



The Cramdown

The Newsletter of the Tampa Bay Bankruptcy Bar Association

Editor-in-Chief, Adam Lawton Alpert, Esq.

Fall 2007

PRESIDENT'S MESSAGE

by Shirley C. Arcuri, Esq.

Shirley C. Arcuri, P.A.



I am delighted to serve as the Association's president for 2007-2008. Although bankruptcy filings were down last year, we ended the 2006-2007 year with no drop in our membership numbers and we are 300 members strong.

Membership in the Association provides a framework for the atmosphere of collegiality which bankruptcy practitioners in the Tampa Division enjoy. The Association's projects present an opportunity for each of us to get to know one another better, to keep up to date on current bankruptcy issues, and to improve our skills as bankruptcy lawyers. We welcome the involvement of all members. If you are not active in the Association and would like to be, please call or email me, or any of our officers or directors.

Just a few of the items we are working on:

Our regular luncheon meetings are held on the second Tuesday of the month. Our CLE co-chairs, Luis Martinez-Monfort and Edward Peterson, have an excellent lineup of topics and speakers planned for this year. We look forward to seeing you.

The Consumer Committee, chaired by Kelley Petry, sponsors monthly pizza lunches and programs in the 5th floor training room at the Courthouse. The regular date for these events is the first Tuesday of every month at noon. Our judges are regular participants in these informal programs, which provide a great opportunity to keep up with the latest developments in consumer practice.

Our Community Services Committee, in conjunction with the Bankruptcy Court and Bay Area Legal Services, was awarded a Florida Bar Foundation grant to produce pamphlets and DVDs explaining the revised Bankruptcy Code to pro se filers. Once completed, these items will be available to legal aid and bar associations statewide for dissemination. We are also launching our C.A.R.E. (Credit Abuse Resistance Education) program this year. Judge May is spearheading this program, which was also awarded a Florida

continued on p. 3

Inside This Issue

President's Message	1	In The Wake of the Travelers Supreme Court Decision	5
Tampa/Ft. Myers Divisions Procedural Changes.....	3	Florida Revises Assignment for Benefit of Creditors Statute ..	6
People On The Go.....	3	Creditors' Rights.....	7
32 nd Annual Bankruptcy Law & Practice Seminar	4	Case Digest.....	12

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

The Tampa Bay Bankruptcy Bar Association 2008-2009 Officers and Directors

President:

Shirley Arcuri
Shirley C. Arcuri, P.A.
4830 W. Kennedy Blvd.
Tampa, Florida 33609
sarcuri2@tampabay.rr.com
813-286-4081

Vice President:

Caryl Delano
Addison & Delano, P.A.
Post Office Box 2175
Tampa, Florida 33601-2175
cdelano@addisondelano.com
813-223-2000

Secretary:

Luis Martinez-Monfort
Brewer Perotti Martinez-Monfort, P.A.
400 N. Tampa St. Suite 2600
Tampa, Florida 33602
lmonfort@mpdlegal.com
813-579-4010

Treasurer:

Donald Kirk
Fowler White Boggs Banker
501 E. Kennedy Blvd.
Tampa, Florida 33602
dkirk@fowlerwhite.com
813-222-2022

Chairman:

Herb Donica
Donica Law Firm, P.A.
106 S. Tampania Ave., Suite 250
Tampa, Florida 33609
herb@donica.law.com
813-878-9790

Directors:

Adam Alpert
Bush Ross, P.A.
Post Office Box 3913
Tampa, Florida 33601
aalpert@bushross.com
813-224-9255

Stephanie Biernacki Anthony
Gray Robinson, P.A.
Post Office Box 3324
Tampa, Florida 33602
stephanie.anthony@gray-robinson.com
813-273-5000

Brad Hissing
Kass Shuler Solomon Spector Foyle
& Singer, P.A.
Post Office Box 800
Tampa, Florida 33601
bhissing@kasslaw.com
813-229-0900

Carrie B. Lesser
Bank of America
Post Office Box 31590
Mail Code - FL1-400-16-12
Tampa, Florida 33631-3590
carrie.b.lesser@bankofamerica.com
813-225-8181

Elena Paras Ketchum
Stichter Riedel Blain & Prosser, P.A.
110 E. Madison St.
Tampa, Florida 33602
eketchum@srpb.com
813-229-0144

Kelley Petry
Kelley M. Petry, P.A.
Post Office Box 7866
Tampa, Florida 33673-7866
kmpetrya@aol.com
813-239-0713

Lara Roeske Fernandez
Trenam, Kemker, Scharf, Barkin,
Frye, O'Neill & Mullis, P.A.
2700 Bank of America Plaza
101 East Kennedy Boulevard
Tampa, Florida 33602-1102
lrfernandez@trenam.com
813-223-7474

Edward Peterson
Stichter, Riedel, Blain & Prosser, P.A.
110 E. Madison Street, Suite 200
Tampa, Florida 33602
epeterson@srpb.com
813-229-0144

Pat Tinker
Office of U.S. Trustee
501 E. Polk St. Suite 1200
Tampa, Florida 33602
thomas.p.tinker@usdoj.gov
813-228-2000

Past Presidents

The Cramdown is published four times per year. Advertising rates are as follows:

Full Page 7.875w x 9.75h	\$400/single issue \$1,200/4 issues
Half Page 7.875w x 4.75h	\$200/single issue \$600/4 issues
Quarter Page 3.75w x 4.75h	\$100/single issue \$300/4 issues
Business Card 3.75w x 2.375h	\$50/single issue \$150/4 issues

Pricing is based on camera-ready or computer generated art being supplied by advertiser.

