Spring 2015

The Cramdown

The Newsletter of the Tampa Bay Bankruptcy Bar Association

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

PRESIDENT'S MESSAGE

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

2015 is off to a grand start! In February, the Chapter 13 Seminar was a great success. A special thanks for all the hard work of those who organized this insightful program. Additionally, the 39th Annual Alexander L. Paskay Memorial Bankruptcy Seminar was a first-rate program and well attended. This is a suitable time to reminisce of our experiences with the Judge. It was a great honor to have argued in front of him and absorb some of his knowledge throughout the years. Judge Paskay's legacy continues today through his contributions to our district and our profession.

Spring is here! What a perfect time for new beginnings. I would like to take a moment and congratulate Chuck Kilcoyne on his retirement. All of the best to Chuck and his new beginning; he will be missed. Furthermore, with Spring, comes the process of selecting next year's board members. I have enjoyed my tenure as president and look forward to the last few months. Mark your calendars for the Annual Golf Tournament on April 24th and the Bankruptcy Boot Camp on May 15th.

As always, I look forward to seeing you all at the monthly luncheons and happy hours, as well as the Annual Dinner on June 4, 2015.

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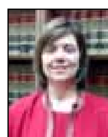

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Too Big to Claw Back? Bankruptcy Code § 546(e) Shields Madoff Ponzi Scheme Profits.

by Frank Harrison

On December 8, 2014, the Second Circuit U.S. Court of Appeals read the Bankruptcy Code to shield the profits paid by a Bernard Madoff company to "net winners" (those paid in excess of their initial investments into the Ponzi scheme) from claw back, as constructively fraudulent transfers, by a trustee seeking to distribute those profits to the scheme's victims. *See In re Bernard Madoff Inv. Sec. LLC*, 773 F.3d 411, 414 (2d Cir. Dec. 8, 2014). While the holding results from a straightforward application of statutory definitions, the effect on previous and future settlements in the case and the Second Circuit's characterization of the Congressional intent behind those definitions – i.e., minimizing market disruption – bear comment.

Madoff orchestrated a massive and unprecedented Ponzi scheme which purported to purchase securities on behalf of customers (many of which were institutional investors and feeder funds) but in reality was depositing customer investments into a single commingled checking account and, for years, fabricating statements showing trading activity and returns between 10-17% annually. *Id*. at 415, 420. After the scheme collapsed, the management of Madoff's company was left to a trustee appointed under the Securities Investors Protection Act, 15 U.S.C. § 78aaa, which empowers a trustee appointed pursuant to it to "recover" (claw back) money paid out by the company if the money would otherwise have been available for ratable distribution and could have been clawed back under the Bankruptcy Code. 773 F.3d at 414.

The trustee sued hundreds of Madoff customers who had withdrawn more than their investments and thus, as the Court put it, "profited (whether knowingly or not) from Madoff's scheme." *Id*. As is common in Ponzi scheme cases, the trustee argued that, under both the Bankruptcy Code and New York law, the net winner payments were "fraudulent transfers" either made by Madoff's company with actual intent to defraud creditors or constructively fraudulent because they were made without receiving reasonably equivalent value in exchange. *Id*. at 416 (citing 11 U.S.C. §§ 544(b), 548(a)(1)(A)-(B)). Several defendants moved to dismiss these lawsuits by arguing that a different Bankruptcy Code provision, 11 U.S.C. § 546(e), precluded avoidance of the constructively fraudulent transfers made by stockbrokers either as "settlement payments" or "in connection with a securities contract."

The Second Circuit held that the net winner payments could not be clawed back as constructively fraudulent transfers because they were both "settlement payments" and "in connection with a securities contract" under the Bankruptcy Code. 773 F.3d at 417. Simply put, the opinion concluded that Congress had legislated that the potential market chill from a claw back made the Ponzi scheme payments too big to claw back (and arguably that this would the case regardless of the magnitude of the potential chill, as § 546(e) contains no dollar threshold). A few examples include:

- "Section 546(e) is a very broadly-worded safe-harbor provision that was enacted 'to minimize the displacement caused in the commodities and securities markets in the event of a major bankruptcy affecting those industries.'" *Id*. at 416 (internal citations omitted).
- "The theory underlying this section is that '[i]f a firm is required to repay amounts received in settled securities transactions, it could have insufficient capital or liquidity to meet its current securities trading obligations, placing other market participants and the securities markets themselves at risk.'" *Id*.
- "The statutory definition and *Enron* compel the conclusion that, for example, if I instruct my broker to sell my shares of ABC Corporation and remit the cash, that payment is a 'settlement' even if the broker may have

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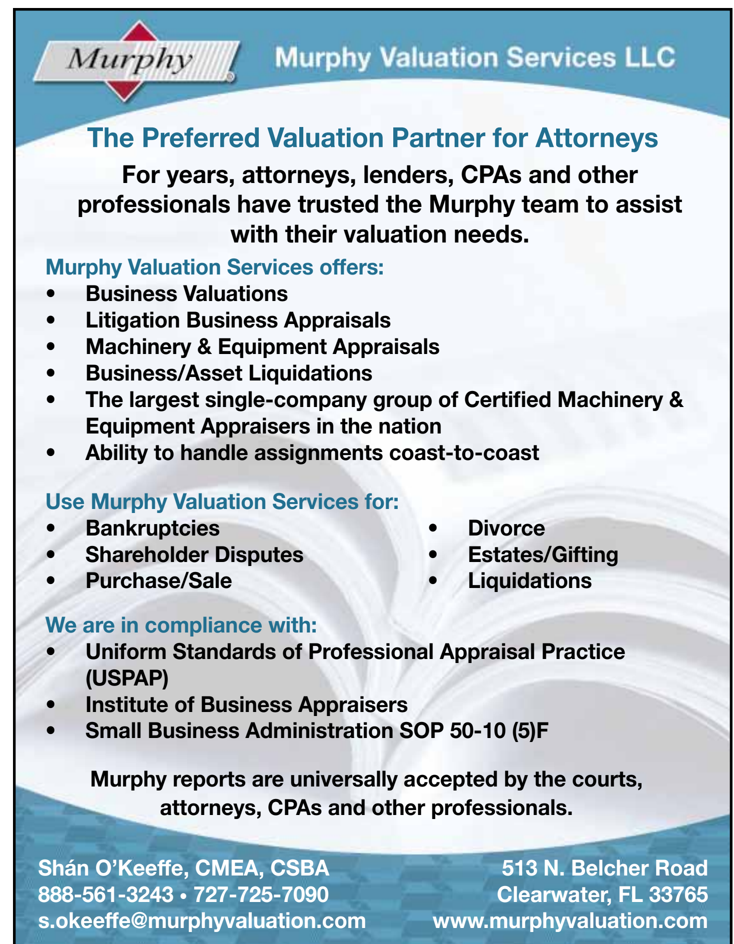
> failed to execute the trade and sent me cash stolen from another client." *Id.* at 422.

The opinion merits at least three observations. First, there may be a new breed of "net losers" in the *Madoff* case: those who settled on a claw back action before this opinion. This category may include nearly half of the total dollars filed as claims in the case, and a strong majority of the dollars recovered by the SIPA trustee. As of February 6, 2015, the SIPA trustee is reported to have recovered or entered into agreements to recover $10.5 billion (approximately 60%) of the estimated $17.5 billion in principal lost by Madoff customers who filed claims, which "far exceeds prior restitution effort related to Ponzi schemes both in terms of dollar value and percentage of stolen funds recovered."[1] Of the $9.8 billion received by the SIPA trustee as of September 30, 2014, $8.7 billion resulted from settlements.[2] Unless the settlements so provide, there is likely no appellate recourse for those who settled before the December 8, 2014 opinion.

Second, the *Madoff* decision may reduce the trustee's prospects for recovering the remaining 40% of the unrecovered dollars in claims filed – amounting to about $7 billion – in this case, which in turn will reduce the amount for distribution to the scheme's victims. Because neither the *Madoff* opinion nor § 546(e) apply to the trustee's attempts to claw back on a theory of actual fraudulent intent under § 548(a)(1)(A), all hope is not lost for the trustee's future recoveries. The trustee may still rely upon the Ponzi scheme presumption of actual fraudulent intent for those transfers made in furtherance of the Ponzi scheme.[3]

Third, the *Madoff* opinion reads certain Bankruptcy Code provisions as essentially prioritizing market stability (or at least perception thereof) over recovery to the Ponzi scheme victims who could benefit from a claw back. While Second Circuit opinions have previously interpreted § 546(e) expansively, this case involved a particularly in-depth analysis as to Congressional intent and dictionary definitions of the terms evincing that intent. Applying the statutory definitions to the *Madoff* facts resulted in those definitions dovetailing neatly with the Second Circuit's interpretation of the policy behind them. So understood, *Madoff* may have been an easy case for the Second Circuit. The dollars and institutional investors laid a clear factual predicate for potential market disruption. But in most instances, the potential for market disruption will be less obvious, and bankruptcy lawyers and investors may speculate how these definitions will be applied by courts (which have not yet weighed in on the issue) in more run-of-the-mill fraudulent transfer cases, including those involving privately held companies.[4]

1 The Madoff Recovery Initiative, http://www.madofftrustee.com/recoveries-04.html (last visited February 27, 2015).
2 *Id.*
3 *See, e.g., Bear, Stearns Sec. Corp. v. Gredd (In re Manhattan Inv. Fund Ltd.)*, 397 B.R. 1, 13 (S.D.N.Y. 2007).
4 The Third, Sixth, and Eighth Circuit U.S. Courts of Appeal have held that § 546(e) protects beneficial owners of privately issued securities. *See, e.g., Contemporary Indus. Corp. v. Frost*, 564 F.3d 981 (8th Cir. 2009); *QSI Holdings, Inc. v. Alford (In re QSI Holdings)*, 571 F.3d 545 (6th Cir. 2009), *cert. denied*, 558 U.S. 1148 (2010); *Brandt v. B.A. Capital Co. (In re Plassein In'l Corp.)*, 590 F.3d 252 (3d Cir. 2009), *cert. denied*, 559 U.S. 1093 (2010). The American Bankruptcy Institute Commission to Study the Reform of Chapter 11, in its 2012-2014 Final Report and Recommendations, has proposed an amendment to the Bankruptcy Code to limit the scope of section 546(e) to prevent it from applying to beneficial owners of privately issued securities in connection with prepetition transactions using some or all of the debtor's assets to facilitate the transaction.



