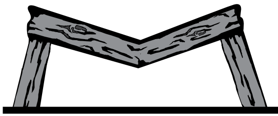


The Cramdown

The Newsletter of the Tampa Bay Bankruptcy Bar Association
Editor-in-Chief, Robert J. Wahl, Forizs & Dogali, P.A. **Winter 2011**

PRESIDENT'S MESSAGE

by Elena Paras Ketchum Stichter Riedel Blain & Prosser, P.A.

Happy New Year, Tampa Bay Bankruptcy Bar Association!!!!!

I am not one for making New Year's resolutions, such as no sweets for the next 3 months, mainly because I can't seem keep them. ☺ I do believe, however, in taking stock at the beginning of a new year of what has been accomplished in the past year and what can be improved in the coming year and working towards those improvements.

In looking back at the first half of the 2010 – 2011 bar year, our Association has had a tremendous beginning, due to the tireless efforts of the Directors who serve your Association and to the numerous other volunteers. Without those of you who volunteer their talents, energy and time to the Association, we would not be able to provide the monthly CLE Luncheons, the Brown Bag Luncheon at the courthouse, or even this wonderful publication to the membership at large. Reiterating what I expressed in my prior message, it is you who keeps the Association running and running strong!

Looking forward, the question is what can we accomplish together in this last half of the 2010-2011 bar year? The answer is, I believe, we can accomplish whatever we, as an Association, put our talents and energy towards!!! Some of the items which we are working towards accomplishing during the remainder of the year are (1) launching the new TBBBA website, (2) circulating a membership directory, (3) continuing the Association's volunteer efforts in the community through the Credit Abuse Resistance Education Program (or C.A.R.E.), (4) hosting Happy Hours for our members, (5) organizing an "Art in the Park" event to be held in the park located in front of the Tampa Museum of Art and the Glazer Children's Museum, and (6) providing outstanding CLE luncheon and Brown Bag luncheons to the membership.

At the beginning of the 2010-2011 bar year, I asked the Board to consider new ideas and new way of doing things for our Association. I now challenge all of you to consider how we may improve our Association and to share your ideas! I welcome you to email any ideas and suggestions to me at eketchum@srbp.com.

I look forward to seeing everyone at our luncheons, happy hours, volunteer events and other Association functions!!!

Inside This Issue

Please Release Me, Let Me Go....3
Good Faith Not Merely a Talking Point....7
Administrative Freezes Unfrozen....12
Robinson v. Tyson Foods....14
SupPrems Court's Ransom....20
Experiencing Financial Difficulties?....23

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

The Tampa Bay Bankruptcy Bar Association
2010-2011
Officers and Directors

President
Elena Paras Ketchum
Stichter Riedel Blain & Prosser, P.A.
110 E. Madison Street
Tampa, Florida 33602
eketchum@srbp.com
813-229-0144

Vice President
Lara Roeske Fernandez
Trenam Kemker
101 East Kennedy Boulevard, Suite 2700
Tampa, Florida 33602
lrfernandez@trenam.com
813-227-7404

Secretary
Brad Hissing
Kass Shuler Solomon Spector Foyle & Singer, P.A.
Post Office Box 800
Tampa, Florida 33601
bhissing@kasslaw.com
813-229-0900

Treasurer
Kelley Petry
Kelley M. Petry, P.A.
Post Office Box 7866
Tampa, Florida 33673
kmpetrypa@aol.com
813-873-0713

CLE Chairs
Keith Appleby
Fowler White Boggs Banker, P.A.
Post Office Box 1438
Tampa, Florida 33601
kappleby@fowlerwhite.com
813-222-2081

Edward Peterson
Stichter Riedel Blain & Prosser, P.A.
110 E. Madison Street, Suite 200
Tampa, Florida 33602
epeterson@srbp.com
813-229-0144

Community Service
Lori Vaughan
Trenam Kemker
101 East Kennedy Boulevard, Suite 2700
Tampa, Florida 33602
lvaughan@trenam.com
813-227-7432

Historian
Wanda Hagan Golson
Golson Legal, P.A.
1724 East 5th Avenue
Tampa, Florida 33605
wgg@golsonlegal.com
813-241-0900

Judicial Liaison
Cinthia P. Burnette
Office of the U.S. Trustee
501 E. Polk Street, Suite 1200
Tampa, Florida 33602
cindy.p.burnette@usdoj.gov
813-228-2000

Consumer
Suzy Tate
Jennis & Bowen, P.L.
400 N. Ashley Drive, Suite 2540
Tampa, Florida 33602
state@jennisbowen.com
813-229-1700

Membership
Stephanie Biernacki Anthony
Anthony & Partners, LLC
201 N. Franklin Street, Suite 2400
Tampa, Florida 33602
santhony@anthonyandpartners.com
813-273-5613

Technology
Adam Alpert
Bush Ross, P.A.
1801 N. Highland Avenue
Tampa, Florida 33602
aalpert@bushross.com
813-224-9255

Cramdown
Robert J. Wahl
Forizs & Dogali, P.A.
4301 Anchor Plaza Parkway, Suite 300
Tampa, Florida 33634
rwahl@forizs-dogali.com
813-289-0700

Past Presidents

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

Please Release Me, Let Me Go (For I don't Want to Owe You Anymore)[1] Third Party Releases and Injunctions in Florida Chapter 11 Cases

by Andrew Layden,
Law Clerk to U.S. Bankruptcy Judge Caryl E. Delano

Third Party Releases Generally

Chapter 11 debtors sometime seek court orders releasing non-debtor third parties and permanently enjoining creditors from asserting claims against the third parties. These third party releases typically benefit the debtor's insiders or non-insiders who contribute to the debtor's reorganization. The federal circuits are currently split over whether bankruptcy courts have the authority to issue releases or permanent injunctions protecting third parties from liability post-confirmation.[2] The Ninth and Tenth Circuits hold that 11 U.S.C. § 524(e) prohibits the release of non-debtors,[3] while the Second, Third, Fourth, Sixth and Seventh Circuits hold that non-debtor releases are appropriate in some circumstances pursuant to a bankruptcy court's § 105 equitable powers.[4]

Third party releases were first used in mass tort cases, when bankruptcy courts approved settlement agreements or confirmed chapter 11 plans containing "channeling" injunctions. These injunctions required tort claimants to assert their claims against trust funds created by the debtor's settling insurance carrier.[5] The injunctions typically barred actions against the debtor's insiders, third parties providing DIP financing, and the debtor's insurance carrier. Following these early decisions, courts have authorized the use of third party releases beyond the mass tort context.[6]

Eleventh Circuit

The Eleventh Circuit has not directly addressed whether the bankruptcy code prohibits the release of non-debtor parties, but in *In re Munford*, the Eleventh Circuit appears to align itself with the "pro-release" courts.[7] In *Munford*, the Eleventh Circuit affirmed the bankruptcy court's approval of a settlement agreement that permanently enjoined non-settling defendants from asserting contribution and indemnification claims against a non-debtor because the injunction was integral to the settlement agreement. The *Munford* decision does not, however, discuss whether § 524(e) acts to prohibit non-consensual third party releases in chapter 11 plans.

Florida Cases

Florida bankruptcy courts have permitted third party releases in some circumstances.[8] Judge Jennemann's decision in *In re Transit Group, Inc.*[9] provides the most comprehensive discussion of third party releases. *Transit Group* adopted a two part test for determining whether a third party release is appropriate. First, the debtor must demonstrate that unusual circumstances exist; second, the non-debtor release must be fair and necessary, utilizing the factors developed in the *Dow Corning* case:

> (1) Whether the debtor and the third party share an identity of interests, usually an indemnity relationship;
> (2) Whether the non-insider contributed substantial assets to the reorganization;
> (3) Whether the injunction is essential to the reorganization;
> (4) Whether the impacted class has overwhelmingly voted to accept the plan;
> (5) Whether the plan provides a mechanism to pay for all or substantially all the claims of the classes affected;
> (6) Whether the plan provides an opportunity for those claimants who choose not to settle to

continued on p. 4

1 With apologies to Englebert Humperdink, http://www.youtube.com/watch?v=6S9ecXWCBCc.
2 Courts generally agree that bankruptcy courts may issue temporary injunctions as to litigation against non-debtors when that litigation significantly impairs the debtor's reorganization. *See In re Goldberg*, 221 B.R. 907 (Bankr. M.D. Fla. 1998); *In re Hillsborough Holdings Corp.*, 123 B.R. 1004 (Bankr. M.D. Fla. 1990). A debtor seeking a temporary injunction protecting a non-debtor should file an adversary proceeding. See F.R.B.P. 7001(7).
3 *See In re Lowenschuss*, 67 F.3d 1394 (9th Cir. 1995); *In re Western Real Estate Fund, Inc.*, 922 F.2d 592 (10th Cir. 1990).
4 *See In re Metromedia Fiber Network, Inc.*, 416 F.3d 136 (2d Cir. 2005); *In re Continental Airlines, Inc.*, 203 F.3d 203 (3d Cir. 2000); *In re A.H. Robins, Inc.*, 880 F.2d 694 (4th Cir. 1989); *In re Dow Corning Corp.*, 280 F.3d 648 (6th Cir. 2002); *In re Airadigm Comm.*, Inc., 519 F.3d 640 (7th Cir. 2008).
5 *See In re Johns-Manville Corp.*, 837 F.2d 89 (2d Cir. 1988); *A.H. Robins, supra* note 4; *Dow Corning, supra* note 4.
6 For a more detailed discussion of the leading cases regarding third party releases, see Steven M. Berman, THIRD PARTY RELEASES AND INJUNCTIONS IN CHAPTER 11 CASES, available at http://www.abiworld.org/committees/newsletters/busreorg/vol9num3/third.pdf.
7 *In re Munford, Inc.*, 97 F.3d 449, 455 (11th Cir. 1996).
8 *In re Mercedes Homes, Inc.*, 431 B.R. 869 (Bankr. S.D. Fla. 2009)(J. Hyman); *In re Winn Dixie Stores, Inc.*, 356 B.R. 239 (Bankr. M.D. Fla. 2006)(J. Funk); *In re Transit Group, Inc.*, 286 B.R. 811 (Bankr. M.D. Fla. 2002)(J. Jennemann); *In re Optical Technologies, Inc.*, 216 B.R. 989 (Bankr. M.D. Fla. 1997)(J. Paskay); Cf. *In re Sago Palms Joint Venture*, 39 B.R. (Bankr. S.D. Fla. 1984)(J. Britton).
9 *Transit Group, supra* note 8.

