The Cramdown

The Newsletter of the Tampa Bay Bankruptcy Bar Association

Editor-in-Chief, Keith Appleby, Esq., Fowler White Boggs P.A. **Spring 2010**

PRESIDENT'S MESSAGE

by Luis Martinez-Monfort, Esq.
Gardner Brewer
Martinez-Monfort

On March 11, 2010, I, along with Elena Ketchum and Brad Hissing, had the distinct pleasure of receiving, on behalf of the Tampa Bay Bankruptcy Bar Association, the award for the Outstanding Pro-Bono Service By a Volunteer Bar Association. The award is given by the Thirteenth Judicial Circuit's pro-bono program, H.A.V.E. a Heart, the Bay Area Volunteer Lawyers' Program and the Hillsborough County Bar Association an a yearly basis recognizing the association that has made exceptional pro bono contributions to our community.

The award was given to our Association because of its development of the video, "What is Bankruptcy." The video was funded by a grant from the Florida Bar Foundation and was created to educate the general public as to what bankruptcy is and its potential ability to assist them with their financial problems. It is available in English, Spanish and Creole and can be viewed directly off of the Bankruptcy Court's website (www.flmb.uscourts.gov/bankruptcybasics). Although the bulk of the work for the video was generated by the Association through a committee comprised of Shirley Arcuri, Elena Ketchum, Ed Whitson, Frank Principe, Kelley Petry, Pat Tinker, Sheila Seig, Lynn Sherman, and Deputy-in-Charge Charles G. Kilcoyne - the Association worked in conjunction with Bay Area Legal Services, the Florida and the United States Bankruptcy Court for the Middle District of Florida.

The screenplay for the video was primarily written by Judge Catherine Peek McEwen and is narrated by local news anchor, Gayle Sierens, who volunteered her time without charge. The video features a collection of local bankruptcy attorneys, bankruptcy court personnel and judges that help navigate the viewer through the multiple different stages of a bankruptcy case. The following is a list of the various "actors" who participated in the video: Chief Bankruptcy Judge, Paul M. Glenn; Bankruptcy Judge Michael G. Williamson; Chapter 7 Trustee, Carolyn Chaney, Charo Vargas, Tim Sierra, Karla Powell, Raymond Waguespack, Stephanie Sivio, Herb Donica, Barry Clark. Court security officers, Bankruptcy Court staff, and Paula Luce.

Once again, special thanks to all those who worked so hard to put the video together (hopefully I mentioned everyone) and a general thanks to all of you that continue to carry forth our Association's commitment to providing quality pro bono legal services to our community.

Inside This Issue

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

The Tampa Bay Bankruptcy Bar Association
2009-2010
Officers and Directors

President:
Luis Martinez-Monfort
Gardner Brewer Martinez-Monfort
400 N. Tampa St. Suite 2600
Tampa, Florida 33602
lmmonfort@gbmmlaw.com
813-221-9600

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

Secretary:
Kelley Petry
Kelley M. Petry, P.A.
Post Office Box 7866
Tampa, Florida 33673-7866
kmpetrypa@aol.com
813-239-0713

Treasurer:
Lara Roeske Fernandez
Trenam, Kemker, Scharf, Barkin, Frye, O'Neill & Mullis, P.A.
2700 Bank of America Plaza
101 East Kennedy Boulevard
Tampa, Florida 33602-1102
lrfernandez@trenam.com
813-223-7474

Chair:
Donald Kirk
Fowler White Boggs
501 E. Kennedy Blvd.
Tampa, Florida 33602
dkirk@fowlerwhite.com
813-222-2022

CLE Chairs:
Stephenie Biernacki Anthony
Gray Robinson, P.A.
Post Office Box 3324
Tampa, Florida 33602
stephenie.anthony@gray-robinson.com
813-273-5000

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

Community Service:
Michael C. Markham
Johnson Pope Bokor Ruppel & Burns, P.A.
911 Chestnut Street
Clearwater, Florida 33756
727-934-1384
mikem@jpfirm.com

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

Judicial Liaison:
Cynthia A. Burnette
Office of U.S. Trustee
501 E. Polk St. Suite 1200
Tampa, Florida 33602
cindy.p.burnette@usdoj.gov
813-228-2000

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

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

Technology:
Adam Lawton Alpert
Bush Ross, P.A.
Post Office Box 3913
Tampa, Florida 33601
aalpert@bushross.com
813-224-9255

Cramdown:
Keith Appleby, Esq.
Fowler White Boggs P.A.
501 Kenndy Blvd. Suite 1700
Tampa, FL 33602
kappleby@fowlerwhite.com
813-228-7411

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. Reidel
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

Clarifying the Florida Personal Property Exemption Statute:
Was the "Right" Question Certified to the Florida Supreme Court?

by Kathleen L. DiSanto[1]

"Sometimes the questions are complicated and the answers are simple." ~ Dr. Suess

Determining the proper interpretation and application of Florida Statutes, section 222.25(4) ("Section 4" or the "wildcard exemption") has precipitated much litigation throughout bankruptcy courts across the state since its enactment in July 2007. While some Section 4 issues are fairly well settled based on existing case law, courts remain divided over what it means to "receive the benefits of a homestead exemption."[2] These seven words have been the primary source of the continued debate over the proper interpretation and application of Section 4.[3]

Two narrow issues seem to have crystallized from the central question: first, whether ultimately indicating an intent to surrender the homestead is sufficient to allow a debtor to claim the wildcard exemption, and second, whether a debtor is entitled to the wildcard exemption if the debtor has no equity in the homestead, does not claim the homestead exempt, but indicates an intent to reaffirm the mortgage(s) on the property. The first question was certified to the Florida Supreme Court by the Eleventh Circuit in the *Dumoulin* case.[4] Unfortunately, the second question, which is equally critical to establishing a uniform interpretation of Section 4, may remain unanswered.

This article will briefly recount the historical background leading to the enactment of Section 4 and summarize the body of case law attempting to determine what it means to "receive the benefits of a homestead exemption." Next, the article will analyze the wildcard exemption cases addressing how and when a debtor must surrender homestead property and claim exemptions to maintain eligibility under Section 4. Then, the article will turn to the most recent decisions interpreting Section 4, focusing on the latest debate over whether a debtor is entitled to the additional personal property exemption when the debtor intends to reaffirm obligations on a homestead property lacking equity. Finally, the article will explore the benefits of a broad answer to the question certified to the Florida Supreme Court by the Eleventh Circuit.

A Historical Background of Section 4: From Here to There, From There to Here[5]

In 1993, the Florida legislature enacted Florida's Personal Property Exemption Statute.[6] Section 4, which provides debtors with a $4,000 personal property exemption if they do not receive the benefits of a homestead exemption, was not added until July 7, 2007.[7] Legislative history indicates that Section 4 was adopted "to give a debtor who lacks homestead protections some extra personal exemptions." [8]

In defining what it means to "receive the benefits of a homestead exemption," courts have remained divided over two basic factual situations. One concerns debtors

continued on p. 4

1 Kathleen L. DiSanto is presently clerking for the Honorable Caryl E. Delano and formerly interned for the Honorable Alexander L. Paskay. Kathleen graduated from the University of Virginia in 2005 and Stetson University College of Law in 2008.

2 Several interpretation issues are fairly well settled. For example, courts have consistently held that debtors are permitted to "stack" the wildcard exemption and with other exemptions. *See In re Mootosammy*, 387 B.R. 291 (Bankr. M.D. Fla. 2008) (debtor may stack motor vehicle exemption, $1,000 constitutional personal property exemption, and wildcard exemption); *In re Hafner*, 383 B.R. 350 (Bankr. N.D. Fla. 2008) (debtor permitted to stack wildcard exemption with $1,000 motor vehicle exemption). Another resolved issue is whether debtors with non-filing spouses who claimed the homestead exempt as tenancy by the entireties property are entitled to the wildcard exemption. *In re Ellis*, 395 B.R. 751 (Bankr. M.D. Fla. 2009); *In re Hernandez*, No. 07-16379-BKC-RAM, 2008 WL 1711528 (Bankr. S.D. Fla. Apr. 10, 2008). In re Franzese, 383 B.R. 197 (Bankr. M.D. Fla. 2008). All three opinions addressing whether a debtor who owns a mobile home on leased land and claims the modular home exemption is entitled the wildcard exemption have held that the debtor is entitled to the additional personal property exemption. *In re Heckman*, 395 B.R. 737 (Bankr. N.D. Fla. 2008); *In re Lisowski*, 395 B.R. 771 (Bankr. M.D. Fla. 2008); *In re Munao*, No. 8:07-bk-11729-PMG, 2008 WL 4602352 (Bankr. M.D. Fla. Sept. 23, 2008).

3 *In re Archer*, 416 B.R. 900 (Bankr. S.D. Fla. 2009); *In re Kent*, 411 B.R. 743 (Bankr. M.D. Fla. 2009); *In re Abbott*, 408 B.R. 903 (Bankr. S.D. Fla. 2009); *In re Brown*, 406 B.R. 568 (Bankr. M.D. Fla. 2009); *In re Bennett*, 395 B.R. 781 (Bankr. M.D. Fla. 2008); *In re Oliver*, 395 B.R. 792 (Bankr. S.D. Fla. 2008); *In re Rogers*, 396 B.R. 100 (Bankr. M.D. Fla. 2008); *In re Guididas*, 393 B.R. 251 (Bankr. M.D. Fla. 2008); *In re Magelitz*, 386 B.R. 879 (Bankr. N.D. Fla. 2008); *In re Martias*, No. 07-20488-BKC-PGH, 2008 WL 906776 (Bankr. S.D. Fla. Apr. 3, 2008); *In re Shoopman*, No. 07-19450-BKC-PGH, 2008 WL 817109 (Bankr. S.D. Fla. Mar. 25, 2008); *In re Morales*, 381 B.R. 197 (Bankr. S.D. Fla. 2008); *In re Gatto*, 380 B.R. 88 (Bankr. M.D. Fla. 2008).

4 *Osborne v. Dumoulin (In re Dumoulin)*, 326 Fed. Appx. 498 (11th Cir. 2009).

5 Dr. Seuss, One Fish Two Fish Red Fish Blue Fish (Random House 1960).

6 Fla. Stat. § 222.25 (2007).

7 *Id.*

8 *In re Rogers*, 396 B.R. at 102 (citing Proposed Amendment to Personal Property Exemption Statute Fla. Stat. § 222.25, Bankruptcy/UCC Comm. Business and Law Section, Florida Bar (August 6, 2006)).

