Winter 2017

The Cramdown

The Newsletter of the Tampa Bay Bankruptcy Bar Association

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PRESIDENT'S MESSAGE

by Scott Stichter,
Stichter Riedel Blain & Postler, P.A.

It is hard to believe that 2017 is already behind us. But what a wonderful year it has been. We have enjoyed another year of excellent CLE programming, along with our annual favorites, including the golf tournament, the installation dinner at Palma Ceia Golf and Country Club, and View from Bench. Last, but certainly not least, we celebrated Judge May's career and sent him off on his next great adventure.

To celebrate the new year, the Cramdown has had a mini-face lift. In addition to some formatting changes to enhance readability, you will notice a new feature section called Case Notes. Our editors will endeavor to provide you with a summary of recent bankruptcy decisions in each issue. Authors will now be featured with a photo and their contact information—if you have not written an article in a while, hopefully this will inspire you!

As we all know, bankruptcy filings are still down in our jurisdiction. That is why the potential for legislation to amend the bankruptcy venue act is so important. Senators Cornyn (R-TX) and Warren (D-Mass) intend to introduce a proposed amendment to the bankruptcy venue statute (28 USC Sec. 1408) in the coming days. The Board of Directors of the Tampa Bay Bankruptcy Bar Association has voted in favor of sending a letter to Senators Bill Nelson and Marco Rubio expressing the Board's support of the proposed amendment. On behalf of the Board, I encourage you to contact Senators Nelson and/or Rubio to voice your support for the proposed legislation.

During the coming months, please consider how you can remain active in our organization. If you are interested in co-chairing a CLE lunch for next year, please contact Noel Boeke or Megan Murray. And please keep volunteering for our Pro Se Clinic.

We look forward to seeing you at our upcoming CLE lunches. You won't want to miss our annual golf tournament scheduled for April 27, 2018. Sponsorship opportunities are available—be sure to contact Jake Blanchard for additional information.

Wishing you all the best in 2018 and thank you for our continued support of TBBBA!

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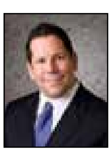

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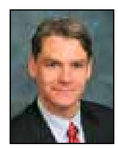

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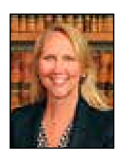

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The *Cramdown* can be accessed via the Internet at www.flmb.uscourts.gov and www.TBBBA.com

Case Notes

By Dana L. Robbins
United States Bankruptcy Court
Law Clerk for Hon. Caryl E. Delano

Eleventh Circuit upholds recovery of attorney's fees under § 363(k) for willful violation of the automatic stay.

Mantiply v. Horne

In *Mantiply v. Horne (In re Horne)*,[1] the Eleventh Circuit affirmed a district court order awarding debtors attorney's fees and costs they incurred ending a willful violation of automatic stay, prosecuting a damages violation, and defending those judgments on appeal. The facts of this case start as many do. The debtors, Richard and Patricia Horne, filed their chapter 7 petition. Despite the bankruptcy filing, an attorney named Mary Mantiply sued the Hornes in state court on behalf of her clients. But here, instead of dismissing the lawsuit upon being notified of the bankruptcy filing (and the automatic stay), Mantiply repeatedly refused to voluntarily dismiss the lawsuit. While the lawsuit was eventually dismissed several months later, that is where the issue that would eventually face the Eleventh Circuit as a matter of first impression begins.

The Hornes filed a motion in the bankruptcy court seeking damages against Mantiply under § 363(k)(1)[2] for violation of the automatic stay. The bankruptcy court awarded the Hornes roughly $80,000 in damages—$40,000 of which was for attorney's fees. Mantiply appealed. The district court affirmed and awarded appellate attorney's fees for additional $34,000.

Now, with more than $100,000 in damages awarded against her, Mantiply filed two motions seeking to recuse the bankruptcy judge: one in bankruptcy court and one in district court. The recusal motions were denied and appealed. The district court affirmed but denied the Horne's request for fees in defending the appeal. Mantiply appealed the affirmance of the recusal order, and the Hornes cross-appealed the denial of their attorney's fees. The Eleventh Circuit upheld the denial of the recusal motion but remanded for the district court to "either award the Hornes attorneys' fees under the mandatory fees provision of § 362(k), or explain why the recusal motion did not involve litigation over the stay violation and thus did not entitle the Hornes to attorneys' fees."[3] On remand, the district court awarded the Hornes $15,000 in fees. Then, Mantiply filed a writ of certiorari to the U.S. Supreme Court. The writ was denied. After, the Hornes filed motions in the Eleventh Circuit seeking fees incurred defending the appeals to the Eleventh Circuit and the Supreme Court, which were sua sponte referred to the district court for disposition. The district court awarded the Hornes more than $90,000 in appellate fees and costs.

Mantiply appealed to the Eleventh Circuit. On appeal, she argued that the Hornes were not entitled to appellate fees as a matter of law because §362(k)(1) only provides for fees in ending a stay violation, not in pursuing damages or defending judgments on appeal. Relying on the Supreme Court's decision in *Baker Botts L.L.P. v. ASARCO LLC*,[4] she argued that the American Rule—that each side pay its own attorney's fees absent statutory authority—should control. So she argued that the Eleventh Circuit should read § 362(k) narrowly in light of the American Rule and only award those fees associated with halting the stay violation.

Judge Leigh Martin May, sitting by designation, examined the statutory langue of § 362(k)(1) and held, consistent with the Ninth Circuit's decision in *In re Schwartz-Tallard*,[5] that the debtors are entitled to recover attorney's fees incurred upholding a judgment for violation of the automatic stay. Section 362(k)(1) expressly provides that "an individual injured by any willful violation of a stay provided by this section shall recover actual damages, including costs and attorneys' fees, and, in appropriate circumstances, may recover punitive damages."[6]

Judge May noted that the Bankruptcy Code section analyzed by the Supreme Court in *Baker Botts*, where the Supreme Court applied the American Rule, was

continued on p. 5

1 *In re Horne*, No. 16-16789, 2017 WL 6002508 (11th Cir. Dec. 5, 2017).
2 11 U.S.C. § 362(k)(1)
3 *In re Horne*, 2017 WL 6002508, at *1.
4 135 S. Ct. 2158, 2165 (2015).
5 803 F.3d 1095 (9th Cir. 2015) (en banc).
6 11 U.S.C. § 362(k)(1).

Case Notes
continued from p. 4

not a fee-shifting statute; § 362(k) is. As a result, Judge May reasoned that § 362 "specifically and explicitly contemplates at least some departure from the American Rule by including 'costs and attorneys' fees' in the damages due to an individual injured by a willful violation of an automatic bankruptcy stay."[7] Judge May interpreted the phrase "including costs and attorneys' fees" to expand the award to not only the actual damages incurred in ending the stay violation but also those that were the immediate result of such injury. Judge May reasoned that any other reading of the statute would unfairly limit and run afoul of the purpose of the statute: to enable debtors to enforce violations of the stay and require those wrongfully violating the automatic stay to bear the burden of the fees. In the end, the Eleventh Circuit affirmed the district court's award of fees. What's more, the court exercised its discretion over the Horne's additional motion for attorney's fees and awarded the Horne's $30,000 for costs and attorney's fees incurred on the appeal.