Please Release Me

continued from p. 3

recover in full, and;
(7) Whether the bankruptcy court made a record of specific factual findings supporting its conclusion.[10]

The *Transit Group* case ultimately authorized a third party release for a secured lender that provided DIP financing to the debtor and subordinated some of its secured debt in exchange for equity in the reorganized debtor, while denying third party releases to other parties, including the debtor's insiders.

In *In re Winn Dixie Stores, Inc.*,[11] the bankruptcy court confirmed a plan containing third party releases that barred creditors' claims against the debtor's directors, officers, or employees arising from the debtor's business, chapter 11 case or the plan. The releases applied only to the creditors voting to accept the plan; creditors voting against the plan essentially "opted out" of the release provision. The court approved the releases based in large part on the ability of non-consenting creditors to opt-out, stating:

> In view of the fact that only Claimholders who vote to accept the Plan are affected by the releases, the Court finds it inappropriate to interject itself into the process and invalidate the releases.[12]

Allowing non-consenting creditors to opt-out may also impact the confirmation requirements of § 1129. Because the "best interest of creditors" test[13] must be satisfied on a per creditor basis at confirmation as to all non-accepting creditors, limiting third party releases to accepting creditors minimizes objections based on the "best interest of creditors" test. Potentially, a non-accepting creditor in an accepting class may object to confirmation, arguing that the value of their claim being released, plus a chapter 7 liquidation distribution, has a greater value than the distribution under the proposed chapter 11 plan. A bankruptcy court in the Southern District of New York recently denied confirmation of a chapter 11 plan on that basis.[14]

The most recent Florida decision involving third party releases is *In re Mercedes Homes*.[15] In *Mercedes Homes*, the bankruptcy court confirmed a plan containing a permanent injunction barring actions that could have been brought against the debtor's directors and officers for mismanagement of the debtor leading up the chapter 11 filing. Judge Hyman utilized the seven factor *Dow Corning* test in determining that the releases were appropriate. In analyzing the identity of interests between the released third parties and the debtor, the court stated:

> The reorganized Debtors' indemnification obligations establish an identity of interest between the Debtors and the Directors and Officers such that a suit against the Directors and Officers is, in essence, a suit against the Debtors.[16]

Later, while discussing whether the releases were essential to the reorganization, the court stated:

> The Directors' and Officers' special knowledge and expertise, and their continuing agreement to manage the reorganized company rather than compete against it, is critical to the successful operation of the reorganized debtor.[17]

Practice Pointers

Overall, third party releases are justified only in unusual circumstances. They act as an exception to the general rule that a chapter 11 creditor can expect to (1) receive payment pursuant to a confirmed plan and (2) remain free to pursue all available remedies against other obligated individuals or entities on the discharged debts.

Parties seeking third party releases must be prepared to offer evidence regarding the unusual circumstances justifying the release. Examples include (1) the third party's financial contribution the debtor's reorganization; (2) the third party's non-monetary involvement in the debtor's reorganization; (3) the affected creditors' consent to the release; (4) the

continued on p. 5

10 *In re Dow Corning Corp.*, 280 F.3d 648 (6th Cir. 2002).
11 *Winn Dixie, supra* note 8.
12 *Id.* at 260.
13 11 U.S.C. § 1129(a)(7) requires that non-accepting creditors receive at least what they would receive if the debtor were liquidated under Chapter 7.
14 *See In re Quigley*, 2010 WL 3528818, *62 (Bankr. S.D.N.Y. Sept. 8, 2010). *See also Mercury Capital Corp. v. Milford Conn. Assocs., L.P.*, 354 B.R. 1, 9 (D. Conn. 2006). *But see In re Lafayette Hotel P'ship,* 227 B.R. 445, 451 (S.D.N.Y. 1998); In re Dow Corning Corp., 237 B.R. 380, 411 (Bankr. E.D. Mich. 1999).
15 *Mercedes Homes, supra* note 8.
16 *Id.* at 880.
17 Id. at 881.

Please Release Me

continued from p. 4

ability of non-consenting creditors to opt-out of the release provisions; and (5) the limited scope of the release provisions.[18] Additionally, practitioners should consider that even in the absence of an objecting creditor, the U.S. Trustee often objects to the confirmation of plans providing for third party releases, even in absence of other creditors' participation in the case or objection. Many of the cases discussing third party releases are before the court on objections filed by the U.S. Trustee.[19] Ultimately, bankruptcy courts are courts of equity, and allow third party releases pursuant to section 105(a) when they determine that the benefit to the estate of the third party release is greater than the cost to creditors.

18 *See In re Ingersoll, Inc.*, 562 F.3d 856, 865 (7th Cir. 2009) ("In this case, however, the release does not provide blanket immunity. . . . [I]t is narrowly tailored and critical to the plan as a whole. The release only covers claims arising from or relating to two cases, so it is far from a full-fledged 'bankruptcy discharge arranged without the safeguards of the Code.'").
19 *Winn Dixie, supra* note 8; *Transit Group, supra* note 8; *In re Friedman's Inc.*, 356 B.R. 758 (Bankr. S.D. Ga. 2005).

tranzon DRIGGERS

NATIONAL AUCTIONS... LOCAL EXPERTISE

Walter J. Driggers, III, CAI, AARE
FL Lic. Real Estate Broker
One NE 1st Avenue, Suite 301, Ocala, FL 34470

Sold.

Asset Marketing Specialists

Nationwide auctions structured to meet your needs…

- **Sealed Bid Auctions**
- **Live Auctions**
- **On-Line Auctions**
- **Courtroom Auctions**

Tranzon can be the most effective solution for an expeditious sale of assets – at market value – no matter where those assets are located nationwide.

It's what we do. 877.374.4437 **www.tranzon.com**

WE MAKE IT EASY

FOR YOUR CLIENTS TO MEET THE BANKRUPTCY CERTIFICATE REQUIREMENTS

- **Local Office**
- **Optional Delivery Method**
  Internet 24/7, Telephone, Classroom
- **Bi Lingual Staff**
- **Prompt Delivery of Certificates**

For More Information Call 800-553-8621

The only locally approved agency to provide the bankruptcy certificate for both pre-filing and pre-discharge

FAMILY LIFE RESOURCES, INC.

CHRISTIAN FINANCIAL COUNSELING & EDUCATION

5802 E. Fowler Ave. Ste. D, Tampa, FL 33617
Ph. (813) 989-1900 • Fax (813) 989-0359
www.flrministry.org

L | S | H

LARRY S. HYMAN, C.P.A.
and ASSOCIATES

- Assignments for the Benefit of Creditors
- Receiverships
- Chapter 11 Trustee, Examiner and Post Confirmation Services
- Accounting and Transaction Investigative Services

Larry S. Hyman

106 SOUTH TAMPANIA AVENUE
SUITE 200
TAMPA, FLORIDA 33609

PO BOX 18625
TAMPA, FLORIDA 33679

TEL | 813.875.2701
FAX | 813.875.2797

larry@larryhymancpa.com
www.larryhymancpa.com

DONICA
MEDIATION
SOLUTIONS, LLC

Herbert R. Donica, Esq.

Florida Supreme Court Certified Ciruit Mediator

Available for mediations in all commercial, business, shareholder and partnership litigation matters in state and federal courts.

106 South Tampania Avenue, Suite 250
Tampa, Florida 33609-3256

813.878.9790 • info@DonicaMediation.com

www.DonicaMediation.com

Good Faith not Merely a Talking Point with the "Mere Conduit" Exception to Initial Transferee Liability

by Philip Nodhturft, III
Law Clerk to the Honorable Catherine Peek McEwen

The Eleventh Circuit Court of Appeals recently clarified its position regarding what an initial transferee under § 550 of the Bankruptcy Code must prove in order to take advantage of the "mere conduit" exception and thereby escape the liability for a fraudulent transfer that would otherwise exist. In *In re Harwell*, 2010 WL 5374340 (11th Cir. Dec. 29, 2010), the court held that an initial recipient of a debtor's fraudulently transferred funds seeking to invoke the equitable "mere conduit" exception to § 550 liability must prove both: (i) that he did not have control over the assets received; and (ii) that he acted in good faith and as an innocent participant in the fraudulent transfer.

Harwell involves[1] a fraudulent transfer case in which, for purposes of the bankruptcy court's summary judgment ruling, the court assumed, without making any findings, that the debtor's attorney had schemed with the debtor to have various of the debtor's funds placed in the attorney's trust account and then distributed from the trust account to the debtor, the debtor's family, and selected creditors – to the financial disadvantage of one particular judgment creditor.

