florida, have held that payments made by joint check are deemed to be "earmarked" for the benefit of the Supplier and, thus, are not subject to avoidance because the money does not become property of the Contractor. *See In re Winsco Builders, Inc.*, 156 B.R. 98, 100-01 (Bankr. M.D. Fla. 1993) ("It is generally recognized that where the payee controls the application of the funds by requiring dual endorsement before the check can be negotiated, the funds are claimed to be earmarked funds insured on the specific condition that a joint payee shall receive the proceeds, the debtor who is already a named payee is merely deemed to be a conduit for those funds, which did not become the property of the debtor's estate."). *See also, In re Davidson Lumber Sales, Inc.*, 66 F.3d 1560, 1568, n. 10 (10th Cir. 1985).

The terms of the joint check agreement itself generally are determinative. However, the parties' conduct also is relevant. For example, in *Mid-Atlantic Supply v. Three Rivers Aluminum Co.*, 790 F.2d 1121, 1125-27 (4th Cir. 1986), the Fourth Circuit Court of Appeals held that a joint check in the Contractor's possession at the time of the bankruptcy filing was not property of the estate where the Supplier acted in reliance upon the joint check agreement in supplying the Contractor with materials.

JOINT CHECK PAYMENTS UNPAID WHEN THE BANKRUPTCY IS FILED.

If a Contractor owes a payment under a subcontract or

1 The Supplier could be a subcontractor or material supplier.

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People On The Go

by Andrew T. Jenkins, Esq.
Bush Ross, P.A.

Edmund S. Whitson III has been named a shareholder in the Tampa office of Akerman Senterfitt. Mr. Whitson will continue to focus his practice in bankruptcy and creditors' rights.

Stichter, Riedel, Blain & Prosser, P.A. has opened an office located at 1342 Colonial Blvd., Suite H57 Fort Myers, Florida 33907.

Noel Boeke with the law firm of **Holland & Knight** was recently elected president of the Florida Turnaround Management Association, an international non-profit association dedicated to corporate renewal and turnaround management.

The softball team consisting of employees and friends from the federal courts, The Feds, was recently the runner-up in the Plant City Recreation Department's Co-Ed Winter Fest Softball Tournament. The Feds are coached by **Barry Clark**, Courtroom Deputy for Chief Judge Paul Glenn, and other team members from the bankrupcty court are **Richard Arendt**, Assistant Systems Manager, and **Jill Norris**, Supervisor of the Judge McEwen team.

Jay Harpley recently announced that he is stepping down from the Panel of Trustees and scaling back his law practice. There was a "retirement" party and many people attended on February 28, 2007 on the roof of The Fly restaurant on Franklin Street to wish Jay well.

Luis Martinez-Monfort recently joined the law firm of Brewer & Perotti, P.A. With the edition of Mr. Martinez-Monfort, the firm will be re-named Brewer Perotti Martinez-Monfort, P.A. Mr. Martinez-Monfort will continue to focus his practice areas of bankruptcy, creditors' rights and commercial litigation.

Submissions to **People on the Go** may be emailed to ajenkins@bushross.com

Bankruptcy Still An Option

Your article titled " 'Song and Dance' Brings Loss of House" (Business, Jan.30) highlighted the scams perpetrated on homeowners who have missed payments on their home mortgages and are seeking a method to save their homes from foreclosure. The article failed to mention the option of a bankruptcy filing by the homeowner. Bankruptcy is a right provided by federal law and, despite changes to the law in Oct. 2005., it is still an available avenue to save homes from foreclosure.

Chapter 13 of the Bankruptcy Code is designed specifically to allow homeowners to pay past due mortgage payments over a period of 60 months while maintaining the current monthly payments. Homeowners who have had an interruption in income due to unemployment or illness but who are back to work are good candidates for a Chapter 13. Consultation with an attorney specializing in bankruptcy will allow a homeowner to weigh the pros and cons of a bankruptcy filing for his or her specific circumstances. Also, information on bankruptcy is available on the court's website at www.flmb.uscourts.gov. Choose "information" and then "bankruptcy basics."

Shirley C. Arcuri, Vice President
Tampa Bay Bankruptcy Bar Association

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List Serves & Blogs

For those of you who are looking for a platform or want to find out what the buzz is all about, you might check out the following:
http://www.bankrupt.com/mail_lists/rt-req.html

The above web address is for a round table discussion and allows anyone to join the list upon entering his or her email address. For more information go to: http://www.bankrupt.com/mail_lists/discussion.round.html

Reminder: Anyone who comes across a valuable website helpful to your bankruptcy practice should forward same to Larry Foyle (LFoyle@Kasslaw.com) and it will be published in a future issue of the Cramdown

Department of Justice

Operation Truth or Consequences

TARGETS BANKRUPTCY FRAUD ACROSS THE COUNTRY; U.S. TRUSTEES ANNOUNCE BANKRUPTCY FRAUD HOTLINE

United States Attorneys have filed criminal charges against 78 individuals in 69 separate prosecutions in 36 judicial districts on a variety of federal bankruptcy fraud and related counts, including 18 cases recently announced by Deputy Attorney General Paul J. McNulty. The announcement is the culmination of "Operation Truth or Consequences," a nationwide sweep that demonstrates the breadth of enforcement actions taken by the Department of Justice to combat bankruptcy fraud and protect the integrity of the bankruptcy system.

Also announced was the creation of a new Internet hotline for reporting suspected bankruptcy fraud to the U.S. Trustee Program, the Department of Justice component that promotes and protects the integrity of the bankruptcy system. Members of the public can now report suspected bankruptcy fraud via email to USTP.Bankruptcy.Fraud@usdoj.gov.

"Today we send a clear message to those who abuse, for their own criminal financial gain, the bankruptcy system's promise of a fresh start to honest Americans." said Deputy Attorney General McNulty. "A bankruptcy filing is often the last step of a series of criminal acts, including mortgage fraud, bank fraud, mail fraud, money laundering, and government program fraud. Bankruptcy fraud is often the tip of the criminal iceberg, and that makes these prosecutions so important."

Collectively, the Operation Truth or Consequences bankruptcy fraud sweep includes charges filed against nine attorneys, two bankruptcy petition preparers, and one former law enforcement officer; alleged concealment of more than $3 million in assets; use of false Social Security numbers and false identities; submission of forged documents and use of false statements; defrauding of individuals whose homes were in foreclosure; fraudulent receipt of government loans and benefits; and various other unlawful acts.

"Bankruptcy fraud must not be tolerated, if our bankruptcy system is to serve its purpose of helping the honest debtor in need of financial relief," said Clifford White, Acting Director of the Executive Office of U.S. Trustees. "Operation Truth or Consequences highlights the commitment of the Department of Justice and our law enforcement partners to vigorously investigate and prosecute bankruptcy fraud wherever it occurs."

"Today's operation is a comprehensive, nationwide sweep that highlights the scope of bankruptcy fraud and the negative impact on the economy," said Chip Burrus, FBI Assistant Director for the Criminal Investigative Division. "Through our collaborative efforts with law enforcement, the FBI remains dedicated to pursuing those individuals who attempt to use our Nation's bankruptcy system to further their criminal intents."

Operation Truth or Consequences is a joint criminal enforcement effort by the U.S. Attorneys' Offices, U.S. Trustee Program, FBI, Department of Housing and Urban Development Office of Inspector General, Social Security Administration Office of Inspector General, U.S. Postal Inspection Service, Internal Revenue Service Criminal Investigation, and U.S. Secret Service.

