Winter 2015

The Cramdown

The Newsletter of the Tampa Bay Bankruptcy Bar Association

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

PRESIDENT'S MESSAGE

by Edward Peterson
Stichter Riedel Blain & Prosser, P.A.

I hope everyone had a wonderful holiday and a happy new year. It is at this time of year that we can be reflective and think about what a wonderful organization we have in the Tampa Bay Bankruptcy Bar Association. It is hard for me to believe that I am already half way through my tenure. I have thoroughly enjoyed working with a great board, great judges, and great lawyers in this association. Since the last publication, we have had the View From the Bench seminar and the Holiday Party. As usual, with the great work of Judge Williamson and Stephanie Lieb, the View From the Bench was a wonderful success, with record-breaking attendance at both the cocktail party and the seminar. The holiday party was also a success as usual, thanks to the hard work of Susan Sharp and Gail Northwood. Thank you to everyone who brought a gift for the kids at the Salesian Youth Center. In addition, many of you have been hard at work volunteering at the courthouse for the *pro bono* clinic. Jake Blanchard has done an excellent job making sure that this program runs smoothly and that each of the time slots is filled. I thank all of you for your hard work in making sure that all of the time slots are filled.

On the horizon, we will have the half-day chapter 13 seminar, which should be excellent. Please be on the lookout for news regarding that seminar. Also, the American Bankruptcy Institute's Alexander L. Paskay Seminar will be in March. We should all try to support this seminar that is named in honor of our great judge.

I look forward to seeing you all at the monthly luncheons and happy hours that we will have this year. Happy New Year.

In This Issue

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

The Tampa Bay Bankruptcy Bar Association
2014-2015 Officers and Directors

President
Edward Peterson
Stichter Riedel Blain & Prosser, P.A.
110 East Madison St., Ste 200
Tampa, Florida 33602

Vice President
Adam Lawton Alpert
Bush Ross, P.A.
1801 N. Highland Avenue
Tampa, FL 336022

Secretary
Kelley Petry
Kelley Petry, P.A.
1936 W. Dr. Martin Luther King Jr. Blvd, #101
Tampa, FL 33607

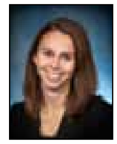
Treasurer
Scott Stichter
Stichter Riedel Blain & Prosser, P.A.
110 E. Madison Street, Ste. 200
Tampa, FL 33602

Chair/Past-President
Stephenie Biernacki Anthony
Anthony & Partners, LLC
201 N. Franklin St., Ste 2800
Tampa, Florida 3360

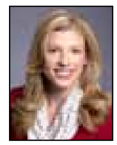
CLE Chairs
Patrick Mosley
Hill Ward Henderson
101 East Kennedy Blvd, Ste 3700
Tampa, FL 33602

Lori Vaughan
Trenam, Kemker, Scharf, Barkin, Frye,
O'Neill & Mullis, P.A.
101 East Kennedy Blvd., Ste 2700
Tampa, Florida 33602

Community Service
Jake Blanchard
Blanchard Law, P.A.
12350 S. Belcher Road, Suite 13B
Largo, FL 337732

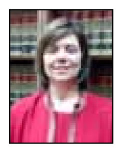


Consumer
Kathleen L. DiSanto
Jennis & Bowen, P.L.
400 N. Ashley Dr., Ste 2540
Tampa, FL 33602



Cramdown
Stephanie Lieb
Trenam, Kemker, Sharf, Barkin, Frye,
O'Neill & Mullis, P.A.
101 E. Kennedy Blvd., Suite 2700
Tampa, FL 33602

Historian
Noel. R. Boeke
Holland & Knight LLP
P.O. Box 1288
Tampa, FL 33601



Judicial Liason
Cindy Burnette
Office of the U.S. Trustee
501 E. Polk St., Ste 1200
Tampa, FL 33602

Membership
Suzy Tate
Suzy Tate, P.A.
14502 North Dale Mabry Hwy., Ste. 200
Tampa, FL 33618

Technology and Communications
Tim Sierra
Law Offices of Timothy J. Sierra
118 S. Rome Avenue
Tampa, FL 33606

Past Presidents

1988 -1989	Don M. Stichter	2001-2002	Zala L. Forizs
1989-1990	Douglas McClurg	2002-2003	Catherine Peek McEwen
1990-1991	Richard C. Prosser	2003-2004	John Lamoureux
1991-1992	Robert B. Glenn	2004-2005	Edwin Rice
1992-1993	Thomas B. Mimms, Jr.	2005-2006	David Tong
1993-1994	Edward M. Waller, Jr.	2006-2007	Herbert Donica
1994-1995	Harley E. Riedel	2007-2008	Shirley Arcuri
1995-1996	Roberta A Colton	2008-2009	Donald R. Kirk
1996-1997	Jeffrey W. Warren	2009-2010	Luis Martinez-Monfort
1997-1998	Michael P. Horan	2010-2011	Elena Paras Ketchum
1998-1999	Dennis J. LeVine	2011-2012	Lara Roeske Fernandez
1999-2000	Russell M. Blain	2012-2013	Keith T. Appleby
2000-2001	John D. Emmanuel	2013-2014	Stephenie Biernacki Anthony

Stern, *Sharif*, and the Purple Elephant

by: Amy Denton Harris
Daniel R. Fogarty
Mark Robens

In the three years since *Stern v. Marshall*[1] was decided, courts have grappled with what the Seventh Circuit has described as the "purple elephant"—the scope of the bankruptcy court's constitutional authority to enter final judgments. In *Stern*, the Supreme Court of the United States held that the bankruptcy court lacked authority under Article III, § 1, to enter a final judgment on the bankruptcy petitioner's state law counterclaim for tortious interference that was not resolved in the process of ruling on the creditor's proof of claim.[2] *Stern* objections—objections to the bankruptcy court's constitutional authority to enter a final judgment in certain statutorily core matters—became common tools in the litigator's toolbox. Many bankruptcy courts, including those in our district, concluded that even if they did not have authority to enter a final judgment they could hear and decide the matter similar to the treatment of a non-core claim, treating the ruling as proposed findings of fact and conclusions of law. In *Executive Benefits Insurance Agency v. Arkison*,[3] the Supreme Court held that a district court conducting a *de novo* review of the bankruptcy court's order cured any constitutional errors, validating this practical approach. The Seventh Circuit's decision in *Wellness International Network, Ltd. v. Sharif*[4] calls that practice into question with respect to so-called *Stern* claims, i.e., statutorily core matters as to which the bankruptcy court lacks constitutional authority.

Seventh Circuit's Holding in Sharif

The dispute between the litigants in *Sharif* spans more than a decade. The litigation was initiated in 2003 by Sharif (and others) against WIN in federal district court claiming that WIN was running a pyramid scheme. In February 2009, Sharif was arrested and held in civil contempt for ongoing discovery violations after significant litigation misconduct resulted in a judgment against Sharif for attorney fees. Two weeks after his release from prison based on his promise to comply, Sharif instead filed for Chapter 7 protection.

WIN filed a proof of claim in the bankruptcy case, as well as an adversary proceeding seeking (i) to deny Sharif's discharge (four counts under 11 U.S.C. § 727(a)(2)(A), 727(a)(3), 727(a)(4)(A), and 727(a)(5)) and (ii) a judgment declaring that a trust was Sharif's alter ego. On July 6, 2010, the bankruptcy court found that Sharif violated a discovery order and entered a default judgment for WIN on all five counts in the complaint. The court noted that Sharif "was so grossly out of compliance with his discovery obligations" and that his "lack of compliance is a pattern that has continued from the time of the underlying litigation in Texas to the instant bankruptcy case and adversary proceeding."[5]

Sharif timely appealed, and on August 9, 2011, a month and a half after the Supreme Court issued its decision in *Stern*, Sharif filed his appellate brief. Sharif asserted two claims of error, but did not raise a *Stern* objection. On January 12, 2012, Sharif filed a motion for supplemental briefing based upon *Stern* and the Seventh Circuit's then-two-week-old decision in *Ortiz v. Aurora Health Care, Inc. (In re Ortiz)*.[6] The district court denied the motion for supplemental briefing because *Stern* had been decided a month and a half before Sharif filed his appellate brief, and Sharif failed to timely raise the issue. The district court affirmed on the merits. The Seventh Circuit reversed the district court and remanded for a determination of whether the alter-ego claim was core or non-core and an appropriate remedy. In reversing the district court, the Seventh

continued on p. 4

1 564 U.S. ___, 131 S. Ct. 2594, 180 L. Ed. 2d 475 (2011).
2 Stern, 131 S. Ct. at 2620.
3 ____ U.S. ____, 134 S. Ct. 2165, 189 L. Ed. 2d 83 (2014).
4 727 F.3d 751, 777 (7th Cir. 2013).
5 Sharif, 727 F.3d at 759.
6 665 F.3d 906 (7th Cir. 2011).

