The Cramdown

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

Fall/Winter 2006

PRESIDENT'S MESSAGE

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

I am honored to be this year's President of the Tampa Bay Bankruptcy Bar Association. Each year, we have seen new and innovative programs as our Association strives to be a meaningful complement to the busy bankruptcy professional. This year is going to be exciting and beneficial to its members in many respects. The Association's 2006/2007 Board and Committee members have been working on your behalf. Among some of our achievements I would like to highlight the following:

Over the summer, Luis Martinez-Monfort and Carrie Lesser developed a remodeling plan for the Attorneys' Resource Room on the 10th floor of the Federal Courthouse. In order to make the Resource Room more comfortable and user friendly, the room was redesigned and refurbished with new furniture and a new computer. Luis and Carrie worked closely with the Tampa Division's Deputy-in-Charge Chuck Kilcoyne and GSA Representative Johnny Prophet in implementing the remodeling plan. Stop by and check it out; it is impressive.

Our Consumer Section chairperson, Kelley Petry, has done a great job in organizing monthly brown bag lunch seminars and we continue to see increased participation. These are the best "nuts and bolts" seminars for bankruptcy lawyers and the price is right (free). We even throw in lunch. In addition, our CLE Committee, chaired by Cheryl Thompson and Luis Martinez-Monfort, have coordinated an excellent selection of seminar topics for the upcoming year.

The biggest change this year is the rollout of our website: www.brokenbench.org. Soon, all of our programs will be listed in the online calendar. When the website is fully implemented, each of our members will have a membership profile which can be modified when necessary. For the past two months, we have been using the website as a platform to send out seminar notices. Greg McCoskey and Elena Ketchum have spent countless hours in bringing this website active and preparing the Association for the future.

The Community Relations Committee, headed by Ed Whitson, applied with Bay Area Legal Services for a grant from the Florida Bar Foundation. Judges Glenn and McEwen put in many

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Bankruptcy Pioneer Dies at 93

EDWARD I. CUTLER WAS A PROMINENT TAMPA BANKRUPTCY LAWYER FOR OVER 50 YEARS

Edward I. Cutler died on October 4, 2006, at the age of 93. A native of Philadelphia, Cutler was graduated Phi Beta Kappa from the University of Pennsylvania in 1934. He graduated from the University of Pennsylvania Law School in 1934 where he was on Law Review and a member of the Order of the Coif. After clerking for the Chief Justice of the Pennsylvania Supreme Court, he joined that judge in private practice in Philadelphia.

During World War II, Cutler moved to Tampa as an executive with a shipyard owned by one of his clients. He was admitted to The Florida Bar in 1947 and opened an office as a sole practitioner. He then joined what would become Carlton Fields in 1961 and practiced there until his retirement in 2001.

If anyone can believe it, Ed Cutler was here practicing first-rate bankruptcy law even before Judge Paskay arrived!

Remarks on the Passing of Ed Cutler

By Leonard H. Gilbert, Esq.
Holland & Knight, LLP

Recently we all learned of the passing of Ed Cutler at the age of 93.

When I came to Tampa in 1960 as a summer clerk at Mabry Reaves & Carlton, and later joined the firm in June of 1961, Ed was a sole practitioner in Tampa, having had various partners and associates in the past, and was identified as a member of the Bankruptcy Bar. Actually, the Bankruptcy Bar was very small and a meeting of the members could probably have been held in the proverbial phone booth!

Ed joined Mabry Reaves shortly after that and practiced in a number of different fields, including bankruptcy, asset based financing, and commercial litigation. There was no tougher, if there is such a word, opponent. Ed was a graduate of the Vince Lombardi School of Law—winning isn't everything—it's the only thing. With a very inventive mind, he would come up with unusual or novel

theories and always gave his clients full representation. That is not to say that the courts always accepted his view.

For example, when the rule was adopted to allow referral of state law questions from the Fifth Circuit Court of Appeals to the Florida Supreme Court, Ed was one of the first to suggest to the Court of Appeals that they refer a particular point of law to the Florida Supreme Court. The Court replied with something like, "If you had wanted the Florida Court to decide it, you should have brought it in a Florida Court. We are perfectly capable of answering this question."

I worked very closely with Ed in my earlier years at the firm. No matter what type of pleading I drew, Ed could always "make suggestions." For instance, I would draft a complaint, take it to him, and he would take out his pen and make the sign of a "Z" through it and begin a rewrite. That practice became so exasperating that one day I obtained from Virginia, Ed's secretary, a copy of a complaint that he had recently drawn. We changed the names and some of the facts and had it retyped. Then I went to his office with his own work of art, and while others gathered in the hall outside, I presented it to him as my work. Ed automatically put a "Z" through it and began to rewrite it. At this point everybody in the hall laughed, then came into the room where Ed was informed of what had taken place. His only response was, "Even Cutler can improve on Cutler." From that time forward, Ed was always known around the office as "Zorro," and he enjoyed telling the story of how he got that name.

Ed enjoyed research and development of the law. He obtained the designation of a Uniform Commissioner of State Laws from the State of Florida and held that position for many years. He was later designated as an "Honorary Member" when he could no longer serve as a Commissioner. He was active in the American Bar Association and received the 50 Year Award from the American Bar Foundation.

In the field of bankruptcy, Ed represented creditors, debtors, and trustees. He was involved in all the major cases in the 1960's and early 1970's, including *Umbaugh Aircraft, Flora Sun, Quality Shell Homes, Rieck & Fleece Builders Supply, Crumpton Builders, Bevis Shell Homes,* and *Gro-Plant.*

His clients loved him, the judges respected him, and many of his opponents were intimidated by him.

People On The Go

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

Carrie B. Lesser has joined **Bank of America, N.A.** as in-house counsel in the bank's Special Asset Group. Ms. Lesser was formerly a shareholder with Bush Ross, P.A. in its Bankruptcy and Creditors' Rights practice group.

Gina M. Pellegrino has joined the firm of **Iurillo & Associates, P.A.** as an associate. Ms. Pellegrino will be practicing in the areas of bankruptcy, creditors' rights and business law and litigation.

Cindy Burnette with the **Office of the United States Trustee** received the Attorney General's Award for Distinguished Service on September 12th at the Attorney General's 54th Annual Awards Ceremony in Washington, D.C. The award was presented in recognition of her leadership in successfully and swiftly implementing, on a national basis, the credit counseling and financial education requirements of BAPCPA.