Art Specifications: ALL ART MUST BE 300dpi or higher. Formats accepted: .jpeg; .tiff; or print quality .pdf files. Microsoft software is NOT accepted as camera ready art.

Ad Design services are available through *Office Dynamics* - Eric - 813-980-3494
eric@officedynamicstampa.com

For information regarding advertising in *The Cramdown*, contact:

Daniel R. Fogarty
Stichter Riedel Blain & Prosser, P.A.
813-229-0144
dfogarty@srpb.com

Graphic Design & Printing by:

OFFICE
dynamics
not your average print shop!

5802 E. Fowler Ave. Ste. B
Temple Terrace, FL 33617
813-980-3494
officedynamicstampa.com

Tampa/Ft. Myers Divisions Procedural Changes

by Chas. G. Kilcoyne
Deputy In Charge

All Judges in the Tampa/Ft. Myers Divisions have made recent procedural changes that I need to bring to your attention.

First, in all forms of order concluding a pre-trial conference and setting a contested matter for final evidentiary hearing, a new paragraph has been added which reads as follows:

“To the extent there are disputes during the conduct of discovery in this case, the parties shall first confer in good faith to resolve the issue. If unsuccessful, a party, or any of them, may request a telephone conference with the Court at a convenient time for all parties at which a court reporter will not be present. If the request is granted, then the Court will hear from the parties and advise the parties informally as to how the Court might rule if formally presented with the dispute. The Court’s informal ruling shall be without prejudice to the right of the party to file a formal motion and be heard on the matters in dispute.”

Make the request for a telephone conference by contacting the courtroom deputy for the judge assigned to the case.

Second, the Clerk’s office has added a second paragraph to and changed the title of a notice to now read “Notice of Requirement to File Statement of Completion of Course in Personal Financial Management and File a Certificate Regarding Domestic Support Obligation,” which will be entered in all Chapter 13 cases.

In order for a debtor to comply with 11 U.S.C. section 1328(a), the Notice directs that if the debtor is required by judicial or administrative order, or by statute, to pay a domestic support obligation, file a Certificate that all amounts payable under such order or such statute that are due on or before the date of the certification (including amounts due before the petition was filed, but only to the extent provided for by the plan) have been paid or file a Certificate stating that the debtor is not required to pay a domestic support obligation.

Please note that failure to file the Certification of Completion of Instructional Course Concerning Personal Financial Management and the Certificate regarding

a domestic support obligation prior to completing all payments under the Chapter 13 plan will result in the case being closed without an entry of a discharge.

The debtor would be required to file a motion to reopen case and pay the prescribed filing fee in order to file one or both of these Certificates in order to obtain a discharge.

People On The Go

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

Camille J. Iurillo with Iurillo & Associates, P.A. has been named President of the St. Petersburg Bar Association for 2007-2008.

Luis Martinez-Monfort has joined the law firm of Brewer Perotti, P.A. as a shareholder. The firm has been re-named to Brewer Perotti Martinez-Monfort, P.A.

Suzy Tate has joined the law firm of Jennis Bowen & Brundage, P.L.

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

President’s Message

continued from p. 1

Bar Foundation grant. C.A.R.E. committee members will make presentations to high school and college students with the goal of educating them on the realities – good and bad – of consumer credit.

One of our goals this year is to improve our communications with you. We email members with notices of meetings and seminars and are constantly working to improve our website, www.brokenbench.org.

We are off to a busy year! If you have any suggestions or ideas about improving the way the Association can better serve you, please let me know.

Stetson Hosts 32nd Annual Bankruptcy Law & Practice Seminar

Stetson University College of Law will host the 32nd Annual Alexander L. Paskay Seminar on Bankruptcy Law and Practice Dec. 7-8 at the Sheraton Sand Key Resort, Clearwater, Florida.

The seminar, designed for experts in the field as well as general practitioners who handle bankruptcy issues, has attracted a national faculty, including top bankruptcy lawyers, judges and officials.

Seminar speakers include Louis Phillips of Gordon, Arata, McCollam, Duplantis and Eagan LLP; U.S. Bankruptcy Judge J. Vincent Aug Jr.; U.S. Bankruptcy Judge Margaret Mahoney; Roberta DeAngelis of the Executive Office for U.S. Trustees; Dennis J. Connolly of Alston and Bird LLP; Frank J. Santoro of Marcus, Santoro and Kozak P.C.; and Rob Charles of Lewis and Roca.

Topics include ethics and recent developments; dischargeability, sovereign immunity and litigation issues; Chapter 11 cases and small business cases; exceptions and extensions to the automatic stay; domestic support obligations; litigation issues; adequate protection payments; trustee's voiding powers and case administration.

The conference is named for its chair, Alexander L. Paskay, chief bankruptcy judge emeritus of the Middle District of Florida. Judge Paskay is an adjunct professor of law at Stetson.

To register, call the Office of Conferences and Events at 813-228-0226, e-mail conferences@law.stetson.edu or visit www.law.stetson.edu/conferences for more information.

Stetson University College of Law is Florida's first law school. It has educated lawyers for more than a century. The 2008 U.S. News & World Report national rankings place Stetson among the nation's top 100 law schools, first in trial advocacy and fifth for legal writing. The law school is located in the Gulfport/St. Petersburg area with an adjacent campus in Tampa.

tranzon DRIGGERS

NATIONAL AUCTIONS... LOCAL EXPERTISE

Walter J. Driggers, III, CAI, AARE
FL Lic. Real Estate Broker
One NE 1st Avenue, Suite 301, Ocala, FL 34470



Asset Marketing Specialists

Nationwide auctions structured to meet your needs...

- Sealed Bid Auctions
- Live Auctions
- On-Line Auctions
- Courtroom Auctions

Tranzon can be the most effective solution for an expeditious sale of assets – at market value – no matter where those assets are located nationwide.