Purple Elephant

continued from p. 3

Circuit held that "a litigant may not waive an Article III, § 1 objection to a bankruptcy court's entry of final judgment in a core proceeding," and that "WIN's alter-ego claim is a state-law claim between private parties that is wholly independent of federal bankruptcy law and is not resolved in the claims-allowance process."[7]

Supreme Court Grants Certiorari in *Sharif*

Less than a month after issuing its decision in *Executive Benefits*, the Supreme Court granted *certiorari* in *Sharif*[8] to consider two questions left unresolved by *Stern*, which have resulted in conflict among the circuits. The first question presented is "whether the presence of a subsidiary state property law issue in a 11 U.S.C. § 541 action brought against a debtor to determine whether property in the debtor's possession is property of the bankruptcy estate means that such action does not 'stem[] from the bankruptcy itself' and therefore, that a bankruptcy court does not have the constitutional authority to enter a final order deciding that action." This question stems from the Seventh Circuit's holding that the bankruptcy court lacked constitutional authority to enter a final judgment on WIN's alter-ego claim. The second question presented is "whether Article III permits the exercise of the judicial power of the United States by the bankruptcy courts on the basis of litigant consent, and if so, whether implied consent based on a litigant's conduct is sufficient to satisfy Article III." This question stems from Sharif's failure to object timely to the bankruptcy court's constitutional authority to enter a final judgment on the alter-ego claim.

The Sixth and Seventh (*Sharif*) Circuits are in conflict with the Ninth Circuit on the issue of whether a litigant can consent to or waive by conduct an objection to the bankruptcy court's constitutional authority to enter a final judgment. The Sixth and Seventh Circuits have held that an objection to the bankruptcy court's constitutional authority is not waivable,[9] while the Ninth Circuit has held that such an objection is waivable.[10] Although the Supreme Court granted *certiorari* in *Executive Benefits* on the consent/waiver issue,[11] it "reserved that question for another day."[12] Whether that day will come in *Sharif* remains to be seen.

The Purple Elephant After *Sharif*

The bench and the bar alike are anxiously awaiting the Supreme Court's decision, which hopefully will provide additional instruction on the scope of the bankruptcy court's constitutional authority to enter final judgments, as well as a litigant's ability to consent to or waive objections to the bankruptcy court's authority. The range of possible outcomes varies like the colors of the aurora borealis.

The Court could address the issue of litigant consent by conduct head on, in which case a ruling against consent could have wide-ranging implications outside bankruptcy jurisdiction. Alternatively, the Court could find that *Sharif* consented to the bankruptcy court's authority to enter a final judgment when he filed the petition for relief, leaving the broader issue of non-debtor litigant consent by conduct for yet another day. Or, the Court could take up the issue of the precise scope of *Stern* claims, avoiding the consent issue altogether. The Court could define *Stern* claims broadly by focusing on the state law claim and finding that the claim does not stem from the bankruptcy itself. Or, the Court could define *Stern* claims narrowly, recognizing that the determination of whether someone or something is the alter ego of the debtor[13] goes to the *res* of the bankruptcy estate, as opposed to augmenting the bankruptcy estate. If the Court defines *Stern* claims broadly, the impact would be far reaching. Much of the litigation traditionally handled by the bankruptcy courts would be handled by, or at least subject to the *de novo* review of, the district courts, impacting both the timing and cost of administering bankruptcy estates.

Oral argument in the *Sharif* case is set for Wednesday, January 14, 2015, and a decision is anticipated in the spring.

7 Sharif, 727 F.3d at 773, 775-76.
8 Wellness Int'l Network, Ltd. v. Sharif, Case No. 13-935, 134 S. Ct. 2901 (July 1, 2014).
9 Waldman v. Stone, 698 F.3d 910, 917-18 (6th Cir. 2012) and Sharif, 727 F.3d at 754.
10 In re Bellingham Ins. Agency, Inc., 702 F.3d 553, 566-70 (9th Cir. 2012).
11 Exec. Benefits Ins. Agency v. Arkison, 570 U.S. ____, 133 S. Ct. 2880, 186 L. Ed. 2d 908 (2013).
12 Exec. Benefits Ins. Agency v. Arkison, ____ U.S. ____, 134 S. Ct. 2165, 2170, n.4, 189 L. Ed. 2d 83 (2014).
13 The ruling and its implications will be impacted by how the Court views the question presented: whether as a state law claim indistinguishable from a contract or tort claim – similar to the Supreme Court's Northern Pipeline and Stern decisions, or as a claim to determine that certain assets are in fact property of the estate.

Recent Decision Creates Split in Middle District Regarding Whether 11 U.S.C. § 707(b)(2) Applies to Cases Converted to Chapter 7

by Armando Nozzolillo and Michael S. Waskiewicz

In the last 2 years, three judges of the Middle District of Florida (Judges Funk, Delano and Williamson) have each issued opinions finding 11 U.S.C. § 707(b)(2) inapplicable in cases converted from a Chapter 13 to a Chapter 7. These Courts have based their findings on the "plain language" of the provision.

11 U.S.C. § 707(b)(1) generally provides that a Court may dismiss a case filed by an individual debtor under this chapter whose debts are primarily consumer debts if the Court finds that granting relief would constitute an abuse of the Bankruptcy Code. 11 U.S.C. § 707(b)(2) generally provides that a Court shall presume that a Chapter 7 case is abusive if the debtor's current monthly income, when reduced by expenses or payments determined under the provision, is greater than a specified threshold amount set forth therein. The above-referenced judges all held § 707(b) is inapplicable to converted cases because the cases are converted to a Chapter 7 from another chapter, and thus, are not originally filed under Chapter 7.

However, in a recent decision from the Middle District Bankruptcy Court, Judge Glenn has created an intra-district split on the issue. In *In re Summerville*, 3:11-BK-4689-PMG, 2014 WL 4723588 (Bankr. M.D. Fla. 2014), a Chapter 13 debtor whose case had recently been dismissed for failure to make payments filed a notice converting her Chapter 13 case to a Chapter 7.

The United States Trustee filed a motion seeking dismissal of the debtor's case pursuant to § 707(b)(1).

In concluding that 11 U.S.C. 707(b)(2) applies to converted cases, Judge Glenn found that (i) the conversion of a Chapter 13 case operates as an order for relief under Chapter 7, (ii) even after conversion of a case from a Chapter 13 to a Chapter 7, the debtor is required to complete Official Form 22A, which incorporates 11 U.S.C. § 707(b)(2), and (iii) a review of the Bankruptcy Code indicates a clear intent to apply the abuse analysis post-conversion. Therefore, it is important that we continue to monitor the case law related to this issue in order to determine which view will win the day.

October CLE Luncheon

The Cramdown is published four times per year. Advertising rates are as follows:

Full Page $400/single issue • $1,200/4 issues
7.875w x 9.75h

Half Page $200/single issue • $600/4 issues
7.875w x 4.75h

Quarter Page $100/single issue • $300/4 issues
3.75w x 4.75h

Business Card $50/single issue • $150/4 issues
3.75w x 2.375h

The Tampa Bay Bankruptcy Bar Association reserves the sole and exclusive right to exclude any advertisement from being published in the Cramdown Newsletter.

Pricing is based on camera-ready computer generated art being supplied by advertiser.

Art Specifications: ALL ART MUST BE 300dpi or higher. Formats accepted: .tiff and print quality .pdf.

Ad Design services are available through *Office Dynamics* Eric West • 813-980-3494
eric@officedynamicstampa.com

For information regarding advertising in *The Cramdown*, contact: **Stephanie Lieb**, Trenam Kemker, 101 E. Kennedy Blvd., Suite 2700, Tampa, FL 33602, 813-227-7469,
slieb@trenam.com

Graphic Design & Printing by:

OFFICE dynamics
not your average print shop!

