Spring 2017

The Cramdown

The Newsletter of the Tampa Bay Bankruptcy Bar Association

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PRESIDENT'S MESSAGE

by Kelley Petry
Kelley Petry, P.A.

Thank you members for your ongoing support and participation with our great organization. We have accomplished several noteworthy services for our membership and community recently. Our Holiday Party at Spain restaurant in December sponsored the Salesian Youth Center and the Salesian Sisters of Tampa through Kathy Pedrero and Sister Elfie, enabling many wonderful children to receive Christmas gifts.

The 41st Annual Alexander L. Paskay Memorial Bankruptcy Seminar in February received a hearty attendance, and a couple of lively discussions to keep the audience involved.

Our CLE and Consumer lunches continue to be well attended, and provide applicable and timely information for practitioners to use on a daily basis. Please be aware that the Florida Bar has enacted an amendment to Rule 6-10.3(b) that now requires practitioners to acquire a minimum of 3 hours in approved technology programs, which our CLE committee will begin to incorporate in the 2017 – 2018 lunch programs.:

Effective January 1, 2017, each member shall complete a minimum of 33 credit hours of approved continuing legal education activity every 3 years. Five of the 33 credit hours must be in approved legal ethics, professionalism, bias elimination, substance abuse, or mental illness awareness programs and 3 of the 33 credit hours must be in approved technology programs which are included in, not addition to, the regular 33 credit hour requirement. If a member completes more than 33 credit hours during any reporting cycle, the excess credits cannot be carried over to the next reporting cycle. **Compliance for the new rule will begin in the member's next reporting cycle following the January 1, 2017 effective date.**

Do you like to run? Saturday March 11, 2017 from 5-7 pm HCBA is hosting their annual Pig Roast and 5K Pro Bono River Run. Instead of seeking monetary sponsors, this run will ask for pledges of time to pro bono services. Check in is at Chester H. Ferguson Law Center, and the run begins at 4:30 p.m. For more information contact Timothy Sierra at (813) 463-2256.

Do you like to play golf? Do you like to relax and watch other people play golf? If yes to either, then be sure to participate in our 19th Annual Golf Tournament to be played at MacDill AFB on April 28, 2017. More details to come.

Thank you all for your ongoing efforts to maintain our association.

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

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Downsizing the Lease Rejection Cap

by: Amy Denton Harris, Stichter, Riedel, Blain and Postler. P.A.

The American Bankruptcy Institute reports that U.S. hunting and fishing retail chain Gander Mountain Co. is preparing to file for bankruptcy, and U.S. shoe retailer Payless Inc. is negotiating a restructuring plan to close about 1,000 stores. Gander Mountain and Payless are following in the footsteps of other retailers who have shuttered unprofitable stores. Indeed, one of the most powerful tools in the debtor's toolbox is the power to reject unexpired nonresidential real property leases, relieving the debtor of the obligation to perform under the leases. The exercise of that power comes at a cost as it gives the landlord a general unsecured claim for damages arising from the rejection of the lease. If unrestricted, the landlord's claim could dwarf the claims of other general unsecured creditors, and the landlord could perhaps control the unsecured creditor class for purposes of confirmation.

As experienced bankruptcy practitioners, we know that the claim of a landlord for damages resulting from the termination of a lease of real property is limited to the rent reserved by the lease, without acceleration, for the greater of one year or 15 percent, not to exceed three years, of the remaining lease term following the earlier of the petition date, the date on which the landlord repossessed the premises, or the date on which the debtor surrendered the premises. 11 U.S.C. § 502(b)(6)(A). We also know that the landlord is entitled to a claim for any unpaid rent due under the lease, without acceleration, as of the earlier of the petition date, the date the landlord repossessed the premises, or the date the lessee surrendered the premises. 11 U.S.C. § 502(b)(6)(B). The 502(b)(6) cap was designed to compensate a landlord for his loss due to the breach of a lease, but to preclude a claim so large as to prevent other general unsecured creditors from recovering a reasonable dividend from the estate. *In re Thompson*, 116 B.R. 610, 612 (Bankr. S.D. Ohio 1990). Unfortunately, the Code provides little guidance on the precise scope of the cap.

