The Cramdown

The Newsletter of the Tampa Bay Bankruptcy Bar Association

Editor-in-Chief, Keith Appleby, Esq., Fowler White Boggs P.A. **Fall 2009**

PRESIDENT'S MESSAGE

by Luis Martinez-Monfort, Esq.
Brewer Perotti
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I am proud to report that, as I take over as president, I find our Association in excellent shape. We are fortunate to be led by a very capable and energetic group of officers and directors. Our past president, Donald Kirk, has been an exceptional steward of the Association's interests. We enjoy an excellent relationship with our bankruptcy judges and clerks' offices and are now approximately 280 members strong.

The new officers and directors for this year are as follows:

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With the help of these strong and dedicated leaders, I look forward to another great year for our Association.

This year, as in recent years, the focal point of the Association's activities will center around our monthly CLE accredited luncheons and consumer luncheons. However, these events are not the only benefits provided to our members. We will continue to publish our quarterly periodical, The Cramdown, as well as our annual membership directory. Our website is being updated on a regular basis to provide you the latest information concerning upcoming CLE programs, consumer luncheons, and other events of importance to our membership. You can also go to the website (www.brokenbench.org) and update your profile to ensure that your most recent contact information is available to all members of the Association. In addition, we will continue to support our various pro-bono activities, including the C.A.R.E. program, which has been a huge success for us over the last couple of years.

Notwithstanding the full plate of activities already coordinated by an all volunteer Board of Directors, this year we will strive to go in several new directions. We are expanding our pro-bono efforts during these difficult economic times when our community can greatly benefit from our collective skill sets. We are also ramping up fundraising efforts, begun last year under the leadership of Donald Kirk, to ensure that we have sufficient funds in our coffers to become a significant sponsor of the National Conference of Bankruptcy Judges, to be held here in Tampa in 2011. Our Ad Hoc Long Term Planning Committee's goals include not only being the local liaison to assist in coordinating the NCBJ events, but also raising sufficient sponsorship funds from other sources, so as not to affect any of the programs the Association offers on a yearly basis. Toward that goal, we have already held one extremely successful fundraiser this summer at the Rays game (discussed later in this Cramdown) that set the tone for our fundraising efforts.

We continue to strive to be an organization that not only represents the local bankruptcy bar, but also enriches its members. Please call me if you ever have any ideas of how to strengthen the organization or how the Association can become a more relevant help to your practice. Here's looking forward to another great year for our Association!

Inside This Issue

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

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All IRAs are Exempt in Florida...Aren't They?

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

Most bankruptcy practitioners in Florida would agree that an IRA is exempt from the claims of creditors and the Trustee in bankruptcy – particularly where the form of the IRA plan had been approved by the IRS. The more nuanced advice is that funds in a **tax-qualified** IRA (or pension or profit sharing plan) are exempt. The legal issue is whether or not an IRA plan is tax qualified, and the factual issue becomes whether the debtor has ever done anything in managing an IRA so as to disqualify its exempt status.

The basis for the exemption of IRAs and similar retirement accounts is found in two places - the Bankruptcy Code and Florida law. To be exempt, each requires an IRA or similar plan to be tax qualified under the Internal Revenue Code ("IRC"). Thus, whether the exemption is claimed under state law or federal law, the analysis is similar.

Since Florida is an opt-out state, a debtor typically looks to state law for the exemptions claimed in bankruptcy. Under Fla. Stat. §222.21(2)(a)(1), entitled "Exemption of pension money and certain tax - exempt funds or accounts from legal processes", tax qualified IRAs are exempt. This section provides:

... (2)(a) ... any money or other assets payable to an owner, a participant, or a beneficiary from, or any interest of any owner, participant, or beneficiary in, a fund or account is exempt from all claims of creditors of the owner, beneficiary or participant if the fund or account is:

1. Maintained in accordance with a master plan, volume submitter plan, prototype plan, or any other plan or governing instrument that has been preapproved by the Internal Revenue Service as exempt from taxation under s. 401(a), s. 403(a), s. 403(b), s. 408, s. 408A, s. 409, s. 414, s. 457(b), or s. 501(a) of the Internal Revenue Code of 1986, as amended, unless it has been subsequently determined that the plan or governing instrument is not exempt from taxation in a proceeding that has become final and nonappealable;

In some cases, the Debtor will claim exemptions under federal law. Specifically, §522(b) of the Bankruptcy Code provides:

(b)(1) Notwithstanding section 541 of this title, an individual debtor may exempt from property of the estate the property listed in either paragraph (2) or, in the alternative, paragraph (3) of this subsection.
(3) Property listed in this paragraph is-
(C) retirement funds to the extent that those funds are in a fund or account that is

exempt from taxation under section 401, 403, 408, 408A, 414, 457, or 501(a) of the Internal Revenue Code of 1986.

