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The Cramdown

The Newsletter of the Tampa Bay Bankruptcy Bar Association

Editor-in-Chief, Stephanie C. Lieb, Trenam Kemker

PRESIDENT'S MESSAGE

by Adam Lawton Alpert
Bush Ross, P.A.

I am honored to serve as the Association's president for 2015-2016. I want to say thank you to last year's chair, Stephenie Anthony, who was a great resource for us and is leaving the Association in excellent form after serving on the board since 2007.

We have a wonderful board for the upcoming 2015-2016 year. Our deep bench of veterans on the board includes the following officers: Edward Peterson, who served as president last year and returns as Chair; Kelley Petry, who will serve as vice-president; Scott Stichter, serving as secretary; and Suzy Tate, who takes over as treasurer. Our directors for this year will be: returning board members Kathleen DiSanto and Patrick Mosley keeping up the excellent monthly luncheon CLE programs; returning director Jake Blanchard and new board member Brad deBeaubien heading up our pro bono efforts, including the Pro Bono/Pro Se Clinic and C.A.R.E. programming; returning director Lori Vaughan at the editor's desk for the Cramdown; returning director Stephanie Lieb, who will organize the monthly consumer lunch programs at the Courthouse (free pizza!); returning board member Noel Boeke taking over as membership director; Cindy Burnette will continue as our judicial liaison; Tim Sierra will continue growing our technological capabilities, including online membership renewals, CLE registration and payment, while keeping our website current; and we welcome new board member Steven Wirth to serve as historian.

Our Association will continue to hold the educational programming to hone our skills as practitioners and the social programming that encourages the wonderful collegiality that our membership enjoys. We welcome the involvement of all members and have many ways for members to get involved from co-chairing events to writing articles for the Cramdown. If you are looking to become more active in the Association, or you know someone else who would like the opportunity to get more involved, please call or email me or any of our board members.

If you have any suggestions or ideas about the way the Association can better serve its members, please let us know. I look forward to another great year!

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Book Three in the Stern Jurisdiction Trilogy: *Wellness International v. Sharif*

by Judge Michael G. Williamson
U.S. Bankruptcy Court, Middle District of Florida
Tampa Division

Last July I wrote an article for the Court Connection titled, "Book Two in the *Stern* Jurisdiction Trilogy: *Executive Benefits v. Arkison.*"[1] I noted that the problem *Stern* created is it did not instruct us on how to deal with *Stern* claims which, while defined as core, cannot constitutionally be decided by bankruptcy courts. And because *Stern* claims also are not considered statutorily to be non-core, they arguably could not be decided by the non-core procedures in 28 U.S.C. § 157(c). In *Executive Benefits*, the Supreme Court closed this so-called gap by holding that *Stern* claims may be adjudicated as non-core within the meaning of § 157(c) based on the severability provision found in title 28.[2] This severability provision closes the gap created by *Stern* claims.

The article also set forth what *Executive Benefits* left for future consideration. Specifically, because the Supreme Court in *Executive Benefits* concluded that the district court did conduct a de novo review of the final judgment—which is all that *Stern* requires—the Court did not need to address whether from a constitutional perspective the petitioner could consent to the bankruptcy court's adjudication of a *Stern* claim. The Court reserved that question for another day. That day has now come with the Supreme Court's decision in *Wellness International v. Sharif.*[3]

In a 6-3 decision written by Justice Sotomayor in which Justices Kennedy, Ginsburg, Breyer, and Kagan joined and in which Justice Alito joined in part, the Supreme Court held in *Wellness International v. Sharif* that Article III is not violated when the parties knowingly and voluntarily consent to adjudication by a bankruptcy judge.

The decision evidences a pragmatic approach to some thorny constitutional concerns, which if analyzed through the prism of "formalistic and unbending rules"[4] rather than "with an eye to the practical effect,"[5] could have had a devastating effect on not only practice in the bankruptcy courts but on the magistrate system and the regime for out-of-court consensual dispute resolution through arbitration.

This pragmatic approach is evidenced in the majority's discussion of its reasoning. As explained in the majority opinion, Congress has authorized the appointment of bankruptcy and magistrate judges, who do not enjoy the protections of Article III, to assist Article III courts in their work. In fact, the number of magistrate and bankruptcy judgeships exceeds the number of circuit and district judgeships. "And it is no exaggeration to say that without the distinguished service of these judicial colleagues, the work of the federal court system would grind nearly to a halt."[6]

Given this pragmatic context, the Supreme Court then looked to long-standing precedents supporting the conclusion that litigants may validly consent to adjudication by bankruptcy courts. For example, in 1878, the Court in *Newcomb v. Wood*[7] recognized "[t]he power of a court of justice, with the consent of the parties, to appoint arbitrators and refer a case pending before it." Fast forward to the 1986 "foundational case" of *Commodity Futures Trading Commission v. Schor*,[8] in which the Court explains, "[A]s a personal right, Article III's guarantee of an impartial and independent federal adjudication

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1 http://www.flmb.uscourts.gov/newsletter/volume3_issue3.pdf.
2 *Executive Benefits Ins. Agency v. Arkison*, 134 S. Ct. 2165, 2173 (2014).
3 *Wellness Int'l Network, Ltd. v. Sharif*, 2015 WL 2456619 (May 26, 2015).
4 *Wellness*, 2015 WL 2456619, at *9.
5 *Id.*
6 *Id.* at *3.
7 97 U.S. 581, 583 (1878).
8 478 U.S. 833, 848-49 (1986).

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is subject to waiver, just as are other personal constitutional rights"—such as the right to a jury—"that dictate the procedures by which civil and criminal matters must be tried."[9]

This precedent makes clear that the decision to invoke a non-Article III forum is left entirely to the parties, and the power of the federal judiciary to take jurisdiction of these matters is unaffected. "In such circumstances, separation of powers concerns are diminished, for it seems self-evident that just as Congress may encourage parties to settle a dispute out of court or resort to arbitration without impermissible incursions on the separation of powers, Congress may make available a quasi-judicial mechanism through which willing parties may, at their option, elect to resolve their differences."[10] According to the majority, the lesson of *Schor* and the history that preceded it is plain: The entitlement to an Article III adjudicator is a personal right and thus ordinarily subject to waiver.

The majority admits that Article III also serves a structural purpose, barring congressional attempts to transfer jurisdiction to non-Article III tribunals for the purpose of emasculating constitutional courts and thereby preventing the encroachment or aggrandizement of one branch at the expense of the other. But, the Court reasons, allowing Article I adjudicators to decide claims submitted to them by consent does not offend the separation of powers so long as Article III courts retain supervisory authority over the process.

The Court then goes on to conclude that allowing bankruptcy litigants to waive the right to Article III adjudication of *Stern* claims does not usurp the constitutional prerogatives of Article III courts. After all, the Court acknowledges that bankruptcy judges, like magistrate judges, are appointed and subject to removal by Article III judges. Furthermore, bankruptcy courts possess no free-floating authority to decide claims traditionally heard by Article III courts. Their ability to resolve such matters is limited to a narrow class of common law claims as an incident to the bankruptcy courts' primary adjudicative function. Importantly, because the entire process takes place under the district court's total control and jurisdiction, there is no danger that use of the bankruptcy court involves a congressional attempt to transfer jurisdiction to non-Article III tribunals "for the purpose of emasculating constitutional courts."[11]

The Court notes that Congress could choose to rest the full share of the Judiciary's labor on the shoulders of Article III judges. But pragmatically, the Court notes that doing so would require a substantial increase in the number of district judgeships. Instead, Congress has "supplemented the capacity of district courts through the able assistance of bankruptcy judges."[12] And the Court concludes that so long as those judges are subject to control by the Article III courts, their work poses no threat to the separation of powers.

