The Cramdown

The Newsletter of the Tampa Bay Bankruptcy Bar Association

Editor-in-Chief, Jake C. Blanchard, Fowler White Boggs P.A. **Spring 2012**

PRESIDENT'S MESSAGE

by Lara Roeske Fernandez
Trenam, Kemker, Scharf, Barkin, Frye, O'Neill & Mullis, P.A.

Tribute to a Wonderful Mentor

Judge Paskay's achievements are so immense that I cannot recite them all. Yet, I express my appreciation for his leadership by dedicating this President's message in his honor. As most of you know, I was blessed to have been his law clerk, not once but twice in my career. Judge Paskay impacted every member of our Bankruptcy Bar, his law students, interns, law clerks, and judges in the manner that we practice, the way we think, and how we express our commitment to the bankruptcy world. While many Federal judges appear to be untouchable, Judge Paskay's chambers was a revolving door for new students, interns, and lawyers to learn about the in's and out's of bankruptcy law. Judge Paskay's legacy continues today with our Tampa judges.

When I moved to Tampa, I was a bright-eyed 24-year old. I never wanted to step foot into a court room, let alone argue on behalf of a client. I wanted to be a transactional real estate attorney. Everything changed when I clerked for the Judge. He was different in chambers than he was on the bench. He questioned attorneys, forced them think on their feet, and overtly challenged them in the courtroom. When we would retreat to chambers, I was pleasantly surprised that he complemented their style and technique, always pointing out how to handle the courtroom as a judge. I realized that judges aren't that bad after all – and this was my first encounter! He was human. His integrity and willingness to mentor, teach, and mold your ambition made a lasting impression on me and others. His compassion for and knowledge of bankruptcy was overwhelming.

Our Bar is unique because of our relationship with the Judge. Judge Paskay's accomplishments in the bankruptcy arena will far surpass his time with us. We are lucky to be able to say that we appeared before him, argued with him, learned from him, achieved new law with his decisions, and were his friend. Our lives will be forever touched by his memory and contributions to our profession.

The Summer "Cramdown" will be entirely dedicated to Judge Paskay. Please forward to Jake Blanchard pictures, favorite phrases, short stories, opinions, and any form of communication that you would like included. We will try our best to incorporate as many submissions as possible in this special edition.

Inside This Issue

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

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Searching for Absolutes in the Absolute Priority Rule: 11 U.S.C. § 1129(b)(2)(B)(ii) and Individual Debtors in the Aftermath of BAPCPA

by Gregory M. Ludtka
Fall 2011 Judicial Intern to the Honorable Catherine Peek McEwen and J.D. Candidate 2012, Stetson University College of Law

The United States District Court for the Middle District of Florida, Tampa Division (Bucklew, J.), recently considered whether the absolute priority rule applies to individual Chapter 11 debtors. In *SPCP Group, LLC v. James John Biggins, et al*,[1] the court held that the absolute priority rule does not apply to individual Chapter 11 debtors. According to the order, an individual debtor's Chapter 11 reorganization plan can be confirmed by the court over an unsecured creditor's objection "because the absolute priority rule no longer applies to prevent individual Chapter 11 debtors from retaining pre- or post-petition property over an unsecured creditor's objection." In so holding, Judge Bucklew joined the ranks of those who endorse the broad interpretation of § 1129(b)(2)(B)(ii),[3] which states,

> (ii) the holder of any claim or interest that is junior to the claims of such class will not receive or retain under the plan on account of such junior claim or interest any property, except that in a case in which the debtor is an individual, the debtor may retain property included in the estate under section 1115 . . . .

The Debtors filed their bankruptcy cases, at least in part, because SPCP Group sought to enforce personal guarantees signed by each of them on a $5,000,000.00 loan taken out by an assisted living facility of which the Debtors each owned a 25 percent interest.[5] The bankruptcy court (Williamson, J.) confirmed the Debtors' Chapter 11 reorganization plans, which allowed the Debtors to retain their ownership in the assisted living facility without requiring them to make payments under the Debtors' personal guarantees to SPCP.[6] However, SPCP retained the right to enforce the Debtors' personal guarantees if the assisted living facility and its management company defaulted on the payments required by their own Chapter 11 reorganization plans.[7] The bankruptcy court found that the individual Debtors' reorganization plans were "fair and equitable," and further found that the absolute priority rule does not apply to individual Chapter 11 debtors, after the passage of BAPCPA.[8]

On appeal, SPCP Group argued the bankruptcy court erred in holding the absolute priority rule no longer applies to individual Chapter 11 debtors, and as a consequence, the Debtors' reorganization plans should not have been confirmed over SPCP Group's objection.[9] The district court affirmed, holding that the plain language of § 1129(b)(2)(B)(ii) "permits a bankruptcy court to confirm an individual Chapter 11 debtor's reorganization plan (which does not pay an unsecured creditor in full) over the unsecured creditor class's objection, even when the debtor retains 'property included in the estate under § 1115.'"[10]

In reaching its holding, the court focused on the proper interpretation of the language "except that in a case in which the debtor is an individual, the debtor may retain property included in the estate under section 1115,"[11] which qualifies the rights of a junior claim or interest holder to retain property, under a Chapter 11 reorganization plan. The court noted that § 1115, cross-referenced by § 1129(b)(2)(B)(ii), begins with the language,

> (a) In a case in which the debtor is an individual, property of the estate includes, in addition to the property specified in section 541 –

continued on p. 4

1 Order Ruling on SPCP Group, LLC's Appeal, *SPCP Group, LLC v. Biggins*, No. 8:10-cv-02381-SCB (M.D. Fla. Sept. 21, 2011) (available on PACER).
2 *Id.* at 11.
3 But *see In re Gelin*, 437 B.R. 435, 437 (Bankr. M.D. Fla. 2010) (holding that "the statutory amendments enacted by BAPCPA do not except individuals from the absolute priority rule in Chapter 11 cases"). This latter perspective is the narrow interpretation of § 1129(b)(2)(B)(ii), adopted by Judge Jennemann. *Id.*
4 SPCP Group was the largest unsecured creditor in the Debtors' reorganization plans.
5 The assisted living facility and its management company were also Chapter 11 debtors. Despite the fact that they were making payments on the $5,000,000.00 debt, pursuant to their own Chapter 11 reorganization plans, SPCP Group still sought to enforce the Bigginses' personal guarantees. Order Ruling on SPCP Group, LLC's Appeal at 3-4.
6 *Id* at 4.
7 *Id* at 4-5.
8 *Id* at 5.
9 SPCP Group also appealed the bankruptcy court's findings on improper gerrymandering and plan feasibility. These issues will not be discussed here.
10 *Id.* at 10.
11 11 U.S.C. § 1129(b)(2)(B)(ii).

Absolute Priority Rule

continued from p. 3

> (1) all property of the kind specified in section 541 that the debtor acquires after the commencement of the case but before the case is closed, dismissed, or converted to a case under chapter 7, 12, or 13, whichever occurs first . . . .

While acknowledging that there is not uniformity in judicial interpretation of § 1115,[12] the court rested on the plain language of the statute. The court asserted that the inclusion of the words, "in addition to the property specified in section 541," clearly included "all legal or equitable interests of the debtor in property as of the commencement of the case"[13] in the qualifying language of § 1129(b)(2)(B)(ii). Therefore, the court will allow individual Chapter 11 debtors to retain pre-petition property over the objection of unsecured creditors who have not been paid in full.

Interestingly, *SPCP Group* disagrees with a previous ruling by the United States Bankruptcy Court for the Middle District of Florida, Orlando Division, in *In re Gelin*.[14] In that case, the bankruptcy court reasoned that it was more appropriate to read § 1115 as only adding to § 541 and not completely replacing it, in the case of individual Chapter 11 cases. The bankruptcy court further reasoned, "[i]f Congress meant to eliminate the absolute priority rule of § 1129(b)(2)(B)(ii) for individual debtors, it could have simply stated that § 1129(b)(2)(B)(ii) is inapplicable in a case in which the debtor is an individual."[15] Congress did not choose this language. Finally, the bankruptcy court denied that its narrow reading of § 1129(b)(2)(B)(ii) rendered that same section and § 1115 meaningless because of the changes those sections still affect on post-petition property.[16]

Moving forward, it will be interesting to see how other judges in the Middle District of Florida rule on the appropriate interpretation of § 1129(b)(2)(B)(ii), as it applies to individual Chapter 11 debtors.[17] For now, bankruptcy practitioners should be aware of the evolving state of the law, which may or may not be resolved by Judge Bucklew's decision in *SPCP Group*, as the binding effect of a single district judge's opinion on bankruptcy judges in the same district remains unclear.[18]