Patrick M. Mosley has joined the firm of **Berman, PLC** in its Creditors' Rights, Commercial Bankruptcy, Bankruptcy Appeals, and Commercial Litigation practice areas. Prior to joining the firm, Mr. Mosley earned his juris doctorate, cum laude, from Vermont Law School in May 2006 and served as a law clerk for the Honorable Colleen A. Brown with the United States Bankruptcy Court for the District of Vermont.

Kelly Keller has joined **GrayRobinson, P.A.** as an associate in the Tampa office. Ms. Keller will focus her practice on commercial litigation, bankruptcy, and creditors' rights.

Susan Sharp hit a hole-in-one on the 6th hole of TPC on Sept. 3rd. It was her second hole-in-one in as many years. Larry Foyle has been playing golf since he was about 11 and has never had a hole-in-one.

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

From the desk of... LeeAnn Bennett

Clerk of the Bankruptcy Court

I am pleased to announce the appointment of Mike Shadburn as the Chief Deputy Clerk of Court for the United States Bankruptcy Court for the Middle District of Florida on October 2, 2006. Mike joined the court in 1989 and for the past four years has served as the Deputy-in-Charge of the Jacksonville Division. Mike has excelled in every position he has held with the Court. He was the Supervisor for the Olympia Holding Company case and oversaw the processing of an unprecedented filing of over 32,000 adversary proceedings. He was also heavily involved in the Court's transitions to CM/ECF and the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005. I have worked with Mike since I joined the Court and look forward to his help in overseeing the operations of the Clerk's office.

Prior to his employment with the Court, Mike served in the United States Navy in a number of legal offices. He finished his navy career with an assignment as the Head of the Paralegal Training Division of the Naval Justice School.

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Clerk's Corner

by Chuck Kilcoyne
Deputy-in-Charge

Chapter 7 trustees will now use a "docket event" to reflect that the section 341 meeting was (1) concluded or (2) continued as to one or both debtors within 5 days of the initial date set for the section 341 meeting. This will be a paperless docket event.

A proposed order granting a motion to avoid lien should contain the following wording "Unless debtor's bankruptcy case is dismissed, the lien of the creditor is hereby extinguished and the lien shall not survive bankruptcy, affix to or remain enforceable against the aforementioned property of the debtor."

An administrative order will soon be entered (if not already) which will require a motion to value collateral or motion to determine secured claim to contain a specific dollar amount as to value or the amount of the secured claim filed. The motion will be denied if it fails to contain the specific dollar amount.

Amended and Agreed Orders – in order to ensure they are entered promptly, follow these guidelines: For amended orders, submit an amended order that reflects why and what you are amended. For agreed orders, submit an agreed motion signed by both parties indicating agreement where one party represents he has obtained consent of the other party or the other party files a stand alone consent. Alternatively you can submit an agreed order signed by both parties; but you should recite in the preamble that by submitting the order you are representing that the other parties have agreed to the form and content of the order.

With the implementation of Version 3.1 it is important for all ECF filing users to use the proper "type of motion" event, rather than using a generic motion. By using the proper "type of motion", we will be able to capture the information to be furnished to the Administrative Office of the U.S. Courts as required by BAPCPA.

CM/ECF *Tips & Tricks*

Due to the many changes and enhancements to the Case Management/Electronic Case Filing program, we will be offering a CM/ECF "tips & tricks" session.

The goal of the session is to provide our current electronic filers with a discussion of the most significantly changed events and functions within ECF. This session is not intended to replace the Court's Electronic Filing Training and attendance will not qualify you for electronic filing access. It is anticipated that the sessions should last approximately 90 minutes. Although the topics for the session will be predetermined by the Court, we welcome any questions/concerns.

We anticipate the sessions will be conducted in November.

If you are interested in attending, please contact the ECF Helpdesk, ecfhelp.tpa@flmb.uscourts.gov, to schedule.

C. Timothy Corcoran, III

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and
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Proposed Amendment to Personal Property Exemption Statute Fla. Stat. Section 222.25

Other individual property exempt from legal process
(4) Where a resident debtor does not claim or receive the benefits of a homestead exemption under Florida Constitution, Article X, Section 4, a debtor's interest, not to exceed $4,000 in value, in personal property.

Commentary: The purpose of this personal property exemption proposal is to address the needs of Florida debtors who are inadequately protected by the law. At present, the typical debtor is able to exempt $1,000 of miscellaneous personal property under the Florida Constitution and $1,000 of automobile under Florida Statutes as well as the homestead exemption under the Florida Constitution and any qualified retirement savings pursuant to Florida Statute. While other, more sophisticated exemptions exist, they are rarely claimed by the typical debtor, either because the debtor does not own the assets that may be exempted. So oftentimes, after protecting homestead and retirement funds, the typical debtor is left with nothing but $1,000 of personal property and $1,000 of automobile to exempt.

Summary of remaining commentary: The University of Florida Law School's Student Association of Law and Business collected data from a sampling of 723 asset bankruptcy cases in the Middle District of Florida. In this sampling of asset cases distribution was 11% dividend to unsecured creditors. In 483 cases used in the sample, a homestead was claimed. Of the remaining 240 in which no homestead exemption could be claimed, $4,287 was the average return to unsecured creditors. The study suggests negligible impact, but on its face shows that those cases would result in net $287 returned to creditors in those cases if the legislation passed. The statistics can be read several different ways, but one thing is clear, the overall distribution to the unsecured creditors of the entire sampling was only reduced from 11% to 10%. Those poorest people and most in need would benefit from the legislation and the impact to creditors might be considered negligible.

CONGRATULATIONS

to Cindy Burnette

On September 12th at the Attorney General's 54th Annual Awards Ceremony in Constitution Hall in DC, I had the honor of watching Cindy Burnette receive the Attorney General's Award for Distinguished Service. The Award was given in recognition of Cindy's leadership in successfully and swiftly implementing the credit counseling and financial education requirements of BAPCPA on a national basis. Her efforts were outstanding and tireless, and she had to spend much time away from home and from the Tampa office. She was invaluable to the process. We are so fortunate to have her, and I wanted to share the good news with all of you. Thank you for all of your support and for your patience while she was away from the district.

Felicia S. Turner
United States Trustee for Region 21

The New Era of Automatic Dismissal (The Lighter Side)

by Larry Foyle, Esq.
Kass, Shuler et al.

In our last issue of the Cramdown, Judge Catherine Peek McEwen provided insight in her article "Credit Counseling Requirement Not Met: A Case For Selective Enforcement". She makes a good case for a "don't ask, don't tell" approach to handling the issue of dismissal in the case of the debtor who did not obtain the requisite pre-filing credit counseling. Congress clearly attempted to craft a law that would discourage people from filing bankruptcy and, if they did file, possibly shorten their stay. One of the areas of real concern, in addition to the problem addressed in the last issue, is the case in which the debtor does not provide required items to the court in accordance with the debtor's duties under section 521. This is the so-called "automatic dismissal on the 46th day."

