The Cramdown

The Newsletter of the Tampa Bay Bankruptcy Bar Association

Editor-in-Chief, Jake C. Blanchard, Fowler White Boggs P.A. **Summer 2013**

PRESIDENT'S MESSAGE

by Keith T. Appleby, Esq.
Hill Ward Henderson

As my term as President of the Tampa Bay Bankruptcy Bar Association nears its end, I want to thank everyone who contributed to our success. The TBBBA has had a great 2012-2013 bar year due to the efforts of our Officers, Directors, support of our Judges, and numerous volunteers. I specifically want to recognize and thank all of the volunteers who provide the materials and organization that make the monthly CLE luncheons, Consumer luncheons, C.A.R.E program, e-mail and website updates, membership directory, social events, and this wonderful newsletter possible. It is the volunteers that make our Association the strong organization that we have all come to know and appreciate.

Over the past year, our Board has emphasized the value of pro bono representation for our court, our Association and our community. While the TBBBA has plenty of opportunities to improve our pro bono programs, I am proud to recognize that we were able to start a program to support pro se debtors and creditors at the courthouse. Our attorney volunteers are available in the 9th floor Attorney Resource Room on Mondays, Wednesdays, and Thursdays for approximately 2 hours during the lunch period. Attorney volunteers provide limited legal advice and information about pending bankruptcy cases and assistance with preparation of bankruptcy-related documents. Volunteers do not give non-bankruptcy advice, provide representation, or file pleadings. We ask that you continue to support this program and volunteer for an hour or two at your convenience.

In addition, we hope that you will join other members for the TBBBA 5th Annual Rays Night on June 28, 2013. The TBBBA Rays Night is a great opportunity to mingle with your peers, friends, and TBBBA family and for chances to win Rays merchandise, memorabilia, and other great prizes provided by our sponsors. Proceeds will be donated to a TBBBA chosen charity. Tickets and sponsorships are limited, so get your tickets while they are still available.

Looking forward, our Association will continue to make every effort to meet the needs of our members, community and court. We are in constant need for new volunteers and new ideas to make our Association better. If you would like to volunteer your skills and expertise to the TBBBA or have suggestions of how we may improve, please e-mail me directly at KAppleby@HWHlaw.com.

I look forward to seeing you at the Annual Dinner, CLE luncheons, and other Association functions. Thanks for a great year!

Inside This Issue

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How Impaired Are You? The Fifth Circuit's Recent Take on § 1129(a)(10) and Artificial Impairment

by Stephanie C. Lieb and Anne C. McAdams
Trenam Kemker

The Fifth Circuit Court of Appeals released an opinion on February 26, 2013 holding that a debtor in a single asset real estate case could artificially impair claims in a class in order to obtain the requisite impaired and accepting class of claims for purposes of 11 U.S.C. § 1129(a)(10). The circuit courts have split on this issue, without the Eleventh Circuit having weighed in at this time.

Village at Camp Bowie I, LLC (the "Village") owned a single asset – real estate in Fort Worth Texas, where it leased several buildings for retail and office space. The Village financed its purchase of the real estate by executing short-term promissory notes in favor of South Trust Bank and Texas Capital Bank, in addition to investing approximately $10,000,000 of its own equity capital. Western Real Estate Equities, LLC ("Western") acquired the notes subsequent to the Village's default. The Village filed a Chapter 11 petition the day before the non-judicial foreclosure sale scheduled by Western.[1]

As of the petition date, the Village owed Western $32,112,711 in outstanding principal on the notes. The Village also owed thirty-eight trade creditors a total of $59,398 in unsecured pre-petition debt.[2] Western moved for stay relief unsuccessfully and it became clear that Western would not consent to a plan by the Village.[3]

The Village proposed a plan of reorganization which designated Western's secured debt and the trade creditors' unsecured debt as the only two voting, impaired creditor classes. It proposed to execute a new five-year note in favor of Western in the amount of its secured claim. The Village's pre-petition owners also agreed to provide a $1,500,000 capital infusion in exchange for newly issued preferred equity. With respect to the trade creditors, the Village proposed to pay all unsecured trade claims within three months from the plan's effective date, without interest. All thirty-eight unsecured trade creditors voted to confirm the plan. Western, not surprisingly, voted against the plan on the grounds that it did not satisfy 11 U.S.C. § 1129(a)(10).[4]

Section 1129(a)(10) requires at least one class of claims impaired under a plan to accept the plan.[5] Since the Village's plan garnered the vote of the impaired class of trade creditors, it satisfied the literal requirements of § 1129(a)(10). Nonetheless, Western accused the Village of "artificially impairing" the class of trade creditors by proposing to pay them over a three-month period despite having the cash to pay in full upon the plan's confirmation.[6] Although the bankruptcy court agreed that the Village could pay the trade creditors in full at confirmation, it found that § 1129(a)(10) did not require "any particular degree of impairment" and confirmed the plan over Western's objection.[7]

Upon Western's appeal, the Fifth Circuit Court of Appeals addressed whether a plan proponent can satisfy § 1129(a)(10) by artificially impairing a friendly class of creditors and, additionally, whether the plan, with this impairment, can satisfy the good faith requirement of § 1129(a)(3). The Fifth Circuit addressed these issues in light of the split among the circuit courts of appeals over whether § 1129(a)(10) distinguishes between artificial and economically driven impairment. On the one hand, the Eighth Circuit Court of Appeals has held that a claim is "impaired" for purposes of § 1129(a)(10) only to the extent that the impairment is driven by economic need.[8] On the other hand, the Ninth Circuit Court of Appeals has reasoned that the plain language of § 1129(a)(10) does not distinguish between discretionary and economically driven impairment, such that it encompasses the so-called "artificial impairment" apparent with respect to the Village's plan.[9]

continued on p. 4

1 *In the Matter of Village at Camp Bowie I, L.P.*, 710 F.3d 239, 242 (5th Cir. 2013).
2 The trade creditors included independent third parties who provided the Village with various services, such as maintenance, landscaping and accounting.
3 *Village at Camp Bowie*, 710 F.3d at 242.
4 *Village at Camp Bowie*, 710 F.3d at 243.
5 11 U.S.C. § 1129(a)(10).
6 *Village at Camp Bowie*, 710 F.3d at 243.
7 *Id.*.
8 *Matter of Windsor on the River Associates, Ltd.*, 7 F.3d 127 (8th Cir. 1993).
9 *Matter of L & J Anaheim Assocs.*, 995 F.2d 940 (9th Cir. 1993).
10 *Village at Camp Bowie*, 710 F.3d at 245.
11 *Id.*
12 *Village at Camp Bowie*, 710 F.3d at 248.

How Impaired Are You?
continued from p. 3

The Fifth Circuit expressly adopted the reasoning espoused by the Ninth Circuit. In so doing, the Fifth Circuit rejected the Eighth Circuit's reasoning on the grounds that it improperly infused a "motive inquiry" into § 1129(a)(10).[10] Thus, according to the Fifth Circuit, the plain meaning of § 1129(a)(10) does not require the impairment of a class of creditors to be driven solely by economic motives.[11] Rather, the Fifth Circuit held that a court can address the motives of a plan proponent only within the context of the § 1129(a)(3) good faith requirement.[12] In this regard, the Fifth Circuit concluded that the bankruptcy court did not commit clear error in finding that the Village proposed its plan for legitimate purposes.[13] The Fifth Circuit held that artificial impairment does not constitute bad faith as a matter of law, emphasizing though that a debtor may not avoid its obligation to propose a plan with the legitimate and honest purpose of reorganization by satisfying the literal "impairment" requirements of § 1129(a)(10).[14]

The Eleventh Circuit Court of Appeals has not addressed whether the artificial impairment of a class of creditors violates § 1129(a)(10).[15] Several courts in the Eleventh Circuit, however, have adopted the reasoning akin to that of the Eighth Circuit and denied confirmation where the debtor artificially impaired the only accepting impaired class under § 1129(a)(10). In *Epic Metals Corp. v. Condec, Inc.*, for example, a district court in the Middle District of Florida held that confirmation of a plan was improper where the debtor did not show that a class of creditors was "truly impaired" under § 1129(a)(10).[16] Rather, the court found that the debtor merely altered the treatment of two classes of creditors in order to obtain their confirmation votes over the opposition of the one truly impaired creditor.[17] The court considered the debtor's bad faith motive in reaching its conclusion, finding that the debtor sought the protection of the Bankruptcy Code merely to avoid a supersedes bond.[18]

Similarly, a bankruptcy court in the Northern District of Florida denied confirmation in *In re Investors Florida Aggressive Growth Fund, Ltd.* where the debtor artificially impaired the only accepting class under § 1129(a)(10).[19] The court found that the debtor used its discretion to impair a class of creditors by proposing to pay their claims over a nine month period despite having the resources to pay immediately in full.[20] Relying on the Eighth Circuit's reasoning in In re Windsor, the court declined to confirm the plan for failure to comply with § 1129(a)(10).[21]

The Fifth Circuit found that a debtor can artificially impair a class of creditors to obtain the requisite impaired and accepting class for purposes of Section 1129(a)(10), a favorable result for single asset real estate debtors. The only limitation on this is the good faith requirement of Section 1129(a)(3). With respect to this requirement, the Fifth Circuit suggested that artificial impairment can be a factor considered, but it is not per se bad faith. The Village's legitimate motives for bankruptcy filing carried the day.