Colony Beach & Tennis Club, Ltd.

Judge May's final written opinion equitably subordinates unsecured IRS tax claim.

In *Colony Beach & Tennis Club, Ltd*, Judge May considered whether a partnership's tax return filed by the Chapter 7 trustee, which would otherwise be timely filed if an extension was granted, could be assessed late-filing penalties by the IRS in the absence of an allowed extension. Judge May started by examining the Internal Revenue Code, which authorizes the IRS to assess a late-filing penalty under § 6698 unless reasonable cause can be shown for the late filing. While reasonable cause is not defined, it has been interpreted to mean ordinary business case and prudence and the inability to file the return within the prescribed time. Here, Judge May found that the trustee's assumption that debtor's former accountants would file for the extension did not establish ordinary business care and prudence. Thus, Judge May concluded that reasonable cause was not established and that the penalties could not be waived.

But under Bankruptcy Code § 503(b), the United States' claim did not qualify as an administrative expense and was ripe to be equitably subordinated under § 510(c)(1). Judge May reasoned that the claim did not fall within § 503(b)(1)(C), which provides for administrative expense status for fines or penalties relating to taxes *incurred by the estate*. Because the debtor was a partnership whose taxes passed through to its limited partners, the partnership tax and the resulting late penalty were not incurred by the estate. Rather, the tax liability passed through to the limited partners. And so Judge May found that the penalty was not entitled to administrative status under § 503(b)(1)(C).

At its core, if the IRS claim was given priority as an administrative expense, the distribution to general unsecured creditors would be significantly reduced. With this in mind, Judge May, considering the equities and the principles of equitable subordination, coupled with the facts of the case, found that the United States' claim could be equitably subordinated under § 510(c)(1) to the claims of general unsecured creditors.

In re Acreman

Homestead Exemption Applies to Contiguous Parcels Outside Municipality.

In *In re Acreman*, 8:17-bk-01184-CPM, Judge McEwen allowed the debtors to claim two contiguous parcels of land outside a municipality as homestead even though the parcels were purchased at different times and one of them was occupied by the debtors' adult son. Noting an intra-district split on this issue, Judge McEwen announced her ruling from the bench, and it was later adopted in a written order that found that it does.

In so finding, she considered the historical construction of the homestead exemption in both rural and municipal settings as provided by the Florida Constitution. Although she articulated several bases for her ruling, Judge McEwen principally relied on a 1968 Florida Supreme Court decision holding that the purchase of acres of land to adjacent to a homestead instantly renders the adjacent land part of the homestead. Judge McEwen did observe that a number of cases have held that homestead property used for commercial or income-generating purposes destroys the homestead exemption when the debtor is not physically residing on that portion of the property. But she nonetheless construed

continued on p. 6

Case Notes
continued from p. 5

Florida constitutional homestead exemption liberally in the interest of protecting the family home. But Judge McEwen stressed the importance of a resolution of this conflict given a split among courts in this district.

In re Namal Enterprises, LLC

Rooker–Feldman Doctrine did not Preclude Bankruptcy Court from Reviewing State Court Final Judgment. And court declined to apply equitable doctrines of res judicata and collateral estoppel.

In re Namal Enterprises, LLC,[8] Chief Judge Williamson found that the Rooker–Feldman doctrine,[9] which generally recognizes that federal district courts lack jurisdiction over state court judgments, did not preclude the bankruptcy court from exercising jurisdiction over the state court final judgement in that case because the doctrine only applies where the state court action has ended. The debtor in *Namal Enterprises* had filed two bankruptcy cases.

In its first case, the debtor confirmed a plan that provided for $1.4 million in payments to TD Bank in satisfaction of its more than $2 million claim on a promissory note. If the debtor defaulted, the plan provided that the debtor would be obligated to pay TD Bank's full $2 million claim, less any payments made. The debtor defaulted, and TD bank sued in state court. But the state court refused to award the debtor the $2 million default amount, instead entering a final judgment for roughly $1.5 million. TD Bank appealed the judgment. While TD Bank's appeal was pending, the debtor filed its second bankruptcy case.

In the second bankruptcy case, TD Bank filed a $2.7 million proof of claim. TD Bank's proof of claim included the $2 million default amount from the previous case, less payments made, plus interest, fees, and later charges. The debtor objected to TD Bank's claim on the grounds that *Rooker-Feldman*, res judicata, and collateral estoppel precluded TD Bank from seeking more than the $1.5 million state court judgment.

In determining whether the *Rooker-Feldman* doctrine applied, Judge Williamson considered the doctrine's historical purpose and contours: Both *Rooker* and *Feldman* sought to preclude the losing party in state court from filing suit in federal court to seek review of the state court judgment after the state court proceedings concluded. Thus, Judge Williamson found that the *Rooker-Feldman* doctrine applies only when the state court proceeding has ended.

And according to the Eleventh Circuit's decision in *Nicholson v. Shafe*,[10] "state proceedings have not ended for purposes of *Rooker–Feldman* when an appeal from the state court judgment remains pending at the time the plaintiff commences the federal court action."[11] There was no dispute in *Namal Enterprises* that the bank's appeal was pending at the time of the bankruptcy filing. For that reason, Judge Williamson concluded that the state court

continued on p. 7

7 *In re Horne*, 2017 WL 6002508, at *3.
8 574 B.R. 300, 302 (Bankr. M.D. Fla. 2017).
9 **Rooker v. Fidelity Trust**, 263 U.S. 413 (1923); District of Columbia Court of Appeals v. Feldman, 460 U.S. 462 (1983).
10 558 F.3d 1266 (11th Cir. 2009).

Case Notes

continued from p. 6

action and the resulting final judgement was not "final" for purposes of *Rooker–Feldman* and that the bankruptcy court could exercise its jurisdiction over the debtor's objection to claim.

Having exercised jurisdiction, Judge Williamson declined to apply the equitable doctrines of res judicata and collateral estoppel to the state court judgment finding it would result in a manifest injustice to the creditor since debtor agreed to pay a higher amount in the event of default to the bank.

In re Ayala

Electing to surrender on statement of intentions does not necessarily preclude defense of a post-bankruptcy foreclosure.

In *In re Ayala*,[12] Judge Colton ruled that "cause" within the meaning of § 350(b)[13] did not exist to reopen a closed chapter 7 case to prevent the former debtors from contesting a foreclosure. In that case, the debtors indicated in their schedules that they intended to surrender their home. But the debtors continued living in the home, making some payments along the way. More than two years after the bankruptcy case was closed, the mortgage company sued to foreclose its mortgage. The debtors defended the foreclosure case. In ruling on the mortgage company's motion to reopen the case, Judge Colton explored possible limits on the Eleventh Circuit's recent decision in *In re Failla*, in which the Eleventh Circuit held that the bankruptcy court could order debtors who indicated an intend to surrender their home to drop their defenses to a foreclosure action.[14] On the facts in *Ayala*, where there was no evidence of bankruptcy abuse and there was evidence that the mortgage company accepted post-bankruptcy payments, Judge Colton concluded the debtors should be permitted to defend the foreclosure action.