5802 E. Fowler Ave. Ste. B
Temple Terrace, FL 33617
813-980-3494
www.OfficeDynamicsTampa.com

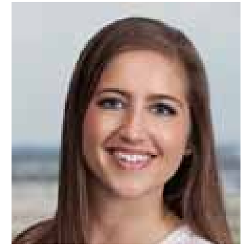
People on the Go

Trenam Kemker attorney **Lori V. Vaughan** has been elected to the Board of Directors of the International Women's Insolvency and Restructuring Confederation (IWIRC). IWIRC is the premier international, networking and professional growth organization for women in the restructuring and insolvency industry. She will serve a two-year term from October 2014 – 2016.

Lori is a shareholder based in the firm's Tampa Office. Her practice involves business reorganizations (debtor and creditor representation), trustee representation, bankruptcy litigation, the representation of official committees appointed by the Bankruptcy Court, commercial foreclosure, and lender liability.

Erica Gooden has joined Holland & Knight as an associate in the litigation department. Erica served as a judicial law clerk to the Honorable Mary S. Scriven in the U.S. District Court for the Middle District of Florida before joining H&K. Erica focuses her practice on commercial litigation and dispute resolution and has experience in cases involving business torts, bankruptcy, and consumer finance matters. She earned her JD, magna cum laude, from the University of Miami School of Law and her BA, magna cum laude, from the University of Miami. She received Miami Law's Public Interest Innovative Service Award in 2012.

Local Rules Committee:
After many years of valuable service as Chair of the Local Rules Lawyer's Advisory Committee, **Roberta A. Colton** has retired from the committee. **Donald Kirk** has replaced Ms. Colton as Chair. **Lara R. Fernandez** has replaced Mr. Kirk as the Tampa representative on the Committee. Congratulations to all, and thank you to Ms. Colton for her service.



Carlton Fields Jorden Burt is pleased to announce that **Stephanie E. Ambs** joined the firm in Tampa as an associate. She practices in the firm's National Trial Practice, Bankruptcy and Creditors' Rights Section.

Ambs' practice includes complex commercial and bankruptcy litigation. She represents creditors, debtors, and equity interests in Chapter 11 bankruptcy, defendants and plaintiffs in commercial and insolvency litigation in state and federal court, and assignees and creditors in state court proceedings.

Marsha Griffin Rydberg was inducted into the Stetson University College of Law Hall of Fame on Nov. 1, 2014. Hall of Fame inductees are selected for having a profound and positive impact on Stetson Law and the legal profession. Ms. Rydberg graduated first in her class at Stetson Law during a time when a Florida Bar survey revealed that women comprised only about 3% of the legal profession. Rydberg was the first woman president of the Hillsborough County Bar Association, the first woman president of the Tampa Exchange Club, the first woman to chair the Tampa Downtown Partnership, and the first woman member and later president of the University Club of Tampa. She twice chaired the Florida Commission on the Status of Women and the Jacksonville Branch of the Atlanta Federal Reserve Board. She was the second woman to chair the Tampa Chamber's Committee of One Hundred. The Girl Scouts of America presented Rydberg with their Woman of Distinction Award. Rydberg was honored with Stetson Law's Outstanding Alumni Representative Award, The Ben Willard Award, and the President's Award. She served as president of the Stetson Lawyers Association, chair of the Board of Overseers, and a member of the Board of Trustees. Rydberg played a pivotal role in helping Stetson Law build its Tampa Law Center. As an adjunct professor at Stetson Law, she has inspired numerous young women to pursue a legal career. A link to a YouTube video on Marsha's career can be found at: https://www.youtube.com/watch?v=K7mGKppKcBU.

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

Hypothetically It's An Actual Test

Clarifying the Effect of Sections 365(c)(1) and (e)(2) of the Bankruptcy Code on Contract Rights in Bankruptcy

by: Erik Johanson[1]

I. Introduction

There is a significant misunderstanding of authority within the Eleventh Circuit regarding whether Sections 365(c)(1) & (e)(2) of the Bankruptcy Code require an "actual" or "hypothetical" test.[2] The "actual" and "hypothetical" tests are, in essence, two divergent judicially created methods for determining (i) whether debtors-in-possession can assume non-assignable executory contracts[3] in bankruptcy, and (ii) whether contractual provisions that purport to require the forfeiture, modification, or termination of debtors' contract rights are enforceable in bankruptcy notwithstanding the Bankruptcy Code's categorical prohibition against ipso facto clauses.[4]

Under the "actual" test, a debtor-in-possession may assume (but not assign) executory personal service contracts under Section 365(c)(1) of the Bankruptcy Code, "so long as its performance is going to be the same as if no petition had been filed."[5] In the same vein, under the "actual" test, courts will enforce the general prohibition against ipso facto clauses under Section 365(e)(1) of the Bankruptcy Code "in a case where no assignment has taken place."[6] However, in jurisdictions that apply the "hypothetical" test, debtors-in-possession may neither assume nor assign executory personal service contracts, even if the debtor-in-possession never actually attempts to assign its interest in the contract.[7] Similarly, under the "hypothetical" test, certain ipso facto clauses contained in non-assignable executory contracts are excepted from the categorical prohibition against ipso facto clauses under Section 365(e)(2).

As set forth above, a bankruptcy court's decision to apply an "actual" or "hypothetical" test can have significant ramifications on parties' contract rights in bankruptcy. While the distinction between the two tests can be expressed in fairly simple terms, the Eleventh Circuit's seminal decision on the issue, *City of Jamestown v. James Cable Partners, L.P. (In re James Cable Partners, L.P.)*,[8] does not squarely address whether bankruptcy courts in this district are required to apply an "actual" or "hypothetical" test. As such, this article seeks to (i) provide readers with a general understanding of the "actual" and "hypothetical" tests, and (ii) explain how a recent decision by the United States Bankruptcy Court for the Middle District of Florida may provide a helpful roadmap for approaching the "actual" and "hypothetical" tests in the Eleventh Circuit.

II. General Overview of "Actual" and "Hypothetical" Tests

As mentioned above, the "actual" and "hypothetical" tests typically arise in two circumstances. The first is where a debtor-in-possession must overcome Section 365(c)(1) of the Bankruptcy Code in order to assume a non-assignable executory contract.[9] In pertinent part, Section 365(c)(1) provides that:

> The trustee may not assume or assign any executory contract or unexpired lease of the debtor . . . (1)(A) if applicable law excuses a

continued on p. 12

1 Erik Johanson is an associate attorney at Jennis & Bowen, P.L. in Tampa, Florida.
2 Compare *In re Fastrax, Inc.*, 129 B.R. 274, 277 (Bankr. M.D. Fla. 1991) (Paskay, J.) (adopting the "actual" test), with *City of Jamestown v. James Cable Partners, L.P.* (In re James Cable Partners, L.P.), 27 F.3d 534, 537 (11th Cir. 1994) (noting that Section 365(c)(1) of the Bankruptcy Code "presents a hypothetical question.").
3 The phrase "non-assignable executory contract," as used in this article, is shorthand for an executory contract that cannot be assigned under "applicable law," such as a "personal service contract." However, whether a particular contract is "executory" or in the nature of a personal service contract that cannot be assigned under applicable law is beyond the scope of this article.
4 Whether a particular contractual provision rises to the level of an ipso facto clause, i.e. a contractual provision that forfeits, modifies, or terminates a debtor's interest in property based on the debtor's insolvency or financial condition is also beyond the scope of this article. For a good discussion of the issue, readers are encouraged to refer to *In re Daugherty Const. Inc.*, 188 B.R. 607, 611 (Bankr. D. Neb. 1995).
5 *In re Fastrax, Inc.*, 129 B.R. at 277.
6 *Bonneville Power Admin. v. Mirant Corp.* (In re Mirant), 440 F.3d 238, 249 (5th Cir. 2006).
7 *In re Catron*, 158 B.R. 629, 638-39 (E.D. Va. 1993).
8 27 F.3d 534, 537 (11th Cir. 1994).
9 Section 365(c)(1) is one of several exceptions to the general rule that the trustee (or debtor in possession in a chapter 11 case) may assume or reject any executory contract or unexpired lease of the debtor under Section 365(a).