There are three prevailing interpretations regarding the scope of the cap. Some courts have interpreted the cap expansively as a subject-matter cap limiting a landlord's claim for any lease-related damages. See e.g., *In re Storage Tech. Corp.*, 77 B.R. 824, 825 (Bankr. D. Colo. 1986). Courts on the other end of the spectrum have interpreted the cap narrowly, limiting only that portion of a landlord's claim for future rent. *See e.g., In re Best Prods. Co.*, 229 B.R. 673, 677-78 (Bankr. E.D. Va. 1998); *In re Atlantic Container Corp.*, 133 B.R. 980, 988 (Bankr. N.D. Ill. 1991). Other courts have taken the middle ground, interpreting the cap as applying only to claims that result directly from the termination of a lease, but not to collateral claims. *See Saddleback Valley Cmty. Church v. El Toro Materials Co. (In re El Toro Materials Co.)*, 504 F.3d 978 (9th Cir. 2007) (postpetition lease rejection); *Lariat Cos. V. Wigley (In re Wigley)*, 533 B.R. 267, 270-71 (B.A.P. 8th Cir. 2015) (prepetition lease termination); and *Kupfer v. Salma (In re Kupfer)*, 2016 WL 7473790 (9th Cir. December 29, 2016) (prepetition lease termination).

In *El Toro*, Saddleback Community Church, the landlord, filed an adversary proceeding against the bankruptcy estate of mining company El Toro Materials, the tenant, to recover $23 million in damages allegedly resulting from the tenant's failure to remove one million tons of its wet clay "goo" mining equipment and other materials on Saddleback's property after rejecting the lease. El Toro sought to cap the claim under Section 502(b)(6). The bankruptcy court held that the claim was

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not subject to the cap. The Bankruptcy Appellate Panel reversed on appeal.

The Ninth Circuit staked out a middle ground position and established a test for determining the scope of the cap in the context of a postpetition lease rejection: "[a]ssuming all other conditions remain constant, would the landlord have the same claim against the tenant if the tenant were to assume the lease rather than rejecting it?" Id. at 981. The Ninth Circuit noted that:

> The statutory language supports this interpretation. The cap applies to damages "resulting from" the rejection of the lease. 11 U.S.C. § 502(b)(6). Saddleback's claims for waste, nuisance and trespass do not result from the rejection of the lease-they result from the pile of dirt allegedly left on the property. Rejection of the lease may or may not have triggered Saddleback's ability to sue for the alleged damages. But the harm to Saddleback's property existed whether or not the lease was rejected. A simple test reveals whether the damages result from the rejection of the lease: Assuming all other conditions remain constant, would the landlord have the same claim against the tenant if the tenant were to assume the lease rather than rejecting it? Here, Saddleback would still have the same claim it brings today had El Toro accepted the lease and committed to finish its term: The pile of dirt would still be allegedly trespassing on Saddleback's land and Saddleback still would have the same basis for its theories of nuisance, waste and breach of contract. The million-ton heap of dirt was not put there by the rejection of the lease-it was put there by the actions and inactions of El Toro in preparing to turn over the site.

Interpreting the section 502(b)(6) cap to include damage collateral to the lease would also create a perverse incentive for tenants to reject their lease in bankruptcy instead of running it out: Rejecting the lease would allow the tenant to cap its liability for any collateral damage to the premises and thus reduce its overall liability, even if staying on the property would otherwise be desirable and preserve the operating value of the business. Bankrupt tenants-especially those who have damaged the property and thus may face liability upon expiration of the lease-would pack up their wares and reject otherwise desirable leases in order to gain the benefit of capping unrelated damages. This would both reduce the operating value of the business and deny recovery to a creditor-a lose-lose situation counter to bankruptcy policy. An incentive to sacrifice efficiency in order to exploit a loophole in the liability-capping provisions would be plainly counter to congressional intent to maximize the value of the estate to creditors.

Further, extending the cap to cover any collateral damage to the premises would allow a post-petition but pre-rejection tenant to cause any amount of damage to the premises-either negligently or intentionally-without fear of liability beyond the cap. If the tenant's debt to the landlord already exceeded the cap then there would be no deterrence against even the most flagrant acts in violation of the lease, possibly even to the point of the tenant burning down the property in a fit of pique.

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In re El Toro Materials Co., Inc., 504 F.3d 978, 980–81 (9th Cir. 2007).

The Eighth Circuit Bankruptcy Appellate Panel adopted El Toro and adapted the test to cases involving prepetition lease terminations: "[a]ssuming all other conditions remain constant, would the landlord have the same claim against the tenant if the lease had not been terminated." *Lariat Cos. V. Wigley (In re Wigley)*, 533 B.R. 267, 270-71 (B.A.P. 8th Cir. 2015).