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continued on p. 5

13 *Id.*
14 *Id.*
15 The Eleventh Circuit has held that although a plan proponent has considerable discretion to classify claims, it cannot design classifications to manipulate class voting. *See Olympia & York Florida Equity Corp. v. Bank of New York (In re Holywell Corp.)*, 913 F.2d 873, 880 (11th Cir. 1990). Likewise, the Fifth Circuit has held that a plan proponent cannot separately classify similar claims in order to gerrymander an affirmative vote on a plan. *See Phoenix Mutual Life Ins. Co. v. Greystone III Joint Venture (In re Greystone III Joint Venture)*, 995 F.2d 1274, 1279 (5th Cir. 1991). In *Village at Camp Bowie*, however, the Fifth Circuit rejected an argument that its anti-gerrymandering principles barred artificial impairment under § 1129(a)(10) as a form of voting manipulation. 710 F.3d at 247. Although analogous to artificial impairment, these anti-gerrymandering principles are outside the scope of this article.
16 *Epic Metals Corp. v. Condec, Inc.*, 232 B.R. 806, 809-10 (M.D. Fla. 1999).
17 *Id.* at 809.
18 *Id.* at 809-10.
19 *In re Investors Florida Aggressive Growth Fund, Ltd.*, 168 B.R. 760, 766 (Bankr. N.D. Fla. 1994).
20 *Id.* at 767.
21 *Id.*

Mission Intousable: This Homebuilder Will Self-Destruct In Six Months

by: Erik Johanson[1]

Introduction

The *In re Tousa* decisions[2] out of the Southern District of Florida and the Eleventh Circuit have garnered considerable attention within the bankruptcy community.[3] With so much already having been said, the purpose of this article is to clarify what the Eleventh Circuit's decision means going forward. Specifically, this article identifies three important *In re Tousa* takeaways; discusses the effect of the 2008 global financial crisis on the outcome of the case; and provides a brief discussion of how *In re Tousa* could someday impact preferential transfer law.

Three Quick *In re Tousa* Takeaways

First, the Eleventh Circuit addressed the scope of trustees' power to recover avoidable transactions under § 550 of the Bankruptcy Code. In so doing, the Eleventh Circuit confirmed that it adheres to the mere conduit defense and control test under § 550.[4] Second, the Eleventh Circuit never directly addressed whether it is proper for courts to overwhelmingly adopt one party's proposed findings of fact. However, the Eleventh Circuit hinted that it is by reviewing the bankruptcy court's factual determinations under the clearly erroneous standard.[5] Third, and perhaps most importantly, the Eleventh Circuit did not directly answer all of the lingering questions regarding the indirect benefits theory[6] and its applicability to the reasonably equivalent value determination. Specifically, the Eleventh Circuit never directly addressed which party bears the burden of proving the indirect benefits theory;[7] the degree to which indirect benefits need to be quantified;[8] and the applicability of the doctrine of substantive consolidation[9] to the reasonably equivalent value determination.[10]

The Effect of the Global Financial Crisis on the *In re Tousa* Decisions

The Eleventh Circuit had the opportunity to review the applicability and validity of the indirect benefits theory, as well as the related doctrine of substantive consolidation *de novo*.[11] However, the Eleventh Circuit did not explicitly adopt or reject either of those theories, and instead deferred to the bankruptcy court's factual determinations. Since the bankruptcy court's controlling factual determinations were made between January 2008 and October 2009,[12] the effect of timing on the resolution of this case was of critical importance. Between the petition date and the bankruptcy court trial, the Dow Jones Industrial Average plummeted from above 13,000/share to around 6,627.00/share, and traded around 8,500.00/share during the trial itself.[13] Other notable events that occurred between the petition date and the bankruptcy trial included: the Bernard Madoff Ponzi scheme saga;[14] the creation and implementation of the TARP program;[15] and the widely

continued on p. 6

1 Erik Johanson is a third-year student at the Stetson University College of Law in Gulfport, Florida. While writing this article, Erik interned for the Hon. Michael G. Williamson in the U.S. Bankruptcy Court for the Middle District of Florida. Special thanks go out to Judge Williamson and his law clerk Ed Comey for their mentorship.
2 *See Official Committee of Unsecured Creditors of Tousa, Inc. v. Citicorp North America, Inc. (In re Tousa, Inc.), 422 B.R. 783 (Bankr. S.D. Fla. 2009); 3V Capital Master Fund, Ltd. v. Official Committee of Unsecured Creditors of Tousa, Inc. (In re Tousa, Inc.)*, 444 B.R. 613 (S.D. Fla. 2011); *Senior Transeastern Lenders v. Official Committee of Unsecured Creditors (In re Tousa, Inc.)*, 680 F.3d 1298 (11th Cir. 2012).
3 The facts of the *In re Tousa* bankruptcy are complex, and in the interest of brevity have been omitted from this article. Readers who are unfamiliar with the *In re Tousa* decisions may wish to refer to: Jessica D. Gabel, *The Terrible Tousas: Opinions Test the Patience of Corporate Lending Practices*, 27 Emory Bankr. Dev. J. 415, 418-27 (2011).
4 *See In re Tousa – Eleventh Circuit*, 680 F.3d at 1313-14.
5 *Id.* at 1310.
6 Under the indirect benefits theory a transferee can receive reasonably equivalent value in a pre-bankruptcy transaction in the form of intangible assets like goodwill. *See, e.g., Mellon Bank, N.A. v. Metro Commc'ns, Inc.*, 945 F.2d 635, 646-48 (3d Cir. 1991).
7 Compare *In re Tousa – Bankruptcy Court*, 422 B.R. at 866 (stating that once the trustee proves that the debtor did not receive direct benefits in an allegedly fraudulent transfer action, the burden shifts to the defendant to prove the existence of indirect benefits), with *In re Tousa – District Court*, 444 B.R. at 653 (stating that the trustee bears the burden of proving the absence of indirect benefits).
8 *See In re Tousa – Bankruptcy Court*, 422 B.R. at 866 (stating that the defendants bear the burden of quantifying the indirect benefits that they allege constitute reasonably equivalent value).
9 The doctrine of substantive consolidation treats an entire businesses' assets as a common pool that are available to the creditors of each individual affiliate. *In re Xonics Photochemical, Inc.*, 841 F.2d 198, 201 (7th Cir. 1988). Under this theory, when interrelated entities pledge or transfer their assets for the benefit of the consolidated enterprise, the entity as a whole receives reasonably equivalent value. *Rubin v. Mfrs. Hanover Trust, Co.*, 661 F.2d 979, 992 (2d Cir. 1981).
10 *See In re Tousa – Bankruptcy Court*, 422 B.R. at 867 (stating that benefits are not to be evaluated from the perspective of a common business enterprise).
11 *See In re Tousa – Eleventh Circuit*, 680 F.3d at 1310 (stating that it reviews the determinations of law made by the bankruptcy court and district court de novo).
12 *See In re Tousa – Bankruptcy Court*, 422 B.R. at 783-85 (stating that TOUSA filed for bankruptcy in January 2008, and the court published its opinion on October 30, 2009), *In re Tousa – District Court*, 444 B.R. at 638 (stating that the trial took place between July 13th and July 28th, 2009).
13 *See* Dow Jones Industrial Average Five Year Chart, YAHOO FINANCE (December 2, 2012, 1:56 PM), http://finance.yahoo.com/echarts?s=%5EDJI+Interactive#symbol=^dji;range=5y;compare=;indicator=volume;charttype=area;crosshair=on;ohlcvalues=0;logscale=off;source=undefined;.
14 David Voreacos and David Glovin, *Madoff Confessed $50 Billion Fraud Before FBI Arrest*, BLOOMBERG NEWS (December 12, 2008), http://www.bloomberg.com/apps/news?pid=newsarchive&sid=atUk.QnXAvZY.
15 *See* Emergency Economic Stabilization Act of 2008, Pub. L. 110-343, 122 Stat. 3765 (October 3, 2008).