Annual Holiday Party at Spain Restaurant

Hypothetically

continued from p. 10

> party, other than the debtor, to such contract or lease from accepting performance from or rendering performance to an entity other than the debtor or the debtor in possession . . . and (B) such party does not consent to such assumption or assignment.[10]

The "actual" and "hypothetical" tests are primarily concerned with Congress' use of the disjunctive term "or" in the prefatory language of Section 365(c), and its subsequent reference to "an entity other than the debtor or debtor in possession" in Section 365(c)(1)(A). Under the "actual" test, courts read the term "or" conjunctively, such that a debtor-in-possession may assume (but not assume and assign) a non-assignable executory contract.[11] On first blush, this reading of the statute appears to conflict with its plain language. Importantly, however, Congress amended Section 365(c)(1) in 1984 to substitute the phrase "to an entity other than the debtor or debtor-in-possession" for the phrase "to the trustee or to an assignee." As noted by Judge Paskay in *In re Fastrax*, the 1984 amendment and corresponding legislative history[12] strongly indicate that Congress intended for Section 365(c)(1) to present an "actual test."[13] In fact, both Judge Paskay and Judge Baynes have interpreted the post-1984 version of Section 365(c)(1) to mandate the "actual" test based on Congress' addition of the term "debtor-in-possession" to Section 365(c)(1)(A).[14]

The second scenario where the "actual" versus "hypothetical" debate has led to a split of authority relates to the validity of *ipso facto* clauses under Section 365(e)(2) of the Bankruptcy Code. Section 365(e)(2) contains an exception to Section 365(e)(1)'s categorical invalidation of *ipso facto* clauses. In particular, Section 365(e)(2) provides that

> Paragraph (1) of this subsection does not apply to an executory contract or unexpired lease of the debtor . . . (A)(i) if applicable law excuses a party, other than the debtor, to such contract or lease from accepting performance from or rendering performance to an assignee of such contract . . . (ii) and such party does not consent to such assumption or assignment.[15]

As emphasized above, it is noteworthy that notwithstanding the 1984 amendments to the Bankruptcy Code, Section 365(e)(2) refers only to a party "other than the debtor" and does not reference the "debtor-in-possession." As such, the statute arguably still mirrors the pre-1984 version of Section 365(c)(1),[16] which in turn may give credence to a "hypothetical" test under Section 365(e)(2). However, as noted by the First Circuit in *Summitt Investment*, an absurd result would eventuate" under a "hypothetical" reading of Section 365(e)(2) because "there would be no contractual right left for a debtor or debtor in possession to assume under section 365(c)(1) because it would already have been terminated automatically under section 365(e)."[17] In addition, as the Fifth Circuit recently observed in the *Mirant* case, the "actual" versus "hypothetical" debate only becomes an issue where "applicable law" excuses performance under the contract.[18] However, where a debtor-in-

continued on p. 13

10 11 U.S.C. § 365(c)(1) (2012) (emphasis added).
11 See, e.g., *In re Fastrax*, 129 B.R. at 277 ("[E]ven though § 365(c) speaks in the disjunctive and provides that a debtor may not assume or assign an unexpired executory contract without consent, a sensible construction of this section permits but one conclusion—that this section was designed solely to govern the debtor-in-possession's ability to assign a contract which it already assumed.").
12 The House Report accompanying the 1984 legislative amendments to the Bankruptcy Code indicates that Congress intended to make "'it clear that the prohibition against the trustee's power to assume an executory contract does not apply where it is the debtor that is in possession and the performance to be given or received under a personal service contract will be the same as if no petition had been filed because of the personal nature of the contract.'" *In re Fastrax*, 129 B.R. at 277 (quoting H.R. Rep. No. 1195, 96th Cong., 2d Sess. § 27(b) (1980)).
13 Notwithstanding the 1984 amendment to Section 365(c)(1), courts applying the "hypothetical" test draw a curious distinction between a pre-petition "debtor" and a post-petition "debtor-in-possession." *See, e.g., In re West Electronics*, 852 F.2d 79, 83 (3d Cir. 1988) (applying the "hypothetical" test, in part, on the basis that "a solvent contractor and an insolvent debtor in possession going through bankruptcy are materially distinct entities."). In sharp contrast, courts adhering to the "actual" test cite to the Supreme Court's holding in *N.L.R.B. v. Bildisco & Bildosco* for the proposition that a debtor-in-possession who assumes an executory contract is "the same entity that existed before the filing of the bankruptcy petition." *See In re James Cable Partners, L.P.*, 148 B.R. 59, 62 (Bankr. M.D. Ga. 1992).
14 *See, e.g., In re Fastrax*, 129 B.R. at 277 ("[T]he hypothetical test established in *West Electronics* is clearly not appropriate under § 365(c)(1)."); *In re Am. Ship Bldg. Co.*, 164 B.R. 358, 363 (Bankr. M.D. Fla. 1994) (Baynes, J.) ("[A] hypothetical test is clearly not the intent of the statute.").
15 11 U.S.C. § 365(e)(2) (2012) (emphasis added).
16 *See Summitt Inv. & Dev. Corp. v. Leroux*, 69 F.3d 608, 613 (1st Cir. 1995) (noting that proponents of a "hypothetical" test under Section 365(e)(2) argue that "Congress inexplicably chose, in 1984, not to alter the corresponding language in section 365(e)(2)(A).") (emphasis in original).
17 Id. (emphasis in original).

Hypothetically

continued from p. 12

possession has not actually attempted to assign its interests under a contract, there is no "applicable law" prohibiting assignment under Section 365(e)(2). As such, there is no basis upon which to except an *ipso facto* clause from invalidation under Section 365(e)(1) of the Bankruptcy Code where the debtor-in-possession merely intends to assume the contract.[19]

III. A Middle District of Florida Perspective on the "Actual" and "Hypothetical" Tests

In a recent decision by the United States Bankruptcy Court for the Middle District of Florida,[20] the Honorable Michael G. Williamson weighed in on the "actual" versus "hypothetical" debate by noting that "the view of most bankruptcy judges is that the actual test is the correct test."[21] In addition to expressing a preference for the "actual" test, Judge Williamson's ruling was significant in that it helped to clarify the Eleventh Circuit's cryptic decision in *James Cable.*

In *James Cable*, both the bankruptcy court and the district court adopted the "actual" test, and in so doing, allowed the debtor-in-possession to assume what both courts characterized as a non-assignable executory contract.[22] On appeal, the Eleventh Circuit surprisingly disagreed with the lower courts' application of the "actual" test by noting that Section 365(c)(1) of the Bankruptcy Code "presents a hypothetical question."[23] Significantly, however, the Eleventh Circuit went on to affirm the bankruptcy court and district court on the basis that the executory contract at issue was not truly non-assignable personal service contract under applicable non-bankruptcy law.[24] As one could imagine, the *James Cable* decisions have caused confusion regarding the Eleventh Circuit's stance on the "actual" versus "hypothetical" debate. For instance, the United States Supreme Court, in an order denying certiorari on the very issue, vaguely categorized the Eleventh Circuit along with the Third, Fourth, and Ninth Circuits as jurisdictions that "prefer" the "hypothetical" test.[25]

IV. A Roadmap Towards Clarity

Due to the lack of clarity created by the *James Cable* decisions, the *DeMasi* case is significant in that it provides a roadmap for approaching the "actual" and "hypothetical" tests in the Eleventh Circuit. Notably, Judge Williamson did not interpret the *James Cable* decision or Justice Kennedy's comments in *N.C.P. Marketing Group* as requiring bankruptcy courts in the Middle District of Florida to apply the "hypothetical" test. To the contrary, Judge Williamson classified the Eleventh Circuit's "discussion" of the issue in *James Cable* as "dicta," and further noted that Justice Kennedy's comments were not precedential and in fact illustrated "exactly why the hypothetical test has its detractors."[27] As such, Judge Williamson's ruling in the *DeMasi* case provides practitioners with a useful roadmap from which to reconcile the *James Cable* decisions with the other authority from this jurisdiction that advocates for an "actual" test under Sections 365(c)(1) and (e)(2) of the Bankruptcy Code.[28]