12 *See e.g. In re Gelin*, 437 B.R. at 437.
13 11 U.S.C. § 541(a)(1).
14 The *In re Gelin* decision was issued after the bankruptcy court's ruling on *SPCP Group* but before the district court's ruling on *SPCP Group*.
15 *In re Gelin*, 437 B.R. at 442.
16 *Id.*
17 *See 7 Collier on Bankruptcy* ¶ 1129.04[3][d] (Alan N. Resnick & Henry J. Sommer eds., 16th ed., 2011) ("Given the relatively straightforward reading of the statute supporting the broader reading, and the general rehabilitative aim of chapter 11, it is likely that the broader reading will be adopted.").
18 Practitioners should be aware of the court's holding in *In re Shunnarah*, 273 B.R. 671, 672-673 (M.D. Fla. 2001), finding that bankruptcy courts are "bound by a rendered published District Court opinion, unless an opinion that contains a different holding is published." *See In re Petersen*, 222 B.R. 382, 385 (Bankr. M.D. Fla. 1998) ("In this jurisdiction, the Court is bound by decisions issued from the District Court for the Middle District of Florida, the Eleventh Circuit Court of Appeals, and the Supreme Court."); *see also In re Epstein*, 298 B.R. 917, 920 (Bankr. S.D. Fla. 2003) (stating "this Court considers itself duty-bound by the published court opinions rendered by judges of the United States District Court for the Southern District of Florida"); Philip White, Jr., *Precedential Effect of Bankruptcy Court, Bankruptcy Appellate Panel, or District Court Bankruptcy Case Decisions*, 8 A.L.R. Fed. 2d 155, §14 (2006) (stating "[t]he courts in the cases which follow indicated that a single-judge district court decision had a binding precedential effect on bankruptcy courts within the same district" and then listing multiple decisions in the jurisdiction of the Eleventh Circuit, including *In re Shunnarah*, *In re Petersen*, and *In re Epstein*). However, it is also important to note that at least one bankruptcy judge in the Middle District of Florida disagrees with the court's holding in *In re Shunnarah*. *See In re Baker*, 264 B.R. 759, 762 (Bankr. M.D. Fla. 2001) (stating "a bankruptcy court is not bound by *stare decisis* to follow the decision of a single district judge in a multi-judge district"); White, *supra* note 18, at §16 (stating "[t]he courts in the cases which follow indicated that a single-judge district court decision had no precedential effect on bankruptcy courts" and then listing multiple decisions in the jurisdiction of the Eleventh Circuit, including *In re Baker*).

Chapter 20: No Stripping without Judicial Permission

by Jacob L. Bair, Esq.
Kelley M. Petry, P.A.

A debtor files a Chapter 7 case and gets a discharge. She then files a Chapter 13 case before the requisite four years have passed which would allow her to get a Chapter 13 discharge. Even though she is not eligible for a discharge in the Chapter 13 case, she can potentially still receive the benefit of the automatic stay and use other reorganization and restructuring benefits of Chapter 13 to manage debt that was not discharged in or incurred subsequent to the Chapter 7 case. For the uninitiated, this is referred to colloquially as a "Chapter 20" bankruptcy filing.

There has been significant debate about how far the benefits of a Chapter 20 go. Specifically, there has been debate about whether junior liens can be stripped from homestead real properties in the context of Chapter 20 cases.

When it comes to the stripping question, saying that the overall judiciary is divided is a huge understatement. Not only are the Circuits themselves divided, but there is significant division within a number of them including the 11th. Several compelling (and conflicting) decisions on the matter have come out of Florida bankruptcy courts recently. Before we explore those, it would be a good idea to look at the recent history of the issue.

There are essentially two schools of thought on the idea of whether a debtor can strip a mortgage in a Chapter 20. These can be labeled Team *Gerardin* and Team *Fisette* (kind of like Team Edward and Team Jacob).

In re Gerardin[1] is an opinion published on the issue from the Southern District of Florida in February of 2011. Judges Isicoff and Cristol joined Judge Mark, who wrote the opinion, addressing the issue of lien stripping in Chapter 20 circumstances. *Gerardin* is a consolidation of seven different cases. *In re Fisette*[2] is an opinion from the 8th Circuit Bankruptcy Appellate Panel regarding lien stripping in Chapter 20 circumstances in August of 2011. Both opinions are well-reasoned and both recognize that the question of stripping a lien in a Chapter 20 depends on the interplay of three sections of the Bankruptcy Code: 506 (which presents the process for determining the secured status of a claim), 1322(b)(2) (which prohibits the modification of a secured lien on a homestead), and 1325(a)(5)(B)(i)(I) (which states that a plan can only be confirmed if it provides that holders of all allowed secured claims will retain their liens until payment under non-bankruptcy law or discharge). Both teams agree that no secured lien on a homestead can be stripped or crammed down even if the lien is grossly under-secured.

Gerardin holds that homestead liens that pass through a Chapter 7 discharge are – by definition –allowed, secured, liens. It also holds that Section 506(d) is not a self-executing "miracle lien remover, " but requires another code section to be able to strip a lien: an enabling section. Were it not so, the *Gerardin* court finds, liens could be stripped in Chapter 7 cases. The court further finds that the appropriate enabling section is section 1325. However, as stated above, section 1325 states that allowed, secured claims must be dealt with in a plan either through return of the secured property, full payment, or discharge. Since discharge is not an option, the Court reasons, either the house must be surrendered or the full lien must be paid but stripping under 506 is not an option.

Fisette holds that homestead liens that pass through a Chapter 7 discharge are merely claims. The Fisette court finds that the appropriate application of bankruptcy law is to then take the claim and apply 506 to determine whether it is secured or unsecured before considering 1322 or 1325. The court finds that if the lien is found to be unsecured, 1325 and 1322 do not apply in the way they are in *Gerardin* and the lien can be stripped under 506.

Team Gerardin is partially supported by a 10th Circuit Bankruptcy Appellate Panel from May, 2010: *In re Picht*[4]. Picht deals with the slightly different question of whether an under-secured lien can be satisfied in a Chapter 20 case by payment of the secured portion and cramdown of the balance. *Picht* uses a very similar analysis of 506 as *Fisette* and comes to a similar conclusion. In addition, In re Quieros-Amy[5] came out of the Southern District of Florida in September 2011. It is almost a carbon copy of *Gerardin*. In December 2011, Judge Briskman from Orlando ruled on a Motion to Value and Avoid Lien in

continued on p. 6

1 447 BR 342
2 455 BR 177
3 At 348
4 428 BR 885
5 456 BR 140

Chapter 20

continued from p. 5

the case *In re Judd*[6]. Judge Briskman firmly falls behind Team *Gerardin* in his reasoning for denying the lien strip in *Judd*.

Team *Fisette* is supported by two very recently published decisions written by Judge Williamson in *In re Scantling*[7] and Judge Glenn in *In re Dang*[8] which were published in February and March of this year respectively. Of these decisions, *Scantling* probably lays out the argument for stripping in a Chapter 20 in the clearest way. It reviews relevant Supreme Court and 11th Circuit cases[9] one by one and explains each point of law relevant to Chapter 20 lien stripping before engaging in an overall analysis of the interplay between 506, 1322, and 1325 and rebutting the arguments laid out by Team *Gerardin*. The author (who is a consumer bankruptcy attorney and not entirely impartial) found *Scantling* to be the most complete analysis of the issue of any of the opinions he reviewed.

The *Gerardin/Fisette* split exists in jurisdictions all over the country including the Middle District of Florida. Within the Tampa Division, Judge Williamson is the only judge with a published opinion on the subject. Judge McEwen was prepared to make a ruling in March when the case was dismissed. She has expressed support for Team *Fisette*. Judge May has not published on the subject and says his mind is still open but that he is influenced by the *Picht* opinion and Team *Gerardin*. Both Judges May and McEwen have expressed a desire for the 11th Circuit to take up the issue as soon as practicable to get some clarity on what the law should be. For now, practitioners in the Middle District of Florida will have to advise their clients that whether a lien can be stripped in a Chapter 20 situation will depend on which team their judge is on.

6 WL 6010025
7 2012 Bankr. Lexis 661
8 2012 Bankr. Lexis 1152
9 *Johnson v. Home State Bank, Dewsnup v. Timm, Nobleman v. American Savings Bank*, and *In re Tanner.*

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NEWS RELEASE

BILL MALONEY RECEIVES CERTIFIED TURNAROUND PROFESSIONAL DESIGNATION

CHICAGO, Ill. – Bill Maloney, Tampa Florida, has been awarded the professional designation of Certified Turnaround Professional (CTP). **Bill is President of Bill Maloney Consulting** and a member of the Turnaround Management Association (TMA) Florida Chapter.

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"The CTP designation is the industry's most recognized certification of experienced and skilled turnaround professionals," said the TMA Vice President of Certification and President of its Certification Oversight Committee Russell Burbank, CTP. ***"It is a mark of distinction for professionals who have demonstrated their commitment to the corporate renewal industry and to a high standard of excellence and integrity."***

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Official Small Business Case Forms: Not so "Form"ulaic After All

by Linda Zhou, Esq.
Fowler White Boggs, P.A.

Debtors' attorneys take note! The preapproved forms for a "small business" plan and disclosure statement may be used in any uncomplicated Chapter 11 case. At a recent Judicial Liaison Meeting, local bankruptcy judges endorsed the idea of using Official Forms B 25A and B 25B[1] in any uncomplicated case with few assets and few classes of creditors, even if it is not technically designated as a "small business case[2]."

Forms B 25A and B 25B are straightforward and easy to use. Practitioners should tailor these "fill-in-the-box" forms to meet the requirements of their specific case. Court approval is not necessary to use these forms in non-small business cases. Judge McEwen supported this idea, saying, "Adjusting these small business case forms for use in other Chapter 11 cases makes wonderful sense. The forms provide attorneys with a good template for their plan and disclosure statement while simultaneously providing them with the flexibility to meet the individual needs of their clients."