Mission Intousable

continued from p. 5

criticized decisions by the CEOs of the major American automakers to fly to Washington, D.C. in private jets to request bailout money.[16] While the Eleventh Circuit ultimately sided with the bankruptcy court, practitioners should be aware of the extremely negative sentiment associated with the financial and homebuilding industries during the bankruptcy court proceedings. Accordingly, practitioners need to appreciate the effect that sentiment may have had on the bankruptcy court's rejection of the indirect benefits theory and the doctrine of substantive consolidation.

Implications of the *In re Tousa* Decisions on Preferential Transfer Law

Practitioners should be aware that the legal questions not squarely addressed by the Eleventh Circuit are relevant beyond the fraudulent transfer context. For example, imagine that the transfer at issue in *In re Tousa* had occurred within the 90 day preference period. Language in both the bankruptcy and Eleventh Circuit opinions indicate that the underlying transfer had a preferential effect.[17] Under this scenario, the parties would have been forced to address some of the legal theories from the fraudulent transfer proceeding differently in the preference context. For instance, the trustee would need to address the fact that under § 547(b)(2), the underlying debt must be an antecedent debt owed by the debtor, but was in reality owed by the TOUSA parent entity.[18] The trustee could have argued that TOUSA and its subsidiaries should be substantively consolidated; the effect being that the underlying debt was owed by the consolidated entity. Alternatively, the trustee could have argued that each subsidiary owed a contingent debt to the TOUSA creditors, which would have been triggered

continued on p. 7

16 *See* Brian Ross, *Big Three CEOs Flew Private Jets to Plead for Public Funds*, ABC NEWS (November 19, 2008), http://abcnews.go.com/Blotter/WallStreet/story?id=6285739&page=1.

17 *See In re Tousa – Bankruptcy Court*, 422 B.R. at 796 (noting that the Transeastern Joint Venture creditors were able to replace a largely unsecured debt with hundreds of millions of secured debt); *In re Tousa – Eleventh Circuit*, 680 F.3d at 1308 (stating that the Transeastern Joint Venture creditors were able to convert unsecured loans into loans secured by the assets of TOUSA's subsidiaries).

18 Section 547(b)(2) requires that the transfer be "for or on account of an antecedent debt *owed by the debtor* before such transfer was made." 11 U.S.C. § 547(b)(2) (2012) (emphasis added).

Mission Intousable

continued from p. 6

in the event of an adverse judgment in the underlying litigation or in the event of a TOUSA bankruptcy filing. Regardless, these arguments are the inverse of what the parties argued in the fraudulent transfer proceeding,[19] but oddly enough, the result sought by both parties would remain unchanged. This flipping of the script, so to speak, provides some valuable insights into the doctrine of substantive consolidation and the indirect benefits theory, namely that neither theory seems patently or exclusively pro-plaintiff or pro-defendant.

Alternatively, imagine that TOUSA still filed for bankruptcy six months prior to the settlement and transfer at issue. However, assume that instead of attempting to avoid the transfer as a fraudulent conveyance, the trustee sought to avoid the transfer as a preferential transfer to an insider.[20] Under those circumstances, the trustee would argue that the TOUSA creditors were insiders under § 547(b)(4) because the transaction occurred outside of the 90 day reachback period.[21] There are certainly indications in the record that this may have been the case. Specifically, the bankruptcy court noted that Citicorp earned substantial fee income for facilitating the transfer;[22] TOUSA's CEO and advisors were promised multimillion dollar bonuses if the settlement was successful;[23] and several of the original TOUSA creditors participated in the syndication of the settlement.[24] Interestingly, this hypothetical leaves the facts from the *In re Tousa* case unchanged, but the trustee apparently chose not to pursue avoidance under § 547(b)(4). Perhaps the trustee felt that it would be more difficult to avoid the transfer as a preferential transfer to an insider than as a constructively fraudulent transfer. In fact, it does appear as though the trustee would have to prove more under this hypothetical: namely, both that the TOUSA creditors were insiders and that TOUSA and its subsidiaries were insolvent at the time of the transfer. Contrastingly, in the constructively fraudulent transfer proceeding, the trustee only had to prove the insolvency issue.[25]

Conclusion

Both of these hypothetical scenarios raise additional legal and factual issues, which could have led the bankruptcy court to consider the indirect benefits theory and the doctrine of substantive consolidation in a different light. Accordingly, practitioners should read *In re Tousa* as much for what it does not say, i.e. that the indirect benefits theory and the doctrine of substantive consolidation are dead law, as for what it does say, i.e. that in one narrow circumstance the bankruptcy court's factual determinations were not clearly erroneous. Therefore, to the extent that practitioners are faced with transactions similar to those at issue in *In re Tousa*, advocates can still argue that the indirect benefits theory and the doctrine of substantive consolidation are viable legal theories in the Eleventh Circuit.

19 *See In re Tousa – Bankruptcy Court*, 422 B.R. at 846 (dismissing Citicorp's argument that the subsidiaries received reasonably equivalent value by virtue of temporarily avoiding liability on the Revolver and Bond debt); *In re Tousa – District Court*, 444 B.R. at 638 (noting that the bankruptcy court rejected Citicorp's argument that TOUSA and its subsidiaries should be substantively consolidated).
20 Trustees may avoid preferential transfers made to insiders between 90 days and one year prior to the filing of a petition. 11 U.S.C. § 547(b)(4).
21 This analysis would have focused on § 101(31)(B)(iii)'s definition of an insider creditor as a person in control of the debtor. *See* 11 U.S.C. § 101(31)(B)(iii) (2012) (defining an insider in the organizational context as any person in control of the debtor). The trustee would have argued that Citicorp, the Transeastern Joint Venture creditors, and the TOUSA parent entity shared a sufficiently close relationship that their dealings in the settlement negotiations did not occur at arm's length. *See Shubert v. Lucent Techs., Inc. (In re Winstar Commc'ns, Inc.)*, 554 F.3d 382, 396 (3d. Cir. 2009) (explaining that the ultimate inquiry in determining whether a particular creditor is an insider focuses on the closeness of the relationship between the parties and the extent to which the parties negotiate at arm's length).
22 *In re Tousa – Bankruptcy Court*, 422 B.R. at 796.
23 *Id.* at 798.
24 *Id.* at 797 (noting that those creditors to the original Transeastern Joint Venture debt were able to grant themselves secured liens while also obtaining a cash satisfaction of their original, unsecured debt).
25 The trustee also had to prove a lack of reasonably equivalent value, which is also a significant difference between preference and fraudulent transfer law. See 11 U.S.C. § 548(a)(1)(B)(i) (2012).

Property of the Estate: To Revest or not to Revest, That is the Question

by Joseph B. Battaglia, Esquire

For chapter 13 bankruptcy cases filed on or after March 15, 2013 in the Tampa and Fort Myers divisions of the Middle District of Florida, debtors are required to file a new version of the model chapter 13 plan ("Model Plan").[1] Along with some minor, non-substantive changes, the Model Plan now contains a requirement that the debtor affirmatively represent whether the plan conforms to the Model Plan adopted by the District. Arguably the most notable change, however, is that which allows debtors to now select when property of the estate revests back to the debtor: either at confirmation of the chapter 13 plan, or upon the debtor's discharge or dismissal of the case. A debtor's initial instinct may be to have the property revest in the debtor upon confirmation; after all, it is their property, right? However, careful consideration should be given to the decision as it can affect several aspects of the debtor's case.

The Chapter 13 Bankruptcy Estate

Upon the filing of a bankruptcy petition, an estate is created, comprised of all legal or equitable property interests of the debtor as of the commencement of the case, wherever located and by whomever held.[2] In chapter 13 cases, property of the estate is expansively defined by section 1306(a)[3] to also "include all property acquired by the debtor after a case commences and until it ends or is converted,"[4] as well as "earnings from services performed by the debtor after the commencement of the case but before the case is closed, dismissed, or converted.[5] Though section 1327(b) provides that property will revest in the debtor at the time of confirmation,[6] the Code also allows plans to provide for the revesting in the debtor at a later time.[7] Courts have had difficulty in reconciling the interplay of sections 1306(a) and 1327(b) when determining what assets, if any, remain vested in the estate following confirmation.[8] Though several approaches exist to reconcile the language of the two sections, each has its own unique set of drawbacks, and no one approach has been universally adopted.[9] In *Telfair v. First Union Mortgage Corp.*, the Eleventh Circuit Court of Appeals adopted the model known as the "estate transformation" approach.[10] Under this approach, 1327(b) is interpreted to revest in the debtor only so much of the property that is not needed to fund the chapter 13 plan.[11] At least one court has observed difficulty in applying this model in practice.[12] Further, this approach fails to give full effect to 1327(b) as it only vests *some* of the property in the debtor at confirmation, when the language of 1327(b) clearly provides that "all of the property of the estate" is vested in the debtor upon confirmation.[13] Nevertheless, *Telfair* controls.