18 *In re Mirant*, 440 F.3d at 249-50 (observing that Congress' decision to tether the Section 365(e)(2) exception to the phrase "applicable law" demonstrates that "[t]he applicability of the law under § 365(e)(2)(A) is determined not in the abstract but on the record at hand.").
19 Id.
20 Order Denying GCEC's, AASWF's, and GCEC Investors' Motion for Relief From Stay, *In re Demasi*, Case No. 8:13-bk-8406-MGW (February 21, 2014) (Doc. No. 222). The *DeMasi* case involved the enforceability of *ipso facto* clauses contained in three analogous limited liability company operating agreements. In particular, each operating agreement contained a provision that permitted the non-debtor members to buy out the interest of any member who filed for bankruptcy protection. After one of the members filed bankruptcy, the other members moved for stay relief to enforce the buyout clauses and purchase the debtor's interests in the companies. The court denied the companies' motion for stay relief on the basis that they had not demonstrated cause for relief from the automatic stay to enforce an otherwise invalid ipso facto clause. Id.
21 While the "actual" test is the favored approach among bankruptcy judges in this district, "[t]he so-called 'hypothetical test' [apparently] is preferred by a majority of the . . . Courts of Appeals that have addressed this question. N.C.P. Marketing Grp., Inc. v. BG Star Productions, Inc., 129 S.Ct. 1577, 1677 (2009) (Kennedy, J.).
22 *See In re James Cable Partners, L.P.*, 148 B.R. at 62; *City of Jamestown v. James Cable Partners, L.P.*, 154 B.R. 813, 816 (M.D. Ga. 1993) ("The appropriate test is to ask whether the entity seeking to assume the executory contract is someone other than the debtor or debtor in possession.").
23 *In re James Cable Partners*, 27 F.3d at 537.
24 Id. at 538.
25 N.C.P. Marketing Grp., Inc., 129 S.Ct. at 1577 (2009).
26 Transcript of Hearing at 94-95, *In re Demasi*, Case No. 8:13-bk-8406-MGW (December 2, 2013).
27 Id.
28 While Judge Williamson endorsed the "actual" test for purposes of denying a motion for relief from the automatic stay, the court indicated that its order was without prejudice to whether the limited liability companies' operating agreements were assumable contracts. Since the DeMasi case is still pending (with a hearing on confirmation scheduled for April 2015), it is possible that the court will have the opportunity to further address the intricacies of the "actual" versus "hypothetical" debate through a subsequent order or written opinion.

Mortgage Modification Mediation: Why Modified Payments Should be Paid Through the Chapter 13 Plan

by Douglas W. Neway
Chapter 13 Standing Trustee
Jacksonville Division

It's been since August, 2014 that we have been operating under the District Wide Uniform Procedures for Mortgage Modification Mediation in the Middle District of Florida. From all appearances, these procedures have impacted the process in a positive way. Adequate Protection Payments are required of every debtor seeking a modification and the holding of these payments by the Trustee no longer casts doubt about payments in transit when a temporary and/or permanent modification is being negotiated. The Portal has gotten rave reviews and has eliminated much wasted time in the communication and document transfers between lender and debtor.

The District Wide Procedures should certainly be considered a success. However, there is still one non-uniform way modified mortgage payments are receiving treatment in the Chapter 13 plan and that is the question of how they should be paid. Some Debtors' counsel argue that payment should be directly to the lender now that the debt is "current", other debtors' counsel prefer that the payment remain in the plan. Lenders have proponents of both sides as well and debtors, I imagine, always want the payments outside the plan so they don't have such a large payment to the Chapter 13 Trustee.

I am a Chapter 13 Trustee and I believe that the permanently modified mortgage payments should be made through the plan. Whenever I mention this, everyone in the bankruptcy world says "Of course you want it in the plan so you can get your trustee percentage fee!" Many don't realize that a Standing Chapter 13 Trustee's compensation is capped by statute. My income doesn't rise if the revenue of my office increases. The only time my income may be affected is if I am dangerously close to not being able to pay my operating costs. In that instance, my income will decrease. This is a very rare concern for a Chapter 13 Trustee. Therefore, when I make the argument that payments should be included in the Chapter 13 Plan, the benefit to me doesn't enter into the equation.

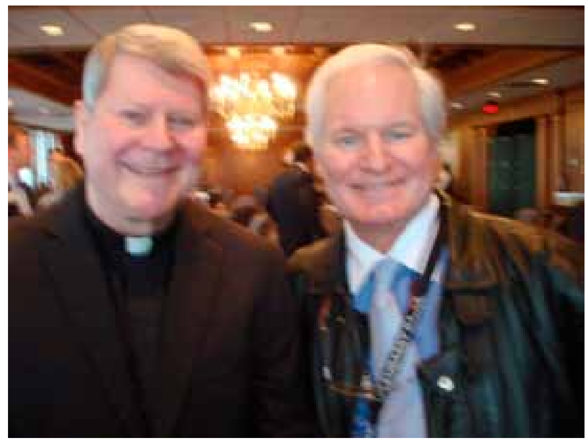
It is well established that if a plan modifies the rights of a creditor, payments must be made through the plan, absent a compelling reason. Avoiding a Trustee fee is not a compelling reason and debtors must be prepared to pay the "freight" for receiving the benefits of bankruptcy.

Aside from the issue of Trustee percentage fees, there are plenty of solid reasons why the debtors' modified mortgage payments should be paid through the plan. HAMP and the various mortgage modification mediation procedures throughout the state were all created to address the historical instances of inaccurate bookkeeping data compiled by lenders, poor communication between mortgagors and mortgagees and the myriad frustrations experienced by debtors attempting to modify mortgages directly. Removing payment of the modified mortgage outside of the plan will lift the automatic stay and the bankruptcy court will cease to exercise jurisdiction over future issues with the modified mortgage. It is naïve to believe that the problems that gave rise to our procedures would somehow disappear one a mortgage is permanently modified. It is not in the best interests of the debtor to waive the court's oversight of future problems with the mortgage while the bankruptcy is open.

It must be remembered that this is not a mortgage that has always remained current. A mortgage modification is essentially a restart button that is pushed and it will impact many different departments within the bank. Future assignments and transfers of the mortgage, as well as future contingencies related to payment history and principal reduction

continued on p. 16

November CLE Luncheon



Mortgage Modification Mediation

continued from p. 14

are all important factors that need to be considered. Depending on how a mortgage is assigned, often times bundled with hundreds or thousands of other non-modified mortgages, the new servicer may not be aware of the permanent modification. In fact, there are instances of foreclosures being reinstated and the debtor not having any relief available in the bankruptcy court because the automatic stay had been lifted due to the direct payment of the modified mortgage.

Additionally, most modification programs whether through HAMP, HARP, HARP 2, or in house programs have lender credits and/or principal reduction components tied to timeliness of payments. This will require a reliable transactional history of payments that is, without question, best handled by the Chapter 13 Trustee.

Finally, the payment of the permanently modified mortgage outside of the plan creates problems with the recently enacted amendments to the Federal Rules of Bankruptcy Procedure, specifically Rule 3002.1. Rule 3002.1 was adopted in order to better police the mortgage industry's charging of post petition fees and costs and require timely notices of mortgage payment changes. With payment of the modified mortgage outside of the plan and the stay lifted, there is no opportunity for the debtor to object to these notices in the bankruptcy court. There is also a provision in Rule 3002.1 that allows the Trustee to file a Motion to Deem the Mortgage Current at the end of the case and provide a confident fresh start for the debtor. This too would be eliminated due to the payment history being unknown to the Trustee.

We need to look beyond the short term impact of paying additional trustee percentage fees when paying modified mortgages through the plan and consider the issues that can benefit each party by having the trustee administer payments. Hopefully this article has provided a few good reasons.

YLD Pro Bono Luncheon

Upcoming Events

– January 22, 2015: Happy Hour at Le Meridien

– February 3, 2015: Consumer Lunch at the Courthouse

– February 6, 2015: On February 6, 2015, from 8:00 a.m. to 1:30 p.m., the Tampa Bay Bankruptcy Bar Association will host a Chapter 13 Seminar at the Intercontinental Hotel, 4860 West Kennedy Boulevard, Tampa, FL 33609. Registration fee is $85, which includes both breakfast and a hot lunch. At least 4 CLE credits will be offered, with some ethics credit available. Seminar topics include:

- Initial Preparation of Schedules and Plans: Avoiding Pitfalls & Unfavorable Recommendations
- Best Practices for Efficient Plan Confirmation & Modification
- End of Case Issues: Ensuring Your Debtor Gets Their Discharge
- Mortgage Modification Mediation & the Portal: Tips, Tricks, and Troubleshooting

Speakers include both Chapter 13 Trustees from the Tampa Division and their staff attorneys, the Hon. Caryl E. Delano, attorneys from both Tampa and Ft. Myers, and Igor Roitburg - the COO of Default Mitigation Management, LLC. Registration details will be available shortly. In the meantime, please contact Chris Broussard (cbrouss@suzytate.com) and Megan Murray (mwmurray@trenam.com) with any questions or for additional details.