It's what we do. 877.374.4437

www.tranzon.com

In the Wake of the Travelers Supreme Court Decision

by Suzy Tate, Esq.

Jennis Bowen & Brundage, P.L.

In March, the Supreme Court struck down a 16-year-old Ninth Circuit opinion known as *In re Fobian*, 951 F.2d 1149 (9th Cir. 1991). From *Fobian* stems the rule that disallowed claims for attorneys' fees incurred by unsecured creditors for litigating bankruptcy law. *Travelers Casualty & Surety Co. of America v. Pacific Gas & Electric Co.*, 127 S.Ct. 1199 (2007). The Travelers decision has been expanded by the Supreme Court to include claims for post-petition attorneys' fees if such awards are allowed under state law. However, the Travelers decision did not address all of the arguments against allowing claims for post-petition attorneys' fees for unsecured creditors, which has resulted in two different interpretations — one from the Northern District of California and the other from the Middle District of Florida.

Travelers filed a claim in the Pacific Gas & Electric ("PG&E") bankruptcy case for its attorneys' fees incurred while litigating issues about the Debtor's disclosure statement and reorganization plan. Travelers argued that it was entitled to its attorneys' fees based on the indemnity agreement executed by PG&E that provided the basis for Travelers' claim. The Ninth Circuit disallowed the claim based solely on its decision in *In re Fobian*, 951 F.2d 1149, 1153 (9th Cir. 1991), which held that "attorney fees are not recoverable in bankruptcy for litigating issues 'peculiar to federal bankruptcy law.'" In overruling *Fobian*, the Court held that the decision was not based on an interpretation of the Bankruptcy Code. This lack of "textual support" proved to be "fatal" for the *Fobian* rule. The Court added "...we generally presume that claims enforceable under applicable state law will be allowed in bankruptcy unless they are expressly disallowed."

PG&E also argued that the attorneys' fees should not be allowed because Section 506(b) of the Bankruptcy Code only allows attorneys' fees for oversecured creditors' claims. The Court declined to address that argument, however, as it was not raised in the lower

courts. Accordingly, the Court vacated the Ninth Circuit *Travelers* decision to disallow the claim. Within a week of the *Travelers* decision, the Court vacated a Ninth Circuit decision that disallowed post-petition attorneys' fees for unsecured creditors, which would otherwise be allowed under state law. *DeRoche v. Arizona Industrial Commission*, 127 S.Ct. 1873 (2007). This case differed from the *Travelers* case in that the *DeRoche* claim was based on state law rather than contractual rights.

Three months later, based on the *Travelers* decision, the Bankruptcy Appellate Panel ("BAP") for the Tenth Circuit affirmed an award of attorneys' fees incurred by the ex-wife of a debtor for litigating the nondischargeability of the ex-wife's claim. *In re Busch*, 369 B.R. 614 (B.A.P. 10th Cir. 2007). The BAP noted that bankruptcy courts have generally refused to award attorneys' fees to ex-spouses incurred in litigating the issue of dischargeability because the Bankruptcy Code does not authorize such fee awards, even if allowed by state law. However, the BAP held that this logic was no longer persuasive in light of the *Travelers* decision as there is no provision in the Bankruptcy Code disallowing a claim for attorneys' fees which would be otherwise permissible under state law.

Two courts have directly addressed the late argument made by PG&E, that Section 506(b) is a proper basis for disallowing post-petition attorneys' fees of unsecured creditors; because Section 506(b) of the Bankruptcy Code allows attorneys' fees for oversecured creditors only, undersecured or unsecured creditors are not entitled to their attorneys' fees. Section 506(b) provides:

(b) To the extent that an allowed secured claim is secured by property, the value of which is greater than the amount of such claim, there shall be allowed to the holder of such claim, interest on such claim, and reasonable fees, costs or charges provided for under which such claim arose.

11 U.S.C. § 506(b) (2007). However, the Northern District of California Bankruptcy Court found the argument "too strained to be persuasive." *In re Qmect*, 368 B.R. 882, 885 (Bankr. N.D. Cal. 2007). The court held that because Section 506(b) was

continued on p. 8

Florida Rivises the Assignment for the Benefit of Creditors Statute

by Keith T. Appleby, Esq.
Fowler White Boggs Banker P.A

The Florida Legislature recently passed legislation amending Florida Statute Chapter 727, General Assignments, more commonly referred to as the "Assignment for the Benefit of Creditors" (or "ABC") statute. Florida Statutes, Section 727.101, *et seq.* An assignment for the benefit of creditors is a Florida statutory alternative to Chapter 7 bankruptcy. It allows a distressed entity to transfer its assets to an assignee. The assignee establishes a trust to collect any money that is owed to the debtor (assignor), sells the debtor's property, and applies the money received toward the payment of creditors, while returning any surplus to the debtor. An assignment for benefit of creditors proceeding effectively winds up the the company's affairs by selling off all assets and distributing the proceeds to creditors in accordance with the priority of their respective claims.

Because the assignment for the benefit of creditors statute had not been modernized or updated since its enactment in 1987, the Business Law Section of The

Florida Bar took on the task of making it a more viable alternative to Chapter 7 liquidations. Several local attorneys, including John Emmanuel, Al Gomez and Keith Appleby served on the Business Law Section task force responsible for drafting SB 2118 and HB 1445. The task force reviewed all relevant case law reported since enactment of the original assignment for the benefit of creditors statute, noted areas needing improvement, and drafted proposed amendments. The Legislature approved the proposed amendments and Governor Charlie Christ signed SB 2118 into law on June 19, 2007, as Chapter No. 2007-185. The revisions took effect on July 1, 2007.