What about property acquired after confirmation? Following *Telfair*, the Eleventh Circuit decided *Waldron v. Brown*.[14] In *Waldron*, the Court found that, as "[s]ection 1306(a) does not mention the confirmation of the debtor's plan as an event relevant to what assets are property of the estate," "and section 1327(b) does not address assets acquired after confirmation," postconfirmation assets are property of the bankruptcy estate, regardless of whether confirmation revested property back in the debtor.[15] Thus, as confirmation only affects those assets in existence at the time of confirmation,16 any asset acquired by the debtor *post-confirmation* should become property of the estate, regardless of the vesting selection the debtor chooses in the Model Plan.

continued on p. 11

1 See the February 28, 2013 announcement *available* at Middle District of Florida – Announcements, http://www.flmb.uscourts.gov/announcements/ (last visited March 10, 2013). The new Model Plan is *available* at http://www.flmb.uscourts.gov/forms/documents/chapter13_model_plan.pdf (last visited March 10, 2013).
2 11 U.S.C. § 541(a)(1).
3 Unless otherwise indicated, all statutory references are to the Bankruptcy Code, Title 11 of the United States Code.
4 11 U.S.C. § 1306(a)(1).
5 11 U.S.C. § 1306(a)(2).
6 11 U.S.C. § 1327(b).
7 11 U.S.C. § 1322(b)(9).
8 *In re Wei-Fung Chang*, 438 B.R. 77, 80 (Bankr.M.D.Pa. 2010); *In re Rangel*, 233 B.R. 191, 195 (Bankr.D.Mass. 1999).
9 A lengthy discussion of these approaches is outside the scope of this article, but for a thorough discussion of each approach, including the drawbacks inherent in each, see *Wei-Fung Chang*, 438 B.R. at 80 – 84.
10 *Telfair v. First Union Mortg. Corp. (In re Telfair)*, 216 F.3d 1333 (11th Cir. 2000).
11 *Telfair*, 216 F.3d at 1340 (citing *In re Heath*, 115 F.3d 521, 524 (7th Cir. 1997) ("We therefore echo the conclusion of the Seventh Circuit and 'read the two sections, 1306(a)(2) and 1327(b), to mean simply that while the filing of the petition for bankruptcy places all the property of the debtor in the control of the bankruptcy court, the plan upon confirmation returns so much of that property to the debtor's control as is not necessary to the fulfillment of the plan.'").
12 For several examples, see *Wei-Fung Chang*, 438 B.R. at 82.
13 *Wei-Fung Chang*, 438 B.R. at 83.
14 *Waldron v. Brown (In re Waldron)*, 536 F.3d 1239 (11th Cir. 2008).
15 *Waldron*, 536 F.3d at 1242. *But see In re Key*, 465 B.R. 709, 712 (Bankr.S.D.Ga. 2012) (holding that sections 541(a)(5) and 1306(a) do not operate to bring into the estate any

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Property of the Estate

continued from p. 9

Property of the Estate and the Automatic Stay

It's crucial to classify property as either vested in the debtor or the estate when determining whether the automatic stay[17] has been violated. The main distinction being that the stay applicable to property of the debtor[18] only applies to pre-petition claims, while the stay applicable to property of the estate[19] applies to all claims, both pre and post-petition.[20] The stay of acts against property of the estate continues until the property is no longer property of the estate.[21] Further, the automatic stay does not prevent the collection of a domestic support obligation from property that is vested in the debtor.[22] Also, a majority of courts deciding the issue have held that the "repeat-filer" stay termination provision in section 362(c)(3)(A) only terminates with respect to property of the debtor, but not property of the estate.[23] Therefore, it appears that "[b]y electing to retain all property in the estate that otherwise would vest in the debtor at confirmation, a debtor is able to obtain "the maximum, post-confirmation protection possible by expanding the definition of 'property of the estate' to the fullest possible extent and in the process, include all post-confirmation income of the debtor, whether actually needed to fund the plan or not."[24]

Disposing of Property Revested in the Debtor

What happens when a debtor wants to sell property during his chapter 13 case? Chapter 13 debtors may only sell property of the estate after notice and a hearing, but may dispose of property revested in the debtor at any time.[25] But what happens to the proceeds from such sales? Section 1327(c) provides that property revesting in the debtor is "free and clear of any claim or interest of any creditor provided for by the plan.[26] In theory, then, proceeds from the sale of such property should likewise be free and clear.[27] Despite this, some courts have been reluctant to allow chapter 13 debtors to retain proceeds from the sale of property revested in the debtor.[28] These courts usually find that the sale proceeds constitute a change in the debtor's financial circumstance, thus giving rise to a modification under section 1329.29 On the other hand, some courts have allowed debtors to retain proceeds from the sale of property vested in the estate, citing the "chapter 13 deal" in which debtors keep assets "free from any claim of creditors" by satisfying the "best interests of the creditors test" of section 1325(a)(4) at the time of confirmation.[30] Based on these conflicts, in the absence of higher authority, it appears that whether or not a debtor must devote sale proceeds to his estate when those proceeds resulted from the sale of revested property will be determined on a case-by-case basis.

Conclusion

While allowing property to remain vested in the estate provides the most protection for the debtor's assets for postpetition liabilities of the debtor, this must be balanced with the debtor's need or desire to dispose of prepetition assets post-filing. Having to ask the court for permission to sell specific property on an ad hoc basis seems to be a fair tradeoff for the protections offered by keeping property vested in the estate, especially as it appears that some debtors may be required to devote the sale proceeds to the plan, regardless of the vesting selection. Every case is different so it will be up to the debtor and his/her counsel in each case to review the situation and go forward with the solution that best fits the debtor's needs.

inheritance received by a chapter 13 debtor more than 180 days post petition); *In re Walsh*, No. 07–60774, 2011 WL 2621018, at *2 (Bankr.S.D.Ga. Jun. 15, 2011) (same); *In re Schlottman*, 319 B.R. 23 (Bankr.M.D.Fla. 2004) (same).

16 *See Waldron*, 536 F.3d at 1242.

17 The filing of a bankruptcy petition operates as a stay against certain acts, applicable to "all entities." 11 U.S.C. § 362(a).

18 The automatic stay prevents any act to create, perfect, or enforce against property of the debtor any lien to the extent that such lien secures a claim *that arose before the commencement of the case under this title.* 11 U.S.C. § 362(a)(5) (emphasis added).

19 The automatic stay prevents any act to obtain possession of property of the estate or of property from the estate or to exercise control over property of the estate, as well as any act to create, perfect, or enforce any lien against property of the estate. 11 U.S.C. §§ 362(a)(3) and (4).

20 *See In re Jackson*, 403 B.R. 95, 98 (Bankr.D.Idaho 2009).

21 11 U.S.C. § 362(c)(1); Jackson, 403 B.R. at 98.

22 *See* 11 U.S.C. § 362(b)(2)(B). *But see Florida Dept. of Revenue v. Rodriguez (In re Rodriguez)*, 367 Fed.Appx. 25, 2010 WL 597224 (11th Cir. 2010) (holding that, though the state of Florida did not technically violate the automatic stay when it attempted to collect child support arrears from the debtor, the state nonetheless violated the terms of the debtor's confirmed plan, and an order of contempt against the state was affirmed).

23 *See In re Reswick*, 446 B.R. 362, 365 – 373 (9th Cir. BAP 2009) (analyzes the issue and adopts the minority view). *See also In re Rinard*, 451 B.R. 12, 15 – 20 (Bankr.C.D.Cal. 2011) (provides further analysis, discusses *Reswick* directly, and adopts the majority view).

24 *Wei-Fung Chang*, 438 B.R. at 84.

25 Section 363(b) (through its incorporation by section 1303) provides that a chapter 13 debtor may sell property of the estate only after notice and a hearing, whereas the Code is silent as to the sale of property vested in the debtor. *See also In re Turek*, 346 B.R. 350, 359 (Bankr.M.D.Pa. 2006) ("According to the terms of the plan, property of the estate vested in the [debtors] upon confirmation; therefore, they were able to sell their residence without seeking prior court approval.").

26 11 U.S.C. § 1327(c).