Moreover, in *Kupfer*, the Ninth Circuit agreed with the Eighth Circuit's adaptation of the *El Toro* test to prepetition lease terminations. *Kupfer*, 2016 WL 7473790, at 4. In *Kupfer*, the debtors leased two commercial properties in California for a period of 10 years. Each lease contained an arbitration provision and a prevailing party attorney fee provision. The debtors stopped paying rent and later vacated the properties. The landlord filed a state court action for breach of the leases. The debtors counterclaimed, alleging various cause of action. The state court stayed the action pending arbitration. An arbitration award in the amount of $1,494,184.18 was entered against the debtors for unpaid past due rent, future rent discounted to present value, attorneys' fees, and arbitration fees. The debtors then filed for protection under Chapter 11. The landlord filed a proof of claim in the amount of the arbitration award. The debtors filed an objection to the claim asserting that the entire award should be limited by the cap in Section 502(b)(6). The landlord asserted that the cap should apply only to past and future rent, but not to the fee award. The bankruptcy court agreed, capping only the past and future rent. The district court affirmed, and the debtors appealed. The issue on appeal was whether the attorneys' and arbitration fees were subject to the cap.

Applying the *El Toro* test to the facts in *Kupfer*, the Ninth Circuit held that: (1) the fees attributable to litigating the landlord's claims for future rent were subject to the cap, because such claims would not arise if the leases had not been terminated; (2) the fees attributable to litigating the landlord's claims for past rent were not subject to the cap because the landlord could claim those damages independent of termination; and (3) to the extent that the debtors' counterclaims involved ordinary breaches independent of a lease termination, the related fees and costs were not subject to the cap. *Kupfer*, 2016 WL 7473790, at 5.

The Eleventh Circuit has yet to rule on the scope of the cap. Until it does, what advice can we offer our clients and prospective clients? Attorneys representing debtor-tenants should advise their clients: (1) to surrender undesirable leased real property expeditiously so as to avoid the accrual of past due rent and attorneys' fees and costs associated therewith; (2) that claims for collateral damage to the premises which are not attributable to the termination or rejection of the lease may not be subject to the cap; and (3) that fees and costs associated with litigating collateral damages claims may not be subject to the cap. Attorneys representing landlords should advise their clients to keep detailed records relating to each component of their claim against the debtor-tenant. In addition, creditors' lawyers should segregate their time entries for collection/litigation regarding past due rent, collection/litigation regarding future rent, and collection/litigation regarding collateral damage issues so that they can present competent evidence regarding the various components of the claim, some of which may be subject to the cap and some of which may not be subject to the cap.

Student Loan Sidebar

by: Christie Arkovich
cdalaw@tampabay.rr.com

Student loans represent the largest consumer debt now at $1.4 trillion or roughly the same amount of credit card and auto loan debt combined. There is even a student loan debt clock located at collegedebt.com. The Wall Street Journal reported in 2016 that one in six student loan borrowers were in default. Despite the magnitude of such debt, there is limited knowledge about what to do with student loans, and limited legal avenues to pursue for relief. The debtor and his or her attorney are challenged to be more proactive to find solutions.

The purpose of this column which will appear in each Cramdown issue will be to report on new judicial, administrative and legislative developments in student loan debt that may help your clients. Many of these items are not sufficient to warrant an independent article but may lead to significant ways to address student loan debt on behalf of your clients.

The Wall Street Journal reported in 2016 that one in six student loan borrowers were in default. With the right consumer law mindset, proactive solutions are often possible to lower payments to sustainable levels with an end in sight.

ABI Feb 2-3, 2016 Seminar: FDCPA/Student loans

For those wanting to learn more about consumer FDCPA/FCCPA violations relating to student loans, this was one of the topics to be discussed at the ABI seminar on February 3, 2017 and you can probably order the materials if you missed it.

ACICS – For-Profit Accreditor Shut Down

The fall quarter saw the demise of the Accrediting Council for Independent Colleges and Schools ("ACICS") which was the accreditor for approximately 750 for-profit schools with nearly 800,000 students including the failed Corinthian, Everest and ITT Tech. In September 2016, they lost their federal recognition (which decision is under appeal). Schools formerly accredited by ACICS will now be scrambling to find a new accreditor within 18 months. This may lead to a lot more closures.

Defense to Repayment ("DTR") Process

In November 2016, the new regulations were published for the Department of Education's new process to discharge federal student loans for students who were defrauded by schools. Generally this will be used for the closed for-profit schools, but the process can be utilized for any school and does not require a closure. This program is designed to help those who are no longer in attendance within 120 days of the school closing.[1]

The application for DTR is rather lengthy and requires specific allegations of fraud that were relied upon by the borrower in making the decision to enroll. The borrower has to show a state law violation that is within the applicable statute of limitations which will vary state to state. Prior to the regs being finalized, it was uncertain whether the DOE would apply a SOL, since it is often years before the fraud is discovered and federal loans themselves do not have an SOL. In Florida, the statute of limitations for fraud and the Deceptive and Unfair Trade Practices Act is four years. However, fraud is one of very few categories of law that allows for extension of the SOL under the discovery rule. In that event, provided the person discovered the fraud in the past four

years, he can then go back up to 12 years to seek relief. The first of these applications were granted in November and many more are expected in the next couple years.

