Fall 2017

The Cramdown

The Newsletter of the Tampa Bay Bankruptcy Bar Association

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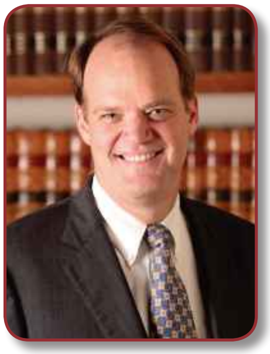

PRESIDENT'S MESSAGE

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

I am honored to have the opportunity to serve as the next President of the Tampa Bay Bankruptcy Bar Association. I am grateful for Kelley Petry's leadership over the past year. She has left the Association on very solid ground and I hope I can continue to build on her successes.

One of my goals this year is to expand the number of people who are actively involved in the Association. There are a number of ways to volunteer.

The largest need is at the Pro Se Clinic. The Association staffs the clinic, which is open Monday and Wednesday from 1:00 to 4:00 p.m., to assist pro se filers. Attorneys can sign up for a one hour slot.

The number of pro se filers seeking assistance is much greater than the number of volunteers. Pro se filers create a significant burden on the judicial system and the bankruptcy judges' time. The Association is thankful for the attorneys who generously give of their time. Unfortunately, it seems that the same attorneys volunteer to staff the clinic. More volunteers would allow the clinic to serve the large number of people who need assistance.

The Association's Pro Bono Committee is chaired by Amanda Smith and Nicole Noel. If you have any questions or would like additional information, please reach out to them.

The Cramdown provides another opportunity to volunteer. The Cramdown Committee, chaired by Noel Boeke, is always looking for people who are willing to write articles for its quarterly publications.

Lastly, we want people to show up. The Association will continue to provide monthly CLE and consumer lunches. Please check the TBBBA emails for updates.

Please remember to register for the annual View from the Bench seminar scheduled for November 2, 2017.

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

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Good Faith Affirmative Defenses Waiving Attorney-Client Privilege and Work-Product Protection Under the "At Issue" Doctrine

by John Emmanuel and Frank Harrison
Buchanan Ingersoll & Rooney PC

On May 8, 2017, the U.S. Bankruptcy Court for the Middle District of Florida entered an order compelling production of attorney-client communications between Regions Bank and its counsel, finding that Regions had put those communications "at issue" by raising a good faith affirmative defense under 11 U.S.C. § 548(c) in response to a fraudulent transfer claim brought against it. *Welch v. Regions Bank (In re Mongelluzzi)*, No. 8:14-ap-00653-CED (Bankr. M.D. Fla. May 8, 2017), ECF No. 319 (Delano, J.) (herein *Mongelluzzi*).

Mongelluzzi bears comment for the considerations it may present to any party relying on a good faith defense, whether rooted in the Bankruptcy Code or otherwise.

Facts of *Mongelluzzi*

As recounted in the *Mongelluzzi* order, Frank Mongelluzzi and his wife owned and operated over a hundred corporations. Between 2007 and 2010, Frank Mongelluzzi and certain of his related businesses (the Debtors) maintained a revolving line of credit and 61 bank accounts at Regions. When the Debtors eventually ended up in chapter 7 bankruptcies in early 2011, the trustees sued Regions, seeking to avoid fraudulent transfers. The trustees further alleged that the Debtors were engaged in a massive check-kiting scheme, that Regions had knowledge of the scheme, and that Regions devised a controlled exit strategy to reduce its exposure. The trustees alleged that, after becoming suspicious, Regions entered some 14 forbearance agreements to give Regions greater rights related to the Debtors' accounts. Ultimately, Regions froze most of the accounts and, two weeks later, setoff roughly $12 million against the obligations it was owed on the revolving line of credit and other loans.