11 *Id*. at 1279.
12 568 B.R. 870 (Bankr. M.D. Fla. 2017).
13 11 U.S.C. § 350(b).
14 *In re Failla*, 838 F. 3d 1170 (11th Cir. 2016) (holding that debtors who filed statement of intent to surrender property that collateralizes secured debt must perform that intent by surrendering the property to both the trustee and to creditor and cannot oppose the foreclosure action).

Home(stead) Is Where The Family Is

By Edward J. Comey
United States Bankruptcy Court
Law Clerk for Hon. Michael G. Williamson

To claim the homestead exemption, a debtor must actually live at the homestead, right? After all, numerous courts have explained that whether property is homestead, and thus exempt from forced sale, ordinarily "depends upon an actual intention to reside thereon as a permanent residence, coupled with the fact of residence."[1] Judge Williamson's decision in *In re Geiger* is a classic example.[2]

In *Geiger*, the debtor lived with his wife in the couple's marital home from 1990 until mid-2012. When the couple began having marital problems in mid-2012, the debtor moved into a double-wide trailer located on adjacent land that his grandmother had given to him years earlier. But the debtor only lived in the trailer for a short time period—ten days, to be specific.

As it turns out, the trailer had holes in the roof and mold throughout, making the trailer unlivable. So after ten days of living in the trailer, the debtor moved back into the marital home. The debtor's ex-wife was eventually awarded the martial home in the couple's divorce, but she allowed the debtor to continue living there while he attempted to fix up the trailer.

By the time he filed for bankruptcy, the debtor was still living in the marital home. Over the years, the debtor had sprayed some mold killer in the trailer and bought some supplies to fix it up in order to make it livable. The trailer, however, was still unlivable at the time the debtor filed for bankruptcy.

Nevertheless, the debtor claimed the trailer as exempt homestead. In support of his exemption, the debtor argued that, although he wasn't living in the trailer at the time, he intended to make it his homestead once he was able to fix it up. Ultimately, Judge Williamson rejected the homestead claim because the debtor was not living in the trailer.

At trial, the evidence established that the debtor had only lived at the property for (at most) ten days over the last decade.[3] Judge Williamson noted that the more persuasive the debtor was that the trailer was unlivable, the more his homestead claim was doomed. That's because the Florida Supreme Court has held that "a lot never occupied as a dwelling place, and incapable of such occupancy, is not homestead within the Constitution."[4] Because the debtor was not living in the trailer and trailer was incapable of being occupied, Judge Williamson denied the debtor's homestead exemption.

Nine months later, in *In re Oyola*, Judge Williamson faced what appeared to be, at least at first glance, a related homestead issue.[5] Whereas in *Geiger*, the debtor was not actually living at the homestead as of the petition date, the debtor in *Oyola*, was actually living at the homestead but could not legally form the requisite intent to reside there permanently because she was not a citizen or lawful permanent resident.[6]

In *Oyola*, the debtor was a Colombian citizen. She apparently came to the United States with her then ten-year-old daughter sometime in 1997. Shortly after coming to the United States, the debtor married a U.S. citizen, which would have made her immediately eligible for conditional permanent residence. After two years, the debtor could have had the conditions removed, making her eligible for a green card. But, for reasons that are unclear, the debtor did not obtain a green card based on her marriage to a U.S. citizen.

Instead, she left the country at some point, only to return in 2008. Since 2008, the debtor had been living in the United States continuously. As of the petition date, the

continued on p. 9

1 *See, e.g., In re Migell*, 569 B.R. 918, 920 (Fla. Bankr. M.D. Fla. 2017) (Jennemann, J.); *In re Cannon*, 568 B.R. 859, 866 (Bankr. M.D. Fla. 2016) (Glenn, J.); *In re Bennett*, 395 B.R. 781, 789 (Bankr. M.D. Fla. 2008) (quoting *Hillsborough Inv. Co. v. Wilcox*, 13 So. 2d 442, 452 (Fla. 1943)) (Williamson, C.J.); see also *Orange Brevard Plumbing & Heating Co. v. La Croix*, 137 So. 2d 201, 207 (Fla. 1962) (holding that "intent *alone* is not a sufficient basis for the establishment of a homestead").
2 569 B.R. 846 (Bankr. M.D. Fla. 2016).
3 *Id.* at 840.
4 *Id.* (citing *Drucker v. Rosenstein*, 19 Fla. 191, 195 – 96 (Fla. 1882)).
5 571 B.R. 874 (Bankr. M.D. Fla. 2017).
6 *Id.* at 876.

Home(stead)

continued from p. 8

debtor was living in her home with her (now 30-year-old) daughter, who was a lawful permanent resident, and her four-year-old granddaughter, who was a U.S. citizen.

The debtor argued that even though she was not a citizen or lawful permanent resident, she could still legally form the intent to reside in the United States permanently because she was on the verge of obtaining her green card. The debtor's daughter was in the process of becoming a citizen. Once the debtor's daughter became a citizen, she would be able to sponsor the debtor for a green card. Judge Williamson, however, rejected that argument because the debtor did not have the right to permanently reside in the United States (i.e., a green card) as of the petition date, which is the relevant date for determining homestead.[7]

So did Judge Williamson ultimately reject the debtor's homestead exemption? Not so fast. Although courts frequently recite that the homestead exemption depends on an intent to reside at the homestead coupled with actual residency, Judge Williamson noted that "the Florida Constitution does not require that the owner claiming homestead reside on the property."[8] Because Article X, section 4 of the Florida Constitution specifically provides that the homestead exemption applies "to the residence of the owner *or the owner's family,*"[9] "it is sufficient [for homestead purposes] that the owner's family reside on the property"

The homestead issue in *Oyola*, then, turned on whether the debtor's daughter and granddaughter were her "family" for homestead purposes. According to Judge Williamson, in order to prove that her daughter and granddaughter were her "family," the debtor had to satisfy one of the following tests: (1) Did the debtor have a legal duty to maintain that arises out of the relationship; or (2) Was there communal living by two or more persons where one is regarded as the person in charge? This is an easy issue when a minor child is living at the homestead. But the issue becomes more complicated when the "family" consists solely of an adult child (or children)? Within the last ten years, both Judge Jennemann and Judge Isicoff have refused to extend homestead status under the "family" test to property occupied by a debtor's adult child.[10] In Judge Jennemann's case, the debtor's adult daughter was occupying a parcel of land that adjoined the parcel of land where the debtor lived.[11] In Judge Isicoff's case, the debtor's son was living in a room in a night club that the debtor claimed was part of his homestead.[12] In *Oyola*, Judge Williamson, relying on the Florida Supreme Court's 1903 decision in *Caro v. Caro*,[13] concluded that the debtor satisfied the "family" test because it was undisputed that the debtor was living communally with her daughter (a lawful permanent resident) and granddaughter (a U.S. citizen) in the same house and that the debtor's daughter and granddaughter recognized her as being in charge.

The takeaway from *Oyola*? Homestead is where the family is.