Recent Significant Florida Exemption Cases

by Dennis J. LeVine

The bankruptcy courts continue to be the prime interpreter of Florida exemptions of personal property and real property. The following are important recent cases.

Homestead

In *In re Furey*, 2014 WL 2119697 (Bankr. M.D. Fla. 2014), the Court found that proceeds of sale of homestead were exempt. The debtor sold his home property for approximately $300,000, and put the proceeds in escrow. The debtor purchased another home for about $225,000, leaving the balance in escrow to improve the property, or to acquire a new homestead property. The trustee objected to the exemption of the funds held in escrow. The debtor testified she intended to reinvest the proceeds into the new homestead. The Court held that the debtor did not abandon her homestead exemption right to the balance in escrow when she was forced to purchase another homestead for a lesser amount. The Court pointed to controlling law related to intent in *Orange Brevard Plumbing & Heating Co. v. La Croix*, 137 So.2d 201, 206 (Fla.1962) ("[O]nly so much of the proceeds of the sale as are intended to be reinvested in another homestead may be exempt under this holding. Any surplus over and above that amount should be treated as general assets of the debtor"). *In re Furey*, 2014 WL 2119697 (Bankr. M.D. Fla. 2014)

Equitable Lien on Real Property

In *In re Thomas*, 2013 WL 6502836 (Bkrtcy. N.D. Fla. 2013), the Court imposed an equitable lien on homestead. The trustee discovered that the debtor was party to pre-petition contracts not disclosed in the debtor's Schedules or SOFA. As a result of one contract, the debtor sold property and made a net profit of $30,839.13. The trustee moved to have the profit deemed property of the estate and requested turnover. The Bankruptcy Court granted the trustee's motion for summary judgment. The District Court and Eleventh Circuit affirmed. The trustee then filed an action to surcharge the debtor's exempt IRA. The Bankruptcy Court declined to grant the surcharge, and held that exceptional circumstances did not exist to warrant a surcharge on or turnover of the debtor's IRA. "There must be something more than just the combination of failing to disclose interests and turn over property of the estate before the Court should order a surcharge on the Debtor's exempt property" ... "The Debtor has not engaged in the sort of inequitable conduct that other courts have used as a basis for surcharging exempt property". *In re Thomas*, 2013 WL 6502836 (Bkrtcy. N.D. Fla. 2013).

In *In re Marcum*, 508 B.R. 499 (Bankr. M.D. Fla. 2014), the Court imposed an equitable lien on homestead. Creditor made pre-petition loans so the debtor could pay delinquent real estate taxes and prevent a forced sale of his homestead. A promissory note identified the property to be pledged as security and expressly stated the amount of the loan secured by a lien upon the property; however, the debtor failed to execute and deliver a mortgage. After the debtor filed Chapter 13, the creditor filed an adversary seeking a declaration that the creditor held a valid first mortgage on debtor's property, even though debtor had failed to execute any mortgages as provided in the promissory note. The Bankruptcy Court granted summary judgment for the creditor, finding the circumstances of the case supported the imposition of an equitable lien under Florida law for money loaned for THE purpose of paying the real estate taxes on the debtor's homestead: "imposition of an equitable lien hardly overrules the statutes and case law that typically require certain formalities in actual recording as a condition to obtaining a mortgage. The equitable lien law exists exactly for the situation in which those formalities were not followed and is itself 'established law.'" The Court concluded that " so long as an agreement exists that indicates intent to create a mortgage, an equitable lien may be imposed with the mortgages never actually executed. Imposition of an equitable lien in this case is further supported by the doctrine of subrogation since the money lent was used to

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pay real estate taxes". *In re Marcum*, 508 B.R. 499 (Bankr. M.D. Fla. 2014).

In *In re Bifani*, 580 Fed.Appx. 740 (11th Cir. 2014), the Eleventh Circuit affirmed summary judgment entered by Judge Williamson in favor of chapter 7 trustee avoiding a fraudulent transfer and imposing an equitable lien against debtor's homestead. The Court found the debtor made a gratuitous pre-petition transfer of real property to a woman he had been living with for seven years, after his former business partner had commenced suit against him, under circumstances in which debtor continued to maintain post-transfer possession and control of the property. These facts presented badges of fraud which supported an inference of actual intent to hinder, delay or defraud creditor(s) and the Court avoided the transfer. The Court also found evidence to justify the imposition of an equitable lien on the debtor's homestead because the home was purchased with "ill-gotten proceeds . . . .", and the debtor failed to present evidence in support of her good faith argument. The case contains an excellent review of the law on equitable liens on homestead. *In re Bifani*, 580 Fed. Appx. 740 (11th Cir. 2014).

Wildcard Exemption

In *In re Castillo*, 2014 W L 843606 (Bankr. S.D. Fla. 2014), the Court found the "wildcard" exemption available for a debtor who lived in the homestead, but was not on the title. The debtor lived with his wife in the family homestead; however, the debtor did not own any interest in the homestead. The debtor claimed the "wild card" exemption and the trustee objected. The Court found that the Florida Supreme Court's holding in Dumoulin was limited to assets of the debtor, since the Florida Constitutional homestead exemption specifically protects "property owned" by the debtor from forced levy sale. Even though it was his family's homestead, the Court found that the debtor could not exempt the homestead because it was not his property to exempt. Thus, the property was not subject to administration by the trustee. Since the debtor had no ownership interest in the home, the debtor was entitled to the additional $4,000 personal property exemptions in Fla. Stat. § 222.25(4). *In re Castillo*, 2014 WL 843606 (Bankr. S.D. Fla. 2014).

In *In re Valone*, 500 B.R. 645 (Bankr. M.D. Fla. 2013), a Chapter 13 debtor could not claim the wildcard exemption. The Chapter 13 trustee objected to the Florida enhanced personal property exemption on grounds that debtors were receiving the benefit of Florida homestead exemption and did not qualify for the "wildcard" personal property exemption. Since the debtor proposed to retain the residence, Judge Delano held that the debtors were not able to claim the "wildcard" exemption because the automatic stay during the Chapter 13 case provided the debtors with the benefit of homestead protection, even though they claimed that protection. As such, the debtors "received the benefit" of Florida homestead exemption. The Court noted that the distribution to unsecured creditors under the Plan as confirmed was $11,585.00, significantly more than the $3,400.00 originally proposed by the debtor. On appeal, the District Court affirmed, framing the issue as whether a debtor receives the benefit of Florida's homestead exemption by simply retaining and residing in the home during a Chapter 13 case. 2014 WL 970024 (M.D. Fla. 2014). The District Court noted that contrary decisions in *In re Iuliano* and *In re Osborne* were issued in a Chapter 7 cases, and did not control in a Chapter 13. *In re Valone*, 500 B.R. 645 (Bankr. M.D. Fla. 2013)

In *In re Fitzpatrick*, 521 B.R. 698 (Bankr. M.D. Fla. 2014), the debtor was entitled to the wildcard exemption by not claiming the home as exempt, but owned as TBE. Chapter 7 trustee objected to debtor's $4,000 wildcard exemption under Florida Statute § 222.25(4), arguing that the debtor was receiving benefits of Florida homestead exemption. The debtor and his non-debtor spouse intended to remain in the house and reaffirm the mortgage debt. They did not claim the property as exempt, but only

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Exemption Case

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immune from administration as TBE property. The trustee argued this was evidence the debtor was "retaining the benefit" of the homestead. Judge Jennemann held that since the debtor had not claimed the homestead exemption, and the non-debtor spouse had affirmatively waived Florida homestead exemption for property, the debtor was not "claiming or receiving the benefits" of Florida homestead exemption. The Court found that under these facts, the debtor did not prevent the trustee from effectively administering the home. The Court noted other cases where a debtor the non-debtor spouse owned homestead property as TBE courts have concluded that the debtor is receiving the benefits of the homestead exemption through the non-debtor spouse, and is precluded from claiming the wildcard exemption. The key fact in this case was non-debtor spouse affirmatively waived his right to claim the homestead exemption. Contrary to the trustee's claim, whether or not the debtor intends to remain in the homestead property was not material. A statement of intention to retain homestead property neither determines whether the property is property of the estate, nor effects a trustee's administration of the estate property. *In re Fitzpatrick*, 521 B.R. 698 (Bankr. M.D. Fla. 2014).