Clarifying Exemption Statute
continued from p. 3

who ultimately do not claim their homestead exempt and indicate an intent to surrender the property, but lived in the property on the petition date. This factual situation is addressed by the *Gatto, Morales, Shoopman, Martias, and Guididas* opinions, in addition to the *Dumoulin* [9] case. The other factual situation involves debtors who do not claim their homestead exempt, indicate an intent to reaffirm the mortgages on the property, but lack equity in the property. *Magelitz, Rogers, Oliver, Brown, Abbott, Kent*, and *Archer* are the opinions that discuss the latter factual situation.[10] *Bennett*, a consolidated opinion, is the lone decision that encompasses both factual situations.[11] Courts' responses to the issues raised by these factual situations are contingent upon their analysis and interpretation of Section 4. Some courts have taken the position that a debtor cannot receive the benefits of a homestead exemption without claiming it or either directly or indirectly benefiting from the homestead exemption,[12] while other courts have required the debtor to express an intent to surrender the property.[13]

Gatto and Its Progeny: The More That You Read, the More Things You Will Know[14]

In December 2007, Judge Williamson's opinion in the *Gatto* case became the first of many decisions interpreting what it means to receive the benefits of a homestead exemption.[15] *Gatto* was a consolidated opinion, consisting of three cases involving debtors who did not claim the homestead exemption and indicated an intent to surrender their homestead property on their initial Schedule C and Statement of Intention, but lived in the residence on the petition date.[16] Judge Williamson held that the debtors were entitled to the wildcard exemption because they did not claim their homestead exempt, nor were they receiving the benefits of a homestead exemption.[17]

Morales was the next case to address the surrender issue.[18] The debtor never claimed the homestead exempt but subsequently amended his Statement of Intention from reaffirming both obligations on the property to surrendering the property to the larger mortgagee and reaffirming the other mortgage.[19] Focusing on the fact that the debtor had claimed the homestead exemption on the date the petition was filed, Judge Ray held that the debtor was not entitled to the wildcard exemption because he had received the benefits of the homestead exemption. [20] Unfortunately, the *Morales* opinion creates the illusion that its holding was consistent with *Gatto*, but the case actually advanced a different interpretation of Section 4.[21]

Shoopman and *Martias* decisions expanded *Gatto*'s holding to debtors who potentially qualified for the wildcard exemption based on amendments to their schedules and statements of intention. [22] The *Shoopman* debtors never claimed the homestead property exempt

continued on p. 5

9 *Osborne v. Dumoulin (In re Dumoulin)*, 326 Fed. Appx. 498; *In re Guididas*, 393 B.R. 251 (Bankr. M.D. Fla. 2008); *In re Martias*, No. 07-20488-BKC-PGH, 2008 WL 906776 (Bankr. S.D. Fla. Apr. 3, 2008); *In re Shoopman,* No. 07-19450-BKC-PGH, 2008 WL 817109 (Bankr. S.D. Fla. Mar. 25, 2008); *In re Morales*, 381 B.R. 197 (Bankr. S.D. Fla. 2008); *In re Gatto*, 380 B.R. 88 (Bankr. M.D. Fla. 2008).

10 *In re Archer*, 416 B.R. 900 (Bankr. S.D. Fla. 2009); *In re Kent*, 411 B.R. 743 (Bankr. M.D. Fla. 2008); *In re Abbott*, 408 B.R. 903 (Bankr. S.D. Fla. 2009); *In re Brown*, 406 B.R. 568 (Bankr. M.D. Fla. 2009); *In re Oliver*, 395 B.R. 792 (Bankr. S.D. Fla. 2008); *In re Rogers*, 396 B.R. 100 (Bankr. M.D. Fla. 2008); *In re Magelitz*, 386 B.R. 879 (Bankr. N.D. Fla. 2008).

11 *In re Bennett*, 395 B.R. 781 (Bankr. M.D. Fla. 2008).

12 *Id.; In re Abbott*, 408 B.R. 903; *In re Martias*, No. 07-20488-BKC-PGH, 2008 WL 906776; *In re Shoopman*, No. 07-19450-BKC-PGH, 2008 WL 817109; *In re Gatto*, 380 B.R. 88.

13 *In re Archer*, 416 B.R. 900; *In re Kent*, 411 B.R. 743; *In re Abbott*, 408 B.R. 903; *In re Brown*, 406 B.R. 568; *In re Oliver*, 395 B.R. 792; *In re Rogers*, 396 B.R. 100; *In re Magelitz*, 386 B.R. 879; In re Guididas, 393 B.R. 251; In re Morales, 381 B.R. 197.

14 Dr. Suess, I Can Read with My Eyes Shut (Random House 1978).

15 *In re Gatto*, 380 B.R. 88 (Bankr. M.D. Fla. 2008).

16 *Id.* at 90.

17 *Id.* at 95.

18 *In re Morales*, 381 B.R. 917.

19 *Id.* at 919.

20 *Id.*

21 *In re Morales*, 381 B.R. at 922; *In re Gatto*, 380 B.R. at 93.

22 *In re Martias*, No. 07-20488-BKC-PGH, 2008 WL 906776 (Bankr. S.D. Fla. Apr. 3, 2008); *In re Shoopman*, No. 07-19450-BKC-PGH, 2008 WL 817109 (Bankr. S.D. Fla. Mar. 25, 2008).

Clarifying Exemption Statute

continued from p. 4

but initially indicated an intent to reaffirm the mortgage debt and later amended their Statement of Intention to surrender the property.[23] In the *Martias* case, the debtor initially planned to reaffirm and claimed the homestead property exempt, but later filed an Amended Schedule C removing the homestead exemption and claiming the wildcard exemption, in addition to an Amended Statement of Intention surrendering the property.[24] In both cases, Chief Judge Hyman held that debtors who ultimately did not claim their homestead exempt and indicated an intent to surrender the property were entitled to the wildcard exemption because mere occupation of the homestead property does not equate to receiving the benefits of a homestead exemption.[25]

Judge Paskay reached an opposite conclusion in the *Guididas* case.[26] In *Guididas*, the debtor initially claimed the homestead exemption and expressed an intent to reaffirm the debt but later filed amended schedules that did not claim the homestead exempt, but claimed the wildcard exemption, and indicated the property would be surrendered.[27] Focusing on petition date as the relevant time for determining eligibility for the wildcard exemption, Judge Paskay determined that the debtor was not entitled to the wildcard exemption based on the belated surrender of the homestead property.[28] Published in June 2008, the *Guididas* opinion is the last decision to exclusively address whether debtors who do not claim their homestead exempt, indicate an intent to surrender the property, but lived in the property on the petition date are entitled to the wildcard exemption.[29]

continued on p. 7

23 *In re Shoopman*, No. 07-19450-BKC-PGH, 2008 WL 817109 at *1.

24 *In re Martias*, No. 07-20488-BKC-PGH, 2008 WL 906776 at *1.

25 *Id.* at *3; *In re Shoopman*, No. 07-19450-BKC-PGH, 2008 WL 817109 at *2, 4.

26 *In re Guididas*, 393 B.R. 251 (Bankr. M.D. Fla. 2008).

27 *Id.* at 252-253.

28 *Id.* at 256.

29 *Id.* *Bennett*, a consolidated opinion that addresses both the surrender and reaffirmation issue, is the only opinion that addresses the surrender issue post-*Guididas*.

Clarifying Exemption Statute
continued from p. 5

The Second Question: The More That You Learn, the More Places You'll Go[30]

The issue of whether debtors who do not claim their homestead exempt, indicate an intent to reaffirm the obligations on the property, but lack equity in the property are entitled to the wildcard exemption has been more enduring. The *Gatto* court seemed to anticipate this factual situation, as the analysis subtly focused on the importance of a debtor claiming the homestead exemption under Article X, section 4 of the Florida Constitution by describing the consequences of not claiming the exemption.[30] However, Chief Judge Killian's decision in *Magelitz* was the first to squarely address these facts.[31] The *Magelitz* debtor lacked equity in the homestead property, did not claim the property exempt, but stated he intended to retain the homestead and continue to make payments, essentially expressing an intent to reaffirm the mortgage.[33] Chief Judge Killian held the debtor was not entitled to the wildcard exemption.[34] *Magelitz* focuses on whether the homestead exemption is self-executing, and Chief Judge Killian concluded that homestead status arises upon the fulfillment of certain constitutional requirements, independent of whether a debtor claims the homestead exemption or a trustee abandons the property.[35] The *Magelitz* opinion represents the majority published position, as the *Rogers, Oliver, Brown, Kent,* and *Archer* courts reached the same conclusions in cases with similar facts.[36]

Bennett and *Abbott* are the sole published opinions in which courts allowed the debtors to claim the wildcard exemption while reaffirming mortgages on property that is fully encumbered. *Bennett* is a consolidated opinion of three cases and is the only decision to address both issues that have emerged in interpreting what it means to receive the benefits of a homestead exemption.[37] The facts of the Browning and Roesler cases reflect the first scenario where a debtor ultimately surrenders the homestead property, but the Bennett debtors sought to reaffirm the obligations on the fully encumbered homestead property and claim the wildcard exemption.[38] In holding that all of the debtors were entitled to the wildcard exemption, Judge Williamson concluded that failure to claim the homestead exempt, thereby exposing the property to administration by the trustee was sufficient, and surrender of the property was not necessary.[39]

In the *Abbott* decision, Chief Judge Hyman adopted *Bennett's* conclusions, holding that a debtor could be eligible for the wildcard exemption without surrendering the property.[40] Recalling the intent behind the enactment of Section 4, Chief Judge Hyman acknowledged the importance of allowing debtors lacking equity in their homestead to claim the wildcard exemption, noting that 1.3 million Florida mortgagors were "underwater" during the fourth quarter of 2008.[41] Further, Chief Judge Hyman indicated that a debtor was not receiving the benefits of a homestead exemption if no equity was being protected, and the potential for future equity in the homestead property did not render the debtor ineligible for the wildcard exemption.[42]

Published after the *Bennett* decision, the *Brown, Kent,* and *Archer* opinions responded to the proposition that a debtor who does not claim the homestead exemption to protect "underwater" property is still entitled to the

continued on p. 8

30 Dr. Suess, I Can Read with My Eyes Shut (Random House 1978).

31 *In re Gatto*, 380 B.R. 88, 93 (Bankr. M.D. Fla. 2008).

32 *In re Magelitz*, 386 B.R. 879 (Bankr. N.D. Fla. 2008).

33 *Id.* at 881.

34 *Id.*

35 *Id.*

36 *Id.*; *In re Archer*, 416 B.R. 900 (Bankr. M.D. Fla. 2009); *In re Kent*, 411 B.R. 743 (Bankr. M.D. Fla. 2009); *In re Brown*, 406 B.R. 568 (Bankr. M.D. Fla. 2009); *In re Oliver*, 395 B.R. 792 (Bankr. S.D. Fla. 2008); *In re Rogers*, 396 B.R. 100 (Bankr. M.D. Fla. 2008).

37 *In re Abbott*, 408 B.R. 903 (Bankr. S.D. Fla. 2009); *In re Bennett*, 395 B.R. 781, 790 (Bankr. M.D. Fla. 2008).

38 *In re Bennett*, 395 B.R. at 784-85.

39 *Id.* at 790.

40 *In re Abbott*, 408 B.R. at 908-09.

41 *Id.* at 911-12.

42 *Id.* at 910.

Clarifying Exemption Statute
continued from p. 7

wildcard exemption because the property is exposed to administration by the trustee.[43] All three courts held that the debtors were not entitled to the wildcard exemption because the debtors retained possession of the property, and subjecting the over-encumbered property to administration by the trustee was "meaningless" as abandonment by the trustee is probable.[44] These cases anticipate the next progression of Section 4 litigation: whether a trustee can establish that abandonment is not appropriate because the fully encumbered property can benefit the bankruptcy estate in some way.

Clarifying the Wildcard Exemption: I Meant What I Said and I Said What I Meant[45]

Unfortunately for bankruptcy courts and practitioners, the *Dumoulin* facts represent the only one of the challenging factual scenarios confronted by bankruptcy courts in their efforts to interpret Section 4. In the *Dumoulin* case, the debtor expressed an intention to surrender the property from the petition date, but initially claimed the homestead property exempt on Schedule C.[46] The property was in foreclosure, and the debtor planned to rent it from the purchaser until the sale fell through.[47] After the sale fell through, the debtor amended Schedule C, replacing the homestead exemption with the wildcard exemption.[48]

Turning to existing case law, most courts would agree that the debtor is entitled to the wildcard exemption under the facts in the *Dumoulin* case, because the debtor ultimately did not claim the homestead exemption and consistently indicated an intent to surrender the property from the date the petition was filed.[49]

The limitations imposed by *Dumoulin*'s facts perhaps could have been overcome if a broader question had been certified to the Florida Supreme Court. The exact question certified asks, "Whether a debtor who elects not to claim a homestead exemption and indicates an intent to surrender the property is entitled to the additional exemptions for personal property under Fla. Stat. § 222.25(4)."[50] An answer to the certified question may not completely resolve the interpretation issues surrounding Section 4. If the Florida Supreme Court answers the question with a "no," indicating Florida's homestead exemption is self-executing and an intention to surrender is insufficient, then courts and practitioners will know that the property must be abandoned as of the petition date for a debtor to be eligible for the wildcard exemption, and the second question concerning debtors who reaffirm the obligations on their homestead property is moot. However, if the Florida Supreme Court answers the certified question affirmatively, courts and practitioners may still grapple with whether a debtor who does not claim the homestead exemption but reaffirms the obligation on fully encumbered property is entitled to the wildcard exemption.