Regions answered the fraudulent transfer claims, denying the material allegations, and asserting, in its affirmative defenses, that it had acted in good faith at all times and that it took in good faith and for reasonably equivalent value in exchange therefor, including the satisfaction of the antecedent debt owed Regions. The trustees then issued discovery and later sought to compel the production of documents withheld pursuant to the attorney-client privilege and the work-product doctrine, arguing that Regions waived those privileges when it asserted a good faith defense to the fraudulent transfer claims.

The Court in *Mongelluzzi* found that Regions had waived the attorney-client privilege and work-product protection with respect to specific documents "that evidenced its knowledge, motive, or intent during the relevant time period." *Id.* at 3, 8. The road to this order was an iterative one and involved a significant in *camera* review and deliberative process.[1]

The "At Issue" Doctrine – Authority Cited in *Mongelluzzi*

As described in *Mongelluzzi*, under the "at issue" doctrine, a party may be deemed to have implicitly waived the attorney-client privilege when:

> (1) assertion of the protection results from some affirmative act by the party invoking the protection; (2) through this affirmative act, the asserting party puts the protected information at issue by making it relevant to

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1 The *Mongelluzzi* order came after the Court initially denied the trustees' motions to compel without prejudice, subject to the Court's in camera review of the documents on Regions' privilege log. After its review of hundreds of emails between Regions and its attorneys, the Court orally announced its intended ruling, noting that most of the emails did not reveal any knowledge, intent or motive on part of Regions or its attorneys, other than what could easily be inferred from the trustees' own filings. The Court then provided an opportunity for counsel to comment and requested two additional documents for in camera review that had not been provided.

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> the case; and
> (3) application of the protection would deny the opposing party access to information vital to its defense.

Mongelluzzi at 12 (citing *Stern v. O'Quinn*, 253 F.R.D. 663, 676 (S.D. Fla. 2008)).

Plaintiffs may take affirmative acts putting communications at issue when filing certain lawsuits. A hornbook example would be a suit for legal malpractice, as in one case cited by *Mongelluzzi*. *See, e.g., Coates v. Akerman, Senterfitt & Eidson, P.A.*, 940 So. 2d 504, 507 (Fla. 2d DCA 2006). The clients in Coates sued their lawyers for malpractice with respect to legal advice concerning a "proprietary tax savings plan" and the establishment of a joint venture related thereto. 940 So. 2d at 506. Coates held that the "clients must necessarily present evidence of these [attorney-client] communications at trial to prove their claims." *Id*. at 508.
The "affirmative act" is clear in cases like *Coates*: clients are suing about legal advice.

Defendants may also put protected communications "at issue" by raising certain defenses, including defenses sounding in good faith. *Mongelluzzi* cited several examples.

In *Hearn v. Rhay*, 68 F.R.D. 574 (E.D. Wash 1975), prison officials, faced with a 42 U.S.C. § 1983 civil rights case, raised qualified immunity as an affirmative defense. *Hearn*, citing U.S. Supreme Court cases, stated that for the defense of qualified immunity to apply, the "ultimate inquiry is always whether the defendant state official acted in good faith." *Hearn*, 68 F.R.D. at 578 (internal citations omitted). Further, "the content of defendant's communications with their attorney is inextricably merged with the elements of plaintiff's case and defendants' affirmative defense," and the court and plaintiff would be prejudiced without them. *Id*. at 582. *Hearn* has been cited by both the Eleventh Circuit and Second Circuit in cases involving good faith defenses, and *Mongelluzzi* cited those cases.
In Cox v. Administrator U.S. Steel & Carnegie, 17 F.3d 1386 (11th Cir. 1994), union members sued certain union leaders and their employer, alleging that the leaders had sold them out in negotiations in exchange for receiving certain pension benefits from the employer. The benefits to the leaders were alleged to have been provided by the employer through retroactive changes to a leave-of-absence policy. The employer in *Cox* alleged that it believed the retroactive changes were lawful when made. *Cox* held that the employer had injected the issue of its state of mind in the case by raising this defense which "necessarily implicates all of the information at its disposal" when it amended the policy. 17 F.3d at 1419. "Having gone beyond mere denial, affirmatively to assert good faith, [the employer] injected the issue of its knowledge of the law into the case and thereby waived the attorney-client privilege." *Id*. 1420.