Importantly, the majority points to the language in *Stern* that precludes the expansive reading of the decision urged by the minority. In this respect, the Court in *Stern* took pains to note that the question before it was a "'narrow' one" and that its answer did "not change all that much" about the division of labor between district courts and bankruptcy courts.[13] The Court admits that it would be an unfair characterization of *Stern* that the decision meant that bankruptcy judges could no longer exercise their long-standing authority to resolve claims submitted to them by consent. The Court then concludes that interpreting *Stern* to bar consensual adjudications by bankruptcy courts would meaningfully change the division of labor in our judicial system, contrary to *Stern's* explicit limitations.

Having held that Article III is not violated when the parties knowingly and voluntarily consent to adjudication by a bankruptcy judge, the Court then goes on to consider whether that consent must be express or whether it may be implied. It is noteworthy

9 *Wellness*, 2015 WL 2456619, at *7 (quoting *Schor*, 478 U.S. at 848-49).
10 *Schor*, 478 U.S. at 855.
11 *Wellness*, 2015 WL 2456619, at *8 (quoting *Peretz v. U.S.*, 501 U.S. 923, 937 (1991) (internal quotation marks omitted)).
12 *Id.* at *10.

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that, as Justice Alito noted in his partial concurrence, there was no need to decide the question of implied consent because the respondent had forfeited any *Stern* objection by failing to present that argument properly in the courts below.

Consistent with the practical tenor of *Wellness*, the Supreme Court nevertheless addressed this issue given its great importance to the bankruptcy legal community. In reaching the conclusion that implied consent is sufficient, the Court points out that nothing in the Constitution requires consent to adjudication by a bankruptcy court be express. In a similar vein, there is nothing in the relevant statute, 28 U. S. C. § 157, that mandates express consent; it states only that a bankruptcy court must obtain the consent—in the Court's words "consent *simpliciter*"—of all parties to the proceeding before hearing and determining a non-core claim.

And, the Court reasoned, a requirement of express consent would be in great tension with the Court's decision in *Roell v. Withrow*.[14] That case concerned the interpretation of 28 U.S.C. § 636(c), which authorizes magistrate judges to "conduct any or all proceedings in a jury or nonjury civil matter and order the entry of judgment in the case," with "the consent of the parties." The Court concludes that the implied consent standard articulated in Roell supplies the appropriate rule for adjudications by bankruptcy courts under § 157. Applied in the bankruptcy context, that standard possesses the same pragmatic virtues—increasing judicial efficiency and checking gamesmanship—that motivated the Court's adoption of it for consent-based adjudications by magistrate judges.

The Court does, however, emphasize that a litigant's consent—whether express or implied—must still be knowing and voluntary. *Roell* makes clear that the key inquiry is whether "the litigant or counsel was made aware of the need for consent and the right to refuse it, and still voluntarily appeared to try the case" before the non-Article III adjudicator.[15]

It appears that black clouds of jurisdictional uncertainty created by *Stern* and the courts that have interpreted *Stern* have now been cleared. Business returns to the days before Stern when few questioned the bankruptcy court's power to enter final judgments in both core matters and in matters in which the parties consent to jurisdiction as established in the statutory framework of 28 U.S.C. § 157. So this concludes the *Stern* Trilogy. Hopefully, there will be no sequel.

13 *Stern v. Marshall*, 131 S. Ct. 2594, 2620, 2629 (2011).
14 538 U.S. 580 (2003).
15 *Wellness*, 2015 WL 2456619, at *12 (quoting *Roell*, 538 U.S. at 590).

Supreme Court Rejects Junior Mortgage Lien Avoidance in Chapter 7

by Richard John Cole, III
R. John Cole, II, & Associates, P.A.

In a short and unanimous opinion the United States Supreme Court has held that a Chapter 7 debtor may not avoid a junior mortgage under Section 506(d) of the Bankruptcy Code in situations where the debt owed on a senior mortgage exceeds the present value of the property.[1] Writing for the Court, Justice Thomas extended the reasoning of *Dewsnup v. Timm*[2] to the specific question presented in *Bank of America v. Caulkett.*

The history of the case is likely well known to readers of the *Cramdown*. In *McNeal v. GMAC Mortgage, LLC (In re McNeal)*[3] the Eleventh Circuit held that a Chapter 7 debtor could avoid junior mortgages where the amount of a senior secured claim exceeded the value of the property citing, pre-*Dewsnup* precedent. The ruling put the Eleventh Circuit at odds with all other Circuits and for some time the opinion remained unpublished, creating uncertainty in the bankruptcy courts. As a result of the bankruptcy of GMAC Mortgage, the *McNeal* case was stayed for some time. Eventually, the Eleventh Circuit published the opinion and later declined to rehear *McNeal* en banc. For debtors, a golden window opened to avoid junior mortgages and other types of liens in Chapter 7.

Bank of America sought to challenge the Eleventh Circuit's holding in *McNeal* by appealing the avoidance of liens in other Chapter 7 cases. The Supreme Court had previously declined to hear Bank of America's appeals but decided to take the issue up this term by granting cert in *Caulkett* and consolidated the case with *Bank of America v. Toledo-Cardona*, which presented the same question for the Court's review.

The Court examined the application of Sections 502, 506(a), and 506(d) in *Caulkett* and extended *Dewsnup's* different definitions of "secured claim" for Sections 506(a) and 506(d) to the question presented. While the Court recognized that a "[u]nder a straightforward reading of the statute, the debtors would be able to void the Bank's claims"[4] it did not rule in favor of the debtors.

In *Dewsnup*, the debtor had sought to "strip down" a partly unsecured junior lien in a Chapter 7 case. The Court reasoned that the term "secured" in Section 506(d) had an ambiguity and relied on the pre-Code practice of liens passing through bankruptcy mostly unaffected to find that "if a claim 'has been 'allowed' pursuant to §502 of the Code and is secured by a lien with recourse to the underlying collateral, it does not come within the scope of §506(d).'"[5] As such, "secured claim" in Section 506(d) is defined as a "claim supported by a security interest in property regardless of whether the value of that property would be sufficient to cover the claim. Under this definition, §506(d)'s function is reduced to 'voiding a lien whenever a claim secured by the lien itself has not been allowed.'"[6] This is separate from the definition of "secured claim" in Section 506(a).

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1 *Bank of America, N.A. v. Caulkett*, No. 13-1421, slip op. at 1 (June 1, 2015); 575 U.S. __ (June 1, 2015); http://www.supremecourt.gov/opinions/14pdf/13-1421_p8k0.pdf
2 502 U.S. 410 (1992)
3 477 Fed. Appx. 562 (11th Cir. 2012)
4 *Caulkett*, slip op. at 3
5 *Id.* at 4 (quoting *Dewsnup*, 502 U.S. at 415, 417-20)
6 *Id.* (quoting *Dewsnup*, 502 U.S. at 416)

Rejects Junior Mortgage Lien

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Perhaps fatal to the debtors in *Caulkett* was their failure to directly ask the Court to overrule *Dewsnup*, with the Court devoting the entire third part of the opinion to discussing the debtors' failure to ask for such relief and the Court's refusal to adopt the debtors' proposed distinction between *Dewsnup* and the facts in *Caulkett*. In that section, *Justices* Kennedy, Breyer, and Sotomayor also declined to join a footnote that discussed the criticisms of *Dewsnup* and Justice Thomas' prior observation that *Dewsnup* created confusion in the courts. As there are no concurrences, it is not clear why the three justices declined to join the footnote.