The charges contained in an indictment, information or criminal complaint are merely allegations, and the defendant is presumed innocent unless and until proven guilty beyond a reasonable doubt.

Interview with Judge McEwen

by Donald R. Kirk, Esq.
Fowler White Boggs Banker, P.A.

I recently had the pleasure of interviewing our newest bankruptcy judge, Cathy McEwen. As we all know, Judge McEwen was, and remains, one of our most active Association members. Just a few years ago she served as our Association's President. We thought it would be interesting to hear from one of our own about what life is like on the bench.

Q. Now that you are on the bench, is there anything that has surprised you?
A. I find it strange to watch lawyers who I know are very good friends with each other argue before me as adversaries. I never gave it a thought when I did this myself as a practitioner, but it is peculiar to watch it from the judge's perspective. I think to myself, "how can they be arguing against each other like this?" Lawyers definitely take on different roles and tones as advocates. I suppose I have always known this, but it is particularly noticeable from my new perspective.
I am also surprised that I do not have as much time as I had expected to write orders or review submitted orders against my hearing notes. I am on the bench approximately 50-60 percent of my time during business hours, and we judges spend a great deal of time on administrative matters, particularly in response to changes brought on by BAPCPA and changes the Court is making to make the practice more efficient and less costly to the litigants. We also have a lot of reading to do – everything from reports from our Clerk or the Administrative Office of the Courts, to new decisions, to motions and deposition transcripts and case law cited in motions. To prepare my own orders and review submitted orders and sign them, I usually find myself working after hours or on weekends. And, of course, the work we do for our local, state, and national bar associations is on top of that.

Q. Do practitioners act differently around you now that you are a judge?
A. For the most part I have found that people generally act the same around me. Lawyers certainly show me the respect they should to a judge, especially in the courtroom. Outside of the courtroom, when I am among several practitioners, for example, attorneys typically refer to me as Judge McEwen. However, in social settings many lawyers continue to call me Cathy in appropriate situations, such as in church, or at a sports event, or at a mutual friend's birthday party. Most lawyers know how to act appropriately, which makes my job easier.

Q. Is it more or less difficult than you thought it would be to make decisions affecting the lives of individual debtors?
A. It is a little easier than I thought. I have found that if you give an individual a reasonable amount of chances to satisfy his or her obligations (such as minimal monthly payments on an automobile loan), then the individual understands when those chances have run out. They then usually accept my "tough decision" since they know they had many chances to remedy the problem.

In terms of reaching a decision where there may be a split of authority, I also believe these decisions are easier than I would have thought. If there is no

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2006 Florida Exemptions Case Law Update

by Dennis J. LeVine, Esq.
Dennis LeVine & Associates, P.A.

Several important cases were decided in both the federal and state courts in 2006 interpreting Florida's exemption laws. This article summarizes the holdings of these cases.

Limitation on Homestead by Commercial Use of Property

The debtor's real property was used in part to lease mobile home sites. The Court held that when a portion of the property is used for commercial purposes, the debtor cannot claim that portion as homestead. *In re Radtke*, 344 B.R. 690 (Bankr. S.D. Fla. 2006)(finding no binding Florida Supreme Court authority, and declining to follow *Davis v. Davis*, 864 So.2d 458 (Fla. 1st DCA 2003)).

Filing a Notice of Homestead Not Prerequisite to Homestead Claim

Florida Statute 222.01 states that a person who is entitled to the homestead exemption "may file a notice of homestead in the public records of the county in which the homestead property is located". In order to assert a claim of homestead, however, the Court held that filing the designation under 222.01 is not required. *Siewak v. AmSouth Bank*, 2007 WL 141186 (M.D. Fla. 2007)(court did not dismiss action to declare property homestead based on the Plaintiffs' failure to file a declaration under 222.01, which is permissive, not mandatory).

Homestead Exemption Cannot be Waived

A homestead can only be waived for the purposes described in the constitutional provision, such as contracts involving work performed on the homestead. The Court held that the Constitutional homestead exemption cannot be waived, even when a waiver is given in writing. *DeMayo v. Chames*, 934 So.2d 548 (Fla. 3rd DCA 2006)(client's waiver of the constitutional homestead exemption in retainer agreement with law firm, which allowed the law firm to enforce a charging lien against all of client's property including his homestead, was invalid). **NOTE:** The Third DCA certified this issue to the Florida Supreme Court)

Non-Resident Cannot Claim Homestead Exemption

A Hungarian national moved to Florida and purchased a home. He was not a permanent resident. The Court found that he lacked the legal ability to formulate intent to remain permanently within State of Florida. As a result, the Court held that the debtor was not entitled to Florida homestead exemption in real property on which he resided. *In re Fodor*, 339 B.R. 519 (Bkrtcy. M.D. Fla. 2006).

Homestead Protection Extends to Property Held in a Revocable Trust

The Florida Constitution requires homestead property be "owned by a natural person". Courts liberally construe the homestead provision in favor of protecting the family home. The Court held that real property owned by a revocable trust may still qualify for homestead protection. *In re Alexander,* 346 B.R. 546 (Bankr. M.D. Fla. 2006)(cases cited); *In re Edwards*, 2006 WL 3788803 (Bank. M.D. Fla. 10/4/2006) (rejecting *In re Bosonetto*, 271 B.R. 403 (Bankr. M.D. Fla. 2001).

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Interview with Judge McEwen

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clear cut answer and there is a split of authority, then common sense guides me to pick one line or the other, which makes things easier. As long as the decision is based on something arguably defensible, then I have done my job, and it is then the appellate court's job to resolve the split.

Q. Do the Judges discuss difficult legal matters amongst themselves?

A. Yes. I often find myself brainstorming with my fellow bankruptcy judges. This allows us to exchange one another's thoughts and ideas, which helps considerably in reaching decisions.

Q. What type of issues or legal matters do you get most excited about?

A. I actually like them all. I like complex cases. I like cases involving an elderly pro se debtor pleading his case to me on an emotional level. It is all very stimulating. Deciding an issue for the first time can also be very interesting. I recently became the first judge locally to decide an issue known as "B22C Line 28" issue, which deals with the allowance of car expenses. It was exciting to know that my decision could guide future Chapter 13 plan strategies on this issue – at least until I'm reversed.

Q. Is it an empowering feeling to know that you can author decisions which would affect the bankruptcy practice for years to come?

A. No. It actually makes you have a higher sense of responsibility. The bottom line is we have try to get it right. Sometimes there is no clear cut right answer. In those cases, I am guided by what the 11th Circuit told me when I first became a judge. I was told that the 11th Circuit would not mind so much if I made mistakes of law, but it would not like it if I treated people badly or improperly.

Q. What types of things do you think the Association can do to improve relations with the bench?

A. The judges in the Tampa and Fort Myers divisions uniformly and enthusiastically agree that we have an excellent communicative and collaborative relationship with the bar, largely due to the work of the TBBBA over the years. To take it to the next level, I think the Association should look into some type of funding for bankruptcy lawyers to assist pro se filers, which, in turn, will assist the bench to do its job. For example, there is something called the Bench-Bar Fund, which is funded by lawyers practicing in the Middle District and administered by the District Court. These funds are used for investitures and special projects. I am not aware that the bankruptcy practitioners here have applied to use any of this money to improve bankruptcy practice in the District. Perhaps a portion of those funds can be used to pay a small amount to lawyers who assist pro se filers. And maybe those funds could be supplemented by unclaimed, disbursed funds in Chapter 11 cases where the plan provides for such use, but the bar needs to be educated that this can be done. Judge Laurel Isicoff in Miami was an early proponent of such plan provisions when she was in the practice. Food for thought, right?