The new legislation revises Chapter 727 in several ways, including staying judicial lien creditors from enforcing their claims against real property transferred to the assignee, increasing priority claim amounts for employees and consumers, creating limitations on landlord and employment contract claims, and clarifying filing procedures. One change is especially noteworthy. The assets which can be liquidated in an assignment case now clearly include tort claims and causes of action. This is a statutory exception to Florida law which generally prohibits the assignment of such claims. These changes to the statute should enhance the ABC statute as a viable and less expensive alternative to Chapter 7 liquidations.

TRIAL CONSULTING SERVICES, LLC

Deposition Video
Exhibit Boards
Graphics
Electronic Trial Presentation
Audio/Visual Equipment



Tampa • Miami • Ft. Lauderdale
Nationwide 800-395-7994
Tampa 813-874-2527
www.trialcs.com

DONICA **M**EDIATION **S**OLUTIONS, LLC



Herbert R. Donica, Esq.

Florida Supreme Court Certified Circuit Mediator

Available for mediations in all
commercial, business, shareholder
and partnership litigation matters
in state and federal courts.

106 South Tampania Avenue, Suite 250
Tampa, Florida 33609-3256

813.878.9790 • info@DonicaMediation.com

www.DonicaMediation.com

Book Review: *Creditors' Rights*, The Honorable Alexander L. Paskay Chief Bankruptcy Judge Emeritus

by Daniel R. Fogarty, Esq.

Stichter, Riedel, Blain & Prosser, P.A.

The dean of bankruptcy judges, The Honorable Alexander L. Paskay has presided over bankruptcy cases under two sets of bankruptcy laws, and has approximately 1,700 published cases to his name. On any issue of law that arises in a bankruptcy case, the chances are that Judge Paskay has considered and issued a well-thought, practical, and insightful ruling.

Judge Paskay, Chief U.S. Bankruptcy Judge Emeritus of the Middle District of Florida and adjunct professor of law, Stetson University College of Law, is the author or co-author of numerous texts and treatises, including the 14th edition of Collier on Bankruptcy and Volume VI of Norton Bankruptcy Law and Practice. Judge Paskay has served on the Advisory Committee on Bankruptcy Rules and Practice, as well as a task force charged with the revision of the Official Bankruptcy Forms. He has

served as vice president and member of the board of directors of the American Bankruptcy Institute and is a fellow of the American College of Bankruptcy.

Creditors' Rights represents the distillation of Judge Paskay's extensive knowledge and practical insight to the laws of bankruptcy, updated to reflect the recent changes of the Bankruptcy Abuse Prevention Consumer Protection Act of 2005 (BAPCPA). Beginning with a discussion of jurisdiction and powers of the Bankruptcy Court, *Creditors' Rights* considers the generally applicable provisions in the context of Chapter 7 liquidation cases, before continuing on to discussions of Chapter 11 reorganization and Chapter 13 individual adjustment of debt sections. The work gives the reader a complete landscape of bankruptcy jurisprudence, with detailed discussions of the code, rules, and cases, including updated citations. The book fleshes out the structure of the Code with a comprehensive citation and discussion of relevant case law.

Creditors' Rights is a comprehensive and exhaustive treatise on bankruptcy law in the United States. Judge Paskay's text represents the knowledge of a man who has, during his illustrious career as a bankruptcy referee and judge, helped mold and create those laws.

Creditors' Rights sells for \$129.95, and is published by Vandeplas Publishing, www.vandeplaspublishing.com.

BANKRUPTCY COORDINATOR

FORMS PROCESSING

Freedom For More Billable Hours

Chapter 7 & 13

Bankruptcy Petition Processing

Under New Reform Law

Best Case Software

ECF Filing

FREE YOUR STAFF to work on more
complex cases! Eliminate all time
consuming details and let us do the work!

Visit our website at: www.bankruptcycoordinator.com

CONTACT US
727-364-6333

Email:
bc@bankruptcycoordinator.com

WE MAKE IT EASY FOR YOUR CLIENTS TO MEET THE BANKRUPTCY CERTIFICATE REQUIREMENTS

*We are the only locally approved agency for the Tampa
Division to provide the bankruptcy certificate for both
pre-filing and pre-discharge*

WE OFFER FOUR DIFFERENT METHODS:
INDIVIDUAL, PHONE, CLASSROOM AND INTERNET

*One day service available. Certificates faxed to you and
mailed the same day. We take "over the phone" debit card
payments from your clients.*

To register: Call (813) 989-1900
Pre-filing \$50. I / \$75. J • Pre-discharge \$50./household
Bi-lingual counselors available
Classroom materials available in Spanish

FAMILY LIFE RESOURCES, INC.

CHRISTIAN FINANCIAL COUNSELING & EDUCATION

5802 E. Fowler Ave. Ste. D, Tampa, FL 33617
Ph. (813) 989-1900 • Fax (813) 989-0359
www.flrministry.org

Travelers Supreme Court Decision

continued from p. 5

titled "Determination of Secured Status," it would not be a "logical place to provide for the disallowance of an element of an unsecured claim." Moreover, the court noted that allowing such claims furthers the preservation of non-bankruptcy legal rights, a vital policy of bankruptcy law.

Conversely, the Middle District of Florida Bankruptcy Court recently disallowed a claim for post-petition attorneys' fees by an unsecured creditor based on an indemnity agreement giving four reasons. *In re Electric Machinery Enterprises, Inc.*, 2007 WL 2031445, *1 (Bankr. M.D. Fla. July 6, 2007). First, the court held that because the Bankruptcy Code provides for post-petition attorneys' fees only to oversecured creditors under Section 506(b), post-petition attorneys' fees for other creditors are necessarily excluded based on the legal maxim *expressio unius est exclusio alterius*. The second ground for its decision is based on the Supreme Court opinion of *United Savings Ass'n v. Timbers*, 484 U.S. 365 (1988), which held that undersecured creditors could not receive interest. The court reasoned that the rationale in *Timbers* for disallowing interest also applies to post-petition attorneys' fees.