If the certified question had been broader in scope, the probability of receiving a more comprehensive response from the Florida Supreme Court could have been increased. If the question had instead been "Whether a debtor must indicate an intent to surrender the property to be entitled to the additional exemptions for personal property under Fla. Stat. § 222.25(4)," perhaps bankruptcy courts and practitioners would have had a better chance of receiving their long awaited answers to the interpretation questions plaguing Section 4. The broader question would frame the surrender issue, in addition to the issue of whether debtors who do not claim their homestead exempt, indicate an intent to reaffirm

continued on p. 9

43 *In re Archer*, 416 B.R. 900 (Bankr. S.D. Fla. 2009); *In re Kent*, 411 B.R. 743 (Bankr. M.D. Fla. 2009); *In re Brown*, 406 B.R. 568 (Bankr. M.D. Fla. 2009).

44 *In re Archer*, 416 B.R. at 902; *In re Kent*, 411 B.R. at 751; *In re Brown*, 406 B.R.at 570-571. Chief Judge Glenn further suggests that not only is a trustee likely to abandon "under-water" property, but that a trustee has a duty to abandon property that lacks equity for the estate. *See In re Kent*, 411 B.R. at 755 *citing In re Integrated Agri, Inc.*, 313 B.R. 419, 425 (Bankr. C.D. Ill. 2004); *In re Rambo*, 297 B.R. 418, 433 (Bankr. E.D. Pa. 2003); *In re Buchanan*, 270 B.R. 689, 693 (Bankr. N.D. Ohio 2001); *In re Feinstein Family P'ship*, 247 B.R. 502, 507-09 (Bankr. M.D. Fla. 2000).

45 Dr. Suess, Horton Hears a Hoo (Random House 1954).

46 *Osborne v. Dumoulin (In re Dumoulin)*, 326 Fed. Appx. 498, 499 (11th Cir. 2009).

47 *Id.*

48 *Id.*

49 *In re Martias*, No. 07-20488-BKC-PGH, 2008 WL 906776 (Bankr. S.D. Apr. 3, 2008); *In re Shoopman*, No. 07-19450-BKC-PGH, 2008 WL 817109 (Bankr. S.D. Fla. Mar. 25, 2008); *In re Gatto*, 380 B.R. 88 (Bankr. M.D. Fla. 2008); *but see In re Guididas*, 393 B.R. 251 (Bankr. M.D. Fla. 2008); *In re Morales*, 381 B.R. 197 (Bankr. S.D. Fla. 2008). While the issue of timeliness was not squarely before the *Franzese* court, as the case focused on whether a debtor who has a non-filing spouse and has claimed the property as an exempt tenancy by the entireties property is receiving the benefits of the homestead protection, Judge Jennemann indicated a debtor must state an intent to surrender the property on the date the petition is filed to lose the benefit of the homestead exemption. *In re Franzese*, 383 B.R. 197, 206 (Bankr. M.D. Fla. 2008).

50 *Osborne v. Dumoulin (In re Dumoulin)*, 326 Fed. Appx. at 502.

Clarifying Exemption Statute
continued from p. 8

the mortgages on the property, but lack equity in the property are entitled to the wildcard exemption.

While an assessment of published opinions suggests that a majority position has also developed on the latter issue, courts are more sharply divided than it appears, so an answer to the question of whether a debtor who does not claim the homestead exemption and reaffirms obligations on "underwater" property is entitled to the wildcard exemption is critical to clarifying Section 4.[51] For example, in the Tampa Division alone, Judges McEwen and Delano have not yet published their decisions (although written opinions are forthcoming) in cases concerning debtors who do not claim the homestead property exempt and seek to reaffirm the obligations on the fully encumbered property, but both have ruled on the matter, allowing the debtor to claim the wildcard exemption.[52] Also, the development of a majority position may be suspended as at least one bankruptcy court has abated ruling on matters concerning the wildcard exemption in anticipation of the Florida Supreme Court's answer.[53]

In spite of the specific question certified, the Florida Supreme Court may decide to give bankruptcy courts and practitioners some much needed clarification in interpreting Section 4, as the latest Section 4 decisions focus on the whether debtors who do not claim their homestead exempt but indicate an intent to reaffirm the obligations on the fully encumbered property are entitled to the wildcard exemption, while no opinions have been issued exclusively on the surrender question certified to the Florida Supreme Court since *Guididas* in June 2008.[54] In the final paragraph of its opinion certifying the question to the Supreme Court, the Eleventh Circuit states, "we do not intend to restrict the issues considered by the state court and note that discretion to examine this issue and other relevant issues lies with the Florida Supreme Court."[55] Hopefully, the Supreme Court will not merely interpret the certified question to address only the issues surrounding the timeliness of the debtor's exemption election and, in light of the trends developing in wildcard exemption case law, consider giving a broad answer to resolve the lingering questions of statutory interpretation surrounding Section 4.

51 *In re Archer*, 416 B.R. 900 (Bankr. S.D. Fla. 2009); *In re Kent*, 411 B.R. 743 (Bankr. M.D. Fla. 2009); *In re Brown*, 406 B.R. 568 (Bankr. M.D. Fla. 2009); *In re Oliver*, 395 B.R. 792 (Bankr. S.D. Fla. 2008); *In re Rogers*, 396 B.R. 100 (Bankr. M.D. Fla. 2008); *In re Magelitz*, 386 B.R. 879 (Bankr. N.D. Fla. 2008); *but see In re Abbott*, 408 B.R. 903 (Bankr. S.D. Fla. 2009); *In re Bennett*, 395 B.R. 781 (Bankr. M.D. Fla. 2008).

52 *In re Iuliano*, No. 8:09-bk-04904-CED (Bankr. M.D. Fla. Sept. 23, 2009 hearing); *In re Radford*, No. 8:09-bk-04014-CPM (Bankr. M.D. Fla. Aug. 24, 2009 hearing); *In re Rohlehr*, No. 8:09-bk-04905-CPM (Bankr. M.D. Fla. Aug. 24, 2009 hearing).

53 *In re Burpee*, 415 B.R. 870 (Bankr. M.D. Fla. 2009).

54 *See In re Kent*, 411 B.R. 743; In re Brown, 406 B.R. 568.

55 *Osborne v. Dumoulin (In re Dumoulin)*, 326 Fed. Appx. at 502.

Florida Bankruptcy Court Outlines Calculations of Damages, for Violating the Automatic Stay

by Dennis J. LeVine, Esq.
Dennis LeVine & Associates, P.A.

When a debtor files bankruptcy, the automatic stay under Section 362 prevents creditors from seeking to enforce pre-petition debts.[1] The automatic stay is "a court-ordered injunction, [and] any person or entity who violates the stay may be found in contempt of court."[2] The automatic stay continues to operate until the time the case is closed, dismissed, or until the time a discharge is granted or denied.[3]

When a creditor willfully violates the automatic stay, the statute **requires** the imposition of actual damages, and also gives the Court discretion to award punitive sanctions.[4] To be considered willful, the creditor's action must occur when a creditor "(1) knew the automatic stay was invoked and (2) intended the actions which violated the stay."[5] Willfulness requires either actual knowledge of the bankruptcy, or "notice of sufficient facts to cause a reasonably prudent person to make additional inquiry to determine whether a bankruptcy petition has been filed."[6] In other words, when the creditor has either actual or constructive knowledge of a bankruptcy case, the Court need find only that the action by the creditor was willful – there is no need for the debtor to prove the creditor had a specific intent to violate the automatic stay.[7] This article will outline what happens when a creditor violates the automatic stay, how the Courts calculate the amount of damages, including

continued on p. 11

[1]The filing of a petition under any chapter of the Bankruptcy Code operates as an automatic stay of, *inter alia*, "any act to collect, assess, or recover a claim against the debtor that arose before the commencement of the case under this title." 11 U.S.C. § 362(a)(6) (2009).

[2]*Jove Eng'g, Inc. v. I.R.S.*, 92 F.3d 1539, 1546 (11th Cir. 1996) (citations omitted).

[3]11 U.S.C. § 362(c)(2).

[4]11 U.S.C. § 362(k).

[5]*Durie v. Dueease (In re Dueease)*, No. 06-02959, 2008 WL 4936398, at *3 (Bankr. M.D. Fla. Apr. 2, 2008) (quoting Jove Eng'g, Inc., 92 F.3d at 1555).

[6]*In re Sansone*, 99 B.R. 981, 984 (Bankr. C.D. Cal. 1989) (citations omitted).

[7]*See Jove Eng'g, Inc.*, 92 F.3d at 1555.

Calculations of Damages

continued from p. 10

punitive damages.

Once the debtor establishes that a willful stay violation occurred, the issue becomes the way the Court calculates damages. In an August, 2009 opinion by Judge Michael Williamson in Tampa, the Court provides an excellent outline on the issue of determining the amount of damages for violations of the automatic stay. *In re: Samantha White*, 410 B.R. 322 (Bankr. M.D. Fla. 2009). In the *White* case, the Debtor filed Chapter 7 and listed Platinum Protection as an unsecured creditor. Despite repeated notices of the bankruptcy case, the creditor continued to contact the Debtor post-petition. The Debtor filed a Motion for Sanctions against Platinum Protection. The Court found that Platinum Protection received notice of the evidentiary hearing but failed to appear. The Court found the following facts:

> "[W]ithin a month of the filing of the bankruptcy petition, Platinum Protection began making phone calls to the Debtor in an effort to collect on a pre-existing, unsecured debt. After receiving almost daily phone calls, the Debtor emailed Platinum Protection, directing it to cease collection efforts and giving Platinum Protection additional notice of the existence of this bankruptcy case. However, the phone calls continued. Additionally, with actual knowledge of the bankruptcy filing, Platinum Protection contacted the Debtor's emergency telephone numbers, advising the Debtor's family and friends of its status as a creditor attempting to collect outstanding debt. Upon becoming aware of the calls to her emergency numbers, the Debtor sent additional written correspondence to Platinum Protection, informing them of the continued collection efforts in violation of the automatic stay, which at that point included multiple, daily communications that were causing her extreme stress. (Doc. No. 14.) In the aggregate, Platinum Protection contacted the Debtor on approximately fifty occasions".

In the *White* case, Judge Williamson found that any violation of the stay under § 362 "injures the debtor by restricting the debtor's breathing spell and subjecting the debtor to continued harassment and intimidation by prolonged collection efforts".[8] The Court found that Platinum Protection received actual, repeated notice of the Debtor's bankruptcy case, but still continued to make daily phone calls to the Debtor, her friends, and her family in a collection effort that lasted for several months after the filing. The Court had no problem in finding the post-petition collection calls were intentional acts.