In trying to decipher just what a court is supposed to do and when it is supposed to act, one may think of the portion of Winston Churchill's famous quote: "It is a riddle wrapped in a mystery inside an enigma." Oddly enough, Judge A. Jay Cristol had the In re: Riddle case and penned his now famous parody of Dr. Seuss in connection with his opinion on the issues concerning the 46th day automatic dismissals, case no. 06-11313-BKC-AJC (Bankr. S.D. Fla. July 17, 2006). A flavor for the case can best be summed up in a few quoted portions:

> "I do not like dismissal automatic,
> It seems to me to be traumatic.
> I do not like it in this case,
> I do not like it any place.
>
> * * *
>
> What is the clue on the 46th day?
> Is the case still here, or gone away?
> And if a debtor did not do
> what the Code had told him to
> and no concerned party knew it,
> Still the Code says the debtor blew it.
>
> Well that is what it seems to say:
> the debtor's case is then "Oy vay!"
>
> * * *
>
> And if the case goes on as normal
> and debtor gets a discharge formal,
> what if a year later some fanatic
> claims the case was dismissed automatic?"

To solve the Riddle case, read Judge Cristol's opinion to its conclusion. The answer's there, not just a trace, satisfying and without illusion.

They Walk Among Us...

"I will keep a watchful eye on developments in the future. But for now, almost one year later, bankruptcy reform seems to have been a success."

Proceedings and Debates of the 109th Congress, Second Session, Friday, September 29, 2006.

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Tax Returns in Post-BAPCPA Individual Chapter 11 Cases

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

The impact of the Bankruptcy Abuse Prevention and Consumer Protection Act ("BAPCPA") on individuals filing a chapter 7 or a chapter 13 has been widely discussed. BAPCPA's impact on individuals filing chapter 11, though significant, has not been as well publicized. BAPCPA has removed many of the distinctions between chapters 11 and 13 for individuals. The amended chapter 11 provisions relating to individual filers are now similar, if not verbatim in many instances to those of chapter 13. Compare §1123(a)(8) (providing for payment of all or such portion of personal services income as necessary for execution of the plan) with §1322(a)(1)); §1127(e) (providing for modification of the plan any time after confirmation, but before the completion of plan payments) with §1329(a)); See also §1129(a)(15) (incorporating the §1325(b)(2) projected disposable income test); §§1141(d)(5) and 1328(a) (providing for entry of discharge only after completion of payments, with certain exceptions). Finally, consider §1115, which is identical to §1306 and provides that all post-petition property acquired by the debtor and income from services performed by the debtor after the commencement of the case become property of the estate.

Despite the new similarities between chapter 11, and chapter 13 for an individual debtor, there is an important, and perhaps unintended, difference between the tax implications of filing chapter 11 as opposed to chapter 13. As a result, counsel advising debtors on the benefits of a chapter 11 or chapter 13 must analyze and consider these implications.

Section 1398 of Title 26 of the United States Code (the "Internal Revenue Code" or the "IRC") provides that a separate taxable entity is created by the filing of a chapter 7 or chapter 11 case by an individual debtor. The debtor in possession, or the trustee, if one is appointed under §1112, is responsible for obtaining a new Employer Identification Number ("EIN") and filing the income tax returns of the estate. I.R.C. §6012(b)(4). In addition, the individual debtor must continue to file his or her individual return. I.R.C. §6012(a)(1). The Internal Revenue Service recently released a notice (the "Notice") to provide guidance to individuals filing for chapter 11 and trustees appointed in individual chapter 11 cases in light of the provisions of BAPCPA. I.R.S. Notice 2006-83 (Oct. 2, 2006).

The separate taxable entities rule was originally designed to facilitate an individual debtor's fresh start by not burdening the debtor with any expenses incurred by the estate. The separate entity status recognized that an individual debtor in a chapter 7 or chapter 11 would continue to acquire property or income from services that would be separate from estate property. In chapter 13 cases, the separate entity status is not applied to the debtor because all property and income from services is first considered property of the estate, such that there is no distinction between the income of the estate and the debtor.

The foundation of the separate entity status of a post-petition individual chapter 11 debtor is now eroded by the BAPCPA amendments, which provide that post-petition income is property of the estate. Since an individual chapter 11 debtor is now similar to a chapter 13 debtor, the same income tax return rules should apply. However, while §1115 is an entirely new section, added by BAPCPA, I.R.C. §1398 has not been amended to recognize this change. Despite the similarities between chapter 11 and chapter 13 individual cases, I.R.C. §1398 applies in the former and not the latter. Therefore,

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Tax Returns continued from p. 8

the rule in a chapter 11 case is that gross earnings from post-petition services of the debtor and gross income from property acquired after the petition date are property of the estate, and are includable in the estate's gross income.

The Notice notes that this general rule regarding the separate entity status does not apply in certain situations. First, it does not apply if a chapter 11 case is converted to a chapter 13 case. Second, it does not apply if a chapter 11 case is converted to a chapter 7. In the event of a conversion, the more general provisions of §541(a)(6) exclude post-petition earnings from the estate. Earnings from services and income from property acquired post-conversion will be taxed to the debtor, and income from property of the chapter 11 estate will be taxed to the newly created chapter 7 estate. Finally, if the chapter 11 case is dismissed, the separate entity is treated as never coming into existence. I.R.C. §1398(b)(1).

For income tax purposes, the gross income of the estate now includes the gross income of the debtor to which the estate is entitled. The estate can take deductions of business expenses to the extent that such deductions would have been allowed to the debtor pre-petition. I.R.C. §1398(c)(3). Part of the deductions allowed are those allowed as administrative expenses under §503 of the Bankruptcy Code. For an individual operating a sole proprietorship, this would include amounts paid to the debtor as wages or salary.

The chapter 11 estate's status as a separate tax entity also imposes certain notification requirements. The debtor in possession should notify those persons required to file information returns reporting gross income or other payments of the estate's new EIN. However, the debtor is not required to provide notice to his employer if employed by a third party employer. The employer must continue to withhold the amounts necessary to comply with the withholding requirements, and should report those amounts on a Form W-2 showing the debtor's social security number, not the estate's EIN.