Legal Definition of Student Loan Under Attack

In the fall quarterly issue of the Cramdown, Lara McGuire authored Signs of Change? Recent Dischargeability Exceptions under § 523(a)(8) about recent discharge cases, *In re Campbell* (Bar Exam Loan) and *In re Decena* (foreign non-eligible institution). Unfortunately in late November 2016, *In re Decena* was reversed on other grounds for improper service. Despite its reversal, *In re Decena* has been cited favorably in at least two other cases *In re: Meyer*, Case No. 15-13193 (Bankr. N.D. Ohio 2016) and *In re: Swenson*, Case No. 16-00022 (Bankr. W.D. Wis. 2016). While student loans are normally not dischargeable without a showing of undue hardship, other grounds do exist to discharge student loans. This may include student loans which involve:

1) co-borrowers who are siblings or friends – any situation where the student was not borrower, borrower's spouse or a dependent of the borrower;
2) loans that exceed the cost of education (including room and board) for accredited schools; and
3) private loans for non-accredited schools such as the enormous number of medical schools in the Caribbean – most of which are not eligible for federal funds.

There are more than 50 medical schools in the Caribbean. Most of which are not accredited by the U.S. and are not on the authorized Federal Schools list eligible for Title IV funding. Therefore most student loans for these schools are private and may be dischargeable under the cases cited above. There may also be some instances whereby federal loans were used as a conduit to fund education at these non-accredited medical schools through a joint degree with a U.S. based institution.

As more for-profit schools close, particularly those with non-transferrable credits, there may be a challenge to the "educational benefit" requirement for a non-dischargeable student loan. I have heard from many former ITT students who feel they did not obtain any value from their education and some employers have even advised them to leave their ITT degree off their resume. The Court in *In re Campbell* rejected a broad reading that assumed that an "educational benefit" encompassed any loan that is tangentially related to education in its decision to discharge the Bar Study Loan.

While arguments like this may only apply to private student loans which represent only 10% of the $1.4 trillion in outstanding student loan debt, it also represents some of the most difficult debt to repay. Private student loans often demand high interest and high monthly payments without recourse to any of the income based debt forgiveness plans available for federal loans.

The takeaway from these 2016 cases is that bankruptcy attorneys should spend some time determining if the private student loans their clients are facing were actually Qualified Educational Loans under IRS 221(d)(1) and, if not, consider bringing or recommending adversary proceedings to determine if those debts are excepted from the bankruptcy discharge.

1 It is a simple matter to apply for a School Closure Discharge if your client was in attendance within 120 days by using this form: https://ifap.ed.gov/dpcletters/attachments/GEN1418AttachLoanDischargeAppSchoolClosure.pdf

SAVE THE DATE

Tampa Bay Bankruptcy Bar Association
ANNUAL DINNER

Thursday, June 1, 2017
6:00 p.m. – Cocktail Hour
7:15 p.m. – Dinner

Palma Ceia Golf and Country Club
1601 South MacDill Avenue
Tampa, Florida 33629

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More details to follow. If you have any questions, please contact:

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Friday, April 28, 2017
11:30 a.m. check-in/lunch*
12:00 p.m. putting contest
12:45 p.m. shotgun start

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(Includes golf, box lunch, drink tickets, prizes, dinner and more)

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Wait to Press Send: Some E-Mails Not Protected by Attorney-Client Privilege

by: By Michael Hooi (Stichter, Riedel, Blain and Postler. P.A.), and Lara McGuire

With the increased prevalence of technology and electronic communication in nearly every aspect of our daily routines, traditional lines of attorney-client privilege have slowly become blurred. Recently, the Middle District of Florida addressed one facet of this ever-changing realm: whether e-mails exchanged between a plaintiff and his counsel, which were later forwarded by the plaintiff to his work e-mail account, are protected by the attorney-client privilege. In *Bingham v. Baycare Health Sys.*,[1] the plaintiff's employer produced e-mails and attachments in response to defendant's subpoena, which included e-mails and attachments between the plaintiff and his attorneys that were forwarded from his personal e-mail to his work account. Following a fact-specific inquiry, the Court concluded that the plaintiff failed to meet his burden in showing "that his communications were reasonably expected and understood to be confidential," and, thus, held that the privilege did not apply.[2]

In arriving at this holding, the court recognized at the outset that "the relevant inquiry is not whether the individual expected his or her communications to remain confidential but rather whether that expectation was reasonable."[3] First, the court adopted a four-factor test to evaluate whether, in the context of e-mails transmitted

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1 8:14-CV-73-T-23JSS, 2016 WL 3917513, at *1 (M.D. Fla. July 20, 2016).
2 *Id*. at *6.
3 *Id*. at *1 (internal citations omitted).