7 *Id*. at 876 – 77.
8 *In re Cooke (Cooke v. Uransky)*, 412 So. 2d 340, 343 (Fla. 1982).
9 *Id*.
10 *In re Fowler*, 2016 WL 1444195, at *2 (Bankr. M.D. Fla. 2016) (Jennemann, J.); *In re Wilson*, 393 B.R. 778, 783 – 84 (Bankr. S.D. Fla. 2008) (Isicoff, C.J.).
11 *In re Fowler*, 2016 WL 1444195, at *1.
12 *In re Wilson*, 392 B.R. at 782.
13 34 So. 309 (Fla. 1903).

Trustees Rejoice: 11th Circuit Sets Tougher Test For Judicial Estoppel

By Noel Boeke
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It happens all too frequently–debtors often omit the existence of pending lawsuits from their bankruptcy schedules. Years after a chapter 7 case has been closed for having no assets, a plaintiff's lawyer realizes that his client filed bankruptcy during the pendency of a personal injury lawsuit and not only failed to tell the plaintiff's lawyer, but also failed to disclose the lawsuit in the debtor's bankruptcy. The plaintiff's lawyer then calls the trustee and asks the trustee to reopen the case and retain the plaintiff's lawyer to prosecute the action now on behalf of the estate. Meanwhile, the defendant in the underlying personal injury action seeks summary judgment or dismissal on the grounds of judicial estoppel.

Judicial estoppel is an equitable doctrine intended to protect courts against parties who seek to manipulate the judicial process by changing their legal positions. In *Slater v. U.S. Steel Corporation*, the United States 11th Circuit Court of Appeals ("11th Circuit" or "Court") addressed how the doctrine of judicial estoppel should be applied when a plaintiff takes inconsistent positions by pursuing a civil claim in district court that she failed to disclose as an asset in her bankruptcy case.[1]

Ms. Slater sued U.S. Steel in federal district court for employment discrimination and retaliatory discharge. Later, after Slater failed to disclose the pending discrimination lawsuit in her subsequent chapter 7 bankruptcy case, the bankruptcy trustee issued a report of no distribution. The day after the trustee's report of no distribution, U.S. Steel moved for summary judgment in the employment discrimination case on the grounds that judicial estoppel should bar Slater from pursuing claims she failed to disclose in her bankruptcy. Ms. Slater later testified that she did not intentionally omit the lawsuit, she simply misunderstood the bankruptcy schedules and statement of financial affairs as asking only about suits filed against her. Slater amended her bankruptcy papers to disclose her claims against U.S. Steel, and the bankruptcy trustee then employed plaintiff's counsel to continue the action on behalf of the estate. Eventually, the district court granted U.S. Steel's motion for summary judgement applying the doctrine of judicial estoppel to bar her discrimination claims.

Slater appealed to the 11th Circuit. The initial appellate panel affirmed the district court's grant of summary judgment to U .S. Steel based on an inference that the debtor's failure to disclose the claim necessarily constituted intent to make a mockery of the judicial system. In a concurring opinion, Judge Tjoflat urged the entire Court to review 11th Circuit precedent permitting this inference and opined that such an inference "guarantees the very mockery of justice the doctrine of judicial estoppel was designed to avoid."[2] The Court agreed to rehear the case *en banc* and vacated the panel opinion.

Prior to *Slater*, other 11th Circuit opinions held the mere fact that a plaintiff failed to disclose a lawsuit in bankruptcy papers was sufficient to support a finding that the debtor intended to make a mockery of the judicial system.3 The *Slater* court sitting *en banc* overruled the prior cases that permitted a trial court to infer intent to misuse the courts without considering the circumstances surrounding the debtor's failure to disclose the lawsuit.[4]

continued on p. 12

1 See *Slater v. U.S. Steel Corp.*, 2017 WL 4110047 (11th Cir. Sept. 18, 2017).
1 See *Slater v. U.S. Steel Corp.*, 820 F.3d 1193, 1235 (11th Cir. 2016) (Tjoflat, J., concurring) *reh'g en banc granted, op. vacated*, No. 12-15548 (11th Cir. Aug. 30, 2016).
3 See *Barger v. City of Cartersville*, 348 F.3d 1289 (11th Cir. 2003) and *Burnes v. Pemco Aeroplex*, Inc. 291 F.3d 1282 (11th Cir. 2002).
4 See *Slater v. U.S. Steel Corp.*, 2017 WL 4110047 (11th Cir. Sept. 18, 2017).

Trustees Rejoice

continued from p. 11

Following the *Slater* decision, trial courts should now look to factors to evaluate a debtor's intent, such as the debtor's level of sophistication, the reasons for the omission, whether the debtor subsequently corrected the disclosures, and any action taken by the bankruptcy court concerning the nondisclosure. *Slater* sets forth a two-part test trial courts should use when a debtor/plaintiff fails to identify a pending civil claim as an asset in a bankruptcy case: (1) did the debtor/plaintiff take a position under oath in the bankruptcy case that was inconsistent with pursuit of the civil lawsuit; and (2) did the debtor/plaintiff intend to make a mockery of the judicial system?[5]

Instead of inferring an intent to misuse the judicial system by mere nondisclosure, trial courts must now consider all relevant facts and circumstances in determining whether the plaintiff acted with the requisite intent to make a mockery of the judicial system. Judicial estoppel should be applied only when a debtor acts with a sufficiently culpable mental state. In addition, the trial court should consider proceedings in bankruptcy court after the omission was discovered as a way to ensure the integrity of the bankruptcy system. The *Slater* Court recognized that some debtors, particularly those proceeding *pro se*, may not realize that a pending lawsuit qualifies as a "contingent and unliquidated claim" which must be disclosed on the bankruptcy schedules. The Court further recognized that Bankruptcy Rule 1009 provides a debtor with liberal rights to amend bankruptcy schedules and that the bankruptcy court retains broad

continued on p. 13

5 *Id.*

Trustees Rejoice

continued from p. 12

discretion pursuant to Section 350 of the Bankruptcy Code to reopen a closed case to administer previously undisclosed assets. The Court stressed that *Slater's* more flexible approach reduces the likelihood that an otherwise liable civil defendant will receive an unjustified windfall or that innocent creditors will be harmed by an absolute application of judicial estoppel any time a debtor fails to disclose an asset.

With its *Slater* decision, the 11th Circuit joins the 6th, 7th, and 9th Circuits which hold the question of whether a plaintiff intended to make a mockery of the judicial system requires consideration of more than whether the plaintiff failed to disclose the claim.[6] The 5th and 10th Circuits, on the other hand, endorse the inference that a plaintiff who failed to disclose a claim in her bankruptcy papers necessarily intended to manipulate the judicial system as a matter of law.[7] As such, a circuit court split exists over the appropriate test a trial court should employ in evaluating judicial estoppel when a plaintiff fails to disclose a lawsuit as an asset in bankruptcy.[8] But in the 11th Circuit, the *Slater* case is a win for those interested in a robust bankruptcy estate.