In the recent case of *In re Willis*, 2009 WL 2424548 (Bankr. S.D. Fla. 8/26/2009), the Debtor claimed three IRAs valued at more than $1.4 million as exempt under federal law pursuant to §522(b)(3)(C). The Trustee and a creditor filed objections to the exemption of the IRAs. Judge Paul Hyman disallowed the exemption of the three IRAs. The basis of the Court's ruling was that the Debtor had borrowed money from the IRAs, which constituted a "prohibited action" under the IRC. The fact that the debtor promptly paid back the money he borrowed from the IRAs did not save the day.

In its legal analysis, the Court in *Willis* found that Sections 522(b)(4)(A) and (B) provide two different analyses to determine whether an IRA qualifies for exempt status under § 522(b)(3)(C). Citing *In re Patrick*, 2008 WL 5521181 at *3 (Bankr. C.D. Cal. Oct. 31, 2008), the Court stated that Section 522(b)(4)(A) applies when an IRA has received a favorable IRS determination. Section 522(b)(4)(B) applies when an IRA has not received a favorable IRS determination. In the *Willis* case, there was no dispute that the IRAs had received a favorable determination under § 7805 of the IRC. This favorable determination was in effect on the Petition Date. Thus, the IRA plan was fine.

The Court focused on § 522(b)(4)(A) (which applies when an IRA has received an IRS favorable determination) to determine whether the IRAs were exempt. Section 522(b)(4)(A) creates a rebuttable presumption of exemption. The Debtor argued that the presumption of exemption arising under § 522(b)(4)(A) was irrefutable. The Court rejected this argument, and found that based on the plain language of the statute, the presumption is subject to rebuttal. The Court found that the Debtor had borrowed $700,000 from his IRA in order to complete a closing in a real estate transaction. The Debtor repaid the entire amount back into his IRA two months later. The Debtor also undertook a series of "check transfers" pre-petition, whereby the Debtor withdrew funds from the IRA, and then put the same amount back into the IRA. The Court found that by borrowing funds from

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Absolute Priority Rule: Absolutely for Unsecured Creditors?

by Michael Fisherman

I was observing a recent bankruptcy hearing on a plan confirmation. The class of unsecured claims had accepted the plan unanimously. Normally, very routine. Until the attorney for a party in interest—not an unsecured creditor—said the plan was not confirmable because it failed to satisfy the Absolute Priority Rule of § 1129(b)(2)(B)(ii). This naturally led to some debate. Who can object to plan confirmation on absolute priority grounds when the unsecured creditors are happy with the plan? Can the United States Trustee? A dissenting secured creditor?

The plain language of § 1129(b)(1) states that the court shall confirm a plan provided it "does not discriminate unfairly, and is fair and equitable, with respect to each class of claims or interests that is impaired under, and *has not accepted*, the plan" (emphasis added). This should end the debate.

Some courts, however, have determined that the absolute priority rule is embodied in the above "fair and equitable" language. The Southern District of Florida once held that "[t]he absolute priority requirement is implicit in § 1129(b)(1) and (2)…." *In re Miami Center Assocs., Ltd.,* 144 B.R. 937, 941 (Bankr. S.D. Fla. 1992).

Eight years later, though, a different judge from that court rejected the argument, looking to statutory construction, and stated that "the absolute priority rule is *explicit*, not *implicit*, in § 1129(b)(2)." *In re New Midland Plaza Assocs.,* 247 B.R. 877 (Bankr. S.D. Fla. 2000). Congress expressly incorporated the absolute priority rule in paragraphs (B) and (C) of § 1129(b)(2), and could have incorporated it in paragraph (A), but clearly did not. *Id*. Paragraph (A) specifically deals with secured claims, while paragraph (B) concerns unsecured claims and paragraph (C) concerns classes of interests. 11 U.S.C. 1129(b)(2). The court additionally based its conclusion to not allow a secured creditor to make an absolute priority rule objection on the recognition that allowing a secured creditor to block confirmation under §1129(b)(2)(B) would "eviscerate the votes of classes of unsecured creditors." *New Midland Plaza,* 247 B.R. at 895.

The Northern District of Nevada took the analysis a step further by looking to the legislative history of § 1129, and determined that Congress intended to treat secured creditors differently from unsecured creditors. *In re Sagewood Manor Assocs. L.P.,* 223 B.R. 756, 773 (Bankr. D. Nev. 1998) (citing H.R.REP. NO. 595, 95th Cong., 1st Sess. 413 (1977), reprinted in 1978 U.S.C.C.A.N. 5963, 6369). The court held that the history "makes it clear that Congress intended the absolute priority rule to apply only to unsecured creditors…." *Id*.