– February 26, 2015: Happy Hour at TBD

– March 3, 2015: Consumer Luncheon at the Courthouse

– March 10, 2015: CLE Luncheon on Chapter 15 Topics at the University Club

– March 26, 2015: Happy Hour at TBD

Reject With Caution: The Risk of Below Market Interest Rates Through Cramdown

by Christopher Broussard

In the recent case *In re MPM Silicones, LLC*, No. 14-22503-RDD, 2014 Bankr. LEXIS 3926, at *1 (Bankr. S.D.N.Y. Sept. 9, 2014) (hereinafter "Momentive"), the U.S. Bankruptcy Court, S.D.N.Y., held secured creditors could be crammed down in chapter 11 through replacement notes bearing substantially below market rates of interest. This ruling could have broad implications, swinging leverage in future cases in favor of debtors while simultaneously tightening lending markets and increasing applicable rates, costs, and fees. This article reviews the transcribed version of Judge Drain's ruling in Momentive to analyze its significance and contemplate its potential impact.

Case Background

Momentive Performance Materials, Inc. and related debtors ("MPM") proposed a plan (the "MPM Plan") that, if accepted, provided for complete payment of allowed claim amounts to holders of $1.1 billion of 8.875% First Priority Notes due 2020 (the "First Lien Notes") and $250 million of 10% Senior Secured Notes due 2020 (the "1.5 Lien Notes") (together, the "Prior Notes"), provided the holders of the Prior Notes (the "Noteholders") forfeit the ability to litigate entitlement to any prepayment penalty, "make-whole" premium, or any other, similar claim (the "Make-Whole Claims").[1] MPM intended to pay the Prior Notes through proceeds from exit and bridge financing commitments (the "Exit Financing").[2]

The MPM Plan also included a "death-trap" provision, explaining that if the Noteholders reject the plan, they would, instead, receive Replacement First and 1.5 Lien Notes (the "Replacement Notes") paying annual interest equal to the Treasury rate plus 1.50% on the First Lien Notes and 2.00% on the 1.5 Lien Notes (together, the "Cramdown Rates") over a period of 7 and 7.5 years, respectively.[3] In the event of rejection, the Noteholders would, however, retain the right to pursue any and all Make-Whole Claims.

The MPM Plan was overwhelmingly rejected. Indenture trustees for both the First and 1.5 Lien Notes (the "Trustees") then filed formal objections to the MPM Plan.[4] In their objections, Trustees campaigned for application of a market based approach to calculating the interest rate for the Replacement Notes and argued MPM's use of the Treasury rate is inappropriate, MPM's risk premium is grossly inadequate and unsubstantiated, and the Exit Financing should serve as a reference, advising a more appropriate rate of interest.

MPM countered by arguing the Supreme Court's decision in *Till* does not mandate market based approaches and the short term prime rate is inappropriate for longer term maturities such as the Replacement Notes.[5] According to MPM, the Treasury rate more accurately tracks the duration of the Replacement Notes and is thus more appropriate under the circumstances. MPM further argued the Replacement Notes' risk premium is supported by rigorous process and analysis, provides substantial equity cushion, is backed by significant collateral and post-emergence liquidity, and is further hedged by the legitimate possibility for new debt acquisition, if necessary, to service the Replacement Notes.

THE CRAMDOWN CONTROVERSY

Cramdown is the forced imposition of a plan of reorganization on an impaired class of creditors that specifically voted to reject the plan. 11 U.S.C. § 1129(b) empowers bankruptcy courts to cram down chapter 11 plans when they do not

continued on p. 19

1 The court describes the Make-Whole Claims as "loosely quantified" at approximating $200 million. *See In re MPM Silicones, LLC*, No. 14-22503-RDD, 2014 Bankr. LEXIS 3926, at *56 (Bankr. S.D.N.Y. Sept. 9, 2014).
2 Case No. 14-22503-RDD, [Docket Nos. 13, 253, 606, and 702].
3 *In re MPM Silicones, LLC*, 2014 Bankr. LEXIS 3926, at *70-71 (explaining that as of August 26, 2014, the First and 1.5 Lien Replacement Notes provided for 3.60% and 4.09% interest, respectively).
4 Case No. 14-22503-RDD, [Docket Nos. 813 and 820].
5 Case No. 14-22503-RDD, [Docket No. 867].

Reject With Caution
continued from p. 18

"discriminate unfairly" and are "fair and equitable." A plan is fair and equitable to secured creditors when they (1) retain, to the extent of their allowed claim, liens in the assets securing their allowed claim, and (2) receive deferred cash payments with a present value totaling, as of the plan's effective date, at least the value of their interest in the estate's interest in the collateral securing their allowed claim.[6]

This means that when a secured creditor is subject to cramdown through installment payments over a period of years, "the amount of each installment must be calibrated to ensure that, over time, the creditor receives disbursements whose total present value equals or exceeds that of the allowed claim."[7] In other words, the interest rate used to calculate installments must be calibrated to stream cash flow capable of providing the present value, as of the effective date, of the full amount of the allowed claim at issue.

Similarly, the cramdown controversy in *Momentive* centers on whether the Cramdown Rates are sufficiently calibrated to provide a stream of cash flow approximating an appropriate present value.[8] In that regard, Judge Drain explains: "The Court clearly is not writing on a blank slate on this issue. It is largely governed by the principles enunciated by the plurality opinion in *Till v. SCS Credit Corp.*, 541 U.S. 465, 124 S. Ct. 1951, 158 L. Ed. 2d 787 (2004), and, to the extent that the Court has any concerns based on *Till* being a plurality opinion, *In re Valenti*, 105 F.3d 55 (2d Cir. 1997)."[9]

To reconcile both *Till* and *Valenti*, *Momentive* articulates several "first principles," which underscore the logic of prior decisions. The first of these principles involves adoption of the formula approach advanced by *Till* as the appropriate method for calculating cramdown interest rates in chapter 11 cases.[10] *Momentive* further explains the formula approach starts with a base rate, then adds a risk premium to account for a debtor's "own unique risks in completing its plan payments coming out of bankruptcy."[11]

Momentive couples its adoption of the *Till* formula with rejection of alternatives requiring market based analysis or other inquiry into interest rates for similar loans in the marketplace, such as, for example, the "forced loan" or "coerced loan" approach.[12] Rejection is premised on the fact those constructs are complicated, impose significant evidentiary costs, and each "aims to make each individual creditor whole rather than to ensure the debtor's payments have the required present value."[13] *Momentive* does, however, briefly acknowledge a narrow carve out for market based evidence, explaining: "market-based evidence should not be considered, except, arguably and, if so secondarily, when setting a proper risk premium in the formula approach taken by *Till* and *Valenti*."[14]

Momentive further explains creditors are overcompensated by market rates, which must, out of necessity, "be high enough to cover factors, like lenders' transaction costs and overall profits, that are no longer relevant in the context of court-administered and court-supervised cramdown loans." The purpose of cramdown present value "is to put the creditor in the same economic position it would have been in had it received the value of its allowed claim immediately," not "the same position that it would have been in had it arranged a 'new' loan."[15] Because "capturing profit, fees and costs is the marketplace lender's reason for being," it is

continued on p. 20

6 11 U.S.C. § 1129(b)(2)(A)(i).
7 *Till v. SCS Credit Corp.*, 541 U.S. 465, 508 (U.S. 2004); *United Sav. Ass'n of Tex. v. Timbers of Inwood Forest Assocs.*, 484 U.S. 365, 377 (U.S. 1988) (noting the phrase "value, as of the effective date of the plan" under § 1129(b)(2)(A)(i)(II) requires present value analysis).
8 *In re MPM Silicones, LLC*, 2014 Bankr. LEXIS 3926, at *71.
9 Id. at *71-73.
10 Id.
11 Id. at *84 (explaining there should be "up to a 1 to 3 percent additional risk premium").
12 Id. at *73 (explaining the "forced loan" or "coerced loan" approach adopts "the interest rate on the rate that the creditor charges for loans of similar character, amount, and duration to debtors in the same geographic region.").
13 Id. at *73-74.
14 Id. at *77-78.
15 Id. at *74-76 ("…the value of a creditor's allowed claim does not include any degree of profit. There is no reason, therefore, that the interest rate should account for profit.").