The bankruptcy court ruled that even assuming the attorney had served as the mastermind of the fraudulent transfer scheme, he was not an "initial transferee" under § 550(a)(1) of the Bankruptcy Code because as an attorney, he never had dominion or control over the funds in his trust account, and was therefore entitled to rely on the "mere conduit" doctrine, which, generally speaking, shields parties from liability where they do not have any control over how the funds are to be used or distributed. Rather, the bankruptcy court held that the attorney was a mere conduit of the funds in his trust account and simply distributed the funds to the persons specified by his client, at the client's direction. The effect of the bankruptcy court's ruling was that the chapter 7 trustee was unable to recover the fraudulently transferred funds directly from the attorney pursuant to § 550.

The trustee appealed the bankruptcy court's entry of summary judgment to the district court, which affirmed. Perhaps as a harbinger of the Eleventh Circuit's holding, however, the district court (Moody, J.) noted certain courts that have expressly required good faith[2] as a necessary component of the mere conduit exception. *In re Harwell*, 414 B.R. 770, 782 (M.D. Fla. 2009). Nevertheless, the district court ultimately agreed with the bankruptcy court that the attorney was not an initial transferee because, as a fiduciary of his client, the attorney was obligated to disburse the funds in question only in accordance with the instructions from his client. On further appeal, the Eleventh Circuit reversed, holding that the attorney, as the assumed mastermind of the fraudulent transfer scheme, could not rely on the mere conduit exception to initial transferee liability because the mere conduit exception requires, in part, a showing of good faith.

In reaching its holding, the court analyzed several of its prior opinions discussing initial transferee liability and discerned several general principles from those cases. First, the literal language of § 550 is to be given a "rigid interpretation," such that the first recipient of the debtor's fraudulently transferred funds is an "initial transferee." *See Harwell*, 2010 WL 5374340 at *10. In reaching this conclusion, the court appears to have adopted a different framework of analysis than that employed by the bankruptcy and district courts. The bankruptcy and district courts held that the attorney was not an initial transferee because he was exempt from § 550 liability under the "mere conduit" exception. In other words, the status of a party as an "initial transferee" depended on whether the mere conduit

continued on p. 9

1 The Eleventh Circuit remanded the case to the bankruptcy court for further proceedings.
2 Regarding the issue of whether the attorney was liable under a state law theory of civil conspiracy, an issue on which the Eleventh Circuit expressed no opinion, the district court telegraphed some dissatisfaction with the notion that scheming attorneys may act with impunity, stating "[t]his issue is best left for another day, but, at the least, a warning bell has sounded for parties involved in 'asset preservation.'" *In re Harwell*, 414 B.R. 770, 787 (M.D. Fla. 2009).

WE MAKE IT EASY

FOR YOUR CLIENTS TO MEET THE BANKRUPTCY CERTIFICATE REQUIREMENTS

- **Local Office**
- **Optional Delivery Method**
  Internet 24/7, Telephone, Classroom
- **Bi Lingual Staff**
- **Prompt Delivery of Certificates**

For More Information Call 800-553-8621

The only locally approved agency to provide the bankruptcy certificate for both pre-filing and pre-discharge

FAMILY LIFE RESOURCES, INC.

CHRISTIAN FINANCIAL COUNSELING & EDUCATION

5802 E. Fowler Ave. Ste. D, Tampa, FL 33617
Ph. (813) 989-1900 • Fax (813) 989-0359
www.flrministry.org

THIS SPACE FOR RENT

For more information on advertising in the Cramdown, contact:
Robert J. Wahl
(813) 289-0700 • rwahl@forizs-dogali.com

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

Full Page 7.875w x 9.75h	$400/single issue • $1,200/4 issues
Half Page 7.875w x 4.75h	$200/single issue • $600/4 issues
Quarter Page 3.75w x 4.75h	$100/single issue • $300/4 issues
Business Card 3.75w x 2.375h	$50/single issue • $150/4 issues

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 files.

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

For information regarding advertising in *The Cramdown*, contact:
Robert Wahl, Esq.
Forizs & Dogali, P.A.
813-289-0700 • rwahl@forizs-dogali.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

Oscher Consulting

- Accounting and Financial Investigative Services
- Expert Testimony
- Securities Fraud
- Family Law
- Business Valuations

Litigation Consulting Services

In the areas of Accounting, Finance and Information Systems

Steven S. Oscher, CPA

One Tampa City Center • 201 N. Franklin Street • Suite 3150 • Tampa, FL 33602
(813) 229-8250 Fax (813) 229-8674

Good Faith

continued from p. 7

exception applied. However, the Eleventh Circuit now appears to require courts to perform a two-part analysis, including a preliminary inquiry into whether a party is the "initial transferee" under § 550, followed by a distinct inquiry as to whether the "mere conduit" exception applies.

In determining whether the exception applies, the court noted that the mere conduit exception is a judicially created equitable exception to the literal language of § 550, pursuant to which parties who are first found to be initial transferees under § 550 can avoid liability if they have no control over the fraudulently transferred funds. The court emphasized that the particular transfer in question should not be examined in a vacuum, but rather that the circumstances of the entire transaction should be considered. The purpose of the exception is "to prevent the unjust or inequitable result of holding an innocent transferee liable for fraudulent transfers where the innocent transferee is a mere conduit and had no control over the funds transferred." *Id* at *11.

Additionally, in deciding whether to recognize the mere conduit exception, courts must determine (in addition to the issue of whether the transferee had control over the funds) whether the initial transferee acted in good faith and was simply an innocent participant to the fraudulent transfer, or whether some element of bad faith was involved. The court disagreed with the attorney that the good faith requirement was simply *dicta* in the court's prior opinions and resolved any doubt on this point by expressly holding that an initial transferee must *prove* that it acted in good faith and as an innocent participant in the fraudulent transfer. Thus, absent a showing of good faith by the initial transferee, the transferee will not be able to successfully rely on the mere conduit exception.

In *Harwell*, because the bankruptcy court *assumed* that the attorney had orchestrated the entire fraudulent transfer scheme, the court reversed summary judgment because the good faith element presented an unresolved issue of fact. On remand, the parties will have the opportunity to present evidence of the attorney's (i) lack of control of the funds in his trust account and (ii) good faith. The court noted that in the vast majority of cases, a client's settlement funds transferred into and out of a lawyer's trust account will not implicate control over the funds, such that most lawyers should be entitled to mere conduit status based on the lack of control over the funds. However, on the facts of *Harwell* and the bankruptcy court's assumption of the attorney's central role in the scheme, summary judgment was precluded.

An interesting question remains as to how, without violating the attorney-client privilege, the attorney is now supposed to prove that he lacked control over his client's funds and acted in good faith. The debtor's conversations with and potential instructions to his attorney concerning the funds in question – specifically their placement into and distribution out of the attorney's trust account – are privileged. Yet, in order to avoid liability, the attorney will be required to establish that he lacked control over the funds and acted in good faith, which may require disclosure of privileged communications. Absent the informed consent of his client, the attorney may have to argue that the rules of professional conduct contain an exception that allows him to reveal such confidences so that he may ethically discharge his duties to his client while also defending himself.

View from the Bench

The Florida Bar held its annual View from the Bench seminar on Thursday, November 4th at the Hyatt Downtown. The seminar drew record attendance of over 280 people. The panel consisted of Judges Glenn, McEwen, Delano, Paskay, Jenneman, Williamson, Hyman, and Killian, with the musically talented Roberta Colton serving as moderator. The Tampa Bay Bankruptcy Bar Association held its annual reception and dinner in honor of the Judges the evening prior at the History Center.

People on the Move

Edmund S. Whitson is now with the law firm of Bryant Miller Olive, located at One Tampa City Center, Suite 2700, Tampa, Florida 33602. Mr. Whitson's telephone number is (813) 273-6677 (main), (813) 222-1728 (direct), and email is ewhitson@bmolaw.com.

Philip Nodhturft, III has joined the chambers of the Honorable Catherine Peek McEwen as a law clerk. Mr. Nodhturft was formerly an associate attorney at Hill, Ward & Henderson, P.A. in the firm's Bankruptcy & Creditors' Rights and Construction Law practice groups. He graduated magna cum laude from the University of Florida Fredric G. Levin College of Law, where he served as a Notes & Comments editor of the Florida Law Review and was elected to the Order of the Coif. Mr. Nodhturft received his undergraduate degree from Dartmouth College, where he majored in Philosophy. He is a Tampa native and graduated from Jesuit High School in 2001. Outside of the legal profession, Mr. Nodhturft enjoys following University of Florida athletics and Tampa Bay's professional sports teams and spending time with family and friends.

Turn to one source for all your
Asset Management & Recovery Needs

MICHAEL MOECKER & Associates, Inc.

♦ *Receiverships*
♦ *Out of Court Workouts with Creditors*
♦ *Assignments for the Benefit of Creditors*
♦ *Services in Bankruptcy Cases*
♦ Asset Liquidation for Trustees
♦ Disbursing Agent for Distributions
♦ Trustee For Liquidating Trusts
♦ Administrator for Creditors Committee

Ft. Lauderdale: **954.252.1560**
Tampa: **813.258.4300**

www.moecker.com

Real Estate Management & Liquidation Services for Trustees, Receivers & Assignees

Moecker Auctions Inc.

Over 40 years in the auction and appraisal industry, we offer a unique approach to auctions, appraisals & liquidations.