There is also a wealth of existing case law from across the country that holds only a dissenting unsecured creditor can raise the absolute priority rule. *See In re Babcock & Wilcox*, 2000 WL 533492, *4 (E.D. La. 2000) (discussing the absolute priority rule and holding that it "provides that a *dissenting class of unsecured creditors* must be provided for in full before any junior class can receive or retain any property under a plan" (emphasis added)); *In re Dean*, 166 B.R. 949, 954 (Bankr. D.N.M. 1994) ("Under [the absolute priority rule], no junior class of creditors could retain a property interest in the debtor if a *dissenting class of unsecured creditors* were not provided for in full." (emphasis added)); 641 *Assocs., Ltd. v. Balcor Real Estate Finance, Inc.* (*In re 641 Assocs., Ltd.*), 140 B.R. 619, 629 (Bankr. E.D. Pa. 1992) ("[§ 1129(b)(2)(B)(ii)] refers only to the consequences of the failure of a class of *unsecured* creditors to accept a plan."); *In re Orfa Corp. of Phila.*, 1991 WL 225985, *6 (Bankr. E.D. Pa. 1991) ("…§1129(b)(2)(B)(ii)…references only what criteria must be met to 'cram down' a plan upon members of a class of *unsecured* creditors which have rejected the plan."); *In re Moore*, 1990 WL 605862, *14 (Bankr. S.D. Ga. 1990) ("[The absolute priority rule] applies only in cases when

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Absolute Priority Rule

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a class of *unsecured claims* or equity interests is impaired and does not accept the plan." (emphasis added)).

As can be seen from the above discussion, case law from around the country routinely suggests that only an unsecured creditor can object to a cram down based on § 1129(b)(2)(B)(ii). The legislative history and statutory construction also indicate that only unsecured creditors were meant to make these objections. Allowing a secured creditor to raise absolute priority rule objections would make it so that a disgruntled secured creditor could block an otherwise confirmable plan, rendering the votes of the unsecured creditors meaningless. For these reasons, when a dissenting secured creditor objects to a plan being crammed down, the judge should only look to § 1129(b)(2)(A) to determine if the plan is fair and equitable. A separate § 1129(b)(2)(B) absolute priority inquiry is not required.

Michael Fisherman is a third-year law student at The University of Texas School of Law. This summer he was a member of the 2009 United States Bankruptcy Court Tampa Division Summer Internship Program in the chambers of the Honorable Catherine Peek McEwen, Michael Williamson, and Caryl Delano.

Judgment Debtors May Invoke the Fifth Amendment... Sometimes

by Hema Persad, Esq.
Fowler White Boggs PA

Many state constitutions grant debtors immunity from prosecution for statements made at a judgment debtor's examination. See e.g. Missouri state constitution. However, the Florida Constitution does not expressly grant a privilege against self-incrimination apart from the Fifth Amendment of the United States Constitution. Instead, use immunity is granted to judgment debtors under the Florida Statutes. *See Fl. Stat. § 56.29(8).*

The broad general rule in Florida is that the "Fifth Amendment privilege is applicable where the [debtor] has 'reasonable cause to apprehend danger from a direct answer.'" *Raass v. Borgia,* 644 So. 2d 121, 122 (Fla. 4th DCA 1994) (quoting *Hoffman v. United States*, 341 U.S. 479 (1951)). According to the Supreme Court, "a witness is generally entitled to invoke the Fifth Amendment privilege against self-incrimination whenever there is a realistic possibility that his answer to a question can be used in any way to convict him of a crime." *Meek v. Dean Witter Reynolds, Inc.*, 458 So. 2d 412, 413-414 (Fla. 4th DCA 1984) (quoting *Pillsbury Co. v. Conboy*, 459 U.S. 248, 266 at n.1 (1983)). This is a question for the court to decide, and to sustain the privilege it "need only be evident from the implications of the questions . . . that a responsive answer to the question or an explanation of why it cannot be answered might be dangerous because injurious disclosure could result." *Raass*, 644 So. 2d at 122.

What this means, is that a judgment debtor "can invoke the fifth Amendment privilege if he has reasonable grounds to believe that his answers might provide a link in the chain of evidence needed to prove a crime against him." *DeLeo v. Wachovia Bank, N.A.*, 946 So. 2d 626, 628 (Fla. 2d DCA 2007). Factors that the Court will look at when determining whether the privilege should apply include: (1) the setting in which the questions were asked (2) the implication of the question being asked (3) facts already in evidence (4) the Judge's own personal perception, and (5) the totality of the circumstances. *DeLeo*, 946 So. 2d at 628-629; *Raass*, 644 So. 2d at 122.