Debtors' attorneys should note, however, that while the small business case plan and disclosure statement forms may be used in uncomplicated Chapter 11 cases generally, only debtors that qualify as "small business" debtors may utilize the "small business" monthly operating report. Moreover, Official Form B 25C requires a "small business" debtor to provide information not required with standard Chapter 11 operating reports, such as a list of all receivables and projections for next month's income, expenses, and cash profit. Accordingly, practitioners should only use the small business forms for operating reports when they have a defined "small business case."

The practice of bankruptcy law is undeniably complex. The vague and circuitous provisions of the Bankruptcy Code do not make attorneys' lives any easier. The suggestion to use Forms B 25A and B 25B in any uncomplicated Chapter 11 case should be music to practitioners' ears. The simple changes that debtors' attorneys will need to make to these forms are a small price to pay for the assistance the forms provide. These changes will not only allow debtors' attorneys to better serve their clients, but also assist attorneys themselves by making their cases more manageable.

1 Form B 25A is titled *"Plan of Reorganization in Small Business Case under Chapter 11."* Form B 25B is titled *"Disclosure Statement in Small Business Case under Chapter 11."*

2 11 U.S.C. § 101(51C) defines a "small business case" as "a case filed under chapter 11 of this title in which the debtor is a small business debtor." 11 U.S.C. § 101(51D) follows to define a "small business debtor" as:

> (A) subject to subparagraph (B), means a person engaged in commercial or business activities (including any affiliate of such person that is also a debtor under this title and excluding a person whose primary activity is the business of owning or operating real property or activities incidental thereto) that has aggregate noncontingent liquidated secured and unsecured debts as of the date of the filing of the petition or the date of the order for relief in an amount not more than $2,000,000 (excluding debts owed to 1 or more affiliates or insiders) for a case in which the United States trustee has not appointed under section 1102 (a)(1) a committee of unsecured creditors or where the court has determined that the committee of unsecured creditors is not sufficiently active and representative to provide effective oversight of the debtor; and
>
> (B) does not include any member of a group of affiliated debtors that has aggregate noncontingent liquidated secured and unsecured debts in an amount greater than $2,000,000 (excluding debt owed to 1 or more affiliates or insiders).

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Fed. R. Bankr. P. 2015.3(c) Requirements, Compliance, and Enforcement Overview

by: John Anthony, Allison Doucette and Stacy Hyman
Anthony & Partners, LLC

I. Fed.R.Bankr.P. 2015.3 – The Rule

Enacted in 2008, Federal Rule of Bankruptcy Procedure 2015.3 and related Official Form 26 provide a rubric by which debtors must report financial information on entities in which the Chapter 11 estate holds a "substantial or controlling interest." Debtors must first file a report on related entities using Form 26 no later than seven (7) days before the first meeting of creditors. Following the initial report, debtors must file subsequent periodic reports every six (6) months.

A presumption in favor of the substantial or controlling interest arises when the debtor owns at least 20% of an entity. A debtor may rebut the presumption of control for entities in which the debtor holds more than a 20% interest, and parties in interest may likewise move to rebut the presumption of non-control of entities in which the debtor has less than a 20% interest.

While debtors may file motions to rebut the controlling presumption, modify specific reporting requirements, or protect information via protective orders, Rule 2015.3 is a vital and required means of financial reporting that can provide a more accurate and complete picture of the overall financial dealings of the debtor, whether individual or corporate. While secured creditors often require or receive this information pursuant to their lending relationship with the debtor, compliance with the rule provides a significant means by which the unsecured creditor body and the U.S. Trustee may receive the information.

II. Compliance by the Debtor with Form 26 Requirements- How Much Reporting is Enough?

The purpose of Rule 2015.3 is "to assist parties in interest [in] taking steps to ensure that the debtor's interest" in an entity in which the debtor holds a substantial or controlling interest "is used for the payment of allowed claims against the debtor." Pub. L. No. 108-9 § 419(b) (2005). Form 26 does not provide ample guidance to the Debtor on what the minimum reporting requirements are, which allows debtors to test more liberal interpretations of the Rule and Form.

Form 26 should be completed to include exhibits and information on each entity in which the debtor owns a substantial or controlling interest. Form 26 states that the series of Exhibit "B" reports, such as statement of cash flows and the statement of income, should be unaudited and prepared in accordance with generally accepted accounting principles in the United States ("USGAAP"). Deviation from the use of USGAAP is permitted, as long as the deviation is disclosed on the report. Considering the purpose and spirit of Rule 2015.3, it follows that in order to carry out the intent of Rule 2015.3, the debtor should not deviate so much from USGAAP as to create confusion to parties relying on these reports to assess the true financial condition of the subject entity. Also, debtors should clearly note deviations from USGAAP in footnotes or elsewhere on the financial statements to put the parties relying on the reports on proper notice of any deviation from USGAAP and the rationale behind such deviation. While an accountant may be hired to independently compile or verify the information, particularly when a trustee has been appointed and the information gathered may be unreliable, the administrative expenses of such a task may not be supportable.

In the interest of consistency, it is also recommended that debtors file each report in the same manner as the others. For example, if a debtor submits its initial report using accrual basis of accounting with its financial statements, it is recommended that the debtor uses accrual basis of accounting throughout the pendency of the bankruptcy when making the subsequent periodic reports. This will enhance the dependability of the reports to the court and parties in interests who will depend on them throughout the pendency of the bankruptcy case.

Issues may arise in compliance with Rule 2015.3 when debtors own or control a substantial number of non-debtor entities, when there are other holders of controlling interests, or where the non-debtor entity is subject to confidentiality restrictions. Courts have fashioned relief on a case by case basis, by modifying reporting requirements, entering protective orders as to certain information, or ordering other relief that protects the interests of the non-debtors while also providing clarity for interested parties. *See, e.g., In re HMC/CAH Consolidated, Inc.*, Case No. 11-44738-11, Doc. No. 302 (Bankr. W.D. Mo. Feb. 9, 2012); *In re Tribune Co.*, Case No. 08-13141 (KJC), Doc. No. 2072 (Bankr. D. Del. Sept 2, 2009).

continued on p. 12

Fed. R. Bankr. P. 2015.3(c)

continued from p. 11

III. Enforcement by Creditors and Trustees of Form 26 Requirements

Rule 2015.3 provides creditors, U.S. Trustees, and other parties in interest with a stronger and more effective means of obtaining relevant information on non-debtor related entities. Rather than seeking the information required by Form 26 through discovery within the bankruptcy court, which may eventually lead to a motion to compel the information upon non-production, the Form and Rule provide a stringent method for reporting and compliance subject to the fraud prevention safeguards, such as penalty of perjury placed on debtor's filings, which in turn places more pressure on debtors to not only provide the information, but provide the information in a reliable and cognizable format.

Non-compliance may have a significant impact on the trajectory of the bankruptcy case. Lack of compliance can be construed by either total non-compliance, or by a lack of acceptable compliance through inaccurate or incomplete reporting or use of unacceptable accounting principles. Parties in interest or the U.S. Trustee may file a motion to seek compliance, and may also include lack of compliance as a factor towards dismissal or conversion under Bankruptcy Code § 1112(b).

In sum, the emergence of Rule 2015.3 provides a powerful tool for parties of all varieties, and compliance by debtors is necessary and important for the fast, efficient, and fair completion of any Chapter 11 case. The Courts, debtors, creditors, and the U.S. Trustee should work together in the process of developing a set of acceptable practices by which to accomplish appropriate reporting of the information required by Form 26.

Three Ways Vendors Can Avoid Delco Pitfalls

by Erik Johanson, Candidate for Juris Doctor, May 2013; Finalist, Duberstein Moot Court Competition; Intern, Second District Court of Appeal, Hon. Anthony Black

Section 363(c)(2) of the Bankruptcy Code places strict limitations on a trustee's ability to use cash collateral.[1] When read in conjunction with § 1107, that limitation applies equally to debtors in possession and, as evidenced by a recent Eleventh Circuit decision, vendors that accept cash collateral from chapter 11 entities do so at their own risk.[2] While there may always be some risk associated with accepting cash collateral from an organization in chapter 11, vendors can take several important steps to insulate themselves from the implications of Delco. First, vendors transacting with chapter 11 entities can attempt to condition doing business with the debtor upon classification as a superpriority administrative claimant,[3] thereby eliminating the risk of § 549 avoidance.[4] Second, vendors that agree to receive cash collateral from a chapter 11 entity should ask for their own individual line item on the relevant cash collateral budget. Third, vendors that agree to receive cash collateral and are properly accounted for on the relevant cash collateral budget should petition the bankruptcy court for a comfort order prior to accepting any cash collateral from a chapter entity.