In *U.S. v. Bilzerian*, 926 F.2d 1285, 1292 (2d. Cir. 1991), *cert. denied*, 502 U.S. 813 (1991), investor Paul Bilzerian was convicted of violating securities laws when he listed certain funds, which he used to buy stock, as being "personal" funds, despite the fact that they had come from other investors with whom he had a profit-sharing arrangement. Bilzerian had moved in *limine* for a ruling allowing him to testify regarding his belief in the lawfulness of describing the funds as "personal" without being subjected to cross examination on otherwise privileged communications with his attorney. The trial court denied the motion. The Second Circuit affirmed that denial, stating that "Bilzerian's testimony that he thought his actions were legal would have put his knowledge of the law and the basis for his understanding of what the law required in issue." *Bilzerian*, 926 F.2d at 1292. *Bilzerian* held that its namesake defendant "was free to deny criminal intent either without asserting good faith or to argue his good faith defense by means of defense counsel's opening and closing statements and by his examination of witnesses." *Id*. at 1293.

In re Gibvo, Inc., 185 F.R.D. 296 (D. Colo. 1997) was the case that the Court in *Mongelluzzi* considered

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most analogous and persuasive. *Gibco* involved a fraudulent transfer claim and a good faith defense under 11 U.S.C. § 548(c). In *Gibco*, homeowners sued the principal of a homebuilder company and the company itself. During the pendency of that suit and utilizing the services of his counsel in that suit, the principal arranged a series of transfers of property, such that the company had nothing left when a judgment was obtained by the homeowners against it. When the company filed for bankruptcy, the trustee brought a fraudulent transfer claim against the principal. The principal asserted that the transfers were made in good faith under § 548(c). The court in *Gibco* held that the attorney-client communications were "the most probative, if not the only, documentary evidence which would tend to show the information available to [the principal] when the transfer was under consideration, and [his] motive for the transfer." *Gibco*, 185 F.R.D. at 301. Further, if the trustee were not permitted discovery on those documents, the principal "will be free to state his version of the facts" surrounding the transfer and leave the trustee "without any means to examine other evidence which would corroborate or contradict [the principal's] statements on the issues." *Id*.

Citing the *Gibco* decision, the Court in *Mongelluzzi* emphasized that the documents it was compelling Regions to produce were the "most probative, if not the only" evidence of Regions' state of mind during the relevant time period. *Mongelluzzi* at 18.

Considerations from Mongelluzzi

Mongelluzzi presents several considerations. First, parties faced with a discovery dispute involving the "at issue" doctrine may benefit from the more deliberate process employed in *Mongelluzzi*. The order in *Mongelluzzi* compelling production was entered only after the Court had reviewed hundreds of documents in a thorough process. The decisions cited by *Mongelluzzi* do not reference such a procedure. However, where such process is employed, parties may want to consider the implications using of such a review in a bench trial setting.

Second, parties may want to pay careful attention to the characterization of the "issue" allegedly injected into the case. *Mongelluzzi*'s analysis was comparatively straightforward in finding that Regions' affirmative defense under 11 U.S.C. § 548(c) – good faith for value – had raised the issue of its good faith belief. But the "issue" is not always so clear. Cases sometimes parse the "issue" in ways that allow the privilege to be used as both a sword and a shield. For instance, Coates held that the plaintiffs/clients had waived the attorney-client privilege as to the communications with their lawyers at the one law firm they were suing, but that they had not done so as to another law firm or an accounting firm that provided input on the transaction giving rise to the malpractice claim. Coates reasoned that the plaintiffs/clients had not put those communications at issue. Coates arguably represents the very harm the doctrine is intended to address that may arise when a court selects an inappropriate level of generality in defining the "issue" injected. The Coates plaintiffs/clients had, effectively, a sword and shield against the defendants in that suit, who could not obtain discovery on other potential causes of the damages alleged.