Questions have arisen on various listservs as to what will happen to those debtors who benefited from *McNeal* before *Caulkett* was decided. Avoided junior mortgages have already been repackaged and sold and some lenders, perhaps unaware of what has happened to their liens, continue to attempt enforcement. Debtors' counsel might consider a review of *United States Aid Funds, Inc. v. Espinosa*.[7] It is highly likely that, under *Espinosa*, those previously entered orders avoiding junior mortgage liens in Chapter 7 are final and cannot be revisited, but challenges should not be ruled out. Perhaps such a challenge would give the Court an opportunity to directly decide on whether *Dewsnup* should be overruled.

The lingering question of lien avoidance in "Chapter 20," where a Debtor has received a Chapter 7 discharge and then files a Chapter 13 case prior to being eligible for a Chapter 13 discharge, will also likely return now that *Caulkett* has been decided.[8] The application of *McNeal* had mostly resolved the issue of whether a Debtor could avoid a junior lien in Chapter 20 in favor of debtors. *Caulkett* did not give the Court the opportunity to rule on lien avoidance in Chapter 20 bankruptcy.

7 559 U.S. 260 (2009)

8 *Compare In re Scantling*, 465 B.R. 671 (Bankr.M.D.Fla. 2012) (holding that a debtor's ineligibility for a Chapter 13 discharge is irrelevant to a strip off in a Chapter 20 case) with *In re Pierre*, 468 B.R. 419 (Bankr.M.D.Fla. 2012) (holding that any modifications to secured creditors' rights through cram down or strip off are not effective unless and until the debtor receives a Chapter 13 discharge).

Where Does Bankruptcy Fraud Lead You? Prison!

by John D. Emmanuel
Buchanan Ingersoll & Rooney PC

On April 22nd I had a hearing scheduled before Senior U.S. District Court Judge Kenneth L. Ryskamp in West Palm Beach. By coincidence, the hearing prior to mine was a sentencing hearing for a bankruptcy fraud conviction. Anesthesiologist Dr. Richard Krugman and his wife Tamara Giordano had pled guilty to bankruptcy fraud. Specifically, they had failed to disclose numerous assets to their Chapter 7 Trustee. These assets included expensive jewelry, items of personal property located in their home, and items located in a storage unit. In his oral ruling denying discharge, Bankruptcy Judge Kimball found that the debtors had made numerous intentional misrepresentations to the Court and to the Chapter 7 Trustee Deborah Menotte and that their testimony in that regard was not credible.

At the sentencing hearing, the District Court initially inquired as to what the standard sentencing level would be, and the parties agreed that the Court could sentence the debtors to prison for in excess of two years. However, the defense attorneys then made a lengthy argument to the court as to why the judge should impose no prison sentence. Specifically, they argued that the debtors had never been in any type of legal trouble prior to this occurrence, that they have not been in any legal trouble since, that they both have significant health problems, and that they have already suffered enough by having lost all of their assets while simultaneously having their bankruptcy discharge denied.

The Chapter 7 Trustee Deborah Menotte took the stand at the sentencing hearing and testified regarding the Debtors' failure to disclose their assets and the effect that has on the administration of bankruptcy cases. The Assistant U.S. Attorney pointed out that her office receives numerous referrals from the bankruptcy system and only has the resources available to prosecute the most serious cases and that this was one of them. The Assistant U.S. Attorney also pointed out that this was the first referral to the U.S. Attorney ever made by Judge Kimball.

District Judge Ryskamp initially questioned what benefit would be gained from sending the debtors to prison. He pointed out that they were not a danger to society, that there was very little likelihood that they would repeat their crimes, and that they would not fare well in prison due to their health problems. However, after hearing additional argument from the Assistant U.S. Attorney regarding the fact that the bankruptcy system only works if debtors are honest in their disclosures to the bankruptcy court, and that a signal must be issued to future debtors, the court imposed a prison sentence on both debtors of one year plus a day. In addition, the court ordered restitution and probation following the prison sentence. It appeared that both debtors, and in particular the wife, were taken aback by the sentence. On top of the prison sentence, there was also some discussion that Dr. Krugman may risk losing his medical license as a result of his felony conviction.

A review of the dockets of our three District Courts indicates that an average of 2.5 criminal bankruptcy fraud cases were filed each year from 2004 to 2013. However, six criminal bankruptcy fraud cases were filed in 2014. These statistics, and this recent sentencing hearing, indicate that our U.S. Attorneys and District Court Judges take bankruptcy fraud very seriously, and that dishonest debtors will suffer real penalties.

Medicare Termination – A Glimmer of Hope

by Angelina Lim
Johnson, Pope, Bokor, Ruppert & Burns, LLP

Judge Williamson in *In re Bayou Shores SNF, LLC.*, 525 B.R. 160 (Bankr. M.D. Fla. 2014) recently gave the nursing home Debtor a reprieve from the termination of its Medicare provider agreement by the Center for Medicare and Medicaid Services ("CMS") and confirmed the Debtor's plan over the government's objections.

The Debtor managed to file its petition just prior to the termination of its Medicare Agreement becoming effective. Earlier in the case, it obtained the much needed breathing room to operate the 159-bed nursing facility that catered to patients with serious psychiatric problems.[1] It was one of the few facilities in Florida to provide such services.

CMS argued that the court was without subject matter jurisdiction over the dispute. However, Judge Williamson ruled that under the plain text of 42 U.S.C. § 405(h) bankruptcy courts had jurisdiction over Medicare-related dispute under 28 U.S.C. § 1334, and declined to follow other courts that have concluded otherwise.

Central to the issue of confirmation was the ability of the Debtor to assume its Medicare provider agreement. The Court found that the agreement was not "terminated" because the Debtor had not exhausted its appeal rights. The Debtor also satisfied the Court that it had cured the past deficiencies and that constituted the "adequate assurance" necessary for assumption.

The Court also concluded that the Debtor's plan was feasible despite the fact that the Florida Agency for Health Care Administration ("AHCA") intended to deny renewal of the license. The Court decided that while AHCA's right to refuse renewal was within its police power, the plan was feasible because the Debtor has the right to present mitigating factors in argument against revocation under Florida law.

The Court confirmed the Debtor's plan and AHCA appealed. The appeals are still pending despite the Debtor's efforts to have them dismissed as moot after its plan had been substantially consummated.[2] Until the resolutions of all appeals are final, the full ramifications of this decision will not be known. In the meantime, this interesting case has been the subject of several news articles in the bankruptcy trade newspaper.[3]

1 As explained in this decision, the Court had initially decided that the actions of the U.S. Department of Health & Human Services ("HHS"), through CMS, was subject to the automatic stay and did not fall within the "police powers" exception per 11 U.S.C. § 362(b)(4) because HHS was only seeking to protect its pecuniary interest in terminating the Debtor's Medicare agreement and did not attempt to shut down the Debtor's facility.

2 The appeals are pending before Judge Moody, Case No. 8:14-CV-02816.

3 *E.g., A Means to Stave off Medicare Termination* by Helen S. Suh, Christopher K. Greene, Brian I. Swett and William T. Nosh, *Law360*, February 27, 2015 and other related *Law360* articles.

Tuition Clawbacks

by Adam Seuss
Law Clerk to the U.S. Bankruptcy Court, Middle District of Florida Tampa Division

A few members of Congress do not appreciate trustees pursuing clawback actions—at least not when they're aimed at university and college tuition payments that bankrupt parents make on behalf of their children. U.S. Representatives Chris Collins (R., NY) and Blake Farenthold (R., TX) introduced a bill this past May that would put such payments outside a trustee's reach. The Protecting All College Tuition Act would amend current law to exempt payments to post-secondary institutions made by debtors in good faith.

Currently, under 11 U.S.C. § 548, a trustee may avoid any transfer made within two years before a debtor's petition date if the debtor "received less than a reasonably equivalent value in exchange for such a transfer." Florida law allows trustees to look back four years.