Wait to Press Send

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over and maintained by a company server, a reasonable expectation of privacy exists.[4] Under this approach, courts consider: (1) whether the corporation maintains a policy banning personal or objectionable use, (2) whether the company monitors the use of the employee's e-mail communications or computer, (3) whether third-parties have a right of access to the e-mail communications or computer, and (4) whether the corporation notified the employee, or whether the employee was aware, of the use and monitoring policies.[5] The court further analogized the issue of reasonableness to cases that address the Fourth Amendment in the context of electronic communications, focusing on whether the "expectation of privacy was objectively reasonable."[6]

The authority splits, however, on whether there must be evidence of actual monitoring, or whether the mere existence of a policy allowing monitoring, is sufficient in meeting the second factor.[7] In adopting the majority view, the *Bingham* court held that a policy retaining the right to access and monitor communications was sufficient to satisfy the second factor.[8]

Here, the employer's documented policy satisfied all four factors. First, the applicable policy explicitly states that use of the communication system was strictly for business purposes, and that the system and all correspondence constituted company property. As to the second and third factors, the policy goes further in providing clear authority to "monitor, review, audit, intercept, access and disclose all electronic and telephone

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4 *Id*. at *2 (citing In re Asia Global Crossing, Ltd., 322 B.R. 247, 257 (Bankr. S.D.N.Y. 2005)).
5 *Id*.
6 *Id*. at *3.
7 *Id*. at *4.
8 *Id*.

Wait to Press Send

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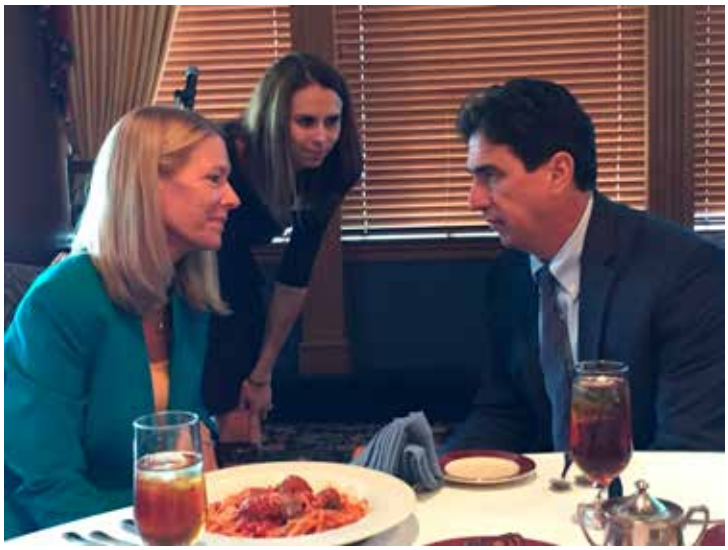
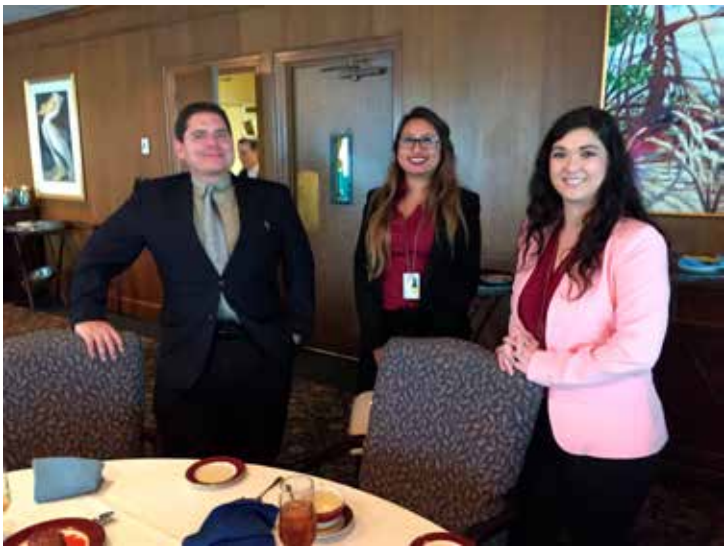
communications created, received or sent over the company's communication system for any purpose."[9] Notably, the policy warns that the "confidentiality of any message should not be assumed."[10] Lastly, the policy was made clear to all employees, and plaintiff certified his compliance with the policy by signing and acknowledgement form.[11] Although plaintiff raised the claim that he subjectively believed the company rarely monitored employee e-mails, the court found that claim alone to be insufficient to meet his burden of proving the communications were confidential.[12]

Due to the clearly prohibitive language of the company's policy, as well as the plaintiff's knowledge that his communications were both accessible and monitored, the court concluded that the plaintiff failed to prove the e-mails were confidential, and, thus, they were not protected by attorney-client privilege.[13]

9 *Id*. at *5.
10 *Id*.
11 *Id*. at 5–6.
12 *Id*. at *6.
13 *Id*.