Third, parties may want to consider arguing, from an equitable and practical standpoint, that raising certain defenses should <u>not</u> be considered an "affirmative act" within the meaning of the doctrine. The cases cited in *Mongelluzzi* could be argued to remain, along with all the other cases applying the doctrine as to defendants, premised on a certain legal fiction of "choice" in how to defend a case. While plaintiffs may be, as a general matter, forbidden from using a privilege as a "sword" when they initiate litigation, the same cannot be said of defendants. Moreover, in many cases where good faith can be an affirmative defense, the claim itself contains some element of scienter which a defendant will deny. *Bilzerian* suggests that, at least in a criminal context with constitutional concerns, denial of an allegation would not be an affirmative act putting something "at issue." 926 F.2d at 1293. *Cox*, likewise, drew a distinction between denying

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Student Loan Sidebar

by: Christie Arkovich
cdalaw@tampabay.rr.com

In the Spring 2017, Fannie Mae announced a new program: *Innovations Help Borrowers Pay Down Student Debt and Overcome Debt Related Obstacles When Buying a Home.*

Be careful what you wish for. Responding to concerns that millennials would be unable to enjoy home ownership at the rates the baby boomer generation experienced, Fannie Mae has recently announced that borrowers can refinance their federal student loans into a new mortgage.

While this will help many young borrowers I'm sure, I'm also cautious in that borrowers are giving up important federal rights in doing so. For instance, if older Americans elect to refinance their Parent Plus loans into their mortgage as they downsize to a more affordable smaller home, they are giving up the right to an income based plan (often 0-$100 a month) and trading that in for a sizable chunk of their home equity. Home equity that could have been used to help fund their retirement.

11th Circuit Reaffirms the Brunner test in Acosta.

Even a younger person should be careful as they too are giving up important rights in the event they lose their job, have a drop in income or become disabled. The present income based/debt forgiveness plans allow for a re-calculation of a student loan payment for all of these events. A federal loan can also be discharged in its entirety under the Total and Permanent Disability Discharge program. A refinance of a student loan, while it may sound inviting due to a lower interest rate (6-8% reduced to 4%), will result in the loss of these federal benefits. It will also cause the student loans to now be collateralized by their home and the loss of a down payment or equity in that home should a calamity occur.

A borrower may also be putting their spouse on the new mortgage loan, whereas he or she was not liable on the former student loan.

For the right person, this new program will help to reduce interest rates on debt and allow for the purchase of a home, for others it may worsen their overall debt situation.

Looming Crisis for Older Americans: Parent Plus loans.

A whopping 37% of federal student loan borrowers age 65 and older were in default according to a recent Consumer Financial Protection Bureau (CFPB) report. Social security offsets are up nearly 500% from 2002 to 2015 for those with Parent Plus loans. Many Americans are struggling to make their student loan payments and in some cases skipping necessary health care needs such as prescription medicines, doctors' visits and dental care because they could not afford it according to a CFPB report. Some believe they cannot afford to retire and are afraid to answer the phone due to debt collection calls.

Unfortunately, not all loan servicers are explaining and offering income based plans to seniors. We have run into several situations where the servicer has been unable to lower the payment, but after analysis, the borrower was indeed eligible for a zero payment after converting their loans to Direct from FFEL and applying for the ICR (Income Contingent Repayment) plan. While the studentloans.gov site contains information about the available income based programs, it is confusing at best, particularly to older Americans who would prefer to just call their servicer for help not realizing the servicer is in reality nothing more than a debt collector.