27 *Wei-Fung Chang*, 438 B.R. at 80 – 81 ("[W]hen property of the estate vests in the debtor under § 1327(b), he acquires something more than possession, which he held at the inception of the case under § 1306(b). When property vests in a debtor he obtains absolute ownership and control of the property.") (internal citations omitted).

28 *In re Murphy*, 327 B.R. 760, 772 (Bankr.E.D.Va. 2005) ("[T]he court concludes that whether the property revested at confirmation is ultimately not dispositive on the issue of whether the trustee can seek modification of the plan to account for the sales proceeds realized by the debtor."); *Barbosa v. Solomon (In re Barbosa)*, 235 F.3d 31 (1st Cir. 2000).

29 *Murphy*, 327 B.R. at 772; *Barbosa*, 235 F.3d at 41.

30 *In re Mangum*, 343 B.R. 185, 190 (Bankr.N.D.Ill. 2006) ("Section 1325 does not require the debtor to comply with the 'best interests of creditors test' by paying the equivalent of her equity to her creditors and then to pay her actual equity realized in a refinance or sale of the property into the plan."). See also *In re Euler*, 251 B.R. 740 (Bankr.M.D.Fla. 2000) (holding that sale of non-exempt real estate did not provide basis for modification) (citing *McDonald v. Burgie (In re Burgie)*, 239 B.R. 406 (9th Cir. BAP 1999) (holding that sale of exempt real estate did not provide basis for modification)).

Seventh Circuit Holds that New Value Reorganization Plans Require Competitive Bidding – And Determines that the Rule Extends to Insiders

by Steven R. Wirth
Shareholder at Akerman Senterfitt

On February 14, 2013, the United State Court of Appeals for the Seventh Circuit held in *In re Castleton Plaza*, LP, 2013 WL 537269 at *1 (7th Cir., Feb. 14, 2013), that an insider of a chapter 11 debtor could not avoid the requirement of competitive bidding in a new-value plan of reorganization. In *Castleton*, the partnership debtor's equity owner arranged for his wife -- an "insider" -- to contribute new value to obtain the equity of the reorganized debtor pursuant to the proposed chapter 11 plan. *Id*. In overruling the bankruptcy court, the Seventh Circuit confirmed that a competitive process is "essential" whenever a plan leaves an objecting creditor unpaid but distributes an equity interest to an insider. *Id*. The decision is important because it provides Circuit Court guidance on two unique issues that often arise in cases where a debtor seeks to keep control of a business: (1) whether providing value under a chapter 11 plan to an "insider" that is not an equity-holder, but that indirectly benefits an equity-holder, violates the absolute priority rule; and (2) whether terminating a debtor's exclusive period to propose a chapter plan is sufficient to address an absolute priority rule violation.

Competitive Bidding

The Supreme Court established the requirement of competitive bidding in *Bank of America Nat'l Trust and Savings Ass'n v. 203 N. LaSalle Street P'ship*, 526 U.S. 434 (1999) ("N. LaSalle Street"). Applying the absolute priority rule embodied in section 1129(b)(2)(B)(ii) of the Bankruptcy Code,[1] the Court held that current equity holders of a debtor cannot, over the objections of impaired senior creditors, contribute new capital and receive ownership interests in the reorganized entity when that opportunity is given exclusively to those equity holders without consideration of alternatives. *See N. LaSalle Street*, 526 U.S. at 435. As the Court made clear, "it is that the exclusiveness of the opportunity, with its protection against market scrutiny of the purchase price by means of competing bids or even competing plan proposals, renders the partners' right a property interest extended 'on account of' the old equity position and therefore subject to an unpaid senior creditor class's objections." *Id*. at 456. Accordingly, "plans providing junior interest holders with exclusive opportunities free from competition and without benefit of market valuation fall within the prohibition of § 1129(b)(2)(B)(ii)," and thus violates the absolute priority rule. *Id*. at 458. In *Castleton*, the Seventh Circuit expanded *N. LaSalle Street* to apply to insiders of a debtor, not just its equity holders.

Application to Insiders

In *Castleton*, the Seventh Circuit determined that *N. LaSalle Street's* holding applied to insiders, as that term is defined in the section 101(31) of the Bankruptcy Code. *See Castleton*, 2013 WL 537269 at *1. "Insider" is defined in section 101(31) of the Bankruptcy Code to include officers and directors, but does not purport to be exhaustive. In particular, subsection (C)(ii) of section 101(31) includes as an insider a "relative of a general partner in, general partner of, or person in control of the debtor." 11 U.S.C. § 101(31)(C)(ii). Thus, the wife of the person owning 100% of a partnership debtor's direct and/or indirect equity interests is, under section 101(31) of the Bankruptcy Code, an "insider".[2]

Background

The debtor, Castleton Plaza, was a single-asset real estate entity that owned a shopping center in Indiana. *See Castleton*, 2013 WL 537269 at *1. The equity owner, an individual, held 98% of Castleton's equity directly and 2% indirectly. *Id*. The debtor had one secured lender (the "Lender"), that held a $9.5 million note that had matured before the debtor's bankruptcy filing. *Id*. The debtor ultimately defaulted on the loan and filed a chapter 11 petition. Id. The debtor proposed a chapter 11 plan that proposed to pay the Lender $300,000 on the plan's effective date, writing the balance of the debt down to approximately $8.2 million and treating the balance as unsecured. Id. The $8.2 million secured loan would be extended with a reduced interest rate, and the plan

continued on p. 16

1 The absolute priority rule, described by the Supreme Court in *N. LaSalle Street*, originates from section 1129(b)(2)(B)(ii) of the Bankruptcy Code. Specifically, "[a]s to a dissenting class of impaired unsecured creditors … a plan may be found to be 'fair and equitable' only if the allowed value of the claim is to be paid in full, § 1129(b)(2)(B)(i), or, in the alternative, if 'the holder of any claim or interest that in junior to the claims of such [impaired unsecured] class will not receive or retain under the plan on account of such junior claim or interest any property,' § 1129(b)(2)(B)(ii)." (emphasis added). *N. LaSalle Street*, 526 U.S. at 441-2.

2 The Court apparently did not view the distinction between a corporation and partnership as material. *See Castleton*, 2013 WL 537269 at *2 ("Family members of corporate managers are insiders under § 101(31)(B)(vi).").

Competitive Bidding
continued from p. 13

provided for virtually no repayment for approximately eight years. *Id*. All of the note's extra security features, including rental lockbox and approval rights, were also to be abolished. *Id*. The plan nominally left the equity holder with nothing, presumably recognizing the absolute priority rule and requirement for competition espoused in *N. LaSalle Street* which would require an auction before the husband could receive any equity on account of a new investment. *Id*. However, the debtor's plan provided that 100% of the equity in the reorganized debtor would be issued to the equity holder's wife for an investment of $75,000. *Id*. The wife also owned all of the equity in a corporation (which the equity holder was the CEO) that managed the debtor under a management contract. *Id*. The Lender, believing that the debtor's assets were undervalued by the plan, offered $600,000 for the equity and to pay all other creditors in full. *Id.* at *2. Conversely, the debtor's plan offered a 15% recovery for unsecured claims paid over five years. *Id*. The debtor rejected the offer, but revised the plan to increase the wife's investment to $375,000. *Id*. The Lender then requested that the bankruptcy court subject the wife's bid to an open bidding process and to condition confirmation on her winning that process. *Id*. Notwithstanding this request, the bankruptcy court held that competition was unnecessary and confirmed the debtor's amended plan. *Id*.

The *Castleton* Holding

On direct appeal to the Seventh Circuit, the issue before court was "whether competition is essential when a plan of reorganization gives an insider an option to purchase equity in exchange for new value." *Id*. The bankruptcy court had held that competition was unnecessary because the wife owned no equity interest in the debtor and because section 1129(b)(2)(B)(ii) of the Bankruptcy Code deals only with the "holder of any claim" or interest that is junior to the impaired creditor's claim. *Id*. In reversing the bankruptcy court decision, however, the Seventh Circuit (by Judge Easterbrook) noted that the rule requiring competitive bidding was meant "to curtail evasion of the absolute priority rule." *Id*.

continued on p. 17

Competitive Bidding
continued from p. 16

> A new-value plan bestowing equity on an investor's spouse can be just as effective at evading the absolute-priority rule as a new-value plan bestowing equity on the new investor. For many purposes in bankruptcy law, such as preference recoveries … an insider is treated the same as an equity investor. Family members of corporate managers are insiders under § 101(31)(B)(vi). In 203 N. LaSalle the Court remarked on the danger that diverting assets to insiders can pose to the absolute-priority rule … *It follows that plans giving insiders preferential access to investment opportunities in the reorganized debtor should be subject to the same opportunity for competition as plans in which existing claim-holders put up the new money.*

Id. (internal citations omitted; emphasis added).