Finally, if the self-incriminating nature of the question is not apparent, then the burden is on the person asserting the privilege—the debtor—to show the court the danger of incrimination that could result from the answer. *Id*. Florida law does not shift the burden to the questioning party to present evidence against the debtor's assertion of the privilege. The privilege will be held inapplicable only when the court determines that the "testimony sought cannot possibly be used as a basis for, or in aid of, a criminal prosecution against the witness." *Meek*, 458 So. 2d at 414 (emphasis added).

The procedure followed by Florida courts requires that the judgment debtor claim the Fifth Amendment privilege each time he is posed with a question, request for production, interrogatory, or other discovery device. The court must then examine each question objected to, to determine if there is a reasonable possibility that the answers may evoke a response forming a link in the chain of evidence which might lead to a criminal prosecution. *See DeLeo*, 946 So. 2d 626 at 629; *Meek*, 458 So. 2d 414; *Novak v. Snieda*, 659 So. 2d 1138 (Fla. 2d DCA 1995); *Eisenstein v. Citizens & Southern National Bank of Florida*, 561 So. 2d 1203, 1204 (Fla. 4th DCA 1990). This vague standard leaves open the possibility of valid objections to a number of different questions.

In sum, a judgment creditor can assert the Fifth Amendment privilege usually only if he is being "compelled to answer questions which may incriminate him in possible criminal proceedings." *Novak*, 659 So. 2d at 1141; *Compton v. Societe Eurosuisse, S.A.*, 494 F. Supp. 836 (S.D. Fla. 1980). However, It is not necessary that a criminal proceeding be pending in order to invoke the privilege. Lastly, the proper way to raise the Fifth Amendment privilege is for the deponent or witness to object to each question at the time of questioning. Upon objection, the court must examine each question objected to, and make a determination as to whether compelling the deponent or witness to answer the question would expose him or her to possible criminal liability.

Greatest Lessons Learned

by Cindy Turner
Law Clerk to the Honorable Paul M. Glenn

On August 5, 2009, the Chambers of Judge Catherine Peek McEwen hosted a New Lawyer Brown Bag Luncheon in the Fifth Floor Training Room at the Bankruptcy Court. The topic of the program was "Greatest Lessons Learned as a New Bankruptcy Attorney."

The presentation was the most recent installment of the Bankruptcy Judges' mentoring program for new lawyers, or lawyers new to the bankruptcy practice. Generally, the program is designed to assist new lawyers as they address the challenges associated with starting their legal careers, and "to help them develop professionally, ethically, and responsibly."

Previous programs had typically featured judges as the senior lawyers and guest speakers. For the summer program, however, co-chairman Katie Brinson-Hinton, wanted to add something new by enabling successful veteran attorneys "to come and give their secrets to success (or their secrets to avoiding big mistakes)."

To ensure that the program met its objective, Judge McEwen and the event's organizers looked to three of the most highly-regarded bankruptcy practitioners in the area. Don M. Stichter, Esquire, and Harley E. Riedel, Esquire, of Stichter, Riedel, Blain & Prosser, P.A., and Jeffrey W. Warren, Esquire, of Bush Ross, P.A., are all past presidents of the Tampa Bay Bankruptcy Bar Association, and have skillfully handled many of the most complex bankruptcy cases in the state.

Each of the presenters shared personal experiences from their careers, and offered practical suggestions to the new lawyers who attended the program. Don Stichter, for example, advised the participants to take advantage of as many legal seminars as possible, and never decline an educational opportunity. Harley Riedel emphasized the value of thorough research and diligence in preparing a case, with the prospect of making the best of a good case or elevating a case that is only mediocre.

Jeff Warren advised the new lawyers to attend key hearings being conducted in the bankruptcy court, even if they are not involved in the case, because of all that can be learned simply from observing the proceedings and the lawyers who appear in them. Jake Blanchard, Esquire, who participated in the

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Greatest Lessons Learned

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program as a junior lawyer, liked Mr. Warren's idea of arriving early to Court to watch other cases on the docket, and says that he always learns "a ton" when he attends hearings as an observer.

If there was a single theme that pervaded all of the speakers' presentations, however, it was the importance of professionalism in the daily practice of law. The bankruptcy bar is viewed as a civil bar association, where professional courtesies are routinely extended and received. According to the speakers, extending such courtesies is not only the right thing to do, but also leads to significant long-term rewards in the practice of law, such as the lawyer's increased credibility among his peers. One of the Greatest Lessons that new attorneys can learn from their senior counterparts, therefore, is that the Golden Rule applies in the practice of bankruptcy law. As stated by Harley Riedel, all attorneys should simply treat their fellow lawyers the way they want to be treated.