11th Circuit Reaffirms the *Brunner* test in Acosta

The 11th Circuit reaffirmed its reliance on the Brunner test for the discharge of student loans in ECMC v. Acosta-Conniff, No. 16-12884 (11th Cir. April 19, 2017). The Court did decline to extend the test further by stating that the debtor's past financial decisions have no bearing on the forward looking prong regarding the future ability to pay. However, the Court passed over the opportunity argued by NACBA and NCLC briefs to re-examine the applicability of the nearly 30 year old non-dischargeability rule in today's student debt environment.

TBBBA Annual Dinner

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an allegation and raising an affirmative defense. 17 F.3d at 1420. However, a mere "denial" without more will not carry a burden of proof at any level. This notional choice – between a denial without more and putting otherwise privileged communications at issue – is a *Catch-22*, not an "affirmative act" (like choosing to file a lawsuit) that should be considered an implied waiver of privilege. Appellate courts should consider whether the "at issue" doctrine, as applied to defendants, should be re-conceptualized as an exception to the privilege rather than an implied waiver of it.

Ultimately, the sword and shield metaphors of the "at issue" doctrine may need to evolve into a more holistic assessment of fundamental fairness and procedural advantage or disadvantage. The point ought to be whether a privilege is being abused to tilt the procedural playing field. *Mongelluzzi*, rather than focusing on such metaphors, engaged in such an analysis and emphasized that the otherwise privileged documents at issue were the most, if not only, probative documents as to Regions' state of mind during the relevant time period. *Mongelluzzi*'s analysis was reminiscent of a work-product doctrine analysis inasmuch as it focused on the evidentiary value of the documents to the dispute and overall procedural fairness. That subtle shift may be the right, or at least more honest, direction for the "at issue" doctrine to evolve when applied to defendants. The common law history of the privilege – including its evolutions – was recounted by the Second Circuit in *Bilzerian*. The attorney-client privilege has certain goals to promote, but they are not absolute, as recognized by other exceptions to the privilege, such as the crime-fraud exception. Courts applying the "at issue" doctrine, could, rather than engaging in the fiction that parties are taking certain steps that implicitly waive the privilege, take into account other factors in determining what amounts to an "affirmative act . . . making it relevant to the case." *O'Quinn*, 253 F.R.D. at 676. One could argue that is what courts are doing already, given the emphasis on the relevance and probative value of documents in cases like *Mongelluzzi* and *Gibco*.

Practitioners should be aware that raising common affirmative defenses may place certain documents "at issue." They should also be aware that their clients' discovery responses (as in *O'Quinn*), including deposition responses, could also place certain communications at issue. Once documents or communications are "at issue," a party's ability to pivot away from them may be limited, at least in terms of legal authority for doing so. The authority in *Mongelluzzi* does not address whether dropping the "issue" that is being considered injected, or whether a narrower defense (such as new value for setoff purposes, a narrower § 548(c) defense) can be relied on instead.

Regardless, counsel and clients discussing transfers – or their belief in the lawfulness of their actions generally – should be mindful that emails and other exchanges may become subject to discovery disputes and judicial review.

Who's That Kid?!

Can you identify the TBBBA member from their childhood picture? Answers on Page 18

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Who's That Kid?!

Can you identify the TBBBA member from their childhood picture? Answers on Page 18

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Leonard H. Gilbert Receives Founder's Award from International Insolvency Institute

The Institute presented its annual award in a ceremony held in London, England

At the dinner, Mr. Gilbert was presented with the III's Founder's Award, given to members who, through their efforts over the years, have made a substantial contribution to further the goals, mission and work of the organization. The Founder's Award is bestowed in honor of III founder E. Bruce Leonard (1944-2017).

Mr. Gilbert, who has practiced bankruptcy law for more than five decades, has acted as a director, officer and secretary of the III. The award recognizes Mr. Gilbert's "fairness, integrity, courtesy, zeal, forensic skill, legal acumen, good sense, and respect for fellow lawyers" over the course of his distinguished career.