We are also working on a consumer debtor portal on our own Middle District of Florida website. This portal will assist pro se debtors in their cases, such as by providing links to plan calculators, model chapter 13 plans, and the like. It would be helpful if the Association website could provide a link to this portal once it is up and running.

Q. What is it like working with pro se debtors?

A. I am actually surprised by how many pro se debtors there are and how ill-equipped many of them are to traverse the Code and rules and recognize practical realities, particularly in Chapter 13 cases. Its often difficult for us as judges because we know what many pro se debtors need to do procedurally to keep their case alive, but we cannot tell them exactly how to do it in detail because we cannot act as advocates. We do the best we can to point them in the right direction. Many pro se debtors can use some help. I recently had a case where a pro se Chapter 13 debtor proposed a 100 percent plan for no good reason. I knew it would be impossible for him to satisfy the plan payments. During the hearing, I asked if anybody in the court room would be willing to help this debtor, and someone volunteered. I think we need more of that type of help from the bar.

Pro se filers are generally good people and very

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November Luncheon Meeting

Article 9 Issues in a Bankruptcy Context

The TBBBA held its November Luncheon Meeting on November 14 at The University Club of Tampa. Bankruptcy practitioners Rod Anderson, John A. Anthony, and Mark J. Wolfson discussed Article 9 issues in a bankruptcy context with a special emphasis on the offensive and defensive opportunities that Article 9 can provide. The panel gave several "real-life" examples of how they had used Article 9 (or had Article 9 used against them) in bankruptcy cases, including some cases with other members of the panel. A highlight of the panel discussion was how the provisions of Article 9 could be used by a debtor in fashioning its cash-collateral obligations and in structuring its Chapter 11 Plan. This successful luncheon was the result of the hard work of Stephenie Biernacki and Rob Soriano.

From the Desk of...

Professor Elizabeth Warren

Once again, the folks affiliated with the Consumer Bankruptcy Project are back in the field collecting data from the families filing for bankruptcy. For the first time ever, we're trying for a national sample. That means we're mailing out questionnaires, and hoping for a big response rate.

If you are a practicing attorney and you receive a question from a client about the CBP questionnaire, please consider urging your client to participate. All the procedures have been approved by human subjects review boards at several universities, and all responses will be confidential. Besides, anyone who is willing to participate in a telephone interview can also earn $50.

A high response rate is critical to the validity of the study. We hope to collect some important data about who is in bankruptcy now, and we appreciate the support of the bankruptcy community in that effort.

Annual Clerks Appreciation Luncheon

The Tampa Bay Bankruptcy Bar Association proudly hosted a luncheon on November 9th for the Clerk's Office of the Tampa Bankruptcy Court, as well as Judges, law clerks and other Chambers personnel. The Clerk's Office organized a Committee, consisting of Jeanine Frensley, Meghan Kenefic, Delores Church, Nita Balames, Dianna Valencia and Anel Merritt, to plan the event and decorate the Fifth Floor training room in a festive Fall theme. The delicious lunch was catered by the Spain Restaurant and those in attendance indulged in savory roast pork, hearty black beans with yellow rice, chicken and rice, and plantains, with creamy flan and stuffed crepes for dessert. Herb Donica, president of the TBBBA spoke at the luncheon and expressed the Bar's appreciation of the Court's staff and the good relationship between the Clerk's Office and the TBBBA. This year was the fourth year of this annual event. After the luncheon, Chuck Kilcoyne delivered the surplus food to Metropolitan Ministries.

TAMPA BAY BANKRUPTCY BAR ASSOCIATION NINTH ANNUAL GOLF TOURNAMENT

Sponsored by Equity Partners, Inc., Bush Ross, P.A., Bay Area Auction Services, Inc., and Berman PLC

When:	Friday, April 20, 2007 11:30 p.m. check-in/lunch* 12:45 p.m. shotgun start
Where:	Bay Palms Golf Club MacDill AFB** Tampa (813) 840-6904
Format:	Four person scramble
Fee:	$60.00 per person (Includes golf, box lunch, drink tickets, prizes, dinner and more)

Marrama v. Citizens Bank of Massachusetts, __ S. Ct. __ 2007 WL 517340 (Feb. 21, 2007)

by Larry Foyle, Esq.
Kass, Shuler

Judge Paskay has been heard to remark "Nothing in Life is Absolute, Except Vodka". The United States Supreme Court recently weighed in on this maxim. The Supreme Court in a 5-4 decision in the case of *Marrama v. Citizens Bank of Massachusetts*, __ S. Ct. __, 2007 WL 517340 (Feb. 21, 2007) concluded that a Debtor who acts in bad faith in a Chapter 7 case does not have an absolute right to convert to a Chapter 13 case. The facts demonstrated that the Debtor failed to disclose assets in his chapter 7 case and that he had transferred his home to a self-settled Trust because he wanted to protect the asset from his creditors. In addition the Debtor failed to disclose that had filed for and was about to receive a tax refund of $8,000 . To add insult to injury, the Debtor also claimed a piece of real property in which he was not residing as his homestead.

The *Marrama* decision (pre-BAPCPA) is perhaps a surprise to some, but for others appears to reflect the manner in which Bankruptcy Courts have dealt with this issue and have managed their own courtrooms and dockets. On the one hand, some Bankruptcy Courts have considered a Debtor's bad faith as a basis to dismiss a pending Chapter 13 case or to prevent confirmation of a Chapter 13 plan. The Supreme Court, however, went beyond those kinds of decisions and determined that bad faith could play a role in precluding even the filing of such a case under Chapter 13. If bad faith allowed a Court to dismiss a pending chapter 13 case, the Court reasoned, it could also preclude the Debtor's right to convert to a Chapter for which the Debtor would not be eligible for relief .

Section 706(a) of the Bankruptcy Code provides that "[t]he debtor may convert a case under this chapter to a case under chapter 11, 12 or 13 of this title at any time, if the case has not been converted under §1112, 1208 or 1307 of this title. Any waiver of the right to convert a case under this subsection is unenforceable." The Supreme Court determined that subsection (a) of Section 706 was not the end of the inquiry. The Court narrowed its focus to Section 706(d) which provides that "(n)otwithstanding any other provision of [§706], a case may not be converted to a case under another chapter of this title unless the debtor may be a debtor under such chapter."

The dissenting opinion applied the plain-meaning doctrine and pointed out that eligibility is a Section 109 concept that only has two requirements for Chapter 13—Debtor must be an individual with regular income, and the Debtor's debts may not exceed certain debt limitations. In the dissenters' eyes, the Debtor would be permitted to convert his case to a Chapter 13 proceeding because he met these two requirements nothwithstanding the pervasive bad faith involved in his Chapter 7 filing.