Annuity Contracts and IRAs

In *Connor v. Seaside National Bank*, 135 So.3d 508 (Fla. 5th DCA 2014), the state court found that annuities purchased by former husband for former wife (with wife as beneficiary) are exempt from garnishment under Florida Statute § 222.14. The debtor received three (3) IRAs pursuant to a divorce settlement. Judge Jennemann held that the debtor's interest in the accounts was exempt under the Florida statute § 222.21(2) providing an exemption from creditors' claims for any interest of an owner, beneficiary, or participant in enumerated tax-preferred funds or accounts. The Court stated that in general, exemptions should be construed liberally in favor of providing the benefits of the exemptions to debtors. Here, the court relied on the language of the statute, which exempts "*any* interest of any owner, participant, or beneficiary in, a fund or account". The Court also found that Florida's exemptions did not prohibit the debtor from claiming an exemption in her equitable or contingent interest in the IRAs. Since the debtor had a contingent interest or equitable ownership interest in the IRAs at the time of filing bankruptcy, her interest was exempt under Florida Statute § 222.21(2), and thus was not subject to garnishment. *Connor v. Seaside National Bank*, 135 So.3d 508 (Fla. 5th DCA 2014).

In *In re Uttermohlen*, 506 B.R. 142 (M.D. Fla. 2012), aff'd, 525 F. App'x 916 (11th Cir. 2013), the debtors had an exempt interest in a prospective tax refund at the time of filing and the law presumes that they intended to possess that interest as TBE. The Chapter 7 trustee objected to entireties exemption claimed by debtor-husband in joint income tax refund of over $10,000 payable to him and his non-debtor wife. The trustee argued that the refunded tax contributions were solely related to the debtor's income, the non-filing spouse did not work outside the home, and the tax refund was not TBE property and should be apportioned according to each spouse's income contribution. Judge McEwen overruled the trustee's objection. See 506 B.R. 142 (M.D. Fla. 2014). On appeal, the District Court noted a split among bankruptcy courts in the Middle District of Florida regarding the applicability of TBE to tax refunds, but found that the Florida Supreme Court 2001 decision in *Beal Bank* had resolved the split. The Court found for the debtor and affirmed, stating: "joint federal income tax refund that became payable to debtor and his non-debtor spouse post-petition was presumptively owned in tenancy by the entireties, and could be

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claimed as exempt in bankruptcy case in which there were no joint creditors that could reach the refund under Florida law, absent evidence to rebut presumption, and evidence that non-debtor spouse did not work outside the home and had no tax withholding was insufficient to overcome presumption that they intended to hold tax refund on their joint federal income tax return in tenancy by the entireties". The 11th Circuit affirmed the "well reasoned" opinion of the District Court. *In re Uttermohlen*, 525 Fed.Appx. 916 (11th Cir. 2013).

Disability Income

In *In re Chesley*, 2014 WL 1859417 (M.D. Fla. 2014), the Court found that funds received by a debtor under a pre-petition settlement of a personal injury claim, where the debtor had been rendered disabled, was not exempt as disability income benefits under Fla. Stat. § 222.18. Chapter 13 debtor negotiated a large settlement of the personal injury action in exchange for a general release of all claims. The remaining $175,000 were being held in the trust account of the debtor's state court attorney. The trustee objected to Florida state law exemption claimed by debtor in proceeds from settlement of personal injury claims. The Bankruptcy Court granted the trustee's motion for summary judgment, and debtor appealed. The case then converted to Chapter 7. The District Court affirmed, and held that the mere fact an automobile accident allegedly rendered a Chapter 7 debtor disabled did not mean that proceeds he received pursuant to general settlement were exempt "disability income benefits." The Court found that simply because the debtor's settlement was funded by the proceeds of an 'insurance policy' had no legal significance. Instead, the Court looked at the nature of the proceeds claimed as exempt which were settlement proceeds from a tort action, not disability benefits paid under an insurance policy. The Court noted that Fla. Stat. § 222.18 uses the terms "whatever form" and "under," so the plain reading of the statute provided the exemption would apply to the settlement proceeds only if the debtor proved (1) the proceeds are disability income benefits and (2) these benefits are under a policy. The settlement agreement did not meet these two requirements. The Court concluded there was no legal support for the contention that because the accident rendered him disabled, the settlement proceeds received by the debtor should be deemed "disability income benefits". The Court recognized the hardship on the debtor, who had sustained serious injuries as a result of an auto accident, but found it was bound by the statute. *In re Chesley*, 2014 WL 1859417 (M.D. Fla. 2014).

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May a Debtor Coming to the Bankruptcy Table Eat Smorgasbord, or Must the Debtor Eat the Entire Meal?

by Daniel R. Fogarty & Michael J. Hooi

When one spouse files a bankruptcy petition but the other does not, may the debtorspouse eat smorgasbord? Or must the debtor eat the entire meal?[1] Our judges have reached various conclusions on the legal issues that arise in bankruptcy filings that involve joint debt and a trustee's administering tenancy-by-the-entireties property. We compare and contrast those conclusions here.

	When does a joint debt trigger a trustee's administration of entireties property in the debtor-spouse's bankruptcy estate?	**How much of the entireties property gets into the debtor-spouse's estate?**	**After the entireties property in the bankruptcy estate is liquidated, are the proceeds available only to joint creditors or are they shared with the debtor's individual creditors?**
Killian (Bankr. N.D. Fla.)	A judgment creditor is unnecessary.[2]	Equity above joint debt is exempt.[3]	All creditors will share in the distribution.[4]
Paul (N.D. Fla.)	A judgment creditor is unnecessary.[5]	Equity above joint debt is exempt.[6]	Distribute entireties property only to joint creditors.[7]
Baynes (Bankr. M.D. Fla.)	A judgment creditor is necessary.[8]	Equity above joint debt is exempt.[9]	Judge Baynes ruled in *Geoghegan* that entireties property subject to

[1] With thanks to The Honorable A. Jay Cristol. *See In re Planas*, 199 B.R. 211, 212 (Bankr. S.D. Fla. 1996).

[2] *In re Boyd*, 121 B.R. 622, 624–25 (Bankr. N.D. Fla. 1989) (Killian, J.), *rev'd*, *Boyd v. Strickland*, TCA 90-40132-WS (N.D. Fla. Nov. 1, 1991) (Stafford, C.J.) & *In re McRae*, 308 B.R. 572 (N.D. Fla. 2003) (Paul, J.).

[3] *Boyd*, 121 B.R. at 625.

[4] *Id.*

[5] *McRae*, 308 B.R. at 576, 579.

[6] *Id*. at 575.

[7] *Id.* at 576–79 (reversing *Boyd*'s conclusion that nonjoint creditors can share in the distribution).

[8] *Matter of Anderson*, 132 B.R. 657, 659–60 (Bankr. M.D. Fla. 1991) (Baynes, J.).

[9] *Matter of Geoghegan*, 101 B.R. 329, 331–32 (Bankr. M.D. Fla. 1989) (Baynes, J.).

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	When does a joint debt trigger a trustee's administration of entireties property in the debtor-spouse's bankruptcy estate?	How much of the entireties property gets into the debtor-spouse's estate?	After the entireties property in the bankruptcy estate is liquidated, are the proceeds available only to joint creditors or are they shared with the debtor's individual creditors?
			administration would be distributed only to joint creditors,[10] but later ruled in *Anderson* that the property would be distributed to all creditors.[11]
Briskman (Bankr. M.D. Fla.)	There must be a joint creditor of the debtor and nondebtor spouse who could have process issued in its favor as of the petition date.[12] But a tax refund on account of a joint tax debt is estate property subject to a trustee's administration in bankruptcy.[13]		
Funk (Bankr. M.D. Fla.)	A judgment creditor is required.[14]	Equity above joint debt is exempt.[15]	Distribute entireties property only to joint creditors.[16]
Glenn (Bankr. M.D. Fla.)	There must be a joint creditor of the debtor and nondebtor spouse who could have process issued in its favor as of the petition date. A tax-certificate holder is a	Equity above joint debt is exempt.[18]	Entireties property may be distributed to a joint creditor with a lien.[19]

[10] *Id.*
[11] *Anderson*, 132 B.R. at 660.
[12] *In re Rufo*, No. 6:12-bk-03238-ABB, 2012 WL 4905737, at *1 (Bankr. M.D. Fla. Oct. 16, 2012) (Briskman, J.).
[13] *In re Gorny*, No.6:08-bk-00007-ABB, 2008 WL 5606583, at *8 (Bankr. M.D. Fla. Aug. 29, 2008) (Briskman, J.).
[14] *In re Himmelstein*, 203 B.R. 1009, 1013 (Bankr. M.D. Fla. 1996) (Funk, J.).
[15] *Id.* at 1016.
[16] *Id.* at 1015–16.
[17] *In re Droumtsekas*, 269 B.R. 463, 466 (Bankr. M.D. Fla. 2000) (Glenn, J.)