Accordingly, when parents, who have in the past paid for their child's education, enter bankruptcy, a trustee might try to recoup the payments that the debtors made to their child's school. The trustee is likely to point out that the child—not the parent—received the benefit of the transfer, and to argue that the parents should have, instead, first paid their creditors.

Under the proposed bill, though, a "payment of tuition by a parent to an institution of higher education . . . for the education of that parent's child" would be an exception to the rule and non-avoidable.

Rep. Collins—who has one child in college and another in law school—explained that parents should have the ability to prioritize their spending. "That's a personal decision on the bills you pay and bills you don't pay," he said. "Families all over America today, when tuition comes due, are tightening their belts and paying the tuition because it's the future for their kids."

According to the Wall Street Journal, consumer bankruptcy experts note that these types of lawsuits were rarely seen even a few years back. They attribute the rise in tuition clawback litigation to the rise in university and college tuition. When tuition payments were smaller, trustees would not go through the effort to recover them. Now that they are, they have seen some success. According to a Journal search of public filings, post-secondary schools have complied with a demand for return of tuition payments in twelve out of twenty-five instances.

Deborah Thorne, a professor of sociology at Ohio University who studies the effects of financial hardship on families, argues that this practice could have significant negative impacts on familial relationships, even driving a wedge between parents and children. Universities and colleges, to no surprise, are also against this growing trend.

As for the current decision makers, bankruptcy courts come down on both sides of the issue.[1] To see how this unfolds, keep an eye on the bankruptcy courts—and the House Chamber.

1 Compare In re Oberdick (Shearer v. Oberdick), 490 B.R. 687 (Bankr. W.D. Pa. 2013) (concluding that tuition payments are not avoidable), with In re Leonard (Gold v. Marquette Univ.), 454 B.R. 444 (Bankr. E.D. Mich. 2011) (concluding that tuition payments are avoidable).

The Tension Between the Homestead Exemption and the Wildcard Exemption: When is a Debtor Receiving the Benefits of the Homestead Exemption?

by Mark Robens
Stichter, Riedel, Blain & Postler, PA

Until 2007, debtors were only permitted to exempt up to $1,000 in personal property from the bankruptcy estate.[1] Now, debtors who do not claim the homestead exemption or otherwise "receive the benefits of a homestead exemption" may elect to exempt up to $4,000 in personal property from the estate, which is called the wildcard exemption.[2] Simply put, a debtor cannot simultaneously claim both the homestead exemption and the wildcard exemption in their bankruptcy. The difficulty arises, however, when the debtor does not expressly claim the homestead exemption, but otherwise enjoys the benefits of the homestead. At first glance, it would seem that the debtor "receive[s] the benefits" of the homestead exemption if the debtor intends to remain in the homestead after filing for bankruptcy. Since the addition of the wildcard exemption, courts were divided about whether the debtor needed to actually surrender the homestead to the bankruptcy trustee, or whether the debtor could simply refrain from claiming the homestead as exempt to be eligible to claim the wildcard exemption. However, recent cases from both federal and state courts have held that a debtor does not "receive the benefits" of the homestead exemption—and is free to claim the wildcard exemption—if the debtor does not expressly claim the homestead exemption and the trustee is not otherwise prevented from administering the home.

A debtor living in Florida may elect to claim Florida's very generous homestead exemption to prevent creditors from levying against the homestead. Under Florida law, as long as the character and attributes of the homestead exist, a debtor does not need to expressly claim the homestead as exempt for the exemption to be effective against creditors.[3] The exemption can only be terminated in the manner proscribed by law, such as abandonment or alienation by the debtor. In other words, a debtor does not waive the homestead exemption simply because the debtor fails to assert the homestead exemption. Bankruptcy adds an additional layer to this analysis: a debtor's homestead automatically becomes property of the estate under section 541 of the Bankruptcy Code unless the debtor expressly claims it as exempt under section 522.

To resolve the split in authority, in *Osbourne v. Dumoulin*, the Florida Supreme Court addressed the circumstances that constitute whether a debtor "receive[s] the benefits."[4] For the purposes of the wildcard exemption, the court held that a chapter 7 debtor does not "receive the benefits" of the homestead exemption if the debtor does not claim the exemption and the bankruptcy trustee is not otherwise prevented from administering the homestead as property of the estate. It is not necessary for the debtor to take the extra step of affirmatively abandoning the homestead to the trustee because the homestead automatically becomes property of the estate upon filing a bankruptcy petition. The court reasoned that the debtor is effectively surrendering the homestead to the trustee for administration when the debtor does not claim the homestead as exempt. It makes no difference to the analysis that the debtor has previously received the benefits of the homestead exemption before filing for bankruptcy, or that the debtor may receive the benefits of the homestead exemption upon grant of a discharge. Either way, if the debtor does not claim the exemption, the bankruptcy trustee is not prevented from administering the homestead as property of the estate. Therefore, the debtor does not "receive the

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1 Fla. Const. Art. X § 4.
2 Fla. Stat. § 222.25(4) (2015). The Florida legislature amended section 222.25 to include the wildcard exemption in 2007. Laws of Florida, 2007-185.
3 Osborne v. Dumoulin, 55 So. 3d 577 (Fla. 2011).
4 55 So. 3d 577 (Fla. 2011).

continued from p. 11

benefits" of the homestead exemption and may claim the wildcard exemption, even if the debtor ultimately retains possession of the homestead.

However, the Florida Supreme Court provided a qualification: each court will need to analyze the facts and circumstances of each case to determine whether the debtor receives the benefits of the homestead exemption. In the court's hypothetical example, a debtor who does not expressly claim the homestead exemption may still "receive the benefits" of the exemption if the debtor's non-filing spouse claims the homestead exemption. The non-filing spouse's claim of the homestead exemption would prevent the trustee from administering the homestead. Although the debtor is not expressly claiming the benefit of the homestead, the debtor still receives the benefits of the homestead exemption vis-à-vis the debtor's spouse. Therefore, the debtor would be ineligible to claim the wildcard exemption under these circumstances. The court cautioned that a debtor's failure to claim the homestead exemption is not "sufficient evidence that a debtor is not receiving the benefits of the homestead exemption." Each court must determine whether the debtor is still receiving the benefits of the homestead on a case by case basis.[5]

The Eleventh Circuit recently extended the holding of *Osbourne* to the chapter 13 context in *Valone v. Waage (In re Valone)*.[6] In that case, joint debtors filed a chapter 13 plan in which the debtors claimed the wildcard exemption rather than the homestead exemption. However, the debtors indicated that they intended to remain in the homestead. The court speculated that the debtors did not claim the homestead exemption because they had no equity in their homestead. The trustee objected to the claimed wildcard exemption, arguing that the debtors were receiving the benefits of the homestead exemption by virtue of their election of chapter 13, which allows a debtor to retain possession of the debtor's property. The bankruptcy court sustained the objection because chapter 13—like the homestead exemption—protects the homestead from administration by the trustee, the debtors were receiving the benefits of the homestead exemption. The Valones appealed the ruling to the district court. While the appeal to the district court was still pending, the Valones were able to confirm a chapter 13 plan without claiming the wildcard exemption. The district court affirmed the bankruptcy court, and the Valones appealed to the Eleventh Circuit.[7]

The Eleventh Circuit held that homeowners who filed a chapter 13 petition are not foreclosed from claiming Florida's wildcard exemption simply because the debtors elected to file in chapter 13.[8] Since the wildcard exemption is limited only to the extent that the debtors "receive the benefits of a homestead exemption," the debtors can only receive the benefits of the exemption when the homestead exemption alone protects the homestead. If the protection of the debtor's homestead arises from an operation of the automatic stay, for example, then it cannot be said that the debtor "received the benefits" of the homestead exemption.[9] "Because the homestead exemption does not reference Chapter 13, the Bankruptcy Code, federal law, or any other source that might implicate Chapter 13, receiving the protection of the automatic stay and discharge simply cannot" prevent the debtor from claiming the wildcard exemption. Therefore, the debtors are eligible to claim the wildcard exemption even if the homestead is protected from a source other than the homestead exemption.