IRA's Exempt in Florida

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the IRA for a business purpose, the debtor became a "disqualified person" who had undertaken a "prohibited transaction". This destroyed the tax qualification of the IRA. As a result, funds totaling more than $1.4 million were found non-exempt and subject to administration by the Trustee.

Under Florida Statute 222, Judge Paskay has at least two reported decisions finding that a Florida debtor's pre-petition actions vitiated the exemption of an IRA, pension or profit sharing plan. *See In re Hughes*, 293 B.R. 528 (Bankr. M.D. Fla. 2003)(J. Paskay)(debtor's misuse of funds from IRA in order to make loan to his closely-held corporation affected status of funds in account, and prevented debtor from claiming IRAs as exempt, notwithstanding that debtor promptly repaid loan); *In re Baker*, 401 B.R. 500 (Bankr. M. D. Fla. 2009) (J. Paskay)(under Fla. Stat. 222.21, funds in a Keogh plan where the claimant is the sole shareholder and sole "participant" in the Keogh plan are not exempt). All of these cases illustrate that sophisticated practitioners (whether representing the debtor, creditor or trustee) should closely review claimed exemptions to make sure the exemption meets all of the applicable statutory requirements. Moreover, counsel should carefully review significant pre-petition deposits or withdrawals related to IRAs, pension or profit-sharing plans.

May Luncheon

On May 12, 2009, "Navigating the Crossroads of Bankruptcy & Family Law" Presented by Joryn, Al Gomez, Terry Smith Jenkins, Doug Menchise















In re Bryan Road; Paving the Way for the Enforcement of Stay Relief Provisions in Prepetition Forbearance Agreements?

by Kelly Robinson, Esq.
Fowler White Boggs P.A.

Prepetition agreements, whereby the debtor waives the automatic stay, are not per se enforceable in bankruptcy, nor are they self-executing. *In re Bryan*, 382 B.R. 844, 848 (Bankr. S.D. Fla. 2008). However, various courts, including the Bankruptcy Court for the Southern District of Florida, has addressed the enforceability of such stay-relief agreements. *E.g., Id.* In our current era of work-out and forbearance negotiations, the impact of *Bryan Road* is ripe for practical analysis. This Article breaks down the *Bryan Road* analysis and assembles a practical guide for drafting waivers of the automatic stay in work-out and forbearance agreements.

In the context of bankruptcy proceedings, "the court shall grant relief from the stay . . . for cause," including the debtor's inability to provide adequate protection for a creditor's interest in property; the debtor's lack of equity in the property, and the property's insignificance toward an effective reorganization. 11 U.S.C. § 326(d). Thus, it is within the court's discretion to determine, after considering the "totality of the circumstances," whether sufficient cause truly exists to lift the stay. *Id*. at 854. The *Bryan Road* Court concluded that, an enforceable prepetition stay relief agreement constitutes sufficient "cause" to warrant granting relief from stay. *Id*. at 855.

The facts underlying the *Bryan Road* decision were critical to the Court's analysis. On the morning of its foreclosure sale, the Debtor entered into a forbearance agreement with its Lender (the "*Forbearance Agreement*"). In the Forbearance Agreement, the Debtor consented to the Lender's relief from the automatic stay in the event the Debtor later filed a bankruptcy case. Pertinent portions of the Forbearance Agreement included:

(a) that the [Lender] should be accorded relief from the automatic stay in the event the Debtor filed for bankruptcy protection as consideration for the [Lender] entering into the Forbearance Agreement;

(b) that the Final Judgment would continue to accrue interest at the rate set forth therein; and

(c) that the Debtor, among others, waived all claims, counterclaims, defenses and causes of action against the [Lender]. *Id*.

On the eve of the rescheduled foreclosure sale, the Debtor filed for relief under Chapter 11 of the Bankruptcy Code. The Lender filed its motion for relief from stay. The Lender based its motion in part on the stay relief provision in the Forbearance Agreement. The Court, relying in part on *In re Desai*, considered numerous factors in enforcing the Forbearance Agreement's lift-

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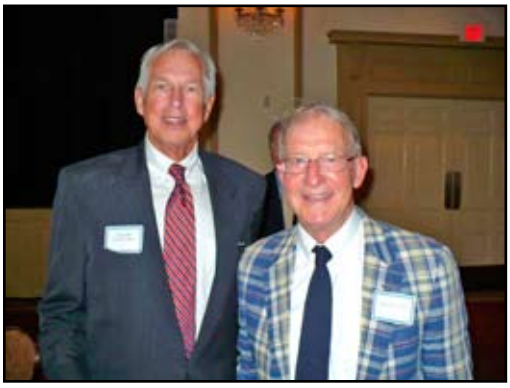
2009 Annual Dinner

The TBBBA held its annual Dinner on June 11, 2009, in the Grand Ball Room of the Palma Ceia Golf & Country Club. Approximately 100 members of the Association enjoyed cocktail/ social hour and delicious surf and turf dinner. The dinner program included the installation of the Association's Officers for the 2009-2010 term.