Superpriority Administrative Expense Claim

One alternative to bearing the risk of accepting cash collateral from a chapter 11 entity is for vendors to seek to become superpriority creditors, and utilize the bankruptcy process as a means of receiving compensation. "Section 364(c)(1) allows a debtor who is unable to obtain post petition unsecured credit to grant, with court approval, a superpriority over all administrative expenses."[5] Superpriority status under § 364(c)(1) is intended to serve as a means by which debtors can acquire otherwise unobtainable post petition financing, and is not intended to merely provide additional protections to an existing cash collateral creditor.[6] Accordingly, § 364(c)(1) allows vendors dissatisfied with the mere promise of receiving § 503(b)(1) administrative claims to condition their doing business with debtors upon receipt of a more favorable priority claim.[7] Ultimately, the administrative priority contemplated under § 364(c)(1) applies only where a vendor extends *new* credit,[8] which when properly bargained for must be paid with priority over all administrative expenses.[9]

Clearly, § 364(c)(1) superpriority administrative expense claims are powerful tools enabling debtors to obtain post-petition financing, and may serve as a means by which vendors can protect themselves from the pitfalls suffered by Marathon in *Delco*. However, the scope of protection offered by § 364(c)(1) is narrow[10]– only creditors extending new credit that would not be available but for the granting of a superpriority claim receive priority status. Accordingly, while vendors may condition doing business with a debtor upon classification as a superpriority creditor, they may not retroactively convert § 503(b) credit into superpriority credit to protect themselves from *Delco* pitfalls. Therefore, vendors considering whether to do business with a chapter 11 debtor should pursue classification as a § 364(c)(1) superpriority creditor before weighing the risk of having their transaction avoided and subsequently reclassified as a § 503(b) administrative claim or § 502(h) unsecured claim.[11]

continued on p. 14

1 *See* 11 U.S.C. § 363(c)(2).
2 *See Marathon Petroleum, L.L.C. v. Cohen (In re Delco)*, 599 F.3d 1255 (11th Cir. 2010) (permitting a trustee to avoid and recover $1.9 million from a vendor that accepted cash collateral without bankruptcy court approval).
3 Section 364(c) also permits vendors to condition doing business with debtors upon classification as secured creditors, which may be a desirable alternative to accepting cash collateral. *See* 11 U.S.C. §§ 364(c)(2) and 364(c)(3). Depending on the circumstances, vendors may prefer either of those alternatives over receipt of a superpriority administrative expense claim. Nonetheless, this paper will only specifically address § 364(c)(1) claims.
4 It should be noted that electing to pursue a superpriority claim still inheres a certain degree of risk, namely that the estate will be insolvent and make it impossible to pay unsecured creditors. This necessarily requires the vendor to choose between the lesser of two evils – potential 549 avoidance or an insolvent estate incapable of paying unsecured creditors. *See In re Mayco Plastics, Inc.*, 379 B.R. 691, 701 (Bankr. E.D. Mich. 2008) (stating that § 364(c)(1) debt is unsecured debt).
5 *In re AMT Inv. Corp.*, 53 B.R. 274, 276 (Bankr. E.D. Va. 1985).
6 *Id.* at 266-67.
7 *In re Mayco Plastics, Inc.*, 379 B.R. at 702.
8 *In re AMT Inv. Corp.*, 53 B.R. at 276.
9 *In re Mayco Plastics, Inc.*, 379 B.R. at 703.
10 From a vendor's perspective, §§ 364(c)(2) and 364(c)(3) may offer more protections than §363(c)(1) where vendors can condition doing business upon receipt of a security interest in unencumbered property. See 11 U.S.C. §§ 364(c)(2) and 364(c)(3).
11 11 U.S.C. § 502(h) (granting a general unsecured pre-petition claim to entities from whom a transfer is avoided and recovered).
12 11 U.S.C. § 363(c)(2).

Delco Pitfalls

continued from p. 13

Line Item on Cash Collateral Budget

The Bankruptcy Code is clear – a trustee or debtor in possession may not use cash collateral without court approval or consent from each affected party.[12] As noted above, vendors can limit the risk associated with accepting cash collateral by conditioning themselves as superpriority creditors. However, vendors who either cannot or prefer not to condition themselves as superpriority creditors, but nevertheless decide to transact with chapter 11 entities risk suffering the *Delco* pitfalls. To minimize that risk, vendors should take every precaution to ensure that their specific transaction is approved by the bankruptcy court. Absent party consent, the means for obtaining court approval is for the trustee or debtor in possession to adhere to the requirements of Federal Rule of Bankruptcy Procedure 4001(b)(1)(A), which requires them to submit an attachment containing a summary of projected revenues and a line item expense budget.[13] A vendor considering doing business with a chapter 11 entity should first determine whether the funds at issue are cash collateral. If they are, the vendor should ask to be included on the line item expense budget submitted to the bankruptcy court in conjunction with Rule 4001(b)(1)(A). In the event that an unauthorized transfer does occur, inclusion on the line item expense budget will differentiate that particular vendor from other vendors who were not included. Accordingly, vendors included in the line item expense budget can avoid having to raise the equitable good faith and innocent vendor defenses that the Eleventh Circuit refused to apply in *Delco*[14] because transfers made in accordance with the budget are necessarily authorized.

Comfort Order

Bankruptcy courts have considerable power under § 105(a) to "issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of the Code."[15] Accordingly, vendors transacting with chapter 11 entities that choose to accept cash collateral should not only ask to be included in the cash collateral budget, but also ask the bankruptcy court for a comfort order confirming authorization prior to engaging in the transaction. "Comfort orders are reserved for those circumstances where there are no genuine factual issues and when a court can readily confirm an event has occurred as a matter of law."[16] Alternatively, "comfort orders are not appropriate when a court must consider information outside of a case's docket or outside of the court's immediate purview."[17] Inclusion in the cash collateral budget will strengthen a vendor's argument in asking the bankruptcy court for a comfort order because its status as a budgeted line item in the cash collateral order is verifiable from within the case's docket, and is within the court's immediate purview. Additionally, inclusion in the cash collateral budget coupled with a comfort order can only enhance a vendor's chances of receiving a *nunc pro tunc* order retroactively authorizing the transaction in the event that the transfer occurs without or in excess of court authorization.

Conclusion

Ultimately, transacting with an entity in chapter 11 necessarily involves a certain degree of risk when the funds at issue are cash collateral. Vendors should take every precaution to avoid the Delco pitfalls – beginning with weighing the possibility of becoming a superpriority creditor, and conditioning receipt of cash collateral upon inclusion in the line item budget coupled with a comfort order.

13 Fed. R. Bankr. P. 4001(b)(1)(A).
14 *Marathon Petroleum, L.L.C. v. Cohen (In re Delco)*, 599 F.3d 1255 (11th Cir. 2010) (refusing to disregard the plain language of the Code to the vendor's detriment).
15 11 U.S.C. § 105(a).
16 *In re Hill*, 364 B.R. 826, 831 (Bankr. M.D. Fl. 2007).
17 *Id.*

Keeping Your Priorities Straight: The New Amendments to Article 9

by Amanda Chazal,
Stetson University College of Law Class of 2012

This article provides an overview of the upcoming Article 9 amendments addressing creditor status and priority dates by highlighting the amendments' significance and implications in bankruptcy. As the amendments have been introduced in Florida, local practitioners should start educating themselves on the changes the amendments will bring about.[1]

The Debtor's Name on the Financing Statement

In order for a financing statement to be sufficient, it must include three pieces of information: 1) the name of the debtor, 2) the name of the secured party, and 3) the collateral covered.[2] The name of the debtor is particularly important as the filing office indexes the financing statements by the name of the debtor, thereby making the debtor's name the avenue through which potential lenders inquire about secured status.[3] In regards to individual debtors, the sufficiency of the debtor's name is where most of the issues arose, which was the primary focus of the legislature when drafting the new amendments.[4] While Article 9 does include guidelines for the debtor's name, such as the minor error and standard search logic test, these provisions did not sufficiently address the problem.[5] For example, if an individual's birth name is Pamela Smith, but all of her friends know her is Pam, and her married last name is Matthews— what name would she be filed under? She might be Pamela Smith, Pam Smith, Pam Matthews, Pam Smith-Mathews, Pam Smith Matthews—the list could go on.

The amendments to Article 9 address the confusion that can arise under a debtor's name by providing two alternatives the states may adopt.[6] Both alternatives focus on the driver's license.[7] States that choose alternative A will be adopting a stricter rule, where a party looks first to a debtor's most recent unexpired driver's license;[8] only if the debtor does not have a driver's license can the filer then look to "the individual name of the debtor or the surname and first personal name of the debtor."[9]

The appropriate driver's license is the one issued by the state where a debtor maintains her principal residence. If a debtor subsequently changes her principal residence, the law of the new state governs perfection. Currently, § 9-316 provides a four-month window for re-filing in the new state in order for the collateral to continue to be perfected and not lapse. For example, if Pamela Smith is a resident of Florida and later moves to Indiana, the collateral continues to be perfected for four months while the creditor files in Indiana. Under alternative A, the debtor's name on the new filing must match that of the driver's license issued in Indiana. If the creditor properly files in Indiana within the four-month period, the collateral remains perfected. But, if the four-month period lapses before the creditor files, the security interest becomes unperfected and the effect will be as if it had never been perfected.