The notification requirements create allocation issues, as the third party employer will report the debtor's income from the calendar year on a Form W-2. Therefore, in the year in which filing occurs part of the income will be property of the debtor, and part will be property of the estate pursuant to §1115. For example, if the debtor filed on November 1, the debtor would report five-sixths of the wages reported on Form W-2 as income and five-sixths of the taxes withheld as credit on the debtor's return, and the estate would report one-sixth of the income and credits on the estate's return. The Notice requires the debtor to attach a statement to the individual tax return stating that he or she filed a chapter 11 case, showing the allocations made between debtor and estate, and describing the allocation method. The estate must attach a similar statement to the estate's tax return. The Notice provides a form statement to comply with the requirements of this section.

A double taxation issue arises where a third party employer pays wages to the estate, which the estate then pays to the debtor for living expenses. For example, at the end of the pay period, the third party employer will pay the debtor his or her wages, minus the amounts necessary to comply with its withholding requirements. The gross wages will be reported on the Form W-2 under the debtor's name, but will be paid over to the estate, as property of the estate. The estate will report income of the gross wages amount, but will only actually receive the amount net of withholding. The estate will then pay over to the debtor the portion of the wages necessary for the Debtor to meet living expenses, minus any amounts the estate is required to withhold. The

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Retired United States
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and
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September TBBA Luncheon and Seminar

The Evolution of CM/ECF: Where We've Been, Where We Are and Where We're Going Tips and Tricks for Versions 3.0 and 3.1

The TBBBA invited the Bankruptcy Clerk's office Training Team to speak at the September 19th luncheon about CM/ECF Tips and Tricks for Versions 3.0 and 3.1

Attending the luncheon were the Honorable Chief Judge Glenn, Judges Williamson, May, McEwen and Paskay. Also attending were the Clerk of the Court, Lee Ann Bennett as well as the Deputy-in-Charge, Chuck Kilcoyne. The emcee of the event, along with Herb Donica, was none other than Judge May's Law Clerk, Paunece "Neecie" Hodgerson.

The Clerk's Office Training Team demonstrated ECF tips and tricks, presented recent modifications to the Electronic Filing System, and offered an introduction to additional modifications that would come with the Court's upgrade to Version 3.1. The power-point presentation included new screen shots of the bankruptcy case filing enhancements, and included a discussion of the adversary proceeding filing enhancements and the submission and tracking process for proposed orders. The Clerk's Office stressed the need for attorneys to file documents accurately—make sure to look at your "pdf" attachments before you file or submit them! The luncheon ended with the Training Team giving their best tip: When in doubt, contact the Help Desk in the Division in which you are filing!

The View From The Bench Seminar

Those of you who attended the View From The Bench Seminar at Stetson's Tampa campus on October 19, 2006 were treated to another well-orchestrated and informative program. The Judges gave their time and talent and provided a format in which we all learned that procedures are in place to deal with the challenges posed by BAPCPA. We were told that the Clerks' Office continues to reduce staff, that we have now entered the era of CM/ECF 3.1, and that nationwide statistical reporting requirements are being implemented in all of our cases. As a result, lawyers will be asked to bear some of the new burdens.

The Judges acknowledged that while the number of case filings are down, they have more time to look at the issues presented. The Judges discussed that everything is "up-for-grabs" and subject to debate as we have no reported Circuit Court decisions on the new law and only a small number of reported District Court opinions. As each of the Judges made their closing remarks, attendees were encouraged to look at the new law and bring the issues before the Court so that lawyers can help shape the future, rather than let the future shape the bankruptcy practice by default.

Volunteers' Venue

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

Congratulations to Elena Ketchum! Elena received the James M. "Red" McEwen Memorial Award in recognition of her outstanding work as a volunteer!!!

Each us has a Professional Responsibility to render pro bono legal services to the poor or participate, to the extent possible, in other pro bono service activities that directly relate to the legal needs of the poor. While the Florida Bar does not mandate such compliance it does set an aspirational goal of providing at least 20 hours of pro bono legal service to the poor or contributing $350 to a legal aid organization. So, before you renew next year's Florida Bar membership …why not consider doing something like the following:

1. Contacting Bay Area Legal at (813) 232-1343, to interview and advise legal aid applicants at their office on Wednesday evenings from 5:30 pm to 7:30 pm;

2. Becoming a member of the Reduced Fee Panel (The reduced fee panel is part of a cooperative "Pro Se" Project that is a joint undertaking of the TBBBA, the Court, BALS, and other bankruptcy bar associations in the Middle District of Florida, with a development grant through the Florida Bar Foundation. Under this program TBBBA members will assist pro se fliers or handle certain matters that don't qualify for Bay Area assistance because the person is slightly above the income requirements). Contact Susan Sharp at ssharp@srbp.com for more information; or

3. Appearing on Television. Have you always wanted to be on TV and just never had the opportunity? Well now you can follow that dream on the first Thursday of each month. You can volunteer for "Ask A Lawyer" at Fox 13 Studios. Members of the public can call in and get answers to their legal questions from HCBA volunteers who appear on the program. If you would like to volunteer, call Pat Bishop at (813) 221-7777.

Above picture: September 15, 2006 - Elena Ketchum and fellow members of the Hillsborough County Bar served lunch at Trinity Café to over 200 homeless people.

Fraudulent Transfer, Preferential Transfer or, as They Say in Jacksonville, *"Haute Couture"*

by Steve Berman, Esq.
Berman, PLC

In today's day and age of lighter filings, good, honest, hard-working bankruptcy litigators have shed their "Will Litigate for Food" signs and have begun zealously representing trustees in pursuit of hidden avoidance actions. Sure, everyone can spot a preferential transfer. You know a payment by the debtor to a creditor, on account of an antecedent debt, within the look-back period. Fraudulent transfers are just as easy to see; a transfer of property of the debtor for less than reasonably equivalent value, while the debtor was insolvent, within the look-back period under bankruptcy or state law.

Judge Funk recently brought us In re: Keith Eickert Power Products, LLC, 344 BR 685 (Bkrtcy. M.D. Fla.). You know the case. The debtor's principal bought clothes from Escada, which Judge Funk told us was a pretty hip place to buy women's clothing. She needed them for her work where she had to portray success, confidence and perhaps financial solvency. She paid for the clothes on the debtor's debit card, at a time within the year pre-petition, and at a time when the debtor was insolvent. The debtor company clearly got nothing of value from its expenditure of funds. It did not matter that the defendant retailer sold its merchandise to its customer within the ordinary course of its business. The transfer was statutorily fraudulent and was, therefore, avoidable. Even though the transfer described above may be obvious, what about the less obvious, potentially avoidable transfers? . . .