Actual Damages

The Court in *White* next determined the amount of damages. The Court looked at cases in other jurisdictions which had attempted to come up with a way to calculate actual damages for stay violations. *See, e.g., In re Hodges*, No. 04-03275, 2004 WL 4960369, at *3 (Bankr. D. Idaho Dec. 15, 2004)(Court estimated the amount of lost revenue caused by the amount of time spent dealing with collection calls and used that estimate as the actual damage award); *In re Hildreth*, 357 B.R. 650, 655 (Bankr. M.D. Ala. 2006)(noting the difficulty in quantifying damages for such stay violations, the Court awarded $100 in actual damages per phone call made in violation of the stay, and $1,000 per letter sent in violation of the automatic stay); *Durie v. Dueease*, 2008 WL 4936398, at *3 (Judge Briskman)(Court awarded $250 in actual damages, plus attorneys' fees and costs, for three post-petition phone calls made by landlord seeking payment on a claim for back rent). Judge Williamson adopted the approach in the *Hildreth* case, and awarded actual damages at $100 per phone call. Based on the Debtor's representation that Platinum called her approximately fifty times, the Court awarded $5,000 in actual damages, plus attorneys fees.

Punitive Damages

Section 362(k)(1) provides Bankruptcy Courts with discretion to award such punitive damages for a willful violation of the stay when "appropriate." Punitive

continued on p. 12

[8]Citing *Jackson v. Dan Holiday Furniture, L.L.C. (In re Jackson)*, 309 B.R. 33, 37 (Bankr. W.D. Mo. 2004).

[9]*In re Hedetneimi*, 297 B.R. 837, 843 (Bankr. M.D. Fla. 2003) (quoting *In re Rivers*, 160 B.R. 391, 394 (Bankr. M.D. Fla. 1993)). Judge Williamson also cited *In re Wagner*, 74 B.R. 898 (Bankr. E.D. Pa. 1987), for determining when punitive damages are appropriate. Under *Wagner*, punitive damages are generally appropriate when the creditor "acted with actual knowledge that he was violating the federally protected right or with reckless disregard of whether he was doing so." Id. (quoting *In re Wagner*, 74 B.R. at 903-904). *See Keen v. Premium Asset Recovery Corp. (In re Keen)*, 301 B.R. 749, 755 (Bankr. S.D. Fla. 2003) (Hyman, J.).

[10]*Johnson v. Precision Auto*, 2007 WL 2274715, at *11; *In re Arnold*, 206 B.R. 560, 568 (Bankr. N.D. Ala. 1997).

[11]*In re Wagner*, 74 B.R. at 905; see also *Johnson v. Precision Auto Sales (In re Johnson)*, No. 06-00164, 2007 WL 2274715, at *10 (Bankr. N.D. Ala. Aug. 7, 3 2007); *Keen v. Premium Asset Recovery Corp.*, 301 B.R. at 755.

Calculations of Damages

continued from p. 11

damages are appropriate "when the violator acts in an 'egregious intentional manner,"[9] and shows "a willful disrespect or arrogant defiance of the bankruptcy laws".[10] In *White*, Judge Williamson stated the Court should examine the following factors in determining whether to award punitive damages for a willful violation of the automatic stay: (1) the nature of the defendant's conduct; (2) the nature and extent of the harm to the plaintiff; (3) the defendant's ability to pay; (4) the motives of the defendant; and (5) any provocation by the debtor.[11] The Court also set out the general legal standard for awarding punitive damages:

> "As a general matter, punitive damages serve both as punishment for wrongful conduct and as a deterrent of future wrongful conduct. *Exxon Shipping Co. v. Baker*, 128 S. Ct. 2605, 2621, 171 L. Ed. 2d 570 (2008). Either a judge or a jury may impose punitive damages. *See* generally id. at 2625. The Supreme Court has established three "guideposts" for courts when contemplating the imposition of punitive damage awards: (1) the degree of reprehensibility of the defendant's conduct; (2) the disparity between the harm or potential harm suffered by the plaintiff and the punitive damages awarded; and (3) the difference between the award granted and the civil penalties imposed in similar cases. *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 575, 116 S. Ct. 1589, 1598, 134 L. Ed. 2d 809 (1996). For the most part, these guideposts have limited punitive damage awards to a single-digit ratio between the punitive and actual damages awarded. *Exxon Shipping*, 128 S. Ct. at 2626."

Based on what the Court found to be a pattern of abusive conduct by the creditor, it should not be a surprise that the Court in *White* found that punitive damages were appropriate. Judge Williamson found that Platinum Protection's actions were egregious, and that Platinum Protection' actions were "intended to expose the Debtor to embarrassment and humiliation by calling the Debtor's workplace and emergency contacts to inform them of the Debtor's delinquent status". The Court awarded $10,000 in punitive damages, which it found to be in line with Supreme Court guidelines on punitive damages (i.e. the ratio between punitive and actual damages awarded was only 2:1).

In conclusion, creditors must respect the automatic stay or face the consequences of monetary damages. Stay violation Motions should be taken very seriously. One point to take away from the *White* case is that a creditor should always retain counsel and appear at a hearing on a Motion for Sanctions.

Toto, I Have a Feeling We Are Not in Kansas Anymore[1]
Comparison of Individual Chapter 11 to Chapter 13

by Susan H. Sharp, Esq.
Stichter, Riedel, Blain & Prosser, P.A.

In the midst of Florida's increasing unemployment and residential foreclosures, more and more individuals are facing the prospect of filing bankruptcy. With the passage of BAPCPA, individuals whose debts are primarily consumer debts[2] and whose income ratio exceeds the threshold under an applicable means test will need to file a case under either chapter 13 or chapter 11[3] of the bankruptcy code if they intend to seek bankruptcy relief. Mounting credit card debts, medical expenses, and escalating mortgage debt may make chapter 13 impossible for some individuals on account of their debts exceeding the debts limit of §109(e) or they do not have regular income.[4]

The purpose of this article is to provide a general overview of some of the differences between chapter 13 and individual chapter 11 cases for the Middle District of Florida consumer practitioners who have routinely practiced chapter 13 and are considering individual chapter 11s for their clients.

Pre-Filing Considerations

The reasons an individual files for bankruptcy (such as pending lawsuits, commercial or residential foreclosure, loss of income, loss of professional license) are generally the same in both chapters. Unfortunately, the costs associated with filing a chapter 11 case are significantly greater than a chapter 13. For example, it is not uncommon to have attorney's fees in excess of $20,000 in an individual chapter 11 compared to the presumptive rate of $3,600 for chapter 13 attorney's fees. In addition, the filing fee[5] and the U.S. Trustee fees[6] are significantly more in chapter 11 than in a chapter 13. As a result, filing a chapter 7 case may be appropriate where there is justification for §707(b)(3)(B)[7] argument based upon the debtor's assets, age of the debtor, the reason the debtor needs to seek bankruptcy relief, changes in employment, health problems and changes in family circumstances.

While careful consideration to formulating an exit strategy is needed in filing all bankruptcy cases, it is paramount in chapter 11 since confirmation requires the acceptance of the plan by a vote of two-thirds in amount and more than half in number of a voting class.[8] While creditors do not vote on a chapter 13 plan, a party in interest may file an objection to confirmation in both chapter 11 and chapter 13.[9] In addition, it is worthwhile keeping in mind that although a debtor in chapter 11 or 13 may convert to chapter 7,[10] there is no absolute right for an individual chapter 11 debtor to dismiss at anytime unlike in chapter 13.

In addition, unlike the codebtor stay afforded by §1301, there is no stay in chapter 11 to prohibit a creditor from continuing to collect a consumer debt

continued on p. 14

[1]Quoting Dorothy in *The Wizard of Oz*.

[2]Most courts have taken the position that a debt secured by a mortgage on a debtor's personal residence is consumer debt. *In re Hall*, 258 B.R. 45, 50 (Bankr.M.D.Fla.,2001). Typically, debt associated with real estate investments is not considered consumer debt.

[3]Interestingly, §303(a) does not permit an involuntary case commenced against chapter 13 debtors, yet the code provides for an involuntary chapter 11, which includes an individual chapter 11. Pre-BAPCPA, the Supreme Court reasoned that an individual debtor forced into bankruptcy whose wages were exempt from the bankruptcy estate would not be "compelled to toil for the benefit of creditors in violation of the Thirteenth Amendment's involuntary servitude prohibition." Prior to BAPCPA, the majority of courts held that post-petition earnings were not property of the estate. *See Roland v. Unum Life Ins. Co. of Am.*, 223 B.R. 499, 502 (E.D.Va.1998), and cases cited in n. 5. Since BAPCPA added §1115 and §1129(a)(15), post-petition earnings are property of the estate, thus raising an issue as to whether an involuntary individual chapter 11 is even constitutional.

[4]Only an individual with regular income that owes, on the date of the filing of the petition, noncontingent, liquidated, unsecured debts of less than $336,900 and noncontingent, liquidated, secured debts of less than $1,010,650 is eligible to be a debtor under Chapter 13. Bankruptcy courts may consider the unsecured portion of a secured claim when determining the eligibility requirements for Chapter 13. *In re Weiser*, 391 B.R. 902, 908 (Bankr.S.D.Fla.,2008) citing *In re Scovis*, 249 F.3d 975, 983 (9th Cir.2001); *In re Balbus*, 933 F.2d 246, 247-48 (4th Cir.1991); *In re Buis*, 337 B.R. 243, 248 (Bankr.N.D.Fla.2006).

[5]Filing fee for chapter 11 is $1,039 compared to chapter 13 filing fee of $247.

[6]Quarterly U.S. Trustee fees are based upon disbursements as set forth in 28 U.S.C. §1930(6). In the Middle District of Tampa the current Chapter 13 Trustee fee is 7.5%.

[7]Although the facts present in *Crawley* did not justify dismissing the debtor's chapter 7, the court signaled that in some instances, "perhaps the significantly higher administrative costs of chapter 11 might result in that chapter not being a practical alternative, and in such instances, the debtor's ineligibility for chapter 13 relief, although not dispositive, would be entitled to greater weight." *In re Crawley*, 412 B.R. 777, (Bankr. E.D.Va. 2009)

[8]11 U.S.C. §1126(c) and (d); §1129(a)(8).

[9]11 U.S.C. §1324(a).

[10]11 U.S.C.§1112(a) and §1307(a).

continued from p. 13

against a codebtor.

Lastly, potentially ethical issues may arise when representing an individual in a chapter 11 since the individual in now the debtor in possession. For example, who is actually being represented when there is a dispute over exemptions or if a creditor raises a dischargeability issue? Since further discussion of ethical issues is beyond the scope of this article, others have suggested that "[r]epresenting a debtor's bankruptcy estate in an individual chapter 11 is almost an out-of-body experience.... It stretches the bounds of legal fiction to comprehend the difference between the bankruptcy estate of an individual (your client) and the individual himself (not your client)."[12]

Beginning of the Case

While the Office of the United States Trustee monitors both chapter 13 and chapter 11 cases, the standing trustee primarily oversees chapter 13 cases. Unless a trustee is appointed pursuant to §1104, the individual in a chapter 11 case functions like a trustee (debtor in possession) overseeing the chapter 11 but with significantly expanded duties as specified in paragraphs (2),(5),(7),(8),(9),(10), (11), and (12) of section 704, as well as those enumerated in §1106. In the event that an individual debtor is designated as a small business debtor in a small business case under §101(51)(B) or (C), the individual debtor will have additional responsibilities and filing requirements, including filing the most recent balance sheet, income statement, and tax returns within seven days after the order of relief and reporting requirements as set forth in §1116 and §308(b) respectively.

Within three (3) business days of filing chapter 11, the debtor must file the Chapter 11 Case Management Summary (the "CMS") pursuant to Administrative Order FLMB-2009-1. The CMS provides the Court and other interested parties immediate information about the case as well as alert the Court to any emergency motions that may need to be heard on an expedited basis.[13] Failure to comply with filing the CMS could result in conversion or dismissal pursuant to §1112(3)(E).

Within the first few days of the case, the debtor will need to file an application to employ counsel. Additional first day motions may include use of cash collateral, in the case involving a small business-such as the debtor d/b/a- a motion to pay pre-petition wages, authority to and motion to approve post-petition financing if applicable.