6 See *Spanie v. Cmty. Contracts, Inc.*, 756 F.3d 542, 548 (7th Cir. 2014) (reversing application of judicial estoppel because the civil defendant "needed to show more than an initial nondisclosure on a bankruptcy schedule"); *Ah Quin v. Cty. Of Kauai Dep't. of Transp.*, 733 F.3d 267, 276 (9th Cir. 2013) (rejecting a "presumption of deceit" where "the plaintiff-debtor has reopened the bankruptcy proceedings and has corrected the initial filing error"); *Eubanks v. CBSK Fin. Grp., Inc.*, 385 F.3d 894, 899 (6th Cir. 2004) (reversing district court's application of judicial estoppel where plaintiffs omitted the claim because defendant "provide[d] no additional evidence that Plaintiffs demonstrated fraudulent intentions towards the court").

7 *See, e.g., Eastman v. Union Pac R.R. Co.*, 493 F.3d 1151, 1157-60 (10th Cir. 2007) ("Where a debtor has both knowledge of the claims and a motive to conceal them, courts routinely, albeit at times sub silentio, infer deliberate manipulations."); *In re Superior Crewboats, Inc.*, 374 F.3d 330, 335-36 (5th Cir. 2004) (concluding that judicial estoppel applied because plaintiffs knowingly omitted civil claim from bankruptcy disclosures).

8 Interestingly, in the nonbankruptcy case *New Hampshire v. Maine*, 532 U.S. 742 (2001), the United States Supreme Court applied this three-part test to determine judical estoppel: (1) "a party's later position must be clearly inconsistent with its earlier position;" (2) the party had to "succeed[] in persuading a court to accept that party's earlier position, so that judicial acceptance of" the party's later position "would create the perception that either the first or the second court was misled;" and (3) the party "seeking to assert an inconsistent position would derive an unfair advantage or impose an unfair detriment on the opposing party if not estopped." *Id.* At 750-51 (internal quotation marks omitted). Additionally, the Court recognized that judicial estoppel should not be applied "when a party's prior position was based on inadvertence or mistake." *Id.* At 753 (internal quotation marks omitted).

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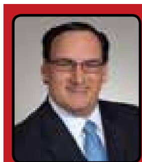
Third Circuit Joins Other Circuits in Holding WARN Act Exception's Standard is "Probable" not "Possible"



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Given the media saturation, it is virtually impossible for any American to be unaware of the allegations that Russia and Prime Minister Putin interfered in the 2016 presidential elections, but much smaller subset of the population likely knows that Russia and Prime Minister Putin played a key role in Eclipse Aviation Corporation's ("**Eclipse**") bankruptcy case seven years earlier.[1] As a result of failed financing from a Russian bank (controlled by the Russian government) to a buyer who was purchasing the company, Eclipse was forced to shutter its operations, laying off hundreds of employees.

In its recent decision in *AE Liquidation, Inc.*, The Third Circuit joined five circuit courts in determining that under the WARN Act, a business must notify its employees of a pending layoff once the layoff becomes probable, rather than when the layoff is only a mere foreseeable possibility.[2] In affirming the decisions of the district court and the bankruptcy court, the Third Circuit found that the manufacturer, Eclipse, demonstrated that the closing was not probable until the day it occurred and, therefore, could not be held liable for its failure to give its employees notice.

The Third Circuit's analysis focused on the relationship between Eclipse, its largest shareholder, European Technology and Investment Research Center ("**ETIRC**"), and the Russian bank that was to provide financing for the sale of Eclipse to ETIRC in connection with Eclipse's 2008 chapter 11 bankruptcy case. Unfortunately, despite daily assurances from the lender that funding was imminent, the sale did not close because the funding never materialized. On February 23, 2009, Eclipse adopted a resolution a resolution that directed management to file a motion to convert the case to chapter 7 if a commitment was not received by the next day, February 24, 2009. Despite calls by ETIRC's Moscow counsel to Prime Minister Putin, the commitment was not received, and unable to fund its operations, Eclipse was forced to close and moved to convert its case to chapter 7 on February 24, 2009. Once the motion to convert was filed, Eclipse informed its employees via email that the furlough was converted to a layoff. In response, the Eclipse employees filed a class action asserting a violation of the WARN Act. The employees and Eclipse each filed summary judgment motions. Eclipse argued that the "unforeseeable business circumstances" exception barred WARN Act liability. The bankruptcy court granted Eclipse's motion for summary judgment, and the district court affirmed.

The WARN Act requires employers to give sixty days' notice to employees or their representatives prior to a mass layoff or closing of a location, subject to certain codified exceptions, one of them being the "unforeseeable business circumstances" exception. To fall within the ambit of this exception, the employer must demonstrate that the closing or layoff "is caused by business circumstances that were not reasonably foreseeable as of the time that notice would have been required. The Sixth Circuit further distilled the "unforeseeable business circumstances" exception down into two discrete elements which must be established by the employer: (1) that the business circumstances that caused the layoff were not reasonably foreseeable and (2) that those circumstances were the

continued on p. 16

1 *Varela v. AE Liquidation, Inc. f/k/a Eclipse Aviation Corp. (In re AE Liquidation, Inc.)*, 2017 WL 3319963 (3d Cir. Aug. 4, 2017).
2 *United Steel Workers of Am. Local 2660 v. U.S. Steel Corp.*, 683 F.3d 882, 887 (8th Cir. 2012); Gross v. Hale-Halsell Co., 554 F.3d 870, 876 (10th Cir. 2009); *Roquet v. Arthur Andersen LLP*, 398 F.3d 585, 589 (7th Cir. 2005); Watson v. Mich. Indus. Holdings, Inc., 311 F.3d 760, 765 (6th Cir. 2002); Halkias v. Gen. Dynamics Corp., 137 F. 3d 333 (5th Cir. 1998).

WARN Act

continued from p. 11

cause of the layoff.[3] In addition, the WARN Act still requires employers to give as much notice to employees as is practicable under the circumstances.[4]

On appeal, the employees made three main arguments (all of which were rejected by the Third Circuit): (1) Eclipse is ineligible for the exception because it never provided the employees with any notice of their termination, (2) Eclipse could not show the failed sale was the cause of the mass layoff, and (3) the "unforeseeable business circumstances" exception is in applicable because the failure to close the sale was not unforeseeable.

Applying the foreseeability analysis to the facts of this case, the Third Circuit found that Eclipse established that ETIRC's failure to obtain the financing necessary to close the sale was not probably prior to Eclipse's decision to lay off its employees on February 24, 2009. The Court looked back to the sixty day mark at which the WARN Act notice would have been due, noting that Eclipse was preparing to be sold on a going concern basis. As the bankruptcy court approved the sale on January 23, 2009, Eclipse could not have known the sale was going to fail as of January 23, 2009. The Third Circuit agreed that Eclipse had little reason to believe the sale would not close based on the assurances from ETIRC prior to Prime Minister Putin's February 21, 2009 decision not to act on the funding. While the Third Circuit stated that it was a closer call as to whether the WARN Act notice should have been issued on February 21, 2009, the Court concluded it was commercially reasonable for Eclipse to believe it was at least as likely that the sale would close versus falling through, given the history between the parties.