Your prospective debtor client comes to you and tells you about how all of the company credit card debt was "the company's debt" and was never personally guaranteed. The debtor business paid the credit card company $50,000 over the past ninety days. Your client asks you if this is ok? You ask to see the credit card and it bears both the company and principal's name. You ask to see the credit card application or, better yet, to receive a printout from the creditor's credit file to see who agreed to be responsible for the debt. Does it even matter if the card was always used as a business card? If the card is truly an individual's legal obligation, even if it was used exclusively for business purchases, and even if the purchases were not of items which could be used outside the business, here is one possible analysis that may lead to an avoidance action. The principal used his or her credit card to buy an item for the business. The debtor uses the goods in the business. The business entity paid the credit card bill directly. What really happened is that the principal, not the debtor business, incurred the debt with the credit card company. In turn, the principal made a loan to the corporation in the amount of the credit card charges or purchase price. And the debtor repaid the principal by and through extinguishing the debt the principal owed to the credit card company. The principal has received a preferential transfer. In re: Rae Orene Bauer and Cyril J. Bauer, Debtors, 318 B.R. 697, 700 (Bkrtcy. D. Minn. 2005); In re: M2Direct, Inc, 282 B.R. 60, 65, (Bkrtcy. N.D. Ga. 2002).

How about this scenario? Consider identical facts, but this time, you want to sue the credit card company. The debtor is not obligated on the card. You know this because the debtor company did not use its taxpayer identification number, nor did it pass a shareholder's resolution to apply for credit. In fact, the application used the principal's social security number to establish credit. You now have a situation where the debtor entity wrote a check to the principal's credit card company. The debtor made a transfer of its property for less than reasonably equivalent value, while the debtor was insolvent, and within the one year look-back period. The brilliant lawyer for the credit card company self-righteously proclaims his client's innocence when he points out that the debtor got the benefit of the goods purchased with the principal's credit card, thus defeating the "for less than reasonably equivalent value" prong. Au contraire! There was no reasonably equivalent value exchange from the credit card company to the debtor by virtue of the goods purchase being contributed by the principal to the business. The exchange must be between the parties to the transfer and it was the principal who transferred the goods to the debtor, not the credit card company. You just found another avoidable transfer.

Just a few idle thoughts as we patiently await our next mega filing. . . .

Do Deadlines Haunt You?

The Bankruptcy Code and Rules are full of such traps for the unwary. To help you cope, there is a new tool that is helpful to Bankruptcy Practitioners. It is the "Bankruptcy Deadline Checklist", Third Edition, by Norman L. Pernick. Orders may be made at www.abanet.org or by calling 800-285-2221. Product Code: 5070532. The book is 165 pages 7 x 10 Paperback.

It is intended to be a quick reference guide to assist bankruptcy judges, attorneys, paralegals, credit managers, collection agents, professors, law students and others participating in bankruptcy cases or study.

The Checklist is organized by chapter of the Bankruptcy Code (i.e. 1, 3, 5, 7, 11, 13 and 15), and, within each chapter by Code section, with additional sections covering those items typically needed upon the filing of a case, rules on adversary proceedings, appeals, and notices.

Factoid:

Recently at a JBBA Seminar the following statistical data was presented to the audience about BAPCPA:

Approximately 5% of filers nationwide are over the median income level. Of the 5% above the median income level, 9% showed a means test presumption of abuse. Of those, UST challenged 77%, and of those challenged, UST had a 90% success rate. All that equals out to the means test "catching" .0031185% bad apples. . .less than 1/3 of 1%. A Chapter 13 trustee has surmised that about 5% of his Chapter 13 cases are filed solely as a result of the means test (no car saving, no home saving feature). Thus, it would appear that BAPCPA pushes about 5 and 1/3% of people who might otherwise file Chapter 7 into Chapter 13. One wonders what those 5 and 1/3% add to the bottom line in a cost (to the system) vs. benefits (to creditors) analysis.

Extra, Extra Read all about it!

Save these Dates!

First Tuesday of each Month
Consumer Lunches
5th Floor Courthouse • Noon to 1 pm

Annual TBBBA Holiday Party is scheduled for December 14th, 2006 • 6pm at The Spain Restaurant on Tampa Street.

The following events do not have locations selected as of publication

January 30 - All Day Seminar - Judge Jeffrey Hopkins will be the Luncheon Speaker - He is the New President of the National Conference of Bankruptcy Judges

February 20, 2007 Luncheon

Tentative Dates
3rd Tuesday of each Month

March -- Luncheon Noon to 1:15pm

April -- Luncheon Noon to 1:15pm

May -- Luncheon Noon to 1:15pm

Save these Dates!

Consumer Corner

by Sheila D. Norman, Esquire
Norman and Bullington P.A.

New developments in the consumer arena continue with a new Clerk of Court for the Middle District of Florida and developing case law interpreting BAPCPA.

LeeAnn Bennett, the new Clerk of Court, appeared at the September brown bag luncheon to discuss new changes to Electronic Case Filing including the new claims register. Among the differences is the availability of history regarding the claims. An amended claim should overwrite the original claim information. As a practice pointer, Ms. Bennet points out that if changing the classification of a claim, a zero must appear in the space for the classification no longer being used. Ms. Bennett also reminds us that beginning October 17, 2006, there were a number of new statistical reporting requirements which went into effect which make the use of the correct docket number critical to assist in keeping track of the information which must be reported.

The US Trustee program should be appointing auditors in not less than 1 in 250 cases and selected additional cases. If the conduct of the audit results in a determination that there has been a material misstatement, the clerk's office must send a notice to parties in the case.

A new version of electronic case filing took effect October 10, 2006. This version is expected to be more complicated than the existing version. There should be training, likely online, and attorneys should take the training and make sure that staff members using the Electronic Case Filing also take the training.

For continuing new developments in electronic case filing, please look at the court website regularly. Also, with any problems the help desk provides an excellent resource.

Judge Glenn announced at the meeting that if the interest rate to be used for secured creditors is clearly set forth in the plan, that the interest rate in the plan will control for purposes of confirmation,

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October TBBA Luncheon and Seminar

The TBBBA held its monthly luncheon on October 17, 2006. Approximately 80 members attended. A portion of the luncheon program involved a demonstration by Donald Kirk and members of his litigation team on the effective use of video depositions in the context of impeaching a witness during a trial with prior inconsistent statements. Each person in attendance was able to see first hand that using video technology to point out a witness's prior inconsistent statements can be an extremely potent tool in a lawyer's arsenal. The demonstration and the comments made by the Judges present at the luncheon also indicated that the use of video at trial may enable the Judge presiding over the trial to better determine the witness' credibility. Creating dynamic tension for a witness who knows that every prior word and action has been captured and can be displayed front and center may have added benefits at trial for the opposing side. The technology permits the user to use word search logic to pinpoint the portion of the deposition involved and results in seamless and professional presentations on the fly while in trial.