The *Marrama* decision exposes some of the ironies of the Bankruptcy code in its pre-BAPCPA and post-BAPCPA forms. Consider the following scenarios: a) Debtor files Chapter 7 and is found to have abused the system and is shown the dismissal door, or given the option to convert to chapter 13; b) Debtor files a chapter 13 in bad faith and is either shown the dismissal door or given the opportunity to convert to chapter 7. Now we have the ironic *Marrama* situation of a Debtor who acts in bad faith and seeks to escape to another Chapter and is retained in the very Chapter that he filed under.

It is obvious why Mr. Marrama sought to convert his Chapter 7 case to a Chapter 13 proceeding. For Mr. Marrama, in his pre-BAPCPA case, a detour to Chapter 13 provided a super discharge with many benefits provided that he was able to propose and complete a confirmable Plan Under BAPCPA, however, Chapter 13 no longer provides such relief to a bad faith debtor seeking to escape discharge and dischargeability bars in a Chapter 7 case.

In the final analysis, *Marrama* may end up being just another case superseded by statutory reform (principally the good faith requirements of Chapter 13 and removal of the super-discharge). *Marrama* does reaffirm that Courts have inherent powers to correct wrongs and Courts do not need to resort to plain meaning to correct the wrong behavior. Mr. Marrama was a Chapter 7 Debtor who acted badly and got caught.

Legislative Initiative Would Create Bankruptcy Awareness for Borrowers in Foreclosure

by Susan Sharp, Esq.
Stichter, Riedel, Blain & Prosser, P.A.

Florida ranks as one of the nation's top foreclosure states, with Miami and Fort Lauderdale ranking third and fifth, respectively, in the nation. With rising adjustable interest rates, increases in property insurance premiums and energy prices, Floridians are finding themselves one crisis away from financial ruin.

Recently several individuals brought this growing problem to the attention of state Senator Arthenia Joyner. Senator Joyner promptly acted by introducing Senate Bill 1460 on February 9, 2007, for consideration during the current legislative session. Essentially, this bill, if passed, would require a foreclosing mortgage holder to serve written notice with the foreclosure complaint that filing bankruptcy is a possible option for curing a mortgage default.

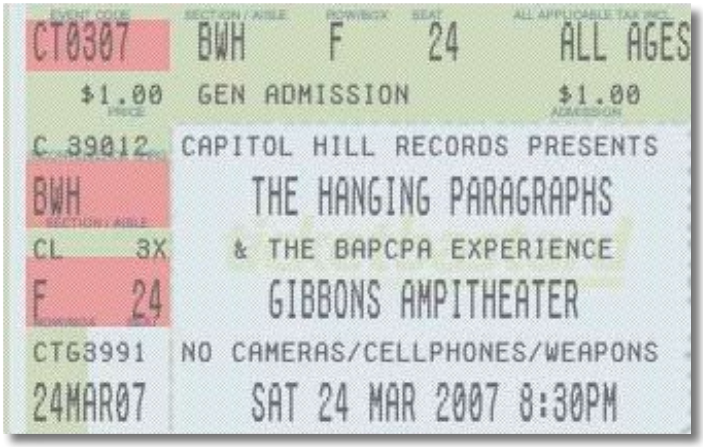
In it proposed form, Senate Bill 1460 would create Section 45.032, Florida Statutes, to read:

> 45.032 Notice of bankruptcy alternatives to judicial sales –
>
> As a condition to the entry of a final judgment under s. 45.031, a lien holder must serve, together with the original process, a notice to the property owner containing the following statement in conspicuous type:
>
> A JUDICIAL OR SHERIFF'S SALE OF YOUR PROPERTY THAT IS SUBJECT TO THE LIEN OF THE PLAINTIFF IN THIS CASE MAY OCCUR SHORTLY. UNDER CERTAIN CIRCUMSTANCES, THE UNITED STATES BANKRUPTCY CODE MAY PROVIDE A PROPERTY OWNER THE ABILITY TO RETAIN THE LIENED PROPERTY AND REORGANIZE THE CLAIMED INDEBTEDNESS IF A BANKRUPTCY PETITION IS FILED **BEFORE** THE JUDICIAL OR SHERIFF'S SALE OCCURS. IN MOST CASES, YOU WILL BE REQUIRED TO COMPLETE A CREDIT COUNSELING BRIEFING BEFORE BEING ELIGIBLE TO FILE A BANKRUPTCY CASE.

Although at this writing it is too early to tell whether lenders will oppose the bill, testimony before legislative committees to which the bill may be assigned for consideration is expected to include information such as: (i) the Congressional intent behind chapter 13 was, in part, to encourage the flow of capital into the home lending market; (ii) the millions of dollars that home lenders receive from chapter 13 trustees, e.g., in 2006 alone, Jacksonville's standing chapter 13 trustee funneled more than $40 million into home lenders' coffers; and (iii) the purpose of this legislative initiative is really no different from the already existing Florida statutory requirement that garnishing creditors provide notice to debtors on how to exempt wages in the garnished account: it is, at bottom, simply meant to provide accurate information about a consumer's rights.

Stay tuned to *The Cramdown* for future developments concerning this proposed legislation.

A Little Bankruptcy Humor!



Courtesy of www.says-it.com/concertticket

Psst…A New Pro Bono Opportunity is in the Works

(and it's easy to do!)

The Bay Area Volunteer Lawyers Project is looking for attorneys for the Forms Clinic who can volunteer for at least 2 hours a month in the County Courthouse helping pro se litigants fill out family law forms.

You say you don't know anything about family law? You don't have to…

- We will provide free training
- The Forms Clinic is only to help people fill out forms that are already approved by the Florida Supreme Court
- All of the family law forms come with instructions
- You are not expected (or even allowed) to give advice

★ Free Training for the Forms Clinic ★

Where:

George E. Edgecomb Courthouse, 800 E. Twiggs Street, Room 202 (behind the coffee shop, past the vending machines)

Dates:

Friday, April 20, 2007
Tues., March 13, 2007
Tues., May 8, 2007

Time:

Noon to 1:30 p.m.

RSVP:

to Elva at 232-1222, ext. 145

Hungry?

Bring Your Own Lunch
(or grab something from the coffee shop)!

Judge McEwen's New Lawyer Brown Bag Lunch Series

(MORE OPPORTUNITIES TO LEARN AND SHARE)

On March 23, 2007, Judge McEwen hosted the Brown Bag Lunch Series for Young Lawyers. The event was a resounding success as many new faces and some not so new showed up to learn about bankruptcy basics and procedural hints which ranged from courtroom decorum to substantive legal issues on preparing and filing and representing creditors and debtors in matters pertaining to the automatic stay. In addition, Judge McEwen had a "bag of goodies" that she drew from to talk about many different aspects of appearing in the courtroom and being candid and persuasive to the Judge. Each attendee was given several handouts and references to key websites such as the "Know Your Judge" section on the Florida Bar's website.

Based upon the keen response, there will in fact be future such lunches scheduled with different topics presented for discussion with the attendees. Everyone who attended wants to thank the Akerman Senterfitt law firm for underwriting the cost of the kick off luncheon. The pizza was outstanding. Judge McEwen reminded everyone that future Brown Bag Luncheons will be BYOBB.

Consumer Brown Bag Lunches

Throughout the operating year we have scheduled Monthly Brown Bag Lunches. Kelley Petry has headed up this valuable program in which the TBBBA has continued to address needs and provide valuable updates to our membership. Future dates for the Lunches are

May 1 • TBA

BANKRUPTCY JEOPARDY!