Reject With Caution

continued from p. 19

unlikely there will ever be an efficient market and by extension, market rate, that does not improperly contemplate profit, fees, or costs.[16] The court thus rejected the Trustees' arguments on using Exit Financing as a proxy for the *Till* formula, explaining no private lender would lend without building in a profit element, which is contrary to the "first principles" and the purpose of § 1129(b)(2)(A)(i)(II).[17] The court further rejected Trustees' reliance on footnote 14 in Till, concluding "footnote 14 is a very slim reed indeed on which to require a market-based approach in contrast to every other aspect of Till."[18]

Finally, *Momentive* endorses MPM's use of the Treasury rate, citing "the circumstances of the debtors' estate, the nature of the security (both the underlying collateral and the terms of the new notes), and the duration and feasibility of the reorganization plan."[19] The court does, however, push back, explaining "there should be an additional amount added to the risk premium in light of the fact that the debtors used Treasury rates as the base rate."[20] That additional amount is 0.50% for the First Lien Replacement Notes and 0.75% for the 1.5 Lien Replacement Notes, bringing the Cramdown Rates up to 4.10% and 4.85%, respectively.[21] No explanation is provided as to how these additional amounts were calculated or whether and to what extent they capture the spread between the Treasury and prime rates.

CONCLUSION

Momentive advocates rejection of market-based concepts in favor of "a present value cramdown approach using an interest rate that takes the

continued on p. 21

16 Id. at *86-87.
17 Id. at *88.
18 Id. at *83-84 ("footnote 14 should not be read in a way contrary to Till and Valenti's first principles").
19 Id. at *90.
20 Id. at *97-98.
21 Id. at *98-99.

Reject With Caution
continued from p. 20

profit out, takes the fees out, and compensates the creditor under a formula starting with a base rate that is essentially riskless."[22] Because the prime rate contemplates certain risks, which have been enhanced in recent years and may, in fact, be responsible for certain "anomalous" results, *Momentive* seems to favor the Treasury rate.[23] Use of a Treasury base rate is, of course, hedged by the watchful eye of the risk premium and the court's perception of each debtor's "own unique risks in completing its plan payments coming out of bankruptcy."[24] However, *Momentive* explicitly dulls those protections by advising "the formula approach's risk adjustment is not a back door to applying a market rate."[25]

Momentive thus seems to tilt leverage in favor of debtors in negotiating consensual plans, allowing them to threaten secured creditors with long-term, low interest repayment through cramdown. Satisfying secured creditors with replacement notes could secure value for unsecured creditors by, for example, reducing exit financing required to refinance secured debt. However, any advantages realized as a consequence of *Momentive* is likely to precipitate increased market rates, fees, and costs as lenders compensate for both the possibility of cramdown at below market rates and a weakened position in chapter 11 negotiations. Finally, because it involves cramdown of in excess of $1 billion for an extended duration at below market interest, *Momentive* provides a powerful example to secured creditors that should, at a minimum, get them to think twice before rejecting plan treatment providing an immediate cash-out.[26]

22 Id. at *84.
23 Id. at *97.
24 Id. at *84.
25 Id. at *77.
26 Creditors receiving an immediate cash-out like the one offered in the MPM Plan could collect proceeds and re-invest at market rates instead of enduring what could, potentially, be several years of lost interest. Significantly, the Noteholders later sought to change their vote and accept the MPM Plan but were unsuccessful in their efforts. *In re MPM Silicones, LLC*, 14-22503-RDD, 2014 Bankr. LEXIS 4062, at *9-10 (Bankr. S.D.N.Y. Sept. 17, 2014) ("The first and 1.5 lien holders clearly are sophisticated institutions represented by knowledgeable and sophisticated professionals. They made the choice to vote against the plan, and I believe it would not be proper, and that they have not shown cause now, to change that vote in order to undo its consequences.").

Judicial Musings

Submissions by U.S. Bankruptcy Judges, Middle District of Florida

From Judge McEwen:
Get your chapter 7 here -- and a lien strip NOW -- while supplies last!

By granting cert last week in *Harris v. Viegelahn*, No. 14-400, and *Bullard v. Hyde Park Savings Bank*, No. 14-116, the Supreme Court will now be considering six bankruptcy-related cases in its current term. Additionally, there were nine amicus briefs filed in *Baker Botts LLP v. ASARCO LLC*, No. 14-103. For more information on all six cases, including the issues presented in each and petitions and briefs filed in the case, be sure to visit the Supreme Court section of the ABI Newsroom.

Electronic Exhibits at Trial, Administrative Order FLMB-2014-6

by Rebbecca Goodall, Paralegal & Stetson Graduate
Shumaker, Loop & Kendrick, LLP

In response to the constant evolution of technology, courts are steadily implementing new rules and procedures, attempting to adapt to new issues and efficiencies in litigation. Some of these procedures respond to the advance of instant electronic communications and the trend toward a paperless practice.

Cognizant of these issues, courts are adapting to changing technology through the adoption of mandatory electronic filing and email service of court documents. Even the amendments to the Federal Rules of Civil Procedure accommodate discovery requests for metadata, electronic mail, and production of documents in native format.

What could possibly be next? The United States Bankruptcy Court for the Middle District of Florida is now implementing Administrative Order, FLMB-2014-6, which provides for use of electronic exhibits at trial. Administrative Order FLMB-2014-6 became effective December 1, 2014. Although compliance with the Order is not mandatory, a corresponding new local rule may be forthcoming.

In September of this year, Judge Williamson oversaw a two-week trial that included seven plaintiffs; seventeen defendants; 1,973 plaintiffs' exhibits; roughly 1,000 defendants' exhibits; and about eighteen live or video-taped witnesses. One complete set of the exhibits filled over thirty binders. Think about the amount of paper floating around the courtroom on any given day. The trial could have quickly spiraled out of control, wasting the Court's resources and countless dollars on attorneys' fees and litigation costs. Instead, the parties attended a meet and confer in advance of trial and agreed to use electronic exhibits.

Administrative Order FLMB-2014-6 now requires the parties to meet and confer no later than seven days before the deadline to exchange exhibits, or ten days prior to trial. At the meet and confer, the parties are to discuss the potential use of electronic exhibits. The court will try to honor the parties' preferences, but in the end may reserve the right to require submission of electronic exhibits, especially

continued on p. 23

continued from p. 22

if there are more than twenty-five exhibits for trial.

How do you make use of electronic exhibits?

When parties agree to use electronic exhibits, the formalities of Local Rule 9070-1 still apply (i.e. requiring an exhibit list and exhibit tags). Save and store each electronic exhibit individually in Portable Document Format (PDF). Number and mark each individual PDF exhibit, and add an Exhibit Cover Sheet as the first page of the PDF. Provide each PDF exhibit file with a unique identification name and number, such as "Debtor's Exhibit 1."

If a party has twenty-five exhibits or less, the submitting party files a "Notice of Filing Exhibit List and Exhibits" via CM/ECF in the appropriate case or adversary proceeding, attaching the exhibit list and all exhibits. Do not upload the exhibit list and all exhibits as one PDF document in CM/ECF. Each exhibit's PDF should be a separate document attachment. For example, if the Notice of Filing is Doc. 52, then each corresponding exhibit would follow as 52-1, 52-2, etc. Filing exhibits also effectuates the necessary exchange of exhibits with opposing counsel.

If a party has more than twenty-five exhibits, instead of a notice of filing, accompanied by the exhibits and exhibit list, you should submit the exhibits to the court and opposing counsel via flash drive or compact disc. Mark the flash drive or compact disc with the case name, case number, and the introducing party. Label the individual PDF exhibits, as outlined above.

After exchanging flash drives or compact discs, all parties except witnesses will have the electronic exhibits available for trial. The examining attorney will still need to provide, to the witness, copies of the specific exhibits on which that particular witness will be examined. But instead of handing the witness volumes comprising the hundreds or thousands of trial exhibits, you can simply hand the witness one binder with the twenty exhibits you want to discuss with that particular witness. For best practice, pull the twenty exhibits intended for that specific witness and place only those exhibits, in numerical order, in a separate binder. When the examination of that particular witness is complete, remove the binder from the courtroom. These are "throw away" binders because the contents go straight to the trash when the examination of the witness concludes. For the environmentally conscious, the exhibits in throw away binders may be recycled or reused for other witnesses later in the trial. The time saved can be devoted to a more thorough trial presentation, a shorter trial or a quicker ruling from the court.