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	When does a joint debt trigger a trustee's administration of entireties property in the debtor-spouse's bankruptcy estate?	How much of the entireties property gets into the debtor-spouse's estate?	After the entireties property in the bankruptcy estate is liquidated, are the proceeds available only to joint creditors or are they shared with the debtor's individual creditors?
	joint creditor who has the capacity to have process issued.[17]		
Jennemann (Bankr. M.D. Fla.)		Implicitly, equity above joint debt is exempt.[20]	
Kovachevich (M.D. Fla.)		Equity above joint debt is exempt.[21]	Distribute entireties property only to joint creditors.[22]
Paskay (Bankr. M.D. Fla.)	Implicitly, a judgment creditor is unnecessary.[23]	Implicitly, equity above joint debt is not exempt.[24]	All creditors will share in the distribution.[25]
Proctor (Bankr. M.D. Fla.)	A judgment creditor is necessary.[26]		
Williamson (Bankr. M.D. Fla.)	Creditors that hold separate judgments against the debtor and the nondebtor spouse do not have a joint debt that allows them to execute against entireties property.[27]		
Cristol	A judgment creditor is	Equity above joint debt	

[18] *Id.* at 467–68.
[19] *Id.* at 469.

[20] *In re Hinton*, 378 B.R. 371, 380–81 (Bankr. M.D. Fla. 2007) (Jennemann, J.).
[21] *In re Pepenella*, 103 B.R. 299, 302 (M.D. Fla. 1988) (Kovachevich, J.).
[22] *Id.*
[23] *In re Amici*, 99 B.R. 100 (Bankr. M.D. Fla. 1989) (Paskay, C.J.); *Matter of Koehler*, 19 B.R. 308 (Bankr. M.D. Fla. 1982) (Paskay, J.).
[24] *Id.* at 309.
[25] *Amici*, 99 B.R. at 102–03.
[26] *In re Campbell*, 214 B.R. 411, 414–15 (Bankr. M.D. Fla. 1997) (Proctor, J.).
[27] *In re Davis*, 403 B.R. 914, 921–22 (Bankr. M.D. Fla. 2009) (Williamson, J.).

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	When does a joint debt trigger a trustee's administration of entireties property in the debtor-spouse's bankruptcy estate?	How much of the entireties property gets into the debtor-spouse's estate?	After the entireties property in the bankruptcy estate is liquidated, are the proceeds available only to joint creditors or are they shared with the debtor's individual creditors?
(Bankr. S.D. Fla.)	unnecessary. Rather, the creditor must have the right to levy if a default occurs.[28]	is not exempt.[29]	Distribute entireties property only to joint creditors.[30]
Friedman (Bankr. S.D. Fla.)		Implicitly, the nondebtor spouse gets half of the liquidated property.[31]	Distribute entireties property only to joint creditors.[32]
Hyman (Bankr. S.D. Fla.)	When a claim is based on a judgment lien on property of the estate that is entireties property, the petition date is the operative time to determine the lien's validity and enforceability.[33]		Distribute entireties property only to joint creditors.[34]
Kimball (Bankr. S.D. Fla.)	A judgment creditor is unnecessary.[35]	Equity above joint debt is exempt.[36]	Distribute entireties property only to joint creditors.[37]
Mark (Bankr. S.D. Fla.)	A joint debt does not have to be reduced to a judgment to subject	Equity above joint debt	Distribute entireties property only to joint

[28] *In re Planas*, 199 B.R. 211, 217 (Bankr. S.D. Fla. 1996) (Cristol, C.J.), *aff'd* in part, *rev'd* in part, 1998 WL 757988 (S.D. Fla. Aug. 21, 1998) (Nesbitt, J.).
[29] *Id.* at 217–19 (Cristol, C.J.)
[30] *Id.* at 215–17.
[31] *In re Wagstaff*, 2006 WL 1075382, at *1–*2 (Bankr. S.D. Fla. Mar. 17, 2006) (Friedman, J.). *Wagstaff* involved the debtor's homestead-exemption claim. Judge Friedman ruled that 11 U.S.C. § 522(p)(1)'s cap on an exemption for a homestead acquired during the 1,215-day period before the petition date applied.
[32] *Id.* at *2.
[33] *In re Sherwin*, 388 B.R. 411, 415–16 (Bankr. S.D. Fla. 2008) (Hyman, C.J.).
[34] *In re Aranda*, No. 08-26059-BKC-PGH, 2010 WL 5018320, at *6 (Bankr. S.D. Fla. Dec. 3, 2010) (Hyman, C.J.).
[35] *In re Helm*, No. 11-18801-EPK, 2012 WL 1616791, at *2 (Bankr. S.D. Fla. May 9, 2012) (Kimball, J.).
[36] *Id.* at *3.
[37] *Id.*

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	When does a joint debt trigger a trustee's administration of entireties property in the debtor-spouse's bankruptcy estate?	How much of the entireties property gets into the debtor-spouse's estate?	After the entireties property in the bankruptcy estate is liquidated, are the proceeds available only to joint creditors or are they shared with the debtor's individual creditors?
	entireties property to trustee administration.[38]	is exempt.[39]	creditors. [40]
Nesbitt (S.D. Fla.)		The nondebtor spouse gets half of the liquidated entireties property.[41]	Distribute entireties property only to joint creditors.[42]
Olson (Bankr. S.D. Fla.)		Implicitly, equity above joint debt is exempt.[43]	
Weaver (Bankr. S.D. Fla.)	A judgment creditor is unnecessary.[44]	Equity above joint debt is exempt.[45]	

[38] *In re Monzon*, 214 B.R. 38, 42 (Bankr. S.D. Fla. 1997) (Mark, J.).
[39] *Id.* at 43–44.
[40] *Id.* at 48.
[41] *Planas*, 1998 WL 757988, at *3–*4 (Nesbitt, J.) (reversing the bankruptcy court's contrary conclusion).
[42] *Id.* at *2–*4 (reversing the bankruptcy court's contrary conclusion).
[43] *In re Schwarz*, 362 B.R. 532, 533, 536 (Bankr. S.D. Fla. 2007) (Olson, J.) (overruling trustee's objection to debtor's claimed exemption in $82,000 of equity in jointly owned homestead property).
[44] *In re Kimmel*, 131 B.R. 223, 228 (Bankr. S.D. Fla. 1991) (Weaver, C.J.).
[45] *In re Traurig*, 34 B.R. 325, 326 (Bankr. S.D. Fla. 1983) (Weaver, J.); *Kimmel*, 131 B.R. at 228.

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FDCPA Cause of Action May Be Barred by the Statute of Limitations Post-Crawford

by Amy L. Drushal

There has been much discussion on the United States Court of Appeals for the Eleventh Circuit's opinion in *Crawford v. LVNV Funding, LLC*, 758 F.3d 1254 (11th Cir. 2014), in which the Court held that the filing of a time barred claim proof of claim could be a violation of under the Fair Debt Collections Practices Act ("FDCPA"). Despite the ever-increasing consumer-friendly decisions arising in the Eleventh Circuit, the United States Bankruptcy Court for the Northern District of Alabama recently issued an opinion, *Gurganus v. Recovery Mgmt. Sys. Corp.* (In re Gurganus), 2015 Bankr. LEXIS 3 (Bankr. N.D. Ala., Jan. 5, 2015), limiting a consumer's rights to bring a claim under the FDCPA.

In *Gurganus*, the United States Bankruptcy Court for Northern District of Alabama held that a debtor's claim under the FDCPA was barred by the statute of limitations under the same legal principle that applied in *Crawford*. The *Gurganus* debtors filed a Chapter 13 case on January 24, 2013, and the creditor subsequently filed a proof of claim on May 12, 2013. The proof of claim included a debt for which the statute of limitations had passed and collection of which was time barred. Over a year later, on September 23, 2014, the debtor filed a lawsuit against the creditor, alleging that the filing of a proof of claim on a time barred debt, post-*Crawford*, is a violation of the FDCPA. The creditor withdrew its proof of claim on October 3, 2014 and then moved to dismiss the FDCPA complaint on the grounds that the claim was barred by the FDCPA's one year statute of limitations and, therefore, failed to state a cause of action.

The debtors did not dispute that the claim was filed after the one year FDCPA statute of limitations. Instead, they claimed that their adversary proceeding action served as a counterclaim to the proof of claim and, therefore, was not subject to the one year statute of limitations. In making this argument, the debtors relied on *In re Ferris*, 764 F. 2d 1475 (11th Cir. 1985). In *Ferris*, the Eleventh Circuit held that a debtor may raise a violation of the Truth in Lending Act ("TILA") as a counterclaim to a claim filed by a creditor in a bankruptcy and that such claim will not be time barred by the statute of limitations. As the Northern District of Alabama recognized, however, *Ferris* is distinguishable because the recoupment savings clause in the TILA statute of limitations created a counterclaim exception that allowed a cause of action to be filed outside of the TILA statute of limitations. There is no such exception in the FDCPA statute of limitations, which provides that:

> An action to enforce any liability created by this subchapter may be brought in any appropriate United States district court without regard to the amount in controversy, or in any other court of competent jurisdiction, within one year from the date on which the violation occurs.

There is no savings clause in the FDCPA and, thus, the Northern District of Alabama found there is no "counterclaim exception" to the statute of limitations in the FDCPA. Accordingly, the debtors' FDCPA claim was time barred and dismissed.