The Eleventh Circuit went on to hold that it makes no difference whether the debtor has filed a petition

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5 Osborne, 55 So. 3d at 589.
6 784 F.3d 1398 (11th Cir. 2015).
7 Ordinarily, a circuit court lacks the jurisdiction to hear an appeal of a bankruptcy court's ruling on exemptions because the ruling is not a final order appealable as of right. Valone, 784 F.3d at 1401. However, while the Valones' appeal was pending before the district court, the Valones were able to confirm a plan, which is a final order. Id. When the district court affirmed the bankruptcy court's order, the district court had the clerk to close the file. Id. The Eleventh Circuit reasoned that since there was nothing left "for the court to do but to execute [the] judgment," there was an indicia of finality and the Eleventh Circuit had the jurisdiction to consider the Valones' appeal.
8 Valone, 784 F.3d 1404.
9 Valone, 784 F.3d 1404.

continued from p. 12

under chapter 7 or under chapter 13. Once the debtor files for bankruptcy, the trustee is free to administer the homestead as property of the estate unless the debtor exempts the homestead by claiming the homestead exemption. In either chapter 7 or chapter 13, the debtor loses the benefits of the homestead exemption once the debtor submits the homestead to administration by the trustee. It makes no difference to the analysis that the homestead exemption revives to protect the homestead from creditors upon discharge because the exemptions are determined on the petition date. Simply put, the debtor "receives the benefits" of the homestead exemption if—and only if—the homestead is protected by the homestead exemption at the time the debtor files for bankruptcy.

Similarly, in *In re Fitzpatrick*, the bankruptcy court held that a chapter 7 debtor can claim the wildcard exemption when the debtor's non-filing spouse expressly disclaims the homestead exemption and the trustee is not otherwise prevented from administering property of the estate.[10] In this case, the debtor expressed her intent to remain in the house by claiming that the homestead was exempt as property held as tenancy by the entireties with her husband. The trustee objected to the debtor's claimed wildcard exemption because, although the debtor was not claiming the homestead exemption, she was nonetheless receiving the benefits of the homestead through her husband.

Although courts have uniformly held that a debtor "receives the benefits" of the homestead exemption if their non-filing spouse is eligible to assert the exemption, the court overruled the objection because, in this case, the non-filing spouse had affirmatively waived the homestead exemption. Thus, neither the debtor nor her spouse were preventing the trustee from administering the homestead as property of the estate. The fact that the debtor's homestead was protected from creditors by some other operation of law—in this case, designating the property as tenancy by the entireties property—does not hinder the trustee from administering the homestead as property of the estate. Furthermore, the court reasoned that "whether or not [the debtor] intends to remain in the homestead property is immaterial. A statement of intention to keep homestead property neither determines whether the property is property of the estate, nor affects a trustee's administration of the estate property." Therefore, so long as a debtor and a non-filing spouse do not claim the homestead exemption, the debtor may claim the wildcard exemption.

A debtor "receive[s] the benefits of a homestead exemption" if—and only if—the debtor does not claim the homestead exemption and the trustee is not otherwise prevented from administering the homestead as property of the estate. For the purposes of section 222.25(4) of the Florida Statutes, a debtor does not "receive the benefits" of the homestead exemption if the homestead is protected by some other operation of law, such as the automatic stay or

10 In re Fitzpatrick, 521 B.R. 698, 702 (Bankr. M.D. Fla. 2014).

Defeating Principles of Collateral Estoppel in Bankruptcy Courts

by Stephanie McNeff
Intern to the U.S. Bankruptcy Court, Middle District of Florida Tampa Division

Principles of res judicata are based on public policy; the idea that there needs to be an end to litigation. While ending controversies is an important task, ending them fairly is just as important. What happens when a party commits fraud on the court and wishes to use principles of res judicata to enforce that judgment in a bankruptcy proceeding? Fortunately, bankruptcy courts are allowed to set aside judgments of other courts when they are based on fraud on the court and defeat intentions to use principles of res judicata.

Typically, issues will be prevented from being re-litigated when (1) the issues are identical to one another, (2) when the parties had a full and fair opportunity to litigate and when the issue has been fully litigated, (3) when the same parties or those in privity are involved and (4) when a final decision has been rendered by a court of competent jurisdiction. Even though these criteria are met, collateral estoppel can be defeated if a party procured a judgment based on fraud on the court.[1]

Fraud on the court is a different type of fraud than the common law fraud. Simple misrepresentation by a party will not suffice for a judgment to be set aside.[2] Instead only egregious conduct is considered fraud on the court. Examples include employment of counsel to influence the court, bribery of a judge or jury members, or the fabrication of evidence by a party in which the attorney has been implicated.[3]

The Supreme Court has identified two distinct types of fraud which are considered fraud on the court, extrinsic and intrinsic.[4] Extrinsic fraud is a more severe type of fraud and has always been considered as fraud on the court.[5] It consists of fraud that infects the judicial process but which was not the subject of litigation.[6] Examples of which include, preventing a party from exhibiting fully his case due to fraud; or where the defendant had no knowledge of the suit due to acts of fraud by the plaintiff.[7] Intrinsic fraud is fraudulent evidence upon which a judgment is based.[8] In the Supreme Court case *Hazel*, the Court included intrinsic evidence as a basis for fraud on the court but added the condition that the fraud must have resulted from the corrupt conduct by officers of the court.[9]

Other courts have expanded the definition of fraud on the court to include fraud where it can be demonstrated, clearly and convincingly, that a party knowingly set into motion a scheme calculated to interfere with the judicial systems ability to impartially adjudicate a matter.[10]

The Supreme Court has given bankruptcy courts a broad power to question other judgments.[11] In *Pepper*, the Supreme Court held that a bankruptcy court, as a court of equity, may sift through the circumstances surrounding a claim to prevent injustice.[12] They may also set aside a judgment which was procured by fraud on the court.[13] Despite typical time frames for filing motions, Rule 60(b) of the Federal Rules of Civil Procedure does not impose a time limit on

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1 *Agripost, LLC v. Miami-Dade County, Fla.*, 525 F.3d 1049, 1055 (11th Cir. 2008)
2 *Browning v. Navarro*, 826 F.2d 335 (5th Cir. 1987).
3 *Williams v. Bd. of Regents of Univ. of Ga.*, 90 F.R.D. 140, 142 (M.D. Ga. 1981).
4 *See, United States v. Throckmorton*, 98 U.S. 61 (1878); Hazel-Atlas Glass Co. v. Hartford-Empire Co., 322 US 238 (1944); Heiser v. Woodruff, 327 U.S. 726, 736 (1946).
5 *Browning*, 826 F.2d 335, 344.
6 *Id.*
7 *Id.*
8 *Id.*
9 Hazel, 322 U.S. 238
10 *Ford Motor Co. v. Stimpson*, 115 So. 3d 401, 404 (5th Cir. 2013).
11 *Browning v. Navarro*, 826 F.2d 3335 (5th Cir. 1987).
12 *Pepper v. Litton*, 305 U.S. 295 (1969)
13 *Heiser v. Woodruff*, 327 U.S. 726, 732 (1946).
14 Fed. Rules Civ. Proc. Rule 60(b), 28 U.S.C.A.

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motions which assert fraud on the court.[14] Therefore, parties wishing to draft a motion based on fraud on the court may do so years after the original judgment if they wish.