Mr. Gilbert is a graduate of Harvard Law School and a member of Holland & Knight's Financial Services Practice Group. He has represented numerous state, national and international banks and other financial institutions, as well as public bodies and secured and unsecured creditors' committees. He has had significant involvement in high profile and complex cases receiving international attention. He is consistently recognized as a top bankruptcy and creditors' rights lawyer by Chambers USA and The Best Lawyers in America, and is AV rated by Martindale Hubbell.

Mr. Gilbert is a former president of The Florida Bar, the Hillsborough County Bar and the American College of Commercial Finance Lawyers. He is a current member of the American Bar Association's House of Delegates and formerly served as the director of the American Bar Foundation. Mr. Gilbert has also served as director and regent of the American College of Bankruptcy and treasurer and director of the American College of Bankruptcy Foundation.

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Supreme Court Interprets FDCPA In Ways Beneficial to Creditors

by Linda J. Z. Young,
Buchanan Ingersoll & Rooney PC

The Supreme Court recently issued two opinions regarding the scope and application of the Fair Debt Collection Practices Act (FDCPA).

First, in *Midland Funding, LLC v. Johnson*, 137 S. Ct. 1407 (May 15, 2017), the Supreme Court resolved a circuit split and held that the filing of a proof of claim as to a time-barred debt does not violate the FDCPA. An individual debtor filed for Chapter 13 protection in March 2014. A creditor filed a proof of claim asserting that the debtor owed credit card debt in the amount of $1,879.71. The proof of claim noted that the last time a charge appeared on the debtor's account was May 2003, over ten years before the debtor filed bankruptcy. The relevant statute of limitations under Alabama law is six years. The debtor objected to the claim, the creditor did not respond to the objection, and the bankruptcy court disallowed the claim. The debtor then filed a suit against the creditor in federal district court alleging a violation of the FDCPA.

The Supreme Court held that filing a time-barred claim is not a false, deceptive, misleading, unfair, or unconscionable debt collection practice under the FDCPA. It first determined that the creditor's filing of an obviously time-barred proof of claim was not "false, deceptive, or misleading." It reasoned that the stale proof of claim fell within the Bankruptcy Code's definition of "claim," which is defined in 11 U.S.C. § 101(5)(A) as a "right to payment." State law typically determines whether such a right exists, and in this case, Alabama law – like that of many other states – provides that a creditor possesses a right to payment of a debt even after the limitations period has expired.

The Supreme Court rejected the debtor's argument that "claim" in the Bankruptcy Code means "enforceable claim," stating that Congress intended to adopt the broadest available definition of the term "claim." It also noted that the expiration of the statute of limitations is an affirmative defense that a debtor or trustee must assert after a creditor files a claim.

Next, while it noted that this was "a closer question," the Supreme Court determined that filing a time-barred proof of claim was not "unfair" or "unconscionable." The debtor pointed to cases finding that in the context of an ordinary civil action to collect a debt, a debt collector's assertion of a claim known to be stale is "unfair." The Supreme Court, however, was not persuaded by this precedent. It reasoned that a civil suit is quite different from a Chapter 13 bankruptcy proceeding. In the latter context, a consumer is less likely to be willing to pay a stale claim to avoid going to court, a knowledgeable trustee is present, and procedural rules streamline the claims resolution process. The Supreme Court also noted that to find a violation of the FDCPA would upset the "delicate balance" of a debtor's protections and obligations created by the Bankruptcy Code.

Second, in *Henson v. Santander Consumer USA Inc.*, No. 16-349, 2017 WL 2507342 (June 12, 2017), the Supreme Court unanimously held that an individual or company that regularly purchases debts originated by another and attempts to collect on the debts for its own account does not fall within the FDCPA's definition of a "debt collector." A bank loaned consumers money to buy cars. After the consumers defaulted on the loans, a company purchased the defaulted loans and sought to collect on them.