On the other hand, states that choose alternative B will be adopting the "safe harbor" test. Under alternative B there are three ways in which a debtor's name can be sufficient on the financing statement: 1) the individual name of the debtor 2) the debtor's surname and first personal name, or 3) the name that appears on the debtor's unexpired drivers license issued by the state where the debtor has its principal residence. Alternative B still emphasizes the use of a driver's license, but it differs in that the driver's license becomes a safe harbor as opposed to a required starting point.

continued on p. 16

1 H.B. 483, 2012, 114th Sess. (Fla. 2012).
2 11 U.S.C. § 9-502(a). In place of the name of the secured party, its representative is also appropriate. *Id.* Additionally, § 9-503 provides further guidance on the required name of the debtor. 11 U.S.C. § 9-503.
3 11 U.S.C. § 9-519.
4 ALI, *Uniform Commercial Code Proposed Amendments to: Article 9. Secured Transactions* xi (2010) [hereinafter Proposed Amendments] ("By far the largest amount of . . . time was spent on the question of the debtor's name on a financing statement: what happens when an individual uses multiple names (middle name, middle initial, birth name, name altered after divorce) in different transactions . . . ").
5 11 U.S.C. § 9-506 (stating a financing statement is sufficient even if it includes minor errors unless the errors are extensive enough to make "the financing statement seriously misleading").
6 Proposed Amendments at 24-31 (changing the current § 9-503 to include the choice of two alternatives). It appears as if Florida has chosen alternative A through the addition of subsections (d) and (e) to section 679.5031 of the Florida Statues. H.B. 483, 2012, 114th Sess. (Fla. 2012).
7 Proposed Amendments at 24–31.
8 Proposed Amendments at 30 (finding it is also suggested that in states where an individual can hold either a driver's license or non-driver identification card, but not hold both simultaneously, then it would be appropriate to include the phrase "driver's license or identification card").
9 Proposed Amendments at 26 (adding subsection (5) to existing § 9-503(a)). A reading of proposed alternative A appears to leave a large amount of ambiguity regarding where to look in circumstances where a debtor does not have an unexpired driver's license. *See id.*

Keeping Your Priorities Straight

continued from p. 15

Perfection Issues on After-Acquired Property Following a Debtor's Relocation

Currently, if a debtor relocates to a different jurisdiction there is a four-month window where the collateral remains perfected, and it will remain continuously perfected if it is perfected in the new jurisdiction within the four-month window.[10] But, if the collateral is not perfected within the four-month period the effect will be as if the collateral had never been perfected.[11] The problem arises in after-acquired property with the two most common examples being inventory and receivables. When the debtor changes jurisdiction, any inventory on hand before the change in jurisdiction remains perfected within the four-month window, but any inventory acquired after the change in jurisdiction is considered unperfected until the lender files in the new jurisdiction.[12] The day the lender files in the new jurisdiction becomes the lenders priority date for the after-acquired property.

Under the proposed amendments, the after-acquired collateral would also remain perfected after the change in location if a financing statement is filed in the new location during the four-month period.[13] This would also mean that the after-acquired collateral would fall under the original perfection date and not take on the new filing date.[14]

Amendments Affecting a New Debtor

A similar amendment is proposed in regards to a change in debtor, such as a restructuring scenario where there is a successor by merger.[15] The problems that arise resemble the change in location, continued perfection, and priority date addressed above.[16]

Currently, if a lender perfects its interest in a debtor's current location, but the debtor merges with a newly created company located in a different jurisdiction, the lender's security interest in pre-merger collateral remains perfected for one year after the merger. This only applies to collateral the lender is perfected in at the time of the merger, and thus the lender is unperfected in any collateral acquired by the new debtor corporation in the new jurisdiction until the lender files in the new jurisdiction.[17]

Under the proposed amendments, similar to the amendment for change of jurisdiction, the lender would remain perfected in both pre and post-merger collateral for four months, and maintain continuous perfection if the lender perfected the collateral in the new jurisdiction within the four-month period.[18]

If the debtor target corporation is merging with an existing acquiring corporation located in a new jurisdiction, the acquiring corporation's pre-merger collateral also becomes an issue. The security interest held by the target corporation's lender attaches to the pre-merger inventory held by the acquiring corporation when the acquiring corporation becomes bound by the security interest of the debtor.[19] If the target corporation's lender perfects within the four-month period, the security interest remains perfected.[20]

Additional Proposed Amendments

Another change the amendments address is the change of "correction statement" to the phrase "information statement" in § 9-518 to properly clarify the operation of this provision. A debtor files a correction statement when he believes that a previously filed financing statement naming him is inaccurate or was wrongfully filed. The correction statement has no legal effect, but purely acts as a mechanism for notice, prompting the change of the document's name to information statement.[21]

The proposed amendments to Article 9 bring clarity and practicality to already existing provisions. As this article only provides an overview, it is important to become educated on the changes and how they will affect your practice as they are slated to have a uniform effective date of July 1, 2013.

10 11 U.S.C. § 9-316(b).
11 *Id.*
12 *See* § 9-316(a) (noting that an existing security interest remains perfected, not addressing security interests that have not yet occurred) (emphasis added).
13 Proposed Amendment at 13–15 (amending section § 9-316 to include subsection (h)).
14 David Frisch, *The Recent Amendments to UCC Article 9: Problems and Solutions*, 45 U. Rich. L. Rev. 1009, 1021 (noting the current four-month rule without the amendment draws "a sharp distinction between collateral acquired by the debtor prior to its relocation to another jurisdiction and collateral acquired after relocation").
15 Proposed Amendments at 13–17 (adding additional subsection (i) to current § 9-316), § 9-102(a)(56) (providing a definition for new debtor as one who is bound by a security agreement previously entered into by another person).
16 Proposed Amendments at 15 (comparing proposed subsection (i) to proposed subsection (h) stating "whereas the latter addresses a given debtor's change of location, the former addresses situations in which a successor to the debtor becomes bound as a debtor by the original debtor's security agreement").
17 § 9-316(a).
18 Proposed Amendments at 13 (adding additional subsection (i) to current section § 9-316), *Id.* (eliminating the risk that collateral acquired after the merger would be unperfected until the lender discovers the merger and files in the new jurisdiction).
19 Proposed Amendments at 16 (appearing as part of proposed subsection (i)).
20 *Id.* (noting that this could created a "double-debtor" problem addressable in current § 9-326).
21 The function of an information statement is comparable to that of a credit report. Discussion with Dean Kristin David Adams, Author, *Uniform Commercial Code in a Nutshell* (Summer 2011).

Your Bankruptcy Judge Isn't Your Chambermaid: An Implicit Practice Pointer from the Eleventh Circuit

by Michael J. Hooi
Stichter, Riedel, Blain & Prosser, P.A.

If you're reading this article, you're probably used to seeing cases where things have or are about to hit the fan. Bankruptcies are on the whole challenging. As one court put it, "[b]ankruptcy is a particularly difficult area of law in which to determine whether a state court decision is subject to collateral attack in spite of the Rooker-Feldman doctrine."[1] That doctrine limits federal jurisdiction by precluding the lower federal courts from entertaining proceedings to reverse or modify final state-court decisions.[2] Dischargeability proceedings may very well be a hotbed in bankruptcy law for *Rooker-Feldman* issues. The Eleventh Circuit recently established in *Bullock v. BankChampaign, N.A. (In re Bullock)*[3] that for dischargeability purposes under 11 U.S.C. § 523(a)(4), defalcation requires a showing of recklessness. In doing so the court implicitly affirmed that federal judges, including bankruptcy judges, are not chambermaids that can sweep under the rug state-court decisions that contribute to a debtor's decision to seek relief in bankruptcy. This is so even when there is some housekeeping left to do in state court after the dischargeability proceeding is over.

When Randy Curtis Bullock took charge of his dad's trust, he became the trustee of an insurance policy on his dad's life. Bullock and his siblings were the beneficiaries, and the insurance policy was the trust's only asset. The trust's terms allowed Bullock as trustee to withdraw money only to pay policy premiums or a beneficiary. Bullock, however, borrowed from the trust three times, first at his dad's request to help his mom, then to obtain a fabrication mill, and finally to buy himself and his mom some real estate. He fully repaid all three loans.

But after two of Bullock's siblings found out what had happened, they convinced an Illinois state court that their brother had breached his fiduciary duties as trustee by taking out the loans. The court remedied the breach by entering a money judgment against Bullock for the amount of the benefit he received through self-dealing plus attorneys' fees, placing the mill and Bullock's beneficial interest in his dad's trust in a constructive trust, and substituting Bullock with BankChampaign as trustee. The court noted, however, that Bullock likely had no bad intentions in borrowing from the trust.

Bullock couldn't satisfy the money judgment unless he sold the mill, but the Bank frustrated his attempts to do so. So he filed a chapter 7 bankruptcy petition in Alabama, hoping that he could flush the debt away. The Bank initiated an adversary proceeding, asking the bankruptcy court to find Bullock's debt nondischargeable under 11 U.S.C. § 523(a)(4) because it arose from "fraud or defalcation while acting in a fiduciary capacity."

Bullock failed to reach his goal of discharging the debt. In granting the Bank's summary-judgment motion, the bankruptcy court concluded that Bullock was collaterally estopped from attacking the Illinois judgment. The district court affirmed on appeal. In doing so it asserted that the Bank was abusing its position of the authority by holding the mill hostage in perpetuity, but concluded that the state court—and not the bankruptcy court—was the proper forum to adjudicate the Bank's conduct.