If a party later discovers the need to ask a witness about a particular exhibit that was not in the throw away binder, they can still go outside the contents of the binder. The binder is simply a mechanism to keep the court and the witness from flipping through multiple sets of binders to locate the document in question, thus wasting everyone's time and disrupting the flow of the proofs being adduced. When a party discovers the need for a document outside of the throw away binders, there are some simple steps to take in advance that will

continued on p. 24

Electronic Exhibits

continued from p. 23

help the court locate the additional exhibits quickly. Hyperlink each exhibit to the exhibit list on the flash drive or compact disc. Download the exhibits and list to a trial laptop, or similar courtroom friendly device, in advance of trial, and keep the exhibit list document open for reference. When counsel directs you to an exhibit outside of the throw away binder, click on the appropriate location in the exhibit list, and within seconds the exhibit is at your fingertips. Hyperlinking the exhibits to the exhibit list also allows examining counsel to stay calm under pressure, and to remain focused on their witness. Your client will notice your ability to prepare for the unexpected, and the courtroom deputy and judge will be grateful you anticipated the issue.

At the conclusion of trial, the parties may notice that additional documents were introduced into evidence, but they were not included on the original flash drive, compact disc or docket filing. In such instances, the Order allows parties up to seven days after trial to provide the court with a supplemental flash drive or compact disc containing any additional exhibits.

Why Does This Matter?

Although the federal courts are starting to see some relief from the effects of sequestration, courts still feel its impact. In days past, court personnel were responsible for uploading trial exhibits to CM/ECF, often working overtime or after hours. There is no longer enough court staff to do so. There are fewer personnel, less resources, and even less file space to store binders of exhibits. Simply put, there are not enough resources for the federal courts to continue to operate as they previously have.

Administrative Order FLMB-2014-6 embraces technological advances and creates judicial efficiency. Within the next six months to a year, the Order may become a new local rule for practitioners to follow. Do not find yourself left behind the technological curve. Try using electronic exhibits and throw away binders at your next trial or final evidentiary hearing, even if there are less than twenty-five exhibits. You might be surprised at how much time you can save on trial preparation and in the courtroom. Better trial flow, better witness examination, greater court focus on the testimony, shorter trials and quicker rulings. It is up to you; well maybe it won't be...

Reviewing The View: View from the Bench 2014 (Tampa)

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

The bankruptcy judges are busy, and that was reflected in the overflow crowds at this year's View from the Bench at Stetson's Tampa campus. Florida bankruptcy judges have a weighted case load averaging around 2,100 per annum. Thankfully, the Middle District is wrapping up an agreement with the 8th Circuit that will allow it to "rent" a (hopefully) local person to serve as a bankruptcy judge in the Orlando Division for a five-year term that can be extended to 14 years. That appointment should be announced shortly.

The Middle District is continuing its march towards uniformity. Rule changes and new administrative orders are on the way, including a new proposed order submission system. New adversary proceeding rules are also coming soon. One of the new rules will soon require searchable PDF filings, so you may wish to start using them now.

We are running low on *pro bono* attorneys. Contact Judge McEwen's office and they will assist you in getting a case. A new program also allows attorneys to come onto a case for purposes of conducting a trial only. Your associates need the experience> Don't forget to give them the gift of pro bono work this holiday season.

The Northern District, the largest single judge district and the busiest of its kind, is hoping that one day Congress will decide to fund the second judgeship approved in 1998. Judge Specie would also like to remind everyone that using a telephone is a convenient way to get disputes resolved without endless emails.

In the Southern District, attorneys are reminded that they must file the certificate of service within five days of filing a Notice of Hearing or their motion will be denied. Attorneys who fail to properly serve parties may be forced to take on a pro bono case. So be careful to serve everyone appropriately. New local rules are coming in early 2015 and a new clerk has already been appointed.

Professionalism starts at home. Judges Jenneman, May, Delano, Hyman, and Glenn wanted to make the point to be dispassionate, respectful to all court employees (including security guards), and objective. Also, be cautious when using coverage counsel. You should only use coverage counsel that is fully aware of all facts and legal issues in any particular matter. Clients must specifically agree to your use of coverage attorneys, so review those fee agreements.

The ghost of Anna Nicole Smith continues to haunt the bankruptcy system with mounting unresolved issues arising from *Stern v. Marshall*, 564 U.S. 2 (2011). We will have to see how the Supreme Court responds to some of those issues in *Wellness Int'l Network, Ltd. v. Sharif*, 573 U.S. ___ (2014), Case No. 13-935, coming from the 7th Circuit. Judge Hyman was the only judge on the panel who had conducted a bankruptcy jury trial, and anticipates that the Supreme Court will disallow jury trials before bankruptcy judges.

Lien stripping in Chapter 7 continues unabated. However, the Supreme Court has granted certiorari in *Bank of America v. Caulkett*, Case No. 13-1421, and *Bank of America v. Toledo-Cardona*, Case No. 14-163. You can anticipate more motions to abate avoidance orders in Chapter 7. When stripping HOA and Condo Association liens, keep in mind that those liens will likely still have to be paid on transfer of the property by sale or death even though avoided.[1]

Judges also examined motions to extend time[2], repeat filers[3], 11 U.S.C. §§ 523 and 727 issues[4], student loans[5], inherited IRAs[6], homestead[7], 11 U.S.C. § 105[8], the wildcard exemption[9], attorneys' fees and bundling[10], leases in Chapter 11[11], individual Chapter 11s[12], confirmation of Chapter 11 Plans[13], voting on Chapter 11 Plans[14], valuation[15], and Section 363 sales[16].

1 JAF - *In re Sain*, 2013 Bankr. LEXIS 4564 (Bankr.S.D.Fla. Oct. 29, 2013) and *In re Sain*, 2014 U.S.Dist. LEXIS 12219 (S.D.Fla. Jan. 31, 2014); Stonebridge Gardens Sec. Two v. Campbell, 2014 U.S. Dist. LEXIS 7195 (S.D.Fla. 2014).
2 MGW – review Rule 9006 carefully as you may need to file certain items on a Sunday or Saturday, e.g., 11 U.S.C. § 523 motions.
3 JAF – *Law v. Siegel*, 134 S.Ct. 1188 (2014) and In re Franzese, 2007 WL 2083650.
4 MGW – advisable to bring discharge actions under Section 523 only so that your client can be the only creditor. CPM – be very specific in settlement agreements about what debtor concedes. PMG – Florida Bar is a government unit so debts owed are nondischargeable.
5 CED – only had five or six dischargeability complaints. KPM – Brunner is an impossible burden and factually dissimilar from most other cases as well as based on a former version of the Code, circuits are relaxing and Courts may be seeking ideal cases.
6 KRM – *Clark v. Rameker*, 134 S.Ct. 2242 (2014) decides the issue in Florida as the Florida statute refers back to the I.R.C., as such there is no exemption in an inherited IRA in Florida. KSJ – not decided on this issue but leaning toward a finding of no exemption.
7 KKS – commercially zoned property can be homestead. MGW – if homestead over ½ acre cannot be partitioned then the property must be sold and proceeds partitioned. PMG – equitable lien on homestead only imposed for fraud or egregious reasons. MGW – also see *In re Bifani*, 493 B.R. 866 (Bankr.M.D.Fla. 2013), regarding equitable liens.
8 CPM – see *Law v. Siegel*, 134 S.Ct. 1188 (2014), if a Code section offers the relief sought, use that Code section and not Section 105.
9 CED – *In re Valone*, 500 B.R. 645 (Bankr.M.D.Fla. 2013), is pending before the 11th Circuit.
10 KSJ – *In re Hood*, 727 F.3d 1360 (11th Cir. 2013); In re Ruiz, 515 B.R. 362 (Bankr.M.D.Fla. 2014). CPM – *In re Peyton*, Case No. 12-15997, as a possible exception to In re Brown, 742 F.3d 1309 (11th Cir. 2014).
11 MGW and CPM – In re 2408 W. Kennedy, 512 B.R 708 (Bankr.M.D.Fla. 2014).
12 MGW and KSJ are in harmony on Section 1115, LMI has taken a contrary view.
13 MGW – No cramdown to 5 cents on the dollar, judges have independent duty to evaluate Plan.
14 American Express SD is a good place to get a yes vote for Chapter 11 confirmation. MGW – *In re J.C. Householder*, 502 B.R. 602 (Bankr.M.D.Fla. 2013), change of ballot after casting vote.
15 CPM – *Till v. SCS Credit Corp.*, 124 S.Ct. 1951 (2004), is dispositive, *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993). PGH – *In re Trailer Park Acquisitions*, LLC, 2012 Bankr. LEXIS 3389 (Bankr.S.D.Fla. July 25, 2012). MGW – see Daubert.
16 KKS – Cannot undo a 363 sale if you participate.

View from the Bench
Reception and Seminar

View from the Bench
Reception and Seminar

The Cramdown
PO Box 1438
Tampa, FL 33601