Although §1102(a)(1) provides for the appointment of a creditors' committee, realistically in most individual chapter 11 cases there are no committees. Subject to court approval, a creditors' committee may employ professionals, which is an additional administrative expense that needs to be paid in full by the effective date of the plan.

Section 1326(a) requires the debtor to begin making plan payments to the Chapter 13 Trustee within thirty days of the commencement of the case whether or not the plan is confirmed; the plan period begins with the first scheduled payment not to exceed five (5) years. In an individual chapter 11, plan payments begin on the "date that the first payment is due under the plan," which normally is after confirmation consistent with §1129(a)(15)(B).

In addition to attending the §341 meeting of creditors, the chapter 11 debtor is required to attend an initial debtor interview ("IDI") conducted by a financial analyst from the US Trustee's Office. In advance of the IDI, the debtor is required to produce numerous documents, open a debtor in possession bank account at an approved depository, and comply with the Internal Revenue Service Publication 908.[14] At the IDI, the financial analyst will advise the debtor about completing and filing the monthly operating report by the 20th of each month. Since many individuals are unfamiliar with preparing financial reports, debtor's counsel can expect to spend additional time assisting their clients. There is no similar requirement for a chapter 13 debtor to file monthly operating reports. Failure to provide timely information to the US Trustee's Office or pay quarterly fees, may result in dismissal or conversion to chapter 7 pursuant to §1112(H) and (K).

continued on p. 16

[11] 11 U.S.C. §1307(a).

[12] *See In re McClelland*, 418 B.R. 61, 67 (Bankr.S.D.N.Y.,2009) Quoting *Ghosts of Individual Chapter 11 Debtors: Ethical Issues in Representing Debtors in Individual Chapter 11s Under BAPCPA:* Part I, C.R. "Chip" Bowles Jr., American Bankruptcy Institute Journal, December 2006-January 2007.

[13] *See* Adm. Order FLMB-2009-1 at http://www.flmb.uscourts.gov/administrativeorders/district/FLMB-2009-1.pdf.

[14] *See* I.R.S. Publication 908 at http://www.irs.gov/publications/p908/

Tampa Bay Bankruptcy Bar Newsletter Advertising Rates

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:
Keith Appleby, Esq.
Fowler White Boggs P.A.
813-228-7411 • kappleby@fowlerwhite.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
Visit Our New Website
www.OfficeDynamicsTampa.com

Toto, I Have a Feeling

continued from p. 14

Plan and Confirmation

Typically, a chapter 13 plan is filed with the schedules and statement of affairs or at least within fourteen (14) days of the petition as required by Fed.R.Bankr. P. 3015(b). Within forty-five (45) days after the §341 meeting of creditors, the Court will hold a confirmation hearing. Unless the Chapter 13 Trustee or a party in interest raises an objection, the plan is confirmed. Again, the vote of creditors is not required. While §1325(a)(6) addresses the feasibility of the plan, as a practical matter most Courts give the debtor the benefit of the doubt if the pre-confirmation payments are current and will confirm the plan. The chapter 13 debtor is the only party authorized to file a plan pursuant to §1321.

In chapter 11, §1121(b) gives the debtor the exclusive right to file a plan for the first 120 days or in the case of a small business 180 days, unless extended. However, a plan involving a small business must be filed no later than 300 days after the order for relief. Unlike chapter 13, upon the expiration of exclusivity, any party in interest, including the creditors' committee, may file a plan. In the case of a small business, unless extended by the Court, the plan must be confirmed forty (45) days after the plan is filed pursuant to §1129(e).

Unlike chapter 13, before soliciting votes from creditors, §1125(b) requires the debtor to submit a disclosure statement to the Court for approval. Section 1125 requires that the disclosure statement provide adequate information of a kind and in sufficient detail about the nature and history of the debtor, the condition of the debtor, potential federal tax consequences of the plan, that would enable a party to make an informed decision regarding the plan. In the Middle District of Florida, the Court will normally conditionally approve the disclosure statement and combine the final approval with confirmation.

Discharge and Case Closing

In chapter 13, §1328(a) provides for the entry of the discharge "as soon as practicable after the completion of all payments." Prior to BAPCPA, after confirmation of the plan, the debtor would immediately file a motion for final decree to obtain a discharge and close the case. Now under §1141(d)(5), the confirmation of a plan does not discharge debts until the completion of all plan payments. As a result, the case remains open requiring the payment of quarterly U.S. Trustee fees. Some Courts have adopted a procedure for individual chapter 11 debtors so that the case may close if the confirmation order states the following "upon filing of a 'Notice of Completion of Plan Payments and Request for Entry of Discharge' accompanied by a certificate of service, the case will be automatically re-opened pursuant to §350(b) without the payment of the fee."

Since the passage of BAPCPA, individuals are required to obtain credit counseling within 180 days of filing the petition from an approved credit counseling agency pursuant to §109(h)(1). However, unlike §1328(g)(1) there is no corresponding requirement for a chapter 11 debtor to complete the personal financial management course in order to receive a discharge, unless § 1141(d)(3)[15] is applicable (i.e., where there is a liquidation of all or substantially all assets and the debtor is not engaging in business.)

Good Luck Finding Your Way Back to Kansas

Before the passage of BAPCPA, individual chapter 11 cases were costly and required significant attention by the debtor and debtor's counsel, which still did not insure that a plan was confirmable. Despite the hurdles created by BAPCPA, with careful planning and implementation a successful individual chapter 11 reorganization is possible.

Because of space limitations, several of the points raised above were not be fully developed and several issues were not addressed (e.g. property of the estate, vesting of property upon confirmation, disposable income under the means test, tax obligations, domestic support obligations, timing of discharge and closing the case, confirmation affidavit, and most importantly the cramdown and absolute priority rule). Practitioners are strongly encouraged to explore these areas before filing an individual chapter 11.[16]

A happy Dorothy, still convinced the journey was real, hugs Toto and says one last time, "There's no place like home." Good luck finding your way back to Kansas.

Please Note: *The Honorable A. Thomas Small has graciously given his permission to reprint his Comparison of Chapter 11 and Chapter 13 for Individual Debtors, which you may request by emailing gnorthwood@ srbp.com.*

[15]Fed. R.Bankr. P. 1007(b)(7)

[16]For additional resources, See Markell, Bruce A., Symposium: Consumer Bankruptcy and Credit in the Wake of the 2005 Act, The Sub Rosa Subchapter: Individual Chapter 11 After BAPCPA, University of Illinois Law Review, Vol 2007; INDIVIDUAL CHAPTER 11 CASES: DESERT SANCTUARYOR PRICKLY PEAR TRAP FOR THE DEBTOR (AND COUNSEL)?, NCBJ 82nd Annual Meeting, Scottsdale, Arizona, September 24-27, 2008, The Hon. Mike K. Nakagawa, James E. Bailey, III, and Sally Neely, Panelists, The Hon. Paul W. Bonapfel, Moderator http://www.law.mercer.edu/academics/handouts /NCBJ%20(08) %20Materials %20 (Final).pdf, The Hon. A. Thomas Small, Discharge Procedures in Chapter 11 Cases Involving Debtors Who are Individuals. http://www.nceb.uscourts.gov/documents /Chapter%2011%20Individual.pdf; *Individual Chapter 11s Really do Work – Practical Considerations for Small- Business Debtors*, Donald R. Lassman, American Bankruptcy Institute Journal, March 2008; and *Ghosts of Individual Chapter 11 Debtors Yet to Come- Confirming an Individual Debtors' Chapter 11 Plan under BAPCPA* ,Gregory R. Schaaf, C.R. Chip Bowles, Jr., and Andrew D. Stosberg, American Bankruptcy Institute Journal, December 2006-January 2007.

Are Debtors' Attorneys "Debt Relief Agencies"?

by Camille Iurillo, Esq. and J'Aimee Crockett, Esq.
Iurillo & Associates, P.A.

Are debtors' attorneys debt relief agencies? This was the threshold question before the U.S. Supreme Court recently in *Milavetz, Gallop & Milavetz, P.A. v. United States*, 2010 WL 757616 (U.S. 2010). And according to its March 8, 2010 unanimous opinion, the answer is "yes."

Shortly following the enactment of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 ("BAPCPA"), Milavetz, a law firm, filed a preenforcement suit in the United States District Court for the District of Minnesota seeking declaratory relief concerning BAPCPA's new debt relief agency regulations. Specifically, Milavetz sought declaration that attorneys, as a class, were excluded from the definition of "debt relief agenc[ies]" as it appears in 11 U.S.C. § 101(12A). Section 101(12A), broadly defines "debt relief agency" as "any person who provides any bankruptcy assistance to an assisted person in return for the payment of money or other valuable consideration, or who is a bankruptcy petition preparer."

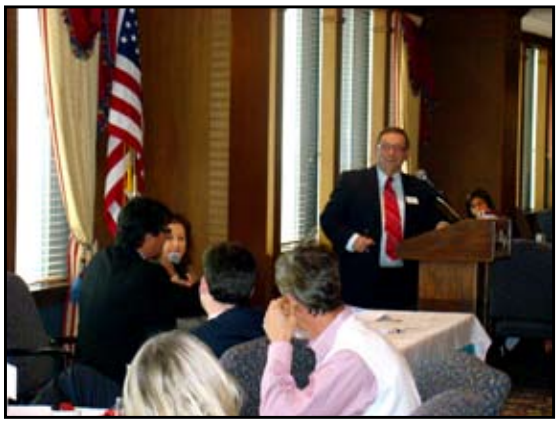
Milavetz recognized that if attorneys were considered debt relief agencies, they were subject to further regulation under sections 526 and 528 of the Bankruptcy Code. Section 526(a)(4) provides, in pertinent part, "a debt relief agency shall not advise an assisted person or prospective assisted person to incur more debt in contemplation of such person filing a case under this title." Section 528 requires all debt relief agencies to include in their advertisements certain disclosures. For example, section 528(b)(2)(B) requires that "an advertisement, directed to the general public, indicating that the debt relief agency provides assistance with respect to credit defaults, mortgage foreclosures, eviction proceedings, excessive debt, debt collection pressure, or inability to pay consumer debt shall include the following statement: 'We are a debt relief agency. We help people file for bankruptcy relief under the Bankruptcy Code.'"

By 2009, Milavetz was still at odds with BAPCPA after receiving conflicting decisions between the District Court for the District of Minnesota and the Eighth Circuit Court of Appeals. The District Court found "debt relief agency" as defined in section 101(12A) did not include attorneys. As such, it held that sections 526 and 528 were unconstitutional

continued on p. 28

March CLE Luncheon

April Charney and John Anthony discuss
Standing, Securitization, Illegal Charges,
and Improper Fees in Residential
Mortgage Related Proof of Claims



February CLE Luncheon

Honoring Judge Thomas E. Baynes, Jr.

Is There *Really* an Issue Concerning Same-Sex Couples in Bankruptcy Cases When it Comes to Determining Household Size?

by Jake Blanchard, Esq.
Reissman & Blanchard, P.A.

As I sit and ponder this issue next to a camp fire at a riverside lodge in Dunnellon, Florida with my wife and good friends, I'm reminded of my favorite camp movie of all time, *Meatballs*. At this point I'm not quite sure why I keep thinking of this article and that movie because the issue of same-sex couples in regards to the definition of household size seemingly have nothing to do with one another. I don't dare engage my fellow campers in a serious conversation of what they think of the issue because it's not quite 6:00 in the evening and the keg is already beginning to float.