Although limited in scope, this opinion provides a defense for the potential onslaught of FDCPA claims for time barred proofs of claim post-*Crawford*. The knife of timely justice cuts both ways when it comes to the FDCPA in bankruptcy. Both *Crawford* and *Gurganus* make clear that, whether you are asserting or objecting to a proof of claim, the use of the FDCPA must be consistent with the time limits imposed by the statute of limitations.

Tension between Florida Law and Bankruptcy Code (Issues of First Impression?)

by Steven R. Wirth

1. *AmMed Surgical Equip., LLC v. Prof. Med. Billing Specialists, LLC*, No. 2D14-4968, 2015 WL 477629 (Fla. 2d DCA Feb. 6, 2015)

Although the court does not say it is an issue of first impression in Florida's state courts, it looks like it might well be, at least in this context. The decision addresses the impact of a bankruptcy petition on the validity of a notice of appeal.

In this case, the Second District Court of Appeal considered the unusual circumstance under which the Court had jurisdiction to review an order for which the notice of appeal was filed more than thirty days after rendition. The appeal apparently suffered from two potential, and seemingly competing, infirmities: it was filed on the seventieth day following rendition of the order challenged, and it was filed after the appellant, AmMed Surgical Equipment, LLC ("AmMed Surgical"), had filed a petition under chapter 11 of the Bankruptcy Code. Upon receipt of the notice of appeal, the Second District Court of Appeal issued an order directing AmMed Surgical to show cause why the appeal should not be dismissed as untimely. After reviewing AmMed Surgical's response to the court's order to show cause and the applicable provisions of the Bankruptcy Code, the appellate court discharged the order to show cause so that the appeal may proceed once the bankruptcy automatic stay was fully lifted.

Professional Medical Billing Specialists, LLC ("Professional Medical Billing"), filed an action in the circuit court against AmMed Surgical. A preliminary injunction in favor of Professional Medical Billing and against AmMed Surgical was rendered on August 12, 2014. On August 22, before the thirty-day deadline for filing the notice of appeal, AmMed filed a chapter 11 petition in the United States Bankruptcy Court for the Middle District of Florida. On October 21, AmMed Surgical obtained an order from the bankruptcy court lifting the bankruptcy stay for the limited purpose of allowing AmMed Surgical to file a notice of appeal of the adverse preliminary injunction order. Later that day, AmMed Surgical filed its notice of appeal with the clerk of the circuit court. In accordance with Florida Rule of Appellate Procedure 9.130(a)(3)(B), the preliminary injunction is an appealable non-final order. Rule 9.130(b) provides further that the jurisdiction of the appellate court over certain categories of non-final orders issued by a trial court is "invoked by filing a notice . . . with the clerk of the lower tribunal within 30 days of rendition of the order to be reviewed." In this case, AmMed Surgical filed the notice of appeal on the seventieth day following rendition, a circumstance that would ordinarily leave the Second District Court of Appeal without jurisdiction to entertain the appeal.

However, the Bankruptcy Code provides that a filing of a petition in bankruptcy operates as a stay, applicable to all entities, of—

> (1) the commencement or continuation, including the issuance or employment of process, of a judicial, administrative, or other action or proceeding against the debtor that was or could have been commenced before the commencement of the case under this title, or to recover a claim against the debtor that arose before the commencement of the case under this title . . . .

11 U.S.C. § 362(a)(1) (2012). In addition, section 108(c) of the Bankruptcy Code contains the following tolling provision:

> (c) Except as provided in section 524 of this title, if applicable nonbankruptcy law, an order entered in a nonbankruptcy proceeding, or an agreement fixes a period for commencing or continuing a civil action in a court other than a bankruptcy court on a claim against the debtor, . . . and such period has not expired before the date of the filing of the petition, then such period does not expire until the later of—

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> (1) the end of such period, including any suspension of such period occurring on or after the commencement of the case; or
>
> (2) 30 days after notice of the termination or expiration of the stay under section 362 . . . of this title, . . . with respect to such claim.

Based on the foregoing provisions, the Second District Court of Appeal concluded that the filing of a notice of appeal in state court was considered the "continuation . . . of a judicial . . . proceeding against" the appellant.[1] More significantly, the Court concluded that under the Supremacy Clause of the United States Constitution,[2] Florida Rule of Appellate Procedure 9.130(b) must yield to the provisions of Sections 362(a) and 108(c) of the Bankruptcy Code.

Because it appeared that Florida's appellate rule and the Bankruptcy Code were in conflict such that it would be a "physical impossibility" for an appellant to observe both of them and ensure that a state appellate court gains jurisdiction over an appeal, the Second District Court of Appeal concluded that 11 U.S.C. §§ 362(a) and 108(c) prevail over rule Florida Rule of Appellate Procedure 9.130(b). As a result, the filing of the bankruptcy petition within the notice-of-appeal period prevented AmMed Surgical from filing a notice of appeal within thirty days of rendition of the challenged order but allowed AmMed Surgical to file the notice within thirty days of the order lifting the bankruptcy stay. Accordingly, the Court determined that it had jurisdiction over AmMed Surgical's appeal.

2. Hamilton v. Pilgrim's Pride Corp., No. 1D14-2436 (Fla. 1st DCA Mar. 3, 2015)

This is a broad decision, as it is a Florida state-court ruling implicating bankruptcy, employment, and general Florida litigation issues. It also appears to be an issue of first impression, although the First District Court of Appeal opinion does not state as such.

Ms. Hamilton appealed the final order dismissing with prejudice—as having been discharged in bankruptcy—her employment discrimination claims against a former employer, Pilgrim's Pride Corporation ("Pilgrim's Pride").

Ms. Hamilton's complaint alleged that she was injured while working for Pilgrim's Pride in 2003, had surgery in 2005 as a result of her job-related injuries, and was harassed upon her return to work because of light duty restrictions she was then under. Her complaint alleged she was the victim of retaliation because she reported unlawful employment practices and made a (valid) claim for workers' compensation benefits. She alleged she was the victim of discrimination based on race, as well as disability.[3] Her employment by Pilgrim's Pride ended on July 17, 2009.

Pilgrim's Pride filed a voluntary petition for chapter 11 relief on December 1, 2008 (the "Petition Date"). On or about April 15, 2009, Pilgrim's Pride served on Ms. Hamilton a Notice of Deadline for Filing Proofs of Claim in the bankruptcy case, advising her of a filing deadline of June 1, 2009 (the "Bar Date") for acts or omissions that arose prior to the Petition Date. Indisputably, Ms. Hamilton filed no claim based on pre-petition acts or omissions prior to the Bar Date. On appeal, Ms. Hamilton conceded any claims that arose before the bankruptcy petition was filed have now been discharged.

The bankruptcy court approved Pilgrim's Pride's

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1 Although it was the defendant/debtor that filed the notice of appeal, the appeal was considered to be the continuation of a proceeding "against the debtor," under 11 U.S.C. § 362(a)(1). (citing Crowe Grp., Inc. v. Garner, 691 So. 2d 1089, 1089 (Fla. 2d DCA 1993); Ingersoll-Rand Fin. Corp. v. Miller Mining Co., 817 F.2d 1424, 1426 (9th Cir. 1987)).
2 U.S. Const. art. VI, cl. 2.
3 Ms. Hamilton alleged that, after her 2005 surgery, her position with the employer changed because of her permanent light duty restrictions; her requests for reasonable accommodations and relocation to another position were denied; her salary was reduced; and she "received multiple forms of unfair discipline, including write ups and suspensions." She does not allege specific dates with regard to these alleged acts.

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chapter 11 plan[4] on December 10, 2009, effective December 28, 2009. Under the confirmation order, the deadline for filing administrative expense claims against the estate was February 26, 2010. The notice of entry of an order confirming the chapter 11 plan[5] also stated: if "you are required to file an Administrative Expense Request pursuant to Section 2.1(a) of the Plan and fail to do so by February 26, 2010, you will be forever barred, estopped, and enjoined from asserting such Administrative Expense Claim" and the "Reorganized Debtors will be forever discharged from any and all indebtedness or liability with respect to such Administrative Expense Claim." Ms. Hamilton does not dispute that she did not file a claim or request for payment prior to February 26, 2010.

Pilgrim's Pride argued to the trial judge that, because she "never filed a proof of claim or administrative expense claim with the Bankruptcy Court," all her claims, including those that arose after Pilgrim's Pride filed for bankruptcy, were discharged. In granting the motion to dismiss, the trial court observed that much of the putative, discriminatory conduct complained of occurred before the bankruptcy petition was filed, and opined that the confirmed chapter 11 plan would preclude relief on administrative expense claims relating to post-petition conduct.

Ms. Hamilton's termination occurred after the June 1, 2009 deadline for filing proof of a pre-petition claim, but prior to the bankruptcy court's confirmation of the chapter 11 plan. The First District Court determined that, like her other employment discrimination allegations concerning the same post-petition period, her allegation of wrongful termination met the Bankruptcy Code's definition of administrative expense claim and would have been discharged under the chapter 11 plan, the order of the bankruptcy court confirming the plan, and the notice of the administrative expenses bar date, except that each of these documents contained the same, important exception.