The third reason for disallowing the claim was based on Section 502(b), which provides that courts determine the amount of the claim as of the date of the filing of the petition. The court reasoned that if a claim for post-petition attorneys' fees is not in existence at the time of filing, it should not be allowed, which does not apply to oversecured claims as they are specifically provided for in Section 506(b). The court's fourth and final motivation for its decision is an equitable consideration. The court noted that to allow some unsecured creditors their attorneys' fees, such as holders of contract claims, while not allowing holders of tort claims their attorneys' fees would be inequitable, and that the allowance of post-petition attorneys' fees claims would provide no "finality to the claims process" as the "cash registers" would be ringing daily because of the ever-accruing attorneys' fees.

Until the Supreme Court specifically addresses the arguments based on the interpretations of 506(b) and 502(b), proponents on both sides will have plenty to argue.

MESSAGE FROM THE CLERK'S OFFICE

Please be advised that all United States Bankruptcy Court Judges in the Tampa and Ft. Myers Divisions of the Middle District have made recent procedural changes. These changes relate to discovery disputes and compliance with 11 U.S.C. §1328(a). Practitioners should refer to the bankruptcy court website (www.flmb.uscourts.gov) and a memorandum dated August 7, 2007 for more details.

WE MAKE IT EASY FOR YOUR CLIENTS TO MEET THE BANKRUPTCY CERTIFICATE REQUIREMENTS

We are the only locally approved agency for the Tampa Division to provide the bankruptcy certificate for both pre-filing and pre-discharge

WE OFFER FOUR DIFFERENT METHODS:
INDIVIDUAL, PHONE, CLASSROOM AND INTERNET

One day service available. Certificates faxed to you and mailed the same day. We take "over the phone" debit card payments from your clients.

To register: Call (813) 989-1900
Pre-filing \$50. I / \$75. J • Pre-discharge \$50./household
Bi-lingual counselors available
Classroom materials available in Spanish

FAMILY LIFE RESOURCES, INC.

CHRISTIAN FINANCIAL COUNSELING & EDUCATION

5802 E. Fowler Ave. Ste. D, Tampa, FL 33617
Ph. (813) 989-1900 • Fax (813) 989-0359
www.flrministry.org

SAVE THE DATES!!!

Upcoming Consumer Lunches

Mark these dates on your calendars for TBBBA Consumer lunches on the 5th floor of the federal courthouse.

Noon-1:00pm

No RSVP is required. Will be serving pizza or pasta, or bring your own brown bag.

November 6, 2007 • U.S. Trustee

December • No lunch

January 15, 2008 • Randy Hiepe

February 5, 2008 • Judge Williamson

March 4, 2008 • TBA

April 1, 2008 • Judge Glenn

May 6, 2008 • TBA

2007 View from the Bench Seminar

On October 17, 2007, the Business Law Section of The Florida Bar and The Tampa Bay Bankruptcy Bar Association will be hosting the annual Bankruptcy Law & Practice: View from the Bench Seminar. This year's Tampa panel will include: Honorable Paul M. Glenn, Chief Bankruptcy Judge, U.S. Bankruptcy Court, Tampa; Honorable Alexander L. Paskay, Chief Bankruptcy Judge Emeritus, U.S. Bankruptcy Court, Tampa; Honorable Lewis M. Killian, Chief Bankruptcy Judge,

U.S. Bankruptcy Court, Tallahassee; Honorable Paul G. Hyman, Chief Bankruptcy Judge, U.S. Bankruptcy Court, West Palm Beach; Honorable A. Jay Cristol, Chief Bankruptcy Judge Emeritus, U.S. Bankruptcy Court, Miami; Honorable Arthur B. Briskman, Bankruptcy Judge, U.S. Bankruptcy Court, Orlando; Honorable Jerry A. Funk, Bankruptcy Judge, U.S. Bankruptcy Court, Jacksonville; Honorable Karen S. Jennemann, Bankruptcy Judge, U.S. Bankruptcy Court, Orlando; Honorable Michael G. Williamson, Bankruptcy Judge, U.S. Bankruptcy Court, Tampa; Honorable K. Rodney May, Bankruptcy Judge, U.S. Bankruptcy Court, Tampa; and Honorable Catherine Peek McEwen, Bankruptcy Judge, U.S. Bankruptcy Court, Tampa. The seminar will be held October 18, 2007 at the Downtown Tampa campus of the Stetson University College of Law, 1700 North Tampa Street, Tampa, Florida. For more details, call (813) 228-6625.

In honor of the Bankruptcy Judges who will be participating in the View from the Bench seminar, the Tampa Bay Bankruptcy Bar Association will be sponsoring a reception on October 17, 2007 from 5:30 p.m. to 7:00 p.m. at the The University Club of Tampa, One Tampa City Center, 201 N. Franklin Street, Suite 3800. For more details regarding the reception, call Brittany Jacobs at (813) 223-2000.