Bullock's subsequent appeal presented the Eleventh Circuit with an opportunity to take a position in a circuit split about what defalcation means for § 523(a)(4) purposes. Defalcation generally "refers to a failure to produce funds entrusted to a fiduciary."[4] But published opinions[5] from various circuits have established three different standards for determining dischargeability that can be roughly summarized as follows:

continued on p. 18

1 *In re Mid-City Parking, Inc.*, 332 B.R. 798, 803 (Bankr. N.D. Ill. 2005).
2 *Nicholson v. Shafe*, 558 F.3d 1266, 1268 (11th Cir. 2009) (citing *Lance v. Dennis*, 546 U.S. 459, 463 (2006)). The *Rooker-Feldman* doctrine is based on two Supreme Court cases, *Rooker v. Fidelity Trust Co.*, 263 U.S. 413, 416 (1923) and *District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462, 482 (1983), where the Court respectively ruled that federal district courts lack jurisdiction to "entertain a proceeding to reverse or modify" a state court judgment or "to review final judgments of a state court in judicial proceedings."
3 *Bullock v. BankChampaign, N.A. (In re Bullock)*, —F.3d—, 2012 WL 446279 (11th Cir. Feb. 14, 2012).
4 *Quaif v. Johnson*, 4 F.3d 950, 955 (11th Cir. 1993).
5 Most circuits have issued published opinions on the issue. The Third Circuit has not done so, however, and the Tenth Circuit stated in an unpublished opinion that defalcation

Bankruptcy Judge Isn't Your Chambermaid

continued from p. 17

1. Defalcation can involve even a fiduciary's innocent act.[6]

2. Defalcation requires a showing of recklessness—willful neglect of duty, but not necessarily actual intent.[7]

3. Defalcation requires a showing of extreme recklessness—conscious misbehavior.[8]

The Eleventh Circuit adopted and applied the recklessness standard. The court found that Bullock, as trustee, acted recklessly by engaging in self-dealing and knowingly benefiting from the loans. And because Bullock's conduct was reckless, the court concluded, he committed defalcation under § 523(a)(4), and the bankruptcy court correctly ruled that the resulting debt was nondischargeable.

Bullock not only clarifies the law of the circuit, but also leaves us with a practice pointer to pick up: As we advise our clients, we should keep in mind the limited role that a bankruptcy court, as a federal court,[9] can play. Although bankruptcy tries to give debtors an opportunity to clean up their financial affairs and creditors their fair share, it's not a sponge that parties can use to scrub a state court's factual findings or legal conclusions that may clog their goals in bankruptcy.

requires some misconduct. *See In re Millikan*, 188 F. App'x 699, 702 (10th Cir. 2006).

6 *See, e.g., In re Uwimana*, 274 F.3d 806, 811 (4th Cir. 2001); *In re Cochrane*, 124 F.3d 978, 984 (8th Cir. 1997); *In re Sherman*, 658 F.3d 1009, 1017 (9th Cir. 2011).

7 *See, e.g., In re Harwood*, 637 F.3d 615, 624 (5th Cir. 2011); *In re Patel*, 565 F.3d 963, 970 (6th Cir. 2009); *In re Berman*, 629 F.3d 761, 766 n.3 (7th Cir. 2011).

8 *See, e.g., In re Baylis*, 313 F.3d 9, 20 (1st Cir. 2002); *In re Hyman*, 502 F.3d 61, 68 (2d Cir. 2007).

9 After all, *Stern v. Marshall* did "not change all that much . . . ." 131 S. Ct. 2594, 2620 (2011).

TURNAROUND UNDERGROUND

by: Steven R. Wirth
Akerman Senterfitt

Turnaround Underground is a networking group, sponsored nationally by the American Bankruptcy Institute, and locally by Akerman Senterfitt, Fowler White Boggs P.A., Michael Moecker & Associates, and Stichter Riedel Blain & Prosser P.A. Turnaround Underground provides a forum for midlevel restructuring professionals employed by law firms, investment banks and financial institutions, accounting and financial advisory firms and companies that provide vendor services, enabling them to meet their peers from other such organizations, to learn about professional opportunities, educate themselves on how their peers view pertinent issues in restructuring, share ideas, and build their professional and social networks.

I attended a few of the events in NYC while I was working at Kaye Scholer and thought it would be a good fit for Tampa when I relocated here with my wife. Thus, I organized our current board and established the Tampa presence here. Based on our first two events, we really think if will be a great success in Tampa and provide a forum for organizing social activities for the 4 year partner and under restructuring crowd.

For more information on Turnaround Underground,
please visit our website at: http://turnaroundunderground.com/

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NATIONAL ASSOCIATION OF CONSUMER BANKRUPTCY ATTORNEYS NAMES CHARLES G. MOORE AS STATE CHAIR FOR THE MIDDLE AND NORTHERN DISTRICTS OF FLORIDA

WASHINGTON, D.C. /// April 17, 2012 /// The National Association of Consumer Bankruptcy Attorneys (NACBA) announced today that Charles G. Moore will serve as its State Chair for the Middle and Northern Districts of Florida. NACBA is the only national organization dedicated to serving the needs of consumer bankruptcy attorneys and protecting the rights of consumer debtors in bankruptcy. NACBA serves more than 4,500 members in all 50 states and Puerto Rico. As the Middle and Northern Districts of Florida Chair for NACBA, Mr. Moore will serve as a liaison between NACBA and attorneys, bankruptcy judges and other court officials, as well as serving as a primary contact for local media regarding consumer bankruptcy issues.

NACBA President William Brewer said: "We are very excited about expanding our mission of helping to protect the rights of families in financial distress to a grassroots level with our State Chairs and hope that they can help correct the misperception that bankruptcy relief is no longer available to the public."

Commenting on his new position, Mr. Moore said: "I am truly humbled and excited by being given the opportunity to be a voice for the troubled consumers of Florida. Not only in the community and in the United States Bankruptcy Court, but also in the halls of Congress where I also currently serve as a legislative advocacy leader for NACBA".

Mr. Moore received a Bachelor of Science degree in Business Administration from the University of Florida and his Juris Doctorate from Stetson University College of Law. Mr. Moore currently practices law with the firm of Charles G. Moore, P.A., a law firm solely dedicated to representing consumers in Chapter 7 and Chapter 13 bankruptcies. Mr. Moore has been practicing law in the state of Florida for 21 years.

ABOUT NACBA

Established in 1992, NACBA is the only organization dedicated to serving the interests of consumer bankruptcy attorneys and protecting the rights of consumer debtors in need of bankruptcy relief. The Association's twin missions are to help consumer bankruptcy attorneys more effectively represent their clients and ensure that the voices of consumer debtors and their attorneys are heard in the halls of Congress, before the Judiciary, in the Executive Branch and in other arenas where consumer debtors are affected.

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Editor's Note: A digital photograph file of Charles G. Moore is available upon request.

UPCOMING EVENTS

Annual Installation Dinner
Tuesday, 05 June 2012
Palma Ceia Golf & Country Club
1601 S. MacDill Avenue, Tampa, FL 33629
Cocktail Hour begins at 6:00 p.m. / Dinner is at 7:30 p.m.

Judges' Quarterly Brown Bag Mentoring Programs for Lawyers New to Bankruptcy
Monday, 11 June 2012, 12:00

Judges' Quarterly Brown Bag Mentoring Programs for Lawyers New to Bankruptcy
June 11, 2012
Topic: Bankruptcy 101
Time: Noon
Location: 5th Floor Training Room, Sam M. Gibbons U.S. Courthouse
(please note that the topic and date are subject to change)

36th ANNUAL Judge Alexander L. Paskay Seminar on Bankruptcy Law and Practice

Sponsored by Stetson University College of Law and the American Bankruptcy Institute

March 15~17, 2012

Hyatt Regency Tampa • Tampa, Florida

American Bankruptcy Institute STETSON LAW

Left: **Joni L. Herndon**, SRA presented on the topic of "Evidence in Consumer Cases: Stripped-down 7s and 13s, standard of valuation and chapter 20 debtors" and **Prof. Theresa J. Pulley Radwan** (far left) was the Moderator.

April CLE Luncheon
Tuesday, April 10, 2012

Perspectives of the Chapter 11 Process from Former Debtors-In-Possession

John Patton, President of Rolling Oaks Utilities and Beverly Hill Development Corporation (left) and **David J. Daly**, *Managing Member and Chairman of Board of Managers* of AlphaRock, LLC (right) spoke about their experience as Debtors-in-possession in Chapter 11.

Greg Charleston (far left), Chief Restructuring Officer and Senior Managing Director at **Conway MacKenzie**, spoke about his experience as the Chief Restructuring Officer on the Dippin' Dots bankruptcy case.

Section 362(d)(4): *Technical* Corrections Act Creates *Substantive* Change

by Elizabeth R. Charlier
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When Congress passed the Bankruptcy Abuse Prevention and Consumer Protection Act on April 20, 2005, it added 11 U.S.C. § 362(d)(4). This subsection of the Bankruptcy Code read that a court must grant stay relief with respect to an act against real property "if the court finds that the filing of the petition was part of a scheme to delay, hinder, and defraud creditors." The use of "and" as a conjunction rather than "or" led some courts to believe that the Legislature intentionally chose the word "and," requiring all three types of conduct. *3 Collier on Bankruptcy* ¶ 362.05[19][a] (16th ed. 2011).

On December 22, 2010, Public Law 111-327, referred to as the Bankruptcy Technical Corrections Act of 2010 ("BTCA") became law (upon signing by President Obama) without a specified effective date. In the BTCA, Congress changed the conjunction in § 362(d)(4) from "and" to "or," so that the pertinent part of this subsection now reads "to delay, hinder, or defraud creditors." While this change passed as a technical correction to the Code, it will have a major effect on how courts apply this subsection.