They all "carved out an exception from the request-for-payment filing requirement for [administrative expense claims constituting] '[l]iabilities incurred in the ordinary course of business by'" Pilgrim's Pride. (citing Sanchez v. Nw. Airlines, Inc., 659 F.3d 671, 678 (8th Cir. 2011) (concluding "Sanchez's ADA claim was the ordinary course indebtedness" so that Sanchez "did not have to file a request for payment by the administrative expenses deadline at any time"); Reading Co. v. Brown, 391 U.S. 471, 485 (1968) (holding that "damages resulting from the negligence of a receiver acting within the scope of his authority as receiver give rise to 'actual and necessary costs' of a Chapter XI arrangement"); In re Eagle-Picher Indus., Inc., 447 F.3d 461, 465-66 (6th Cir. 2006) (stating that "'liabilities incurred in the ordinary course of business by any of the Debtors in Possession'" included claims for patent infringement, as well as tort and contract claims, stemming from post-petition sales of the debtor's products to third parties)). Based on the foregoing authorities, the First District Court of Appeal determined that, as a matter of law, Ms. Hamilton's employment discrimination claims arose "'in the ordinary course of business.'" (quoting Sanchez, 659 F.3d at 678).

As such, the First District Court of Appeal held that Ms. Hamilton's claims arising subsequent to December 1, 2008, were not subject to either the initial June 1, 2009 deadline for filing pre-petition claims or, because they arose in the ordinary course of business, the February 26, 2010 deadline for filing administrative expense claims based on post-petition conduct. As such, the Court determined that dismissal of such claims in the present case was therefore error.

In sum, the First District Court of Appeal determined that Pilgrim's Pride's chapter 11 plan did not preclude Ms. Hamilton from litigating in state court her claims based on acts or omissions alleged to have occurred after December 1, 2008.

4 The chapter plan provided, in part, that the "holder of an Administrative Expense Claim, other than . . . a liability incurred and payable in the ordinary course of business by a Debtor (and not past due), . . . must file with the Bankruptcy Court and serve on the Debtors . . . notice of such Administrative Expense Claim on or prior to the Administrative Expense Claim Bar Date" and that "[f]ailure to file and serve such notice timely and properly shall result in the Administrative Expense Claim being forever barred and discharged." (Emphasis supplied.)

5 Whether Ms. Hamilton received this notice was not clear from the record.

People on the Go

On March 26, 2015, **Marsha Rydberg** was awarded the 2015 Trailblazer award by the Hillsborough Association for Women Lawyers. Here is how the Association describes the award:

"The award recognizes an established female attorney in the Tampa Bay area who has exhibited throughout her life and career a pioneering spirit, courageous leadership, outstanding contributions to the legal community, and who has refused to let her career and contributions be limited or defined by the expectations of others. These trailblazers demonstrate a spirit of excellence that has lent credibility to the practice of law by women. They use their legal skills and knowledge to benefit those less able to protect themselves."

On January 22, 2015, **Marsha G. Rydberg** was awarded the 2014 Hillsborough County Outstanding Lawyer Award. This major award is intended to recognize an attorney who has made a significant difference in the practice of law and the community because of the individual's personal and professional ethics and conduct. This award will not necessarily be presented each year because it is designed to recognize unique lawyers whose professional conduct has made a real difference in the practice of law and in the community.

Keith T. Appleby, is pleased to announce he has moved to Banker Lopez Gassler P.A.

Happy Birthday to **Elena Ketchum**!

Hunter Mariani Noel – born August 15, 2015 to Austin and **Nicole Noel**. Austin is at Buckley Madole, P.C. and Nicole is at Kass Shuler, PA.

Anthony & Partners' real estate practice area is now headed by **Frank A. Lafalce** and **Barbara H. Luikart**. With over 58 combined years of legal and baking experience in real estate transactions and real estate finance, the firm is uniquely qualified to handle complex transactions for its real estate investor, developer, property owner and financial institution clients. Their representations have included developers, lenders, borrowers, commercial landlords and tenants, as well as individuals and businesses.

Dennis LeVine is pleased to announce he is merging his firm with Kelley Kronenberg, a Ft. Lauderdale firm with 100 layers in ten Florida offices.

Janelle M. Miller, Esq. is pleased to announce she has opened J. Miller Law, P.A. at 3626 Erindale Dr., Valrico, FL 33596.

Alabama-based **Bradley Arant Boult Cummings LLP,** has expand into Florida with the addition of 12 lawyers from Glenn Rasmussen PA in Tampa. Glenn Rasmussen will become Bradley Arant Boult Cummings' Tampa office.

New hire? Promotion? Birth announcement? Share with your colleagues in the next edition by emailing these personal and career updates to Stephanie Lieb at slieb@trenam.com

UCC Filers: Be Diligent and Beware

Official Committee of Unsecured Creditors of Motors Liquidation Co. v. JPMorgan Chase Bank, N.A. (In re Motors Liquidation Co.), No. 13-2187 (2nd Cir. Jan. 21, 2015).

by Stephanie E. Ambs

On January 21, 2015, the United States Court of Appeals for the Second Circuit issued a decision that would frighten any lawyer. The decision involves the unintentional termination of a security interest securing a $1.5 billion loan as a result of an error in the preparation of transaction documents.

In 2001, General Motors obtained $300 million in financing through a Synthetic Lease transaction for which JPMorgan Chase Bank, N.A., served as administrative agent and secured party of record on the UCC-1 financing statements filed in connection with the transaction.

Years later, General Motors obtained a separate $1.5 billion Term Loan which was secured by a security interest in all equipment and fixtures at forty-two of General Motors' facilities. JPMorgan also served as administrative agent and secured party of record on the multiple UCC-1 financing statements filed in connection with the Term Loan.

When the Synthetic Lease reached maturity, General Motors retained Mayer Brown, LLP to prepare documents for the final satisfaction of its obligations and the release of the lenders' security interests. In preparing UCC-3 termination statements for the UCC-1s related to the Synthetic Lease, a paralegal with Mayer Brown also mistakenly prepared a UCC-3 termination statement for the primary UCC-1 related to the Term Loan. No attorneys at Mayer Brown noticed the error. The closing checklists and UCC-3s prepared by Mayer Brown were circulated to JPMorgan and its counsel, Simpson Thacher & Bartlett LLP, but neither group noticed that one of the UCC-3s related to the Term Loan, and would terminate the security interest securing the $1.5 billion obligation. The UCC-3 termination statements, including the one that related to the Term Loan, were subsequently filed.

In 2009, when General Motors filed for chapter 11 reorganization, the Committee of Unsecured Creditors in the case became aware that a termination statement had been filed for the Term Loan. The Committee commenced an action against JPMorgan, seeking a determination that the UCC-3 termination statement that related to the Term Loan was effective and had therefore (i) terminated the Term Loan security interest and (ii) rendered JPMorgan an unsecured creditor. JPMorgan argued that because it had not intended to terminate the Term Loan security interest, it had not authorized the termination statement as required by UCC §9-509(d)(1) and the termination statement was therefore ineffective. The United States Bankruptcy Court for the Southern District of New York agreed.

On direct appeal, the Second Circuit reversed and remanded the Bankruptcy Court's Order and held that JPMorgan authorized the filing of the statement because, even though it never intended to terminate the Term Loan UCC-1, it authorized the filing of a UCC-3 termination statement that had that effect. The Second Circuit's decision rested primarily on the fact that both a Managing Director at JPMorgan who supervised the Synthetic Lease payoff and JPMorgan's counsel, Simpson Thacher, had received copies of and signed off on the closing checklist and the draft UCC-3 termination statements prior to filing.

Quoting the Delaware Supreme Court's answer to a related certified question posed by the Second Circuit, the Court acknowledged the policy that a secured party "ought to review [a termination] statement carefully and understand which security interests it is releasing and why [because] [i]f parties could be relieved from the legal consequences of their mistaken flings, they would have little incentive to ensure the accuracy of the information contained in their UCC filings."

The simple takeaways from this decision are: (1) it is imperative that attorneys carefully review any UCC statement (and any other document for that matter) before filing—even the best can make mistakes—and (2) lawyers and clients cannot expect courts to be sympathetic to the serious consequences suffered by a party who had ample opportunity to discover and remedy a mistake and failed to do so.

39th Annual Alexander L. Paskay Memorial Bankruptcy Seminar

by Keith Appleby and Adam Seuss

During the first week of March, Tampa hosted the 39th Annual Alexander L. Paskay Memorial Bankruptcy Seminar. Throughout, the sessions principally focused on emerging issues—from both a business and a consumer perspective. Across the board, the speakers and the moderators presented interesting and compelling programs. Overall, the seminar seemed to be a big success.

The first afternoon offered a program of particular importance: the Article III panel on bankruptcy appeals. Roberta Colton moderated a discussion between the Honorable Charles R. Wilson, of the United States Court of Appeals for the Eleventh Circuit, and the Honorable Charlene E. Honeywell, the Honorable Mary S. Scriven, and the Honorable John E. Steele, all of the United States District Court for the Middle District of Florida.

The judges covered a lot of ground, from good lawyering to bankruptcy appellate panels, and nearly everything in between.