Turn to one source for all your Asset Management & Recovery Needs

**MICHAEL
MOECKER
& Associates, Inc.**

- ◆ *Receiverships*
- ◆ *Out of Court Workouts with Creditors*
- ◆ *Assignments for the Benefit of Creditors*
- ◆ *Services in Bankruptcy Cases*
 - ◆ Asset Liquidation for Trustees
 - ◆ Disbursing Agent for Distributions
 - ◆ Trustee For Liquidating Trusts
 - ◆ Administrator for Creditors Committee

Ft. Lauderdale: **954.252.1560**

Tampa: **813.875.2701**

www.moecker.com



**Moecker
Realty, Inc.**
Licensed Real Estate Broker

**Real Estate
Management &
Liquidation Services
for Trustees, Receivers
& Assignees**

**Moecker
Auctions Inc.**

*Over 40 years in the
auction and appraisal industry,
we offer a unique approach to
auctions, appraisals & liquidations.*

- ◆ *GPPA and USPAP Appraisals*
- ◆ *Certified Estate Specialist*
- ◆ *Chapter 7 & 11 Case Liquidation*
- ◆ *Short and Long Term Asset
Management & Dispositions*
- ◆ *Fully Licensed, Bonded and Insured*
 - ◆ *Completely Automated*
 - ◆ *Licensed Auctioneers*

800.840.BIDS (2437)

www.moeckerauctions.com

OFFICES IN: FORT LAUDERDALE • TAMPA • JACKSONVILLE • ORLANDO

AB1098
AU3219

C. TIMOTHY CORCORAN, III

Retired United States
Bankruptcy Judge
Middle District of Florida
and
Certified Circuit Civil
and Federal Mediator

is available
to serve as
mediator
arbitrator
counsel
and
co-counsel

in commercial and
business litigation
in state and federal courts
including reorganizations
and insolvencies



C. TIMOTHY CORCORAN, III, P.A.
400 N. ASHLEY DRIVE
SUITE 2540
TAMPA, FLORIDA 33602
(813) 769-5020
ctcorcoran@mindspring.com
www.ctcorcoran.com

September Half-Day Seminar: Fraud, Greed and Terrorism

by *Shane G. Ramsey, Esq.*
Bush Ross, P.A.

The TBBBA held its September Half-Day Seminar on September 11, 2007 at the Tampa Convention Center. The seminar was well-attended. Speakers included Gerald A. McHale, Jr., CPA., Hans Christian Beyer, Esq., Steven S. Oscher, CPA and Alan S. Glassman, Esq.

Mr. McHale provided insightful commentary and anecdotes regarding typical consumer fraud schemes based upon his experience as a Chapter 11 trustee and state court receiver in numerous bankruptcy and state court insolvency proceedings. Mr. Beyer discussed various tools and methods available for recovering fraudulently transferred assets from foreign jurisdictions. Mr. Oscher spoke about his experience as a Chapter 11 trustee in investigating various fraudulent schemes. Finally, Mr. Glassman discussed legitimate uses for commonly challenged protection structures, such as estate, tax, and business planning devices. These insightful presentations provided TBBBA members with a framework for identifying and analyzing the necessary issues regarding fraudulent schemes and recovery of assets obtained as a result of these fraudulent schemes.

The highlight of the seminar was the luncheon featuring Juval Aviv as keynote speaker. Mr. Aviv is President and CEO of Interfor, Inc., an international corporate intelligence and investigations firm. Before founding Interfor, Mr. Aviv served as an officer in the Israel Defense Force and was later selected by the Israeli Secret Service to participate in a number of intelligence operations in the late 1960's and 1970's. A true account of one mission that he led was published in a book entitled *Vengeance*, by George Jonas. The book became a best seller and was later the basis for the HBO film, *Sword of Gideon* and Steven Spielberg's *Munich*.

Mr. Aviv spoke on international asset search and recovery methods for collecting judgments. Mr. Aviv also spoke on the issue of terrorism based upon his many years of experience in the intelligence community.





US Auction Realty

**BANKRUPTCY • RESIDENTIAL
COMMERCIAL • INDUSTRIAL**

FREE EVALUATION OF ASSETS IN 3 DAYS

- Specializing in Bankruptcy in the Middle District of Florida.
- Obtain the most for assets.
- Building long term relationships one client at a time.
- A custom marketing campaign for all assets.
- Immediate and professional results.
- Fully Licensed, Bonded, and Insured.

813 414-0980

AuctionForBankruptcy.com

*Is your auction firm giving
you the results and level
of professionalism you
demand?*

US Auction Realty
Gulf Coast Preferred
Properties
Licensed Real Estate Broker
Licensed Auctioneer

813 414-0980

AuctionForBankruptcy.com

Case Digest

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

Eleventh Circuit Court of Appeals:

Educ. Credit Mgmt. Corp. v. Mosley (In re Mosley), No. 06-10349, 494 F.3d 1320 (11th Cir. Aug. 9, 2007). Affirmed bankruptcy court order discharging student loans where debtor had history of mental and physical illness, rejecting argument that debtor was required to present independent medical evidence of his condition.

United States v. Jacobs (In re Jacobs), 490 F.3d 913 (11th Cir. June 29, 2007). Tax debt related to law practice, dischargeability of same. Affirming bankruptcy court ruling that debtor attempted to evade tax or defeat tax by transferring title in home to wife.

Miller Buckfire & Co., LLC v. Citation Corp. (In re Citation Corp.), 494 F.3d 1313 (11th Cir. July 26, 2007). Affirming bankruptcy court use of lodestar method under §330 to reduce fees requested by investment bank where court reserved such ruling at time of employment, rather than allowing fixed fee pursuant to §328. Remanding to bankruptcy court to determine whether bank violated Rule 2014 by failing to disclose connections to private equity firm with large equity interest in debtor, whether court should penalize bank for violation.

Middle District of Florida Bankruptcy Court:

In re Cocke, 371 B.R. 554 (Bankr. M.D. Fla. July 11, 2007) (Proctor). Debtor's beneficiaries and grantors of trust holding legal title to real property could claim as exempt homestead, where maintained right to revoke interest in trust.