Case Study

Mishandling Collateral Results in Nondischargeable Debt

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

In *In re Monson*, 2016 WL 6833332 (11th Cir. Nov. 21, 2016), the Eleventh Circuit held that where a debtor has knowledge of a lienholder's claim and subsequently sells or disposes of the property without the lienholder's consent, that act constitutes a willful and malicious injury under 11 U.S.C. § 523(a)(6), regardless of whether the lienholder's security interest is properly perfected.

A secured creditor loaned an acquaintance $130,000 to purchase equipment for an internet café business. Pursuant to the contract between the parties, the loan was to be secured by the equipment. Law enforcement subsequently shut down the business as an illegal online gaming scheme and seized the equipment, but ultimately did not formally charge the borrower and permitted him to retrieve the seized equipment. While the equipment was still in law enforcement's possession, the secured creditor provided notice to the borrower that it was demanding liquidation of the business' assets to repay the loan. The borrower instead used the equipment to open a new business.

The secured creditor filed a state court action against the borrower and obtained a judgment for $130,000. Subsequently, the borrower filed for Chapter 7 bankruptcy. The bankruptcy court granted the debtor's motion to turn over the equipment to the secured creditor, but by then, the equipment appraised at a value of only $12,050.

The bankruptcy court found that the debtor's actions constituted a willful and malicious injury to the secured creditor within the meaning of 11 U.S.C. § 523(a)(6). It entered a judgment of nondischargeability in favor of the secured creditor for $117,950, the difference between the original loan amount and the current value of the equipment returned to the secured creditor. The district court affirmed the bankruptcy court's opinion and final judgment. The debtor appealed, and the Eleventh Circuit affirmed the district court.

The Eleventh Circuit first addressed whether the debtor committed a willful injury and concluded that absconding with the equipment and using it to open a new business was an intentional act the purpose of which was to cause injury or which was substantially certain to cause injury. The court noted that the debtor knew about the secured creditor's demand that he return or liquidate the assets to repay the loan, the debtor was aware of at least a "purported" security interest in the assets, and the secured creditor never consented to the opening of the new business. The Eleventh Circuit relied on two bankruptcy court decisions holding that, regardless of whether a lienholder's security interest is properly perfected, where the debtor has knowledge of the lienholder's claim and subsequently sells or disposes of the subject property without notice to the lienholder, such an act constitutes willful and malicious injury under Section 523(a)(6).

The Eleventh Circuit next concluded that the debtor committed a malicious injury. A "malicious" injury is one that is wrongful and without just cause or excessive even in the absence of personal hatred, spite, or ill will. The court again emphasized that the debtor knew the secured creditor was attempting to recoup the loan, had agreed to a repayment of the loan through a liquidation of the equipment, and yet nevertheless relocated the equipment for use in another business without the creditor's consent.

Consequently, the Eleventh Circuit held that the Chapter 7 debtor's unauthorized removal of the equipment was nondischargeable under Section 523(a)(6) as debt for the debtor's "willful and malicious injury." Accordingly, improper disposition of collateral results in a nondischargeable debt, even if the secured creditor's lien is unperfected, as long as the debtor has knowledge of the lien.

Case Study

Baker Botts v. ASARCO Read Narrowly When Supplementing Fee Application

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

In *In re Stanton*, 559 B.R. 781 (Bankr. M.D. Fla. Oct. 26, 2016), the bankruptcy court interpreted the Supreme Court's decision in *Baker Botts LLP v. ASARCO LLC*, 135 S. Ct. 2158 (2015) narrowly and concluded that a Chapter 7 Trustee's counsel was entitled to compensation from the estate for time and work spent supplementing a fee application in response to the U.S. Trustee's objection.