Your Category:
FAMOUS DEBTORS

Answers:

$100 *(play money)*
This debtor was a spokesperson for the Florida citrus industry and a Miss America runner-up.

$200*(play money)*
You "can't touch this" debtor, even without the automatic stay.

$300*(play money)*
This debtor filed for bankruptcy after his grocery business failed in 1833. Later he became President.

$400*(play money)*
This movie star bought Braselton, Georgia and then went broke, eventually being forced to sell the town.

Double Jeopardy
This former NY Giants linebacker filed for bankruptcy in 1998 after retiring from the NFL. He was later elected to the Pro Football Hall of Fame.

see page 27 for Questions

Spoliation of Electronic Information: *In re Quintus Corp.*

By Daniel R. Fogarty, Esq.
Stichter, Riedel, Blain & Prosser, P.A.

With the advent of the "paperless society," the archetype of finding the "smoking gun" in a row of boxes pulled from office shelves has been largely replaced by finding an e-mail in a directory pulled from the opposing party's server. Amidst the unprecedented business opportunities associated with the new technologies of the information age looms litigious pitfalls certain to frustrate the unwary business and trap the unprepared counsel. Recent amendments to the Federal Rules of Civil Procedure include "electronically stored information," or, "ESI," as a separate category of discoverable materials, recognizing the vast amounts of discoverable evidence created on a daily basis in the electronic age. While ESI has potentially significant probative value, it is also subject to variying degrees of permanence, and is often overwritten or destroyed. The frequently temporary nature of ESI brings with it the potential for claims based on spoliation of evidence. The recent decision in *In re Quintus Corporation*, 353 B.R. 77 (Bankr. D. Del. 2006), provides guidance to litigants and their counsel regarding spoliation of evidence and its consequences.

In *Quintus*, a buyer purchased substantially all of the debtor's assets in exchange for cash and the assumption of certain liabilities listed on the books and records of the debtor as of the closing date. Three years after the closing date, the trustee in the debtor's chapter 11 case filed a breach of contract action against the purchaser alleging that the purchaser failed to pay all of the liabilities assumed under the asset purchase agreement. To determine the assumed debts and the amounts which remained unpaid, the trustee requested discovery of the electronic books and records of the debtor as of the closing date (which records the purchaser was contractually obligated to retain). Because the purchaser destroyed the relevant books and records within months after the closing date in order to "give itself more computer space," the trustee sought summary judgment as a sanction for the purchaser's failure to produce documents necessary for the trustee's case.

To sanction a party for spoliation of evidence, the *Quintus* court considered three elements: (1) the degree of fault of the party who destroyed the evidence; (2) the degree of prejudice suffered by the opposing party; and (3) what degree of sanction is necessary to avoid substantial unfairness to the opposing party and to deter such conduct by others in the future. *Quintus*, 353 B.R. at 83. In determining the degree of fault of the purchaser, the court considered whether the purchaser knew or should have known that the destroyed evidence was relevant to pending, imminent or reasonably foreseeable litigation. *Id*. at 84. The court noted that when the purchaser destroyed the records, it had not yet paid all of the liabilities assumed under the contract. Accordingly, and despite that fact that the trustee filed suit three years following the destruction, the court determined that the purchaser should have anticipated litigation over its contractual obligations. As additional evidence of fault, the court pointed out that the purchaser intentionally (rather than accidentally) destroyed the records for more computer space despite the purchaser's contractual duty to maintain them. *Id*.

With regards to the degree of prejudice suffered by the trustee, the court determined that because the documents were necessary to the trustee's case, the trustee was prejudiced. Based on the facts surrounding the destruction of the evidence,

continued on p. 17

Spoliation continued from p. 16

the court concluded that it would impose the most severe sanction against the purchaser by entering a default judgment in favor of the trustee. The court explained that the same result would have been reached under the spoliation of evidence inference. By inferring that the destroyed records would be unfavorable to the purchaser's position, the court would have accepted the amount of unpaid liabilities offered by the trustee.

The ruling in *Quintus* may leave counsel uncertain as to when litigation is impending or imminent, and the consequences are significant. If the destruction of evidence occurs prior to the anticipation of litigation, the opposing party must show bad faith on part of the destroying party in order impose a sanction. *E*Trade Securities, LLC v. Deutsche Bank AG*, 230 F.R.D. 582 (D. Minn. 2005). If the destruction occurred after litigation is imminent or has begun, bad faith is not a required element. The court in *Quintus* concluded that because the purchaser had not paid all of the assumed liabilities at the time of the destruction of the records, the purchaser should have anticipated litigation over such failure.

The decision in *Quintus* demonstrates the need for counsel to consider a client's document retention policy and to consider instituting a litigation hold as early as possible given the potential for litigation. See *Zubulake v. UBS Warburg LLC*, 220 F.R.D. 212, 214 (S.D.N.Y.2003); *E*Trade*; The Sedona Principles: Best Practices Recommendations & Principles for Addressing Electronic Document Production, 3-7 (Jonathan M. Redgrave, ed. 2004) In *E*Trade*, the court sanctioned a party in large part due to the failure to institute proper policies to prevent the party's ordinary and routine document retention policy from destroying ESI that could provide discoverable evidence in pending or imminent litigation. *E*Trade*, 230 F.R.D. at 590-593. Given the ruling in *Quintus* as to when litigation is imminent, such discussions between counsel and client needs to occur as early as possible to prevent sanctions based on spoliation of evidence.

Case Law Update continued from p. 7

Homestead Protection Extends to Foreclosure and Insurance Proceeds

The Court held that the Florida homestead exemption protects the proceeds from a homeowner's insurance claim paid to the debtor. *In re Gilley*, 236 B.R. 441 (Bankr. M.D. Fla. 1999); *In re Crooks*, 351 B.R. 783 (Bankr. S. D. Fla. 2006)(funds exempt even where damage occurred before house was deeded to the debtor when the funds were used for repairs of house, and debtor had acquired title by the time he filed bankruptcy).

The Court held that the Florida homestead exemption protects the excess proceeds from a foreclosure sale. *In re Dezonia*, 347 B.R. 920 (Bankr. M.D. Fla. 2006)(even where debtor did not know there would be surplus funds from the foreclosure sale).

Homestead "Cap" under BAPCPA

The Court held that in a joint case, both spouses have the right to exempt $125,000 of equity in a homestead, extending to joint married debtors an aggregate cap of $250,000. In re Rasmussen, 349 B.R. 747 (Bankr. M.D. Fla. 2006)(Williamson, J.). The Court also held that passive appreciation which occurs during the 1,215-day period does not count toward the $125,000 cap. *In re Rasmussen*, 349 B.R. 747 (Bankr. M.D. Fla. 2006)

The Court held that the $125,000 cap in section 522(p) does not apply to a homestead purchased or otherwise acquired more than 1215 days prior to bankruptcy, even if the property's equity increases (i.e. appreciation) during the 1215 days prior to the bankruptcy filing. *In re Sainlar*, 344 B.R. 669 (Bankr. M.D. Fla. 2006).

Equitable Lien Limited

The imposition of an equitable lien on a Florida homestead is permitted under very narrow circumstances. Most courts reject creditor attempts to impose equitable liens. In reversing the Bankruptcy and District Courts, the 11th Circuit ruled that a creditor was not entitled to an equitable lien on a homestead where the debtor admitted waiting to file bankruptcy until after receiving a personal injury settlement and using the funds to pay down her mortgage. *In re Chauncey*, 454 F.3d 1292 (11th Cir. 2006)("decision to delay the filing of a bankruptcy petition until after she received the funds, while blatantly a move designed to deceive her creditors and one made in bad faith, does not rise to the level of fraud, nor does it constitute egregious behavior").