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stay provision: (1) the sophistication of the party making the waiver; (2) the consideration given in exchange for the waiver; including the creditor's risk and the length of time covered by the waiver; (3) whether other parties would be affected including unsecured creditors and junior lienholders; and (4) the feasibility of the debtor's plan. *Id*. at 848 – 49 (citing *In re Desai*, 282 B.R. 527 (Bankr. N.D. Ga. 2002)).

While finding the above-factors relevant and weighing them "heavily in favor of enforcement," the Court noted that other factors are also relevant to this enforceability analysis. Specifically, and perhaps of utmost importance to the Court, was the context in and time at which the stay-relief agreement was entered into. *Id* at 848. At one end of the spectrum, a prepetition waiver of stay relief included in the initial loan documents will be given little to no deference in a subsequent bankruptcy. At the other end of the spectrum, an agreement entered into during the course of prior Chapter 11 proceedings will be given the "greatest effect." *Id*. Somewhere in between we find the now-common forbearance agreement, loan workout, and all similar contractual arrangements. What can a lender do to maximize its chances of successfully obtaining relief from stay in reliance on a prepetition waiver contained in a forbearance or similar agreement? Consider the following non-exclusive list:

• If possible, give more than di minimus consideration in exchange for the waiver; and document any risk to the lender and the length of time covered. While greater consideration given in exchange for the waiver increases the likelihood of enforcement, a lender should be cautious of bargaining away too much in exchange for an agreement of questionable enforceability. The *Bryan Road* borrower received a two month forbearance in exchange for its waiver. While the Court was not overwhelmingly impressed with this consideration, it noted that the consideration received by the borrower "was what the [borrower] wanted at the time the Forbearance Agreement was signed." *Id*. at 849. Under these circumstances, the consideration was not de minimus. Because

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sufficiency of consideration is determined on a case-by-case basis, lenders should be cognizant of the borrower's specific desires when entering into a forbearance agreement, and clearly document the extent to which these desires are met in exchange for the waiver.

• Be cognizant of when the forbearance agreement is entered into and recall that a prepetition waiver of stay relief included in initial loan documents likely will be given little to no deference in a subsequent bankruptcy, while greatest effect will be given to an agreement entered into during the course of prior Chapter 11 proceedings.

• Be prepared to make traditional stay relief arguments. As stated above, cause for granting relief from stay includes the debtor's inability to provide adequate protection for the creditor's interest in the property, the debtor's lack of equity in the property, and the property's insignificance toward an effective reorganization. *See* 11 U.S.C. § 362(d). With this in mind, lenders should include a litany of agreed facts in forbearance agreements, which favor stay relief. For example, the *Bryan Road* included agreements that: (1)"the automatic stay should, at the request of the Bank be immediately lifted or modified in a fashion to permit the Bank to proceed with its foreclosure action"; (2) the debtor "is a single purpose entity, has few unsecured creditors, and it is highly unlikely that any significant benefit to unsecured creditors will be achieved by a bankruptcy reorganization; and (3) the subsequent filing for bankruptcy protection "will be for the sole purpose of delaying the Bank in its foreclosure action and will constitute a bad faith bankruptcy filing." Fla. Cmty. Bank Mot. for Stay Relief, filed in the United States Bankruptcy Court, S.D. Fla., Case No. 07-17922, Doc. 19 at p. 33. If favorable to the lender's stay relief efforts, additional agreed facts should be incorporated into the Forbearance Agreement. For example, lender and borrower may agree to the value of the collateral, the amount of outstanding debt, the debtor's lack of equity in the collateral, the debtor's inability to adequately protect the lender's interest in the collateral, and

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Procedure for Filing Motion to Determine Secured Status and to Strip Junior Lien on Debtor's Principal Residence on Negative Notice

1. Motions to value claims secured by junior liens on the debtor's principal residence and to strip off the liens may be filed on negative notice only in a Chapter 13 case. Lien stripping is not available to debtors in a Chapter 7 case.

2. Motions to value claims secured by junior liens on the debtor's principal residence at $0 and to "strip off" such liens shall not be filed before the earlier of the time when: (a) the affected creditor has filed a proof of claim or (b) the expiration of the time to file claims (claims bar date). A premature motion to value will be denied without prejudice.