In holding that WARN Act is triggered when a mass layoff becomes probable, the Third Circuit adopted a standard that "strikes an appropriate balance in ensuring employees receive the protections the WARN Act was intended to provide without imposing an "impracticable" burden on employers that could put both them and their employees in harm's way."[5] The Third Circuit recognized the impact of a premature warning, stating "[w]hen the possibility of a layoff – while present – is not the more likely outcome, such premature warning has the potential to accelerate a company's demise and necessitate layoffs that otherwise may have been avoided."[6] Employers should take comfort that in the fact that the Third Circuit adopted the higher threshold of probability of a pending layoff instead of only a mere possibility to trigger an obligation to notify employees under the WARN Act.

3 *Calloway v. Caraco Pharm. Labs.*, Ltd., 800 F.3d 244, 251 (6th Cir. 2015).
4 29 U.S.C. § 2102(b)(3).
5 *AE Liquidation*, 2017 WL 3319963 at *11.
6 *Id.*

October CLE Lunch

Student Loan Sidebar

by: Christie Arkovich
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Tampa Efforts to Allow Income Driven Plans for Federal Student Loans for Chapter 13 Debtors

We are spearheading a movement this Fall in the Tampa Division, Middle District of Florida, to allow debtors to participate in Income Driven Plans allowing for eventual forgiveness of federal student loan debt as opposed to the standard forbearance when a debtor files bankruptcy.

Presently, a debtor who files bankruptcy can expect that his or her federal student loans to be placed in administrative forbearance. No collection actions are taken, but interest continues to accrue. The problem with a simple forbearance is that a $100,000 federal student loan accruing interest at 8% would total $148,984.57 at the end of a 60-month plan. Even though the debtor's house and vehicle would be saved, the end result is that sometimes a much larger problem is created when the debtor is left with a significantly higher non-dischargeable student loan balance.

Tampa Efforts to Allow Income Driven Plans for Federal Student Loans for Chapter 13 Debtors

Several people raised this student loan issue during the comment period regarding revisions to the Middle District's Model Chapter 13 Plan. Judge Delano advised in a letter to the undersigned that one possibility is to include student loans that are subject to an Income Driven Plan, Public Service Loan Forgiveness Program or other program in Section E "Nonstandard Provisions". Judge Delano noted if the student loan creditor is not receiving a greater distribution than other unsecured creditors, there is unlikely to be an objection to this plan treatment.

We would go one step further and assert that as long as a non-student loan creditor was receiving a meaningful payment and was not unfairly discriminated against, even a small reduction in their dividend would not outweigh the severe detriment to the debtor of being prohibited from participation in IDR and Public Service Loan Forgiveness if they otherwise qualified for such relief.

We have two such cases underway now both of which are pre-confirmation. If anyone would like a copy of our Memo of Law to allow for this non-standard provision and for possible separate classification, please email me. I understand that Orlando has been allowing Chapter 13 debtors to separately classify their federal student loan debt and apply for IDR, following the seminal case in *In re Buchanan*, in North Carolina, which received the Department of Education's blessing and was confirmed on June 12, 2015 (Case No. 6:14-bk-51161).

CFPB Consent Orders for NCSLT and TSI include a Halt of Collection Activity for Private Student Loans

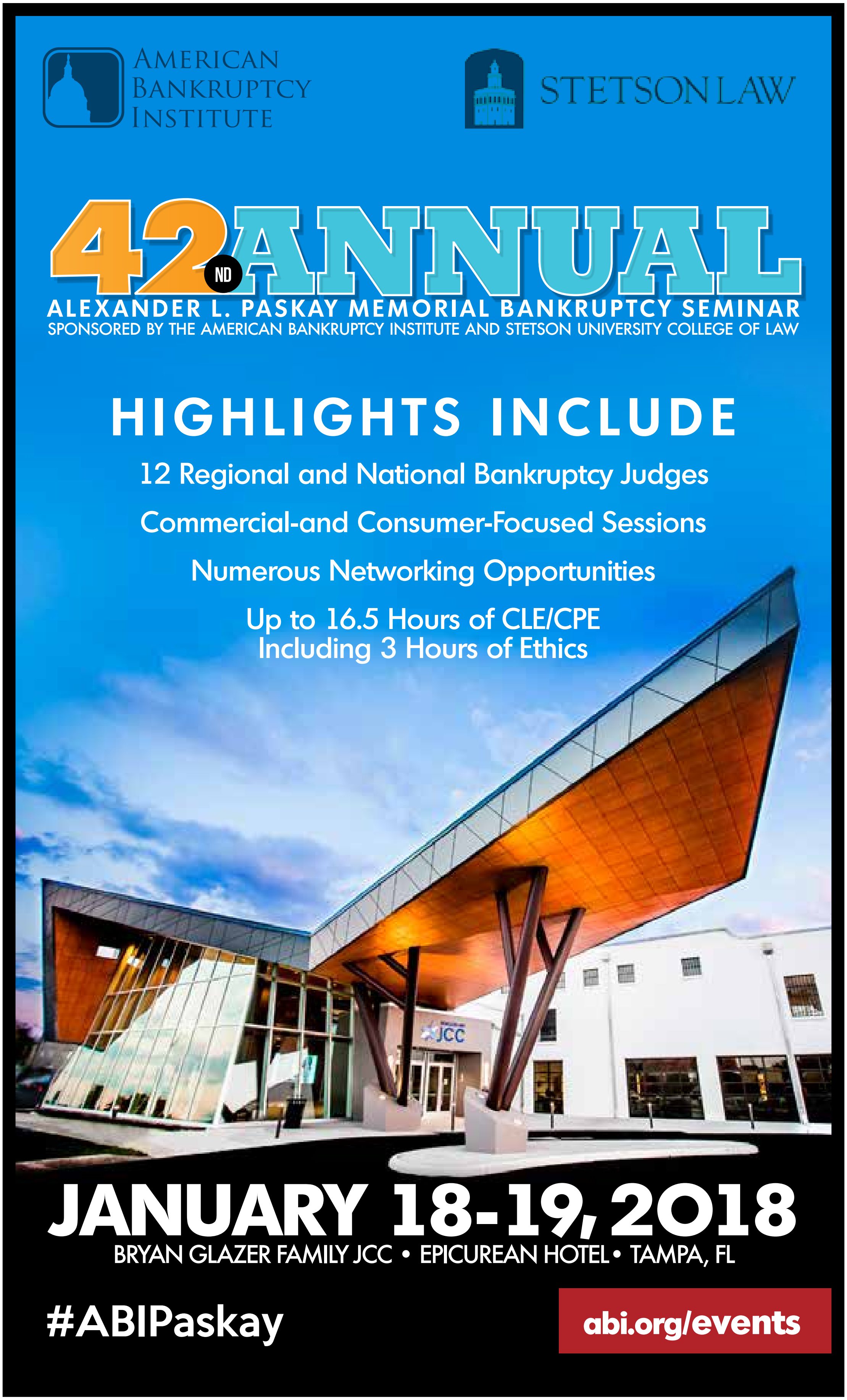
On September 19, 2017, the CFPB entered into two Consent Orders with NCSLT and TSI which affect the vast majority of private student loan debt. The Orders require a halt to all collection activities for NCSLT trusts for private student loans while an audit takes place, but what might it mean for pending bankruptcies?

First, the Consent Orders require the payment of millions of dollars in damages in some cases, so Schedule B should reflect the possibility of recovery against NCT, collectors and law firms. It may be awhile before the Judge signs off on the Proposed Judgment due to several Motions to Intervene filed by various involved parties. But the Agreed Consent Orders themselves make certain admissions of liability in the meantime.