Joint Tenancy and Tenancy by the Entireties

The Florida Supreme Court has recognized that under common law, personal property owned by husband and wife is presumed to be TBE. *Beal Bank v. Almand & Assoc.*, 780 So.2d 45 (Fla. 2001). The Court held, however, that this presumption can be overridden by statute. Thus, a jet ski titled husband "OR" wife is not owned as TBE, because Florida's vehicle title statute specifically indicates otherwise. In re Caliri, 347 B.R. 788 (M.D. Fla. 2006) (use of the word "or" between two or more persons named on vessel title creates a joint tenancy, even where co-owners are married).

continued on p. 19

Case Law Update continued from p. 18

Where only one spouse files bankruptcy, the Court ruled that the trustee may administer TBE property only to the extent of the joint debts for the benefit of the joint creditors. This applies to a homestead of the debtor and non-debtor spouse where Section 522(p) cap applies. *In re Wagstaff*, 2006 WL 1075382 (Bankr. M.D. Fla. 2006).

The issue of homestead exemption, personal property exemption and Tenancy by the Entirety continues to be an important and in many respects untested and unsettled area in Florida. Some of the questions were answered by the courts, but it will be several years until many of these questions wind there way through our judicial system to become settled by our highest courts.

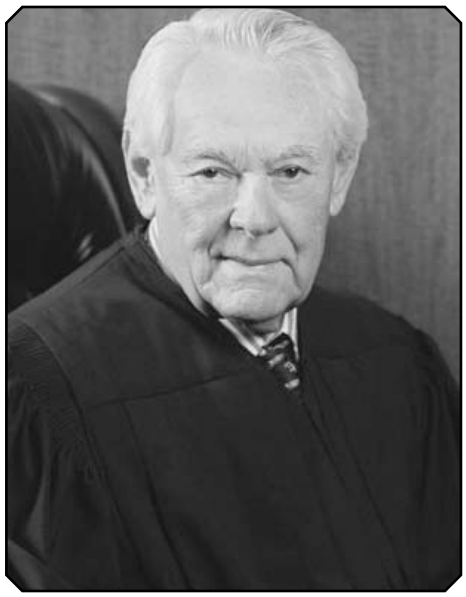
Interview with Judge McEwen continued from p. 8

much appreciate whatever little guidance we are permitted to give them or what members of the bar give them, whether as volunteers or as representatives of the opposing party. I recently received a very nice letter from a pro se debtor who told me that she appreciated my patience in her case. The opposing party, the mortgagee, was represented by a lawyer who was unusually patient with the debtor and worked to communicate with her in a way that she could understand the various components of the lender's claim. In her note, this debtor wrote that, prior to her bankruptcy, she had lost confidence in the judicial system, which was why she didn't bother to hire a lawyer for her case. She said her experience in the bankruptcy court allowed her to regain that confidence in – and I quote "justice for one and all." I received that note on the last business day of 2006. What a way to end a year and go into a new year! Receiving a letter like that makes me know that the lender's lawyer and I treated her the way we as officers of the Court should treat pro se filers.

The 31st Annual Judge Paskay-Stetson Bankruptcy Seminar

(A Brief Recap)

The Office of Conferences and Events at Stetson University College of Law hosted the 31st Annual Alexander L. Paskay Seminar on Bankruptcy Law and Practice December 8-9, 2006.



Judge Paskay, program chair and moderator, was very pleased with attendance. "The speakers were well-received and this was a very successful seminar," said Judge Paskay. A nationally renowned faculty included Bankruptcy Judges Bruce Markell, and Cecilia Morris, former Judge Lou Philips, Esq. of Gordon, Arata, McCollam, Duplantis & Eagan, Susan Freeman, Esq. of Lewis & Roca; Richard Lieb, Kronish, Lieb, Weiner & Hellman LLP; John Rao, Esq. National Consumer Law Center; and Mark Redmiles, Esq., Chief of Civil Enforcement Unit, Executive Office of the U.S. Trustee.

Presentations concerned some of the most significant issues in bankruptcy and fulfilled the purpose of the seminar which was to provide an insight into the operation of the court and focus on the jurisdiction of the bankruptcy court, the substantive and procedural aspects of cases filed under Chapter 7, 11 and 13. Some of the other issues discussed during the seminar were: The Means Test, Dismissal for Abuse, Sections 707(b)(2) and (3), extended duties of a debtor under section 521, lien stripping in Chapter 13, and consequences of repeat fillings on the automatic stay.

Judge Paskay is a chief U.S. Bankruptcy Judge Emeritus of the Middle District of Florida and adjunct professor at law at Stetson University College of Law. He is the author of Trustees and Receiver's Handbook and author of the 14th Edition of Collier on Bankruptcy. He has served on the Advisory Board Committee on Bankruptcy Rules and Practice, appointed by Chief Justice Burger, from 1980 to 1984. He has also served as vice president and member of the board of directors of the American Bankruptcy Institute. He is a fellow of the American College of Bankruptcy.

Left to Right:
Mark Redmiles, Hon. Cecilia Morris, Louis M. Phillips, Hon. Alexander L. Paskay, Hon. Bruce A. Markell, Richard Lieb and John Rao. Susan Freeman is not pictured.
More pictures on p. 27

Joint Check Agreements continued from p. 3

a material contract at the time the Contractor files for bankruptcy, the Contractor's bankruptcy trustee likely will make demand upon the Owner to pay the money directly to the Contractor's bankruptcy estate, regardless of whether a joint check agreement is in place or not. Again, the critical issues will be whether the Contractor has the requisite interest in the joint check and whether the Owner has the contractual right to make payment directly, or by joint check, to the unpaid Suppliers.

PREFERENCE DEFENSES

If the court finds that the payment by joint check satisfies the elements of a preference, the next issue is what defenses may be applicable. The most pertinent defenses are as follows:

1. Contemporaneous Exchange for New Value. Under Section 547(c)(1), the creditor has a defense to any preferential transfer to the extent that the transfer was intended to be a contemporaneous exchange of new value and the transfer was, in fact, substantially contemporaneous with the receipt of new value. Mechanics' lien creditors will often argue that when they were paid, they released the mechanics' lien on property of the debtor and, in so doing, contemporaneously gave "new value" back to the debtor that was worth at least the amount of the transfer. A transfer is only protected by the substantially contemporaneous exchange defense to the extent of the "new value" provided to the debtor. In other words, the lien being released must have value (and in order to protect the entire transfer from avoidance, the lien must be worth at least the amount of the transfer). *See In re Nucorp Energy, Inc.*, 902 F.2d 729, 733 (9th Cir. 1990) (release of lien in valueless property is not new value); *In re George Rodman, Inc.*, 792 F.2d 125, 127-28 (10th Cir. 1986) (similar facts, but at the time of the payment, it was not clear that the property (an oil well that turned out later to be dry) was valueless; in the absence of any evidence that the well was of no value at the time of the payment, the court held that the release of lien constituted new value.).