3. The motion shall

– clearly state (a) all known parties who may have an interest in the mortgage, (b) the loan number (formatted as xxxx1234) and recording information of all mortgage lien(s) affected by the Motion, (c) the legal description and street address of the subject property, and (d) the basis of the valuation – private appraisal, county valuation, or other;

– be verified, or supported by an affidavit or declaration (pursuant to 28 U.S.C. § 1746) of the debtor;

– include on the first page the "negative notice" legend (below) giving interested parties 30 days to file an objection/request for hearing;

– certify service on (i) the appropriate persons required by Rule 7004 (b) (note in particular the requirements of Rule 7004 (h) for insured depository institutions), (ii) on the person who filed the mortgagee's proof of claim, (iii) the attorney, if any, for such creditor, and (iv) the Chapter 13 trustee; and

– be docketed in CM/ECF using the "Motion to Determine Secured Status (and strip lien if applicable)" docket event.

4. The movant shall submit the attached form of proposed order to the Clerk's Office through its e-orders program not later than ten (10) days after the expiration of the thirty (30) day objection period. If attorney's fees are sought in the motion, then the title of the motion should reflect that, and the title of the order should reflect the awarding of fees therein.

5. The negative notice legend should read substantially as follows:

NOTICE OF OPPORTUNITY TO OBJECT AND FOR HEARING

Pursuant to Local Rule 2002-4, the Court will consider this motion without further notice or hearing unless a party in interest files an objection within thirty (30) days from the date of service of this paper. If you object to the relief requested in this paper, you must file your objection with the Clerk of the Court at 801 N. Florida Avenue, Suite 555, Tampa FL 33602-3899, and serve a copy on the movant's attorney, [Insert name and address, and any other appropriate person].

If you file and serve an objection within the time permitted, the Court may schedule a hearing and you will be notified. If you do not file an objection within the time permitted, the Court will consider that you do not oppose the granting of the relief requested in the paper, will proceed to consider the paper without further notice or hearing, and may grant the relief requested.

6. The debtor's Chapter 13 plan shall provide for the stripping off of the lien, conditioned on the debtor's obtaining a discharge or on further order of the Court.

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UNITED STATES BANKRUPTCY COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

In re: Case No. 8:09-bk-00000-XXX
Chapter 13

Debtor.
_____/

ORDER GRANTING DEBTOR'S MOTION TO DETERMINE
SECURED STATUS OF ABC MORTGAGE COMPANY
AND TO STRIP LIEN EFFECTIVE UPON DISCHARGE

THIS CASE came on for consideration on the Debtor's Motion to Determine Secured Status of **ABC Mortgage Company** and to Strip Lien (the "Motion") (Doc. No. XX) pursuant to negative notice provisions of Local Rule 2002-4. The Court, considering the Motion and the absence of any record objection to the relief requested in the Motion by any party in interest, deems the Motion to be uncontested.
The real property (the "Real Property") that is the subject of the Motion is located at **123 Maple Street, Tampa, Florida,** and more particularly described as follows:

LEGAL DESCRIPTION

Accordingly, it is hereby
ORDERED:
1. The Motion is GRANTED.
2. Claim No. X filed by **ABC Mortgage Company** shall be treated as an unsecured claim in this Chapter 13 case.

3. The mortgage on the Real Property held by **ABC Mortgage Company** recorded on **April 1, 2002**, at **Book XXXX, Pages XXXX, Instrument No. XXXX** of the official records of Hillsborough County, Florida, shall be deemed void, and shall be extinguished automatically, without further court order, upon entry of the Debtor's discharge in this Chapter 13 case, provided, however, that the Court reserves jurisdiction to consider, if appropriate, the avoidance of ABC Mortgage Company's mortgage lien prior to the entry of the Debtor's discharge.

4. This order does not prohibit **ABC Mortgage Company** from asserting, at any time prior to the time when the lien is avoided by this order upon entry of the Debtor's discharge, any rights it may have as a defendant in any foreclosure proceeding brought by a senior mortagee, including the right to claim excess proceeds from any foreclosure sale.

DONE and **ORDERED** in Chambers at Tampa, Florida, on _____.

_____
[Insert Judge]
United States Bankruptcy Judge

Why Reinvent the Wheel? Some Official Forms Work Fine

by Hon. Catherine Peek McEwen
United States Bankruptcy Judge

The Official Bankruptcy Forms include some forms that might be overlooked by do-it-yourselfers. Below is a sampling of forms that don't need much, if any, tweaking. Some of the instructions to these and other official forms are also worth looking at because they provide citations to applicable statutes and rules and, in some instances, step-by-step advice for accomplishing some task.