Prior to this change, some courts required creditors to prove all three types of conduct described in § 362(d)(4) in order to grant relief from the automatic stay, imposing on creditors "a more substantial burden of proof." *3 Collier on Bankruptcy* ¶ 362.05[19][a]. These courts commonly denied relief under this subsection because the creditor failed to show the third type of conduct, i.e., that the debtor had an actual intent to defraud the creditor. *Id*. In fact, some courts required actual intent to defraud based on the following traditional elements of fraud: " i) false representation of a material fact; ii) knowledge of or belief in its falsity by the person making it; iii) belief in its truth by the person to whom it is made; iv) intent that it should be acted upon; and v) detrimental reliance upon it by the person claiming to have been deceived." *See, e.g., In re Poissant*, 405 B.R. 267, 274 (Bankr. N.D. Ohio 2009).

The new wording of § 362(d)(4) effectively lowers the creditor's burden of proof. The creditor is no longer required to prove a scheme to defraud if the creditor can prove a scheme to either delay or hinder. This new wording now matches the use of the phrase "intent to hinder, delay, or defraud" as it appears in § 548(a)(1) and § 727(a)(2). *3 Collier on Bankruptcy* ¶ 362.05[19][a]. As a result, courts may now look at case law under these two subsections when deciding whether to grant stay relief under § 362(d)(4). *Id.*

Unfortunately, when the Legislature passed the BTCA, it failed to specify when to apply the change to § 362(d)(4). This change appears to be substantive because it reduces the elements requiring proof by the creditor — to the debtor's detriment. Therefore, an argument can be made that the change applies only to cases filed after the effective date of the BTCA, December 22, 2010. *See Bennett v. N.J.*, 470 U.S. 632, 105 S. Ct. 1555, 84 L. Ed. 2d 572 (1985) (statutes affecting substantive rights are presumed to have prospective application only).

The court in *In re J.R. Hale Contracting Co., Inc.*, 2011 WL 3799244, 55 B.C.D. 110 (Bankr. D. N.M. 2011), looked at the issue of whether the BTCA should be applied retroactively in the context of a different Bankruptcy Code subsection (§ 724(b)(2)) and concluded it should not. First, the court disregarded an after-the-fact statement by a Congressional sponsor of the BTCA (made five years later) that he meant for the BTCA to correct technical errors and not enact a substantive change. 2011 WL 3799244 *5. Then the court quoted *Bowen v. Georgetown Univ. Hosp.*, 488

continued on p. 26

Section 362(d)(4)

continued from p. 25

U.S. 204, 208, 109 S. Ct. 468, 102 L. Ed. 2d 493 (1988), for the proposition that "congressional enactments and administrative rules will not be construed to have retroactive effect unless their language requires this result." 2011 WL 3799244 *6. The *J.R. Hale* court found nothing in the BTCA requiring retroactivity and went on to point out that although Congress acknowledged an error, that acknowledgement is different from "a command to apply the statute retroactively." *Id.*

In cases filed after the effective date of the BTCA, a creditor's burden is clear – just one of the three types of conduct under new § 362(d)(4) need be proved. However, in a case predating the effective date of the BTCA, there is an argument to be made by both sides of a contested matter under § 362(d)(4). Of course, the *J.R. Hale* decision is not binding on bankruptcy courts in the Middle District of Florida. Therefore, a creditor who wants to take advantage of the reduced showing required by new § 362(d)(4) should argue the remedial title of the BTCA and urge the bankruptcy court to apply the statute retroactively. And a debtor in a case predating the effective date should do just the opposite, urging the court to apply the loosened standard prospectively only.

To (b)(2)(B)(ii), or Not To (b)(2)(B)(ii): That is The 1129(b) Question.[1]

by Larry Foyle, Kass Shuler, P.A and John Brock, Albertelli Law

The purpose of this article is to explore the impact of the history of cramdown and to suggest that Congressional adjustments to Section 1129(b) under BAPCPA pertaining to Individuals cannot be taken out of context, but must be considered in light of the history of the "absolute priority" rule found in Section 1129(b)(2)(B)(ii). It is only when a consensual Plan cannot be achieved that one resorts to Section 1129(b). Therefore, Section 1129(b) must add something critical to the confirmation process that is different from the requirements of a consensual Plan confirmation. The article's conclusion will suggest that a uniform approach to the absolute priority rule is desired because, at present, the divergent views among the courts make it difficult to counsel clients on both sides of the aisle.

Section 1129(a) provides that "The court shall confirm a plan *only if all* of the following requirements are met:" The statute goes on to list 16 separate criteria. Chief among those criteria are the requirements that the Plan must have the necessary votes of all of the impaired classes of creditors and that the Plan must satisfy the 1129(a)(7) best interest of creditors test.

The best interest of creditors test found in 1129(a)(7) requires the court to hypothetically separate the Debtor's exempt assets from property of the estate and asks: what would creditors receive in the event of a liquidation of the Debtor's *non exempt* assets as of the effective date of the Plan? As long as the Plan satisfies the liquidation analysis, the Debtor's Plan passes the best interest of creditors test. In the event the Debtor meets all of the other 1129(a) criteria, but does not have the required votes of the unsecured class of creditors, the Debtor may still confirm the Plan over the rejecting class of unsecured creditors provided the Debtor can satisfy the applicable portion of the absolute priority test under 1129(b)(2)(B)(ii). Prior to BAPCPA, Section 1129(b)(2)(B)(ii) provided the following:

(B) With respect to a class of unsecured claims--

(ii) the holder of any claim or interest that is junior to the claims of such class will not receive or retain under the plan on account of such junior claim or interest any property.

Effect of Exemption on Absolute Priority

At first blush, one might state that the absolute priority rule provides, that a Plan must provide for all unsecured claims in full, before any interest junior to those unsecured claims may retain or receive "any property." The early analysis of the absolute priority rule in the Middle District of Florida regarded the rule to be the legal equivalent of a step ladder. Unsecured Creditors were considered to be on a higher rung than the Debtor and thus senior to the Debtor.[2] Prior to BAPCPA there were competing lines of cases. Judge Baynes' 1989 case, *In re Yasparro*, represented one line in which exemptions were irrelevant. As early as 2002, and possibly prior, commentators began to parse the language in 1129(b)(2)(B)(ii).[3] They began to ask what does "any property" mean. What does being "junior" mean? Does the Debtor retain exempt property on account of its status in the Plan, or does Debtor obtain exemptions outside of the Plan's context?[4]

As a result, in 2005, *In re Henderson*[5] emerged, representing the second line of cases in which Debtor

continued on p. 28

1 This article will focus on the test as it relates to unsecured creditors and does not address the absolute priority rule as it applies to secured creditors or to interests.
2 See for example In re Yasparro, 100 B.R. 91 (B M.D. Fla 1989) In re Johnson, 101 B.R. 307 (B. M.D. Fla 1989) both decided within a short time of each other by Judges Baynes and Paskay. Later Judge Hyman in In re Gosman, 282 B.R. 45 (B. S.D. Fla 2002) decided the absolute priority rule required dedication of exempt property to fund the plan in the absence of full payment to unsecured creditors who were senior to the Debtor.
3 See ABI Journal, November 2002, Exempt Property and the Absolute Priority Rule in Individual Chapter 11s, Bruce H. White and William L Medford.
4 Arguably, a Debtor can have its exemptions determined following the conclusion of the meeting of creditors, but oftentimes the determination is not made. For strategic reasons and the automatic stay protections, exemptions are not determined and the Plan often proposes under 1141(b) retain all property in the estate rather than vest all property of the estate in the Debtor.
5 321 B.R. 550 (B. M.D. FL 2005)
6 See footnote number 2
7 See 1123(c) which provides that in the case of an individual, a plan proposed by someone other than the Debtor may not provide for sale, use or lease of exempt property.

Section 362(d)(4)
continued from p. 27

could keep his exempt property and still satisfy the absolute priority rule. In the *Henderson* case, Judge Paskay *sub silentio* reversed his prior position in *Johnson*,[6] and agreed with the commentators that the Debtor may be junior to other creditors with respect to non exempt assets, but was not junior as to exempt property, since unsecured creditors could never share in the Debtor's exempt assets.[7] In addition, exemptions were determined outside of the Plan's context and confirmation events and, therefore, the exempt assets were neither received, nor retained on account of the Plan. As a result, the Debtor who retained exempt assets in a cramdown was not, according to Henderson, receiving or retaining "any property" in violation of the Statute's proscription.[8]

Although the *Henderson* view is an elegant position, it contains a real conflict. If *Henderson* merely segregates exempt property from property of the estate, the available distribution to unsecured creditors will never differ from simply applying the best interest of creditors test under 1129(a)(7). If courts can simply disregard absolute priority altogether, why would Congress go to any length to create a cramdown test? The cramdown test must mean more than the best interest of creditors' test which would otherwise be surplusage.