The debt should be listed as disputed pending outcome of an audit (required to be completed within 180 days for accounts currently in litigation, within 365 days for all other accounts).

For all proofs of claims that are already filed, debtors' counsel may want to file objections pending the outcome of the audit — there are deadlines to filing Proofs of Claims that will be shorter than the audit time period to complete.

Motions can be filed to withhold payment on allowed claims.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Don't Be a Fool: If you are a Chapter 11, 12, or 13 Creditor or Debtor Attorney, File this Motion Soon After April 1st

By Catherine Peek McEwen,
United States Bankruptcy Judge

Most folks don't know that ad valorem tax certificate auctions are won by the bidder who bids the lowest interest rate, meaning it's a reverse auction. Statutory interest on delinquent property taxes is 18 percent. An auction that lowers that rate, whether by 1 point or, more likely, as much as 16-17 points is a good thing, then — for both the debtor property owner and the secured creditor who holds the first mortgage behind the tax man or tax certificate holder.

Tax certificate auctions occur in Florida after the Tax Collector certifies the delinquent tax roll. Property taxes for the previous year are due by March 31st, so they become delinquent on April 1st. The tax certificate auction is held on or before June 1st (in Hillsborough County, the auction last year started May 8th) — that is, unless the property owner is in bankruptcy.

Technically speaking, the automatic stay doesn't apply to the sale of tax certificates (the same as if one creditor sells its claim to a third party), yet probably all of the Tax Collectors in Florida exclude or pull from the auction tax certificates relating to a known pending bankruptcy. And at least in Hillsborough County, the Tax Collector cancels certificates that are sold while a bankruptcy is pending once the Tax Collector learns about it after-the-fact. They pull certificates (or cancel them) out of an abundance of caution. But when they do this, they arguably harm all constituencies in a chapter 11, 12, or 13 bankruptcy because the tax debt continues to grow with 18 percent interest.

The average yield on the 2017 tax certificate sales was an astonishing fraction of one percent (!), according to Hillsborough County Tax Collector Doug Belden. Think about that. Would a commercial bank rather be behind a debt growing at 18 percent or less than 1 percent? Wouldn't a debtor's plan be more feasible if the tax debt were payable at a single digit interest rate? Wouldn't other creditors in the case stand to get more of a debtor's disposable income or profit if the tax debt were payable at a single digit interest rate? And wouldn't the Tax Collector himself or herself want to collect the taxes that are paid as a result of the auction? Duh! — to all four questions.

So it's not a stretch to suggest that an attorney for the debtor — or for even the first mortgage creditor — in a chapter 11, 12, or 13 is not doing an A+ job for his or her client if the lawyer does not provide a comfort order or obtain stay relief, assuming someone thinks it may apply, to permit the Tax Collector to include in the auction tax certificates relating to property owned by debtors in bankruptcy. And don't we all want to do an A+ job? Until such time, if ever, as the Court may enter an administrative order providing a blanket comfort blanket to Tax Collectors in Florida, do your case a favor, go get a comfort order yourself. But do it as soon as possible after you detect that the ad valorem taxes weren't paid on March 31st so that you don't miss the auction window.

[Author's note: I can't speak for all the judges, but I will be happy to entertain the motions on an expedited basis. And I thank David Steen for bringing this issue to the Court's attention.]

Beware the 1099-C

By Tyler C. Troyer
Stetson University College of Law Student, J.D. Candidate 2019 and Previous Intern to the U.S. Bankruptcy Court, Middle District of Florida Tampa Division

Under the current Internal Revenue Service ("IRS") regulations, debt reported on a 1099-C form by a creditor as having been discharged constitutes taxable income for the debtor. However, because the IRS requires creditors to file a 1099-C whenever one of seven defined events occur, "whether or not an actual discharge of indebtedness has occurred,"[1] a debtor can be compelled to both pay income tax on the reported debt and pay back the debt itself.

The Mechanics of the IRS Reporting Requirement

The situation described above will only occur in narrow circumstances. Specifically, this situation can occur where the 1099-C reflects that the debtor is personally liable for the reported debt[2] and the identifiable event code selected on the form does not correlate with an actual discharge.

Of the seven identifiable events ("events") that trigger the 1099-C reporting requirement, all but three correlate to an actual discharge of debt. The plain language of the statue provides some insight into which identifiable events correlates with an actual discharge, using the phrase "cancellation or extinguishment" for four of the events and "discharge of indebtedness" for the remaining three.[3]

The "cancellation or extinguishment" language is used for reporting events such as "receivership, foreclosure, or similar proceeding in a federal or State court," expiration of the statute of limitations, "election of foreclosure remedies," and debt extinguished "pursuant to a probate or similar proceeding."[4] The remaining three events are referred to as a "discharge of indebtedness" and include bankruptcy, discharge pursuant to an agreement, and a decision by the creditor to discontinue collection efforts.[5]

Clearly, a decision by the creditor to discontinue collection efforts could be reversed by the creditor at a later date. Additionally, there are numerous situations where an agreement with a creditor to discharge debt could fall through before completion of the agreement and subsequently, the debt could be enforced. The identifiable event involving bankruptcy is more complicated but nevertheless does not always actually discharge the involved debt. Bankruptcy, "operates as an injunction against the commencement or continuation of an action, the employment of process, or an act, to collect, recover or offset any such debt as a personal liability of the debtor, whether or not discharge of such debt is waived."[6]

There are three important distinctions that prevent debt discharged through bankruptcy from being viewed as income for tax purposes. First, § 1.6050P-1 provides an exception from the 1099-C reporting requirement unless the creditor knows that debt discharged in bankruptcy is related to business or investment purposes.[7] Additionally, IRS Form 982 provides an exception for debt discharged in a bankruptcy case.[8] Finally, bankruptcy removes the debtor's personal liability for the debt.[9] Therefore, box four of the 1099-C regarding personal liability should be left unchecked in the case of debt discharged through bankruptcy. And according to an IRS guidance

continued on p. 22

1 26 I.R.C. § 1.6050P-1 (2016).
2 Internal Revenue Service, *About Publication 4681*, IRS.gov, https://www.irs.gov/forms-pubs/about-publication-4681 (last visited Nov. 29, 2017) (noting that if you are not personally liable for the debt, you don't have ordinary income from the cancellation of debt).
3 § 1.6050P-1.
4 *Id*.
5 *Id*.
6 11 U.S.C. § 524 (2010).
7 § 1.6050P-1 (a)(3)(d)(1)(i).
8 Internal Revenue Service, *About Publication 4681*, IRS.gov, https://www.irs.gov/forms-pubs/about-publication-4681 (last visited Nov. 29, 2017).
9 § 524; *Johnson v. Home State Bank*, 501 U.S. 78, 80 (1991) (holding that debtor's personal liability was discharged but the Bank's right to proceed against petitioner in rem survived the Chapter 7 liquidation).