Judge Easterbrook then reviewed various ways in which the equity holder would receive value from the equity to be issued to his wife. *Id*. at *2-3. Because the equity holder would receive value on account of his investment, and also had control over the plan (setting the purchase price for his wife at $75,000 and then $375,000), Judge Easterbrook explained, "[t]he absolute-priority rule therefore applies despite the fact that [his wife] had not invested directly in [the debtor and] [t]his reinforces our conclusion that competition is essential." *Id*. According to the Seventh Circuit, application of the rule requiring a competitive process from *N. LaSalle Street* did not depend on the debtor's proposing the plan during its exclusivity period or on the identity of the plan proponent. Instead, Judge Easterbrook stated: "Competition helps prevent the funneling of value from lenders to insiders, no matter who proposes the plan or when. An impaired lender who objects to *any* plan that leaves insiders holding equity is entitled to the benefit of competition." *Id*. (emphasis in original). Without providing a lengthy analysis on the issue, the Seventh Circuit remanded the case back to the bankruptcy court with instructions to open the proposed plan to competitive bidding at an auction to ensure that the debtor's estate and creditors maximized their recoveries. Thus, in *Castleton* the Seventh Circuit both extended the holding of *N. LaSalle Street* to any attempt to "evade the absolute-priority rule," and seemingly (in *dicta*) eliminated the possibility of permitting competing plans as a mechanism to fulfill the *N. LaSalle Street* market test requirement.

Conclusion

In sum, a new-value plan granting equity to insiders contributing new capital, but leaving creditors impaired, cannot be confirmed by a court (at least for now in the Seventh Circuit) over the objection of creditors unless the insider's contribution is subjected to a competitive process. *Castleton* clearly expands the requirement of competition in the plan confirmation process to insiders. Thus, proponents of new-value plans (whether the debtor or another interested party) cannot skirt the competitive plan process by merely channeling the new value through an insider. Moreover, termination of a debtor's exclusive period to file a plan no longer appears to be a viable mechanism in the Seventh Circuit to cure an absolute priority violation.

Unbundling Unbundled Services: Limited Scope Representation in the Middle District of Florida

by Heather Reel, Esq.
Law Clerk to the Honorable Catherine Peek McEwen

Effectively changing the landscape of legal representation, the phenomenon of unbundling continues to gain prevalence and popularity across the nation. Instead of traditional representation where a lawyer handles a case from start to finish, unbundling, also known as "limited scope representation" or "discrete task representation," involves representation where a lawyer performs some, but not all, of a client's case. Under this new form of representation, lawyers and clients delegate which tasks the lawyer will perform and which remaining tasks the client will perform on his or her own. Despite the momentum behind the unbundling trend, unbundling continues to be an issue of hot debate due to serious legal and ethical issues involved.[1]

Pros and Cons of Unbundling

Proponents of limited scope representation believe that unbundled legal services provide an excellent option for clients who cannot afford full representation, stressing the old idiom that "some is better than none." In fact, the ABA House of Delegates just recently adopted a resolution encouraging practitioners to consider unbundling, when appropriate, as a means of increasing access to legal services.[2]

Proponents also assert that limiting the scope of representation allows lawyers to work more efficiently by focusing their practice on specific services, such as filling out schedules, and either delegating time consuming tasks to clients, or, excluding such tasks from the scope of representation.[3] In turn, lawyers can offer services at a lower cost, making representation more affordable, and resulting in more clients requesting services.[4] This creates a win-win situation for both lawyers and clients. Moreover, unbundling provides clients with the autonomy to decide what legal assistance is necessary and to pay only for those services they deem necessary.

Provided that lawyers are able to attract more clients resulting in fewer *pro se* filings, unbundling also allows for more efficiency within the court system.[5] Higher quality pleadings submitted by lawyers help ease the burden on the courts by streamlining and clarifying the legal issues to be determined.[6] A reduction in *pro se* litigants also helps prevent delayed resolution of cases, and litigation based on incorrect or incomplete pleadings prepared by *pro se* parties.[7] In all, proponents of limited scope representation believe that unbundling offers tremendous benefits to clients, lawyers and courts alike.

Opposition to limited scope representation stems in large part from the belief that the unbundling of legal services contravenes a lawyer's duty to provide competent representation as set forth by Rule 1.1 of the Model Rules of Professional Conduct.[8] Less than full participation in a case can increase the risk of a lawyer violating this professional duty.[9] This is particularly true when a lawyer makes a limited appearance in a case without participating from the beginning. The lawyer may not have all of the information necessary to represent the client competently, causing more harm than good.

A related issue of concern involves a client's ability to represent themself in matters outside of the lawyer's scope of representation.[10] According to some, lawyers offering unbundled legal services have an ethical obligation to establish whether limited scope representation is right for a particular client.[11] In order to determine whether a client is capable of representing himself or herself outside of the lawyer's limited scope representation, lawyers should consider factors such as

continued on p. 21

1 1-7 *Collier Bankruptcy Practice Guide* ¶ 7.02[1][b] (2012).
2 *See* ABA House of Delegates, *ABA House Passes Resolutions on Ethics Guidelines and Human Trafficking During Midyear Meeting*, Feb. 11 2013, <http://www.abanow.org/2013/02/aba-house-passes-resolutions-on-ethics-guidelines-and-human-trafficking-during-midyear-meeting/>.
3 *See* ABA Section of Litigation, *Handbook on Limited Scope Legal Assistance: A Report of the Modest Means Task Force*, 2003, at 4.
4 *See id*; see also, Scott Russell, *Opportunity for All or Pandora's Box*, 64(2) Bench & Bar of Minnesota 16 (Feb. 2007).
5 *See* ABA Section of Litigation, *supra* at 11.
6 *See* Scott Russell, *supra*.
7 *See id.*
8 *See* ABA Section of Litigation, *supra* at 93.
9 *See* Scott Russell, *supra*
10 *See id.*
11 *See id.*

Unbundling Unbundled Services

continued from p. 20

"the client's sophistication, the complexity of the issues involved, and the client's ability to articulate arguments for and against her position."[12]

Rule 1.2(c) of the Model Rules of Professional Conduct requires the client to give informed consent.[13] Taking the requirement one step further, Rule 4-1.2(c) of the Florida Rules of Professional Conduct requires the client to give informed consent in writing.[14] Accordingly, when a lawyer is determining whether a client is able to adequately represent him or herself in matters outside the scope of representation, it is critical that a lawyer carefully explain the following to a client: what legal services the lawyer will perform, what remaining tasks the client will perform, any issues likely to arise based on the facts of the case, and the fact that the client may come across legal topics that he or she may not be familiar with.[15] In the end, a lawyer's ability to competently represent a client in a limited role must be determined on a case-by-case basis.[16]

Unbundling in Bankruptcy

As the vast majority of states, including Florida, adopt Model Rule of Professional Conduct 1.2(c), allowing unbundling, several areas of law in particular are experiencing a dramatic increase in the use of limited scope representation.[17] Chapter 7 bankruptcy cases represent one area in which limited scope representation thrives.[18] Advocates of unbundling in the bankruptcy arena stress the importance of access to legal assistance in light of the severe consequences a *pro se* debtor faces when traversing the bankruptcy system without legal assistance.[19] If the court dismisses a debtor's case, the debtor may be required to pay a second filing fee in order to file a second time.[20] If the debtor files twice within one year, the debtor may only receive limited benefits of the automatic stay.[21] Worse yet, if the debtor is forced to file a third time, the debtor may lose the benefits of the automatic stay altogether.[22] Even limited representation could help prevent such devastating events from occurring.