In re Morande Enterprises, Inc., 371 B.R. 546 (Bankr. M.D. Fla., June 29, 2007) (Paskay). Based on totality of circumstances and equities of the case, nonpecuniary tax penalty claim of IRS would be subordinated, citing 726(a)(4) and 1129(a)(7).

In re Arsenault, 370 B.R. 845 (Bankr. M.D. Fla. July 3, 2007) (Williamson). Form B22C is starting point for calculations of term "projected disposable income" under 1325(b)(1)(8), but provides rebuttable presumption subject to evidence that shows different amount projecting income over life of Chapter 13 plan.

In re Elec. Mach. Enters., Inc., 371 B.R. 549 (Bankr. M.D. Fla. July 1, 2007) (Williamson). Unsecured creditor of insolvent debtor not entitled to recovery of postpetition attorney fees and costs as part of claim, even if there is an underlying contractual right to fees and costs.

In re Mazon, 368 B.R. 906 (Bankr. M.D. Fla. May 11, 2007) (Williamson). Chapter 7 trustee may surcharge exempt assets where nonexempt assets are not disclosed and subsequently dissipated, but homestead property only available where assets traced directly to homestead.

Oscher Consulting



- Accounting and Financial Investigative Services
- Expert Testimony
- Securities Fraud
- Family Law
- Business Valuations

Litigation Consulting Services

In the areas of Accounting, Finance and Information Systems

Steven S. Oscher, CPA

One Tampa City Center • 201 N. Franklin Street • Suite 3150 • Tampa, FL 33602

(813) 229-8250 Fax (813) 229-8674

Judicial Liaison Program

by Adam Lawton Alpert, Esq.
Bush Ross, P.A.

The United States Bankruptcy Court for the Middle District of Florida, Tampa Division, and the Tampa Bay Bankruptcy Bar Association recently announced the creation of the new Judicial Liaison Program, the goal of which is to foster effective communications between the bankruptcy community and the United States Bankruptcy Court and the Clerk's Office. If persons appearing before the United States Bankruptcy Court for the Middle District of Florida, Tampa Division, have questions or concerns that they believe should be raised with the Court or the Clerk's Office but they would prefer not to raise such concerns or questions directly, the new Judicial Liaison Program encourages people to raise such concerns with the Tampa Bay Bankruptcy Bar Association, which will in turn consider raising such questions or concerns, on a confidential basis if possible, with the Court or the Clerk's Office.

For more details on the Judicial Liaison Program, please contact any of the Officers or Directors of the Tampa Bay Bankruptcy Bar Association.

THIS SPACE FOR RENT

For more information on advertising
in the Cramdown,
contact: Daniel R. Fogarty
(813) 229-0144 • dfogarty@srbp.com



Serious leverage at depositions

Fully
compatible
with Microsoft®
Vista!

LiveNote® gives your side a distinct advantage before, during and after depositions.

This powerful yet easy-to-use software connects your laptop directly to the court reporter's machine and the videographer's camera during a deposition. So you can edit, sort and organize the testimony as it's given, save video clips and later embed them in PowerPoint® for presentation at trial. Even better, you can send a live, realtime feed of the deposition – both video and transcript – to remote attorneys. Now *that's* serious leverage.

For more information, call **1-800-762-5272** or visit **livenote.com**.

Calculating Current Monthly Income Under the Means Test: To Deduct or not to Deduct That is the Questions

Susan H. Sharp, Esq.

Amy Denton Harris, Esq.

Stichter, Riedel, Blain & Prosser, P.A.

With mortgage foreclosures reaching an all time high in Florida and home prices continuing to decline, it is no wonder that more home owners are surrendering their homes rather than trying to save their home by filing a Chapter 13 bankruptcy case. Notwithstanding the rise in foreclosures, many home owners may benefit from filing a Chapter 7 bankruptcy case to eliminate any mortgage deficiency as well as unsecured debt which may have been incurred in trying to save their home. If a home owner files a Chapter 7 bankruptcy case with the intent to surrender the home during the Chapter 7 case, an issue arises as to whether the home owner may deduct the contractual monthly mortgage payments for purposes of calculating current monthly income ("CMI") under the means test.¹ The issue arises because of the

debate over the interpretation of 11 U.S.C. § 707(b)(2)(A)(iii), which provides that "[t]he debtor's average monthly payments on account of secured debts shall be calculated as the sum of – (I) the total of all amounts **scheduled as contractually due** to secured creditors in each month of the 60 months following the date of the petition." 11 U.S.C. § 707(b)(2)(A)(iii). (emphasis added).

A survey of the recent cases examining the issue reflects that the majority of the courts allow a Chapter 7 debtor to deduct contractual monthly mortgage payments for purposes of calculating CMI, even though the debtor intends to surrender his/her home during the Chapter 7 case. The leading case on the issue is *In re Walker*, 2006 WL 1314125 (Bankr. N.D. Ga. 2006). In *Walker*, the debtors owned a home, subject to a first and second mortgage, which they intended to surrender during the Chapter 7 case. *Id.* While the United States Trustee agreed that the debtors were contractually obligated to make the monthly mortgage payments, the United

¹ This issue is the same whether the debtor intends to surrender his/her home, vehicle, or other property subject to a secured claim. Recently, Judge Cristol held that a debtor was entitled to a deduction for contractual monthly payments on a vehicle for purposes of calculating CMI under the means test even though the debtor declared his intent to surrender the vehicle and in fact surrendered the vehicle after the Petition Date. See *In re Benedetti*, 2007 WL 2083576 (Bankr. S.D. 2007).