Pre-Code History

The pre-code history of absolute priority reflects its influence and the problems it is intended to address. Courts have recognized the need to protect unsecured claims from being shorted while ownership interests, which are traditionally junior to claims of creditors are able to retain their property and benefit from the newfound freedom of a discharge. Since the time of the large railroad reorganization cases over 100 years ago, there have been different iterations of the absolute priority rule. In *Northern Pacific Railway Co. v. Boyd*[9], the Supreme Court held that a reorganization plan could not provide for retention by equity unless all unsecured claims were satisfied. Although seemingly a large hurdle to proposing a feasible Plan, that ruling was codified in 1939 by Chandler Act.[10]

In 1952, Congress amended part of the Chandler Act (chapters XI – XIII). These chapters permitted smaller businesses and individuals to reorganize. Congress in its 1952 amendments removed the "fair and equitable" requirement from cases filed by individuals.[11] The legislative history of these amendments specifically provided that the Boyd rule shall not apply in cases filed by individuals because application of the test, was not "practicable [n]or realistic."[12]

The 1978 Code – 2005 BAPCPA Amendments

In 1977, while Congress was considering bankruptcy reform, the 1952 amendment to the Chandler Act was repealed. The "fair and equitable" standard returned to bankruptcy law and with the passage of the Bankruptcy Reform Act of 1978 (The Code) became part of its structure. Section 1129(b)(1) requires that a Plan be "fair and equitable" for confirmation. 1129(b)(2)(A),(B), and (C)[13] then elaborates on the meaning of "fair and equitable."

The most recent sweeping change to the law came with the 2005 BAPCPA amendments. Section 1129(b)(2)(B)(ii) was altered to contain a reference to Section 1115. It now reads as follows:

"[T]he holder of any claim or interest that is junior to the claims of such class will not receive or retain under the plan on account of such junior claim or interest any property, **except that in a case in which the debtor is an individual, the debtor may retain property included in the estate under section 1115, subject to the requirements of subsection (a)(14) of this section."** (Bold text was added by BAPCPA in 2005)

continued on p. 29

9 228 U.S. 482 (1913),
10 The Chandler Act was supplement to Bankruptcy act to account for large restructuring cases which provided that a plan for restructuring be "fair and equitable" in order to be approved by a court. The "fair and equitable" requirement was understood to mean that the plan meet the Boyd rule. The "fair and equitable" requirement applied to all chapters within the Chandler Act from cases involving large companies with publicly traded stock to cases involving individuals.
11 The Bankruptcy Act of 1898 did not distinguish which chapter was used based on whether the Debtor was a business, or an individual. Thus, prior to 1952, the fair and equitable requirement applied equally to all Debtors in those Chapters including individuals.
12 In re Fross, 233 B.R. 176 (10th Cir. B.A.P. 1999, unpublished opinion).
13 Sub-sections (A),(B), and (C) relate to fair and equitable treatment for secured creditors, unsecured creditors and ownership interests respectively

Section 1115: a Mystery wrapped in the Code?
The BAPCPA addition of section 1115[14] and its insertion into 1129(b)(2)(B)(ii) is presently an enigma. Interpreting Section 1115's wording is the key to determining whether the absolute priority rule applies to an individual chapter 11 cramdown case. To what extent did Congress seek to limit the absolute priority rule's potentially crippling effect on cramdown? Courts and commentators have tried to deal with textual analysis to determine what section 1115 property is. The question is whether section 1115 subsumes section 541 property or, In the alternative, is section 1115 merely an additional subset of property not contained within section 541 property?

The two primary views subsequent to BAPCPA have become known as the "broad view" and the "narrow view."[15] The broad view is that section 1115 is the all encompassing property of the estate statute that supplants and subsumes section 541. The narrow view states that section 1115 merely identifies two forms of post petition property not contained in section 541. Under the narrow view interpretation, the absolute priority rule can still apply because section 541 property must be committed to the Plan and the Debtor only keeps section 1115 property. In effect, the broad view says that Congress has abrogated the absolute priority rule in individual cases because the Debtor retains all property irrespective of the amount of distribution to unsecured creditors who must now accept whatever the best interest of creditors' determination dictates.

Part of the problem with the broad view's abrogation analysis is that it fails to take into account that chapter 11 is a consensual process and creditors have the right to vote to reject a Plan. If the absolute priority rule is abrogated, there is no reason to have a vote in an individual chapter 11 Plan or for unsecured creditors to review the Disclosure Statement. The Debtor must only meet the best interest of creditors test. Additionally, what happens when an unsecured creditor not only rejects, but also objects to the Plan? In that event the objection requires that Debtor must satisfy the means test under section 1129(a)(15). Ironically, the funds necessary to satisfy the test would have come from section 1115 assets which the Debtor need not devote to a Plan in a cramdown under 1129(b)(2)(B)(ii).

An additional, perhaps unintended, consequence of section 1115 is that Debtor's post petition earnings and post petition acquisitions of property are property of the estate which must now be included in the analysis of the best interest of creditors test determined as of the effective date of the Plan.

There are disputes concerning the purpose of the addition of section 1115 and its impact in the 1129(b) analysis. Many people think that Congress wanted to create a more user-friendly version of chapter 11 by adding the reference of section 1115 within section 1129(b) and argue that every Debtor must have the ability to file bankruptcy under some chapter of the code.[16] The detractors to that view point out that Congress could have simply increased or eliminated the debt ceilings in chapter 13 cases to allow more people to qualify. Congress clearly knew how to write section 1129(b) so as to say that the absolute priority rule will not apply in individual chapter 11 cases. But Congress did not do that.

CONCLUSION?
Chapter 11 and the absolute priority rule pose difficult and knotty problems for people who are in difficult situations. There should be uniformity and less gamesmanship or gambling on significant outcomes that are presently dictated based upon which division of a court one files in or which judge is drawn in a blind rotation.

continued on p. 30

14 Section 1115 provides "(a) In a case in which the debtor is an individual, property of the estate includes, in addition to the property specified in Section 541
(1) all property of the kind specified in Section 541 that the debtor acquires after the commencement of the case but before the case is closed, dismissed, or converted to a case under chapter 7, 12, or 13, whichever occurs first…"

15 The broad view is represented by the Court's conclusions in In re Biggins 465 B.R. 316 (M.D. Fl. 2011) while the narrow view is well represented by In re Gelin, 437 B.R. 435 (B.M.D.Fl. 2010)

16 Norwest Bank Worthington v. Ahlers, 485 U.S. 197 (1988) The Supreme Court determined that the Debtor, who did not qualify for Chapters 7, 13 or 12 and was forced into a chapter 11 case, simply had to grapple with the consequences and face the rigors of chapter 11.

Section 362(d)(4)

continued from p. 29

Courts must consider the roots of the absolute priority rule. Examining the language of section 1115 and searching for its revelation that is shrouded in mystery at present is not a constructive exercise. Consideration of absolute priority's history provides context to the overall structure of Section 1129(b). In 1979, Congress did not draft the absolute priority rule in a vacuum absent any influences of past versions of the law. The retention of absolute priority from the Act of 1898 was clearly intended to provide the same protection to unsecured creditors on which the Supreme Court based its ruling in the Boyd case. In 1952, Congress acted with intention and reason based upon a perceived need for a change in the law. To suggest that Congress has now evinced a wholesale change in absolute priority abrogating its effect via the back door, is illogical. Given the long history of the absolute priority rule, there are many easier and more explicit ways in which Congress could have abrogated the rule in individual cases, if that were Congress's intention.

Additionally, abrogating absolute priority does not fit with the rest of the remaining structure of chapter 11. If Congress is saying unsecured claims are not entitled to cramdown protection, then there is no need for an unsecured creditor to review the Disclosure Statement and no need for an unsecured creditor to vote for, or against the Plan. Such a dramatic change in consensual and cramdown Plan requirements is not consistent with Congressional BAPCPA reforms to the bankruptcy code.

In fact, by grafting section 1115 into section 1129(b) Congress has demonstrated that no change in the absolute priority rule is intended under BAPCPA. Congress added post petition assets that were never available in pre BAPCPA plans under section 1115. Therefore, Congress has merely balanced the equation precluding unsecured creditors from seeking to obtain post petition assets in a Cram down situation.[17] The net effect is a zero sum game.

In the end we have come full circle: To (b)(2)(B)(ii), or Not To (b)(2)(B)(ii): That is Still The 1129(b)Question.

17 However because Congress is very mindful of the plight of spouses involved in bankruptcy cases, the Debtor even in a Cramdown must commit 1115 assets to fund DSO obligations under 1129(a)(14).

People on the Go

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Anthony and Partners' focus is in the areas of Bankruptcy, Creditors' Rights, and Complex Litigation, serving clients statewide in both State and Federal venues. The Firm's founders combine 52 years of specialized experience focusing in these areas as members of the Florida Bar.

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Carlton Fields is pleased to announce that Jacqueline R. Ambrose a joined the firm as associates in the Tampa office.

Ambrose practices in the firm's Business Litigation and Trade Regulation Practice Group. She was a Carlton Fields summer associate in 2009 working at the Tampa Office. Ambrose received her J.D. from Georgetown University Law Center in 2010 and her B.A., magna cum laude, in Political Science from the University of Florida in 2007.

Jacqueline Ambrose focuses her practice on commercial litigation and class action defense on behalf of national title insurance underwriters. She also defends institutional lenders against consumer protection and collection claims. Ms. Ambrose has participated in the litigation of various products liability actions, commercial bankruptcy disputes, and general business and real property lawsuits, as well as the development of antitrust claims.

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The Cramdown
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