Beware the 1099-C
continued from p. 21

publication, if a debtor is not personally liable for debt, it is not counted as ordinary income.[10]

Therefore, due to the exceptions for bankruptcy, the two important reporting events that have the potential to lead to the inequitable situation described above are discharge by agreement or decision by the creditor. Of course, this issue remains an important consideration for bankruptcy practitioners and courts because a proof of claim can be objected to by the debtor on the basis of a previously distributed 1099-C.[11]

In responding to this issue, courts have split between a technical perspective and an equitable perspective. From a technical standpoint, the clear language contained in § 1.6050P-1 prevents a debtor from using a valid 1099-C as proof that the creditor did, in fact, discharge the debt. From an equitable standpoint, requiring a debtor to both pay income tax on a reported discharge of debt and repay the debt is unacceptable. Little uniformity exists among federal bankruptcy courts on this issue.[12]

The Technical Perspective

The majority of bankruptcy courts have adopted the technical perspective and declined to provide any relief based on equitable principles. In *F.D.I.C. v. Cashion*, for example, the court adopted a technical approach based upon the plain meaning of the relevant statute, the purpose of the 1099-C form, and the IRS's interpretation of the effect of the form.[13] As stated above, under the plain meaning of the statue, a 1099-C is required regardless of whether an actual discharge of indebtedness occurs. Accordingly, the purpose of the 1099-C form is to satisfy IRS reporting requirements and not to act as an instrument to discharge debt.[14] And the IRS "does not view a Form 1099–C as an admission by the creditor that it has discharged the debt and can no longer pursue collection."[15] The court in *Cashion* found these arguments persuasive and held that a 1099-C is not valid proof that a debt has been discharged.[16] Moreover, the court declined to provide any requirement to amend the 1099-C prior to collection of the debt.[17] The holding in *Cashion* clearly conforms to strict statutory construction concerning the 1099-C form.[18] Additionally, the perspective of the creditor supports this interpretation and is not without merit. Creditors, specifically bulk purchasers of discounted debt, are often compelled to satisfy the 1099-C reporting requirement and do not want to compromise their ability to collect the debt they own.[19] In a published IRS informational letter, creditors have expressed concern that complying with the 1099-C requirement may inevitably lead to an inability to successfully collect previously purchased debt.[20] The strict interpretation remains consistent with the guidance provided by the IRS and will allow bulk debtors to continue to effectively collect debt they have a valid claim to. Furthermore, from the creditor's perspective, amending the 1099-C to reflect that the debt was not discharged is undesirable because doing so may open them up to liability under the Fair Debt Collection Practices Act ("FDCPA").[21]

However, this interpretation fails to address the counter-intuitive and unjust result of the 1099-C reporting

continued on p. 23

10 Internal Revenue Service, *About Publication 4681*, IRS.gov, https://www.irs.gov/forms-pubs/about-publication-4681 (last visited November 29, 2017).
11 See, e.g., *In re Reed*, 492 B.R. 261 (Bankr. E.D. Tenn. 2013); *In re Zilka*, 407 B.R. 684 (Bankr. W.D. Pa. 2009); *In re Crosby*, 261 B.R. 470 (Bankr. D. Kan. 2001); *In re Welsh*, 06-10831ELF, 2006 WL 3859233, at *1 (Bankr. E.D. Pa. Oct. 27, 2006).
12 *F.D.I.C. v. Cashion*, 720 F.3d 169, 177 (4th Cir. 2013).
13 *Id*. at 179.
14 *Capital One, N.A. v. Massey*, No. 4:10-CV-01707, 2011 WL 3299934, at *3 (S.D. Tex. Aug. 1, 2011).
15 Info. Letters, IRS INFO 2005-0207, 2005 WL 3561135 (Dec. 30, 2005).
16 *Cashion*, 720 F.3d at 179.
17 *Id*.
18 *Id*.
19 *Info. Letters*, IRS INFO 2005-0207 (Dec. 30, 2005).
20 *Id*.
21 *Debt Buyers' Ass'n v. Snow*, 481 F. Supp. 2d 1, 6 (D.D.C. 2006) (holding that issuing a 1099-C where the debt has not been discharged is not a deceptive practice under the FDCPA but not addressing amendments to a 1099-C).
22 See, e.g., *Reed*, 492 B.R. at 273; *Zilka*, 407 B.R. at 691.
23 *Reed*, 492 B.R. at 273.

Beware the 1099-C

continued from p. 22

requirement that occurs when a debtor must pay taxes based on debt reported as discharged but not actually discharged.

The Equitable Perspective

In order to remedy the inequity that can occur under a strict interpretation of the 1099-C reporting requirement, a small number of courts have either prevented collection of 1099-C reported debt entirely or required an amended 1099-C form prior to collection in order to provide tax relief to the debtor.[22] Of the courts that have adopted the minority view, most agree that the filing of a 1099-C does not act as a legal discharge of debt.[23] Instead, they hold that a 1099-C filing prevents collection where a debtor has relied on the 1099-C to their determinant and the 1099-C has not been amended or withdrawn.[24] Procedurally, an equitable solution can be implemented as in *In re Zilka*, where the court used its discretion and ordered a corrected 1099-C form to be filed prior to collection of the debt.[25] This type of solution allows the court to protect creditors from unintentional discharge of debt, while preventing the inequitable result of the strict interpretation of the 1099-C requirement discussed above.[26]

Additionally, creditors' concerns about FDCPA liability are speculative at best. While amending a 1099-C may be in violation of the FDCPA, one court has already held issuing a 1099-C where the debt is not discharged does not violate the act. Based on this holding, courts will likely extend the holding to include amended 1099-C forms.[27]

Conclusion

Due to the unjust consequence that can result under the technical perspective, this writer advocates adoption of the equitable approach. In order to provide needed relief to debtors, courts should require an amended 1099-C form before a creditor can collect on a debt previously reported as discharged on a 1099-C form. This approach is preferable for several reasons. First, an equitable solution places a relatively light burden on creditors. It does not treat a reported debt as discharged. It only requires the filing of an amended 1099-C prior to debt collection. And creditors, as sophisticated, repeat players, are in the best position to be aware of and comply with this requirement. Second, as noted above, the IRS has opined that the 1099-C is a reporting tool and not an instrument to discharge debt. The equitable solution does not alter this original purpose of the 1099-C and allows it to continue working as intended. Third, the IRS interpretations require deference by the courts only if persuasive.[28] And in light of the serious tax implications for debtors under the IRS's interpretation, courts need not defer to that interpretation.

In sum, while a clear reading of the applicable statute, the IRS's interpretation of that statute, and the purpose of the 1099-C form all support a creditor's ability to collect a debt despite having reported the debt as discharged, the inherent inequity that can occur requires judicial intervention. Accordingly, the U.S. Bankruptcy Court for the Middle District of Florida should adopt the equitable view of the 1099-C form.

24 *Zilka*, 407 B.R. at 690–91 (citing *Crosby*, 261 B.R. at 474–75). See also Franklin Credit Mgt. Corp. v. Nicholas, 812 A.2d 51, 62 (Conn. App. 2002).
25 *Zilka*, 407 B.R. at 691.
26 *Welsh*, 2006 WL 3859233, at *2.
27 *Debt Buyers' Ass'n*, 481 F. Supp. 2d at 6.

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