♦ *GPPA and USPAP Appraisals*
♦ *Certified Estate Specialist*
♦ *Chapter 7 & 11 Case Liquidation*
♦ *Short and Long Term Asset Management & Dispositions*
♦ *Fully Licensed, Bonded and Insured*
♦ *Completely Automated*
♦ *Licensed Auctioneers*

800.840.BIDS (2437)

www.moeckerauctions.com

OFFICES IN: FORT LAUDERDALE • TAMPA • JACKSONVILLE • ORLANDO

AB1098
AU3219

Administrative Freezes Unfrozen: In Re Young as Validation of Automatic Holds on the Bank Accounts of Chapter 7 Debtors

by Thomas Seider, Esq.

The Middle District of Florida, Tampa Division, recently held that a bank's practice of placing administrative freezes on the bank accounts of chapter 7 debtors did not violate the automatic stay.[1] With this decision, the Middle District rejects a recent and factually similar case from the Ninth Circuit Bankruptcy Appellate Panel ("BAP"),[2] and supports a Wells Fargo automatic freezing process that has been the subject of contention for some time.

The Administrative Freeze: A Technical and Procedural Background

Wells Fargo, pursuant to its nationwide policy, receives daily notifications through the federal CM/ECF system of accountholders who have filed chapter 7 bankruptcies. The bank then proceeds to place an administrative freeze on those accounts, so long as the identified debtors are non-borrowers of the bank and have an account balance of at least $5,000. The freeze, referred to internally by the bank as placing an account in "bankruptcy status," results in a debtor being locked out of his or her account, and the funds being constructively turned over the chapter 7 trustee.[3]

Upon Wells Fargo becoming aware of a chapter 7 filing, notice is immediately sent to the debtor and bankruptcy trustee, informing both parties of the freeze and seeking direction from the trustee as to what should be done with the funds. From this point forward, the chapter 7 trustee has total authority over the account.[4]

Wells Fargo's administrative freeze process has generated some pointed criticism,[5] and is seen by many as an obstruction of debtors' rights. For those of this view, BAP's *In re Mwangi* ruling was a decided victory, holding that Wells Fargo violated the automatic stay by freezing a chapter 7 debtor's accounts that were claimed as exempt. To arrive at this holding, the Court in *Mwangi* had to first deftly navigate a threshold question that had proven dispositive in prior, and contrary, opinions:[6] How does a debtor have standing to challenge an administrative freeze if the bank accounts in question are property of the estate?

That the accounts were property of the estate was a settled matter, thanks to a Supreme Court decision[7] that had ruled conclusively against the argument that property claimed as exempt was property of the debtor and not the estate.[8] Rising to the challenge presented by this classification, the Ninth Circuit held that the debtor had an "inchoate interest" in the property because it was *claimed* as exempt, and, as such, had standing to seek sanctions against Wells Fargo for violation of the automatic stay.[9]

***In re Young* as Validation of the Administrative Freeze**

In re Young arose out of a factual situation nearly identical to that of *Mwangi*: The chapter 7 debtor alleged that Wells Fargo had violated the automatic stay when placing an administrative freeze on bank accounts claimed as exempt, and, accordingly, should be sanctioned. The Court in *Young* addressed these allegations and held that: (a) the accounts were property of the estate, (b) the administrative freeze did not violate the automatic stay, and (c) the debtor did not have standing to bring these allegations.[10]

continued on p. 13

1 *In re Young*, 439 B.R. 211 (Bankr.M.D.Fla. Sep 28, 2010).
2 *In re Mwangi*, 432 B.R. 812 (9th Cir. BAP 2010).
3 *Young* at 214.
4 *Id.*
5 "Automatic Bank Freezes: Protecting Estate Assets or Impeding Consumer Debtors' Rights?" American Bankruptcy Institute Journal, Volume XXIX, No. 9 (November 2010).
6 *Calvin v. Wells Fargo Bank, N.A.*, 329 B.R. 589, 603 (Bankr. S.D. Tex. 2005); *Wells Fargo Bank, N.A. v. Jimenez*, 406 B.R. 935, 946-47 (D.N.M. 2008).
7 *Schwab v. Reilly*, 560 U.S. ___, No. 08-538, slip op. at 20 (June 17, 2010).
8 This was precisely the argument made by the lower bankruptcy Court in *Mwangi* before appeal. *Mwangi* at 821.
9 *Id* at 821.
10 *Young* at 211.

Administrative Freezes Unfrozen

continued from p. 12

The Court in *Young* quickly classified the bank accounts as property of the estate[11] and then moved on to the statutory duties that this designation imparted. The Court found that, pursuant to Bankruptcy Code Section 521, the debtor had an obligation to surrender all accounts to the appointed trustee.[12] Further, the Court stated that Wells Fargo was similarly obligated under the mandatory turnover provision of Bankruptcy Code Section 542[13] and had acted properly in offering control of the account to the trustee. Indeed, the implication of holding the bank obligated under the mandatory turnover provision is that Wells Fargo would have violated the Bankruptcy Code had it *not* taken steps to block the debtor from the accounts and turn them over to the trustee.[14]

In discussing the automatic stay, the Middle District started by providing the Supreme Court's[5] definition of a bank account: a promise to pay from a bank to a depositor, not the physical holding of money belonging to a depositor.[16] The bank's freezing of the account, then, was a refusal to pay as promised, due to the fact that the debtor no longer possessed the authority to demand payment for accounts that were property of the estate, and, as a result, Wells Fargo could not be in violation of the automatic stay.[17]

The Court ruled that the debtor lacked standing to challenge the administrative freeze, rejecting the "inchoate interest" analysis of *Mwangi*, stating that standing could not arise out of an interest "in property claimed as exempt solely based on the claim of exemption." The Court could find no "injury in fact" caused by the bank towards the debtor as a result of the freeze, as the debtor had no authority over the accounts while they still were property of the estate.[18]

To conclude its opinion, the Court stated unequivocally that its holding should be applied only to chapter 7 cases, and that an administrative freeze on the accounts of a chapter 11 or 13 debtor probably would be a violation of the automatic stay. The distinction, according to the Court, is a fairly simple one: the purpose of chapter 7 cases is to liquidate property of the estate, whereas chapter 11 and 13 cases are predicated upon the notion that a debtor should retain at least some control over property of the estate.

Looking Forward

With *In re Young*, the Court validated the administrative freeze, a procedure which has proven a controversial topic in the bankruptcy world. So, while the Middle District has provided a bright-line ruling for now, it would seem unlikely that we have seen the last of litigation surrounding Wells Fargo's administrative freeze.

11 "…A debtor's mere claim of exemption for property does not cause it to cease being property of the estate until the exemption is allowed or until the time for objecting to the exemption under Bankruptcy Rule 4003 has expired." *Id* at 214.
12 *Id* at 215.
13 Bankruptcy Code section 542 makes turnover mandatory unless excused under Bankruptcy Code section 542(c), which excuses parties that take part in post-petition transfers so long as they don't possess any actual knowledge of the bankruptcy proceedings. Because the Bank was aware of the bankruptcy through its monitoring of the federal CM/ECF system, it was not immunized under section 542(c). Id at 216.
14 *Id.*
15 *Citizens Bank of Maryland v. Strumpf*, 516 U.S. 16 (1995).
16 *Id* at 217.
17 *Id.*
18 *Id.* at 218.

Robinson v. Tyson Foods, Inc.: Judicial Estoppel and the Continuing Duty to Disclose

by Roberto DeLeon, Fall 2010 Intern for U.S. Bankruptcy Court for the Middle District of Florida; J.D. Candidate 2011, Stetson University of Law

The 11th Circuit's decision in *Robinson v. Tyson Foods, Inc.*[1] should serve as a solemn reminder of the potential consequences of a failure to continually disclose any potential assets which may vest in the debtor while a Chapter 13 case is still open. Judicial estoppel has long been used to prevent debtors from asserting rights in property after a bankruptcy case has closed in which the debtor failed to schedule such property.[2] Bankruptcy's heightened disclosure requirements and the survival after bankruptcy of many pre-petition relationships, combine to make bankruptcy representations a particularly fruitful source of judicial estoppel.[3] Judicial Estoppel can be used not only to dismiss ones bankruptcy case , but also to prevent other unrelated suits which may arise long after the bankruptcy has been filed from ever being heard on their merits.[5]

Robinson involves a woman who, during the administration of her Chapter 13 plan, brought an action against her former employer alleging unlawful employment practices and mistreatment on the basis of race.[6] However, the debtor failed to amend her schedules to include the potential claim. The debtor completed her plan nearly a year later, repaying all her debts and thereafter received a full discharge.[7] Two months after she received her discharge, the defendant employer moved for and was granted summary judgment on the basis of judicial estoppel.[8]

Judicial estoppel is used to protect the integrity of the judicial process by prohibiting parties from changing positions according to the exigencies of the moment.[9] In order to find that judicial estoppel should result in summary judgment against the debtor, the court looked at three factors to inform their decision: (1) whether the present position is clearly inconsistent with the earlier position; (2) whether the party succeeded in persuading a court to accept the earlier positions, so that judicial acceptance of the inconsistent position in a later proceeding would create the perception that either the first or second court was misled and; (3) whether the party advancing the inconsistent position would derive an unfair advantage.[10] In order to find that the debtor had taken a present position inconsistent with an earlier position, the court needed to find a continuing duty to disclose changes in her bankruptcy asset schedule, otherwise the position would only be inconsistent if the claim existed at the time of the filing.[11] The court adopted the holding that the duty to disclose does not end once the schedules are filed with the bankruptcy court, but rather continues and must be amended if circumstances change.[12]

Beyond these factors, the 11th circuit also required intentional contradictions intended to make a mockery of the judicial system.[13] While the court recognizes that simple error or inadvertence of the debtor would not give rise to the doctrine of judicial estoppel, intent may be

continued on p. 15

1 595 F.3d 1269 (11th Cir. 2010).
2 First National Bank v. Laseter, 196 U.S. 115, 119 (1905).
3 Benjamin J. Vernia, J.D., Judicial Estoppel of Subsequent Action Based on Statements, Positions, or Omissions as to Claim or Interest in Bankruptcy Proceeding, 85 A.L.R.5th 353 (2001).
4 Yerk v. People for the Ethical Treatment of Animals, 2010 WL 3746815 (M.D. Fla. 2010).
5 Robinson v. Tyson Foods, Inc., 595 F.3d 1269 (11th Cir. 2010).
6 Id. at 1272.
7 Id.
8 Id. at 1272-1273.
9 Id. at 1273 (citing New Hampshire v. Maine, 532 U.S. 742, 749 (2001)).
10 Id. at 1273.
11 Id. at 1274.
12 Id.
13 Id. 1275.