After recovering $6.5 million for the estate in settlement of fraudulent transfer claims against the debtor's wife, counsel for the Chapter 7 Trustee filed his initial fee application seeking $748,875 in fees. The fee application contained all of the information required for a Chapter 7 fee application and cited approximately 2,000 hours worked. The U.S. Trustee objected, in effect insisting on the level of detail required for a fee application in a Chapter 11 case. In response to the U.S. Trustee's objection, counsel for the Chapter 7 Trustee filed a detailed supplement to his initial fee application addressing the U.S. Trustee's objections. The U.S. Trustee conceded that the supplement largely resolved his objections, and the bankruptcy court ultimately approved the fee application in its entirety.

Counsel for the Chapter 7 Trustee's second fee application included fees incurred for time spent on his initial fee application. The U.S. Trustee again objected, arguing that *Baker Botts* precluded recovery of fees incurred for time spent on a fee application after an objection has been lodged, as such fees are for work defending a fee application and therefore unrecoverable.

The bankruptcy court disagreed and approved the second fee application in its entirety, explaining that to be compensable, fees must have been incurred for work done in service of the estate. A professional's preparation of a fee application is a service to the estate, since an itemized bill explains the fees incurred. Here, the additional disclosures made through the supplement benefited the administration of the estate by allowing the Chapter 7 Trustee, the U.S. Trustee, and other parties to understand the work performed and, if necessary, the ability to dispute counsel's fees. Thus, the challenged fees were for work "more akin to the preparation—rather than defense—of a fee application." The court noted that had counsel provided the level of detail in his initial fee application that he did in his supplement, he would certainly have been compensated for it.

In re Stanton should give counsel who seek compensation from the estate comfort, since the court made clear that "it is the nature of the work—not when it is performed—that determines whether it is compensable."

Case Study

Eleventh Circuit Holds Debtor Who Elects to Surrender Collateral Cannot Oppose Foreclosure

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

In *In re Failla*, 838 F.3d 1170 (11th Cir. Oct. 4, 2016), the Eleventh Circuit resolved a split among Florida bankruptcy judges by ruling that a debtor who elects to "surrender" real property during his or her bankruptcy case cannot oppose a state court foreclosure action against the property. The *Failla* decision represents a significant victory for mortgage lenders who can now be assured that they will be able to complete foreclosure proceedings quickly and without opposition following abandonment.

In Failla, a husband and wife owned a piece of real property, the purchase of which they financed through a loan and mortgage. The couple defaulted on the mortgage and the bank filed a foreclosure action in state court. Subsequently, the couple filed a voluntary chapter 7 bankruptcy petition. During the bankruptcy proceeding, the debtors admitted that the mortgage on their house was valid, that the house served as collateral for the mortgage, and that the mortgage debt exceeded the value of the home. They also filed a statement of intention, as required under 11 U.S.C. § 521(a)(2), electing to surrender the house. Because there was no equity in the home, the chapter 7 trustee abandoned the home back to the debtors. The debtors continued to live in the house while they contested the foreclosure action.

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courthouse, 5th floor training room

March 7, 2017
April 4, 2017
May 2, 2017

Monthly CLE Lunch – University Club

March 21, 2017
April 11, 2017
May 9, 2017

Happy Hour

March 23, 2017 – Location TBD
April 27, 2017 – Location TBD
May 25, 2017 – Location TBD

Holiday Party
December 1, 2017

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June 1, 2017

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Case Study, Eleventh Circuit

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The bank filed a motion to compel surrender in the bankruptcy court, arguing that the debtors' opposition to the foreclosure action was contrary to their statement of intention to surrender the house. The bankruptcy court granted the bank's motion and ordered the debtors to stop opposing the foreclosure action. The district court affirmed.

In affirming the district and bankruptcy courts, the Eleventh Circuit first concluded that Section 521(a)(2) of the Bankruptcy Code effectively prevents debtors who surrender their property from opposing a foreclosure action in state court. Under Section 521(a)(2)(A), a debtor must declare what he intends to do with respect to the collateral securing his debts – namely, the collateral is claimed exempt, the debtor will surrender the collateral, the debtor will redeem the collateral, or the debtor will reaffirm the debt.

The Eleventh Circuit held that by surrendering the property, a debtor surrenders it to both the trustee and the secured creditor. The court analyzed other sections of the Bankruptcy Code which explicitly specify to whom a debtor surrenders property (either the creditor or the trustee in those instances). Because the surrender language in Section 521(a)(2) does not specify to whom the surrender is made, the Court concluded that it must be to both the trustee and the creditor. Upon surrender, the trustee must first decide whether to liquidate or abandon the property. If the latter, then the debtor surrenders it to the creditor.

The Eleventh Circuit agreed with the lower courts that a debtor must also drop its opposition to a foreclosure action. While "surrender" does not mean to give up possession of the property, in the context of Section 521(a)(2), "surrender" means to give up a right or claim, including a right or claim to contest a foreclosure action. As a result, debtors who surrender their property can no longer contest a foreclosure action. Any other result would allow debtors to obtain a discharge in bankruptcy based on a sworn statement of intention to surrender, and yet enjoy possession of the collateral indefinitely while hindering and prolonging the state court foreclosure process.