Those parties who wish to take advantage of the judicial system by fraudulently procuring judgment will not be able to benefit from their deceitful act in future cases. A final issue decided upon by a court may be set aside in bankruptcy proceedings if fraud on the court can be proved. This balances the values inherent in our judicial system, that of fairness and swiftness.

"It Ain't Over Till It's Over": Supreme Court Deems Orders Denying Confirmation Non-Final

by Seth P. Traub
Shumaker, Loop & Kendrick, LLP

On May 4, 2015, the U.S. Supreme Court decided *Bullard v. Blue Hills Bank*,[1] holding that a bankruptcy court's order denying confirmation of a debtor's Chapter 13 plan is not a final order subject to immediate appellate review under 28 U.S.C. § 158(a).

In *Bullard*, the debtor, Louis Bullard's principal creditor, Blue Hills Bank ("Blue Hills"), successfully objected to a Chapter 13 plan that would have bifurcated its secured claim based upon the estimated value of a multi-family property owned by the debtor. Bullard appealed the denial of confirmation to the Bankruptcy Appellate Panel for the First Circuit Court of Appeals ("BAP").[2] The BAP held that the order denying confirmation was not a final appealable order, but exercised its discretion to hear the appeal of an interlocutory order and affirmed the bankruptcy court's decision on substantive grounds.[3] Bullard again appealed, but the First Circuit Court of Appeals dismissed for lack of jurisdiction, holding that an order denying confirmation of a plan is not final as long as a debtor may propose another plan.[4]

The Supreme Court affirmed. In its ruling, the Court emphasized that bankruptcy cases are different from other federal court litigation because they involve "an aggregation of individual controversies" within the context of a single case, thereby prompting Congress to allow "orders in bankruptcy cases [to] be immediately appealed if they finally dispose of discrete disputes within the larger case."[5] Bullard argued that the conclusion of a bankruptcy court's consideration of a single plan should be subject to appellate review, whether the plan is confirmed or denied. In turn, Blue Hills argued that only orders that dispose of the entire case should be appealable—i.e., an order confirming a plan or, in the absence of a confirmable plan, an order dismissing the bankruptcy case. The Court agreed with Blue Hills. Chief Justice John Roberts wrote the Court's unanimous decision:

> The relevant proceeding is the process of attempting to arrive at an approved plan that would allow the bankruptcy to move forward. This is so, first and foremost, because only plan confirmation—or case dismissal—alters the status quo and fixes the rights and obligations of the parties.
>
> Denial of confirmation with leave to amend, by contrast, changes little. The automatic stay persists. The parties' rights and obligations remain unsettled. . . . "Final" does not describe this state of affairs. An order denying confirmation does rule out the specific arrangement of relief embodied in a particular plan. But that alone does not make the denial final any more than, say, a car buyer's declining to pay the sticker price is viewed as a "final" purchasing decision by either the buyer or seller. "It ain't over till it's over."[6]

The Court also highlighted the practical importance of its holding, stating that if every denial of plan confirmation were appealable, multiple appeals

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1 135 S.Ct. 1686 (2015).
2 *See In re Bullard*, 475 B.R. 304 (Bankr. D. Mass. 2012).
3 *See In re Bullard*, 494 B.R. 92 (BAP 1st Cir. 2013).
4 *See In re Bullard*, 752 F.3d 483, 486-90 (1st Cir. 2014).
5 *Bullard*, 135 S.Ct. at 1692 (citation omitted). The flexible finality standard in bankruptcy cases has been discussed by the Eleventh Circuit in a number of cases, including *In re Celotex Corp.*, 700 F.3d 1262, 1265 (11th Cir. 2012) and *In re Donovan*, 532 F.3d 1134, 1136 (11th Cir. 2008).
6 *Id.* at at 1693.

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of a nonconfirmable plan could follow, resulting in a debtor asserting unwieldy leverage over its creditors by keeping those parties hostage in the bankruptcy case. Alternatively, the Supreme Court suggested that by not allowing appeal of a plan denial, the debtor would be incentivized to work with his creditors towards a confirmable plan, resulting in a more expeditious and efficient process:

> We think that in the ordinary case treating only confirmation or dismissal as final will not unfairly burden a debtor. He retains the valuable exclusive right to propose plans, which he can modify freely. The knowledge that he will have no guaranteed appeal from a denial should encourage the debtor to work with creditors and the trustee to develop a confirmable plan as promptly as possible. And expedition is always an important consideration in bankruptcy.[7]

While Bullard argued that if orders denying plan confirmation are not final, there would be no way of obtaining appellate review of the denied proposal, the Court noted the availability of interlocutory review through other means—i.e. when denial of confirmation turns on a pure question of law over which bankruptcy courts are divided or via certification of the order to a court of appeals[8] — thus leaving a safety valve for appellate review.

Although the *Bullard* case involves an order denying confirmation of a Chapter 13 plan, there is little reason to think that a different rule would apply in Chapter 11 cases as long as the Chapter 11 debtor maintains the right to file an amended plan. Indeed, in discussing its concerns over the delays and inefficiencies of piecemeal appeals[9] the Court stated that such concerns were heightened in Chapter 11 cases where "Chapter 11 debtors, often business entities, are more likely to have the resources to appeal and may do so on narrow issues."

Accordingly, the Court's decision in *Bullard* resolves the issue of the appealability of an order denying the confirmation of a Chapter 13 plan, and its reasoning signals applicability in the context of Chapter 11 cases. The Courts in the Middle District already encourage debtors and creditors to work towards a consensual plan, and the Supreme Court's ruling reinforces the necessity of doing so given a denial of a plan will not result in an appeal as a matter of right.

7 *Id.* at 1694.
8 *See* 28 U.S.C. § 158(a)(3) and (d)(2).
9 *Bullard*, 135 S.Ct. at 1693
10 *Id.*

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Divorce, Distribution, and Debt Discharge

by Bryant C. Lee

It is the job of state courts to hear divorce disputes and try to equitably distribute the marital property between the two spouses under Fla Stat. § 61.075.[1] While state courts may be well meaning in their judgments, most state courts do not consider that one of the spouses may enter into bankruptcy and try to discharge the equitable distribution judgment.

While equitable distribution has traditionally been used to distribute marital property, some judges have drafted equitable distribution orders to also serve as domestic support obligations.[2] While the subtle distinction between equitable distribution and domestic support may seem trivial, the distinction between equitable distribution and domestic support is a dispositive issue for bankruptcy courts in determining the dischargeability of a debt under 523(a)(5).[3]

In determining whether an equitable distribution order is intended to act as support, and therefore a domestic support obligation, bankruptcy courts have looked beyond the mere label used in the equitable distribution order. Looking beyond the label used by state courts in the equitable distribution order, bankruptcy courts have weighed various factors and looked at the intent of the state court in drafting the equitable distribution order to determine whether or not the equitable distribution order was in the nature of support.[4]

In weighing factors regarding equitable distribution, the bankruptcy courts do not all consider the same factors.[5] The Florida bankruptcy courts have traditionally focused on six factors when evaluating the nature of a debt resulting from an equitable distribution.[6] However, after *In re Benson*, an Eleventh Circuit Court of Appeals decision that considered an equitable distribution obligation, many courts consider:

(1) The agreement's language
(2) The parties' financial positions when the agreement was made
(3) The amount of the division
(4) Whether the obligation ends upon death or remarriage of the beneficiary
(5) The frequency and number of payments
(6) Whether the agreement waives other support rights
(7) Whether the obligation can be modified or enforced in state court
(8) How the obligation is treated for tax purposes[7]