Robinson v. Tyson Foods
continued from p. 14

inferred from the record.[14] The court in *Robinson* found such intentional contradictions by implying a motive rooted in the fact that the debtor could have kept the proceeds for herself and could have denied the creditors an opportunity to claim what was rightfully theirs.[15] The debtor had, by failing to amend her schedules to include her claim against her former employer, essentially tried to have her cake and eat it too, and the court was not going stand for it.

The circumstances in *Robinson* are far from rare and the use of judicial estoppel has already proven to be an especially sharp sword with which to attack potential lawsuits, especially by employers against discrimination suits.[16] Despite any injustice which may occur to the debtors in these circumstances, courts have shown a repeated inclination toward applying judicial estoppel to stop these suits from being heard on their merits. Protection for the integrity of the judicial process appears to trump any injustice which may occur to a former debtor. As such, any bankruptcy petitioner must keep in mind and inform clients of not only the consequences of failing to schedule current assets, but also the disastrous consequences which may befall clients in the future for failing to amend their schedules to include claims or assets which often the clients may not even think of as property and which may arise long after the petition has been filed.

14 Id.
15 Id. at 1275 – 1276
16 Theresa M. Beiner & Robert B. Chapman, Take What You Can, Give Noting Back: Judicial Estoppel, Employment Discrimination, Bankruptcy, and Piracy in the Courts, 60 U. Miami L. Rev. 1 (October 2005).

Interim
Management: LITIGATION

...When litigation erupts between business partners and the prospect of a court appointed receiver looms, clients call on me to step in and take control of the business.

With over 30 years of "in the seat" experience in CEO, COO and CFO positions of companies ranging from Fortune 50 to small family businesses, I am well equipped to help your client succeed.

Certified Public Accountant
Certified Valuation Analyst
Member : AICPA, FICPA, ACG, TMA and NACVA

BILL MALONEY CONSULTING

Corporate Restructuring Services / Interim Management
Bankruptcy Advisory / Business Valuation / Expert Testimony

Tel: 727-215-4136
Fax: 813-200-3321
E-mail: bill.maloney@bmaloney.com
200 2nd Ave. South, #463
St. Petersburg, FL 33701

Bill Maloney, *President*

Check out my website to see what former clients have to say about their experiences at:

www.billmaloneyconsulting.com

Confirming an Individual Chapter 11 Plan and Satisfying Unsecured Creditors under §1129(a)(15)

by Stefan Beuge, Esq.

Prior to 2005, the disposable income test was confined to Chapter 13 cases only. BAPCPA rendered an individual Chapter 11 similar to a Chapter 13 case in some instances. For example, 11 U.S.C §1115 allows for certain post-petition assets to be deemed part of the estate. Additionally, the court in *In re Rodemeier* applied §1129(b)(2)(B)(ii) to except individual Chapter 11 debtors from the absolute priority rule.[1] However, in the Middle District of Florida, Judge Karen Jennemann reached a different conclusion. *See, In re Gelin*, holding "that the statutory amendments enacted by BAPCPA do not except individuals from the absolute priority rule in Chapter 11 cases."[2]

In addition to individual Chapter 11 cases being akin to Chapter 13 cases in certain respects, BAPCPA also added §1129(a)(15), which adopts the Chapter 13 disposable income test for individual Chapter 11 debtors. The test is only applied upon objection to confirmation by an unsecured creditor with an allowed unsecured claim that is not paid in full under the plan. §1129(a)(15) obligates the debtor to commit all "projected disposable income, as defined in §1325(b)(2), […] received during the 5-year period beginning on the date that the first payment is due under the plan, or during the period for which the plan provides payments, **whichever is longer**." (Emphasis added). This raises the question of how the period during which the plan must provide for payments to the objecting unsecured creditor is determined and how the disposable income is calculated in an individual Chapter 11.

Seemingly, the Chapter 11 disposable income test does not operate exactly like it would in a Chapter 13. Section 1129(a) cross-references §1325(b)(2), but not subsection (3). Omission of a reference to 1325(b)(3), which requires the debtor's expenses to be calculated on the basis of the standardized expenses formula of §707(b) where the debtor's currently monthly earning exceeds the median income, suggests that in a Chapter 11 case, the debtor's expenses are determined on the basis of actual, reasonably necessary expenditures. For instance, if an individual debtor-in-possession ("DIP") values undersecured claims on real estate investment properties to reflect the current market value of the properties, §1141(d)(5) obligates the DIP to devote his "disposable income" to the payment of the allowed unsecured claims of unsecured creditors, including the unsecured portions of the valued claims of the undersecured mortgage holders. Take, for instance, a debtor who files a plan with several investment properties, each of which have been valued and their claims treated as allowed unsecured claims to be paid over a period of 30 years. The plan, however, proposes to make payments to unsecured creditors over a five-year period. Upon objection by an unsecured creditor, arguably, §1129(a)(15)(B) would require the DIP to make payments of his "projected disposable income" over the 30-year period of the valued or modified mortgages. This would likely yield a significantly higher return to unsecured creditors than the *pro rata* return set forth in the plan. In the alternative, the unsecured creditors could argue that the debtor must contribute payments totaling his "projected disposable income," either based on post-petition operations or projections, over a span of 5 years, whereby the return to unsecured creditors would also likely be higher than the *pro rata* share. Finally, if the debtor were to make the same payment over the entire modified mortgage repayment period, unsecured creditors could essentially be paid in full.

In *Rodemeier*, the debtor's plan called for *pro rata* payments among the general unsecured creditors.[3] One unsecured creditor objected that §1129(a)(15)(B) had not been satisfied,[4] but the court determined

continued on p. 17

1 *See In re Rodemeier*, 374 B.R. 264, 275 (Bankr. D.Kan. 2007).
2 *See In re Gelin*, 437 B.R. 435 (Bankr. M.D. 2010).
3 374 B.R. at 268.

Confirming Individual Chapter 11 Plan

continued from p. 16

the contrary by finding that the debtor's disposable income was calculated to be $0, and therefore, satisfied the confirmation requirement because the debtor had no disposable income to pay the unsecured creditor.[5] Moreover, §1325(b)(1)(B) prevents a court from approving a Chapter 13 plan if an unsecured claimant objects to confirmation unless the plan provides for payment in full, or provides that all projected disposable income "to be received in the applicable commitment period" will be applied to make payments to unsecured creditors. While the language is almost identical to §1129(a)(15)(B), most courts have adopted a forward-looking approach[6] and concluded that the "applicable commitment period" is a temporal requirement requiring debtors to repay the maximum they could afford.[7]

The applicable commitment period was at issue before the court in *In re Fredrickson*. The debtor in *Fredrickson* was an above-the-median debtor with negative disposable income. The question before the court was whether the applicable commitment period was to be the life of the plan (five years) or a shorter span due to the negative disposable income.[8] The *Frederickson* court disallowed the debtor's plan to confirm because the plan provided for payments to unsecured creditors for 48 months rather than the full five years. Following this reasoning, one could argue that the "applicable commitment period" obligates the debtor to provide for payments of "projected disposable income" to unsecured creditors for the duration of the plan. In a Chapter 11 case, a debtor may propose to stretch out his mortgage obligation to 30 years.[9] However, reading a strict temporal requirement into §1129(a)(15)(B) adheres to the §1325(b)(1)(B) corollary and also follows Congress's clear mandate in directing above-median income individual debtors to repay as much unsecured debt as possible. Therefore, an election of a 30-year long repayment of a valued property should lock debtors into a repayment period of equivalent length with respect to unsecured creditors, upon an objection by an unsecured creditor. Where debtors derive an apparent benefit from a lengthy plan, unsecured creditors ought to be entitled by statute to receive payments equaling the projected disposable income during the entire life of the plan or until the unsecured creditors are repaid in full, whichever occurs first.[10]

4 *Id.* at 271.
5 *Id.* at 273.
6 *See In re Boyd*, 414 B.R. 223, 231 (Bankr. N.D. Ohio, 2009).
7 *See In re Frederickson*, 545 F.3d 652, 652 – 660 (8th Cir. 2008).
8 *Id.*
9 *See, e.g., In re Mulberry Agricultural Enterprises Inc.*, 113 B.R. 30 (D. Kan. 1990) (discussing stretch-out mortgage terms under Ch 11 plan); *In re Snider Farms Inc.*, 83 B.R. 977, 999 (Bankr. N.D. Ind. 1988) (holding that stretch-out of loan secured by mortgage to make plan payment period 30 years would not be unreasonable).
10 Daniel W. Sklar and Holly J. Kilibarda, §1129(a)(15): What's an Individual Debtor to Do?, XXVIII ABI Journal 6, cover, 62-64, July/August 2009).