Courts are divided on the issue of whether the release of a mechanics' lien on the property of a third party, namely the Owner, constitutes new value for the Contractor. Most courts have held that such a release does not constitute new value to the Contractor. *See In re Bownick Insulation Contractors, Inc.*, 134 B.R. 261, 266 (Bankr. S.D. Ohio 1991) (debtor's payment of claim secured by property of third-party did not result in any direct benefit to the debtor and merely depleted the bankruptcy estate and, thus, was not subject to new value exception); *See also In re Chase & Sanborn*, 904 F.2d 588, 596 (11th Cir. 1990) (rejecting argument that the creditor's release of a contingent guaranty or indemnity obligation of the debtor in exchange for the debtor's payment constitutes new value).

2. Ordinary Course of Business Issues. The 2005 BAPCPA revisions to the Bankruptcy Code affected this defense. This provision now provides as follows:

> (b) Except as provided in subsections (c) and (i) of this section, the trustee may avoid any transfer of an interest of the debtor in property –
>
> > (2) to the extent that such transfer was in payment of a debt incurred by the debtor in the ordinary course of business or financial affairs of the debtor and the transferee, and such transfer was –
> >
> > (A) made in the ordinary course of business or financial affairs of the debtor and the transferee; or
> > (B) made according to ordinary business terms.

In order to satisfy the requirements of this section, "the defendant must show: (i) that the debt was incurred in the ordinary course of business, measured in light of the relationship between the debtor and defendant; and (ii) a showing of either (a) the payment was made in the ordinary course of affairs between the debtor and defendant or (b) was according to ordinary business terms." *In re Ameri P.O.S., Inc.*, 2006 WL 3231274 (Bankr. S.D. Fla. 2006) (citing 5 COLLIER ON BANKRUPTCY p. 547.04 [2] (15th ed. rev. 2006)).

a. Incurred in Ordinary Course of Business. The test for this requirement is "whether or not the debt was incurred in a typical, arms-length commercial transaction that occurred in the marketplace, or whether it was incurred as an insider arrangement with a closely-held entity." *In re Valley Steel Corp.*, 182 B.R. 728, 735 (Bankr. W.D. Va. 1995). This element is usually not difficult to satisfy in the normal construction situation.

b. Paid in Ordinary Course Between the Parties. The next test looks to whether the payment was ordinary as between the debtor and creditor. It is more difficult to establish this prong of the ordinary course defense when payments are made pursuant to a joint check agreement that was entered into shortly before a bankruptcy filing. *See In re Trinity Plastics, Inc.*, 138 B.R. 203, 209 (Bankr.

continued on p. 22

Joint Check Agreements continued from p. 21

S.D. Ohio 1992) ("absent evidence that prior to the preference period [the Supplier] received joint checks from [the debtor's customer], the court regards such a transaction to be unusual and not 'ordinary.'"); *In re Control Electric, Inc.*, 66 B.R. 624, 627-28 (Bankr. N.D. Ga. 1986) (holding that payment by joint check on eve of bankruptcy was outside the ordinary course of business.).

c. Ordinary business terms. This element requires that the timing and manner of the payment be ordinary, based upon the industry standards. *See In re A.W. & Associates, Inc.*, 136 F.3d 1439, 1443 (11th Cir. 1998) ("Industry standards do not serve as a litmus test by which the legitimacy of a transfer is adjudged, but function as a general backdrop against which the specific transaction at issue is evaluated."). There is an absence of case law discussing this prong in the context of joint check payments. However, at least one nonbankruptcy court has suggested that joint check arrangements are "commonly used in the construction industry." *Glen-Gery Corp. v. Warfel Const. Co.*, 734 A. 2d 926, 929 (Pa. Super. Ct. 1999).

3. Subsequent New Value (547(c)(4)). Of course, any creditor supplying subsequent, unsecured new value may be entitled to a full or partial defense to the preference action being prosecuted against it. This defense typically arises with respect to Suppliers who either fail to protect their lien rights or who are not entitled to lien protection under applicable state law.

PRACTICE POINTERS:

• **Amount of Joint Checks.** If the joint check includes the payment of any money that will be retained by the Contractor, the trustee has a much better argument that the Contractor has the requisite "interest" in the joint checks.

• **Parties to Joint Check Agreement.** A joint check payment is more likely to be recoverable by a trustee or the Contractor if the joint check agreement is solely between the Owner and the Contractor (i.e., it does not make the Supplier a party to the joint check agreement).

• **Contractor's Duties.** A joint check payment is more likely to be recoverable by a trustee or the Contractor if the agreement does not (1) impose an affirmative duty upon the Contractor to endorse the joint check to the Supplier upon receipt, and (2) prohibit the Contractor from unilaterally revoking the joint check agreement.

• **Contractor Serving as Trustee.** A joint check payment is more likely to be recoverable by a trustee or the Contractor if the agreement does not include language specifying that the Contractor holds the joint check in trust and serves merely as a conduit for the payment due to the Supplier.

• **Language in General Contract or Subcontract.** If the general contract or subcontract provides that the Owner or Contractor, as the case may be, has the right to pay unpaid Suppliers directly or has a right of setoff with respect to such unpaid amounts, recovery by a trustee or the Contractor will be more difficult. *See e.g. In re C&C Excavating, Inc.*, 288 B.R. 251, 262 (Bankr. N.D. Ala. 2002).

• **Timing.** If the joint check agreement is entered into within the preference period, it will be more difficult for the Supplier to argue that the payments made pursuant to the agreement were in the ordinary course of business between the Contractor and the Supplier.

Extreme MAKEOVER
RESOURCE ROOM EDITION

On November 7, 2006, Herbert Donica, president of the Tampa Bay Bankruptcy Bar Association, proudly presided over the ribbon cutting ceremony for the newly remodeled Attorney Resource Room on the 10th Floor of the Sam M. Gibbons United States Courthouse.

Most of us are familiar with the Attorney Resource Room, but few of us know its history. When the new courthouse was opened, the TBBBA was granted some space on the 10th Floor to maintain an attorney resource room. At that time the goal was simple, organize a functional room where attorneys can relax between hearings. Modestly furnish the room, put a telephone, fax machine, a computer with internet access, printer and copier capabilities to act as an emergency office for members of the bar and call it the Attorney Resource Room. Initially, the TBBBA purchased the computer equipment and the room was furnished with several desks and some furniture graciously donated by Past President Zala L. Forizs and the Forizs & Dogali, P.L. law firm. Over the years however, the resource room became the courtroom repository for bits and pieces of furniture and old desks. This past summer, the Board decided to completely remodel the Attorney Resource Room into a more functional space that better served the needs of its membership.

The newly remodeled Attorney Resource Room boasts a comfortable lounge area with a leather sofa and chair, matching coffee and end tables, a six-top conference room table with matching leather chairs, a computer desk work station with a new Dell desktop computer and even a stocked coat rack for those clients who do not have on the proper courtroom attire (kindergarten rules govern the coat rack – if you borrow it, you must return it). The remodeled room is now a fully functional space that offers multiple amenities to the membership. Please take the time to come by and enjoy the new Attorney Resource Room the next time you are at the courthouse. After all, that's what it is for!

Special thanks to Luis Martinez-Monfort, Carrie Lesser, Paula Luce and Chuck Kilcoyne for all of their hard work on this project.