Early on in the discussion, the judges each recounted their experiences with bankruptcy matters prior to joining the federal bench. And there was a common thread: they didn't have many. To a round of laughter, Judge Honeywell admitted that she didn't even know that district judges handled bankruptcy appeals until after she received her commission from the president. But as generalist judges, they explained, seeing new things is just part of the job.

Continuing with this theme, Judge Scriven took the opportunity to remind those in attendance that district judges are not always familiar with detailed aspects of the Bankruptcy Code, such as the § 1111(b) election or the interplay between Florida's wildcard exemption and its homestead protection. Neither are they necessarily familiar with bankruptcy acronyms and shorthand that bankruptcy practitioners use routinely. So the best appeals, she noted, come from the lawyers who recognize and appreciate this reality. On the other hand, when lawyers presume that a district judge has specialized bankruptcy knowledge, things are likely to be lost in translation.

Judge Steele mentioned that effective oral argument is just as important. He explained that it is an opportunity for the lawyers to educate the court about the law and their positions, but it is also a time for the judge to ask questions that the parties might not have previously answered. Not every case calls for oral argument, he said—but when one does, complete preparedness is essential.

The Courts of Appeals for the First, Sixth, Eighth, Ninth, and Tenth Circuits have each established a

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Paskay Seminar

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bankruptcy appellate panel. The Eleventh Circuit, of course, has not. But our circuit judges have considered it. Judge Wilson explained that one of the obvious benefits of creating a bankruptcy appellate panel is that it allows bankruptcy experts to handle bankruptcy appeals. But this can also be a drawback, he admitted. There's something positive that comes from having non-bankruptcy judges review appeals with fresh eyes, he noted. Bankruptcy appellate panels also increase the workload of the bankruptcy judges, require additional funding and staffing, and can lead to conflicting case law in a circuit, since one panel decision is not binding on the next. Although the Eleventh Circuit has in the past decided against establishing a bankruptcy appellate panel, Judge Wilson said, that doesn't mean that it won't happen in the future.

At the front of everyone's mind, of course, remains the relative impact of the Supreme Court's decisions in Stern and in Executive Benefits, in addition to thoughts on how the Court might resolve Wellness International. Although the judges were understandably reluctant to discuss the particulars of these cases, they did broadly touch on two topics.

Judge Wilson first reminded the audience of the importance of Article III, which explains that only judges with lifetime tenure and salary protection can exercise the "judicial power of the United States." This, he explained, is an important consideration in deciding whether bankruptcy courts have the constitutional authority to "hear and determine" core proceedings. Second, the panel recognized that no matter how the Supreme Court resolves these looming issues—whether in this or in future terms—bankruptcy courts might not be the only courts to feel the effects. They explained that the magistrate system could get similar treatment.

Toward the end of the discussion, Judge Honeywell mentioned that even as things change, the district court judges and the local bankruptcy bar have good reason to be thankful. Our bankruptcy judges are really great, she said with a smile.

Editor's Note: If you missed out on the Article III panel at the Paskay Seminar, all is not lost. Judge Honeywell and Judge Scriven will be participating in a similar event at the Bankruptcy Court Evidence Boot Camp hosted by the Business Law Section of the Florida Bar, which will be held on May 15, 2015 here in Tampa.

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Stripping a Second Mortgage in Chapter 7, *Bank of America, N.A. v. Caulkett* and the Impact on the 11th Circuit Holding in *McNeal*

by Jake C. Blanchard

Section 506(d) of the Bankruptcy Code provides in relevant part that "[t]o the extent that a lien secures a claim against the debtor that is not an allowed secured claim, such lien is void." Over twenty years ago, in its decision *Dewsnup v. Timm*, 502 U.S. 410 (1992), the United States Supreme Court held that section 506(d) does not permit a chapter 7 debtor to "strip down" a mortgage lien to the current value of the collateral. The question now presented to the Supreme Court in *Bank of America, N.A. v. Caulkett*, Case No. 13-1421, is whether section 506(d) permits a chapter 7 debtor to "strip off" a junior mortgage lien in its entirety when the outstanding debt owed to a senior lienholder exceeds the current value of the collateral. The Supreme Court heard oral arguments on March 24, 2015 on this issue presently dividing the Circuit Courts of Appeal.

In May of 2012, the Eleventh Circuit issued its opinion in *In re McNeal*, holding that a debtor proceeding under Chapter 7 of the Bankruptcy Code may strip off a wholly unsecured lien.[1] The court in *McNeal* relied on its earlier decision in *Folendore v. United Small Business Administration*, 862 F.2d 1537 (11th Cir. 1989), which held that a wholly unsecured lien was voidable under the plain language of section 506(d). The *McNeal* decision was controversial because it seemed to collide with the long held assumption, promulgated by previous interpretations of *Dewsnup*, that a debtor was unable to strip a wholly unsecured lien in Chapter 7. However, the *McNeal* court drew a fine, yet well-defined, line between the issue presented in *McNeal* and the issue decided by the Court in Dewsnup. Simply, *Dewsnup* addressed the issue of a "strip down" of a partially secured lien while *McNeal* addressed the issue of a "strip off" of a wholly unsecured lien.

Bankruptcy judges throughout the Eleventh Circuit gave thoughtful pause prior to implementation *McNeal* in bankruptcy court rulings. Indeed, at its inception, some courts declined to rule based upon the decision entirely because it was not yet published. The confusion over *McNeal's* viability as precedent escalated in February of 2013 when the Eleventh Circuit stayed all pending proceedings against GMAC indefinitely due to GMAC's pending chapter 11 bankruptcy. In July 2013, the *McNeal* opinion was finally published and rehearing en banc was requested. Eventually, the rehearing en banc was denied and the Eleventh Circuit solidified its position on Chapter 7 lien stripping-joining a minority of other circuits that allow at Chapter 7 strip off.

Bank of America spearheaded a charge to put the issue in front of the Supreme Court and filed three separate appeals, which were consolidated for hearing under *Bank of America, N.A. v. Caulkett*, Case No. 13-1421, and *Bank of America, N.A. v. Edelmiro Toledo-Cardona*, Case No. 14-163. Here, in the Middle District of Florida, Bank of America filed several appeals by disputing the correctness of the analysis in *McNeal* and *Folendore*. Nevertheless, Bank of America concedes that *McNeal* plainly binds the Middle District of Florida such that a challenge to its reasoning would be futile. Bank of America accordingly sought to have its pending *McNeal* appeals in the Eleventh Circuit held in abeyance pending a decision from the Supreme Court in *Caulkett* and *Toledo-Cardona*.

Oral arguments in front of the Supreme Court focused on whether the Eleventh Circuit Court of Appeals debtors, Caulkett and Toledo-Cardona, could dispose of their second mortgages in their Chapter 7 cases. Justice Scalia, having dissented during the *Dewsnup* decision[2], got straight to the point during oral argument, addressing Petitioner's attorney Danielle Spinelli of Wilmer Hale as follows: "I dissented in Dewsnup, and I continue to believe the dissent was correct. Why should I not limit Dewsnup to the facts that it involved, which is a partially underwater mortgage"?[3] Ms. Spinelli eventually responded by saying that "it was well established that Dewsnup applied equally to [mortgages] completely underwater."[4] The crux of Ms. Spinelli's argument appeared to be that banks have always relied on

continued on p. 27

1 In re McNeal, 735 F.3d 1263 (11th Cir. 2012).

2 Justice Scalia dissented in Dewsnup and stated "[t]he Court makes no attempt to establish a textual or structural basis for overriding the plain meaning of § 506(d)…." See Dewsnup v. Timm, 502 U.S. 410 (1992) (Scalia, A., dissenting),

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Stripping Second Mortgage

continued from p. 25

Dewsnup in extending second mortgages and that it is illogical to distinguish between an undersecured and fully unsecured lien, thus, the *Dewsnup* decision should be expanded to fully unsecured liens.[5]

Stephanos Bibas of the University of Pennsylvania Law School argued for the debtors and the Justices were no less exacting with their line of questioning. For purposes of oral argument, at least, whether a loan was undersecured or wholly unsecured was a distinction with a difference.[6] Justice Kagan asked Mr. Bibas why he simply didn't argue for the Court to overturn *Dewsnup* and allow lien-stripping for undersecured loans.[7] Bibas simply indicated that he didn't need them to overturn *Dewsnup* because under *Dewsnup* he would win this case and there is no need to argue against stare decisis.[8] Mr. Bibas stated "Dewsnup itself reserved the completely underwater hypothetical on the face of its opinion."[9] Mr. Bibas went on to say that *Dewsnup* was "exceptionally narrow, and the lawyers could read and see that it declined to reach this issue."[10]

Both Mr. Bibas and Ms. Spinelli made arguments concerning economics and policy ramifications of a decision by the Court finding in favor of their respective sides of the argument. Mr. Bibas pointed out that a completely underwater junior lien qualifies as no value under the code.[11] Mr. Bibas further pointed out that present economic value is what the Court has consistently focused on.[12] Thus, the value of the claim is equal to the value of the collateral, and that's the present value of the collateral.[13] Ms. Spinelli countered by arguing that completely underwater liens are not valueless because the value stems from the potential for appreciation in the collateral.[14]

Although Mr. Bibas may not agree, it appears from the Court's line of questioning that the focus seems to be drawn at *Dewsnup* and whether the holding in *Dewsnup* applies in *Caulkett*. However, how the Supreme Court will rule is not predictable from this line of questioning. If *Dewsnup* does apply, Bank of America argues that the *Dewsnup* holding should control in this case. If *Dewsnup* doesn't apply, then Mr. Caulkett, and many like him in this district, may be relieved of their second mortgages. However, the comments of Justice Elena Kagan may in retrospect, have summarized the day's arguments. After hearing the arguments of both counsel, Justice Kagan stated that the distinctions between partially and fully secured underwater mortgages "are not very persuasive"[15] and "the only thing that may be less persuasive is Dewsnup itself."[16]

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3 See Transcript of Oral Argument at 11, Bank of America, N.A. v. Caulkett, Case No. 13-1421.
4 Id. at 14.
5 Id. at 15, 16, 17.
6 Id. at 32-26.
7 Id. at 36.
8 Id. at 37.
9 Id.
10 Id. at 47.
11 Id. at 48.
12 Id.
13 Id.
14 Id. at 49.
15 Id. at 45.
16 Id.