TBBBA Holiday Party

The 2010 TBBBA Holiday Party was held on Thursday, December 9th, at Spain Restaurant in Downtown Tampa.

Don't Miss
the 35th Annual
Paskay Bankruptcy Seminar
in March!

The 35th Annual Judge Alexander L. Paskay Seminar will be held on March 10 – 12, 2011, at the Tampa Marriott Waterside in Tampa, Fla. The event includes a nuts and bolts programs, concurrent tracks with national speakers and fun optional events including a Yankees spring training game. Thirteen bankruptcy judges from around the country are on the faculty. Included with registration is your choice of either Reaffirmation Agreements in Consumer Bankruptcy Cases, Second Edition or Bankruptcy Issues for Commercial Landlords, Tenants and Mortgagees, Second Edition. Attendees have the opportunity to earn 15.25 hours of CLE credit, including 1 hour of ethics! To see the full program, visit http://www.abiworld.org/SP11/.

WE SPECIALIZE IN:

PRE AND POST BANKRUPTCY SHORT SALE LIQUIDATION

WHY SHORT SALE IN A CHAPTER 7?

-SENSE OF CLOSURE (PERSONAL RESPONSIBILITY)
-NO FORECLOSURE ON CREDIT REPORT
-USUALLY NO NEGATIVE TAX IMPLICATIONS

WE HELP YOU STAY IN CONTROL AND IN COMMUNICATION WITH THE BANK DURING THE WHOLE FORECLOSURE PROCESS!

EXPERIENCED NEGOTIATORS ON STAFF TO HELP YOUR CLIENTS
NO FEES TO YOUR CLIENT

1(866)577-8047

4100 WEST KENNEDY BLVD. SUITE 312 ,TAMPA, FL 33609
WWW.QUICKSILVERREALESTATE.COM

Paying the Supreme Court's Ransom: New Developments in Means Test Calculations

by Jacob L. Bair, Esq.

The Decision

On January 11, 2011, the US Supreme Court handed down a decision in *Ransom v. FIA Card Services, N.A., fka MBNA America Bank, N.A., No. 09-907.* Ransom involves an over-median-income debtor in a Chapter 13 case who claimed standard vehicle-ownership (Lines 28, 29) and vehicle-operation (Line 27A) expenses as part of his disposable income calculation (Form B22C). The debtor's vehicle was free and clear of liens and an unsecured creditor in the case objected to his claim of vehicle-ownership deduction. The bankruptcy court upheld the objection reasoning that a debtor should not be permitted to claim a vehicle-ownership deduction on a vehicle with no lien payment. The Ninth Circuit Appellate Panel and the Ninth Circuit upheld that decision. The question was then taken up by the U.S. Supreme Court which ruled 8-1 to uphold the decision of the Ninth Circuit to wit: a Chapter 13 debtor who does not make loan or lease payments may not take the car-ownership deduction.

The Results

As a result of the decision in *Ransom*, all new Chapter 13 cases in which debtors own vehicles free and clear of liens may not include a vehicle-ownership cost as part of the disposable income calculation of Form B22C. In addition, any filed but unconfirmed Chapter 13 cases may be subject to change in the disposable income calculation.

Like the other standards on the means test, the vehicle-ownership expense continues to be a black and white proposal: debtors either qualify for the whole thing or they qualify for nothing at all. Even cars with small liens against them will qualify for the full vehicle-ownership expense of $496.00 per month. Something for a debtor's attorney to consider now is whether it would be in the best interest of his client to trade a free and clear vehicle for one with a lien or to obtain a title loan in order to reduce monthly disposable income.

However, since debtors' attorneys have been designated "debt relief agencies" (see *Milavetz, Gallop & Milavetz, P. A., et al. v. United States*, No. 08–1119), they are not permitted to "advise an assisted person or prospective assisted person to incur more debt…" (11 U.S.C. 526 (a)(4)). This will present a delicate balance for debtors' attorneys between making clients fully aware of all legal options that would be in their best interest and following the edict of the code not to advise clients or prospective clients to incur more debt.

Potential Repercussions

There is some potential for the application of this decision to expand from Chapter 13 debtors only to both Chapter 7 and 13 debtors. This application has the potential to push a number of cases from Chapter 7 to Chapter 13. In addition, Chapter 13 cases in which a debtor does not have a car payment but subsequently purchases a financed vehicle during the life of the case will have to be modified to reflect this new expense. Subsequently, this could lead to a slew of Motions to Modify Confirmed Plans to reduce the distribution to unsecured creditors.

While We Know Florida's Offer of Judgment Statute May Apply in Federal Court, Does Florida's Offer of Judgment Procedural Rule Apply?

by Camille J. Iurillo and Gina M. Pellegrino of ***Iurillo & Associates, P.A.****, located in downtown St. Petersburg*

Scenario: A defendant files an offer of judgment in federal court, pursuant to Florida's offer of judgment statute, Fla. Stat. § 768.79, and Florida's offer of judgment civil procedure rule, Fla. R. Civ. P. 1.442. The plaintiff rejects the defendant's offer of judgment. Thereafter, a judgment of no liability is entered in favor of the defendant. The defendant files a motion seeking to recover attorneys' fees and costs under section 768.79. The plaintiff then objects to the defendant's motion, arguing that the defendant's offer of judgment did not comply with Rule 1.442. Does Florida's offer of judgment civil procedure rule, Fla. R. Civ. P. 1.442, apply in federal court, and therefore, does a federal court even need to consider any argument based on Rule 1.442?

Fla. Stat. § 768.79 provides, in pertinent part, that "[i]n any civil action for damages filed in the courts of this state, if a defendant files an offer of judgment which is not accepted by the plaintiff…the defendant shall be entitled to recover reasonable costs and attorney's fees…if the judgment is one of no liability or the judgment obtained by the plaintiff is at least 25 percent less than such offer." Fla. Stat. § 768.79(1). Florida has also adopted a rule of civil procedure, Rule 1.442, which establishes additional requirements as to the form and content of an offer of judgment that are not set forth in section 768.79 of the Florida Statutes.

According to the pertinent case law, federal courts in diversity cases must apply the law of the forum state to any substantive issues and must apply federal law to any procedural issues. *See, Tiara Condominium Ass'n, Inc. v. Marsh USA, Inc.*, 697 F.Supp.2d 1349, 1357 (S.D. Fla. 2010). Pursuant to the Eleventh Circuit, section 768.79 of the Florida Statutes is substantive in nature and therefore applicable in federal court. *See, McMahan v. Toto*, 311 F.3d 1077, 1081 (11th Cir. 2002). Thus, while the case law is clear that section 768.79 of the Florida Statutes applies in federal court, the case law is not as definitive with respect to whether Rule 1.442 applies in federal court.

Several cases have discussed whether Rule 1.442 is procedural or substantive in nature. If Rule 1.442 is deemed procedural then it likely does not apply in federal court and if it is deemed substantive then it arguably applies in federal court. The Fourth District Court of Appeal has stated that section 768.79 of the Florida Statutes provides "the substantive law concerning proposals for settlement while Rule 1.442…provides its procedural mechanism." *Saenz v. Campos*, 967 So.2d 1114, 1116 (Fla. 4th DCA 2007).

However, it appears from the relevant case law that Rule 1.442 is not purely procedural and does have at least some substantive aspects which are applicable in federal court. The Supreme Court of Florida has noted that both section 768.79 and Rule 1.442 contain substantive and procedural portions. *See, Campbell v. Goldman*, 959 So.2d 223, 227 (Fla. 2007).

Furthermore, the Middle District of Florida has held that a portion of Rule 1.442 is substantive in nature, specifically discussing Rule 1.442(f), which permits an extension of time for a plaintiff to accept an offer of judgment made in a class action case. *See, Owner-Operator Indep. Drivers Assoc., Inc. v. 4 Points Logistics, LLC*, 2007 WL 2789265, 3 (M.D. Fla. 2007).

Moreover, in *McMahan*, the Eleventh Circuit construed Rule 1.442 as substantive in nature by applying it to a claim in federal court where Florida law was applicable. In *McMahan*, the defendant proposed an offer of judgment that the plaintiff rejected, the defendant was awarded attorney's fees and costs, and the plaintiff objected arguing that the defendant's offer of judgment

continued on p. 22

While We Know...

continued from p. 21

was defective because the offer failed to comply with Rule 1.442(c)(2)(E) as it did not state with particularity the amount of the claim for punitive damages. The Court in McMahan substantively applied Rule 1.442 in concluding that the defendant's offer of judgment was valid. *See, McMahan*, 311 F.3d at 1081-3.