What solution combines **research, litigation services, practice management** and **client development** in one nice, neat package?



LexisNexis Total Practice Advantage™
For Consumer Bankruptcy



Go to **lexisnexis.com/practiceadvantage** for more information, or find your local LexisNexis® consultant at **877.810.5324**

TOTAL PRACTICE SOLUTIONS

Client Development Research Solutions Practice Management Litigation Services



LexisNexis and the Knowledge Burst logo are registered trademarks and LexisNexis Total Practice Advantage is a trademark of Reed Elsevier Properties Inc., used under license.
© 2006 LexisNexis, a division of Reed Elsevier Inc. All rights reserved.

Calculating Current Monthly Income

continued from p. 14

States Trustee argued that since the debtors intended to surrender their home they were only entitled to the lower local standard allowance because they did not intend to make the future contractual monthly mortgage payments on the home. *Id.* The court held that the debtors were entitled to deduct the contractual monthly mortgage payments on the home for purposes of calculating CMI under the means test because on the petition date the debtors were contractually obligated to make the monthly mortgage payments. *Id.* In reaching its holding, the court looked to the plain meaning of the statute and the principles of statutory construction. *Id.* Since the Bankruptcy Code does not define the term scheduled, the court turned to the dictionary, which defines schedule as “to plan for a certain date.” *Id.* The court also found that the common meaning of “as contractually due” is “that the debtor is legally obligated under the contract. . . to make a payment in a certain amount, with a certain amount of interest, for a set number of months into the future. Accordingly, payments that are ‘scheduled as contractually due’ are those payments that the debtor will be required to make on certain dates in the future under the contract.” *Id.* The court went on to say that “[t]he debtor’s contractual liability for the debt is not eliminated upon the surrender of collateral.” *Id.*

Several courts have followed the holding in *Walker*, including *In re Hartwick*, 2006 WL 2938700 (Bankr. D. Minn. 2006), *aff’d, sub nom. Fokkena v. Hartwick*, 2007 WL 2350560 (D. Minn. 2007). In *Hartwick*, the court held that the debtor was entitled to deduct her contractual monthly mortgage payment for purposes of calculating CMI under the means test even though the debtor had declared her intent to surrender the home, the mortgagee filed a motion seeking relief from the automatic stay to continue foreclosure proceedings, which the court granted, and debtor vacated the home approximately four months after filing bankruptcy. *Id.*

A minority of the courts that have examined the issue hold that the debtor’s intention to surrender property subject to a secured claim precludes the debtor from deducting the contractual monthly payment for purposes of determining CMI under the means test. See *In re Skaggs*, 349 B.R. 594 (Bankr. E.D. Mo. 2006). In *Skaggs*, the court rejected the *Walker* court’s reliance on dictionary definition of “schedule”. Instead, the court looked to other sections within the Bankruptcy Code which define “schedule” and reasoned that “scheduled” refers to the debtor’s schedules and

statement of financial affairs. *Id.* Therefore, the court held that the debtors were not entitled to the deduction since their statement of intention evidenced their intent to surrender the property. *Id.*

In *Singletary*, the court took an approach in between the *Walker* and *Skaggs* courts, holding that the relevant date on which the CMI calculations should be determined is the date the United States Trustee files a motion to dismiss the case under Section 707(b)(2) of the Bankruptcy Code based upon a presumption of abuse and not the date of the filing of the bankruptcy petition. *In re Singletary*, 354 B.R. 455 (Bankr. S.D. Tex. 2006). The court reasoned that if stay relief is granted, then technically the schedules should be amended to reflect the obligations as unsecured debt and would not be considered in means test calculation. *Id.* Therefore, if stay relief is granted at the time the United States Trustee files its presumption of abuse motion, then payments on that debt are not deductible in calculating CMI. *Id.* at 458.

Whether a given district follows the majority view, minority view, or follows *Singletary*, a debtor probably will not be entitled to deduct its contractual monthly mortgage payment for purposes of calculating CMI under the means test if the debtor allows the home to be sold at a foreclosure sale and, under state law, the foreclosure sale terminates the debtor’s contractual obligations under the mortgage. See *In re Brandenburg*, 2007 WL 1459402 (Bankr. E.D. Wis. 2007).

Foreclosures are at an all time high as a result of interest rate increases on adjustable rate loans, principal becoming due on interest-only loans, the principal amount of loans exceeding the value of the home because of negative amortization, unemployment, and other factors. Since many of these home owners do not have sufficient equity in their homes, they are surrendering them. Given the emerging majority view among the courts allowing Chapter 7 debtors to deduct the contractual monthly mortgage payments for purposes of calculating CMI under the means test, these home owners might be better served by a Chapter 7 bankruptcy case and surrendering the home post-petition. The courts in the Middle District of Florida have not yet decided the issue, therefore, it remains to be seen whether the surrender of the home in a Chapter 7 case in this district will serve as a pre-emptive strike to foreclosure. However, careful analysis is required since alternatively the United States Trustee may still seek to dismiss a Chapter 7 case under 11 U.S.C. § 707(b)(3) for abuse based on “the totality of the circumstances.”

Johnson Transcription Service



For one-stop shopping for all of your bankruptcy transcription needs, call Johnson Transcription Service. Now transcribing digitally recorded 341 meetings and hearings in Bankruptcy Court. JTS is certified by the A.O. of the U.S. Courts to transcribe electronically recorded hearings.

For complete court reporting services call upon our professional and friendly staff.

Kimberley S. Johnson

Telephone: (813) 920-1466

Facsimile: (813) 920-0800

Email address: kgjits@aol.com

7702 Cypress Lake Drive
Odessa, Florida 33556

The Cramdown

PO Box 800

Tampa, Florida 33601-0800