Upcoming Events

17th Annual TBBBA Golf Tournament
April 24, 2015 • 12:00 pm - 5:00 pm
Bay Palms Golf Club, MacDill AFB, Tampa

Consumer Lunch
May 5, 2015 • 12:00 pm
Sam Gibbons Federal Courthouse

CLE Luncheon
May 12, 2015 • 12:00 pm

Bankruptcy Court Evidence Boot Camp: Basics to Advanced
May 15, 2015 • 8:00 am - 6:00 pm

Happy Hour
May 28, 2015 • 5:30 pm

Annual Installation Dinner
June 4, 2015 • 5:30 pm

Judicial Musings

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

In re Maury Rosenberg (appeal from a district court's decision affirming the bankruptcy court's final order awarding appellee Maury Rosenberg attorney's fees and costs, pursuant to 11 U.S.C. § 303(i)(1)).

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Turn It Around! Bankruptcy Success Stories

Five years after its dip in the Chapter 11 pool, Restaurant BT is still going strong

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South Tampa's French Vietnamese foodie gem Restaurant BT is doing very well in its new location, despite having gone through some tough times in 2010. As you may know, the LLC owner of the restaurant filed a Chapter 11 in April of 2010. Upon review of the docket and particular the Case Management Summary, the main reason for the filing was the inability to meet the terms of the commercial lease in its former location in Old Hyde Park Village in South Tampa.

Restaurant BT was founded in 2004 by B.T. Nguyen-Batley, who owned several other successful restaurants in South Tampa. At the time of the Chapter 11 filing in 2010, Restaurant BT was a five-time recipient of Florida Trend's Golden Spoon Award, and was rated by Conde Nast as one of the top 73 restaurants in the World.

However, when the economy took a downturn, the restaurant saw a 45% decline in sales. Despite offering a lower-priced bar menu and trimming the staff by 30%, the restaurant could not meet its operational expenses. After falling behind in the rent in June of 2009, the restaurant spent a year of struggling and trying to work with the landlord before having to eventually seek Chapter 11 protection to preserve its leasehold interest and going concern value.

Restaurant BT was represented by Stichter, Riedel, Blain & Prosser, PA. The landlord, MW Hyde Park, LLC was represented by Shumaker, Loop & Kendrick, LLP.

The automatic stay afforded by the Chapter 11 filing provided breathing room, allowing the restaurant to find a new, right-sized location on South MacDill. The restaurant still has the clean, Zen-like ambiance, with just enough tables to suit the needs of busy executives for lunch, or a romantic dinner for couples. The 10-stool bar continues to serve exotic concoctions.

And what about the food? The beef pho is more than a meal, with fresh herbs throughout. Lobster bisque is smooth and delicate, and highly recommended. There are many healthy salad choices, and vegetarians will also be happy here. Another dish that is highly recommended is the lemongrass beef noodle salad bowl, with rice vermicelli, mixed herbs, vegetables, and nuoc mam dressing.

The service was polite and attentive – a perfect match for the serene setting and lovely food. Enjoy a light jasmine-orange tea with your meal.

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Samantha L. Dammer, Esq. has represented consumers in Chapter 7 and 13 bankruptcy cases in Tampa since 2007.

March 26 Happy Hour

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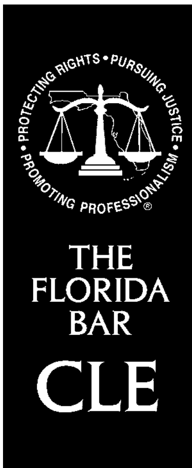

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8:30 a.m. – 9:00 a.m.
Registration, Welcome, and Introductions
Stephanie C. Lieb

9:00 a.m. – 9:50 a.m.
"Objection, No Foundation!"— Evidence Basics
Overview of topics: Judge Michael G. Williamson
Introduction of case study: Michael Moecker & Associates, Inc.

9:50 a.m. – 10:40 a.m.
The "Do's" and "Don'ts" of Effective Witness Examination
Overview of topics: Joseph H. Varner
Mock trial examples:
Attorney for plaintiff: Lori V. Vaughan
Attorney for defendant: Douglas A. Bates
Judge: Karen S. Jennemann
Witness: Daniel J. Stermer

10:40 a.m. – 11:00 a.m. **Break**

11:00 a.m. – 11:50 a.m.
The "ABC's" of Documentary Evidence
Overview of topics: Charles F. Ketchey
Mock trial examples:
Attorney for plaintiff: Douglas A. Bates
Attorney for defendant: Lori V. Vaughan
Judge: K. Rodney May
Witness: Soneet R. Kapila

12:00 p.m. – 1:30 p.m. **Lunch**
Litigation in the Electronic Age: E-Discovery and Use of Electronically Stored Exhibits at Trial
Panelist: Judge Anthony E. Porcelli, Judge Michael G. Williamson, Chad S. Bowen, Adam Sharp

1:30 p.m. – 2:20 p.m.
Discovery: an Ethical Minefield—Judicial Perspective
Panelists: Judges Caryl E. Delano, K. Rodney May, and Catherine Peek McEwen
Moderator: David S. Jennis

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2:20 p.m. – 3:10 p.m.
Fact or Fiction—the Netherworld of Opinion Testimony
Overview of topics: Joseph H. Varner, Charles F. Ketchey, Steven S. Oscher
Mock trial examples:
Attorney Calling Expert: Corali Lopez-Castro
Attorney Objecting: Elizabeth A. Green
Judge: Paul G. Hyman
Witness: Steven S. Oscher

3:15 p.m. – 3:30 p.m. **Break**

3:30 p.m. – 4:20 p.m.
Attorney-Client Privilege — Now You See It, Now You Don't!
Moderator: Corali Lopez-Castro
Panelists: Judge Paul G. Hyman, Judge Michael G. Williamson, John L. Holcomb

4:20 p.m. – 5:00 p.m.
Bankruptcy Appeals
Moderator: Elizabeth A. Green
Panelists: Judge Charlene V. Honeywell, Judge Mary S. Scriven, Stacy D. Blank

5:00 p.m. – 6:00 p.m.
Cocktail Reception

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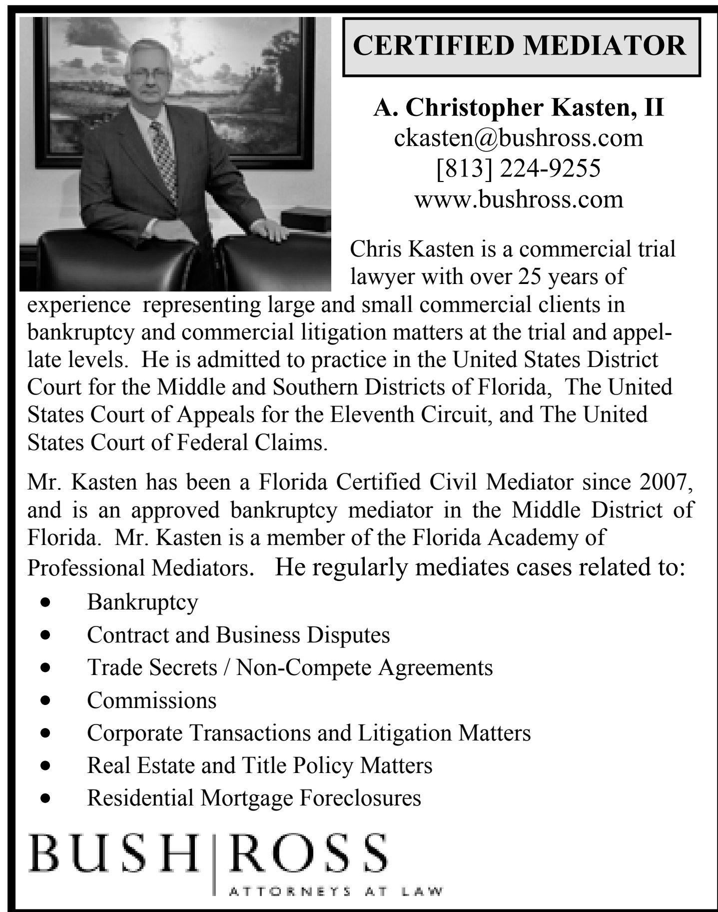
March CLE Luncheon

March CLE Luncheon



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