The Supreme Court noted that the statutory language defining the term "debt collector" embraces anyone who "regularly collects or attempts to collect . . . debts owed or due . . . another." It focused on the "owed . . . another" language, which by its plain terms the Supreme Court stated means third party collection agents working for the debt owner, not the debt owner itself. The Supreme Court also commented that it is irrelevant how a debt owner came to be a debt owner. What matters is whether the defendant in a FDCPA action regularly seeks to collect its own debts or debts owed to "another." Accordingly, a debt purchaser who collects debts for its own account does not trigger the FDCPA.

The Supreme Court's recent FDCPA opinions represent victories for creditors and debt collectors. As a result of the Johnson opinion, professional debt purchasers will now only be further encouraged to buy stale debt, file claims in bankruptcy proceedings, and hope that no one notices that the debt is time-barred. The Henson opinion provides comfort to debt purchasers that they will not be subject to the provisions of the FDCPA. Finally, the opinions may give rise to an increase in the recovery value of second-hand debts (or a perceived increase in such recovery value), and therefore result in the growth of the secondary debt market.

Congratulations to Rob Soriano as recipient of the Douglas McClurg Award

Good evening ladies and gentlemen.
I am Leonard Gilbert, a past Chair of the Tampa Bay Bankruptcy Bar Association, indeed the first Chair of the Association, when it was originally formed. This evening, I have the honor and privilege of presenting the Douglas P. McClurg Professionalism Award to, I hope, a surprised recipient. The McClurg Award is given infrequently by this Association to a deserving lawyer who is a member of the Association.

A word about Doug McClurg for whom this Professionalism Award is named. Doug was a University of Florida graduate, served in the military, practiced law in Jacksonville and later came to Tampa to join Holland & Knight to lead its Bankruptcy Practice. In 1992 he joined Hill, Ward & Henderson and founded that firm's Creditor Rights and Bankruptcy Department. He was a highly regarded and respected practitioner. I had many matters with him. He was a worthy opponent.

In 2002 Doug joined a group of friends in a weekend deer hunt in Hardee County, Florida where he died in a freak accident. He was 53 years old. This Award was created in his honor.
The criteria for the award are:

- outstanding effectiveness in the presentation of matters to the Bankruptcy Court
- a reputation for thorough preparation
- civility and courtesy to opposing counsel
- appropriate courtroom demeanor
- ethical conduct and professionalism at the highest level
- long-term service to the bankruptcy bar

The prior recipients of this Award are Don Stichter, Harley Riedel, Jeff Warren, Bob Glenn, Judge Roberta Colton, and me.

Now you might ask how the selection is made! The answer is similar to Act I, Scene I in Macbeth. The prior recipients of the Award gather in a dark corner at Four Green Fields or in the Boardroom at Stichter Riedel, stir the pot, and make the decision. Again, we do not make a selection every year, but we do try to make the right selection when one is in fact made.

This year's selection is no exception. I first met our Awardee for breakfast at the Barclay's Hotel in New York many years ago. When he decided to move to Tampa I was able to direct him to a house that was about to come on the market, which he selected. We worked together for many years on a variety of cases, big and small, representing both debtors and creditors, including Air Florida in the Southern District and Lykes Brothers Steamship Lines here in Middle District. Of course, he had many more cases on his own, including National Gold Exchange and Taylor Bean and Whitaker.

Always the consummate professional, he was selected as a Fellow of the American College of Bankruptcy, was an original director of this Tampa Bay Bankruptcy Bar Association, and recognized in the Best Lawyer's in America, listed in Chambers, Super Lawyers and a variety of other publications.

After practicing law together until almost 20 years ago, our recipient and I went in different directions. He continued to work on many important cases here in Florida and outside the state.

There was no doubt in the mind of the selection committee that our recipient this evening met the criteria I first outlined to you for professionalism, civility, courtesy, and ethical conduct as well as service to the Bar.

It is therefore with great pleasure that I present to you Robert A. Soriano, the 2017 recipient of the Douglas P. McClurg Award. Rob, please come up to receive this Award.