The factors used to determine whether equitable distribution is in the nature of support is not dispositive. Bankruptcy courts have discretion in deciding which factors to consider and must weigh those factors against the intent of the original state court judge.[8] However, in determining whether equitable distribution is in the nature of support, many Florida bankruptcy courts have focused on whether the equitable distribution

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1 Fla. Stat. § 61.075 (2015).
2 *See generally In re Baron*, 283 B.R. 328 (Bankr. M.D. Fla 2002).
3 "A discharge under section 727, 1141, 1228(a), 1228(b), or 1328(b) of this title does not discharge an individual debtor from any debt-- (5) for a domestic support obligation." 11 U.S.C. § 523(a)(5) (2015).
4 *In re Baron*, 283 B.R. at 333-334.
5 *See generally In re Baron*, 283 B.R. 328 and In re Benson, 441 F.App'x 650 (11th Cir. 2011).
6 1) Whether the obligation under consideration is subject to contingencies, such as death or remarriage.
2) Whether the payment was fashioned in order to balance disparate incomes of the parties.
3) Whether the obligation is payable in installments or in lump sum.
4) Whether there are minor children involved in a marriage requiring support.
5) The respective physical health of the spouse and the level of education.
6) Whether, in fact, there was need for support at the time of the circumstances of the particular case. *In re Bowsman*, 128 B.R. 485, 487 (Bankr. M.D. Fla. 1991).
7 *In re Benson*, 441 F.App'x at 651.
8 Cummings v. Cummings, 244 F.3d 1263 (11th Cir. 2001).

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obligation: terminated upon death or remarriage, had a payment schedule, could be modified based on changed circumstances of either spouse, and indicated that the equitable distribution was intended to act as support.[9]

Bankruptcy courts must look at the intent of the original state court when determining whether an equitable distribution is in the nature of support.[10] The court in *Cummings* held that the bankruptcy court should take into account not only *Benson* factors, but also the intent of the original state court in determining whether an equitable distribution order was a domestic support obligation.[11] The language of intent used by the state court in *Cummings* was: "[t]he Wife will be able to support herself and the children ... upon receipt of the income-generating assets awarded her in the equitable distribution."[12] The court in *Cummings* did not set a standard to determine what type of language would constitute "intent" by the state court. Without a standard, bankruptcy courts are given discretion to determine whether language used by the state court constitutes "intent" for purposes of determining whether an equitable distribution order is in the nature of support.

When there is no explicit language by the state court indicating that the equitable distribution order is to be considered support, the bankruptcy court may await clarification from the district court or the bankruptcy court may use its discretion and read the intent of the equitable distribution order and weigh the *Benson* factors.[13] To alleviate the need for clarification by the state court, state courts should consider the fact that a spouse may file bankruptcy and clarify the intent of the equitable distribution order. Alternatively, attorneys should seek clarification from state courts regarding the intent of the equitable distribution order prior to seeking relief from the bankruptcy court.

9 *See generally* Equitable distribution was not support because the obligation award was absolute, survived death and remarriage, and was enforced by execution and levy. *Matter of Rachmiel*, 19 B.R. 721 (Bankr. M.D. Fla. 1982); Equitable distribution was not support because obligation was absolute, did not terminate upon death or remarriage, not subject to modification upon a change in circumstances, and not designed to provide support for a dependent child. Additionally, the agreement failed to mention need for support but included waivers by both parties to claims of alimony of any kind. *In re Ellertson*, 252 B.R. 831 (Bankr S.D. Fla. 2000); Equitable distribution was not support because obligation did not terminate upon death or remarriage, was not based on disparate incomes, was to be paid in a lump sum rather than periodic payments, and was not modifiable based on changes in circumstances (*In re Pattie*, 112 B.R. 437 (Bankr. M.D. Fla. 1990).
10 *Cummings*, 244 F.3d 1263.
11 *Id.* at 1267.
12 *Id.* at 1266.
13 *Id.* at 1267.

People on the Go

Richard J. Cole, III has been appointed as the ABI's Special Projects Manager along with Elizabeth Stephens of Las Vegas, NV. The role includes preparing the weekly ABI - Collier Consumer Case Update and preparing several webinars.

Richard is Peer Review Rate by Martindale Hubbell as AV Preeminent in Bankruptcy as of April 27, 2015. If anyone would like an ABI webinar speaking opportunity contact Richard, (941) 365-4055, rc3@rjcolelaw.com.

Richard has also been selected for participation in the National Conference of Bankruptcy Judges Next Generation Program taking place at the NCBJ in Miami this September.

Trenam Kemker attorney **Lara R. Fernandez** has been certified by the American Board of Certification (ABC) in the area of Business Bankruptcy Law. Certification is the highest level of recognition and the ABC's programs are designed to identify those attorneys in consumer or business bankruptcy who have met or exceeded rigorous certification standards relating to experience, continuing legal education, integrity, and peer review; in addition to demonstrating a sophisticated understanding of the law in their specialty area.

Lara is a Shareholder in the firm's Tampa office and Chairs the Bankruptcy, Creditors' Rights and Insolvency Practice Group.

Taking a major step forward in a steadily advancing legal career, **Rebbecca A. Goodall** was recently named a staff attorney with Shumaker, Loop & Kendrick, LLP, the firm where she worked full-time as both a legal assistant and paralegal as she put herself through law school, cared for a daughter with type 1 diabetes and gave birth to two children.

Kelley Kronenberg, a national, full-service law firm, is expanding its reach into the Florida market with the addition of a Bankruptcy Practice Group. The new group, which joined the firm's Tampa office in April, is the result of Kelley Kronenberg acquiring Dennis LeVine & Associates, a bankruptcy law firm in Tampa, and its team of attorneys and administrative staff.

Kelley Kronenberg's new Bankruptcy Practice Group includes Dennis J. LeVine, David E. Hicks and Alison V. Walters. Mr. LeVine and his team bring extensive experience to the firm and focus on matters involving Bankruptcy, Replevin and Collection, as well as Creditors' Rights for major national lenders and finance companies in all Florida Courts. Mr. LeVine is one of only seven attorneys in Florida who is board certified in both Consumer Bankruptcy Law and Business Bankruptcy Law by the American Board of Certification (ABC).

"We look forward to being a part of the Kelley Kronenberg team," Mr. LeVine said. "Our bankruptcy and collection offerings will serve as a nice complement to the firm's Mortgage Foreclosure and Real Property Litigation practices."

Kelley Kronenberg's growth strategy has been steady and methodical over the past five years. In March, the firm expanded into the Miami market by opening a new office in Brickell and adding a litigation group consisting of six attorneys. The firm plans to continue its growth by expanding its services and legal footprint.

New hire? Promotion? Birth announcement? Share with your colleagues in the next edition by emailing these personal and career updates to Stephanie Lieb at slieb@trenam.com

Bankruptcy Bootcamp Results in Better Litigators

by John Landkammer
Anthony & Partners

Friday, May 15, 2015 saw the realization of a goal for David Jennis, Jennis & Bowen, who, according to Judge Catherine P. McEwen, United States Bankruptcy Court for the Middle District of Florida (Tampa Division), wanted for years to bolster his trial skills and those of his colleagues through an intensive symposium on evidentiary issues in bankruptcy. It was easy for David to convince others, including local bankruptcy judges, of the value of such a program. The difficult part was the organization and preparation required, amongst busy schedules, to bring the program to fruition. A steering committee of bankruptcy professionals was assembled. Judge Michael G. Williamson, United States Bankruptcy Court for the Middle District of Florida (Tampa Division), known for a profound acumen concerning evidence and a frequent lecturer on the topic, agreed to serve as the Judicial Chair and Judge Laurel M. Isicoff, United States Bankruptcy Court for the Southern District of Florida (Miami Division) signed on as an additional member of the steering committee. Stephanie C. Lieb, Trenam Kemker, served as program Co-Chair with David Jennis, and the program that would come to be known as the "Bankruptcy Court Evidence Boot Camp: Basics to Advanced" developed.