Judges Glenn, Williamson and McEwen then spoke concerning the uses and availability of technology in the courtrooms in Tampa, as well as the Federal Rules governing same.

Tax Returns continued from p. 9

estate will report and pay taxes on income that it did not actually receive, and the debtor will show income double the amount actually earned and will be subject to two withholdings. Counsel should discus these potential problems with the Debtor.

The IRS is requesting comments on two issues related to the tax consequences of §1115. First, given the conflicting authority in the chapter 13 context, see Telfair v. First Union Mortgage Corp., 216 F.3d 1333, 1340 (11th Cir. 2000) (discussing the various approaches to the effects of plan confirmation on the extent of the chapter 13 estate), whether post-confirmation income is property of the estate or property of the debtor, as well as whether a plan may alter the taxation of post-confirmation income. Second, the IRS requests comments on the double taxation issue discussed above.

Given the awareness of the problems created by BAPCPA, there is hope that these problems will be resolved. Commentators have suggested that the best solution to the issues created by the addition of §1115 as it relates to I.R.C. §1398 is to amend the latter section to recognize the new similarities between chapters 11 and 13 for individuals. See Jack F. Williams & Jacob L. Todres, *Tax Consequences of Post-Petition Income as Property of the Estate in an Individual Debtor Chapter 11 Case and Tax Disclosure in Chapter 11*, 13 Am. Bankr. Inst. L. Rev. 701 (2005). In the interim, counsel representing individuals in a chapter 11 and chapter 11 trustees must be prepared to comply with the notice and apportionment requirements set out by the IRS, and should seek the assistance of sophisticated accounting professionals in complex cases to ensure compliance. In any event, counsel should consider the complications of filing separate returns in advising individuals on the benefits of chapter 11 versus chapter 13.

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President's Message continued from p. 1

hours with Ed's committee and Shelia Seig, the Bay Area Legal Services' representative, in developing the grant proposal. The grant will fund a multimedia presentation aimed at educating the public as to their rights under BAPCPA. Ed's committee will also establish a "reduced fee" panel of lawyers willing to take on clients who do not qualify for indigent services from Bay Area Legal Services. Bay Area Legal Services will provide prescreening services and obtain client documentation. Kelley Petry is working to develop this program.

The Judicial Liaison Committee chaired by Patrick Tinker has also been busy. Patrick worked with our judges to develop our first liaison program. The program, which will be activated before the end of the year, affords any lawyer or party a way of registering complaints they may have about the bankruptcy process, or any persons involved in the process, including court personnel

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

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unless another rate is announced at the confirmation hearing. For debtor's attorneys, this means that it is critical that the treatment of these creditors be clear but it is unnecessary for a separate motion to be filed. For creditors, it is critical that the creditors read the plans in case an objection is appropriate. A claim that is not subject to amendment or valid objection will continue to control for the balance of the claim but not for the applicable interest rate.

In addition, Kelley Petry was kind enough to provide everyone who attended the brown bag luncheon copies of 14 recent cases discussing current consumer bankruptcy issues. Included in these cases were the following cutting edge cases decided in the bankruptcy courts of the Middle District of Florida. Where no citation is listed, there is no Westlaw cite at this time and the cases are available on the Court's website.

In the Mitchell case (In re: Mitchell, 344 B.R. 171 (Bankr. M.D. Fla. 2006)), Judge Glenn upheld a debtor's tenancy by the entireties exemption where the property was held as husband and wife with their son. The presumption is in favor of tenancies by the entirety where property is held as husband and wife and there is no express contrary intent.

Judge Williamson, in the Alexander case (In re: Alexander, 346 B.R. 546 (Bankr. M.D. Fla. 2006))determined that real property held in a trust can still be the debtor's homestead. The trust was a revocable trust and the debtor was the trustee with the right to revoke the trust at any time and all indications were that the debtor continuously resided on the real property with the intent to make it her permanent residence.

The determination in the Fodor case (In re: Fodor, 339 B.R. 519 (Bankr. M.D. Fla. 2006)) was that the debtor could not claim a valid homestead exemption in his Florida real estate where the debtor's immigration status at the time the bankruptcy case was filed did not allow for permanent residence in the United States. At the time of filing, the debtor's application to adjust to permanent resident status was pending and he did not receive his green card

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The Demise of Rules 4004 & 4007 as Jurisdictional Bars

by Amy Harris, Esq.
Strichter Riedel Blair & Prosser, P.A.

As a matter of professional courtesy, bankruptcy practitioners frequently stipulate to extend various deadlines imposed by the Federal Rules of Civil Procedure, as made applicable to bankruptcy cases by the Federal Rules of Bankruptcy Procedure (the "Rules"). In many cases, counsel stipulate to such extensions without obtaining leave of court, as required by the Rules. In most cases, the parties abide by the agreement and it does not become the subject of litigation. What happens, however, if a party changes his/her/its mind about the agreement and obtains new counsel who asserts that the pleading is time barred because the party seeking the extension failed to timely file a motion to obtain leave of court? This article examines this issue in the context of Rules 4004 and 4007, which require a party in interest to file a complaint objecting to the debtor's discharge or to determine the dischargeability of particular debts within 60 days after the meeting of creditors. Rule 4004(a) provides in pertinent part that "[i]n a chapter 7 liquidation case a complaint objecting to the debtor's discharge under § 727(a) of the Code shall be filed no later than 60 days after the first date set for the meeting of creditors under § 341(a)."

Rule 4004(b) provides that "[o]n motion of any party in interest, after hearing on notice, the court may for cause extend the time to file a complaint objecting to discharge. ***The motion shall be filed before the time has expired"*** (emphasis added). Rule 4007(c) provides in pertinent part that "[a] complaint to determine the dischargeability of a debt under § 523(c) shall be filed no later than 60 days after the first date set for the meeting of creditors under § 341(a) . . . On motion of a party in interest, after hearing on notice, the court may for cause extend the time fixed under this subdivision. ***The motion shall be filed before the time has expired"*** (emphasis added). Rule 9006(b)(3) provides that "[t]he court may enlarge the time for taking action under Rules 1006(b)(2), 1017(e), 3002(c), 4003(b),

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Committee on Pro Bono, Pro Se, Low Fee Panel and Legal Clinic Update

by Ed Whitson, III, Esq.
Akerman Senterfitt

Last year, the TBBBA formed a Committee to address increasing concerns about the recent rise in pro se and pro bono bankruptcy filings. The Committee consists of the community service chairman from the board, Judge Glenn and Judge McEwen, and attorneys Herb Donica, Susan Sharp, Kelly Petry, Shirley Arcuri, Kathy McLeroy and Sheila Seig from Bay Area Legal Services as well as Chuck Kilcoyne from the Clerk's Office.