The sole issue to be determined in this article is what number a debtor, who is cohabitating with his or her same-sex partner, should use for household size when completing Form B22 . The phrase "household size" is not defined in either the Bankruptcy Code or on Form B22 forcing courts to look to other sources to determine the intent of Congress when it drafted line 14(b). The following analysis is not limited to Chapter 7 cases but may be applied whenever the means test and the determination of disposable income is an issue due to household size.

One approach to determine the meaning of household size is to look to other parts of the Bankruptcy Code for the source of a definition of a term that may somehow be related. The court in *In re Ellringer* found that the Census Bureau's definition of household is the most appropriate because of the definition of median family income in Bankruptcy Code section 101(39A)(A). 370 B.R. 905, 910 (Bankr.D.Minn. 2007). Bankruptcy Code section 101(39A)(A) defines median family income as the "the median family income both calculated and reported by the Bureau of Census." Thus, the court in *Ellringer* reasoned that it should utilize the same source of the definition for "median family income" in the Bankruptcy Code and apply it to "household size." The Census Bureau defines "household" as "all of the people , related and unrelated, who occupy a housing unit." http://www.census.gov/population/www/cps/cpsdef.html. It seems from this definition that it does not matter if one considers a same-sex couple related or unrelated under the Census Bureau approach. This is the "heads on beds" method of determining household size adopted by some bankruptcy courts and it doesn't consider important factors that actually determine what the disposable income for the household truly is.

The "heads on beds" approach seems to disregard what Form B22 is actually used for and applies a broad definition to an issue that deserves a more focused factual analysis. Form B22A is a means test designed to determine a debtor's disposable income. *In re Jewell*, 365 B.R. 796, 800 (Bankr.S.D.Ohio 2007). In *Jewell* the debtor was faced with a motion to dismiss for abuse by the trustee because the debtor had two adult children living with him that the debtor counted as part of the household but did not include any of the adult children's income. The court in *Jewel* suggests that when one combines the utility of the Form B22A to its practical application a more thorough analysis needs to be done to decide if that head on the bed is actually providing for the household expenses or just a fixture next to the potted plant that consumes without contribution. This more realistic view is determined by finding the disposable income for the household, not just the debtor. *Id* at 802. Therefore, when applying the analysis to same-sex partners it must be determined if the debtor is supporting his or her partner, according to the court's analysis in *Jewell. Id* at 800. If the person lives in the home with the debtor but the debtor does not support that person then that person should not be counted as part of the debtor's household. Id . When applying the court's reasoning in *Jewell* it really doesn't seem to matter if we are concerned with same-sex couples or adult children living with the debtor because the breakdown is the same. The court in *Jewel* falls a bit short because it focused on the support portion of the analysis but never fully addressed the issue of an adult child (or same-sex partner) who only contributes a certain amount to the debtor's expenses.

The most well reasoned approach takes the "head on beds" approach in *Ellringer* and adds to it by creating a case by case analysis focusing on actual contributions to the household . The court in *In re Epperson* was faced with the issue of a roommate ("Roommate") cohabitating with the debtor. 409 B.R. 503. The court in *Epperson* does not specifically

continued on p. 20

Issue Concerning Same-Sex Couples

continued from p. 19

state that the debtor and Roommate are same-sex partners but it uses the term "a cohabitating couple" to describe the pair. *Id* at 504. *Epperson* examines whether Roommate is contributing to the expenses of the household and if so, how much per month. The trustee proffered the legendary argument that the "debtor is having his cake and eating it too" because the debtor was increasing household expenses with a second household member with no corresponding increase in income. *Id* at 506. This approach by the trustee places form over substance. The debtor countered with an argument that basically stated Roommate only contributes a certain amount to the household, therefore, the income for the B22A should only be increased to match that contribution. Id at 505. The court agreed with the debtor and focused on the plain meaning of section 101(10A)(A), which simply states that currently monthly income "from all sources that the debtor receives."

The court in *Epperson* never gives away the gender of Roommate almost as if to say that it really doesn't matter what sex Roommate is, opposite of the debtor or otherwise. This is how the issue of two unwed people living together should be treated. The approach in *Epperson* when applied to the issue of a same-sex partner cohabitating with the debtor suggests that the Code explicitly limits the contribution by the debtor's partner to current monthly income to that amount that the partner actually pays toward the household expenses of the debtor. *Id* at 508. The court further stated the amount non-debtor Roommate contributes to the expenses of the household benefits the debtor because these are expenses the debtor would otherwise have to pay for. *Id*. Therefore, the debtor is required to count the contribution as income but is not required to include all of Roommate's income in a calculation of disposable income. Furthermore, the court stated that the debtor is not required to include all of the Roommate's income on Schedule I. *Id*.

On a practical note, if a debtor's attorney is going to take the same position as the court in *Epperson* in this district, the trustee may require you to list out the expenses of the roommate in a separate Schedule "J" and include the contribution to the debtor's expenses as income to the debtor on Schedule "I" and line 10 of Form B22. Furthermore, the trustee will likely require the roommate to provide his or her last six months of pay advices. The trustee will want to see if the debtor does in fact support the significant other and to what extent. The debtor's attorney will have to argue that the debtor supports the roommate and that the roommate has his or her own expenses, which are not already included in the household expenses the debtor listed on Form B22. In other words, the debtor will need to show that the debtor mostly supports the roommate and the roommate contributes only marginally towards the household expenses. Otherwise, the trustee may argue the roommate's entire income should be listed on Form B22 along with the debtor's because while "household size" may not be defined in the Code, "disposable income" certainly is.

The key word in the definition of "disposable income" is "support." Section 1325(b)(2) states "[f]or the purposes of this subsection, the term 'disposable income' means current monthly income received by the debtor... less amounts reasonably necessary to be expended -- (A)(i) for the maintenance or *support* of the debtor or a *dependent* of the debtor...." *emphasis added*. Because the definition of disposable income uses the terms "support" and "dependent" it seems necessary that an analysis determining household size for purposes of calculating disposable income include this as a factor. It may seem the Code specifically limits this definition to this particular section of 1325(b). However, section 1325(b) refers back to the means test calculations in section 707(b)(2) to calculate disposable income. Thus, for practical purposes the definition is applied in the determination of whether a debtor may file a Chapter 7 under 707(b)(2) and if the debtor cannot how much the unsecured creditors should get through a Chapter 13 plan under section 1325(b).

Interestingly enough, there may be times when a debtor's counsel may want to play the same-sex card, but it still may not matter. The median family income for a household size of ***one*** in Florida is $42,468.00. http://www.justice.gov/ust/eo/bapcpa/20090315/bci_data/median_income_table.htm. So, the wily debtor's attorney carefully assembles and calculates his client's pay stubs from the past six months and finds that the client is just above the median income, and after artfully filling out the Form B22A finds his client has about $200.00 per month in disposable income. I would suggest, as a debtor's attorney, that no one turns to their client and asks "do you have a same-sex partner I can count as part of the household?" Rather the analysis becomes "how many people live with you, do you provide support for them, do they have a job, and do they contribute to the expenses

continued on p. 21

Issue Concerning Same-Sex Couples

continued from p. 20

of the household?" At this point the ideal answer is "why yes... I have a roommate, same-sex partner, and three adult children who live with me and none of them have a job or contribute to the household expenses." The median family income for a household size of six in Florida is $84,924.00, welcome to Chapter 7. *Id*.

Marriage in certain instances can actually be detrimental to a debtor because if the debtor is married and filing individually and not counting his or her spouse as part of the household, it almost always peeks the interest of the trustee. This in practice is a huge red-flag and the natural progression of the line of questioning that follows at the section 341 meeting may be very unconformable. Unless, of course, the debtor has a reasonable and unequivocal explanation such as; the debtor and the estranged spouse live on opposite sides of the house and only live together because they cannot afford a divorce or separate places to live. Proving that case may be an uphill battle especially if it comes out that the non-filing spouse has an inordinate amount of income. Whereas a debtor who is not married and has a same-sex partner (or opposite-sex partner) may simply and informally change the label from "partner" to "friend" to avoid such scrutiny. Same-sex partners and opposite-sex partners that cohabitate may actually have a distinct advantage over married couples because if the partner does not suit the bankruptcy needs of the debtor then that debtor simply does not count the partner as part of the household.

I'm back at my campfire and suddenly realize why the movie *Meatballs* has such significance. Towards the culmination of the movie the camp full of geeks and misfits, the underdogs of the story, are about to compete against an elite camp with physically superior and overly privileged campers. The underdogs are discouraged and think there is absolutely no way they can win, so the hero of the story, played by Bill Murray, who realizes how ridiculous the whole competition is anyway, begins to chant "it just doesn't matter... it just doesn't matter" over and over again until the entire camp is chanting along with him. The moral of the story is different but the words of the chant hold true. In the final analysis, roommates, same-sex partners, unwed opposite-sex partners, and adult children living with the debtor should be treated exactly the same way when determining household size; gender or relationship to the debtor just doesn't matter.

How to Stay Abreast of Bankruptcy Topics through the Internet

by Keith T. Appleby, Esq.
Fowler White Boggs P.A.

As a bankruptcy professional, it is imperative to stay on top of current trends and changes in the law. There are several ways to keep current with the latest legal news and trends. The simplest method is to become familiar with legal news websites and visit them regularly. Many websites and search providers offer e-mail alerts that can provide up-to-the-minute news delivered to your e-mail inbox.

In addition, you can join a bankruptcy listserv, e-mail discussion list, blog or podcast for in-depth discussion. For example, bankruptcy listservs provide access to a network of lawyers across the country that practice bankruptcy law under BAPCPA. One of the most popular features of a listserv membership is the ability to pose bankruptcy questions and get real time responses from their colleagues around the country. Listserv participants enjoy the unparalleled ability to post both the easy and hard questions to some of the best bankruptcy judges, professors and attorneys in the nation. The listserv, which also functions as a virtual community of people doing the same type of work, is a boon for the new practitioner as well as the most sophisticated bankruptcy attorneys.

One of the better listservs is the Bankr-L list by Campus Information Technologies and Educational Services at the University of Illinois Urbana-Champaign. To subscribe, go to: https://listserv.illinois.edu/wa.cgi?A0=BANKR-L. Prospective members should also send an e-mail to Professor Robert M. Lawless at rlawless@illinois.edu with a brief description of their professional connection to bankruptcy. A simple, "I am lawyer/judge in Tampa/Clearwater/St Pete" is sufficient and Prof. Lawless will approve your application.

In addition, you can find other listservs at FindLaw and LawGuru.com. FindLaw provides links to many legal listservs and includes instructions on how to subscribe to each listserv. Additionally, FindLaw provides access to the archives of many legal listservs. LawGuru provides an online form that facilitates subscribing and managing subscriptions to more than 600 legal-related listservs. Simply complete the online web form to subscribe to a listserv.

Does Ogle Signify a Change in the Way Courts View Post-Petition Attorney's Fees?

by Suzy Tate, Esq.
Jennis & Bowen, P.L.

Historically, there has been a split among courts as to whether an unsecured creditor with a claim arising from a prepetition contract is entitled to post-petition attorneys' fees. The majority view has been that unsecured creditors are not entitled to such fees as part of their unsecured claims. The minority view has been that unsecured creditors could claim post-petition attorneys' fees. Since the Supreme Court's decision in Travelers regarding post-petition attorneys' fees in 2007, courts continue to be divided on this issue.

In Travelers, the Supreme Court vacated a Ninth Circuit decision that disallowed post-petition attorney's fees holding that the Ninth Circuit's "Fobian" rule was not supported by bankruptcy law. *Travelers Casualty & Surety Co. of America v. Pacific Gas & Electric Co.*, 549 U.S. 443 (2007) (examining *In re Fobian*, 951 F.2d 1149 (9th Cir. 1991)). The Supreme Court specifically expressed no opinion as to whether "other principles of bankruptcy law might provide an independent basis for disallowing" such fees.