Rule 1.442 has also been applied by the Bankruptcy Court in the Middle District of Florida. In *In re Auffant*, 274 B.R. 554 (Bankr. M.D. Fla. 2002), a debtor sued her insurer, pre-petition, in state court following the insurer's denial of the debtor's theft loss claim. The insurer served an offer of judgment, pursuant to section 768.79 and Rule 1.442, which the debtor rejected. A judgment of no liability was entered in favor of the insurer and the jury found that the debtor intentionally misrepresented material facts as to the theft loss she incurred. Thereafter, the insurer filed a motion seeking recovery of its attorney's fees. The debtor filed bankruptcy on the eve of the hearing on attorney's fees. Post-petition, the insurer filed an adversary proceeding against the debtor, seeking a determination that the attorney's fees and costs owed by the debtor to the insurer were non-dischargeable. The Bankruptcy Court held that the debtor's conduct was willful and malicious; therefore, pursuant to section 523(a)(6) of the Bankruptcy Code, the attorney's fees were deemed non-dischargeable. *See, In re Auffant*, 268 B.R. 689 (Bankr. M.D. Fla. 2001). The debtor then argued to the Bankruptcy Court that the offer of judgment proposed by the insurer in state court was invalid under Rule 1.442 because it required the debtor to execute a general release containing the following language "any and all claims and demands of whatever nature which [debtor] holds or may hold, known or unknown," and therefore, failed to state with particularity the relevant conditions and nonmonetary terms. *In re Auffant*, 274 B.R. at 558. Rule 1.442 specifically provides that an offer of judgment must state with particularity any relevant conditions and nonmonetary terms. See, Fla. R. Civ. P. 1.442(c)(2)(C) and (D). The Bankruptcy Court in *Auffant* disagreed with the debtor, and determined that the offer of judgment proposed by the insurer, containing the general release, was valid and consistent with the plain meaning of Rule 1.442. *See, In re Auffant*, 274 B.R. at 559-60.

This article is intended only as a starting point with respect to discussing the applicability of Florida's offer of judgment civil procedure rule in federal court and an exhaustive discussion of all case law is beyond the scope of this article. In addition, the question remains whether Florida's offer of judgment civil procedure rule is applicable to litigation initiated in bankruptcy court with no prior state court litigation involving an offer of judgment proposal.

Experiencing Financial Difficulties? What You Can Do Today to Ensure the Future Success of Your Company

About the Author:
Charles Fultz is a Vice President of Farlie Turner & Co., a Fort Lauderdale, Florida-based investment banking firm that offers capital raising, restructuring, merger and acquisition advisory services.

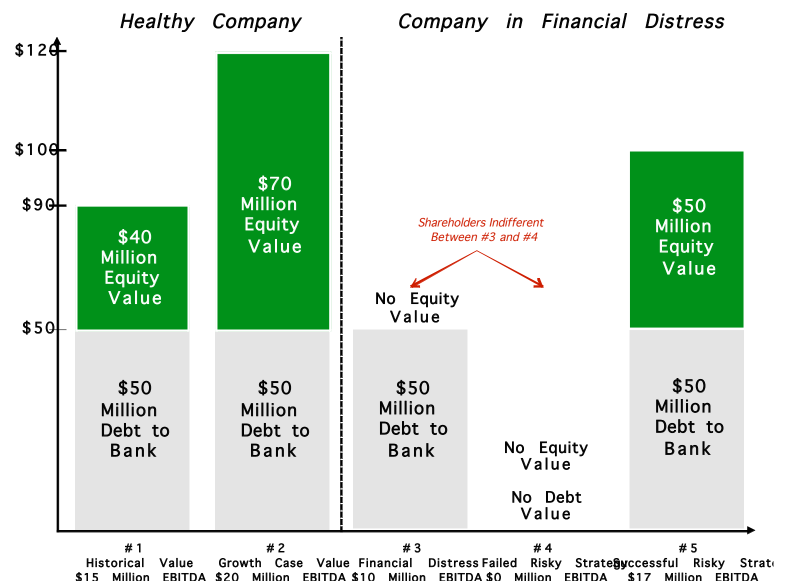
The Zone of Insolvency – The Reason Why Your Bank Isn't Listening to You Anymore

Is the bank that you've been with for many years turning a deaf ear to your restructuring plans, no matter how viable the plans may be? Has your loan been moved to a new "workout" or "special situations" department? It is important to understand that lenders and company shareholders have very different interests when a company encounters financial difficulty. The owners of the equity are known as a residual claimant – when all other debts are paid off, they get the residual value. The bank on the other hand has written a call option on the company – they get value up to the amount of their debt – and leave all value above that amount for the residual claimant. Because of these different positions, the debt and equity holders can have very dissimilar motivations when difficulties are encountered, with the bank's desire to preserve value at odds with shareholders' aspirations to increase value above the amount of the bank's debt, outlined below.

For example, say that Conservation Bank has $50 million in debt outstanding with a sporting goods manufacturer specializing in hockey equipment, that has historically generated $15 million in EBITDA each year. Hockey Stick Manufacturing might have a value of six times the $15 million in EBITDA, or roughly $90 million. In this case, there is little cause for concern as there is approximately $40 million in equity value ($90 million in total value less the $50 million in debt). If Hockey Stick Manufacturing continues to grow, say to $20 million in cash flow and $120 million in total value, all of the incremental value accrues to the equity/shareholders – the debt holders still only have their $50 million of value.

However, say that the cash flow declines to $10 million and that Hockey Stick Manufacturing is trending downward. The company may only be worth five times EBITDA, or $50 million. At this point, the bank is no worse off than when the company was worth $120 million. However, Conservation Bank knows that the residual claimants, or equity holders, have an incentive to make Hockey Stick Manufacturing worth more. Under normal circumstances this works to benefit both parties as the bank may lend more money to finance growth in the business and their debt is further "in the money." Conversely, this situation lends itself to excessive risk taking by the equity holders as they have nothing to lose – their equity value is now $0 – the entire $50 million of value goes to the bank. Thus, rather than give Hockey Stick Manufacturing back to Conservation Bank at the $50 million that it is worth, the equity holders would be inclined to make risky bets to increase the value of the company (i.e., entering new and unproven product lines, opening up new geographies in unknown markets, significantly adding to the size of the salesforce, etc.). At the extreme, the shareholders would be better off checking into the MGM casino in Las Vegas, and placing $50 million dollars on black at the roulette wheel. If the ball bounces the right way they will have $100 million dollars – they can give the bank their $50 million and keep $50 million for themselves. If the ball lands on red, they are no worse off than before – their equity is still worth $0. You can obviously see where the bank would have an issue with this behavior as they stand to have their investment go from the full value of $50 million to $0 very quickly.

Figure 1: Differing Equity and Debt Holder Interests



continued on p. 22

Experiencing Financial Difficulties?

continued from p. 23

Note that equity holders are no worse off in scenario #3 than if a risky strategy fails to work as in scenario #4. However, the bank stands to lose the entire value of its outstanding debt if a strategy fails when under financial distress.

The above is an extreme example to highlight the different incentives and motivations of equity and debt holders as a company experiences financial distress. Often, management will want more capital to expand product lines, services and geographies in a genuine attempt to build value. They do not understand why the bank isn't up for their plans to build value. The key is what is outlined above – the shareholders no longer bear the downside risk to their decisions – the downside risk is borne solely by the bank. Conversely, all upside goes to the shareholders. For this reason, a company's board of directors should be aware that its fiduciary duties may shift from acting in the best interest of shareholders to acting in the best interests of all constituents – including creditors – as a company enters the zone of insolvency or becomes insolvent.

You can now see why the bank may be distrustful as a company enters financial difficulty. Likewise, you can also see why the bank may seem to act "irrationally" – no longer interested in new products, customers or geographies. Put simply, in this situation things can't get better for the bank, only worse, and they would just as soon sell the company for the value of their debt and call it a day.

What You Can Do to Prevent the Bank from Taking Over Control of Your Company

#1 Review Loan Documentation

There is an age-old truism that "bad loans are made during good times." Covenants are a way for a bank to monitor a loan's performance – setting up automatic alerts similar to your car's yellow "check engine" light that warns of trouble. Contractual restrictions placed on the company when it borrowed cash from the bank, covenants set up minimum standards and regulate the company's activity if they are violated. If you violate a covenant, the bank may have several alternatives, including:

- Increasing the cost of debt through higher interest rates and fees
- Accelerating the maturity of the loan
- Starting a negotiated restructuring
- Imposing additional constraints as the bank sees fit (i.e., putting a Chief Restructuring Officer ("CRO") in place, restricting the use of cash, etc.)
- Forcing the company into bankruptcy

Understand that a covenant default may be a sign of serious trouble or a forewarning "canary in a coalmine," alerting of things to come. The course of action that the bank chooses will largely depend on which of the aforementioned events they believe is taking place. You have the ability to influence whether they believe the company is headed for disaster, or is simply passing over a bump in the road.

One of the first steps that you can take to ensure that you do not encounter a liquidity crisis is to read your loan documentation, if possible with the help of counsel. Often, the first sign of trouble that a business owner or CEO encounters is that the company has "tripped a covenant." Blindsided by the default and unfamiliar with what is going on, the business owner is slow to react and misses the opportunity to get the company back on course. By becoming familiar with the terms of your credit facility you will be able to anticipate any such violations. Knowing the covenants and proactively reaching out to the bank can enable you to maintain good relations and mitigate interest rate increases, maturity acceleration, etc. If forewarned, the bank may feel that the company has a good handle on the situation and that management will be able to navigate the company through crisis. Without forewarning, the bank may develop feelings of distrust for the management team – both in their ability to lead the company and in their desire to keep the bank informed (again, think Vegas).