The Bankruptcy Evidence Bootcamp sold out and hundreds of attendees from all over the state packed the Renaissance Hotel at International Plaza in Tampa at 8:30 a.m. that Friday morning. The seminar topics were arranged in entertaining blocks including *"Objection, No Foundation!"- Evidentiary Basics; The "Dos" and "Don'ts" of Effective Witness Examination; The "ABC's" of Documentary Evidence, Litigation in the Electronic Age: E-Discovery and Use of Electronically Stored Exhibits at Trial; Discovery: an Ethical Minefield-Judicial Perspective; Fact or Fiction—the Netherworld of Opinion Testimony; Attorney Client Privilege—Now You See It, Now You Don't!; and Bankruptcy Appeals.*

The steering committee and panelists did a fantastic job of presenting complicated evidentiary issues in an entertaining and informative manner. The program was attended and participated in by no less than nine federal judges including District Court Judges Mary S. Scriven and Charlene V.

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Honeywell, Magistrate Judge Anthony E. Porcelli, and Bankruptcy Judges Karen S. Jennemann, Paul G. Hyman, K. Rodney May, Michael G. Williamson, Catherine Peek McEwen, and Caryl E. Delano. Many attorneys from all over the state volunteered their time, expertise and energy to prepare and participate in the terrific presentation. All participants and the steering committee deserve the thanks of the Bankruptcy Bar and kudos for a terrific program. Special thanks are due to David Jennis for accomplishing his goal to the benefit of us all.

Fables in Law, Chapter 1

Legal Lessons from Field, Forest, and Glen

D. Brock Hornby

We are pleased to present the first of three (and perhaps more) collections of Aesopian legal fables by Judge Hornby.

— The Editors

The Fox's Foundation

Fox was representing Hedgehog in a dispute over whether contractor Mole had properly supervised the workers repairing Hedgehog's den. Fox called Hare as a witness and asked Hare

D. Brock Hornby is a District Judge on the U.S. District Court for the District of Maine.

whether Mole had supervised the workers properly. Opposing counsel Snake objected, claiming "Lack of foundation." Judge Owl said to Fox, "You need to lay a foundation before I will permit that question." Fox then proceeded as follows:

> Fox: "Hare, have you ever been to Hedgehog's den?"
>
> Hare: "I have been visiting there on a daily basis for the past three months."
>
> Fox: "Did you have occasion on your visits to see Mole at work?"
>
> Hare: "Well, I saw him a couple of times, but during the repairs he was hardly ever there."
>
> Fox: "How do you know that?"
>
> Hare: "Hedgehog was ill, and I visited with him daily, all day long, during the repair period."
>
> Fox: "How many times did you see Mole inspect the building site during that period?"
>
> Hare: "Twice. Five minutes each time."
>
> Fox: "What did you observe about Mole's condition?"
>
> Hare: "Each time he appeared bleary-eyed and unsteady on his feet."
>
> Owl: "Objection overruled."

As a result of the careful foundation that Fox was prompted to lay, the jury found Hare's testimony very important.

Moral: An experienced lawyer does not object for lack of foundation unless certain that the foundation cannot be laid.

The Mole in His Own Words

Snake prepared carefully for each witness in each case. For witnesses he cross-examined, he had a list of leading questions, with alternate lines available, depending upon the answers. As an inexpe-

rienced advocate, he tended to use leading questions for the witnesses he called for his own side of the case as well (unless there was

objection), so that their testimony would support his theory of the evidence and the argument. In questioning his client Mole, Snake thus proceeded as follows:

> Snake: "You have been supervising construction workers for 10 years, correct?"
>
> Mole: "Yes."
>
> Snake: "And during that time no one else has ever questioned your job performance, correct?"
>
> Mole: "That's right."
>
> Snake: "You have never been inebriated on a job site, correct?"
>
> Mole: "Correct."
>
> Snake: "And you never saw Hare at Hedgehog's den during the ten occasions on which you came to supervise the repairs, correct?"
>
> Mole: "Correct."

Experienced opposing counsel Fox never objected that Snake was improperly leading his own witness. Although Snake obtained the answers he wanted, the jury never got to hear Mole tell in his own words what happened. As a result, in deliberations they were skeptical of this version.

Moral: Unless your witness is unreliable, let him tell his story in his own words. Juries pay more attention to the words of witnesses than to the words of lawyers.

The Hare's Final Answer

Snake was cross-examining Hare over Hare's testimony that Possum had a carrot in his possession. Snake succeeded in getting Hare to agree that, at the time, dusk was falling, Hare was in a hurry, and he was some distance from Possum. Snake concluded the line of questioning by asking Hare, "So you don't really know what Possum was carrying, do you?" Hare blurted out in response, "Of course I do. I saw him take something long and orange out of his mouth and heard him scream, 'This carrot tastes awful.'"

Moral: It is safer not to ask the final question. Instead, one can argue later, after the record is closed, that the witness could not be confident of what he saw.

The Unimpeached Muskrat

Fox was cross-examining Muskrat who had proven to be a credible witness against Fox's client. Fox had in her hand a copy of

Muskrat's deposition transcript.

> Fox: "So, Muskrat, did I hear you on direct examination say that the waterway around the dam was large?"
>
> Muskrat (pausing): "Yes."
>
> Fox: "Do you remember that I took your deposition on January 12 of this year?"
>
> Muskrat: "The date sounds about right."
>
> Fox: "And was there a court reporter there recording everything that you said just as there is here in the Glen today?"
>
> Muskrat: "Yes."
>
> Fox: "And did you then swear to tell the truth, the whole truth, and nothing but the truth, just as you did today before this jury?"
>
> Muskrat: "Yes."
>
> Fox: "And did you not then say — and I quote — that the waterway around the dam was *huge*?"
>
> Muskrat (puzzled): "Yes."

Whereupon, Fox walked triumphantly back to counsel table, threw down the deposition transcript, and said to Owl, "No more questions," looking meaningfully at the creatures on the jury. The jury, however, was nonplussed by Fox's performance.

Moral: Not every difference in the choice of adjective amounts to impeachment.

The Snake's Not-So-Brilliant Brief

Snake filed a legal brief with Owl. Snake had worked on it late into the evening, fortified by a little wine. Some of Snake's arguments were brilliant, but they dripped with sarcasm and vitriol. Fox, on the other hand, filed a brief whose logic was simple and plainspoken, without histrionics or memorable utterances. As Owl studied both briefs in deciding the controversy between the parties, she virtually winced each time she had to re-read Snake's brief. Owl was much more comfortable re-reading Fox's less vehement brief. In the end, Fox's more temperate argument prevailed in Owl's decision.

Moral: For persuasion, simple statements generally wear better and longer than sarcasm and bombast.

To be continued . . .

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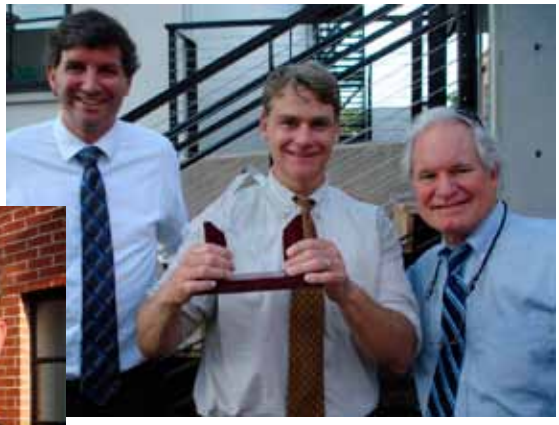


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