In *Electric Machinery*, the only Eleventh Circuit opinion published since Travelers, Judge Williamson adopted and reaffirmed the majority view based on "other principles of bankruptcy law" and the public policy reasons for disallowing such claims. *See In re Electric Machinery Enterprises, Inc.*, 371 B.R. 549 (Bankr. M.D.Fla. 2007). The *Electric Machinery* court first analyzed section 506(b) of the Bankruptcy Code and held that because it provides an exception in the Bankruptcy Code for attorneys' fees for oversecured creditors, unsecured creditors are not entitled to attorneys' fees. The court also noted that many courts find support for this interpretation of section 506(b) in *United Savings Ass'n v. Timbers*, 484 U.S. 365 (1988), where the Supreme Court denied post-petition interest for an undersecured creditor.

The *Electric Machinery* court further found support in section 502(b) of the Bankruptcy Code, which provides that if an objection to a claim is filed, the bankruptcy court shall determine the amount of the claim as of the petition date. As noted in Electric Machinery, many courts hold that because this section requires that claims be determined as of the petition date, they cannot include post-petition fees or costs.

Finally, the Electric Machinery court addressed the public policy reasons for disallowing these claims, including the prime policy of bankruptcy law to provide for equality among the creditors. To allow post-petition attorneys' fees for claims based on prepetition contracts, while denying such fees for other types of claims, such as tort claims, would be inequitable. Further, the court noted the impracticalities of allowing post-petition attorneys' fees for unsecured creditors because there would be no finality to the claims process in that the "cash registers" would ring on a daily basis to include attorney fees claims for unsecured creditors that are active in a bankruptcy case.

While the Travelers Court did not address any of these other issues, the Second Circuit has recently reaffirmed the minority view in *Ogle v. Fidelity & Deposit Co. of Maryland*, 586 F.3d 143 (2d Cir. 2009). While some may argue that Ogle signals a change in the allowance of post-petition attorneys' fees for unsecured claims, the Second Circuit decision is consistent its pre-Travelers position on such claims.

In 1982, the Second Circuit found no basis for disallowing post-petition attorneys' fees for unsecured creditors under the 1976 Bankruptcy Act or section 506 of the Bankruptcy Code. *United Merchants & Manufacturers, Inc. v. Equitable Life Assurance Society of the U.S.*, 674 F.2d 134 (2nd Cir.) The Ogle court examined the Supreme Court's decision in Travelers to determine whether it affects the United Merchants decision. Finding no conflict, the Second Circuit rejected the chapter 11 liquidating trustee's argument that sections 502(b) and 506(b) disallowed claims for post-petition attorneys fees based on pre-petition contracts, thereby reaffirming its pre-Travelers position on such claims. Future decisions are needed to determine whether *Ogle* indicates a shift among courts regarding post-petition attorneys' fees for unsecured creditors or if *Ogle* is simply a reaffirmation of the minority view.

When Business Judgment Just Isn't Enough-Raising the Standard for Court Approval of the Assumption or Rejection of Executory Contracts Implicating Public Health or Safety

by Kelly V. Robinson, Esq.
Fowler White Boggs P.A.

Under Section 365(a), a Chapter 11 debtor-in-possession's decision to assume or reject an executory contract is subject to court approval. Where a debtor-in-possession seeks court approval to assume or reject a contract, a bankruptcy court will typically apply the business judgment standard when determining whether to permit the requested action. *In re Surfside Resort and Suites, Inc.*, 324 B.R. 465, 469 (Bankr. M.D. Fla. 2005). The business judgment standard requires a showing that the proposed assumption or rejection will "likely benefit the estate." *Id*. Typically, a court may not substitute its judgment for that of the debtor-in-possession unless such judgment is "so manifestly unreasonable that it could not be based on sound business judgment, but only on bad faith, whim, or caprice." *Id*. Under most circumstances, few would challenge the business judgment standard as the appropriate standard for the Court to apply when determining whether to approve a proposed contract assumption or rejection. However, under circumstances where the debtor-in-possession's decision to assume or reject will implicate the health or safety of the public, a heightened standard will be more appropriately applied.

Where a debtor-in-possession desired to reject an agreement related to the transmission and sale of electricity to the public, the District Court in and for the Northern District of Texas outlined a heightened analytical standard. The court found that when the rejection of a contract implicates issues of public interest, the debtor-in-possession must prove (1) that the contract burdens the estate, (2) that after giving careful scrutiny to the effect of rejection on the public interest, the equities favor rejection; and (3) that contract rejection would further the Chapter 11 goal of permitting debtor's successful rehabilitation. *In re Mirant Corp.*, 318 B.R. 100, 107–108 (N.D. Tx. 2004). Following such showing, the court should then scrutinize the impact of rejection on the public interest to ensure, *inter alia*, that rejection would not compromise or disrupt the public interest in any way. *Id*. In the case of *Mirant*, this required the court to consider whether the proposed rejection would cause any interruption to the supply of electricity to the public or lead to unjust or excessive rates. If the court determines that rejection would compromise the public interest, such rejection should not be authorized unless the debtor-in-possession shows it is unable to reorganize without the proposed rejection. *Id*.

Similar considerations are raised when a debtor-in-possession provides any services that benefit the health or safety of the public, especially under circumstances where the debtor-in-possession is subject to stringent state, federal and local laws, as well as rules and regulations that require the expertise of knowledgeable and properly licensed individuals (e.g., hospitals, nursing homes, public utilities). The fact that an entity files for protection from its creditors under the United States Bankruptcy Code should not diminish these considerations. Rather, an entity's submission to the jurisdiction of the bankruptcy court should call the court's attention to any significant issues of public health and safety.

The debtor-in-possession may reject a contract and plan to enter into a new contract with a replacement vendor. Alternatively, the debtor-in-possession may plan to provide the services "in house". The proposed rejection of a contract affecting public safety under either scenario is likely to raise questions that include: (1) whether the debtor-in-possession (or new vendor) is ready and willing to take over operations; (2) whether the debtor-in-possession (or new vendor) has the expertise, licensing, personnel, and equipment available to properly provide the necessary services to its customers; (3) whether the debtor-in-possession (or new vendor) has the equipment, tools, and other items required to provide the services; (4) whether the debtor-in-possession (or new vendor) has obtained appropriate review and approvals to the extent required from the applicable state and local regulatory authorities for the change in operation or management; and (5) a determination of the appropriate date for rejection and transfer of operations. Business judgment alone, which requires nothing more than a showing that contract rejection will "likely benefit the estate" fails address

continued on p. 27

ADMINISTRATIVE OFFICE OF THE
UNITED STATES COURTS

JAMES C. DUFF
Director

WASHINGTON, D.C. 20544

March 12, 2010

MEMORANDUM

To: Chief Judges, United States Courts of Appeals
Chief Judges, United States District Courts
Judges, United States Bankruptcy Courts
Clerks, United States Bankruptcy Courts
Bankruptcy Administrators

From: James C. Duff

RE: ADJUSTMENTS TO CERTAIN DOLLAR AMOUNTS IN THE BANKRUPTCY CODE AND OFFICIAL FORMS **(INFORMATION)**

On April 1, 2010, automatic adjustments to the dollar amounts stated in various provisions of the Bankruptcy Code and one provision in Title 28 of the United States Code will become effective. The amended dollar amounts will apply to cases filed on or after April 1, 2010.

The amended dollar amounts will affect, among other matters, the eligibility of a debtor to file under chapters 12 and 13 of the Bankruptcy Code, certain maximum values of property that a debtor may claim as exempt, the maximum amount of certain claims entitled to priority, the calculation of the "means test" for chapter 7 debtors, the duration of a chapter 13 plan, the definition of a small business debtor, the minimum aggregate value of claims needed to commence an involuntary bankruptcy, the value of "luxury goods and services" deemed to be nondischargeable, and where the trustee may commence certain proceedings to recover a money judgment or property. In the Bankruptcy Reform Act of 1994, as amended by the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, and Pub. L. No. 110-406, (2008), Congress provided for the automatic adjustment of these dollar amounts at three-year intervals. The relevant provisions are codified in 11 U.S.C. § 104(a).

The adjustments reflect the change in the Consumer Price Index for All Urban Consumers published by the United States Department of Labor for the three-year period ending December 31, 2009, and rounded to the nearest $25. Use of this formula to adjust specified dollar amounts in the Bankruptcy Code is prescribed by 11 U.S.C. § 104(a). On February 25, 2010, the Judicial Conference published the revised dollar amounts in volume 75, number 37, of the Federal Register, at page 8747, as required under 11 U.S.C. § 104(c). The next three-year automatic adjustments of these dollar amounts will be published before March 1, 2013, and take effect April 1, 2013. Attached is a chart showing the affected sections of the Bankruptcy Code and Title 28 and both the current and the revised dollar amounts in those sections. Seven of the Official Bankruptcy Forms and two of the Director's Forms contain references to several of the affected dollar amounts.

continued on p. 25

Adjustments to Certain Dollar Amounts

continued from p. 24

- Official Form 1, Voluntary Petition
- Official Form 6C, Schedule of Property Claimed as Exempt
- Official Form 6E, Schedule of Creditors Holding Claims Entitled to Priority
- Official Form 7, Statement of Financial Affairs
- Official Form 10, Proof of Claim
- Official Form 22A, Statement of Current Monthly Income and Means Test Calculation (Chapter 7)
- Official Form 22C, Statement of Current Monthly Income and Calculation of Commitment Period and Disposable Income (Chapter 13)
- Director's Form 200, Required Lists, Schedules, Statements and Fees
- Director's Form 283, Chapter 13 Debtor's Certifications Regarding Domestic Support Obligations and Section 522(q)

These forms will be amended April 1, 2010, and will apply to cases filed on or after that date. The revised forms incorporating the changes will be posted on the bankruptcy forms pending amendment page of the Judiciary's website at http://www.uscourts.gov/bankform/index.html.

Questions concerning the revised dollar amounts in the Bankruptcy Code, Title 28, and Official Bankruptcy Forms may be directed to Francis F. Szczebak, Chief, Bankruptcy Judges Division, at (202) 502-1900 or via e-mail at Bankruptcy_Judges_Division@ao.uscourts.gov.