The Committee filed for a grant and recently received funding support from the Florida Bar Foundation. We are thankful for the tremendous efforts of committee members Kathy McLeroy (who sits on the board of the Foundation) and Sheila Seig who, because Bay Area Legal Services was a qualifying I.R.C. 503(c)(1) entity, drafted and sponsored our grant application. In addition, Deputy-in-Charge, Chuck Kilcoyne provided critical statistical data which demonstrated that an overwhelmingly large percentage of pro se cases were dismissed for failure to comply with the recent bankruptcy law changes and other administrative requirements. The Committee also provided anecdotal evidence of an apparently widespread public perception as to the unavailability of bankruptcy protection in the post-BAPCPA environment.

The Foundation awarded a grant in the amount of $14,500 to provide seed financing for a community outreach program to develop updated legal information and filing assistance packages for potential consumer bankruptcy filers and other pro se litigants. This information will be available in a bilingual format and distributed through written materials and an instructional DVD video. The new information and materials will be available through video players which will be donated by the bankruptcy bar associations for Fort Myers, Tampa and Jacksonville. Again, due to the generous efforts of Mr. Kilcoyne and the courthouse staff, space will be available in the Clerk's office for viewing these videos and for dissemination of the written materials.

The Committee's ultimate goal is to obtain other sources of funding and to create a tripartite effort, involving our association, Stetson University College of Law and Bay Area Legal Services to operate a pro se bankruptcy clinic, for filers who are unable to pay for any legal assistance, to provide greater assistance to these consumers and alleviate the burden on our courts. This clinic will also provide valuable litigation experience to third-year law students looking to focus their eventual practices in bankruptcy. It will also offer a wonderful opportunity for members of our association to mentor these students and create relationships that will extend throughout their mutual careers.

In addition to the Pro Se and Pro Bono Committee efforts, Kelly Petry has revived the "low fee panel" which will involve a group of lawyers who are able to offer lower fee-based legal assistance to people who do not qualify for pro se benefits, but who cannot afford market rate legal services.

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Demise of Rules continued from p. 19

4004(a), 4007(c), 8002, and 9033, only to the extent and under the conditions stated in those rules." Courts uniformly apply the same analysis when interpreting Rules 4004 and 4007.

Until recently, the Eleventh Circuit's position was that Rules 4004 and 4007 are jurisdictional, such that the bankruptcy court lacks the discretion to extend the time for a creditor to file a complaint objecting to the debtor's discharge or to the dischargeability of particular debts if the creditor does not file its motion to extend the time prior to the deadline for filing a complaint. *See In re Alton*, 837 F.2d 457 (11th Cir. 1988) and *In re Coggin*, 30 F.3d 1443 (11th Cir. 1994). In *Alton*, the Eleventh Circuit stated that:

> The dictates of the Code and Rules are clear. It is not our place to change them. Under Rule 4007(c), any motion to extend the time period for filing a dischargeability complaint must be made *before* the running of that period. There is 'almost universal agreement that the provisions of F.R.B.P. 4007(c) are mandatory and do not allow the Court any discretion to grant a *late filed* motion to extend time to file a dischargeability complaint. *Id.* at 458.

Contrary to the Eleventh Circuit's view that such time frames are jurisdictional, the majority of the other circuits have held that Rules 4004(a) and 4007(c) are not jurisdictional and are subject to the equitable defenses of waiver, estoppel, and equitable tolling. *See e.g. In re Benedict (European American Bank v. Benedict)*, 90 F.3d 50 (2d Cir. 1996); *In re Kontrick*, 295 F.3d 724 (7th Cir. 2002); *Farouki v. Emirates Bank International, Ltd.,* 14 F.3d 244 (4th Cir. 1994); *In re Maughan (Nardei v. Maughan)*, 340 F.3d 337 (6th Cir. 2003); *In re Santos (Schunck v. Santos)*, 112 B.R. 1001 (9th Cir. BAP 1990). In finding that the debtor had waived her right to object to the extension, the *Benedict* court stated that:

> In this case, Benedict intentionally waived her right to object to the extension of time give to EAB for the purpose of allowing it to file an untimely complaint to determine dischargeability when she executed the reaffirmation agreement and stipulation a day after the January 10, 1994 deadline had expired . . . ***Indeed, it was not until Benedict obtained new counsel in the spring of 1994, after the March Order was already in effect, that the debtor finally objected to the extension of time. We think it would be inequitable to allow Benedict to enter into a stipulation extending the time for EAB to file a complaint to determine dischargeability and then to allow her to object to an order extending the time once the stipulation no longer serves her purposes. The entry of new counsel should not make a difference. New counsel cannot be permitted to disaffirm a stipulation entered into by his predecessor.*** Accordingly, we think that the bankruptcy court's March Order was proper and should not have been rescinded for lack of jurisdiction. Id. at 55 (emphasis added).

In 2004, the jurisdictional debate concerning Rules 4004 and 4007 went to the Supreme Court in *Kontrick v. Ryan*, 540 U.S. 443 (2004). Recognizing the disagreement among the circuits, the Supreme Court affirmed the judgment of the Seventh Circuit in *In re Kontrick*, 295 F.3d 724 (7th Cir. 2002), and abrogated the Eleventh Circuit's decision in *In re Coggin*, 30 F.3d 1443 (11th Cir. 1994). *Kontrick v. Ryan*, 540 U.S. 443 (2004). *In Kontrick*, a creditor filed a complaint objecting to the debtor's discharge after the expiration of the time set forth in Rule 4004(a). *Kontrick*, 540 U.S. at 446. The debtor did not file a motion to dismiss the complaint on the basis that it was time barred. *Id*. After the bankruptcy court granted summary judgment and denied the debtor's discharge, the debtor appealed and asserted that Rule 4004 was jurisdictional and, therefore, the creditor's complaint was time barred. *Id*. The lower courts had held that Rule 4004 was not jurisdictional. *Id*. at 447.

The Supreme Court held that Rule 4004 was not jurisdictional and that it was an inflexible claim processing rule. *Id*. at 447, 456. The Supreme Court also held that the debtor forfeited the right to rely on the time limitations in Rule 4004 because he failed to raise the issue before the bankruptcy court reached the merits of the creditor's complaint. *Id*.