In response to the growing trend of unbundling in Chapter 7 cases, bankruptcy courts in districts around the nation are taking varied approaches regarding whether, and to what extent, unbundling is permitted. Some districts are adopting local rules that effectively prevent unbundling in consumer bankruptcy cases by requiring counsel to continue representation in all matters that arise in the case until the court allows counsel to withdraw.[23] Other districts are taking a less restrictive approach by adopting local rules which impose requirements such as written consent and mandatory attendance of counsel at section 341 meetings.[24] Likewise, in case law, bankruptcy courts are deciding that lawyers must represent clients in the "normal, ordinary and fundamental aspects" of the bankruptcy process.[25]

Unbundling in the Middle District

Currently, the Middle District of Florida has a local rule that some read as ambiguous on whether unbundling is allowed. Historically, the judges in the Tampa division, following the policy set by the late Chief Judge Emeritus Alexander L. Paskay, have considered Local Rule 2091-1 as meaning "in for a penny, in for a pound!" Although the rule prohibits attorneys who file a petition on behalf of a debtor from abandoning a case or proceeding except by written leave of Court, the rule begs the question: Does a lawyer "abandon" a case when a lawyer and client contracted for limited representation? It is also interesting to note that lawyers who prepare statements and schedules for a client without actually filing the petition on behalf of the debtor fail to fall within the purview of Rule 2091-1.

continued on p. 22

12 *Id.*
13 *See* Model Rules of Prof'l Conduct R. 1.2(c) (2012).
14 *See* Fla. Rules of Prof'l Conduct R. 4-1.2(c) (2012).
15 Thomas J. Yerbich, *supra*.
16 *See id.*
17 *See* John T. Broderick Jr. and Ronald M. George, *A Nation of Do-It-Yourself Lawyers*, N.Y. Times, Jan. 1, 2010, at A21; *see also*, Fla. Rules of Prof'l Conduct R. 4-1.2(c) (2012).
18 *See Collier Bankruptcy Practice Guide, supra.*
18 *See* Kathleen Farrell-Willoughby and Laura Brundage, *Pro Bono Representation Helps Meet Needs of Pro Se Filers*, 25 Am. Bankr. Inst. J. 44 (Sep. 2006).
20 *See id.*
21 *See id.*
22 *See id.*
23 *See Bankruptcy Law Manual* §4.34 (5th ed. 2012); see also, e.g., Bankr. D. Minn. R. 9010-3(f)(4).
24 *See Collier Bankruptcy Practice Guide, supra; See also, In re Castorena*, 270 B.R. 504, 530 (Bankr. D. Idaho 2001).
25 *See In re Castorena*, 270 B.R. 504, 530 (Bankr. D. Idaho 2001).

Unbundling Unbundled Services

continued from p. 21

Case law from the Middle District follows the approach that lawyers must represent clients in the fundamental aspects of the bankruptcy process in the case. In the case *In re DeSantis*, Judge Jennemann held that lawyers must perform key aspects of the bankruptcy case, such as representing debtor-clients at the section 341 meeting of creditors, and in reaffirmation negotiations.[26] Judge Jennemann stated:

> Attorneys representing individual debtors in consumer cases filed under Chapter 7 of the Bankruptcy Code have certain essential duties they must perform. They must help debtors file the necessary petition, schedules, statements, and pleadings. They must attend the scheduled meeting of creditors. Most relevant here, attorneys representing consumer debtors must advise and assist their clients in complying with their responsibilities assigned by Section 521 of the Bankruptcy Code, including helping their clients decide whether to surrender collateral or instead to reaffirm or to redeem secured debts.[27]

As many Middle District practitioners know, Judge Jennemann, currently serving as the Chief Judge of the Bankruptcy Court for Middle District of Florida, recently entered an administrative order establishing the Bankruptcy Steering Committee. Aimed with the purpose of unifying district-wide procedures and policies, the Bankruptcy Steering Committee reviews and assesses current practices and procedures used throughout the district. The Steering Committee hosted the First Annual Bench Bar Conference this past November to provide a forum for guests and judges to candidly discuss important issues confronting the Middle District. Unbundling is one of the topics addressed as an issue confronting the Middle District.

Taking Judge Jennemann's opinion in *DeSantis* even further, the attendees at the First Annual Bench Bar Conference discussed whether the unbundling of legal services should be prohibited. As the Steering Committee's goal is to provide direction to the Local Rules Committee and the Court, practitioners throughout the Middle District should anticipate possible changes in the local rules clarifying to what extent unbundling is permitted in the near future. However, a possible exception might be seen for *pro se* filers whom the Court suggests needs counsel.

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Heather Reel is a graduate of the University of Miami School of Law, and a member of The Florida Bar. During her time at the University of Miami, Heather actively participated in the school's Bankruptcy Assistance Clinic by providing pro bono legal services to low-income individuals dealing with bankruptcy. In addition to her work with the clinic, Heather interned with the Honorable Paul G. Hyman, Jr., Chief Judge, and also served as an intern at the Office of The U.S. Trustee in the Southern District of Florida. Heather is currently serving as a law clerk to the Honorable Catherine Peek McEwen through May.

26 *See In re DeSantis*, 395 B.R. 162 (Bankr. M.D. Fla. 2008) (Jennemann, J.).
27 *Id.* at 169.

The **Honorable Cynthia Carson Jackson** was appointed as a bankruptcy judge of the United States Bankruptcy Court for the Middle District of Florida, Orlando Division, on March 5, 2013. She attended Tulane University and received her Bachelor of Science degree from Florida State University in 1981, and her Juris Doctor degree from the University of Florida Levin College of Law in 1984. Judge Jackson practiced at Smith Hulsey & Busey in Jacksonville, Florida, for the past 29 years, where she focused on bankruptcy and insolvency matters throughout the United States. She represented debtors, creditors, committees, and trustees in both commercial and consumer cases. Her most notable cases include The Charter Company, Circle K Corporation, Prime Hospitality Corporation, Winn-Dixie Stores, and the Sawgrass Marriott. Judge Jackson also has substantial experience in representing commercial landlords in bankruptcy cases and is an experienced litigator in both bankruptcy and complex commercial matters.

Judge Jackson is a member of The Florida Bar, the American Bar Association, the American Bankruptcy Institute, the Turnaround Management Association, the Bankruptcy Bar Association for the Southern District of Florida, and was the former president of the Jacksonville Bankruptcy Bar Association. She also was a member of the Local Rules Committee for the Middle District of Florida. Judge Jackson, who is rated AV by Martindale Hubbell, is recognized in Chambers USA America's Leading Lawyers for Business and Best Lawyers in America.

Judge Jackson was appointed by the United States Court of Appeals for the Eleventh Circuit, which appoints all bankruptcy judges in Florida, Georgia, and Alabama. Including Judge Jackson, there are nine bankruptcy judges sitting in the Middle District of Florida, which extends from Jacksonville to the north and Ft. Myers to the south.

Positions Available

Staff Associate

National multi-office specialty financial advisory and restructuring firm is seeking a financial professional for an Associate position in its Tampa office. The ideal candidate will have three to five years work experience with a public accounting firm. Experience in analyzing and critiquing financial models, reconstruction of financial activity, familiarity with bankruptcy and the related accounting issues, litigation support, knowledge of one or more common accounting software programs. Skills should include advanced Excel modeling techniques and database functionality. Said candidate must have either and undergraduate degree in accounting or be qualified for the CPA examination. Travel is required, sometimes on short notice. Compensation is commensurate with the individual candidate's experience and qualifications. Email resume to apeal@glassratner.com.

Receptionist/Administrative Assistant

National multi-office specialty financial advisory and restructuring firm is seeking a receptionist/administrative assistant in Tampa office to perform a broad range of administrative and secretarial duties for the professionals in the company. Individual must have a Bachelor's degree or related office experience with strong organizational, administrative, and communication skills. Individual must be diligent, detail-oriented who excels at multi-tasking in a fast paced environment, completing projects within allotted timeframe and works well independently. Candidate must have computer skills that include at a minimum proficiency in Word, Excel, Outlook and Power Point. Email resume to apeal@glassratner.com.

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FOR IMMEDIATE RELEASE

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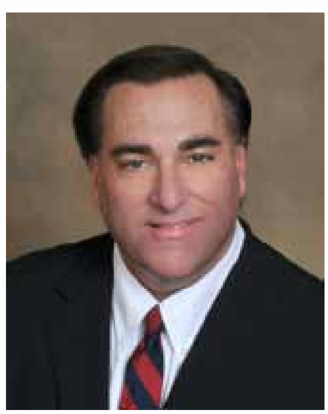
(813) 221-4113 Facsimile

EDMUND S. WHITSON JOINS ANTHONY & PARTNERS, LLC.

TAMPA, FLA. – Edmund S. Whitson joins Anthony & Partners as a shareholder with the firm's Bankruptcy and Creditors' Rights Practice Group. He has more than 19 years of experience representing creditors almost exclusively, including banks, insurance companies and similar financial institutions. His work has consisted of protecting creditors' rights in bankruptcy proceedings, in addition to enforcing remedies in state courts in various jurisdictions such as Florida, Delaware, Wisconsin and South Carolina. Mr. Whitson also has represented commercial landlords in state and federal courts, and has gained considerable experience in real estate litigation. He most recently practiced as a shareholder and the Chair of Bryant Miller Olive's Bankruptcy and Creditors' Rights Practice Group. He also has practiced with Akerman Senterfitt, and he began his career at the Tampa office of Carlton Fields, where he also was a shareholder. Mr. Whitson is admitted to the Florida and District of Columbia bar associations. He participates in the American Bar Association's Business Law section, the Tampa Bay Bankruptcy Bar Association and the American Bankruptcy Institute, where he has published articles in the ABI Journal. Mr. Whitson graduated from the University of Virginia in 1985 with a degree in Commerce and earned his law degree, cum laude, from the University of Florida in 1991.