Pretty cool checklist to avoid deficient filings

At an educational conference last year, one of my colleagues got me acquainted with Official Form B 200, a procedural form I had never taken a peek at. This form comprises a nifty checklist of what must be filed in each case under the most used operating chapters of the Bankruptcy Code, 7, 11, 12, and 13. Most of the requirements are annotated with a citation to a statute within the Code or a rule within the Federal Rules of Bankruptcy Procedure. Just give the form to your paralegal to follow and check off and your filings will never be deficient again.

Okay, a caveat to the title of this article: Some reinvention is required due to a court's discretion to dispense with the filing of certain papers described in section 521(a)(2)(B) of the Code. By administrative order, payment advices are not required in cases filed in the Tampa or Fort Myers Divisions.

Powers of attorney for creditors and debtors

Need someone else to vote a claim on behalf of a creditor? Check out Form B 11A. What about to attend a meeting of creditors for a debtor? Check out Form B 11B.

Statement of Military Service

Given our Court's our country's current military presence in the Middle East as well as our Court's proximity to MacDill Air Force Base, Form B 202 should not be overlooked. A party who is eligible for relief under the Servicemembers Civil Relief Act of 2003 should file this form to alert others involved in the case to check the Act to ensure compliance with its terms.

Transferred claims

No need to create your own form to establish ownership of a claim that has been transferred to your client. Form B 210A tracks the information required by Rule 3002(e). And don't forget that the form should be used for scheduled claims in a chapter 11 case as well as for claims evidenced by proofs of claim in all cases.

Keep track of claims

Our Court, like most, maintains its own claims register. Form B 133 may be used by practitioners, however, to provide a handy snapshot of claims that have been filed and allowed – as well as other information that might be useful to have at hand at a hearing involving claims issues.

Disclosure statement and plan of reorganization in chapter 11 case

Forms B 25A and 25B are meant to be used in small business cases, but they would work very well in routine, bigger cases. Basically, the forms are guidelines, but they are helpful guidelines. Included in the instructions for the plan is the observation that "[b]ecause the type of debtor and the details of the proposed plan of reorganization may vary, the form is intended to provide an illustrative format, rather than a specific prescription for the language or content of a plan in any particular case." Included in the instructions for the disclosure statement: "[T]he form seeks to strike a practical balance between the reasonable needs of the courts, the Uniting States trustee, creditors, and other parties in interest for reasonably complete information, on the one hand, and economy and simplicity for debtors, on the other. ... Because the relevant legal requirements for, and effect of, a plan's confirmation may vary depending on the nature of the debtor and the details of the proposed plan, this form is intended to provide an illustrative format for disclosure, rather than a specific prescription for the language or content of a particular disclosure statement." Don't skip the instructions; they will help you put meat on the bones of the skeleton.

Final judgment forms

Two forms of a final judgment, both based on a default, are Forms B 261A and 261B. The difference between the two forms is that the former is entered by the clerk of the court and the latter by the court. The instructions for each include a description of the procedure for obtaining a judgment by default.

Bill of Costs

Use Form B 263 for a Bill of Costs. The instructions provide a good how-to on the process of requesting a costs allowance.

Direct appeal certification

Form B 24 covers the bases for seeking authorization for a direct appeal to the court of appeals pursuant to 28 U.S.C. § 158(d)(2)

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the property's insignificance toward an effective reorganization.

• Lenders should consider and be prepared to counter: (1) whether other creditors would be affected by their obtaining stay relief, including unsecured creditors and junior lienholders; and (2) the overall feasibility of the debtor's plan. The *Bryan Road* Court's consideration of these factors indicates that stay relief may not be granted, despite the execution of what might be an otherwise enforceable prepetition waiver, if the debtor has proposed a feasible plan, or the requested stay relief will negatively affect other creditors.

• Work with a "sophisticated" borrower. This is not to say that only those agreements with borrowers well-versed in lending practices will be enforced in a subsequent bankruptcy. Rather, it suggests that lenders may benefit from requiring, as a condition to entering into a work-out or forbearance agreement, that borrower be represented by sophisticated bankruptcy counsel. Further, the fact of this representation should be included in the agreement. In fact, the *Bryan Road* Court made no analysis of the borrower's individual sophistication. Instead, it focused only the experience of borrower's counsel and noted that counsel was "a very experienced bankruptcy lawyer fully capable of understanding the implications of the Forbearance Agreement."

Although prepetition waivers of the automatic stay are not *per se* enforceable in bankruptcy, the *Bryan Road* facts and analysis provide lenders with a helpful framework in which to draft forbearance and work-out agreements that seek such waiver. Consideration of the foregoing factors and careful drafting will hopefully serve to increase lenders' success in seeking enforcement of similar prepetition agreements in bankruptcy court.

The Cramdown
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