The Eleventh Circuit also reasoned that its ruling is fair. Because the debtors conceded in their bankruptcy filings that the mortgage was valid and the bank had the right to foreclose, compelling them to stop opposing the foreclosure action equates to requiring the debtors to honor their statement of intention.

Lastly, the Eleventh Circuit found that the bankruptcy court possesses the authority to enjoin the debtors from contesting the foreclosure action. Rejecting the debtors' contention that the lender's only remedy was to obtain relief from the automatic stay to foreclose, the Eleventh Circuit found that bankruptcy courts have broad powers to remedy violations of the mandatory duties Section 521(a)(2) imposes on debtors and to prevent an abuse of process. Under Section 105(a), bankruptcy courts may issue any order, process, or judgment that is necessary or appropriate to carry out the Bankruptcy Code. Accordingly, bankruptcy courts in the Eleventh Circuit have the authority to compel debtors not to oppose a foreclosure action.

People on the Go

Hugo S. "Brad" deBeaubien was recently named a partner with Shumaker, Loop & Kendrick, LLP. Brad is a member of the litigation and labor and employment practice groups in the Tampa, Florida office. Brad practices primarily in the area of business litigation, with an emphasis on bankruptcy and labor and employment law. He received his J.D., magna cum laude, from Florida State University and his B.A. from the College of William and Mary.

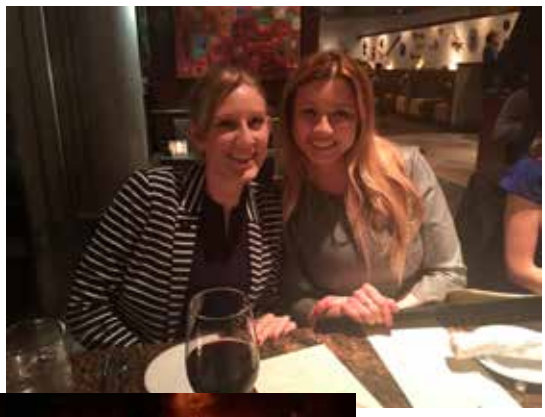
Kathleen L. DiSanto recently joined the Bush Ross, P.A. law firm. Kathleen focuses her practice on matters related to bankruptcy, corporate restructuring, creditors' rights, insolvency proceedings, and general commercial transactions. Ms. DiSanto is Board Certified in Business Bankruptcy Law by the American Board of Certification, accredited by The Florida Bar. Ms. DiSanto entered private practice in 2010, following the completion of a two-year clerkship to the Honorable Caryl E. Delano, United States Bankruptcy Judge, Middle District of Florida. She received her B.A. from the University of Virginia, and her law degree from Stetson University.

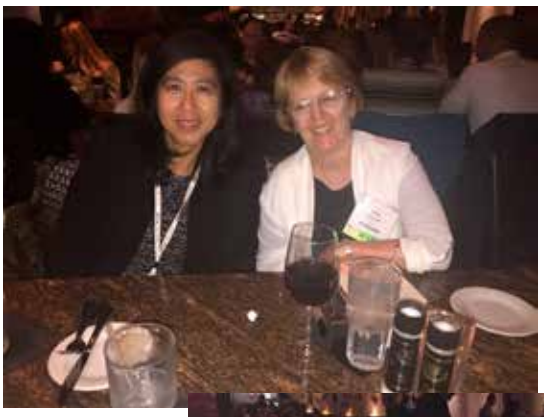
Bush Ross P.A. is proud to announce that Lauren Rehm has joined the firm as an associate. Lauren received her law degree from the University of Florida Levin College of Law. Prior to joining Bush Ross, Lauren clerked for the Honorable Steven D. Merryday, Chief Judge of the United States District Court for the Middle District of Florida.

Shutts & Bowen LLP named Ryan C. Reinert as a partner. Ryan is a member of the firm's Creditors' Rights/Bankruptcy Group in Tampa. Ryan focuses his practice on business bankruptcy, including trustee and creditor committee representation, and commercial litigation

IWIRC Tea held on Feb. 17th at the Royal Tea Room in Tampa

On February 2, 2017, the **Florida Network** hosted a dinner at Jackson's Bistro for members and friends attending the **ABI- Paskay Seminar** in Tampa. Not only was the event well attended by members and long-time supporters of IWIRC, but we welcomed a few new faces as well. Thanks to all that joined in making networking so enjoyable.





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