Eleventh Circuit Holds that Non-Dischargeability Exception Under 11 U.S.C. § 523(a)(19) Applies Irrespective of Debtor's Conduct

by Linda J. Z. Young, Buchanan Ingersoll & Rooney PC

In In re Lunsford, 848 F.3d 963 (11th Cir. Feb. 15, 2017), the Eleventh Circuit held that under 11 U.S.C. § 523(a)(19), an individual debtor cannot discharge a debt arising from a securities violation regardless of whether he or she was responsible for the conduct that led to the violation of securities laws.

The debtor was the president of a limited liability company which sold securities to the plaintiff. After discovering that the company's assets were plagued by title and other problems, the plaintiff sued in Mississippi chancery court to rescind the sale. After the Mississippi court ordered the parties to arbitration, the debtor filed for bankruptcy. The bankruptcy court permitted the arbitration to proceed, and the arbitrator ruled in favor of the plaintiff and awarded it $606,892. The chancery court confirmed the arbitration award and entered a final judgment jointly and severally against the debtor, his company, and another individual.

The plaintiff then filed an adversary proceeding, asserting that the debtor could not discharge this debt because the debt was "for the violation" of securities laws under 11 U.S.C. § 523(a)(19). The bankruptcy court agreed. The debtor appealed, arguing that Section 523(a)(19) only bars a discharge when the debtor himself committed a securities violation, not when his or her violation arose from a third party's violation. The district court disagreed, and the debtor appealed again.

In affirming the district court, the Eleventh rejected the debtor's argument that the bankruptcy court and arbitrator never made a finding of culpability against him. The Eleventh Circuit stated that based on the language in the arbitrator's decision, the bankruptcy court had "sufficient reason" to determine that the arbitrator made a specific finding that the debtor did indeed violate securities laws.

The Eleventh Circuit then held that alternatively, even if the bankruptcy court had not found that the debtor violated securities laws, Section 523(a)(19) "applies irrespective of debtor conduct." It reasoned that with respect to the non-dischargeability of a debt for violation of securities laws, the text of the Bankruptcy Code makes no distinction between when the debtor violates securities laws and when the debtor's liability arises from securities violations committed by a third party. The Eleventh Circuit noted that other subsections of Section 523 explicitly require that an event be "caused" by the debtor. Thus, Section 523(a)(19) is not dependent on debtor conduct. In so ruling, the Eleventh Circuit departed from other federal circuits in holding that a debt is non-dischargeable under Section 523(a)(19) even if the debtor's liability resulted from a third party's violations of securities laws.

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May 25, 2017

The Honorable Michael G. Williamson, Chief Judge
United States Bankruptcy Court for the
Middle District of Florida
Sam G. Gibbons United States Courthouse
801 N. Florida Avenue
Suite 555
Tampa, Florida 33602

RE: Debtor Audits to Resume

Dear Chief Judge Williamson:

As you may know, the United States Trustee Program (USTP) has established procedures for independent audit firms to audit petitions, schedules, and other information in consumer bankruptcy cases, as authorized by the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (BAPCPA). Pursuant to 28 U.S.C. § 586(f), the USTP contracts with independent accounting firms to perform audits in designated cases.

Due to budgetary constraints the USTP suspended its designation of cases subject to audit in 2016. Effective June 7, 2017, however, the USTP will resume the designation of cases for audit.

If you have any questions, please do not hesitate to contact one of us.

Very truly yours,

Cynthia
Burnette

Digitally signed by Cynthia Burnette [illegible]

Cynthia A. Burnette
Assistant U. S. Trustee

Charles R. Sterbach
Assistant U. S. Trustee

TMA - TU - TBBBA Happy Hour Pics

Judge Paskay Award Winner Jessica Adair Hicks

Who's That Kid?!

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1. Judge McEwen
2. Leonard Gilbert
3. Michael Barnett

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4. Don Stichter
5. Bill Maloney
6. Kelley Petry

Rays Game and 3 Daughters Brewery

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