Once you have the required loan documents, determine what the covenants are and lay them out in a spreadsheet. Monitored weekly/monthly, this spreadsheet can foretell when you may encounter difficulties with the bank. Note that there are two types of covenants – affirmative and negative covenants. An affirmative covenant requires the company to maintain certain obligations such as providing updated financials, paying taxes as they come due and keeping adequate insurance levels. It is not the affirmative covenants, but rather negative covenants, that typically get a company into trouble. Negative covenants restrain the borrower from taking certain

continued on p. 25

Experiencing Financial Difficulties?
continued from p. 24

actions such as spending cash on capital expenditures, increasing management salaries or paying dividends. They also include financial covenants where the borrower has promised to meet certain tests. These financial covenants are often where companies first run into trouble. Some common debt covenants that you may want to watch out for are outlined below:

- Minimum net worth – has the company maintained its assets relative to liabilities?
- Earnings – have the company's earnings simply fallen below a predetermined threshold?
- Debt to EBITDA – has EBITDA declined to a point where debt may be five, six or more times the annual EBITDA?
- Fixed charges coverage ratio – will the company be able to generate enough free cash to make its interest payments?

Figure 2: Example of Management's Covenant-Watch Dashboard

		3 Years Ago		2 Years Ago		1 Year Ago		Today
Minimum Net Worth	$	40,000,000	$	45,000,000	$	39,000,000	$	33,000,0
Debt Outstanding	$	50,000,000	$	50,000,000	$	50,000,000	$	50,000,0
EBITDA	$	14,500,000	$	16,000,000	$	13,000,000	$	9,050,0
Debt to EBITDA		3.45x		3.13x		3.85x		5.52
Fixed Charge Ratio		1.25x		1.37x		1.12x		.95

#2 Communicate with Your Lender

First, make sure you put together a financial forecast that shows what you believe the debt covenants will be in the coming weeks, months and years. Next, constantly communicate this along with high-level sales, EBITDA and working capital (accounts receivable, inventory and accounts payable) projections to the bank. This will reassure them that you are not harboring plans for that late night flight to Vegas.

If you have heard of a Chief Restructuring Officer coming into a competitor, it is likely because they didn't communicate with their lender. Yes, the bank may say that the CRO will improve profitability or help to salvage the business, but a key reason for placing a CRO at a company is to ensure that someone trustworthy is looking out after that $50 million of value and that the value isn't being used to pursue risky alternatives. You can do much of this watchdog role by providing the bank with thoughtful projections that give them comfort with the fact that the management team has a handle on the situation and is proactively addressing potential concerns.

#3 Refinance the Outstanding Debt

In past recessions, companies have often found other lenders willing to refinance their debt. Unfortunately, right now, it is a difficult environment to refinance. As you are probably all too familiar with, the newspaper is flooded with articles detailing the ravishing effects of the liquidity crunch. Rare is the company that is able to refinance its debt. One alternative is to seek a debt and equity combination capital raise. Under this plan of action, a company seeks both debt and equity to solve its liquidity needs. Typically conducted with the help of an experienced investment banker, this solution may entail current shareholders substantially diluting their equity, but is an attractive alternative to a distressed sale or bankruptcy down the road.

#4 Alternative Solutions

If you are truly overlevered, ask the bank if they are willing to swap a portion of their debt for equity. Although this is not often the preferred route, a bank will sometimes do this if they believe in the turnaround plan that management has set forth. Now that the bank is an owner of the equity as well as the debt, some of the conflicts outlined earlier are eliminated – the bank now shares in the upside as well as the downside. By the very nature of the conversion, the equity is worth little – don't be surprised if the bank is asking for a large portion of the equity. This is why bankruptcy is soon an alternative if there is little equity value and the bank prefers hard cash to paper shares.

#5 Maximize Cash Flow

Through all of this, managers should obviously keep an eye towards maximizing cash flow. An important distinction here is that they should be managing cash – not the paper profits and losses of an income statement. Experienced turnaround practitioners are all too familiar

continued on p. 26

Experiencing Financial Difficulties?

continued from p. 25

with the company that had a turnaround plan to generate fantastic earnings over the course of a year, only to find themselves shutting their doors or entering bankruptcy because, despite a bright future, the company ran into a situation where they didn't have enough cash to pay interest, principal amortization and payroll despite a big sale that was just 30 days away (a more heartbreaking version is when the big sale has already been made but the customer takes 90 days to pay for it, leaving the company without the cash it needs). Remember, you can't use great upside potential to make interest payments and payroll. Think critically about sources of cash:

- Does the company own unencumbered real estate that could be sold quickly in a sale-leaseback transaction?
- Can the company more aggressively collect receivables from its customers?
- Can it succeed in coming weeks without paying vendors as customarily due (this strategy often works when a CEO or President gets on the phone with the vendor versus the accounts payable department – an unpleasant but often successful endeavor)?
- Can the company conduct a discounting program, warehouse sale, service line discount, etc. to reduce inventory levels and generate needed cash, albeit at margins that are unsustainable over the long term?
- What non-essential personnel can be eliminated quickly to reduce payroll?
- Can the company divest any non-core assets or divisions without impairing the bank's position?
- Will the bank allow for an extended principal repayment plan?

#6 Seek Professional Advice

Often, shareholders are tempted to invest their own additional cash into the business. They may also be getting pressure from the bank to do so. Think carefully before doing this. If the value of your business has deteriorated to $30 million and the bank is owed $50 million, it may not be wise to invest cash into the business. This cash will likely be "behind" the bank's $50 million and will only serve to reduce their outstanding position (assuming that there are no personal shareholder guarantees on the debt). However, in a small minority of cases, it may be just the thing that gets the company through a difficult bind and back on the road to recovery.

In this situation, and often any time that a company is experiencing financial difficulties, it may be best to seek expert advice. By assembling a team of professionals – accountants, lawyers, turnaround professionals and investment bankers that have been there many times before – you are far more likely to endure the financial troubles and either put your firm back on the road to recovery or maximize value for shareholders.

A company in financial distress is a tough situation for all of those involved, especially owners that have a majority of their net worth and life's effort invested in the business. Through all of this, keep in mind that the bank is not, and has no interest in becoming, an operator of companies. The general assumption used by banks is that the best team to lead a company through financial difficulty is the team that is currently in place. By taking the aforementioned actions, you can demonstrate to your bank that this is in fact the case, preserving future value for the company's shareholders.

Proposed Amendments to the Federal Rules of Bankruptcy Procedure & Official Forms

by Lindsay Galloway, Esq.

The Judicial Conference's Advisory Committee on Bankruptcy Rules has proposed amendments to various bankruptcy rules and forms that are currently open for public comment. The full text of the proposed amendments can be found at www.uscourts.gov/RulesAndPolicies/FederalRulemaking/PublishedRules. The proposed rule amendments, after public comment and approval by the necessary bodies, are set to take effect on December 1, 2012. The proposed form amendments, after public comment and approval by the necessary bodies, are set to take effect on December 1, 2011.

The following is a summary of the proposed amendments:

The proposed amendments to Rule 3001 require creditors to provide certain information when a claim is based on an open-end or revolving consumer credit agreement, including: (1) the name of the entity from whom the creditor purchased the account; (2) the name of the entity to whom the debt was owed at the time of the last transaction on the account by an account holder; (3) the date of the last transaction on the account by an account holder; (4) the date of the last payment on the account; and (5) the date on which the account was charged to profit or loss. Additionally, upon written request, the holder of such a claim must provide the above information to a party in interest. This disclosure is intended to assist the debtor in associating the claim with a known account, and provide a basis for assessing the timeliness of the claim.

The proposed amendments to Rule 7054 extend the time for notice to a party of costs taxed by the clerk from one day to fourteen days. Additionally it increases the time to serve a motion objecting to the clerk's action from five days to seven days.

The proposed amendments to Rule 7056 sets the deadline for serving a motion for summary judgment at thirty days before the initial date set for an evidentiary hearing on any issue for which summary judgment is sought, unless altered by local rule or court orders. This is shorter than the time provided in Fed. R. Civ. P. 56 which sets the deadline at thirty days after the close of discovery.

The proposed amendments to Official Form 10 require more information on the interest rate specified by secured creditors, clarify the requirement to attach supporting redacted documents, add space for a uniform claim identifier and emphasizes the duty to provide true and accurate information. The proposed amendments also add a new attachment, Attachment A, and two new supplements, Supplement 1 and Supplement 2. Attachment A provides for the mortgagee to itemize all prepetition interest, fees, expenses and charges asserted in the claim, and provides for a statement of the amount necessary to cure any default. Supplements 1 and 2 implement Rule 3002.1

The deadline for public comment on the proposed amendments is February 16, 2011, and comments may be submitted electronically to Rules_Comments@ao.uscourts.gov or in hard copy to the Secretary of the Committee on Rules of Practice and Procedure, Administrative Office of the United States Courts, Washington, D.C. 20544. Public hearings on the proposed amendments are set for January 7, 2011 in San Francisco, CA and February 4, 2011 in Washington, DC. If a member of the public wishes to testify at the public hearing notice must be received by the Committee Secretary, at the above address, at least thirty days before the scheduled hearing.

Johnson Transcription Service

For one-stop shopping for all of your bankruptcy transcription needs, call Johnson Transcription Service. Now transcribing digitally recorded 341 meetings and hearings in Bankruptcy Court. Government-established page rates honored on preparation of 341 meeting transcripts. JTS is certified by the A.O. of the U.S. Courts to transcribe electronically recorded hearings.

For complete court reporting services call upon our professional and friendly staff.

Kimberley S. Johnson

Telephone: (813) 920-1466
Facsimile: (813) 920-0800
Email address: kgjjts@aol.com

7702 Cypress Lake Drive
Odessa, Florida 33556

The Cramdown
4301 Anchor Plaza Parkway, Suite 300
Tampa, FL 33634