TBBBA Holiday Celebration

The annual TBBBA Holiday Celebration was held on December 14, 2006, at the Spain Restaurant. Decked out in their holiday finery were approximately 90 members and their guests bearing gifts to be distributed to needy children by Metropolitan Ministries. It wouldn't be a holiday party without some Christmas caroling, so, under the direction of Judge McEwen and Larry Foyle, attendees including Judge Williamson, sang Down at the Courthouse to the tune of Up On The Rooftop:

Down at the Courthouse
The lawyers pause,
The Debtor's invoked
The bankruptcy clause.
Lawsuits, levies, foreclosures stayed,
Now only lawyers will get paid.

Ho! Ho! Ho! Bankruptcy's filed,
Ho! Ho! Ho! Creditors riled.
File the petition, click, click, click,
With E-C-F, it is really quick.

Chief Judge Glenn raised a toast to the Association with wishes for the continued civility and professionalism for which the Tampa Bankruptcy Court is well known. The holiday cheer continued until late in the evening. Enjoy the photos.

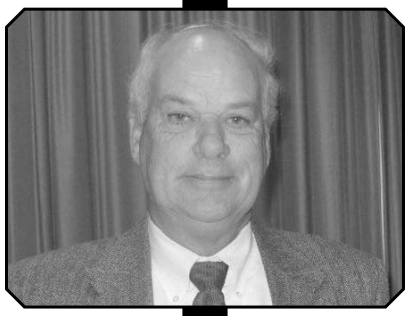
January Seminar on Professionalism and Practice Pointers

(A Special Day)

The TBBBA held a full day Seminar on January 30 at the Marriott Waterside Hotel in Downtown Tampa. The focus of the Seminar was "Professionalism and Practice Pointers" and featured District Judge James D. Whittemore (Middle District of Florida, Tampa Division); Magistrate Judge Mary S. Scriven (Middle District of Florida, Tampa Division), Bankruptcy Judge Jeffery P. Hopkins (Southern District of Ohio and President of the National Conference of Bankruptcy Judges) and all five of the Bankruptcy Judges for the Tampa and Fort Myers Divisions of the Bankruptcy Court for the Middle District of Florida. The Seminar also featured Charles G. Kilcoyne, Deputy-in-Charge for the Tampa and Fort Myers Divisions of the Bankruptcy Court; Felicia Turner, United States Trustee; Cindy A. Burnette, Assistant United States Trustee and C. Timothy Corcoran, III, Retired Bankruptcy Judge for the Middle District of Florida, Tampa Division. Each of the speakers offered helpful information and materials to the attendees to facilitate practice and enhance professionalism.

Judge Hopkins was the featured speaker at the luncheon and spoke on ways for lawyers to promote professionalism and diversity in their practice. The luncheon also featured a short film honoring African-American men and women who were prominent in integrating the legal system in our country. Following the Seminar, the TBBBA hosted a cocktail reception in conjunction with the George Edgecomb Bar Association for the Judges and speakers. Lexis-Nexis, Westlaw and Ikon Copy Service provided sponsorship for the Seminar.

The following people deserve a special thank-you for their service to our Association for all of the hard work done in connection with producing and promoting the Seminar: David Tong, Edward Peterson, Luis Martinez Monfort and Cheryl Thompson



February Luncheon Meeting

The "CARE" Program

The TBBBA held its February Luncheon Meeting on February 20 at The University Club of Tampa. Leyza F. Blanco, the President of the Bankruptcy Bar Association ("BBA") for the Southern District of Florida, and Ileana M. Espinosa, chair of the Credit Abuse Resistance Education ("CARE") Committee of the BBA shared their experiences with the CARE program in South Florida and offered helpful insights on the TBBBA's implementation of this program in the Tampa and Ft. Myers Divisions. The CARE program is designed to provide information about responsible credit management to high school and college students through volunteer professionals. Judge May and Judge Paskay are spearheading the program in the Tampa and Ft. Myers Divisions.

Ms. Blanco and Ms. Espinosa gave an example of a CARE presentation using a PowerPoint demonstration as well as a live demonstration involving Judge May's factitious purchase of Gucci sunglasses. In this example, Judge May's cash purchase of the super-stylish $125.00 sunglasses cost him just that--$125.00; however his purchase on credit cost him several hundred more dollars in addition to fees and interest. The sunglass demonstration was witty and effective. Several members of the TBBBA expressed an interest in participating in the CARE program in this District. The TBBBA is in the process of forming a CARE Committee for the Tampa Division. Interested members should contact Herb Donica, the TBBBA's President.

This informative and entertaining luncheon was the result of the hard work of Angelina Lim and Patricia Avidan.

BANKRUPTCY JEOPARDY!

Questions:

$100 Who is Anita Bryant?

$200 Who is M.C. Hammer?

$300 Who is Abe Lincoln?

$400 Who is Kim Basinger?

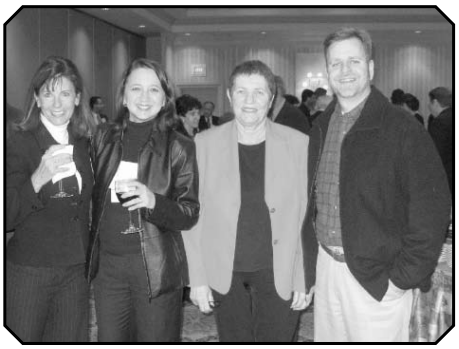
Double Jeopardy

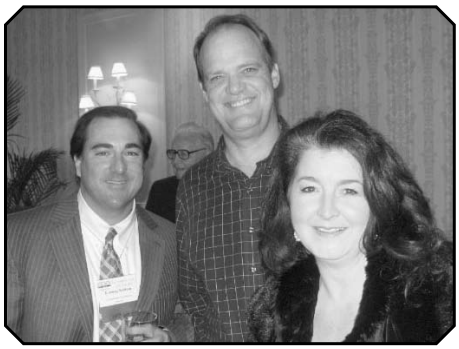
Who is Lawrence (L.T.)Taylor?

see page 15 for Answers

The 31st Annual Judge Paskay-Stetson Bankruptcy Seminar

continued pictures





Increase in Presumptively Reasonable Fee to be Considered by Tampa Division Judges, Input Sought From Consumer Bar

by Kelley Petry, Esq.
Kelley M. Petry, P.A.

The Judges of the Tampa Division of the Middle District Bankruptcy Court have expressed an interest in considering an increase in the presumptively reasonable fee for Chapter 13 bankruptcy cases filed in the division. The Court wishes to determine an appropriate presumptively reasonable fee in light of the changes in duties for the Chapter 13 Debtor lawyer since the establishment of the current presumptively reasonable fee in 2003. The Court will enter an administrative order on Debtor's fees which will set forth the factors that the Court wishes to consider in determining the presumptively reasonable fee and when and how interested parties should provide written submissions and requests to be heard. It is anticipated that there will also be discussion pertaining to the timing of payment of fees through Chapter 13 plans. The Tampa Bay Bankruptcy Bar Association will be coordinating the efforts of attorneys who wish to participate in the determination of the amount of fees. If you are interested in participating, please contact Herb Donica via e-mail at Herb@Donicalaw.com or Kelley Petry via e-mail at kmpetrypa@aol.com. There will be additional meetings scheduled regarding the fee issue and small committees to work on different areas of concern. For guidance, see the Southern District of Texas case, *In re: Chapter 13 fee applications* which can be found at 2006 WL 2850115 (B. S.D. Tex.).

The Cramdown
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