Affected Sections of Title 28 U.S.C. and the Bankruptcy Code	Dollar Amount to be Adjusted	New (Adjusted) Dollar Amount
28 U.S.C.		
1409(b) - a trustee may commence a proceeding arising in or related to a case to recover		
(1) - money judgment of or property worth less than	$1,100 $16,425	$1,175 $17,575
(2) - a consumer debt less than	$10,950	$11,725
(3) - a non consumer debt against a non insider less than		
11 U.S.C.		
Section 101(3) - definition of assisted person	$164,250	$175,750
Section 101(18) - definition of family farmer	$3,544,525 (each time it appears)	$3,792,650 (each time it appears)
101(19A) - definition of family fisherman	$1,642,500 (each time it appears)	$1,757,475 (each time it appears)
101(51D) - definition of small business debtor	$2,190,000 (each time it appears)	$2,343,300 (each time it appears)
Section 109(e) - allowable debt limits for individual filing bankruptcy under chapter 13	$336,900 (each time it appears) $1,010,650 (each time it appears)	$360,475 (each time it appears) $1,081,400 (each time it appears)

continued on p. 26

Adjustments to Certain Dollar Amounts

continued from p. 25

Affected Sections of Title 28 U.S.C. and the Bankruptcy Code	Dollar Amount to be Adjusted	New (Adjusted) Dollar Amount
11 U.S.C. ***(Continued)***		
Section 303(b) - minimum aggregate claims needed for the commencement of involuntary chapter 7 or chapter 11 bankruptcy		
(1) - in paragraph (1)	$13,475	$14,425
(2) - in paragraph (2)	$13,475	$14,425
Section 507(a) - priority expenses and claims		
(1) - in paragraph (4)	$10,950	$11,725
(2) - in paragraph (5)	$10,950	$11,725
(3) - in paragraph (6)	$5,400	$5,775
(4) - in paragraph (7)	$2,425	$2,600
Section 522(d) - value of property exemptions allowed to the debtor		
(1) - in paragraph (1)	$20,200	$21,625
(2) - in paragraph (2)	$3,225	$3,450
(3) - in paragraph (3)	$525 $10,775	$550 $11,525
(4) - in paragraph (4)	$1,350	$1,450
(5) - in paragraph (5)	$1,075 $10,125	$1,150 $10,825
(6) - in paragraph (6)	$2,025	$2,175
(7) - in paragraph (8)	$10,775	$11,525
(8) - in paragraph (11)(D)	$20,200	$21,625

Affected Sections of Title 28 U.S.C. and the Bankruptcy Code	Dollar Amount to be Adjusted	New (Adjusted) Dollar Amount
11 U.S.C. ***(Continued)***		
522(f)(3) - exception to lien avoidance under certain state laws	$5,475	$5,850
522(f)(4)- items excluded from definition of household goods for lien avoidance purposes	$550 (each time it appears)	$600 (each time it appears)
522(n) - maximum aggregate value of assets in individual retirement accounts exempted	$1,095,000	$1,171,650
522(p) - qualified homestead exemption	$136,875	$146,450
522(q) - state homestead exemption	$136,875	$146,450
523(a)(2)(C) - exceptions to discharge		
in subclause (i)(I) - consumer debts, incurred ≤ 90 days before filing owed to a single creditor in the aggregate	$550	$600
in subclause (i)(II) - cash advances incurred ≤ 70 days before filing in the aggregate	$825	$875
541(b)- property of the estate exclusions		
(1) - in paragraph (5)(C) - education IRA funds in the aggregate	$5,475	$5,850
(2) - in paragraph (6)(C) - pre-purchased tuition credits in the aggregate	$5,475	$5,850
547(c)(9) - preferences, trustee may not avoid a transfer if, in a case filed by a debtor whose debts are not primarily consumer debts, the aggregate value of property is less than	$5,475	$5,850

Affected Sections of Title 28 U.S.C. and the Bankruptcy Code	Dollar Amount to be Adjusted	New (Adjusted) Dollar Amount
11 U.S.C. ***(Continued)***		
707(b) - dismissal of a case or conversion to a case under chapter 11 or 13 (means test)		
(1) - in paragraph (2)(A)(i)(I)	$6,575	$7,025
(2) - in paragraph (2)(A)(i)(II)	$10,950	$11,725
(3) - in paragraph (2)(A)(ii)(IV)	$1,650	$1,775
(4) - in paragraph (2)(B)(iv)(I)	$6,575	$7,025
(5) - in paragraph (2)(B)(iv)(II)	$10,950	$11,725
(6) - in paragraph (5)(B)	$1,100	$1,175
(7) - in paragraph 6(C)	$575	$625
(8) - in paragraph 7(A)	$575	$625
1322(d) - contents of chapter 13 plan, monthly income	$575 (each time it appears)	$625 (each time it appears)
1325(b) - chapter 13 confirmation of plan, disposable income	$575 (each time it appears)	$625 (each time it appears)
1326(b)(3) - payments to former chapter 7 trustee	$25	$25

Business Judgment
continued from p. 23

these issues, the resolution of which is imperative to ensure that the health and safety of the public remains protected.

Any proposed contract rejection that will implicate the health or safety of the public should be approved only under the heightened standard outlined above. If permitted, such rejection should be done in a deliberate and careful manner with the full knowledge and approval of any appropriate regulatory authorities. If applicable, the debtor-in-possession should be required to confirm to the appropriate regulatory authorities that it employs the required licensed professionals before any transition resulting from contract rejection is completed. Sufficient safeguards should be incorporated to make sure that any transition is safe and calculated, causing little to no disruption to the health and safety of the public.

Debtors' Attorneys
continued from p. 17

as applied. The Eighth Circuit Court of Appeals, however, disagreed in part. Notably, it rejected the District Court's conclusion that attorneys were not debt relief agencies and it reversed the District Court's finding that section 528 was unconstitutional. Yet, a majority of the Eighth Circuit panel agreed with the District Court that section 526 was invalid. In light of the conflict, the Supreme Court granted certiorari to resolve whether attorneys are indeed debt relief agencies, to answer questions regarding section 526's scope, and to determine the constitutionality of section 528's disclosure requirements.

Before the Supreme Court, Milavetz first argued that attorneys are not "debt relief agencies" as defined in section 101(12A). Going straight to the point, the Court found this position wholly unpersuasive. It noted, by definition under section 101(4A), "bankruptcy assistance" encompasses several services performed generally by attorneys including "providing information, advice, counsel, document preparation, or filing . . . or providing legal representation with respect to a case or proceeding." Moreover, section 101(3) defines an "assisted person" as "any person whose debts consist primarily of consumer debts and the value of whose nonexempt property is less than $150,000." Thus, if an attorney or law firm provides bankruptcy assistance to an assisted person, then that attorney or law firm is a debt relief agency. The Court further found that Milavetz's interpretation of section 101(12A), which would exclude *only* attorneys providing bankruptcy assistance, was a constructional implausibility.

Upon finding that "attorneys who provide bankruptcy assistance to consumer debtors" are clearly debt relief agencies, the Court turned to Milavetz's constitutional claims. Milavetz's challenged two BAPCPA provisions that it claimed violated the First Amendment rights of attorneys. In particular, section 526(a)(4), which prohibits advising persons to incur more debt in contemplation of filing bankruptcy, and section 528 which requires certain disclosures in advertisements.

True to form, the Court upheld these provisions. It found the Eighth Circuit Court of Appeals erroneously concluded that section 526(a)(4) prohibited a debt relief agency from advising a person to incur any additional debt in contemplation of bankruptcy. Instead, the Court clarified that section 526(a)(4) only prohibits debt relief agencies from advising debtors to "load up" on debt with the expectation of obtaining a discharge in bankruptcy. Accordingly, the Court disagreed that section 526(a)(4)'s narrow rule prohibiting attorneys from advising clients to commit abusive pre-filing conduct could chill attorney speech or hinder the attorney-client relationship. Summarily, the Court declined to find that Milavetz's First Amendment rights were implicated by BAPCPA's prohibition on advising debtors to commit fraud.

Lastly, the Court affirmed the validity of section 528's disclosure requirements as applied to Milavetz. Here, the Court agreed with the Eight Circuit Court of Appeals—because the challenged provision imposed a disclosure requirement, rather than an affirmative limitation on speech, rational basis review was appropriate. Milavetz countered that the term "debt relief agency" was confusing and misleading, therefore, its mandated inclusion in attorney advertisements was not "reasonably related" to the Government's interest in preventing consumer deception. The Court disagreed, citing the potential for debtors to be misled by advertisements promising debt relief without any reference to filing for bankruptcy, which presents additional economic costs. In sum, the Court found Milavetz's objection to the disclosure requirement in section 528 "little more than a preference on Milavetz's part for referring to itself as something other than a "debt relief agency." The Court concluded that Milavetz's labeling preference raised slight constitutional concern.

There are two lessons in Milavetz—the first of which should go without saying—never advise a debtor to incur additional debt with the expectation of obtaining a discharge in bankruptcy. Second, if you or your firm assist debtors who fall within the definition of an "assisted person" you are a debt relief agency under BAPCPA.

Stetson's Bankruptcy Society Hosts Panel Discussion

by Cramdown Editorial Staff

On February 18, 2010, the Stetson University College of Law Bankruptcy Society hosted a luncheon and panel discussion on bankruptcy. The Bankruptcy Society reached out to our Association's Board of Directors and requested volunteer attorneys who could address topics such as the local bankruptcy practice, the practice's projected growth over the next few years and how to effectively make the transition from law student to practitioner.

Volunteer panel members included, Luis Martinez-Monfort, Cynthia Burnette, Lara R. Fernandez and Elena P. Ketchum. Each of the panel members gave a brief presentation on the suggested topics, and then answered questions from the approximately 40 students in attendance.

Building on the success of their first event, the Bankruptcy Society is making efforts to organize a cocktail party and networking event in April in downtown Tampa inviting all the members of our Association. Notice of the event will be provided through the Association's weekly email blast and all attorneys are encouraged to attend and meet our future members and fellow bankruptcy practitioners.

Upcoming Events

April 6
Consumer Lunch: 12 p.m. at Sam M. Gibbons U.S. Courthouse (5th Floor Training Room)

April 13
TBBBA CLE Luncheon: 12 p.m. – 1:30 p.m. at the University Club

April 23
TBBBA 12th Annual Golf Tournament: 11:30 a.m. – check in/lunch and 12:45 p.m. – shotgun start at MacDill AFB

May 4
Consumer Lunch: 12 p.m. at Sam M. Gibbons U.S. Courthouse (5th Floor Training Room)

May 21
Tennis Social: 1 p.m. – 4 p.m. at HCC Tennis Complex

July 14 -17
15th Annual Southeast Bankruptcy Workshop: Ritz-Carlton, Amelia Island, Florida

August 13
TBBBA Rays Fundraiser for National Conference of Bankruptcy Judges: 7:10 p.m. Rays vs. Baltimore Orioles game at the Trop

Alexander L. Paskay Bankruptcy Seminar

Stetson University College of Law and the American Bankruptcy Institute partnered to present the 34th Annual Judge Alexander L. Paskay Seminar on Bankruptcy Law and Practice March 4-6, in Tampa, Fla.

People on the Move

• In October of 2009, Michael J. Hooi joined the firm of Stichter, Riedel, Blain & Prosser, P.A. as an associate after completing a 2008–09 judicial clerkship at the U.S. Court of Appeals, Eleventh Circuit, for the Honorable Charles R. Wilson.

• In September, Sasha Lohn-McDermott joined Bush Ross, P.A. as an associate in the firm's Bankruptcy and Creditor's Rights practice group. Next fall, Ms. Lohn-McDermott will begin a judicial clerkship with the Honorable Virginia Hernandez Covington in Tampa.

• Larry S. Hyman, CPA is pleased to announce that Rick Onderko has joined the firm as an accountant/financial analyst. Rick will assist in the administration of bankruptcy, assignment for the benefit of creditors and receivership matters.

• Effective April 1, 2010, Sarah Olsen will be joining the office of Jon Waage, Standing Chapter 13 Trustee for the Middle District, as a staff attorney.

• In June of 2009, Patrick Mosley joined the firm of Hill Ward & Henderson as an associate in the Bankruptcy and Creditors' Rights group.

• Alison Walter, an attorney with Dennis LeVine & Associates, and her husband are expecting their first child in April. It's a girl!

• In January, Liben Amedie joined the firm of Shumaker Loop Kendrick LLP as an associate focusing on commercial litigation and bankruptcy.

• Steven M. Berman, a partner at Shumaker, Loop & Kendrick, LLP, has recently been elected President of the San Diego Bankruptcy Bar Forum, elected to the Board of Directors of the American Board of Certification, and has been appointed to the Advisory Board of the American Bankruptcy Institute.

• Mike Luetgert has joined Michael Moecker & Associates, Inc. as a Director. Mike will be working from the firm's new office located at 1409 W. Swann Avenue, Tampa, Florida 33606.

• Nava Ben-Avraham joined Dennis LeVine & Associates as an associate. Ms. Avraham is formerly with Banker Lopez & Gassler.

To have your firm's announcements included in the next issue of The Cramdown, please email Stephanie Lieb at slieb@trenam.com.

The Cramdown
PO Box 800
Tampa, Florida 33601-0800