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at 447. The Supreme Court noted that whether the bankruptcy court in this case had the discretion to allow a late filed complaint was not at issue because the debtor did not assert any equitable ground for enlarging the deadline. Id. at 458. The Supreme Court also mentioned that the circuits which held that Rules 4004 and 4007(c) were not jurisdictional have also held that the Rules were subject to equitable defenses. Id.

Interestingly, in a footnote, the Supreme Court cited to *In re Dollar (Community Bank of Johnson County v. Dollar)*, 257 B.R. 364 (Bankr. S.D. Ga. 2001), and stated that it was not deciding whether a debtor and a creditor may stipulate to the assertion of time-barred claims when such a stipulation would operate to the detriment of other creditors. *Kontrick*, 540 U.S. at 458. *In Dollar*, a creditor filed a complaint objecting to the debtor's discharge pursuant to § 727(a)(2). *Dollar*, 257 B.R. at 365. After the deadline for filing complaints under § 727 and § 523 had expired, the debtor and creditor sought approval of a settlement which sought to replace the § 727(a)(2) count with a count under § 523(a)(6). *Id*. The Supreme Court noted the obvious prejudice to other creditors by virtue of the substitution because all of the debtor's other debts would be discharged except for the one creditor's late filed § 523(a)(6) debt. *Kontrick*, 540 U.S. at 458.

In the recent case of *In re James Edward Larson (Deppert v. Larson)*, Case No. 8:05-bk-20526 (Bankr. M.D. Fla. 2006)[1] , the Honorable Michael G. Williamson had an occasion to consider whether, given the strict deadlines set forth in Rules 4004(b) and 4007(c) requiring parties in interest to file motions to extend the time to file complaints objecting to the debtor's discharge or to determine the dischargeability of particular debts prior to the expiration of the deadline, the bankruptcy court has the discretion to extend the time if counsel for the debtor and counsel for the creditor stipulate to an extension of time, but the creditor does not file its motion to extend the time until after the expiration of the original deadline, and the debtor obtains new counsel and files a motion to dismiss the complaint as time-barred.

In *Larson*, the debtor, who is a lawyer, filed a Chapter 7 petition. After the filing of the bankruptcy petition, there was substantial activity between the parties with respect to discovery, some of which was frustrated by the debtor's assertion of a fifth amendment privilege. The initial deadline for filing complaints objecting to the debtor's discharge or to determine the dischargeability of particular debts was January 9, 2006. On that date, a creditor timely filed a motion to extend the deadline. On February 10, 2006, the court entered an order extending the deadline to March 2, 2006. On March 3, 2006, one day after the extended deadline had run, counsel for the debtor and counsel for the creditor stipulated to a further extension, which agreement was memorialized in a letter from debtor's counsel to counsel for the creditor. Based upon this agreement, on March 3, 2006, counsel for the creditor filed an unopposed motion to extend the deadline. On March 8, 2006, the court entered an order extending the deadline to April 15, 2006. Discovery ensued and, on April 14, 2006, the creditor filed a complaint objecting to the debtor's discharge. At some point after the entry of the court's March 8 order, the debtor obtained new counsel who filed a motion for reconsideration of the March 8 order and a motion to dismiss the creditor's complaint. Both motions asserted that Rule 4004 was jurisdictional and, therefore, the court did not have discretion to extend the time because the creditor's motion to extend the time was filed one day after the deadline.

The issue posed by the court was whether the debtor's express waiver of the deadline excused the creditor's compliance with the otherwise strict requirements of Rule 4004. Transcript of Hearing, June 29, 2006, at p. 36. In light of *Kontrick* and *Benedict*, the court held that Rule 4004 was not jurisdictional and was subject to waiver, estoppel, and equitable tolling. The court stated that "I've looked at *Benedict* and I've looked at other cases that could be cited to the contrary, and am persuaded that if the Eleventh Circuit were to visit this issue since *Kontrick*, it would come down with a view consistent with *Benedict*." Transcript of Hearing, June 29, 2006, at p. 37. The court denied the motion for reconsideration and the motion to dismiss. The court found that the debtor, through counsel, had

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explicitly waived his right to object to the extension and that such waiver was sufficient to extend the time period under Rule 4004.

Larson, *Kontrick*, and *Benedict* represent the demise of Rules 4004 and 4007 as jurisdictional bars to the filing of untimely complaints objecting to the debtor's discharge or to determine the dischargeability of particular debts. These cases teach bankruptcy practitioners representing debtors in Chapter 7 cases that stipulating to an extension of time for a creditor to file a complaint objecting to the debtor's discharge or to determine the dischargeability of particular debts will be deemed a waiver of the right to challenge the complaint on the basis that it is time barred. *Larson* and *Benedict* also demonstrate the importance of memorializing, in writing, agreements to extend the time for taking some action, as well as agreements as to other matters. Finally, *Larson* and *Benedict* send a clear message to the parties to a bankruptcy case that they are bound by the actions taken by counsel on their behalf; changing counsel will not enable the parties to change their position.

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Consumer Corner continued from p. 18

until after the case was filed.

In yet another homestead case, In re: Dezonia 347 B.R. 920 (Bankr. M.D. Fla. 2006), Judge Briskman determined that where the Debtor has a good faith intention, prior to and at the time of the sale, to reinvest the proceeds into another homestead within a reasonable period of time, the surplus proceeds from a foreclosure sale may be exempted under Florida law.

In another Judge Briskman case, In re: Sainlar 334 B.R. 669 (Bankr. M.D. Fla. 2006) the Court made a determination that where the value of the Debtor's interest in property increases by more than $125,000.00 within the 1215 days before a bankruptcy case is filed due to appreciation in the value of the property or the decrease of the secured debt by regular payments, the limitations of §522(p) are not implicated. There must be an acquisition of the interest in property.

In another exemption case, In re: Crandall 346 B.R. 220 (Bankr. M.D. Fla. 2006) Judge Williamson ruled that where New York exemptions would have applied to the Debtor due to the requirements of §522(b)(3)(A), the Debtor could not take New York exemptions and would instead have to claim the federal exemptions where the New York exemption law provided that it only applied to individual debtors domiciled in New York.

New York is one of a number of states that provide that some or all of its exemptions only apply to residents. It is important when attempting to apply out of state exemptions to determine whether the exemptions have any application outside the state or it appears the Debtor will be required to use the federal exemptions.

After the brown bag luncheon, Judge Williamson decided in In re: Rasmussen 349 B.R. 747 (Bankr. M.D. Fla. 2006)case that in a joint case, married debtors can each take the $125,000.00 exemption provided for in §522(p), resulting in a joint exemption of $250,000.00. The decision also confirmed that equity resulting from appreciation during the 1215 days before filing for bankruptcy, is not an interest acquired for purposes of §522(p).

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