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.

The firm's main office is located in Suite 2800, 201 North Franklin Street in downtown Tampa (813-276-5616), and the Central Florida offices are located in Suite B, 415 E. Main Street, Bartow, Florida, (863-537-6490), and 5025 S. Orange Avenue, Suite 201, Orlando, Florida 32809 (407-349-6002).



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CASSANDRA DENMARK JOINS ANTHONY & PARTNERS, LLC.

TAMPA, FLA. – Cassandra L. Denmark has joined Anthony & Partners as an associate attorney. She has more than 10 years of experience representing clients in a wide variety of general civil matters, including, but not limited to, law enforcement, forfeiture law, and contract law. She served as Director of Legal Affairs for the Polk County Sheriff's Office for 5-1/2 years. After a successful career serving the citizens of Polk County, she decided to go into private practice. Ms. Denmark most recently practiced as a partner with Meeks & Denmark in Bartow. Ms. Denmark is admitted to the Florida and Lakeland bar associations. She has been a member of the Florida Association of Police Attorneys from 2002 – 2010, the Tenth Judicial Circuit Judicial Nominating Commission since 2008, acting as Chair from 2012 – 2013, the Virgil D. Hawkins Bar Association, Bartow, Florida, since 2002, was President from 2002 – 2008, and the Willson American Inn of Court. Ms. Denmark graduated from the University of South Florida, Tampa, in 1995 with a degree in Criminology and earned her law degree, cum laude, from the Thomas M. Cooley Law School in 2002.

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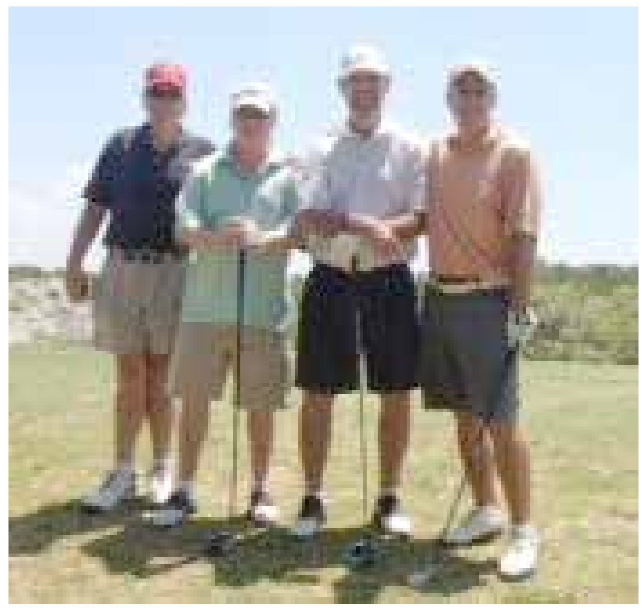
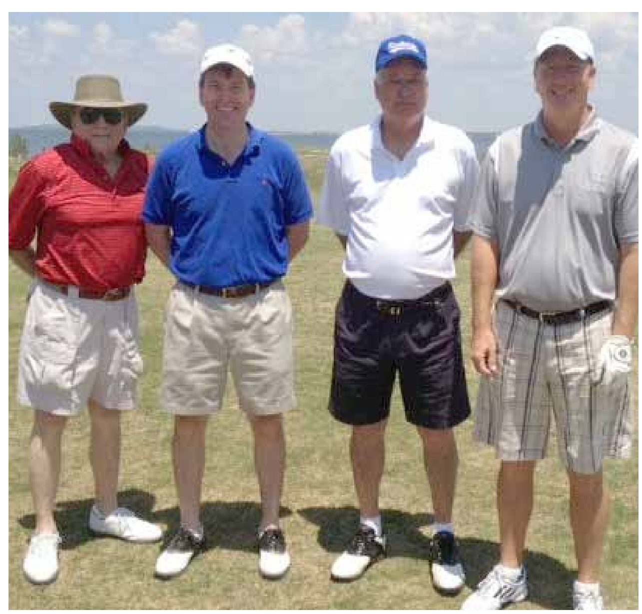




Residential Mortgage Modification Mediation Gets Results; Learn the Ropes by Taking on a Pro Bono Case, Complete with a Coach!

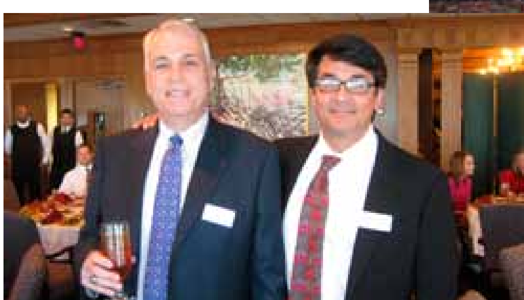
The following case was handled by a Bay Area Legal Services staff attorney.

Clients with similar problems could well be helped by pro bono attorneys, and the pro bono attorneys could, in turn, well learn the how-to's of successful mortgage mediations. BALS will even provide mentors who know how to get good results. If you are interested in taking on such a case, please email Dick Woltmann at dwoltmann@bals.org. Here are the case facts:

An attorney who shall remain unnamed first saw Mr. and Mrs. J on March 1, in preparation for their March 5 mediation conference. They had fallen behind because of overextended credit and expenses caused by an automobile accident. The attorney questioned the adequacy of Plaintiff's NPV disclosure and threatened cancellation of the conference. Plaintiff's prompt, supplemental disclosure indicated that the bank had a favorable modification offer to make to the J's. Consequently the mediation conference occurred. The J's accepted a permanent (no trial period) modification of 30 years which reduced their interest from 6.25% to 3.5% and their monthly PITI. The monthly payment is closer to 18% of their gross income than to the usual standard of 31%. An arrearage approaching $25,000 was rolled into the new loan to bring the J's current. This was an investor-approved in house modification. The modification is contingent on clear title beyond the second mortgage, which the J's say they have. This modification saved the J's home of the last 4 years, where they can now continue to live in peace with their sons, ages 6 and 12.

Catherine Peek McEwen
U.S. Bankruptcy Judge
Middle District of Florida

January 2013 TBBBA CLE Luncheon



Judge Catherine Peek McEwen has been appointed Chair of the Thirteenth Judicial Circuit Pro Bono Committee, for a two-year term, by Administrative Order of the Hon. Manuel Menendez, Jr., Chief Judge of the Thirteenth Judicial Circuit.

Code's Monetary Adjustments Take Effect April Fool's Day

by Joel Porter
(J.D., University of Florida, 2012)
Extern to Hon. Catherine Peek McEwen

The Bankruptcy Code at 11 U.S.C. § 104 requires the periodic adjustments of certain dollar figures every three years to account for inflation. A new set of figures will be effective April 1, 2013, and has just been released on federalregister.gov by the Judicial Conference of the United States.

As required by § 104, the dollar amounts are adjusted to reflect the change in the Consumer Price Index for the most recent three-year period. To reflect the change, the inflator value was determined to be 1.063. Once the inflator is determined, the dollar adjustments are then calculated.

The 6.3 percent increase, while not substantial (consider a 7.3% increase in 2010 and a 9% increase in 2007), may affect debtors who are on the margin of an applicable dollar amount, especially when reviewing eligibility to be a chapter 13 or chapter 7 debtor.

1. Chapter 13 Debt Limit Increases
Section 109(e) of the Code limits the eligibility of people to file a chapter 13 bankruptcy based on amount of debt. The limit on noncontingent, liquidated, unsecured debt will increase from $360,475 to $383,175, and the limit on noncontingent, liquidated, secured debt will increase from $1,081,400 to $1,149,525.

2. Means Testing
The means test controls chapter 7 eligibility for debtors by providing a ground to dismiss chapter 7 cases that fail the test. In chapter 7, a case fails if, after applying deductions, too much income remains. Whether the income after deductions is too much is determined by comparison to statutory thresholds, which will be increased by the April 1st adjustments.

The means test only applies if a debtor is above the median income for his or her household size. While household sizes of one to four use actual statistical data, household "medians" for household sizes of five and more are calculated by adding a statutory amount to the United States Trustee-published statistic for a household of four. The monthly statutory figure for each extra person will increase from $625 to $675. Annualized, the $50 monthly increases result in medians for households of five increasing by $600, households of six by $1,200, households of seven by $1,800 etc.

Other increases are shown at right (source: Bankruptcy Judges Division, Administrative Office of the United States Court).

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